

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM.

CIVIL CASE No. 216 OF 2016

MIRAGE LITE LTD.....PLAINTIFF

Versus

AIRTEL TANZANIA LTD.....DEFENDANT

JUDGMENT

31st March, - 7th May, 2020

J. A. DE-MELLO J;

It is a claim of **United States Dollars Two Hundred and Seventy two Thousands, Seven Hundred and, Sixty Five (USD \$ 272,765.00)** being the amount due as per the **Variation Certificate No. 1 to 13**, that, the Plaintiff has brought against the Defendant. The Defendant are a reputable mobile network provider who contracted the Plaintiff to carry out electrical works for **MSR Data Room center** at the then, **Zain/Airtel building** along **Bagamoyo Road**, at an agreed total costs of **United States Dollars Nine Hundred and Forty Eight Thousands, Four Hundred and Twenty Eight and Four cents (USD \$ 948,428.04)** evidenced by **Purchase Order Number 000022927** dated the 31st October, 2008. It is also evident that, Plaintiff carried out the work under supervision of **M/S Kentoplan Ltd.** as an **Electrical Consulting Engineers**, the ones who allegedly made variation for an additional of extra work which Plaintiff

carried out on the inter-connecting rooms. Following completion of that, extra work, the Plaintiff raised variation certificates which were approved by the consulting Electrical Engineer who in-turn forwarded them to the Defendant for payment. However, the Defendant managed to pay **USD \$ 844,873.19** only leaving a balance of **USD \$ 272,765.00**, now subject to this claim.

Worth noting here is that, the suit was a pending backlog since and it is until 2020 that, it attracted a full hearing with the Plaintiff in care of **Counsel Rutabingwa Advocates** whereas the Defendant fended by Counsel **Miriam Bachuba** from **IMMA Advocates**

The following issues were framed;

- I. Whether M/S Kentoplan Ltd. was an Agent of the Defendant?**
- II. Whether the variations carried out by Plaintiff were lawful sanctioned by the Defendant as per the governing procedures?**
- III. What are the Reliefs Parties entitled to?**

In course of hearing the following exhibits were tendered and, admitted.

The Plaintiff summoned three witnesses namely **Mehangra Gurdeep Singh, Adonis Kamala,** and, **Davinder Singh**, while the Defendant lined up only one, named **Gladdy Fimbari**, legal officer of the Defendant,

Reading from the pleadings and, which the witnesses based their evidence it is from outstanding amount owing from the Defendant to the tune of **USD\$ 272,765.00** as a result of variations for electrical works The following were the issues framed;

- 1. Whether M/S Kentoplan was an agent of the Defendant?**
- 2. If issue number 1 above is in affirmative, whether the variations carried out by the Plaintiff were lawful?**
- 3. Reliefs if any are Parties entitled to?**

On the **7th** of **February, 2019** before **Hon. Luvanda J;** and, in the presence of **Rutabingwa Advocate** and, **Salah Advocate**, a **Settlement** was registered to be attempted, as the Court was prayed to adjourn the matter with a view of finalizing it. This was submitted by **Counsel Rutabingwa** and, which **Counsel Salah** conceded it to be the right position. However, on **28th May, 2019** the anticipated **Settlement** was record not forthcoming.

On the **16th** of **May, 2019** the matter assumed its course as hearing and in full gear commenced backed up by seven exhibits other than the said witnesses as hereunder;

- 1. Purchase Order No. 000022927 dated the 31st October 2008 – exhibit P1**
- 2. Variation No. 1 Extra Works for Zain MSR Tanzania – exhibit P3**
- 3. Valuation No. 4 Final Account Electrical Works for Zain Tanzania – exhibit P3**
- 4. Final Account for Electrical Works for Zain Tanzania dated the 15th November 2010 – exhibit P4 from Kentoplan Ltd. To Airtel (T) Ltd.**

5. **Extract of a Special Resolution of an Extraordinary Meeting of Board of Directors held on the 6th January, 2016 for legal action against Airtel as well as instructing Rutabingwa & Co. Advocates for suing – exhibit P5**
6. **Demand of Retention of Money for Electrical Works dated 19th March 2012 – exhibit P6**
7. **Letter in response to the Demand Notice dated the 5th February 2012 annexed with letter dated the 7th May 2012 admitting the claim and commitment to pay the amount due – 7th May, 2012 – exhibit P7**

PW1 Gurdeep Mehagra, tendered **exhibits P1, P2, P3, P4, P5, & P6**, all in the endeavour to show cause why the remaining balance **USD \$ 270,000.000** is still owing and pending from the Defendant. That, nothing out of scope was done and without the Defendants knowledge in whose supervision was **Kenton Plan** their electrical engineer. Two demand notes were issued one for retention while the other for variations much as no written agreement was in place but based on what **Kentoplan** was recommending. Be it as it may and, notwithstanding the gap, payments by the Defendant were directed to the Plaintiff indicating recognition. **Adones Kamala, PW2**, a registered quantity surveyor gave an account of how the stakeholders in similar works operate in case of an assignment/project. It is a circle involving various players each attracting a separate expertise, from **Employer, Consultant and Contractors**. He alluded as to how jobs can be varied in case of need and always agreed between the contractor and consultant for onward approval by the Employer. In this instant case he

observed there was agreement between the Employer and the Defendant too of which the Consultant Kentoplan was fully aware and in charge. Last on line was **PW3 Davinder** a director for **Kenton Plan** corroborated engaged for design a mobile switch gear for the Defendants in which the Plaintiff secured the job. He highlighted all the duties undertaken by him to include changes and variations if any in course of projects. His assessment confirmed the accomplishment of the same and approved by issuing a final certificate for payment. He even and on cross examination testified Airtel to be aware and approved, after their Project Manager, engineers and Architects deliberated in a meeting. The neglect, failure of refusal does not augur well, he observed much as he never followed up whether the Plaintiff was paid or not. It is thus the Plaintiff's prayer for reliefs sought considering the fact that the company has been denied its gainful use of the said money and pray for the **Commercial Bank interest of 20%** on the said sum of **USD \$ 272,765.00** from **November, 2010** to the date of Judgment, compounded annually. **PW2** corroborated on **PW1's** but went to explain how. It is hence their prayers that the suit is allowed, prayers granted with costs

As observed above, **one (1)** witnesses appeared for the Defendant who as evidenced from their **Written Statement of Defense** vehemently denied the allegations. In essence it was categorically stated that, no variation whatsoever other than the substantive job that was discussed and, agreed by the Plaintiff and, the Defendant. Moreover, **M/S Kentoplan Limited** whom they contracted with, was not an agent of Defendant and, hence not party to the agreement. If at all, it is purchase order **number 000022927**

that, was agreed as they denied liability if any, for variation as alleged by the Plaintiff, she stated. **Glady Fimbali** the **Legal Counsel** for the Defendant since **August 2014**, is evidently relying on what she found from record, not being around the time this matter was in action. Hers was basically avoiding liability based on absence of "**Principal and Agent**" between the two. **Exhibit P2** she alludes did not receive any blessings from the Defendant hence not sanctioned, not even the alleged minutes for the meeting claiming the presence of **Project Manager and Engineers from Airtel**. In the absence of emails, purchase order or standard terms and conditions, **exhibit P1 & D1** renders the claim void, of which up to this moment the Plaintiff has failed to share. In total, **DW1** testified, the reliefs sought and, unsupported are vague and unmerited. **Section 110 (1) & (2)** of **Cap. 6** is applicable for failing proof that Civil law demands, on such allegations.

To start with the first issue, and, in as far as **exhibit P4**, there is no dispute that, **Kentoplan Ltd.** acted as a Consultant in contractual works implemented by Plaintiff for Defendants. **Exhibit P4** shows Final account for electrical works for **Zain Tanzania** in respect of **Purchase Order No. 0022927** which is **exhibit P1** as evidenced **PW3**. It is even glaring clear that, relationship created an **Agent** and, **Principal** expressly or implied and, or ratification by the **Principal of the Agent's** act, done on his behalf. All that is required to create an agency relationship is the manifestation of assent by both sides, which Defendant's act manifest the existence of fiduciary relation. In this instant case **Kentoplan Ltd**, was an Agent of the Defendant. This then answers the first issue in affirmative. Coming to the

second issue, and, based on the above, the Plaintiff acting in that capacity went ahead to conduct variations that **Kentoplan Ltd.** an agent of the Defendant found to be significant to allow the switch gear to turn on. The said variations were confirmed though email and, were carried on as per **exhibit P2** which is variation for extra work for Zain and, **exhibit P3** final accounts electrical work for Zain Tanzania.

I heard and, have gone through the evidence submitted by both Parties and would wish to state ay, the subject of the contract was implemented within the premises of the Defendant with no evidence had been brought about disputing that the said works had not been done. Since it is now established that, **Kentoplan Ltd.** acted as an **Agent** of the Defendant, all the advice and variation proposed was done on behalf or for the Defendant and can not simply deny having full knowledge backed up with all the necessary documents such as **exhibit P2** directed to **Kentoplan Ltd** for communication to Defendant. **PW3** told the Court that his duty was to verify the correctness of variations and, its implication financially prior to submissions to the Defendant. He further said that, the variations were known to all Zain/Airtel team. It is also clear that, the performance of the contract was done on agreed standards which the Defendant failed to address, reasons which I find enough evidence to satisfy the findings that Defendant did authorized variation as advised by his agent. It is obvious that, the Plaintiff has performed his responsibility of which the Defendant has not denied under the contract but, failed to discharge his, which then gives rise to liabilities accruing and, owing to the Plaintiff as reflected in the Relief sought. In fact and on record there was an attempt to Settle let alone

the letter acknowledging the debt and promise to pay admitted as (exhibit P7). One would wonder and if not a party to, then why all these correspondences. **Section 73** of the **Law of Contract Cap. 345** is certain on Compensation and, Damages, considering failure to respect the contract by the Defendant. This will afford the injured rather suffering party, to his rights. In the case of **Kibwana & Another vs. Jumbe (1990-1994) 1 EA 223** it was held;

“The Court in granting damages will determine an amount which will give the injured party reparation for the wrongful act and for all the direct and unnatural consequence of the wrongful”

This being special damage and, which is evident in as far as exhibit justifies an award to the exact amount of **Principal sum of USD \$ 272,765.00**, interests at the **Court’s rate of 7%** from **November, 2010** to the date of Judgment, Interests on the **Decretal sum at rate of 12%** as well as costs of this suit.

It is accordingly ordered.


J. A. DE-MELLO

JUDGE

07/05/2020