

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 47 OF 2009

A/S NOREMCO.....PLAINTIFF

VERSUS

DAR ES SALAAM WATER AND SEWAGE AUTHORITY
(DAWASA).....DEFENDANT.

JUDGMENT

MRUMA, J

The Plaintiff A/S NOREMCO is a legal person incorporated in Norway. It is a contractor company carrying on the business of civil works in Tanzania among other countries. It has a certificate of compliance in Tanzania issued under the Companies Act, [Cap. 212 RE 2002].

On the other hand the defendant is a legal entity too. It is a Parastatal Organization established under the Dar Es Salaam Water and Sewerage Authority Act, 2001 [Cap.273 R.E. 2002]. It is charged Inter alia with securing water for the lawful purposes within Dar Es Salaam city and parts of the Coastal Region.

The plaintiff's claim against the defendant is for payment of a sum of USD 422, 472. 79 being an amount due and payable to the plaintiff arising from the decision of the adjudicator made on

the 19th December, 2006 plus interest accrued thereon up to June, 2009.

The relationship between the parties in this case is pegged on the contractual relationship between the company called City Water Services Limited (herein after City water) and DAWASA (the defendant herein). The two companies entered into a water and sewerage lease contract (the contract) under which City Water was contracted to deliver piped portable water sewage services for the benefit of customers within the operation area. City Water contracted AS NOREMCO (the plaintiff herein) to install water meters within 20 Kilometres radius of the City centre of Dar Es Salaam and separately for installation of water meters outside the 20 Kilometres radius.

The Plaintiff performed its contractual obligations as specified in the contract and installed the said water meters as of 6th September, 2004. City Water did not discharge its contractual obligation of payment for the services rendered.

A dispute arose between the parties and in 2004 the agreement was terminated and the matter was referred to an adjudicator in London in the United Kingdom.

Apparently the adjudication proceeded ex-parte due to City Water's failure to appear and give its defence. The adjudicator's decision was to the effect that City water was liable to pay a total

of USD 237,129.69 exclusive of VAT to the plaintiff. Thereafter the plaintiff started to make demand for the payment of the awarded amount from City Water but before the award was paid, the water and sewages lease contract between the City water and DAWASA (the defendant) was terminated by the Government on the 1 June, 2005.

It is stated further that the plaintiff's cause of action against the defendant arises from the Agreement between the plaintiff and City Water executed prior to the Leases Agreement between the defendant and City Water whereby it was agreed that on termination of the all contracts and agreements made by City Water shall be assigned to the lessor (the defendant) and by reason thereof the defendant was assigned all the contracts between the plaintiff and City Water.

It is against this bone of contention that the plaintiff came into this court claiming from the defendant for payment of a sum of USD 422,472.79 as an amount payable to it arising out of the said adjudicators decision of 19/12/2006 plus interests accrued thereon up to 12/6/2009. And on such strides the plaintiff prays for judgment and decree against the defendant for

- a) Payment of the said amount of USD 422.472.79.
- b) Interest on (a) above at the rate of 13.5% pa annum from 13th June, 2009 to the date of judgment.

- c) Interests on the decretal sum at the rate of 7% per annum from the date of judgment to the date of full payment;
- d) Costs incidental to this suit and.
- e) Any other reliefs this honourable court deems fit and just to grant.

Before commencement of hearing this court framed a total of four issues to wit;

1. Whether there was any contract/agreement that could be assigned by City water to the defendant on termination of the lease agreement on 1/6/2005.
2. If the answer to issue 1 is yes then whether the contract/agreement between City water and the plaintiff was assigned to the defendant upon termination of the lease agreement.
3. Whether the adjudication decision dated the 19th December, 2006 is binding on the defendant by virtue of the lease agreement between the defendant and City water services of the 19/2/2003.
4. To what reliefs are the parties entitled to.

The plaintiff called one witness Mr. Garry Neil Gill (PW.1). Similarly the defendant called only one witness Mr. Titus Constantine Machumu (DW1.). Parties were represented by Mr.

Lutema learned counsel of Asyla Attorneys and Mr. Koyugi learned counsel from Mkono and Company advocates respectively. At the close of their respective cases counsels' preferred to file closing submissions. I recommend them for their strenuous work, and surely they have been of help in the course of my judgment.

Mr. Gary Nek Gill PW.1 a Quantity Surveyor working with the plaintiff at the material time testified that his company A/s Noremco (the plaintiff herein) entered into a Water Meter Installation Contract with City Water (Exhibit P1) for installation of water meters within and outside Dar Es Salaam city. The plaintiff carried out its obligations as specified in the contract by installing 793 water meters outside the 20 kilometres radius and 7019 meters within 20 kilometres radius as of 6th September, 2004. It is the evidence of this witness that their contract was terminated by agreement on 8th December, 2004 but at that material time the value of the works carried out was USD 347,907.42. Out of this amount City Water paid USD 12,968.40 leaving a balance of USD 334,939.02 unpaid. Despite repeated demands (Exhibit P2) City Water did not respond or settle the outstanding amount.

PW1 testified further that because City Water and later on the present defendant did not heed to the plaintiff's demand the plaintiff was forced to refer the matter to the adjudicator as per

their contract who gave an award in the plaintiff's favour (Exhibit P3). The witness tendered in evidence a copy of the lease agreement between City Water and DAWASA (Exhibit P4) under which it was agreed that on termination of the lease (I. e. Exhibit P4), all contracts and agreement made by City Water shall be assigned to the Lessor (The defendant herein). It is on that ground according to PW1, that the defendant was assigned all the contracts between the plaintiff and City Water and continued to enjoy the benefit of the contract assigned to it. The witness referred this court to clause 56.5 of the lease agreement which provides that:-

"On the termination of this contract, all contracts and agreements and obligations made by or with the operator shall be assigned (whether directly or shall be deemed to be so assigned) from the operator to the Lessor so that the lessor shall, from the date of the such termination have all necessary rights and duties in relation to such matters shall be vested in the lessor and not in the operator"

The witness told the court that after they obtained an award from the adjudicator they demanded payment from the defendant but the defendant did not respond. He tendered in evidence a demand letter (Exhibit P5) Addressed to the Director of DAWASA. He said that as per amended plaint, the plaintiff is claiming USD 422,472.79 as an award assessed by the adjudicator plus interest

and costs. He said further that the rate of interest chargeable is 2% per annum based on Standard Chartered Bank interest chargeable on overdrafts.

On cross-examination by Mr. Koyugi for the defendant, PW1 told the court that the agreement between City Water and A/S NOREMCO was terminated on 8th December, 2004. He could not recall when the contract between DAWASA and City Water was terminated but when he was referred to paragraph 12 of the amended plaint he recollected and stated that it was terminated at around June, 2005. He insisted that although the contract between City Water and the plaintiff was terminated on 13th December, 2004 as per pleadings, the plaintiff is still claiming under the contract because it had not been paid its dues under that contract. He said that the obligation to pay under the contract passed over to the defendant in June, 2005 when it signed an agreement with City Water. He said that the plaintiff referred the matter to the adjudicator despite the fact that both the contract for installation of water meters and the lease agreement had been terminated because the plaintiff had not been paid under the contract. He told the court that the matter was referred to the adjudicator in October, 2006 and the adjudicator's decision was handed down in December 2006.

He conceded that DAWASA was not a party to the adjudication proceedings and when asked why the plaintiff did not join

DAWASA in those proceedings if it believed that it had claimed against DAWASA PW1 said that there was no requirement to join DAWASA.

On the other hand Mr. Titus Machumu DW.1, the defendant's procurement Manager testified that said that although he is aware of the plaintiff's claims but the defendant (DAWASA) is not liable because by the time the lease agreement between DAWASA and City Water was terminated the contract between the plaintiff and City Water was not in existence. He said that the lease agreement between City Water and DAWASA was terminated in June, 2005 while the contract between the plaintiff and City water was terminated on 13th December, 2004. He said that the contract between the plaintiff and City Water was not assigned to DAWASA because at the time of termination of the lease agreement in June, 2005 the plaintiff/City Water agreement was not in existence. He said that to his understanding the City Water/plaintiff's agreement was terminated on mutual agreement but later on the plaintiff realized that it had some issues remaining which they referred to an adjudicator. He said that the defendant were not aware of the adjudication proceeding until when the plaintiff commenced this suit.

On cross-examination by Mr. Lutema, counsel for the plaintiff DW1 said that the plaintiff's claims against the present defendant lacks basis. He said that the defendant cannot be liable to pay the outstanding amount because she was not a party to the agreement entered between the plaintiff and City Water. He however, conceded that the plaintiff installed water meters as per their agreement with City Water and that the water meters are still being used by DAWASCO's customers. He said that only existing contracts were taken over by the defendant by way of assignment and not non-existing contracts.

On further cross-examination DW1 conceded that in terms of clause 56.5 of the lease agreement entered between City Water and the defendant (DAWASA) all relevant contracts, agreements and obligations were assigned from the operator to the lessor and also that in that agreement the lessor was DAWASA (the defendant herein) and the operator was City Water.

The first issue is **whether there was any contract or agreement that would be assigned by City Water Services Limited to the defendant on termination of the lease agreement.**

Counsel for the plaintiff came up with a proposal to amend the issues framed. He based his proposal under the provisions of Order XVII Rule 5 of the Civil Procedure Code [Cap.33 R.E 2002]

which in principal empowers the court to amend issues at any stage before passing a decree.

It is the learned counsel's feeling and belief that the issues framed by this court at the commencement of the hearing might not yield the results intended or as he puts it; **"the first and second issues should be amended to reflect the facts in the pleadings and evidence adduced by the parties in the wake of hearing the suit"**.

The learned counsel argues that in the interest of justice the court should do the needful so as to resolve the controversial issues that were pleaded and canvassed by the parties during the trial. The learned counsel went ahead to propose what should be the first issue. According to him in view of the contents of clause 56.5 of the Lease Agreement (Exhibit P4), the first issue should read; **whether or not there was any contract or agreement or obligation that would be assigned by City Water Limited to the defendant on termination of the lease agreement on 1st June, 2005.**

Regarding the second issue which is; **whether if the answer to the first issue is in the affirmative, the contract/agreement between City Water and the Plaintiff was assigned to the defendant upon termination of the lease agreement**, the learned counsel proposes that the issue should be amended and read: **"whether, if the answer to the first issue is in affirmative, the contract/agreement between City Water**

and the plaintiff or its obligations were assigned to the defendant upon termination of the lease agreement”.

I entirely agree with the learned counsel that the provision of sub rule (1) of Rule 5 of Order XIV of the Civil Procedure Code [Cap 33 R.E 2002] empowers court to amend, strike out and/or frame additional issues as may be necessary for determination of the matters in controversy between the parties. I, however, disagree with him that the framed issues in this case do not cover all the necessary points in controversy as to enable this court to determine the real questions in issue between the parties. It is my considered view that in a law suit an issue (which can be defined as a disputed point of law or question of fact set forth in the pleadings, that is alleged by one party and denied by the other), must lay a level ground for all players in the suit. It should not be coached in such a way that it leads to an answer desired by one of the parties. In other words, it should not amount to a leading question in favour of any of the parties in the proceedings. It should be a factual dispute between litigants that must be resolved by the court through trial. It is a question of fact that is material to the impartial outcome of the case and requires an interpretation of conflicting views on the factual circumstances surrounding the case.

Having that in mind I find that the issues framed by this court and agreed upon by the parties on 16th November, 2010 covers

all the points in controversy between the parties in this suit. Thus, there is no need to adopt the plaintiff's proposed issues.

Now submitting in respect of the first issue, it was the defendant counsel's view that under clause 56.5 of the Lease Agreement (Exhibit P4), the time for assignment of the relevant contacts, agreements and obligations was 01.06.2005 when the lease agreement was terminated. Referring this court to the case of **Andre et Cie SA versus Marine Transocean Ltd [1981] Q.B.694** the learned counsel submitted further that a contract when terminated the pertaining contractual rights and obligations unless reserved by an express contract during termination, comes to an end. It is therefore his conclusion that since the obligations and rights under the water meter installation contract were discharged on the 13.12.2004 when the said contract was mutually discharged the first issue should be answered in the negative.

It is stated under paragraph 5 of the amended plaint that:

"pursuant to the said agreement, the plaintiff carried out its obligations specified therein that is to say, installing 793 meters outside the 20 Kilometres radius and 7019 metres within 20 Kilometres radius as of 6th September, 2004. For reasons attributable to City Water, the contract was terminated on 8th December, 2004."

The fact that the contract between the Plaintiff and City Water was terminated by agreement is not disputed. In paragraph 4 of the amended written statement of defence it is stated that:-

"The contents of paragraph 5 are not in the knowledge of the defendant and are disputed. However, it is not disputed that the contract between the Plaintiff and City Water Services Limited (City Water) was terminated by mutual agreement of both parties save that the date of termination was 13th December, 2004 and not 8th December, 2004 as alleged in the amended plaint"

It is further submitted for the defendant that when a contract is terminated the relevant rights and obligations unless reserved by an express contract during termination, come to an end.

Termination of a contract is actually accomplished through a legal process known as ***rescission***. When each party to a contract agrees that the other parties need not perform their duties under the contract the process is known as mutual rescission. An

effective rescission must meet a set of legal requirements. In the case at hand it is the evidence of both PW1 and DW1 that there was an agreement between the Plaintiff and City Water to the effect that neither party should perform its duties under the contract. That agreement was a rescission of the contract. Rescission does not terminate the contract but rather it discharges the party's duties under the contract. Legally, parties who have rescinded a contract have already performed their complete duties under the contract. When parties agree to rescind that agreement to rescind establishes a new and equally binding contract. A third party who has gained some rights as a result of a rescinded contract and whose rights have been impacted may seek court intervention.

In law when a contract is terminated by all parties to the contract upon agreement the rights of the parties to terminate the contract may be defined in the terminating contract itself, it may be by subsequent agreement or it may be by law.

Now the question is; what are the rights of the parties who terminate their contract by mutual agreement? It would appear that under section 62 of the Law of Contract Act, the rights and obligations come to an end.

Section 62 of the Law of Contract Act provides that:

"If the parties to the contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed".

However, when section 62 is read together with section 65 of the same Act it would appear that upon mutual agreement of the parties to rescind the contract and terminate any other duties and obligations, the parties must pay any money owed for the performance already completed prior to the termination of the contract. The rights and obligations which come to an end are those which have not yet been performed.

Section 65 provides that:-

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the such agreement or contract is bound to restore it or to make compensation for it to the person the agreement from him he received it"

In terms of section 2(1) (j) of the Law of Contract Act, a contract which ceases to be enforceable (like the one at hand) becomes void. Thus, the Water Meter Installation Contract between the Plaintiff and City Water became void immediately after their mutual agreement to terminate it.

On his part, counsel for the plaintiff submitted that although on termination of the lease agreement (Exhibit P4) on 1st June, 2005 there was no signed contract that existed between the plaintiff and City Water that could have been assigned to the defendant because the water meter installation agreement between the Plaintiff and City Water had already been terminated way back in December, 2004 there was an implied understanding between the parties inter se for City Water to pay for the installed water meters and that understanding was assignable under the Lease Agreement. On this point the learned counsel relied on a letter from City Water addressed to the Plaintiff dated 27th October, 2005 (which form part of exhibit P2), which in essence connotes that the obligation to pay survived the termination of the contract. The most relevant part of the said letter reads:-

"I would be grateful if you could provide a detailed explanation and analysis of Noremco's claim for a total of approximately USD 335,000. This figure does not accord with the City Water's own records of progress claims received from Noremco. Further it is my understanding that there remains a significant dispute between City Water and Noremco, which has prevented the payment of

such outstanding claims as they have been received. I would request that you:

- (i) Clarify the exact circumstances in which the alleged debt under the Meter Installation Contract and in respect of the Emergency Repair Works was accrued, and in particular which amounts are claimed up to 1st June, 2005.***
- (ii)[Not relevant]***

Notwithstanding the above, you will be aware that the City Water's business and assets were expropriated by the government of the United Republic of Tanzania.....on 1st June 2005, since that date, City Water has had no access to its premises, papers, files or bank accounts. Therefore, once Noremco has been able to substantiate a valid claim against City Water, it will be recorded in our books, but it is not currently possible to make payment."

The plaintiff responded by its letter dated 3rd November, 2005 (also part of Exhibit P2) and submitted to City Water all the requested documents in the above quoted letter.

When exhibit P2 (which indicates that the plaintiff has been claiming before, during and after the termination of Meter Installation Contract) is construed in the light of the provisions of sections 62 and 65 of the Law of Contract Act, it goes without saying that the obligation to pay for works already executed

survived the mutual agreement and consequently the termination of the contract.

The next question is whether the obligation to pay was assignable. Clause 56.5 of the Lease Agreement (Exhibit P4) which is the gist of this contention is couched in the following terms:

"On the termination of the contract, all relevant contracts "and" agreements "and" obligations made by or with the operator shall be assigned (whether directly or shall be deemed to be so assigned) from the operator to the lessor so that the lessor should from the date of such termination have all necessary rights and duties in relation to such matters shall be vested in the lessor and not in the operator"

Admittedly the **operator** in this agreement was City Water and **Lessor** is DAWASA

Reading from the language of clause 56.5 of the Lease Agreement it is discernable clear that the contracts, the agreements and obligations were separable from each other. That is the essence of deploying the conjunction **"and"** between the terms agreed. In the circumstance therefore the obligations which survived the termination of the contract and which was existing on the date of termination of the Lease Agreement were

assignable to the defendant herein. This answers the second issue in the affirmative.

The third issue **is whether the adjudication decision dated 19th December, is binding the defendant by virtue of the Lease Agreement dated 19th February, 2003 between the defendant and City Water Services Limited**

It has been submitted for the defendant that because the defendant was not a party to adjudication proceedings and since there was no any assignment to the defendant of any contract or obligation arising there from, the decision against City water cannot be binding on the defendant.

With equal force the learned counsel submits further that the plaintiff is not entitled to any of the reliefs prayed, first because of the contradictions in the amounts prayed for, secondly that the claim of interest is fraudulent and baseless because it is the Taxing Master who quantifies the interests and costs, thirdly that the defendant cannot pay the interests awarded by an adjudicator because he was not party to the adjudication proceedings, and fourthly that all the interests prayed for if awarded would amount to unjust enrichment. The learned counsel argues that the plaintiff is not entitled to inflate the adjudication of award without the order of the court. On such submissions the counsel invites this court to dismiss the suit.

From the pleadings and evidence adduced in this case the following observations are clear and without any dispute:-

- (i) That the parties are related in the manner and existent shown at the beginning of this judgment;
- (ii) That the bone of contention is the interpretation of clause 56.5 of the Water and Sewage Service Lease Agreement (Exhibit P 4);
- (iii) That there were outstanding amounts of monies payable to the Plaintiff by City Water by virtue of their water meter installation agreement;
- (iv) That by consent of both parties the dispute in respect of the outstanding sum was submitted to the adjudicator;
- (v) That the adjudicator made his decision on the matter on 19th December 2006;
- (vi) And that City water is now defunct and the defendant herein is the proprietor of all works of the City Water by virtue of the water and Sewage Service Lease Agreement (Exhibit P4).

I have already ruled that the obligation to pay for the accomplished works under the Water Meter Installation contract is separable from the contract itself and it survived termination of the said contract. I have further held that the said obligation is assignable in terms of clause 56.5 of the Lease Agreement (Exhibit P4).

It has been submitted for the plaintiff that the adjudicator's decision is binding upon the defendant herein for contractual and statutory reasons. Counsel argues that contractually it is binding because by deductive reasoning the said decision relates back to the obligations that existed even before the termination of the Water Meter Installation Agreement. And that it is statutorily binding by virtue of the DAWASA Act and the Law of Contract Act. I do agree with the learned counsel's observations. The water installation works were performed for and on behalf of the defendant and therefore since the adjudication was a result of a dispute arising from non payment of the prices for the installation of the water meters it binds the present defendant. It was for a job which by the time of termination of the said contract it had already been done therefore in terms of section 65 of the Law of Contract Act it is binding on the defendant. It is binding on the defendant because in terms of section 65 of the Law of Contract Act the defendant is a person who received an advantage under the rescinded contract and is obliged to make compensation for it.

To appreciate this contention suffices to explore the origin of the adjudicator's decision and the circumstance pertaining thereto. Vide **exhibit P.2** there are various correspondences as between the City Water and the plaintiff pointing to the former's failure to effect payments due to the latter upon completion of some works

related to the water meter installation. This is not disputed by the defendant in so far as default to pay the said prices for the services rendered by the plaintiff. Further, the failure to pay culminated into referring the matter to an adjudicator in October 2006. This was per the **PW.1** testimony. The lease agreement between the City water and the defendant terminated on the 1st June, 2005 where as that between the former and the plaintiff was terminated on 13th December, 2004.

The counsel for the defendant raised a question in cross examination as to why did the plaintiff proceed against the City Water in 2006 after the contract between them had been terminated instead of proceeding against the defendant in adjudication, trying to show that the plaintiff chose purposely not to proceed against the defendant because the defendant was not a part to the said contract. In reply, the **PW.1** said that they resorted to adjudication and had a decision entered for them against City Water. He stated further that the defendant could not be made a part to the adjudication proceedings because it was not a part to the Contract. However, he stated that they instituted this suit against the defendant having been aware of the termination of the lease agreement between the Defendant and City Water and therefore the assignment of the said Contract by virtue of which this court has found obligations thereof to survive its termination as between the plaintiff and City Water.

All what such circumstance entails is that indeed although the defendant was not made a part to the adjudication proceedings but since the decision thereof contains the rights of the plaintiff resulting from un-discharged obligations by the agent of the defendant then the defendant is certainly bound by that decision to the extent declared therein.

The fourth issue is reliefs. **To what reliefs are the parties entitled?**

Having found the defendant is bound by the decision of the adjudicator,

The plaintiff's first prayer is for the payment of the said amount of USD 422,472.79 being amount due and payable to the plaintiff arising from the decision of the adjudicator made on 19th December 2006 plus interest accrued thereon up to 12th June, 2009.

The Adjudicator's decision was that the amount payable to the plaintiff as at the date of decision was USD 237,129.69. This award included interest at the rate of 2% above the prevailing overdraft rate of the Standard Chartered Bank of Tanzania. The amount of interest on delayed payments up to the date of reference was found to be USD 47,241.63 which formed part of the amount of USD 237,129.69 awarded by the adjudicator. I have not seen any document suggesting that interest was chargeable subsequent to the decision of the adjudicator.

Moreover, the underlying issue before this court is whether the defendant is bound by the decision of the adjudicator.

Thus, having found that the defendant is bound by that decision by virtue of the Water Meter Installation Agreement between City Water and NOREMCO, it goes without saying that the duty of this court is to declare that the present defendant is bound by the decision of the adjudicator and not to look into the merits and demerits of the dispute referred to the adjudicator. I accordingly enter judgment for the plaintiff for USD 237, 129.69 being an amount due and payable from the decision of the Adjudicator made on 19th December, 2006. I also award interest on the decreed amount at the rate of 7% per annum from the date of this Judgment to the date of full payment. The plaintiff will also have their costs of the suit.


A. R. Mruma

Judge.

7/10/2011

Coram: HJon. A.R.Mruma, Judge.

For the Plaintiff – Mr. Kipanga for the Plaintiff.

For the Defendant – Mr. Mchome for the Defendant.

CC: J. Grison.

COURT: Judgment is delivered this 7th day of October 2011 in presence of Mr. Kipanga, advocate for the plaintiff and Mr. Mchome, advocate for the Defendant.


A. R. Mruma

Judge.

7/10/2011

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