

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

CIVIL CASE NO. 100 OF 2018

**MTWIVILA TRADERS &
CONSTRUCTION CO. LTD----- PLAINTIFF**

VERSUS

GROUP SIX INTERNATIONAL LTD-----DEFENDANT

JUDGEMENT

Date of Last Order: 27.11.2019

Date of Final Submissions: 20.12.2019

Date of Judgement: 20.03.2020

Ebrahim, J.:

The Plaintiff and the Defendant are both registered companies based in Dar Es Salaam. As evidence on record would reveal, the Defendant had acquired a contract with the then Parastatal Pension Fund (PPF)(the Client) to carry out among other things bitumen work on construction of external work at the University of Dodoma. The Defendant sub-contracted the Plaintiff. On 21st April 2015 they entered into a sub-contract agreement(**exhibit PE1**) whereby the Plaintiff was sub-contracted by the Defendant to carry out a bitumen

works on construction of external works and incinerator for College of Informatics and Virtual Education for the University of Dodoma. The sub-contract period was for two months at a value of **Tshs. 237,086,250/- exclusive of VAT**. The Defendant was required to pay the advance payment of **15% of the contract** amount and the remaining balance was to be paid after execution of the work and approval of the said work by the Contractor i.e. the Defendant. The Defendant paid the advance payment of **Tshs. 177,814,687.50** and the Plaintiff executed the work so sub-contracted to do and handed over the work to the Defendant as agreed. Furthermore as it could be discerned from the plaint, the Defendant assigned the Plaintiff additional work amounting to **Tshs. 55,405,500/-** of which again the Plaintiff claims that the Defendant failed to pay her for the additional work that she carried out. It is due to the advertent acts of the Defendant of failing to make good payment to the Plaintiff for the work done, the Plaintiff instituted the instant suit.

In her written statement of defense, the Defendant agreed at para 3 that she sub-contracted the Plaintiff to execute bitumen works and external works and incinerator for College of Informatics and Virtual Education for the University of Dodoma. The Defendant also

conceded that she paid the Plaintiff the agreed amount of 15% of the agreed amount as an advance payment and the remaining balance was to be paid only after the completion of work and subsequent approval by the Defendant. She averred further that the Defendant approval was strictly dependent on attaining the approval from the client of the Defendant on the whole work done including that of the Plaintiff. The Defendant strongly disputed the issue of additional work as claimed by the Plaintiff and put her into strict proof thereof.

Following the above assertions and averments by both parties, three issues were framed and agreed for court's determination as follows:

1. Whether the defendant breached a sub- contract agreement entered between parties.
2. If the first issue is answered in the affirmative; then whether the plaintiff suffered loss hence a claim for damages and payment of the outstanding balance.
3. Relief(s) if any parties are entitled to.

In this case the Plaintiff was represented by Advocate Patricia Pius Mbosa whilst the Defendant had the services of advocate Paul Makang'a.

After hearing the evidence from the witnesses of both parties, Court ordered parties to file their final submissions on/before 20.12.2019. It is only the Plaintiff's Counsel who filed the submissions. I shall refer to the submissions in the course of addressing the substantive issues.

To substantiate her claim, the Plaintiff called two witnesses. Mr. Alphonse Salum Mdegipala (**PW2**), employed by the Plaintiff as a Civil Technician. He tendered in court the agreement entered between the Plaintiff and the defendant (**exhibit PE1**). The second witness was Mr. Alexandra Peter Ngilangwa, the Plaintiff's accountant. He tendered the EFD receipt in respect of the advance payment (**exhibit PE2**) and demand letters to the Defendant (**exhibit PE3**).

On her part, the Defendant relied on the sole testimony of Mr. Enock Winston (**DW1**), the quantity surveyor.

Before I embark on the journey of determining the first issue *as to whether the Defendant breached a sub-contract agreement entered between parties*; 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).

In pursuit to prove their case, PW1 heavily relied on the sub-contract agreement entered between the parties and testified before the Court under oath that the main job that they were sub-contracted to do was to carry out the bitumen work on the already constructed road by the Defendant. It was however discovered by the Plaintiff that the main contractor did not smoothen the road properly. Therefore the Defendant orally agreed with the Plaintiff to carry out the work at an extra payment of Tshs. 55,405,500/-. PW1 testified further that the Plaintiff smoothened the surface by using asphaat concrete. After finishing the job they handed over the same to the Defendant. However, the Defendant did not effect the final payment. Responding to cross examination questions when asked

to read **Clause 1b of exhibit PE1**, PW1 explained that the extract of the main contract was put into their agreement and they knew that their work emanates from the main contract. Further under **clause 1(c) of exhibit PE1**, the Plaintiff was supposed to comply with specifications and instructions from contractor and engineer representatives of which the Plaintiff received them from the Defendant. In further reading of **clause 8 of Exhibit PE1**, PW1 conceded that the payment was to be effected after approval of the same from the **contractor**.

DW1 on the other hand recognised exhibit PE1 as the agreement entered between parties and went on to assert that once the work has been checked and approved, the sub-contractor must submit an invoice for payment. He said the approval is given by the consultant as a representative of the client. In essence DW1 was arguing here that the approval was subject to the satisfaction by the Client.

Counsel for the Plaintiff has insisted in her written submission that the approval is obtained from the Contractor/Defendant and not the client as they did not have an agreement with the said Client

because their acts were only responsible to the Contractor whom they entered into an agreement with.

What is apparent here is that the Plaintiff and the Defendant entered into an agreement to perform a specific work. In the course of such performance additional work emerged and according to the Plaintiff they agreed **orally** that the Plaintiff should do the extra work at an agreed extra payment. DW1 apart from recognizing **Exhibit PE1** as the sub-contract agreement they entered, he also admitted that there was additional work and that they have submitted to the client for the approval to pay the Plaintiff Tshs. 55,000,000/-. DW1 also admitted in his testimony in chief that the Plaintiff's claim is on the remaining balance together with the additional costs. He insisted however that what hinders the payment is the approval from the client.

Certainly what governs the relationship between the Plaintiff and the Defendant herein is **Exhibit PE1**. To begin with one might argue in terms of the proviso to **Clause 1(c) of Exhibit PE1** that all works and instructions/directives shall be in writing and shall be logged by the sub-contractor which will be used as evidence for any of the sub-

contractors claim. Nevertheless, there is no doubt from the evidence of DW1 that the Defendant instructed the Plaintiff to perform the extra work as claimed and that work extended the contract period to December 2015 instead of the two months period agreed before. Moreover, if the proposal and acceptance of any promise is made in words then it is said to be express, otherwise it is said to be implied – **section 9 of the Contract Act, Cap 345, RE 2002**. It follows therefore that following the concession by DW1 of the existence of agreement and other extra work that were performed by the Plaintiff, indeed apart from the written agreement for the specified work, there was also existed an express promise to pay the Plaintiff for the extra work done.

The point for determination now is whether according to their agreement the Plaintiff payment shall be subject to the approval by the “client” as averred in the pleadings and testified by DW1.

The answer to the issue above is well canvassed in **Exhibit PE1**. It is the law i.e. **Section 100(1) of the Evidence Act, Cap 6 RE 2002** that when the terms of a contract is reduced into writing, such document shall speak of itself and no other evidence shall be given

in its proof. For the purpose of clarity, **Section 100(1) of the Evidence**

Act reads:

*"100.-(1) **When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document,** and in all cases in which any matter is required by law to be reduced to the form of a document, **no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.**" (emphasis supplied)*

Exhibit PE1 explicitly provides that the sub-contract agreement was made between the **Defendant who is "the Contractor"** and the **Plaintiff the "Sub-contractor"**. Apart from the definition of who is who there is no further definition of who is the Engineer's Representative. According to the testimony of PW1 in chief, he said he only worked with one Mr. Abraham Mwasula, a Quantity Surveyor of the Defendant and thereafter the work was accepted and handed to Mr. Lin Lin who was a Site Agent. Both Mr. Mwasula and Mr. Lin Lin who were the key players were not brought to adduce evidence much as they were very relevant witnesses and their evidence would have shed light in respect of the Defendant.

The above notwithstanding, going through **Clause 1(b) and (c) of exhibit PE1**, they call for the specifications of the work to be from the main contract of which PW1 said that they were availed with the extract of the same in performing their work; and also that the sub-contractor's performance shall be to the Contractor and the Engineer's Representative and shall be supervised by the Contractor and the Engineer's Representative. More so in terms of **Clause 8 of Exhibit PE1**, the Sub-Contractor shall be entitled to payment for executed work after approval by the Contractor Engineer and any payment due to the Sub-Contractor under the Agreement shall be paid by the Contractor to the Sub-Contractor within 7 days after the Contractor has received and approved the Sub-Contractor Interim Statement.

As evidenced by both PW1 and DW1, the Contractor did not disapprove the Sub-Contractor's work and does not dispute the claim but DW1 averred that they have submitted the work for the approval of the Client first before they could pay the Plaintiff.

Counsel for the Plaintiff has stressed that there is no Clause in Exhibit PE1 which stipulates that the Plaintiff shall not be paid until the

approval is sought from the Client. In any event, the "purported client" is a stranger in so far as Exhibit PE1 is concerned. It is the position of the law in a contract that in a contract, parties have an obligation to perform their respective promises, unless such performance is dispensed with - **section 37(1) of the Law of Contract Act, Cap 345, R.E. 2002**. There is no such dispensation by the Plaintiff and it is on that basis I join hands with the Counsel for the Plaintiff as argued in her submission that the act of the Defendant of failing to honour her promise of making good payment to the Plaintiff after performing part of her contract **amount to a breach of sub-contract agreement**. I so hold.

I further associate myself with the principle illustrated by the Court of Appeal in the cited case of **Millen Richard V AyubBakariHoza**[1992] TLR 385 (CA) that failure to pay balance within the time stipulated in the agreement constitutes breach.

The next issue is whether the Plaintiff has suffered loss/damages. PW2, the Plaintiff accountant while tendering the EFD Receipt and the invoice for the advance payment - **Exhibit PE2**; and **Exhibit PE3** being three demand letters sent to the Defendant wanting her to

make good payment of the remaining balance testified before the court that the Plaintiff incurred expenses in performing the work but did not receive returns. Consequently the returns on investments were reduced and there was also cost in running the case and that despite several demand letters they wrote to the Defendant, they have not been paid. PW2 testified further that currently Plaintiff's claim against the Defendant stands at TZS 204,507,426/= being the remaining unpaid balance of Tshs. 59,000,000/- in terms of Exhibit PE1 exclusive of VAT and Tshs. 55,000,000/= the agreed payment on the extra work done. The amount also includes interest of 20% per annum on late payment and VAT on the balance of 59,000,000.

Indeed it is the general rule that parties are bound by their pleadings - **James FunkeGwagilo Vs. Attorney General** [2001] T.L.R, 455; **Captain Harry Gandy Vs. Gaspar Air Charters Ltd** [1956] E.A.C.A, 139 at 140.

The Plaintiff averred at Para 7 of the Plaint that interest for late payment as per the agreement is 20%. Again, Exhibit PE1 explicitly provides for the interest on the late payment i.e. 20% as expressly pleaded in the plaint. Certainly it is obvious that if the interest is

expressly provided in the terms of an agreement it is implied in the pleadings.

PW2 thoroughly calculated the balance pertaining to the outstanding amount. The calculations were as follows;

According to PW2, the first payment was effected on 12/11/2015, therefore interest was calculated from January 2016 – December 2018- 3 years. Then after from January 2019 to November 2019.

THUS:

1. **TZS 59,271,689**(outstanding contract amount)
2. $TZS\ 59,271,687 \times 20/100 = TZS\ 11,000,000/=$.
 $TZS\ 11,000,000 \times 3\text{yrs} = \mathbf{TZS33,000,000/=}$
3. From January 2019 – 26/11/2019
 $TZS\ 59,271,689 \times 20/100 \times 11/12 = \mathbf{TZS\ 10,866,476/=}$.
4. Additional work – **TZS 55,405,500/=**.
5. Interest at the additional work
 $TZS\ 55,405,500 \times 20/100 \times 3\ \text{yrs} = \mathbf{TZS\ 33,243,000/=}$.
6. $TZS\ 55,405,500 \times 20/100 \times 11/12(\text{Jan –Nov 2019}) =$
TZS10,157,675/=.
7. VAT on TZS 59,000,000/- = **TZS 10,668,904/-**

He rounded up the figures from item 1 to 7 to a TOTAL of **TZS. 204,000,000/=**.

The same was not controverted at all in cross examination by the Counsel for the Defendant. As a general rule failure to cross examine a witness on an important fact implies the admission of such fact. The same goes to the evidence of DW1 that apart from insisting that the Certificate of Completion has not been issued by the Client, which is insignificant following my holding that the Client is a stranger to Exhibit PE1, there is no concrete evidence issued by the Defendant to disapprove the claim by the Plaintiff. Accordingly, I do not hesitate to conclude that the Plaintiff suffered loss and entitled to compensation. The law i.e. **section 73(1) of the Contract Act**, provides for compensation for loss or damage caused by a breach of contract from the party that has broken the contract.

As alluded earlier, the Defendant breached the terms of the sub-contract and it follows that the Plaintiff suffered loss/damages and she is entitled to compensation.

The Plaintiff among other things prays for the court to award him general damages to the tune of 75,000,000/- for failure and neglect by the Defendant to honour the terms of the contract .

Generally, the award of general damage is awarded at the discretion of the court judiciously exercised. The purpose of general

damages is to put the plaintiff in the same position as far as money can do as if his rights had been observed. Analyzing the purpose and essence of general damages Lugakingira J (as he then was) stated in the case of **P.M. Jonathan V Athuman Khalfan** [1980] TLR 175 at page 190 that:

"the position as it therefore emerges to me is that general damages are compensatory in character. They are intended to take care of the Plaintiff's loss of reputation, as well as to act as a solarium for mental pain and suffering"

I subscribe to the above position.

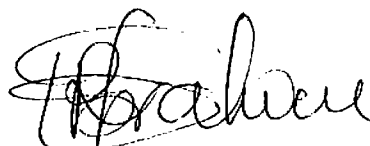
As it could be gleaned from the evidence adduced in court and even admitted by DW1 himself that it is more than 3 years since the Plaintiff has been claiming to be paid her remaining balance for the work done and the extra work. PW2 testified in court on how in several times they have been reminding the Defendant to fulfill their part of obligation by making good the payment in vain – See exhibit PE3. He also evidenced that the return on investment has been reduced and the costs and expenses associated with the whole issue.

Thus in consideration of the loss incurred and all other costs and inconveniences associated in claiming their balance payment, the award of Tshs. 10,000,000/- (say Tanzania Shillings Ten Million Only) as general damages would be adequate under the circumstances.

In the whole and for the above reasons, this court finds that the Plaintiff's suit against the defendant has merits. It is therefore accordingly declared and ordered as follows:

1. The Defendant breached the contract and should within the period of three (3) months from the date of judgement pay the Plaintiff the Total amount of Tshs. 204,000,000/- (say Tanzania Shillings Two Hundred and Four Million only) being an outstanding balance for the work done, interest as stipulated in the contract agreement and VAT.
2. The Defendant shall also pay the Plaintiff general damages to the tune of TZS 10,000,000/- (say Tanzania Shillings Ten Million only).
3. Interest on the decretal amount at the rate of 7% per annum from the date of judgement to the payment in full.
4. Costs of this suit shall be borne by the defendant.

Accordingly ordered.



R.A. Ebrahim

Judge

Dar Es Salaam
20.03.2020