IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CIVIL APPEAL NO. 116 OF 2015

JOHN KASHEKYA . . . . . APPELLANT

VERSUS

ATTORNEY GENERAL . . . . . RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Kyando, J.)

dated the 19th day of September, 2001
in
Civil Case No. 18 of 1996

JUDGMENT OF THE COURT

5th April, & 11th April, 2016

KILEO, J.A.:

This case has an old and checkered history. It has been in and out of the courts several times for almost twenty years now.

The facts of the case as they appear from the pleadings are briefly to the following effect:

The plaintiff applied for a prospecting right from the Commissioner for Mines and was granted with one (Exhibit P6) on 05.06.1992. Having

obtained the prospecting right he went to Nzuguni village where the village chairman assigned him four old men familiar to the area. He was led to Madengi Hill where he demarcated an area for himself in which he was to carry out prospecting for gold. The area he demarcated measured 1500 ft x 600 ft. In order to facilitate his prospecting activities the appellant carried out developments in the area including the making of an access road to the area, digging trenches around the area to demarcate it and putting relevant signs around the area to show that it was his area. The appellant claimed that pursuant to his prospecting right he also extracted samples of gold from the area for analysis. The appellant further claimed that in carrying out the whole exercise he incurred a lot of expenses. It was the appellant's claim also that he obtained a temporary claim title to the area he had demarcated.

The trouble began when the Commissioner declined to register the appellant's claim to the area which he had demarcated. It was the appellant's prayer that the respondent make good what he had suffered in terms of the expenses he had incurred in the exercise of his prospecting right.

On the other hand, in their written statement of defence the respondent claimed that efforts to have the claim registered by the Commissioner were frustrated by the appellant himself and also by the fact that the appellant had not completed legal requirements. The respondent denied to have issued any temporary registration of the claim.

The following issues were framed at the trial:

1. Whether or not the plaintiff did comply with all legal requirements and acquired a right to the claim.
2. Whether the defendant lacked good cause to refuse registration of the plaintiff's claim.
3. Whether the plaintiff suffered damages by the alleged refusal to register the plaintiff's claim.
4. What reliefs are the parties entitled to.

The first issue is really the bone of contention in this matter. The appeal, (as was the suit,) stands or falls depending on the answer to this issue.

After a consideration of a number of provisions of the Mining Act, 1979 then in force, the trial judge found and held that *"the plaintiff did not*

comply with all legal requirements, especially with section 48 (1) (e) of the Mining Act before he applied for registration of his claim and that the Commissioner of Mines had good cause in refusing to register the claim."

The appellant through the services of his learned counsel, Reverend Kuwayawaya S. Kuwayawaya filed a memorandum of appeal comprising of the following eight grounds:

1. That, the Learned Honourable Judge ought to have found DW1 Salum Mohamed as untruthful witness when he asserted that he told the appellant the requirement of consent from the Capital Development Authority as the owner of surface rights as the appellant could not have failed to pursue same as the appellant himself diligently pursued a business Tax Clearance Certificate Exh. P5 from the Income Tax Dept and pursued a letter from the Village Chairman of Nzuguni Village Exh. P19 upon the instructions of DW1.
2. That, the Learned Honourable Judge erred in law in misapplying section 48 (1) (e) of the Minerals Act, 1979 in order to deny the appellant's rights.

3. That, the Learned Honourable Judge ought to have found that after the Commissioner (DW.1) had issued to the appellant temporary claim title No. 81/92 on 06 January, 1993 (Exh. P15) and a prospecting right No. 019041 dated 5th June, 1992 (Exh. P6) coupled with the fact that at all the material times the appellant carried various developments from June, 1992 to 16th March, 1993 and since the Capital Development Authority did not object to that the Commissioner (DW1) had no right at that stage to refuse registering the appellant's claim.
4. That, the Learned Honourable Judge ought to have held that the Commissioner (Dw.1) revoked the appellant's claim in bad faith.
5. That, the Learned Honourable Judge misdirected himself in fact and in law in his finding that the Commissioner was justified in law to refuse to register the appellant's/plaintiff's claim for the reason that the appellant ha not obtained the consent from the Capital Development Authority (CDA) the surface rights holder.

6. That, the Learned Honourable Judge failed to consider the appellant's efforts, time and money the appellant lawfully spent in developing the piece of land in question.
7. That the Learned Honourable Judge erred in fact and in law in holding that the appellants expected earnings from the gold he would have prospected were speculation.
8. That, the Judgment and decree passed by the Learned Judge is contrary to law, against the weight of evidence and against the principles of justice, equity and good conscience.

Given the circumstances of the case, we are however of the settled view that the appeal will stand or fall depending on whether or not the appellant had complied with all legal requirements and for this reason we shall not have to address ourselves to all the grounds listed above.

At the hearing of the appeal the appellant was represented by Reverend Kuwayawaya S. Kuwayawaya and the respondent Republic was represented by Ms. Rosemary Shio, learned Principal State Attorney. Each side had filed a written submission in support of its case prior to the hearing.

The question before us is whether the learned trial judge erred in holding that the appellant did not comply with all legal requirements to warrant the registration of his claim.

The matter centres on interpretation of legal provisions and it need not detain us.

We have given due consideration to the written submissions as well as oral presentations of counsel for both sides.

It was not disputed that the appellant was issued with a prospecting right on 05/06/1992. At this time the Mining Act, 1979 was the law in operation in relation to mining of minerals. The prospecting right was tendered at the trial as exhibit P6. According to the interpretation section a prospecting right is a right issued under section 70 of the Mining Act, 1979. The right entitled the appellant to prospect for gold in Dodoma. It did not specify which area of Dodoma. According to the interpretation section to "prospect" means **"to search for any mineral by any means, and to carry out any such works and remove any such samples as may be necessary to test the mineral bearing qualities of the land;"**

Section 71 provides for the rights under prospecting right. The ⁄ant part provides:

(1) A prospecting right may authorize the holder of the right to prospect in all designated areas, or in any designated area or areas identified in the right, for all minerals prescribed in relation to any designated area to which the right applies, or for any such mineral specified in the right.

(2) The holder of a prospecting right may, subject to this Act, the Regulations and the conditions of the prospecting right, enter on any land in which he is authorized to prospect and carry on prospecting operations for any minerals to which his right relates.

(3) The holder of a prospecting right shall not prospect –

(a) Not applicable

(b) Not applicable

(c) in land to which section 48 applies unless any consent required to be given in respect of that land is given.

Section 48 imposes restrictions on the exercise of mineral rights and the relevant part provides:

48.- (1) The registered holder of a mineral right shall not exercise any of his right, under his licence or under this Act-

(a) not applicable

(b) not applicable

(c) Not applicable

(d) not applicable

(e) in respect of any land within any city, municipality, township or demarcated settlement, except with the written consent of holders of surface rights, and of the responsible Minister or authority having control over the city, municipality, township or demarcated settlement.

The prospecting right of which the appellant was a holder falls under the definition of a mineral right upon which restrictions were imposed. A mineral right is defined as *"a reconnaissance licence, a prospecting licence*

or a mining licence." The appellant being a holder of a prospecting right was therefore covered under the restrictions imposed by section 48 (1) (e).

In the instant case there was no dispute that the CDA was the surface rights holder of the area to which the appellant had obtained a prospecting right. This means that the appellant could not legally exercise any of his rights under his prospecting right unless the surface rights holder, in this case the CDA, had given its consent.

The prospecting right as per definition of "prospect" which we have mentioned before entitled the appellant *"to search for any mineral by any means and to carry out any such works and remove any such samples as may be necessary to test the mineral bearing qualities of the land"*. This to us, considered in the light of section 48 (1) (e) of the Mining Act logically presupposes that you cannot start prospecting on any one's land without the consent of the owner of the surface rights. To suppose otherwise would mean that someone could just go into any one's land (without the owner's consent) where he thought that there were minerals and start prospecting for the same. This would no doubt result in chaos. The respondent's witness, Salum Mohamed who was then the Assistant Commissioner of Minerals and Head of the Mineral's Centre in Dodoma was

emphatic that the appellant had been carrying out prospecting illegally in the area by March, 1993 (see page 138 of the record) as he had not yet obtained the CDA's written consent.

We are settled in our minds that the respondent's witness was right in his assertion in view of the provisions of the law which we have just alluded to above. For the avoidance of doubt, in order for one to begin prospecting after obtaining a prospecting right, in terms of section 48 (1) (e) of the Mining Act, 1979 a written consent from the surface rights owner was essential. Moreover, possession of a prospecting right does not automatically entitle a holder to have a claim registered. Consent is essential before the exercise of any rights under the licence. From the evidence on record no such consent concerning the appellant specifically was exhibited.

What might be considered to have constituted consent in respect of the area under dispute is exhibit D2 which was a letter from CDA addressed to the Commissioner for Minerals consenting to the carrying out of mining operations in the area. As there were several small scale miners who were in need of mining blocks the Commissioner decided to divide the area in small blocks of 50x50meters each so as to meet the demands of

those miners. The appellant, (who had been carrying on prospecting operations without consent from CDA) was invited by the Commissioner to communicate with his office so that he could be shown a block which would have been accordingly inspected ready for issuance of a mining title. (See Exhibit D2). The appellant did not bother to heed to the Commissioner's advice. This was surely, to his own detriment.

Without having to tarry any more on the matter we wish to conclude as follows: That the appellant needed to have consent of the CDA before he carried on any operations on the area for which he had obtained the prospecting right as the CDA was the surface rights holder. He carried on the prospecting operations without the necessary consent under a misconception. Even though he had carried on prospecting operations illegally, the Commissioner was still willing to offer him a block after the CDA had given its consent pursuant to exhibit D2. The learned trial judge was correct to hold, as he did, that the Commissioner was justified in law to refuse to register the appellant's claim. Indeed, the appellant did not comply with all legal requirements, especially with section 48 (1) (e) as rightly held by the learned judge. The Commissioner was entitled to decline

to register the claim as requirements of the law had not been complied with.

In the end we find the appeal to be lacking in merit and for this reason we dismiss it.

We shall not make an order for costs considering that the appellant has been pursuing his appeal through legal assistance provided by the Tanganyika Law Society.

Order accordingly.

DATED at **DODOMA** this 8th Day of April 2016.

E. A. KILEO
JUSTICE OF APPEAL

K. K.ORIYO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL