

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 14 OF 2017

GAUFF INGENIEURE GmbH & Co. KG –JBGPLAINTIFF

VERSUS

KINONDONI MUNICIPAL COUNCILDEFENDANT

JUDGEMENT

B.K.PHILLIP,J

The plaintiff claims against the defendant a sum of Tshs. 242,331,562.51 being an outstanding amount on account of consultancy services rendered by the plaintiff to the defendant at the request of the defendant, in respect of supervision in construction of Community infrastructure upgrading Programme (CIUP), partly financed by the World Bank , under contract No. KMC.MC/58/2010.

It is the plaintiff's case that, the plaintiff was engaged by the defendant under the above mentioned contract No. KMC.MC/58/2010 to provide consultancy services for the defendant and the same was satisfactorily carried out. The plaintiff further alleged that despite discharging its responsibilities satisfactorily in accordance with the terms and conditions stipulated in the contract, the defendant did not pay it the agreed fees for the aforesaid consultancy services, as demanded in various invoices served to the defendant. The plaint reveals that upon continued neglect of the invoices for the fees served to the defendant, on 5th August 2014, the plaintiff issued a statutory notice to the defendant intimating its intention to seek court redress. Following the issuance of the aforesaid notice, the defendant wrote a letter to the plaintiff promising to pay the plaintiff its consultancy fees between 10th and 14th November 2014, however, the defendant did not keep its

aforesaid promise. In this case the plaintiff prays for the following reliefs;

- i) Payment of Tshs. 242,331,562.51.
- ii) Interest on item (i) above at the rate of 25% per annum from the date of each invoice to the date of payment in full.
- iii) Interest on the decretal sum at Court rate from the date of judgment to the date of payment in full.
- iv) Costs of the suit.
- v) Any other or further relief as the Court may deem just and fit.

The defendant's defence is a general and evasive denial. There is no any substantive defence and explanations concerning the allegations made by the plaintiff in the plaint. For easy of understanding let me reproduce it hereunder;

"WRITTEN STATEMENT OF DEFENCE"

The defendant has read the plaint and replies as follows:-

- 1. That the contents of Paragraph 1 and 2 are noted.*
- 2. That the contents of Paragraph 3 are strongly disputed with reasons that the plaintiff was paid all his dues as per execution. The plaintiff is put to strict proof thereof.*
- 3. That the contents of Paragraph 4 are noted.*
- 4. That the contents of Paragraph 5 are strongly disputed with reasons that the defendant paid to the plaintiff all monies arose from the contract. The plaintiff is put to strict proof thereof*
- 5. That the contents of Paragraph 6, 7 and 8 are partly noted to the extent of exchange of various information but finally the plaintiff was paid his dues. The plaintiff is put to strict proof thereof.*

6. That the contents of paragraph 10 are noted.

Wherefore, the defendant prays to this honourable court to dismiss the plaint at its entirety with costs”.

At the hearing of this case the learned Advocate Julius Bundala Kalolo and Municipal solicitor, Ms Leah Kimaro appeared for the plaintiff and the defendant respectively. At the Final PTC the following issues were framed for determination by the court;

- i) Whether there is unpaid monies by the defendant to the plaintiff.
- ii) What reliefs are the parties entitled to.

Starting with the first issue that is **Whether there is unpaid monies by the defendant to the plaintiff**, in proving its case, the plaintiff brought two witnesses, namely, Mr. John Rwegasira (PW1) and Dorothee Maria Grafin Strachwitz, (PW2). In his testimony PW1 reiterated the contents of the plaint that I have already summarized herein above. Basically, his testimony was to the effect that by virtue of the contract for provision of consultancy services in respect of supervision in construction of community infrastructure upgrading Programme (CIUP) Phase I and II, contract No.KMC/MC/58/2010, the plaintiff is entitled to the payment of the claimed sum in this case , since it discharged its responsibilities to the satisfaction of the defendant and the financiers of the project. Furthermore, PW1 testified that despite the defendant’s promises to pay the plaintiff the outstanding fees , the defendant did not pay the same.PW1 tendered in court the contract for the provisions of the consultancy services, 2010 phase I and II (Exhibit P1), Invoices Numbers; 13 of 4/11/2011, 14 of 30/11/2011, 15 of 31/12/2011, 16 of 3/2/2012, 17 of 16/04/2012, 18 of 21/05/2012, 19 of 23/05/2012, 21 of 10/07/2012, 22 of 17/01/2013, 23 of 04/04/2013 and 24 of 21/10/2013 (Exhibit P2 collectively), letters addressed to the plaintiff dated 13-6-2017, 12-7-2011 and 16-9-2011 (Exhibit P3 collectively) and a letter dated 6-11-2013 (Exhibit P4).

Upon being cross examined by Ms. Kimaro, PW1 told this court that the consultancy fees in respect of the main contract were all paid. He further said that the amount claimed in this case arises from three addendum contracts agreed between the plaintiff and the defendant, that is addendum I, II, III. He admitted that the said addendum contracts were not tendered in court as exhibits.

During re- examination by his advocate Mr. Kalolo, PW1 told this court that exhibit P4 is a letter that was written by the defendant. He also maintained his assertion that the plaintiff has valid claims against the defendant.

Dorothee Maria Grafin Strachwitz's, (PW2) testimony in chief was similar to PW1's testimony. Basically, she testified to the effect that the consultancy work in respect of the aforesaid contract for provision of Consultancy Services in respect of supervision in construction of community Infrastructure Upgrading Programme (CIUP) Phase I and II, Contract No. KMC/MC/58/2010 was successfully done, but the fees for the work done was not paid as agreed, thus there is unpaid amount to a tune of Tshs. 242,331,562.51, which is equivalent to Euro 82,380:=- At the exchange rate of Tshs 2,941.60. PW2 further testified that she signed the contract at issue for and on behalf of the plaintiff and the plaintiff's sub-consultant Mr. Emmanuel Tasei for Nimeta Consult (T) Limited co-signed it. PW2 prayed that the plaintiff's claims be granted.

Upon being cross examined by Ms. Kimaro, PW2 told this court that the amount claimed by the plaintiff in this case is in respect of contract signed by the parties herein and addendum Nos. I, II and III. Furthermore, PW2 told this court that she did not tender in evidence addendum No. II and III as they were sent to the defendant for signature but were never given back to the plaintiff. Also, PW 2 told this court that the plaintiff did all the work in good faith and there was extension of time for completion of the work which had cost implications too.

Upon being re-examined by Mr. kalolo, PW2 told this court that the plaintiff's claims are justifiable despite the fact that addendum No. II and III were not tendered in Court because the plaintiff did complete the work in respect of the project in question.

On the other hand, the defendant brought one witness, namely Issack Kashangaki (DW1). His testimony in chief was very brief. He admitted the existence of contract No KMC/MC/58/2010 for consultancy services for supervision of construction of community infrastructure upgrading Programme (CIUP) phase II in Kinondoni Municipality. Furthermore, DW1 testified that the contract was executed as scheduled and the defendant paid all the monies in the invoices raised by the plaintiff for the work done as per the contract. Upon being paid all the amount that it was claiming, the plaintiff forwarded to the plaintiff invoice No. 20 dated 15th August 2012 (Exhibit D1) which was for the retention money, thus, indicating that all of amount due was paid. It was DW1's testimony that all of the plaintiff's money were paid, thus the claims in this case are not justifiable.

Upon being cross examined by Mr. kalolo, DW1, told this court that, the defendant has not produced in court any document for proof of payment of the amount claimed because the documents that could be used for that purpose were lost and the file containing the documents in respect of this matter was lost. He admitted that the plaintiff did the consultancy work in the contracts successfully. Upon being referred to Exhibit P4, that is a letter from the defendant , admitting the claimed amount herein and promising to pay the same, DW1 told this court that he knows Eng Mafita the one who signed Exhibit P4 and confirmed that Exhibit P4 was written by the defendant.

Responding to the question posed unto him by the court, DW1 admitted the existence of Addendum II and III, and told this court that the same were for a contract called NAMUS CORPERATE LIMITED. Furthermore, he explained before this court that the plaintiff was a

consultant while NAMIS CORPERATE LIMITED was a contractor. He maintained that the plaintiff was paid all its monies.

In his closing submission Mr. Kalolo, submitted that the first issue has to be answered in the affirmative, since the evidences tendered in Court (Exhibit P5 collectively) as well as PW1's and PW2's testimonies prove that there is unpaid monies by the defendant to the plaintiff. Furthermore, Mr. Kalolo submitted that clause 6.4 (d) of Exhibit P1 required the defendant to pay the invoices within 60 days of submission of such invoices and supporting documents. He contended that in this case the defendant did not pay the plaintiff's money as stipulated in the contract. Mr. Kalolo further contended that, the defendant did not adduce any evidence to prove that the amount indicated in Exhibit P4, (the letter from the defendant) was paid. He refuted the defendant's allegations on the loss of the documents/receipts evidencing payment of the claimed amount on the ground that no loss report of those documents/receipts was produced in court.

As regards the plaintiff's failure to tender in evidence Addendum II a and III to the contract, Mr. Kalolo submitted that, the fact that addendum II and III were not tendered in evidence cannot vitiate the contractual relationship between the parties herein so far as the works at issues were carried out in the knowledge and presence of the defendant, and that the said documents were submitted to the defendant for signature but the defendant did not sign the same and return them to the plaintiff as it was supposed to be done. To cement his points he referred this court to the case of **Petrofuel (T) Ltd Vrs Zantel, Commercial case No 139 of 2012** (unreported) and **Zantel Vrs Petrofuel (T) Ltd , Civil Appeal No.69 of 2014 (CA) ,** (unreported), in which the Court of Appeal held that if a party who is required to complete the execution of a contract defaults to do so, but through his conduct implements and honours the terms of the contract, he is bound by the terms of the contract, regardless of the fact that the contract was not finally executed (signed). Mr. kalolo insisted since the works under addendum II and III were performed, those contracts (addendum II and III) are binding to the parties.

On the other hand, the Municipal solicitor's closing submission was to the effect that the first issue has to be answered in the negative. She contended that since on 15th August 2012, the plaintiff sent to the defendant invoice No.20 dated 15th August 2012 which was for the retention money, it means that the plaintiff was paid all his money. She also submitted that basing on clause 8.2 of the contract, this matter was supposed to be referred to Arbitration.

From the evidence adduced as summarized herein above, DW1 did not deny the fact that the plaintiff did serve to the defendant the unpaid invoices,(Exhibit P2 collectively). However, he contended that the same were wrongly issued , since there was no unpaid money on the ground that the plaintiff had already issued an invoice for defects liability period for the year 2012 which implied that all monies were paid. The evidence adduced revealed that the amount claimed by the plaintiff is for the works done after the extension of the contract as per addendum II and III. There is no dispute that there was extension of the contract as reflected in Exhibit P3 collectly.DW1 conceded in court that no any proof was tendered in court proof of payment of the plaintiff's money in respect of the work done after extension of the contract. The defendant seems to rely on Exhibit D1 (Invoice No.20 for the payment of defect liability period for 2012) to prove that the plaintiff's money for the work done upon extension of the contract was fully paid. In my considered view this is not legally correct. To my understanding proof for the payment of money has to be done by showing how payment of the money was effected. It can be either by cash, cheque or wire transfer and the like. The defendant was supposed to produce documents to prove that the amount indicated in the invoices (Exhibit P2 collectively) was paid. This is in line with the position of the law as provided in section 110 of the law of evidence Act, which provides as follows;

"110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"

As I have indicated herein above, DW1 conceded in court that Exhibit P4 was written by the defendant. This letter (Exhibit P4) was served to the plaintiff on 7th November 2014 and it is titled *"Notification on your payments for addendum No.2 & 3 and release of Final Completion certificate for NAMIS CORPERATE LTD"*. Its contents show that the defendant's tender board had planned to meet on 7th November 2014 to deliberate on the plaintiff's payments and went further to state that the payments were expected to be effected on 10th -14th November 2014. Reading Exhibit P4 together with the invoices served to the defendants (Exhibit P2 collectively) leads to a conclusion that there were unpaid monies by the defendant to the plaintiff.

I am inclined to agree with the closing submission made by Mr Kalolo that the first issue has to be answered in the affirmative, since the invoices tendered in Court (Exhibit P2 collectively), PW1's and PW2's testimonies , both the testimony in chief and answers made during cross examination prove that there is unpaid monies by the defendant to the plaintiff. I am also in agreement with Mr Kalolo that the allegations on the loss of the documents for the payment of the claimed amount is pure afterthought and not substantiated since, no loss report was tendered in court to that effect. No any reason leave alone convincing reason was adduced for failure to produce the loss report for the alleged documents.

In addition to the above, the issue of loss of document was not pleaded by the defendant. In fact as I have said earlier the defendant's defence is a pure evasive denial thus contravenes the provisions of Order VIII Rule 4 of the Civil Procedure Code, Cap 33 R.E 2002.

I have considered the fact that the contract for addendum II and III were not produced in court. However, I am satisfied with the explanations given by the plaintiff's witnesses for failure to produce the

same. Also, as I have said herein above, the existence of addendum II and III to the contract is not in dispute, thus failure to tender the same does not have any impact on the plaintiff's case.

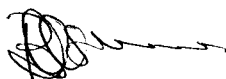
I wish to point out that the contention made by Ms Leah in her closing submission that this matter was supposed to be referred to Arbitration is misconceived, since a party who intends to refer a case to arbitration is supposed to move the court to stay the suit pending arbitration by filing a petition in court [see the case of **East Africa Breweries Ltd Vrs GMM Company, (2002)TLR 12**].

Coming to the last issue, that is, what reliefs are the parties entitled to, I am inclined to agree with the closing submission made by Mr. kalolo that the plaintiff has proved his case to the standard required by the law. Thus, I hereby enter judgment for the plaintiff as follows;

- i. The defendant shall pay the plaintiff a sum of Tshs 242,331,256.51.
- ii. The defendant shall pay interests on the decretal sum in item (i) herein above at the rate of 23% per annum from to the date of filing this case to the date of judgment .
- iii. The defendant shall pay the plaintiff interests on the decretal sum at the rate of 7% from the date of judgment to the date of full settlement.
- iv. The defendant shall bear the costs of this case.

Dated at Dar es Salaam this 7th day of February 2020.




B.K. PHILLIP
JUDGE