IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 82 OF 2015

GATI MASERO BUITER t/a BOTECH PROJECT MANAGEMENT ---------- PLAINTIFF

Versus

ELTEL TANZANIA LIMITED ---------- DEFENDANT

Date of last order: 28/03/2023
Date of Judgment: 06/06/2023

J U D G M E N T

MGONYA, J.

The Plaintiff herein instituted a suit against the Defendant claiming the following reliefs:

(a) A declaration that the 3rd Defendant has breached the Subcontract Agreement which it had with the Plaintiff;

*(b) Payment of **Euro 3,867,998** being the Plaintiff's expected income out of the subcontract Agreement;*

*(c) Payment of **Euro 637,998** being the loss of income during the three months suspension time;*

*(d) Payment of **Tshs. 15,000,000/=** being the non-refundable money that the Plaintiff incurred in securing performance bond;*

(e) *Payment of **Tshs. 30,000,000/=** being the none refundable premium that the Plaintiff paid to first Assurance in securing the Security bond;*

(f) *Payment GENERAL DAMAGES TO THE TUNE OF **Euro 150,000** to the Plaintiff due to the inconvenience, loss of business and degradation of the Plaintiff's business reputation and CV so occasioned by the 3rd Defendant breach of Contract;*

(g) *Interest at the banks rate on the (b) to (f) claims stated hereinabove from the date of Judgment until full payment of the same;*

(h) *Interest on the decretal sum at the sum at the court's rate from the date of Judgment until full payment of the same;*

(i) *Costs of this suit be borne by the Defendant; and*

(j) *Any other relief(s) of this suit borne by the Defendant.*

Being served with the Plaint, the Defendant resisted the claims by filing a Written Statement of Defence together with a Counter Claim in which she was claiming for the following reliefs:

(i) *Payment of **Euro 161,039.49** being the value of the advance payment which the Subcontract Defendant failed to refund after the termination of the Subcontract Agreement;*

(ii) *Payment of **US$ 70,000.00** being the value of the equipment that the Defendant in the Counterclaim failed to return and handover after the termination of Subcontract Agreement;*

(iii) *General damages for breach of contract at the rate assessed by the Court;*

(iv) *Interest on items (i) – (ii) above at the Commercial rate of **18% p.a** from the date of the Counterclaim to the date of Judgment and thereafter at the court rate until full satisfaction of the same;*

(v) *Costs of the counter claim; and*

(vi) *Any other relief deemed fit and just.*

It is averred in the Plaint that, in the year 2013 after having secured a Tender 001/11/HQ/W/061, the Defendant agreed to enter into a Subcontract Agreement with the Plaintiff, the Agreement which was executed on the 1st day of June, 2013. That from the Subcontract Agreement, the Parties amended some of the clauses for smooth running of the Project. The Parties had some pre-conditions precedents which among others included, the Plaintiff to secure a performance bond from his banker and served it to the Defendant for necessary actions thereto. That despite the Plaintiff's compliance of the security bond condition, the Defendant became reluctant and delaying the performance of his part to the contract. The delay

included but not limited to the supply of the working materials. That due to the delay the Plaintiff wrote a demand notice to the Defendant demanding the compliance of the conditional precedents they agreed. Unexpected the Defendant in an attempt of silencing the Plaintiff, she decided to terminate the subcontract Agreement. That the Defendant went further to assign the project to another subcontractor. It is the Plaintiff's allegations that, the Defendant's breach of contract occasioned great financial loss hence this case.

Meanwhile in the Counterclaim which is the Defendant's Plaint it is alleged that, contrary to the Agreement the defendant in the Counterclaim breached the subcontract Agreement. Due to the breach the Plaintiff in the Counterclaim suffered losses and damages.

In resolving parties dispute the following issues were framed and agreed by the Court:

(i) What were the terms and conditions of the Contract entered between the parties;

(ii) Who among the parties were in breach of the Contract;

(iii) Whether the Plaintiff suffered the alleged loss;

(iv) Whether the claims in the Counter claim have merits; and

(v) What reliefs are the parties entitled to?

At the hearing, Mr. Rweyongeza, Mr. Philimon Mutakyamirwa, Ms. Jackline Rweyongeza and Ms. Rehema Samwel, Learned Advocates appeared for the Plaintiff. Whereas the Defendant was represented by the learned Advocates Joseph Ndazi and Josephine Safiel.

Two witnesses were summoned by the Plaintiff who are **Robert Jacob Buiter** the Executive Manager of the Plaintiff who testified as **PW1** and **Frank Bengt Ostlund** who testified as **PW2.** Whereas the Defendant also paraded two witnesses to wit **Stephen Butler Rees** who testified as **DW1** and **Arif Fatiel Shariff** who testified as **DW2.** The Plaintiff also relied on three documentary exhibits which includes Subcontract Agreement **(Exhibit P1),** Notice of Demand **(Exhibit P2)** and Notice of Termination **(Exhibit P3)** while the Defendant tendered no exhibit.

In determining the Parties' rights, this Court will be guided by the established principles in proving Civil Cases as well as consideration of pleadings, adduced evidence and final submissions by both parties.

It is well established principle of law under **Section 110 and 111 of Evidence Act, Cap. 6 [R. E. 2019] (hereinafter "the Act")** that, he who alleges existence of a

certain fact must prove its existence and that, the onus of so proving lies on the party who would fail if no evidence at all is given on either side.

Equally it is the principle of law under **Section 3(2)(b) of the Act** (supra), that existence of certain fact is to be proved on preponderance of probability meaning should be on the balance of probabilities. See the case of ***ABDUL KARIM HAJI VS. RAYMOND NCHIMBI ALOIS & ANOTHER, CIVIL APPEAL NO. 99 OF 2004, PAULINA SAMSON NDAWAVYA VS. THERESIA THOMAS MADAHA, CIVIL APPEAL NO. 53 OF 2017*** *and* ***BERELIA KARANGIRANGI VS. ASTERIA NYALWAMBWA, CIVIL APPEAL NO. 237 OF 2017*** *(All CAT unreported)* In ***BERELIA KARANGIRANGI*** *(*supra) when considering the onus of proof and the standard to be applied in Civil matter the Court of Appeal had this to say:

> ***"We think it is pertinent to state the principle governing proof of cases in Civil suits. The general rule is that, he who alleges must prove.....it is similar that in Civil Proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities."***

In this Judgment, I am not intending to reproduce the evidence in whole as adduced by Parties' witnesses as I will be referring to the relevant part in determination of the issues.

To begin with the first issues on **which terms and conditions of the Contract entered between the Parties.** It is the Plaintiff's evidence that, in their Subcontract Agreement there were terms and conditions they agreed. The same includes; to provide a list of their personnel, a list of CVS, advance bond, a specified irrevocable paid bond, a revocable performance bond, a site organisation chart, name of key personnel and their CVS clearly showing their experience, the Plant and Equipment proposed to be used on sight. To prove his testimony PW1 tendered **Exhibit P1,** as they agreed on 1st June, 2013.

On the Defence side, it was stated by the witness that, basic terms and condition of the Contract was signed on June, 2013. The same includes; ELTEL to supply equipment to the Subcontractor in carrying the work which included a compressor, grand penetrating grader and cable pulling equipment. BOLTECH was to supply an advance payment guarantee to the Subcontractor for 10% of the Contract price to be received 14 days after signing the Contract, and a list of staff on size showing that they were able to do works.

Having heard the above witnesses' evidence, this court had an ample time to go through **Exhibit P1.** In their Agreement there are many conditions but for the purpose of this Judgment, the court will focus on the terms and condition that are relevant to the Parties dispute as it appears in their pleadings.

It is garnered from the Subcontract Agreement that, the Subcontractor is responsible for the security of the site and safety of all persons entitled to be on the site. Also, from their Agreement, the Main Contractor was responsible to supply the Subcontractor with all documents available for the execution. Not only that, there was the condition that the Main Contractor will pay **120,000 Euro** which correspond to **10%** of Subcontract's provision contract sum of **1,200,000 Euro** as advance for mobilisation, and also the submission of documents by the subcontractor in relation to; irrevocable advance payment bond from reputable bank, irrevocable performance bond from reputable bank, site organisation chart, names of key personnel and their CVS clearly showing their experience as well as the plant and equipment proposed to be used at site.

Therefore, this court has no doubt that, the above terms and conditions as testified by the witnesses from both sides

and supported by the written subcontract Agreement, are the terms and conditions entered into between the Parties in this case.

Turing to the second issue as ***to who among the parties was in breach of the contract.***

From the pleadings and evidence presented by both parties, it is doubtless to the Court that, Parties are at one on the point that there was a delay to commence the contract work. That the delay occasioned by the delay of the permit as TANESCO was yet to supply them with the permit from TANROADS. Also, there was a delay to be supplied with the equipment. The Plaintiff was supplied with only two equipment contrary to their Agreement. PW1, testified further that, TANESCO and ELTEL were not serious to follow up the Project.

In obtaining permits from TANROAD, he offered his help but they refused. It was PW1 further testimony that, ELTEL Project Manager decided to close the work for holiday where the Experts were to go on leave for one month. They verbally agreed to resume the work on 14th January, 2015. Unexpectedly, around Christmas in 2014, while was along Bagamoyo Road, he found Chinese Company doing their work. He complained to the Management of ELTEL in the first week of January. He then consulted his Advocate for major breach

of Contract were they wrote a letter for notice of demand **(Exhibit P2).** After the Notice, ELTEL promised to sit with them and they offered a minimum of the pay which was not enough to meet their costs. Suddenly, instead of sitting with them the Defendant wrote a Notice of termination **(Exhibit P3).**

On the defence side, the witnesses stated that, due to the Contract condition the Plaintiff was to supply an advance payment guarantee and a performance bond for **20%** of the Contract price. They only received advanced payment guarantee in October, 2013 and they never received performance bond DW1 Further testified that; they had safety issue where the Plaintiff was not complying to the regulations. He went on to state that, there were period reports to be submitted by BOLTECH which were not submitted in time as required by the Contract. He said that from August 2014, BOLTECH was not performing the Contract as required. They wrote warning letter in September after repeatedly safety violation. They wrote another warning where the final warning was issued in January and they terminated the Contract.

While under cross examination DW1 stated that, there was a delay which caused by TANESCO to obtain relevant permits required to start the work. The witness stated that

there were two permits which were required one from Municipal and the other one from TANROADS. TANROADS permit was issued in November, 2014 and ELTEL received the same in January, 2015. With regard to the late supply of equipment DW1 stated that, ELTEL had to supply some of the equipment to the Plaintiff but the equipment didn't arrive in time. The equipment came late in August, 2014 and it took 2 ½ month to clear. Therefore, the same were delivered to store yard late November, 2014.

Having in my mind the Parties' testimony as to who was in breach of the Contract, this court directed its mind to **Exhibit P3.** The said notice was written on 13th February, 2015. The Defendant alleged that, the Plaintiff failed to comply with two written warnings dated August, 27, 2014 and September, 22, 2014. She also alleged in the said notice that, they noted the advance paid funds were diverted to non-project related activities. The Defendant also allege that, the Plaintiff is in default of safety issues which includes; insufficient qualified personnel, insufficient safety equipment on site, road marking barriers etc, breaking existing marked TANESCO cables, breaking DAWASCO water pipes and failure to comply with OHS regulations as provided by the client.

It is undoubtedly that he Defendant has a right to terminate the subcontract as it is provided under **clause 2.5** of **Exhibit P1.** According to that clause, the Defendant will have the right to take over the subcontract works on the following circumstances:

One, when there is default or delay in programme of works;

Two, when written warnings from the Main Contractor to Subcontractor;

Three, is when no improvement notice.

It is the position of the law that, Parties to contract must perform their respective promises unless such performance is excused by the law. Failure of any Party in the contract to perform his obligation(s) under the contract, amounts to breach of contract. See **Section 37(1) of the Contract Act, Cap. 345 [R. E. 2019].**

As I have discussed above in the first issues, there were terms and conditions made by the parties. Among those terms the Defendant was required to supply the Plaintiff with the equipment for the performance of their Agreement. However, it is the Plaintiff complaints that, there was a delay to be supplied with the said equipment and the permit from TANROADS. That allegation has been corroborated with the

evidence of DW1, who admitted, they delayed to supply the Plaintiff with the permit and the equipment.

On the other side, the Defendant in his letter of termination **(Exhibit P3)** among other allegation she alleged that, there was diversion of fund made by the Plaintiff and also there were violation of safety regulation by the Plaintiff. However, this court finds that the Defendant has failed to prove it for want of evidence. As it has been provided in **clause 25 of Subcontract Agreement** that, there should be warning letter in case of violation of terms of contract. Two witnesses came to testify before the court on behalf of the Defendant, but none of them tendered even a single warning letter him for the said volition. Therefore, this court finds from the evidence that, it is the Defendant who breached the contract is heavier than the opposite. That being the case, the second issue is resolved that; **it is the Defendant who breached the contract.**

Coming to the third issue as to **Whether the Plaintiff suffered the alleged loss.** In a bid to prove this issue the Plaintiff informed the court that, the has been on hold for 1 ½ year while he couldn't do anything. Therefore, that was a loss of income to a tune of **3,867,988 Euro** because they have been on hold. On the other side, the Defendant in his

submission argued that, the Plaintiff alleged to have suffered losses but he did not testify despite being present during the Plaintiff's case.

I am aware of the position of the law in relation to specific claim. **Euro 3,867,988** has been claimed by the Plaintiff as a specific loss due to the breach of contract. With due respect, I distance myself from the Plaintiff allegations on the following reason; the first one is the facts that, in his testimony the Plaintiff testified that he was paid advance payment and he didn't submit the performance bond since the contract work was due. PW1 testified that, he worked on the small project at Upanga of which he was paid for. It is also stipulated in **clause 2.5** of the **Exhibit P1** that, the value of the Subcontract was not known until final quantities are measured when the work is complete. With those facts this court finds that, the Plaintiff alleged loss was not proved to the balance of probabilities.

Coming to the **fourth issue** as whether **the claims in the Counter Claims have merits.** The Defendant in her counter claim alleged that, after issuing the termination letter, the Plaintiff failed to return Equipment and advance payment of **161,000 USD** and **70,000 USD** respectively. While the

Plaintiff herein responding to the Counter Claim he stated that, the Counter Claim is fake and fabricated.

It is a settled fact that, a Counter Claim when raised under **Order VIII Rule 9(2) of the Civil Procedure Code** (hereinafter **the CPC)** is treated as a Cross Suit and has to be dealt with in accordance with the provisions of **Order VII as if it is Plaint.** Order **VIII Rule (2) of the CPC.** reads:

> *"(2) Where a counterclaim is set-up in a written statement of defence, the counterclaim shall be treated as a* ***cross suit and the written statement shall have the same effect as a plaint in a cross-suit****, and the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint." (*Emphasis supplied).

Therefore, the Counter Claim being a cross suit, a standard of proof required in proving the allegations in Plaint as provided under **Section 110 and 111 of the Act** applies also in proving the Counter Claim.

DW1 is a sole witness who testified on a counter claim. Apart from stating that, the Plaintiff failed to return the equipment and advanced payment hence the claimed amount is **161,000 USD** and **70,000 USD.** He didn't specifically state

how the said amount has been reached. Neither documentary evidence has been tendered to show the costs of the said equipment nor reference has been made, to show this court the specific clause in the Subcontract Agreement which requires the Plaintiff to return the claimed amount and the equipment upon termination of the subcontract by either part. The Plaintiff claim in a counter claim being a specific claim was supposed to be backed up by tangible evidence for the court to grant the same. Contrary to that, **this court resolve the fourth issue in negative that the claim in the Counter Claim have no merit.** In the event therefore, **I dismiss the Counter Claim with costs.**

I now move to the fifth issue **on the relief(s) if any parties are entitled to.** It is provided under **Section 73(1) of the Contract Act** that, a Party who suffers out of breach of Agreement is entitled to compensation. The said **Section 73(1) of Contract Act** stipulates that:

> *73.-(1) where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made*

the contract, to be likely to result from the breach of it."

Also, **Subsection (2)** of the same Section reads that:

> *"The compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach".*

In this case as it has been resolved in the second issue that it is the Defendant who breached the contract, then the Plaintiff is entitled compensation for the damages suffered. It is gathered from the Pleadings that the Plaintiff's claims include; Payment of **Euro 3,867,998** being the Plaintiffs expected income out of the subcontract Agreement, Payment of **Euro 637,998** being the loss of income during the three months suspension time, Payment of **Tshs. 15,000,000/=** being the non-refundable money that the Plaintiff incurred in securing performance bond. Payment of **Tshs. 30,000,000/=** being the none refundable premium that the Plaintiff paid to first Assurance in securing the security bond, Payment of general damages to the tune of **Euro 150,000** to the Plaintiff due to the inconvenience, loss of business and degradation of the Plaintiff's business reputation and CV so occasioned by the 3rd Defendant breach of Contract.

The law is very precise on the award of damages particularly specific damages. Unlike general damages which is awarded at the discretion of the Court, specific damages being special expenses incurred in monies or actually loss, must be specifically pleaded and strictly proved. This court and the Court of Appeal several times insisted on the need to plead and strictly prove the special damages. See the cases of ***ALFRED FUNDI VS. GELED MANGO & 2 OTHERS, CIVIL APPEAL NO. 49 OF 2017, ZUBERI AUGUSTINO VS. ANICET MUGABE, (1992) TLR 137, PETER JOSEPH KILIBIKA NAD ANOTHER VS. PARTIC ALOYCE MLINGI AND RELIANCE 15 26 INSURANCE COMPANY (T) LTD AND 2 OTHERS VS. FESTO MGOMAPAYO, CIVIL APPEAL NO. 23 OF 2019 CIVIL APPEAL NO. 39 OF 2009*** (all CAT-unreported).

In the case of **ZUBERI AUGUSTIONO** (supra) the court had this to say:

> ***"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."***

Likewise, in the case of ***PETER JOSEPH KILIBIKA AND ANOTHER VS. PARTIC ALOYCE MLING, CIVIL APPEAL NO. 39 OF 2009*** (CAT-unreported) which cited with approval

the holding of Lord Macnaughten in **Bolog Vs. Hutchson** (1950) A.C 515 at page 525 on special damages, the court stated that:

> ***"...such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly."***

In the case at hand, the Plaintiff's claims as I have indicated above paragraph, save for the general damages, this court finds that, **other claims have never been strictly proved.** To start with the claim of **Euro 3,867,998** which is alleged to be the expected income out of the Subcontract Agreement. This court finds that the claims fails because it is just a mere assumption or expectation. The same is not actual loss suffered by the Plaintiff as the law requires. Equally on the other claims of **Euro 637,998** Payment of **Tshs. 15,000,000/=** and Payment of **Tshs. 30,000,000/=.** There is no tangible evidence tendered before the court to strictly prove the same to the required standard. Therefore, this court rejects these claims for want of evidence.

With regard to the general damages, the Plaintiff vide his Plaint he demanded Payment of general damages to the tune of **Euro 150,000** due to the inconvenience, loss of business and degradation of the Plaintiff's business reputation and CV so occasioned by the 3rd Defendant.

It is the position of the law that general damages are such as the law will presume to be direct natural or probable consequence of the act complained of. For the same to be awarded the defendant's wrongdoing must therefore have been a cause, if not sole, a particularly significant cause of damage. See; ***TANZANIA SARUJI CORPORATION VS. AFRICAN MARBLE COMPANY LTD. [2004] TLR 155.***

Also, in the case of ***ANTHONY NGOO & ANTOHER VS. KITINDA MARO, CIVIL APPEAL NO. 25/2014*** (CAT-unreported) it was stated that:

> ***"general damages are those presumed to be direct or probable consequences of the act complained of."***

PW1 testified that, they agreed with the Defendant that he will perform the entire project and not half of it. The subcontract involved excavations of electric cable covered the areas along Bagamoyo Road to City Centre, from City Centre to Railway station, From City Centre to Kisutu and from Kisutu to

Mnazi Mmoja. However, while he was waiting for the permit from TANROAD, he saw the Chines along Bagamoyo Road doing the work he was waiting to do. PW1 wrote a demand notice (exhibit P2) dated 29th January, 2015 to the Defendant who responded by terminating the subcontract through the letter dated 13th February, 2015.

The circumstance of this case as indicated in the above paragraph, reminded me of the saying of the wise "kunyang'anywa tonge mdomoni" (taking a food from someone's mought). It appears that after signing the subcontract the Plaintiff dedicated his time and mind towards the Project. When testifying PW1 informed the court that when there was a delay to have a permit from TANROAD he offered to allowed to make a follow up but the Defendant refused. PW1 also testified that, there was the incident occurred in 9th December, 2014 where all the supervisors from the Main contractor were not present at a site as they were required. To make sure there is no delay in the work, the Plaintiff continued to work and risking his life. After all the effort, it appears that without sufficient reasons or being informed the Defendant subcontracted another company to perform duties of their company the facts which remain unchallenged by the Defendant before this Court. At this juncture, there is no dispute that the Plaintiff mobilised himself

and hr commenced small Project while waiting for the Major Projects, the mission which became abortive following Defendant's act of giving the work to another Company **Which is a total breach of Contract.**

In the event therefore, the Plaintiff suffered damages such as embarrassments and mental anguish. **He therefore deserves to be awarded general damage a prayer I hereby grant.**

Having said and done, Judgment is entered in favour of the Plaintiff as follows:

1. ***It is declared that the Defendant indeed breached the contract between her and the Plaintiff;***
2. ***The Defendant to pay the Plaintiff 150,000 Euro as general damages;***
3. ***The Defendant to pay interest of 7% of the awarded amount from the Judgment date till full satisfaction of the decree; and***
4. ***The Defendant to pay costs of the suit.***

It is so ordered.

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

L. E. MGONYA

JUDGE
06/06/2023