IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO. 148 OF 2022

BM FAMILY INVESTMENT LIMITED ..... PLAINTIFF

VERSUS

DAR ES SALAAM INSTITUTE OF

TECHNOLOGY COMPANY LIMITED .....1ST DEFENDANT

THE ATTORNEY GENERAL .....2ND DEFENDANT

JUDGMENT

13th May & 13th June, 2024

KAMUZORA, J

The Plaintiff BM Family Investment Limited is a private limited liability company incorporated under the laws of Tanzania which deals with various business activities including capital financing for various projects. The 1st Defendant Dar es Salaam Institute of Technology Company Limited (herein to be referred as DIT Company) is a company owned by the government through the Dar es Salaam Institute of Technology and Treasury Registrar while the second Defendant is the office established under the law with duties are among others, to represent the government and its institutions in any legal proceedings.

The brief facts of the case as gathered from the record is that, the 1st Defendant was entrusted to perform different projects in different

areas within Tanzania Mainland but had no fund to finance the projects. It approached the Plaintiff and they signed a business agreement for the Plaintiff to finance projects run by the 1st Defendant with consideration of sharing the profit therefrom after the refund of the capital advanced. It is on record that the Plaintiff released funds to the 1st Defendant who performed the intended projects. It is the Plaintiff's claim that the 1st Defendant was unable to perform his obligation of refunding the capital advanced plus profit. The Plaintiff therefore sued the Defendants jointly and severally for an assortment of reliefs as follows: -

i. *Payment of sum of TZS 419,647,853.85 being outstanding principal sum which was availed to finance Defendants' projects.*
ii. *An order for payment of TZS 623,853,235.85 being agreeable penalty.*
iii. *Commercial interest of prayer i and ii above at the rate of 23% per annum from June, 2019 to the date of judgment.*
iv. *An order for payment of both punitive and aggravated damages not less than 100 million.*
v. *An order for payment of court's interest at the rate of 12% from the date of issuance of the decree to the date of payment in full.*
vi. *Costs of the suit*
vii. *Any other relief this honourable court shall deem fit to grant.*

The Defendants filed a joint written statement of defence in which they disputed the Plaintiff's claims but also raised a counter claim against

the Plaintiff claiming for a sum of TZS 2,725,522,282.58 costs of the case and any other relief this court deems fit and just to grant. It was the Defendants' argument that the money paid to the Plaintiff as refund exceeded the amount advanced by the Plaintiff in funding the 1st Defendant's projects thus, they claim for the excess amount. In its written statement of defence to the counter claim, the Plaintiff disputed the Defendants' claims.

As a matter of legal representation, the Plaintiff was represented by Messrs. Jonathan Mbuga and Hans Mlindoko, learned Advocates while the Defendants were represented by Messrs. Erigh Rumisha and Nelson Ndelwa, learned State Attorneys. At the hearing of the matter the Plaintiff's side presented three witnesses while the Defendants called four witnesses.

Brief evidence from the Plaintiff's witness Beatus Wilbard Mabere (PW1) who is the company director is that, the 1st Defendant was a private company established by the employees' community of Dar es Salaam Institute of Technology (herein to be referred to as DIT) including; lecturers, supporting staffs and DIT alumni intending to earn income for members using their expertise. That, the company was established with the aim performing engineering an allied works. After the 1st Defendant had secured projects, it approached the Plaintiff as one of the DIT alumni

for project financing. That, they entered into a two years business agreement (exhibit PE1) for the period of May 2018 to May 2020 in which they agreed for the Plaintiff to provide money for executing the projects assigned to the 1st Defendant. That, as per the terms of the agreement, if the Plaintiff had financed the project at 100%, he was entitled to a profit share of 70% after the refund of the capital advanced and the 1st Defendant was entitled to 30% of the profit. That, according to the agreement, the money to the Plaintiff were to be paid within 15 days from the date it was paid by the client and failure of which, the 1st Defendant was to be charged 2% as penalty per month.

PW1 claimed that the Plaintiff funded the 1st Defendant in different projects which are; three lines by TANROAD at Mwanza in 2018, LOOP Counter by TANROAD at Mwanza in 2018, Shinyanga Pedestrian Zebra cross by TANROAD in 2019, Geita Zebra Cross by TANROAD in 2019, Simiyu IFM in 2019, Songwe project by TANROAD in 2019. That, they also funded the purchase of materials at LOOP Counter Mwanza and issued petty cash to finance renovations by DIT company. That, the money to finance the projects were either deposited to DIT company's account through NMB Bank or petty cash voucher or direct deposit in the bank account of service provider after receiving instructions from DIT company. That, the total amount which the Plaintiff funded DIT company projects

was TZS 733,865,970.05/- in which the amount of 554,148,501.00/- was deposited in DIT company's account at NMB and TZS 179,000,000/- was paid through petty cash voucher and deposits in bank account of the service provider depending on the request by the 1st Defendant. That, out of the money advanced as capital for those projects, the 1st Defendant was able to pay only TZS 314 million and failed to pay TZS 419 million.

PW1 further testified that, they exchanged several correspondences and several meetings in discussing the Plaintiff's claim and at all times the 1st Defendant admitted to the Plaintiff's claim of TZS 419, 647,853.85/-. That, the 1st Defendant also audited the claim and at the end, confirmed the claim but failed to pay. Letters evidencing their different correspondences and audit report were admitted as exhibits in this case.

PW1 prayed for this court to order DIT company to pay principal amount of TZS. 419,647,853/-, interest of 2% per month from July, 2019 to the time of filing this suit in February 2022 amounting to TZS. 623,853,235.85/-. That, the Defendants be ordered also to pay commercial interest of 23% per annum of the principal amount which is TZS. 419,647,853/- from July 2019 to the date of filing, TZS. 200 million as general damages, 7% as court interest and costs of the case.

When he was cross examined on the money deposited through CRDB bank account, PW1 testified that apart from the projects financed

subject to exhibit PE1, the Plaintiff also financed other projects covered in a different agreement.

The evidence by PW1 was supported by PW2, Joseph Yongolo Challo, a former Director General of the 1st Defendant. He testified that he was among the founders of DIT company which was registered as private company in 2010 but it was not operational until 2017 when he was appointed the first Director General of that company. He admitted that the company was entrusted to perform TANROADS projects but had no funds thus, they approached different DIT alumni who were ready to invest their capital with the 1st Defendant. That, the Plaintiff was ready to work with the 1st Defendant in performing the projects and they signed a two years business agreement with condition for the Plaintiff to finance the projects and for the two to share the profit. That, they also agreed that before sharing the profit, the 1st Defendant had to pay back the fund released as capital and the profit was to be shared at the rate 70% for the Plaintiff and 30% for the 1st Defendant if financed at 100% by the Plaintiff but, if partly financed, the profit share was subject to amount of capital invested by each party. He supported the fact that the 1st Defendant verified and confirmed the Plaintiff's claim of TZS. 419 million but failed to pay. He however, claimed not to be aware of the claim by the Defendants raised in the counter claim. He explained that, there were

other continuing projects apart from those involved in the first agreement because when the first agreement ended in May 2020, they entered into the second agreement which had no penalty provision. That, while performing three-line project at Mwanza, they incurred more costs as there were technical errors thus, they were unable to pay the Plaintiff. That, they however promised to pay him as they were still running other projects but until he left the office, the Plaintiff's claims were yet to be paid. From his evidence, PW1 support the Plaintiff's claims.

PW3, Mazengo Andrew Kasirati is the auditor at Diamond Financial Services Company, a company that was engaged by 1st Defendant to audit its financial accounts. He testified that, in course of auditing the 1st Defendant's financial accounts, they discovered a debt owed to BM Family (the Plaintiff herein) thus, requested for necessary documents to verify the debt. That, upon going through the documents they were satisfied that the BM Family had a claim of TZS. 417,6487,854/- against DIT company and the same was so indicated in Exhibit PE9 which is the audit report.

In defence, DW1 Charles Mapunda, a customer manager at NMB testified that, they issued bank statement to DIT company for the period from 01/12/2017 to 28/02/2022 (exhibit DE1). DW2, Rose William Mkumbwa is also a bank officer at CRDB Vijana Branch working as a

Manager Customer Experience. Her evidence is that, CRDB issued bank statement to DIT company for the period from 22/06/2019 to 04/10/2023 (ID1).

DW3, Magdalena Oforo Ngoty works as an accountant at DIT and was appointed as the director of finance and administration of DIT company (the 1st Defendant herein) in March 2022. She testified that, DIT company received a claim for TZS. 419 million and interest from BM Family Investment and the debt was for the period from 2018 to 31st March 2020. That, in course of verifying the claim, they discovered that some of the money was deposited in the company's account and some was paid to employees, ex-director general of the DIT company and to other individuals. That, the amount deposited in BM Family account was huge compared to the amount of money deposited in DIT account so, they thought that DIT company had claims against BM for they paid more amount to BM account as opposed to that paid by BM to DIT account. She explained that, the total amount deposited by BM to DIT's account as per all bank accounts is almost TZS. 500million while the amount deposited by DIT company to BM Family is more than TZS. 3.08 billion but she later changed and claimed that it was more than TZS. 2.7 billion.

DW3 further testified that, since there were transactions involving individual persons, they wanted to verify the debt by looking into bank

accounts and all projects performed and they discovered that the 1st Defendant paid more money to the Plaintiff than what was released by the Plaintiff to the 1st Defendant. DW1 admitted that she was among the individual employees who deposited money in the 1st Defendant's account but claimed that he received the money from the director general.

DW4, Dr. John Andrew Msumba, is a Lecturer at DIT and currently, a Director General of DIT Company Ltd. He testified that, he was appointed in 2022 to take over the position of a Director General of the 1st Defendant after PW2 had left the office. That, when the office was handled to him, the Plaintiff was among the people listed with claims against DIT company and the claim was TZS. 419 million plus. That, they tried to verify the claim but they discovered that the 1st Defendant had paid more money to the Plaintiff than the money that was released by the Plaintiff to the 1st Defendant thus, they initiated the investigation over the matter and raised a counter claim in this suit. That, the claim against the Plaintiff is about TZS. 2.7 billion.

From the above evidence, the following issues will guide this court in its determination of the matter;

1. *Whether there was a valid business agreement.*
2. *If the first issue is affirmatively answered, what were the terms of that business agreement.*

3. Whether the Plaintiff has any outstanding claims against the first Defendant.

4. Whether the first Defendant has any claims against the Plaintiff.

5. What reliefs are the parties entitled.

Starting with the first issue on whether there was valid business agreement, the Plaintiff's counsel argued in his closing submission that there was valid agreement which was entered between the Plaintiff and the first Defendant. He contended that, for an agreement between the companies to be valid, it must comply with the requirements of section 39 (1) and (2) of the Companies Act which require an agreement between the companies to be signed and stamped with company seal or signed by two directors of the company. Referring the Plaintiff's evidence, the counsel maintained that, Exhibit PE-1 is a valid business agreement for it was stamped with the company seal along with endorsement of two directors of parties to the agreement. On the other hand, the Defendants argued that exhibit PE1 is not valid business agreement between the parties because it was entered by PW2 without approval by the board of directors as required under Article 11 of the original Articles of Association and Article 17 of the Amended Articles of Association.

I have considered the rival arguments of the counsel for the parties and carefully gone through the evidence on record. In his evidence PW1,

Beatus Wilbard Mabere, the Plaintiff's director, apart from his oral testimony, he tendered the business agreement which was admitted as exhibit PE1 for contractual period of two years from May 2018 to May 2020. This piece of evidence was supported by PW2, Joseph Yongolo Challo who was the former director general of the 1st Defendant who admitted to have signed the business agreement on behalf of the 1st Defendant. Two defence witnesses who are currently holding the 1st Defendant's office (DW3 and DW4) also admitted in their evidence that PW2 was the first managing director of the 1st Defendant. They also acknowledged the existence of exhibit PE1 as the agreement entered between the Plaintiff and the 1st Defendant. When the said agreement was tendered, there was no any objection raised by the Defendants. PW2 who signed the business agreement on behalf of the 1st Defendant was not cross examined regarding the authority in signing exhibit PE1. If the Defendants were doubting PW2's authority in signing the agreement and or, whether he was authorised to sign the same by board of directors, it was expected for them to cross examine him on that fact. It is settled position that failure to cross examine a witness on a certain fact amounts to acceptance of such fact. In that regard, the Defendants' argument that the director general had no capacity to sign the agreement on behalf of

the 1st Defendant merely because there was no approval of board of directors, is unfounded.

It is also in evidence that the 1st Defendant was first established as a private liability company in 2010 before it was transferred to the sole ownership of government in 2022. This is so evidenced by exhibit PE16 containing original memorandum and articles of association for 2010 showing individual persons as shareholders and the Amended Articles of association for 2022 showing DIT and treasury registrar as shareholders. Thus, by the time the parties signed a business agreement, the 1st Defendant was operating as a private company. There is nothing showing that what was performed by the then management was not authorised by the board of directors. In other words, whether the managing director was authorised by the board of directors or not, that was an internal matter of the company which could have moved the new leadership in taking action if proved that there was no such approval.

From the record, there is no evidence showing that after DW4 and his team took over leadership of the 1st Defendant in 2022, they took any step in rescinding or challenging legality of the agreement entered before on behalf of the company. This presupposes that the 1st Defendant acknowledged the existence of the agreement entered between the Plaintiff and the 1st Defendant. My position is also fortified by the fact that

there were several correspondences between the parties referring the transactions based on the same agreement. In that regard, there was direct acknowledgment of the agreement (exhibit PE1) thus, the same cannot be considered invalid on the Defendant's wish. I therefore answer the first issue in affirmative that there was a valid business agreement.

Since the first issue has been answered in affirmative, it takes me to the second issue which refers the terms of the business agreement. According to the Plaintiff's evidence and closing submission, the terms of the agreement were specified in exhibit PE1 and it was all about provision of the capital in financing projects performed by the 1st Defendant. Clause 11 of the exhibit PE1 reveals that the duration of the agreement was two years renewable with written consent of both parties. According to the evidence by PW1 and clause 1 of the agreement, the distribution of the profit between the parties was 70% for the Plaintiff and 30% for the 1st Defendant if the project is full funded by the Plaintiff and if not, the profit was to be shared according to the capital contributed by each party. The agreement also contains clause 8 on penalty of 2% per month in case of delay in paying amount entitled to the Plaintiff.

The Defendants' closing submissions is silent over this issue and the defence evidence did not contradict the above referred terms of the business agreement. Although DW4 claimed that the business agreement

(exhibit PE1) had no contractual value rather it was intended for all projects, it suffice it to say that the terms of the business agreement exhibit PE1, bind the parties who signed it.

Coming to the third issue on whether the Plaintiff has any outstanding claims against the Defendants, apart from considering the closing submissions by the counsel for the parties, I revisited the evidence to verify if there is any valid claim by the Plaintiff. In its final submission, the Plaintiff argued that a sum of TZS. 733,865,970.05/= was advanced to the 1st Defendant within the period of the agreement but only part of the money was refunded while the sum of TZS. 419,647,853.85 remains unpaid. According to the Plaintiff's evidence, the sum of TZS. 554,148,501.00 was paid through the 1st Defendant's bank account by the Plaintiff and the remaining balance of TZS. 179,717,468 was paid either directly to the 1st Defendant's customers such as Tanzania Revenue Authority (TRA) or Tanzania Bureau of Standards (TBS) or paid through the 1st Defendant's staffs working in various projects and other through petty cash following directives of the 1st Defendant. Such facts were also verified by PW2 who was holding the 1st Defendant's office by that time. Exhibits PE8 and PE10 are letters from the 1st Defendant confirming the outstanding amount and that was also supported by PW3 and audit

report, Exhibit PE9 which shows the amount of debt as TZS. 417,647,854/=.

The Defendants disputed the amount claiming that the same has been staged up. The reason for stating so is that, the amount which was received by the 1st Defendant is only TZS. 554,148,501/- and the rest of the amount was paid to individual persons in cash thus, lacks proof if at all it was used for the activities of the 1st Defendant. The Defendants submitted further that there is difference between the amount stated in the plaint and what was actually paid. That, the record shows that the total amount which the Plaintiff paid to the 1st Defendant is TZS. 653,001,343.10/= and since the 1st Defendant had refunded the Plaintiff the sum of TZS. 314,218,116.20/- then, the total outstanding amount is TZS 338,783,226.9/-. The Defendants challenged the amount of TZS. 417,647,854.00/- reflected on the audit report (exhibit PE9) for the reason that it has different figure from the amount claimed in the plaint which is TZS. 419,647,853.85/=. The Defendant added that exhibit PE7 is self-manufactured document since it shows different figure from that claimed in the plaint.

From the Plaintiff's evidence, PW1 mentioned some of the projects funded by the Plaintiff and the mode used in payment. He claimed that, they used to release funds depending on the request by the 1st Defendant

and for that reason, three modes were adopted; one, by depositing money into the 1st Defendant's bank account through NMB Bank, two, by signing petty cash voucher for small expenditures and three, by direct deposit in the bank account of service provider after receiving instructions from the 1st Defendant. According to PW1, the total amount which the Plaintiff funded the 1st Defendant's projects for that period was TZS. 733,865,970.05/- in which, TZS. 554,148,501.00/- was directly deposited in the first Defendant's bank account at NMB bank.

The bank statement was tendered and admitted as exhibit PE5 save that the bank pay-in-slips were not tendered for the good reason that they were requested by the 1st Defendant during audit and never remitted back. Letters evidencing that fact were admitted as exhibits PE2, PE3 and PE4. The bank statement is a direct proof that such amount was deposited in the 1st Defendant's bank account. The TZS 75 million reflected at paragraph 10 of the plaint as amount deposited by Beatus Mabere on 31/03/2020 was not reflected in the bank statement (exhibit PE5) for the statement in exhibit PE5 ended in January, 2020. However, such amount is reflected on exhibit DE1. This justifies the claim that the amount of TZS. 554,148,501.00/- was deposited by the Plaintiff to the 1st Defendant's bank account.

Again, from the Plaintiff's evidence and closing submission, the remained amount of TZS. 197 million was by cash payment to the 1st Defendant based on request letters attached with the activities intended to be performed. The request letters, petty cash vouchers and deposit slips were admitted collectively as exhibit PE6. Although the Defendants tried to challenge the direct advancement of cash to individual employees on account that it was not within official procedures for money intended for the company, it seems that such modality was used and acceptable between the parties by that time and was never questioned. PW2 who was the 1st Defendant's director, admitted to have received cash amount of TZS 23,444,803 from the Plaintiff by petty cash and insisted that it was within the accepted modality of payment. DW3 also admitted to have deposited money in the 1st Defendant's account which she claimed to have received from the director general. There were other transactions of the individual employees depositing money to 1st Defendant's bank account and the then director general claimed to be the one who assigned them to do so. In the absence of any other evidence to the contrary, it is believed that the money they deposited came from the Plaintiff and was intended for the projects run by the 1st Defendant.

It was also explained that, the 1st Defendant requested for such modality as some of their matters needed urgent or quick performance

which could not wait for the cheque to mature. Thus, the 1st Defendant used to ask for cash and in case the Plaintiff had no one send to the bank to deposit the money in the 1st Defendant's account, the director general of the 1st Defendant used to assign DIT employees to collect cash from the Plaintiff's office and deposit it into the 1st Defendant's account. This is also evidenced by the pet cash vouchers and well supported by the said director general who admitted to have sent employees to collect cash from the Plaintiff's office. The business agreement (exhibit PE1) did not specify the mode of payment therefore, the Defendants' contention that the cash mode of payment was contrary to the agreement is without basis. In that regard, the Defendants' argument that the money paid directly to individual lacked supporting documents on how it was spent, is unfounded. Since the people who were entrusted with the duty by the 1st Defendant admit to have received money from the Plaintiff, in the absence of any evidence to the contrary, it goes without say that, the same were spent for the 1st Defendant's projects.

The question that follows, is how much was proved as other amount paid apart from that deposited in the account. While the Plaintiff claims 197 million, paragraph 10 of the plaint shows that 23 million was received by the director general of the 1st Defendant while 75 million was received by other individuals and institutions and both were intended for the 1st

Defendant's projects. Thus, as per the plaint, the amount pleaded as separate disbursement is TZS 23,444,803.00/= plus TZS. 75,408,039.10 supported by Exhibit PE6 which make a total of TZS. 98,852,842.10/- million and not TZS 197 million mentioned in evidence.

From the above analysis, I am satisfied that the total amount paid by the Plaintiff to the 1st Defendant was TZS. 554,148,501.00/- that was directly paid to the 1st Defendant's bank account and TZS. 98,852,842.10/- TZS paid by other means making a total of TZS. 653,001,343.10/- and not TZS. 733,865,970.05/= as alleged by the Plaintiff. Although exhibits PE8 refers TZS. 733,865,970.05/= as principal amount advanced by the Plaintiff to the 1st Defendant, there is no corresponding evidence to support such amount. The amount which is supported by other corresponding evidence is TZS. 653,001,343.10/=. Since the Plaintiff admitted at paragraph 11 of the plaint and in evidence that the first Defendant managed to pay a sum of TZS. 314,218,116.20/=, if such amount is deducted from TZS. 653,001,343.10/= the outstanding amount will be TZS. 338,783,226.90/= which this court finds to be proved and not TZS 419,647.853.85/= claimed by the Plaintiff. This basically responds affirmatively to the third issue that the Plaintiff has outstanding claim of TZS. 338,783,226.90/= against the 1st Defendant.

On the fourth issue as to whether the Defendants have any outstanding claims against the Plaintiff, the evidence from DW3 and DW4 shows that, their investigation to the matter came up with a different result showing that it was the 1st Defendant who paid more money to the Plaintiff than what was disbursed by the Plaintiff to the 1st Defendant. They relied on the bank statement which however was admitted for identification purpose only as ID1 and payment vouchers that were admitted as exhibit DE2 and customer's account admitted as exhibit DE1. In their closing submission, the Defendants insisted that exhibits DE1, ID1 and DE2 prove that between 29/5/2018 to 26/11/2020, the Plaintiff received from the 1st Defendant a sum of TZS. 3,088,725,435.18/= while the former advanced to the latter only a sum of TZS. 554,148,501.00/=. In her evidence DW3 claimed that the amount of TZS. 3.08 billion was paid to the Plaintiff, surprisingly, such claim differs from the amount of TZS. 2.7 billion indicated in the counter claim and from the evidence by DW4 who alleged that the claim was TZS. 2.7 billion.

The Plaintiff denied to have received such amount in relation to the signed agreement (exhibit PE5). PW1 claimed that other deposits were made following other projects agreed by the parties after the lapse of the first agreement. Such fact was supported by the then director general who testified that, after the lapse of the first agreement, they continued

their business relationship with the Plaintiff and agreed to continue with other projects while trying to raise funds to cover the debt. To him, the debt was carried forward waiting for excess amount while performing new projects so that they could pay it.

Having gone through the exhibits relied upon, I realised that exhibit DE2 which are payment vouchers refer payment made after the lapse of exhibit PE1. While such exhibit shows that it was for two years counted from 25th May, 2018 and ending 25th May 2020, the admitted vouchers annexed with payment sheets and cheques reflects payment made thereafter save for only three of them which I will give their description. One, the amounts of TZS. 1,000,000/= and TZS. 276,185,168/= were reflected in the payment voucher dated 19/05/2020 as amount to be paid to the Plaintiff. However, but it was not supported by payment cheques, and such figure is not reflected in exhibit DE1 as amount disbursed to the Plaintiff's bank account. Since the defence witnesses confirmed that all money paid to the Plaintiff was through bank transfer or deposit, it was expected for such amount to be reflected in their bank statement.

Two, the amount of TZS. 1,000,000/= reflected in the payment voucher dated 13/03/2019 and another TZS. 1,000,000/= reflected in the payment voucher dated 27/03/2019 were reflected in the bank statement and not disputed by the Plaintiff for it was paid within the contractual

period. Three, the amount of TZS. 33,811,184/= is reflected in the payment voucher dated 08/1/2018 as follows; TZS. 16,997,184/= and TZS. 11,148,000/= as refund to BM family and same is reflected in the bank statements Exhibits PE5 and DE1. Such amount is basically not disputed as it was paid within contractual period hence, included in the Plaintiff's calculations. However, the rest of the amount reflected in that payment voucher; TZS. 600,000/= as payment to OMASECO, TZS. 66,000/= as payment for newspaper and TZS. 5,000,000/= as executive and staffs' compensation, were not proved as amount paid to the Plaintiff and is not reflected in the bank statement.

In that regard, exhibits DE2 collectively do not establish any claim against the Plaintiff. It is in evidence that after the lapse of the first agreement the Plaintiff and the 1st Defendant continued working together in another agreement. Thus, the argument by the Defendants that the Plaintiff's bank statement proved less the amount, is unfounded. It is obvious that the 1st Defendant's record reflected the transaction of the years up to 2022 covering even the period that was not within the agreement while, the Plaintiff brought evidence covering contractual period within the meaning of exhibit PE5. There is no record that was brought by the Plaintiff to prove transactions after the contractual period because he claimed that those transactions were covered by separate

agreements. The claim of TZS. 2,725,552,282.58/= being specific claim, the Defendants were bound to specifically prove the same. Even in the CRDB statement admitted for identification purpose as ID1, apart from not being part of evidence reliable, it did not disclose if the amount of TZS. 2,725,552,282.58/= was paid to the Plaintiff within the contractual period. From the defence evidence, nothing was brought to justify the claim of TZS. 2.7 billion.

In their counter claim, the 1st Defendant claimed that the Plaintiff unjustly enriched herself a sum of TZS 2,725,522,282.58/= in execution of the operational agreements signed on 20th August 2020 and 11th January 2022 but their evidence and closing submission refer to the amount paid to the Plaintiff between 29/5/2018 to 26/11/2020. The Plaintiff's case was in relation to business agreement which was valid for the period from May, 2018 and May 2020. Therefore, the operational agreements signed for the period from 20th August 2020 to 11th January 2022 referred by the Defendants was separate from the business agreement referred to by the Plaintiff which covered the period from May, 2018 and May 2020.

It is a settled law that counter claim stands as a cross suit and a party raising counter claim is equally bound to prove the same on the balance of probabilities. Since the Defendants agreed in their defence that

there was another business agreement signed between 20th August 2020 and 11th January 2022, it corresponds to the Plaintiff's claim and evidence by the then director general that, those other payments were intended for that agreement and not for debt carried forward from the previous agreement. I therefore find the fourth issue is not in affirmative for the first Defendant was unable to prove their counter claim against the Plaintiff.

Coming to the last issue as to the reliefs which parties are entitled to, the Plaintiff claimed an interest of TZS 623,853,235.85 which is agreeable penalty of 2% per from June 2019 to date. I have carefully gone through exhibit PE1, clause 8 provides for a 2% monthly penalty in case the first Defendant breached clause 6 and 7 of the exhibit PE1. Clause 6 of exhibit PE1 is on the share profit which was required to be paid to the Plaintiff after the first Defendant had received the payment from the client. However, in order to determine the amount of profit to be divided, clause 1 of exhibit PE1 must be taken into account. That, if the project was to be funded wholly by the Plaintiff sharing of the profit would have been 70% to 30% to the Plaintiff and the first Defendant respectively. But if it was financed equally by the parties then sharing of the profit would be equal. I have gone through the evidence on record, it is unfortunate that the Plaintiff did not adduce evidence to establish the

amount of profit earned from the projects it funded. In his evidence, PW2 stated that there were technical errors in three-line project at Mwanza which forced them to restart the work. This suggests that there was loss on the part of the 1st Defendant which was also communicated to the Plaintiff and that is why he was ready to continue funding other projects knowing that the previous project never yield any profit. I therefore find unfair to punish the 1st Defendant for that as there was no deliberate default in paying the profit. The claim for penalty at 2% on the profit amount therefore cannot stand.

However, in terms of clause 7 of exhibit PE1 the first Defendant was required to refund to the Plaintiff the amount of money the latter financed the projects. This was required to be paid within 15 days upon the first Defendant receiving payment from the client. Since the evidence shows that the principal amount of TZS 338,783,226.90/= was injected by the Plaintiff to the first Defendant as capital for the projects and there was no explanation as to why the said amount was not paid, I allow penalty at 2% of the principal amount of TZS 338,783,226.90/= per month from June, 2019 to the date of judgment.

On the claim for general damage, this court finds that, since the first Defendant has been holding the Plaintiff's money since 2019 without any justification, the Plaintiff is entitled to the award of general damages. In

considering the circumstance of the case, I find that the general damages at the sum of TZS. 20 million will meet the ends of justice. The Plaintiff's claim of TZS. 200 million as punitive and aggravated damages is unfounded for the assessment of the same is within the discretion of the court.

In the final analysis, this court is satisfied that the Plaintiff was able to prove part of its claim but the Defendants were unable to prove their counter claim. This court therefore awards the following reliefs to the Plaintiff: -

1. The Defendants shall pay to the Plaintiff the sum of TZS. 338,783,226.90/= as principal amount.
2. The Defendants shall pay to the Plaintiff 2% penalty per month of the principal amount from June, 2019 to the date of judgment.
3. The Defendants shall pay TZS. 20,000,000 as general damages to the Plaintiff.
4. The Defendants shall pay 3% interest per annum on the principal amount at No. 1 above, from the date of judgement to the date of payment in full.
5. The Defendants shall pay all costs of the suit.

DATED at **DAR ES SALAAM** this 13th Day of June, 2024

HIGH COURT OF TANZANIA

D. C. KAMUZORA

JUDGE.