

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM SUB-REGISTRY**

CIVIL CASE NO.160 OF 2022

STERLING & WILSON PVT LIMITED.....PLAINTIFF

VRS

SUBSTATION TECHNOLOGY ENGINEERING (S.T.E)1ST DEFENDANT

BUMACO INSURANCE TANZANIA LIMITED2ND DEFENDANT

JUDGMENT

Date of last Order: 28-11-2023

Date of Judgment: 15-2-2024

B.K. PHILLIP, J

The plaintiff sued the defendants for breach of a sub-contract agreement for towers construction project for the 220KV Rusumo-Nyakanazi Transmission line, entered into by the plaintiff and 1st defendant. It is alleged in the plaint that the plaintiff herein obtained a contract from Tanesco for the construction of the 220KV Rusumo- Nyakanazi Transmission line. In the course of implementation of the contract, the plaintiff decided to subcontract the tower construction works to the 1st defendant. Before being granted the sub-contract, the 1st defendant was supposed to present to the plaintiff an advance payment and performance guarantee bond from a reputable institution. Upon obtaining the advance payment and performance guarantee bond to the tune of Tshs. 84,013,030/= and Tshs.70,586,605

respectively, from the 2nd defendant, the 1st defendant was subcontracted to undertake the tower construction works in the aforementioned project and signed the sub-contract agreement with the plaintiff. In the course of implementation of the sub-contract agreement, the plaintiff was not satisfied with the works done by the 1st defendant, thus she terminated the sub-contract agreement and demanded the 2nd defendant to pay the money indicated in the advance payment guarantee bond since, according to her the 1st defendant failed to discharge her duties thus, there was no any way of recovering the advance payments made to her except through the realization of the guarantee bond. The 2nd defendant did not heed the plaintiff's demands. So, the 2nd defendant was joined in this case because she issued the guarantee bonds in favor of the plaintiff. The plaintiff's in this case prayers are reproduced verbatim here under ;

- i) Order be issued by the Honourable Court directing the defendants to pay the plaintiff specific loss amounting to Tshs. 343,101,704.18
- ii) Order be issued by the Honourable court for payment of general damages for injury caused by the defendants to be assessed by the court or for consecutive assessment of Tshs.200,000,000/=.
- iii) Aggravated and exemplary damages amounting to Tshs.60,000/=.
- iv) Interests on items (i), (ii), and (iii) at the commercial rate of 21% from the date of cause of action till the date of judgment and thereafter the court rate of 7% till full and final payment.
- v) The defendant pays the plaintiff's costs and incidental to the suit.
- vi) Any other relief(s) that the Honourable court may deem fit.

The defendants filed their written statements of defence in which each one denied the plaintiff's claims. In her defence the 1st defendant raised a counterclaim against the plaintiff and the 2nd defendant in which she alleged as follows; that she entered into a sub-contract agreement with the plaintiff for the construction of tower foundation for -220KV- Rusumo-Nyakanazi Transmissions Line, (hereinafter to be referred to as "the sub-contract"). The 2nd defendant issued an advance payment guarantee in respect of the said sub-contract. The scope of the works/project was divided into three phases; to wit; construction of tower foundation, tower erection, and stringing. The total value of foundation and tower erection works were Tshs.1,481,051,245/= and Tshs.705,866,047/= respectively. The value of stringing works was Tshs.677,425,382/=. The total value of the sub-contract was Tshs.2,864,342,674.20 VAT exclusive. All works were supposed to be completed within a prescribed time from the date of signing the subcontract. The 2nd defendant issued a performance guarantee bond in favor of the 1st defendant. The 1st defendant discharged her obligation as stipulated in the sub-contract. She conducted mobilization works, tower erection, and stringing. Thereafter submitted to the plaintiff a certificate for payment of the amount due for the work done, but the plaintiff refused to pay the costs for the works indicated in the certificate, instead, she issued a notice of termination of the sub-contract dated 17th January 2022. The plaintiff had paid the 1st defendant a sum of Tshs. 259,000,000/= only which was just part of the agreed costs and left an outstanding amount to the tune of Tshs.490,000,000/=.

The 1st defendant's prayers in the counterclaim are reproduced verbatim hereunder;

- i) That the payment of Tshs.490,000,000/= for breach of the sub-contract agreement.
- ii) An order for perpetual injunction restraining the plaintiff from receiving the payment of Tshs. 84,000,000/= from the 2nd defendant as the plaintiff breached the subcontract.
- iii) An order for perpetual injunction restraining the plaintiff from benefiting proceeds of the performance guarantee bond entered between the 1st defendant and the 2nd defendant in favor of the plaintiff.
- iv) Payment of general damages resulted from the plaintiff's acts.
- v) Costs of the suit.
- vi) Interests on the decretal amount at the court rate from the date of the judgment to the date of full payment.
- vii) Any other relief this honorable court shall deem fit to grant.

The plaintiff filed her written statement of defence to the counterclaim in which it refuted all of the 1st defendant's claims and stated as follows; That the work assigned to the 1st defendant as per the sub-contract was divided into three phases to wit; the first phase was Construction of tower foundation, 2nd phase was tower erection and the 3rd phase was tower stringing. The 1st defendant failed to honor the terms of the contract because she failed to perform the tasks stipulated in the sub-contract. The tasks in the sub-contract were to be approved by the plaintiff and Tanesco officials.

None of the work allegedly performed by the 1st defendant was either approved by the plaintiff or Tanesco officials.

Further, the plaintiff averred that the 1st defendant was granted 10% of the value of the sub-contract plus additional funds to the tune of Tshs.89,489,039.18 for mobilization works which were supposed to be recovered through the payments for the works performed by the plaintiff., but the 1st defendant failed to perform the works assigned to her.

At the final pre-trial conference the following issues were framed for determination by the court.

- i) Whether or not there was a breach of the sub-contract for the tower construction project -220KV Rusumo- Nyakanazi Transmission line by either party thereto.
- ii) Whether or not the 2nd defendant is liable for the plaintiff's claims under the performance guarantee contract.
- iii) To what reliefs are the parties entitled?

At the hearing of this case, the learned Advocate Ferdinand Makore appeared for the plaintiff whereas the learned Advocates Augustine Kusalika and Erneus Swai appeared for the 1st and 2nd defendants respectively. As usual, the plaintiff was the first one to be heard. Only one witness testified for the plaintiff's case since, when the case was called for continuation of the hearing of the plaintiff's case, Mr. Makore prayed for withdrawal of the plaintiff's case. consequently, the plaintiff's case was marked withdrawn as prayed and a hearing of the counterclaim commenced. After the closure of the 1st defendant's case in the counterclaim, Mr. Makore prayed for leave to

raise a point of preliminary objection, to wit; that the counterclaim is incompetent because it has been instituted and litigated without the sanction of the board resolution of the 1st defendant. I granted Mr. Makore's prayer and the point of preliminary objection was heard. I reserved the determination of the point of preliminary objection and ordered that the same shall be determined in the judgment of the counterclaim as the first issue before the determination of the issues framed at the 1st Pre-Trial Conference. That enabled me to proceed with the hearing of the defence case. At the closure of the defence case, the learned advocates were granted leave to file closing submissions.

In this judgment, I shall start delving into the point of preliminary objection then if the point of preliminary objection will not sail through I shall proceed with the determination of the issues on the merit of this case framed at the Final Pre-Trial Conference.

Mr. Makore's arguments in support of the point of preliminary objection were as follows; According to the provisions of Order 8 Rule 9(2) of the Civil Procedure Code (" CPC"), a counterclaim is a suit separate and independent from the main suit filed by the plaintiff. In this case, the 1st defendant did not produce in evidence any board resolution passed by the 1st defendant company to institute the counterclaim against the plaintiff herein. He was emphatic that the 1st defendant closed her case without tendering in court proof of the existence of the board resolution authorizing the 1st defendant to institute a case by way of counterclaim against the plaintiff. He was of the view that according to the provision of section 147 (1) (a) (c) of the Companies Act, the counterclaim is incompetent and invited this court to

strike it out. To cement his arguments he cited the case of **Mahumy Investment Coy Ltd and another Vs Mic Tanzania Company Ltd, Civil case No.95 of 2021, Ursino Palms Estate Limited Vs Kyela Valley Foods Limited and two others, Civil Application No.28 of 2014, New Life Hardware Company Ltd and Another Vs Shandong Locheng Export Co. Limited and Two others, Commercial Case No.86 of 2022 and Misc. Commercial Application No.135 of 2022, Boimanda Modern Construction Co. Ltd Vs Tenende Mwakagile and six others , Land case No. 8 of 2022, Kati General Enterprises Limited Vs Equity Bank Tanzania Limited and Another, Civil case No.22 of 2018 and Simba Papers Convertes Limited Vs Packaging and Stationery and Two others , Civil Appeal No.280 of 2017 (All unreported).**

In rebuttal, Mr. Kusalika argued that, when this matter was called for the 1st Pre-Trial Conference, Mr. Makore, informed this court that there were no pending and/ or further applications or points of preliminary objections. He contended that since the point raised by Mr.Makore is not about the jurisdiction of this court, the same is wrongly raised at this stage. Only points of preliminary objection about the court's jurisdiction can be raised at any stage.

Moreover, Mr. Kusalika submitted that all cases cited by Mr.Makore are distinguishable from the case in hand since in none of those cases the point of preliminary objection on lack of board resolution was raised after the closure of the plaintiff's case. He argued that the issue on whether or not a board resolution was tendered in court is the issue of evidence. He pointed

out that the point of the preliminary objection raised by Mr. Makore does not go to the root of the controversy between the parties and cannot dispose of the case. In addition, Mr. Kusalika contended that points of preliminary objection are not supposed to be raised in a manner that takes the adverse party by surprise as done by Mr. Makore. In conclusion of his submission, Mr. Kusalika urged this court to dismiss the point of preliminary objection.

In rejoinder, Mr. Makore reiterated his submission in chief and added that a point of preliminary objection on matters of law that relates to the competency of the case can be raised at any time before the judgment. He was of the view that the point of preliminary he has raised does not require evidence to be determined as it is a pure point of law. Responding to Mr. Kusalika's arguments that during the 1st Pre-Trial Conference he did not indicate that he intended to raise a point of preliminary objection, Mr. Makore maintained that parties are not barred from raising points of law which requires the attention of the court. In addition, Mr. Makore submitted that he notified this court that he intended to raise the point of preliminary objection in question, therefore Mr. Kusalika has not been taken by surprise.

Having dispassionately analyzed the competing submissions made by Mr. Makore and Kusalika, I find myself compelled to deal with the concern raised by Mr. Kusalika on whether it is proper for this point of preliminary to be raised amid the proceedings after the closure of the plaintiff's case, before embarking on the merit of the same. It is not in dispute that at the 1st Pre-Trial Conference, none of the learned advocates informed the court that he intended to raise a point of preliminary objection, which is why this court proceeded to schedule the case for hearing. One of the relevant questions

here is: can a party to a case raise a point of preliminary objection after the commencement of the hearing of the case, if the answer is in the affirmative, which kind of preliminary objection can that be? Mr. Makore and Kusalika are at one that a point of preliminary objection can be raised after the commencement of the hearing of the case and subscribe to that position, but they have locked horns on the kind of preliminary objection that can be raised at any stage of the proceedings. Makore's stance is that any point of law can be raised as a point of preliminary objection at any stage whereas Mr. Kusalika is of the view that only points of law on the court's jurisdiction can be raised at any stage. So, according to Mr. Kusalika, there are limitations to the type of preliminary objections that can be raised at any stage. On the face of the rival arguments raised by the learned advocates, I find Mr. Kusalika's argument valid on the limitations of the types of points of preliminary objection that can be raised at any stage, in the sense that all points of preliminary objection are supposed to be pure points of law. [See the case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) E.A 696**. Thus, Mr. Makore's argument that any point of law that requires the court's attention can be raised at any stage does not make sense since all points of preliminary objections are supposed to be pure points of law anyway, and it is the position of the law that any point of preliminary objection has to be raised at the earliest stage of the case. The earliest stage of the case cannot be after the closure of the plaintiff's case. To my understanding, a point of preliminary objection that can be raised at any stage is the one concerned with the court's jurisdiction and time limit in the institution of cases in court, which in essence touches

the court's jurisdiction. There are a plethora of authorities to support this position. For instance, in the case of **Charles Julius Rukambura Vs Isaac Ntwa Mwakajila and Tanzania Railways Corporation, Civil Appeal No.2 of 1998**, (unreported) the Court of Appeal, held as follows;

"The question of jurisdiction is paramount in any court proceedings. It is so fundamental that in any trial even if it is not raised by the parties at the initial stages, it can be raised and entertained at any stage of the proceedings in order to ensure that the Court is properly vested with jurisdiction to adjudicate the matter before it"

(emphasis added)

It is worth noting that the point of the preliminary objection raised by Mr. Makore has nothing to do with the jurisdiction of this court, thus, it was supposed to be raised at the initial stage of the case.

Additionally, it is not in dispute that when the matter was called for the 1st and Final Pre-Trial Conference, Mr. Makore did not raise any point of preliminary objection. To my understanding, one of the purposes of conducting the First and Final Pre-trial conferences is to lay down a foundation of the case before the hearing starts and to resolve all preliminary issues including the determination of points of preliminary objections if any, for smooth and speedy hearing of the case to achieve what is envisaged in the principle of overriding objectives. (See sections 3A and 3B of the CPC) As alluded to earlier in this judgment, the law does not envisage circumstances whereby a party to a case can raise a point of preliminary objection which was supposed to be raised at the initial stage in the amid of

the hearing of the case apart from points of preliminary of objection about the court's jurisdiction which, if left unresolved might render the proceedings a nullity. Failure to adhere to the procedures laid down in the CPC creates a chaotic situation in civil proceedings.

In all of the cases cited by Mr. Makore, none of the points of preliminary objection about the lack of board resolution was raised after the closure of the plaintiff's case except for the case of **Mahumy Investment Company** (supra), in which the propriety of the manner the said point of preliminary objection was raised was not questioned/ brought to the attention of the court by the plaintiff's advocate as a result, the same was not discussed by the court, thus that case is distinguishable from the case at hand. Moreover, that case is not binding to me.

Lastly and without prejudice to my observations herein above, in any case, since Makore did not raise the point of preliminary objection in question at the initial stage of the case and decided to raise it after the closure of the defendant's case in the counterclaim and part of his arguments were pegged on the evidence adduced by the PW1 in the counterclaim, it is obvious that he believed that the same needed to be proved by evidence. Thus, under the circumstances, it was not proper to raise the same after the closure of the defendant's case because by so doing he took the 1st defendant by surprise since she did not prepare her witness to give evidence in respect of that issue. Not only that, it is not proper to move this court to determine an issue that requires this court to evaluate the evidence adduced before the closure of the hearing of the case, that is, receiving evidence from both sides. Evidence has to be evaluated in its totality. Our laws do not provide for

circumstances whereby the court can start evaluation of the evidence adduced in court by one side before the other side gives his/her evidence in a manner suggested by Mr. Makore in this case.

From the foregoing, I am of a settled view that the point of preliminary objection has been raised wrongly, thus the same is hereby dismissed.

Having disposed of the point of preliminary objection, let me proceed with the determination of the issues on the merit of this case. However, at this juncture, I think it is worth pointing out that I will deal with the 1st and 3rd issues only since the 2nd issue has become redundant following the withdrawal of the main case.

In proving her claims in the counterclaim the 1st defendant had one witness namely Vennon Michael Mwamlangula who testified as PW1 and on the defence side the plaintiff had one witness namely Pius Maro Ruge, who testified as DW1. Starting with the 1st issue, to wit; *Whether or not there was breach of the sub-contract for the tower construction project - 220KV Rusumo- Nyakanazi Transmission line by either party thereto.* PW1's testimony was to the effect that the plaintiff, in this case, was granted by Tanesco a contract for the construction of 220KV for an electric Transmission line along Rusumo- Nyakanazi road. In the performance of that contract, the plaintiff entered into a sub-contract agreement with the 1st defendant for the construction of the aforesaid 220KV for an electric transmission line along Rusumo- Nyakanazi road, in three aspects, namely; construction of tower foundation, tower erection and stringing/ installation of wire. It was agreed in the sub-contract that the plaintiff would pay the 1st defendant advance

payment for the tower construction works and the 1st defendant was supposed to secure an advance payment guarantee and secured one from the 2nd defendant. Upon submitting the documents for the advance payment guarantee, the plaintiff did not pay the 1st defendant the advance payment but requested her to conduct mobilization works using her money while awaiting the process for payment of an advance payment to be completed and payment effected. The 1st defendant spent about Tshs.350,000,000/=. Thereafter the plaintiff paid the defendant a sum of Tshs. 84,000,000/= only. PW1 tendered in court the receipts for the money spent by the 1st defendant in the works done (Exhibit P1). He went on to testify that because the project was urgent the 1st defendant continued doing the works agreed in the contract and complied with all the required standards and conditions. All works done were approved by the consultant. The works done included excavation, concrete casting, reinforcement binding, and back-filling. To substantiate his assertion PW1 tendered in court the following documents; documents titled "concreting permit" (exhibit P2 collectively), and documents titled " foundation Checklist for transmission lines" (exhibit P3 collectively).

Further, PW1 testified that the 1st defendant served the plaintiff with the invoice for the amount due but no payment was effected instead the plaintiff wrote to the defendant a termination letter and served the 2nd defendant with a demand letter for recalling the advance payment guarantee. Consequently, the 2nd defendant informed the 1st defendant about the plaintiff's demand for payment of Tshs.84,000,000/= as stipulated in the advance guarantee agreement. The 1st defendant communicated with the

plaintiff in writing through a letter dated 18th December 2022 in which she analyzed the costs so far spent by the 1st defendant in the performance of the works done and the money paid by the plaintiff which showed that the total advance payment money paid to the 1st defendant by the plaintiff were Tshs.256,000,000/= only and the plaintiff owes the 1st defendant a sum of Tshs.660,000,000/=being unpaid costs for the works done, thus the plaintiff's demands to the 2nd defendant were not justifiable. The 1st defendant demanded the plaintiff to pay the outstanding amount but in vain. The plaintiff breached the sub-contract agreement.

In response to questions posed to him during cross-examination, PW1 testified that the sub-contract was for two months. The 1st defendant managed to construct 22 towers. Upon being referred to exhibit P3 collectively, he told this court that by the time of termination of the sub-contract, eleven (11) towers were at the excavation stage and eleven (11) towers were at the concrete stage. The construction manager was from the plaintiff's office. The construction manager had no responsibility for checking the work. The quality manager is the one who is supposed to check the quality of work. He admitted that some of the documents (exhibit P2 and P3) were not signed by the technical supervisor but maintained that does not mean that the works were not properly done. The defendant deserves to be paid for the concrete and excavation works. The 1st defendant had not yet handled the site because the sub-contract period had not yet expired. The 1st defendant stopped working because the plaintiff did not pay him. The Plaintiff paid the 1st defendant Tshs.84,000,000/= as part of the advance payment but the same was paid belatedly. The advance payment was 10%

of the value of the contract. The plaintiff gave the 1st defendant some materials for the work whose value was around 84,000,000/= and 89,000,000/=, and the same was supposed to be deducted from the advance payment supposed to be paid to the 1st defendant. After payment of the said advance payment and providing support in terms of supplying some materials to the 1st defendant, the plaintiff had nothing more to be done on its part. It was supposed to be handed over to the site.

Conversely, DW1's testimony was to the effect that the plaintiff hired the 1st defendant to accomplish the tasks for the construction of the tower foundation, tower erection, and stringing of those towers for the Rusumo-Nyakanazi transmission line. During the construction of the tower foundation, the plaintiff was not satisfied with what was done by the 1st defendant. The steps involved in the construction of the tower foundation are; excavation of the pits, followed by concreting and the last step is back-filling. The 1st defendant did excavation works and backfilling only but did not do stringing works. The role of the plaintiff was to verify the works done by the 1st defendant. Upon being referred to Exhibits P2 and P3, DW1 told this court that exhibit P2 was supposed to be endorsed by all officials indicated therein (the construction manager, technical supervisor, quality manager, and the client-Tanesco or a consultant hired in line with the terms of the contract). The fact that the documents tendered in court as exhibits (exhibit P2) were not signed by some of the plaintiff's officials means that the officials who did not sign exhibit P2 collectively were not satisfied with the work done by the 1st defendant. Thus, the 1st defendant was in breach of the contract because did not perform the works to the standard agreed in

the sub-contract. The plaintiff's task was to pay the 1st defendant advance payment (10% of the value of the sub-contract) which was for the construction of the Tower foundation. The 1st defendant did not complete all the stages in the construction of the tower foundation, it ended up at the 2nd stage, that is, the concreting stage. The plaintiff incurred a lot of costs for re-hiring another contractor to accomplish the works that were supposed to be done by the 1st defendant. The 1st defendant does not deserve to be paid the money claimed in the counterclaim.

In response to questions posed to him during cross-examination, DW1 told this court the following; He is not an engineer but has a general knowledge of engineering and construction matters. His testimony as far as engineering matters is concerned was from a layman's perspective. He became knowledgeable that the plaintiff was not satisfied with the work done by the 1st defendant because he was attending briefing meetings in which various actors in the supervision of the project participated. Expert engineers were complaining that the work done by the 1st defendant was horrible. The duration of the contract was six months and visited the site once. The plaintiff was responsible for the accomplishment of the works/project, overseeing the works done in the project and everything that was going on in the project. The 1st defendant was hired by the plaintiff to perform the works within the parameters agreed in the sub-contract. He was not able to recall the exact amount paid to the 1st defendant as advance payment. The 1st defendant failed to complete the works assigned to her in the contract because there was no approval to continue to the next stage for the works to be done. He did not recall the specific details of the sub-contract on the

payments. The plaintiff decided to withdraw its case not because there were no losses incurred by the plaintiff but for other reasons. He was not among the persons who were supposed to endorse exhibit P2. If a document is not endorsed by all officers who were supposed to endorse it, it means that the particular work(s) indicated in the document were not approved.

The 2nd defendant who was joined in the counterclaim as the necessary party, did not defend the case. Mr. Erneus Swai informed the court that upon going through the counterclaim between the lines, he noted that the 1st defendant has no claims against the 2nd defendant.

Having analyzed the evidence adduced by both sides, I noted that, it is a common ground that the plaintiff and the 1st defendant signed the sub-contract for the construction of the 220KV Rusumo- Nyakanazi Transmission line. The contract was terminated before its expiry. The controversy between parties herein is who should be held liable for the failure to complete the works stipulated in the sub-contract agreement. PW1's evidence is to the effect that the plaintiff breached the conditions stipulated in the subcontract.

Conversely, DW1's testimony is to the effect that the 1st defendant breached the conditions stipulated in the sub-contract agreement for failure to perform the works per the conditions stipulated therein. Therefore, this court must go through the sub-contract agreement to properly determine important issues which arose in the course of the hearing of the case such as; what were the exact conditions stipulated in the sub-contract agreement as far as the advance payments to the defendant were concerned, what were the agreed standards in the construction of the tower's foundation, concreting

and backfilling, and who were the responsible officials in the approval of the works stipulated in the sub-contract agreement. It is worth noting that the sub-contract agreement is not among the exhibits tendered in court by the 1st defendant. From my observations made herein above, I find myself in agreement with Mr. Makore's stance held in his closing submission that is, it was crucial for the 1st defendant to tender in court the sub-contract agreement in question for admission as an exhibit in this case.

In his closing submission, Mr. Kusalika submitted that since the existence of the said sub-contract agreement is not disputed, then, in the determination of the issues this court is at liberty to look at the copy of the sub-contract agreement that was annexed to the plaint. In other words, Mr. Kusalika appreciates that this court must peruse the sub-contract agreement to know the conditions and terms stipulated in the sub-contract agreement to properly determine who between the parties herein is responsible for the breach of the sub-contract agreement. However, as pointed out by Mr. Makore in his closing submission, the position of the law is that an annexure to the plaint/ pleadings does not form part of the evidence /exhibits in a case until when it is admitted in court as an exhibit. In the case of **God bless Jonathan Lema Vs Musa Hamis Nkanga & Two others, Civil Appeal No.47 of 2012** (unreported) cited by Mr. Makore in his closing submission, the Court of Appeal had this to say on the status of annexures;

" But in our case, there is no evidence on the record to indicate that the respondents were registered voters. The record contains annexures. It is a trite law that annexures are not evidence for a court of law to act and rely upon",

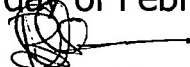
Thus, I wish to state categorically here that Mr. Kusalika's contention that in the determination of issues, this court can rely on the sub-contract agreement annexed to the main case which was withdrawn is misconceived. It is the well-settled position of the law that this court can only rely on the exhibits that have been admitted in court. After all, upon the withdrawal of the main suit, all documents which were annexed thereto cannot remain to be part of the court's record as they are inseparable from the main suit.

In addition to the above, in the absence of the sub-contract agreement which stipulates the conditions for the implementation of the works stipulated therein, including the relevant approvals of the works before issuance of certificate of payments, exhibits P2 and P3 cannot be of help to this court in the determination of the 1st defendant's claims.

It is trite law that 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. The burden of proof in suit proceedings lies on the person who would fail if no evidence at all were given on either side. [See sections 110 and 111 of the Law of Evidence Act]. The standard of proof in civil cases is on the balance of probabilities. In this case, the 1st defendant had the burden of proof of his claims of breach of the sub-contract agreement. As aforesaid, the 1st defendant was duty bound to produce in court the sub-contract agreement to prove the terms and conditions of the subcontract agreement on the advance payment she deserved to be paid, the type of work she was assigned to do and the required approvals for those works. From the foregoing, it is the finding of this court that the 1st defendant

failed to prove the breach of sub- contract agreement. The counterclaim is hereby dismissed with costs.

Dated this 15th day of February 2024



B.K.PHILLIP

JUDGE

