

IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 71 OF 2018

REFERENCE POINT LIMITED..... PLAINTIFF

VERSUS

OVERSEAS INFRASTRUCTURE ALLIANCE (I) P. LTD..... DEFENDANT

JUDGEMENT

Date of last order: 04.09.2020

Date of Judgement: 01.10.2020

EBRAHIM, J.:

The Plaintiffs have instituted this case against the Defendants claiming that in year 2016 she entered into an agreement with the defendant for provisional of consultancy services for a consideration of **Tshs. 282,704,145/-**. She claimed further in her plaint that despite the letter wrote by the defendant in December 2016 acknowledging to be indebt by the plaintiff to the tune of **Tshs. 152,258,275/-** and promised to pay the remaining balance by January 2017; the defendant has not made good such payment. She claimed also that despite several attempts by the plaintiff to claim the remaining

balance, the defendant has not fulfilled the promise to pay the same.

Following the act of the defendant which has caused great damages to the plaintiff; the plaintiff is now praying for judgement and decree against the defendant as follows:

- a. Payment of liquidated damages of Tshs. 300,000,000/-
- b. Interest at court rate of 12% per annum from the date the cause of action arose to the date of judgement in (a) above.
- c. Interest at commercial rate of 21% of item (b) above from the date of judgement to the date of payment
- d. Costs of the suit.

This case proceeded *ex parte* against the defendant. On 14.12.2018 following a prayer made by the counsel for the defendant one Ms. Kiveya, the court allowed the defendant to institute proceedings for stay of the suit following their contention that there is an arbitration clause in their agreement. The defendant never filled the same nor entered appearance. On 05.08.2020 they were accordingly summoned by the court and accepted service. However, they did

not enter appearance and no information was relayed to the court on their absence. On 28.08.2020 this court granted the prayer by the plaintiff counsel for *ex parte* proof against the defendant.

In this case the plaintiff was represented by advocate Hisani Mtolela.

The framed issues for determination are:

1. *Whether the plaintiff entered into a consultancy agreement with the defendant*
2. *Whether the defendant breached the contract for failure to pay the balance of Tshs. 152,258,275/-.*
3. *Relief(s) if any parties are entitled to.*

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

In a bid to prove that the defendant indeed entered into a consultancy agreement with the plaintiff, plaintiff's side called to a stand one witness only namely **Mr. Elifuraha Saria (PW1)**. He testified before the court that he is a co-director of the plaintiff and they entered into a contract with the defendant on 29.09.2015. The subject of the contract was consultation on distribution of water from Wami River to villages in Bagamoyo District. The consultation work

included land survey and mapping of where the pipes would pass and where and how the wells should be constructed. He testified further that payment was for work done. He confirmed that the defendant initially paid Tshs. 132,000,000/- but did not finalize the payment of the remaining balance of Tshs. 152,000,000/-.

PW1 tendered in court what he termed as contract, Purchase Orders of 02.05.2016 and 15.10.2016 which were collectively admitted as **exhibit PE1**. He also tendered a letter dated 14.12.2016 which was admitted as **exhibit PE2**.

He concluded by praying to the court to order the defendant to pay the outstanding balance.

Before I embark on a journey of determining the issues present before me; let me point out the legal obligations of parties in a civil case like the instant one.

In a civil case it is the general rule of the law that **“he who alleges must prove”** as provided under **Sections 110 and 111 of the Law of Evidence Act, CAP 6, R.E. 2002**– See also the case of **Attorney General & Others V Eligi Edward Massawe & Others**, Civil Appeal

No 86 of 2002, CAT (unreported). Further, the party with legal burden also bears the evidential burden on the balance of probabilities. This position was illustrated in the case of **Anthony M. Masanga V Penina (Mama Mgesi) and Another**, Civil Appeal No. 118 of 2014, CAT (Unreported).

From the testimony of PW1, proof of their case against the defendant is predicated in **exhibits PE1 and PE2**. Beginning with exhibit PE1, PW1 told the court that the same is the contract they entered and it was sent by e-mail.

I have had a thorough look at exhibit PE1. I must state out-rightly that exhibit PE1 is not a document pleaded and annexed with the plaint which was referred as **Annexure A** in para 3 of the Plaint. **Exhibit PE1** were the documents that were sneaked in by the Plaintiff and did not form part of the documents to be relied upon in terms of **Order VII Rule 9 read together with Rule 14(1) and (2) of the Civil Procedure Code, Cap 33 RE 2002**. The law is clear that the plaint is required to endorse on the plaint, or annex thereto a list of documents which he has produced along it (**Order VII Rule 9**). Further in terms of **Order VII**

Rule 14 (1) and (2) a plaintiff is required to produce in court a document which he/she has sued upon and he/she has filed with the plaint. The law further gives a leeway to the plaintiff who relies on a document as evidence in support of his claim to enter such document in a list to be added or annexed to the plaint.

From the position of the law above, a party can only rely and produce a document as evidence in court which she has either pleaded and annexed it with the plaint or has provided a list of such documents to be added or annexed with the plaint. The rationale being that parties are bound by their pleadings and should also not take the other party by surprise or even trying to add evidence which was not pleaded; hence trying to fill in the gaps.

The plaintiff in this case never entered the documents produced as exhibit PE1 in a list of additional documents nor pleaded or annexed them with the plaint.

Consequently, I accordingly discard exhibit PE1 from evidence for none compliance with the law.

Coming to exhibit PE2, the same leaves a lot to be desired. A copy of exhibit PE2 was annexed with the plaint as per para 4 of the plaint as **annexure A. Annexure A** appended with the plaint is a Commercial Invoice dated 01.12.2016 showing net payable amount to be TZS 123,788,060.50 and it does not reflect any terms or conditions of the purported agreement.

During hearing of the case, PW1 tendered a copy of a letter dated 14.12.2016 in showing that the defendant admitted the claim of TZS 152,258,475/- and promised to pay by the end of January 2017. However, in tendering such document, much as it is addressed "**TO WHOMSOEVER IT MAY CONCERN**"; there was no foundation laid as to why it is a photocopy with no addressee in terms of **section 66, section 67 and 68 of the Law of Evidence Act, Cap 6 RE 2019**. The cited laws require a document to be proved by primary evidence (**section 66 of Cap 6**) except in circumstances illustrated under **section 67 of the Act** and or where notice to produce has been given to the adverse party in terms of **section 68 of the Act**.

Let us say for argument sake that exhibit PE2 is an electronic document. Still, in terms of **section 18(3) of Electronic Transaction Act No. 13/2015 (the Act)**, which caters for recognition of electronic transactions; the **Act** presumes the authenticity of the electronic records where there is evidence to support that the computer was operating properly or integrity was not affected. The law further require the document to have been recorded by a party to proceedings adverse in interest to the party seeking to introduce it, or it was recorded and issued in ordinary course of business. Thus, to determine its admissibility an evidence may be presented in respect of the set standard, procedure, usage or practice.

In this case there is no certificate of authenticity of email, no notice to produce or any foundation laid as to why the Plaintiff relied on a copy of a flimsy paper which its authenticity is lacking.


Again, this court cannot take risk and rely on such a piece of shady evidence produced by the plaintiff contrary to the requirement of the law to determine right or confer obligation to another party. I accordingly also discard it from the court records.

What remains therefore are only empty words of PW1 that they entered into a written agreement with the defendant. Unfortunately, they had no concrete documentary evidence to prove their claim.

Thus, without hesitation, in answer to the 1st and 2nd issues, I find that there is no concrete proof to prove that indeed the Plaintiff and Defendant entered into an agreement as claimed and that the Defendant promised to pay the remaining balance of Tshs. 152, 258,475, hence breached the contract.

All said and done concluding on the relief(s), I find that in preponderance of evidence, the Plaintiff has failed to prove her case as required by the law and I accordingly dismiss this suit with costs.

Accordingly ordered


R.A. Ebrahim
Judge

Dar Es Salaam

01.10.2020