IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 26 OF 2017

The Concern for Development Initiatives in Africa

(For DIA).....1st PLAINTIFF

BUBELWA KAIZA.....2ND PLAINTIFF

VERSUS

AMBERO CONSULTING Gesellschaft mbH.....1st DEFENDANT

TANZANIA ASSOCIATION OF NON-GOVERNMENTAL

ORGANISATIONS (TANGO).....2ND DEFENDANT

JUDGEMENT

Date of last order: 12.03.2020

Date of Judgement: 24.07.2020

EBRAHIM, J.:

The Plaintiffs have instituted this case against the Defendants claiming that the Defendants unilaterally terminated the contract they entered contrary to the terms of the contract law and good practise. According to the Plaintiffs averments in the plaint, on 23rd September 2016 the 1st Plaintiff and the Defendants entered into a

Consultancy Services Agreement (**Consultancy Agreement**) the services of which were to be provided by the 2nd Plaintiff starting from 1st September, 2016 to 28th February, 2020. Following such breach of contract the Plaintiffs' claims against the Defendants are as follows:

1. Payment of EUR 4,109 x 38 remaining months of the contract plus gratuity of EUR 17,257.80 which totals to EUR 173,399.80 equivalent to Tshs. 418,240,317.60.
2. General damages
3. Interest of what is prayed in (1) and (2) above at 12% Court rate from the date of filing the suit to the date of judgement
4. Interest of 1 and 2 above at commercial rate of 21% from the date of judgement to the date of payment in full.
5. Costs of the suit.

The 1st defendant upon being served with the plaint filed a written statement of defense disputing the allegations and putting the Plaintiffs into strict proof thereof. She contended that the 1st Defendant issued a notice of termination of contract on 30th

November 2016. The 1st Defendant contended further that the contract was terminated according to the terms set out in **Clause 9(1) of the Contract** which entitled the Defendant to terminate the contract during the three months' probation period without assigning reason. The said notice could be given at any time within the probation period. The Defendant stated also that under the terms of the Contract in **Clause 9(1),** the 1st Defendant was supposed to pay the 1st Plaintiff 4 weeks' pay of which she did. As for the status of the 2nd Plaintiff, the 1st Defendant stated that he was no an employee of the 1stDefendant but was seconded by the 1st Plaintiff to provide services to the 1st Defendant for the predetermined contract period. The Plaintiff therefore prayed for the dismissal of the suit with costs.

The 2nd Defendant in disputing the claim levelled against him contended that the contract was terminated on the due date in accordance to what was agreed by the parties as provided under Clause 9 of the contract.

In this case the Plaintiffs were represented by advocate Leonard Kiwango; the 1st Defendant preferred the services of advocate

Miriam Bachuba; and the 2nd Defendant was represented by advocate Armando Swenya.

On 18.02.2020 this court ordered parties to file their final submissions on/before 11.03.2020 of which I shall consider them in the course of addressing substantive issues. The court also ordered parties in the course of submissions to address the court as to whether the 2nd Plaintiff could claim against the Defendant in his individual capacity; and whether the claim by the 2nd Plaintiff was in the proper forum.

On 03.12.2019 the court adopted the agreed issues for determination by the court which are:

1. *Whether the procedure for termination of the contract was followed by the 1st Defendant*
2. *Whether the 1st Defendant was entitled to terminate the Consultancy Agreement*
3. *If the answer in the second issue is answered in the negative, whether the 1st defendant breached the consultancy agreement.*
4. *If the 3rd issue is answered in the affirmative, whether breach was contributed by the Plaintiff.*

5. *Whether the 2nd Defendant has liability in respect of breach of consultancy agreement (if any) between the Plaintiffs and the 1st Defendant.*
6. *Whether the Plaintiffs are entitled to damages and to what extent.*
7. *Relief(s) if any parties are entitled to.*

In determining this case I find it suitable to address the 1st and 2nd issues together.

Indisputably is the fact that the 1st Plaintiff and the 1st Defendant entered into a Consultancy Service Agreement of which the 1st Plaintiff was to issue the services of the 2nd Plaintiff in her performance to the agreement as exhibited in **exhibit P3**. The said agreement constituted among others terms the procedure for termination of the said agreement. **Clause 9(1) of the Consultancy Agreement provides for such procedure** which forms the bone of contention of the matter before me. As per the submission by the Counsel for the Plaintiffs, they claim that the Defendants were supposed to issue 4 weeks' notice before termination of the agreement. Arguing to the contrary the 1st Defendant's closing submission suggests that according to the termination clause either

party could terminate the agreement by issuing 4 weeks' notice which could be issued at any time before the end of probation period or issue 4 weeks' pay on termination. The Defendants argued further that the assertion by the Plaintiffs on the requirement of 4 weeks' notice before termination has not been substantiated.

Now coming to the evidence adduced by **PW1- Mr. Buberwa Kaiza – CEO** of the 1st Plaintiff; he testified in court that the project subject of the agreement started officially in 1st September 2016 and it was for the duration of 42 months to be concluded on 28th February 2020. He testified further that he worked for three months only i.e. from 1st September 2016 to 30th November 2016 when he was called by the leader and informed on the termination of the agreement and was eventually issued with a termination letter for consultancy services – **exhibit P4.** He said he discovered the breach of terms of the agreement under Clause 9.1 of the agreement after termination because no notice was issued prior to the termination of the agreement. He testified also that the procedures for termination as provided under **Clause 9(4) of the agreement** were not followed. He testified on the difficulties he experienced after the termination and

quantified the damage to a total of € 173,399/80 as specific loss which he prayed for the court to order the defendants to pay the same together with costs and interests thereof.

Responding to cross examination questions he admitted that the agreement was between the Defendants and ForDIA – 1st Plaintiff. He admitted also that there was a probation period of the agreement where either party to the agreement was allowed to terminate the contract. He also conceded that there is nowhere under **Clause 9(1)** of the agreement where it is written that a party has to provide reason for termination of a contract. He insisted on the issuance of four weeks' notice. He confirmed that after termination he was paid one month's salary and as per **Clause 3(2)** of the agreement it was the Contractor – For DIA that was supposed to be paid gratuity after the end of the project of 42 week. He confirmed also that For DIA was paid monthly payment for the agreement.

Being led in re-examination question PW1 repeated again that under **Clause 9(1)** the contract can be terminated within 3 months of

probation upon the 1st Defendant issuing 4 weeks' notice which was supposed to be issued at the beginning of the month.

PW2 – Ms. Rose Maria Mwaipopo, a board member of the 1st Plaintiff testified to be among the board members who signed exhibit P3 and interpreted **Clause 9(1) of the agreement** to mean that either parties could terminated the contract within probation period and the agreement can be terminate on the four weeks compliance. Speaking of **Clause No. 9(4)** she said that it provides for the termination of the agreement following the break of ethical behaviors after failure to reconcile. Explaining her reasons of coming to court, she said she came to claim a total compensation of €173,399.80 being a monthly payment of €4,109/- for 42 months and gratuity together with costs and interests.

Responding to cross examination questions and made to read Clause 9(1) of the agreement, she registered her disagreement with the termination letter for failure to comply with four weeks procedure. She stated however that according to **Clause 9(1)** the 1st Plaintiff could as well terminate the agreement during probation

period where their consultant would have worked for the last four weeks of the probation period. Responding further in relation to **Clause 1(3) of exhibit P3**, PW2 said that Mr. Kaiza was supposed to be seconded by the contractor and the 1st Plaintiff obligation was to provide the defendants with Mr. Kaiza as a National Long Term Expart. Thus Ambero was supposed to pay For Dia for the work done by Mr. Kaiza, PW2 insisted. She testified also that 1st Plaintiff was supposed to be paid gratuity if Mr. Kaiza had worked for 42 months.

Testifying further during re-examination PW2 differentiated between the four weeks compliance and the last payment paid to For Dia that the last payment was paid according to **Clause 3** of the Agreement whilst four weeks compliance is an agreement that parties are ending the agreement.

On the other hand **DW1 Mr. Thomas Hansen** testified to have worked with ForDIA with Mr. Kaiza being the only contact person. He explained the cause of dispute being that Mr. Kaiza failed to follow directions and was not a team player. Having no form of contact with For Dia they sent a termination letter by email and post -

(**Exhibit D1 – email** correspondences from Bubelwa Kaiza to Thomas Hansen and vice –versa dated 30th November 2016). He admitted not to have stated any reason in the termination letter. He also referred to exhibit P4 saying that they terminated the agreement in accordance to Clause 9 of the service contract between Ambero and For Dia. He also recognized **exhibit P3** being an agreement between 1st Plaintiff and the Defendants. He explained also that according to Clause 9(1) they were supposed to pay compensation for the four weeks which they had to pay on top of the normal three months. He explained further that they would have to pay gratuity if the 2nd Plaintiff worked from 01/09/2016 to 29/02/2020. He concluded his testimony by praying for the court to dismiss the case and order plaintiffs to pay costs of the suit.

Responding to cross examination questions he insisted that Mr. Kaiza failed to follow direction as a team leader. He also insisted that Mr. Kaiza did not provide the e-mail address of one Rosemary Mwaipopo but instead insisted on informing the Board himself. He said that they paid compensation for December 2016 after termination as per the agreement. He responded further that on his

understanding of the contract that the agreement can be terminated within three months of the probationary period or even on the last day of probation period. He stressed that they had reasons to terminate the agreement and there was nowhere in the agreement which required them to state reasons for termination. He said in total they paid €4,109 x 4 months being three months' work and one month compensation paid out by TANGO.

DW2 testified that in the agreement between the 1st Plaintiff and the 1st Defendant, the 2nd Defendant was a coordinator. He explained their duty which was to manage payroll and pay tax because when they were entering into a contract Ambero Consulting was not registered in Tanzania. He said their role was to pay parties that Ambero have entered into contract with after securing money for this special project from Ambero – German. He narrated that at the end of the month of November; DW1 called and informed him of his intention to terminate the agreement under Clause 9(1). On seeing that it was within time, he signed the termination letter.

Reading Clause 9(1) of the Agreement he commented that the agreement is silent on the reason and termination can be terminated even on the last day following the words "...ultimately on the last day..." or there can be notice of three months. He confirmed that all payments were effected and the contract was terminated as per the terms of the agreement.

Responding to cross examination questions DW2 said that they paid 1st Plaintiff for four months but did not issue notice. Speaking on the role of Mr. Kaiza, DW2 stated that he was presented by For DIA to work as a consultant and not as a part to the contract.

After having exposed the facts and legal arguments of the case, the next step is to address the issues.

Beginning with the 1st issue as to *whether the procedure for termination of the contract was followed by the 1st Defendant;* it is agreeable by both sides that either party could terminate the contract within the probation period. The contentious issue is whether there is a requirement for issuance of four weeks' notice or pay compensation and or assign reason for termination. All these are subject tointerpretation of **Clause 9 of the agreement (exhibit P3)**

and for the purpose of clarity I find it useful to reproduce it. It is drafted in the following words:

"(1) The Contractor and Ambero agree upon a probation period of 3 months. During this probation period it is possible for both parties to terminate the present contract in compliance with a period of 4 weeks before the end of the month, ultimately on the last day of the probation period

(2) After the probation period the contract is valid for the rest of the working time according to Clause 2(3). During this time, the contract can be terminated in compliance with a period of 8 weeks before the end of the month. In case the main contract between AMBERO and GIZ will be terminated, this contract can as well be terminated immediately

(3) In the case that the contract is terminated before the beginning of the duty due to a reason to be expressed by the National Long-Time Expert, the National Long – Term Expert is obliged to compensate all costs and losses resulting to AMBERO

(4) Suspension or termination of this contract takes place id either party is in significant default of its obligations and fails to resolve the matter after reasonable efforts to resolve it have failed.

In addition, AMBERO/TANGO may suspend and or terminate this contract without notice suspend payment of instalments at any stage in the event of substantial deviations from the time schedule, where the national long- term expert has engaged in or attempted to engage in, fraud, bribery, corruption, other unethical practices or other such egregious actions or engages in conduct that may substantially damage the reputation and/or interests of AMBERO/TANGO.

(5) If either party is prevented from complying with its obligations by causes beyond the reasonable control (Force Majeure),

including fire, explosion, flood, war, strike or riot, it shall immediately notify the other party and take all necessary steps to mitigate the event of Force Majeure, and the parties shall consult with each other with a view to agreeing on appropriate measures to be taken in the circumstances. Force majeure shall not be taken in the circumstances. Force Majeure shall not include any event which is caused by the negligence or intentional action of a party or such party's subcontractors or agents or employees, or by a failure to observe good professional practice"

It is obvious that the relevant sub clause in our instant **case is sub clause (1)**. Both PW1 and PW2 admitted before the court that the termination of the contract during probation period was subject to the period of four weeks before the end of month, with ultimate on the last day.

Before I proceed further, I would wish to address on the catch word "ultimately" in Clause 9(1). In literal meaning of the word, it connotes the most critical or basic level which would mean that there would be no any other way possible to comply with the four weeks period notice before termination of the contract but terminate the same on the last day. I am taking that stance on the consideration that generally parties to a contract do have a duty of treating each other with utmost good faith. It is a rule of the thumb to inform each

other on the intention to terminate the same so as the other party is not taken by surprise, unless otherwise. Of course I would not want to insert my own assumption by following a rule on the limitation of the court's activity; still it is agreeable that when parties enter into an agreement, they always strive to conclude it in amicable manner for future references. I take cognizance of the fact that there was a special clause to allow termination on probation period, but again the ultimate last day was given as a last option hence the four weeks compliance. Again much as it is silent in this agreement, the practice and procedure has always been that in the absence of the express provision of the requirement of notice period; the party wanting to terminate the contract in non-observance of the notice must pay in-lieu of notice period. The same spirit of which I borrow a leaf from is on the labour laws and employment contracts.

It follows therefore that in this agreement the party that wished to terminate the contract during the probation period ought to have complied with the four weeks' notice or if issued on ultimate last day make payment in lieu of notice for the notice period.

As for giving reason, again it is conspicuous that the agreement does not provide for the requirement on the party terminating the contract during probation period to assign reason for termination. Such fact is also agreed by all witnesses. This court therefore is not ready to imply terms and conditions of the contract considering that it is not the duty of the court to re-phrase, re-write or alter written agreement (**see the literature on the Law of Contract in East Africa by R.W. Hodgin, page 86)**. This principle was also well articulated by the defunct Court of Appeal for East Africa in **Damodar Jinabhai and Co. Ltd V Eustace Sisal Estates Ltd**, 1966 (2) A.L.R. Comm. 514 where it was held that:

"It is a general rule of interpretation that where there is an express provision in a contract, the court will not imply any provision relating to the same subject-matter...it is not, in my opinion, open to the court to interpret [a] negative provision as a positive one; to do so is ***...to imply a term in the contract which the parties did not think*** *fit to include, although they not only had the matter in mind but were even dealing expressly with it in the contract." (emphasis added)*

I also fortify my stance by the wisdom illustrated in the case of **Campling Bros. and Vanderwal Ltd V United Air Services Ltd**, 19 E.A.C.A 155 where it was held that;

*" In Reigate V Union Manufacturing Co. (Ramsbottom) [1918] 1 K.B. 592, Scrutton L.J. said: "**The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.** A term can only be implied if it is necessary in the business sense to give efficacy to the contract, that is, if such a term that can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen and so will happen; we did not trouble to say that: it is too clear.' **Unless the court comes to some conclusion as that, it ought not imply a term which the parties themselves have not expressed**"*(emphasis added). I also associate myself with the interpretation as quoted by the Counsel for the 1st Defendant in his submission when referred to the Literature on **Chitty on Contract: General Principles, 13th Edition, Volume 1, Sweet and Maxwell,**

Thomson Reuters (Legal) Limited, paragraph 12-042 and 12-043, page 839 that:

"...The object of all construction of the terms of a written agreement is to discover therefrom the common intention of the parties to the agreement... The cardinal presumption is that the parties have intended what they have in fact said so that their words must be construed as they stand"

Tailoring the above with the assertion by the counsel for the Plaintiffs in the closing submission that the contract was terminated without giving notice or reasons for such termination is contrary to the provisions of the instant contract is not correct as there is no provision in exhibit P3 for a contract terminated under **Clause 9(1)** requiring parties to assign reason. The fact that the contract was terminated during probation period was admitted by PW1 when responding to cross examination questions. PW2 admitted also that if they were to terminate the contract under **Clause 9(1)** of the agreement, their consultant would have worked for four week but registered disappointment that four weeks' notice was not issued. Thus the cited case of **Merali Hirji and Sons Vs. General Tyre (EA) LTD** (1983)

175(HC) is distinguishable with the circumstances of this case on the basis that in the cited case it was an oral contract which had lasted for five years and there were no written terms. In this case all terms and conditions of the contract are well articulated in the written agreement.

Evidently the Defendants did not issue four weeks' notice as the contract was terminated on the last day of probation period. However as this court made a finding earlier, in the absence of such notice, the Defendants were supposed to pay four weeks' pay in lieu of notice. PW1 admitted in court that he was paid for four months' while at the same time admitting also that he did not work after the termination of contract. The fact that PW1 was paid for four months was also conceded by PW2 when she said that the 1st Plaintiff was paid for four months but no notice was issued. DW2 confirmed to have paid PW1 four weeks' pay for four months. I therefore answer the first issue in the affirmative that the Defendants indeed followed the procedure of termination of contract in probation period by paying the 1st Plaintiff four weeks' pay in lieu of notice. The contract

was therefore terminated in accordance to the express agreed terms and conditions.

The second issue is *Whether the 1st Defendant was entitled to terminate the Consultancy Agreement.*

As alluded above, the termination of the contract by the Defendants was done during probation period in accordance to the agreed terms and conditions. I need not repeat that **Clause 9(1) of the contract** allowed either party to terminate the contract without assigning reasons subject to payment of notice or payment in lieu thereof. The Defendant fulfilled the said terms by paying the 1st Defendant four weeks' pay. Therefore I also answer the second issue in the affirmative.

I now turn to address the 3rd and 4th issues together that if *the answer in the second issue is answered in the negative, whether the 1st defendant breached the consultancy agreement; and that if the 3rd issue is answered in the affirmative, whether breach was contributed by the Plaintiff.*

Again, I need not repeat myself here because much as the Plaintiffs are claiming for breach of contract, such breach has not been proved because there is no proof of breach of a term of the

contract. The contract was terminated in accordance to the set terms and conditions as agreed by parties in terms of Clause 9(1) of **exhibit P3.** Moreover while testifying under oath; DW1 said that the termination of the contract was attributed to the failure by the 2nd Plaintiff to be a team player and he was not cooperative with other two exparts and the staff. He explained further when responding to cross examination question that the 1st Plaintiff failed to follow the directions issued by the team leader. DW1 said further that he did not say PW2 was incompetent but rather not a team player. He admitted to have not assigned that reason in termination letter. Nevertheless, the Plaintiffs did not dispute that fact as contended by the 1st Defendant in para 5 (A) to (H) of the Written Statement by either filing a reply to WSD or giving evidence to disapprove such assertion. Since the Plaintiffs chose not to respond to that fact, it falls under the admission of the truth. It is the general principle of the law that failure to challenge an important fact amounts to admission of that fact see the case of **Damian Ruhele VR, Criminal Appeal** No. 501 of 2007 (CAT – UR).

Counsel for the 1st Defendant cited the provisions of **section 37(1) of the Law of Contract Act, Cap 345 RE 2002** and argued that since the performance of the agreement by the 1st Plaintiff depended on the performance by the 2nd Plaintiff, his failure made difficult to proceed with the agreement. I subscribe to this line or argument.

Counsel for the Plaintiff has put a reliance on **Clause 9(4)** of the agreement and submitted that the termination of the contract took the Plaintiffs by surprise. Out-rightly that is not correct because firstly the contract was terminated under **Clause 9(1) of the Agreement;** and the provisions of clause 9(4) of the agreement refer to a contract after the passage of probation period.

The next issue is *Whether the 2nd Defendant has liability in respect of breach of consultancy agreement (if any) between the Plaintiffs and the 1st Defendant.*

I would dwell on this issue as I have already concluded that there was no such breach of consultancy agreement.

As for the 6th issue since damages are payable when there is breach of contract and the aggrieved party can prove the loss sustained (see **section 73 of Cap 345 RE 2002**); it is obvious in this instant case

that no such breach has been proved to entitle the Plaintiffs for any damages.

Before I embark on determining the relief part, I wish to address on the issue raised by the court on the status of the 2nd Plaintiff to claim in his individual capacity.

Verily as the evidence would reveal **exhibit P3,** the testimony of PW2, DW1 and DW2, the 2nd Plaintiff was seconded by the 1st Plaintiff so that he can perform the contract that the 1st Plaintiff entered as a legal person. In his own testimony PW1 admitted that the money was paid to the ForDIA and after that the Consultant who was PW2 would be paid. PW2 also admitted that the gratuity would be paid to PW1 upon completion of the set contract period and PW2.

Assuming but in no way concluding that if the Defendants were held to pay both Plaintiffs, it would mean double payment. I can therefore safely conclude that the 2nd Plaintiff derives his right from the 1st Plaintiff and not the Defendants. Thus the 2nd Plaintiff has no cause of action against the Defendants as he was not even a party to the agreement (see the cited case of **Kayanja V New India**

Assurance Company Limited, [1968] E.A.L.R 295- *a stranger to a contract cannot sue upon the contract unless given right;* and **Makori Wassanga V Joshua Mwaikambo and Others**, [1987] TLR 88- a party is bound by his pleadings).

All said and done, concluding on the relief(s), I find the Plaintiffs have failed to prove their case and I accordingly dismiss this suit with costs.

Accordingly ordered

R.A.Ebrahim

Judge

Dar Es Salaam

24.07.2020