IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO DISTRICT REGISTRY
AT MOROGORO

CIVIL APPEAL NO. 27766 OF 2023
(*Arising from the Judgement of the District Court of Morogoro in Civil Case No. 6 of 2023*)

OTTO MARK MOSHA ..... 1ST APPELLANT
ROWLAND AUGUST MLAY ..... 2ND APPELLANT

VERSUS

PETER ALFRED MPINE..... 1ST RESPONDENT
APOLINARY JOSEPH RUSINGIZA..... 2ND RESPONDENT

JUDGEMENT

14/03/2024 & 21/03/2024

KINYAKA, J.:

Before the District Court of Morogoro (hereinafter, the "trial court"), the appellants were sued by the respondents for breach of a contract dated 03/07/2021. In their written statement of defence before the trial court, the appellants raised a counter claim against the respondents for breach of the contract. Upon hearing the respondents' suit and the appellants' counter claim, the trial court dismissed the appellants' counter claim for lack of merit and allowed the respondents' suit for being merited.

The trial court declared the appellants to have breached the agreement and ordered the distribution of the uncrushed gold stones which were at the site by the appointed site manager in the manner and shares agreed by the parties; general damages to the tune of TZS 5,000,000; interest at the court

rate of 7% from the date of judgement until payment in full; and costs of the suit.

Dissatisfied with the decision, the appellants appealed to this Court preferring eight grounds of appeal, namely:

1. That the trial District Court erred in law and in fact for failure to properly analyze and evaluate evidence on record;
2. That the trial District Court erred in law and in fact in awarding reliefs not prayed for;
3. That the trial District Court erred in law and in fact in not dismissing the impugned suit on account of forgery;
4. That the trial District Court erred in law and in fact in granting an order for injunction without there being any sufficient and justifiable ground;
5. That the trial District Court erred in law and in fact in holding that the respondents had fulfilled their obligation to invest in the Project without there being any evidence to that effect;
6. That the trial District Court erred in law and fact in not holding that it is the respondents who failed to fulfill their obligation to distribute the produce to the appellants;

7. That the trial District Court erred in law and fact in grounding its decision on extraneous matters not borne by pleadings and evidence tendered; and
8. That the trial District Court erred in law and fact in not holding that the respondents had no any shares on the uncrushed goldstones for which they had not contributed in its extraction.

The respondents disputed the appellants' grounds of appeal as contained in the memorandum of appeal based on the reasons that, the trial court properly analyzed the evidence adduced at the trial; the court can grant relief it deems just; there was no evidence to prove forgery and this court has no jurisdiction to determine forgery allegations; the trial court was satisfied that injunction was appropriate; the contract provided for the duties and obligations of the parties; the trial court's decision was correct as it decided according to the evidence; and the parties had separate shares stipulated under the contract.

At the hearing of the appeal, the appellants appeared in person and the respondents were represented by Mr. Kisawani Mandela, learned Advocate. Upon the appellants' prayer to dispose of the appeal by written submissions, I ordered parties to lodge their respective submissions on the scheduled dates which they duly complied.

Mr. Benjamin Jonas who drew the appellants' submissions commenced his submission on the first ground of appeal by faulting the trial court's findings on the validity of Exhibit P1. He attacked the trial court for ignoring the fact that the alleged exhibit was not submitted for registration as required by section 123 of the Mining Act, Cap. 123 R.E. 2019 (hereinafter, the "Mining Act") which confers upon the Mining Commission the mandate to maintain a register of, among others, dealings in mineral rights. He referred to the holding of the Court of Appeal in the case of **Hosea Katampa v. The Attorney General and Geita Gold Mine, Civil Appeal No. 221 of 2017** (unreported) which emphasized on the importance of registration of the same.

Fortified by the case of **Sabarudin Othman v. Malayan Banking Berhad (2018) ILNS 357**, the learned counsel further attacked Exhibit 1 for not bearing the signature of one of the investors, one Samwel Kobelo Muhulo despite the fact that his name appeared as a party to the contract.

He added that the trial court wrongly ignored material alterations which inserted the names and signatures of Paulo Boay and Hembekwa Saru as parties to Exhibit P1, while at the time of signing the contract, the two were not parties and did not sign in the presence of the attestor (PW2). He added further that even PW2 had no valid practicing certificate at the time of

attesting Exhibit P1. He referred this court to the case of **Aggreko International Projects Limited v. Triumphant Trade and Consultancy Services Limited**, Civil Appeal No. 83 of 2020 and **Mary Mchome Mbwambo & Amos Mbwambo v. Mbeya Cement Company Ltd, Civil Appeal 161 of 2019** to stress that the validity, authenticity, and enforceability of an agreement was affected under the circumstances.

He submitted further that trial court's findings that the Appellants were in breach of the contract as they ordered the Mine Manager to stop distributing to the Respondents their respective share of the produce, and that Exhibit D2 wrongfully amended the provisions of Exhibit P1 and P3 and removed the respondents herein from share distribution, were premised on the trial court's own assumptions as no evidence was tendered to that effect.

On the claim that the respondents fulfilled their obligations of investing in the project, Mr. Jonas relied on the decision of the Court of Appeal in the cases of **Alfred Fundi v. Geled Mango and Others, Civil Appeal No. 49 of 2017** (unreported), **Crescent Impex (T) Limited v. Mtibwa Sugar Estates Limited, Civil Appeal No. 455 of 2020** (unreported), and the provisions of section 61 and 64 (1) of the Evidence Act, Cap. 6 R.E. 2019 (hereinafter, the "Evidence Act"), and contended that there was no any

cogent evidence that was tendered to prove that the alleged investment activities were carried out and the alleged costs incurred.

In line with the above submission, the learned counsel averred that Exhibit D1 which is a letter from the Mining Commission enlisting a total of seven items which constituted grave violation of the Primary Mining License (PML) conditions, was written on 20th October 2021, after a lapse of two months from the date the respondents herein alleged to have procured the excavator vide Exhibit P2 on 16th August 2021. In his view, the same proves that the alleged excavator was not taken to the project site and the alleged clearing of the mining site was not undertaken.

In rounding off, Mr. Jonas faulted the trial court's conclusion that the respondent's herein proved special damages they sustained as a result of the alleged breach by the appellants. In his view, it is a contradiction for the court to hold that the expenses were incurred while the same court reached a conclusion that there is no evidence that such costs and expenses were incurred.

As for the second ground, the counsel contended that the order that the uncrushed gold stones that were at the site be distributed by the appointed site Manager in the manner and shares agreed by the parties in Exhibit P3 was not amongst the reliefs prayed for in the plaintiffs' plaint. He cited the

case of **Dr. Abraham Israel Shuma Muro v. National Institute for Medical Research and the Attorney General, Civil Appeal No. 68 of 2020** on page 13 to amplify his contention that the court erred in granting an order or relief which has not been prayed for.

On the third ground, the learned counsel faulted the trial court for ignoring the allegations that the signatures of Samwel Kobelo Muhulo in the plaint and other documents before the trial court were forged. In a wrong turn, Counsel contended, the trial court only ordered amendment of the plaint by removing the 3rd plaintiff from the list of plaintiffs. To buttress his proposition, he cited the cases of **Bansons Enterprises Limited v. Mire Artan, Civil Appeal No. 26 of 2020** (unreported), **Mkumbi MaJashi Holela & 75 Others v. Musa Christopher Ginawele @Musa Balali and Anna Mugandio BalaJ, Land Case No. 10 of 2022,** and **COSEKE Tanzania Limited v. The Board of Trustees of the Public Service Social Security Fund, Commercial Case No. 143/2019** (unreported) and implored this court to nullify the whole judgment and decree of the trial court for being founded on a suit which was incompetent from its inception.

As for the fourth ground, Counsel substantiated that Misc. Application No. 12 of 2023 which granted an order restraining the Appellant's herein from removing, alienating from the site, distributing, processing or otherwise

selling the uncrushed stones containing gold minerals pending hearing and determination of the main suit, was vague and deserved not to be granted as the conditions set in **Atilio v. Mbowe (1969) HCD N. 284** were not met.

On the fifth ground, it was Mr. Jonas' submission that the respondents did not present any credible evidence during the trial to establish that they discharged their obligations outlined in Clause 3 especially clauses 3.1, 3.2., 3.5 and 3.7 of Exhibit P1. He said, Exhibit P2, the excavator rental agreement seems to be dubious because in paragraph 1.3 in the schedule of the equipment, the slot for the start date of hire is not filled and that the respondents did not tender any evidence to prove payment of rental fee, and or payment of its operations as stipulated in the said schedule of the equipment. He averred that PW1 adduced oral evidence which is not reliable as in the circumstances, the respondents would have been expected to tender cogent primary evidence. He prayed the Court to find this ground meritorious.

In support of the sixth ground of appeal, the learned counsel's argument was that it was the respondents who had the obligation to distribute the produced uncrushed gold stones as per clause 3.5 of Exhibit P1, and that

the shift of the duty to the appellants was never disclosed during trial. He prayed to the Honourable Court to make such a finding in this respect.

In support of the seventh ground, it was the counsel's submission that the respondents did not tender any evidence, neither proving investment done by them on the project side nor acted in accordance with the agreement. According to him, the decision of the trial court was not founded on evidence adduced and admitted on record, but on unfounded assumptions.

On the last ground, Mr. Jonas accentuated that the respondents did not tender any evidence to prove the fulfilment of their obligations as required by the terms of Exhibit P1, which would have entitled them to seventy percent (70%) share of the produce realized through their investment as per clause 4.1.3 of Exhibit P1, and sixty five percent (65%) as per the provisions of Exhibit P3. In the end, the appellant's counsel prayed for the appeal to be allowed and the decision of the trial court be quashed with costs to the appellants.

The respondents' advocate strongly opposed the appeal. In reply to the appellant's first ground of appeal on the aspect that one party named Samweli Kobelo Muhulo did not sign the purported contract, the learned counsel submitted that on 17th May 2023, the respondents registered the amended plaint which excluded the name of Said Samweli Muhulo. He cited

the cases of **Ashraf Akber Khan v. Ravii Govind Varsan, Civil Appeal No. 5 of 2017, CAT at Arusha** and **Pantaleo Teresphory v. Republic, Criminal Appeal No. 515 of 2019, on page 11** to cement the position of the law that once pleadings are amended, what stood before amendment is no longer material.

On the complaint that the names Paulo Boay and Hembekwa Saru were inserted to Exhibit P1, Mr. Kisawani, relying on the case of **Ashraf Akber Khan v. Ravii Govind Varsan** (supra) on page 19, invited the Court to draw adverse inference against the appellant herein because none of the above mentioned was summoned by the appellants herein to prove that they were not present during the signing of the said agreement.

He further opposed Advocate Jonas' contention that the officer who attested the said contract (PW2) was not eligible as there was no electronic print out from the advocates management system to prove the same. Putting reliance on section 10 of Law of Contract Act, Cap. 345 R.E. 2019 (hereinafter, the "LCA") and the case of **Sabarudin Othman v. Malayan Banking Berhad (2018) 1LNS 357**, the learned counsel opined that even if there was no witness when the parties were concluding the agreement, the contract cannot be invalidated.

Resisting the third ground of appeal, Mr. Kisawani submitted that the ground ought to be dismissed for want of merit in two ways; one, the pleadings were already amended, citing the case of **Ashraf AJcber Khan v. Ravji Govind Varsan, Civil Appeal No. 5 of 2017 and Pantaleo Teresphory v. Republic, Criminal Appeal No. 515 of 2019** (supra) to cement his argument, and that the issue of forgery was neither pleaded nor proved before the trial court contrary to what was emphasized in the cases of **Twazihirwa Abraham Mgema v. James Christian Basil (As Administrator of the Estate of the Late Christian Basil Kiria, Deceased), Civil Appeal No. 229 of 2018 (CAT) on page 4 to 6** with the approval of the cases of **Ratilal Gordhanbhai Patel v. Lalji Makanji [1957] EA 314, Omari Yusuph v. Rahma Ahmed Abducadir [1987] TLR 169, City Coffee Ltd v. The Registered Trustee of Ilolo Coffee Group, Civil Appeal No. 94 of 2018** (unreported).

Submitting against the fourth ground of appeal, the counsel cited the case of **National Housing Corporation v. Peter Kassidi and 4 others, Civil Application No.23 of 2016**, on page 15 and contended that the trial court was satisfied with the arguments amplified by the respondents herein during the hearing of the application for grant of injunctive orders.

Opposing the fifth, six, and eighth grounds jointly, Mr. Kisawani restated the cardinal principle of the law that parties are bound by the terms of their contract, and elucidated that the respondents have taken what has been agreed in the contract which was entered and executed freely by parties. To add weight to his submission, he referred this court to the case of **Eupharacie Mathew Rimisho t/a Emari provisions store & Another v. Terna Enterprises Limited & Another, Civil Appeal No. 270 of 2018** (CAT-Dar es-Salaam) on page 24 to 25 and **COSMOSS Properties Limited v. Exim Bank of Tanzania, Misc. Civil Application No. 584 of 2021**.

On the last ground of appeal, Mr. Kisawani told the court that the contract amplified the extent of shares of parties in the said contract of which the respondents as the investor have acquired 65% of shares and that in any circumstances, the respondents are the one who invested a lot compared to the appellants herein who own only 15% percent of the shares from the uncrushed stones. In the end, the respondents' Advocate urged this court to find the present appeal unmerited and proceed to dismiss the same with costs.

Rejoining, on the validity of Exhibit P1, the appellants' advocate stated that the amendment of the plaint does not negate the fact that one of the

investors did not sign Exhibit P1. He also insisted that the attestor admitted to not having a valid practicing license at the time of attesting Exhibit P1. On the claim of forgery, Mr. Jonas pressed that the trial court failed to adjudicate and determine the issue of appropriateness and competence of the plaint presented before it following the allegation that it contained the signature of the person who disputed the same.

On the fourth ground, he rejoined that the injunction was wrongly granted as all three conditions set out in the case of **Atilio v. Mbowe** were not proven.

As for the fifth, sixth and seventh grounds, he insisted that the respondents failed to prove that they fulfilled their obligation under the contract as well as substantiating their investment in the project. As regards to the eighth ground, he stressed that the respondents were claiming what they did not produce and that which was not in accordance with terms of the agreement. He insisted that in granting reliefs in that regard, the trial court was acting outside the parties' agreement. In the end, Advocate Jonas prayed the appeal be allowed.

Having thoroughly examined the submissions from the rivalry parties, I have found it convenient to start determining the third ground of appeal, followed by the fourth. The first, fifth, sixth, seventh and eighth grounds will be

determined in their generality as they all revolve around one issue as to whether in reaching its final verdict, the trial court properly evaluated the evidence on record. In the end, I will resolve the second ground of appeal, if necessary.

On the third ground, the appellants attacked the trial court for not dismissing the suit on account of forgery. I have re-visited the typed trial court proceedings on page 6 through to 9 reflecting the submissions of the parties on the issue as well as the respective ruling of the trial court dated 12th May 2023. As rightly deliberated by the trial magistrate, the trial court was not an appropriate platform to determine the issue of forgery for the reason that in order for the trial court to ascertain whether there was forgery of his signature, the then 3rd plaintiff had to be shouldered with high standard of proof required in criminal cases, as forgery cannot be proved by mere statements presented in a civil suit. More so, the 3rd plaintiff's prayer before the trial court was for the withdrawal of his name in the case.

In view thereof, I shake hands with the trial magistrate for her decision to order amendment of the plaint instead of embarking into considering the allegations of forgery, which in my view, required evidential proof rendering it inappropriate to determine at that stage and the nature of the suit before the trial court. The case of **Bansons Enterprises Limited** (supra) cited by

Mr. Jonas is distinguishable. In that case, the issue before the court was whether or not, the plaint was properly signed and verified by PW2 in accordance with Order XXVIII Rule 1 of the Civil Procedure Code. After hearing both parties, the Court of Appeal nullified the proceedings of the trial court for being instituted by a plaint which was signed and verified by a person not listed under Order XXVIII Rule 1 of the Code. This is not the case in the present matter in which the complaint was pegged on 3rd plaintiff's inclusion in the case before the trial court.

Further, the situation in **Mkumbi MaJashi Holela & 75 Others** (supra), was very different from the one in the suit before the trial court. In that case, the application for contempt of the court was made against 76 respondents for disobedience of court orders. In their counter affidavit, the 2nd to 7th respondents claimed that they were not parties to the main case. The issue before the court was not on the propriety or otherwise of the plaint that instituted the main suit, but whether the respective respondents were aware of the order, and whether they disobeyed the same. In view of my observations, I find no merit in the third ground of appeal.

Turning to the fourth ground in which the appellants attacked the order of temporary injunction granted by the trial court in Misc. Civil Application No. 12 of 2023 on the basis that it was granted without there being any sufficient

and justifiable grounds. My determination of the same is simple and straight forward. From the submission of the parties, it is apparent that the injunction order was granted by the same court in Misc. Civil Application No. 12 of 2023.

From my observation, I strongly hold that, being aggrieved by the order, the appellant had to express his grievances through an application for revision to this Court. I say so being aware that, an order granting a temporary injunction is not among the appealable orders under the Civil Procedure Code. [See Order XL and section 74(1) of the CPC]. That being the legal stance, it follows that the only avenue that the appellants had, was to channel their grievances under section 79(2) of the CPC which vests the High Court with powers to revise a decision made by any court subordinate to it in which no appeal lies, if such an order has an effect of determining the suit.

In the matter under consideration, as the order for injunction was granted in favour of the respondents against the appellants, it is without doubt that the same had the effect of conclusively determining the Misc. Civil Application No. 12 of 2023 to its finality. [see the case of **Chama cha Walimu Tanzania v. The Attorney General, Civil Application No. 151 of 2008** (unreported)].

As the said order qualified for revision under section 79(2) of the CPC, it was inappropriate for the appellants to raise its grievance over the order as a ground of appeal before this court. It should be noted that the appeal is against the decision of the trial court on matters deliberated in the suit. An application and order granting temporary injunction was not part of the matters heard and deliberated in main suit, the subject of the present appeal.

Further, the order of temporary injunction had been duly consumed and expired upon the determination of the main suit, the subject of the present appeal. Even if this Court was obliged to determine the ground, which is not, I do not see the purpose it would save in an event the ground of appeal is allowed. On the above observations, and for the purpose of the present appeal, I find the ground was improperly raised and is misplaced.

I now move to resolve the fifth, sixth, seventh and eighth grounds of appeal on appellants' allegation on failure by the trial court to evaluate the evidence on record. Being the first appellate court with a duty to re-evaluate the evidence adduced at the trial court and come up with my own finding, I thoroughly read the evidence both oral and documentary adduced before the trial court.

It is undisputed from the records that on 3rd July 2021, the parties herein entered into a five years' contract operation and production of minerals at the area with Mining Licence No. PML0842MOR located at Mazizi area, in Maseyu Village, Gwata Ward, within Morogoro District. According to the said agreement, the respondents being the investors were supposed to fund and operate all the mining activities and distribute the benefits accruing from the project to all people involved in the project, whereas the appellants' obligation was to make sure that the mining license remains valid.

From the trial court records, there were three main contentious issues which I am called upon to determine in the course of re-evaluating the evidence of the parties and their witnesses at the trial. These include, whether there was a valid contract between the parties; whether there was a breach of contract and, if there was breach, who was liable for that breach between the parties; and what reliefs each party was entitled.

I will start with the first issue as to whether there was a valid contract between the parties. In their evidence at the trial Court, the appellants through their advocate raised four concerns invalidating the contract between the parties which was admitted in evidence as Exhibit P1. The first concern was that the contract did not bear the signature of one of the investors, one Samweli Kobelo Muhulo, despite the fact that his name

appeared as a party to the contract; the second, was the insertion of the names and signatures of Paulo Boay and Hembekwa Saru as parties to the contract who did not sign Exhibit P1 in the presence of the attestator; the third was that the contract was not submitted for registration under section 123 of the Mining Act; and the fourth is that the attestator of the contract had no valid practicing certificate at the time of attesting the contract.

I do not find merit in the appellants' first and second concerns regarding the signature of Samweli Kobelo Muhulo and insertion of the names and signatures of Paulo Boay and Hembekwa Saru. It is in the record of the trial court that on 17th May 2023, the respondents were allowed by the trial court to lodge amended plaint removing the name of Said Samweli Muhulo upon his prayer for withdrawal of his name in the suit. Again, the allegation on insertion of the names and signatures of Paulo Boay and Hembekwa Saru who did not sign in the presence of attestator, were matters of fact that required proof. The record of the trial court does not reflect proof of such allegations on the required standard. After all, I have held above that it was correct for the trial court to desist from entertaining allegations of forgery in the proceedings. In the circumstances, I hold that the raised concerns did not affect the validity of the contract.

As for the concern that the said contract was attested by a person who had no valid practicing license, I need not be delayed much on the discontent. The claim was not substantiated by the appellants through evidence at the trial. Further, not all contracts derive their validity or enforceability upon notarization. It means that an omission to have the contract attested or witnessed does not affect the validity or enforceability of the same in cases where the document does not require notarization. I fully associate myself with the Malaysian case of **Sabarudin Othman** (supra) cited by the honourable trial magistrate on page 11 of the trial court's judgment, where the Court of Appeal of Malaysia held that:-

> *".....If a document is required by law to be attested, the primary evidence of execution of the document is the testimony of an attesting witness to the document: s. 68 of the EA 1950. A power of attorney is a document required by law to be attested pursuant to the Powers of Attorney Act 1949....Examples of other documents required by law to be attested include wills under the Wills Act 1959, prescribed statutory forms under the National Land Code and prescribed statutory forms under the Companies Act 2016....on the other hand, if it is just a commercial agreement or contract, it is not invalidated if it is not signed by*

a witness or the signing of the document is not witnessed as long as it is signed by all contracting parties.."

From the above, I find that Exhibit P1 was not a document that the law required to be notarized in order to gain its validity or enforceability. I hold Exhibit P1 was a valid contract under section 10 of the Law of the Contract Act, Cap. 345 R.E. 2019 and cannot be invalidated by a mere fact that the advocate purported to notarize the same was unqualified.

On the allegation of omission to register the contract, I find it necessary to reproduce section 123 (1) of the Mining Act relied by the appellants, as well as the terms of the contract to ascertain whether registration of Exhibit P1 was mandatory in terms of the rights and obligations created therein.

Section 123(1) of the Mining Act provides:-

123(1) The Commission:

(a) shall maintain a central register of all mineral rights which shall include a record of all applications, grants, variations and dealings in, assignments, transfers, suspension and cancellation of the rights.

The relevant part of the contract on the rights and obligations created reads:

"MKATABA WA UENDESHAJI KITALU CHA MADINI NAMBA PML0842MOR

... 2.0 WAJIBU WA WENYE LESENI

2.1 watahakikisha kwamba leseni ya uchimbaji wa madini inakuwa hai katika kipindi cha mkataba huu. Hata hivyo gharama za kuhuisha mkataba ni kwa wawekezaji wenyewe. Wenye leseni hawataingilia shughuli za uchimbaji kwa namna yoyote ile

2.2 watamteua Peter Alfred Mpine kuwa meneja kwa kusimamia mradi katika kipindi chote cha mkataba huu na atawajibika na kutoa taarifa tu kwake kuhusu shughuli za mradi

2.3 N/A

2.4 N/A

WAJIBU WA WAWEKEZAJI

3.1 Watawajibika kutoa mtaji wa mradi katika kipindi chote cha mkataba huu

3.2 watawajibika kutekeleza masharti yote ya leseni ya uchimbaji madini kabla na baada ya uchimbaji

3.3 watahakikisha eneo la mradi linakuwa salama katika kipindi chote cha mkataba

3.4 watawajibika kulipa kodi zote za serikali kipindi chote cha mkataba kwa viwango vilivyowekwa na serikali

3.5 watatoa gawio kwa mwenye ardhi na mwenye leseni kama ilivyoainishwa hapo chini

3.6 endapo litatokea tukio lolote kuhusiana na shughuli za utekelezaji wa mradi linalohitaji fidia ya aina yoyote mwekezaji atawajibika kulipa

3.7 Watahakikisha kwamba mradi wa uchimbaji madini unaanza kufanya kazi ndani ya miezi minne kuanzia tarehe ye leseni (9/6/2021)."

The title and clause 3.1 through to 3.6 of the contract signifies that the appellants granted some of their rights in the mining license to the respondents. In effect, they assigned some of the rights granted and embedded under the license to the respondents. It means that the contract was registrable with the Mining Commission under section 123 as the appellants assigned their rights and so the dealings in the mining license.

Despite the fact that the contract was registrable under the Mining Act, the Mining Act is silent on the consequence of non-registration of the same. Section 124 of the Mining Act provides that a certificate issued by the Commission upon registration, may be used in court to prove facts in relation to the matters that the certificate was granted. The provision does not invalidate or bar enforceability of a document which is not registered with the Commission under the Mining Act.

It is my considered position that although the trial court erred to hold that Exhibit P1 was not a registrable document, it did not err to admit, and rely on the same. This is based on my finding that there is no specific provision

under the Mining Act that invalidates or bars the enforceability of the documents similar to Exhibit P1 based on lack of registration.

That said, it is my finding that the contract between the parties was valid in the eyes of the law as it was entered by parties with capacity to contract, out of free consent and with a lawful object and consideration. [See section 10 of the Law of Contract Act and the case of **Simon Kichele Chacha vs Aveline M Kilawe, Civil Appeal 160 of 2018 (unreported)** on page 9].

All the same, even if the contract had been found to be invalid, the oral testimony of the witnesses from both parties, sufficiently established that there existed an agreement between parties herein as far as the operation and production of minerals at the area with Mining License No. PML0842MOR was concerned. This is evident in evidence of PW1 and PW5 (respondents herein) who in their testimonies they elaborated how they came into agreement with the appellants concerning the mining site and the testimony of PW4 and PW6 who testified on how they were involved in the meeting convened for the purpose of resolving the disputes that arose as a result of the breaches on the said agreements. Equally the evidence of all defense witnesses was to the effect that the appellants entered into contract with the respondents over production of minerals.

I now move to determine on the issue as to who breached the parties' contract. In resolving the issue, I will summarize the witnesses' testimonies and scan the terms of the contract between the parties in line with the evidence adduced by both parties at the trial court. I will further, for a just determination of the issue, be guided by the governing provision in determination of civil suits as enshrined under section 110 of the Law of evidence and well amplified in the case of **Registered Trustees of Joy in The Harvest v. Hamza K. Sungura, Civil Appeal 149 of 2017 (unreported),** where on page 16 of the judgment, the Court of Appeal observed thus;

> *"With the above evidence at our disposal, and in order to decide whether the respondent managed to prove the case at the required standard we had to revisit the trite principles in the law of evidence; the general concept of the burden and the standard of proof in civil litigations. The concept is "he who alleges must prove," and it means that the burden of proof lies on the person who positively asserts existence of certain facts. The concept is embodied in the provisions of section 110 (1) and (2) of the* ***Evidence Act [Cap 6 R.E. 2019]*** *which provides that:-*
> *"(1) Whoever desires any court to give judgement 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."*

In the present matter, the respondents paraded a total of six witnesses in a bid to establish that they performed their core contractual obligation of investing in the site. The evidence of Peter Alfred Mpine (PW1) was to the effect that they started mining operations by filling the dangerous pits, built toilets, preparing environmental plan, hiring an excavator from Dar es Salam to the site at a cost of TZS 50,000,000 and thereafter continued with mining and research.

The testimony of PW2, Allen Laurent Ndomba was to the effect that as a legal officer of the Morogoro District Council, he was the one who prepared the draft of Exhibit P1 from the instruction of the then District Commissioner of Morogoro District following the dispute between the parties herein. However, in winding up his testimony in chief, he told the court that he didn't know what transpired at the mining site thereafter as he was transferred to Mtwara.

On his part, PW3, Rosemary Nicas Semiono, an environmental officer who prepared the Environmental Protection Plan (EPP) for the mining site testified that, six months after preparing the EPP, they went to the mining site for inspection where they found that the site was not active as the production was very low, although the requirement of the environmental protection plan was complied with, but with exception of the absence of a strong fence.

PW4, Ally Mohammed Gobole, the village Chairman of Maseyu who took part in meetings at the District Commissioner's office testified that there were meetings that were convened to resolve the complaints that resulted into an agreement made on 08/01/2022, which was admitted in evidence as Exhibit P3. Upon re-examination, he stated that there was another meeting held on 03/06/2022 at the village office upon the appellants' complaints.

PW5, Apolinary Joseph Rusingiza, the second respondent herein, testified to the effect that, after the dispute arose between them and the appellants, they were reconciled at the office of the District Commissioner and consequently entered into an agreement concerning the mining activities at Mazizi area, in Maseyu Village and thereafter proceeded with the activities. Generally his evidence was centred on how the parties herein came into the impugned contract.

Zongo Lobe Zongo, a Counselor of Maseyu, testified as PW6. His testimony was premised on the disputes that rose in the mining sites and his role as the mediator appointed by the District Commissioner to reconcile the parties. He informed the court that after the said reconciliation, the agreements were put in writings and signed by both parties and thereafter the work continued. He testified further that he was called several times at the village office due

to the appellants' dissatisfaction of the share given to them by the respondents.

On their part, the appellants' side brought four witnesses. The evidence of DW1, Otto Mark Mosha was to the effect that, the respondents breached the contract as they abandoned the mining site and disappeared without neither investing nor distributing the portion of the product to them as agreed. He told the court that the claim that the appellants did not distribute the products to the respondents is unfounded as it was the respondents who were required to distribute the shares.

His evidence was corroborated by the evidence of DW2, Philipo James Mathayo, the Geologist and Officer from the Commissioner for Mining who testified to have received complaints from the appellants that the respondents were not fulfilling the terms of their agreement. He told the court that, he attended the meeting which was held at the District Commissioner's office on 08/01/2023. He also testified to have attended the meeting convened on 03/06/2022 at Maseyu Village Office where the appellants were complaining that the investors were claiming to get shares while they didn't make any investment to the mining project. On cross examination, DW2 told the court that, the capital invested by the respondents was not enough as they only brought one compressor which

was only working in their three pits and he found the other miners paying for compressor.

On his part Rowland August Mlay (DW3), the 2nd appellant herein supported the testimony of DW1 that it is not true that they did not distribute to the respondents their share as the respondents were the ones with the duty of distribution of the parties' respective shares. He said numerous meetings were convened to resolve their complaints on the respondents' failure to honor their obligation of financing the project. His piece of evidence was corroborated by that of Mr. Nickson Project Rweyongeza (DW4), a site manager of the site in dispute who testified that it is not true that the respondents produced the "stones" and that he refused to give them their share. He informed the court that, the respondents were not in the site for so long and that there was no any investment they made in the site.

From the above summary of evidence adduced at the trial, it is undoubtedly that it was the respondents who breached the said contract. It is crystal clear that the respondents and their witnesses failed to prove as to how and to what extent the respondents invested in the mining site under clause 3.1 and 3.5 of the contract. For instance, the testimony of PW1 was in my view wanting. The fact that he hired an excavator from Dar es Salaam to the mining site, do not suffice to establish that the said machine was used in

mining operations. There was a need for an evidential proof that the said machine was brought to the mining site and used for mining purposes. The respondents should have proved that the machines were operated on site at all required time. It should have been established that during all the time of operations at the mining site, the investors complied with the terms of the contract by financing the project.

It was expected of the respondents to parade the operators of the machines and/or persons working in the mining site to prove that the machines were used on site for mining activities at all required time, under the control, supervision and expense of the respondents as investors. Such evidence was material to prove that the respondents complied with the terms of the contract as investors of the project

Again, PW2's testimony couldn't establish that the respondents were duly complying with the terms of the contract and performed their obligations as he told the court that after drafting the agreement, he was transferred to another duty station and hence he could not be in a position of knowing what was transpiring in the mining site thereafter. Further, the testimony of PW3 when matched with the respondents' obligation, the inactiveness of the site and absence of strong fence demonstrate gaps in the respondents' compliance with clause 3.2 of the contract.

Additionally, in his testimony, PW5 did not illustrate how and to what extent they complied with the terms of the contract of investing in the project. To the contrary, in paragraph 4 of page 43 of the typed court proceedings, upon being cross examined by the appellants' advocate, he conceded that they neither had a proof of financing the site nor distributing the stones to the parties to the contract.

On the other hand, the testimonies of PW4 and PW6 proved to the court that there were grievances on part of the appellants resulting from the respondents' failure of funding the mining project that led them to be called in numerous meetings in attempt to reconcile the parties herein. In view of the above summarized evidence, it can be safely said that, it was the respondents who should be blamed for breaching the contract.

Another crucial aspect is the respondents' cause of action founded on breach of contract against the appellants at the trial. In paragraph 12 of the amended plaint, the respondents pleaded that the dispute arose after the appellants' refusal to honour the mining operation agreement following their refusal to distribute the respondents' share. PW1 testified on page 30 of the proceedings when cross examined that, it was the respondents' obligation under the contract to make the distribution and that admitted that he did not provide evidence to prove that they made any distribution.

It is my considered view that for as long as it was the respondents who were responsible to distribute the shares of produce under clause 3.5 of the contract, the appellants cannot be held to be under breach of the term of the contract to which was not their obligation. I find the trial magistrate to have erred when she held that the appellants breached the agreement by directing the manager to stop giving the respondents their share of distribution while the contract was still valid. In my view, for as long as the contract was not changed in respect of the respondents' obligation under clause 3.5 of the contract, the distribution of the shares remained to be the respondents' obligation which could not be shifted to the appellants by conduct or implication.

That said, I am not in agreement with the trial court that the respondents managed to prove their compliance with contract to the extent required under the contract, as weighing between the evidence of the respondents and that of the appellants, the latter's evidence was more weighty to prove that it is the respondents who breached the terms of contracts. My findings are supported by appellants' averments in their counter claim supported by the evidence of their respective witnesses indicating that the respondents neither fulfilled the obligations under the contract dated 3rd July 2021 nor the resolutions of the meeting held on 08/01/2022 in full by abandoning the

mining project which as a result, subjected the appellants and the local miners to mount their resources to perform the respondents' obligations under the contract.

Although I agree with the trial magistrate that Exhibit D2, which is the minutes of the meeting dated 03/06/2022 did not operate to change the terms of contract (Exhibit P1) and MoU (Exhibit P3), the minutes however, establishes the respondents' breach of contract by their failure to fully perform their obligations as investors in mining project as required by the contract.

From the above analysis, I am fully convinced that the evidence of the respondents and their witnesses fell short of standard of proof required in civil cases as enshrined under section 110 and 111 of the Evidence Act **[See also the case of Antony M. Masinga v. Penina (Mama Mgesi) and Another, Civil Appeal No. 118 of 2014**, on page 8-9]. I am of a view that, since the burden of proof was on the respondents and not the appellants unless and until the former had discharged theirs, which was not made possible in this case, I can now safely land into a conclusion that the evidence of the appellants at the trial had more weight compared to that of the respondents.

On the basis of the above observations, I am of a settled opinion that the appellants' claim against the respondents for breach of contract, was sufficiently established. It follows that, it is the finding and holding of this court that it was the respondents who breached the contract.

Having made a departure from the trial court's finding that the appellants were the ones that breached the contract, the decision of the District Court in Civil Case No. 6 of 2023 is hereby quashed. The reliefs granted as a result of the trial court's finding that the appellants breached the parties' contract are also set aside. As a consequence, I refrain from determining the second ground of appeal that the District Court erred in law and in fact in awarding reliefs not prayed for. This is because, upon being set aside, the impugned reliefs granted to the respondents at the trial are redundant. In my view, the re-assessment of the same won't serve any meaningful purpose under the circumstances.

My mind is now directed to the reliefs that the appellants are entitled, following the respondents' breach of the contract. It is a settled position under section 73 of the Law of Contract Act and through various decided cases including the case of **M/S Universal Electronics and Hardware (T) v. Strabag International GmbH (Tanzania Branch), Civil Appeal No. 122 of 2017** (unreported) that a person who suffers breach of contract

is entitled to receive, from the party a who has breached the contract, direct and non-remote compensation for any loss or damage caused to him which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

According to evidence adduced at the trial, it is apparent that the appellants incurred loss in performing obligations of the investors, the respondents herein, that would have entitled them to compensation. However, the appellants' counter claim does not contain any prayer for compensation but rather a prayer for general damages for the breach of contract. Moreover, no evidence was adduced to prove the extent of loss sustained by them that would entitle them to compensation in the form of special damages. In my firm view, the appellants were required to quantify the amount of the loss before the trial court. This being an appellate court, a prayer for compensation for loss prayed for in the present appeal cannot be entertained as the same should have been prayed and proved at the trial court. It has been held in a number of cases that special damages must be specifically pleaded and must be proved, and that the court cannot grant a prayer not sought or pleaded by a party. I thus hold that although the appellants ought to have been be entitled to compensation for loss as a result of the

respondents' breach of contract, the Court has not awarded any compensation for failure by the appellants to plead and prove the same in the form of special damages.

Before the trial court, the appellants claimed for general damages for breach of contract, costs and any other reliefs that the court would find just to grant. It is a settled stance that general damages are awarded at the discretion of the Court, [**see the case of Yara Tanzania Limited v. Charles Aloyce Msemwa & Others, Commercial Case 5 of 2013** (unreported) on page 8]. The evidence adduced at the trial clearly establish the appellants' struggles to have the respondents perform their obligations as investors and later on, to have the project proceed despite the respondents' failure to fully perform their obligations. The testimonies of PW4, PW5, PW6, DW1, DW2, DW3, and DW4 established the appellants' struggles and complaints which led to holding of various meetings to reconcile the parties.

It is clear that the breach resulted to disturbance, and psychological torture and struggles requiring the appellants to seek for alternative means to finance and carry on with the project. Under the circumstances, I award the appellants general damages to the tune of TZS 30,000,000 only.

With the above findings, I reverse the decision of the trial court. Consequently, the present appeal is allowed to the extent demonstrated herein above. Costs shall follow the course.

It is so ordered.

Right of appeal to the Court of Appeal fully explained.

DATED at **MOROGORO** this 21st day of March 2024.

SGD: H.A. KINYAKA
JUDGE
21/03/2024