IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

COMMERCIAL CASE NO.138 OF 2019

MR ERICK JOHN MMARI...............................PLAINTIFF

VERSUS

M/S HERKIN BUILDERS LTD ....DEFENDANT

Last Order: 20/12/2021
Judgment: 18/02/2022

JUDGEMENT

NANGELA, J:.

Ordinarily, in most construction and engineering contracts, as it may be evidenced by this case, contractors are required to complete all contracted works within a pre-agreed and fixed completion date, failure of which they may become liable to the employer.

In this instant suit, the Plaintiff is claiming from the Defendant a total of **TZS 398,842,534.03** as specific damages. The claims result from failure on the part of the Defendant to complete contracted works within pre-agreed completion date. Besides, the Plaintiff claims from the Defendant, payment of general damages, as well as costs of this suit.

To fully appreciate the gist of such claims, I will set out the facts of this case shortly hereafter. It all started on or about the 6th day of December, 2010, when the Plaintiff and the Defendant concluded a house construction agreement. Under the contract, the Defendant agreed to construct for the Plaintiff, a one storey residential building, with three bedrooms, bathrooms, lounge, dining, kitchen, store, etc, on Plot No.17, Block 1, Mtoni Kijichi Area, Temeke Municipality, Dar-Es-Salaam. The costs of the works were for an agreed contract sum of **TZS 324,196, 436/=**.

Although the contract was signed on 2010, construction works were to commence 14 days later upon receipt of instructions to commence. As such, the contracted works commenced on the 6th day of February 2011, and the same were to be completed in a year's time (12 months), meaning that, completion and site handover date was the 5th day of February 2012.

However, having been paid the first payment for mobilization, fencing, etc., upon commencement of the works on the day when the Defendant got instructions to commence, the project got held up due to a number of unforeseen events. Consequently, the parties entered into a mutual agreement and varied the earlier agreement by extending the construction completion period to December 2013.

It is worth noting, however, that, up to July 2013, already the Plaintiff had paid the Defendant a total sum of **TZS 277,000,000/=**. That fact, notwithstanding, up to December 2013 the construction works remained incomplete.

On or about January, 2014, the parties agreed mutually to further extend the contract's completion period to 14th November 2014 (as completion date) and the 15th day of November 2014 was appointed as a day when the Defendant was supposed to hand over the completed works to the Plaintiff. However, up to the 15th day of November, 2014, the contracted works had not been completed and, the handing over could not take place.

Earlier, on the 10th day of October, 2015, the Defendant had submitted to the Plaintiff a soft copy of an Interim Valuation and a **Claim No. 4**, claiming for a sum of **TZS 147,284,625.94**. Notably, however, shortly before receiving that Claim No.4, the Plaintiff had inspected the site and found it to be at a standstill. He noticed that, some works were carried out below acceptable standards of construction and, up to 18th October 2015, nothing was done and, hence, no progress was registered.

Due to the delayed completion and other factors which affected the project, the parties herein were drawn

into back and forth arguments and correspondences. In the end, their disharmony about the project ended up later being submitted, by the Plaintiff, to the Contractors Registration Board (**CRB**) as a formal complaint.

Besides, the same complaints drew in other construction quality assurance bodies such the Engineers Registration Board (**ERB**) and the *Architects and Quantity Surveyors Registration Board* (**AQSRB**), all trying to mediate between the parties or come out with a agreed way forward as the works at the site remained uncompleted.

To be precise, the Plaintiff's complaint was formally submitted to the CRB on 16th July 2016. Even so, after a long protracted effort to diffuse the dispute, the respective bodies, led by the CRB, failed to resolve the parties' standoff. They afterwards advised that the matter be submitted to a Court of law. On 28th August 2019, therefore, Defendant handed back the construction site to the Plaintiff and, on 2nd October 2019, the Plaintiff terminated the contract.

It is from such a background that, on the 20th day of November, 2019, the Plaintiff filed this suit claiming for a sum of **TZS 398,942,534.03** as specific damages from the Defendant.

In particular, the Plaintiff claims to have suffered damages, both specific and general, for breach of

contract, loss in the form of lost opportunity to derive rental income from the proposed residential house, from December 2014 at a rate of **US$ 1,500.00** (net of taxes) per month which makes a total of **US$ 87,000.00** or **TZS 200,100,000** up to September 2019.

Besides, the Plaintiff claims to have incurred costs of making unscheduled travelling (*safaris*) from Cairo/Nairobi/Khartoum to Dar-Es-Salaam to attend the various meetings and site visits, accommodation in Dar-Es-Salaam as well as other expenditures totalling **US$ 3,805.00 or TZS 8,750,989.00**. Furthermore, the Plaintiff claims to have engaged services of various consultants, all of whom he paid a total of **TZS 22,089,046/=**, and that, he was inconvenienced having secured a loan of **US$ 125,000.00** to finance the incomplete house, which loan he is forced to service without seeing the fruits thereof.

On 3rd March, 2020, the Defendant filed her Written Statement of Defence (WSD) and the Plaintiff filed a reply to it on the 18th day of March, 2020. In her **WSD**, however, the Defendant raised a preliminary point of law, to the effect that, the suit is hopelessly time barred. This Court heard both parties and on the 11th May 2020, I overruled the objection.

Unfortunately, the parties could not resolve their dispute during mediation session and during the final pre-

trial conference the parties filed issues which the Court adopted as drawn and agreed issues. The issues agreed upon were as follows:

(i) Whether the Defendant breached the Contract for Construction of residential house on Plot No.17, Block 1, at Mtoni Kujichi, Dar-es-Salaam.
(ii) If the above issue is in the affirmative, whether the Plaintiff contributed to the alleged breach by the Defendant.
(iii) Whether the Plaintiff suffered damages as prayed due to the Defendant's breach of contract.
(iv) To what relief are the parties entitled.

At the hearing of this case Mr Elvaison Maro, learned advocate, appeared for the Plaintiff while Mr Alfons Nachipiangu, and Omar Msemo, learned advocates, represented the Defendant.

In the course of hearing of this case, the Plaintiff called four witnesses to testify and tendered in Court a total of 39 Exhibits in proof of his case while the Defendant called one witness and tendered in Court eight (8) Exhibits.

At the closure of the hearing session, the learned counsels for the parties did as well pray to file closing submissions.

I will, therefore, summarise the witnesses' testimonies and, in the course of my analysis of the evidence, take into account the closing submissions as well as the pleadings of each part.

In his testimony in chief, **Pw-1**, (Mr Erick John Mmari) testified that, currently he is working as a Logistic Officer at the United Nations World Food Programme , Sudan Mission.

Pw-1 stated that, his claims against the Defendant is for payment of specific damages in the sum of **TZS 398,842,534.03** by way of costs of completing construction works on his construction site, loss of earnings and costs of engaging various consultants, transport costs, stationary and allied costs.

He stated further that, as the Plaintiff, he also claims for general damages for breach of contract, personal stress, and humiliation, and mental torture, loss of expectation, harassment and over engagement in attempt to amicably resolve the current dispute.

Pw-1 testified that, on 6th December 2010 he entered into a house construction contract with the Defendant wherein **TZS 324,196,436/=** were the agreed consideration or contract price. He tendered in Court a copy of the said contract which was admitted as **Exh.P1.** He testified that, the house to be constructed was to be erected on Plot No.17, Block 1, Mtoni Kijichi

Area, Temeke Municipality, Dar-es-Salaam. He told this Court that, he procured a building permit, which he tendered in Court and was admitted as **Exh.P2**.

According to **Pw-1**, the Defendant took possession of the construction site and received initial payments on the 06th day of February 2011 and, in terms of Clause 3 of **Exh.P1**, the construction works were to begin Fourteen days upon receipt of instructions to commence the works and the entire project was to be completed within twelve (12) months, i.e., by **5th of February 2012.**

Pw-1 stated, however, that, while the construction of the foundation was on-going, there was received a Municipal "Stop Order". According to **Pw-1**, the Stop Order was issued because the contractor had not displayed any signboard and stickers from the relevant regulatory boards.

Pw-1 stated that, on 30th April 2012 he was called upon and engaged a structural engineer and a Quantity Surveyor (**QS**) to supervise the works. The QS engaged was M/S Masterpiece Consult and M/s Nimeta Consult (T) Ltd. A copy of the engagement contracts were tendered and received as **Exh.P3** and **Exh.P4** respectively.

It was a further testimony of **Pw-1** that, as a result of the Stop Order and other unforeseen subsequent events, the parties agreed mutually to extend the life span of the construction contract from the 5th day of

February 2012 to December 2013. **Pw-1** testified, however, that, up to December 2013 the Defendant had not finished the works, hence, on or about January 2014, the parties varied the completion dates to 15th November 2014, a day appointed for a handover ceremony.

Pw-1 testified further that, pursuant to the parties' joint discussions, the Defendant prepared a schedule of the outstanding works and timelines for the completion and issued the same to the Plaintiff. As such the parties agreed to the extension period and the Defendant retained the works' site and continued to execute the works. The schedule of works was tendered and admitted into evidence as **Exh.P5**. According to **Pw-1**, during the entire construction period he paid the Defendant various sums at various stages, a total of which amounted to **TZS 277,587,112.40**. The same were paid as follows:

(i) On 2nd and 8th Feb.2011 = USD 62,500 (TZS 93,875,000/=)
(Bank Transfer to Defendant's Account)

(ii) On the 8th of October 2011 = USD 25,000 (TZS 42,000,000/=)
(Bank Transfer)

(iii) On 12th November 2012 = TZS 12,000,000 (Cash payment)

(iv) 17th July 2013 = USD 75,400,000 (TZS 120,618,530.40)
(Bank transfer to the Defendant's A/c).

TOTAL PAID AMOUNT.........TZS 277, 567,112.40.

Pw-1 tendered in Court various receipts evidencing such payments and the same were received as

Exh.P6A, and 2 copies of Telegraphic Transfers (TT) as **Exh.P6B**.

It was **Pw-1's** testimony that, up to 15th day of November 2014 the Defendant was yet to complete most of the construction works on site, a fact which drew the parties to long-drawn arguments and exchange of correspondences concerning the progress of the project which was stagnant. **Pw-1** tendered in Court e-mail correspondences between the parties and the same were admitted as **Exh.P.7**.

It was a further testimony of **Pw-1** that, on the 10th day of October 2015, the Defendant sent, to the Plaintiff, an Interim Valuation for Claim No.4 in respect of the works carried out on the project site, claiming to be paid **TZS 147, 284,625.94**. The Valuation Claim No.4 and a dispatch book were tendered and admitted as **Exh.P8** and **Exh.P9**.

Pw-1 stated, however, that, before the said claim was received, he had personally inspected the site and found it to be with no operational activities while some executed works were below standards, including noticeable leakages and obvious alterations from the agreed bills of quantity (BoQ).

Pw-1 testified, in response to the claim No.4, that, he advised the Defendant to complete the construction works, rectify all noticeable anomalies to the acceptable

construction standards and submit a final bill to be settled within two (2) weeks of submission and handing over of the construction site and the completed works. A notice to produce and the copy of the letter sent to the Defendant were tendered in Court and admitted as **Exh.P10** and **Exh.P11** respectively.

Pw-1 testified that, despite such a call for completion and handing over of the works and the site, up to 18th October 2015 nothing was done and no progress was made on the construction site, a fact which made **Pw-1** to lodge a complaint with the *Contractors' Registration Board* (CRB), on 13th July 2016. A notice to produce and a letter of complaint served upon the CRB was tendered as evidence and collectively admitted as **Exh.P12**.

It was a further testimony by **Pw-1** that, subsequent to the lodgement of the complaint, a meeting was convened on the 20th day of July 2016 at the CRB offices attended by the Plaintiff, the Defendant and CRB Staff. He stated that, it was agreed in that meeting that, an independent consultant be sought at both parties' shared costs to assess the progress of the contracted works and advise the way forward. Tendered in Court, was a tripartite handwritten agreement arising from the meeting and the same was admitted as **Exh.P.13**.

Pw-1 told the Court further, that, subsequent to the issuance of **Exh.P13,** the Plaintiff consulted the Defendant's Managing Director, the late Eng. S.I Kishimbo on the way forward regarding **Exh.P13**, but the managing director of the Defendant was non-cooperative. He stated that, upon consulting the CRB, he was advised to consult the **AQSRB** (the *Architects and Quantity Surveyors Registration Board*) for guidance.

It was **Pw-1's** further testimony that, on the 21st day of July 2016, the Plaintiff consulted the AQSRB on how to access and engage registered and qualified Architects and Quantity Surveyors and he was given a pamphlet with a list of practicing A & Qs at a cost of **TZS 30,000**. He tendered in Court a letter with Ref.AQ15/PO/VOL.III/32 dated 26th July 2016 and a receipt No.41968 which were collectively admitted into evidence as **Exh.P14**.

Pw-1 told this Court also that, with recommendations of the AQSRB, the Plaintiff picked QS Mr Wasiwasi Kezilahabi who works with M/S LM Construction Management Ltd. He stated that, on 28th July 2016, the Plaintiff, the QS and the Defendant's Managing Director (the Late Mr Kishimbo) visited the site and an inspection and initial observations were made leading to an initial report.

However, according to **Pw-1's** testimony, the services of the consultant were procured at the Plaintiff's costs as the Defendant refused to share the costs. **Pw-1** stated that, M/S LM Construction Management Ltd carried out the assessment of the works' progress and financial appraisal and delivered a report to the "CRB." **Pw-1** tendered in Court a copy of a letter by the CRB dated 30th November 2016, attesting contents of the handwritten tripartite agreement (**Exh.P.13**) arising from the meeting held at the CRB's offices and, the same, was admitted as **Exh.P15**.

Furthermore, **Pw-1** tendered in Court a letter dated 2nd December 2016, addressed by the Plaintiff to the CRB expressing his acceptance with the consultant's findings. The same was admitted as **Exh.P16**. **Pw-1** told this Court as well that, at the instance of the CRB and the Plaintiff's desire to have a technical and engineering structural investigation (TE&SI) be done, M/S S W Msambaza Design Consult was engaged to executed the works, including carrying out laboratory tests and, that, a report to that effect was submitted on the 28th day of March 2017.

Pw-1 tendered in Court a contract of engagement of M/s Msambaza Design Consult which was admitted as **Exh.P.17**. He further told this Court that, at the recommendations of the CRB and, after a careful revision

of the two investigation reports by the consultants, the two reports were consolidated to produce a consolidated technical and financial Report, which was submitted to the Board on 27th day of October 2017. A copy of a letter submitting the Report to CRB was tendered and admitted as **Exh.P18**.

It was a further testimony of **Pw-1** that, following the submission of the consolidated technical and financial report, there were series of meetings at the CRB's offices, including a meeting held on the 27th April 2018, which was attended by the Plaintiff, the Defendant's Managing Director, the two consultants and the Plaintiff's legal advisors M/S KRN. Minutes of the meeting were recorded by the Consultant from M/S Msambaza, wherein the agreement was that, the M/S Msambaza's consultant was to carry out site meeting and prepared minutes. However, he told this Court that, later the Defendant refused to sign those minutes.

Pw-1 told this Court as well, that, on 27th April 2018, the Plaintiff wrote to the CRB briefing them on what transpired in the site meeting and proposed the way forward. He stated that, on 14th May 2018, the CRB wrote to the Defendant asking for the latter's feedback regarding what had been done in resolving the dispute. A copy of the letter was tendered and admitted as **Exh.P.19**.

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Furthermore, **Pw-1** tendered a letter written by CRB, dated 1st March 2019, inviting the Defendant to a stakeholders' meeting on 8th March 2019, at 10:30hrs and which directed the Defendant's Managing Director to appear in person, and explain as to why the Defendant refused to sign the site meeting minutes. He told this Court that, the meeting was rescheduled to 19th March 2019 and, a letter by the CRB was admitted as **Exh.P20**.

Pw-1 further testified that, following the meeting held on 19th March 2019, on the 3rd day of May 2019, the Plaintiff received a letter advising that the CRB was unable to mediate the parties and they should refer their dispute to the Court. He tendered the said letter which was admitted as **Exh.P21**. **Pw-1** further tendered in Court, various receipts and tickets of expenses incurred and these were collectively admitted as **Exh.P.22**. He also tendered in Court receipts for payments made to the consultants which were collectively admitted as **Exh.P23**.

Pw-1 did also tender in Court a loan agreement advanced to the Plaintiff by the UN Federal Credit Union and the same was admitted as **Exh.P24**. He did also tender in Court a letter he delivered to the Defendant on 2nd October 2019 about the termination of the contract as he CRB had not been able to arbitrate the parties. The letter was admitted as **Exh.P25**.

Besides, **Pw-1** did tender in Court a site register book which was admitted as **Exh.P26**. He also tendered two letters written to the **AQSRB** and these were admitted as **Exh.P27**, and **Exh.P28.**

In addition, the Court received e-mail correspondences between the parties concerning various variations which were proposed either by the Defendant or by the Plaintiff and mutually agreed upon, "costed" and paid for, and these were admitted as **Exh.P29** as well as Interim payment Certificate admitted as **Exh.P30. Pw-1** tendered as well two letters dated 12th April 2013 and 1st May 2012 about the mutually agreed variations and which were admitted as **Exh.P31.**

Further still, **Pw-1** submitted a trail of e-mails dated from 24th February 2014 to 4th November 2014 regarding different samples of materials used during the execution of works, as well as emails dated 18th June 2015 to 17th July 2015. The same were admitted as **Exh.P.32** and **Exh.P33.** Finally, he asked the Court to grant the reliefs sought in the Plaint.

On cross-examination, **Pw-1** told the Court that, M/s Masterpiece was a project manager whose job was to supervise the construction works. He admitted that, there was an extension of the contract which was unilaterally signed by the Defendant and, has been admitted as **Exh.P5** and was part of the original agreement.

Concerning the Defendant's involvement in the preparation of the consultants' reports, **Pw-1** stated that, the Defendant did attend on the 1st day of the consultants' evaluation/assessment and, that, without the Defendant's involvement the report would not have been complete. He further admitted that, **Exh.P17** did not have the signature of the Defendant on it and stated that, the reason for that missing signature was the fact that the Defendant refused to take part in the exercise of engaging the consultants.

Pw-1 told this Court that, about 90% of his thoughts and concentration went to the project and this was stressful or tortured him. He told the Court that, **Exh.P13** does not have an aspect of costs but he did explain that, the issue of cost was between the Plaintiff and the Defendant who should have engaged the consultant. He admitted that, there was no evidence showing that both engaged them. He also admitted that, M/S LM Construction Ltd was appointed by the Plaintiff alone since the Defendant was uncooperative.

Upon re-examination, **Pw-1** told this Court that, **Exh.P1** had a schedule of works which was an addendum to **Exh.P1.** He also told this Court that, the hand over date for the contracted works was the 15th day of November 2014. He stated that, **Exh.P5** was not signed by the Defendant because the Defendant did not

take any interest to engage the consultant. He stated that, nowhere did the Defendant raise any query about the Consultant's report.

The second witness for the Plaintiff was Engineer Samson W. Msambaza, a holder of Msc. Degree in Structural Engineering from the Military School of Civil Engineering in Bulgaria, which he obtained since 1981. He testified as **Pw-2** and, as a registered engineer, he practices his profession under a professional firm styled M/S S.W. Msambaza Design Consult.

Pw-2, told this Court that, his firm was engaged by the Plaintiff on the 6th day of January 2017 to carry out a technical structural engineering investigation over a structure standing on Plot No.17, Mtoni Kijichi, Temeke Municipality, Dar-es-Salaam. He told this Court that, he did sign a formal consultancy agreement with the Plaintiff, and, that, on the 19th day of January 2017, his firm wrote to the Defendant requesting for copies of engineering drawings (structural, electrical and plumbing) as well as architectural drawings. The letter was tendered and admitted as **Exh.P34**.

He further testified that, on the 19th day of January 2017, a meeting was convened at the Defendant's office whereupon it was agreed that, a field visit, for purposes of taking of samples and testing, was to be carried out on the 23rd January 2017, and, that, such a consensus was

confirmed by his firm's letter to the Defendant, dated 23rd January 2017. The letter referred was tendered and admitted as **Exh.P35**.

Pw-2 stated further that, having received requested documents and embarked on the assignment, it was observed that the engineering drawings did not match with the architectural design used for construction. Noting the anomaly, **Pw-2** stated that, a letter was written to the Defendant requesting the original approved drawings, the BoQ documents and Engineering Architectural drawings for the compound wall. A letter written by **Pw-2's** firm was tendered and admitted as **Exh.P36**.

Pw-2 stated that, the investigators embarked on the assignment with full cooperation of the Defendant who offered its personnel who took part in the field work, as well as the project contractor's representative one Mr Kumbula, Lukani. He stated that, at the end of the assignment, a report was produced with findings that, the building required major and minor rectifications to make it safer for habitation. He tendered in Court, the Investigation Report (IR) which was admitted as **Exh.P.37**.

Pw-2 stated further that, some of the findings enumerated in the Report could be easily and visibly noted by naked eyes while some of the client's (Plaintiff's)

complaints were verified through laboratory tests conducted by the Tanzania Bureau of Standards (TBS), whose tests reports form part of the **Exh.P37**. He also told this Court that, in his professional opinion, the **Exh.P37** proved most of the Plaintiff's complaints.

Pw-2 told this Court that, at the instance of the CRB, another site meeting was conducted on the 27th day of April 2018 which was attended by Pw-2, the QS (Mr. Kezilahabi), the Defendant's Managing Director, the late Engineer S.I Kishimbo, Mr. Yureudi Rwebugisa from the *Engineering Registration Board* (ERB), Architect Mlezi Makuka from AQSRB, Architect C. Hejuye (from Masterpiece Consult), Eng. Charles Mathias (from Nimeta Consult (T) Ltd), QS Mr. Lukani Kumbula (from the Defendant's firm, Advocate Fatuma Amiri (for the Plaintiff) and the Plaintiff himself.

According to **Pw-2**, in that site meeting, he was in-charge and took the minutes of the inspection meeting. He also stated that, the aforesaid meeting received the QS's and structural Engineers Reports and the meeting resolved for a way forward detailed on page 4 to 8 of the minutes. He stated, however, that, later, the Defendant's project contractor refused to sign the site meeting findings and assignments of various site works but **Pw-2** did personally sign the same.

Pw-2 did also state that, sometimes in June 2019, the Plaintiff approached the consultants and requested for a merged and updated consolidated report as he had resolved to have the dispute brought before a Court of law. That assignment was carried out and **Pw-2** stated that, having read it he was satisfied that it presented a balanced and accurate views.

On cross-examination, **Pw-2** told the Court that, he was instructed by the Plaintiff as per **Exh.P17** and, that, the Defendant did not form part of **Exh.P17** as the agreement was not with the contractor (the Defendant). He told the Court that, it was M/S Nimeta who prepared the drawing and architectural designs, together with M/S Masterpiece Consult. **Pw-2** also told this Court that, he did not evaluate the percentage of the works accomplished. When asked if he was a duly registered engineer, **Pw-2** told the Court that, he was registered with ERB and, the he had all relevant practicing licences.

On re-examination, **Pw-2** stated that, although it was the Plaintiff who engaged him, the Plaintiff did so through the **ERB** who appointed him as that is where he is registered as a practicing engineer. He told the Court further that, the Defendant availed to **Pw-2** all necessary documents they had requested from the Defendant and, that, Mr Lukani, the Defendant's QS, did take part in the investigation. He further told this Court that, although

materials tested by the TBS such as steel bars passed the test, the problem lied on qualified workmanship and supervision, negligence and quality control.

The third witness for the Plaintiff who testified as **Pw-3** was QS- Mr. Joseph Mende. He told this Court that, he is a qualified Quantity Surveyor with Bsc. Degree in Building Economics and professionally registered and working with M/S LM Construction Management Ltd. **Pw-3** told this Court further, that, his company got involved in the construction project on Plot No.17 Block 1, Mtoni Kijichi, Temeke Municipality, DSM and, that, he was one of the personnel who participated in the investigation and preparation of professional reports, on the quality of works and financial appraisals in regard to the adjusted contract sum and current costs of completing the outstanding works, extensive rectifications and re-doing of various works on the site.

He testified to the Court that, on 27th July 2016, M/S LM Construction was engaged by the Plaintiff to carry out an assessment of work in progress on a Construction site, to wit, on Plot No.17 Block 1, Mtoni Kijichi, Temeke Municipality, DSM, and provide a financial appraisal thereof. **Pw-3** also told this Court that, on 28th July 2016, himself, the Plaintiff, one Mr Kezilahabi and the late Eng. S.I Kishimbo (the MD of the Defendant) as well as Engineer Kazi from the CRB, visited the site, carried out

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inspections made preliminary observations and delivered a report to the CRB with copies to both the Plaintiff and the Defendant.

Pw-3 told the Court that, later, at the guidance of the CRB, the Report was consolidated with an initial Report prepared by M/S Msambaza Design Consult to produce a consolidated Report on the assessment of work progress and financial appraisal. According to him, the consolidated Report was submitted to the CRB on the 27th October 2017.

He also stated that, at the request of the CRB another site meeting was convened on 27th April 2018 and the attendants of it were **Pw-3**, QS Kezilahabi, the Defendant's Managing Director, the late Engineer S.I Kishimbo, Mr. Yureudi Rwebugisa from the *Engineering Registration Board* (ERB), Architect Mlezi Makuka from AQSRB, Architect G. Hejuye (from Masterpiece Consult), Eng. Charles Mathias (from Nimeta Consult (T) Ltd), QS Mr Lukani Kumbula (from the Defendant's firm, Advocate Fatuma Amiri (for the Plaintiff), the Plaintiff himself and Pw-2, who took minutes of the meeting.

Furthermore, **Pw-3** told this Court that, later in June 2019 an updated report was produced regarding the assessment of the work progress and financial appraisal at the request of the Plaintiff, as the Plaintiff had expressed a desire to go to Court. He tendered the report

in Court and the same was admitted as **Exh.P38**. He told the Court in summary that, the market value of the works which called for extensive rectification and re-doing of the incomplete works, was at a sum of **TZS 165,787,898.53** (VAT Exclusive).

Upon being cross-examined by Mr Nachipiangu, **Pw-3** told this Court that, his involvement in the matter was through the AQSRB and, that, he was asked to come up with a consolidated report, taking into account the other report furnished by **Pw-2**, M/S Msambaza Consult. As such, he told this Court that the 2nd report was made after signing an agreement with the Plaintiff but not the first report which was directly ordered by the AQSRB.

Pw-3 stated further that, the 2nd Report (**Exh.P38**) was a consolidated report ordered by the Plaintiff and was for the Plaintiff who had shown him a letter from CRB to the effect that a consolidation was necessary. He said, he was free to prepare it as a report. He told this Court that, while the costs will remain to be those agreed between the parties, updated project costs meant costs which will affect the initial costs. He also stated that, as per the findings, there were both corrective works to be done and works which had not been done at all and which were worth of about **TZS 80,642,152.10.**

On re-examination **Pw-3** confirmed to be registered as a Quantity Surveyor (QS) and, that, his registration was in accordance with the AQSRB's requirements. He also stated that, in the course of the evaluation carried out, he used no other new prices of materials used since the initial price was on the basis of supply and fix.

He confirmed also, that, the building was about 74% completed but, that; the requisite corrective works would lower those percentages. He stated further that, instead of using the agreed roofing materials the contractor used his own type and there was roof leakage that required an overhaul of the entire roofing work.

The last witness for the Plaintiff was **Pw-4**, Mr Issa Sultan Mundeme, a registered Valuer who holds an Advanced Diploma from UCLASS since 1979 (before the College changed into Ardhi University) and Msc. Degree in Urban Land Appraisal from Reading University, UK. He also practises his profession with a firm called GimcoAfrika Ltd.

In his testimony, Mr Mundeme told this Court that, he is a registered property valuer, registered with the Tanzania Valuer Registration Board (VRB) and owns a professional firm which advises clients on all aspects of real estate, including Land Management, valuation etc. He testified further that, sometimes in the month of

March 2021, he was instructed by **Maro and Co, Advocates** to assist in assessing what would be an acceptable, realistic and provable passing rate of rental (assuming complete) for a proposed residential house on Plot.No.17, Block 1, at Mtoni Mtongani within Temeke Municipality.

According to **Pw-4**, having visited the property and considered similar properties of the like nature (assuming the structure was completed), **Pw-4** arrived at a finding that, the passing rate would be between a sum of **TZS 700,000=** and **900,000/=.** He tendered in Court a *Report on Rental Loss Assessment* in respect of a Property on Plot.No.17, Block 1, Mtoni Kijichi, Temeke Municipality, DSM, which was received in Court as **Exh.P.39.**

Upon being cross-examined, **Pw-4** stated further that, there are various things which determine what amount of rental charges would be for a particular property, among them being the neighbourhood location of the property, e.g. whether if it is planned or unplanned; accessibility, standard of finishing and specifications, amenities provided etc. He told this Court that, ordinarily, any informed owner would not like to rent his or her property at a less comparable rate unless s/he is compelled to by other factors.

Pw-4 told the Court further, that, the methodology he used in the course of preparing **Exh.P39** was comparative in nature, and involved looking at the existing neighbourhood properties, market research relying on informants (Madalali), use of information from local leaders and use of information from colleagues in the industry as reliable sources of information. He also told this Court that, he used an investigative approach as if he was a client seeking to rent a house.

Pw-4 did admit to the Court that, at his engagement, he was informed that there was a pending matter in Court and, that, the appraisal was for a proposed litigation as he needed to know what was the assessment for. He denied, however, that, **Exh.P39** was ever prepared for the purposes of "*cooking the evidence*" in this case.

On re-examination, **Pw-4** reiterated that, the fact that he was informed what his report could be used for such information, did not and does not affect his findings regarding the proposed rental value of the property. Briefly, that marked the end of the Plaintiff's case.

The **Defendant's witness Ms Luisia Kishimbo** testified as **Dw-1.** She told this Court that, she has worked with the Defendant as a project coordinator since 2011 until 2019. Her witness statement was received in Court as her testimony in chief. **Dw-1** stated, in her

testimony in chief, that, she has been the custodian of all documents at the site.

According to her, right from the beginning of the project, the Plaintiff was troublesome and caused lots of challenges which eventually frustrated the project. She told this Court that, the project's registration requirements, which ought to have been done by the client, were left to the Defendant.

According to **Dw-1,** such a conduct caused unnecessary delays and led government authorities to halt the progress of the project for a while. She tendered, as evidence in Court, various stop orders issued by Temeke Municipality and these were admitted as **Exh.D-1**. **Dw-1** told this Court further that, although the contract price which was for a sum of **TZS 324,196,436** was to be paid on instalments, the Plaintiff refused to effect payment of **TZS 147,284,625.94** upon Defendant's submission of **Claim.No.4.** She tendered in Court the Claim Note No.4 which was admitted as **Exh.D-2**.

Dw-1 testified further that, the Plaintiff was not adhering to established professional standards as he was a sole decision maker even on technical processes like architectural, structural and QS, and made a lot of variations that caused repetition of the works or stoppage while awaiting further instruction from him. She tendered

to the Court a letter dated 13th June 2018 as part of her evidential material and the same was admitted as **Exh.D-3**.

Dw-1 stated, as well, that, when the project was nearing completion in around 2014, the Plaintiff made variations on specification of tiles (porcelain) materials contrary to what was specified in the BoQ in terms of price. She stated that, although the Plaintiff wanted the same tiles, he opted for those of higher price, hence, on 27th April 2018, it was agreed that the Plaintiff will purchase the same and the Defendant will fix them, although this agreement was not honoured.

According to **Dw-1**, the minutes taken during the 27th April 2018 meeting had shown that the Plaintiff will choose and the Defendant will buy, but it was done otherwise. She tendered a letter sent to the CRB requesting that a correction to the minutes be made. The letter was admitted as **Exh.D-4**. She also submitted a letter from the Defendant to the CRB dated 21st March 2019, explaining why the Defendant refused to sign minutes of a site meeting. The same was admitted as **Exh.D-5**.

Dw-1 stated further that, the Reports produced by the independent consultants were unreliable because the Defendant was not involved in the appointment of the said consultants and, hence, not impartial. She tendered

a letter dated 30th August 2017, which had been written by the Defendant to the Plaintiff, explaining that the Defendant was not ready to pay the costs incurred to procure the independent consultants. The respective letter was admitted as **Exh.D-6**.

Regarding the claim that the Plaintiff was frustrating the works, **Dw-1** cited, as an example, the incident of failure to purchase the tiles as agreed on 27th April 2018, and that, on 08th June 2018, the Plaintiff had issued a directive to stop all works at the site until when a handing over was done in July 2018. **Dw-1** tendered an email to the Court, which was written by the Plaintiff and copied to the Defendant to stop all works and, this was admitted as **Exh.D-7**. She also tendered a letter sent to the CRB on 06th March 2019 which had been admitted earlier as **Exh.P-8.**

On cross-examination, **Dw-1** told this Court that, she was familiar with **Exh.P1** and, that; the late Engineer Kishimbo was her father as well as the Managing Director of the Defendant. She stated that, in construction industry, there is the so-called '*labour only contracts*' and '*full contract*', and, that, **Exh.P-1** fell on both at different times. According to her testimony, initially the contract started as full contract, whereby the contractor was doing all that which was necessary as per the instructions of the

Client's consultant, but as the project progressed, things changed.

Dw-1 told the Court that, the first scenario is when the Client failed to involve other professionals such as structural and architectural consultants, and, that, the second scenario was after the project had progressed to the stage of fitting (floor) tiles as the Plaintiff chose a different material other than the one in the BoQ, which was different in size and prices. She stated that, at that juncture, it was agreed that the Client will buy and the Contractor would offer labour to fix then on site.

Dw-1 testified further that, the floor tiles materials had to be fixed first to allow other works to be done, and that, the related discussions on the type of tiles took place in 2015/2016. She told this Court that, the Client brought an invoice to the Defendant. However, she did not tender it in Court. She, however, told this Court that, while she understands in construction contracts there might be a necessity for variations, nevertheless, variations might not change the nature of the contract, although at times it does.

Dw-1 stated further that, this being a privately engaged project, the Client had room to make changes and did so outside the project manager's mandate. She emphasized that, the issue of floor tiles changed the nature of contract from "full-contract" to "labour-only

contract". She maintained that, the variation regarding purchase of tiles brought a new agreement. She admitted, however, that, as per **Exh.P1**, works were to be initially completed by 13th September 2011 as per the schedule of works.

As for the delays, **Dw-1** told this Court that, there were architectural and structural drawings which needed to be reconciled and, that, there were also stop orders issued and received by the Defendant, coupled with several variations of works and late payments. She further told this Court, while on cross-examination, that, there were other *force majeure* events, such as rain season, which made the works to stop, as well as the non-payment of claims raised, all of which became contributing factors which delayed the project completion.

Even so, **Dw-1** admitted that, the delays occasioned by the stop orders (**Exh.D1**) were mitigated by the extension of the contract and, that, **Exh.P5** was one of the revised schedules of works but, she observed that, it was not the final one. She admitted, therefore, that, it was for the Defendant to deliver the works on 14th day of November 2014, although she also claimed that, there was another work schedule agreed upon beyond 15th November 2014, but she neither tendered it in Court nor did she refer to it in her witness statement.

Dw-1 admitted that, in the interest of moving forward, the client had given the contractor his list of activities and the contractor (defendant) was to come up with a schedule of works which would have reflected the new agreement, and, that, the Contractor did send it to the client capturing a new time frame of implementing what was agreed on the 27th April 2018. She told this Court, therefore, that, as for the floor tiles' issue, the client had agreed to pay for any additional square meter and the Defendant was to mobilize labour.

Dw-1 stated further on cross-examination, that, the Defendant did not sign the minutes of the meeting held on 27th April 2018 because they were considered misleading as per the letter the Defendant wrote on 21st March 2019 (**Exh.D-4**). She told this Court that, earlier the Defendant had a draft of the minutes for them to go through and they were sent as a soft copy.

However, **Dw-1** admitted that, before commencement of any construction at any site, there should be at the site, an engineer, the QS and the project manager. She told the Court that, for the part of the Defendant, the contractor did register the project. However, she stated that, mobilizing the team to the site and having the signboards erected and stamps attached, were the responsibilities of the Client.

Dw- 1 stated further that, **Exh.P11** was an email addressed to the Defendant but the e-mail does not make reference to the Claim Note No.4 earlier stated above which was for about **TZS 147 Million.** However, she admitted that, according to **Exh.P11**, the Plaintiff was ready to pay in two weeks if some rectifications were made. She stressed that the Defendant did rectify the problems noted as they were minor works.

On re-examination, **Dw-1** stated, inter alia, that, statutory requirements would demand that, the Consultant Engineer and the QS be engaged by the Client before construction works begin because the contractor comes at last after the whole team is mobilized for the works to commence. In short, that was the end of the defence case.

As I stated herein earlier, the parties agreed to four issues which need to be established in this case. As the law stands, the burden of proving any allegation rests on the party who substantially asserts the affirmative of the issue. Sections 110 to 111 of the Evidence Act are applicable to that view.

See also the cases of **The Registered Trustees of Joy in the Harvest vs. Hamza K. Kasungura**, Civil Appeal No.149 of 2017 and the case of **Manager, NBC Tarime vs. Enock M. Chacha** [1993] TLR 228. The principle in civil cases, however, is that, the standard of

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proof required is generally proof on the balance of probabilities. See the cases of **Silayo vs. CRDB (1996) Ltd** [2002] 1 EA 288 (CAT).

Having said all that, can it be said that the Plaintiff in this case has successfully discharged her duty to prove the case to the required standards? To respond to that question, one has to consider the facts in the pleadings and the issues alongside the evidence offered for and against, in the light of the existing law. I will start with the first issue which was in relation to:

> Whether the Defendant breached the Contract for Construction of residential house on Plot No.17, Block 1, at Mtoni Kujichi, Dar-es-Salaam.

Before I delve into the depths of this issue, I find it apposite to comment on some few points which emanated from the pleadings and which, as correctly submitted by the learned counsel for the Plaintiff, would have shortened the lengthy proceedings, had the Defendant out rightly admitted them in her WSD.

To start with, it is clear, in paragraph 8 and 9 of the Plaint, that, the Plaintiff had pleaded that, due to a number of unforeseen events, the parties mutually agreed to extend the completion period to December 2013 and later to 15th November 2014. In paragraph 4 of

the WSD the Defendant disputed such a fact putting the Plaintiff to a strict proof.

However, during cross-examination, **Dw-1 <u>admitted, that, there were such mutually agreed extensions</u>** regarding the period when the works were to be completed.

Secondly, on paragraph 12 of the Plaint, there were also pleadings regarding receipt of Claim No.4 valued at **TZS 147,284,625.94**, and the Plaintiff's readiness to honour it in two weeks on condition that certain observed defects on the works were rectified. In her WSD, the Defendant merely took note of the amount regarding Claim No.4, but denied all other assertions.

During the full hearing of the case, however, **Dw-1 <u>admitted those facts</u>**, including a letter by the Plaintiff dated 18th October 2015, which was received in Court as **Exh.P11.** The said letter, which was addressed to the Defendant, outlined the defects and called upon the Defendant to rectify them and submit a final bill which the Plaintiff was willing to settle it within two weeks.

Thirdly, on paragraph 14 of the Plaint, the Plaintiff averred that on 20th day of July 2016, parties had a meeting at the CRB's office and, it was agreed they should engage an independent consultant to assess the works at the site. The Defendant disputed those facts in paragraph 10 of her WSD but did at the same time admit

that appointment of an independent consultant was to be done mutually.

At the hearing, however, **Dw-1 <u>did not dispute</u> Exh.P-13**, a handwritten note confirming that the parties had mutually agreed to that approach. Paragraph 15, 19 and 20 of the Plaintiff's averments in the Plaint were also disputed by paragraphs 11 and 13 of the WSD respectively, but during cross-examination, **Dw-1 <u>admitted the contents disclosed in those paragraphs,</u>** including the fact that, the Defendant cooperated with the consultant M/S Msambaza and furnished to him documents requested in **Exh.P34** to **Exh.P 36**. Further, that, the Defendant's QS, one Mr Lukani did take part in the assessment done by M/S Msambaza Design Consult.

Let me pose a bit and state that, where a Defendant knows very well that a particular fact needs not be disputed, that should be clearly stated in the WSD instead of disputing it for the sake of just disputing that fact and later admit it at a later stage. Doing so does not serve the purpose stated under Order VIII Rules 3 and 5 of the Civil Procedure Code, Cap.33 R.E 2019, of requiring the defendant to make specific denials.

In essence, those provisions are meant to compel the Defendant to specify the matters which he intends to disprove and disclose the matters upon which he relies to

support his denial, thereby limiting the issues and avoiding unnecessary delays and surprises. Having said so, let us revert to the pertinent discussion in response to the first issue.

As it may be observed, **Exh.P1** is a construction contract. Construction contracts are equally governed by the same principles that govern contracts under the law of contract. As a matter of fact, when a client and a contractor executes a construction contract, the two may, like any other transaction, fall apart and, due to various factors such as delay in finishing the works assignment which operates as setbacks to the original timetable agreed upon by the parties, poor workmanship contrary to specifications etc, a disputes may arise from that contract.

It is worth noting, however, that, not all delays in construction works may constitute a breach of a construction contract. The truth remains that, some construction delays may or may not constitute a breach of the contract. If they do, those will be the non-excusable delays and if they do not, e.g., those associated with acts of God, those will be excusable delays.

From the context of this case, and, taking into account the modality of implementation of project; it seems to me that **Exh.P1** was in the somewhat nature of

a turnkey-based kind of a contract, where the contractor procures or supply the materials, carry out the construction works within a specified completion date and hand over the completed building ready for use.

As I look at the clauses making **Exh.P1,** I see not, in any way, any escalation clause. Generally, an escalation clause in a construction contract will provide for increases in the contract price under certain specified circumstances, e.g., as the cost of selected commodities (cement, fuel, steel bars) or inflation.

From the look of things, therefore, **Exh.P1,** was a fixed price, i.e., not subject to escalation, but a lump sum contract, whereby, the payments of the agreed sums, as per clauses 2 and 5 (a), were based on an upfront payment for the value of works of the first three (3) months, and the rest being paid on a 'quarterly-basis lump sums' in proportion to the value of the completed works.

From the evidence of **Pw-1**, up to July 2013 the Plaintiff had paid the Defendant a total sum of **TZS 277,587,112.40/=**, as evidenced by **Exh.P.6A** and **Exh.P.6B.** This was equal to **85.62%** of the whole contract sum (or only less by about **TZS 46,609,233.6** of the entire contracted sum).

However, by the time when assessment of the work progress and financial appraisal were done in the

year 2018/2019, as per **Exh.P.38** and **Exh.P.39**, **only 74%** of the works were completed and, this percentage, according to **Pw-3**, was subject to a further reduction, given the observed major and minor defects which needed to be attended before the building could become habitable.

From the foregoing, one glaring pictures portrayed in the pleadings and supported by the testimonies of **Pw-1**, **Pw-2**, **Pw-3** and even **Dw-1**, is that of a vivid delayed completion of the contracted works. The question that arises from such a glaring factual position is whether or not such delay constituted the kind of construction delays which amounts to a breach of contract and, thus, from which the Plaintiff can recover compensation from the contractor.

From the pleadings, it is an undisputed fact that, the Defendant took possession of the relevant construction site on 6th February 2011. Likewise, since the initially agreed timeline for the completion of the constructed works was, as per **Clause 3 of Exh.P1**, twelve (12) months from the date of commencement, the site handover date was the 5th day of February 2012.

In his testimony, **Pw-1** testified, and **Dw-1** does acknowledge, that, by mutual agreement, the completion period was extended to from 5th February 2012 to

December 2013. But, even so, the construction works were still incomplete.

It is also clear from the evidence of **Pw-1** and **Dw-1**, that, on or about January, 2014, the contract's completion period was further extended and a handing over of the completed works to the Plaintiff was supposed to be done on the 15th day of November 2014. As clearly shown on **Exh.P-5**, which is a revised works' schedule tendered as evidence, the works were to be completed on the 14th day of November 2014 (and, thus, a hand over was to be the next day which was the 15th day of November 2014), but that never happened.

Ordinarily, the question which may be raised here is: was the Defendant contractor supposed to stick to the schedule of works (i.e., **Exh.P5**)? In essence, where there are changes to the completion timelines, the parties may, as demonstrated in this case, agree to another timeline and require the contractor to submit a fresh program or schedule of work for execution of the works.

However, that submission, in itself, does not mean that there is a contractual obligation to keep to that program in its strict sense. What matters is that, the works, regardless of which one starts and which one follows, are completed within the agreed time of completion.

Certainly, it is for such a reason that, most construction contracts would require contractors to maintain a satisfactory rate of progress throughout the project, provided that, the works are on the track of completion within the agreed period.

In her testimony during cross-examination, **Dw-1** stated that, there was another work schedule which indicated a different completion date beyond that evidenced by **Exh.P5**. Even so, and, as I noted earlier, **Dw-1** failed to substantiate that fact, meaning that, the completion date remained the 14th day of November 2014 and, the works ought to have been handed over in their complete form on the 15th day of November 2014.

Since evidence on record shows that such works were not completed on time, as per **Exh.P7, Exh.P.11, Exh.P13, Exh.P.17, Exh.P18, Exh.P19, Exh.P21, Exh.P37** and **Exh.P38**, there can be no dispute that the contracted works were not completed within the agreed time and, hence, the reason why the dispute at hand erupted.

As a matter of principle, a contractor is said to have completed a project when every item of that project is fully performed devoid of defects. I do understand, however, that, logically, it is often impossible to complete a construction project neatly as it appears in its archetype or the drawings and specifications. In most cases, for

instance, the best language employed, rather than providing a hard and fast definition of the term **'completion'**, is a reference to the terms like "*practical completion*" and "*substantial completion*".

In the case of **H W Nevill (Sunblest) Ltd vs. Wm. Press & Son Ltd** (1981) 20 BLR78, for instance, Nwey, J., had the following to say regarding what practical completion would mean:

> "I think that the word "practically" ... gave the architect a discretion to certify that William Press had fulfilled its obligation ... where very minor *de minimis* works had not been carried out, **but if there were any patent defects in what William Press** had done the architect could not have given a certificate of practical completion." (Emphasis added).

From the above, it would mean, therefore, that, "**practical completion**" of a construction project contemplates a project in a situation which would entitle the owner to enter into its full possession with no outstanding works remaining to be carried out, *save for very minor or often negligible* works which may be still left incomplete by the contractor.

As regards such works, the principle of '*de minimis non-curat lex* (the law does not concern itself with trifles*)"* will definitely apply as a test of completion which makes trivial defects exceptions to the concept of **"completion of works"**.

In an earlier House of Lords' decision in **City of Westminster v Jarvis,** [1970] 1 W.L.R. 637, the Court had the following to say:

> "The Contract does not define what is meant by 'practically completed'. One would normally say that, a task was practically completed when it was almost but not entirely finished; but **'Practical Completion' suggests that,** that is not the intended meaning and, that, what is meant is **the completion of all the Construction work that had to be done.**" (Emphasis added).

As I stated here above, the other term used in the alternative or interchangeably is **"substantial completion.**" In the Indian case of **Patel Engineering Ltd. And Anr vs. National Highways Authority** AIR 2005 Delhi 298, the Delhi High Court observed that:

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> "Substantially completed works means those works which are **at least 90% completed** as on the date of submission (i.e. gross value of work done up to 1 month before the date of submission is 90% or more of the original contract price) and continuing satisfactorily...."

As it may be noted in the above, construction works which are said to be **"substantially complete"** would mean that, such works are in a state whereby the client is capable of taking possession of them, for purposes of occupation, without much ado and, whatever may be considered as '*minor outstanding works*' and/or 'defects' will remain to be rectified within the defect liability period.

From such discussion, therefore, whether one refers to 'practical completed" or "substantially completed" works, the gist of it would mean that, a particular given project is sufficiently complete, that is to say, that, the completed work aligns with what was detailed in the construction contract and the owner can readily utilize his property for its intended use.

In view of the above, and, as regards the works for which this suit relates, can it be safely said that the works in question were substantially or practically

complete? To respond to that enquiry, one would have to refer to **Exh.P37** and **Exh.P38.**

Although **Dw-1** vehemently denounced the utility and reliability of these two exhibits on the ground that they were unilaterally procured, I do not find that to be a correct position when one looks at the facts on the ground in light of the testimony of **Pw-1, Pw-2** and **Pw-3**. Further, taking into account that **Exh.P11, Exh.P13, Exh.P14, Exh.P.15, Exh.P16, Exh.P18** and **Exh.P19** provides background information, which, in one way or the other, lend credence as to how the two reports (**Exh.P.37** and **38**) came about, I see no reason why I should regard the two reports as being useful and reliable.

It is also clear, for instance, and well admitted by **Dw-1** while under cross-examination, that, when **Pw-2** and **Pw-3** were carrying out their assessment, they did receive documents from the Defendant upon request and the Defendant's personnel did take part in the site meetings which lead to the making of what is **Exh.P.13.** For that reason, I do safely make a finding that **Exh.P.37** and **38** are reliable documents.

Having said all that let me revert to the issue of completeness of the project works. According to the testimonies of **Pw-1, Pw-2** and **Pw-3** (and **Exh.P.37 and 38** which were tendered in Court by **Pw-2** and **Pw-**

3 respectively), the works were by all standards incomplete and full of defects and, necessitated major and minor rectifications, some of the defect being visibly seen by naked eyes. In his testimony, **Pw-1** stated that, in some instances, the engineering drawings did not even match with the architectural design used for construction.

Further, according to **Pw-3's** testimony, the entire project was only **about 74% complete.** Even so, **Pw-2** told this Court that, the building still needed major and minor rectifications and, for that reason, **Pw-3** was of further testimony (and as per **Exh.P38** (and also **Exh.P37)**), that; given the corrective works that needed to be carried out at the site, those completion percentages noted herein (i.e., the **74% percentage** of the completed works) were to be further scaled down.

If substantial completion, as observed in the earlier cases referred to here above, (see **Patel Engineering Ltd & Another vs. National Highways Authority** (supra)), means that, the construction works are **<u>at least 90% completed</u>** as on the date of submission, it is clear from **Exh.P.38** and the testimony of **Pw-3**, that, the works were far from being complete by the time when the Plaintiff decided to terminate the Contract, on the 2nd day of October 2019, (**Exh.P25**), which was more than 5years from the date when the Defendant should have handed over the works.

In the South African case of **Group Five Building Limited vs. Minister of Community Development** (449/91) [1993] ZASCA 75; the Court was of the view that,

> "A contractor is bound to complete the work by the date stipulated in the contract for its completion. If he fails to do so he will be liable, if so agreed, for liquidated damages to the employer. The employer will not, however, be entitled to liquidated damages if by his act or omission he prevented the contractor from completing the contract by the agreed date. As it was put by Vaughan Williams LJ in Wells'case supra at 354, "[I]n the contract one finds the time limited within which the builder is to do this work. That means, not only that he is to do it within that time, but it means also that he is to have that time within which to do it."

According to **Exh.P1**, at the stated contract price of **TZS 324,196, 436/=**, the Defendant contractor was obligated to construct and complete a residential building in accordance with agreed technical drawings, work

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schedule and the BoQ, and, the building contracted for was required to be completed and ready for use and occupancy (after extension of time) by the 15th day of November 2014. However, as per **Exh.P37** and **Exh.P.38**, the various defects observed upon inspection, makes the entire project to be one constructed well below expectations, and some defects noted arose from lack of adhering to specifications stated in the BoQ.

From the above observations and discussions, it follows, therefore, that, since the Defendant failed to complete the works within the agreed date and in accordance with the technical drawings, work schedule and the BoQ, the Defendant's failure amounted to a serious breach of the contract. With such a finding, the first issue is responded to affirmatively.

The second issue was predicated on the first issue being responded to affirmatively. The issue was that:

> If the first issue is in the affirmative, whether the Plaintiff contributed to the alleged breach by the Defendant.

In her testimony in chief, **Dw-1** did testify that, the Plaintiff was to blame for the delay to complete the works. She told this Court that, the conducts of the Plaintiff from the beginning of the project, left much to be desired, including, that, the Plaintiff left the issue of registration of the project in the hands of the Contractor,

hence, the stop orders (**Exh.D1**) which contributed to the delay.

Besides, **Dw-1** told the Court that, the Plaintiff did also interfere with the project and failed to adhere to the established professional standards as he became a sole decision maker – an architect, a structural engineer and QS. She also raised the issue of Plaintiff making various major variations.

Essentially, under the English law, for instance, there is, in the construction industry, a so-called "prevention principle" whose effect is to prevent a party, in the absence of clear terms to the contrary, from taking advantage of its own wrongs. If, for instance, the employer prevents the contractor from completing the contracted works (either by the employer's legitimate conduct or by breaching the contract), most construction contracts would either provide a mechanism for extending the completion date to reflect the employer's act of prevention or where there is no such a mechanism, the parties, may, by mutual agreement, vary the contract and agree on a different completion date.

As a matter of fact, the prevention principle will apply even where there is no a mechanism within the contract which regulate matters regarding extension of time, or where such mechanism exists in the contract but fails to clearly address what happens to the completion

date, in the event that it is the employer who caused the delay.

In the context of construction law, the said principle of prevention dates back to as far as the case **Holme vs. Guppy** (1838) 3 M&W 387 and this seems to be the first case to introduce the concept of "time at large", a concept later upheld in **Dodd vs. Churton** [1897] 1 QB 562.

In that latter case, Lord Esher was of the view, at page 566, that:

> "...if the building owner has ordered extra work beyond that specified by the original contract which has necessarily the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed upon the Contractor."

A modern approach to the principle, however, developed to amplify it further. This was developed by Lord Denning, in the case of **Trollope & Colls Ltd vs. North West Metropolitan Regional Hospital Board**, [1973] 1 W.L.R. 601, a case which was upheld in the House of Lords. In that case, the Court had the following to say, at page 607, that:

> "It is well settled that in building contracts - and in other contracts too - when there is a stipulation for work to be done in a limited time, if one party by his conduct - it may be quite legitimate conduct, such as ordering extra work - renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."

A somewhat more recent, but still orthodox view, was stated by Jackson, J in **Multiplex Constructions (UK) Ltd vs. Honeywell Control Systems Ltd (No 2)** [2007] EWHC 447 (TCC). The Court in this case stated that;

> "In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified

> completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor."

In **Group Five Building Limited vs. Minister of Community Development** (supra) the court observed from the English position, that,

> "Any conduct on the part of the employer or his agent, whether authorised (e.g. the issue of variation or suspension orders) or wrongful (e.g. the failure to deliver the building site or plans or instructions by an agreed date) exonerates the contractor from completing the contract by the contractual completion date. Time then becomes, as it is

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> sometimes stated, at large. The Work must then be completed within a reasonable time."

In the instant case, however, the position stated in the above cited cases, though relevant and highly persuasive, cannot be of aid to the Defendant's case. It is also clear to me that, **Dw-1's** testimony regarding the Plaintiffs conduct, cannot give the Defendant any meaningful mileage.

I find it to be so, because, first, in respect of the variations effected during the lifetime of the parties' contractual relations, the same were, as per the testimony of **Pw-1**, variations proposed either by the Defendant or by the Plaintiff and **mutually agreed**, "costed" and paid for. The email communications between the parties, admitted in Court as **Exh.P29** as well as **Exh.P31** well reveals that mutual agreement.

Secondly, the issuance of stop orders and the time lost thereby were all matters taken care of by the parties' mutual agreement to change the completion date of the contracted works from being the initial 5th day of February 2012 to December 2013 and, later again to 15th day of November 2014.

Thirdly, according to **Pw-1** and **Exh.P.3** and **Exh.P4**, the Plaintiff had in place the services of two consultants, one for structural engineering works and the

other as Qs. In view of all that, it cannot be said, in my considered view, that, the Plaintiff assumed the role of client as well as structural engineer, architect and quaintly surveyor as claimed by **Dw-1.** For that matter and, from the available evidence which I have laboured to take into account here in, I am unwilling to accept what **Dw-1** states in her testimony, to wit, that the Plaintiff is to blame.

On the contrary, I find, therefore, that, the Defendant's sloppiness in executing the works as evidenced by what **Pw-1** states as his complaints evidenced in **Exh.P32** (the various emails some of which contain the Plaintiff's complaints and dissatisfactions against the Defendant's performance of the works at the site, as well as what **Pw-2** and **Pw-3** stated in respect of **Exh.P37** and **Exh.P38**), there is no doubt that, the Plaintiff cannot share the blames at any rate. That being said, the second issue is responded to in the negative.

The **third issue** is:

> Whether the Plaintiff suffered damages as prayed due to the Defendant's breach of contract.

In the circumstance of all what transpired in this case, it is without doubt that, the Plaintiff has suffered damage due to the Defendant's breach of the construction contract. According to sections 73 of the Law of Contract Act, Cap. 345 R.E 2019, damages are

awarded as an entitlement to a successful claimant in a claim regarding breach of contract. Generally, such damages are of compensatory in nature and more often they fall in two limbs: special (consequential damages) and general damages.

In particular, special damages cover any actual loss suffered by the innocent party and these, as it was stated in the case of **Stanbic Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited**, Civil Appeal No.21 of 2001 (CAT) (unreported), must not only be **pleaded** but also **particularised** and strictly **proved**. See, for that matter, the case of **Cooper Motors Corporation (T) Ltd vs. Arusha International Conference Centre** [1991] TLR 165 CAT.

In this instant case at hand, the Plaintiff has pleaded for payment of special damages to a tune of **TZS 398,842,534.03,** this being a sum total that takes into account, costs of completing the construction works, loss of earning and costs of engaging consultants, transport costs, stationary and allied costs.

Essentially, in a construction matter as the one at hand, where a contractor fails to complete a contracted project or abandons the project and is liable for breach of contract, the appropriate measure of direct damages which s/he must pay for abandoning or otherwise failing to complete the project under a fixed price, lump sum

time-bound contract, is the increase over the original contract price which the project owner would have to pay if the project is to be completed.

In present suit, it is clear, in the first place, and according to the testimony of **Pw-2,** taking into account Appendix 7 of **Exh.P38**, that, currently the project needs demolitions, modifications and major rectification works on various parts ranging from its underpinning superstructure and substructure, staircase balustrade, replacement of the deformed gypsum ceiling due to leakage, to mention but a few.

According to **Exh.P37 and Exh.P38**, such extensive rectifications and re-doing of various works which need to be carried out if the house is to be said to have attained the state of substantial completion, has adjusted the Contract sum which, as per the testimony of **Pw-3** and **Exh.P38**, stands at **TZS 423,440,690.01** as of now. This means, as per the testimony of **Pw-3** and **Appendix 2 to Exh.P38,** that, it will cost the Plaintiff a total sum of equal to **TZS 165,787,893.53,** if the project is to be completed.

By virtue of the testimonies of **Pw-2, Pw-3** and read together with **Exh.P37** and **Exh.P38**, it follows, therefore that, the Plaintiff has succeeded to establish why **TZS 165,787,893.53** should be paid as **part of** specific damages to the Plaintiff.

Secondly, the Plaintiff has claimed for loss of rental earnings from his property which is equal to **TZS 900,000/-** per month, from the time when the project ought to have been completed in 2014 to the date of judgement. In his endeavour to prove this, the Plaintiff has relied on the testimony of **Pw-4** and **Exh.P.39**.

As a matter of principle, therefore, where there has been an unjustified delay in completion of a construction project, a client is entitled to be compensated for the loss of rental amount which he would have earned from his property based upon the fair market net rental value.

Perhaps the case of **Fisher Island Holdings, LLC vs. Cohen,** 983 So.2d 1203 (Fla. Dist. Ct. App. 2008), will illustrate that point. The facts of this case were that, Mr and Mrs Cohen (the "Cohens") sued Fisher Island Holdings, LLC ("Fisher Island") alleging breach of contract arising out of the construction and purchase of their Fisher Island home. The construction of the Cohens' home was to be completed no later than two years from the signing of the Agreement for Sale on December 4, 2002. As per the agreement, the closing should have occurred shortly after December 2004.

The contractor failed to substantially complete the contracted works timely and the Cohens were forced to enter into a nine-month lease in the amount of **$144,000** for alternative living arrangements. On trial,

the Court granted the Cohens' directed verdict as to liability for the delay in construction, leaving it to the jury to determine the amount of damages the Cohens were to receive.

Of particular importance, and, relevant to this instant case of ours, is that, the Court in Fisher's case stated, relying on an earlier decisions in **Russo vs. Heil Constr., Inc.,** 549 So.2d 676, 677 (Fla. 5th DCA 1989); **Vanater vs. TomLilly Constr.,** 483 So.2d 506, 508 (Fla. 4th DCA 1986), that:

> "Damages for delay in construction are measured by the rental value of the building under construction during the period of delay."

In that case, the jury calculated the delay damages based upon the fair market net rental value of the home and thereby awarded delay damages. In yet another decision by the Court of Appeal of Ghana, in the case of **Benda vs. Awuku** 1978 (2) ALR Comm.281, the same approach seems to be applied, whereby, the Court held that:

> "If the builder fails to carry on the work and complete the building at the time agreed upon, the usual measure of general damages for the delay

> is the rental value of the building during the period for which the completion was delayed."

As it may be observed in the above cases, the award was regarded as general damages. However, the principle will equally apply in a situation like the one at hand, where the Plaintiff has claimed for specific damages in the form of loss of rental benefits which he expected to derive from the property and for which the monthly ranges were well established by **Exh.P39** and the testimony of **Pw-4**.

One notable thing according to **Pw-4**, however, is that, the rent could have ranged between **TZS 700,000 – TZS 900,000**/-per month. The Plaintiff has not been able to justify why the highest amount of **TZS 900,000/=** should be the benchmark. For that reason, I will award the specific losses based on the least rental amount, which is **TZS 700,000/-** per month from the 15th day of November 2014 to the date of this judgment of the Court.

The third specific claim relates to repayment of transport costs incurred by the Plaintiff, amounting to **TZS 8,750,989.00** (equal to **$3,805.00** at the time these costs were incurred). The testimony of **Pw-1** and the evidence of **Exh.P22** do prove that such amount was spent and for the purposes connected to this matter at hand. As such, the Plaintiff has also established these claims and is entitled to be paid that amount as claimed.

The fourth category of specific claims relate to costs of engaging consultants. A sum of **TZS 22,834,046.50** was claimed and the testimony of **Pw-1, Pw-2, Pw-3** and **Exh.13, Exh.17, P37** and **P38** are all evident that certain provable costs were incurred by the Plaintiff and **Exh.P23** shows the costs for such. To me, this claim is fully pleaded and strictly proved, hence justified as a specific claim.

As regard the claim for payment of general damages, generally payment of these, unlike specific damages which need to be pleaded, particularized and proved, need not be proved as their award is at the discretion of the Court based on the available evidence on record. See the Ugandan case of **UCB vs. Kigozi** [2002] EA 305 and the case of **Southern Engineering Company Ltd vs. Mulia** [1986-1989] EA 541.

From the above understanding and, based on the evidence submitted to the Court as a whole, therefore, I am indeed satisfied that, the Plaintiff suffered under the hands of the Defendant, and is entitled to be paid general damages which, having looked at the entire evidence supporting the Plaintiff's claims, I hereby assess the claim of general damages to be the tune of **TZS 25,000,000/-**

The fourth and last issue is:

'to what relief are the parties entitled.'

Essentially, the party who succeeds to prove the case to the required standards is the one who carries the day and will be entitled to reliefs. In this case, the balance of probabilities lies in favour of the Plaintiff as against the Defendant. In other words, the Plaintiff has been able to discharge his burden and has proved the case to the required standards.

In the upshot, it is the Plaintiff who is therefore entitled to judgement and decree of this Court. This Court enters judgement and decree in his favour as follows:

1. That, the Defendant is hereby ordered to pay to the Plaintiff a sum of **TZS 165,787,893.53, (plus VAT)** being cost of completing the various unfinished works, carrying out rectifications and re-doing of various works at the project site.
2. That, the Defendant shall pay a sum of **TZS 700,000/=** per month, being loss of earnings/rental value, to be calculated from the month of December 2014 to the date of this Judgement.
3. That, the Defendant shall pay the Plaintiff a sum of **TZS 8,750,989.00/=** being amount

covering travelling, accommodation and other miscellaneous expenses incurred by the Plaintiff.

4. That, the Defendant shall pay the Plaintiff a sum of **TZS 22,834,046.50,** being cost incurred by the Plaintiff to hire consultancy services.
5. That, the Defendant shall pay general damages to the Plaintiff amounting to **TZS 25,000,000**.
6. That, the Defendant shall pay interest on the decretal amount stated in Nos. 1-4 here above, at a Court **rate of 7%** p.a., from the date of this judgement to the date of full payment thereof.
7. Cost of this suit follows the event.

ORIGINAL

It is so ordered

DATED at DAR-ES-SALAAM, this 18th Day of FEBRUARY 2022

....

HON. DEO JOHN NANGELA

JUDGE

Right of Appeal Explained