IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 52 OF 2021.

CATIC INTERNATIONAL ENGINEERING.....PLAINTIFF

VERSUS

HANS POPE HOTELS LIMITED.....DEFENDANT.

JUDGMENT.

Date of Last Order: 3/08/2022

Date of Judgment: 29/09/2022.

MARUMA J.

The suit between the parties herein resulted from the claims of breach of the standard construction agreement for the construction of a hotel building on Plot No. 68,69 and 33 M Miyomboni area in Iringa Municipality with a contract sum to the tune of TZS. 4,527,218,464.10/=.

The Plaintiff before this Court is therefore praying for the Judgment and Decree against the Defendant for the following reliefs and Orders that

a) A declaration that the Defendant caused loss of profit to the Plaintiff;

b) Payment of TZS 1,358,165,539.23/= being the loss of profit arising from the breach of the Agreement;

c) Payment of TZS 131,420,046.77/= being the amount paid by the Plaintiff to the Tanzania Revenue Authority plus interest al the commercial rate from the date of payment up to the date of judgment;

d) Payment of TZS 500,000/- being costs for registration of the project; plus interest at the commercial rate from the date of payment up to the date of judgment;

e) Payment of general damages suffered by the Plaintiff for breach of the Agreement as will be assessed by this Honorable Court.

f) Costs for this suit.

g) Any other order(s) or reliefs) that this Honorable Court may deem just and fair to grant.

Before proceeding further, it is better to appreciate the background of the suit that on 13th June 2012, Catic International Engineering (the Plaintiff) dealing with construction of buildings and Hans Pope Hotels Limited (the Defendant) dealing with accommodation services, entered into an agreement for the construction of a hotel building for the hotel at a tune of TZS. 4,527,218,464.10/=. After the signing of the agreement, the Plaintiff did register the hotel construction project with the Contractors' Registration and paid all fees and registered the project. However, the project did not takeoff until October 24th, 2017, when the Plaintiff received a notice of tax investigation from the Tanzania Revenue Authority (TRA) concerning the signed contract. After requesting an extension of time from TRA to reply to the notice of tax investigation, the Plaintiff started conducting an investigation and found out that the agreement was performed by another person who is known by the Defendant, who introduced himself as the branch director of the Plaintiff. The Plaintiff also found that the project consultant had issued 23 certificates for the project and the payment of TZS

3,558,725,949.43/= was made. After the fracas, the parties had a discussion and agreed that the project would be handed over to the Plaintiff in order to proceed with the construction. (exhibit). Following the agreement on 4th June 2018 the Plaintiff had a meeting with TRA and agreed to pay taxes with the expectation that she will recover the taxes from the Defendant after the project was handed over to them. On the different dates, the plaintiff paid a total amount of TZS 4,057,200/=

To determine the dispute the Court has framed four issues to lit;

1. Whether the Court have jurisdiction to determine the suit.
2. Whether the defendant breached the terms of the contract.
3. Whether the plaintiff suffered damages or loss of profit.
4. To what reliefs are the parties entitled?

On the date set for hearing, the parties to the suit were presented by their counsel, Mr. Jerry Msamanga for the Plaintiff and Mr. Melckedeck Lutema, assisted by Ms. Subira Omary for the Defendant.

On the Plaintiff's side one witness (PW1) Mr. George Palangyo the legal officer of Catic International Engineering (T) Limited (the Plaintiff) testified on behalf of the Plaintiff who tendered the documentary evidence include the notice of tax invoice dated 19th October 2017 (exhibit P1), A letter to TRA requesting for an extension of time to reply to the notice of tax invoice (exhibit P2), Agreement between Plaintiff and Defendant dated 13th June 2012 (exhibit P3), Receipt for contractor registration fees(exhibit P4), 23 certificates issued by the consultant (exhibit P5 collectively), A letter dated 30th May 2018 activation of construction activities Hotel in Iringa (exhibit P6) and Memorandum of interview (exhibit P7). Other documentary evidence tendered were TRA electronic receipts (exhibit P8 collectively), a letter dated 7th June 2018 from the Plaintiff to Architect (exhibit P9), A letter dated 19th June 2018 on project activation from architect to the Plaintiff (exhibit P10), a letter dated 26th June from CATIC to Design Concern (exhibit P11),a letter dated 12th July 2018 from Design Concern (exhibit P12), a letter dated 18th July 2018 from CATIC to Design Concern(exhibit P13) and a letter dated 17th

September 2018 from CATIC to Design Concern) (exhibit P14). Also, a letter dated 20th September 2018 from Architect to CATIC (exhibit P15), demand notice dated 11th March 2019 (exhibit P16), demand notice dated 17th April 2019 (exhibit P17), a letter from National Construction Council dated 22nd June 2020 (exhibit P18), an introduction letter to contractors' registration Board dated 15th October 2020 (exhibit P19) and a letter from contractors' registration board to CATIC dated 9th April 2021 (exhibit P20).

On the other hand the Defendant called on one witness Ceaser Hans POPE (DW1) who tender documentary evidence include a letter dated 15th October 2012 from CATIC to Hans POPE Hotel (exhibit D1), a letter dated 8th November 2012 from CATIC to Architect (exhibit D2), a letter dated 2nd March 2916 from Hans POPE limited to Architect (exhibit D3) and a letter dated 22nd March 2016 from Shangai Mitsubishi Elevators and escalators to Hans POPE Hotel Ltd (exhibit D4).

Determining the first issue whether the court has jurisdiction to determine the suit. This question of jurisdiction was raised by the

Defendants under paragraph 1 of the amended written statement of defense that the Court lacks jurisdiction to determine the matter as the alleged breaches occasioned on or before 28th April 2015 are hopelessly out of time and "ipso facto" time barred. However, I am not going to labour much on this point as the witness statement of DW1 under paragraph 25, DW1 stated that, I quote,

> "*…That I hereby aver that, save for the tax claims, the jurisdiction of this Court to adjudicate over the rest of the suit is not being contested at this stage…"*

It is also an undisputed fact that the concerned suit is of a contract nature whose limitation period is six years pursuant to item 7 of Part 1 of the Schedules of the Law of Limitation Act Cap 89 RE 2022 as argued by the Plaintiff. Having the evidence by the Plaintiff that the cause of action is based on the breach of the contract arose on 24th October 2017 when the Plaintiff was served with a notice of tax investigation from the Tanzania Revenue Authority on 19th October 2017 (exhibit P1) and this suit was instituted on 4th May 2021. It is quite clear that the Plaintiff was within the limitation period of 6 years.

In that regard, the first issue is answered in positive which lead the way for this Court to proceed with the determination of other issues.

Also, it is at this juncture, I have to remind the Defendant that parties are bound by their pleadings and closing submission is not among them. This is said so because, despite the length of the submissions made in the closing submission in regard to the issue of jurisdiction, the Defendant tried to establish issues which were neither in the amended written statement nor in the DW1's testimony. Having in mind that this Court is only bound to determine what is in the pleadings and not otherwise. What is before the Court is an amended plaint filed on 15th December, 2021, in which the nature and cause of action is a breach of contract terms as stated under paragraph 28 of the amended plaint. The arguments tried to be raised by the Defendant have no room at this stage as such rights have been overtaken by the amended plaint.

Moreover, being guided on the stand that the purpose of closing submission is to assist the Court to determine issues already raised in the pleadings and not to raise new issues as it was held in the case of

Sunlon General Building Contractors Ltd & Two Others vs KCB Bank Tanzania Limited, Civil Appeal No. 253 of 2017 that it is trite position that final submissions are not evidence, the decision also cited the case of **Southern Tanganyika Game Safaris and Another vs Ministry of Natural Resources and Tourism and Others** [2004] 2 E.A 271, final submissions are only intended to provide a guide to the Court in resolving the framed issues.

Therefore, for the Defendant to raise at the stage of closing submission is to obstruct the due process of dispensation of substantive justice and a denial of the right to be heard on the Plaintiff's side is something that cannot be entertained.

Coming to the second issue, whether the Defendant had breached the terms of the contract. It is alleged that on 13th June 2012, the Plaintiff entered into an agreement with the Defendant for the construction of a hotel building on Plot No. 68, 69 and 33 "M" Miyomboni area in Iringa Municipality at tune of TZS 4,527,218,464.10/=. This fact was not disputed by the Defendant. All throughout the written statement of defence and the witness

statement of DW1, facts confirm that there was a contract between the Plaintiff and the Defendant as it is reflected under paragraphs 2 and 5 of the written statement of defence. The construction contract was signed in June 2012 and the construction of the hotel began in July 2012 immediately after registration of the project with the Contractors Registration Board.

This was also supported by the evidence of DW1 in his witness statement that after the registration of the project with the Contractors Registration Board in 2012 the Plaintiff erected at the site the billboard bearing the names of the client: project; architect; civil and structural engineer; quantity surveyor; electrical subcontractor; main contractor; and the building permit; the Plaintiff was duty bound to guard, manage, and protect the site (exhibit P17). All these proved the fact that there was a contract between the Plaintiff and the Defendant.

Based on the above facts, the next question is about the alleged breach of the terms of the contract by the Plaintiff. It was the Plaintiff's evidence that on 24th October 2017 the company received a

letter from the Tanzania Revenue Authority dated 19th October 2017(exhibit P1) concerning the issue of tax investigation. This was when the Plaintiff while doing an investigation, came to discover that on 13th June 2012, the Plaintiff's company had entered into a Standard Construction Agreement with the Defendant for the construction of a hotel building on Plot No. 68. 69 and 33 M Miyomboni area in Iringa Municipality at the tune of TZS 4,527,218,464.10/= . The said contract was signed by one Xu Shi Tao who came to be known to PW1 to be the former Managing Director by 2012.

However, PW1 testified that after the Company had registered the project with the Contractors Registration Board, the company made a long-time follow-up for an advance payment as per the contractual terms for the hotel construction project to commence. But the Defendant went silent with regard to the execution of the project, and no payment was made to the company. PW1 went further to testify that during the investigations they found out that the agreement was performed by another person (Sham contractor) who was best known by the Defendant, introduced himself as the branch

director of the company while the Plaintiff did not assign or empower any person from the company to act on behalf of the company as an independent contractor to perform the agreement. He also argued that the plaintiff's company did not receive any prior notice or information from the Defendant in relation to the said performance of the agreement. PW1 also testified that they found that the project consultant/Architect, one Design Concern, had issued 23 certificates of payment for the project and the sum of TZS 3,558,725,949.43/= was made by the Defendant in respect of the said 23 certificates.

These facts were strongly disputed by the Defendant in the written statement of defence and in DW1's witness statement that after the registration of the project with the Contractors Registration Board in 2012 and erected of the project, no person could have invaded the site and commenced constructions of a hotel of a big magnitude like which have the site the billboard bearing the names of the client and all other project details and continued to do so for more than five years without the attention of the Plaintiff who was managing and guarding the site as reflected in exhibit P17. DW1 also

argued that in paragraph number 15 of the amended plaint the Plaintiff claimed for compensation for costs due to suspension of works for lack of funds from the Defendant since 2016 whereas in the same letter the Plaintiff alleged that they had no any records of the project and they were not aware of construction until after the TRA investigation of October 2017.

DW1 also averred that while the Plaintiff had alleged to be not aware of the construction of the project, there was a contract letter for the lift consignment that was signed by the Plaintiff on 10th April 2015. DW1 testified that the first thirty percent (30%) payment for the lifts consignment was made by electronic transfer on 13th July 2015. The original bill of lading was issued on 22nd November 2015 and the Plaintiff experienced problems in clearing the lift consignment for want of the original copy of the bill of lading. The Plaintiff also requested the Defendant to request the consignor to deliver the original copy of the bill of lading, and the Defendant wrote a letter to the consignor dated 2nd March 2016 (exhibit D3). The consignor replied through a letter dated 22nd March 2016 indicating that Mr. Liu from the Plaintiff

would take the original bill of lading for and on behalf of the Defendant (exhibit D4).

It is also on record in the testimony of PW1 that on 22nd May 2018, the Company and the Defendant had a discussion on the contract dispute, tax liability issues, as well as demobilization of contract activities whereby it was agreed that the project would be handed over to the Company in order to proceed with the construction of the remaining, and on 30th May 2018, the Architect wrote a letter to the company confirming that the project would be handed over to the Company as it was agreed (exhibit P6).

All these were denied by the Defendant. DW1 also testified that Plaintiff's allegations leave a lot to be desired, as the Plaintiff alleges that Mr. Xu Wu (Mr. Frank) was not a representative of the Plaintiff but there were no objections or complaints or reservations from the same Plaintiff for Mr. Xu Wu (Mr. Frank).

Moreover, in paragraph number 15 of the amended Plaint, the Plaintiff acknowledges that Mr. Xu Wu (Mr.Frank) did sign the construction contract as a manager of the Plaintiff (exhibit P9). Also,

there is nowhere the Plaintiff has not pleaded that they did notify the whole world by publication in the media that people should not transact with Mr. Xu Wu (Mr. Frank) for and on behalf of the Plaintiff because Mr. Frank had ceased to be an official of the Plaintiff Company from any particular date.

DW1 further argued that the smug that Plaintiff had never received any payments and had not issued any payment invoices, then agreed to unquestionably pay taxes to TRA concerning a project in which it had never participated. DW1 also testified that the Plaintiff agreed to unquestionably settle tax liabilities with TRA based on invoices bearing fake official stamps of the plaintiff company without reporting that fact to TRA. Also, as indicated in paragraph number 6 of the amended plaint, the plaintiff allegedly faked an official stamp appearing on invoices, which is exactly identical to the official stamp appearing on the application form for project registration with the Contractors Registration Board. In addition to that, the Plaintiff contacted the malfeasant who had fraudulently obtained and eaten all the funds for the project and agreed to proceed with the construction

project with the assistance of the fraudster and swindler without grudges or acrimonies. All these facts raised a serious doubt on the awareness of the contract implementation by the Plaintiff .

It is a trite law that the one who assets must prove as provided under **section 110 of the Evidence Act, Cap 6 R.E 2019** that:-

"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."

Guided by the preceding position and analysing the evidence and pleadings from both sides Forthrightly conceding that the Plaintiff was aware of the contract implementation based on the following findings. The evidence showed that the contract was signed by the person Mr. Xu Shi Tao who was the former Managing Director managing director of the Plaintiff by that time, as stated in paragraph 9 of PW1's witness statement. Furthermore, the plaintiff testified that after signing the said contract, the Plaintiff registered the construction project with the

Contractors Registration Board and paid all fees for registering the project as reflected in paragraph six of the plaint. However, during cross examination, it was discovered that PW1 did not know Mr. XU SHI whether he was the one who signed the contract or registered the project. PW1 opted not to tender the registration form when it was shown to him by the Defendant.

However, he admitted that although he didn't know who applied for the registration form, on the face of it, it was done by the Plaintiff. PW1 during the cross examination also testified that Mr. XU was not a managing director and that he did forge the documents as the company had no one with the name XU. But PW1 admitted that Mr. XU is also known as Mr. Frank who pretended to be a Plaintiff's representative all the time before the discovery of the contract to be implemented by the stranger. Moreover, PW1 admitted that Mr. Fank was the same person known as Mr. XU who signed the construction agreement on behalf of the Plaintiff.

Strangely enough, the Plaintiff did not institute any case against Mr. Frank and claimed that the Plaintiff was not able to find him.

Further to this, when PW1 responded to the questions posed to him with a forgetful mind, he testified that Mr. Fank was the one who represented the Plaintiff's company after the discovery of a contract to be performed by him with the Defendant. In the examination in chief PW1 also testified that following the letter of 7th June 2018, they have to communicate with Mr. XU or Mr. Fank on the challenges of the project and get those explanations included in the letter. He also pointed out that it was to their benefit to have those details. Besides, in re-examination, PW1 stated that the 1st alert was the tax notice from TRA forgetting to testify during cross examination to admit that the project was suspended in 2016 due to lack of funds and he became aware of this in 2018.

All this raised a lot of questions and contradictions by the Plaintiff on her claims to prove the breach of contract. The PW1's testimony was that since the signing of the contract and despite a longtime follow-up of the advance payment, the Defendant was silent with regard to the execution of the project. This fact raised a question as to why the plaintiff did not take any action or effort to ensure

contract terms were complied with or take further steps to terminate the contract and waited until they received notice of tax investigation in October 2017 from the TRA. The Plaintiff has not placed any material evidence to back up her testimony to justify the alleged follow-up. It is also an unfounded reason given by the plaintiff. compromised with those findings and agreed to proceed with the project, which was implemented by the stranger who trapped them on issues of tax investigation as indicated in exhibit P7 of the Memorandum of interview by the TRA. Also, it is a very strange scenario that while the Plaintiff claimed not to recognize Mr. Frank as their representative, as reflected in exhibit 9 as indicated in letter to the Managing Director Design Concern. Still, the Plaintiff contacted Mr. Frank and agreed to proceed with the work despite the fact that the Plaintiff's office never instructed Mr. Frank to be the company's representative. Also, analysing the fact that after the discovery of the performed contract by the stranger, the Plaintiff and the Architect agreed to the liability issues as well as the demobilization of the

remaining contract activities, evidenced by a letter dated 30th May 2018 (exhibit P6).

Furthermore, Mr. Fank, who declared that he would not be recognized as the Plaintiff's representative, was the one reported to be a CATIC representative on May 22nd, 2018. This was also indicated in (exhibit P10), the letter dated June 19, 2018 from the Design Concern to the Plaintiff, in which the Plaintiff was required not to involve Mr. Frank's liabilities to CATIC.

In addition to the foregoing, the Design Concern, the Architect, has never appeared in Court to testify. However, all of the concerns and correspondence made were between the Plaintiff and the Architect Design Concern in all most of the exhibits tendered in Court such as exhibits P10, P6, P9, P11, P15, P12, P14, and P13 despite the DW1 testimony, speak for themselves. This is ruled out based on the principle of the law that it is a trite law that in the existence of evidence in writing, the same will prevail over oral evidence. This was held in the case of **MS. Msolopa Versus Paul Warema & Others** (Land Case No.23 of 2017 [2020] TZHC 2078 (26th February 2020) it

was discussed that *"where there is documentary evidence it is valid and that oral evidence cannot superseded"*.

Therefore, the existence of exhibits P10, P6, P9,11, P15, P12, P14, and P13 which speak by themselves, sufficed to establish that the Plaintiff was aware of what was going on in respect of the contract implementation.

Muchmore, despite that the company had never received any payment or issued any invoice with respect to the project. The Plaintiff continued to provide conditions as shown in exhibit P9 paragraph 2 items 1 through 5. Among them was for the client to compensate the contractor for the costs incurred by the suspension of the work due to lack of funds. Customs clearance of the containers in October 2016, VAT for previous certificates that the Plaintiff was unaware of, and revision of the remaining work rates for the contract he never performed any reasonable person can conclude from the Defendant's allegations that the Plaintiff was unaware of what was going on with respect to the contract, resulting in the breach. Looking deeply into all these facts, there is a lot to be desired concerning this project which

the Plaintiff who is bound to prove as it was held in the case of this Court to the case of **Barelia Karangirangi Versus Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017. The Court of Appeal at page 7,8,9,10 and 11 it was held that;

"*The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side*".

As guided above, taking into account all the above findings in regard to the breach of the contract I am of the settled view that the burden of proof, which is on the plaintiff's side, was not discharged to prove his case. In the result, I find the second issue, whether there is a breach of contract, is answered in the negative.

On the issue of whether the plaintiff suffered damages or loss of profit. Since the first issue has been answered in negative. This issue is automatically failed as there is no breach of contract proven so as to amount to the awarding of damage or loss as prayed.

Concerning the final issue of what reliefs entitled to the parties. Consequently, the fact that the Plaintiff failed to prove his case against

the Defendant on the two issues above, the relief is on the aspect of costs of this case as ordered hereafter.

Finally, since the Plaintiff has failed to establish a case against the Defendant for breach of contract, I therefore find this dispute lacks merit and is accordingly dismissed with costs.

Dated at Dar es Salaam this 29th day of September, 2022.

Z.A. MARUMA

JUDGE.

29/09/2022