IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A. MZIRAY, J.A. And MWAMBEGELE, J.A)

CIVIL APPEAL NO. 227 OF 2017

GEITA GOLD MINING LTD.....1ST APPELLANT
MANAGING DIRETOR GGM.....2ND APPELLANT
VERSUS
IGNAS ATHANAS..... RESPONDENT

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

(Matupa, J.)

dated the 27th day of April, 2016
in
Land Appeal No. 122 of 2015

JUDGMENT OF THE COURT

3rd & 8th April, 2019.

MZIRAY, J.A.:

The appellants, Geita Gold Mining Limited and the Managing Director GGM, are challenging the decision of the High Court of Tanzania at Mwanza (Matupa, J.), in Land Appeal No. 122 of 2015 delivered on 27th day of April, 2016. The suit commenced as Application No. 21 of 2014 in the District Land and Housing Tribunal for Geita at Geita, wherein the respondent, Ignas Athanas sued the appellants for trespass. He claimed for the repossession of land the appellants trespassed upon and as the lawful

owner he be paid compensation of the same together with the destroyed properties thereto. The appellants in their respective defence denied to have trespassed into the respondent's land. They claimed that the land in dispute did not belong to the respondent. After a full trial, the District Land and Housing Tribunal decided in favour of the respondent where it ruled out that the respondent was the lawful owner of the land in dispute. In addition to that, the appellants were ordered to make compensation for the destroyed crops and trees.

Dissatisfied, the appellants lodged Land Appeal No. 122 of 2015 in the High Court of Tanzania at Mwanza to challenge the decision of the District Land and Housing Tribunal. The High Court partly allowed the appeal. Further to that, it ordered the matter to be remitted to the District Land and Housing Tribunal for re-trial. Still dissatisfied, the appellants have filed this second appeal.

In the memorandum of appeal, Dr. Mwaisondola, learned advocate, for the appellants listed two grounds of appeal thus:-

1. *The learned appellate judge erred in law by shifting the burden of proof to the appellants in that:*

i. *It was the respondent's primary duty as a matter of law to prove location of the area which he claimed to be his.*

ii. *It was the respondent primary duty to prove that he was entitled to compensation as alleged in his pleadings.*

2. *The appellate judge erred both in law and fact for his order of re-trial after being satisfied that the respondent had failed to prove special damages which were awarded by the trial tribunal.*

When the matter came for hearing, Dr. George Mwaisondola, learned advocate appeared for the appellants whereas, Mr. Deocles Rutahindurwa, learned counsel, represented the respondent.

Both learned counsel filed written submissions in support and against the appeal. In his submission to support the first ground of appeal, Dr. Mwaisondola faulted the decision of the first appellate court in that the judge erred in shifting the burden of proof from the respondent to the appellants when he said it was the responsibility of the appellants to show the map and plots in the area in dispute which were to be compensated. With regard to the second ground, the learned counsel submitted that since the specific damages were pleaded but not proved as rightly

observed by the first appellate court, then, the judge ought to have dismissed the claim for special damages instead of ordering re-trial to determine the value of the listed crops.

Mr. Rutahindurwa, learned advocate, in his submissions supported the decision of the High Court. He maintained that the burden of proof lies on the one who alleges. He pointed out that, since the appellants alleged to have compensated the respondent over the suit land then, the burden of proof in the circumstance, lied on their side to prove that indeed they compensated the respondent. As to the second ground, the learned counsel submitted that an order of re-trial after the court had been satisfied that the respondent had failed to prove special damages was misconceived and unfounded. He submitted that the proposal to have a re-trial was made by the appellants themselves and the judge acceded to it.

We have carefully considered the arguments both in support and against the appeal. Going by the submission of Dr. Mwaisondola, learned Advocate, the position taken by the appellants is that all the previous owners of the land, the respondent inclusive, were legally compensated for the unexhausted improvement. If that was the case, then the burden of proving the allegations that the previous owners were compensated lied on

the appellants. This is the position as per section 110 (1), (2) and section 112 of the Evidence Act, Cap. 6 of the Laws of Tanzania Revised Edition, 2002. It is prudent at this juncture to reproduce these sections:-

> *"110(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*
>
> *112. The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."*

Also in **Anthony M. Masanga versus Penina (Mama Mgesi) & Lucia (Mama Anna),** Civil Appeal No. 118 of 2014 (unreported) it was held that:-

> *"...let's begin by re-emphasizing the ever cherished principle of law that generally, in civil cases, the*

burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law Evidence Act, Cap. 6 of the Revised Edition, 2002."

In the joint written statement of Defence of the appellants at page 26 of the record of appeal, a list of names of people who were allegedly compensated (Annexture GGM3) in the suit land have been shown but the name of the respondent is not reflected anywhere in the said list. This suggests that the respondent was not compensated, so in such a situation the burden of proof lies on the appellants to prove that the respondent was among those persons compensated. It is not correct therefore that the first appellate court erred in law by shifting the burden of proof to the appellants. On that basis therefore, the first ground of appeal fails.

In determining the second ground of appeal we will start with what the judge stated at page 14 of the judgment:-

"In the present case we have demonstrated that the plants which were pleaded could as well not be there. We have taken this position independent of

the complaint, it was suggested by the respondent at the trial that, the appellants were leveling ground and damaging crops. This would have made the task of proving the existence of the crops easy. Even with this blank cheque, still the respondents failed to prove that they had plants on the land. Again I will agree with the appellant that the trial Chairperson failed to appreciate that the claim of the respondent had its genesis both under the Land Act and the Mining Act."

He then proceeded at page 16 by stating:-

"In the present case I can see that what can be claimed is the land not the crops which were not proved. The present case is even more difficult as the trial tribunal did not even attempt to address the issue of the measure of damages. I am not seeing a commitment from the bar either. The only option I have is to remit the case to the trial tribunal with an order for a re-trial, limited to the

size and the value of the land subject of the suit,

and the compensation payable."

From the above extracts, the issue is whether the trial judge was right in ordering re-trial in respect of the size and value of the land for compensation purposes after holding that the respondent failed to prove special damages as awarded by the trial tribunal. As rightly submitted by the learned counsel for the appellants, as a matter of law, special damages must be specifically pleaded and strictly proved - see **Anicet Mugabe versus Zuberi Augustino** [1992] TLR. 137. As the record shows, the respondent stated the special damages in his pleadings but did not prove them by evidence. In the absence of evidence to prove special damages, the appropriate course to take was for the first appellate court to dismiss the respondent's claims for special damages on ground that they were not proved to the required standard. To order re-trial was not the appropriate remedy as by all necessary implications would tend to suggest that the first appellate court had an intention to assist the respondent to establish his case in respect of the size and value of the land for compensation purpose.

In the light of the above, we find merit in this second ground of appeal. We allow the appeal with costs.

DATED at **MWANZA** this 6th day of April, 2019.

M. S. MBAROUK
JUSTICE OF APPEAL

R. E. S MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL