

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

AT DAR ES SALAAM

CIVIL CASE NO. 152 OF 2014

**EAST AFRICAN STATISTICAL
TRAINING CENTRE (EASTC).....PLAINTIFF**

VERSUS

SIHA ENTERPRISES COMPANY LTD.....DEFENDANT

NIKO INSURANCE (T) LTD.....NECESSARY PARTY

AND

SEBASTIAN NARIA.....1st THIRD PARTY

EDMUND KILEO.....2nd THIRD PARTY

YAHAYA ZUBERI.....3rd THIRD PARTY

JUDGMENT

11/07/2022 & 01/09/2022

Masoud, J.

There was an undisputed contract for construction entered into on 5/11/2010 between the plaintiff as the employer on one hand, and the defendant as the contractor on the other. The contract was for construction of administration block at the plaintiff's premises situated at Changanyikeni Observation Hill - Dar es Salaam. The project involved a total sum of Tshs 2,321,063,027.88. It was being managed by Ardhi University as the Consultant whose consulting team was led by Dr Huba Nguluma (PW.1). The duration of completion of the project was twelve months. The duration was to be reckoned from 5/11/2010 which is the date on which the contract was signed.

There was a necessary condition under the contract which was to be complied with by the defendant for the performance of the work under the contract. The condition entailed execution and submission by the defendant of advance payment bond and performance bond. The said condition was complied with as the said bonds were issued to the defendant by the necessary party. There were therefore Advance Payment Bond No. L48/10/02631 and Performance Bond No. L.48/10/02630 for a sum of Tshs 996,318,908/- and a sum of Tshs 232,106,303 respectively. The bonds were to cover the plaintiff in the events of breach of the contract by the defendant.

The plaintiff claimed in her counterclaim against the defendant and necessary party jointly and severally for a total sum of Tshs 4,032,136,533/- as reliefs and damages for breach of the contract. She complained about a number of things. Firstly, excessive delays in the performance of works. Secondly, underperformance whereby as at 13/11/2011 the contractor had only performed 17% of the entire works. And thirdly, wrongful termination of the contract by the defendant on the alleged refusal or payment delays of Interim Payment Certificate No. 4 and 5 issued on 16/02/2012 and 05/04/2012 respectively.

The plaintiff contended that the said Interim Payment Certificates No. 4 and No. 5 were properly withdrawn and nullified by the consultant on 8/5/2012. The plaintiff alleged that the decision of the consultant to withdraw and nullify the certificates was not challenged by the defendant under clause 27.1 of the Contract, having applied to the consultant for a revised Interim Certificate No.4. Thus, the defendant could not terminate the contract on the allegation of the delayed payment or non-payment under clause 62.2(d) of the Contract. In fact, clause 27.1

of the Contract required the defendant to refer her grievances on a decision taken by the consultant to an adjudicator within 14 days of being notified of the decision.

The plaintiff alleged that she has, as a result, suffered loss and damages due to loss of use of the money secured by the bonds, inflation of costs for completion of the project, cost and inconvenience of follow up, and loss of use of the building under construction and costs for alternative use of facilities.

As such, the plaintiff in her counterclaim sought for a number of reliefs as follow. An order for payment of Tshs 712,922,106.00 being the outstanding amounts under the bonds; an order for payment of inflationary escalation of costs for completion of construction which by the time of filing the suit was at Tshs 1,365,883,227.66; an order for the payment of Tshs 100,000,000.00 being costs for the follow up and enforcement of the bonds; an order for the payment of Tshs 1,953,331,200.00 as redress for loss of use of building under construction, and costs for alternative use of facilities; an award of general damages for breach of contract, loss and inconvenience to be assessed by the court; costs and any other reliefs the court shall deem fit and just to grant.

The defendant filed a written statement of defence against the plaintiff's claim. She disputed all of the plaintiff's allegation justifying the reliefs sought. She contended that she terminated the contract she had entered with the plaintiff as the same was breached by the plaintiff and could not be continued by her.

The necessary party filed a third party notice and was granted leave to issue third party notice against the third parties. She also filed a written statement of defence in addition to lodging a third party notice. She specifically denied the validity

of the Bonds Coverage. She disputed the indorsements for extension of the said bonds. She further disputed the claims alleged to have arisen from the contract as the same was between the plaintiff and the defendant and had nothing to do with her. In case there was breach, the liability of the surety could under no circumstances escalate beyond the limit of the bonds. It was likewise averred that the amount of loss claimed was a mere estimate despite also being exaggerated.

. There was also a written statement of defence by the second third party setting out his defence against the counterclaim. He denied that he is liable to the plaintiff on the alleged breach of the contract. He stated that it was the plaintiff who breached the contract which breach entitle the defendant to terminate the contract. The other third parties did not appear or file a written statement of defence. The matter therefore proceeded ex-parte against them.

Issues for determination of the instant suit which is based on the counterclaim by the plaintiff were framed and recorded by the court. The first issue was about who breached the contract between the plaintiff in the counterclaim and the defendant. The second issue was whether the plaintiff is entitled to compensation and damages from the defendant. The third issue was whether the plaintiff is entitled to be indemnified from the advance payment bond and performance bond issued by the necessary party. The fourth issue was if the third issue is answered in the affirmative, whether the necessary party is entitled to be indemnified from the counterindemnities/guarantees issued by the third parties in their personal capacities. And the last issue was to what reliefs are parties entitled.

The plaintiff was at the trial represented by Ms Grace Lupondo, learned State Attorney, who was assisted by Zeraphina Gotore, learned State Attorney, while the defendant and the second third party were represented by Khalid Suddy Rwebangira, learned Advocate. The necessary party was represented by Oscar Msechu, learned Advocate, who was assisted by Ms Dorothea Rutta, learned Advocate.

The plaintiff brought three witnesses, namely, Tumaini Katunzi (PW.1), Huba Nguluma (PW.2), and Adonis Mwijage (PW.3) who testified in support of the plaintiff's case. The defendant on her part brought two witnesses, namely, Edmund Johnson Kileo (DW.1), and Kassim Mzee Leikusye (DW.2). Edmund Johnson Kileo (DW.1) also testified on behalf of the second third party. There were also Cicilia Peter Shirima, and Sarah Jones Haule, who testified as DW.3 and DW.4 respectively for the necessary party.

The testimony of PW.1 was, by and large, on the contract which was not disputed. She also testified as to how the contract was entered into and implemented before it was wrongfully terminated by the defendant. She tendered the contract in evidence, which was admitted as Exhibit P.1. PW.1 testified on the advance payment amounting to 30% of the value of the contract. She told the court that the advance payment was paid to the defendant as required by clause 55 of the contract (Exhibit P.1).

It was PW.1's testimony that the defendant complied with the requirements of having performance bond, and advance bond issued by the necessary party, which were to last for 12 months. PW.1 told the court that the extension of the bonds duration from 25/05/2012 to 24/11/2012 was later on sought and obtained from the

insurer who is the necessary party. The bonds and indorsements for extension were tendered and admitted in evidence as Exhibits P.2 and P.3 respectively.

PW.1 testified about how the payment was to be effected to the defendant under the contract. In such respect, he told the court about the requirement of payment for work done upon issuance of interim payment certificates by the consultant, and how the requirement was all along complied with. The issuance of interim payment certificate, the court was told, was based on the invoice raised by the defendant detailing works accomplished and their respective values. Accordingly, an interim certificate would be issued when the consultant is satisfied with the values of the accomplished works. It was however not stated by PW.1 that the plaintiff was dissatisfied on how the work done was valued by the consultant for purposes of certifying payment.

PW.1 told the court about the Interim Certificates No. 4 and No.5 which were issued on 16/2/2012 and 5/4/2012 respectively. They respectively involved a sum of Tshs 129 Million and Tshs 87 Million. As PW.1 put it, the certificates were issued to the defendant by the consultant requiring the plaintiff to pay the defendant. Having received the said certificates, and as the plaintiff was about to pay the defendant, the plaintiff received a copy of letter dated 10/5/2011 from the consultant to the defendant which expressed the consultant's dissatisfaction with the implementation of the project by the defendant. The said letter was tendered by PW.1 and admitted in evidence as Exhibit P.8. Worth noting on this piece of evidence is that while Exhibit P.8 was dated 10/5/2011, the certificates referred to by PW.1 was issued on 16/2/2012 and 5/4/2012, almost a year later.

Consistent with the evidence about the consultant's dissatisfaction with the progress of the works, PW.1 testified on the inspection of the project which followed after the receipt of the letter Exhibit P.8. The project was, according to the testimony of PW.1, inspected by the consultant, and a report dated 13/09/2011 issued. According to PW.1 the site inspection report showed shortfalls on the execution of the project by the defendant contrary to the requirements of the contract. The same was tendered by PW.1 and admitted in evidence as Exhibit P.9.

It is worth noting, at the outset, that Exhibit P.9 was ahead of the issuance of the interim Certificates No. 4 (Exhibit P.10) and No.5(Exhibit P.11). It was also prior to the indorsements for extension evidenced in Exhibits P.2 and P.3, and the previous extension indicated in the Interim Certificates No. 4 and No 5. It must be noted that there was no dispute between the plaintiff and the defendant on the extension.

Testifying on the inspection report Exhibit P.9, PW.1 pointed out that while the timeframe of the project was about to expire, it was only insignificant percentage of the work that was completed. It meant that the defendant could not, according to PW.1, finish the work in time as required by the contract. PW.1 stated that the defendant had only accomplished shuttering stage for second floor slab, when the inspection was conducted on 13/09/2011. The report, according to PW.1, indicated that the quality of the work so far completed was of a poor quality and not consistent with the contract. The claim about quality of work was however not accompanied with a report in that respect substantiating allegation other than the site inspection report Exhibit P.9.

It was further in the testimony of PW.1 that the defendant was at the time of the inspection evidenced by Exhibit P.9 still yet to submit a report of the progress of works, and schedule of work among others. She also stated that pursuant to Exhibit P.9, the defendant was required to submit time lost recovery strategies, and a confirmation that the site was not abandoned. She further stated that the next meeting was scheduled on 18/10/2011.

Subsequently, the plaintiff received on 16/02/2012 and 05/04/2012 Interim Payment Certificates No. 4 and No.5 requesting for payment of Tsh 129 Million and Tshs 87 Million respectively. PW.1 tendered the said certificates, which were admitted in evidence as Exhibits P.10 and P.11 respectively. Instead of settling the payment, the plaintiff called a management meeting involving the consultant, which meeting was not attended by the defendant.

The meeting as per PW.1 was to look at the plaintiff's concerns over the progress and quality of the work whose practical completion date was scheduled on 25/5/2012 following the extension, and ascertain whether the project would be completed within time. The minutes of the management meeting was admitted as Exhibit P.12. As is clear on the minutes, the plaintiff was concerned on the quality and progress of the work and non-responsiveness of the defendant.

Consequently, PW.1 testified that Site Meeting No. 10 was held on 27/04/2012. It was well attended by the defendant, plaintiff and the consultant. Upon inspection of the site by the meeting, it was found that the objective of the project was not achieved, and that it was doubtful whether the project would be completed on 25/5/2012 as scheduled. PW.1 tendered the minutes of the said site

meeting, which were admitted as Exhibit P.13. PW.1 told the court that it was against the above background that the Interim Payment Certificates No. 4 and No. 5, were not honoured and the decision was made by the consultant to withdraw and nullify the certificates.

In his further evidence, PW.1 testified about a letter dated 08/05/2012 communicating to the plaintiff the decision withdrawing and nullifying the Interim Certificates No. 4 and No. 5. The letter was copied to the defendant, and was herein admitted as Exhibit P.14 after being tendered by PW.1. Attention of the court was drawn to a letter dated 10/05/2011 with Ref.ARU/A538/SF 155 (Exhibit P.8) referred in the letter (Exhibit P.14) which was, according to PW.1, about unsatisfactory progress of work.

In so far as Exhibit P.14 is concerned, PW.1 drew the court's attention to its contents as they relate to problems which were raised in Exhibit P.12 (i.e management meeting minutes). It must however be remembered that subsequent to Exhibit P.8 referred in Exhibit P.14 (i.e letter withdrawing and nullifying Interim Certificates No.4 and No. 5), there was Interim Certificate No. 3, tendered by PW.1, and admitted in evidence, as Exhibit P.5, which was issued on 17/08/2011 and accordingly honoured on 26/09/2011, after a lapse of 38 days. It has also to be born in mind that there was no evidence from PW.1 as to service of Exhibit P.14 to the defendant.

The plaintiff on 01/06/2012, according to PW.1, received a letter from the defendant admitted herein as Exhibit P.15. The said letter was about termination of the contract by the defendant in accordance with clause 62(d) of the said contract

(Exhibit P.1). The clause related to fundamental breach of the contract by the plaintiff for her failure to honour a certified payment within 84 days of the issuance of a relevant interim certificate.

Mindful of Exhibit P.15, PW.1 told the court that the Certificates No. 4 and No. 5 were not honoured because the consultant withdrew and nullified them on 08/05/2012 within 84 days of their issuance. It was, in particular, shown that Certificates No.4 and No.5 issued on 16/2/2012 and on 5/4/2012 were withdrawn and nullified on 08/05/2012 after a lapse of 82 days, and 32 days respectively, which is within the contractual period of 84 days.

It was further testified by PW.1 that the plaintiff wrote to the defendant to the effect that since the defendant had among other things abandoned the site, the plaintiff thus invoked clause 62.2(a) of the contract]to terminate the contract as evidenced by Exhibit P.16 collectively. The plaintiff also wrote to the Public Procurement Regulatory Authority about the termination and to the necessary party about termination of the contract, and her obligation to effect payment in the favour of the plaintiff of a sum of Tshs 232,106,303.00 pursuant to sub-regulation 123(5)(b) of the Public Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005, GN. 97 as also evidenced in Exhibit P.16 collectively. And PW.1, further, testified on other correspondences that were made involving the defendant, the necessary party, National Construction Council, and Tanzania Insurance Regulatory Authority which were all admitted as Exhibits P.17, P.18, P.19 and P.20.

When cross-examined by the counsel for the defendant, PW.1 was clear that Interim Certificate No. 3 was issued on 17/8/2011 after the letter dated 10/05/2011 (Exhibit P.8) which expressed the consultant's dissatisfaction with the implementation of the project. On further cross-examination, PW.1 had it that no payment would have been effected had there been poor performance of the project. PW.1 was equally clear that he was not sure where the consultant derived her powers to nullify the certificates, and whether the defendant received the letter from the consultant withdrawing and nullifying the Certificates No.4 and No. 5. In re-examination, PW.1 said that in as much as the consultant was empowered to issue Interim Payment Certificates under the contract, she has was equally empowered to withdraw and nullify them. PW.1 was however not re-examined on whether the consultant served the defendant the letter withdrawing and nullifying the certificates.

As to PW.2 who was the team leader of the consulting team, she testified on the implementation of the contract, saying that it was not good. PW.2 stated that the defendant as the contractor was all along behind her schedule of work. She did not however tender in evidence the defendant's schedule of works. PW.1 told the court that the defendant was given opportunity to redefine her programme of work in a manner that is consistent with the contract in vain. She requested postponement of site meeting due to her management problems as was evident in Exhibit P.21.

PW.2 recognised Exhibit P.8 about unsatisfactory work progress, and the need on the part of the defendant to address the problem and expedite the execution of the project. PW.2 told the court about the site visit conducted which established that the site was dormant as there were neither materials on site nor manpowers. As a result, Exhibit P.8 was written in that respect on 10/5/2011. On my part, I was clear

that Exhibit P.8 was thus written on 10/5/2011 before the issuance of the Interim Payment Certificate No.3 (Exhibit P.6) on 17/8/2011 which was honoured on 26/09/2011 after a lapse of 38 days. I also found it correct to say that Exhibit P.8 was written 55 days after the issuance of Interim Certificate No.2 on 16/03/2011 and before the said certificate was honoured on 22/06/2011, after a period of delay of 98 days.

Moreover, PW.2 recognized Exhibit P.9, a site inspection report of 13/9/2011, which revealed that there was a slow work progress on the site, and that Site Meeting No.7 could not be held due to the absence of the defendant. Looking at the evidence as a whole, Exhibit P.9 signified inspection held on 13/9/2011, after a lapse of 27 days of the issuance of the Interim Payment Certificate No. 3 (Exhibit P.5) on 17/8/2011, and indeed, before the said certificate was honoured on 26/09/2011 after 38 days of its issuance which is beyond 28 days provided for under clause 27.1 of the contract.

It must be underlined here that the interim payment as per the said Interim Certificate (Exhibit P.5) was based on the valuation for works prepared on 15/08/2011. The valuation certified for payment the net amount due to the defendant as Tshs 171,290,016 as shown in Exhibit P.5. Indeed, similar valuations of work done certifying payment dues to the defendant were conducted in respect of the other Interim Certificates for the respective work done.

PW.2, in addition, testified on the request by the defendant to postpone site meeting on account of unavailability of the defendant or her manpower at the site, save for a store-keeper and a watchman. PW.2 said that the defendant was, in

relation to the request, asked to confirm in writing that they have not abandoned the site. PW.2 told the court that pursuant to Exhibit P.21, the reason for requesting postponement of Site Meeting No.8 was due to unavoidable circumstances on materials procurement process, which resulted into minimal progress of work at the site. According to PW.2, the overall work progress was not in conformity to the contract. PW.2 had it that pursuant to Exhibit P. 21, the defendant admitted that there was minimal work progress.

Likewise, PW.2 testified as to how Interim Payment Certificates were issued after valuation of work done and certifying claims the defendant was entitled to be paid. PW.2 also testified on Exhibit P.12 and Exhibit P.13 which evidenced the management meeting held at instance of the plaintiff with a view to looking at the progress of the work, following the plaintiff's concern over the quality and progress of work at the site and the eventual Site Meeting No. 10 held on 27/04/2012 as already testified by PW.1 herein above.

In particular, PW.2 told the court that the site meeting evidenced by Exhibit P.13, which was attended by the consultant, the defendant, and the plaintiff, was satisfied that the work progress was not satisfactory as it was done by 14% only, and it was behind the schedule for eight weeks. The site meeting, according to PW.2, directed the Quantity Surveyor to carry out a valuation of the work done of which he did. PW.1 recalled that it was found in such valuation that the money already paid to the defendant pursuant to Interim Payment Certificates No. 1, No. 2, and No. 3 exceeded the value of the work done at the site. Such valuation report was not tendered by PW.2.

PW.2 took the court through the contents of Exhibit P.12 and P.13. PW.2 said that such meetings led to the decision for the withdrawal and nullification of the Interim Payment Certificates No. 4 and No. 5 as per Exhibit P.14. PW.2 told the court that in Exhibit P.14 the consultant documented the background that led to the withdrawal and nullification of the interim certificates. The background included Exhibit P.8, and Exhibit P.12 which were referred for such purpose in the Exhibit P.14.

As a team leader of the consulting team, PW.2 said, she had all the powers of issuing certificates as well as powers to make necessary adjustments. The contract is, according to PW.2, quite clear about such powers. She added that she had also power to withdraw and nullify an interim certificate, which power is drawn from the best practices. In relation to the decision of the consultant in the exercise of her powers as such, the defendant is, it was so testified, protected by clause 27.1 of the contract. .

The attention of the court was, accordingly, drawn by PW.2 to the contents of clause 27.1 of the contract (Exhibit P.1). According to the said clause if the defendant, as the contractor, is not satisfied with any decision of the consultant, she has to refer her grievances on a decision taken by the consultant to an adjudicator within 14 days of notification of such decision. She told the court that the withdrawal and nullification of the certificates was not challenged by the defendant.

Rather, PW.1 further testified that the defendant submitted an application for a revised Interim Payment Certificate No. 4. She accordingly tendered the application for the revised certificate, which was admitted as Exhibit P.22. With the such

application, it was said that the defendant had knowledge of the decision. As was PW.1, PW.2 did not testify about service of the letter about withdrawal and nullification of the certificates to the defendant. In other words, she did not testify about the requirement of having the decision notified to the defendant by the consultant.

The revised application, according to PW.2, reduced the amount payable from Tshs 129,865,316 to Tshs 82,874,204.48 plus VAT. PW.2 also testified about Exhibit P.15 which was the letter by the defendant terminating the contract under clause 62.2(d) of the contract. PW.2 had it that the defendant could not terminate the contract under the clause because there was no fundamental breach committed by the plaintiff under the contract in view of the withdrawal and nullification of the certificates before the expiry of 84 days.

It seems to me that PW.1 reasoning was that since the certificates were withdrawn and nullified by the consultant, there was no delayed payment of certified claims within the purview of clause 62.1&1(d) of the contract. As far as PW.2 was concerned, it was the defendant that breached the contract, by abandoning the site pursuant to clause 62.2(a) of the contract, as was evident in the letter employing circumstances which were not contractual.

In cross-examination by the counsel for the defendant, PW.2 testified about certification of payments to be made, saying that they were all issued after valuation of work done. She admitted that she did not to have a schedule of site meeting with her as she was testifying. She testified about unsatisfactory work progress, about clause 7 which provides that communication under the contract has to be in writing

and not by phone, about the signatures in Exhibits P. 21, P.22 and P.1 not being the same, about Exhibit P.1 not having a specific clause providing for withdrawal and nullification of certificates after being issued, about Interim Certificates No. 4 (Exhibit P.10) and No. 5 (Exhibit P.11) not being defective, not receiving an early warning from the defendant although the plaintiff on her part expressed her dissatisfaction with the progress of the work, and about the letter withdrawing and nullifying the certificates not showing when and whether the defendant was notified about the decision so that she could challenge the decision within 14 days if need be.

In re-examination, PW.1 reiterated what she said earlier as to her power as a consultant to issue and withdraw an Interim Payment Certificate, the reason why the certificates were withdrawn, 30% of the contract sum already paid, as well as Interim Certificates No. 2 (Exhibit P.10) and No.3 (Exhibit P.11), and the need to protect interests of the plaintiff as a client.

The third and last witness for the plaintiff was, Adonis Mwijage, Project Quantity Surveyor, who testified as PW.3. He testified about the extension which the defendant was granted as she could not finish the construction as per Exhibit P.2. He further testified that despite the extension being granted based also on the extension of the bonds as per Exhibits P.2 and P.3 which she presented, the defendant could not seem to complete the project within the period of extension. He told the court that as the extension was about to expire, the construction was still lagging behind as the work done was only between 14% to 17%.

PW.3 as was PW.2 recognised all certificates that were issued in favour of the defendant, namely, Certificate No. 1 (Exhibit P.4), Certificate No.2 (Exhibit P.6),

Certificate No. 3(Exhibit P.5), Certificate No. 4(Exhibit P.10), and Certificate No.5(Exhibit P.11). He told the court that the defendant abandoned the site in May 2012, and according to clause 62.2(a) of Exhibit P.1, she committed a fundamental breach entitling the plaintiff to terminate the contract.

PW.3 did not, however, testify as to the duration that the site remained abandoned, and about programme of work which envisioned or did not envision any stoppage of work as is required by clause 62.2(a) of the Contract. PW.3 testified to have done valuation of the work done pursuant to clause 63.1 of the contract. In relation to the valuation, PW.3 tendered Exhibits P. 23 and P.24 which reported on the inflationary costs, and value of work done respectively. There was however no certificate envisaged under clause 63.1 which was admitted in evidence.

Accordingly, the court was shown by PW.3 that the value of outstanding work as of June 2012 was Tshs 1,741,546,291.84 while the value of work done was Tshs 579,516,736.04 which is 25.37% of the whole project and the total payment pursuant to Interim Payment Certificates No.1, No. 2, and No.3 was Tshs 992,296,873.00. With the above evidence, PW.3 further stated that the difference between the amount the defendant was paid and the value of the work done was Tshs 412,780,137 as per the requirement of clause 63.1 of Exhibit P.1. PW.3 went on to tell the court that the plaintiff is thus entitled to be paid the difference as a debt by the defendant.

Similarly, PW.3 testified about the plaintiff's entitlement to liquidated damages as provided for under clause 52(1) of Exhibit P.1. PW.3 told the court that the liquidated damage is Tshs 1,000,000/- per week or part thereof. Thus, since it is

about eight years that has already elapsed if the period is reckoned from the date the defendant abandoned the site, the plaintiff would be entitled to a sum equivalent to liquidated damage for 430 weeks.

Consistent with his testimony, PW.3 tendered a report on the liquidated damage dated 31/08/2020 that he prepared after the filing of the case, which was admitted as Exhibit P.25. The said exhibit, PW.3 stated, indicated that the plaintiff was then entitled to a liquidated sum amounting to 428,000,000/- for the period between May 2021 and 31/08/2020 and that pursuant to Exhibit P.1, the damage was still accruing against the defendant. Similarly, PW.3 testified on cost escalation, showing that since May 2012, construction costs increased by 72%. In all, the plaintiff is, according to PW.3, entitled to, a monthly payment without working, liquidated damage, costs of escalation as at August 2020.

When cross-examined, PW.3 stated as follows. In relation to payments made in respect of Certificate No.1, if there was delay in effecting the payment beyond the contractual period, there was fundamental breach. However, the contract was not terminated because of the breach and the construction thus continued. He could not tell whether payment was made in respect of Certificates Nos 4 and 5. They were not however re-issued after being withdrawn and being nullified by the Architect, which testimony is contrary to what was pleaded in the counterclaim. He could not say anything about powers to withdraw and nullify the certificates.

When further cross-examined, he told the court that he was not aware that there was proof of extension of the bonds on the record. He testified also that the advance bond expired on 02/12/2011 while the performance bond having

commenced on 5/11/2011 was to expire on the expiry of the contract. The basis of the extension was the project duration which was extended by the parties. PW.3 told the court that there were problems with the defendant as to his progress of the work which were noted sometime in April-May 2012. In a further cross-examination, PW.3 had it that the extension of the performance and advance bonds were from 25/05/2012 to 25/11/2012.

It was further said by PW.3 in cross-examination that before 25/5/2012 and between December 2011 and 25/05/202012, there was no advance bond. The extension had to be sought because there was money which was yet to be recovered. It was effected by a letter by the consultant as provided under clause 31 of the contract. He reaffirmed his earlier testimony as to how and why he carried out valuation of work done after the site was abandoned by the defendant and that the same was done pursuant to clause 63 of the Contract.

In his re-examination, PW.3 reaffirmed his testimony in chief and provided further clarification as to the evaluation undertaken under clause 63.1 of the contract, the value of the withdrawn certificates, why they were withdrawn, why he excluded the said Certificates in his site valuation and average inflation for the 8 years the site remained abandoned and on Exhibit P.23 about indices and construction costs and liquidated damages. He told the court that when they went for the final valuation at the site, all materials that were earlier at the site had already been removed. He clarified on extension of the advance bond indorsed on 25/5/2012, and as to the other bond that remained valid as the certificate of completion was yet to be issued. The plaintiff is entitled to recover the advance pay as the same was still yet to be recovered.

In so far as the defendant was concerned, DW.1 who is the Managing Director and one of the directors of the defendant, testified in defence. He admitted the contract entered into between the defendant and the plaintiff for construction of administration block for the plaintiff(Exhibit P.1). He testified on the prerequisites of the contract, and how they were complied with as was apparent in the testimonies of the other witnesses of the plaintiff. His evidence on the certificates issued was consistent with the evidence of the plaintiff's witnesses.

However, DW.1, in particular drew the attention the court to notable delays by the plaintiff in honouring certificates. In respect of certificate No. 2, the court was told that it was paid after a lapse of 98 days instead of being paid within 28 days as required by clause 46.1 of the Contract, while certificate No.3 issued on 17/8/2011 was paid on 26/09/2011. Clearly, in both instances, the certificates were honoured after a lapse of more than 28 days provided for under clause 46.1, and it was even worse on the Certificate No. 2, which having been issued on 16/03/2011, it was honoured on the 22/06/2011 after a lapse of 98 days which is beyond 84 days provided for under clause 62.2(d) of the Contract.

As the work at the site proceeded DW.1 testified, the defendant raised a claim which gave way to Interim Certificate No.4, whose payment was not effected, and subsequently, Interim Certificate No. 5 issued on 5/04/2011, which was also not honoured. Having noted that the plaintiff committed fundamental breach, the defendant, according to the DW.1, terminated the contract on 01/06/2012 as per Exhibit P.15. As to Exhibit P.14 about withdrawal and nullification of the certificates, DW.1 said that it was never served to the defendant and they did not have any knowledge of the same before this case commenced.

Subsequent to the termination of the contract by the defendant, DW.1 stated that the defendant wrote to the plaintiff through the Consultant as to the need for a joint meeting to ascertain each parties entitlements and amicable handing over of the site. DW.1 said that the meeting was not, however, held due to lack of cooperation from the plaintiff as she maintained that she did not recognise the termination. DW.1 testified about the defendant's letter to National Construction Council in vain about possible arbitration. He said that he does not recognise Exhibit P.22 as if at all there were corrections needed on the certificate already issued, they were to be reflected in the subsequent interim certificate. He disputed to have signed the counter indemnity.

When cross-examined by Ms Lupondo, State Attorney, DW.1 told the court that the defendant was pursuant to Exhibit P.4 paid Tshs 696,518,908.00 which amount was proportionally recoverable from subsequent certificates starting with Interim Certificates No.1. He admitted that where certificates could not be honoured in 28 days, the delays would attract interest payable in favour of the defendant as stipulated under clause 46.1 of the Contract (Exhibit P.1). He further admitted that they never charged interests as per the requirements of the clause.

When shown Exhibit P.8, DW.1 said that it was a letter which the defendant received from the consultant expressing concerns about unsatisfactory work performance at the site and measures to redress the situation the defendant was required to take and which were of course eventually complied with. As to Exhibit P.14 which was about withdrawal and nullification of certificates Nos 4 and No. 5, he maintained that the same was never served to the defendant. With regard to Exhibit P.22, DW.1 disputed that it was signed on behalf of the defendant's Managing

Director. Upon terminating the contract as per Exhibit P.15, DW.1 in cross-examination told the court after reading clause 62.2(a) of Exhibit P.1 that the defendant left the site on 1/6/2012 and never resumed and filed the case which stands dismissed two years after.

Apart from the admission that the delay of 28 days in honouring an interim certificate would entitle the plaintiff to interests as provided for under clause 46.1 of the Contract, there was no similar cross-examination on the delays for the payment of certified payment for the Interim Certificates No.2 and No.3. In re-examination, DW.1 reiterated that the defendant was never served with Exhibit P.14 regarding withdrawing the certificates.

There was also one, Kassim Mzee, a Quantity Surveyor, who was employed by the defendant as a project manager and who in this suit testified for the defendant as DW.2. He testified on the contract evidenced by Exhibit P.1 and how the requirements for performance bond and advance bond were complied with. He told the court about processes involved in issuance of the certificates starting with a claim by the defendant which is accompanied with invoice, detailing the role played by the defendant, consultant and the requirement of the plaintiff to honour the certificate issued.

He also testified as to the failure to pay Interim Certificate within 28 days, and failure by the plaintiff to honour certificate No. 4 (Exhibit P.4) within 28 and within 84 days pursuant to clause 46.1 and 61.2(a) of the Contract. He testified that the defendant terminated the contract when the certificate (Exhibit P.4) was already due for 105 days. He told the court about Exhibit P. 14 concerning the withdrawal and

nullification of the Interim Certificates No. 4 and No. 5 which the defendant had not been served with. He also said that Exhibit P.1 does not provide for withdrawal of certificates or their nullifications once they are issued. DW.2 further maintained that the defendant would have taken steps pursuant to clauses 27 and 28 had the letter been served to them.

DW.2 also testified on Exhibit P.22, saying it was a mere letter, which was signed by an individual that he did not recognise. He told the court that once an interim certificate is issued, it cannot be revised. Rather, an application has to be made for a subsequent certificate which should take into account any needed adjustments. He recalled that Exhibit P.10 (certificate No. 4) was for Tshs 129,865,316.00 while the alleged revision sought by the defendant was for Tshs 82,874,204.48. He disputed that the letter (Exhibit P.22) was written by the defendant. DW.2 insisted that the termination of the contract by the defendant was instigated by the failure of the plaintiff to honour Interim Certificate No.4.

In cross-examination by Ms Lupondo, DW.2 told the court that while Certificate No. 4 was copied to and received by the defendant, Exhibit P.14 which also seem to have been copied to the defendant was not received by the defendant. He told the court that between 16/2/2012 and 8/5/2012 when the disputed letter was issued, there was a total of 81 days that elapsed. He told the court that clause 62.2(d) of Exhibit P.1 had it that 84 days must have elapsed without payment of relevant certificate for the delay to amount to a fundamental breach.

In relation to DW.2's claim that Exhibit P.22 was not signed by the defendant, he compared during cross-examination the signature in Exhibit P.22 with the

signature appearing in the letter of acceptance of award contained in Exhibit P.1. In so doing, and as was in re-examination, DW.2 maintained that the two signatures are different. And added in re-examination that, he saw the letter in court for the first time. Apparently, DW.2 was not specifically cross-examined by the counsel for the plaintiff in respect of the delay in the payment of the Interim Certificates No. 2 and No.3 which was accordingly made after a lapse of 98 days and 38 days respectively contrary to clause 46.1 and 61.2(d) of the Contract.

There was also one, Cecilia Peter Shirima, an employee of the necessary party who herein testified as DW.3. She recognised Exhibit P.2 and P.3 as advance bond and performance bond respectively which the necessary party issued to the defendant. In relation to the said bonds, DW.3 testified about security which was furnished. DW.3 thus tendered the relevant documents relating to counter indemnity dated 10/11/2010 which were admitted as Exhibit D.1 collectively.

Accordingly, the court was told by DW.3, the directors of the defendant, Edmund Kileo and Yahya Zuberi, undertook to personally indemnify the necessary party in case of anything. DW.3 told the court that the bonds were issued once the indemnity was signed by the said directors. She further said that the guarantee was meant to remedy the fault by the defendant where the plaintiff played her part. She went on to say that as the directors are the ones who signed the guarantee, they were liable to remedy the fault.

Upon being cross-examined by Mr Rwebangira for the defendant and the second third party, DW.3 testified on the validity period of the bonds, having been made to read relevant parts of the said bonds. She declined to have extended the

timeframe of the bonds. Thus as regard to the extension indorsements, she told the court that they were not recognised by the necessary party.

Upon being further cross-examined by Ms Lupondo, State Attorney for the plaintiff, DW.3 said that the plaintiff paid advance sum to the defendant based on the advance payment bond that the necessary party extended to the defendant. She also admitted that the bond was intended to guarantee recovery by the plaintiff of the advance made in favour of the defendant.

With reference to paragraph 2 of Exhibit P.2, she told the court that the necessary party was not liable to reimburse the plaintiff the advance payment. Rather, it meant that the advance payment would be paid by the necessary party if the defendant is in default. As to paragraph 3 of Exhibit P.3, DW.3 said that it was not meant to require the necessary party to reimburse the plaintiff but only when the defendant was in default.

There was, furthermore, one, Sarah Jones Haule, an employee of the necessary party who testified as DW.4 for the necessary party. She testified about the demand notice (Exhibit P.17) which the necessary party received on 05/07/2014 in relation to the bonds issued to the defendant. Upon her scrutiny she realised that there were no valid claims as the bonds had long expired in December 2011 after being issued on 03/12/2010. Despite seeking clarification from the defendant why the claim was brought after the validity period of the bonds, there was no response from the directors of the defendant who were nonetheless required to notify the necessary party about any default that occurred.

DW.4 was cross-examined by Mr Rwebangira, Advocate for the defendant and Ms Lupondo, State Attorney, for the plaintiff. As a result, DW.4 stated that the liability of the necessary party in respect of the bonds ended on the expiry of the validity period of the bonds and that she was not aware of any extension sought and properly granted. Further that the purported indorsement for extension were purportedly signed by one Manfred Sibande, who was the Chief Executive Officer of the necessary party. She admitted that the claim based on the bonds was lodged but could not be attended as it fell outside the validity period of the bonds.

On further cross-examination, DW.4 said that paragraph 6 of Exhibit P.2 meant that liability would end once certificate of completion is issued as long as the same is within the validity period of the bond. DW.4, however, agreed that it was nowhere in the relevant bond specified that liability period of the necessary party would end after a year. DW.4 also admitted that the defendant was still yet in receipt of the certificate of completion.

There were final submissions filed by the counsel for the parties. They analysed the evidence adduced by the witnesses in relation to the pleadings, and issues on the record. As a result, there were rival arguments and submissions made in favour of the respective pleadings of the parties to the case. It is now my duty to determine the suit by considering the competing arguments and submissions made by the learned counsel for the parties as they relate to the pleadings and the evidence on the record. However, before doing that I find it appropriate in the circumstances of the case to preface my eventual deliberation with the basic tenets which will guide me in determining the suit.

It is a cardinal principle of law that, in civil cases as is the present, the burden of proof lies on the party who alleges anything in his favour. I am fortified in this view by the provisions of sections 110 and 111 of the Evidence Act, Cap. 6 R.E 2019.

"110-(1) Whoever, desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

111. The burden of proof in any suit lies on that person who would fail if no evidence were given on either side."

With the above provisions which are fortified by a long line of authorities to that effect, a party in civil proceedings who alleges anything in his favour bears the evidential burden, and the standard of proof is on the balance of probabilities. It means that, the court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved.

From the long line of authorities on the above mentioned principle, I wish to only mention, **Stanslaus Rugaba Kasusura and Another v. Phares Kabuye** [1982] TLR 338, **Jasson Samson Rweikiza v Novatus Rwechungura Nkwama**, Civil Appeal No. 305 of 2020, and **Godfrey Sayi v. Anna Siame as Legal Personal Representative of the late Marry Mndolwa**, Civil Appeal No. 114 of 2012 (unreported). I will be guided by the above mentioned principle in the course of my determination in this matter.

From the rival arguments as was from the pleadings and evidence, it was not in dispute that there was a contract for proposed construction of administration block of the plaintiff entered into between the plaintiff and the defendant and herein

admitted as Exhibit P.1; the works under the said contract were to be completed in twelve months period as from the date of signing the contract, which period was undisputedly extended for a further term as shown in Exhibit P.2 and Exhibit P.3 and in the certificates issued; and there were advance bond and performance bond which were respectively admitted as Exhibits P.2 and P.3 which were issued pursuant to the contract by the necessary party, but it is disputed by the necessary party that there were valid indorsements for extension.

In so far as Interim Certificates were concerned, there were Interim Payment Certificates, namely, Certificate No.1 issued on 11/11/2010, Certificate No.2 issued on 16/03/2011, and Certificate No.3 issued on 17/08/2011, which were all honoured as is evident in Exhibits P.4, P.6 and P.5 respectively; and there was similarly no dispute that interim Certificates No. 2 and No. 3 were honoured after lapse of 96 days and 38 days contrary to the provision of clause 62.2(a) and 26.1 of the Contract respectively.

There were furthermore Interim Payment Certificate No.4 (Exhibit P.10) and Interim Payment Certificate No. 5 (Exhibit P.11) issued on 16/02/2012 and 5/04/2012 respectively, and which were not honoured by the plaintiff. The dispute in respect of Interim Certificates No. 4 and No. 5 was on whether these certificates were validly withdrawn and nullified by the consultant and whether the decision about such withdrawal and nullification was notified to the defendant.

It was also not in dispute that the defendant on 01/06/2012 issued, and served the plaintiff a letter of termination of the contract under clause 62.2(d) of the contract. The letter was herein admitted as Exhibit P.15 after being tendered by

PW.1. Apparently, Clause 62.1 & 2(a) of the contract provides that failure to honour payment certified by the consultant within 84 days of the date of the interim payment certificate is a fundamental breach entitling the defendant to terminate the contract.

It was further not in dispute that following the issuance of Exhibit P.15 by the defendant under clause 62.2(a) of the Contract, the plaintiff issued to the defendant a letter dated 11/06/2012 (herein admitted as Exhibit P.16). The said letter (Exhibit P.16) notified the defendant of the plaintiff's decision to terminate the contract under clause 62.1(a) of the Contract on the allegation that the defendant has exhibited unsatisfactory work progress and abandoned the site.

As earlier shown, clause 62.1(a) of the Contract applies when the contractor stops work for 28 days while the stoppage of work is neither reflected in the programme nor authorised by the consultant. Given the plaintiff's pleading in her counterclaim, there was no allegation of stoppage of work as reflected in and pursuant to clause 62.1(a) of the Contract. There were only allegations of excessive delay, underperformance and wrongful termination of the contract by the plaintiff.

Given the two letters of termination of the contract from the defendant and plaintiff dated 01/06/2012 and 11/06/2012 respectively, the issue is whether there was a fundamental breach of the contract by either of the parties envisaged under clause 62.2(a) and (d) of the Contract justifying the termination of the contract by the affected party. In particular, since the present suit is in relation to the counterclaim by the plaintiff, the issue is whether the allegations of fundamental breach of the contract by the defendant comprising complaints of stoppage of work

and unsatisfactory progress were established by the plaintiff on a balance of probabilities. The other issue is whether there was indeed wrongful termination of the Contract by the defendant.

As to the alleged issuance by the consultant of a letter dated 8/05/2012 withdrawing and nullifying the Interim Payment Certificates No. 4 and 5 which was tendered by PW.1, admitted in evidence as Exhibit P.14, and relied upon by PW.2, the defendant as per the evidence of DW.1 and DW.2 disputed to have seen, and to have been served with, the letter before the trial. In addition, the defendant as per the evidence of DW.1 and DW.2 testified that the consultant had no power under the contract to withdraw and nullify interim payment certificate.

On the other hand, PW.2 testified in chief that a consultant is, pursuant to the prevailing best practices, empowered to withdraw and nullify an interim payment certificate once it is issued. Further that, the defendant had knowledge of the decision of the consultant as she acted in accordance with the decision as evidenced by Exhibit P.22 which is her application for a revised Interim Certificate No.2.

With the alleged decision of the consultant withdrawing and nullifying the certificates as afore said, the issue is, as earlier pointed out, whether the Exhibit P.14 was, if at all, validly issued and duly served to the defendant. In relation to Exhibit P.14, it is the alleged failure by the defendant to exercise her right under clause 27.1 of the Contract (Exhibit P.1) to challenge the decision taken by the consultant to withdraw and nullify the said certificates within 14 days of the notification of the decision to the defendant. The allegation as to the failure of the defendant to act in accordance with clause 27.1 of the Contract was testified upon by both PW.1 and

PW.2 without producing before the court any proof of service of the letter of withdrawal and nullification of the said certificates.

As to the alleged failure to prefer the decision to the adjudicator under clause 27.1 of the Contract, it was testified by PW.2, and argued by the learned State Attorney for the plaintiff in her final submission, that the defendant waived her right to challenge the said decision within 14 days of the notification of the relevant decision of the consultant. In addition to the above issue on the withdrawn and nullified certificates, the other issue therefore is whether the defendant failed as alleged to refer the consultant's decision to the adjudicator as required by clause 27.1 of the contract, and should, for such reason, be taken to have waived her right of challenging the withdrawal and nullification of the interim certificates. All of the above issues are critical to the determination of the first on the record which is about breach of the contract. If at all there was delay in the execution of the project, the delays in honouring the certificate could have contributed the delay in the execution of the project and hence underperformance.

With regard to the allegations of stoppage of works which was not pleaded, and unsatisfactory work progress by the defendant, which were testified upon by PW.1 and PW.2 relying on Exhibits P.8, P.9, P.12, P.13, P.16, and P.21; it was disputed by the defendant, and the evidence was accordingly led by DW.1 and DW.2. The testimony by DW.1 and DW.2 was that the Interim Payment Certificates admitted as Exhibits P.5, P.10 and P.11 are evident that there was nothing like unsatisfactory progress or abandonment of the site by the defendant amounting to a fundamental breach of the contract.

Of significance, it was shown in cross-examination of PW.2 that Interim Payment Certificate No.2 issued on 16/03/2011 was honoured on 22/06/2011 after a lapse of 98 days contrary to clause 46.1 and clause 62.2(d) of the Contract. Similarly, Interim Certificate No. 3 was honoured after a lapse of 38 days contrary to clause 46.1 of the Contract. PW.3 admitted that there was a fundamental breach of the contract in that respect although the defendant did decide to terminate the Contract under clause 62.1(d) of the Contract. If at all there were delays in the execution of the project, I have no doubt that the delay in the payment of the certified payments might have contributed to such delays.

As to abandonment of the site which however was not pleaded, it was not shown in the evidence by the plaintiff's witnesses that the defendant abandoned the site for 28 as the starting date and ending date of the period were not specifically testified upon, and shown in evidence, neither was it testified that the defendant had abandoned the site for such period of time. It was equally not shown that there was no authority for stoppage of work and that the current programme did not envisage the stoppage of work.

In so far as the withdrawal of the Interim Payment Certificates No. 4 and 5 is concerned, it must be recalled that these certificates were issued on 16/02/2012 and 5/04/2012 respectively. They were allegedly withdrawn and nullified on 8/05/2012 after a lapse of 82 days, and 33 days of their respective issuance. Clearly, the period of 82 days and 33 days is by far beyond the 28 days within which the certified claims were to be paid and failure of which the defendant would automatically be entitled to interests on the late payment. It was so testified by DW.1 and DW.2 without being contradicted in any way by the plaintiff. It was equally so testified without being

contradicted that when the defendant issued and served the plaintiff the notice of termination on 01/06/2012 as per Exhibit P.15, the Certificate No. 4 was already overdue for 105 days.

The period of delay of 105 days of the payment of the Interim Certificate No. 4 is reckoned from the first day of its issuance on 16/02/2012. The period is far beyond the 84 days stipulated under clause 62.2(d) of the Contract within which the payment certified by the consultant must be paid, for the delay not to amount to a fundamental breach.

It means that by 8/05/2012 when the consultant sought to withdraw and nullify the two Interim Certificates, the plaintiff was in breach, in respect of both Certificate No.4 and Certificate No.5, for her failure to honour the Certificates within 28 days of their respective issuance as required by the contract. The plaintiff was thus liable to pay interests to the defendant on both certificates and as the certificates were still yet to be honoured, the interests were still accruing. The interest was to be calculated from the date by which the payments should have been made up to the date when the late payment is made at the commercial rate of borrowing.

Pursuant to the pleading, it was testified by PW.1 and PW.2 that the said withdrawal and nullification amounted to a decision by the consultant. And if the defendant was aggrieved by the decision, she ought to have challenged the decision by referring it to the adjudicator under clause 27.1 of the Contract. However, there was no proof from the plaintiff's witnesses that the defendant was duly served with

the notice of the decision for the withdrawal and nullification of the certificates as already shown above.

Since Exhibit P.14 was a mere copy of the letter in the possession of the plaintiff, it did not by itself prove service of the notification letter to the defendant as it did not have any signature and or stamp of the defendant signifying receipt. I am accordingly satisfied that the notification of the alleged decision was not served to the defendant and not brought to the attention of the defendant as is required by clause 27.1 of the Contract. In particular, there was neither a dispatch book produced, nor a testimony of any witness as to how the defendant was served.

Reinforcing the evidence that the defendant was notified of the withdrawal and nullification of the said certificates, it was by the evidence of PW.2 shown that the defendant applied for a revised Certificate No.4 as evidenced by Exhibit P.22. Having so applied for a revised certificate as alleged, it was argued that the defendant had a prior knowledge of the decision of the Consultant. The implication according to PW.1 and PW.2 was therefore that the defendant was notified of the decision.

However, the said Exhibit P.22 was a mere photocopy of a letter head of the defendant, which was signed on behalf of the defendant's managing director by an unknown person according to DW.1. The signature on the said exhibit when compared with similar signatures in exhibit P.1 revealed notable differences. Even if it were to be held that the said Exhibit P.22 signified knowledge and service, one cannot tell exactly when was the notification effected if at all and when the counting of 14 days within which the reference was to be made would start. In any event,

Exhibit P.22 could amount to an evidence of notification of the decision for purposes of clause 27.1 of the Contract.

Over and above, there is nothing in the said Exhibit P.22 revealing a clear link with Exhibit P.14. Thus, even if the said Exhibit P.22 were from the defendant, it cannot be confidently said that it was made in response to the said Exhibit P.14 and in compliance with the requirements of Exhibit P.1 as to adjustment of previous certificates. Be it as it may, it does not evidence notification of the consultant's decision to withdraw and nullify the above mentioned certificates regardless of the issue whether or not the decision was valid under the Contract. In so far as there was no notification of the consultant's decision as is required by clause 27.1, there was no decision within the contextual requirements of the clause and thus the Contract justifying withdrawal and nullification of the Interim Certificates No. 4 and No. 5.

Even if the decision were duly notified to the defendant, there was no contractual basis of the decision of the Consultant to withdraw and nullify the certificates which was shown in the evidence of PW.1 and PW.2. It was only stated by PW.2 that the decision is derived from the best practices which provide for powers of the consultant in the implementation of construction project. There was nothing disclosed in the evidence of the plaintiff's witnesses as to the best practices referred.

My reading of Exhibit P.1, and in particular, clause 45 of the Contract, revealed that there was no clause allowing withdrawal and/or nullification of certificates once issued and the plaintiff's witnesses could not point any even when they were cross-examined by the defendant's counsel. There were however clauses

under the Contract allowing proportion adjustments by exclusion or reduction of items from the previous certificates and the plaintiff's witnesses were cross-examined on them. The finding on the absence of contractual basis for the alleged notice of withdrawal and nullification of the certificate are consistent with my earlier findings that the decision was not valid under the contract.

As to the allegation of unsatisfactory performance and abandonment of the site, my eyes were drawn to Exhibit P.12 and Exhibit P.13 which were minutes of management meeting of 25/04/2012 and site meeting No.10 of 27/04/2012. While the former was not attended by the defendant, the latter was. The defendant through the evidence of DW.1 stated that she was not notified about the meeting, while the plaintiff through her witnesses stated that the defendant was notified about the meeting but he was non-responsive.

There was however no proof shown that she was indeed notified in good time to attend the meeting. The allegation that the defendant was notified by phone calls were not proved by a showing of at least phone numbers of the defendant's principal officers and it was also not shown that the alleged notification was consistent with the relevant clauses of the contract as to the requirement of written communication.

Despite expressing the plaintiff's concerns as to the unsatisfactory work progress, the two meetings as can be gathered from the minutes directed milestones to be achieved, and strategies to be put in place by the defendant to address the concerns raised notwithstanding the outstanding certified payments. There was thus nothing in the minutes (Exhibits P. 12 and P.13) directing withholding the outstanding certified payments in Interim Certificates No. 4 and Certificate No. 5 or

withdrawing and nullifying the said certificates. Rather, the plaintiff was directed and reminded as per Exhibit P.13 evidencing the site meeting held on 27/4/2012 to *'..honour the outstanding interim payment certificate No.04 issued on 16/02/2012 as soon as practicable.'*

It may rightly be inferred that the reminder was, generally, mindful of the consequences of the delay in honouring certified payments which would necessarily affect progress of the works, and was also, specifically, mindful that the delay or failure to honour the certified payments within 28 days and 84 days in the favour of the defendant amounted to a breach of the contract, which could also lead to fundamental breach of the contract entitling the defendant to terminate the Contract under clause 62.1& 2(a) of the Contract (Exhibit P.1).

In the management and site meetings held on 24/4/2012 and 27/4/2012 respectively as evidenced by Exhibit P.12 and P.13, it was directed, no doubt with a view to ascertaining the alleged unsatisfactory works progress, that:

"Project Quantity Surveyor to evaluate the project in order to compare and comment on the amount paid, and value of the works on site before the 4th May 2012. The information will assist the client on decision for way forward."

The valuation report resulting from the above directive was not shown by either PW.1 and PW.3 in relation to the alleged unsatisfactory works progress, neither was it pleaded nor was any evidence led that such valuation was carried out. It was only mentioned by PW.1 that the valuation was conducted by PW.2 which assertion was not supported by the evidence of PW.3 and a report in that respect. It

is not clear as to whether or not the envisaged valuation was indeed carried out and whether it was such valuation that informed the plaintiff's complaints.

It is in evidence however that the resolution of 27/04/2012 evidenced in Exhibit P.13 which directed and reminded the plaintiff to honour the certified payments in Certificate No. 4 was just eleven (11) days later followed by the Consultant's letter withdrawing and nullifying the two Certificates No. 4 and No. 5 on 08/05/2012 prior to the scheduled meeting of 25/05/2012, and without being shown that the directed valuation of the works on site by project quantity surveyor comparing and commenting on the amount paid, and value of works on site was duly conducted as directed.

On a different note, there was no testimony from PW.2 accounting for the sudden and radical decision just eleven (11) days after the site meeting (Exhibit P.13) that among other things directed the plaintiff to urgently honour the Certificate No.4. It is equally not without relevant to underline that despite tendering and testifying on Exhibits P.12 and P.13, the plaintiff's witnesses chose to skip the resolution directing the plaintiff to honour certified payment in respect of the interim certificate No.4 with immediate effect. On the basis of such resolution, the defendant was no doubt entitled to terminate the contract pursuant to clause 62.2(d) of the Contract.

In any event, if the valuation was conducted as per Exhibit P.13, the report was not brought to the attention of the court in support of the allegation of unsatisfactory works progress which entailed working behind the approved schedule of works, which schedule was also not availed for the court's scrutiny without reason.

In the absence of the valuation report, there is only flat claims by PW.1, PW.2 and PW.3 that there was unsatisfactory works progress and abandonment of the site by the defendant justifying withdrawal of the certificates and ultimate termination of the contract by the plaintiff.

Although a subsequent site meeting was due to be held on 25/05/2012 as clearly indicated in minute 3.8 and minute 8.1 of Exhibits P.12 and 13 respectively and as already mentioned above, the minutes of such subsequent meetings was not produced to show the extent to which the decisions of the previous meetings were carried out and how the deliberation informed the consultant's decision to withdraw the certificates and the termination of the contract by the plaintiff.

The absence of the above information meant that the decision of refusing to honour the certificates and the eventual withdrawal of the certificates is baseless as it is neither supported by deliberations of the site meeting nor by the evidence on the record and not within the stipulations of the Contract. As already shown, the letter (Exhibit P.14) did not even make any reference to Exhibit P.12 and P.13.

To make it worse, the decision is contrary to the directive of the site meeting requiring the plaintiff to "*honour the outstanding interim payment certificate No.04 issued on 16/02/2012.*" It is to be recalled that the plaintiff's failure to honour Interim Payment Certificate No. 4 for over 105 days was the reason shown in evidence by DW.1 as to why the defendant terminated the Contract under clause 62.1(b) of the said Contract (Exhibit P.1). The failure was thus contrary to the deliberation of the site meeting (Exhibit P.13) if I go by the record availed to the court.

There was evidence adduced by PW.1, PW.2 and PW.3 in relation to poor work performance, delays in execution of the work and abandonment of the site. However, such evidence, particularly on unsatisfactory work progress, were in relation to matters that preceded certificates which were subsequently issued, the extension that were not disputed at all as evidenced in Exhibits P.2, P.3 and the Interim Certificates, and matters which could not establish unsatisfactory works progress and abandonment of the site either. Such evidence if I were to add would need also to be looked at in relation to the delays occasioned by the plaintiff in the payment of the interim certificates No. 2 and No.3 in respect of which the plaintiff's witnesses were of the view that much as the delays entitled the defendant to terminate the contract, the defendant did not do so and had as such waived her right of doing so.

When PW.2 was cross-examined about the letter by the consultant to the plaintiff on the complaint about unsatisfactory work progress dated 10/03/2011 admitted as Exhibit P.8, which referred to site visit of 07/05/11 and the plaintiff's letter STC/3/90/Part. III/45 dated 02/05/2011; she admitted that had the unsatisfactory work progress been prevailing, the subsequent payment claims by the defendant would not have been certified for payment by the Consultant. If I may add, the report of the site visit of 07/05/2011 and the plaintiff's letter STC/3/90/Part. III/45 of 02/05/2011 referred in Exhibit P.8 which according to PW.2 also informed the decision to withdraw and nullify the two certificates were not brought to the attention of the court in order.

Without such documents, the court could not appreciate the context within which the Exhibit P.8 was written as the defendant through her witnesses was saying

that the directed measures were all complied with and that the plaintiff grossly failed to honour the certified payments as per the requirements of the Contract of which their withdrawal and nullification were contrary to the Contract and not notified to the defendant.

It is in the evidence on the record that consequent to issuance of the letter by the Consultant (Exhibit P.8), there were claims which were certified and in respect of which Interim Payment Certificates were issued and accordingly honoured. Exhibit P.8, for example, having been issued on 10/05/2011, it clearly preceded Interim Payment Certificate No.03 issued on 11/8/2011 which was duly honoured by the plaintiff notwithstanding the delay in effecting the payment as already shown.

There were also Exhibit P.9 of 13/09/2011 signifying inspection conducted on the site 27 days after the issuance of the Interim Certificate No. 3 on 17/8/2011 and before the payment was effected on 26/09/2011, which was relied on in relation to unsatisfactory work progress. Indeed, the Interim Certificate No.3 as were the other Interim Certificates, based on valuation of works on site, carried out on 15/08/2011, and which certified net payment of Tshs 171,290,916.00 in the favour of the defendant.

In view of the foregoing, Exhibit P.9 could not therefore be held as a sufficient evidence establishing fundamental breach of the contract by the defendant under clause 61.2(a) of the Contract which relates to stoppage of works and which stoppage was not after all pleaded in the counterclaim. The said Exhibit could not also discharge the plaintiff's burden of proving the alleged unsatisfactory work

progress on the balance of probabilities in view of the Interim Certificate No. 2 and Interim Certificate No. 3 issued six month later.

Besides the foregoing Exhibits, there was also Exhibit P.21 which was relied on by the plaintiff, and which was issued before the issuance of the two Interim Payment Certificates No. 4 and No.5 of 16/02/2012 and 5/04/2012, respectively. Pursuant to the evidence of DW.1, the directive as to having strategies in place to address the challenges identified were all implemented, and as a result, the subsequent claims by the defendant were duly certified and relevant certificates issued on 16/02/2012 and 5/04/2012. And pursuant to Exhibits P.12 and P.13, the plaintiff was urgently reminded to honour the Interim Certificate No. 4 while the project quantity surveyor was directed to carry out valuation of the work done as already shown.

As already pointed out herein above, as the certificates were indeed subsequently issued for payment, sufficient evidence was needed from the plaintiff to persuade the court that the identified shortcomings in the execution of the works prevailed notwithstanding the issuance of the certificates and the reminder to the plaintiff to honour the outstanding payments in the favour of the plaintiff. On the record, I do not see such evidence from the plaintiff other than the testimony by PW.2 and PW.3 in cross-examination that the certificates were properly issued and had no any defects whatsoever.

I am of the above position because; firstly, the minutes of the scheduled meeting subsequent to Exhibits P.12 and P.13 as agreed upon were neither shown nor testified upon by the plaintiff's witnesses despite being referred in a letter by the

Consultant ARU/A.538/SF 155 which was also not tendered and not admitted in evidence for no apparent reason; secondly, the valuation directed to be carried out by the Project Quantity Surveyor by 4/5/2012 was not exhibited in evidence to vindicate the allegations against the defendant concerning unsatisfactory work progress, working behind the schedule and abandonment of the site despite the flat claim by PW.1 and PW.2; and thirdly, there was no plausible evidence supported by an exhibit of valuation of works carried by the project quantity surveyor accounting for the radical shift by the Consultant withdrawing and nullifying the two certificates, which were already overdue, just eleven (11) days after the payment reminder was made in the site meeting reminding the plaintiff to honour the Interim Payment Certificate No. 4 as soon as practicable.

In spite of the claim that the Consultant was mandated to withdraw and nullify issued certificates as afore said, it was not shown in the Contract (Exhibit P.1) as to where exactly such mandate was provided for while PW.2 and PW.3 agreed during cross-examination that there were not provision for such powers under the Contract. As already explained, the court was not shown the alleged best practices where such powers were derived as alleged so that the court could see whether they were indeed applicable and if so whether they were properly applied in the circumstances. There were no submissions in this respect either in the final submissions filed by the learned State Attorney for the plaintiff.

In line with the above, it needs to be reiterated that there were clauses under the contract allowing proportion adjustments by exclusion or reduction of items from the previous certificates and the plaintiff's witnesses were cross-examined on them.

It was however not shown why such contractual measure was not used as against the decision of the consultant which is not supported by any clause of the contract.

I am, nonetheless, aware of the case of **Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd** (1973) 3 All ER 1975 which was relied on by my brother, Hon. Nangale J., in **Maswi Drilling Co. Ltd vs Sengerema District Council**, Commercial Case No. 03 of 2019 (MZA) (unreported). The reliance on such authority was in relation to the principle that a defendant who is sued for payment for either work done by a contractor or materials supplied, is entitled to raise as a defence that the work or materials were defective and, therefore, that he is not liable for the whole or part of the payment claims that may be raised in a certificate. Viscount Dilhorne had in **Gilbert Ash (Northern) Ltd** (supra) this to say, at page 220h in relation to this principle:

It is, of course, true that the contract makes provision for payments as the work proceeds, but it is to be observed, a fact to which I feel insufficient attention has been paid, that the contractor is only entitled to be paid for work properly executed. He is not entitled to be paid on interim certificates for work which is defective. The Architect should only value work executed properly, that is to say, to his reasonable satisfaction (clause 1); and no interim certificate is of itself conclusive evidence that the work was in accordance with the contract (clause 30(8)).

While the authority is about a defective work in respect of which a certificate was issued and about withholding the payments in respect of defective work, it might be argued that the principle would nonetheless provide guidance on the case at hand. The same is to the effect that one who wishes not to honour the certificates on reason that the work was not properly executed, he must prove that the work

was indeed improperly executed. Thus, evidence must be led to establish on the balance of probabilities that the work or materials were defective for the employer not to be liable for the whole or part of the payment raised in the certificates.

It would also mean that the employer, who is in this matter the plaintiff, must by evidence establish that the valued work on the basis of which the contractor's claims were certified was not properly valued. In other words, it must be sufficiently shown that the consultant valued the work which was not properly executed or did not value the work to his reasonable satisfaction.

In line with the above authority, there was, in the instant case, no evidence led showing that the valuation of work for purposes of issuing the certificates was not properly carried out to justify their withdrawal and nullification by the consultant. While PW.1, PW.2 and PW.3 testified that there was unsatisfactory work progress in the execution of the project by the defendant, they did not testify that there were problems or failure on the part of the consultant in certifying payment claims in respect of the certificates issued for the work done, which was otherwise not properly or satisfactorily executed or whose work progress was unsatisfactory.

While it was established by the defendant without being contradicted whatsoever by the plaintiff that there was all along a problem of delay in honouring certificates on the part of the plaintiff as is evidenced by the Certificate No.2, and No.3 on one hand, which were delayed for 98 days and 38 days, respectively, and Certificate No.4 and No.5, on the other, which were withdrawn when there was already a delay in payment of over 28 days without notifying the defendant and contrary to the requirements of the contract; there was nothing from the plaintiff's

witnesses to the effect that the complained unsatisfactory work progress was not a result of such late payment or non-payment of the certified claims in the respective interim certificates.

There was also no testimony from the plaintiff's witnesses that the valuation was either defective or not to the consultant's reasonable satisfaction. It is noteworthy, in particular, that it was the evidence of PW.2 and PW.3 in cross-examination that the interim certificates were not defective for they were all properly issued. The principle underlying the case of **Gilbert Ash (Northern) Ltd** (supra) would not in the circumstances apply in the favour of the plaintiff for lack of evidence.

In **Maswi Drilling Co. Ltd vs Sengerema District Council** (supra), where the plaintiff alleged that the defendant breached the contract having withheld payment of interim certificate, the principle was successfully applied in favour of the defendant as there was ample evidence that the works which were executed were defective. Notably, the issue was not about withdrawal and nullification of the interim certificate but withholding payments in respect of the relevant interim certificate.

It is not without relevance to restate the main allegation against the defendant in the pleading. The pleading was that the defendant fundamentally breached the contract, which as a result entitled the plaintiff to remedies. The allegation was, as already shown, hinged on the provision of clause 6.1& 2(a) of the Contract which was however not specifically pleaded. The said clause 6.1&2(a) of the Contract concerned stoppage of work on the site by the defendant for 28 days

without the authority of the Consultant, and contrary to current programme of works.

Notwithstanding the findings already made on the allegation and the evidence led in respect of the allegation, my reading of the Contract against the backdrop of the allegation led me to clause 63.1 of the Contract. The clause provides for the requirement on the part of the Consultant to certify the value of work done and materials ordered, whilst taking into account the advance payment received, and value of work not completed, as a basis of determining entitlement to the parties under the Contract. The provision reads thus:

"If the contract is terminated because of a fundamental breach by the contractor, the Consultant shall issue a certificate for the value of work done and materials ordered less advance payment's received up to the date of issue of certificate and less the percentage to apply to the value of work not completed, as indicated in the Special Conditions of Contract. Additional liquidated damage shall not apply. If the total amount due to the Employer exceeds any payment due to the contractor, the difference shall be a debt payable to the Employer."

If it were assumed that the defendant breached the contract (Exhibit P.1) as adduced by PW1, PW.2 and PW.3, the remedy or relief available to the plaintiff is among other things, provided for under the above provision of clause 63.1 of the Contract. However, despite the pleading, there was no evidence led by the plaintiff establishing the plaintiff's claims in accordance with clause 63.1 of the Contract. I so

hold because no certificate envisioned under the said clause was tendered and admitted in evidence.

Despite the testimony of PW.3 who was a quantity surveyor that the valuation was conducted, there was no evidence that such certificate was issued by the Consultant as required by the Contract. Exhibit P.24 which was styled as value of outstanding work issued on 11/06/2012 left a lot to be desired to be relied on as a certificate envisaged under clause 63.1. It appeared not to have been issued by the consultant and was not stamped and signed under his or her name. It was alleged that it was part of a bundle of documents including Inflation costs issued on 31/08/2020, which was signed and stamped. This assertion is defeated by the fact that the said document was dated 11/06/2012.

If I may add the deliberation under Exhibit P.12 and P.13 as to the carrying out of the valuation of the project by the project quantity surveyor in order to compare and comment on the amount paid, and value of the works on site before the 4th May 2012 was not shown to have been conducted if one goes by the evidence of PW.3 in relation to that of PW.2.

Likewise, the meeting of 25/5/2012 whose minutes could have shown whether or not such valuation was conducted if it was so held and also showing what was the outcome and deliberation of the same was not mentioned by any of the plaintiff's witnesses despite being mentioned in Exhibit P.12 and P.13 and being referred as held as was scheduled in the letter in the list of additional documents to be relied upon by the plaintiff in relation to the claim that the defendant was notified of the said meeting of the consultant's decision. The minutes of such meeting as well

as the said letter in the said list were not tendered in evidence for no apparent reason.

My findings herein above addressed the issue whether there was fundamental breach of the contract by the defendant as pleaded. In so doing, regard was had on the withdrawal and nullification of the interim certificates No. 4 and 5, and the allegations by the plaintiff and the corresponding evidence adduced in respect of fundamental breach of the contract by the defendant.

In view of my deliberation and findings herein above, I am unable to find that on the basis of evidence of the plaintiff as adduced by PW.1, PW.2, and PW.3 the plaintiff established on the balance of probabilities that there was a fundamental breach of the contract by the defendant pursuant in terms of clause 62.2(a) of the Contract, let alone a wrongful termination of the contract by the defendant.

The determination of the issue whether the defendant fundamentally breached the contract informed also my determination on the other issues. As I have already found that the defendant did not breach the contract as alleged, it goes without saying that the plaintiff will not be entitled to compensation or damages from the defendant. The latter takes care of the second issue as to whether the plaintiff is entitled to compensation and damages from the defendant.

In **Patel v Samaj and Another** [1944] EACA 1, which was referred to me by the learned State Attorney for the plaintiff has it that a party to be awarded damages by the court has to establish that a wrongful act was done to him. Unfortunately, the principle does not apply in the favour of the plaintiff in the present case as the plaintiff did not establish her case against the plaintiff as already shown in the

analysis of the evidence adduced herein above. It is in the same vain that section 73 of the Law of Contract Act, cap. 345 R.E 2019 which entitles a party who has suffered damages out of a breach of a contract, both specific and general, to be compensated would not apply in the favour of the plaintiff as the alleged fundamental breach was not established and the alleged damages were not proved for their award either.

It would equally follow that the plaintiff would not, in respect of the third issue, be entitled to be indemnified from the advance payment bond and performance bond issued by the necessary party. And further that I agree with the submissions by all learned counsel that the provision of section 78 of the Law of Contract Act (supra) is a relevant provision of law in matters relating to guarantee as is in the present case which involved contracts of guarantee, namely, performance bond and advance payment bond entered between the defendant and the necessary party.

However, on the issue whether the provision would apply in this case in the favour of the plaintiff, I would agree with the counsel for the defendant that the provision would only apply if the defendant were in default, that is, were in breach of the contract pursuant to clause 62.2(a) of the Contract as alleged, which is not the case in the present instance as the plaintiff did not establish her case. Accordingly, the claim for the recovery of advance payment bond and performance bond would not stand.

My finding herein above is consistent with the finding of this court in **Rorya District Council v DABENCO Enterprises Ltd & Another**, Civil Appeal 33 of

2020 (unreported) HC, which was referred to me by Mr Msechu, learned counsel, for the necessary party, and in which the court held and I quote:

In terms of section 78 of the Law of Contract Act, Cap. 345, R.E. 2019 (the LCA), the contract of guarantee places a surety under an obligation to honour the promise of the principal by paying the principal debtor's present or future debt, provided to him by a creditor in case of default by the principal debtor. Further to that, unless stated to the contrary, the liability of the surety is co-existence with of his principal as provided for in section 80 of the LCA. However, for a surety to be liable, it must be established that the principal defaulted to execute his obligation under the contract guaranteed by the former (surety).

Since the third issue is not answered in the affirmative, it follows that the issue of necessary party being entitle to be indemnified from the counterindemnities/guarantees issued by the third parties in their personal capacities would not arise. It is so because the defendant was not proved by the evidence of PW.1, PW.2 and PW.3 to have breached the contract as alleged by the plaintiff, neither was allegation of wrongful termination established.

It was however disputed by the necessary party that the extension indorsements of the bonds were valid. The plaintiff and the defendant were of the view that there were valid indorsements for extension of the two bonds. The indorsements for the said extension in Exhibit P.2 and Exhibit P.3 were relied upon in this regard, and the plaintiff had in this respect in my view discharged her burden of proof on the balance of probabilities. The reliance on Exhibit P.18 by the plaintiff

further fortified the validity of the indorsements extension as very well argued by the learned state Attorney for the plaintiff in her final submissions.

Other than flat claims of the necessary party's witnesses that the indorsements for the extension of the bonds were not valid, there was nothing adduced by DW.3 and DW.4 who were witnesses of the necessary party to support the necessary party's claim that the indorsements for extension were not valid. The burden of proof which had shifted to the necessary party was thus not discharged by the necessary party by merely saying that the indorsements extension did not bear the necessary party's common seal without adducing further evidence that the said extension indorsements were, in accordance with the necessary party's practice, required to be indorsed under the necessary party's common seal.

The burden of proof having so shifted to the necessary party was also not discharged by the necessary party because of her failure to lead evidence to the effect that the indorsements for extension signed by one, Manfred Sibane, as the Chief Executive Officer of the necessary party, were not so indorsed by the necessary party's Chief Executive Officer. The evidence purporting to discharge such burden was therefore by and large insufficient.

On my party, I found merit on the testimony of PW.1 and DW.1 and Exhibit P.2, Exhibit P.3 and Exhibit P.18 that there were indeed valid indorsements for the extension of the bonds. The indorsements for the said extension were duly stamped and signed by one, Manfred Sibande, as the Chief Executive Officer of the necessary party, whose signature appears to be the same as was on the other documents

signed by the said Chief Executive Officer of the necessary party, constituting Exhibits P.2 and P.3.

Despite disputing the validity of the indorsements for the extension, there was nothing shown to have been done by the necessary party following her knowledge of the disputed extension upon receipt of Exhibit P.18. Indeed, Exhibit P.18 was categorical about the indorsements extension. Yet there was nothing from the necessary party about the extension.

It is worthwhile to say that despite my finding that the extension was valid, my earlier findings on the above issues would remain the same because the allegations by the plaintiff of fundamental breach of the contract by the defendant were not established as discussed and shown in the preceding paragraphs of my judgment.


Having answered the recorded issues as to, the breach of contract, entitlement to compensation or damages from the defendant, and entitlement to indemnity from the advance payment bond and performance bond, not in the favour of the plaintiff, and the issue whether the necessary party is entitled to be indemnified from the counterindemnities/guarantees issued by the third parties in their personal capacities not being applicable in the circumstances in view of the finding on the other issues, I am content that there are no remedies that the plaintiff would be entitled to within the context of the reliefs sought in the counterclaim. I say so notwithstanding my finding that there was valid indorsements for the extension of the two bonds effected by the necessary party.

In the end, and for the reasons already shown in the course of my judgment herein above, I am satisfied that the counterclaim which was the basis of the instant suit is not meritorious and is accordingly dismissed. The plaintiff failed miserably to discharge her burden of proof of establishing on the balance of probabilities that there was a fundamental breach of the contract on the party of the defendant in terms of clause 62.2(a) of the Contract for the Proposed Construction of Administration Block at Changanyikeni Observation Hill, Dar es salaam. However, in view of the circumstances of the matter, I will not make any order as to costs.

It is so ordered.



DATED and DELIVERED at Dar es Salaam this 1st day of September 2022.


B. S. Masoud
Judge