IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO 47 OF 2012

BETWEEN
TANZANIA PORT AUTHORITY ----- ----------PLAINTIFF

VERSUS
MGen TANZANIA INSURANCE CO LTD ----------DEFENDANT

JUDGMENT

Date of the Last order ; 28/7/2015
Date of the Judgement; 8/10/2015

SONGORO, J
The event leading to the present insurance dispute is that, Tanzania Ports Authority, (TPA); the Plaintiff contracted Mult Con Ltd to build a residence house of the Port Master at Tanga.

Then under the Guarantee Agreement, the construction company obtained Advancement Payment Guarantee, furnished from MGen Tanzania Insurance Co, the Defendant, and used the bond to secure a sum of shs 100,000,000 from the Plaintiff, to cater for it construction works.

In the guarantee, the Defendant, an insurance company, agreed to reimburse a sum not exceeding Shs. 100,000,000 in the event, contractor fails to execute contractual works as per building contract.

In view of guarantee furnished by Defendant, an insurance company, the Plaintiff advanced a sum of shs 100,000,000 to the contractor, for execution of preliminary construction works.

It happened that, the Contractor who was furnished with Advance Payment Guarantee, entered into the dispute with the Plaintiff, and his contract was terminated without any of his certificates being approved for payment.

It is in this regard, the Plaintiff turned to the Defendant's an insurance company instituted the present claim demanding for reimbursement of the guaranteed sum of shs 100,000,000/= plus, interests.

In response to the Plaintiff claim, MGen Tanzania Insurance Co , the Defendant, filed a Written Statement of Defence, and firmly opposed all Plaintiff`s claims on the ground that, they were not lodged pursuant to Clause 62 of Building Contract, and the Plaintiff was put to strict proof.

In view of his defence, the Defendant prayed for dismissal of the suit for lack of merit with costs in its favour.

In the light of the Plaintiff claim, and Defendant's defence, the Court on 17/4/2014 in consultation with the parties, drew five issues (5) as matters for determination in the suit. The agreed issues were as follows;

1. *Whether the Plaintiff` s claim against the Defendant was ascertained in terms of clause 62 of the Building Contractor which is Annexure TPA-1 to the Plaint.*
2. *Whether the Plaintiff frustrated and obstructed the performance of the Project, by refusing to avail the Defendant the Electrical and Plumbing Drawings,*
3. *Whether the Plaintiff was in breach of the building contract by refusing to honour interim certificate No 1 for Tshs 101, 883,511.00 after it had been evaluated, and agreed by the plaintiff for payment in the sum of Tshs 66, 450, 768/=,*
4. *Whether the plaintiff carried out valuation of the project work, performed by the defendant plus materials on site and agreed on the value thereof with the defendant prior to terminating the contract, and*
5. *To what reliefs are parties entitled*

In view of the above, the Plaintiff suit was heard, and concluded on the basis of the above-mentioned agreed issues. At the hearing of the suit, Mr. Chiduga Learned Advocate appeared for the Plaintiff; whereas the Defendant was represented by Mr. Octavian Temu, Learned Advocate.

In pursuing his claim, the Plaintiff called Evarist Msele who testified as PW1. To start PW 1 told the Court that is an Engineer by professional and has wrote and filed his witness statement in court and, wants the court to consider it.

Further, he tendered a Lab Test result which was admitted as Exhibit P1, and a letter from the Project Manager calling for Lab test results which was admitted as Exhibit P2. Next, PW1 tendered Minutes of the site Meeting held 27/6/2011 which the Plaintiff, and contractor attended, and it was admitted as Exhibit P3. Also he tendered a letter approving the adjusted amount of Interim Certificate which was admitted as Exhibit P4. Then the witness finally tendered a letter of instruction to take Concrete materials for testing, and it was admitted as Exhibit P5,

After tendering the Exhibit, PW1 cross examined by Mr. Temu and witness said he was the supervisor of the project on behalf of Director of Engineering, and the project was of shs 500,000,000/.

He indicated that according to the terms of the building contract, once a contractor fails to complete the contract his guarantor is held accountable, and reimburses the employer for the loss incurred.

The witness told the court that, they were supervising the construction and did not assign an Independent Engineer to supervise the work because clause 33 of Building Contract allowed Plaintiff as employer to supervise the work themselves at the site. He then elaborated that, he was the one at the site, overseeing the construction work but the work was of poor quality. On workmanship

of the contractor, PW1 said the contractor was using weak blocks, which lead to substandard workmanship.

He maintained that, as a Project Manager,he was allowed by the Building Agreement to supervise and intervene the contractors work in the event poor workmanship and he did so several times

The witness then insisted that, even the minutes of the meeting which they had with the contractor, shows there were no experts working at the site, and that is why there was poor performance, they issued notice, pursuant to clause 61 and 62 of the agreement, for improving quality of work but the contractor failed to do so. Finally the witness told the court that, the contractor failed to discharge his work as per the agreement.

After PW1 testified the Defendant called Abdallah Othman Mwinyi, who testified as PW2 and he told the Court that, he has filed his statement in court, and would like the court to consider it.

Further the witness introduced himself that, is an Engineer and was acting by then as the Director of Engineer, and Technical Services of Ports Authority.

He then explained that, his main duty was supervising construction works including, construction of residential house of Port Master at Tanga.

Like PW1, also PW2 argued before the court that, the work of the contractor was substandard, and he was terminated for that reasons. To substantiate his point PW2 tendered Minutes of the Meeting in which they discussed about project implementation with the contractor on the 7/1/2014. The Minutes were admitted as Exhibit P7.

He then clarified that, in the minutes of the Joint Meeting with a contractor, it was recorded that, the Contractor admitted to have breached the contract, by using poor building materials, weak bricks, and concrete, which did not meet the agreed specifications, which lead to breach of contract, and termination of the contractor.

On the Defendant's contention that, the Plaintiff delayed to test construction materials, PW2 said the complaint is unfounded because the work of testing building materials was of the contractor, but he abandoned his duty.

PW2 said after realising that, the contractor has failed to discharge his work as per the contract they decided to terminate the contract and all his claims are baseless. On reasons for termination, PW2 said

they considered the fact that, the contractor admitted in their meeting to have underperformed in his construction work.

Also on the reason why they did not employ an Independent Engineer to supervise and assess the work done by the contractor, PW2 said the building Contract required Plaintiff to assess and verify the work of the Contractor, but he had disappeared completely to unknown place and even efforts to trace him in his office has failed.

Finally, the witness said, based on the performance bond issued by the Defendant insurance company, they decided to sue the Defendant` Insurance Company which offered a bond on advanced payment. He maintained that is their claim before the court.

After PW2 testified, the Plaintiff closed his case, and Defendant opened his defence by calling Alexander Chagu who testified as DW1, to start the witness told the court that,he is the proprietor of AF Multi Con Limited which was contracted by the Plaintiff to build the house of Port Master, Tanga

The witness then claimed that, it is Engineers of the Plaintiff who interfered with the execution of the Project because they delayed to make decisions on the project, and that lead to termination of his Contract. He then said after 8 months of working he raised a

certificate of work of shs 100,000,000 for payments, but during joint assessment with the client, the claim amount was reduced to shs 66,000,000 even that, sum has remained unpaid to-date.

He reminded the court that, under the building contract his obligation was to raise a certificate of works done for payment. The witness said TPA is claiming nothing from him; but he has a claim against TPA for works he executed under the contract. Regarding the minutes of the Meeting which took place PW1 said there was a minute of the Meetings which were recorded but were not signed.

The witness said, his construction company was removed from the site on the 26th October, 2011 under Police supervision, while the work was on progress. On the work which was found to be substandard, he briefed the court that, was done after he was removed from the site. On the certificate of works which was issued to the Plaintiff, DW2 said it was supposed to be paid by the Plaintiff.

DW1 closed his testimony by saying that, by the moment he was removed from the site, he had materials which were worth more than shs 100,000,000/=.

After DW1 testified the Defendant also called Ernest Joseph Kirumbi who testified as DW2. In his testimony DW2 told the court he is working with MGen insurance company as Chief Operations Officer.

Then relying on Exhibit D1, DW2 said they issued a guarantee to AF Mult Co Limited on the 1/2/2011 as security for construction of a fence of house of Post Master Tanga.

On the performance bond which was issued, DW2 said is a guarantee in case there is a default to perform on the advanced sum. He argued that, once the contractor has default to perform his work, the insurer is under obligation pay. He further argued that, once the contractor has been paid advance payment which is secured and has started the work, and is terminated, the one who is supposed to determine insurance's payment under the bond is an independent person apart from the Plaintiff who is an employer.

He insisted that, under the building contract only the independent person may justify the amount to be paid, under the bond.

He then argued that, since there is no certification or valuation from Independent valuer or engineer who justified the claim of shs 100,000,000/ then the claim is not proper. It was part of his testimony that, since the contractor performed substantial works definitely the amount claimed from the Performance bond will not be the entire sum of the bond, because substantial part of advanced monies have been spent during the construction works by the contractor.

DW 2 closed his testimony by saying that, in Principle, the Plaintiff in his claim for re imbursement of advance performance bond was supposed to deduct the sum which was spent by the contractor in the construction works and by doing so he would not have arrived to the claim of shs 100,000,000 because some monies were on the works. After DW2 testified the Defendant closed his case
Following the closure of the Plaintiff`s and Defendants case, Counsels from both sides with the leave of the court made their final submissions,

Mr. Chiduga, Learned Advocate for the Plaintiff, relying on the testimony of PW1 and PW2 submitted that, AF Multi Con was the Defendant client in the construction project. The contractor was paid advance sum of shs 100,000,000 for mobilisation of work to be executed on the condition that, the same shall be recovered by a way of deductions from Interim Certificate.

Then the Learned Advocate said after some works were done by the contractor, the Plaintiff found the works were not according to specification, and the contract was terminated. Due to the fact that, the Plaintiff terminated the work of the contractor, and there was secured advance payment made to the contractor UN paid, the Plaintiff instituted the instant claim to pursue the guarantee issued by the Defendant.

Plaintiff`s Counsel submitted that, the claim originates from the Guarantor / Principal relationship, and is provided by the law of contract. Then relying on testimonies of PW1 and PW2, he submitted that, the Plaintiff has proved his claim on the balance of probability and prayed for judgment with costs in his favour

On his part Mr Temu for the Defendant submitted that, the suit essentially is based on the advance payment bond issued by the Defendant's insurance company, which was relied upon by the Plaintiff`s company to advanced shs 100,000,000 to the contractor to meet his start up expenses, such mobilisation of labour, materials and equipments in his project. The Counsel then acknowledged that, the contractor's contract was terminated and the bond has not been paid.

Turning to the issue of whether the Plaintiff claim in the suit is proper, the Counsel submitted that, clause 62.1 of the Contract, requires that, once there is fundamental breach of contract, before termination of contract , the Project Manager had a duty of making valuation of materials at the site, and advise on the amount to be deducted from advanced sum as spent costs in the project.

Mr. Temu submitted that, in order to get the sum which may be reimbursement on advanced payment bond clauses 62.1. And 62.2 of

the contract must be invoked to get the value of works and deduct it from, sum previously advanced sum to the contractor.

On the performance of the contractor, Defendant's counsel submitted that, the contract was not completed as per agreement, because the Plaintiff failed to furnish to the contractor drawings on time. He also enlightened the court that, it is Plaintiff who frustrated the project, by failing to pay the amount of monies raised in the certificate of works on time, and that, was a breach of contract.

He then submitted that, going by the evidence on record, set of events as explained by the DW1 and DW2, the suit against the Defendant has been filed in court pre-maturely, and is misconceived. It was the views of the Defendant's Counsel that, the entire dispute was supposed to go for arbitration. For those reason the Counsel prayed for the dismissal for the Plaintiff suit with costs.

The court has carefully considered the Plaintiff claim, Defendant's defence, and submissions from parties, and easily find I that, the Plaintiff`s claim is mainly based on the advanced performance bond issued by the Defendant insurance company.

In essence Advance Performance Bond is an insurance contract, and is used by the contractor to secure the release of advance payment or mobilisation materials and equipment and for other works. In the

present suit, the guarantee which was issued by the Defendant insurance company was to cover the Plaintiff from loss.

In simple language, it is contractual promise of the Defendant insurance company to cover the Plaintiff from loss which may arise in advance payment he made to the contractor, in case the contractor failed to perform his contractual obligation. Honest, I find it is *a contract of guarantee, and indemnity" envisaged under Section 76 of the Contract Act Cap 345 [R.E.2002].*

Turning to the Plaintiff claim, I find from the presented evidence, there is no dispute that, Defendant's company issued the guarantee and that, Plaintiff is now pressing the Defendant's insurance company to comply with guarantee and reimburse the secured amount of shs 100,000,000 which was advanced to the contractor, because it is still outstanding.

The key issue for determination on the Plaintiff claim is whether or not the Defendant's Insurance Company is liable to pay a guaranteed sum to the Plaintiff as indemnification because the contractor has defaulted to perform his contract.

In addressing the above mentioned the court is mindful that depending on the terms of guarantee, in some of contacts of guarantee and indemnity the payment of a guaranteed amount, in

the event of default is unconditional, in the sense that payment is upon demand and at once or immediately. In some contracts of guarantee the payment of guaranteed sum is subject to fulfilment of conditions contained in the letter of guarantee or Insurance Policy.

In the second type of guarantee a claim for payment of guarantee or bond even if there is a default, there will be conditions stated in the contract or insurance policy which must be fulfilled by the parties concerned.

In other words payments in some guarantee are made only after proof of fulfilment of stated conditions. The aim of setting condition, in some cases is to avoid fraud, cheating, unfairness and other reasons. So, payments are sometimes made in accordance with the terms of the insurance policy and the guarantee.

Also it is important to emphases that, in assessing the terms of the guarantee, the Court in the case of Trust Bank Tanzania Limited Versus Le Marsh Enterprises Ltd and 2 others Commercial Case No 4 of 2000, Hon. Nsekela J as he then was stated where're possible, the court must give the effect to all clauses in the guarantee , and construe them in harmony.

Bearing in mind, the court guidance on the cited case on the terms of guarantee, I perused Advance Payment Bond"Exhibit D1 which is

guarantee issued by Defendant's insurance company, I easily find that, the guarantee agreement which was issued to the Plaintiff is one of those contract of guarantee which has in built terms need before a claim and payment on guarantee is made.

In deed Paragraph 3 of Advance Payment Bond, Exhibit D1 provides guidance to parties on the condition under which the guarantee is payable once there is a failure on the part of the contractor to perform his obligation in the contract. Paragraph 3 states that;

> *NOW THEREFORE, IN CONSIDERATION OF the Employer paying the sum of TANZANIA SHILLINGS ONE HUNDRED MILLION ONLY(TSHS 100,000,0000.00 to the contractor being an Advance Payment under the terms of the said Contract , we hereby undertake to repay to the Employer , in the event of the Contractor failing to fulfil his obligation under the terms of the said contract , such failure to be established by the contractor's admissions to the surety, in writing, or by decision of the Engineer named in the said Contract or Legal Proceedings , or arbitration between the Employer and Contractor establishing the amount to be repaid under the terms of this Guarantee.*

Guided by what is stated in the cited Exhibit D1, I noted that, its a condition that, a claim of guarantee on failure of the contractor to fulfil obligation, must be established before the guarantee is claimed or paid. The clause provides three ways under which the failure to perform may be established. One way of establishing the failure of the contractor is if it is proved that, the contractor admitted himself to his surety (meaning the Defendant insurance company) in writing that, has failed to perform the contract.

The second method of establishing that, there was failure on the part of the contractor to perform the contract is where there is a

decision of an Engineer named in the contract, served to the Defendant's insurance company. By using the word "a decision of Engineer" is stated in the contract in my view it means, it's a decisions which has a weight to be called a decision of Engineer with details of the project, obligation of the contractor, his failure and reasons for such failure. In my view the minutes of the meeting or a mere decision of suspension or termination of contract will not suffice.

Thirdly is, if there is legal Proceedings or Arbitration between the employer and contractor which established that, there was a failure on the part of the contractor to fulfil his obligation.

In view of what is stated in Exhibit D1, I revisited the evidence from both parties in order to find whether there was a decision of an Engineer made pursuant to Exhibit D1 which establishes failure on the part of the contract to fulfil his obligation. But honestly, I did not find any.

What I found in the testimonies and Witness Statements of Everest Mselle Daudi PW1 and Abdallah Othman Mwinyi PW2 who were engineers dealing with the project on behalf of the Plaintiff is that, both are talking about the failure on the part of the contractor to perform his contractual obligation, but none of them has told the

court that, he made a decision pursuant to Exhibit D1 which is insurance guarantee.

Even in their Witness Statement, PW1 and PW2 did not annexe the said "Engineer's decision" as envisaged in Exhibit D1. In other words PW1 and PW2 did not tender in court as an Exhibit, a decision of an Engineer establishing that, the contractor failed to discharge his obligation in the building contract.

More the court find, there is no any evidence which established that, the Defendant insurance company was served with such decision of an Engineer for their action.

One may be tempted to argue that, the decision of an Engineer was in the Notice of Intention to terminate the contract or in the minutes of the Meeting or on a letter termination of the contract. But honestly, that is not what is envisaged in Insurance Policy- Exhibit D1. What is required is a decision of an Engineer named in the contract. It is my view that, when it is stated that, there must be "a decision of engineer" the decision must be made.

Since I have found that, PW1 and PW2 in their Witness Statements and testimonies, none of them annexed a decision of an Engineer on the failure of the contractor, to perform his obligation under the

contract , I have a settled mind that, requisite condition for claiming and payment of guarantee were not met by the Plaintiff.

The court was expecting that, since the suit is about reimbursement of Insurance guarantee, then the Plaintiff and his witnesses would have furnished the court with "decision of Engineer properly made as stated in Exhibit D1.

It seems where a party relies on Engineers in supervising the work like the Plaintiff did then it is a decision of an Engineer which triggers the insurance company to consider the issue of reimbursement of the guaranteed sum in case of default.

It is in this regard, I fully agree with Mr. Temu that, the claim was made and filed in court pre maturely and without paying attention on requirements stated in Exhibit D1.

So to conclude on issue No 1, I decide that, the claim was made pre-maturely in court, and it fails. If the Plaintiff wants to claim the guarantee then has to follow the terms stipulated in the guarantee, Exhibit D1. That, is all the court may say about issue No.1.

Next, for convenience purpose I will move and deliberate on issue No 3 on whether the Plaintiff was in breach of the building contract by refusing to honour interim certificate No 1 for Tshs 101,

883,511.00 after it had been evaluated, and agreed by the plaintiff for payment in the sum of Tshs 66, 450, 768/=,

Honestly, I find this is an issue which appears to be between the Plaintiff and the contractor. In the circumstances of this case it appears before and in the cause of terminating the contract there are decisions which were taken by Project Manager. Further the court found under Clause 26, 27.1 27.2 and 27.3 of the General Condition of Contract such decisions were supposed to stand but if there are grievances and disputes arising from the decision of Project Manger, reference was supposed to made to the Adjudicator, and once there is dissatisfaction the reference goes to Arbitration. Indeed clause 26.1 of the General Condition of Contract states that;

> *If the contractor believes that, a decision taken by the Project Manager was either outside the authority given by the contract, or that, the decision was wrongly taken; the decision shall be referred to the Adjudication within 14 days of the notification of the Project Manager's decision.*

Further, clause 27.2 states that;

> *.....Either party may refer a decision of the Adjudicators to Arbitration.*

Guided by the above-mentioned clauses, I find there was a choice of the parties to Arbitration. Therefore in order to avoid parallel and conflicting decision with those of Project Managers, and Adjudicators on the issue of breach of contract and others, connected to execution

of building contract, I will deliberately abstain to make any decision on matters which were reserved for adjudication and arbitration. The reasons for abstention are because there was choice from the Plaintiff and the Contractor to refer their dispute to Adjudication and then Arbitration. I will take the same view and decision on issue No 2, 4, and others which are connected with the execution of the project and building contract.

It is important to state that, once the parties are bound by any agreement/contract which requires a dispute be heard and resolved by adjudicator and arbitrator, and then it is a necessary that, the dispute be resolved by the method selected by the parties. It seems to me that, the matter may come to the court where the parties withdrawals their agreement to go to arbitration and there must be a note to that, effect.

Turning to issue of what reliefs are parties entitled too, I find the claim for reimbursement of the guaranteed sum was not proved because it lack Engineers decision. I have said it was filed prematurely and it fails. On claims of frustration of contract, breach of contract, and whether there was valuation, I have said those are matters which parties agreed upon will be pursued by a way of adjudication and arbitration in accordance with the General Condition of Contract. In view of the above, I decline to make any of the reliefs prayed in the Plaint and dismissed the suit. The plaintiff is ordered to

pay half of the costs incurred by the Defendant in defending the suit. Right of Appeal is explained to the parties.

Dated at Dar es Salaam this 8th day of October, 2015

H.T.SONGORO
JUDGE

Delivered at Dar es Salaam this 8th day of October, 2015

H.T.SONGORO
JUDGE

The Judgment was delivered in the presence of Mr. Ronald Teemba, Learned Advocate for the Plaintiff, and Mr. Octavian Temu, and Mr Nuru, Learned Advocates for the Defendant.