IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF SONGEA

AT SONGEA

CIVIL CASE NO. 3 OF 2022

ALLY ALLY MCHEKANAE ..... 1ST PLAINTIFF

ISSA ALLY MCHEKANAE ..... 2ND PLAINTIFF

VERSUS

HASSADY NOOR KAJUNA ..... 1ST DEFENDANT

MBUYULA COAL MINE LTD ..... 2ND DEFENDANT

JUDGMENT

9th and 18th April 2024

KISANYA, J.:

On 28th of June 2022, the Plaintiffs lodged a plaint with this Court, seeking a judgment and decree against the defendants, both jointly and severally, as outlined below:-

(a) *An order that, the 1st Defendant has breached the agreement with the Plaintiffs.*

(b) *An order that, the act of the 2nd Defendant to interfere and prevent/stop/obstruct the Plaintiffs to undertake their mining activities is unlawful.*

(c) *An order that, the Plaintiffs are entitled to damages for the breach of their agreement with the 1st Defendant.*

(d) *An order that, the Defendants should pay the Plaintiffs the sum of Tshs. 4,431,713,076.50/= or any other amount determined by court thereof, being the payments for damages of loss of business, loss of profit and the value of coal appropriated by the Defendants.*

(e) *An order that, the Defendants pay interest of 21% or any rate determined by court thereof, of the amount awarded in paragraph (d) above from 2022 to the date of Judgment*

(f) *An order for payment of interest of 30% or any rate determined by the court thereof, of the amount awarded in paragraph (d) from the date of judgment to the date of payment in full.*

(g) ***ALTERNATIVELY:*** *An order that the defendant provide to the Plaintiff a total tones 10,000 tons of coal and the agreement between the Plaintiff and the 1st Defendant be extended to further eight months to compensate the frustrated months.*

(h) *The Defendants be condemned to pay general damages.*

(i) *Costs of the case.*

(j) *Any other order (s) this Honourable Court may deem fit and just to grant.*

To understand the essence of the plaintiffs' case, it is essential to outline its material facts. It is stated in the plaint that, the 1st Defendant, Hassady Noor Kajuna was the lawful owner of the mineral rights over a coal mining area with Primary Mining Licence PML0311RVM (hereinafter referred to as the primary mining licence or PML) situated at Mbuyula within Mbinga District in Ruvuma Region. It is further stated that, on 18th July 2021, the 1st defendant executed a Deed of Assignment of the Mineral Rights (also referred to as "the agreement") in which he assigned his mineral rights over the

primary mining licence to the Plaintiffs. The assignment duration was for one year, commencing from 30th July 2021, with an option of renewal.

The plaintiffs assert that the 1st Defendant delayed in registering the deed of assignment with the Mining Commission for more than a month from the effective date, thereby causing them to suffer a significant loss due to this delay.

It is also stated that, in August 2021, the plaintiffs, through their agents engaged to undertake mining activities, market, and sell the product on their behalf, started production mining of coal at the assigned primary mining licence. It is however, claimed that, in November 2021, the defendants began to interfere with mining activities and that, the matter was referred to the Resident Mining Officer (RMO), who failed to resolve the dispute during a meeting held on 03/01/2022. According to the plaintiffs, it became apparent during meeting that the defendants were cooperating to frustrate the deed of assignment and exclude them from the assigned mineral rights. The plaintiffs state that this observation arose after they discovered that the 1st defendant, without their consent, had entered into an agreement to transfer the primary mining licence to the 2nd defendant, Mbuyula Coal Mine Limited and that the said agreement was not registered by the RMO because of the existing deed of assignment between the plaintiffs and the 1st defendant.

The plaintiffs state that, the RMO registered the transfer of the primary mining licence, following the 2nd defendant's letter dated 09/02/2022, in which she guaranteed or assured the RMO of her readiness to adhere to the terms of the deed of assignment between the plaintiffs and the 1st defendant. It is their further assertion that, after the transfer of the mining licence to the 2nd defendant, the latter (2nd defendant) started preventing the Plaintiffs from undertaking the mining activities at the area of the primary mining licence, thereby breaching the deed of assignment.

The plaintiffs allege that, despite several meetings convened by the RMO, no amicable settlement was reached. They assert that, the 2nd defendant obstructed their operations, preventing them from collecting a consignment of coal weighing about 10,000 tonnes valued at TZS 850,000,000. It is the plaintiffs' assertion that they were unable to meet pending orders from Lake Oil Ltd, amounting to TZS 580,560,000/=. The plaintiffs further claim that the defendants' breach of the agreement resulted in the loss of orders for coal supply, a decline in business confidence and reputation with their customers, and a loss of profit. Therefore, they filed this suit seeking the judgment and decree as mentioned earlier.

The plaintiffs served the defendants with the Plaint, following which the defendants filed their respective Written Statements of Defence, refuting the claims.

In his Written Statement of Defence, the 1st defendant denies breaching the deed of assignment with the plaintiffs. He states that he had no obligation to register the deed of assignment. While the 1st defendant admits transferring his ownership of the mineral rights in the PML to the 2nd defendant, he denies interfering with the plaintiffs' activities, colluding with the 2nd defendant to frustrate the deed of assignment, or removing them from the site of the PML. Therefore, he requests the Court to dismiss the plaintiffs' suit with costs.

Similarly, the 2nd defendant refutes all of the plaintiffs' claims. She contends that she is not accountable for the breach of the deed of assignment between the plaintiffs and the 1st defendant. The 2nd defendant asserts that the deed of assignment was not registered as required by law and disputes the claim that she promised to comply with the deed of assignment.

It is also the 2nd defendant's contention that the plaintiffs failed to comply with the agreement by not refunding her the sum of USD 14,087.21, which she paid on behalf of the 1st defendant to facilitate the transfer of the mining licence, and not paying USD 3.5 per ton of coal mined by the plaintiffs from the site of the PML from 14/02/2022 to 22/03/2022.

Consequently, the 2nd defendant has raised a counter-claim against both plaintiffs and the 1st defendant. Her counter-claim is based on the sum of

USD 14,087.21, which she alleges was paid to the 1st defendant in agreement with the plaintiffs for repayment of *'Mrahaba wa serikali'* (royalty). The 2nd defendant claims that the plaintiffs failed to pay the royalty, and she was obliged to pay the outstanding balance of USD 16,000 to protect the PML. Moreover, the 2nd defendant states that she incurred costs of TZS 126,000,000/= to rectify the shortcomings pointed out by the Mining Commission. As a result, the 2nd defendant is seeking judgment and decree against the Plaintiffs and 1st Defendant, jointly and severally, in the following terms:

(i) An order that, the plaintiffs are in breach of the contract.

(ii) An order that, the Plaintiffs should pay the 2nd Defendant, the sum of USD 73,500 arose from unpaid sum of USD 3.5 per ton extracted of extracted coal by the Plaintiffs from 14th February 2022 to 22nd March 2022 in Mining Licence No. PML0311RVM.

(iii) An order that, the Plaintiffs sum of USD 14,087.27 which was given to the 1st Defendant by 2nd Defendant in agreement with the plaintiffs for payment of 'Mrahaba wa serikali'.

(iv) An order that Plaintiff should pay Tsh. 126,000,000/= costs incurred by 2nd defendant to rectify all shortcomings pointed in the said mining site.

(v) An order that the plaintiffs should pay USD 16000 as Royalty due which was paid by 2nd Defendant.

(vi) *An order that the Plaintiffs pay interest of 21% or any rate determined by the Court of the amount claimed in paragraph (ii), (iii) and (iv).*

(vii) *An order that the Plaintiffs should pay an interest of 30% or any rate determined by the Court of the amount claimed in paragraphs (ii), (iii) and (iv).*

(viii) *Costs of the suit.*

(ix) *Any other relief(s) that this honourable Court shall deem fit and just to grant.*

Upon receiving the counterclaim, the defendants in the counterclaim filed their Written Statements of Defence, disputing the claims made by the plaintiffs in the counterclaim. They requested the court to dismiss the counterclaim with costs.

During the Final Pre-trial Conference (FPTC), the following issues were framed by the Court in consultation with the parties:

1. *Whether the 1st defendant breached the Deed of Assignment of the Mineral Right with the Plaintiffs.*
2. *Whether the 1st and 2nd Defendants cooperated to frustrate the Deed of Assignment of the Mineral Rights.*
3. *Whether the 2nd Defendant is entitled to the amount of money pleaded in the counter claim.*
4. *To what reliefs are the parties entitled to.*

At the hearing of this matter, all parties were duly represented. The plaintiffs enjoyed the legal services of Messrs. Elias Machibya, Raphael Matola,

Vicent Kasale and Ms Lilian Kimaro, learned Advocates. On the other hand, Messrs. Nestory Nyoni and Michael Mwambeta, learned Advocates, represented the 1st and 2nd Defendants, respectively.

In their endeavour to prove their case, the plaintiffs, Ally Ally Mchekanae (PW1) and Issa Ally Mchekanae, testified as PW1 and PW2, respectively. They also summoned two other witnesses namely, William Ally Kapinga (PW3) from Ariim Company Limited, and Augustino Mahenge (PW4), a lawyer who drafted the deed of assignment. The plaintiffs further presented twelve documents, all of which were admitted as exhibits. The exhibits are, Deed of Assignment of Mineral Rights (Exhibit P1), Exchequer receipt dated 16/09/2021 (Exhibit P2), 2nd defendant's letter dated 9th February, 2022 (Exhibit P3), 2nd defendant's letter dated 29th March, 2022 (Exhibit P4), Mining Commission's letter dated 31st March 2022 (Exhibit P5), Minutes of the meeting held by the plaintiffs and the 2nd defendants on 30th March, 2022 before the RMO-Ruvuma (Exhibit P6), Mining Commission's letter dated 14th April, 2022 (Exhibit P7), Mining Commission's letter dated 6th May, 2022 (Exhibit P8), Plaintiff's letter dated 25th May 2022 (Exhibit P9), Certificate of Incorporation of Ariim Company Limited (Exhibit P10), Agency Agreement between the Plaintiffs and Ariim Company Limited (Exhibit P11) and Two local purchase orders (LPO), one from Dangote Cement Limited and the other from Lake Cement Limited (Exhibit P12 collectively).

On the opposing side, each defendant called one witness. The 1st defendant, Hassady Noor Kajuna, testified as DW1, whereas, Eng. Hamis Kamando, RMO for Ruvuma Region, designated as DW2, was the sole witness called by the 2nd defendant, Mbuyula Coal Mine Limited. Mr. Lazaro William Kandore whose witness statement was filed by the 2nd defendant failed to appear. Consequently, his witness statement was struck out under Order XVIII Rule 5(5) of Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC) as amended.

After the closure of the defence case, parties were instructed to submit their final closing submissions by 21st September 2023. The case was then scheduled for mention on September 22, 2023, to fix the date for judgment. However, the case lost its track after I transferred to another duty station on 20th September, 2023.

While composing the judgment, I observed that an issue regarding the validity of the deed of assignment between the plaintiffs and the 1st defendant had not been addressed during the FPTC. Recognizing the importance of resolving this matter, which stemmed from the pleadings of the plaintiffs and the 2nd defendant, I recalled the parties, who appeared virtually on 8th April 2024. Subsequently, the Court invoked its powers under Order IV, Rule 5 of the CPC, to amend and incorporate this issue:

"Whether the deed of assignment between the 1st and 2nd defendants complied with the laws."

Both parties were afforded the opportunity to address the newly introduced issue, and chose to present submissions or arguments, which they did on the following day, 9th April 2024.

Having carefully examined the evidence on record and considered the arguments presented by both parties, I am now in a position to address the issues at hand. However, before proceeding with this crucial task, it is pertinent to elucidate the law regarding the burden of proof. As correctly submitted by Messrs. Machibya and Mwambeta, the burden of proof in civil cases rests upon the party alleging the existence of a particular fact. This legal principle is enshrined in sections 110, 111, and 112 of the Evidence Act [Cap 6 R.E. 2019] and reiterated in a plethora of authorities, including the case of **Godfrey Sayi vs. Anna Same as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2012 (unreported) in which the Court of Appeal held:

"It is a cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act [CAP 6 re, 2002] which among other things state:

"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence

of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side".

With respect to standard of proof in the case of this, it is on the balance the balance of probabilities. In the same case of **Godfrey Sayi** (supra), the Court of Appeal referred to its case in **Anthony M. Masanga vs Penina (Mama Ngesi) and Another**, Civil Appeal No. 118 of 2014 (unreported) which cited with approval the case of **In Re B** [2008] UKHL 35, where the term "balance of probabilities" was explained in the following terms:

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened."

In light of the above legal stance, both the plaintiffs and the 2nd defendant are tasked with bearing the burden of proof for the claims asserted

in the plaint and counter-claim, respectively. To ascertain whether they have adequately fulfilled their respective obligations, I will carefully evaluate the framed issues and the presented evidence.

First for determination is the additional issue, whether the deed of assignment between the plaintiffs and the 1st defendant complied with the laws. It is notable that, in their pleadings, the 1st and 2nd defendant did not dispute the existence of the deed of assignment. The issue at hand was framed based on the assertion made by the 2nd defendant in her witness statement of defence, contending that the deed of assignment did not comply with the law.

During the trial, DW2, called by the 2nd defendant, testified that the deed of assignment was not registered with the Mining Commission. Building upon this testimony, Mr. Nyoni and Mr. Mwambeta argued that the deed of assignment lacked validity due to its non-compliance with section 123 (a) and (b) of the Mining Act, Cap. 123 R.E. 2019. Furthermore, Mr. Mwambeta argued that the deed of assignment contravened section 9(4) of the Mining Act, as DW2 stated that consent for transfer of the mining licence under the deed of assignment was not granted due to outstanding tax payments and other liabilities.

Mr. Machibya, on his part, argued that the assignment of the mineral right license is governed by section 9 of the Mining Act and emphasized that

the requirement for payment of fees lies with the license holder, as per regulation 18 of the Mining (Mineral Rights) Regulations, GN No. 1 of 2018. He asserted that the registration fees were duly paid, as evidenced by Exhibit P2. Referring to various documents, including Exhibit P3, Mr. Machibya contended that the plaintiffs were recognized as the mineral right holders. He highlighted that the Mining Commission did not notify the plaintiffs of any response to the application for assignment of the mineral right, implying that the Mining Commission acknowledged, through its conduct, the plaintiffs as the lawful holders of the mining license. To support his argument, he cited the case of **Zanzibar Telecom Ltd vs Petrofuel Tanzania Ltd**, Civil Appeal No. 69 of 2014.

Mr. Machibya further argued that, even if there was non-compliance with the law, any decision to refuse the deed of assignment would violate the rights of the parties under the agreement, which had already been breached by one of them. To strengthen his argument, he cited the case of **George Shambwe vs National Printing Company Ltd** (1995) TLR 262, where the failure to comply with the law was held to have rendered the agreement inoperative, yet enforceable before a court of law. Mr. Machibya reiterated his contention that the conduct of the parties implied compliance with the law, and there was nothing to suggest that the application for assignment of the

mineral rights was refused. Consequently, he urged the Court to answer the additional issue in the affirmative.

I have duly considered the arguments concerning the additional issue, and I find it imperative to reiterate the established principle of contract law. Pursuant to section 2(1)(a) and (b) of the Law of Contract Act, Cap. 345 R.E. 2019 (the LCA), unless the context dictates otherwise, a contract comes into existence when one person signifies to another his willingness to do or abstain from doing something, and the person to whom the proposal is made signifies his assent, thereby accepting the proposal and forming the agreement or contract. For an agreement to be enforceable, it must possess all the ingredients outlined in section 10 of the LCA, including the free consent of the parties, the competency of the parties to contract, the lawful consideration and the lawful object. In addition, the agreement must not expressly be declared to be void. It is only when these ingredients are present that the injured party may pursue a claim against the party in default.

In the present, none of the parties assert the deed of assignment pertinent to be incompetent for lack of free consent and competency of both the plaintiffs and the 1st defendant who executed the same. As regards the consideration, Mr. Nyoni submitted that the plaintiff had not adduced evidence to substantiate the same. However, I have noted that consideration was duly stated in clause 6 of Exhibit P1 and that, clause 7 thereof indicates

that the plaintiffs had already made an advance payment of TZS 5,000,000/= as part of the consideration. As rightly noted by Mr. Machibya, the 1st defendant has not contested in his written statement of defence the presence of any of the ingredients required for a valid contract. As a result, there is no evidence to suggest that the deed of assignment was also associated with an unlawful object. Given these circumstances, I find that the deed of assignment incorporates the necessary ingredients of a valid contract as delineated under section 10 of the LCA.

As previously stated, the defence counsel argued that the deed of assignment was invalid due to non-compliance with sections 9 and 123 of the Mining Act, contending that it was not registered with the Mining Commission. However, there is no evidence to suggest that the deed of assignment was in contravention of the provisions referred to by the defence counsel. For instance, section 9 of the Mining Act stipulates that:

> *"9.-(1) The holder of a mineral right, or where the holder is more than one person, every person who constitutes the holder of that mineral right, shall, subject to subsection (2), be entitled to assign the mineral right or, as the case may be, an undivided proportionate part thereof to another person.*
>
> *(2) No Special Mining Licence, Mining Licence or any undivided proportionate part thereof shall be assigned to*

another person without a written consent of the licensing authority.

(3) Notwithstanding subsection (2), consent of the licensing authority shall not be required for an assignment to-

(a) an affiliate, where the obligations of the affiliate are guaranteed by the assignor or by a parent company approved by the licensing authority; and, for the purposes of this paragraph, an affiliate means any company which directly or indirectly controls or is controlled by the applicant or which is controlled directly or indirectly by a company which directly or indirectly controls the applicant;

(b) (b) a bank or other financial institution by way of mortgage or charge given as security for any loan or guarantee in respect of mining operations;

(c) another person who constitutes the holder of the special mining licence or, as the case may be, the mining licence.

(4)The consent of the licensing authority where it is required under subsection (2), shall not be given unless-

(a) there is a proof that substantial developments have been effected by the holder of mineral right in accordance with the programme of mining operations under sections 41(3) and 49(2); (b)

there is a Tax Clearance Certificate issued by the Tanzania Revenue Authority; and (c) there is a proof that other charges, fees and payables have been cleared.

(5) Application for assignment or transfer of mineral rights shall be made in a prescribed form and accompanied by a prescribed fee."

As gleaned from the above provision, a mineral rights holder is entitled to assign the mineral right to another individual. Moreover, the law specifies that written consent from the licensing authority is necessary when the assignment involves a Special Mining Licence, Mining Licence, or any undivided proportionate part thereof. In terms of section 7 of the Mining Act, the mineral right held under the primary mining licence is different from that held under the Special Mining Licence and the Mining Licence. Since the mineral right assigned under Exhibit P1 is primary mining licence and not Special Mining Licence or the Mining Licence, I am of the considered view that, it did not necessitate written consent from the licensing authority.

As regards section 123 of Mining Act, it just empowers the Mining Commission to maintain a central register of all mineral rights, which includes records of applications, grants, variations, dealings, assignments, transfers, suspensions, and cancellations of the rights. In this instance, Exhibit P2 demonstrates that the registration fee for the assignment was indeed paid.

Furthermore, I agree with Mr. Machibya's assertion that the actions of the Mining Commission, as evidenced in Exhibits P5, P7, and P8, acknowledge the plaintiffs' recognition through the deed of assignment.

Given the stated reasons, the argument claiming the invalidity of the deed of assignment due to non-compliance with sections 9 and 123 of the Mining Act, owing to the absence of written consent from the licensing authority, holds no weight. Consequently, there is no indication that the deed of assignment did not comply with the law. Thus, the additional issue is answered in the affirmative.

I now revert to the first issue; whether the 1st defendant breached the deed of assignment. In the plaint, the plaintiffs allege two breaches by the 1st defendant: *firstly,* by delaying to register the deed of assignment, and *secondly,* by transferring the deed of assignment to the 2nd defendant without consent.

Regarding the breach due to the delay in registering the deed of assignment, both PW1 and PW2 testified that the 1st defendant was obligated to register the deed but failed to do so in July and August 2021. They pointed out that it was until September 16, 2021, when the 1st defendant applied for registration of the deed, as evidenced by Exhibit P2, and that this delay resulted in significant losses for them. During cross-examination by counsel for both defendants, PW2 affirmed that the responsibility to pay the

registration fees lay with the 1st defendant, asserting that these fees formed part of the debt. However, during re-examination by the plaintiffs' counsel, PW2 claimed to have no knowledge of the delay. Notably, in their respective final closing submissions, both parties failed to address the issue of the delay in registering the deed of assignment.

Upon examining the deed of assignment (Exhibit P1), I have noted that it does not have any provisions regarding its registration. Even clause 8.4 of Exhibit P1, referenced by PW1, refers to debt related to the license and not the registration of the assignment. Although it was not explicitly stated that the 1st defendant was responsible for registering the deed of assignment, Exhibit P2 reveals that the registration fees were paid by the 1st defendant more than a month and a half later, on 16/09/2021. However, since the party responsible for registering the deed of assignment and the timeframe for registration were not stipulated in Exhibit P1, and PW1 stated during re-examination that he was unaware of any delay, I find that the breach due to the delay in registering the deed of assignment has not been proved.

The second aspect of breach concerns the transfer of the mineral rights to the 2nd defendant. It is noteworthy that the 1st defendant admitted in paragraph 9 of his written statement of defence to having transferred his ownership over the mineral right under Exhibit P1 to the 2nd defendant. This admission is further reflected in the testimonies of both DW1 and DW2. Now,

clause 8.10 of Exhibit P1 stipulates that any agreement with a third party that may affect the performance of the deed of assignment must be approved by the plaintiffs and the 1st defendant after mutual agreement. The question that arises is whether this term of Exhibit P1 was complied with.

In their testimonies, PW1 and PW2 asserted that the transfer of the primary mining licence, was executed without their knowledge and in violation of Exhibit P1's terms. This fact is further corroborated by Exhibit P6, wherein the plaintiffs claimed to the RMO that they were not consulted regarding the transfer of the mining license to the 2nd defendant. In response, the 1st defendant (DW1) claimed under oath to having informed the plaintiffs of his intention to transfer his mineral rights to the 2nd defendant. However, this crucial detail was not averred in his written statement of defence. Moreover, during cross-examination by the plaintiff's counsel, DW1 admitted to not producing the notice served to the plaintiffs regarding the transfer of the Primary Mining License. Since clause 12 of Exhibit P1 required written notice, I am at one with Mr. Machibya that the 1st defendant should have presented it as evidence. Considering these points, it is evident that the 1st defendant's transfer of the Primary Mining License to the 2nd defendant breached Exhibit P1 for want of written notice and mutual agreement between the parties, as specified in clauses 8.9 and 8.10 of Exhibit P1.

Mr. Nyoni's argument that the plaintiffs breached clauses 6 and 7 of Exhibit P1 by failing to pay consideration is not supported by the 2nd defendant's written statement of defence, let alone the evidence of DW1. Hence, I will not consider it.

Taking all of the above into account, the first issue is answered in the affirmative.

Next for determination is the second issue; whether the 1st and 2nd defendants cooperated to frustrate the Deed of Assignment of the Mineral Right. Mr. Machibya argued that, in paragraph 8 of the amended written statement of defence, the 2nd defendant admitted to interfering with the plaintiffs' undertaking starting from November, 2021. However, upon my reading of the said paragraph, I find that the 2nd defendant disputed that her officers interfered with the plaintiffs undertaking.

Be that as it may, the issue under consideration was based on paragraph 8 of the plaint that, following a meeting with the RMO, the plaintiffs noticed that there was cooperation between the 1st and 2nd defendants to frustrate the deed of assignment. It was further stated in the plaint and testified by PW1 and PW2 that the defendants had an agreement to eliminate the plaintiffs from the assigned mineral rights. However, the purported agreement was not tendered in evidence to substantiate the claim that the defendants cooperated to frustrate the deed of assignment.

That aside, it is not disputed that what the 1st defendant transferred to the 2nd defendant is the mineral rights which were also subject to the deed of assignment between him and the plaintiffs. It is also not disputed and deduced from the evidence of PW1, PW2, DW1, and DW2 and Exhibits P3 and P4 that the 1st defendant's transfer of the mineral right to the 2nd defendant was made while the deed of assignment was still in force. However, I align with the defense counsel's argument that the 1st defendant possessed the right, as stipulated under section 9(1) of the Mining Act, to transfer the mineral right in the PML to any individual. Therefore, any arrangement by the 1st defendant to transfer his mineral right to the 2nd defendant cannot be termed as a move to frustrate the deed of assignment. As stated in the previous issue, such an arrangement contravened the terms of Exhibit P1 as the plaintiffs were not notified.

It is my further considered view that, as the successor of the 1st defendant to the mineral right in the PML, the 2nd defendant was obligated to honor the existing liabilities and obligations related to the said mineral rights. In this regard, the 2nd defendant should have complied with the terms of the deed of assignment as the 1st defendant would have done. Indeed, the 1st defendant stated in his written statement of defence and witness statement that he had an agreement with the 2nd defendant, wherein the latter would honor the existing agreement between the former with the plaintiffs.

Furthermore, PW1 and PW2 testified that, the RMO was not ready to register the transfer of mineral rights to the 2nd defendant until 16th March 2022, and after receiving the 2nd defendant's undertaking (Exhibit P3). In this undertaking (Exhibit P3), the 2nd defendant informed the RMO as follows:

> *"We would like to inform your humble office that, we Mbuyula Coal Mine Limited, have managed to resolve our dispute with Hassady Noor Kajuna with regard to PML No. 0311 RVM and that from the date of this letter, we will honour and have a right on the agreement entered between Hassady Kajuna and Ally Mchekane and Issa Ally Mchekanae with regard to the above mentioned License."*

It is evident that a dispute arose between the plaintiffs and the 2nd defendant regarding the execution of the deed of assignment. For instance, in her letter (Exhibit P4) dated 29th March 2022, the 2nd defendant notified the RMO of her intention to terminate the deed of assignment with the plaintiffs, citing breaches of clauses 8.2, 8.4, 8.6, and 8.8 of Exhibit P1. Therefore, the 2nd defendant urged the RMO to intervene and resolve the matter between her and the plaintiffs as mandated by Exhibit P1. Taking prompt action, the RMO convened a meeting the following day, on 30/03/2022 to address the matter. The 2nd defendant's complaints during that meeting were recorded in the minutes (Exhibit P6) as follows:

> *"...mwansheria wa ndugu hao alieleza kuwa wateja wake Ndugu Ally Ally Mchekanae na Issa Ally Mchekane hawatambui kampuni ya Mbuyula Coal Mine Ltd kama ni*

mmoja wa wasimamizi wa utekelezaji wa mkataba wao na ndugu Hassady Noor Kajuna na hivo kuomba mwenyekiti kama ataridhia aitwe Ndugu Hassady Noor Kajuna ili aweze kuwatambulisha wamiliki hao wapya wa leseni na kukubaliana jinsi ya mkataba wao kutavokuwa unatekelezwa kwa kuwa kwa mujibu wa mkataba wao ilibidi awashirikishe kabla ya kufanya zoezi la kuhamisha sihia kwenda kwa wamiliki wapya....

At the end of the meeting, it was resolved that: *One,* the 1st defendant be called to introduce the new license owners to his investors (Ally and Issa Mchekanae). *Two,* Mr. Idd Kajuna explained that Mbuyula Coal Mine Ltd is the rightful owner of the license and therefore they will submit their letter on 31.03.2022 regarding the steps the office should take regarding the operation of the license. *Three,* the plaintiffs requested to be consulted on any decision likely to affect them.

Based on the foregoing, the defendants cannot be held to have cooperated to frustrate Exhibit P1 only because the 2nd defendant referred the matter to the RMO. This is because the 2nd defendant being a new owner of the mineral rights was entitled to ensure that terms and conditions of Exhibit P1 are complied with. In that respect, he was entitled to have Exhibit P1 terminated if the plaintiffs were indeed breaching its terms and conditions.

It should further be noted that, at the mining site, the mining was carried out by the plaintiffs' agency, Ariim Co. Ltd. Pursuant to paragraphs 7, 8, 9, 10, and 11 of the witness statement of PW3 from Ariim Co. Ltd, the mining operation started on 30/07/2021, after the execution of the agency agreement, and the agency received several orders for the supply of coal. These include the orders dated 27/04/2022 and 02/03/2022 from Lake Cement Ltd and Dangote, respectively. It was his further evidence that Ariim Co. Ltd received the orders at the time when the 2nd defendant had already interfered with the activities at the site by trying to stop them from the mining activities and also that they failed to deliver the coals because the 2nd defendant prevented them from continuing with the mining at the site. Thus, his evidence does not show whether both defendants indeed stopped them from continuing with the mining operation.

To the contrary, the stop order (Exhibit P7) against the plaintiffs was issued by the RMO on 14/04/2022. That was almost two weeks before Ariim Co. Limited's receipt of Lake Cement's order. Furthermore, the RMO's stop order was premised on the ground that the plaintiffs had failed to comply with mining regulations, including those related to safety, occupational health, and environmental protection. There is nothing to suggest that the stop order was instigated by the defendants. It was categorically stated in Exhibit P7 that the

stop order was grounded on the defects detected during the inspection held at the site on 27/03/2022.

It is noteworthy that clause 8.6 of Exhibit P1 imposes an obligation on the plaintiffs to utilize the mining site in a manner that upholds the safety and quality of the surrounding area and environment. Therefore, if the RMO had identified the defects outlined in Exhibit P7 during their inspection on 27/03/2022, the 2nd defendant, as the new holder of the mineral rights, had the inherent right under clause 10 of Exhibit P1 to express her intention to terminate the deed of assignment by first requesting the RMO to resolve the matter, which she did through Exhibit P4.

Based on the above analysis, I am of the view that the plaintiffs have not substantiated his claim that the defendants cooperated to frustrate the deed of assignment. Hence, the second issue is answered in the negative. However, the 2nd defendant's refusal of the plaintiffs to continue with the mining operation and collecting the mined coals will be addressed in the course of dealing with fourth issue.

I now proceed to address the third issue; whether the 2nd defendant is entitled to the amount pleaded in the counterclaim. It is firmly established in law that a counterclaim constitutes an independent legal action or suit. On

that account, the counterclaimant bears the onus of substantiating his or her claim.

As previously noted, the substantive claims put forth by the 2nd defendant, a counterclaimant in this case are delineated as follows: *first,* an order declaring the plaintiffs in breach of contract; *second,* an order compelling the plaintiffs to remit USD 73,500, emanating from an outstanding sum of USD 3.5 per ton of extracted coal by the plaintiffs from February 14, 2022, to March 22, 2022; *third,* a demand for reimbursement of USD 14,087, representing moneys advanced by the 2nd defendant to the 1st defendant pursuant to an agreement with the plaintiffs for the payment of 'Mrahaba wa serikali'; *fourth*, an order for the plaintiffs to disburse TZS. 126,000,000, covering expenses incurred by the 2nd defendant to rectify defects identified at the mining site; and *fifth*, a claim urging the plaintiffs to settle USD 16,000, constituting unpaid royalty fees remitted by the second defendant and left outstanding due to the plaintiffs' default.

It is pertinent that, the monetary claims advanced in the counterclaim take the form of special damages. The legal principle governing special damages states that, besides being expressly pleaded, such damages must be strictly substantiated. For instance, in the case of **Strabag International (GMBH) vs Adinani Sabuni**, Civil Appeal No. 241 of 2018, the Court of Appeal enunciated:

> *"In this jurisdiction, as it is in most commonwealth jurisdictions, the law on specific damages is settled. Special damages, in accord with the settled law, must be specially pleaded and strictly proved as demonstrated by decided cases."*

I have already indicated the special damages pleaded in the 2nd defendant's counterclaim. However, as aptly argued by the learned counsel for the plaintiffs and 1st defendant, none of the 2nd defendant's officers or representatives appeared to confirm or prove the claims proffered in the counterclaim. The lone witness summoned by the 2nd defendant is the RMO, DW2, whose testimony failed to validate the counterclaim's assertions for the following reasons:

One, DW2 attested to the 2nd defendant's claim concerning royalty and inspection dues totalling TZS 95,000,000, notwithstanding the absence of specific pleading of such dues in the second defendant's counterclaim.

Two, given the nature of this claim for TZS 95,000,000 and the claim for royalty fees amounting to USD 14,087, it was imperative for the 2nd defendant to furnish evidence substantiating the existence of inspection and royalty dues, as well as proof of payment pursuant to an agreement with the plaintiffs and/or the first defendant. However, DW2's testimony regarding the second defendant's claim for TZS 95,000,000 and USD 14,087 lacked documentary support.

Three, paragraphs 7 and 9 of DW2's witness statement indicate that his testimony concerning the 2nd defendant's claims for TZS 95,000,000 and USD 14,087.21 is based on the information he received from the 2nd defendant. For instance, DW2 testified as follows in paragraph 9 of his witness statement:

> *"That, the 2nd defendant and Plaintiffs were thereafter engaged in series of disputes in respect to the Mine under the Primary Licence PML 0311 RVM in which a couple of meeting were convened with the Resident Mines Officer, Executive Secretary and the District Commissioner for Mbinga in that regard contractual issue between the above mentioned parties where the 2nd Defendant principally demanded to be refunded USD 14,087. 21 plus TZS 95,000 she gave the 1st defendant to pay hence rescuing the licence from being revoked."*

The above excerpt from the witness statement indicates that DW2's assertion regarding the claim of USD 14,087.21 and TZS 95,000,000 was predicated on information sourced from the 2nd defendant. In the circumstances, I agree with Mr. Machibya's argument that, without direct testimony from the 2nd defendant herself, DW2's evidence on this matter constitutes hearsay and therefore cannot be accorded weight by this Court.

Consequently, in the absence of the 2nd defendant's principal officer or representative to confirm the claims and reliefs set forth in the counterclaim, and considering DW2's inability to substantiate any of the second defendant's

claims for the money stated in the counterclaim, I am compelled to answer the third issue in the negative.

The final issue to be determined pertains to the reliefs sought by the parties. Considering the arguments presented in addressing the third issue, I find that the 2nd defendant is not entitled to the claims asserted in the counterclaim. Consequently, the plaintiffs and the 1st defendant are entitled to the costs incurred in defending the counterclaim.

Turning to the main suit, the crux of this issue lies in the prayers put forth by the plaintiffs. The first prayer seeks an order declaring that the 1st defendant breached the agreement with the plaintiffs. In light of the discussions held during the deliberation of the first issue, I find no compelling grounds to deny this relief.

Another prayer made by the plaintiffs is for an order declaring the actions of the 2nd defendant to interfere, prevent, or obstruct the plaintiffs from undertaking their mining activities as unlawful. As discussed in addressing the second issue, the 2nd defendant, as the successor to the mineral rights, had the obligation to ensure compliance with the terms of Exhibit P1. Despite the resolution on the second issue, it is evident from the Mining Commission's stop order (Exhibit P7) that the plaintiffs were suspended from conducting mining activities until all deficiencies or defects

were rectified. Consequently, since the Mining Commission through the RMO confirmed in Exhibit P8 that the plaintiffs had rectified the deficiencies outlined in the stop order (Exhibit P7), the plaintiffs were entitled to resume mining operations.

However, Exhibit P8 indicates that the plaintiffs were only permitted to collect the mined coals. Moreover, the testimonies of PW1, PW2, and PW3, supported by Exhibit P9, suggest that the 2nd defendant denied the plaintiffs access to the mining site, let alone collecting the mined coal. It is worth noting that the 2nd defendant did not present evidence to challenge such claims. On the other hand, Exhibit P8 indicates that the deficiencies outlined in the Mining Commission's stop order were rectified on 6th May 2022, coinciding with the time of the deed of assignment. Furthermore, there is no indication that, after referring the matter to the RMO, the 2nd defendant terminated the deed of assignment by serving the plaintiffs with a 30 days' notice to remedy the breach, as stipulated under clause 10 of Exhibit P1. Therefore, the 2nd defendant was also in breach of the deed of assignment inherited from the 1st defendant and that the said acts were unlawful.

The plaintiffs further pray for an order asserting their entitlement to damages for the breach of their agreement with the 1st Defendant. As previously determined, both defendants breached the deed of assignment on different occasions. Consequently, I declare that the plaintiffs are entitled to

damages arising from the breach of the deed of assignment (Exhibit P1). However, the extent of damages depends on the pleadings and the evidence presented during the trial.

The next relief is an order that the Defendants pay the plaintiffs the sum of TZS 4,431,713,076.50/= or any other amount determined by the court, representing damages for loss of business, loss of profit, and the value of coal appropriated by the Defendants. It was stated that the loss of business, loss of profit, and value of appropriated coal amounted to TZS 2,310,782.630=, TZS 1,270,930,445.50/=, and TZS 850,000,000/= respectively.

I am alive to the position of the law that loss of business and loss of profit are in the form of general damages. The law is further settled that general damages do not need proof and are awarded at the discretion of the court based on the circumstances of each case. Thus, what is required by the plaintiff is to plead in the plaint and state how he is entitled to the general damages. I am fortified by the case of **Peter Joseph Kilibika vs Partic Aloyce Mlingi**, Civil Appeal No. 30 of 2009 (unreported) in which the Court of Appeal cited with approval the case of **Admiralty Commissioners vs. SS Susquehanna** [1950] 1 ALL ER 392 where it was held that:

"If the damage is general then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."

In the instant case, loss of business, loss of profit, and the value of appropriated coals were claimed as special damages. This is because the amount of both losses and the value of coal was specified and pleaded in paragraph 23 of the plaint that it was within the jurisdiction of this court. It is settled law and I need not cite any authority that general damages do not constitute the jurisdiction of the court. Therefore, had the loss of business, loss of profit, and value of coals been pleaded as general damages, the Court would have considered whether it has original jurisdiction to determine the matter.

Therefore, the plaintiffs was required substantiate the loss of business, loss of profit, and value of appropriated coal, amounting to TZS 2,310,782.630=, TZS 1,270,930,445.50/=, and TZS 850,000,000/= respectively, arising from the defendants' breach of the deed of assignment.

Concerning the loss of profit totalling TZS 1,270,930,446.50/=, the plaintiffs failed to provide substantiation for this claim. Notably, PW3 of Arriim Co. Ltd, tasked with mining and selling the coals on behalf of the plaintiff, did not provide the evidence or methodology used to calculate this loss.

Regarding the loss of business, PW1, PW2, and PW3 testified that the plaintiffs anticipated earnings of TZS 580,560,000/= and TZS 1,661,440,000/= by supplying 6,000 and 18,000 tons of coal to Lake Cement and Dangote, respectively. However, scrutiny of the local purchase order (LPO) (Exhibit P12) reveals that the coals delivery date to Lake Cement was slated for 27th April 2022. Notably, this LPO lacks signatures from both Lake Cement and Ariim Co. Ltd, rendering it unreliable. Moreover, the date of issuance together with the coals delivery date stated in this LPO coincided with the period during which the plaintiffs' mining operations were halted by the Mining Commission's order. Consequently, the plaintiffs could not have delivered the coals to Lake Cement within the stipulated timeframe. As there is no evidence of an extension for delivery, the defendants cannot be held accountable for the purported loss of business amounting to TZS 580,560,000/=.

Furthermore, Exhibit P12 shows that the plaintiffs' agency anticipated earning TZS 1,661,440,000/= by supplying 18,000 tons of coal to Dangote Cement Ltd. However, the testimonies of PW1, PW2, and PW3 indicate that the RMO's stop order was issued when the site had about 10,000 tons of coal. This implies that it was unfeasible for the plaintiff's agency to meet Dangote Cement's order for 18,000 tons. Also, there was no clarification from PW1, PW2 and PW3 on whether the remaining 8,000 tons of coal could have been

extracted between 6th May 2022, when the Mining Commission through the RMO lifted his stop order, and 31st May 2022, the delivery date of the consignment. As a result, the purported loss of business totaling TZS 1,661,440,000/=, which the plaintiffs' agency expected to earn from supplying coals to Dangote, remains unproved.

Regarding the value of coal, the plaint and the witness statements of PW1, PW2, and PW3 show that the stop order was issued when "about 10,000 tons" of coals had been mined. The use of the term "about" indicates a level of uncertainty or approximation, as noted in the Legal Dictionary|Law.com and **The Oxford Advanced Learner's Dictionary**, 8th Edition at page 3. Therefore, although Exhibit P8 shows presence of coals at the site, PW1, PW2, and PW3 have not specifically proven that the quantity of coals mined was precisely 10,000 tons. For that reason, the claim of TZS 850,000,000/= fails.

Given the above considerations, I am of the view that the reliefs for loss of business, loss of profit, and value of coal cannot be awarded as prayed in the plaint. As regards the plaintiffs' request for the court to award any amount thereof, it will be addressed during the determination of the relief for general damages.

Alternatively, the plaintiffs have requested the Court to order the defendants to provide them with 10,000 tons of coal and extend the deed of assignment for a further eight months to compensate for the frustrated months. From the outset, since the proof of 10,000 tons of coals is lacking, the order compelling the defendant to provide the plaintiff with 10,000 tons of coal is untenable. On the second limb of this relief, it is in evident that the defects leading to the stop order were rectified when the deed of assignment had less than three months before its expiry. Considering further PW3's evidence that 2nd defendant possessed the mining site after the stop order, I hold the view that an extension for a further eight months is not viable.

This leads me to the relief for general damages. As stated herein, it is well-established that general damages are awarded at the discretion of the court to compensate the plaintiff for losses incurred. In this case, the breach of the deed of assignment by the 1st defendant followed by the actions of the 2nd defendant in preventing the plaintiffs from continuing with the mining operation and collecting the coals after rectification of defects stated by the RMO, clearly warrants compensation. This is when it is considered that the plaintiffs through his agency were receiving orders for supplying coals. Therefore, although the amount was not strictly proven, I am of the view that the plaintiffs suffered a loss of business and profit, and their business confidence and reputation with their customers, including the agency,

declined. Taking these factors into account, I award the plaintiffs general damages of TZS 250,000,000/=.

Another relief sought by the plaintiffs is a decretal sum at the rate of 21% or any rate determined by the court from 2022 to the date of judgment and 30% or any rate determined by the court from the date of judgment to the date of full payment. Pursuant to Order XX, Rule 21(1) of the CPC, interest at the rate of 7% per annum is awarded by the Court from the date of judgment until satisfaction of the decree, unless the parties have agreed upon a different rate not exceeding 12%. There is no evidence to suggest that the rate of 30% per annum was agreed upon by the parties. Therefore, I award interest on the decretal sum of TZS 250,000,000 at the rate of 7% per annum from the date of judgment until satisfaction of the decree.

With regard to the costs of the suit, section 30 of the CPC and established legal principles dictate that costs follow the event. Considering that the plaintiffs have proven that the defendants breached the contract, they are entitled to the costs of this case.

In light of the above analysis and findings regarding the five issues, the counterclaim is hereby dismissed with costs, and the main suit is decreed in favour of the plaintiffs as follows:

1. A declaration is made that the 1st defendant breached the deed of assignment between him and the plaintiffs.
2. A declaration is made that the act of the 2nd Defendant to interfere and prevent/stop/obstruct the Plaintiffs from undertaking their mining activities is unlawful.
3. A declaration is made that the Plaintiffs are entitled to damages for the breach of the deed of assignment, but subject to pleadings and evidence.
4. The defendants shall pay the plaintiffs the general damages of TZS 250,000,000/=.
5. The decretal amount in item (4) above shall attract interest of 12% per annum from the date of filing this suit to the date of judgment.
6. The decretal amount in item (4) shall attract court rate interest of 7% per annum from the date of judgment to the date of full satisfaction.
7. The defendants are ordered to pay costs of the main suit.

Dated this 18th day of April, 2024.

S.E. KISANYA
JUDGE
18/04/2024

Court: Judgment delivered through virtual court system this 18th day of April, 2024 in the presence of Mr. Elias Machibya, learned Advocate for both

plaintiffs and Mr. Nestory Nyoni, learned Advocate for the 1st defendant and also holding brief of Mr. Michael Mwambeta, learned Counsel for the 2nd defendant. B/C Mpoki present.

Right of appeal to the Court of Appeal is duly explained.

S.E. KISANYA
JUDGE
18/04/2024