

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

COMMERCIAL CASE NO 161 OF 2013  
BETWEEN

NGOTE ENTERPRISES LTD -----1<sup>ST</sup> PLAINTIFF  
RAINER TRADERS AND FOOD STUFF SUPPLIES LTD-----2<sup>ND</sup> PLAINTIFF

VERSUS

JV OF CR 15G AND NEW CENTURY CO LTD -----DEFENDANT

**JUDGMENT**

Date of last Hearing; 23/3/2015  
Date of Judgment; 29/9/2015

**SONGORO, J**

Ngote Enterprises Ltd, and Rainer Traders, and Foodstuffs Supplies Ltd, herein after referred as the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, instituted a suit, against JV of CR 15G, and New Century Co Ltd, hereinafter referred as the Defendant, claiming that, on 11/9/2013, they signed a contract to hire an excavator, and three dumping trucks, from the Defendant company, to be used on their road construction project for 20 days.

But, due to negligent conduct of the Defendants workers, the Plaintiff claim was compelled to enter into another contract with the Defendant for the supply on three more trucks to perform the contractual work. The two also mutually agreed to extend the contract period up to 7/10/2013.

However, on the 3/10/2013, Defendant unilaterally ordered to halt the service of his trucks and equipment, that, impended construction work, and as a result, the Plaintiff suffered financial loss.

The Plaintiff's therefore claim that the Defendant conduct of halting the services of his trucks and equipments, was a breach of contract, and he prayed for orders, and following reliefs;

- 1. Special Damages to the sum of shs 165,983,000/=,*
- 2. General Damages in terms of Paragraph 10,*
- 3. Interests on the current bank rate from 11/9/2013 up to date of payment.*
- 4. Costs.*

In response to the Plaintiff's claims, the Defendant Company filed a Written Statement of Defence and opposed all claims. Then the Defendant stated that, the Equipment, Plant hiring Contract was executed on the 11/9/2013, between the Plaintiff, and Defendant.

Furthermore, the Defendant contested that, under the signed Contract, the excavator and dumping trucks were hired on the daily basis, at the rate of Shs, 1,100,000, and Shs. 500,000 respectively.

So, the Defendant stated in his defence that the, Plaintiff claims that, there was no a breach of contract and suit has no merit, and is supposed to be dismissed with costs.

Thus on the 21/11/2012 when the suit was due for hearing, the Court in consultation with the parties, framed up three issues, as matters for determination. The Agreed framed issues were as follows;

- 1. Whether there was a breach of contract, and who breached the contract,*
- 2. Whether the Plaintiff suffered any damages as a result of breach of contract, and*
- 3. What reliefs are parties entitled too.*

In view of the above, the hearing of, the Plaintiff suit proceeded, and was concluded on the basis of the above-mentioned agreed issues.

On his part, Plaintiff called Gilbert Barongo, who testified as PW1, and informed the court that, he has a company called Ngote Enterprise and JV.

Then the witness said on the 5/9/2013, his company was contracted by TANROAD, to undertake road maintenance of Kasansa to Kilyamatundu Road in Kigoma Region, at the costs of shs 685, 523,223/=.

To support his argument PW1 tendered the Contract for Periodic Maintenance of Kasansa / Kilyamatundu Road which was admitted as Exhibit P1.

Then the witness argued that, in view of the contract with TANROADS their company entered into another Agreement of hiring trucks, and equipments from the Defendant's Company to undertake Road maintenance as per Exhibit P1.

To support his argument, PW1 tendered Equipment, and Plant hiring Agreement signed by the Plaintiff and Defendant Company which was admitted as Exhibit P2.

He then argued that, there was another agreement which was entered to bring three Dumping Trucks to support, other trucks which were found to be defective, but it was not signed by his Company. The second equipment contract signed by Defendant alone was admitted as Exhibit P3.

Furthermore, PW1 argued that, on the 28/9 2013 they had a site meeting with the Defendant, there was an understanding and oral contract whereby, the Defendant Company agreed to bring 3 trucks to support other trucks which were defective without any charges.

PW1 said it was Mr. Zhoy who is the Defendant's official who was speaking in Chinese language with assistance of interpreter, orally agreed to bring additional trucks free of charge to work on the project.



Then, PW1 said, to their surprise, on the 6/10/2013 when the construction work was on progress, the Defendant issued a notice of demobilization of equipments dated 6/10/2013, and halted the work on the 8/10/2013. He then tendered a Notice of demobilisation of equipments, which was admitted as Exhibit P7.

The witness said after the notice of demobilisation of equipments expired, the Defendant halted the work, and removed the equipments and the pace of road maintenance work, slow down completely.

PW1, also said the Defendant action of halting the work and removing his equipments compelled the Plaintiff to find other equipments somewhere else, and that caused them to incur extra costs, like costs of conducting meeting with other contractors and hiring of other equipments. Also PW1 said the removal of the Defendant's equipments from the site, and the finding of another equipment delayed to complete the Project by 63 days. Finally, PW1 said they are praying for costs because the Defendant actions of removing his equipments was a breached of contract.

After PW1 testified, the Plaintiff called Paulo William Sunga who testified as PW2. In his testimony PW2 told the court that, he knew Exhibit P6 which is a Log book. He then explained that, while at the site, he was using Exhibit P6- the Log book in issuing fuel on hired trucks, and he even counted trips which were made by trucks.

PW2 then elaborated that, Exhibit P6 was even signed by Mr. Sanny an employee of the Defendant who acknowledged the days which equipments and trucks worked.

He then complained that, going by the Log Book, from 16/9/2013 to 4/10/2013 there are days when hired trucks did not work while payments were made.

PW2 argued that although there are day's fleet of hired trucks was increased and exceeded which were agreed upon in the contract, but the speed of trucks and driver was still low, and that negatively affected the pace of maintenance work.

Then, PW2 told the court that there was site meeting deliberate on progress of the work, involving both sides on the contract, it was agreed that there will be additional trucks which will be added to assist the work free of charge, and the Plaintiff Company will pay allowance for drivers for 13 days.

Also PW2 informed the court that together with what was agreed at the Site Meeting, but the Defendant's company demobilised the equipments and halted the contract work.

After PW2 testified the Plaintiff closed his case, and the Defendant opened his case, by summoning Mr. Zhang who testified as DW1 through an interpreter named as Mr. Manfred Chispilyoto.

In his testimony, DW1 told the court that, has filed a written statement in court, and would like the court to consider it. The witness then said, he is representing the Defendant's company known as JV of CR15.

Further, he told the court that, it is true on the 11/9/2013 his company entered into contract with the Plaintiff's company, to lease 3 trucks and one excavator for 20 days only.

DW1 briefed the court that, the agreement was signed on the 11/9/2013, they started the work on the 16/9/2013 and they carried the work for 20 days as agreed in the contract.

The witness said his company fulfilled its contractual obligation of leasing trucks, and excavator and the Plaintiff claim for breach of contract has no basis at all.

Regarding the Second Agreement, DW 1 said it was prepared and their company signed, but the Plaintiff Company did not sign, so there is nothing like second agreement.

When DW1 was being cross examined by Mr Mushokorwa, he clarified to the court that they fully understood the terms of the contract, which was to lease three trucks, and they fulfilled their obligation under the contract.

Then the witness informed the Court under the Contract -Exhibit P2, the overall responsibility of supervising the construction work, equipment and trucks was on the Plaintiff Company alone, and for that reasons the Plaintiff may not shift any blame to the Defendant.

He insisted that, the Defendant's responsibility under the contract, was to lease, trucks and equipment, and once there was defective truck, their duty was to repair defective truck or bring a replacement. DW1 said the contractual obligation of the Defendant was performed.

On the Plaintiff claims for loss due to demobilisation of equipment and truck from the site, DW1 maintained that, there was no loss which was caused by the Defendant's company, because during the demobilisation of equipments, contractual period of 20 days had expired.

Regarding Plaintiff's complaint that, by the moment of demobilisation of equipments the contract between the Plaintiff and TANROAD was still in force, DW1, said Defendant had nothing to do with the TANROAD Agreement.

On the Second Agreement, DW1 told the court that, there was no payments which were made to the Defendant's company by the Plaintiff, and that is the reasons they decided to terminate the work by issuing a notice of termination.

So, it was the view of DW1, that when demobilisation of equipment took place, there was no any agreement, which binds the Defendant, and he requested the court to dismiss the Plaintiff suit for lack of merit.

After DW1 testified, the Defendant closed his case; and the Counsels from both sides with the leave of the Court presented their final written submissions.

On his part, the Plaintiff`s counsel argued that, from the presented evidence, there is no dispute that the on the 11/9/2013, the Plaintiff hired one excavator and five trucks at the price of shs 77,800,000 for contractual period of 20 days commencing 13/9/2013 to 3/10/2013.

He further stated that, from the testimony of PW1 and PW2 on the 28/9/2013 there was a site meeting between the staff of the Plaintiff and Defendant. He then argued that after the meeting the available evidence shows the Defendant deployed 3 more trucks. Also, he pointed out that from the testimony of PW1, the parties had another contract Exhibit P3 which was supposed to be signed, come into force. Then, Mr Mushokorwa at page 2 of his submission, stated that, the second contract was exact the

same like the first contract, and is one which gave rise to the present dispute.

He then submitted that, the parties are at a logger head on why trucks and equipments were removed on site, when there was already another contract.

It was his views and submission of the Plaintiff's Counsel that, at least the three hired trucks and an excavator, which were also removed, during demobilisation of equipments were supposed to work on site for some days, despite the fact that, the life span of the first contract had expired.

The Plaintiff's Counsel then strongly submitted that, the Defendant did not have a any justification of stopping his employees to work on 3/10/2013. Also the Defendant did not have any justification of removing his trucks and equipment from the site on the 6/10/3013 on the excuse of non payment of lease fees, because previously they were payments made on contracts entered on 30/9/2013.

He further submitted that, going by the logbook Exhibit P6, the entries suggest that the leased equipments and trucks did not work on all 20 days which they were hired. Also, the equipment and trucks did not work for maximum period of 10 hours per day every day as required by paragraph 9 of the Agreement.

It was the views of Plaintiff Counsel that, though the first contract its life span expired, but it was mutually extended, thus it was wrongful for the Defendant to terminate the contract, and its termination caused the Plaintiff Company to suffer loss, and damages

Mr. Mushokorwa indicated to the court that, the termination of contract caused, the Plaintiff to delay to complete his contract with TANROAD.

He strongly submitted that, removal of equipment and trucks was a breach of contract, and definitely, the Plaintiff Company suffered loss, because the contract was not completed as per schedule, and they had to replace other machineries at huge costs of shs 330, 692, 400 as shown in Exhibit P8.

So, it was the view of the Plaintiff`s Counsel, that, the Plaintiff has proved all his claim on the balance of probability, and is entitled to reliefs and ordered pleaded under paragraph 12(a) to (e) of the Plaint.

On his part Mr Ogunde the Learned Advocate for Defendant, submitted that, the Plaintiff suit is essentially based on the breach of contract.

He then argued that, the Plaintiff`s key complaint is that, the Defendant's company wrongly and without any legal justification on the 3/10/2013 ordered, and halted his trucks to stop working on the Plaintiff Project. Then on the 4/10/2013 equipments and trucks stopped to performing work at the Plaintiff site.

The Counsel explained that, the demobilisation of Equipments and trucks done on the 8/10/2013 was because the first contract expired and was not extended.

Turning to the issue, whether there was a breach of contract, Mr Ogunde stated that, the parties were bound by an agreement dated 11/9/2013 which is Exhibit P2, which its life span was 20 days from 16/9/2013, to 4/10/2013.

He then explained that, on the second agreement dated 28/9/2013-Exhibit P3, Defendant's Counsel said, it was supposed to last for 10 days, but the Plaintiff failed to pay for the second contract, and even failed to pay for other additional three trucks which were working on the Plaintiff's site. Due to the failure to pay on the second contract and for additional trucks, Defendant issued a notice of demobilisation of equipment and truck.

He then explained that, according to paragraph 5 of Exhibit P2, the hiring of trucks was on daily basis, and numbers of days were stipulated in Exhibits P2 as 20 days. So, it was the views of the Defendants Counsel that the first Contract was fully complied with.

On the Plaintiff contention that, the Plaintiff was offered three trucks free of charge, Defendant denied that, assertion and say there is no proof to



that, effect. So, Mr Ogunde maintained in his submission that, there was no breach of contract.

Moving to the issue if the Plaintiff suffered any damages, the Defendant's Counsel submitted that, there is no evidence on breach of contract, and the Defendant is not contractual liable and the Plaintiff did not suffer any damages from the 1<sup>st</sup> contract.

On reliefs, claim, the Defendant Counsel submitted that, the Plaintiff is not entitled to relief claimed in the Plaint. Finally, he prayed that, the suit be dismissed for lack of merit.

The court has carefully considered the Plaintiff's claims for breach of contract, Defendants defence that, there was no breach of contract in line with contracts which were presented in court, and find the key issue for determination is whether the Defendant breached the terms of that contract.

In addressing the claim for breach of contract, I find Plaintiff and Defendant had only one contract document which was admitted as Exhibit P2. In Paragraph 8 of Exhibit P2, it is stated that the contracts started on 13/9/2013 and it expiry period was the on 3/10/2013. Turning to Exhibit P3 and its contents, I find it is not a binding contract because it was signed by the Defendant and not signed by the Plaintiff.

Turning to the specific issue of breach of contract, it seem to me a party who claim for breach of contract including the Plaintiff in the present case, must establish from the contract itself a term or terms which the Defendant willingly refused, and neglected to perform it and ultimately caused non performance of the contract.

The court has attentively listened to Plaintiff claim that, the Defendant's notice and actions of demobilisation and stopping of use of leased equipment and trucks from continuing with construction work, and realised from the testimony of DW1 that, by the moment the Notice of Demobilisation of hired equipment - Exhibit P7, was issued on the 6/10/2014, the Contract in question -Exhibit P2, had already expired on the 3/10/2013. .

In view of the above, I find the Plaintiff complaint in paragraph 8 of the Plaint, that the notice and the stoppage of the use of hired equipment was a breach of contract, has no merit for simple reason that, by that moment the notice was issued, there was no binding contract, between the Plaintiff and Defendant, after the expiry of Exhibit P2.

More, the court found from the available evidence there is no credible evidence which established that within 20 days of which equipments and trucks were on lease contract, there was none performance of any of the terms agreed in Exhibit P2.

So, it is my view based on Exhibit P2, that notice of demobilization of the equipments issued by the Defendant, and subsequent steps of removing equipments did not in any manner halt the implementation of the signed contract which expired on the 3/10/2013. On Exhibit P2 which is unsigned contract, I find that, it was not binding contract because it was not signed by both parties.

On the foregoing reasons, I find Defendant's action of demobilization of equipments was not a breach of contract, but Defendant was exercising his right after fulfilling his obligation in the contract. Situation would have been differently if notice or the demobilization of equipments would have been done while the contract on Exhibit P2 would have still been in force.

Moving on the 2<sup>nd</sup> issue of whether or not Plaintiff suffered any damages, I have already ruled and decided that notice of demobilization of equipment issued by the Defendant did not amount to breach of contract.

Also, I have realized from Section 73(1) and (2) of the Law of Contract, Cap 345 that compensation of any loss or damages arising from the contract, may be legally entertained once there is or are damages suffered as a result of breach or termination of contract. Indeed Sections 73(1) of Cap 345 states that;

*When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

Guided by the words of Section 73 of the Law of Contract , cited above, I find the section, insists that a party to the contract may be held liable for loss or damages which arises from breach of a term or terms of contract or termination of contract, in which I have said there was term which was violated.

On the Plaintiff's argument that there was mutually agreement to extend the contract period up to 7/10/2013 and retain trucks after the expiry of the contract -Exhibit P2, I find that verbal undertaking by a party or parties, like those advanced by PW1 and PW2 may not change the content of written contract.

That is also one of the reasons, I find that even mutual understanding agreed the Plaintiff and Defendant are not enforceable as contract, until they are reduced, and included into contract. It is suffice to say what was agreed upon in written contract may not be changed by mere words.

Bearing in mind the fact that, there was no breach of contract, I find the Defendants are not liable for any loss or damages which the plaintiff may have incurred after their contract Exhibit P2 had expired. In view of the above, I rule that the Plaintiff is not entitled to any relief prayed in the Plaint because if at all there are damages or loss were not caused by the breach of contract.

On the foregoing reason, I hereby dismiss the Plaintiff suit with costs in favour of the Defendant. The right of appeal is fully explained to the Parties.

Dated at Dar es Salaam on this 25<sup>th</sup> day of September, 2015

  
H.T. SONGORO  
(JUDGE)



Delivered at Dar es Salaam on this 28<sup>th</sup> September, 2015

  
H.T. SONGORO  
(JUDGE)



The Judgement has been delivered in the presence of Mr. Mafwele Advocate for the Defendant, and absence of the Plaintiff and their Advocate.