

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF KIGOMA
AT KIGOMA**

(HC) CIVIL CASE NO 6 OF 2019

SUPER MAGALLA INVESTMENT

& GENERAL SUPPLY.....PLAINTIFF

VERSUS

TANZANIA RED CROSS SOCIETY (TRCS)DEFENDANT

JUDGMENT

Dated: 30/07/2020 & 04/08/2020

Before: Hon. A. MATUMA, J.

The plaintiff Super Magalla Investment & General Supply sued the Defendant herein Tanzania Red Cross Society (TRCS) along with one another namely Medical Team International who was however discharged for the cause of action having not been established against her.

The Plaintiff claims against the Defendant payment of contractual amount which remained unpaid as a debt of Tshs. 241,163,004/=, Payment of Tshs. 237,600,000/= as compensation for contractual losses suffered by the Plaintiff as a result of the defendant's suspension of the contract as between April and August, 2019, Tshs. 6,600,000/= as compensation for other costs incurred during the suspense period, general damages at the tune of Tshs. 20,000,000/=, interests, costs of the suit and any other reliefs.

The brief undisputed facts of the matter between the parties is that; they sometime in the end of the year 2018 and at early 2019 contracted for the Plaintiff to carry on construction activities of buildings for living quarters within Mtendeli refugees camp and at Makere Nyarugusu respectively. They are however in dispute on whether in the due course of the activity they reviewed their contracts in respect of the number of buildings which was to be constructed by the Plaintiff for the defendant and whether the agreed contractual price between them was as well reviewed.

In the circumstances each party had to present her case to reveal out what was the actual agreement between them in accordance to her evidence for determination by this court. They thus agreed that four issues be framed for better determination of this suit. The issues framed for determination are;

- i. Whether there were building contracts between the parties.*
- ii. If the first issue is answered in the affirmative, whether there was any review in either contract.*
- iii. Depending the outcomes of the (i) and (ii) issues supra, whether either party breached such contracts.*
- iv. To what relief(s) are the parties entitled to.*

The Plaintiff brought four witnesses as follows; PW1 was Magalla Nganyira Samakere who testified as the Managing Director of the Plaintiff's company. He stated that on October, 2018 one Raymond Abuya (Logistic Coordinator) and Augustino Runyange (team leader) from the Defendant's office visited his company and requested him to visit their compound at Mtendeli Refugees Camp

with the view to inspect the site which had unfinished building and estimate its finishing costs so that he could finish it. That he

inspected the building and then took his expert personnel to make the estimations. The work was estimated at Tshs 68,000,000/=, he prepared and submitted the BOQ to that effect. That his BOQ was accepted and he was requested to finish the building under the estimated costs which shall be paid after finishing construction/finishing. That he started the work until he finished it. He was paid twenty millions in two instalments of **Tshs. 18,000,000/=** and **Tshs. 2,000,000/=** respectively and that he is still claiming from the Defendant **Tshs. 48,000,000/=**. He went on further that the Defendant told him to start constructing another building and his previous claims shall be paid in the due course. The intended new building had a BOQ which was brought to him for filling but had already with the quotation of **Tshs 86,262,093.42**. He told them that the value stated thereof could not finish the construction as per the BOQ itself but they requested him to adjust the BOQ and finish the construction under the stated amount of Tshs 86,262,093.42/=, i.e make the construction not strictly as per BOQ but by using his own experience and finish the construction on the stated figure.

He adjusted the BOQ by using clay (matope) in some parts where they ought to have used the cement as per BOQ. He finished the building under the estimated costs and was fully paid a hundred percent. That was a Mtendeli Refugees Camp at Kakonko. That the Defendant was so happy with his service and on 28/1/2019 she wrote him a letter offering him another tender at Makere to build another building of the same nature to that of Mtendeli at the same price of Tshs 86,262,093.42. He tendered that letter (Offer) as exhibit P1.

PW1 went on testifying that he agreed the offer and signed the contract to start the construction. He tendered the Contract as exhibit P2 and stated further that according to the contract, the contractual price was Tshs 86,262,093.42 just like that of Mtendeli for him to use the same experience he used to build the building of Mtendeli as he adjusted the BOQ.

PW1 further testified that he started the work and when he reached 30% he called the defendant to inspect the work and pay him the first phase of the payment whereas on 28/2/2019, came officers of the defendant namely **Baraka Maembe** the Logistic Coordinator, **Augustino Runyange** team leader and **Optatus Likwelile** the Program Manager.

That they were satisfied with the work and speed and requested him to proceed until he get to the lintel which would amount to two phases and they will pay him both the two phases. That he went on until reached the lintel stage, he called them again and by that time he was already reached 60% of the work and the total claim up to that stage was **Tshs 51,757,256/=**. This time came one **Athumani M. Juma** the health Coordinator, **Optatus Likwelile** the programme Manager, **John Busungu** from DSM, one **Uldricu Nicholaus** from Dar es salaam, **Vivadiva Shao (BRM)**, **Baraka Maembe** the Logistic Coordinator.

The witness went on that these officers after visiting the site they required him to finish the building by building five courses from the lintel by concrete materials i.e cement instead of clay. That he built the five courses over the lintel which was seventy percent (70%) of the work then they stopped him on fear that the donor might not accept to pay for the work as they used clay and therefore he should stop there and start another building by concrete materials according to the BOQ and that he will be paid his dues for the already done construction which was over 60%.

That he started the new building as per the BOQ on agreement that he should issue his own BOQ to reflect the real building costs. He prepared and presented his BOQ on the real costs. That they told him that they will convene the meeting to Review the BOQ (to discuss it) while he was continuing with the construction.

That on 25/6/2019 they convened the meeting and agreed the contractual price to be reviewed to the tune of **Tshs. 90,638,817.88**. He tendered the minutes of the meeting as exhibit P3.

PW1 went on that **Tshs 90,638,817.88** was the additional costs to the original BOQ and therefore making the total value of the work on the new concrete building to be **Tshs. 176,900,911/=**. That out of it they paid him at first **Tshs. 51,757,256/=**, and then **Tshs. 18,115,039.62**.

That he continued with the construction until 21st August,2019 which was almost 95% when he received the email stopping him from continuing with the work as the approval of the reviewed price was yet to be obtained. He tendered the Print out of the email as exhibit P4. That he awaited with no response and some people from whom he had borrowed for the work started to claim their dues and even sued him in court. In the circumstances he decided to issue a notice of his intention to sue and after they received his notice, they issued him a letter acknowledging the debts. He tendered with no objection the said letter dated 21/10/2019 with reference No. TRCS/SM. Conf/01 as exhibit P5. PW1 concluded that he is thus claiming from the defendant **Tshs 241, 163, 004/=** which is a principal acknowledged debt. The hire costs of vehicles and labour charges during the whole period as from 12/4/2019 up to 21/8/2019 whose total is **Tshs. 237,600,000/=**, general damages to the tune of **Tshs 20,000,000/=**, interests and any other relief.

Then came PW2 MG. 345882, Eliud Cheupe who testified as the Chief Security Officer at the site of Super Magalla at Makere. This witness gave evidence to the effect that he used to welcome visitors at the site, cause them to sign in the visitors' book and that at different times the defendant's officers visited the site and inspected the work. He tendered Visitors' book as exhibit P9. From exhibit P9 the witness stated that on 25/3/2019 the defendant's officers visited the site and signed the book naming them to be; **Athumani M. Jumanne, Optatus Likwealile, John Busungu, Uldricu Nicholas, Vivadiva Shilo, and Baraka Maembe.**

That he gave them chairs for the meeting thereat with his employer Super Magalla, he heard the visitors informing boss that the building which was ongoing by clay be stopped as it won't be accepted by the Donors and they asked him to start another concrete building. They however required his boss the Managing Director of Super Magalla Investment to put a lintel in the clay building to make it stable before he starts a new building.

PW2 then named some other dates in which the defendant's officers and some other officers from the Donor of the defendant visited the site as follows: - **Cosmas Shija** (16/6/2019), **Joseph Mosha** (16/6/2019), **Halfani Nako** (16/6/2019), **Noha Mwakalabwe** (MTI 18/6/2019), **Paulo Malaika** (MTI 18/6/2019), **Optatus Likwelile** (18/6/2019) and **John Cremo** (MTI), and **Filvia.**

This witness winded up that up to date he is still on duty with two others guarding the building, and they are paid Tshs. 10,000/= each per day. That on 21/8/2019,

the Managing Director (his boss) came to take off the equipment's. He took two tippers, one bowser water, and the mixer vehicle to return them to their owners.

The third witness for the Plaintiff's case was **CHIZA KAGOMA BIKEBUKA** who gave evidence as PW3. He stated in his evidence that he is self-employed but previously was employed by Tanzania Red Cross Society the defendant herein since November, 2005 up to 31/3/2020. That by the year 2018, he was stationed at Mtendeli as Security Compound Supervisor and he remember on November 2018 came the Plaintiff to finish the building which was built by volunteers including himself.

That the Plaintiff when he was continuing to finish the building, he was given another contract to build another new building. That both the two buildings were built by clay.

The last witness for the Plaintiff was PW4 Clavery Ntitanga Ntjicha, he gave evidence that he is a qualified Technical Education Officer who was previously a government employee as a Technical Education District Officer.

That he started to work with Super Magalla Investment on 1/2/2019 owing a duty of giving advice to the Company on issues of constructions and also to supervise works when the company gets contracts.

That on February, 2019 his Employer company had a contract to build the hostel at Makere. He supervised the work in which they built the building with twenty rooms, four toilets and four bathrooms and that according to the contract, the building at Makere was to be built as it was built at Mtendeli i.e. by clay and making a finishing by cement.

That they started to build and when they reached at the lintel stage almost 60% of the whole work they were told to stop as the Donor might not accept it. Instead they were told to build another building of the same size; generally equivalent to that one they have built but that the new one should be built by concrete materials.

He advised his employer Super Magalla that the previous BOQ of **Tshs 86,000,000/=** plus for the clay building could not be sufficient for the concrete building. After some communication, he was told to prepare the BOQ which would meet the requirements for the concrete building. He prepared a BOQ of **Tshs 176,900,911/=** which was presented to the Defendant and they were told to continue with the construction pending the amendment of the BOQ. They thus built the whole building and completed it except the finishing only. That on 21st August, 2019 his employer told him that the work has been stopped. They therefore, stopped all the works leaving behind the watch guards only.

That marked the end of the Prosecution case and the Defendant opened her case arraigning three witnesses namely; **Julius Remius Kejo (DW1), Baraka Evarist Maembe (DW2) And Uldrick Nicholas Kundi (DW3).**

DW1 the Secretary General of Red Cross Tanzania, testified that they employed the Plaintiff to construct a building at Mtendeli under the BOQ of **Tshs. 86,262,093.42** which was a fixed price. That such contract was fully executed by the parties as each one fulfilled its obligations. That they then gave the Plaintiff another contract to build the same building of the same nature and price at Makere. He tendered in evidence the two contracts i.e the one for the building at Mtendeli as exhibit D1 and that of Makere as exhibit D2. He stated that the two contracts were less similar and among the contractual obligations was that if the Plaintiff shall default the contract he will have to make it good at his own costs.

That the plaintiff Super Magalla Investment started the construction at Makere but they learnt that he was building out of contract as he used clay instead of Cement. They thus rejected that work and required him to start another building in accordance to the agreed BOQ. He testified further that the Plaintiff started to build another building in accordance to the contract by concrete materials.

He also acknowledged that the new building which was built in accordance to the contract is complete (**limejengwa na kukamilika hadi kuezekwa**), what has remained is the finishing only and that they have already paid the Plaintiff Tshs 70,000,000/= on that work and that the remaining balance is Tshs 16,000,000/= which they are ready to pay upon the Plaintiff handling the building after the finishing.

This witness denied to have varied the price anyhow and denied any knowledge of exhibit P5 which was signed by Optatus Likwelile stating that it is for the first time he sees it in court. He further stated that Optatus Likwelile had no power to acknowledge the debt as per exhibit P5.

DW2 the Logistic Coordinator of Tanzania Red Cross testified to have known the Plaintiff as their contractor who was given a contract to build a living twenty roomed house at Makere after their previous contractor have failed to start the job on time. That the said previous contract one Gohedi was disqualified by the project Manager Mr. Optatus Beda Likwelile and in his place Super Magalla the current Plaintiff was procured for the work through a call for offer who came and accepted the offer.

DW2 went on that on the 25/6/2019, there was a meeting between the Donor (MTI), Tanzania Red Cross Society (the Defendant) and the contractor (the

Plaintiff) and that it is him who convened the meeting to discuss the proposed additional costs. In that meeting he stated, they discussed the proposed additional costs and rejected it because it was over and above 10% which could at least be justified. They thus agreed that the contractor should review the proposed additional cost to reach at least 10% which might be discussable as legally it can be justified.

That he used to visit the work and at one time when he visited it he got the plaintiff reached at the window level (**kozi ya tano kabla hajakata madirisha**) but he observed that the plaintiff was using a clay contrary to the contract. They stopped him and gave him another place adjacent thereat to build in accordance to the contract. The Plaintiff then started constructing a concrete building.

DW3, Uldricu Nicholaus Kundi, the Finance Manager of Tanzania Red Cross testified that work of Mtendeli was fully executed and they dully paid for it and that of Makere Makere has already been paid by three phases. It has remained the last phase of Tshs 16,000,000/= the retention inclusive.

This witness tendered various vouchers with some attachments to authenticate his evidence and they were received collectively as exhibit D3.

The witness further disputed exhibit P5 stating that the one with power to confirm debts is the head of Finance Department who is the Director of finance and not Optatus Likwelile who signed it while he was not the Director of finance.

That marked the end of the defence case and it is now my turn to discuss and determine the issues earlier on framed for determination of the dispute between the parties.

Starting with the first issue on ***Whether there were building contracts between the parties***, I find that this is not a disputable issue according to the evidence on record. Both parties agreed materially that they had entered contracts for constructions of buildings both at Mtendeli and at Makere Nyarugusu. In the circumstances I need not discuss this issue at length, as any discussion thereof won't serve any useful purpose for the parties are not at issue. I therefore find it in the affirmative.



On the second issue as to; ***If the first issue is answered in the affirmative, whether there was any review in either contract***, I find that this issue can legally and justifiably so in my view be determined on credibility basis. This is because the witnesses of both parties gave rival evidences for and against the issue.

According to PW1 at first, they called him to make a finishing of the building which was already there unfinished. He finished it at the agreed costs of Tshs. 68,000,000/= but they only paid him **Tshs. 20,000,000/=**. He still claims from the defendant Tshs. 48,000,000/=. There was no serious dispute on this as out of the Defendant's witnesses only DW1 disputed it and he did not do that during his examination in chief. He came to dispute it during cross examination in the meaning that had he not been cross examined on that he would have finished his testimony without disputing it. I had at one time dealt with the matter of a similar nature in the case of **Naftari Mathayo versus Fabian Victor Mhamilawa & 3 Others, Civil Appeal No. 10 of 2019 High Court Kigoma** in which I held;

*"The 1st respondent did not even dispute such allegation in his defence in chief until when he was cross examined by the appellant's Counsel. Given the seriousness of the allegations against him on the **Tshs 22,000,000/=** one would expect him to deny them in his defence in chief and not during cross examination. Taking the seriousness of the allegations against him and his silence throughout his defence in chief draws inference that his denial of the facts during cross examination was nothing but an afterthought".*

In fact, the plaintiff's claim on this gets support by both his witnesses and the evidence of the defence. Let me start with that of the defence which corroborates

the plaintiff's claims. In one of the attachments to exhibit D3 there is a letter dated 30/11/2018 wrote by the defendant to the plaintiff with the tittle **"TENDER AWARD"**. IT bears Reference no. TRCS/REQ/10/MTI/BPRM/2018/01 and it clearly states the subject thereof to be; **"FINISHING OF 20 ROOMS HOUSE AT MTENDELI STAFFS LIVING COMPOUND under TRCS/REQ/003/MTI/BPRM/2018"**.

The contents therein are very clear that the Plaintiff was awarded a **Finishing job** at the late 2018 as he stated in his evidence. The said contents reads;

"Dear Sir/Madam

*I refer to the tender submitted by your company **for provision of finishing 20 rooms' house at Mtendeli Living Camp in Kakonko District.** I am pleased to inform you that the TANZANIA RED CROSS SOCIETY, after prudent consideration of your tender bid, decided to award the contract to your company. Please contact Baraka Maembe, Logistic Cordinator of TANZANIA RED CROSS SOCIETY at Mtendeli Refugees Camp Office to discuss the subsequent arrangement".*

Within the same exhibit D3 there are some other letters for unsuccessful tender bid. One of them is PWD Enterprises who was informed that her company was not selected for the provision of a finishing job in a 20 rooms house at Mtendeli

Staff Living Compound and that the company which has been selected was the Plaintiff herein;

"Dear Sir/Madam,

*I refer to the tender submitted by your company **for provision of finishing 20 rooms' house at Mtendeli Staffs Living Campound in Kakonko District.** I regret to inform you that your Company has not been selected for the provision of the*

*services. **The selected company is M/S Super Magalla Investment & General Supply.** If you have any query, please contact Baraka Maembe, Logistic Coordinator Tel 0757 716 252 of TANZANIA RED CROSS SOCIETY at Mtendeli Refugees Camp”.*

That evidence of the defendant himself indicates clearly that she had a finishing job and it was the plaintiff who was awarded as against other bidders.

Not only that but also the plaintiff's claim was further corroborated by his witness PW3 Chiza Kagoma Bikebuka supra who was an Employed staff of the defendant. In his evidence he confirmed that the Plaintiff was awarded the tender to finish the building in which they had constructed through volunteers including himself.

In the circumstances the plaintiff have very strong evidence that he had the job. About the amount he ought to be paid she testified that it was Tshs. 68,000,000/= and that she was paid only Tshs. 20,000,000/= and she is still claiming the outstanding balance of Tshs. 48,000,000/=. That claim is corroborated by exhibit P5 in which the defendant acknowledged that debt. I am aware that the defendant's witnesses disputed the authority of the author of exhibit P5 but their objection have no legal base as I shall hereunder explain. I therefore allow this claim by the Plaintiff.

Now, was the contract for the complete building at Mtendeli exhibit P2 as tendered by the Plaintiff and or exhibit D1 as tendered by the Defendant Reviewed?

The parties did not agree. While the plaintiff maintained that it was reviewed as he told the defendant that the price thereof could not finish the job in which they asked him to use his experience and adjust the BOQ to have the same costs Tshs. 86,262,093.42/= suffice to construct the building, the defendant maintained that it was not reviewed at all.

The Plaintiff stated that in its review he used the clay instead of cement and completed the building under the same estimated costs. The Defendant was happy on the manner he adjusted the BOQ and finish the job. She was thus dully paid a hundred percent. She has thus no claim thereof. The defendant's witnesses all agreed with the plaintiff that such work was successfully done and they dully paid for it. Since at first they had agreed the use of cement but later the plaintiff used clay as against their previous agreement, and the fact that the defendant was inspecting each stage of the building and at the end she was satisfied with the work done thereby paying the plaintiff fully, and given the fact that even the District Engineer one Alex Fungo was frequently visiting the site to satisfy himself of the work and at the end approved that it was successfully performed as per exhibit D3, I am inclined to believe the Plaintiff that indeed there was undocumented adjustment which I may call an Oral agreement for adjustment of the contract.

Had that adjustment not been there, the defendant would have not paid for the work done, and would perhaps be in dispute with the plaintiff at the time the work was in progress, or at the end of it or even to date but to the contrary each was happy for the work done as authenticated by both parties that they are not in dispute for that work.

What about the contract of Makere, was there any change or revie to the contract?

I find this very simple to determine. The work of Makere traces its origin from the work of Mtendeli. When the Plaintiff finished the work at Mtendeli she was offered another contract to build another building at Makere with the same experience to that of Mtendeli. That is in accordance to exhibit P1 titled **"Call for Offer"**.



That exhibit was not in dispute by either party and in fact the parties were at consensus in its contents that the work to be done at Makere must be the same as the one which was done at Mtendeli and for the same costs.

In my view the parties are right on the manner they have construed the contents of exhibit P1 supra. The same reads;

"To: SUPER MAGALLA INVESTMENT & GENERAL SUPPLY

RE: call for Offer

*Kindly be informed that you have been appointed to carry out construction of one building block at living compound at TRCS Makere living compound, **the appointment as a contractor was based on the good experience on building the same structure at TRCS Mtendeli**, with this offer **we are basing on the price you provided at TRCS Mtendeli** and applying **the same speed** for building this structure".*

From the contents of that Offer, it is obvious that the parties were at consensus that the work to be done at Makere would be the same as that which was done at Mtendeli, on the same price with the same speed. The offer was then followed by the contract exhibit P2 by the plaintiff and D2 by the defendant respectively. The contract price is the same as that of Mtendeli Tshs. 86,262,093.42 and therefore further elaborating exhibit P1 call for offer that what was to be done would be ***mutatis mutandis*** to what was done at Mtendeli.

The Plaintiff started the job at Makere as per his experience of work at Mtendeli. He constructed the building up to 60% which was on the window level when the defendant asked him to change the materials at the lintel stage to make the building stable and then stop there as they anticipated that their Donor would not pay for the work because of the use of Clay instead of cement. According to the plaintiff's evidence the defendant told him that he will pay for the work by herself

but the plaintiff should start a new building with only concrete materials which they anticipated that the Donor would accept and pay for it. They agreed that the BOQ must change because Tshs. 86,262,093.42 could not suffice for the work. According to the further evidence of the plaintiff they reviewed the price to **Tshs. 176,900,911/=** and he has been paid only Tshs. 70,000,000/=.

The defendant's witnesses however denied to have authorized the plaintiff to build by clay and that is why they rejected the work and required him to reconstruct another building to the required standard by using concrete materials. They thus acknowledge the new concrete building and reject the clay one which they considered to have been built contrary to their agreement. Even on the new building with concrete materials they dispute to have varied the contractual price. They also stated to have paid the plaintiff Tshs. 70,000,000/= and that they are ready to pay the plaintiff only Tshs. 16,000,000/= as the outstanding debt subject to the plaintiff finishing it and handle the same to the defendant.

Who should then be believed on this between the plaintiff and the defendant. Before I say who I believe between them, let me reproduce what I said in the other case of a similar nature whose determination depended on the credibility of witnesses for both parties. It was the case of **YASSIN SAID @ SELEMB**
versus RUMACO AGRICULTURAL MARKETING CO-OPERATIVE SOCIETY,
Consolidated DC Civil Appeal no. 1 & 3 of 2020 in which I had the following observation which I reiterate in this case;

"I am aware that it is the principle of law as per the decision of the Court of Appeal of Tanzania in **Goodluck Kyando versus Republic [2006] TLR 363** that **every witness is entitled to credence and have his testimony accepted unless there is good and cogent reason for not believing such witness**".

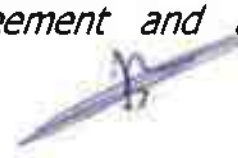
Although that was a criminal case but in the Civil Land case of ***Ulimwengu Rashid T/A Ujiji Mark Foundation versus Kigoma/ Ujiji Municipal Council Land Case No. 13 of 2016*** at Tabora, I had time to observe that;

"In the case of Goodluck Kyando versus Republic (2006) TLR 363 though a Criminal case, the Court of Appeal set out the Principle of the law which is applicable in both Civil and Criminal cases. Such Principle is that every witness is entitled to credence and have his testimony accepted unless there is good and cogent reasons for not believing such witness".

With that principle who should I believe? It is the Plaintiff. Why then she seems more credible and believable than the defendant! There are so many reasons and which are cogent. To mention just few;

- i. Exhibit P1 which was a call for offer is very clear that she was required to carry on the activity on the same experience as she did at Mtendeli. He did that and was being visited at every stage as per Visitors Book exhibit P9 until when he got 60% plus (almost 70%). They did not stop him at all that stages since he started the foundation.
- ii. The District Engineer one Fungo Alex vide his letter with Ref. No. HW/KNK/DEV.40/2/019/1 dated 28 March, 2019 which is an attachment to exhibit D3 by the Defendant herself confirmed that there was change agreements and the work was successfully done up to 60% at that time;

*"This is to certify that the works has successful carried out on construction of LIVING compound with 20 rooms at Makere village and the work has reached 60% on 28th March, 2019. The contractor M/S Super Magalla Investment and General Supplies, P.O.Box 99 Kibondo who engaged by Tanzania Red Cross Society (TRCS) at Makere village have constructed the work up to 60% as per contract agreement. Hereby certify to the best of my knowledge, the cost of work identified represents full compensation for the actual value of work completed in accordance with the terms of agreement and **authorized changes**. The*



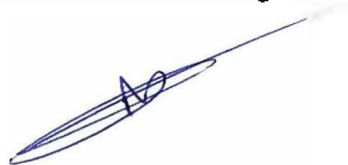
performance of work found satisfactory during the execution of the work..."

- iii. The Plaintiff's evidence is corroborated by exhibit P5 the defendant's letter confirming the debt;

"TRCS was supposed to pay you the sum total of TZS 86,262,093.42 upon completion of constructing a staff living house of 20 rooms in Makere Village – Kasulu District. In another building of 20 rooms with initial budget of 86, 541,731 was later agreed to cost 176,900,911 after reviewing the BOQ"

This exhibit signifies two buildings at the same compound at Makere and it was written by the defendant herself contrary to her evidence in court.

- iv. The plaintiff's evidence was further corroborated by her witness PW2 MG. 345882 Eliud Cheupe who is the Chief Security Officer at the site of Super Magalla at Makere. This witness gave evidence to the effect that he saw the construction of the two buildings and had witnessed in one of the meeting between the parties herein, the plaintiff being told to stop the clay building as Donors might not accept it but the defendant instructed the plaintiff to put the lintel by using concrete materials to make it stable and then stop there and start a new building by concrete materials only. In that regard the defendant was aware of the construction at every stage but by her anticipated fear of the Donor to reject the project she stopped the plaintiff after he had gone far and incurred costs.
- v. Such evidence was further corroborated by PW4 Clavery Ntitamga Ntijicha, a qualified Technical advisor of the plaintiff who supervised the whole work at Makere on the two buildings.



- vi. If the clay building costed Tshs. 86, 262,093.42, in no way the one of the same structures with concrete materials would have been built at the same costs.

On the party of the defendant there are also many reasons and cogent one for not believing her. As I cannot state them all in this judgment to avoid it being prolonged long unnecessarily as it has already been long, is that the defendant gave evidence contradicting herself. She produced exhibit D3 in support of her case but most of the attachments to the said exhibit contradicts her own case. It seems they had prepared to deny everything but her advocate was not smart enough to scrutinize and expunge some of unfavourable documents to their case. In my view the learned advocate did not do that job expecting the client would do. Unfortunately, the client (defendant) took them all and produced in court and on my party, I did not skip any of the documents. I passed my eyes to each and every documentary evidence tendered. Another reason for not believing the defendant's case is that; the grounds stated herein above for believing the plaintiff which I have already credited are inconsistency with the evidence of the Defendant's witnesses. Two divergent or conflicting witnesses on the same fact cannot be believed at the same time. In the instant case, I believe the witnesses of the plaintiff as against those of the defendant.

I therefore find the second issue in the affirmative that the contracts between the parties were reviews in both the building materials and price.

On the third issue; ***Depending the outcomes of the (i) and (ii) issues supra, whether either party breached such contracts***, I find that the Plaintiff did not breach her contractual obligations, she executed her obligation according to their agreements with its subsequent changes as herein stated. To the contrary, it was the Defendant who breached the contract for not paying the plaintiff her

due balance of Tshs. 48,000,000/= on the first building at Mtendeli which was for a finishing job only. The defendant purported to deny acknowledging such executed work by the plaintiff contrary to the abundant evidence on record. It is the Defendant who breached her contractual obligations for subjecting the plaintiff to her anticipated fears from her Donor a stranger to the contract between the parties. It was the defendant who breached the agreements by frustrating the plaintiff's due execution of her obligations on the contract at Makere by stopping her in the first building after it had gone over 60% and pulling her into another oral contract for the new building which they agreed to review the building costs but tries to deny the reviewed costs. Generally, it was the defendant in the instant case who violated the agreement and frustrating the agreements and thereby causing the execution to stop under way while the plaintiff has already incurred costs for the same.

Before I go to the last issue, let me explain why I said herein above that the defendant's denial of the powers of Optatus Beda Likwelile who signed exhibit P5 is unfounded.

In both contracts tendered by both parties as their respective exhibits, under the Payment clause 22, the Defendant categorically names people with powers to certify bills/invoices before payment is effected to the plaintiff. Those people are among others the Program/project Manager who by then was Mr. Optatus Beda Likwelile. But again the said Optatus Likwelile played a very big role throughout the program as per exhibit D3. He approved various payments and the defendant duly paid them, he wrote various letters on behalf of the defendant appointing the plaintiff as a contractor and rejecting others, he stamped exhibit P5 with the defendant's stamp and such stamp has not been disputed by the defendant.

With all what the said Optatus Likwelile did in the project, the plaintiff was entitled to believe that he had powers to confirm the debt as he did and the defendant is estopped to deny such belief within the meaning of section 123 of the Evidence Act, Cap. 6 R.E 2019 and as it was held in the case of **SASA ENTERPRISES (Z) LIMITED v MOHAMED RAZA HUSSEIN DHARAMSI**

(1989) TLR 78 (HC) that a third party dealing with one of the Directors of a company is not obliged to know the internal procedures and requirements of the company and his interests on the contract cannot be defeated by the mere fact that some internal requirements was not adhered to.

Most important is that it is not for the defendant to deny that Optatus Likwelile had no powers to issue exhibit P5 without either bringing him in evidence as her witness or bringing him as a co-defendant through third party notice for him to be heard on the allegation. This court cannot rule out that he had no such powers without according him a hearing. An adverse inference against the defendant for her failure to bring him in the suit by either status as a witness or a co-defendant is hereby drawn as I once observed in the case of **Angelina Reubeni Samsoni & Another versus Waysafi Investment Company, DC Civil Appeal no. 4 of 2020** High Court at Kigoma that;

*"Failure of the respondent to bring **Bayana Shomari** in Court as a witness or even to have joined him as a co-defendant through third-party notice entitles this Court to draw an adverse inference against him that had he called the said Bayana Shomari, he would have testified against his favour".*

In the like manner, when the Plaintiff filed this suit, she disclosed under paragraph 9 of the Plaint that she shall rely on the defendant's letter confirming the debt annexure E to the plaint which is now exhibit P5. The defendant ought thus to have arranged a serious contest on the said evidence by either bringing the said Optatus Likwelile as her witness or by joining him in her defence. She did not however, and instead in her Written statement of defence she merely noted that pleaded fact that she confirmed the debt through annexure E to the

Plaint (exhibit P5). She did not dispute that fact nor called a proof thereof as she did in other paragraphs. In fact the parties did not draw the issue for determination as to whether or not Optatus Likwelile had powers to issue exhibit P5. The dispute by the defendant during trial is thus an afterthought which has no room in Civil justice.

Now back to the last issue; ***To what relief(s) are the parties entitled to;***

With the herein analysis of the evidence on record, the defendant is liable to honour the agreements she entered with the plaintiff as it was held in the case of ***Mohamed Idrisa Mohamed v. Hashim Ayoub Jaku (1993) TLR 280*** that;

"Where a party to the contract has no good reason not to fulfill an agreement, he must be forced to perform his part, for an agreement must be adhered to and fulfilled"

I therefore condemn the defendant to pay the Plaintiff a total of **Tshs. 241,163,004/42** being the outstanding balance of the unpaid debt. I further condemn the defendant to pay the plaintiff the guarding costs of the structures at Makere which she is incurring for the three watch guards as from 21st August, 2019 when she formally received an email stopping him from continuing with the work but she could not withdraw the watch guards because the structures are in

the bush and one of it is already roofed. Since the three watchmen are paid Tshs. 10,000/= each per day, then the defendant should pay the plaintiff Tshs. 30,000/= per each day as from 21st August,2019 until the date when the plaintiff shall withdraw the watchmen as per the instructions herein below.

The defendant should replace her own watchmen within fourteen days from the date of this judgment so that the plaintiff withdraws her watchmen. If the Defendant shall fail to take over the site and replace her own watchmen then the plaintiff will be at liberty to withdraw her watchmen and any risks at the site due to absence of watch guards shall be at the risks of the defendant herself.

The plaintiff also claimed for payment of Tshs. 237,600,000/= as cost incurred for retaining the tools of work which were hired from some other people. These were two tipper vehicles and one water bowser vehicle each allegedly hired at Tshs. 500,000/=, one concrete mixer vehicle (**mashine ya kuchanganyia zege**) and one small visiting vehicle allegedly each hired Tshs. 150,000/= per day. These amount are claimed as from 12/04/2019 when the plaintiff was told to stop the work to await the approval of the adjusted costs up to 21/08/2019 when he was formally informed that the work should stop for the approval has yet to be obtained. The plaintiff tendered exhibit P6 which was his request to continue hiring the three vehicles (2 tippers & 1 water bowser) from one Maulid Juma Enterprises and the reply thereof accepting the request, exhibit P7 a letter from Lucas Ngalaba Kilungu accepting the plaintiff to continue hiring the concrete mixer machine, and exhibit P8 the request and acceptance to continue hiring the small visiting vehicle. The exhibits herein were all executed on the same day 12/04/2019 and according

to the evidence of PW1, they were all executed in his office in the meeting he convened with the owners of those vehicles.

In my view, the purported hiring of the vehicles was unreasonably necessary. I could not understand why the plaintiff decided to continue hiring those vehicles after he was told to stop the work pending approval of the adjusted costs which he did not know when shall be due, why did he hire them on the same very day

he was stopped, was that day the end of his previous hire agreements? If so where are those initial agreements to authenticate the first day they were hired and the end day of the hire.

Not only that but also there is no evidence to the effect that those vehicles were necessary to be retained without working. The plaintiff did not establish as such. Also, in the case of **SHIRE 2004 TRANSPORT CO. LIMITED versus the REPUBLIC & 5 OTHERS, Misc. Criminal Application no. 14 of 2020** High Court Kigoma I had time to discourage the habit of the Republic in holding exhibits particularly vehicles for such longer and undefined period before they are formally put in evidence and a final order to their fate is issued be it a forfeiture one or restitution to its owners. In that respect I held;

*"This is due to the fact that by that time such properties would either be deteriorated, damaged or lost its value for being deserted against their order of the nature **like vehicles which would normally damage in cases they are not in their routine use and services. Some spares would completely be out of use and demand replacement** or get lost in the hands of unfaithful custodians as it used to be the general cries of the general public in most cases whose exhibits were held for a long time before the final orders in their respective cases, **some of those spares being so expensive**".*

In the same view I am far to agree that the plaintiff could hire vehicles which he was not going to use because it was mechanically foreseeable that the none use of the vehicles would damage them and cost him so expensively to service them before starting to re-use them. In the same way, their owners could not allow such purported hire as they would have been putting their vehicles into danger as they were being hired not for use but for going to be deserted.

But again, I have obtained no evidence that the defendant had any control over the movements of the plaintiff's tools of work nor that the defendant was in any manner involved with the intended hire at the suspension period of the work. In the circumstances the vehicles were free to be used in other works as they would have been needed during the suspension period of the work. Therefore, if the plaintiff retained them, then she did so at her own risks. The claim for costs incurred in hiring the vehicles is thus dismissed in its entirety.

Likewise, I dismiss the claims of **Tshs. 20,000/=** allegedly paid to PW4 per day because being paid by daily basis. In the circumstances when there was no work he was not paid. Thus during the period the defendant suspended the work, the plaintiff not was necessitated to retain him as he was for the watchmen who despite of being paid daily like PW4, they were and are still on duty whether or not there is a continuous work because they are there for security purposes of the already properties on the ground.

The plaintiff further claimed interests. I order no interests because I have already condemned the defendant to pay the plaintiff the contractual price regardless that the fist clay building at Makere is yet finished. It is said to have been reached between 60% to 70%. Also, the second concrete building at Makere is said to have yet finished despite of having gone 95%. Therefore, the plaintiff is to be paid the

whole sum contracted despite of the unfinished work for there was a breach of contract. In the circumstances the defendant would still need to use some other money to complete the project. Therefore, the money that the plaintiff would have used to complete the project suffices to serve the purpose of the interests so claimed.

The plaintiff also claims Tshs. 20,000,000/= as general damages. He has explained how he suffered as a result of the breach of contract. He was sued by his creditors and an order for sale his residential house was issued, the Bank attached his house, he suffered from Pressure and Diabetes as a result of the defendant's breach of contract. He also testified that he faced difficulties to take care his children's school needs. The sufferences explained by plaintiff seems to be individually based rather than the plaintiff in its Company name. Even though, I agree with the plaintiff that by whatever means he has suffered some problems as a result of the defendant's acts breaching the contract and also denying the genuine claims as herein above determined. I therefore grant the Plaintiff against the Defendant **Tshs. 10,000,000/=** as general damages for the breach of contract.

The plaintiff's suit is therefore allowed to the extent herein above explained with costs of the suit. Whoever aggrieved has a right of appeal to the Court of Appeal of Tanzania subject to the requirements of the laws governing appeals thereto. It is so ordered.



A. Matuma

Judge

04/08/2020