

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL CASE No. 1/2016

MS DRK GENERAL MERCHANT LTD ----- PLAINTIFF

VERSUS

MULEBA DISTRICT COUNCIL ----- DEFENDANT

EX – PARTE JUDGMENT

1/8/2017 & 9/3/2018

KAIRO, J.

The Plaintiff Ms DRK General Merchant Ltd has decided to sue the Defendant praying for Judgment and decree as follows:-

1. An order for the payment of the sum of Tshs 207,399,056.81 against the Defendant being the consideration for the contracted work.
2. An order for the payment of the interest of the mentioned amount of Tshs 207,399,056.81 at the rate of 21% p.a from the date of the delivery of judgment to its total payment

3. An order for the payment of the suffered general damages as this Honorable court may deem just to grant.
4. Cost of the suit.
5. Any order (s) and relief (s) as the Hon. Court would deem just to grant.

The Defendant was accordingly served as conceded by the council solicitor one Mr. John Ngimbwa on 3/5/2016 when the matter was scheduled for mention. He further conceded to be late to file their written statement of defence and that they were negotiating with the Plaintiff to settle the matter out of court.

It seems the negotiations to settle didn't bare fruits and since the Defendant hasn't filed their WSD, the court ordered exparte proof of the suit.

The Court and the Plaintiff framed and agreed on the following issues:

1. Whether the Plaintiff and the Defendant have entered into the agreement for the construction of the irrigation scheme and supply of pumps and pipes at Kyota and Buyaga in Muleba District.
2. Whether the Plaintiff has executed its contractual obligation by constructing the irrigation scheme at Kyota and supply of pumps and pipes at Buyaga Irrigation scheme in Muleba District.
3. Whether the Defendant has fully paid the works amount totaling to Tshs 234,744,196.64 being the total discharge of the agreed sum.
4. To what reliefs are the parties entitled to.

The Plaintiff case was built up of only one witness who has tendered three documentary exhibits (exhibits P1 – P3). The Plaintiff was represented by the learned counsel Advocate Lameck Erasto.

Pw1 who was the only witness for the Plaintiff was one Rwehumbiza Katabo, the Plaintiff's Managing Director. His evidence was to the effect that, the Plaintiff has entered into agreement with the Defendant to build canals, supply of water pipes and water pumps into two projects of Kyota and Buyaga and that the said agreement was signed on 3/3/2015. The witness (Pw1) tendered the said agreement between the Plaintiff and the Defendant. The same was admitted as exhibit 'P1'.

Pw1 prayed to refresh his mind on the contents of the agreement under section 168 of the Law of Evidence Act, Cap 6 RE 2002, and the prayer was granted.

Pw1 went on to testify that the contract price was Tshs 234,744,196.64. He went on that after signing the contract and executed the task partly, the Defendant paid the Plaintiff an advance of Tshs. 25,000,000/= but the balance was never paid after fulfilling the task agreed in the contract. The witness went on that, the District Irrigation Engineer wrote a completion certificate to authenticate that the Plaintiff has already fulfilled the task worth Tshs 207,399,056.81, but the Plaintiff was never paid the said sum. The Plaintiff wrote three letters to the Defendant requesting them to pay the company (Plaintiff) the said amount but in vain. The Plaintiff thus

decided to consult the Advocate instructing him to write to the Defendant a demand letter to demand the said sum of Tsh 207,399,056.81 which the Advocate did. Pw1 prayed to tender the demand note wrote by the Advocate to the District Council as an exhibit which prayer was granted. The said Demand letter to the Defendant was admitted in court as an exhibit 'P2'.

Pw1 went further that, the District Council after receiving the Demand letter answered them through the Advocate wherein the Council admitted the liability and promised to pay the same. The witness prayed to tender the answer letter from Muleba District Council dated 26/11/2015 acknowledging the debt as an exhibit. The court accordingly admitted it as exhibit 'P3'.

The Witness went on testifying that despite the admission of the debt into the said letter, they didn't pay in time adding that it was after the institution of this suit and serving them with the summons that the Council paid the Plaintiff Tshs. 40,800,000/= promising to pay the difference of Tshs.166,599,056.81 in a month's time but up to the time when Pw1 was testifying, five months have lapsed and no payment was effected to the Plaintiff. Pw1 also added that, the Plaintiff has to borrow from the bank where it was paying interest so that the workers who performed the work subject of the contract could be paid. Pw1 concluded that, following the said default, he prayed the court to order the Council to pay the balance of Tshs 166,599,056.81, general damages and cost.

That marked the end of the Plaintiff's case. The Advocate for the Plaintiff didn't wish to make final submission and thus prayed for Judgment.

When the court was in the process of writing the Judgment, the defendant filed application No. 14/2016 wherein the affidavit showed that the same was affirmed by one Bakari Juma Bakari.

In the said application, the Defendant was praying for a court order to set aside the order to proceed with the hearing of the suit *ex parte* in respect of this case among other reliefs. The court thus in its wisdom stayed the judgment writing process pending the hearing of the filed application. In reply to the application, the Plaintiff raised three P.Os and on 19/7/2016, the court in the presence of the Learned Counsel Advocate Lameck Erasto and Mr. Ngimbwa; the Solicitor for the Defendant agreed that the hearing of the P.Os be scheduled to take place on 9/8/2016. Surprisingly no one on the part of the Defendant appeared on the scheduled date. But more surprising, no information whatsoever was relayed to Court on the cause of the Defendant's absence despite having various officers. The Court thus proceeded to hear the P.Os in the Defendant's absence. After hearing the arguments, the court sustained one of the P.Os raised and consequently struck out the application with cost for want of competency on 7/4/2017. The Court thus reverted to writing the judgment stayed. I will thus analyze the framed issue in *seriatim*.

Starting with the first issue; Pw1 who introduced himself when testifying as the Managing Director of the Plaintiff stated that on 3/3/2015, the Plaintiff and the Defendant entered into a contract wherein the Plaintiff was to conduct the tasks of constructing and supplying pumps at Kyota and Buyaga irrigation scheme in Muleba District. The witness tendered the original document of the said contract (exhibit P1). The court went through the tendered exhibit P1 to verify what has been asserted by Pw1 and observer to be correct. But further to that exhibit 'P3' which is a letter written by one John Ngimbwa to the Advocate of the Plaintiff, confirmed that they have entered into agreement with the Plaintiff. The said exhibit P3 was replying the letter written by the Plaintiff through his Advocate (Exhibit P2) into which he referred to the contract No. LGA 1037/KGR/2013-14/MLB/DIDF/01 of 3/3/2015 for the consideration of Tshs 234,744,196.64 which is exhibit P1. As such I have no doubt in my mind that what has been testified by Pw1 with regards to the existence of the agreement between Plaintiff and Defendant to do the said tasks is true. It is therefore the finding of this court that the first issue has been answered affirmatively.

The second issue is whether the Plaintiff has executed its contractual obligation by constructing the irrigation scheme at Kyota and supply of pumps and pipes at Buyaga Irrigation scheme in Muleba District.

Pw1 in his testimony asserted that after signing the contract, they started the assigned task and eventually finalized the same. He went on that after completion, the District Irrigation Engineer wrote a completion certificate to

verify that the assigned task which amounted to Tshs 207,399,056.81 has been fulfilled. The said certificate was not tendered as an exhibit. Nevertheless the witness (Pw1) when testifying told the court that after failure to get the payment for the work done, the Plaintiff instructed Advocate Erasto to demand the amount due from the Defendant; (Exhibit P2). The court observed that the heading of the said letter reads; *“statutory notice of the intention to sue the District council with respect to the unpaid Tshs 207,399,056.81 relating to the building and supply of Pumps ad pipes”*. The court further observed that the said letter was replied by the Defendant (Exhibit P3) through his official; one John Ngimbwa into which he conceded to the debt amount. Impliedly the Plaintiff has fulfilled the tasks assigned to it that is why the Defendant has conceded to be indebted of the stated amount in the letters (exhibit P2 & P3) which is almost the difference of the contract sum and the advance payment given to the Plaintiff. I am thus clear in my mind that the Plaintiff has executed its part of the bargain. Consequently the second issue has also been answered affirmatively.

The third issue framed is whether the Defendant has fully paid the work amount; totaling to Tshs. 234,744,196.644 as a total discharge of the agreed sum.

According to the testimony of Pw1 and evidence adduced the contract amount was Tshs. 234,744,196.64. It was testified that, the Defendant has advanced Tshs, 25 million after contract signing thus reduced the contract amount to some extent, but no more payment was effected and the Plaintiff

decided to demand the remaining balance of Tshs. 207,399,056.81- (exhibit P2) the amount which was conceded by the Defendant and promised to pay (Exhibit P3). But again the promise was not fulfilled. Pw1 has testified that after the Plaintiff decided to institute this suit, the Defendant paid some money out of the debt of Tsh. 207,399,056.81 amounting to Tshs. 40,800,000/= thereby reducing the debt to Tshs. 166,599,056.81 which remain unpaid to date.

Looking at the facts and evidence adduced and the analysis done on the same, the Defendant is still indebted to the tune of Tshs. 166,599,056.81 out of the total contract sum of Tshs. 234,744,196.64. In that respect therefore the third issue has been answered negatively.

The last issue to be determined is to what relief the parties are entitled to.

Section 37 of the Law of Contract Act, Cap 345 RE 2002 has put obligations to the parties to a contract to perform their respective promises in the contract concerned and I wish to quote it in verbatim;

“Section 37 (1) the parties to a contract must perform their respective promises, unless such performance is dispensed with or excuses under the provision of this Act or any other law”.

In the case at hand, I believe the exception provided by the above cited provision doesn't concern the contract between the Plaintiff and the Defendant that is why the Plaintiff has fulfilled its obligation, but the Defendant has failed on his part, thus infringed section 37 (1) of Cap 345.

The omission amounts to the breach the contract by the Defendant. I understand that the Defendant has paid partly but the contract required the Council to discharge fully its obligation by paying the whole contract price having in mind that the Plaintiff has fully discharged its obligation in the contract. Though it is not stipulated when the whole sum was to be paid, however I believe by 3/11/2015 when Advocate Lameck Erasto was writing a demand letter (exhibit P2) the remaining amount of Tshs. 207,399,056.81 was already due. I am thus convinced that some amount has remained due to date despite the part payment made. Section 73(1) of Cap 345 (supra) has provided for the consequence/remedy in case of contract breach as follows 73 (1):

“when a contract has been broken a party who suffers by such break is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby which naturally arose in the usual cause of things from such breach of it”.

The Plaintiff in the matter at hand has prayed for payment of the remaining balance of Tshs. 166,599,056.81 and general damages as the court would deem just to order. Principally the award and quantum of the general damages are in court's discretion. **[Refer the case of Admiralty Commissioner vrs S. Susquehan [1926] AC 655 AT page 661.** However the general rule applicable in assessing damages is *restitution in integrum* and not to enrich the claimant/Plaintiff unjustly. Section 73 (2) of the Cap 345 (supra) has given some guidance in awarding the injured party

compensation wherein it provides that, *“the compensation is not to be given for any remote and indirect loss of damages sustained by reason of the breach”*.

Further to that the case of **Bolag vrs Hutchison [1950] AC 525** also can assist to clarify the *restitution* rule whereby Lord Macnaghten observed the following *“General damages are such as the law will presume to be direct natural or probable consequence of the action complained of”*.

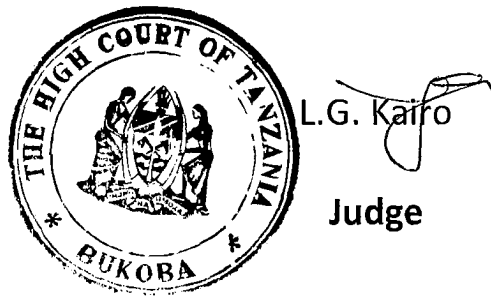
Pw1 has deposed that the Plaintiff had to borrow from the bank so as to pay the workers who performed the task and that the company is paying the interest as a result of such borrowing. However no documentation to that effect was tendered in court. Nevertheless it is not in dispute that the action of the Defendant to refuse or neglect to pay for the task performed since year 2015 definitely has caused agony, anguish and loss to the Plaintiff having in mind the devaluation of our shilling and escalation of cost of fund, since then. Therefore considering the circumstances above explained, I hereby enter Judgment for the Plaintiff and decree as follows:

- i. Payment of the remaining balance for the task performed as per contract, amounting to Tshs. 166,599,056.81.
- ii. General damages of Tshs. 5,000,000/=.
- iii. Interest at banks rate (21%) per annum on the remaining contractual amount due which is Tshs. 166,599,056.81 from the date when the amount became due to the date of judgment.

- iv. The decretal sum shall attract an interest of 7% per annum from the date of judgment to the payment in full.
- v. Cost of this suit shall be borne by the Defendant.

It is so ordered.

R/A explained.



At Bukoba

9/3/2018

Date: 09/03/2018

Coram: Hon. L.G. Kairo, J.

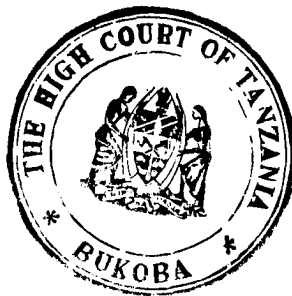
Plaintiff: Absent, Advocate Lameck Erasto

Defendant: Absent

B/C: R. Bamporiki

Advocate Lameck Erasto: Hon. Judge, I am representing the Plaintiff who is not in court due to unavoidable reason. The matter was scheduled for Judgment. We are ready to receive it.

Court: The case is scheduled for Judgment. The same is ready and is read over in open court before Advocate Lameck Erasto for the Plaintiff but in the absence of the Defendant.



L.G. Kairo
Judge
9/3/2018