

**IN THE HIGH COURT OF TANZANIA**

**AT ARUSHA**

**CIVIL CASE NO. 46/2013**

**ENERGY DEVICES CO. LTD.....PLAINTIFF**

**Versus**

**ENERGY AND WATER SOCIAL**

**INVESTMENT CO. LTD.....DEFENDANT**

*Date of last Order: 14/07/2015*

*Date of Judgment: 28/07/2015*

**EX-PARTE JUDGMENT**

**MASSENGI, J**

The Plaintiff ENERGY DEVICES COMPANY LIMITED through the service of a law firm styled "Law Access" is suing the defendant for the recovery of Euro One Hundred and Eighty Nine Thousand Nine Hundred and Seventy One and Thirty Seven Cents ( 189,971.37) and Tanzania Shillings Four Hundred Thousand and Eighty One Seven Hundred and Twenty Seven and Seventeen Cents (Tshs. 481,727.17) being outstanding amount for the services rendered to the defendant; and compensation for breach of contract to the tune of Two Hundred and Forty One Thousand, Four Hundred and Eighty Eight Euros (241,488). Hence the Plaintiff prays for reliefs as follows;

- (i) Declaration that the Defendant has breached the contract

- (ii) The Defendant be condemned to pay the Plaintiff the sum of One Hundred and Eighty Nine Thousand Nine Hundred and Seventy One and Thirty Seven Cents Euros (189.971.37) and Tanzania Shillings Four Hundred Thousand and Eighty One Seven Hundred and Twenty Seven and Seventeen Cents (Tshs. 481, 727.17) being the amount of outstanding invoices.
- (iii) Pay specific damages as the tune of Two Hundred and Forty One Thousand, Four Hundred and Eighty Eight Euros (241,488) for breach of contract.
- (iv) General damages
- (v) Interest of 23% of the decretal sum at Commercial Bank's rate
- (vi) Interest of 12% of the decretal sum from the date of judgment till payment in full.

Brief facts emanating to this suit are as follows; Sometimes in March, 2011 the Plaintiff entered into a contract with the defendant for operation, maintenance and servicing of the steel structures of the defendants' buildings, electrical wiring of the building from the meter up to the place where the machinery is installed and all the machinery installed at the Defendant's workshop. The said contract was for a period of three (3) years commencing from 1<sup>st</sup> March, 2011 to 28<sup>th</sup> February, 2014. The Plaintiff undertook to discharge its obligations as per the said contract by maintaining and servicing the Defendant's machinery and electric equipments. After rendering the above services, the Plaintiff issued the Defendant with invoices for the service rendered, but the defendant never took any trouble to pay the amount claimed. Probably the Defendant after

being served with the twenty one (21) days notice of liquidation which ultimately could result in the winding up of the Defendant's Company as suggested by the Plaintiff; on the 11<sup>th</sup> day of September, 2013 the Defendant wrote to the Plaintiff a notice to terminate the contract which was to exist until 28<sup>th</sup> February, 2014. The Plaintiff's efforts and demand to communicate with the Defendant regarding to the invoices and a notice for breach of contract was in vain, hence this claim.

Initially, before the hearing stage of this matter, the Defendant was represented by Mr. Gerald Nangi learned counsel. Even on that initial stage, the Defendant's counsel rarely appeared before the court the fact which forced this court to adjourn the case several times. On 23/06/2014 this court fixed the matter to come for FPTC on 25/6/2014 but on that date as usual the Defendant's counsel never appeared hence Mr. Ngoisek learned counsel who appeared for the Plaintiff prayed the court to fix a date for ex parte hearing as the Defendant's counsel habitually never appeared and without any notice to the court; hence the court allowed ex parte hearing to be on 17/7/2015. On that date, Mr. Nangi appeared and prayed for an order of ex parte hearing be set aside and the defendant be given an opportunity to defend his case. For the interest of justice, this court set aside the ex parte hearing and ordered the matter to proceed with 1<sup>st</sup> Pre Trial Conference (1<sup>st</sup> PTC) and then the matter was assigned to the Mediator. On 23/10/2014 the mediation was marked to have failed and the mediator ordered the file be remitted to the trial judge for mention on 5/11/2014. Since then the Defendant's counsel never appeared before the court thus, on 14/07/2015 the Plaintiff's counsel again prayed for ex parte

hearing. This court after considering the above situation which show habitual non appearance of the Defendant's counsel and without and justifiable cause granted the prayer for ex parte hearing.

PW1 SANDER R. VANDER WAAL the Director of the Plaintiff's company testified that the company is dealing with maintenance, services and installation of power energy resources such as generators, solar panel and wind generators. He stated that he know the Defendant as they have been working together on various projects for more than 8 weeks whereby they were serving their equipments which they installed for them. He stated that they offer contract for service and maintenance for all their installed equipment and he prayed to tender the contract which they entered with the defendant and the same was admitted and marked PE1. He further stated that they claim against the Defendant for the outstanding invoices to the tune of Euro 189, 971.137 cents and Tanzania Shillings 481,727.70 for the services provided to the Defendant. He prayed to tender the said invoices and the same were admitted in evidence and marked PE1-2 collectively.

He further stated that they also claim compensation for breach of contract to the tune of Euros 241, 488 as there was no notification on such breach as the defendant was required to issue a notice in writing and be served to the other party six months before expiry of the contract as stipulated under clause 4 item 5 of the contract. He contended that the contract was to expire on November, 2013 but they were served with termination letter on 11<sup>th</sup> September, 2013 which was a period less to the termination time. He prayed to tender the notice of termination of contract

and the same was admitted in evidence and marked PE3. He further testified that they did remind the defendant about the due payment by sending a demand note to the Defendant to pay the outstanding invoices and compensation for a breach of contract and prayed to tender that demand note and the same was admitted in evidence and marked PE4. He therefore stated that their prayer before this court is to be paid the outstanding debt, compensation for breach of contract with interest and costs of the suit.

I have considered the Plaintiff's evidence and gone through the exhibits tendered before the court. Having gone through the evidence adduced by PW1 there is sufficient evidence proving that the Plaintiff entered in to a contract with the Defendant for operation, service and maintenance of the Defendant's structures as proved by exhibit PE1. Starting with the claim of Euro One Hundred and Eighty Nine Thousand Nine Hundred and Seventy One and Thirty Seven Cents (Euro 189,971.37) and Tanzania Shillings Four Hundred Thousand and Eighty One Seven Hundred and Twenty Seven and Seventeen Cents ( Tshs. 481,727.17) being outstanding debt for the services rendered by the Plaintiff to the Defendant, I have gone through the Profoma Invoices (exhibit PE1-2 collectively) and the same show that in October, 2012 the Plaintiff rendered services for replacing 25 pieces of metal electricity poles to the Defendant and on 29<sup>th</sup> October, 2012 the Plaintiff issued the Defendant with Profoma Invoice of Total amount including VAT - Tshs. 11,357,500.00/=. The Profoma Invoice show that the amount indicated above was partly paid and remained a balance of Tshs. 481,727.17/= as

proved in evidence. In regard to the claim of Euro 189,971.37, the evidence show that for the period of 01/01/2014 – 31/02/2014 the Plaintiff issued a Profoma Invoice of Euro 94,985.68 in total being contractual charges, for the period of 01/10/2013 – 31/12/2013 the Plaintiff issued a Profoma Invoice of Euro 142, 478.53 being contractual charges as well and both of them were not paid by the Defendant. But this court after going through the invoices which were issued for contractual charges and after doing the calculations, it was found that the two invoices make a total of Euro. 237,464.21 but the amount claimed in the plaint is Euro 189,971.31. PW1 never testified or gave any clarification in regard to the said deference in amount. In absence of the evidence in that regard, therefore this court prefer to grant the amount sought in the plaint for being lesser than the total amount indicated in the two Invoices. Basing on that, I therefore order the Defendant to pay the Plaintiff the amount of Tshs. 481,727.17/= and Euro 189.971.37 being the outstanding amount for the services rendered by the Plaintiff to the Defendant as indicated above.

In regard to the claim of specific damages for breach of contract at the tune of Two Hundred and Forty One Thousand, Four Hundred and Eighty Eight Euros (Euro 241,488); it is certain principle in law that special damages must be proved as stated in the case of **ZUBERI AUGUSTINO VS. ANICET MUGABE (1992) TLR 137**. See also the case of **BAMBRASS STAR SERVICE STATION VS. MRS. FATUMA MWALE [2000] TLR 390** where it was stated that;

*"It is trite law that special damages being exceptional in their character and which may consist of off pocket*

*expenses and loss of earnings incurred down to the date of trial must not only be claimed specifically but also strictly proved."*

But in this matter, the Plaintiff never give any evidence to prove special damages. There is no evidence which establish that the Plaintiff suffered any loss for the breach of contract. That being the case, this court cannot grant the prayer for special damages. Rather this court grant general damages of Tshs 3,000,000/= for the distress occasioned to the Plaintiff for the breach of contract.

This court also awards the interest of 12% of the decretal sum at Commercial Bank's rate and interest of 7% of the decretal sum as from the date of judgment till payment in full. The Defendant also shall pay costs of this suit.

Order accordingly.

**(SGD)**

**F.H. MASSENGI**

**JUDGE**

**28/07/2015**

Judgment delivered in Court this 28<sup>th</sup> day of July, 2015 in the presence of Mr. Ngoseik for the plaintiff and in absence of the defendant.

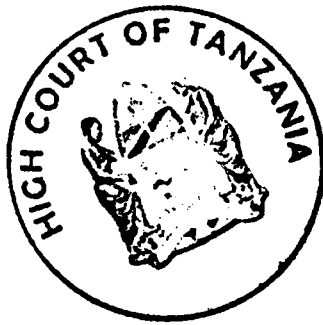
**(SGD)**

**F.H. MASSENGI**

**JUDGE**

**28/07/2015**

**Order:** Plaintiff to serve defendant with a copy of the ex-parte judgment.



**(SGD)**

**F.H. MASSENGI**

**JUDGE**

**28/07/2015**

I hereby certify this to be a true copy of the original.

  
**DEPUTY REGISTRAR**  
**ARUSHA**

*13/8/15*