

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT SOROTI
CIVIL SUIT NO. 16 OF 2014

WELT MACHINEN ENGINEERING LTD.....PLAINTIFF

V

- | | | |
|--|---|------------------------|
| 1. CHINA ROAD & BRIDGE CORPORATION | } |DEFENDANTS |
| 2. ILUKOL JOBS LOMENEN | | |
| AND | | |
| 3. NAKAPIRIPIT DISTRICT LOCAL GOVERNMENT..... | | THIRD PARTY |

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The plaintiff through its advocates sued the defendants jointly and severally for the following orders:

1. Permanent injunction
2. A declaration that the defendants have no legally recognizable rights to extract /mine granite stones from the suit land
3. An order of eviction
4. General damages for trespass on the plaintiff's location licence area
5. An order against the defendants to account for the proceeds of the 1st defendant's unlawful activities
6. Aggravated and exemplary damages
7. Interest and costs

The 2nd defendant in his defence denied that the plaintiff is entitled to any relief and averred that he acted in his official capacity on behalf of the district and that the district followed

required procedure to establish ownership of the rock at Kamusalaba before entering an agreement with the 1st defendant.

The 2nd defendant also alleged fraud on the part of the plaintiff because its officials were at the time of their application for a license informed that Kamusalaba rock was not available for leasing. Further particulars of fraud are contained in the 2nd defendant's written statement of defence but include the following:

Applying for Atumtaok rock from the district; using the application form for Atumtoak to obtain a location license for Nakumama also known as Kamusalaba; purporting to customarily own land at Kamusalaba whereas not; Purporting to own exploration licence a pre requisite to location licence; submitting false information in their application.

The 1st defendant denied the plaintiff's claims and joined issues with the 2nd defendant. It also averred that the plaintiff is not the owner of suit land and is not held by the sons of Teko Apo Oroma under customary tenure. Additionally, the 1st defendant averred that it is entitled to quiet use of the land and that the attempted fraud has caused severe inconvenience to the 1st defendant.

In its counterclaim, the 1st defendant alleged fraud on the part of the plaintiff. Particulars of fraud inter alia, are that the plaintiff processed licences through Hon. Lokeris for the rock well knowing the 1st defendant was already engaged in the same place; Hon. Lokeris intimidating leadership of Lorengedwat sub county Nakapiripit district local government over entering the agreement; purporting to have known of the activities of the 1st defendant at Kamusalaba after obtaining the licence whereas not; processing the licence even after the CAO warning them not to interfere with the 1st defendant's activities.

The third party denied the plaintiff's claim and averred that the rock did not belong to the family of Hon. Lokeris and that Hon. Lokeris used his office to obtain a licence well knowing that the 1st defendant had entered into an MOU with the 1st defendant. Additionally, that the plaintiff obtained a licence of a small scale venture to defeat the interests of the 1st defendant. The third party agreed to indemnify the 1st and 2nd defendants.

In reply to the defendants' written statement of defence and counter claims, the plaintiff, inter alia, averred that it does not claim ownership of the suit land but rather exclusive rights to mine granite.

Issues for trial were agreed upon in the joint scheduling memorandum are as follows:

1. Whether the plaintiff is the lawful owner of the location licences for exclusive /sole mining of granite on the suit rock.
2. Whether the 1st defendant is trespassing or infringing on the plaintiff's rights.
3. Whether the second defendant and the third party had the capacity to enter the agreement to operate on Kamusalaba rock land with the 1st defendant.
4. Whether the 2nd defendant has/owns the reversionary interest in the said Kamusalaba rock.
5. Whether the 1st defendant is entitled to its counter claim
6. Remedies.

Both counsel filed written submissions that i have carefully considered.

I have carefully evaluated the evidence adduced and arrived at conclusions of fact and law on the issues framed for trial.

The burden of proof in civil cases lies on he who alleges the existence of facts which must be proved on a balance of probabilities. Under section 102 of the Evidence Act, in civil cases, the burden lies on that person who would fail if no evidence was given on either side. Both parties therefore have burdens to discharge as both asserted the existence of sets of facts that had to be proved either by evidence or by interpretation of the law.

Resolution of issues

Issue No. 1: Whether the plaintiff is the lawful owner of the location licences for exclusive /sole mining of granite on the suit rock.

I expected counsel to address me on these sub issues that emerged during the trial: whether the plaintiff was the holder of location licences for mining granite; what is the actual location of the location licences? ; And finally whether the process for the application of location licences was free from fraud.

(i) *whether the plaintiff was the holder of location licences for mining granite*

The concept of ‘owner ‘ of a mineral right is misleading and is not defined by the Mining Act which means it does not apply to mineral rights. . Instead section 2 of the Mining Act describes ‘holder’ as

a person to whom a licence is granted under the Act and includes every person to whom that licence is lawfully transferred or assigned.’

I will therefore discuss the sub issue within the context of the definition of ‘holder’ and not ‘owner’.

Counsel for the plaintiff relied on section 97 of the Mining Act 2003 and section 90 of the Evidence Act. Under this section, the Commissioner is authorised to issue certificate of grant of a mineral right and

such certificate shall be received in evidence but without prejudice to the right to adduce evidence in rebuttal.

The implication of this section is that the licence issued by the Commissioner is good evidence that the licensee holds a mineral right but it is not conclusive evidence.

Counsel also relied on section 90 of the Evidence Act which excludes oral evidence to prove a document. While counsel makes a correct statement of the law, the relevant law is section 80 that empowers courts to presume the genuineness of a document purporting to be a gazette, Acts of parliament and other documents.

To the extent that the Location licenses were required by section 93 (4) of the Mining Act to be gazetted and the same were duly gazetted as PE5 shows, Location licences 1194 and 1195 were validly obtained. This is irrespective of minor glitches like failure to cause beacons to be erected on site and failure to have someone resident at the site as required by the Mining regulations.

Suffice it to state that to the extent that in their joint scheduling memorandum, both counsel agreed that the plaintiff is a holder of two location licences Nos. 1194 and 1195 for mining granite, i resolve that the plaintiff is the holder of Location Licences.

ii) What is the actual location of the location licences?

On this issue, counsel submitted that one Hon. Lokeris, who did not testify, lodged an application at the CAO's office for a location licence as prescribed by regulations which DW1 Ilukor Jobs in his capacity as CAO endorsed. According to DW1, when he examined the PE.3 that contains the said form, he discovered that the word village had been added to Atumtoak to read Atumtoak village whereas this was just the name of a rock.

In his evidence, DW1 testified that Atumtoak and Kamusalaba are names of rocks and that he endorsed the application with respect to Atumtoak rock and not Kamusalaba which, according to him, had been offered to the 1st defendant under an agreement with the third party, Nakapiripit district local government. It was the testimony of this witness that the two rocks are located in Lorengedwat Sub County and that there is no village called Atumtoak. It was counsel for the defendant's submission that the inclusion of the word 'village' created the impression that the licence was for Atumtoak village, which is non-existent. DW1 was supported in this position by DW2 Agaza sub county chief of Lorengedwat whose testimony is that the rocks are known as Atumtoak and Kamusalaba. Lorukale Paul DW 6 the LC V councillor Nakapiripit district confirmed that the two rocks are two km apart and both are located in Longoleyek village.

From the evidence of, PW1 Felix Apo Oroma, the managing director of the plaintiff company, he asserts that Atumtoak is the entire area where the plaintiff was granted two licences while Kamusalaba is an area located within Atumtoak. From his evidence, he admits that he doesn't know which area is specific to which licence. PW3 Okewling a mining engineer was unable to verify location of each licence although he had visited the area. His evidence was that two areas measuring 16 hectares each had been assigned two licences.

Obviously, DW1, DW2 and DW6 are all administrators in Local government and as such they are better versed with names of locations than PW1 who gave a general description of the location of the two licences as Atumtoak when in fact this is the name of the rock applied for.

Counsel for the plaintiff argued that oral testimony of DW1 that the word 'village' was wrongly added to the applications is not admissible under section 91 of the Evidence Act. He cited **General Industries (U) Ltd v NPAPT SCCA 5 of 1998** in support except that he did not supply the full text of the decision.

Section 91(1) is an exception to the parol evidence rule. It provides as follows:

Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, or mistake in fact and in law.

Clearly, the reference to Atumtoak village was a mistake in light of the defendants' case that no such village exists.

The plaintiff's reference to Kamusalaba commenced after PE 2 and 3 had been lodged and licences issued. (Licenses were issued on 16th August 2013). I will give some examples. In PE10, a letter by the plaintiff to the CAO Nakapiripit dated 27th February 2014, the title of that letter reads:

Award of mining rights by Nakapiripit DLG to China road and Bridge Corporation over Atumtoak/kamusalaba mining area.

In PE11, a letter by the plaintiff to the managing director UNRA dated 3rd march 2014, the title of that letter is:

Quarrying of the granite rock in Atumtaok and Kamusalaba Nakapiripit district

This means the plaintiff's claim to Kamusalaba came after the applications were lodged.

Furthermore, I have carefully examined the two sketch maps and statements of state of environment attached to the two applications. I have compared these two sketch maps with the map that was attached to the plaint. While PW1 states in his evidence that each licence has coordinates, i observed from the statements of state of environment for the two applications that they give exactly the same coordinates for the areas applied for. Coordinates given for each statement are:

Beacon	Easting (m)	Northing (m)
LB	683600	247400
CB1	683900	247400

CB2	683900	246870
CB3	683600	246870

In each of the statements, the introduction reads,

‘ M/S welt Machinen Engineering Ltd is a company.....interested in exploiting syenitic granite in a 16 hectare area under application located in Atumtoak, Lorengedwet in Nakapiripit district...’.

An analysis of the two sketch maps attached to the two applications reveals that they do not name the location licence for each sketch map. Secondly, the sketch map attached to the plaint refers to location licence 1194, gives similar coordinates as in the statements of the environment and is authenticated by an official from the department of geological survey and mines. No such sketch map citing location licence 1195 was availed.

The fact that PW1, and PW2 Okewling Mining engineer agree that no beacons were erected makes it impossible to locate the specific area for each location licence yet these beacons would have given the coordinates of the two areas to correspond to the sketch maps tendered in court. PW2 Okewling was unable to verify location of each of licences although he had visited the area. His evidence was simply that the two areas measuring 16 hectares each had been assigned two licences.

More importantly, the map attached to the plaint and the two sketch maps shows the location as Atumtoak, Lorengedwat in which ‘Atumtoak ‘is the actual name of the location licence area.

Consequently, the similar coordinates in the statements on state of environment; the sketch map for location licence 1194 attached to the plaint and none for location licence 1195; the clear statement that the location applied for was Atumtoak; the admission by PW1 Apo Oroma that he could not tell the specific area for each location licence; the failure to erect beacons to demarcate the areas for the two licences ;the credible evidence of DW1 Ilukor , DW 2 Agaza and DW6 Lorukale that there are two rocks called Atumtoak and Kamusalaba

aka Nakumama and that reference to Atumtoak ‘village’ in the applications was a mistake; are pieces of evidence that tend to show that the location licences granted were for Atumtoak rock only and not Kamusalaba .

(ii) *Whether there was fraud in the process of applying of location licences.*

On the specific issue as to whether there was fraud in the process of applying for the licences, i find that there was no fraud in as far as the applications were for the rock called Atumtoak and the reference to ‘village’ was a mistake.

As to the doctrine of bona fide and notice of the 1st defendant’s existing interest, i need not discuss it because i have resolved that the licences were for Atumtoak rock and not Kamusalaba rock.

On the main issue, i find that while the plaintiff was holder of location licences 1194 and 1195, these licences were for Atumtoak rock only.

Issue No. 2: Whether the 1st defendant is trespassing /infringing on the plaintiff’s rights.

It was the plaintiff’s case that it is the holder of location licences for two areas measuring 16 hectares each and located in Atumtoak village. The lack of clarity on the area for the two location licences in the plaintiff’s case was resolved in favour of the defendants to mean that the licences were for Atumtoak rock only.

In the joint scheduling memorandum, the 1st defendant admits that it is currently conducting mining / quarrying activities at Kamusalaba having entered the land after signing an agreement with the third party. According to Deng DW8, mining commenced in October 2013. It is also not disputed that the 1st defendant quarried aggregate used for construction of Moroto –Nakapiripit road.

The agreement between the 1st defendant and the third party was entered into on 13th May 2013 for hire and use of Kamusalaba rock land at a consideration of 50,000,000/.

For an action in trespass to be maintained, the plaintiff must be in actual or constructive possession of land. In the instant case, the plaintiff is in possession of a mineral right. This

means that the applicable principles are to be found in the Mining Act, regulations and case law.

Section 2 thereof defines a mineral right as

A prospecting licence, exploration licence, retention licence, mining licence and location licence'

Mining or to mine is defined by section 2 as meaning

Intentionally to dig or excavate for minerals and includes operations directly or indirectly necessary for or incidental to the digging or excavation for minerals.'

The location licences were therefore minerals rights authorising the plaintiffs to enter the area of the licences to excavate for minerals.

The defendants and third party were categorical that the 1st defendant operates in Kamusalaba rock area while the plaintiff's area of operation is Atumtoak rock.

This means the 1st defendant has not infringed on the mineral rights of the plaintiff at all. The second issue is resolved in the negative.

Issue No. 3: whether the 2nd defendant and the 3rd party had capacity to enter into the agreement to operate on Kamusalaba rock land with the 1st defendant.

This issue calls for an examination of whether the rock contained minerals and subject to article 244 of the Constitution as amended and the Mining Act.

Under article 244 (1) of the Constitution as amended, the entire property in and the control of , all minerals and petroleum in, or on or under any land or waters in Uganda are vested in the government on behalf of the Republic of Uganda.

Article 244(2) mandates Parliament to make laws for management of minerals.

Article 244(6) authorises Parliament to regulate exploitation of any substance excluded from the definition of minerals when exploited for commercial purpose.

Under sub article (5) mineral does not include clay, murrum, sand, or any stone commonly used for building.

Sub article 5 was not a new enactment by the Constitution Amendment Act 11 of 2005 as DW 4 Bwesigye suggests but it was a re-enactment of article 244 (3) of the 1995 Constitution.

In their statement of state of environment, the plaintiff states, and i quote:

‘the applicant is confident that granite resource has potential to supply the road contractor with suitable aggregates’.

DW13 Fan Wei project engineer’s evidence was that the 1st defendant excavated the rock that he referred to as gneiss and crushed it into aggregate for road construction. According to this witness, once they identify a rock, they test it for properties and when satisfied its good for road construction, they enter into agreements with the owners of the land.

Both the plaintiff and the 1st defendant were in agreement that the granite rock was a source of aggregate for road construction.

At the heart of issue No. 3 is whether granite is an industrial mineral and therefore regulated by the Mining Act 2003.

Both parties called expert witnesses, to prove their respective positions.

While PW2 Okewling a mining engineer in the Ministry of Energy was emphatic that granite rock can only be mined by licence from the Ministry, DW 3 Mr. Rudigizah assistant commissioner, Ministry of Energy was emphatic that granite is not subject to regulation and a licence is not required to mine it.

PW2 relied on a PE. 18 a letter by the Permanent secretary Ministry of Energy and Mineral development addressed to the Permanent Secretary Ministry of Lands, Housing and Urban Development in which the permanent secretary reproduces the definitions of building minerals and industrial minerals in the Mining Act. The letter was intended to give guidance to computation of compensation where development projects are being undertaken.

The letter was not addressed to the defendants or the plaintiffs; therefore, its evidential value is questionable as an authoritative interpretation of whether granite is a building or an industrial mineral.

In fact , the only written statement that came from the Commissioner department of Geological Survey and Mines was a request to the 1st defendant to directly address the department on the subject of quarrying granite rock at Atumtoak and Kamusalaba, and not to simply be copied letters addressed to the Permanent secretary. This letter is PE17 and dated 25th August 2014. Therefore, no authoritative statement came out from the responsible department on the definition of minerals when the dispute first arose.

While agreeing that granite is a both a stone and a mineral, DW3 Rudigizah and Bwesigye DW4's positions were that it was not an industrial mineral having been taken out of that definition by article 244 (5) of the Constitution as amended and in spite of the definition in section 2 of the Mining Act that classifies it as an industrial mineral.

Under section 2, industrial minerals includes rock, gravel, **granite**, sand, sand stone among other minerals, commercially mined by a person for use in Uganda or industrially processed or semi finished products and may include such minerals as the Minister may from time to time declare in the gazette.

Building minerals include rock, clay, gravel, sand murrum among other minerals mined by a person from land owned or lawfully occupied by the person for domestic use in Uganda for building or for his own use of road making and may include such minerals as the Minister may declare in the gazette to be building minerals.

For comparative purposes, i examined the Mining Act 14 of 2010 of Tanzania. Building minerals are referred to as building *materials* and they include all forms of rock, stones, gravel, used for construction of building, roads, dams etc.

Industrial minerals on the other hand include metallic minerals used in industries.

As clearly defined under section 2 of the Mining Act, whether a mineral is a building mineral or industrial mineral is determined both by the Mining Act and whether it is used for domestic or commercial purpose respectively.

Both parties are in agreement that granite rock was good for road construction. This means it is classified as a building mineral because the 1st defendant was not using it for commercial purpose but for road construction.

Both parties agree that the rocks in issue were granite rocks. They are two rocks or stones sticking out from the earth's surface as demonstrated by Dexh. 6 drawn by DW 6 Lorukale.

Cambridge Advanced Learners dictionary 3rd edition defines 'rock' as the dry solid part of the earth's surface or a large piece of stone or stones sticking up from the sea. It defines granite as a hard, pink and grey black rock used for building.

The Mining Act 14 of 2010 of Tanzania in its definition section refers to building 'materials' and not 'minerals', a position that is more consistent with article 244 (5) of the Uganda Constitution as amended that removes any stone used for building or similar purpose out of the classification of minerals .

In spite of the clear position that granite is used for building, the Mining Act 2003 that was enacted after the 1995 Constitution classified granite as an industrial mineral. This was intentional and cannot be construed as a conflict with the Constitution because the 1995 Constitution authorised parliament to make laws to regulate the exploitation of minerals.

DW4 Mr. Bwesigye, a mineral consultant wanted this court to believe that the 2005 Constitution Amendment Act introduced a new test for determining minerals but as i have earlier observed, sub article 5 is a re-enactment of sub article 3 of the 1995 Constitution and therefore the classification of granite as an industrial mineral was not affected.

In Ugandav **Bagonza, Const. Reference No. 31 of 2010**, the applicant was charged under the new Anti corruption Act for an offence allegedly committed before the enactment of the Anti Corruption Act. He argued that the law does not act retrospectively. The Constitutional Court held that the offence under the new law was a reaffirmation of the old law so that the provisions under the repealed law continue in force without interruption.

Similarly, sub article 5 of the 2005 amendment is a continuation of the 1995 position that sand, murrum, or any stone used for building purpose is not a mineral. When the Mining Act 2003 classified granite as an industrial mineral, Parliament was exercising its powers under article 244 (2) of the 1995 Constitution to make laws to regulate exploitation of minerals. In its wisdom, parliament classified granite, a substance used for building and road construction as an industrial mineral. The law will be enforced as it is.

The only lacuna i observe is the reference to building ‘minerals’ which is a contradiction if the substances listed therein are not minerals.

In their submissions, counsel for the defendant dwelt on the surface rights of occupiers of land, and the role of district local government in management of natural resources.

Counsel for the defendants made reference to article 237 of the Constitution that provides that land belongs to the citizens of Uganda. Counsel also made reference to sections 73 of the Land Act that authorises undertakers to enter and remove stone, murrum, or similar material in the execution of their work where undertaker means a person or authority authorised to execute public works. Another legislation canvassed by counsel is the Local Government Act.

Reference to these legislations other than the full text of article 244 of the Constitution as amended by Act 11 of 2005 and the Mining Act, is to say the least diversionary.

The overriding regulatory framework for minerals in Uganda is article 244 (1) of the Constitution as amended that places the management of minerals under the Government of Uganda on behalf of the Republic of Uganda. I reproduce the article:

Subject to article 26 of this Constitution, the entire property in, and the control of , all minerals and petroleum in, on or under any land or waters in Uganda are vested in the Government on behalf of the Republic of Uganda.’

This means it is the central government that controls and manages minerals.

Under section 13 of the Mining Act, only the Commissioner of Geological Survey and Mines is authorised to issue licences and therefore authority to mine and not the district local government. Participation in management of minerals by the local government is enabled by the Mining regulations 2004 that require the CAO to endorse applications for licences.

With respect to rights of occupiers of land, this issue does not arise in this case because a dispute between the occupiers and the plaintiff had not yet arisen owing to the fact the plaintiff never commenced mining operations in Atumtoak. I will only state that sections 78 to 87 of the Mining Act defines the rights of occupiers and a mineral right holder. In any case, these rights have to be fully complied with before mining operations begin.

As for the right of the community of Atumtoak or Kamusalaba to permit mining works on their land, this right is non-existent because minerals are vested in the Government of Uganda by the Constitution.

In conclusion, I find that the rock excavated by the 1st defendant contained granite mineral therefore the 1st defendant required a licence from the Commissioner of Survey and Mines, to mine and crush aggregate for road construction.

It follows therefore that the third party was not entitled to enter into an agreement with the 1st defendant to mine Kamusalaba rock and the 1st defendant was in contravention of the Mining Act irrespective that the third party had consent of the community where the rock is located.

The third party and 2nd defendant did not have capacity to enter into an agreement with the 1st defendant because under section 13 of the Mining Act, only the Commissioner of Geological Survey and Mines is authorised to issue licences and therefore authority to mine and not the district local government as already observed above.

Issue No. 3 is therefore resolved in favour of the plaintiff.

Issue No. 4: Whether the 2nd defendant has/owns the reversionary interest in the said Kamusalaba rock

While both parties are in agreement that the 2nd defendant signed owner's statement on reinstatement of the rock and land, they disagree in what capacity he signed this statement. I have examined the statement and I find that the 2nd defendant signed the statement on behalf of Nakapiripit District the third party and not on his own behalf.

It is inconceivable that the 2nd defendant would breach the Leadership code by acting on his own behalf. PE9, the agreement between the 1st defendant and third party does not suggest anywhere that this was the 2nd defendant's personal deal.

This issue is resolved in the negative.

Issue No. 5: Whether the 1st defendant is entitled to its counter claim.

The 1st defendant counterclaimed for a permanent injunction and alleged fraud.

The allegations of fraud made in the counter claim of the 1st defendant were that:

- a) Purporting that Koriang Aporole, Loyok Pudale Rapheal, Akol Charles, Lokeris Peter, Lokongole Loyor and Lokol Joseph hold the suit land under customary tenure.
- b) the plaintiff processed licences through Hon. Lokeris for the rock well knowing the 1st defendant was already engaged in the same place;
- c) Hon. Lokeris intimidating leadership of Lorengedwat sub county Nakapiripit district local government over entering the agreement;
- d) purporting to have known of the activities of the 1st defendant at Kamusalaba after obtaining the licence whereas not;
- e) processing the licence even after the CAO warning them not to interfere with the 1st defendant's activities

As submitted by counsel for the plaintiff, fraud must be specifically pleaded and proved and the standard of proof is slightly higher than in ordinary civil cases.

- a) *Purporting that Koriang Aporole, Loyok Pudale Rapheal, Akol Charles, Lokeris Peter, Lokongole Loyor and Lokol Joseph hold the suit land under customary tenure.*

I have examined the witness statement of PW1 Apo Oroma and his evidence and nowhere is there reference to a claim of the suit land as customary owners. The only reference to ownership of the suit land came out in paragraph 8(ii) of the amended plaint where it is alleged and i quote:

The 2nd defendant purporting to be the owner of subject land whereas it is common knowledge that the same is held under customary tenure by Koriang, Loyok, Akol, Lokeris, Lokongole, Lokol all sons of Teko Apo Oroma.

I have found that the 2nd defendant acted for the third party and therefore he has no personal interest in the land. Merely making a statement that the land belongs to A or B does not impute a fraudulent intent. I therefore find that this allegation of fraud has not been proved.

- b) *the plaintiff processed licences through Hon. Lokeris for the rock well knowing the 1st defendant was already engaged in the same place.*

I have found earlier on that at the time of filing the application for location Licences, no fraud was committed because the application was specific to Atumtoak rock although, the

application indicates village which village i found does not exist. Even if the plaintiff had prior knowledge, this would not impute fraud.

Secondly, Hon. Lokeris is not a party to this suit therefore his actions cannot be visited on the plaintiff.

c) *Hon. Lokeris intimidating leadership of Lorengedwat sub county Nakapiripit district local government over entering the agreement;*

I have found that as Hon. Lokeris was not a party to this suit nor was he a witness, his actions cannot be visited on the plaintiff.

d) *Purporting to have known of the activities of the 1st defendant at Kamusalaba after obtaining the licence whereas not.*

In fact, the plaintiff learnt of the activities at Kamusalaba after obtaining the licences and that is why all their correspondences after 16th August 2013 cited Atomtoak/Kamusalaba or Atumtoak and Kamusalaba. On 28th August 2013(PE16), the plaintiff wrote to the 1st defendant with respect to granite rock at Atumtoak. By then, there was no knowledge of Kamusalaba.

It was on 20.12. 2013, that they began referring to Atumtoak and Kamusalaba. (PE 6). The fact that the plaintiff knowingly laid claim Kamusalaba rock after licences were granted with respect to Atumtoak rock might be evidence of fraud. However, because this specific fraud was not pleaded, the 1st defendant is not entitled to claim benefit from it.

This means the allegation of fraud in (d) has not been proved to the required standard.

e) *processing the licence even after the CAO warning them not to interfere with the 1st defendant's activities*

For the plaintiff to continue with processing the licence after been advised by the CAO that Kamusalaba rock was not available was the plaintiff's choice. It does not amount to fraudulent conduct.

Remedies.

The plaintiff failed on some issues and succeeded on others and so did the defendants. Where a party claims special and general damages, it is a rule of practice that i assess them in the event that the appellate courts find that i erred.

Special damages

The plaintiff claimed for special damages of 8,582,022, 000/

The plaintiff relied on an expert PW3 Henry Bwire who gave projected profits after five years investment of 848million/ as 8.5 billion/.

DW6 Kyalimpa the expert witness for the defendants was of the view that the economic viability of a project is determined by the Net Present Value which Mr. Bwire PW3 did not show neither did he show how he arrived at the sum of 8.5 b as projected profits. Dr. Kyalimpa defined NPV as the difference between projected expenditures and projected revenues and a negative NPV means the project is not viable while a positive NPV means it is viable.

Dr. Kyalimpa and other defence witnesses were emphatic that it is not the monetary cost of making a road that matters but the immense economic and social benefits that will accrue to the community.

PW4 Ronald Olaki from UNRA presented the approved bill of quantities that put cost of crushed aggregate at 23 billion. This being the case, I would rather peg my assessment of special damages to this cost than on projections of experts.

Had the plaintiff succeeded in their claim, I would have awarded the sum of 4 billion as special damages bearing in mind the budget for crushed aggregate is 23billion and bearing in mind that the plaintiff has not mitigated its loss by excavating Atumtoak rock.

General damages

The purpose of general damages is to compensate the injured person as far as possible for the harm or wrong suffered. This means the failure to excavate Kamusalaba, assuming the plaintiff had control over it, cost it a business opportunity. Considering that no such opportunity may come up again in that location in the near future, I consider a sum of 500,000,000/ adequate as general damages.

Exemplary and punitive damages

With respect to exemplary and punitive damages, these do not arise because the 1st defendant genuinely believed it had the right to mine granite for road construction having been mistakenly granted authority by the third party that was acting on behalf of the community.

By way of obiter, i wish to note that rather than defending individuals or entities that breach the Mining Act, the Commissioner of Geological Survey and Mines should take steps to investigate and prosecute them.

Having found that the 1st defendant was not licenced to mine Kamusalaba rock, in the interests of justice, I make the following orders.

1. The 1st defendant shall render an account of the quantity of aggregates procured from Kamusalaba rock to the Attorney General and pay the Government its monetary value within reasonable time and not later than 30 days from the date of this order.
2. A permanent injunction shall issue restraining the 1st defendant from mining Kamusalaba rock.
3. The Commissioner Geological Survey and Mines to take steps to investigate and prosecute future breaches of the Mining Act 2003
4. The order dated 9th September 2015 attaching the 1st defendant's payment of 8.5 Billion/ held by UNRA is hereby vacated.
5. As the plaintiff was successful on three issues while the defendant was successful on two issues, and because it is the plaintiff who brought this action that exposed the irregularities by the 1st defendant, the 1st defendant shall pay ½ of the taxed costs to the plaintiff.

DATED AT SOROTI THIS 14TH DAY OF APRIL 2016.

HON. LADY JUSTICE H. WOLAYO

