IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM

COMMERCIAL CASE NO.23 OF 2008

KASTAN MINING LTD.....PLAINTIFF

VERSUS

LUGURUNI MINING LTD & THREE OTHERS.....DEFENDANTS

Date of Hearing: 2nd and 3rd June, 2011 and 6th July, 2011
Date of last order: 06/07/2011
Date of closing submissions: 12/09/2011
Date of Judgment: 22/03/2012

JUDGMENT

MAKARAMBA, J.:

This judgment arises out of a suit the Plaintiff lodged in this Court on the 28th day of March, 2008. On the 29th day of April 2008, with leave of this Court the Plaintiff filed an Amended Plaint. The Plaintiff in this suit is claiming against the Defendants jointly and severally for the following orders:-

a) *Declaration that the transfer of the prospecting License with reconnaissance period PLR 4939/2008 (formerly Application HQ-P15511) from the 1st Defendant to the 2nd Defendant is illegal and ineffectual.*

b) *Specific performance in all material respects, of the Option and Purchase Agreement against the 1st Defendant.*

c) *In the alternative to (a) and (b) above and (e) and (f) below, the 1st,2nd 3rd and 4th Defendants jointly and severally pay the Plaintiff the sum of US$ 743,711 being special damages and inducement of breach and unlawful interference with the lawful contract entered into by the Plaintiff and the 1st Defendant.*

d) *The 1st, 2nd, 3rd, and 4th Defendants jointly and severally pay the Plaintiff the sum of US$ 100,000 as general damages for breach and inducement of breach and unlawful interference with the lawful contract entered into by the Plaintiff and the 1st Defendant.*

e) *Perpetual injunction restraining the 2nd and 3rd Defendant and their agents or associates from inducing breach and interfering with a contract between the Plaintiff and 1st Defendant.*

f) *Perpetual injunction restraining the 2nd Defendant and its agents and associates from conducting any and all activities related to prospecting, exploring for, mining or otherwise collecting or extracting, or otherwise engaging in any activities within the boundaries of PLR 4939/2008.*

g) *Interest at commercial rate on item (c) and (d) above from the date of the accrual of the cause of action to the date of judgment.*

h) *Interest at commercial rate on item (c) and (d) above from the date of judgment to the date of the full settlement of the decretal sum.*

i) *Costs of this suit be paid by the defendants jointly or severally, as for the 1st Plaintiff, costs shall be paid as stipulated in the Option and Purchase Agreement.*

j) *Any other relief as this Honourable Court may deem fit and appropriate.*

In this suit, appearing for the Plaintiff is **Mr. Mbuya**, learned Counsel. For 1st and 3rd Defendants it is **Mr. Tundu Lisu**, learned Counsel. **Mr. Shirima,** learned Counsel appeared for the 2nd and 4th Defendants.

In support of its case, the Plaintiff called two witnesses, **Mr. JOHN TATE**, the Director of the Plaintiff's Company, KASTAN MINING LTD and also in-charge of Financial and Operative Affairs of the Plaintiff's Company who testified as **PW1. Mr. WILFRED RUTU MACHUME**, an Assistant Commissioner for License and Mineral Rights at the Ministry of Energy and Minerals, who testified as **PW2**.

The Defendants on their part called three witnesses. M/s **THERESA KERENGE**, the Managing Director of the Plaintiff's Company, KASTANI MINING LTD testified as **DW1**. **Mr. MSIGALA LISTA CHIMA,** who is among the founders of the Plaintiff's Company, KASTAN MINING LTD, testified as **DW2. Mr. MOHAMED AYASI RASHID**, a businessman doing his business in Congo DRC, testified as **DW3**.

At the close of the proceedings the learned Counsel for the parties sought leave to file their closing submissions, which this Court duly granted. However, unfortunately, Mr. Tundu Lissu, learned Counsel for the 1st and 3rd Defendants, neither filed his closing submissions nor assigned any excuse for such failure.

Given the nature of the suit, a brief recapitulation of its factual background as could be gathered from the Plaint is quite apposite. The facts briefly are that on the 30th October, 2007, the Plaintiff signed an Option and Purchased Agreement (OPA) (herein the Agreement) with the

1st and 3rd Defendants. In terms of the Agreement, the 1st Defendant gave a right to the Plaintiff to purchase its (Plaintiff's) mineral rights over the Prospecting License **PLR 4285,** and an application for prospecting License with Reconnaissance **No.HQ-15511.** As a demonstration of good faith, the Plaintiff made a deposit of **USD 18,000** on the date of execution of the Agreement (OPA). The details of the minerals rights on which the Plaintiff was granted right to purchase were as follows:

(a) Prospecting License with reconnaissance period expected to be granted pursuant to Application No. **HQ-P15511** at Malolo in Kilosa and Mpwapwa Districts with the following coordinates:-

A. 07 05′ 00″	36 30′ 00″
B. 07 05′ 00″	36 35′ 00″
C. 07 20′ 00″	36 35′ 00″
B. 07 20′ 00″	36 30′ 00″

(b) Prospecting License **No. 4285/2007** at Malolo in Kilosa and Mpwapwa Districts with the followings coordinates:-

A. 06 55′ 00″	36 30′ 39.60″
B. 06 55′ 30″	36 45′ 00″
C. 07 00′ 00″	36 45′ 00″
B. 07 00′ 00″	36 30′ 39.60″

The original closing date for the Option and Purchase Agreement (OPA) initially was set as on the 30th November 2007, but it was extended until the 8th of December 2007. The 1st Defendant agreed to deliver to the Plaintiff at or before the closing date various documents including but not

limited to endorsements, assignments, and other instrument of sale, transfer, conveyance and assignment, as would be necessary or desirable to vest in the Plaintiff, good and marketable title to mineral rights over Prospecting License **PL 4285/2007** and Application **HQ-P15511**. The consideration for both Mineral Rights was as follows:

(i) Purchase price of **USD 50,000;**

(ii) Completion and Transfer Bonus of **USD 18,000;**

(iii) Annual rent, preparation and transfer fees payment in respect of minerals rights payable to the ministry of Energy and Minerals; and

(iv) Participation rights in which the 1st Defendant would be entitled to 2% of the net back value for prospecting license PL 4285 and 1% of the net back value for HQ-P15511 as defined in the Mining Act, 1998.

The parties also agreed that all taxes pertaining to the acquisition and transfer of the mineral rights would be paid by the Plaintiff. Out of this consideration, by the closing date the Plaintiff paid to the 1st Defendant through the 3rd Defendant a total sum of **USD 68,000.** The Plaintiff also paid the annual rent and preparation and transfer fees for prospecting License **PL 4868** directly to the Ministry of Energy and Minerals. On the 28th December 2007 the Plaintiff also paid the preparation fee for the application of **HQ-P15511** directly to the Ministry of Energy and Minerals.

The Plaintiff allege that the Prospecting License with Reconnaissance **No.PLR 49393** formerly recognized as application **HQ-P15511** was fraudulently and illegally transferred to the 2nd Defendant by the 1st

Defendant which amounts to a breach of contract. The Plaintiff has given the following particulars of fraud:-

(a) The 1st and 3rd Defendants despite being aware that the Prospecting License with reconnaissance period was granted to him on 18th January 2008, continued to fraudulently misrepresent to the Plaintiff that it had not been granted the license instrument over Application HQ-P15511 as of closing date.

(b) All Defendants fraudulently and corruptly procured the office of the Commissioner for Minerals to issue a grossly incorrect search report misrepresenting to the plaintiff that the license instrument over Application HQ-P15511 had not been granted as of 30th January 2008.

(c) That the 1st Defendant and 2nd Defendant agreed to transfer the Prospecting License with reconnaissance period PLR 4939/2008 (formerly Application HQ-P15511) while it was aware that the option and purchase Agreement was still in existence.

(d) The 4th Defendant was aware of the existence of option and Purchase Agreement in that it encountered Plaintiff's field team at the site on 25th January 2008 ad told him that they were in the process of acquiring mineral rights over the area and requested

him to stop illegal mining activities that requested him to stop illegal mining activities that were being conducted by its company, 2nd Defendant.

The defendants have vehemently disputed all the facts the Plaintiff alleged in its Amended Plaint, which essentially has put the parties at issue. On the first day of the hearing of the suit, the parties framed the following issues, which were recorded by this Court for the determination of this suit, namely:

1. *Whether the pending application for Mineral Rights is transferable under Tanzanian law;*

2. *If the first issue is answered in affirmative, whether the transferee of the Minerals Rights (Luguruni Mining Ltd) had residual legal rights/title to transfer to a third party the licence granted by the Minister for Energy and Minerals basing on already transferred pending Application;*

3. *Whether the Purchaser (Abba Mining Ltd) of a licence issued on already transferred pending Application acquired a better title against the Transferee (Kastan Mining Ltd) of a pending Application;*

4. *Whether the alleged transfer of application No. HQ-P15511 from the 1st Defendant to the Plaintiff was proper at law and fact;*

5. *Whether the 2nd Defendant as purchaser of the mineral license from the 1st Defendant acquired a better title than the Plaintiff; and*

6. *What reliefs are the parties entitled to.*

In his testimony, **PW-1, Mr. JOHN TATE,** the Director of KASTAN MINING COMPANY LTD since 12th Day of September, 2007, and whose duties include setting the policies of the Company's Board and also being in-charge of Financial and Operative Affairs Department of the Company, told this Court that he (PW1) knew the 1st Defendant since October, 2007. PW1 told this Court further that the 1st Defendant and PW1 made geological exploration where they found an area rich in minerals on which they were interested. They conducted search at the Ministry of Energy and Minerals on such areas and discovered that LUGURUNI MINING LTD. had owned the two concessions. PW1 told this Court further that these two concessions were two applications which were in a primary stage with applications **No.HQ-P15511** and **No.4285**. PW1 testified further that the Plaintiff consulted Theresa Kerenge, the director of LUGURUNI MINING LTD, to inquire if she will be interested to sale the license to the Plaintiff. PW1 testified further that the Plaintiff successfully negotiated with Theresa Kerenge and entered into an agreement with the 1st Defendant for an **Option Purchase Agreement** (OPA) dated 13/10/2007. PW1 tendered the Agreement (OPA) which this Court admitted and marked as **Exhibit P1**.

PW1 testified further that the Plaintiff has paid **USD 18,000** as fees together with charges related to transfer and annual rent for the Prospecting Licenses. PW1 testified further that Theresa Kerenge had a residual right with any production from either area of the net back value of production, that on the application **No.4285** it was 2% of the Net back value of production and for application **No.15511** it was 1%. PW1 testified

further that the Plaintiff did not get a license despite of paying **USD 18,000** to Theresa Kerenge. PW1 tendered in this Court the Petty Cash Voucher with Payment Request Form which this Court admitted and marked as **Exhibit P2.** PW1 told this Court further that, the closing date for all actions was on 30th day of November 2007. However, it was extended to 31st January 2008 because the licenses were not yet issued to the 1st Defendant by the Ministry of Energy and Minerals. PW1 tendered in this Court the Addendum to Agreement extending the closing date which was admitted and marked as **Exhibit P3.** PW1 stated further that, the Plaintiff had executed another payment to the 1st Defendant of **USD 6,000,** and an advance payment of **TZS 500,000/=** for an application **HQ-P15511** and also paid for the 1st Defendant **USD 2,192.50** and **USD 200** as transfer fees for **PL No. 4868**. The Plaintiff tendered in this Court a set of documents for the payment of **USD 22,000, USD 200** and **USD 2,192.50** which were admitted and marked as **Exhibit P4** collectively.

PW1 told this Court further that the Plaintiff used SEAMIC and Korean experts to conduct a series of tests on the area under application **No.15511**. PW1 told this Court further that the Plaintiff further sent a team of experts to examine the area for other commercial aspects including constructions of roads and the village proximity from the mining area. PW1 also told this Court that the Plaintiff had discussed with the Kilosa District Council about the construction of roads to the mining site which was to be regarded as one of the community project, and told this Court further that the Plaintiff estimated that they have spent about **USD 493,711** as reflected in the financial statements. PW1 tendered in this

Court an Indicative Estimated Cost list which was admitted and marked as **Exhibit P5.**

PW1 told this Court further that the Plaintiff conducted another official search at the Ministry of Energy and Minerals where on 13/01/2008 they had been informed by the Ministry that the license on application **No.HQ-P15511** has not yet been issued, but however, the 1st Defendant had been granted an offer with modification of the coordinates on the applied area. PW1 tendered in this Court the search letter which was admitted and marked as **Exhibit P6.** PW1 testified further that prior to the official search the 1st Defendant had told the Plaintiff that an offer was issued on the 24th day of December 2007. PW1 told this Court further that the 1st Defendant directed Ms. Msigala to go to the Ministry and pay for the preparation fees and that M/s Msigala collected the original invoice from M/s Theresa Kerenge and went ahead to pay **USD 200**. PW1 tendered in this Court the Revenue Collection Form which was admitted and marked as **Exhibit P7**. PW1 also tendered in this Court the Notice of Termination of Option and Purchase Agreement; the letter search for minerals right **No.4939/2008;** and other various documents, which were admitted and marked as **Exhibit P8** collectively.

PW1 told this Court further that application **HQ-P15511** was not transferred to the Plaintiff as agreed with the 1st Defendant, instead it was transferred to a Third Party, ABBA Mining Ltd, the 2nd Defendant in this case. The transfer of such license to ABBA Mining Ltd was contrary to the agreement between the Plaintiff and the 1st Defendant which has been associated with fraud, PW1 further told this Court. The transfer of the

prospecting licence from an application **No.HQ-P15511** to Third Party was fraudulent because the Plaintiff had already paid for it, PW1 further told this Court.

PW1 told this Court further that the 1st Defendant did not honour the contract to the Plaintiff instead, the 1st Defendant fraudulently transferred the license to the Third Party. PW1 further told this Court that the 1st and 2nd Defendant did not return the entire consideration paid in property **HQ-P 15511**, which is **USD 200** as preparation fees and **TZS 500,000/=** the advance paid to Theresa Kerenge. PW1 further told this Court that the area on which the application was made was owned by SAMWEL NTOBI. PW1 told this Court further that KASTAN MINING LTD wrote a letter to Chima Msigara claiming back the money Chima had taken as commission on the transactions between KASTAN MINING and Mr. Ntobi for the two prospecting licenses. PW1 tendered the said letter which was admitted and marked as **Exhibit P9**. PW1 also tendered the bilateral confidentiality agreement together with performance assessment of independent contractor which was admitted and marked as **Exhibit P10**.

In cross-examination PW1 told this Court that under section 7 of the Mining Act, an application to the prospecting license can be sold and that this is a contingent right. PW1 testified further under cross-examination that the Plaintiff did not intend to be transferred with an application but they only expected to be transferred with a license once the same has been granted to the 1st Defendant by the Ministry. The Plaintiff referred to section 6(1) of the Mining Act and stated that it is not true that the Plaintiff breached the law when he sent experts to the area under the prospecting

license since the Plaintiff was permitted by Theresa Kerenge to explore the area. PW1 told this Court further under cross-examination that, indicative costs are not solely expenses for HQ-P15511 but form the entire package for both two applications, which expenses have been generated from September 2007 to February 2008. Since some of the equipments were taken from SIEMENS therefore some of the Plaintiff's claim includes costs of inadvertent error by SIEMENS, PW1 further testified. The expenditures as prescribed under **Exhibit P5** were not supported by any document and in addition, such estimate was prepared by the Plaintiff himself, PW1 further testified. The breach of the agreement occurred before the road had been constructed since the construction started in May 2008, PW1 further stated. PW1 stated further that the **USD 200** and **TZS 500,000/=** was paid by the Plaintiff on application **PL 15511** at the request of Theresa Kerenge. PW1 told this Court further that, they do not have a mining license but they have done intensive activity on the Northern part of the expected area.

In re-examination PW1 told this Court that, he did not intend to buy an application but a license, which was still in process and expected to be granted in future. The Plaintiff had sued the 2nd and the 4th Defendant because they had colluded with the 1st and 3rd Defendants in order to frustrate their contract.

Testifying for the Plaintiff, **PW-2, Mr. WILFRED RUTU MACHUMU** who is an employee of the Ministry of Energy and Minerals working as Assistant Commissioner for License and Minerals Rights, told this Court that his duties were to process mineral applications according to the law, and to

ensure that the integrity of the registration process is maintained; and that all holders comply with the law including payment of fees and royalty and flow of information to the public. PW2 told this Court that he (PW2) received the application from the 1st Defendant where he (PW2) processed and granted it to the 1st Defendant. PW2 told this Court further that the application was lodged on 24th May 2007 and the license was granted on 18th January 2008, and was registered as **PLR 4939/2008** for a period of 24 Months. PW2 told this Court further that, between the time of the lodging and the grant of the license there was no any further communication between the Ministry and the 1st Defendant.

Testifying for the Defence**, DW1, Ms. THERESA KERENGE** told this Court that the subject matter of the contract with KASTAN MINING LTD was to purchase the license. DW1 told this Court further that the one which has been brought to this Court was a mere application license which can never be sold because it is not yet a license, and that as such an application can be granted or rejected by the Ministry. DW1 told this Court further that the application **HQ-P15511** was processed and the prospecting license was granted and then such license was transferred to ABBA Mining Ltd. DW1 told this Court further that DW1 ended the contract after realizing that she (DW1) was doing something which was not right since an application cannot be transferred, and therefore she (DW1) wrote a letter of termination to the Plaintiff, and that she had returned the **USD 6000** to the Plaintiff by cheque.

DW1 told this Court further that the Plaintiff has never suffered any loss because the Defendant has returned all the money that had been paid by

the Plaintiff. According to DW1 there is no any breach of contract and that it will be unfair if the Defendant will be awarded any order for damages.

In cross examination DW1 told this Court that the Application **HQP 15511** was purposely for Mpwapwa and Kilosa areas and the result of that application is a license **PLR 4939/2008**. DW1 told this Court further that she (DW1) knew Mr. Chima Msigala as an officer from the Plaintiff's Company from whom DW1 acknowledged to have received an advance payment of **USD 6000**. DW1 told this Court further that she (DW1) wrote a letter to terminate the Option Agreement after realizing that she (DW1) was not in good terms with Mr. Tate. According to DW1, she had received Five Hundred Thousand (**TZS 500,000/=)** from Mr. John Tate as a gift for personal use. In re-examination DW1 insisted before this Court that she has returned the **USD 6000** to the Plaintiff for application **HQP 15511** although on that particular day she testified she told this Court that she did not come with any evidence to prove this particular fact.

Testifying also for the Defence as **DW2, Mr. MSIGALA LISTA CHIMA** who resides at Kawe and is among the founders of the Plaintiff's Company, told this Court that he (DW2) knows the 1st Defendant, a Company going by the name of LUGURUNI MINING LTD. DW2 told this Court further that while making survey, they discovered that some of the potential areas were already covered by the LUGURUNI MINING LTD. DW2 told this Court further that since they had interest on those areas they decided to convene meetings with LUGURUNI MINING LTD trying to see the possibility of LUGURUNI MINING LTD transfering some of their properties to KASTAN MINING LTD. DW2 further told this Court that luckily enough, LUGURUNI

MINING LTD agreed to transfer some of its potential areas to KASTAN MINING LTD., and that by that time Luguruni Mining Ltd had yet to be issued with a license. DW2 told this Court further that an area with application number **HQ-P15511** was not paid for by the Plaintiff. DW1 told this Court further that, it is true that the Plaintiff brought some heavy machines for mining processes for **PL4285.** However, the imported machines were exempted from tax. DW2 told this Court further that, the Plaintiff has constructed roads although the construction has not been completed, and that funds for the road construction were sponsored by the Government through the District Authority, and therefore the Plaintiff is not entitled to any special damages.

In cross examination DW2 told this Court that he signed a contract with KASTAN MINING LTD as an Independent Contractor. DW2 tendered the Independent Contractor Agreement between Kastan Mining Ltd and DW2, which was admitted and marked as **Exhibit D2.** DW2 further told this Court that he (DW2) did write and sign a resignation letter dated 7th day of April 2008 to resign from the position of Director in Kastan Mining Ltd. DW2 tendered the resignation letter together with another letter dated 26th November 2008 from the Ministry of Energy and Minerals to M.A. Ismail & Co which were admitted and marked as **Exhibit D1** collectively. DW2 told this Court further that Mr. John Kerenge and Theresia Kerenge had received a cheque **No. 6822793** to the tune of **USD 27,565.** DW2 also told this Court that Kastan Mining Ltd. had agreed with Luguruni Mining Ltd to buy the license once it has been obtained.

Testifying for the defence as DW3, **Mr. MOHAMED ABASI RASHID,** a businessman working for gain in Congo DRC, and who has been engaged in mining activities for eight years, told this Court that he (DW3) met with Theresa Kerenge for the first time in between the 4th or 5th January 2008, to discuss on the area located at Mpwapwa which he (DW3) believed to be rich in copper. DW3 told this Court further that he (DW3) conducted search at the Ministry and was informed that the requested area was already occupied by Luguruni Mining Ltd. DW3 told this Court further that the area occupied by Luguruni Mining Ltd was under application **No. HQ-P15511.** DW3 told this Court that he (DW3) had entered into agreement with Luguruni Mining Ltd to buy such area once the license has been obtained. DW3 told this Court further that Luguruni Mining Ltd had successfully obtained the license on 18th January 2008. DW3 told this Court further that the agreement to transfer the license between ABBA Mining Ltd and Luguruni Mining Ltd was signed on 22nd January 2008. DW3 tendered this Agreement which was admitted and marked as **Exhibit D3.** DW3 told this Court further that, on 18/01/2008, the 1st Defendant was granted by the Minister for Energy and Minerals the Prospecting License **No.PLR 4939/2008, Exhibit D4.** DW3 told this Court further that, the transfer of license from Luguruni Mining Ltd to ABBA Mining Ltd was acknowledged and recorded in the central register on 30/01/2008. DW3 tendered the acknowledgment of transfer of the prospecting license PLR 4939/2008 from Luguruni Mining Ltd to ABA Mining Ltd signed by the Commissioner for minerals which was admitted and marked as **Exhibit D5**. DW3 told this Court further that, he (DW3) met with Mr. John Tate

for the first time in this Court. Briefly such is what the witnesses on both sides told this Court.

Let me now turn to consider the issues framed and recorded by this Court for the determination of this suit.

The first issue is *whether the pending application for Mineral Rights is Transferable under Tanzanian law?* DW1 told this Court that under Tanzanian law an application for Mineral Rights is not transferable because it can be rejected at any time by the Ministry of Energy and Minerals. This same position has been echoed by Mr. Shirima, learned Counsel for the Counsel for the 2nd and 4th Defendant in his closing submissions, that **HQ-P15511** was a mere application for mineral rights, and therefore not transferable under the Mining Act, [Act No.14 of 2010] (hereinafter the Act). In terms of the Act, an "*application*" means "*an application for the grant or surrender of a* ***Mineral Right*** *made in accordance with the Mining Act."* Mineral Rights which may be granted under the Act have been broadly defined under section 7 of the Act to include t*he following:–*

(a) under Division A of Part IV–
(i) a prospecting licence
(ii) a gemstone prospecting license
(iii) a retention licence;
(b) under Division B of Part IV–
(i) a special mining licence;
(ii) a mining licence;
(c) under Division C of Part IV–a primary mining licence;
(d) Under division D of Part IV-
(i) a processing licence
(ii) a smelting licence

(iii) a refining licence

In terms the Act, a person is said to have "***Mineral Rights***" if that person holds either of the licenses mentioned under section 7 of the Act. The question whether an application is transferable under Tanzanian law is to be answered by looking at Section 9 (1) of the Act which stipulates as follows:

> *(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****.(the emphasis is of this Court)*

Clearly, emanating from the foregoing provision of the law, a pending application for Mineral Rights is not, in the eyes of the law, a mineral right and cannot therefore be assigned or transferred. The law stipulates in very clear terms that it is only "license" which can be "assigned" or "transferred" from one person to another. An application not being a license is not therefore assignable under the law. This essentially settles the first issue *whether the pending application for Mineral Rights is transferable under Tanzanian law,* which is to be answered in negative.

The first issue having been answered in the negative, the second issue *whether the transferee of the Minerals Rights (Luguruni Mining Ltd) had residual legal rights/title to transfer to a third party the licence granted by the Minister for Energy and Minerals basing on already transferred pending Application which is dependent on the first issue*, must also fail.

I shall now proceed to canvass the third and fifth issues seriatim, namely *whether the Purchaser (Abba Mining Ltd) of a licence issued on already transferred pending Application acquired a better title against the Transferee (Kastan Mining Ltd) of a pending Application; and whether the 2nd Defendant as purchaser of the mineral license from the 1st Defendant acquired a better title than the Plaintiff.*

Let me before canvassing these two issues jointly, begin by stating that the first issue which has been answered in the negative was to the effect that under Tanzanian mining law, a pending application for Mineral Rights cannot be transferred. In the instant case there is no any application which has been transferred from the 1st Defendant to the Plaintiff. Furthermore, there is no any evidence on record proving that the prospecting license **No.PLR 4939/2008** was transferred to the Plaintiff. What is on record as per **Exhibit D4,** is that the 1st Defendant was granted Prospecting License **No.PLR 4939/2008** on the 18th day of January 2008, which the 1st Defendant thereafter transferred to ABBA Mining Ltd on the 22nd day of January, 2008 as per **Exhibit D3**. This transfer was acknowledged by the Commissioner for Minerals who accordingly recorded it in the central register on the 30th day of January 2008, as per **Exhibit D5.** On the evidence on record, therefore, the procedures taken by ABBA Mining Ltd of purchasing the Prospecting License **PLR 4939/2008** from the 1st Defendant was perfectly according to the mining law under which a holder of a mineral right is entitled to assign it to another person. This comes out clearly under section 9(1) of the Mining Act, which provides as follows:

> ***"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**." (the emphasis is of this Court)*

The only evidence brought by the Plaintiff in this Court on the transfer of the disputed prospecting license is an Option Purchase Agreement (OPA) which was concluded between KASTAN MINING LTD and LUGURUNI MINING LTD. There is no evidence that the Plaintiff or the 1st Defendant took no any further steps to transfer the said license to the Plaintiff. In this regard therefore, this Court finds that the 2nd and 4th Defendants acquired a better title than the Plaintiff, unless proved otherwise.

The Plaintiff has raised allegations of fraudulent acts committed by all the Defendants and some officials from the Ministry of Energy and Minerals in the whole process of transferring the prospecting license PLR 4939 from the 1st Defendant to the 2nd and 4th Defendants respectively. The term "fraud" is defined at page 685 in ***Black's Law Dictionary,*** 8th Edition as follows:

> *"...a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment or a misrepresentation made recklessly without belief in its truth to induce another to act."*

In the eyes of the law, allegations of fraud border on criminal accusation. For that reason such allegations have to be specifically proved

by adducing evidence, for the degree of proof required in law in order to establish fraud is slightly much higher than merely on a balance of probabilities. This legal position has been well restated by Hon. Makaramba, J. in **Commercial Case No.27 of 2002 between TANZANIA INVESTMENT BANK V. M/S ILABILA INDUSTRIES AND JOHN MOMOSE CHEYO** (decided on 24th day of December 2010 unreported) and also by Hon. Massati, J. as he then was in **Commercial Case No.35 of 2006 between THE NATIONAL BANK OF COMMERCE LIMITED V. RABCO TANZANIA LTD AND ANOTHER**, an unreported ruling delivered on 30th day of March 2007.

The Plaintiff has not brought any evidence to prove commission of fraud on the part of any officials from the Ministry of Energy and Minerals as alleged. Since it is the Plaintiff who alleged the fact of fraud and has failed to bring any evidence to establish the allegations, the allegations of fraud must fail.

The Plaintiff has also alleged that the 2nd and 4th Defendants committed fraud because they had conspired with the 1st Defendant to cause the transfer of the prospecting license from the 1st Defendant to the 2nd Defendant while knowing that the said license was to be transferred to the Plaintiff. PW1 told this Court that the 2nd Defendant proceeded with the transfer of the prospecting license while knowing that there was a contract concluded between the Plaintiff and the 1st Defendant and therefore the 2nd and the 4th Defendants had actual notice to such effects.

On the allegations of fraud raised by the Plaintiff purportedly committed by the 2nd and 4th Defendants, there is no any evidence on

record establishing whether the Option Purchase Agreement (OPA) between the Plaintiff and the 1st Defendant on the expected license was filed or registered at the Ministry of Energy and Minerals of Tanzania so as to make it public. In his closing submissions the Plaintiff's Counsel referred this Court to the case of **BAILEY V. BARNES (1894) 1 Ch. 25 at P. 35,** where it was held that "*one has actual notice when a public record has been registered.*" The Plaintiff has not brought any evidence of any filing at the Ministry of Energy and Minerals so as to bar any transfer of PL 4939/2008 from the 1st Defendant to any other person other than the Plaintiff. The Option Purchase Agreement (OPA) is the property of the Plaintiff, and the 1st Defendant has nothing to do with the Ministry unless either party to such agreement has filed it with the Ministry, which presently is not the case presently. The question is, how could the 2nd and 4th Defendant have become aware of the Option Purchase Agreement (OPA) over the Prospecting License PLR 4939/2008 entered into between the Plaintiff and the 1st Defendant? In his closing submissions the Plaintiff's Counsel also cited the case of **KINGSWORTH FINANCE TRUST CO. LTD V. TIZARD (1986) 1 WLR 783** where it was held that:

> "*...in order to raise the bonafide purchaser defence one must make "such inspections as ought reasonably to have been made.*"

In my considered view, even if the 2nd and 4th Defendant could have conducted a search at the Ministry of Energy and Minerals, they could not get any details on the Option Purchase Agreement concluded between the

Plaintiff and the 2nd Defendant, since there is no any evidence if the same was ever filed or registered at the Ministry. In his closing submissions the Plaintiff's Counsel also referred this Court to the case of **HUNT V. LUCK (1902) 1 Ch.428** where it was held that:

> *"... a purchaser must inspect the land and make inquiry of anything which appears to throw doubt on the title offered by the vendor."*

And similarly, in **RE COS AND NEVE'S CONTRACT (1891) 2 Ch 109 at pg. 117, 118** it was held that:

> *"...a purchaser has constructive notice of all rights which he would have discovered had he investigated the title of land."*

It is on record that even application No.HQ-P15511 was made in the name of Luguruni Mining Ltd, and that all payments over such application were made by the name of Luguruni Mining Ltd. This goes only to show that still, it was not possible for the 2nd and 4th Defendant to discover the existence of the Option Purchase Agreement (OPA) even if they had inquired or investigated the Agreement at the Ministry. In their testimonies before this Court both PW1 and DW3 stated that after making search at the Ministry of Energy and Minerals over the title covered by application HQ-P15511, they were informed that the said area had already been occupied by Luguruni Mining Ltd. In any event, the 2nd and 4th Defendant could not get any information over the Option Purchase Agreement considering what I said earlier on that there is no evidence if the Option Purchase Agreement was ever registered at the Ministry.

In the light of the foregoing reasons, this Court finds that the 2nd and 4th Defendants are bonafide purchasers. The allegations of fraud leveled by the Plaintiff against the 2nd and the 4th Defendants lack any merits and must accordingly fail.

Whether the 2nd Defendant as purchaser of the mineral license from the 1st Defendant acquired a better title than the Plaintiff

In considering the allegations of fraud leveled by the Plaintiff on the 1st Defendant, it must be taken into consideration that the 1st Defendant by consent entered into the Option Purchase Agreement (OPA) with the Plaintiff on the agreement that once the license under application No. HQ-P 15511 has been processed the same shall be transferred to the Plaintiff. The evidence on record shows that initial payment as consideration for the agreement has already been paid by the Plaintiff. The closing date of the Option Purchase agreement (OPA) initially was set at 30th day of November 2011 but was extended to the 31st June 2008. The prospecting license from application HQ-P15511 was granted on the 18th day of January 2008 as PLR 4939/2008. On the 22nd day of January 2008, the 1st Defendant transferred the said license to the 2nd and 4th Defendants, which transfer was confirmed by the Commissioner of Minerals on the 30th day of January 2008. The notice of termination of the Option and Purchase Agreement (OPA) was made on the 31st day of January 2008, and the letter of the termination thereto was made on the 13th day of February 2008.

Emanating from the foregoing uncontroverted facts, it has been clearly exhibited that the 1st Defendant had transferred the Prospecting

License to the 2nd and 4th Defendants while knowing that she had entered into another contract with the Plaintiff, which was still in force. The 1st Defendant had transferred the Prospecting License to the 2nd and 4th Defendant on the 22nd January 2008 as per **Exhibit D3** before the closing date of the Option Purchase Agreement, which was set at the 31st January 2008 as per **Exhibit P3**. The evidence on record also shows that the 1st Defendant had issued the notice of termination of the Option Purchase Agreement (OPA) on the 31st January 2008 as per **Exhibit P8 collectively,** while she had already transferred the Prospecting License to the 2nd and 4th Defendants on the 22nd January 2008 as per **Exhibit D3**). Worse enough, the 1st Defendant had issued the letter of termination of the Option Purchase Agreement on the 13th February 2008 as per **Exhibit P8 collectively** to the Plaintiff while she had already transferred the prospecting license to the 2nd and 4th Defendants on the 22nd January 2008 as per **Exhibit D3**. Even the reasons for the termination given by the 1st Defendant are not in my view that certain. DW1 told this Court that she had decided to terminate the contract with the Plaintiff after discovering that "*she has done wrong because an application cannot be transferred.*" During cross examination, DW1 told this Court further that she had decided to terminate the contract because "*she was not in good relationship with Mr. John Tate.*" Then, in the letter of notice of termination the reason for termination was given as being failure of the Plaintiff "*to honour the transfer fees and part payment.*" There is a very clear contradiction between the factual analysis and the reasons for termination as adduced in this Court by DW1.

On the evidence on record, this Court finds that the 1st Defendant has fraudulently transferred the Prospecting License PLR 4939/2008 to the 2nd and 4th Defendants. This Court finds also that the 1st Defendant having transferred the prospecting license fraudulently to the 2nd and 4th Defendants, it was clearly in breach of the terms stipulated under the Option Purchase Agreement (OPA), which the 1st Defendant had concluded with the Plaintiff.

In his closing submissions the Plaintiff's Counsel submitted that the 3rd Defendant and her husband who is also the Director of the 1st Defendant, have also proven to be fraudsters in **Civil Case No.142 of 1998** of the High Court of Tanzania at Dar es Salaam between **SISTERS OF OUR LADY OF KILIMANJARO V. JOHN AND THERESA KERENGE (unreported) AND MENONITE CHURCH V. JOHN AND THERESA KERENGE,** in which they were found to have sold a property and took payments from the Plaintiffs, and to have subsequently sold the respective properties to different parties. However, in my considered opinion, and with due respect to the learned Counsel for the Plaintiff, I do not see the direct relevancy of these two cases to the instant case in so far as allegations of fraud are concerned. This is a civil matter where evidence of past misconduct by one of the parties is irrelevant in establishing the likelihood of similar current or future conduct.

In the instant case, the evidence on record is sufficient for this Court to find that the Plaintiff has successfully proved fraud against the 1st Defendant without resort to similar past conduct by the 1st Defendant's

directors in other cases in which such directors of the 1st Defendant might have been involved.

Let me now turn to consider the fourth issue which is *whether the alleged transfer of application No. HQ-P15511 from the 1st Defendant to the Plaintiff was proper at law and fact.*

As I intimated to earlier when dealing with the first issue, under Tanzanian law an application is nontransferable. PW1 however told this Court that, the Plaintiff did not intend to transfer an application rather he intended to be transferred with a licence once granted to the 1st Defendant by the Ministry of Energy and Minerals. The Plaintiff and the 1st Defendant entered into an Option Purchase Agreement that once the license has been granted to the 1st Defendant, the said license shall then be transferred to the Plaintiff. The testimony of PW1 has been corroborated with that of DW2 which shows that Kastani Mining Ltd had agreed with Luguruni Mining Ltd to purchase the license once it has been obtained. By consent, the Option Purchase Agreement was signed by John Tate and Theresa Kerenge on 30th October 2007. The contract mainly focused on two assets, namely HQ-P15511 and PL 4285. There is no any dispute over PL 4285. The dispute however has arisen over application HQ-P 15511. The closing date of the contract was set at 30th day of December 2007 and then extended to 31st January 2008. As rightly submitted by the Plaintiff's Counsel, the agreement was an offer to purchase mineral rights once application HQ-P 15511 had been processed by the Ministry to become a license. PW1 told this Court also that the Plaintiff had paid **USD 18,000** to the 1st Defendant as consideration for the contract. **Exhibit P2** on record proves that indeed

the 1st Defendant had received **USD 18,000** from the Plaintiff. PW1 told this Court also that the Plaintiff had executed other payments to the 1st Defendant amounting to **USD 6,000** and **TZS 500,000/=** respectively in respect of application HQ-P15511. In her testimony DW1 before this Court, DW1 acknowledged to have received an advance payment of **USD 6,000** from Mr. Msigala on behalf of the Plaintiff. DW1 also told this Court that she had received Five Hundred Thousand (**TZS. 500,000/=)** from Mr. John Tate for her personal use.

Theresa Kerenge who is the Managing Director of Luguruni Mining Ltd signed the Option Purchase Agreement by her consent on behalf of his company. This made the Agreement binding and enforceable as per the terms of section 10 of the Law of Contract Act, [Cap.345 R.E 2002] which stipulates that:

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:*
>
> *Provided that nothing herein contained shall affect any law in force, and not hereby expressly repealed or disapplied, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.."*

The nature of the contract was based on the license which was expected to be granted by the Ministry in future. This, as the Plaintiff's Counsel rightly submitted in his closing submissions, forms a "contingent contract." Expounding on the import and reach of "contingent contract"

Lord Wright had this to say in the case of **HILLAS & CO. LTD V. ARCOS LTD [1932] All E.R 494** that:

> *"It would be mistaken to interpret the option as an offer into a new contract despite the wording suggesting otherwise. The contract for the option was formed as part of the initial agreement and was only to be executed at a later date. A contract* ***de praesenti*** *to enter into what, in law, is an enforceable contract is simply that enforceable contract, and no more and no less."*

Contingent contract is recognized in Tanzanian laws under section 31 of the Law of contract Act Cap.345 R.E 2002, defines contingent contract in the following terms:

> *"A Contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen."*

A contingent contract is unenforceable until such event collateral to such contract has happened as provided for under section 32 of the Law of Contract Act thus:.

> *"A contingent contract to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened; and if the event becomes impossible, such contract becomes void."*

In the instant case, the contract between KASTAN MINING LTD and LUGURUNI MINING LTD would have become enforceable soon after the 1st Defendant had been granted with the Prospecting Licence. As the learned Counsel for the Plaintiff rightly submitted in his closing submissions quoting from the words of Lord Denning in the case **SMITH & SNIPES HALL FARM LTD V. RIVER DOUGLAS CATCHMENT BOARD (1949) 2 K.B 500, 514**, that:

> *"A man who makes a deliberate promise which is intended to be binding, that is to say, under seal, or for good consideration, must keep his promise, and the Court will hold him to it."*

The Prospecting Licence (PL) was granted to the 1st Defendant on the 18th day of January 2008 as per **Exhibit D4,** even before the closing date of the Option Purchase Agreement (OPA). In that regard, the Option Purchase Agreement (OPA) therefore became binding and enforceable as from the 18th day of January 2008, the date it was granted to the 1st Defendant. It was therefore for the 1st Defendant to perform the contract as promised. In his closing submissions the Plaintiff's Counsel referred this Court to the case of **HELBY V. MATHEWS AND OTHERS [1895] A.C 471 at page 481,** where Lord McNaughten stated that

> *"...an option agreement is an agreement which is not forbidden by law, not unintelligible and not, I think unreasonable."*

The above statement by Lord McNaughten is quite instructive in so far as the facts of the present case are concerned. The Purchase

Agreement (OPA) which was concluded between the 1st Defendant and the Plaintiff is not forbidden by law, it was intelligible and reasonable and became binding and enforceable as from the date it was granted to the 1st Defendant who had obligation to perform it as promised.

On the conduct required of reasonable parties to an agreement intended to be binding between them, the Plaintiff's Counsel in his closing submission has referred this Court to the case of **SMITH V. HUGHES (1871) LR 6 QB 597** where Lord Blackburn held thus:

> *"If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the party's terms."*

On the strength of the evidence on record and the persuasive submissions of the Counsel for the parties, this Court finds that the Option Purchase Agreement (OPA) between the Plaintiff and the 1st Defendant on the Prospecting License (PL) basing on application HQ-P15511 was valid and enforceable. This essentially settles the fourth issue *whether the alleged transfer of application* ***No. HQ-P15511*** *from the 1st Defendant to the Plaintiff was proper at law and fact.*

The last issue is *what reliefs are the parties entitled to?* This Court has already determined that the Option Purchase Agreement between the Plaintiff and the 1st Defendant was valid and enforceable between the parties. This Court has also found that the 1st Defendant has committed

fraud against the Plaintiff. The Plaintiff is therefore entitled to the reliefs to the extent as hereunder explained.

This Court has found and held that the 2nd and 4th Defendants are bonafide purchasers. This being so, the Plaintiff's reliefs are to be based on the alternative reliefs as prayed for by the Plaintiff. The only problem however is that certain costs as appearing in the Option Purchase Agreement (OPA) include both for application **HQ-P15511** and for **PL 4285.** This Court will therefore only grant all expenses which have been proved by the Plaintiff to have been spent in respect of application **HQ-P15511.**

The Plaintiff has claimed special damages to the tune of **USD 743,711** and general damages amounting to **USD 100,000**. In so far as the award of special damages is concerned, it is now settled law that such special damages must be specifically pleaded and proved. This legal position has time and again been succinctly stated by our courts in a host of cases, **ZUBERI AUGUSTINO v. ANICET MUGABE [1992] T.L.R. 137 (CA); JUMA MISANYA AND ANOTHER v. LISTA NDURUMAI [1983] T.L.R. 245 (HC);** and **MASOLELE GENERAL AGENCIES v. AFRICAN INLAND CHURCH TANZANIA [1994] T.L.R. 192** to mention only a few.

DW1 told this Court that she has paid back all the monies which have been paid by the Plaintiff. DW1 however, did not bother to bring any evidence to prove her averments on such payments alleged paid back. In that regard therefore, the Plaintiff is entitled to the **USD 6,000,** as per **Exhibit P4,** and to the **TZS 500,000/=** as per **Exhibit P8** collectively,

being advance payments the Plaintiff made to the 1st Defendant in respect of HQ-P15511.

Furthermore, the Plaintiff is also entitled to the **USD 200** as preparation fee in respect of HQP-15511 as per **Exhibit P7**. I shall however make no order as to the payment of Indicative Estimated Costs under **Exhibit P5,** since such costs are not solely expenses for HQ-P15511 but form the entire package for both applications HQ-P 15511 and 4195 respectively. The Plaintiff has not substantiated the costs as between the two applications, and therefore this Court has no basis for choosing which expenses were incurred in respect of application **HQ-P 15511** and which for **4195.** As for specific damages, the Plaintiff is therefore entitled to a total sum of **USD 200** plus **USD 6,000** and the **TZS. 500,000/=.**

The Plaintiff has also prayed for general damages amounting to **USD 100,000.** As a matter of general principle as per the decision of the Court of Appeal of Tanzania in **COOPER MOTOR CORPORATION LTD V. MOSHI/ARUSHA OCCUPATIONAL HEALTH SERVICES [1990] T.L.R. 96 (CA),** general damages need not be specifically pleaded, and may be asked for by a mere statement or prayer of claim as the Plaintiff did in this case. The purpose of an award of damages is to put the Plaintiff in the position he or she would have been in had the breach not occurred, and the contract been performed. This was restated in **MUSTAFA EBRAHIM KASSAM AND ZULFIKAR EBRAHIM KASAM T/A RUSTAM & BROTHERS V. MR. JOFREY C. MNGANO, Commercial Case No. 2 of 2010.** In terms of the decision in **HADLEY V. BAXENDALE (1854) All E.R.,** it is trite law that damages would only be awarded to compensate

the claimant for and to the extent of losses that arise and flow naturally from the breach of contract, which damages were or ought to have been within the contemplation of the party in default. Given the nature of the contract entered into between the Plaintiff and the 1st Defendant and the circumstances of the breach, in my considered view, the claim of **USD 100,000** as general damages are far on the higher side. A payment of **USD 10,000** as general damages will suffice the justices of this case.

In the whole and for the foregoing reasons Judgment and Decree is hereby entered against the 1st and the 3rd Defendants jointly and severally. The Plaintiff shall be entitled to the following reliefs:-

a) *The 1st and 3rd Defendants jointly and severally shall pay the Plaintiff the sum of **USD 6,200** (Say Six Thousand and Two Hundred American Dollars) and **TZS. 500,000/=** (Say Five Hundred Thousand Tanzanian Shillings) being special damages and inducement of breach and unlawful interference with the lawful contract entered into by the Plaintiff and the 1st Defendant.*

b) *The 1st and 3rd Defendants jointly and severally shall pay the Plaintiff the sum of **USD 10,000** (Say Ten Thousand American Dollars) as general damages for breach and inducement of breach and unlawful interference with the lawful contract entered into by the Plaintiff and the 1st Defendant.*

c) *The 1st and 3rd Defendants jointly and severally shall pay interest at commercial rate of 4% per annum on the **USD 6,200** and 7% per annum on the **TZS 500,000/=** at item (a) above from the date of the accrual of the cause of action to the date of judgment.*

d) *The 1st and 3rd Defendants jointly and severally shall pay Interest at Court rates of 7% per annum on item (a) and (b) above from*

the date of judgment to the date of the full settlement of the decretal sum.

e) *The 1st and 3rd Defendants jointly and severally shall pay costs of this suit.*

Order accordingly.

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R.V. MAKARAMBA
JUDGE
22/03/2012

Judgment delivered this 22nd day of March, 2012 in the presence of Mr. Mbuya, Advocate for the Plaintiff, Mr. Shirima, Advocate for the 1st & 3rd Defendants and Mr. Shirima for Lissu, Advocate for the 2nd & 4th Defendants

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R.V. MAKARAMBA
JUDGE
22/03/2012

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