

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO 114 OF 2017

LEIGHTON OFFSHORE PTE LIMITED..... PLAINTIFF

VERSUS

TANZANIA PORTS AUTHORITY.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

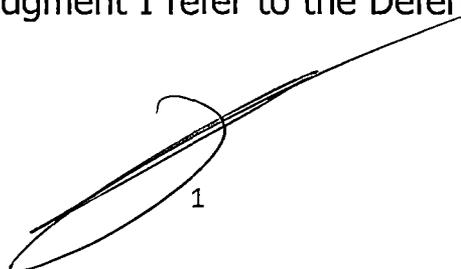
EX-PARTE JUDGMENT

Date of Last Order: 23/10/2023

Date of Delivery: 27/10/2023

MATUMA, J.

In this suit the Plaintiff is claiming from the first Defendant a total sum of USD 23,364,628, interests thereof, general damages and costs of this suit. The reliefs sought supra are pleaded by the Plaintiff as a redress against the said Defendant for non-payment of the balance arising from the contractual sum for the work done by the Plaintiff in execution of the contract entered between them. The second defendant became a party to this suit after having been intervened to defend the interest of the first defendant. In that regard wherever in this judgment I refer to the Defendant, it means the 1st Defendant.

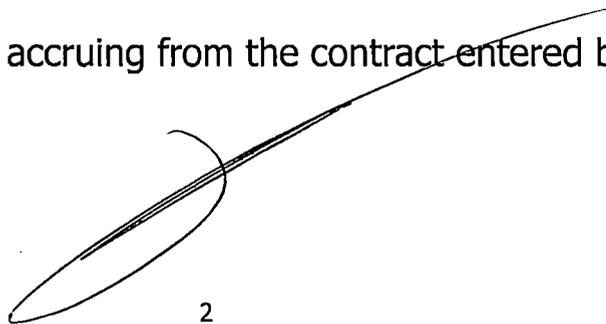


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The brief historical background leading to this suit can be summarized as follows; Sometime in September 2010 the parties executed a contract whereas the Plaintiff was to install a new CALM type single point mooring (SPM) facility and associated submarine and onshore pipelines for crude and white product import to replace the existed SPM and pipeline system at Ras Mjimwema Dar es Salaam. The total contractual agreement value was USD 70,822,536.

The Plaintiff is now alleging to have been paid less amount of the contractual value after having completed the work. She alleges that a total of USD 10,766,536 remained unpaid by the Defendant which attracts the demand of such amount, she also claims USD 5,830,329 as interest for late payment as of June 2017, USD 3,324,538 as contractor's Indirect prolongation (EOT-Onshore Works) and USD 3,443,225 for additional costs for rock berm installation making the total claim USD 23,364,628.

The Defendant in her Amended Written Statement of defense disputed the whole claim stating that there is no any outstanding payment by the Defendant to the Plaintiff accruing from the contract entered by them.

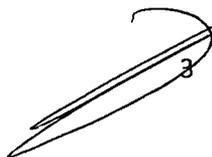
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The Defendant further averred that it was the Plaintiff who breached the contract because the work done was not in conformity with the contract and not fit for the intended purpose. The Defendant also contravened the total amount on the contract which is pleaded by the plaintiff supra. Instead, the Defendant avers that the total contract sum is USD 70,451,900 which arises from the initial contract of USD 66,481,900 and an addendum for additional works amounting to USD 3,970,000.

The Defendant further pleaded in her defense that she paid the Plaintiff USD 62,433,446 yet the Plaintiff did not rectify the defective works nor did she complete all the works within the intended completion period leading to the accrual of liquidated damages as per their agreement.

In paragraph 14 of the amended Written Statement of Defence the Defendant avers that the USD 62,433,446 paid to the Plaintiff was equivalent to the work done by the Plaintiff and thus there is no outstanding payment against her. She then raised a counter claim against the Plaintiff for the following claims:

- (i) *USD 6,880,340 as payment of liquidated damages*
- (ii) *USD 1,151,361 as advance payment not recovered*
- (iii) *USD 359,400 as costs for post-construction survey works*

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- (iv) *USD 500,000 as charges for failure to submit as built documents and operational manual,*
- (v) *USD 1,337,686.5 as a refund of the amount paid for uncompleted work.*
- (vi) *USD 9,000 being overpayment in the letter of credit.*
- (vii) *USD 25,000,000 as costs incurred for delay in offloading white products,*
- (viii) *USD 3,876,407.41 wrongly attached in execution of the decree against the Plaintiff in Commercial Case No. 22 of 2015 by a third party one DP Shapriya.*

Both parties dully filed their respective Witness Statements and at the hearing, the Plaintiff arraigned two witnesses namely Clive Davies (PW1) and Tharmalingam Thirunavukarasu (PW2), and tendered a total of 23 exhibits while the Defendants defaulted appearance and thus could not arraign any witnesses.

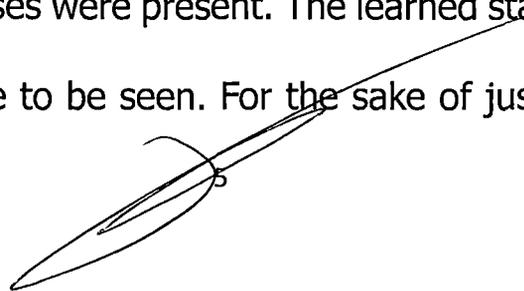
Before I proceed to determine this suit on merit, I find it imperative to speak something regarding the absence of the defendants during trial and the fate of their counter claim.

Starting with the fate of the Counter Claim, the Plaintiff's advocate Mr. Gerald Nangi pressed for it to be dismissed for want of prosecution. I however for the reasons stated in the ruling refrained from taking that course

but decided to struck out the counter claim. I directed that if the Defendants still feels to have a genuine claim against the Plaintiff, they are at liberty to commence a separate suit as if the counter claim was not raised and dealt within this suit.

For the absence of the defendants at the hearing of this suit, the game started at the briefing hours in my chamber. Both parties appeared whereas Mr. Gerald Nangi learned advocate appeared for the Plaintiff and Mr. Mathew Fuko learned State Attorney appeared for both defendants. The learned state attorney expressed his concern arguing for the court to adjourn the case as he was not prepared and not acquainted with the facts of the case. I expressed my stance that I was not prepared to adjourn the case which has been pending in court since 2017 thus a backlog and more so the same having been cause listed in this very special session for clean-up of backlog cases and the fact that both parties were duly summoned and acknowledged service of summons to that effect for more than ten days ago. I thus directed the parties to get into the courtroom for hearing of the suit as scheduled.

Unfortunately, when we got into the courtroom only the Plaintiff's advocate and his witnesses were present. The learned state attorney and his witnesses were nowhere to be seen. For the sake of justice, we waited for

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one hour and twenty minutes perhaps they could enter appearance but all ended in vain. I thus struck out the defendants' witness statements and ordered the matter to proceed ex-parte.

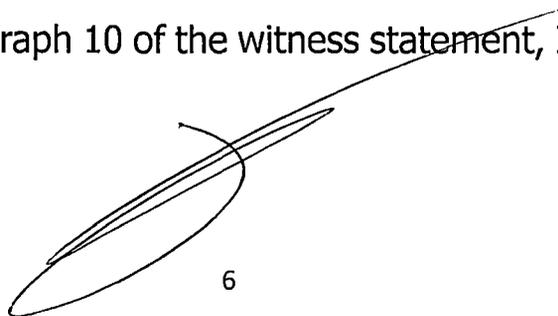
Now back to the matter at hand, in their respective statements the Plaintiffs' witnesses testified to the effect of what has been stated herein above on the historical background of the suit. I will therefore go direct to determine the issues framed as follows;

(1) Whether the Defendant in the main suit or Defendant in the counter claim breached the terms of contract.

This issue for what I have said supra in regard to the Counter claim shall be determined on one side on whether the defendant herein breached the terms of contract.

It should be mindful that both parties in accordance with the surviving pleadings do not dispute to have entered into a contractual agreement named supra.

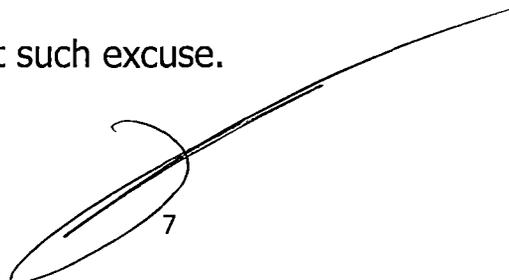
Having gone through the evidence of the plaintiff vide her witness PW2 as deposed under paragraph 10 of the witness statement, I am satisfied that

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the total amount paid by the Defendant to the Plaintiff was USD 60,056,473 and therefore the total unpaid amount as per the contract is USD 10,766,063.

The issue thus is whether the Defendant for not paying such an amount was justifiable. As stated supra the defendant was absent and did not give evidence to justify her non-payment. It is however on record in accordance with the defendant's written statement of the defense that the plaintiff was paid the money which was equivalent to the work done out of the agreed sum as per the cost report from the consultant (project Manager). In that respect the unpaid amount according to the Defendant was for the work not done and therefore the Plaintiff is not entitled to the same.

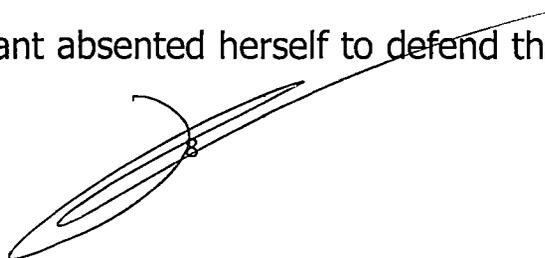
Having considered thoroughly the evidence on record, I am of the firm finding that the defendant had no justifiable cause for not paying such an outstanding balance to the Plaintiff. This is because at the end of the contract, the defendant issued to the Plaintiff a certificate of satisfactory completion of work exhibit **P2**. I am aware that the defendant purported to put forward in her statement of defense that the certificate was issued because of compelling circumstances solicited by the plaintiff but I am far away to catch up and admit such excuse.



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The contract between the parties does not provide for any excuse upon which the certificate of satisfactory completion of works might be issued despite of the incompleteness of the work or its defects. I therefore find that the defendant by issuing such certificate and taking over the project was meant to acknowledge the work done and discharge the Plaintiff from any further obligation on the contract and the defendant within the meaning of section 123 of the Evidence Act, Cap.6 R.E is estopped from denying such inference.

Not only that but also through exhibit **P20**, on the 10th October, 2019 the defendant wrote to the Plaintiff acknowledging to have been indebted unpaid outstanding balance of USD 5,635,384.09 and Tshs. 2,821,917,247.11. In accordance with the google search the exchange rate as of 2016 when the amount ought to have been paid was 1 USD per 2185 Tshs. Therefore, the confirmed balance in Tanzania shillings supra was equivalent to USD 1,291,495.30 by then which would mean by 2019 when the matter was already filed and still pending in court the defendant was still acknowledging the debt balance of USD 6,926,879.39. the plaintiff is however claiming that the total unpaid balance is USD 10,766,536. Unfortunately, the defendant absented herself to defend the difference and

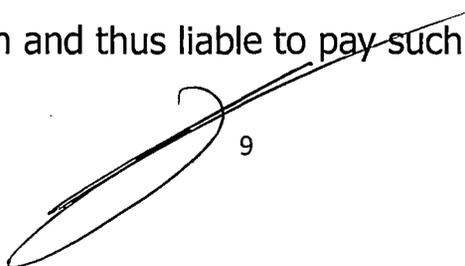
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in fact the defendant had through such exhibit **P20** not closed the matter for the sum of outstanding debt. She made it clear the plaintiff could state any other higher balance if she had a different figure of the outstanding debt. That is seen in the confirmation letter (exhibit **P20**) which reads;

"Should there be any amounts not specified in this request above, kindly disclose accordingly".

From the above quotation, it is obvious that the defendant acknowledged not only the amount she confirmed through exhibit **P20** as an outstanding balance due payable to the plaintiff but also any other amount that the plaintiff might have disclosed over and above the confirmed amount by the defendant. I thus take the evidence of the Plaintiff as uncontroverted and proceed to declare that the total unpaid balance by the defendant to the plaintiff and which has been proved by evidence is USD 10,766,063 which is slightly different from the claimed amount of USD 10,766,536.

In that regard I find the defendant to have breached the contract by not paying to the Plaintiff her due balance supra which was due upon completion of the contract works as evidenced by the Certificate of Satisfactory Completion and thus liable to pay such amount.



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(2) To what reliefs are the parties entitled?

In addition to what I have already decreed supra in respect of the outstanding balance, I find that the Plaintiff is entitled to compensation for the loss of late payment of the decreed amount supra. The claim of USD 5,830,329 for that purpose has however not been established and hence denied. Despite the fact that I have denied such a claim for having not been established, I am aware that the plaintiff is entitled to redress for the late payment because being a construction company she ought to have been paid her due balance for use in her other activities. I, therefore, grant only USD 700,000 as compensation for the late payment of the decreed amount.

The other claims by the plaintiff against the defendant for payment of USD 3,324,538 for the contractor's indirect prolongation costs and USD 3,443,225 for additional costs for rock berm installation are also denied as there is no evidence on record to establish them. First of all, these claims do not arise out of the contractual works in both the initial contract and the addendum. There is also no evidence establishing any handing over of such works after their completion and no certificate of satisfactory completion was issued to that effect in accordance with the main contract and the plaintiff in the matter at hand has not pleaded any deliberate denial of such certificate

by the defendant. In that respect, the certificate of satisfactory completion referred to (exhibit **P2**) did not cover the two claims denied herein above.

The claim of loss of use of the money wrongfully withheld under paragraph 14 (e) in the plaint is also not payable to the plaintiff because I have already granted her an interest of USD 700,000 for loss resulting from late payment. The late payment is what resulted in the loss of use of the said unpaid balance. Therefore, the two claims are the same though duplicated.

I also deny a 12% Commercial rate of the decretal sum to the plaintiff from the date of filing the suit to the date of this judgment because this matter has been pending in court for a long time since 2017 and the reason behind has been contributory by both parties and in some occasions by the court itself.

The Plaintiff is further granted general damages to the tune of USD 100,000 and interest at court rate of 7% of the principal decretal sum of USD 10,766,063 from the date of this judgment to the date of full payment. I also grant the costs of this suit to the plaintiff against the defendants.

In the final analysis, this suit is allowed to the extent herein above stated. The right of appeal to the court of appeal is explained to whoever becomes aggrieved.

It is so ordered.

MATUMA
JUDGE
27/10/2023

Court:

Judgment delivered in the presence of advocate Jeremia Tarimo for the Plaintiff and in the presence of Mr. Lukelo Samuel Principal State Attorney and Charles Mtae Senior State Attorney for the Defendants.



MATUMA
JUDGE
27/10/2023