

TANZANIA / JUDGMENT

PAMOJA MINING

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18 March 2024

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IN THE HIGH COURT OF TANZANIA (SUB - REGISTRY OF GEITA) AT GEITA LAND CASE NO. 5665
OF 2024 SALUM OTHMAN SALUM.....PLAINTIFF VERSUS PAMOJA MINING
COMPANY LIMITED.....DEFENDANT

JUDGMENT

Date of last Order: 20/08/2024 Date of Judgment: 17/09/2024 K. D. MHINA, J. The main issue of controversy between the parties to this suit is the lease agreement for carrying out mineral processing activities at Plot No. 1 Block “E” located at Nyarugusu area within Geita District. Whereas Salum Othman Salum, the plaintiff herein (“the plaintiff”), lodged this suit in this Court on 18 March 2024 against Pamoja Mining Company Limited (“defendants”) 1 The background to this matter briefly, as can be gleaned from the pleadings, is as follows: the plaintiff alleges that he was the sole lawful owner of the land described as Plot number 1, Block ‘E’, Nyarugusu area within Geita District and on 7 November 2018, he signed the Memorandum of Understanding with the defendant, agreeing to revise the Lease Agreement between them dated 13 June 2012, on Plot number 1, Block ‘E’, Nyarugusu. He further alleges that they agreed to revise the lease rent to a consideration of TZS. 5,000,000/= per month. However, since they entered that Memorandum of Understanding, the defendant denied affecting any amount to the Plaintiff despite several fruitless follow-ups. This triggered the plaintiff to seek relief from this Court. He now fervently prays for Judgment and Decree against the defendant for the following reliefs;

- i. Payment of rent arrears Tanzania shillings Three Hundred Twenty-Five Million (TZS. 325,000,000/=) by Defendant being the unpaid sum between November 2018 and March 2024.
- ii. Payment of rent arrears by the Defendant from the date of default to the Judgment Day.
- iii. Eviction order against the Defendant. 2 iv. An order for payment of general damages by the Defendant in an amount to be assessed by this Court.
- v. The Defendant to bear the costs of this Suit and vi. Any other order(s) this Court may deem just and equitable to grant under the circumstance of this suit. On his side, the defendant vehemently disputed the claims in the written statements of defence. He alleges that he has never entered into a lease agreement with the plaintiff of the land and rent described and identified in the plaint. Further, he asserts that the memorandum of understanding was unenforceable with no legal legs to stand as its intended effects never took place. The controversy above put the parties at issue; therefore, on the first day of the hearing, the

following issues were framed and were accordingly recorded by this court for the determination of this suit namely:

- i. Whether there is a lease agreement between the plaintiff and the defendant in the land described as plot No 1 Block E within the Nyarugusu area in Geita District. 3 ii. If issue No. is in the affirmative, whether the defendant is in arrears of TZS. 325,000,000/= as rent from November 2018 to March 2024. iii. To what the relief(s) parties are entitled. At the hearing, the plaintiff was represented by Mr. Ernest Makene, a learned advocate, while the defendant had the services of Mr. Andrew Luhigo, a learned advocate. In support of his case, the plaintiff called one (1) witness: Salum Othman Salum (the plaintiff), who testified as PW1. The defendant called two (2) witnesses in a bid to support his case: Nathan Damian Conrad (the former Director of the defendant), who testified as DW1, and Evarist Daniel Kaombwe, the defendant's operation manager, who testified as DW2. PW 1, Salum Othman Salum, testified that he had a contractual relationship with the defendant due to the fact that he leased his land measuring 11.26 acres located at Ililika Village in Nyarugusu area to the defendant. 4 He further stated that the land was unsurveyed when he purchased it in 2012 from Deus Kapuli and Kaselya Kapuli. Later, it was surveyed and described as Plot No. 1 Block "E" Nyarugusu Geita, and he was given the title deed. He tendered to that effect;
- i. Title deed No. 3575 registered in the name of Salum Othman Salum as Exhibit. P1. In 2012, he leased his land to the defendant for the rent of TZS. 3,000,000/= per year. He tendered to that effect;
- i. The lease agreement dated 13 June 2012 as Exhibit. P2 PW1 further stated that in 2018, they amended the contract and agreed to revise the lease rent from TZS. 3,000,000/= per year to TZS. 5,000,000/= per month. He tendered to that effect;
- i. The Memorandum of Understanding dated 7 November 2018 on revising the Lease Agreement as Exhibit. P3. He concluded by testifying that since they signed the memorandum of understanding, the defendant has failed to pay the agreed-upon rent from that year, 2018. That triggered him to serve the defendant with a 5 demand notice for more than TZS. 300,000,000/= unpaid rent. He tendered to that effect;
- i. The demand notice dated 4 September 2023 as Exhibit. P4 He prayed for an order from the court for the defendant to pay the rent from 2018, when they signed the new contract, until the date of the judgment, the defendant be evicted from the leased land and costs of the suit. On being cross-examined on the description of the leased land in exhibits P2 and P3 (lease agreement and memorandum of understanding) versus the description of that land in the plaint, PW1 stated that at the time of signing P2 and P3, the land was still unsurveyed and he had yet to obtain the title deed. He also stated that in paragraph 6 of exhibit P2 (lease agreement), it was agreed that the plaintiff should not receive any amount of rent until he paid in full the loan of TZS. 95,000,000/= to the defendant. Regarding exhibit P3 (Memorandum of understanding), he stated that paragraph 3 of that MOU indicated that the intended revised tenancy 6 agreement should take effect from 5 November 2018 after being

signed by both parties. On further cross-examination, he stated that the revision of Exhibit P2 did not take effect because after signing Exhibit P3, there was no longer good communication between the parties. In the defence case DW1, Nathan Damian Conrad (the former Director of the defendant), the defendant's company, which dealt with the mining process, leased land located at Ililika Village in Nyarugusu area from the plaintiff as per exhibit P2 (lease agreement). That lease agreement was for 30 years, starting on 13 June 2012. He further testified that as per paragraphs 5 and 6 of the lease agreement, the lease money would be offset from the loan the defendant advanced to the plaintiff. That loan of TZS. 95,000,000/= was for the plaintiff to purchase the leased land. He tendered to that effect;

- i. The loan agreement of TZS. 95,000,000/= between Pamoja Mining Co. Ltd and Salum Othman dated 13 June 2012 as exhibit D1. 7 DW1 also testified that when they leased the land, it was yet to be developed, but after the defendant leased it, he developed it by constructing buildings, erecting a fence, and installing machines. Furthermore, he stated there was one attempt to revise the lease agreement. There was a MOU between the parties. It was after the pressure from the Resident Mining Officer on the defendant after the plaintiff complained. Still, there was never any revision to the lease agreement apart from that MOU (exhibit P3). DW12 said that the MOU intended to revise some of the conditions in the lease agreement, such as the rental amount and the lease period. Unfortunately, the intention was never materialized because the defendant could not accommodate the amendment based on financial constraints. When cross-examined, DW1 stated that among the agreeable issues in the MOU was the rental amount being altered to TZS. 5,000,000/= per month. Further, in the MOU, the defendant intended to forgo the loan of TZS. 95,000,000/= advanced to the plaintiff. 8 In his evidence, DW2 Evarist Daniel Kaombwe (defendant's operations manager) testified that the defendant leased the land from the plaintiff. The defendant used that land to process gold minerals. Further, on the leased land, there were structures such as office blocks, residential blocks, and processing plant machines. He concluded by testifying that the complaint by the plaintiff was baseless because there was a valid lease agreement. In a nutshell and briefly, that was the evidence from both the plaintiff's and defendant's witnesses. Therefore, in deliberating and determining the suit, I will start with the 1st issue: whether there is a lease agreement between the plaintiff and the defendant in the land described as plot No 1 Block E within the Nyarugusu area in Geita District. As per the evidence, in my view, there are three sub-issues that need to be determined as follows; First, whether there is a lease agreement between parties to the suit. Second, whether the MOU (exhibit P3) between the parties is a letter of intent or can constitute an enforceable contract and Third, the land leased in exhibit P2 is the same as in this suit (plaint) 9 In the determination, I will be guided by the following principles; One, in trials, a person who makes an averment or assertion which is denied by his opponent has the burden to establish that his averment or assertion is true, admissible and credible evidence which can be properly and safely inferred. This simply means "he who alleges must prove the allegations." This principle is enshrined in Section 110 (1) and (2) of the Evidence Act, Cap. 6 [R.E. 2019], and in numerous authorities, such as the case of Hemedi

Said vs. Mohamedi Mbilu (1984) TLR 113. Two, it is also trite that parties in civil cases must prove their cases on the balance of probabilities. See Ernest Sebastian Mbele vs. Sebastian Sebastian Mbele and two others, Civil Appeal No. 66 of 2019 (Tanzlii). Reverting to the sub-issues I framed, I will start with the first one, which is whether there was a lease agreement between parties to the suit. On this, the evidence from both parties shows that there is no dispute regarding the lease agreement dated 13 June 2012 (exhibit P2). The period for that agreement was 30 years, and the agreed-upon rent was TZS. 3,000,000/= per annum (year). 10 According to DW1, they advanced a loan of TZS. 95,000,000/= to the plaintiff (exhibit D1) to enable the plaintiff to purchase leased land. The conditions in the lease agreement and the loan were as follows. I quote clauses 3, 4, 5 and 6 in the lease agreement and 2, 3 and 5 in the loan agreement. Lease agreement

3. That the period of this agreement shall be thirty (30) years with immediate effect from 13.06.2012.
4. That the agreed annual rental amount is Tanzania Shilling Three Million (Tshs.3,000,000.00).
5. That the Lessee will offset the payment of the rental amount from the loan monies of NinetyFive Million advanced to the Lessor as stipulated in the Loan Agreement signed by the two parties, and as such, the said loan Agreement shall be construed as an integral part of this Agreement.
6. In the premises, the Lessor shall not receive any payment under this agreement until the loan amount of Tanzania Shillings Ninety Five Million is fully received by the lessee as agreed herein. 11 Loan agreement
2. The Borrower has requested the Lender to make advances to him by way of a simple loan without interest for a total sum not exceeding Tanzania Shilling Ninety Five Million Only (Tshs.95,000,000.00) (hereinafter the "Loan") for purposes of his businesses.
3. The Lender has agreed to make the Loan available to the Borrower, and the Borrower, by signing this Agreement, accepts to have received the said loan monies of Tanzania Shilling NinetyFive Million Only. (Tshs.95, 000,000.00).
5. The lender shall recover the advance by offsetting the same against the rental amount due and payable to the Lender for renting his part of his licensed mining area situated at Nyarugusu within Geita District, and as such, the relevant lease agreement is an integral part of this agreement lease Agreement. 12 From the above two documents, the following can be gleaned; One, there was a lease agreement between the parties dated 12 June 2023. Second, the lease period was 30 years from the date of signing. Third, the agreed rent was TZS. 3,000,000/= per annum. Fourth, the TZS. 95,000,000/= loan advanced to the plaintiff by the defendant was agreed to offset the lease rent from the loan money. Going by the two documents above, the loan money TZS. 95,000,000/= offset the lease rent at the tune of TZS. 3,000,000/=. And that, by simple calculations, means the rent of almost 31 years already paid by the defendant to the plaintiff. The next issue is whether the MOU (exhibit P3) between the

parties is a letter of intent or can constitute an enforceable contract. Therefore, it is of utmost importance in this suit to determine whether the MOU between the parties (exhibit P3) is a contract or a mere intent. This is because of the controversy raised by the parties. While the plaintiff argued it is a contract enforceable by law, the defence side claimed it was merely an intent, with its terms never coming to fruition. Thus, the question is whether the MOU is a letter of intent or if it can indeed be considered an enforceable contract. This determination will profoundly impact the outcome of this case. On this, the Court of Appeal in *M/s Mwananchi Engineering and Constructing Corporation Ltd vs. Mr. Silvano Copetti*, Civil Appeal No. 104 of 2011(unreported), had an occasion to expound at length on this issue. It held that “First, whether or not a M.O.U. amounts to a contract is not a matter of mere definition. Second, the intention of the parties to the M.O.U. was to be gathered primarily from the terms and conditions stipulated therein and not the mere appendage of their signatures to that instrument, which, to some extent, was the focus of the High Court's analysis. In our respectful view, the M.O.U. itself provides, in large measure, the means of resolution of the acute question of whether or not it was an enforcement sale contract. Third, the title of the document, memorandum of understanding, could not have been determinant of the parties’ intention or of its legal character as a sale agreement”.¹⁴ As per the above-cited case, the question of whether the MOU between the parties is legally binding is a matter of construction of the document itself and a question of legal analysis. It is the court’s duty to interpret the MOU and give effect to the intention of the parties, which is discernible from the documents and conduct of the parties. Therefore, in the instant suit, the validity and applicability of the MOU between the parties is an issue that can be dealt with briefly by looking at the terms and intentions of the parties. In the MOU dated 7 November 2018 (exhibit P3), the terms are as follows; “1. That the parties herein shall revise their tenancy agreement dated 13 June 2012.

2. That amongst the new terms to the intended revised tenancy agreement shall be;
 - i. Rent payable by the tenant to the landlord is TZS 5,000,000 per month
 - ii. Medical Insurance for the Landlord and his family of 3 people for the whole period of tenancy.
 - iii. A clause by the tenant forgiving a loan of TZS 77,727,397.26 owed by the landlord.
 - iv. The parties herein agree that they shall work together to have the revised lease ready in two months' time from the signing of this Memorandum of understanding.
3. That the intended revised lease agreement shall have the 5th day of November 2018 as its commencement date and shall take effect soon after the signing of the same by both parties therein.” On close scrutiny of the terms and intention of the parties in the MOU (exhibit P3), the parties; One, in clause 1, the parties intended to revise the tenancy agreement dated 13 June 2012. Two, in clause 2, the parties intended to enhance the rental amount from TZS. 3,000,000/= per annum to TZS. 5,000,000/= per month, issuance of medical insurance for the landlord and his family during the tenancy period and working together to have the lease agreement revised. Third, they intended the revised lease to be in force on 5 November 2018 after both parties signed it. In his evidence, PW1 (the plaintiff), when cross-examined,

stated that the revision of the tenancy agreement never took effect because after 16 signing Exhibit P3, there was no longer good communication between the parties. On the other hand, DW1, in his evidence, stated that after signing the MOU, the intentions never materialized because the defendant could not accommodate the amendment based on financial constraints. From above, the evidence from both parties indicated that the MOU between the parties was never translated into an agreement. Its terms and intentions were not effected to revise the tenancy agreement dated 13 June 2012 as intended, and the revised tenancy agreement to commence on 5 November 2018. Considering the above, since the lease agreement dated 13 June 2012(exhibit P2) was never revised after the signing of the MOU, then the terms of the MOU regarding the rent were never revised; hence, the terms in the MOU regarding rent could, therefore not be bound the parties. Having found as above, I hold that the MOU (exhibit P3) between the parties was a letter of intent intending to revise the lease agreement (exhibit P2); therefore, under the law, its terms are not binding and enforceable after the parties failed to revise the lease agreement as they 17 intended in the MOU. In the circumstances of this suit, by looking at the terms of the MOU, the lease agreement dated 13 June 2012 (exhibit P2) remains valid and binds the parties. The third sub-issue is whether the leased land is the same land described in the plaint; this should not detain me long. There is no dispute between the plaintiff and the defendant that the former leased land to the latter. The disagreement is on the description of that land. The defendants' side testified that in exhibits P2 and P3 (the lease agreement and MOU), the description of land differed from the one alleged in the plaint by the plaintiff. In the plaint, the leased land is described as Plot number 1, Block 'E', located at Nyarugusu area within Geita District. According to exhibit P1 (the title deed), the title deed was issued to the plaintiff on 3 May 2023. On the other hand, the defence evidence and exhibits (P2 and P3) did not give such a description of the land. In the evidence and both exhibits, the land was described simply as located at Ililika Village in Nyarugusu. 18 In his evidence, the plaintiff explained that at the time he signed exhibits P2 and P3 (the lease agreement and MOU), the land was still unsurveyed. In my view, the statement above from the plaintiff is credible. This is because Exhibit P2 was signed in 2012 and Exhibit P3 in 2018. On the other hand, the title deed, which described the land as Plot number 1, Block 'E', located in the Nyarugusu area, was issued in 2023. Further, there is no dispute that there is no dispute that the parties signed the lease agreement for the plaintiff to lease his land to the defendant. Thus, I hold that the land in exhibits P2 and P3 is the same land as in exhibits P1 and described in the plaint. There is no other land leased to the defendant by the plaintiff. Therefore, the first issue is answered that the valid and binding lease agreement between the parties is valid and binding to them, and there is no addendum to revise or alter it. The MOU is not in this suit, as its intentions were never executed. Further, the leased land description as Plot. No 1 Block "E" 19 Nyarugurusu area in the plaint and title deed (exhibit P1) is the same land shown in the lease agreement (exhibit P2) and MOU (exhibit P3). As the evidence reveals, after the leased land was in exhibits P2 and P3, it was surveyed, and the title deed was issued; it is described as a plot. No 1 Block "E" Nyarugurusu area. The second issue framed in this case concerns whether the defendant is in arrears of TZS. 325,000,000/= as rent from

November 2018 to March

2024. This also should not detain me long. This issue depended on the first issue, which was whether the MOU was a letter of intent or an enforceable contract in the circumstances of this case. The sum of TZS. 325,000,000/= was calculated based on the MOU (exhibit P3). Therefore, since I held in the first issue that the MOU was, in this case, a letter of intent and not a contract enforceable by law, the second issue is decided negatively. The lease agreement binding the parties was the one dated 13 June 2012 (exhibit P2). Based on that lease agreement, the defendant is not in rent arrears for the leased land. 20 In the final analysis, the plaintiff's evidence did not prove the claims on a balance of probabilities; the suit lacks merit. Therefore, the relief entitled in such a circumstance is to dismiss the suit for want of merits. Consequently, I proceed only to dismiss the suit with costs. I order accordingly. K. D. MHINA JUDGE 17/09/2024 Court The right to appeal explained to the parties. K. D. MHINA JUDGE 17/09/2024 21 22

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