IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: JUMA, C.J., MUGASHA, J.A. And NDIKA,J.A.)

CIVIL APPEAL NO. 221 OF 2017

HOSEA KATAMPA.....APPELLANT

VERSUS

1. **THE MINISTRY OF ENERGY AND MINERALS**
2. **THE ATTORNEY GENERAL** **.....RESPONDENTS**
3. **GEITA GOLD MINE**

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

(Hon. Makaramba,J.)

dated the 11th day of June, 2015
in
HC Land Case Number 11 of 2009

JUDGMENT OF THE COURT

1st & 3rd October, 2018

JUMA, C.J.:

Ownership of an area of land with prospect of gold at Nyamlilima village, described in the Amended Plaint as "RIDGE-8 NO 3" situated in Geita District, lies at the centre of this appeal by HOSEA KATAMPA, and also subject of a Cross Appeal by the Geita Gold Mine Ltd (the 3rd respondent). The appellant blames the Ministry of Energy and Minerals (the 1st respondent) and the Attorney General (the 2nd respondent) for

allocating the disputed ridge to the 3rd respondent. He filed a suit in the High Court at Mwanza where he sought, among other remedies, a declaration that he is the lawful owner of the Nyamlilima Ridge-8 No. 3. He also urged the trial court to stop the 3rd respondent from unlawfully carrying on with the gold mining activities over and under the disputed land.

In the hearing of the suit before the trial court, the appellant highlighted a chronology of events to back up his ownership claim. Sometime in the 1980s, he traced; a mining company going by the name DAR TADINE TANZANIA LIMITED (D.T.T.) had entered into an agreement with the State Mining Corporation (STAMICO), which was the Government-owned mining agency. Under this agreement, the appellant claimed, the Government engaged the D.T.T. to supervise small-scale mining activities over several areas of Geita District which included the disputed ridge. At some point during the course of the agreement between STAMICO and D.T.T., the appellant, and several other small-scale miners, became sub-contractors of the D.T.T. who purchased gold obtained from their mining plots.

The appellant also claimed that when the Government terminated its relationship with the D.T.T., the District Commissioner for Geita issued orders which allowed the former sub-contractors of the D.T.T., like the appellant, to remain and continue with small-scale mining activities over areas which included the disputed ridge. He further referred to several applications for grant of mining rights, and communications he received in return, which seemed to assure him and other small-scale miners that their areas would be surveyed for purposes of ultimate grants of mining rights.

In their defence at the trial court, the 1st and 2nd respondents claimed that the appellant is not the owner of the disputed ridge. In so far as they were concerned, the ridge lawfully and legally belonged to the 3rd respondent. In its defence, the 3rd respondent challenged the appellant to present before the trial court documentary proof of his alleged allocation of the disputed area. Short of that, the mining company urged the trial court to dismiss the suit.

The trial court adopted four issues for its determination. Firstly, whether the appellant is legally the owner of the mining area known as Nyamlilima Ridge-8. The second issue sought to determine whether the

allocation of the disputed mining area to the 3rd respondent was lawful. The third issue was, if the first and the second issues are in the affirmative; whether the appellant suffered damage and to what extent. The fourth issue was about the reliefs; the disputing parties are entitled to.

With regard to the first issue, the learned trial Judge noted that the appellant did not bring cogent evidence to establish his alleged ownership of the disputed ridge. The trial Judge further observed that the appellant did not show the steps he had taken to secure a mining licence. The trial court was left in no doubt that a copy of the Ruling of the District Court of Geita in Criminal Case No. 177/2005 (exhibit P1), which the appellant tendered as part of his evidence did not prove his ownership of the disputed mining area.

On the second issue, regarding the lawfulness of the allocation of the disputed area, the learned trial Judge declined to find that the area had been lawfully allocated to the 3rd respondent. He observed that the Special Mining Licence No. SML 45/1999 (Exhibit D1) which the 3rd respondent relied upon as its documentary proof of lawful allocation mentions *"Geita Hill & Kukuluma area in Geita District"*, which is quite a different location

from Nyamlilima Ridge Eight the subject of the dispute. In his conclusion that Exhibit D1 does not prove that the 3rd respondent was actually allocated the Nyamlilima Ridge Eight, the learned trial Judge stated the following on page 207 of the record of appeal:

> *"On the evidence on record, it has not been proved that the allocation of the disputed mining area to the 3rd Defendant was lawful. Furthermore, it has not even been proved if the 3rd Defendant was ever allocated the mining area located at the Nyamlilima Ridge Eight at Nyamlilima village.* ***The Special Mining Licence No. SML 45/1999, Exhibit D1,*** *as Mr. Mutabuzi rightly submitted was applied for and located at* ***Geita Hill & Kukuluma area*** *in Geita District, which is quite a different location from Nyamlilima Ridge Eight at Nyamlilima village. On the evidence on record, I do not therefore find that there is dispute over the Mining Area located at the Nyamlilima Ridge Eight at Nyamlilima village. The evidence of the mining licence, Exhibit D1, shows that, the 3rd Defendant was never allocated the disputed area.*
>
> *It is for the above reasons that the second issue whether the allocation of the disputed mining area to the 3rd Defendant was lawful is to be answered in the negative."*

The answer which the trial Judge gave in his considered judgment to the first issue attracted the following three grounds of appeal by the appellant before us:

> *1.- THAT, the Honourable Judge erred in law and in fact by deciding the matter in favour of the Respondent while there was no sufficient evidence to that effect.*
>
> *2.- That, the Honourable Judge erred in law and in fact by denying the appellant the right of ownership of the disputed land just for failure to show a mining licence without considering the fact that it is not [the] Appellant who issues the license.*
>
> *3.- That, the Honourable Judge erred in law and in fact for failure to scrutinize the evidences availed by the Appellant and ending up delivering unjust decision.*

Likewise, the conclusion, which the trial Judge arrived at to the effect that Exhibit D1 does not prove that the 3rd respondent was actually allocated the disputed ridge, precipitated the Cross-Appeal by the 3rd respondent which sets out two grounds by which the mining company seeks to vary the decision of the trial High Court:

1.- The trial judge erred in facts by his finding that the disputed area was not allocated to the third defendant [respondent] while it is in evidence that the disputed area was allocated to the third defendant [respondent].

2.- The trial judge erred in fact by his finding that the Special Mining License, Exhibit D1, was not issued in respect of the disputed area while the said Special Licence covers the area in dispute.

At the hearing of the appeal and the cross-appeal on 1st October 2018, the appellant appeared in person. He immediately adopted his written submissions and made brief oral highlights of the submissions which he had filed earlier. Mr. Robert Kidando learned State Attorney who appeared together with Ms. Lillian Meli learned State Attorney for the 1st and 2nd respondents, did not earlier file any written submissions. He chose to reply by way of oral submissions. The learned counsel for the 3rd respondent, Ms. Marina Mashimba, highlighted the written submissions she had filed earlier.

In his written submissions which merged his three grounds of appeal together, the appellant feels that he, and his fellow small-scale miners

operating under their umbrella group known as MWAREMA have not been treated fairly by the respondents. This is because, although they had been engaged in gold-mining activities at the disputed ridge since 1988, the 3rd respondent who came much later was granted mineral rights over their areas. The appellant further submitted that the letter, which the District Commissioner of Geita wrote to the former sub-contractors of the DTT supported their ownership claim because it allowed them to not only retain their areas, but the letter allowed them also to continue on with their mining activities in the disputed area. He also submitted that his ownership claim is also supported by the promises which were made by government officials that upon filing their individual applications, they would be granted mining rights over their areas.

As proof that he was on the right track towards securing a formal mining licence, he referred to a letter (which was not tendered in the trial court) where the Geita Resident Mines Officer had asked him to clear an outstanding fee totalling Tshs. 919,000/=. He referred to yet another letter which he also did not tender as his exhibit, where the Zonal Mines Officer

for Mwanza instructed the Resident Mines Officer for Geita to formally lodge to the appellant's application for Mining Licence.

In his submissions, the appellant downplayed the evidence of DW1, who had testified that the disputed area had been earmarked for further exploration and all those who were occupying that ridge were asked to look for other areas. The appellant submitted that he was not informed of that decision, nor did the two witnesses for the respondents, DW1 and DW2, tender documentary proof that the disputed ridge was set aside for other purposes other their use for mining activities.

The appellant referred us to the evidence of PW2 as another example of the way he was unfairly treated. How come, he submitted, he was excluded from allocation while all his fellow sub-contractors were all granted ownership rights in the areas formerly under the DTT. He submitted that although he did not possess the mining licence, prudence required the learned trial judge to conclude that he had legitimate expectation of being issued with the mining licence, taking into account so much effort he had made to contact so many Government offices. He

referred to the case of **SCHMIDT V SECRETARY OF STATE** (1969) 1 All ER to ground his submission on the validity of his legitimate expectation.

For the respondent, Mr. Robert Kidando made an oral submission. He supported the decision of the High Court, pointing out that appellant had failed to prove his ownership of the disputed ridge. On the question whether the appellant had any documentary support of his alleged ownership, Mr. Kidando submitted that the two documents which were exhibited as evidence on the appellant's behalf (i.e. exhibit P1 and P2) did not confer any mineral rights over the Nyamlilima Ridge No. 8. He referred to the evidence of DW2 outlining the procedures which the appellant did not follow to acquire a mining licence, and also the evidence of DW2 who confirmed that the appellant had never applied for any Mining Licence over the disputed ridge. The learned State Attorney insisted that not a single former sub-contractor was allocated any mining right over the Nyamlilima Ridge 8 because it was an area designated for research. In particular, he referred us to page 156 of the record of appeal where one Isidori Ngowi had been mistakenly allocated a Mining Licence in the ridge, but the anomaly was rectified when his licence was shortly thereafter revoked.

Mr. Kidando referred us to the evidence of DW2, who had explained to the trial court the process which ultimately led to the grant of Special Mining Licence 45/1999 (Exhibit D1) to the 3rd respondent. He concluded his submission by urging us to dismiss the appeal.

After adopting the third respondent's reply to submissions of the appellant, Ms Marina Mashimba expressed her stand that she agreed with the learned State Attorney's submissions only to the extent that the trial Judge was right to dismiss the appellant's appeal together with the appellant's claim of ownership of the disputed ridge. She submitted that the two grounds of cross-appeal manifest the extent of her dissatisfaction with that part of the decision where the learned trial Judge had concluded on page 207 of the record of appeal that: "*On the evidence on record, it has not been proved that the allocation of the disputed mining area to the 3rd defendant (respondent) was lawful, ... it has not even been proved if the 3rd defendant (respondent) was ever allocated the mining area located at the Nyamlilima Ridge Eight..... and that the evidence of the mining licence, exhibit D1 shows that the 3rd defendant (respondent) was never allocated the disputed area.*"

Beginning with the appellant's submissions on the three grounds of appeal, Ms Mashimba argued that the appellant cannot trace his claim for ownership through his sub-contracting agreement with the DTT. The appellant is not a successor in any Mineral Licence because DTT did not have Mining Licence or any kind of ownership of the area in dispute. She submitted that the DTT was appointed by the Government to only carry out supervision of areas with mining potentials in the Lake Zone.

The learned counsel submitted further the appellant has not complied with Part IV of the Mining Act, 2010 which specifies how a person can acquire mineral rights under different categories of licences. That as long as the appellant has not shown any type of mining licence he holds, he cannot claim any ownership.

On the two grounds in the cross-appeal, Ms. Mashimba submitted that the learned trial Judge should have found that the 3rd respondent had proved it had been lawfully allocated the disputed Nyamlilima Ridge, and as such, the 3rd respondent is the lawful owner of the ridge. She submitted that the learned trial Judge should have taken into account evidence of exhibit D1, a Special Mining Licence No. 45/99 which was tendered and

admitted as proof of the 3rd respondent's lawful ownership of the disputed mining area. She submitted further that the evidence of the appellant, the evidence of the appellant's own witness, PW2; and the evidence of the respondents' witness, DW1, all prove that Nyamlilima Ridge 8 is within the Special Mining Licence which was lawfully allocated to the 3rd respondent. She urged us to allow the cross-appeal because the evidence on record proves that the 3rd respondent was allocated the disputed Nyamlilima Ridge under the Special Mining Licence.

After hearing the submissions of the appellant and the three respondents' learned counsel on grounds of appeal and cross-appeal; we take the threshold of a first appellate court. The established practice requires us to re-evaluate the evidence that was presented before the trial court in order to arrive at our own conclusions, always bearing in mind the proximity the trial court had to see the evidence as tendered first hand. In **JAMAL A. TAMIM V. FELIX FRANCIS MKOSAMALI & THE AG,** CIVIL APPEAL NO. 110 OF 2012 (unreported) we restated our established practice that a first appeal is in the form of a re-hearing where parties are

entitled to have the first appellate Court's own consideration and views of the entire evidence and its own decision thereon.

From the three grounds of appeal and two grounds of cross appeal two basic issues call for re-evaluation of evidence and our determination. The **first** issue is whether appellant is the legal owner of the mining area known as Nyamlilima ridge eight situated at Nyamlilima village. The **second** issue is whether the disputed mining area known as Nyamlilima ridge eight was allocated to the 3rd respondent under a Special Mining License (Exhibit D1).

On the question whether the appellant is the legal owner of the disputed ridge, the trial Judge cannot from the evidence on record be faulted for concluding, as he did, that the appellant did not bring any cogent evidence to establish his ownership over the disputed mining area known as Nyamlilima Ridge 8. What is meant by "evidence of ownership" in the context of Part IV of the Mining Act, 2010 (ACT NO. 14 of 2010) is documentary proof in the form of Prospecting Licence, or Special Mining Licence, or Primary Licences.

No mining or mineral activities can take place outside the strict legal regime provided under the Mining Act. Section 5 of the Mining Act, 2010 illustrates the extent which the Republic has over minerals that are found on any land, or under any land. Such minerals do not in law belong to either the occupier of land or any person who finds the mineral on top of the land outside the mineral licensing statutory regime. Sections 5 and 6 provide:

> *"5. Subject to the provisions of this Act the entire property and control over minerals on, in or under the land to which this Act applies is vested in the United Republic.*
>
> *6 (1) No person shall, on or in any land to which this Act applies, prospect for minerals or carry on mining operations except under the authority of a mineral right granted or deemed to have been granted, under this Act.*
>
> *(2)…*
>
> *(3) Any person who contravenes sub-section (1) commits an offence and on conviction is liable-…..*

.....”

In our reckoning, the phrase that *"the entire property and control over minerals is vested in the United Republic"* in the cited section 5, read together with section 6, illustrates the extent access to mineral rights in Tanzania is controlled and regulated. It does not matter, for the purposes of regulation and control, that the mineral concerned is on, in or under the land under right of occupancy, or village land or forestry, national park or even in a game reserve. In law, "land" to which Mining Act, 2010 applies is widely defined under section 4 to mean:-

> *"(a) land in Tanzania; (including land beneath the territorial sea and other territorial waters); and*
>
> *(b) the sea bed and subsoil of the continental shelf."*

From the above controlling and regulating regime over mining and minerals, it is not possible for the appellant to claim mineral rights evidenced by documentary licence, by reason only that he and other small-scale miners, were formerly sub-contracted to the DTT. It is also not legally feasible outside the licences provided for, for the appellant to acquire mineral rights from the directives or orders of the then District

Commissioner of Geita or a letter which the District Commissioner purportedly wrote, to inform the appellant and fellow small scale miners that were free to mine. It is in law farfetched for the appellant to suppose that the he can be issued with any category of mining licence on basis of the administrative principle of legitimate expectation [**SCHMIDT V SECRETARY OF STATE FOR HOME AFFAIRS-**(supra)] because of the promise of allocation conveyed in the letter from the Permanent Secretary of the 1st respondent (Exhibit P2). Exhibit P2 does not grant any allocation in the disputed ridge.

We are not sure from the evidence how the appellant and fellow small-scale miners entered the surface under which they mined for gold. As a result, there is no evidence to show if the appellant had any surface land rights over which the Special Mining Licence (Exhibit D1) was granted to claim lack of consent. Section 95 (1) of the Mining Act, 2010 require holders of mineral rights to seek consents of surface land right holders before exercising their mineral rights:

> *"95 (1)-The holder of a mineral right* ***shall not exercise any of his rights under his licence*** *or under this Act—*

....

(e)-in respect of any land within any city, municipality, registered villages, or demarcated settlement, ***except with written consent of holders of surface rights*** *and of the responsible Minister or the authority having control over the city, municipality, township, registered villages or demarcated settlements."* [Emphasis added].

We next move on to the question whether the Nyamlilima ridge eight was allocated to the 3rd respondent under a Special Mining License (Exhibit D1).

Although the two witnesses for the respondents (DW1 and DW2) at the trial court should have been asked to highlight whether Nyamlilima Ridge 8 is within the co-ordinates rather than to simply tender a copy of a Special Mining Licence (Exhibit D1), we, with due respect, agree with the learned counsel for the 3rd respondent that there is other evidence on record which suggests that the disputed Nyamlilima ridge 8 falls within the boundaries of the Special Mining Licence No. 45/1999. On our own re-evaluation of evidence regarding the lawful owner of the disputed ridge, the learned counsel for the 3rd respondent is correct to submit that

although the co-ordinates of the boundaries of areas covered by the Special Mining Licence do not mention the disputed ridge in so many words; all the same, there is other evidence which places the disputed areas within the area of the Special Mining Licence. **Firstly,** there is the appellant's own evidence, which one may say, corroborates and expounds the areas envisaged under the Special Mining Licence, when he resignedly stated: *"The disputed area is allocated to GGM and upon claim of it [the] Commissioner told me to come to court..."* **Secondly,** there of the appellant's witness Peter William Chipaka (PW2) who, like the appellant, had been mining gold within Geita District from as early as 1989.

On page 144 of the record of appeal PW2 conceded that "*currently the disputed area is owned by GGM.*" There is also the corroborating evidence of Donald Emily Mremi (DW1) who was at the material time a Senior Mining Officer in Geita. DW1 testified on the process and how the 3rd respondent was allocated the disputed area. At page 157 of the record of appeal DW1 confirms that: *"Ridge 8 which is Nyamlilima is within the Mining licence of Geita Gold Mine."*

From the totality of the evidence of the Special Mining Licence (exhibit D1) and the evidence of witnesses on record, we agree with the learned counsel for the 3rd respondent that the learned trial judge erred to conclude that the disputed area was not allocated to the 3rd respondent, which was; and that the Special Mining Licence does not cover the disputed area, which it does.

To the extent we have outlined we allow the cross appeal with no orders as to costs. Otherwise we hereby dismiss the appeal with no orders as to costs.

DATED at **MWANZA** this 2nd day of October, 2018.

I. H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A.M. NDIKA
JUSTICE OF APPEAL

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

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL