IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REIGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL CASE NO 58 OF 2021

JUVE CONSTRUCTION &

GENERAL TRADING COMPANY LIMITED .....PLAINTIFF

VERSUS

NEEMA DANIEL KANYARO T/A

ALFA SPECIALIZED MEDICAL CLINIC.....DEFENDANT

JUDGMENT

12th June & 31st July 2023

F. H. MAHIMBALI, J.

The plaintiff herein claims against the defendant a total of TZS: 104,864,450/= being an outstanding amount due payable to the plaintiff on account of construction of Alfa Specialised Medical Clinic at Mikocheni 'A' Dar es salaam.

On the 21 January 2020 the parties executed construction agreement for purpose of construction of Alfa Specialised Medical Clinic at the latter mentioned area, with contractual value of Tshs 499,873,000/=.

It was further agreed that the completion of the work would be on 30th May 2020, but it was not possible as impingent raised, and thus led for signing of addendum to the main contract.

The plaintiff alleges that the work was not timely completed as he was not timely paid, and when paid he was paid less monies as compared to the amount requested to the defendant.

Meanwhile the plaintiff complained for unnecessary deduction of amount to be paid to him on the alleged facts that there were several previous payments made in the year 2019. Due to that aspect some wrangles occurred and the parties undergo some mediation steps including CRB machinery but unsuccessfully.

Being undaunted on the manner their contract was executed or performed, the plaintiff decided to institute this matter before this Court for redress as advised by CRB for the claim of the alleged balance of **TZS: 104,864,450/=**.

At the hearing of this case, the plaintiff was represented by Mr. Eliamin Daniel, learned advocate while the defendant enjoyed legal service of Deniss Msafiri, learned advocate. Two issues for determination of this suit were framed namely;

i. Whether there was a breach of construction agreement.

ii. To what reliefs are the parties entitled to.

The plaintiffs' case had only one witness namely; Venance Makuya (PW1), the managing director of the plaintiff company who testified on behalf of the plaintiff that he claims against the defendant a total of Tshs 104,864,450/=.

Whereby on 20/1/2020, the parties entered into an agreement for; subject to engagement of a consultant, change of drawings to make them compatible with the construction site, Preparation of Bill of quantities. The said contracted was eventually put on place on 20/01/2020.

PW1 tendered exhibit P6 which is a copy of contract concluded by the parties and it was admitted as Exhibit P6. The contractual value was of tune of total TZS: 499,730,000/=. It was further agreed that the plaintiff be paid advance payment of 25% but the defendant asked to be allowed not to pay the whole amount of 25%. On that agreement, on 20/01/2020, the defendant transferred to the plaintiff's account at Akiba Bank some of Tshs 40,000,000/=. On March 2020, the defendant deposited Tshs 20,000,000/=, whereas in April the defendant paid the plaintiff in three instalments paid cash: Tshs 10,000,000/=, Tshs 20,000,000 and Tshs 40,000,000/=. This then made the total sum paid to the plaintiff being

Tshs 130,000,000/= an equivalent of the 25% agreed in the agreement. He tendered exhibit P7 being Bank statement to the effects.

On 04/05/2020, the 1st certificate was issued valued of Tshs 173,937,727/=, only Tshs 40,000,000/= were deposited in plaintiff account and the rest was covered on advance payment.

The plaintiff proceeded with the work but it appeared the money was spent all prior to the completion of the work equivalent to the claims in the certificate. The plaintiff asked for a second certificate payment for purposes of purchasing site material. Certificate No 1 was admitted as exhibit P8 while the receipts, delivery notes, local purchase orders, perform invoice were admitted as exhibit P 9 Collectively.

PW1 proceeded with construction, on 21/08/2020, the plaintiff asked for certificate No 2, the same was prepared, after deduction of amount which the plaintiff had not been paid being total of Tshs 87,000,000/= on the reasons that he was paid in the year 2019, misunderstanding between the two arose. PW1 tendered Certificate No 2 and it was admitted as exhibit P10.

The dispute was mediated by the consultant and then by the CRB, where it was agreed that the work done be re-measured to ascertain the value of money. Whereby it was determined that it was worthy TZS:

314,217,240/= used in total. PW1 tendered exhibit P13 being report for re-measurement of the work done.

The CRB failed to mediate them and advised them to approach court of law for their redress to come to court for justice.

PW1 refuted that he does not remember if there was adjustment of the contract. And thus, he did not sign an addendum.

He also averred that he had not yet been paid 65% of the contract value equals to, Tshs 269,000,000/= he further alleged that he was paid less, he was paid Tshs 220,050,000/=only.

Meanwhile PW1, testified that his company did not fail to execute the contract within time. He also admitted that, in certificate No 1 he was paid very little money because of deduction, and thus he did not complete the project, instead it was completed by another contractor.

On the side of the defendant **DW1; Neema Daniel Kanyaro (Director of the Defendant Company),** testified that on 20/1/2020, she signed a valid contract with Mr. Venance Makuya on behalf of the plaintiff. The contract value had a total of **Tshs** 499,873,000/= payable by instalment after construction in any subsequent phase until final completion of the contract.

During signing of the contract, Mr. Venance Makuya (PW1) acknowledged receiving 50,000,000/= given by (Mr. Erick Mtundo) and Tshs 20,000,000/= (for building material), and 3,000,000/= for site clearance. A day before signing the contract 20/1/2020 the defendant deposited cash Tshs 40,000,000/= to settle the differences.

The signing of the contract was then done on 21/1/2020. The period of contract was four months (i.e up to 30/5/2020) in which the defendant was to be handled with the keys of the building. After initial payment, PW1 started the construction thereto.

Between March 2020, PW1 went to the defendant and demanded for some payment.

The defendant issued Bank Cheque of Tshs 20,000,000/=, then Tshs 50, 000,000/= and later Tshs 40,000,000/=. The last transaction was dated on 27/4/2020.

One week later, DW1 while going to MNH (Muhimbili National Hospital), passed through site, nothing was in progress.

She contacted the contractor immediately and asked for an emergency joint meeting with him together with the consultant Eng. Francis Madai. The joint meeting was done on 7/5/2020, the defendant raised worries

over the consultant and contractor. The defendant asked how the Tshs 110,000,000/= which she paid between March and April 2020 was spent, it was not clarified.

To rescue the situation, she made payment of some material; which was equal to Tshs 20,000,000/= thereafter, the whole work stranded, nothing went on.

They then had a joint meeting in which they agreed to sign addendum to the contract. The addendum then explained DW1 should purchase the building materials and that the plaintiff should pay man power. The addendum then extended the life spam of the Contract to 30/08/2020, yet the contract was not completed.

When the defendant asked for the plaintiff, she was told that his man power had deserted the site because of non-payment of the said workers.

She also averred that by 14/7/2020, the whole amount received by the contractor was estimated to be Tsh. **269,000,000/=.**

The defendant registered her concern to CRB on 17/9/2020. Where the CRB ordered for revaluation of the work done, then joint site

revaluation was done to ascertain the money used for construction and the quality of the work.

Measurement and calculation were done, and it was established that the work done was with value of Tshs 314, 000,000/=, actual payments were established to be **323,000,000/=** thus, there was over payment of Tshs 9,000,000/= that was by Sept 2020.

With the CRB'S report, they recommended for some rectifications to some parts of the structure for proper shape.

The defendant was advised to get another contractor after they had disqualified the plaintiff for being negligent. The CRB then recommenced another contractor by name of Ali Mohamed with his firm Syscon Builders Ltd where he completed the whole work.

The defendant also averred that the plaintiff abandoned the site without due cause. She also added that the claims raised by the plaintiff that he owes so money, failed to be accounted for when they were at CRB office and thus the plaintiff was instructed to indemnify the defendant the exceeded amount which Tshs 9,000,000/= and so she stated that the plaintiff's claims are baseless.

DW2: ELISALIA JUSTINE MOSHA, testified that in July 2020. The parties went to his office for the aim of adding terms to their existing contract (addendum). For the plaintiff was Mr. Venance (PW1) and on the other hand, she was the defendant.

DW2 also stated that the parties also came for purposes of extending the contractual period (three months) from April. Secondly, they wanted to add some terms and that the plaintiff needed further money for the facilitation of the said contract. DW2 as an advocate, prepared the said addendum, and upon their satisfaction each party signed before him and each took his/her own copy. The addendum was dated on **14/7/2020**.

The addendum (D1 exhibit) amended the main contract (exhibit P.6) which was executed on 21st Jan 2020 by the parties. Its contractual period in the main contract expired on 30/4/2020 as the work was still unperformed.

The plaintiff needed extension of time of the contractual period, (to 30/8/2020).

Meanwhile the plaintiff admitted to have received Tshs 269,000,000/= However, he asked for temporal financial support for the facilitation of the said contractual performance, However, there would be

reduction of what was being demanded. All these temporal financial support by the client was deductible from the contractual amount payable to the plaintiff.

However, they agreed that if there was any negligence, they introduced a default clause (clause 7 and 8).

As per main contract, the contractual sum was 499,873,000/= and out of it, up to 14th July 2020, a sum of 269,000,000/= had already been spent and the balance was 230,873,000/=.

DW3: **FRANCIS LUCAS MADAI, ARCHECT,** testified that he knows that parties since 2019, It appeared in the 2019 the parties had a project which could not proceed as there emerged misunderstanding between them. Then later on, DW3 was involved as consultant of the project. The contract in fact had commenced in January 2020.

It was agreed that the work could be completed within a period of three months (Jan – April 2020).

By 30th May 2020, the contract had not yet been completed, they sat together (client, contractor and consultant) and discussed over the issue as by that time the contract had been only 70%.

The matter was ultimately referred to CRB, for further settlements, which then guided them on the best way to undergo. It was directed that they should re measure the work done.

The report to CRB was mainly prepared by DW3, in conjunction with the client and the other agent for the plaintiff Company. DW3 referred to exhibit D2.

He also added that, the report intended to describe the whole work done for the purposes of knowing the value of the said structure. Therefore, as per the report the amount paid to the plaintiff was Tshs 323,100,000/= up to that date of the report. But in reality, the construction value of the work done was measured to be Tshs 314,217,240/=.

Thus, whereas the total contract value was 499,873,000/= the actual work done by the contractor was only Tshs 314,217,240. He was therefore in excess (contactor) for over 9,000,000/= with this summary, 323,100,000/= it has the following description; -

1. Previous payment (2019) = 87,000,000/=
2. Previous payment No, 2 = (in 2020) 142,000,000/=
3. Interim payment certified (in 2020) = 40,000,000/=
4. Costs for material paid = 54,400,000/=

Total amount continued to be paid and costs for materials = Tshs 323,100,000/=. Overall percentage of the amount certified and costs for materials paid contract price = 65% Gloss valuation of the work done = 314,217,240/=. The work percentage was 65% the contract period had expired and thus renewed it.

Having heard both parties on merit, I have now to determine this suit based on evidence before this Court. I will therefore respond to both issues simultaneously.

The evidence provides that, the parties concluded the contract for construction of medical Poly Clinic building located at Mikocheni A in Dar salaam, where it was agreed that the contractual value is Tshs 499,873,000/=. The work was to commence on 21 day of January 2020 and the completion date was on 30th day of May 2020.

The evidence also provides that, the said work was not completed as agreed and thus on 14th day of July 2020 the parties signed addendum to the main contract. Which extended the completion period for three months up to 30th August 2020. The parties also added some terms including the defendant to provide material support and the plaintiff to pay man power. And the amount sent for purchasing of material support

would be deducted from actual payment. See Exhibits D1 and P1 to the effect.

The extended period in the addendum expired without the work being accomplished and thus the defendant filed claims to CRB, where it was directed the work done be re measured to ascertain its value.

The inspection was jointly made by the parties and the consultant and then the report was prepared. Also, the report intended to describe the whole work done for the purposes of knowing the value of the said structure. Therefore as per the report the amount paid to the plaintiff was Tshs 323,100,000/= up to that date of the report. But in reality, the construction value of the work done was measured to be Tshs 314,217,240/=.

Thus, whereas the total contract value was 499,873,000/= the actual work done by the contractor was only Tshs 314,217,240. He was therefore in excess (contractor) for over 9,000,000/= with this summary, 323,100,000/= it has the following description; -

5. Previous payment (2019) = 87,000,000/=
6. Previous payment No, 2 = (in 2020) 142,000,000/=
7. Interim payment certified (in 2020) = 40,000,000/=
8. Costs for material paid = 54,400,000/=

Total amount continued to be paid and costs for materials = 323,100,000/=. Overall percentage of the amount certified and costs for materials paid contract price = 65%, Gloss valuation of the work done = 3114,217,240/=. The work percentage was 65%. See exhibit D2.

The plaintiff when testifying before the Court denied to have signed addendum with the defendant, and thus he does not recognise it.

It is trite law that the parties are bound by the contract concluded by themselves, see section 9 of the Law of Contract Cap 345 RE 2019.

Section 100(1) of the Law of Evidence Act Cap 6 RE 2022 provides that;

> *When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible.*

Now, the plaintiff denied to have concluded addendum contract with the plaintiff.

Under paragraph 7 of the plaint provides " *That on 14th July 2020, the parties signed an addendum to the construction agreement to validate*

their oral conversation in respect of mode of payment and more time to finalise the works. Attached hereto and marked Annexture JC -3 is a copy of the said addendum it forms part of this plaint"

DW2, when testifying before the Court stated that *in July 2020. The parties went to his office for the aim of adding terms to their existing contract (addendum). For the plaintiff was Mr. Venance (PW1) and on the other part was the defendant"*

DW2 also stated that the parties also came for purposes of extending the contractual period (three months) from April. Secondly, they wanted to add some terms and that the plaintiff needed further money for the facilitation of the said contract.

DW2 as an advocate, prepared the said addendum, and upon their satisfaction each party signed before him and each took his/her own copy. The addendum was dated on 14/7/2020.

The addendum (D1 exhibit) amended the main contract (exhibit P.6) which was executed on 21st Jan 2020 by the parties. Its contractual period in the main contract expired on 30/4/2020 as the work was still unperformed.

The plaintiff needed extension of time of the contractual period, (to 30/8/2020).

Meanwhile the plaintiff admitted to have received Tshs 269,000,000/= However, he asked for temporal financial support for the facilitation of the said contractual performance, However, there will be reduction of what was being demanded. All these temporal financial support by the client is deductible from the contractual amount.

However, they agreed that if there was any negligence, they introduced a default clause (clause 7 and 8).

As per main contract, the contractual sum was 499,873,000/= and out of it, up to 14th July 2020, a sum of 269,000,000/= had already been spent and the balance was 230,873,000/=

Therefore, based on that facts and in relation to the annexture referred by the plaintiff to mean addendum, it is the one which also referred by DW2 which exhibit D1.

Now, taking into board that the period for completion was extended to 30th Augst 2020, yet the work was not completed.

The defence evidence provides that the plaintiff was not on the site and no else communicated to the defendant. The defendant after has

interrogated the plaintiff she was informed that the man power deserted from the site for non-payment. The defendant the filed claims to CRB.

The plaintiff claims that, he did not accomplish the work because he was not timely paid and some of payments were deducted without due cause. Hence failed to discharge his duties.

According, to the addendum to main contract by the parties it was agreed as follows;

1. *That on account of current supervening events actuated with Covid -19 pandemic contractor's financial situation, both parties agree to extend the main contract for another three months commencing from 30th May 2020 to 30th August 2020 with a view to enable the contractors accomplish the remaining part of the main contract.*
2. *The with a view to accomplish the said task, the client has accepted the contractor's request for financial support in the form of necessary materials to accomplish the remaining part of contractual obligation within the stated period in this addendum*
3. *The contractor hereby acknowledges receiving of Tshs 269,000,000/= up to the time of execution of this addendum from the main contract in addition be given a temporal financial support*

in the form of materials to be deducted from contract value as per BOQ and architectural drawing attached to the main agreement.

4. *Both parties hereby agree that the client shall give such necessary material support upon placement of written requisition by the contractor specifying the actual costs and quantity demanded with a sole purposes of accomplishing the reaming work in the 2nd floor and further that, upon commencing work the 3rd floor the same support shall apply but subject to condition that such costs, if any, shall be deducted from the contract value and further that it shall be lawful for client to strictly supervise the whole work to ascertain its value for money.*
5. *Upon receipt of the afore mentioned materials, the contractor shall acknowledge the same by issuing a legal receipt.*
6. *It is mutually agreed that the labour charges for the work done during the period under extension shall be borne by the contractor at own expense"*

Now, I have decided to produce the extract above in order to ascertain with what are complained by the plaintiff that some money were deducted without due cause and that he was not paid timely.

In my view, I am worried with the means used by the plaintiff to have money from the defendant.

The agreement is clear when endorsing the addendum, the plaintiff had already been paid Tshs **269,000,000/=.** And he agreed to be deducted amount payable for purchasing of material support. See item 3 & 3 of the addendum to the main contract.

According to DW1 testified he paid the plaintiff in accordance with the terms and condition of their contract.

DW2 averred that the contractual sum was 499,873,000/= and out of it, up to 14th July 2020, a sum of 269,000,000/= had already been paid to the plaintiff and the balance was 230,873,000/= .

The evidence reveals that PW1 confessed to have been paid Tshs 130,000,000/= a 25% of advance payment. He denies to be paid Tshs 269,000,000/=

Section 123 of the Evidence Act (supra) provides for estoppel principle that, when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be

allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing.

Therefore, the plaintiff is estopped from denying the truth of which the parties agreed by themselves.

Now having scrutinized the same, my position is that the plaintiff was paid 269,000,000/=see exhibit D1 - an addendum). Since the re-measurement of the work established to be 314,000,000/=, there has been no proof how then the plaintiff paid a total of 323,000,000/= instead of the established 269,000,000/= see Exhibit P7. My understanding of the case and the evidence established by the defendant is this, the whole work done amounted to 314,000,000/=. Whereas the amount dully paid to the plaintiff is only 269,000,000/=. There is no proof that there was any payment beyond 269,000,000/=. This is also supported by the defendant's evidence that by 14th July 2020 (the date of addendum), the whole amount received by the contractor was an estimate of 269,000,000/=. And that thereafter, as nothing was done, similarly there was no evidence that there was anything paid. On that grievance, on 17th September 2020 the defendant registered her concern to the CRB where her case was assigned to one Eng. Nashomi. Where upon a joint discussion it was ultimately recommended that the whole work be re-

measured, calculations be done and the quality of work be examined as well. That upon measurement and calculations done it was established that the work done was worthy 314,000,000/=. That actual payments were 323,000,000/=. Thus, a conclusion was drawn that there was overpayment by 9,000,000/=.

I have a reservation with this finding, and in a way favours the plaintiff. I say so because, it was expected the said Eng. Nashomi from CRB had featured as one of the defendant's witnesses in this case to establish the manner the said calculations were done and that the Plaintiff was paid the said 323,000,000/= instead of 269,000,000 acknowledged by the defendant herself via DW1. Otherwise, the said overpayment (323,000,000) is mainly a creature of CRB's calculations and in any way it is doubtful if it states the actuality. Otherwise I agree with the plaintiff's claims that he owes the plaintiff the difference between 269,000,000 against the actual work done. I say so on the basis that both claims (the plaintiff and that of the defendant) coincide at 269,000,000/= being the actual money the plaintiff had been paid up to 14th July 2020. However, there is no proof by the defendant that she did any payments to him other than that much. However, the CRB's report favours the plaintiff that the work done is worth 314,000,000/= by re-measurement and calculations done in which the defendant is estopped from denial. It is my conclusion

that the plaintiff's claims have been established to the tune of unpaid balance of TZS: 45,000,000/= (314,000,000 -269,000,000/).

According to Section 110 of the Evidence Act(supra) places the burden of proof for any allegation before the court of law.

In the case of: ***Paulina Samson Ndawavya Vs. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017*** (unreported), in which the Court stated:

"*It is trite law that he who alleges has a burden of proving his allegation as per the provisions of section 110 of the Tanzania Evidence Act, Cap 6, R.E. 2002 It was therefore the duty of the appellant to prove the claims on a balance of probabilities. "*

Now, it is well settled that , specific damages ought to be proved. See in the case of ; ***Zuberi Augustino versus Anicet Mugabe (1992) TLR 137, the case of : Jnakirama Lyer versus Nilkanta Lyerx, AIR 1962 SC 633.*** And the case of : ***Solvochem Holland BV versus Chang Quing International Investment Co.ltd, Commercial Case No 63 of 2020*** (unreported)

In the case of Zuberi Augustino (supra) the Court of Appeal was of the view that:

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved. Cost of repair was pleaded but not proved."

In the case of : Xiubao Cai and Maxinsure (T) Ltd vs. Mohamed Said Kiaratu, Civil Appeal No.87 of 2020 at Page 8 the Court, exploring what does special damages entail, stated, and quoting from other persuasive and authoritative sources, that:

"Special damages are such a loss as will not be presumed by law. They are special expenses incurred or monies actually lost. For example, the expenses which a plaintiff or a party has actually incurred up to the date of the hearing are all styled as special damages; for instance, in personal injury cases, expenses for medical treatment, transportation to and from hospital or treatment centre, etc... Unlike general damages, a claim for special damages should be specifically pleaded, particularized and proved. I call them three P's."

Guided by the principle set out in the case of ***Zuberi Augustino Mugabe (supra) and Stanbic Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited, Civil Appeal No.21 of 2001 (CAT) (unreported),*** the Court emphasized that, a claim for specific or special

damages must not only be pleaded but also its particulars must be specifically stated and strictly proved. These are three limbs which must be demonstrated, failure of which the objection is to be found merited.

As I have demonstrated herein above, I have failed to account the defendant for the breach of the contract instead the plaintiff breached the contract.

In conclusion, whereas the plaintiff is held responsible of breaching the contract as per first issue as per facts of the case, the manner the calculations were done at the date of termination of the contract it appears that she owes the defendant the sum of 45,000,000/=.

Now with the second issue as to what reliefs are the parties entitled to, I am the firm view that, the defendant had the right of action to sue for the damages occasioned in hiring another contract and for extra costs. However, she relaxed and proceeded with the completion of her project. Since parties are bound by the terms of their contract, they are duty bound to honour them. In the current case as the plaintiff provided services to the defendant, she stands to be paid to the extent of unestablished payments. This is because it is common knowledge that parties to a contract are bound by the terms of their contract (See: **Unilever Tanzania Ltd v. Benedict Mkasa trading as BEMA**

Enterprises, Civil Appeal No. 41 of 2009; **Philipo Joseph Lukonde v. Faraji Ally Saidi,** Civil Appeal No. 74 of 2019 and **Simon Kichele Chacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, Lulu Victor Kayombo Vs. Oceanic Bay Limited and Mchinga Bay Limited, Consolidated Civil Appeals Nos. 22 of 155 of 2020 (all unreported)).

That the parties who freely entered into the agreement like the one at hand are bound by this cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus: -

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"*

That said, I give judgment in favour of the plaintiff for the unpaid balance to the tune of 45,000,000/ for the work done which is in essence admitted by the defendant herself.

As per circumventing events of this case, parties shall bear their own costs.

It so ordered.

Right of appeal is explained.

DATED at Dar es Salaam this 31st day of July, 2023.

F. H. MAHIMBALI

JUDGE