**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF DAR ES SALAM**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 207 OF 2021**

**PERNTELS COMPANY LIMITED ..... PLAINTIFF**

***VERSUS***

**WIAFRICA TANZANIA LIMITED ..... DEFENDANT**

**EX-PARTE JUDGMENT**

11th October and 14th December, 2022

**KISANYA, J.:**

The plaintiff herein, is suing the defendant seeking for the following reliefs:

*(a) Payment of USD 175,881.83 [currently valued at Tanzania Shillings Four Hundred and Two Million and Sixty (sic) Nine Thousand Three Hundred and Ninety One (Tshs 402,769,391/=) only being the principal outstanding debt.*

*(b) Payment of Tshs. 50,000,000/= only being the compensation for business loss.*

*(c) Interest of 7% per month on the claimed amount from the date of institution of this case to the judgment date.*

(d) *Interest of 12% per month of the amount claimed at the court's rate from the date of judgment of this case till payment is made in full.*

(e) *Costs of this suit be borne by the Defendant.*

(f) *Any other relief this Honorable Court may deem fit to grant.*

For better clarity, I find it apt to restate the facts of this case. It is stated in the plaint that, on 20th July, 2016 the plaintiff and defendant entered into an agreement for execution of the project named 2016 WIAFRICA 1ST STAGE PROJECT (henceforth "the contract"). The contracted scope and content were cable laying, bury cable laying, constructing pole-line, constructing man-holes, ODF terminal and fiber fusion.

It is alleged that, parties agreed that the payment arising from the agreement would be made by the defendant in three installments as follows: *One,* 30% of the total value of the Purchasing Order (henceforth "PO) when the plaintiff completes 30% of the total work quantity under PO; *two,* 40% of the total value of the PO upon the plaintiff completing 30% of the total work quantity under PO; *three,* 25% of the total value of the PO upon the plaintiff delivering to the

defendant the project settlement book and upon reviewing the same and issuing a first trial results; and *four*, 5% of the total value of the PO after expiration of the warranty period of 12 months.

The plaintiff claims to have completed the work as per PO. It is however, stated that the defendant paid 70% of the total value of the PO (covering the first and second installments) and that she rejected to pay the remaining 30% of the total value of PO. The plaintiff further states that the defendant rejected to receive documents, including invoices, project settlement books and demand notice that were forwarded to her as proof of the work done. That act prompted the plaintiff to sue the defendant for the aforesaid reliefs.

The defendant failed to appear and/or file her defence after being served through substituted service. Acting under the provisions of Order VIII, Rule 14 of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC), this Court ordered the suit to proceed *ex-parte* against the defendant.

In the course of hearing, three issues were recorded for determination of this suit. The said issues are to the following effect:

1. Whether the plaintiff and defendant entered into a valid contract.
2. Whether the defendant breached the contract entered with the plaintiff.
3. To what reliefs are the parties entitled to.

At the hearing of this matter, the plaintiff enjoyed the legal services of Mr. John Lingopola, learned advocate.

In order to prove her suit, the plaintiff called one witness namely, Mr. Edwin Matata (PW1). His evidence in chief was adduced by way of witness statement. PW1 introduced himself as the Operational Director of the plaintiff's company. He stated to have been charged with the duty of overseeing and administrating various project operated by the plaintiff.

PW1 recalled that, on 20th July, 2016, the plaintiff and defendant entered into an agreement for the execution of the project named 2016 WIAFRICA 1ST STAGE PROJECT for cable laying, bury cable laying, constructing pole-line, constructing man-holes, ODF terminal and fiber

fusion. He also stated that he is the one who managed the operation of the said project under the contract.

PW1 went on adducing that the plaintiff and defendant agreed that the payment in respect of the project, is to be made in the following installments: (i) 30% of the total value of the PO upon the plaintiff completing 30% of the total work quantity as per PO; (ii) 40% of the total value of the PO after the plaintiff has completed 30% of the total work quantity as per PO; (iii) 25% of the total value of the PO upon the plaintiff delivering to the defendant the project settlement book and upon reviewing the same and issuing a first trial result; and (iv) 5% of the total value of the PO after expiration of the warranty period of 12 months.

It was further adduced by PW1 that, the defendant paid the plaintiff 70% of the total valued of the PO for the first and second installments. He recalled that the defendant paid 70% of the total value of PO as proof that the work was duly completed and approved by signing a contract/P0 payment application form.

PW1 went on to depose that the defendant rejected to pay the remaining 30% of the total value of PO even after being served with the tax invoices and the Project Settlement Book. He also told the Court that the plaintiff did not receive any complaint as to the project within the warrant period of twelve months. He stated on oath that the outstanding contractual sum which is required to be paid by the defendant in favour of the plaintiff is USD 175,881.83. On the foregoing evidence, PW1 urged this Court to grant the reliefs sought in the plaint.

To supplement his testimony, PW1 tendered five documentary evidence to wit, Project Service Contract (Exhibit P1), Twenty (20) Purchase Order (Exhibit P2 collectively) and Contract/PO payment application form (Exhibit P3 collectively) and Tax Invoice (Exhibit P4)

Having considered the plaint and examined the evidence on record, I will proceed to determine the merits of this suit in view of the above stated issues.

It is a fundamental principle enshrined under sections 110, 111 and 112 of the Evidence Act, Cap. 6, R.E. 2022 (the TEA) that, a person

who alleges on existence of certain facts is duty bound to prove the same. This being a civil case, the standard of proof on the party of the plaintiff is on the balance of probabilities. [See the case of **Catherine Merema vs Wathlgo Chacha,** Civil Appeal No.319 of 2017 (unreported)].

The first issue is whether the plaintiff and defendant entered into a valid contract. According to section 10 of the Law of Contract Act, Cap. 345, R.E. 2019 (the LCA), a contract is an agreement made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and which is not expressly declared to be void.

According to PW1, the parties herein entered into an agreement for the execution of the project named 2016 WIAFRICA 1ST STAGE PROJECT on 20th July, 2016. His evidence was supported by the Project Service Contract which was admitted in evidence as Exhibit P1. It is on record that Exhibit P1 was signed by the representatives of the plaintiff and defendant on 20th July, 2016. Pursuant to PW1 and Article 1 of Exhibit P1 the project to be executed under contract was named "2016

WIAFRICA 1ST STAGE PROJECT", while the contracted scope and content were, cable laying, buried cable laying, construction pole-line, manholes construction, ODF terminal and fiber fusion.

I have further noticed that in terms of Article 3(1) of Exhibit P1, the defendant assigned the plaintiff as the service provider of engineering construction and the latter accepted the evaluation terms in the Assessment of the Project Service Providers formulated by the defendant. Further to this, Exhibit P1 has terms on contract price and settlement, supply of material equipment purchased by the plaintiff, construction safety and project quality, design proposal and alteration, project acceptance, warranty, obligation of parties, liabilities of parties, force majeure, dispute resolution, contract effectiveness and miscellaneous. Reading from Article 13 of Exhibit P1, it is also vivid that the contract came when it was signed by the representatives of the plaintiff and defendant into force on 20th July, 2016.

Nothing to suggest that the parties had no capacity to enter the contract. It was also not established that the plaintiff and defendant were forced to enter into the contract in question. All the above

considered, I am satisfied that there was a valid contract between the plaintiff and defendant.

This leads us to the second issue which is, whether the defendant breached the terms of the contract. At the outset, the legal position provided for under section 37(1) of the LCA requires each party to a contract to perform his promises, unless such performance is dispensed with or excused under the law. The law is further settled that, there should be a sanctity of the contract. In that regard, parties are not excused for non-performance of their respective duties under the contract unless it is shown that there is incapacity, fraud or misrepresentation, or principle of public policy prohibiting enforcement.

According to Article 9(2) of Exhibit P1, the plaintiff's obligations included, procurement and storage of material and equipment; ensuring quality of construction, implementing the technical specifications and operating procedures related to Wiafrica, and managing dispute arising in the process of construction; and providing technical document for completion, proceeding the handover

acceptance and participating in the project acceptance to ensure timely completion.

On the adverse part, the defendant was, among others, required to review and approve commencement report, construction organization design, construction scheme, and acceptance report submitted by the plaintiff; and audit the design alteration and project schedule, and settle the project payment and conduct settlement as per terms of contract. These obligations are stated in Article 9(1) of Exhibit P1

It is evidence of PW1 that the plaintiff completed the works and that the defendant signed the contract/PO payment application form to such effect. The procedure for payment is stated in Article 3 (1) of Exhibit P1. It was agreed that the PO issued by the defendant shall be the settlement unit; and that project settlement amount shall be the final settlement reviewed and determined by the defendant.

As adduced by PW1, Article 3(2), (3), (4) (5) and (6) of Exhibit P1 shows that the payment was to be made in the following schedule: *First,* upon the completing 30% of the total work quantity of PO, the

plaintiff was entitled to 30% of the total value of the PO. *Second*, 40% of the total value of PO was required to be paid after the plaintiff has obtained the completion certificate. *Third*, after the plaintiff has obtained the result of the first trial and evaluation, the defendant was required to pay the former up to 95% of the settlement amount in first trial. *Fourth,* the remaining payment (5% of settlement amount) was to be paid upon expiry of the warrant period of 12 months.

PW1 admits that paid 70% of the total value of PO was duly paid by the defendant and that the payment made by the defendant covered the first and second installments. It is his contention that the defendant defaulted to pay the remaining 30% of the value of PO. Given the fact that the unpaid amount is in respect of the third and fourth installments, the procedure and conditions for paying the same are elaborated in Article 3(4), (5) and (6) of Exhibit P1 in which the plaintiff and defendant are respectively referred to as *Party B* and *Party A*. The said Article provides:

> 4. *After acceptance: Party B shall, in accordance with the actual project quantity determined in completion document, the unit price for settlement agreed by the parties and the price information in the material market,*

*prepare the Project Settlement Book and issue the results of the first trial. Party B shall verify with Party A at its own initiative within 7 days the notice to verify the results of the review issued by results issued by Party A. Party A shall output the project evaluation results after comprehensive evaluation on the basis of the performance of Party B in project. Within 15 days upon Party B obtaining the results of first trial and the evaluation, Party A may pay Party B maximum of 95% the settlement amount in the first trial, and the remaining payment shall be quality-guarantee bond of the project.*

5. *Upon expiry of the warranty period, if the project meets the quality requirement stipulated in the contract, there is no major quality accident or defect caused by construction reason, and the existing problems are solved, Party A shall, upon the signature of both parties' representative, pay Party B quality-guarantee bond within 30 days upon the expiry of the warrant period, which shall be free of interest.*
6. *Party B shall issue legal invoice to Party A when Party B is to request the progress payment and completion payment of the project from Party A, and Party A shall carry out the payment procedure with invoice. When the payment hereof reaches to 95% of the total amount of*

*settlement, Party B shall issue an invoice of 100% of the total settlement amount. All payment shall be settled by TT or by cheque. The quotation hereof excludes tax."*

In view of evidence of PW1 and the above terms and conditions of Exhibit P1, the remaining balance of 30% is payable as follows: *First,* the defendant is required to pay the plaintiff a maximum 95 % of the settlement amount in the first trial. This implies that the maximum amount payable at this stage is 25% of the value of PO. However, as adduced by PW1, the said amount is paid upon the plaintiff preparing the settlement book which is then reviewed by the defendant who also issues the results of the first trial.

Although PW1 stated on oath that the project settlement books were submitted to the defendant, the same were not tendered in evidence. It was also not stated as to when the project settlement books were submitted to the defendant. In the absence of the project settlement book which were the basis of paying the plaintiff up to 95% of the settlement claim, this Court is not in a position of holding that the defendant breached the terms of contracts by rejecting to pay the plaintiff.

The second and last payment (5%) is quality-guarantee bond of the project. It was required to be paid upon expiry of the warrant period. Article 8 of Exhibit P1 suggests that the warranty period was twelve (12) months counted from the date when the defendant signed the certificate of final acceptance. This court was not told as to when the defendant signed the certificate of acceptance.

I have further considered the proforma invoice (Exhibit P4 collectively) which were relied upon by the plaintiff. Reading from Article 3(6) of Exhibit P1, the plaintiff was required to issue legal invoice to the defendant at the time of request for progress payment (30% of the total value of P.O) and completion payment (40% of the total value of P.O). As indicated herein, the maximum amount required to be paid in the third instalment was 95% of the settlement amount in the first trial after the defendant had reviewed the project settlement book and the plaintiff agreed with the settlement as per review. That being the case, the said invoices do not prove that the defendant breached the terms of contract with the plaintiff.

On the foregoing findings, I am of the considered view that the plaintiff has failed to prove that the defendant breached the terms of Project Service Contract.

Last for consideration is the issue on the reliefs to which the parties are entitled. I have stated earlier that the plaintiff's cause of action and reliefs sought were based on breach of contract by the defendant. Having resolved that the plaintiff has not proved breach of the Project Service Contract by the defendant, I hold the view that she is not entitled to the reliefs prayed in the plaint.

In the final analysis, this suit is hereby dismissed for want of merit. Considering that the hearing proceeded *ex-parte*, I make no order as to costs

DATED at DAR ES SALAAM this 14th day of December, 2022.

S.E. KISANYA
**JUDGE**