**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: LILA, J.A., KITUSI, J.A., And KAIRO, J.A.)**

**CIVIL APPEAL NO. 103 OF 2019**

**GEITA GOLD MINING LIMITED ..... APPELLANT**

**VERSUS**

1. **TWALIB ISIMAIL**
2. **ANDREA HASSAN IKOZA**
3. **HAMIS MGANJA**
4. **CHRISTOPHER TARIMO ERICK**

**..... RESPONDENTS**

**[Appeal from the Judgment of the High Court at Mwanza]**

**(Ebrahim, J.)**

**dated the 13th day of October, 2017**

**in**

**Land Appeal No. 123 of 2015**

---

## JUDGMENT OF THE COURT

29th November & 3rd December, 2021

**KITUSI, J.A.:**

This is a second appeal by Geita Gold Mining Company Limited, the appellant, having originally lost in Land Applications No. 16 and 17 of 2014 before the District Land and Housing Tribunal (DLHT) for Geita and on first consolidated appeals before the High Court sitting at Mwanza. As its name suggests, the appellant's registered main activity is mining, which it carries out within Geita Region. Naturally, in order for the appellant to carry out its main activity, it needs land. The appellant claims

that it is a lawful owner of an area or areas described as Geita Hill and Kukuluma area, vide a Special Mining Licence No. 45/1999.

The appellant further alleges that in 2006 she compensated all previous owners of the land in the area that had been allocated to it by the said Licence, and they all vacated. The essence of the dispute is an allegation appearing under paragraph 6 (a) (iii) of the application that: -

> *"Sometimes in the year 2013, the Respondents on different dates and occasions did trespass and invade into the Applicant's above-named land commenced farming activities thereon including growing of permanent and short-term crops, poultry keeping and fish farming. The Respondents have also erected some structures thereon."*

The respondents' joint statement of defence was that they are lawful owners of the land alleged to have been trespassed by them, because, they averred, they have never received any compensations as alleged as no valuation has ever been carried out on those parcels of land.

At the trial, the DLHT rejected the account given by one Mussa Shunashi (PW1) who worked for the appellant as Liason Officer from 2006. We think the core of his testimony is in the following excerpt: -

> *"After acquiring the licence, the GGM, the occupiers are compensated. We contacted the village leadership. The villagers were informed after the valuation (2004 – 2012). There was an advertisement, the village leadership was informed. The owners came. We were me, WEO, village council members and the valuer and the land officer. We surveyed the whole land. The respondents were not one of the owners according to the list of villagers brought to us by the Nyamalembo village council. After the survey, valuation was conducted, compensation was done".*

The reason for the DLHT rejecting PW1's evidence was that he testified on matters that took place even before he had started working for the appellant and that he did not identify the suit land. It accepted the respondents' version of the matter that they lawfully acquired their respective pieces of land and that they were entitled to full, fair and prompt compensation in terms of section 3 (1) (g) of the Land Act No. 4 of 1999.

On appeal, the High Court agreed with the DLHT that the appellant's case rested on 'skimpy' evidence of PW1 who did not discharge the appellant's burden of proof for his failure to describe the suit land by plot numbers and coordinates. It concluded that the appellant had not proved that the respondents were compensated. It however faulted the DLHT for ordering compensation, a relief the respondents had not prayed for. That decision is faulted on two grounds which we reproduce as hereunder: -

1. *That the learned appellate judge erred in law by her position that the appellant had failed to prove that the respondents were in its mining area, while it was not in dispute that the said respondents are in the appellant's mining area.*
2. *That the learned appellate judge erred in law by concurring with the trial Chairperson that the appellant had failed to prove that the respondent had been compensated, while according to Exhibit PE-1 all persons who had to be compensated were compensated.*

Dr. George Mwaisondola, learned advocate, argued the appeal on behalf of the appellant. He had filed written submissions ahead of the date of hearing, so he adopted them and proceeded to highlight and

clarify on some points. The learned counsel's main theme is an argument that right from the pleadings, evidence and finding of the High Court, there was no dispute as regards the appellant's right to the suit land, so the High Court erred in turning around and demanding from the appellant, proof of ownership and description of the suit land.

Mr. Elias Hezron, learned advocate, argued the appeal on behalf of the respondents. Unlike the appellant's counsel, he had no written submissions to lean on, but addressed us orally. His line of argument is that, it is a principle of evidence that he who alleges must prove, and maintained that the appellant did not prove anything to support her claim.

Back to Dr. Mwaisondola. He strongly argued that the appellant's basis of the claim as appearing at paragraph 6 of the complaint was responded to by the respondent's Written Statement of Defence (WSD) at paragraph 3 which offers no better than a feeble general denial which, in the learned counsel's view, leaves the allegations undisputed. He also cited the learned Judge's finding at page 189 of the record that; *"It is undisputable in this case that the appellant held a Special Mining Licence No. 45/1999 at Geita Hill and Kukuluma Area in Geita Region".* The learned counsel's argument is that the learned Judge having been

satisfied that the appellant had proved being a holder of the Special Mining Licence, ought to have proceeded to find the respondents trespassers. After all, he argued, proof of trespass does not necessarily call for proof of ownership, because mere possession of a property may entitle one to sue for trespass. He cited the case of **Jela Kalinga vs Omari Karumwana** [1991] T.L.R. 67.

In order to feel the real pulse of the appellant's argument on the matter, we have decided to pick the relevant excerpt from counsel's written submission:

> *"The first issue was who between the contestants was the rightful owners of the land in dispute. That was the issue after the parties had filed their respective pleadings. According to the pleadings by the respondents and their evidence,* ***there is nowhere they claimed to be outside the area*** *covered by the Mining Licence which was issued to the appellant for mining purposes. According to the evidence given by the respondents it was their version that they were not compensated.* ***There is nowhere in their evidence where they stated that they were outside*** *the Appellant's mining area therefore not trespassers."(emphasis supplied)*

On the other hand, Mr. Hezron submitted that in their Written Statement of Defence the respondents claimed to be the owners of the land which they occupy, therefore the appellants had a duty to prove otherwise, or to prove that she is the owner. The learned counsel would argue that the appellant did not even bother to tender the said Special Mining Licence. He submitted, that the respondents had no access to the Special Mining Lincence therefore, even if they had no duty to prove, they could not state whether they were within or outside the licenced area. He referred us to DW3's testimony at page 106 of the record of appeal, where he categorically stated that *"The suit land does not belong to GGM"*. Counsel submitted that the appellant would have called the District Executive Director for Geita District who was the signatory of the Agreement between the appellant and Geita District Council, to testify on whether the special Mining Licence covers the area now occupied by the respondents. However, there was no such evidence.

In our consideration of this appeal we shall keep in mind the fact that this is a second appeal as we earlier observed. Our interference with concurrent findings of facts, if any, will therefore be made only when justified. The principle in the case of **D.P.P vs Jaffari Mfaume Kawawa** [1981] TLR 149 is all too common to repeat.

To begin with, we are respectfully in agreement with the learned Judge's application of the law regarding burden of proof and the cases she cited: - **Attorney General & Others vs Eligi Edward Massawe & Others**, Civil Appeal No. 86 of 2002 and; **Anthony M. Masanga Vs Penina (Mama Mgesi) and Another,** Civil Appeal No. 118 of 2014 (both unreported). As it has not been suggested to us, that once a person holds a special mining licence he has no duty of proof in a legal dispute, we shall apply known standards of proof in this case. We are a bit disturbed by Dr. Mwaisondola's point of view suggesting that it fell upon the respondents to prove that they were not within the licenced mining area.

We must put matters in their proper perspective in this case by pointing out that as of the time of institution of the suit, the respondents were, rightly or wrongly, the ones in possession of the suit land and had built houses on it as well as carrying out their economic activities. We agree with Dr. Mwaisondola that the tort of trespass is founded on possession as held in **Jela Kalinga** (supra). See also our recent decision in **Avit Thadeus Massawe vs Isdory Assenga** Civil Appeal No. 6 of 2017 (unreported). So, we ask ourselves whether this principle is anyhow in favour of the appellant as to justify her complacency in adducing

evidence to prove her claim. The position begs the question whether in the circumstances it would be enough for the appellant to sue and leave everything to mere conjuncture. If that were the case then decisions of the court would be as unpredictable as a toss of the coin, as it was once remarked in **Ikindila Wigae vs Republic** [2005] T.L.R 365.

Before we determine the question whether or not the appellant adduced such evidence that would entitle her to a judgment, there are two collateral issues for us to bring to light at this point. **One**, the contention by Dr. Mwaisondola that the respondents did not, in their Written Statement of Defence, dispute the claim is, we are afraid, not supported by the record, especially the WSD. Paragraph 3 of the WSD, is clear that the respondents were disputing the whole of paragraph 6 (a), and they further stated that they are lawful owners of the land at Compound hamlet. In his testimony during the trial, the first respondent stated that he was lawfully occupying the land at Compound street as it was lawfully allocated to him.

There was no attempt by the appellant to prove that the said Compound street is within the area in the Special Mining Licence, instead in his submissions earlier reproduced, Dr. Mwaisondoia has blamed the respondents for not leading evidence to prove that they were outside the

area. This is a suggestion to twist the burdens of proof, which we have consistently held unacceptable. For instance, in **Paulina Samson Ndawavya vs Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017 (unreported) we said: -

> *"It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the apposite party's case".*

See also **Geita Gold Mining Ltd & Another vs Ignas Athanas** Civil Appeal No. 227 of 2017 (unreported).

The second collateral issue we want to bring forth is the appellant's counsel's apparent wrong appreciation of the High Court's findings. The learned advocate appears to mistake the High Court's demand for proof of demarcation with proof of ownership of the land. That, in our view, is the reason he has cited the case of **Jela Kalinga** (supra) for the principle that there is no need of proof of ownership in cases of trespass. It is a truism that trespass is a tort of interference to possession, that is why even a tenant may sue his landlord for trespass if he encroaches upon his lawful possession. See our decision in **Avit Thadeus Massawe vs Isdory Assenga** (supra). In that case we reproduced the following

passage from **Frank Safari Mchuma vs Shaibu Ally Shemndolwa** [1998] TLR 280 at page 288 :-

> *"By definition trespass to land is unjustifiable intrusion by one person upon the land in the possession of another. It has therefore been stated with a light touch that: "**If the defendant places a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile in it"** (Ellis vs Loftis Iron Co. (2) per Coleridge C.J. at Page 12)..."*

Taking clue from the above example of the defendant's foot, wouldn't the plaintiff be required to first establish the boundaries of his land for the defendant to be held liable for placing a part of his foot on it? Again, in view of the fact that the respondents are the ones who were in actual possession of the land, was there evidence upon which the DLHT and High Court would have decided the matter in favour of the appellant? We are very certain that this is the kind of proof the DLHT and the High Court concurrently found missing.

We are as satisfied as were the two courts below, that there was no evidence to prove the appellant's case and we have seen no reason for disturbing the concurrent findings of fact on that. On the basis of our

discussion above, the first ground of appeal which faults the learned High Court Judge for concluding that there was no poof that the respondents were on the appellant's area, has no merit. The appellant's contention in that ground of appeal and in the learned counsel's submissions that there was no dispute that the respondents were on the appellant's land is as surprising as it is devoid of merit. It is against the pleadings by the parties, particularly paragraph 6(a)(iii) of the application which we reproduced earlier, and respondents' WSD at paragraph 3 which disputed paragraph 6 (a), thereby forming the first issue which reads: -

> *"who between the applicant and the respondent are lawful owners of the land in dispute."*

We wonder how would the learned Tribunal Chairman be expected to decide the above issue without evidence being placed before it? It should also be recalled that Holding No. (iii) in **Jela Kalinga** (supra), a case cited by Dr. Mwaisondola himself, is to the following effect:

> *"(iii) one of the defences against an action for trespass is a claim by the defendant that he had a right to the possession of the land at the time of the alleged trespass or that he acted under the authority of some person having such a right."*

In the instant case, the respondents raised a similar defence that they were in lawful occupation of the disputed land. Therefore, it was not

'a walk in the park' affair as the appellant would have us believe. This disposes of the first ground of appeal.

The second ground of appeal seeks to fault the learned Judge's finding on the issue of compensation. We do not know how this came about, because, in our view, the appellant would be the last person to be aggrieved by the learned Judge's decision on that point. Having satisfied herself that the respondents had not pleaded for compensation, the learned Judge quashed and set aside the order of the DLHT in that respect. As matters now stand, there is no order of compensation whatsoever, so it is not clear what the second ground of appeal intends to achieve.

We think the context in which the respondents brought in the issue of compensation was an attempt to assert that they are occupying land that lawfully belongs to them and that no one has changed that status by buying them off. The learned Judge's reference to compensation was also in the context of proof of the first issue namely; who between the contestants is the lawful owner of the land. But since the appellant has maintained that the respondents were not paid compensation because they were not entitled to, that takes us back to the issue of rightful

possession of and trespass to the land, which we have already dealt with under the first ground of appeal, dismissing it for want of proof.

Therefore, the second ground of appeal is, with respect, uncalled for as it does not affect our decision on the first and main ground of appeal, so we dismiss it. All said, this appeal is dismissed with costs.

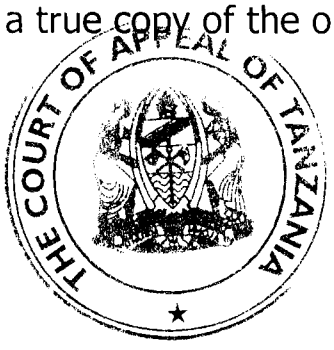
**DATED** at **MWANZA** this 2nd day of December, 2021.

S. A. LILA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

L. G. KAIRO
**JUSTICE OF APPEAL**

The Judgment delivered this 3rd day of December, 2021 in the Presence of Ms. Marina Mashimba, learned counsel for the appellant and Mr. Elias Hezron, learned counsel of the Respondent, is hereby certified as a true copy of the original.




S. J. KAINDA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**