IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

COMMERCIAL CASE NO.3 OF 2020

ISAACK & SONS CO.LTD .....PLAINTIFF

Versus

NORTH MARA GOLD MINE LTD.....DEFENDANT

RULING

Last Order: 27/07/2021.
Date of Ruling: 28/07/2021.

NANGELA, J.:

On the 23rd December 2020, the Plaintiff filed this suit in Court against the Defendant, seeking for the following judgement and decree:

1. An order for payment of US$ 21,610,827.00 or equivalent in Tanzanian Shillings, being the Plaintiff's entitlement to revenue royalties up to 30th June 2017.
2. An order compelling the Defendant to pay the Plaintiff the sum of royalties' revenue of 1% as per the contract for the gold produced up for the years 2017, 2018, 2019 and the

years to come up to the closure of the mine.

3. Interests at the court's rate from the date of judgement and decree to the date of final payment of the claimed amount.
4. General damages for breach of contract.
5. Costs be provided.

On the 4th of February 2020, the Defendant contested the suit by filing a written statement of defence ("**WSD**"). In her WSD, the Defendant raised a preliminary objection. In particular, the Defendant objection, which is premised on paragraphs 11 and 12 of the Plaint, is as follows, that:

> "to the extent that the Plaintiff's claim or cause of action is breach of contract, the claims at paragraphs 11 and 12 of the Plaint are time-barred for being filed out of the statutory time contrary to item 7 of Part I to the Schedule to the Law of Limitation Act, Cap.98 RE 2019."

This ruling, therefore, is in respect of the Defendant's preliminary objection against the continued hearing and disposal of the claims based on item 11 and 12 of the Plaint filed by the Plaintiff in this Court.

The facts of the present case are fairly short. The Plaintiff, is a limited liability company incorporated under the Companies Act, Cap.212 [R.E 2002], was a holder and beneficial owner of mining rights under the Mining Act, 1979, registered as **TR 13/91, TR14/91** and **TR 15/91**, over the land situated in the Respondent's Special Mining Licence No. 18/96 in Tarime District, referred to as the "Claim Title Areas".

On 3rd September 1999, the Plaintiff executed three agreements with the **Afrika Mashariki Gold Mines Ltd, a predecessor of the** Defendant. The private Company incorporated under the Companies Act as well, carrying out mining operations at Nyamongo, Tarime District in Mara region. By virtue of the agreements, the Plaintiff surrendered and granted to the latter, a sole and exclusive right to use the "Claim Title Areas" and land subject to the "Claim Title Areas".

It has been averred that, much as the agreements so executed granted sole and exclusive right to carryout mining operations over the "Claim Title Areas" and other ancillary purposes to the conduct of the mining operations, the Plaintiff was to be entitled to revenue royalties calculated at one percent (1 %) of all gold produced from the said

"Claim Title Areas" and, that, such payments were to be effected on a quarterly basis having been calculated at the last day of the quarter at the London Spot gold price.

It is averred further that, at the conclusion of the contracts, the Defendant paid the Plaintiff a total of US$ 10,800 for the surrender of the three former rights held on the "Claim Title Areas". However, the Plaintiff has alleged that, since 2013 when the Defendant commenced mining operations over the "Claim Title Areas", the Plaintiff has never been furnished with any information pertaining to the production of gold from the "Claim Title Areas".

On the basis of such and other documentary facts relied upon by the Plaintiff, on 18th day of December 2020 the Plaintiff's Board of Directors convened a meeting and passed a resolution to sue the Defendant, and, hence, the filing of this suit.

On the 27th day of July 2021 when the suit was called on for the hearing of the preliminary objection reproduced herein above, Mr. Heri Kayinga, learned advocate, represented the Plaintiff, while Mr Faustine Malongo, also a learned advocate, appeared for the Defendant.

In support of the preliminary objection, Mr Malongo submitted that, the suit claims based on paragraph 11 and 12 should be dismissed for being time barred. He argued that, as per the Item 7 of Part 1 to the Law of Limitation Act, Cap.89, R.E 2019, claims or suit based on breach of contract are to be brought within six (6) years. He observed and submitted that, in the present suit, the claim under paragraph 11 of the Plaint accrued in June 2013. As such, he argued, since the present suit was filed on 23rd December 2020, the expiry date was on June 30, 2019.

Similarly, as regards the claims under paragraph 12 of the Plaint, it was Mr Malongo's submission that, the same accrued on June 2014. He contended, therefore, that, the six years limitation period set-in on the 30th June 2020. As such, it was his argument, that, since the suit was filed on 23rd December, 2020, the claim under that paragraph 12 was time-barred. For the reasons above, he prayed that the two claims under the suit be dismissed with costs under section 3(1) of the Law of Limitation Act, Cap.89, R.E 2019.

For his part, Mr. Kayinga was totally opposed to the submissions and averments made by Mr Malongo.

For him, the two claims in the suit were a live, intact and filed well within the time.

Mr. Kayinga submitted that, the facts on the ground are evident that, the Defendant has never, at all material times, availed to the Plaintiff's information pertaining to gold production over the "Claim Title Areas." He contended that, even if the contract is silent as regards to modality of relaying such information to the Plaintiff, the Plaintiff is nevertheless entitled to know what is going on. He queried how under such a paucity of information could the Plaintiff file a suit while in the dark?

Mr. Kayinga submitted that as the records will show, the Plaintiff was made aware in 2015 through Tanzania Extractive Industries Transparency Initiative (TEITI) reports which had indicated that the Defendant was on the production course for the period covering July 2011 to June 30th 2013. He contended that, the said reports, annexed to the Plaint as **Annex.ISL5** was made available to the public and to the knowledge of the Plaintiff in November 2015. On that ground, he contended that, the plaintiff was well within time in bringing her claims challenged by the Defendant.

Mr Kayinga referred to this Court its own decision on a similar point. This is in respect of a ruling issued by Her Ladyship B.K. Philip, J., in the case of **Mr Josephat Muniko (suing under the constituted power of attorney conferred to him by Mr.Mwita Makindya and Mrs Mwita Anthony Wambura) vs. North Mara Gold Mine Ltd, Commercial case No.9 of 2019, Mwanza Registry, (unreported).**

He as well relied on the final decision of this Court (Fikirini J., (as she then was) in the same case, and argued that, in those decisions, it was agreed that, the cause of action in such cases arose in 2014, as there was no way the Plaintiff could have known about the operations in the property areas under concern. For the reasons above, he prayed that, the objection be overruled with costs.

Mr Malongo made a brief rejoinder. He rejoined that, prescription of time is a matter that is as per the Law of Limitation Act, Cap.89 RE 2019. As such, the fact that the Plaintiff was not given information or reports timely, is not material. He argued that, if the Plaintiff was out of time she ought to have applied from the Minister, under section 44 of the Law of Limitation Act and, consequently, failure to do so warrant dismissal of the two claims.

Commenting on the two decisions of this Court which Mr Kayinga relied upon to anchor his submission, it was Mr Malongo's submission that, the decision by Madam Philip, J., did not conclude the issue of limitation of time. Further, the judgement of Madam Fikirini, J., (as she then was) found that the matter was not time barred but even so, this Court is not bound to follow it, so argued Mr Malongo. On those brief rejoining remarks, Mr Malongo urged this Court to dismiss the two claims indicated in paragraphs 11 and 12 of the Plaint with costs.

Having given my attention to the rival submissions, the issue I am called upon to resolve is whether the preliminary objection raised by the Defendant has any merit in it. Briefly stated, I do not subscribe to the position taken by Mr Malongo. First, the reading of the plaint in a disjoined form is not warranted. It is trite law that, not any particular plea has to be considered, and the whole plaint has to be read, together with its annexure and, if no cause of action is disclosed, the plaint as a whole must be rejected.

In the Indian case of **T. Muralidhar vs.Pvr Murthy**, RFA (OS) No.115/2014 & CM No.12344/2014, the Delhi High Court was of the view that:

> "There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair splitting technicalities."

The above position was also adopted by this Court, (Hon. B.K Philip, J) in her ruling in **Mr Josephat Muniko'** case (supra), where she stated on page 5 of the ruling that:

> "With due respect to the defendant's advocate, the contents of a plaint have to read together in their totality including the annextures attached thereto."

Similar words were echoed in **MIC (T) Limited vs. TTCL,** Commercial Cause No.146 of 2002 (unreported) by Mr. Justice, Dr. Bwana, J., (as he then was) where he stated that:

> "the question whether a Plaint discloses a cause of action must be determined upon perusal of the Plaint alone together with anything attached so as to form part of it."

In this instant case, Mr Malongo seems to have forgotten that principle or might have chosen to give it a blind eye even if this principle makes a louder sounding of alarm to all who wish to raise a plea of no cause of action disclosed in a Plaint.

Secondly, and deriving the thinking from the same principle, as correctly argued by Mr Kayinga, all what Mr Malongo has raised is misconception of fact since he ought to have read the **Annex.ISL5, (the TEITI Report).** This was the source of the Plaintiff's information since there were no disclosures on the part of the Defendant to the Plaintiff and, as correctly argued, how could the Plaintiff knew that production

had started so as to claim for her rightful share if at all she was entitled to?

Basically, a person cannot be bound by information which was not available to him. In the same way a course of action based on the disclosure of information would start to accrue from the time when knowledge of the respective information is divulged. In our case, the Plaintiff became aware on the month of November 2015, and so the cause of action accrued from that time and not before.

That was the position in respect of the decision made by Hon. B.K Philipi J, in her ruling in **Mr Josephat Muniko' case** (supra), and so was the finding of Hon. Fikirini, J., (as she then was) in the her final judgment regarding the same case. In particular, the Court, (Hon. Fikirini, J., (as she then was)) stated as follows:

> " So, I completely agree with Mr Kayinga's submission that, the cause of action accrued from the year 2014, when the TEITI Report came out irrespective of the report status, as there was no any way the Plaintiff could have known what was going on their former Claim title."

In my humble view, a very similar position need to be observed in respect of this case whose facts are

very similar to the facts in the **Mr Josephat Muniko' case** (supra). Indeed, even if Mr Malongo submitted that, this Court is not bound by the decisions, meaning that I should depart from these decisions.

However, as a matter of practice, comity and rationality, it is not advisable to depart from a decision of a brother or sister Judge easily unless there are truly cogent reasons to do so. This was once stated in the case of **Bank of Africa Tanzania Ltd v Nakumatt Tanzania Ltd & 3 Others,** Commercial Case No.151 of 2019 (HCCoDv), (unreported).

It follows; therefore, that, this Court settles on and proceeds to make the following orders:

1. that, the preliminary objection raised by Mr Malongo is found to be devoid of merit and I hereby dismiss it with costs to the Plaintiff.
2. Parties are to proceed to the next stage of the hearing of the suit as it shall be scheduled by the Court.

It is so ordered

DATED at **MWANZA**, this **28th** Day of **JULY 2021**

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

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HON. DEO JOHN NANGELA

JUDGE