IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 97 OF 2018

qD CONSULT TANZANIA LIMITED .....1ST PLAINTIFF

UNDI CONSULTING GROUP LIMITED .....2ND PLAINTIFF

KIMPHIL KONSULT TANZANIA LIMITED .....3RD PLAINTIFF

BANGALIMA ASSOCIATES.....4TH PLAINTIFF

VERSUS

THE BOARD OF TRUSTEES OF PUBLIC SERVICE

SOCIAL SECURITY FUND (PSSSF).....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

BY WAY OF COUNTER CLAIM

THE BOARD OF TRUSTEES OF PUBLIC SERVICE

SOCIAL SECURITY FUND (PSSSF)..... 1ST PLAINTIFF

THE HON. ATTORNEY GENERAL.....2ND PLAINTIFF

VERSUS

qD CONSULT TANZANIA LIMITED .....1ST DEFENDANT

UNDI CONSULTING GROUP LIMITED .....2ND DEFENDANT

KIMPHIL KONSULT TANZANIA LIMITED .....3RD DEFENDANT

BANGALIMA ASSOCIATES.....4TH DEFENDANT

JUDGMENT

Date of last order: 16/11/2023
Date of Judgment: 09/02/2024

AGATHO, J.:

The above-named Plaintiffs save for 4th plaintiff are both limited liability companies registered and all are operating the business of construction and consultancy in accordance with the laws of United Republic of Tanzania. Whereas the 1st defendant is aparastatal organization and Social Security Fund established under the laws of Tanzania and the 2nd defendant is chief advisor of the government who has been sued as a necessary party by virtue of being a representative of the public in legal proceedings against the government. By way of the amended plaint filed in this court on 7th October 2022 the above-named plaintiffs have knocked at the door of this court praying for judgment and decree against the defendants jointly and severally for the following orders:

a. Judgement and decree against the 1st defendant be entered for the sum of Tanzania Shilling Eleven Billion Two Hundred and Fifty Million Sixty-Nine Thousand, Thirty-Two Shillings and Sixty-Two cents (TZS. 11,250,069,032.62).
b. That the 1st defendant to pay plaintiffs interest on the principal amount in prayer(a) herein above at commercial rate (30%) from the due dates till judgement
c. That the 1st defendant to pay plaintiffs interest on the principal amount in paragraph (a and b) herein above at courts rate, 9%, from the date of judgement till date decree is satisfied in full.
d. The defendants be condemned to general damages as assessed by this Honourable court.
e. The defendants be condemned to punitive damages as assessed by this Honourable court.
f. Costs of this suit be provided for

g. Any other and further relief(s) the court may deem fit.

Upon being served with the joint amended plaint the Defendants swiftly filed their joint amended written statement of defence disputing plaintiffs' claims and all reliefs contained in the plaint on two grounds. One, thatthe whole arrangement stipulated in the consultancy agreement was frustrated by the dilatoriness of the plaintiffs byacting beyond agreed scope of work. Two, tender action was never achieved for want of completion of stage 4 as required in consultancy agreement and simultaneously raised a counter claim against the defendants jointly and severally praying for judgement and decree on the following orders:

a. The plaintiffs suit be dismissed in its entirety.
b. The plaintiffs pay the 1st defendant the sum of TZS 3,256,613,599.40 being a refund of the monies paid by the 1st defendant to the plaintiffs for work not done successfully.
c. The plaintiffs pay the 1st defendant liquidated damages in terms of paragraph 22of the amended Written Statement of Defence.
d. The plaintiffs pay 1st defendant interest on (b) herein above at the Commercial bank rate as per mercantile custom from the date the monies were paid by the 1st defendant to the plaintiffs for work not done successfully.
e. The plaintiffs pay the 1st defendant interest on 9(b) herein above at the commercial bank rate as per mercantile custom from the date the monies were paid till the date of judgement.
f. The plaintiffs pay 1st defendant interest on the decretal amount at the courts rate of 11% per annum from the date of judgement till when the decree is fully satisfied

g. The plaintiffs pay the defendants costs of and incidentally to the suit and counter claim.

h. Any other relief(s) that the Honourable Court may deem fit.

The brief facts as to the genesis of this suit are imperative to be stated for a better understanding of the nitty-gritty of the suit. It is on the record that plaintiffs were the winners of tender No PAO38/HQ/2010/C/3, which was floated for the provision of architectural consultancy service in respect of the proposed development of PPF Ununio water front project on plots No 16,17 and 18 Ununio, Kinondoni Municipality within the City of Dar-es-Salaam. Facts go that, following the winning of the floated tender,the Board of Trustee of Public Service Social Security Funder (The 1st defendant PSSF) and qD Consult Tanzania Limited and three other Sub Consultants, (Undi Consulting Group Limited, Kimphil Konsult Tanzania Limited and Bangalima Associate)executed consultancy agreement dated 11th December, 2013 for provision of consultancy service.

Further facts were that it was a common understanding among the parties that, the consultancy fees will be charged at the rate of 4.3% of the contract sumin which the preliminary costs of the contract sum were (TZS. 223,631,955,347.86).However, in the course of the implementation of the consultancy agreement, there was an addition of works consequently it escalated the initial approved budget of (TZS. 223,631,955,347.86) to TZS. 601,691,667,300.24 inclusive of VAT. It was common understanding further thatthe implementation of the contract was in two phases, pre-construction contract and administration of construction contract services. However, after completion of the pre-construction contract service the 1st defendant vide the letter dated 13th July 2017 instructed the plaintiffs to halt the

implementation of the project owing to Government directive (force majeure) and after the termination of the contract the plaintiffs sought payments.

It was alleged further that the parties agreed to termination of the agreement, but the plaintiffs claimed for payments of TZS. 7,226,803,519 being unpaid outstanding consultancy fees for completion of the pre-contract services stage of works done before the government directive (force majeure) plus 40% of the escalated scope of work making the total unpaid consultancy fees TZS. 11,250,069,032.62.The efforts by the plaintiffs through their lawyers to have the unpaid consultancy fees paid were in vain. Hence, this suit claiming the prayers as contained in the plaint. On the other hand, the facts as to counter claim were that the defendants cum counter claim plaintiffs claim for refund of TZS. 3,256,613,599.40, the claim which result from failure on the part of the defendants in counter claim to complete contracted works within the pre-agreed completion date and breachof the consultancy agreement for over designing and submission of cost estimates above the approved budget. Besides the plaintiff cum counter claim claims from the defendants in counter claim, payment of liquidated damages as well as costs of this suit.

The Plaintiffs at all material times have been enjoying the legal services of Mr. Deogratias W. Ringia, Mr. Donald Chidowu and Ms. Judith Ulomi, learned advocates, while the defendants have been enjoying the legal services of Messrs. Stanley Kalokola and Francis Wisdom, State Attorneys. Before the hearing started the following issues were framed and agreed upon between the parties for the determination of this suit, namely:

1. Whether the scope of the proposed development of PPF Ununio water front project at Plot No. 16, 17 and 18 in respect of Tender No. PA038/HQ/2010/C/3 changed from time to time and to what extent.
2. If the answer to issue No. 1 is in the affirmative, who was responsible for such changes?
3. Whether the Plaintiffs performed their obligation under the Consultancy Agreement in close consultation and correspondence with the 1st Defendant up to the tendering stage.
4. Whether the Defendant was satisfied with the tender documents which were submitted to it by the Plaintiffs after being approved by the Defendant's Board of Directors.
5. Whether the Plaintiffs fraudulently concealed the engineering estimates and whether the estimates were exaggerated or not.
6. Whether the project was delayed and if yes, who among the parties was responsible for the delay?
7. Whether the termination of the contract by the Defendant was lawful and rightful
8. Whether the letter by PSSSF, that the project would not continue amounted to "FORCE MAJEURE, or frustration of contract.
9. Whether the Defendant is stopped/estopped from claiming liquidated damages based on any cause other than the agreed "FORCE MAJEURE".
10. Whether either party breached the contract before the occurrence of the Force Majeure.
11. Whether the Plaintiffs prepared the detailed designs in accordance with the given approved budget by the Defendant.

12. Whether the Plaintiffs claims are rooted from the actual construction cost of the project following the Consultancy Agreement.

13. To what relief(s) are the parties entitled to?

In a bid to prove their case the plaintiffs called three witnesses the first witness to testify was Mr. **Said Mwanga,** (hereinafter referred to as **"PW1"**). PW1 under affirmation and through his witness statement which was received by this court and adopted as his testimony in chief told the court that, he is the director of the 1st plaintiff who is the lead consultant in the agreement authorized to testify on behalf of the 2nd 3rd and 4th plaintiffs who are sub-consultants in the consultancy agreement. PW1 went on to tell the court that, on 11th December 2013, the 1st defendant and plaintiffs entered into a consultancy agreement in respect of tender No PA038/HQ/2010/C/3 for the proposed development of PPF Ununio water front project at plots No 16,17 and 18 Ununio Kinondoni Municipality, Dar es Salaam.PW1 tendered in evidence the consultancy agreement which was admitted and marked **as exhibit P3**. PW1 went on further telling the court that, the 1st plaintiff being a lead consultant her role among others, was to conceptualize the project from the needs of the client, architectural design, and project management coordinating, supervising the sub-consultants, and communicate with the client. PW1 tendered in evidence the request for proposals for the provision of consultancy services for the proposed construction of the PPF Ununio water front project dated 2.01.2012 in evidence which was admitted and marked as an **exhibitP1.**

PW1 went on narrating that, it was a common understanding of the parties that the initial estimated value of the proposed project as per 1st

defendant's requirements was TZS 223,631,955,357.86, VAT inclusive and the consultancy fees were 4.3% of the contract sum. PW1 tendered in evidence pre-contractual documents and award notification, letter Ref PPF/AC.193/270/01C/47 dated 27th May 2013 which were received and admitted in evidence as **exhibit P2(A).**PW1 further went on narrating that, it was a further common understanding that payments were to be executed upon execution of works as per agreement and as means of compliance with the agreed above terms the following works were executed, which include submission of the inceptions report which encompassed feasibility study report, outline proposal/sketch design, and preliminary cost estimates of the projects, in which consultancy fees were paid as agreed. However, while the plaintiffs were executing the above-mentioned agreed works, the 1stdefendant during presentations and consultative meetings between her and the Plaintiffs kept giving several new requirements. PW1 tendered in evidence letter Ref: No PPF/HB.130/177/01/1 dated 19th September, 2014 which was admitted and marked **as exhibit P2(B).**

According to PW1 new requirements resulted in further adjustments to the scope of work and as a means of accommodating the additional scope of work, three proposals were submitted to 1st defendant for her approval. PW1 further testimony was that upon submission of the three proposals Defendant opted for the first option. PW1 went on testifying that after approval of the selected alternative, the client gave the consultants several new changing requirements which changed the scope of the project from its original scope. PW1 testified that the changing scope of the project to meet the changing requirements of the 1stdefendants was

signified by the letter dated 31st July 2015 which was referring to the meeting held on 28th July2015 at PPF Board room. PW1 testified further that the said letter indicated what was approved by the board of trustees. PW1 tendered in evidence letter with Ref No. PPF/HB.130/194/08/35 dated 31st July 2015 which was admitted and marked **as exhibit P2(C).**

Testifying on the contents of the letter and proving that the board of trustees approved the changed scope of work, PW1 told the court that, the said letter clearly states that a floating hotel cannot be omitted without the approval of the Board of Trustees which the Board had at a point in time approved its addition to the initial design. PW1 tendered in evidence Letter Ref qD /PPF/UNUNIO/7/2015/199 in evidence which was admitted and marked as **exhibit P2(M)**.PW1 went on with his testimony that the Board of Trustees after scrutiny of the tender documents prepared by each consultant and submitted to the 1st defendant the scope of the project hadbeen changed as well as the value of the project from the initial budge estimated to TZS. 601,691,667,300.24/= VAT inclusive, before review and the client (1st defendant) was satisfied with the submitted tender documents, and subsequently, she made public advertisement of the said tender for submission by bidders. PW1 tendered in evidence the letter Ref: No QD/PPF-UNUNIO /02/2016/52 and letter Ref: PPF/HB.130/194/08/64 which was admitted and marked as **exhibit P2(J)** and **exhibit P2(K) collectively**.

Testifying further on completion of stage four, PW1 told the court thata pre-bidwas held for example on 5thJune 2015 pre-bid meeting was held and the1stdefendant invited all bidders and even PW1 attended themeeting. He added thatthe attendees of the meeting signed the

attendance sheet which was attached to the minutes of the meeting. PW1 told the court that, the minutes of the meeting were signed by the Chairman Eng. Marko Kapinga and Secretary Mr. Gervas Huka from the 4th plaintiff herein. PW1 reasoned that in terms of clause 6.3.3 of the consultancy agreement the plaintiffs had completed the tender action. After all, the bill of Quantities and project planning had been submitted and approvedby the 1st defendant. PW1 went on testifying that upon completing the tender action, the 1st defendant requested the plaintiff to apply for a Building Permit to Kinondoni Municipal Council, and the same permit was applied, and necessary Municipal fees were paid to the tune of TZS. 85,645,000 for the said purpose as a reimbursable expense but to date the 1st defendant has yet to reimburse the plaintiffs. PW1 tendered in evidence letter with Ref No. qD /PPF-Ununio/08/2015/256 which was admitted and marked **as exhibit P2(D) collectively**. PW1 continued to tell the court that, the 1st plaintiff being a lead consultant was requested to evaluate and advise the 1st defendant on a clerk of works, and the same the 1st plaintiff acted accordingly to the request and later on a list of proposed candidates for the appointment of the said Clerk of Works was placed before PW1.

According to him all these acts prove that the project was ready for the construction stage and plaintiffs were entitled to payments of 40% of the consultancy fees because the tender action had been completed. PW1 tendered in evidence letter Ref PPF/HB.130/194/08/54 dated 31st August 2017 which was received and admitted in evidence **as exhibitP2(E)**.It was PW1'sfurther testimony that the plaintiffs believed that the tender action had been completed and that is why they raised and submitted

proforma invoice No.0019 dated 25/7/2016 for payments of the consultancy fees.PW1 tendered in evidence proforma invoice with Ref No: qD/PPF-UNUNIO/07/2016/280 dated 25th July 2016 which was admitted and marked as **exhibitP2(N)**. However, he was quick to point out that later on the said pro-forma invoice was replaced with new pro-forma invoice No .0021 dated 12.8.2016 with the amount of TZS. 3,846,469, 641 becauseupon ascertaining the real costs for the project, the 1stdefendant instructed the plaintiffs to scale down the project to meet its internal allowable investment threshold which according to PW1 was an extra assignment and an indication that stage four was completed. It was further testimony of PW1 that the Plaintiffs for the second time carried out the scaling down as required by the 1st defendant and successfully submitted scaled-down tender documents to the defendant which were accepted and awaited approval. PW1 tendered in evidence letter Ref. No qD/PPF/UNUNIO/10/2015/52 which was admitted and marked **as exhibit P2(I)**. PW1 went on telling the court that just before bids were to be re-issued to the short-listed firms from the previous initial completed tender action, the 1st Defendant by a letter Ref. No. PPF/HB/130/194/08B/25 dated 13th July 2016, instructed the plaintiffs to halt further implementation of the project due to government directive on investment. PW1 went on to tell the court that, following that directive, the defendant invited the plaintiffs to discuss a way forward for costs incurred.

PW1 told the court that following that letter on the 12th day of August 2016 the meeting was conducted and the parties mutually agreed to the termination of the consultancy agreement. PW1 tendered in evidence the minutes of the meeting held on 12.8.2016 which was admitted and marked

as exhibitP4. PW1 told the court further that it was agreed in the said meeting that the consultants' payments for services done up to the date of notice stopping services shall be made as per the contract. PW1 tendered in evidence letter with Ref. No. PPF/HB/130/194/08B/25 dated 13th July 2016 and Ref: No PPF/HB.130/194/08B/15 dated 13.6.2016 which was admitted and marked **as exhibit P2(G)**and **exhibit P2(F).**

PW1 went on telling the court following the outcome of the meeting the plaintiffs issued the proforma invoices for the work done before force majeure but the 1st Defendant did not honour the said invoice and vide its letter Ref No. PPF/HB. 130/194/08B/47 dated 23rd December 2016 the 1st defendant expressly refused to settle the amount due on the ground that they have been discharged from the liability because of force majeure. PW1 tendered in evidence letter Ref: qD/PPF-UNUNIO/07/2016 and letter Ref: No.PPF/HB.130/194/08B/47 which were admitted **as exhibit P2(H)** and **exhibitP6.** PW1 went on telling the court that the unjustified refusal by the defendant to pay them the 40% for work donehas occasioned great damages and inconvenience in terms of time, operational, and financial hardships, including non-payment of our staff, sub-consultants, taxes, and inconveniences caused by the Tanzania Revenue Authority, payments to associates whom they had engaged in the process and locking out their working capital. That is why they are praying for payments of **TZS. 11,250,069,032.62**.

Testifying on the counterclaim PW1 told the court that, they are denying the plaintiffs' in the counter claim on the ground that there were no delays on the part of the defendants in the counterclaim. If there were any imminent delays, the defendant could have resorted to a contractual

mechanism to remedy the situation up to the level of imposing liquidated damages as per the contract. PW1 testified further that any issues on delays were discussed and settled, and parties moved on to the next stage as such claims on delays are an afterthought geared to neutralize plaintiffs'substantive claim for unpaid consultancy fees.

Testifying on the allegation of inflating the budget, it was PW1's testimony that, the said allegationis yet another afterthought aimed at neutralizing the plaintiff's claim as they had never been raised in any prior communication also the final project costs could have been that which could have been approved by the 1st defendant because at the time the consultancy agreement was signed it was based on preliminary project estimates costs. He further denied the allegation on the ground that in adjustments to the scope of work, three proposals were placed before the 1st defendant and the 1st defendant upon its internal considerations opted for one of the alternatives, thus changing of scope of the project from its original scope. Further testimony of PW1 was that there was never an issue of concealment of engineering estimates as the alleged. The plaintiffs complied with all the requirements under the contract and the final project estimated cost of TZS. 601,691,667,300.24 VAT inclusive which was issued based on the final adjusted and approved detailed designs in the scope of works in line with the 1st Defendants' changing requirements. However, all invoices raised, and payments made were based on initial estimates of TZS. 189,518,606,227, exclusive of VAT. PW1 added that all works submitted to the 1st defendant from the plaintiffs were further scrutinized by an independent team of professionals who were specifically hired to advise the 1st defendant on delivery and compliance by the plaintiffs after

every stage. As such the 1st defendant is not entitled to the claimed sum of TZS 3,256,613,599.40 as claimed because shehad never during the implementation of the contract claimed refund of any monies lawful and rightful paid to plaintiffs nor liquidated damages save only for (TZS. 40,000,000/=) as costs for the 2nd valuation team as officers of the 1st defendant could not make a double request for Audit purposes. PW1 tendered in evidence letter Ref PPF/HB.130/194/08B/14 dated 08th June 2016 which was admitted and marked **as exhibit P2(I)**. PW1 denied the allegation that the said amount was a penalty as wrongly stated by the 1st defendant in her counter claim. PW1 further testified that the Plaintiffs discharged their obligations under the contract and submitted tender documents to the 1st defendant and the same were approved and advertised. According to PW1, the obligation was fully discharged as per the contract.

Under cross-examination by Mr. Kalokola, State Attorney PW1 told the court that the work was required to be done within 20 weeks after 14 days of the signing of the contract. PW1 when pressed intoquestions told the court that, the costs of the project were not known but the requirements were known which is why after preliminary design the plaintiffs submitted three alternative costs to the 1st defendant for approval to wit, one TZS. 189 billion VAT exclusive, Two, TZS. 200 billion VAT exclusive and TZS. 300 billion. PW1 tested further with questions admitted to having been paid 50% of the preliminary works as shown inparagraph 6 of his witness statement. PW1, when referring to paragraph 7 of his witness statement told the court that, the client was giving several requirements that led to an adjustment of the scope of work which

affected the three proposed alternatives. PW1, asked to read paragraph 8 of the witness statement read it and told the court that, the changing requirements led to an increase in cost to TZS.601,691,667,300.24 VAT inclusive. However, he was quick to point out that the consultants were allowed to add any additional design but within the approved budget. PW1 when asked to read paragraph 10 of the witness statement read it and told the court that they had not been paid 40% of consultancy fees after completion of tender action, submission of bill of qualities, and project planning. However, he admitted the draft contract documents for payments of 40% were yet to be prepared but there were exhibits P2(J), exhibit P2(I) and exhibit P2(K). PW1 asked about exhibit P2(I) identified it and told the court that the plaintiffs did not receive any approval but continued with work. PW1 when asked about exhibit P2(J),he stated that they had not tendered the tender documents because they submitted them to the 1st defendant. PW1 when questioned on the submission letter responded that he had not tendered it because it is a photocopy. PW1 asked about a refund of TZS. 85,645,000/=,he admitted that the amount was not pleaded. PW1 facing more questions responded that when the project was halted 20 weeks had elapsed and the plaintiffs were out of time. Responding to a question on scaling down the project, PW1 stated that the 1st defendant instructed the plaintiffs to scale down the project to meet internally allowable investment thresholds which is extra work. However, he admitted that there was no contract to that effect or addendum accommodating the extra work. PW1 when question further he admitted that it was true the government action was force majeure. However, he was quick to point out that even if there were force majeure

plaintiffs were entitled to payments for works completed before force majeure.

Under re-examination by Mr. Ringia, Advocate for plaintiffs, PW1 told the court that there were changes of requirements from the client which led to the additional scope of work. For example, after the presentation there was an addition of a floating hotel. PW1 probed about the fees, he told the court that, they had been paid two installments of 15% of TZS. 189 billion VAT exclusive and 20% of the total initial costs of TZS. 189 billion VAT exclusive, 40% remained unpaid which is TZS. 7,226,803,519 VAT inclusive and the whole second stage was not paid at all. PW1 when asked about the stage of work he responded that the plaintiffs could not go to the stage of construction because after evaluation the costs were seen to be high due to the investment threshold of the client which is why plaintiffs were asked to do rescoping of the project to ensure that it does not exceed the investment threshold set by BOT which was new requirement. PW1 when further questioned on extra works told the court that exhibit P3 (a photocopy of the consultancy agreement between the Plaintiffs and the 1st defendant dated 11/12/2013) includes extra works and there is no clause that if there is extra work the parties must sign another contract.

Under re-examination by Mr. Chidowu advocate for plaintiffs, PW1 told the court that the plaintiffs are claiming payments of TZS. 11 billion for services rendered and as per computation given in this court.

The next witness the plaintiffs was one **Philip Makota** (hereinafter referred to as **"PW2"**). PW2 under oath and through his witness statement which was received by this court and adopted as his testimony during

examination in chief told the court that, he is a Chief Executive Officer of UNDI Consulting Group Limited the 2nd Plaintiff herein, a consultant in an agreement who has been authorized to testify on behalf of the 1st, 3rd, and 4th plaintiffs, Co-consultants in the said agreement which is subject of this case. PW2 went on to tell the court that his major roles were Civil/ Structural, Electrical, and Environmental Engineering Services. The rest of the testimony of PW2 is a replica of PW1 on the performance of the consultancy agreement between the 1stdefendant and plaintiffs.

Under cross-examination by Mr. Kalokola State Attorney PW2 told the court that the initial value was TZS 223 billion VAT inclusive which was from submission placed before the 1st defendant. However, there were some changes to TZS 275 billion. Asked on the contract sum, PW2told the court that the sum of the contract was not known it could have been known if the client could have entered into a contract with contractors. On the payments done, PW2 stated that, the payments of 35% were made from the initial estimated of project value of TZS.223 billion. PW2 when referred to exhibit P3 (consultancy agreement) told the court that the works involved 4 stages therefore the formula could be approved estimated value of the project times 4.3% times 75% less 35% payment already done. However, he was quick to point out that the formula is not in the contract.PW2 went on telling the court that invoice No. 0019 was for TZS.7,226,803,919 which was withdrawn and replaced with invoice No 0021 for TZS 3,846,469,641 which was balance equivalent to 40% of the consultancy. PW2, when asked about the claim of 40% stated that it is a claim emanating from stage 4 which is the preparation of bid documents and procurement because stages 1 to 3 were paid.

When asked about added requirements, he told the court that the added work was a nightclub, and floating hotel block. PW2, when asked to read paragraphs two and six of his witness statement he read them and told the court that it was the client who introduced the new works. PW2 when asked about delay stated that the 20 weeks from 11thDecember, 2013 which ended on 10th May, 2014. PW2, when asked to read paragraph 10 of his witness statement read it and told the court that, on one instance they delayed. PW2 when referred to annexture QD-7 identified it and told the court that he does notrecall if the plaintiffs disputed or objected if they submitted engineering estimate that was above the approved budget.

During re- examination by Mr. Chidowu Advocate for plaintiff PW2 told the court that, he does recall the plaintiffs submitted the budget of 601 billion but the client approved about 242 billion VAT inclusive, but the client added some of the items which was through the meeting, the item added were retaining wall, parking under shopping mall and extension of parking garage.

Under re-examination by Mr. Ringia Advocate for plaintiff, PW2 testified that the plaintiffs' claim is based on amended plaint and his witness statement. PW2 when referred to letter exhibit P2(C) he stated that the approved amount was about TZS 242 billion and as per the letters dated 31.7.2015 and 13.7.2015 the amount submitted was higher than the approved budget. As for the actions under stage 4, PW2, testified that, under stage 4 the plaintiffs were supposed to submit architectural drawings, Civil structural engineering drawings, building services and Bill of Quantities.

The next witness was one **Mussa Saidi Kimaka** (hereinafter referred to as **"PW3"**). PW3 under affirmation and through his witness statement which was received by this court and adopted as his testimony in chief told the court that, he is a Director of KIMPHIL Konsult Tanzania Limited, the 3rd plaintiff herein, a consultant in an agreement who has been authorized to testify on behalf of the 1st, 2nd, and 4th plaintiffs, Co-consultants in the said agreement which is subject of this case. PW3 went on to tell the court that his major roles were Mechanical Engineering Services. The rest of the testimony of PW3 is a replica of PW1 and PW2 on the performance of the consultancy agreement between the 1st defendant and plaintiffs.

Under cross-examination by Mr. Kalokola State Attorney PW3 told the court that there are three plaintiffs in this case. PW3 when referred to exhibit P3 read it and told the court that, the preparation of tender document, detailed design and tender documentation that is works of stage 4 according to page 11 of clause 5.4.25-5.4.29 of consultancy agreement and these works were to be completed within 20 weeks. Regarding the plaintiffs claim, it was the testimony of PW3that the plaintiffs are claiming for TZS.7.2 billion, which is the outstanding sum stated under para 8 of his witness statement. PW3 facing more questions he testified that the claim of TZS 11.2 billion includes 40% of the original scope of work and additional work because there were two tender actions.The first for stage 1, and the second tender action was for additional work that came after the first tender action. According to him TZS 11.2 billion also includes interest for the delayed payment from the time the invoice was issued to the time the case was filed in court. He also

conceded that the additional works and interest have not been mentioned or pleaded in the amended plaint.

Asked on the claim for refund of municipality fees for building permit of TZS 85,645,000/=, the witness admitted while referring to paragraph 11 of the witness statement that the said amount is not part of the claims in the amended plaint.

PW3 when referred to exhibit P2(N) told the court that the invoice of TZS 7.2 billion was withdrawn and was replaced with invoice for TZS 3.8 billion which is equivalent to 40% of the consultancy fee due.Yet he said that the amount claimed is TZS 7.2 billion. And that is the amount the court should consider not TZS 3.8 billion.

PW3, when referred to the letter dated 27.7.2015 identified it and told the court that they were informing the client that they have introduced floating hotel and night club. However, he was quick to state that it is the clientwho introduced them. He added that the plaintiffs' letter was replied to by client (the 1st defendant) and the said letter was a series of conversations.

Under re -examination by Mr. Chidowu advocate for plaintiff, PW3 told the court that, the 4th plaintiff is deceased. When more questions were directed to him, PW3 told the court that the tender action had two stages. On the first stage document were prepared and the defendant called for bids and the bidders submitted their bid while the consultants were involved in pre bid meeting and evaluation was done. On the second stage there was a request to scale down the scope of the work under the completed bid. Pushed with a question on the work stages, PW3 insisted that there were four stages of work that plaintiff was supposed to perform,

first feasibility study and inception, second was preliminary design, third detailed design and fourth was bills of quantities and tender documentation. PW3 when questioned further he told the court thatthey prepared draft contract and necessary drawings, and the 1st defendant had the drawings. PW3 went on telling the court that the remaining claim for the 1st tender was TZS. 7.2billion.Thereafter, the 1st defendant asked the plaintiffs to scale down the costs which led to an increase of fee of 40% which is 4.7 billion plus 20%.

Under re-examination by Mr. Ringia advocate for plaintiff PW3 told the court that force majeure occurred after completion of the first tender action and before completion of the second tender action. That marked the end plaintiffs' case and the same was marked closed.

In defence, the defendants were defendedby one witness, **Marco Benedict Kapinga** (hereinafter referred to as **"DW 1"**). DW1 under oath and through his witness statement adopted in these proceedings as his testimony during examination in chief told the court that, he is as an employee of the Public Service Social Security Fund (PSSSF), herein to be referred to as **"the Fund"** which replaced the defunct PPF Pensions Fund, and he is testifying in the capacity as the Project Implementation Manager. He went on to tell the court that in 2008 he was employed by the defunct PPF Pension Fund in the position of Principal Engineer and thereafter in 2014 he was appointed as Project Implementation Manager (PIM) the position he holds to date. DW1 went on telling the court that among his duties is toadvise the employer on all matters relating to project implementation activities, supervisionof construction projects, maintenance activities and participate in pre-contract processes.

It was DW1's evidence that in 2012 the defunct PPF Pension Fund approved and directed the management to undertake and implement the construction of Mixed-Use Facilities at Ununio Area on Plot No. 16, 17, and 18 owned by the Fund. He was involved in the proposed project from the initial stage as the appointed in-house Project Manager of the Fund. DW1 told the court that his duties in the referred project included but were not limited to, participating in the development of the project concept, preparation of technical project inputs, review of the construction documents, participating in the evaluation process, and adviser to the Fund on the implementation and execution of the project including certification of the payments and project quality control. It was DW1's testimony that on 11th December 2013, the defunct PPF Pensions Fund entered into a consultancy agreement with the **M/S qD Consult (T) Ltd** in association with **Undi Consulting Group Limited, Kimphil Konsult Tanzania Limited and Bangalima Associates** for consultancy services in the proposed development of PPF-UNUNIO Water front project on Plot No. 16, 17 and 18 in Ununio area within Kinondoni District in Dar es Salaam. Testifying on the implementation of the agreement, DW1 told the court that the implementation of the proposed project started immediately after the signing of the agreement by the parties on 11th December 2013 in which the undersigned assignments were to be implemented into two phases. That is pre-construction contract services and administration of construction contract services. Testifying further DW1 told the court that the timeframe for execution and completion of the pre-construction contract services was 20 weeks commencing from the date of signing of the consultancy agreement.

Further testimony of DW1was that the pre-construction contract services had four stages that is, the first stage: Inception (Site Feasibility Study), the second stage: Preliminary Design, the third stage: Preparation of Detailed Design and fourth stages: Preparation of bidding documents, all these stages were to be completed not later than 11th May 2014. However, up to 11th May 2014, the Consultants had only managed to submit the inception report and preliminary design, which contained preliminary costestimates with three options, that is **TZS 189, 518, 660, 227, TZS 329,059,024,198.28** and **TZS 257,105, 746,171.4** respectively VAT exclusive. These proposals are reflected in a letter with Ref No. qD/PPF-UNUNIO/RFP/05/2014/75 dated 8th May 2014 which was later admitted as exhibit **D2(ii).**DW1 went on with his testimony that upon submission of the said options, the Fund opted and approved the first option of **TZS. 189,518,660,227 VAT exclusive** which is equal to **TZS. 23, 631,955,347.86 VAT** inclusive. According to DW1 up to11th May 2014 which was the end of the pre-construction contract period, the Consultant had managed to execute the assignments under stages one and two only contrary to the agreed terms of the Consultancy Agreement in particular clause 5.4.10 to 5.4.29. DW1 admitted that the Consultant performed the assignments under stage three of the Consultancy Agreement and submitted the detailed design which had no revised cost estimates as per Clause 5.4.21 and 5.4.24 of the said Agreement. Hence, the initial costs estimate approved by the Fund remained to be TZS 223,631,955,347.86 VAT inclusive and were paid for the said work based on the initial costs estimate approved by the Fund. It suffices at this point to state that this court disassociate itself with this testimony which is also reflected by the

defendants' submission that the consultants did not submit stage 3 revised cost estimates as that is half-truth. They consultants did submit revised estimates as exhibits P2(C) and D1(H) show. And that is why the cost estimates of TZS 242 billion were approved by the client. However, the subsequent cost estimates e.g., TZS 602 billion were not approved.

Testifying on work to be carried under stage four, DW1 told the court that in terms of Clause 5.4.25 to 5.4. 29 of the Consultancy Agreement, the Consultant was required to perform the following works Prepare Construction documents and assist the Client in preparation of the bidding documents. Coordinating production of information that is to say complete construction documents, assess the tenders submitted, negotiate the rate and prices and advise the Client on the award of the Contract, Review the costing and programme, and advise the Client of any adjustments to previous preliminary estimates of construction costs and Prepare draft Contract documents based on agreed price to be finalized and signed by the Client; issue contract document including necessary drawings to the successful contractor. DW1 went on telling the court that on payments for stage works, that for the consultant to have been paid in accordance with Clause 6.3.2 of the Consultancy Agreement the following must have been completed: tender action, submission to and approval by the Client of the Bills of Quantities, and Project Planning of the successful bidder. Butin his view the Consultants performed only assignments stated in paragraph 12(a) and (b) of the witness statement, thus unqualified for the payment under Clause 6.3.2 of the Consultancy Agreement that was for stage 4.

DW1 testified that in the course of implementation, defendants (plaintiffs in counterclaim) raised concerns on the delay of execution and

submission of the undersigned assignments by the Consultants which contractually entitles the Fund to liquidated damages for the period of delay as stated in Clause 7.8.3 of the Consultancy Agreement. But on this point the court wonders if this can be the case even where the 1st defendant did not rescind the contract after having observed the consultants' delays that could have amounted to breach of contract? As will unfold in due course, it is the court's view that unless the 1st defendant repudiated/rescinded the contract, she will be estopped from raising the counter claim against breach that she treated as not a fundamental breach. Ironically, the Consultants acknowledged the said delays and promised to complete the assignments. Back to the testimony of DW1, he testified further that despite the acknowledgement of the delay and the plaintiffs accepted to rectify it, the delay had forced parties toreschedule the assignment. The court considers this as confirmation that the 1st defendant ratified the delayed works. DW1 went on to tell the court that under stage 2 the Consultants were required to prepare the initial design, calculate the preliminary cost estimates and at stage 3 revise the cost estimate without exceeding the budget limit as stated by the Client and both works were to be submitted to the Client for the approval as per Clause 5.4.16, 5.4.17, 5.4.21 and 5.4.24 of the Consultancy Agreement (exhibit P3).

It was DW1's testimony that upon completion of the initial stage, the Consultant claimed and was paid the consultancy fees based on **TZS 223, 631,955,347.86 VAT** inclusive being the estimated approved budget by the Fund subject to adjustment if any upon obtaining actual construction costs. DW1 added that theparties had never at any point in time departed

from the agreed estimated costs of **TZS 223,631,955,347.86 VAT** inclusive because the Consultancy Agreement did not allow for any adjustment of costs beyond the approved budget by the Client as shown under Clause **5.4.21** of the Agreement.

However, DW1 admitted that upon submission of the tender documents the 1st plaintiff in counterclaim proceeded to float the tender to the short listed bidders in which the bidders submitted their bids and in circumstance, the said bids were opened on 25th June, 2015 at 10:00 a.m. In this court's view this is another confirmation that the 1st defendant did not rescind the contract instead she ratified the plaintiffs' completed work. However, DW1 was quick to point out that the tender didnot have any revised cost estimates. She went on telling the court that on 1st July 2015, the Fund received a letter from the Consultant submitting the cost estimates for lots 1 to 4 all valued at **TZS 601,691,667,468.24** VAT inclusive as such upon valuation on 22nd July 2015 the evaluation report indicated bid prices highercosts than original estimates of **TZS 223,631,955,347.86 VAT** inclusive. In the circumstance, and visibly seen on exhibit D1(I) – a letter dated 12th October 2015 issued by the 1st defendant to bidder informing them about tender cancellation. DW1 testified that all tenders were canceledin accordance with Section 59(2)(d) of the Public Procurement Act, 2011 as amended. This in the court's view is intriguing, and the court asked itself was such tender cancellation allowed by the consultancy agreement? Impliedly that was within the mandates of the client. However, we ask againg, did the tender cancellation occur before force majeure? The answer here is yes, while tender cancellation occurred on 12th October 2015, the force majeure was communicated to

the plaintiffs on 13th July 2016. But was the cancellation due to plaintiffs' high engineering estimates or due to bidders' high quotation of project cost? Again, the defendants have submitted that there is no evidence that the increased engineering estimates and BoQs as presented by the plaintiffs were approved by the client. But the defendants failed to tell the court how come the plaintiffs submitted tender documents and eventually the 1st defendant advertised the tender that was later cancelled? Can the tender be advertised if the consultants have not prepared and submitted tender documents? Could the tender be advertised before the tender documents submitted by the plaintiffs have not been approved? These questions will be answered in due course. Notably, exhibit P2(L) – a letter dated 5th October 2015 (three days after tender cancellation) the plaintiffs wrote to the 1st defendant. In the letter the plaintiffs requested approval of the pricedBOQ and final Bid Documents was received by the 1st defendant. Moreover, there is exhibit D1 (Q) – a letter dated 15th October 2015 titled submission of Civil and structural drawings for final review and tendering documents. That letter too was received by the 1st defendant. These letters imply that after cancellation of the tender, the plaintiffs were asked to rescope the work and revise the tender documents and resubmit them. Exhibit P2(J) a letter dated 11th February 2016 and exhibit D1(R) a letter dated 14th April 2016 from the 1st plaintiff to the 1st defendant titled submission of tender documents for PPF Ununio project are loud that the plaintiffs re-worked and submitted tender documents to the client once again.

DW1 further testimony was that following the evaluation report the plaintiffs in the counter claim wrote a letter(exhibit D3) inviting the

Consultant to attend a meeting which was scheduled on 14th July 2015to discuss issues pertaining Consultant's estimates of **TZS 601,691,667,468.24** VAT inclusive which they considered to be high compared to what the Consultants presented in the feasibility study and the amount approved by the Fund's Board of Trustees.DW1 narrated thaton 14th July 2015,the meeting was held as scheduled and the issue of higher costs among others was discussed in the circumstance, the consultants admitted having made the mistake of going beyond the agreed terms and conditions in particular the approved budget under the consultancy agreement. DW1 testified that following the meeting of 14th July 2015 the Consultants revisited among others; the Drawings, Bill of Quantities, Cost estimates, and tender documents as agreed by the parties to be within the approved budget of **TZS. 223, 631,955,347.86 VAT** inclusive and continued to redo the work in accordance with the given terms and approved budget. Thereafter the Consultants among others, submitted the following, Cost estimates via a letter with Ref. qD/PFF-UNUNIO/08/2015/280 dated 28th August 2015, bid documents for final review and final architectural drawings via a letter with Ref. qD/PFF-UNUNIO/10/2015/51 dated 5th October 2015, Civil and structural drawings for final review and tendering via a letter with Ref. qD/PFF-UNUNIO/10/2015/77 dated 15th October 2015, Tender documents for lot 1-4 via letter with Ref. qD/PFF- UNUNIO/04/2016/116 dated 14th April 2016. However, DW1 narrated further that consultants acts of revisiting the workhave occasioned unnecessary costs to the plaintiffs in the counter claim including the costs for the Evaluation Committee set to evaluate and observing the admitted mistakes by the Consultants as such the

Consultants were notified and agreed to bear the incurred costs of the Evaluation Committee amounting to **TZS 40,299,300.00** which money were to be deducted from the Consultancy fee.

DW1 went on to testify that the consultants delayed in completion of work as a result of the delay the consultants were later caught by the *"Force Majeure"* of 9th May 2016 when the Government prohibited the implementation of the project which act fell within Clause 7.9.1 of the Consultancy Agreement. Although the issue of force majeure succinctly treated herein below, at this juncture the court noted that force majeure occurred after cancellation of the first tender due to escalation of project cost that was estimated to be **TZS 601,691,667,468.24** VAT inclusive which was higher compared to the approved budget; and consultants' revised or did the redothe work. DW1's further testimony was that the *Force Majeure* event was communicated to the Consultants who accepted its occurrence and accepted that the *"Force Majeure"* released the parties from their respective obligations under the Consultancy Agreement. He thus tendered exhibit D1 (S) (letter from the 1st defendant to 1st plaintiff notifying her about suspension of the project, dated 23rd December 2016) and exhibit D2 IV a reply letter from 1st plaintiff to the 1st defendant titled Suspension of implementation of the project dated 1st February 2017.

DW1 also stated that it was a common understanding of the parties as provided under Clause 7.9.1 of the Consultancy Agreement that in case of *Force Majeure* occurrence, either party can claim for costs of the already rendered services provided that he is not in default of its obligations under the Agreement. At this point the court wonders when is the default counted? If a party has waived the right to rescind the contract can that

party counter claim the money paid? On the other hand, Can a party that has delayed in completing the project be awarded general and punitive damages?. Generally, and as rightly held in **M/S Tax Plan Associates Ltd v M/S American International Development Corporation 200 Ltd [2015] T.L.R. 506** compensation for performance of contract is available if there is proof that a plaintiff has performed his contractual obligation or work and the same was accepted by the defendant. The work was not done gratuitously.

Consistent with exhibit D1(S) and according to DW1 since consultants were in breach of the consultancy agreement, they are not entitled to any payment arising from or connected to the Consultancy Agreement. And in turn the 1st defendant counter claim that she is entitled to the liquidated damages under Clause 7.9.1 of the Agreement and Regulation 322(2) of the Public Procurement Regulation, 2013 as amended which iscalculated at the rate of one-tenth of one percent of the cost of the unperformed portion for every day of delay which is equivalent to 0.10% of the estimated cost of **TZS. 223, 631,955,347.86 VAT** inclusive for the entire number of days in default which according to DW1 is 701 days reckoned from **11th May 2014** to **14th April 2016** when the Consultant resubmitted the Tender Documents in which the total claim is **TZS 2,236,319, 553.48. DW1** added further that the consultantsare obliged to refund the amount of **TZS. 3,256,613,599.40** (VAT Inclusive) paid by the 1st plaintiff in the counter claim due to breach of the Consultancy Agreement.

In proof of the above facts, dW1 tendered in evidence the following exhibits, namely: -

a. consultancy agreement dated 11, November, 2023 as exhibit D1(A)

Letter Ref. qD/PPF-UNUNIO/RFP/12/2014/180 as exhibit D1(B),

Letter Ref. qD/PPF-UNUNIO/RFP/07/2014/145 as exhibit D1(C),

Under cross-examination by Mr. Ringia Advocate for the plaintiffs, DW1 told the court that he is not a member of the Board of Trustees of PSSSF but a project manager implementation. On completion of tender documentation, DW1 stated that the tender was advertisedand evaluated because all documentation was ready. DW1 when pinned with more questions told the court that the initial approved budget was about TZS.223 billion VAT inclusive and if VAT exclusive it was TZS. 187 billion. DW1 when referred to exhibit P2(C) read it and told the court that the approved budget was approximately TZS 242 billion which indicates that the budget was approved. DW1 when asked to read paragraph 23 of the amended witness statement read it and told the court that the fund issued instruction to consultants to revise the design and costs estimated beyond the approved budget of TZS. 223,631,955,347.86. Squeezed with more questions, DW1 testified that, the consultants were instructed to redo the work, however, stage 4 was not completed. DW1 when shown exhibit P4 recognized it and told the court that, it was agreed that stoppage is governed by a force majeure clause and the consultants payments for the services done until the date of the notice stopping the service shall be made as per the contract clause 6.2.1 based on original estimated used by the client. Responding to a question about invoices, DW1 testifiedthat the proforma invoice (exhibit P2(N)) was withdrawn. He added that the amount in the invoice was not the amount for which the

consultants were supposed to be paid for the work done. DW1 when shown exhibit P2(I) recognized it and told the court that TZS 40 million was for recovery because PPF incurred costs for tender action which was not completed. It was for tender evaluation committee expenses. Probed on the amount counter claimed, DW1 stated that in the counterclaimthe 1st plaintiff is claiming for payments of TZS.3.2 being money paid to consultants for work done unsuccessfully and in terms of contract clause 7.12.2. However, he was quick to point out that the money could not be certified.

Under further cross-examination by Mr. Chidowu DW1 told the court that the consultants were supposed to be paid in terms of percentage and the payments were to be effected within 30 days of the presentation of an interim certificate.

Under re-examination by Kalokola State Attorney DW1 told the court that he denied or rejected the contents of the minutes dated 29.7.2015. He went on clarifying that, the entire project was to cost TZS. 242 billion but the tender was incomplete because for the tender to be completed there must be a contractor appointed for construction based on the documents issued and the approved budget. Examined further, DW1 admitted that the mode of payment was provided under clause 6.3.2 of the agreement.

That marked the end of the defence case and the same was marked closed. The learned advocated for parties prayed to exercise their rights under rule 66(1) of this court Rules to file final closing submissions and the same were granted and the submissions were duly filed. I have, as well, considered their closing submissions in this judgment. I am indeed grateful

for the submissions made by the learned counselfor the parties. Their industry while hearing of this case is appreciated. It is worth noting that in the present suit, all parties herein agree that, their primary relationship was premised on Exhibit P3 which is also exhibit D1(A) consultancy agreement which they themselves voluntarily signed. What divides the parties, however, is whether each of them adhered and honoured the terms governing their contractual relationship. Reading from the pleadings and their testimonies in chief, both parties trade allegations of breach of the underlying commitments forming the bedrock of their contractual relationship. That being in mind, it is high time to answer the 13 issues raised.

The first issue was that, *whether the scope of the proposed development of the PPF Ununio water front project at Plot No. 16, 17, and 18 in respect of Tender No. PA038/HQ/2010/C/3 changed from time to time and to what extent.* The learned counsel for the plaintiff submitted that as per a letter dated 19th September 2014, the first approval was TZS. 223,631,955,347.86, the second approval was a letter dated 31st July 2015 which referred to the meeting dated 28th July 2015 the approved budget was TZS. 242,463,270,400 as well as the project concept as evidenced by exhibit P2(C) and the letter dated 25th July 2016 which refers to 3rd approval on that regard and according to the plaintiff's nothing was acted by the plaintiffs contrary to terms and conditions of the contract. On the other hand, the defendants submitted that the response to the first issue is in the affirmative and that the extent of changes were in according to approvals by the 1st Defendant as evidenced by the letters of approvals from the 1st Defendant. They referred to **exhibit P2(B),** the letter of 19th

September 2014, that referred to, inter alia, on fees of 15% of 4.3% of the preliminary construction costs of **TZS 223,631,955,347.86 (VAT inclusive)** being part payment of the preliminary contract fees based on the preliminary construction costs. Thus this was the 1st approval. Another evidence is **exhibit P2(C),** the 2nd letter is dated 31st July, 2015, referring to a meeting of 28th July, 2015 at PPF Board Room where the 1st Defendant approved, for the second time the sum of **TZS 242,463,270,400/= (VAT exclusive),** as well as the approval of project concepts. The plaintiffs went on submitting that **exhibit P2(C)** insisted that any amendment of the approved concepts had to be made by the 1st Defendant. It was further submission of the plaintiffs that the contract between the parties provided under clause 5.3.2, thus: "*The Consultants shall act on behalf of the Client in the matter set out or implied in the Consultants' appointment; the Consultants shall obtain the authority of the Client before initiating any Service or Work stage*".

The plaintiffs continued submittingon the changes by referring to the 3rd Letter dated 25th July, 2016 on claim for fees. The letter refers to the 3rd and operative Approved Budget, as at Force majeure event of around **TZS** 275 billion-VAT exclusive, that upon being shown this document, DW-1 recognized it as a document from the 1st Defendant. (See pages 60 and 61 of the Court proceedings and Court noted the contradiction).

The first issue was *whether the scope of the proposed development of PPF Ununio waterfront project at Plot No. 16, 17 and 18 in respect of Tender No. PA038/HQ/2010/C/3 changed from time to time and to what extent.* From the evidence recorded in the proceedings the answer in the

court's view is yes. The scope of the proposed development of PPF Ununio waterfront project changed from time to time, and that largely led to increase of project cost. The **exhibit P2(B) shows an increase** from **TZS 223,631,955,347.86 (VAT inclusive)** being original engineering estimates approved by the 1st defendant. Later it was revised due to addition of new items including floating hotel and night club led to increase of construction costs to TZS **242,463,270,400/= (VAT exclusive) as per exhibit P2(C). Yet more changes requirements were brought. According to evidence of PW1, PW2 and PW3 these** were retaining wall, parking under shopping mall, extension of parking garage, etc., introduced by the 1st defendant leading to an increase in project cost to TZS.601,691,667,300.24 VAT inclusive. While the plaintiffs on their side referred to three approvals, the defendants referred to two approvals (first approval for initial cost estimates **TZS 223,631,955,347.86 (VAT inclusive) and 242,463,270,400/= (VAT exclusive)** per exhibit P2(C)**). On the plaintiffs' side the approvals included engineering estimate of** TZS. 601,691,667,300.24 VAT inclusive which the defendants have disputed for it was not approved. The PW1 also, during cross examination, told the court that the consultants were allowed to add or make changes to the design but within the approved budget. It is his testimony that TZS.601,691,667,300.24 VAT inclusive as project cost was brought by changing requirements brought by the 1st defendant. He admitted that it was way too high than the approved budget of **TZS 223,631,955,347.86 (VAT inclusive)**. Moreover, he conceded that he has not brought any evidence before the court to show that TZS.601,691,667,300.24 VAT inclusive was approved by the client.

According to PW1, the project did not proceed to construction stage because the costs was above investment threshold. That is also seen in the DW1's testimony that the engineering estimates of **TZS. 601,691,667,468.24** VAT inclusive was higher than the approved budget of **TZS. 223,631,955,347.86 (VAT inclusive)** or TZS **242,463,270,400/= (VAT exclusive)** per exhibit P2(C). That is why the tender was cancelled. And eventually the government directive halted the project.

The second issue was *if the answer to issue No. 1 is in the affirmative, who was responsible for such changes?* Looking at the evidence on record, both parties were responsible for the changes stated in the first issue above. The consultants were allowed to make changes or add new items provided the cost does not exceed the approved budget. That is stated in exhibits P2(C) and D1(H). PW1 testimony shows that the consultants were at liberty to add new items or make changes to the designs but withinthe approved budget. Therefore, one cannot pour the blame on the plaintiffs only. PW3 also testified in cross examination that the plaintiffs introduced the floating hotel and a night club. But exhibits P2(C) and D1(H) show that these new items were approved. While the 1st Defendant's board was responsible for approving the project budget, the new items brought or suggested by the plaintiffs were received and affirmed by the 1st Defendant. However, since it was the term of the agreement that consultants if they add the new items, they should not exceed the approved budgetof **TZS 223,631,955,347.86 (VAT inclusive) or TZS 242, 463, 270, 400 (VAT exclusive) as per** exhibits P2(C) and D1(H). Therefore, the plaintiffs, by providing engineering

estimates of **TZS. 601,691,667,468.24** VAT inclusive above the approved budget, became responsible for the changes. In the end it was the plaintiffs themselves who were responsible for some of these changes especially those that were above approved budget.

The third issue was *whether the Plaintiffs performed their obligation under the Consultancy Agreement in close consultation and correspondence with the 1st Defendant up to the tendering stage*. Clause 5.4.10 – 5.4.30 of the consultancy agreement (exhibit P3) indicates that the work had six stages. Stage 1 – inception (site feasibility study); stage 2 – preliminary design stage (concept and viability); stage 3 – preparation of detailed design (design development); stage 4 – preparation of bidding document (documentation and procurement); stage 5 – implementation stage (administration of the construction); and lastly stage 6 – close out stage (handing – over of the project). Looking at the evidence on record, the plaintiffs performed their obligation under the consultancy agreement in close consultation and correspondence with the 1st Defendant up to the tendering stage. The testimonies of PW1, PW2, PW3 and DW1 attest to this fact. Looking at the exchange of letters and meetings done between the parties, clearly, there were regular communications and most of the time the engineering estimates were sent to the client for review and approval.

The evidence given by witnesses from both sides attest that stages 1 – 2 were completed and paid for. However, stage 3 was done iteratively, yet the engineering estimates due to new items added reached **TZS 601,691,667,468.24** VAT inclusive above the approved budget. Thus, the project costs were high due to the additional changes that were

introduced by the plaintiffs. Despite that and my steriously, the stage 3 work – preparation of detailed design went ahead, and the engineering design and drawings were submitted. And chaos ensued as new items kept on being introduced. Thereafter, stage 4 commenced and according to PW2 and PW3 stage 4 was not completed because the project was halted by the government directive, force majeure. Nonetheless, the evidence on record indicates that the tender was advertised and later cancelled. Since the tender was floated, it means that tender documents and BoQs were submitted to the 1st defendant. Although the plaintiffs added new items that led to project cost to shoot, overall, the plaintiffs performed their obligation in consultation and correspondence with the 1st defendant. However, it cannot be said that there was close consultation as there were delays, and escalation of project cost above the approved budget. But it is my considered view that there was an implied term of the contract that the 1st defendant through DW1 (the project manager) shall oversee the work of the consultants. This view is supported by the testimony of DW1 himself Not withstanding such an implied term, there was no close consultation. Had there been close consultation the project cost would not have exceeded the approved budget, and the tender would not have been cancelled in the first place.

The fourth issue was *whether the Defendant was satisfied with the tender documents which were submitted to it by the Plaintiffs after being approved by the Defendant's Board of Directors*. The evidence on record shows that the 1stDefendant, despite the plaintiffs' delay in completing the work, was satisfied with tender documents submitted after being approved. That is because the testimony of DW1 indicates that the plaintiffs

submitted tender documents to the 1st defendant who accepted them and proceeded to advertise the tender for project construction. The exhibits P2(K) and D1 (Q) show that the tender documents were submitted. The exhibit D1 (I) confirms that the tender was floated and later cancelled. There could not have been floating of tender if the plaintiffs submitted unsatisfactory tender documents or if at all stages 3 and 4 were not completed.

The fifth issue was *whether the Plaintiffs fraudulently concealed the engineering estimates and whether the estimates were exaggerated or not.* The evidence adduced by the parties did not confirm that the plaintiffs fraudulently concealed the engineering estimates. That is because all the engineering estimates were submitted to the 1st defendant for review and approval. See exhibits P2 (J), P2(K), D1 (D), D1(O), D1 (P) and D1 (Q).Moreover, there were meetings to discuss the project design and drawings and the engineering estimates. See Exhibit P2(C) a letter dated 31st July 2015 titled Meeting held on 28th July 2015 at PPF Board Room. Further the 1st defendant had DW1 who was a project manager, responsible for supervision of the project. As for the allegations of engineering estimates being exaggerated, that too is inconclusive because the estimates were subject to review by the 1st defendant's internal experts (engineers) and thereafter approval by the said client. Should there have been exaggeration, the 1st defendant would have not approved the estimates. Even if there was exaggeration the 1st defendant would be liable for the estimates that were approved by her Board. The initial estimates were therefore not exaggerated. But following the addition of new items the engineering estimates increased to **TZS 601,691,667,468.24** VAT

inclusiveabove the approved budget. In the premises one can hardly deny that there was exaggeration to that extent. Nevertheless, there was no fraudulent concealment of engineering estimates because these estimates were reviewed by the 1st defendant vide DW1 and other experts.

The sixth issue was *whether the project was delayed and if yes, who among the parties was responsible for the delay?* The testimonies of parties' witnesses especially PW1 have shown that there was delay. The plaintiffs' work was to be completed within 20 weeks from the date of contract signing. But PW1 testified that when the government stopped the project, 20 weeks set for the work had lapsed. And the 1st defendant sent several reminders to the plaintiffs who replied to them with an apology and promise to send the project engineering design and estimates documentation after a short while. See Exhibit D1 (F), aletter from the 1st plaintiff dated 6th March 2015 with reference No. qD/PPF-Ununio/03/2015/33 apology for not meeting deadline as promised with reasons, (referred on paragraph 17 of DW1's witness statement).There was a delay caused by the plaintiffs. However, the 1st defendant merely sent the reminder letter and eventually ratified the work done by the plaintiffs. She never repudiated the contract. In fact under clause 7.3.1 (b) of exhibit P3 and exhibit D1 (A) titled Termination on Default reads:

> "*the client without prejudice to any other remedy for breach of the Agreement, by notice of default sent to the Consultants, may terminate this Agreement in whole or in part should the Consultants cause a fundamental breach of the Agreement i.e. fail to substantially perform in*

accordance with the terms and conditions of this Agreement e.g. fail to commence or complete the work within the time periods agreed to and quality expected..."

Looking at the evidence adduced, there is nowhere the Client (1st defendant) issued notice of termination even when the plaintiffs delayed completing some of the works agreed as based on stages stated in the contract. The closer the 1st defendant came was to issue a letter reminding the plaintiffs that they have delayed. And the latter apologized.

The seventh issue was whether the termination of the contract by the Defendant was lawful and rightful. The termination of contract by supervening event, which is force majeure, and it was not the fault of the 1st defendant is lawful in terms of Clause 7.9.1 of exhibit P3 and exhibit D1 (A) – consultancy agreement. PW1 admitted during cross examination told the court that the project was halted by government directive which is force majeure. The government had issued a directive to stop the project. In the circumstances, the contract was terminated by frustration/force majeure, whichwas lawful and rightful.

The eighth issue was *whether the letter by PSSSF, that the project would not continue amounted to "FORCE MAJEURE, or frustration of contract.* The 1st defendant's letter dated 13th July 2016, titled Board of Trustees Decision on Development of Ununio Plots, which is exhibit P2(G) informing the 1st plaintiff that the government directed to stop the project confirms that there was force majeure. There is no need to spill the ink over this point. As seen in evidence given by the witnesses: PW1, PW2, PW3, DW1, and the 1st defendant's letter notifying the Plaintiffs about the

government decision to stop the project, that act constitutes force majeure. The law under Section 56(2) of the Law of Contract Act [Cap 345 R.E. 2019] is loud that force majeure is a supervening event making an act or a contract impossible to be performed and neither party is at fault.

The ninth issue was *whether the Defendant is stopped/estopped from claiming liquidated damages based on any cause other than the agreed "FORCE MAJEURE".* The defendant here means the 1st defendant. Un disputedly, the consultancy agreement exhibits P3, which is also exhibit D1 (A) concluded by the parties had a provision for force majeure under clause 7.9. Subclause 7.9.1 states that in the event of force majeure the parties will not be liable and will be released from their respective obligations. Under clause 7.9.1 the events regarded as force majeure include prohibitive government regulation or action. In the case at hand the government directive to halt the project is crystal in exhibit P2(G) – Board of Trustees Decision on the Development of Ununio Plots and exhibits D1 (S)- suspension of implementation of the project.

Despite force majeure, the 1st defendant has claimed liquidated damages from the plaintiffs in her counter claim citing delays and exaggeration in engineering estimates. She is claiming a refund of the money paid to the plaintiffs. There is no dispute on the plaintiffs' side that they were partly paid for the works done. PW1 testified that they had been paid two installments of 15% of TZS.189 billion VAT exclusive and 20% of the total initial costs of TZS.189 billion VAT exclusive and 40% remained unpaid which is TZS.7,226,803,519 VAT inclusive and the whole second stage was not paid at all.

Nevertheless, it was expected that the 1st defendant would bring evidence such as payment voucher or cheque or bank slip to show that she paid the plaintiff **TZS. 3,256,613,599.40** (VAT Inclusive) claimed as being paid in the execution of consultancy assignment. Be it as it may, the liquidated damages claimed would have made sense if the 1st defendant had rescinded or repudiated the contract when she noticed the delays or exaggeration of the engineering estimates by the plaintiffs. Apparently, she did not do so. Instead, she ratified the plaintiffs' actions by letting them continue performing the contract by preparing the engineering estimates and tender documents. As held earlier, these documents were submitted and received by the 1st defendant. In law the moment the plaintiffs breached the contract through delaying to complete the works, the 1st defendant had the right to rescind or repudiate the contract. But she waived that right. Now, she cannot be allowed to front allegations of delay and claim liquidated damages. Moreso, the force majeure discharges the parties from future performance of the contract. Thus, what the law excuses is the performance of the contract after force majeure as was held in the case of **Hirji Mulji v Cheong Yue S.S. Co Ltd [1926] A.C. 497 at 505.** The obligation or liability prior to force majeure have to be performed. That though is subject to being diligent and not waiving the right to rescind the contract. For the 1st defendant liquidated damages claimed cannot be sustained because she ratified the delay and unsatisfactory work complained of. Also looking at **Hughes v Metropolitan Railway Co. (1877) 2 App Cas 439 HL**, and **Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130**, the law estops the 1st defendant from claiming what would otherwise

entitle her from rescinding or repudiating the contract. But she chose to waive it. In my view she cannot afterward claim for liquidated damages. **Lord Devlin, the Treatment of Breach of Contract, [1966] Cambridge Law Journal 192** and **Chershire, Fifoot & Furmston's Law of Contract, 13th Edition at page 549** commented that a right of a party to treat the contract as discharged and claim for damages arises where:

a) The party in default has repudiated the contract before performance is due or before it has been fully performed.
b) The party in default has committed a fundamental breach.

Without delving into the details of fundamental breach, which has been intimated in clause 7.3.1 of exhibit P3 (consultancy agreement), it is my conviction that none of the situations above cited arose in the case at hand. It is therefore unfair to grant the 1st defendant's counter claim.

The tenth issue was *whether either party breached the contract before the occurrence of the Force Majeure*. One of the key issues is whether there was frustration of the contract through force majeure. The force majeure claimed in the case at hand is the order of the government to stop the project. See exhibit P2 (G). Force majeure is frustration of the contract because it is an intervening event beyond the control of the parties as rightly held in **Krell v Henry [1903] 2KB 740 The contract is frustrated in case of** non-occurrence of contemplated event. Thusa contract to hire a room to view a proposed coronation procession of King Henry was frustrated when the procession was postponed. Another example is when the subject matter is destroyed or ceases to exist as it

was held in **Taylor v Caldwell 3 B & S 826: 122 ER 30** where a promise to let the music hall became frustrated when the music hall was destroyed by fire.

It is trite law as held in **Davis Contractor Ltd v Ferham Urban District Council, (1956) AC 696** that when frustration occurs, it operates automatically to discharge the contract irrespective of the parties' interest and circumstances. Similarly, Section 56 of Law of Contract Act [Cap 345 R.E. 2019] provides for frustration of contract or *force majeure*. The Section provides as follows:

> *"Agreement to do impossible act, subsequent impossibility or unlawfulness and related compensation:*
>
> *(1) An agreement to do an act impossible in itself is void.*
>
> *(2) A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*
>
> *(3) Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."*

Whether the plaintiffs' acts done prior to *force majeure* deserve payment as per the contract?

According to Section 56(2) of the Law of Contract Act [Cap 345 R.E. 2019] *a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

I have noted that this provision of the law does not explicitly tell whether the payment due for work done prior to frustration is recoverable. But since the contract becomes void due to frustration from the time the supervening event occurs, that is when the act/work becomes impossible or unlawful, it means that payment due for works done prior to the frustration should be paid for. That is in line with last paragraph of clause 7.3.2 of the Consultancy Agreement, exhibits P3 and D1 (A), which states:

> *"PROVIDED THAT:*
>
> *Termination of this Agreement, for whatever reason, shall not prejudice or affect any right(s) or claims and liabilities of either party to this Agreement, which has/have accrued or will accrue thereafter to either of the party."*

Intriguingly, the Defendants claim that the Plaintiffs delayed completing the works and several reminders were issued. But under the law of contract if a party has an option to rescind the contract and fails to do so it means the delay or fault has been excused and the performance of contract proceeded. One cannot refuse to fulfil her contractual obligation under the guise of other party's fault which the former never objected in the first place. In other words she hard ratified the works done unsatisfactorily. See **Leather Cloth Co v Hieronimus (1875) L.R. 10**

Q.B. 140; Enrico Furst & Co. v W E Fischer Ltd [1960] 2Lloy's Rep. 340.

In the present case, the defendant waived her right to repudiate or rescind the contract the moment the breach occurred, and she did not rescind the contract. That is when the plaintiffs' delayed to complete the work and yet the 1st defendant accepted its performance. The law estops such a party (1st defendant) from declining performing her obligation. See the case **High Trees House Ltd** (supra). See also the case of **Renair Limited v Phoenix of Tanzania Assurance Company Ltd [2010] TLR 358** where it was held that the respondent was aware of the breaches but her express actions of proceeding with negotiations for a settlement supported the fact that the contract was not rescinded. She waived her right to rescind the contract. In this case, I am therefore unconvinced with the defence argument that the delay should be a ground to deny the Plaintiffs' claim.

As for the issue of invoice for TZS.7,226,803,519 VAT inclusive, that was withdrawn and replaced by the invoice for the sum of TZS 3,846,469,641.This should not detain us much. The point here is not just invoice but rather the totality of evidence adduced. Although the invoice was withdrawn there is no dispute that the plaintiffs performed the work. The 1st defendant's submission that the invoice was withdrawn does not change the fact that the work was done, and the plaintiffs are ought to have been entitled to payment for the work done. As to how much they should be paid,exhibit P3 – consultancy agreement clause 7.9.1 and exhibit P4 – minutes of the meeting held on 12th August 2016 at PPF to discuss way forward on the use of Fund's idle plot following the government

directive not to construct investment building on page 2 last paragraph gives light. It provides:

> *"...Consultant's payment for services done up to a date of notice stopping the services shall be made as per Contract Clause 6.2.1; basing on an original estimate used by the Client to make payments for consultancy services done so far."*

The claim found in the Amended Plaint, is TZS 11.2 billion. That is the amount for unpaid fees for services contracted. However, the evidence in the course of the proceedings has failed to substantiate it. It has been proved that the said amount is not based on original estimates. The witness of the plaintiffs testified that they are claiming TZS 3.8 billion which is outstanding and based on original estimates. But the invoice for the same was never tendered in court. This invoice replaced the withdrawn invoice (for TZS 7.2 billion) and sadly it was not tendered in court. It is the law under Section 110 of the Evidence Act that he who allege must prove. This principle was reiterated in **Paulina Samson Ndawavya v Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 CAT at Mwanza (unreported)** pp. 15-16, and in the case of **City Coffee Ltd v The Registered Trustee of Ilolo Coffee Group [2019] 1 T.L.R. 182**. In the instance case the plaintiffs have failed to prove on the balance of probability as required by Section 3(2)(b) of the Evidence Act [Cap 6 R.E. 2019] that they are entitled to payment of either TZS. 11,250,069,032.62 as found in the plaint. The evidence adduced have also failed to convince the court that the plaintiffs should be awarded either TZS.7,226,803,519 VAT inclusive or TZS. 3,846,469,641for the services rendered to the 1st

defendant. That is because the invoice for TZS.7,226,803,519 VAT inclusive was withdrawn, and its production in court as part of exhibit P2 (N)was in my view of no use. On the other hand, the invoice for TZS. 3,846,469,641 was not tendered in court. In fact, the defendants were right to highlight the plaintiffs' failure to tender that invoice for TZS. 3,846,469,641 in evidence which if granted could have acted as consolation to them.

Regarding force majeure, this is understood as a discharge of contract by frustration. It is a supervening event which is none of the parties' fault. In the case of **Hirji Mulji v Cheong Yue S.S. Co Ltd [1926] A.C. 497 at 505** it was held that frustration does not rescind the contract ab initio. *It terminates the contract automatically and releases the parties from further performance of the contract.* See also **Chitty on Contracts, Vol. I, Sweet & Maxwell, 2015 at p. 1716**. It means the contract is terminated as to the future only. Lord Wright in **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 at 70** held:

> *"In my opinion the contract is automatically terminated as to the future, because at that date its further performance becomes impossible in fact in circumstances which involve no liability for damages for the failure of either party."*

The issue number 10 can thus be briefly answered by referring to the evidence on record. Exhibits P2(C) and D1(H) make it plain. What would have otherwise been regarded as breach of contract before the occurrence of force majeure was the plaintiffs' delays as confirmed by the letters written by the 1st defendant to the plaintiffs. Moreover, and in accordance

with PW1's evidence the plaintiffs added new items that increased the cost to **TZS 601,691,667,300.24 VAT inclusive** above the approved budget. This shows that the plaintiffs breached the contract. However, the 1st defendant too had an opportunity to repudiate the contract. But she did not do so. As stated earlier that amounts to waiver. By continuing to allow the plaintiffs to proceed with the work and eventually receiving the tender documentation prepared by the plaintiffs, the 1st defendant waiver her right to rescind or repudiate the contract. As per part VI clause 6.3.1 and 6.3.2 of the contract the plaintiffs were entitled to payment for the work done (stage 1-2 and part of stage 3). However, from the evidence of PW1-PW3 there was outstanding amount that was not paid yet. In that regard, the 1st defendant breached the contract by failing to pay the plaintiffs their outstanding amount for fulfilling their contractual obligation.

This though needs scrutiny. PW1 testified during cross examination that the plaintiffs were paid two instalments amounting to 50%.He told the court that the amount due is 40% (as per exhibit P3) and costs for extra works because of additional items alleged to have been introduced by the 1st defendant. It was PW1's testimony that stage 1 was fully paid for. Candidly, PW3 testified that the extra works and interest as well as claim for reimbursement of building permit fees paid to municipality have not been pleaded in the amended plaint. In **EX – B.8356 S/SGT Sylivester S. Nyanda v The Inspector General of Police and the Attorney General [2014] T.L.R. 234** it was held that the purpose of pleadings is to guide parties to give evidence within the scope of pleaded facts. Thus, if the fact is not pleaded then the evidence given on that fact is useless. As to what is left, PW3 told the court they are claiming the outstanding

amount of TZS 7.2 billion. To him that is the amount the court should consider not TZS 3.8 billion. But in the court's view that is not possible because PW3 himself told the court that that the invoice for TZS 7.2 billion was withdrawnand replaced by the invoice for TZS 3.8 billion the latter invoice was not tendered in evidence. I am inclined to hold that the invoice that was withdrawn has no relevancy in this case.

Turning to force majeure defence which both parties seem to recognize and accept, it is worth examining it to make an informed decision. From the outset, and in the circumstances of the case at hand, *force majeure* is an incredible defence. I am saying so because the work was done before the government issued the directive to halt the project. Force majeure or a frustrating event (government directive to halt the project) here did not destroy the work which had been done. The doctrine of frustration as restated in **M/S Kanyarwe Building Contract v The Attorney General and Another [1985] T.L.R. 61** and in **Namahonga AMCOS & Two Others v Hamisi Abdallah & Another [2016] 1 T.L.R. 550** is applicable where the frustrating event has occurred making the performance of the contract impossible, and it is not the fault of either party. The 1st defendant in the present case had an expert (DW1) who was a project implementation manager responsible for examining the work done and advising her. Moreover, the frustration occurred after the work was completed as tender documents were ready and the tender was floated. This is also in the testimony of DW1. However, what is grasped from the evidence on record is that the frustration occurred before the appointment of a contractor. It would thus be fair for plaintiffs to be paid for the work they have done prior to force majeure save for short falls in

evidence. In my view, considering the facts of this case, force majeure cannot act retrospectively. Hence the defendants cannot treat themselves discharged from the liability to pay the plaintiffs for the works done prior to force majeure subject to evidence adduce. In my understanding, force majeure would have been a valid defence of frustration of contract if nothing had been done or if the performance of contract was for the future.

The eleventh issue was *whether the Plaintiffs prepared the detailed designs in accordance with the given approved budget by the Defendant.* It is conspicuous from the evidence that the plaintiffs prepared detailed designs that exceeded the budget. That is because additional items such as a floating hotel, and night club increased the project cost above the approved budget. Interestingly, PW1 testified that the consultants were at liberty to add new items but within the approved budget, which they did not observe. They added new items that increased the project cost to **TZS 601,691,667,300.24 VAT inclusive** above the approved budget of **TZS 223,631,955,347.86 (VAT inclusive)**. The exhibit P2(C) and exhibit D1(H) confirm that. According to the consultancy agreement (exhibit P3 and exhibit D1(A) at stage 3; Preparation of Detailed Design is where the Consultant could have revised the initial costs estimates as provided by **clause 5.4.21** of **the Consultancy Agreement.** This clause allowed the consultants to revise costs but not exceeding the budget stated by the Client. The clause reads; *"The Consultants shall revise their cost estimates but not exceeding the budget limits as stated by the Client."*

Despite the above requirement, the plaintiffs forwarded the detailed designs to the 1st defendant above the approved budget that prompted her

through exhibit D1(H) to insist on them to stick to the approved budget. But PW1 told the court that when the plaintiffs wanted to remove from the design details the floating hotel as part of new items introduced, the 1st defendant said the floating hotel should not be removed as the Fund's Board will not allow and at the same emphasized to stick to the approved budget without the new items. What is gathered from the evidence shows that the floating hotel could not be removed because the Board approved it in the initial budget.

The twelfth issue was *whether the Plaintiffs claims are rooted from the actual construction cost of the project in accordance with the Consultancy Agreement*. Clearly, the plaintiffs' claims and some of evidence are marred with inconsistencies as evidenced from testimonies of PW1, PW2 and PW3. The amount of money claimed is equally confusing. There is **TZS 11,250,069,032.62** which included the 40% outstanding amount and the costs for additional work, other witnesses said TZS.7,226,803,519 VAT inclusive, yet there is a claim of TZS 3,846,469,641. It is noteworthy that 40% of the consultancy fees was to be paid upon completion of tender action and submission by the consultants and approval by the client of the Bills of Quantities and Project Planning as per clause 6.3.2 of exhibits P3 and D1(A) (consultancy agreement). Nevertheless, exhibit P2(J)- submission of tender documents dated 11th February 2016 and exhibit P2(K) - submission of bid documents for final review and final architectural drawings for tendering, dated 12th October 2015 indicate that these consultants did submit the tender documents to the client.

Regrettably, some of the plaintiffs' claims were based on either withdrawn invoice or an invoice not tendered in court. The exhibit P2(N) –

the invoice No.0019 dated 23/05/2016 for TZS. 7,226,803,919 sent to the 1st defendant. The plaintiffs claimed that they requested 10% of the total consultancy fee though they deserved 40% upon completion of tender action as per clause 6.3.2 of exhibit P3 – consultancy agreement. In accordance with PW2's testimony this invoice No.0019 was later withdrawn, hence of no relevancy. That invoice was replaced with the invoice No. 0021 dated 12/08/2016 for TZS 3,846,469,641 that was balance equivalent to 40% of the consultancy fees. This came after force majeure and based on original agreed estimates. To the court's dismay the latter invoice No. 0021 was not tendered in evidence. The claim according to the contract was supposed to be 4.3% of the project cost. PW2 said that the plaintiffs were paid 35%, which was for stages 1-3 of the work. What they (plaintiffs) are claiming is for stage 4 works. The outstanding amount is 40%. According to plaintiffs' witnesses (PW1, PW2 and PW3), the outstanding sum plus additional costs for new items that the plaintiffs are claiming was a result of the 1st defendant's increasing the volume of work by adding new items such as floating hotel and night club. PW2 conceded that he did not know the actual project costs because the construction had not started as the contractor had not been appointed when force majeure occurred.

Ideally, the plaintiffs' claim ought to have been rooted in actual construction costs in accordance with the consultancy agreement, the new items such as floating hotel and nightclub that were added increased the works for the plaintiffs. Hence, they included them in their claims plus interest. In the plaintiffs' view that is why it reached **TZS 11,250,069,032.62**. But during cross examination,PW2 told the court

that the amount due is TZS 7,226,803.919 whose invoice was withdrawn and replaced by another invoice for TZS 3,846,469,641 which was not tendered in court. The court noted the contradiction in the testimonies of plaintiffs' witnesses. While PW1 said they were paid 50% PW2 testified that the plaintiffs were paid 35% and yet PW3 told the court that they were paid TZS 3.8 billion. Regarding the plaintiffs' claim of **TZS 11,250,069,032.62 from the 1st defendant,** this too is controversial because it includes claims not pleaded in the amended plaint like interest and extra works. That was conceded by PW3. Paragraph 3.0 of the Witness Statements of PW1, PW2 and PW3 shows that the claim of **TZS 11,250,069,032.62** is for unpaid original fees, fees for extra works and associated interests. This is inconsistent with what is stated in paragraph 3 and prayer (b) in the Amended Plaint where it is stated that **TZS 11,250,069,032.62** is only for unpaid services rendered. It means the plaint did not contain a claim for extra works and associated interests. During cross examination, PW3 testified that the amount of **TZS 11,250,069,032.62** is inclusive of **TZS 4.7 billion being** costs for extra works and 20% being interest for delayed payments. The witness further admitted that there is no amount of extra work and interest that has been stated in the Amended Plaint. It is the law that parties are bound by their pleadings.

Along with that the Plaintiffs claimed **TZS 85,645,000/=** under paragraph 11.0 of the Witness Statements of PW1, PW2 and PW3 as being municipal fees for building permit. This claim for refund was not pleaded as admitted **by PW1, PW2 and PW3** that such claims are not part of the claims in the Amended Plaint. From legal standpoint above claims

constituting cost of extra work, interest and refund for fees paid to the Municipality are unfounded and liable to be ignored for not being pleaded in the pleadings.

That is fortified by **Barclays Bank T. Ltd vs Jacob Muro (Civil Appeal 357 of 2019) [2020] TZCA 1875 (26 November 2020) at page 11-12 the CA**T held as follows:

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings .... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."*

From the above analysis and findings drawn the claim for extra works, interest and municipality fees for permit are hereby rejected. Hence the

claim for TZS 11,250,069,032.62 is declined.

It was the testimony of PW3 that the 1st defendant asked the plaintiffs to scale down the cost of the project because the costs was high and also to meet investment threshold of the funds as per the Bank of Tanzania regulations. They therefore did the redesigning which means a completely new detailed design. This led to increase of the consultancy fee.That is 40% of the consultancy fee, which is TZS 4.7 billion plus interest of 20% because the plaintiffs had claims that they made prior to filing of the case.

But upon scrutiny, the testimony of PW3 indicates that under the contract the plaintiffs were to be paid 4.3% of the cost of the project. This also stated in exhibit P2(A) – notification of the award. AndTZS 7,226,803,919 claimed is for first tender action which was completed before force majeure.This amount is shown exhibit P2(N) as outstanding payment for consultancy fees for completion of pr-contact service stage. If what PW3 testified is credible, then TZS 4.7 billion which he said is for extra work plus TZS 7.2 billion for first tender action that is equal to TZS 11.9 billion. If we add 20% interest the total amount will exceed TZS 11,250,069,032.62, the amount claimed in the amended plaint. But the amount claimed in the plaint did not include extra work and interest.These therefore were brought up by the plaintiffs' witnesses.

Besides that, TZS 7,226,803,919 claimed for first tender action is also problematic. The plaintiffs tendered in evidence exhibit P2(N), the invoice for TZS. 7,226,803,919 which was sent to the 1st defendant and later withdrawn and replaced with the invoice for TZS. 3,846,469,641 that was never tendered in court. Shortly, these claims have not been substantiated.

Furthermore, it is difficult to say with certainty that these claims were all rooted in the actual consultancy agreement. For instance, PW1 and PW3 testified that there was no agreement for the extra work caused by the new items. PW3 also told the court during cross examination that it was the consultants who introduced the new items.

Even if we assume that the works were rooted in the contract, the plaintiffs' testimonies have raised issues that have gone beyond what is in the pleadings. These are claims for the extra works, municipality fees and interest.It is the law that the parties are bound by their pleadings.The Court of Appeal of Tanzania in the case of **Barclays Bank T. Ltd vs Jacob Muro (Civil Appeal 357 of 2019) [2020] TZCA 1875 (26 November 2020)** at page 11 where it was held that:

> *"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."*

As for interest, it is the law that interest must be rooted in the pleadings as was held by the CAT in **National Insurance Corporation T. Limited & Another vs China Civil Engineering Construction Corporation (Civil Appeal No.119 of2004) [2010] TZCA 4; (25 March 2010)**. The CAT further emphasized in**Zanzibar Telecom Ltd vs Petrofuel T. Ltd, Civil Appeal No.69 of 2014, [2019] TZCA 176; (06 February 2019)** *at page 25 that:*

"...as a matter of substantive law, the court cannot grant interest in a case where such interest was not pleaded and proved."

Despite the above flaws and considering the totality of evidence adduced, the plaintiffs' claims are partly rooted in the contract and partly not. In my view and considering the evidence on record, the TZS 3,846,469,641 claimed by the plaintiffs is as per PW2 testimony a consultancy fee for stage 4 of project work contract that is 40%, and that is what they have not been paid. This seems to be consistent with the costs rooted in the consultancy agreement. But was this amount due prior to force majeure? PW2's testimony was contradicted by PW3 where the latter said stage 4 of the project work was not completed. Compounded with that contradictory evidence the invoice supporting that claim of the TZS 3,846,469,641 was not tendered in evidence. The plaintiffs never provided any explanation as to why that crucial evidence was not tendered. Such vital evidence is conspicuously missing. Indeed, the 1st defendant paid the plaintiffs a certain amount, and she has not disputed that there is some amount due. Nevertheless, she decried delays and unsatisfactory work done by the plaintiffs. Yet she never opted to rescind the contract.

Notably, the claim for extra works, the additional items that were introduced appeared to be unfounded in the pleadings and they increased project costto **TZS 601,691,667,300.24 VAT inclusive** above the approved budget. It should be remembered that the initial cost estimates approved by the 1st Defendant was**TZS 223,631,195,347.86 VAT inclusive**. That was the original estimates. However, I have noted that exhibit P2(C) and D1(H) – a letter dated 31st July 2015 referring to the

meeting held by the consultants and the client on 28th July 2015 it is shown that the total amount approved by the 1st defendant's Board of Trustees is TZS 242,463, 270, 400 (VAT exclusive). That amount came after revising the earlier submitted estimates that were criticized by the 1st defendant for being very high by virtue of exhibit D3 – a letter dated 13th July 2015 titled consultant engineers estimate. Interestingly, the exhibits P2(C) and D1(H), which is the letter 1st defendant's letter included new items a night club and a floating hotel among others and the project cost stood at TZS 242,463, 270, 400 (VAT exclusive). The same letter emphasized that additional items may be included but within the approved budget. I am settled in my view that the new items (changing requirements) that increased the project costto **TZS 601,691,667,300.24 VAT inclusive (**as seen in testimony of PW2, PW3, and exhibit D2(iii)) abovethe approved budget is tantamount to abreach of contract. And as above held, it would be unfair to award claims for works linked to such new items. Worse still the plaintiffs have not clearly indicated the cost for specific new added items. Nonetheless, after including the new items the engineering estimates increased the project cost exceeding the approved budget. That certainly constitutes breach of contract. That breach would have supported the defence case if they had treated it as a fundamental breach and decided to rescind the contract.

Moreover, exhibit P2(M), a letter dated 27th July, 2015 from the plaintiffs to the 1st defendant contain the following words in paragraph 2 reads:

> *"We wish to acknowledge that the engineering estimates we submitted are slightly above the*

expectation..."

In my view, this is an admission from the plaintiffs that the engineeringestimates were higher than the approved budget.

In lieu of the foregoing disposition, although the 1st defendant did not repudiate the contract, it is the law that a party (in this case the plaintiffs) cannot benefit from his own wrongdoing as held in **National Development Corporation v Equador Limited, Civil Appeal No. 136 of 2017 CAT**. Hence the money claimed by the plaintiffs for extra work cannot be awarded. But this is not without difficulties as the plaintiffs have not clearly stated in their claim forTZS 3,846,469,641 which emerged in the witnesses' testimonies how much is for the additional items that increased the scope of work or if that amount excludes extra works. PW1 testified that the 1st defendant has paid two installments of 15% of TZS. 189 billion VAT exclusive and 20% of the total initial costs of TZS.189 billion VAT exclusive to the plaintiffs. According to him 40% remained unpaid, which is TZS.7,226,803,519 VAT inclusive.

The 1st defendant counter claimed **TZS. 3,256,613,599.40** (VAT Inclusive) as liquidated damages. That included the money paid to the plaintiffs for unsatisfactory work. That is the work delayed in its completion. The blow to the defendants' case was inflicted by the DW1's testimony during cross examination where he told the court that the amount counter claimed was never certified. I also observed that the defendants concentrated on the allegation that the new items added were brought by the plaintiffs as per **exhibit P2(C) and** exhibit **D1 (H) and** the delays in completing the project. I have already held that the 1st

defendant had an opportunity to repudiate the contract after noting that the plaintiffs are in breach of the contract. She waived that right. She is estopped from claiming liquidated damages for the said breach and from denying liability for payment of the outstanding amount to the plaintiffs for the work done prior frustration of the contract.

The last issue was, to what relief(s) are the parties entitled to? The defendants through their counterclaim claimed liquidated damages to the tune of TZS **3,256,613,599.40** (VAT Inclusive). This has been held hereinabove to be unsubstantiated. Even if there could beevidence to support it, and assuming that it was the amount that the 1st defendant paid to the plaintiffs, the 4.3% of the project cost (initial approved budget) that is about TZS 7,226,803,519 VAT inclusive minus counter claimed amount of TZS **3,256,613,599.40** (VAT Inclusive) the amount said to have been paid by the 1st defendant to the plaintiffs then simple arithmetic would show that there will still be amount due to the tune of about TZS 4 billion. That is for the unpaid sum for the works done and extra works. It should also be noted that the 1stdefendant waived her right to rescind the contract when she became aware of the plaintiffs' delays incompleting the work and yet decided to proceed with the contract. The 1st defendant is claiming the said amount alleging that the plaintiffs breached the contract by delaying completion of the work which was also unsatisfactory. But this has been discussed at length hereinabove. Shortly, I find that the counterclaim of**TZS. 3,256,613,599.40** (VAT Inclusive) by the 1stdefendant as liquidated sum for breach of the Consultancy Agreement to be not only lacking merit but also an afterthought. It is thus dismissed.

The plaintiffs on the other sidehave given contradictory testimonies

on the amount and the claims for interest, extra work and municipality fees not found in the pleadings. In their own testimonies the plaintiffs said the amount of TZS 11 billion was after 1st defendant's review which found the project cost to be high and she asked them to scale it down. They did it and submitted to 1st defendant the invoice for TZS 7.2 billion. However, that invoice was withdrawn and replaced with the invoice for TZS 3.8 billion which was not produced in court. But there is evidence that they completed the work before the occurrence of force majeure. It is undisputed that plaintiffs were paid about TZS **2,759,842,033.40 (VATexclusive) in line with contract** though the 1st defendant claimed to have paid TZS **3,256,613,599.40** (VAT Inclusive). It is noteworthy that the plaintiffs according to their amended plaint are claiming TZS 11 billion being outstanding payment, extra work, and interest. But the testimonies of PW1, PW2 and PW3 have failed to prove the claimed amount. I should add here that the plaintiffs' claim for TZS3,846,469,641/= as testified by PW2 during cross examination could not be sustained because its invoice,No. 0021 dated 12/08/2016 was not tenderedas evidence.Indeed, in as far as the claim in the plaint is concerned, the plaintiffs had a burden of proof. They failed to discharge it. The principle of law is that for a claim to be sustained there ought to be credible evidence not mere allegations. A party with credible and heavy evidence ought to win the case as was held in **Hemedi Said v Mohamed Mbilu TLR [1984] 113.** In absence of evidence to justify the claim of TZS 3,846,469,641/= the same cannot be awarded. See the case of **Geita Gold Mining Ltd & Another v Ignas Athanas [2019] 1 T.L.R. 318**. Therefore, the claim of TZS 11 billion lacks merit and it is dismissed. The TZS 7.2 billion claim is unfounded in the

relief section of the plaint. It was rather raised by PW3 in his testimony. But that claim too is without substance because of inter alia the fact that its respective invoice was withdrawn. The reliance would have been placed on the claim for TZS 3,846, 469,641/=. But for reasons known best to the plaintiffs the invoice for that sum was not tendered in evidence. Had they tendered that invoice probably it would have proved that they are entitled to the payment to that tune for the works done prior to force majeure and based on original estimates. Briefly, their suit is marred with contradictions in the testimonies and lack of invoice to substantiate their claim. In the end their claim lacks substance and consequently it is rejected.

Furthermore, the plaintiffs' claims for general damages as well as punitive damages are refused for the simple reason that the discharge of contract by force majeure/frustration was neither party's fault. In addition to that the plaintiffs cannot relyon Equity either because they had unclean hands. They delayed completing the work and they also added new items that increased project cost above the approved budget as per exhibits P2(C) and D1(H). With such shortfalls it would be a mockery of justice to award them general damages and punitive damages.

Regarding the costs of the suit, generally the party that emerged victorious is awarded the costs. However, since there is no dispute that the contract was frustrated by the government directive to stop the project, it would be fair if each party will bear its costs.

In the end the court declares, and orders as follows:

1. The plaintiffs' suit fails due to shortfalls in evidence as elaborated hereinabove.
2. The defendants' counterclaim is dismissed for want of merit.

3. Each party shall bear its costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 09th Day of February 2024.

U. J. AGATHO

JUDGE

09/02/2024

Date: 09/02/2024

Coram: Hon. U. J. Agatho J.

For Plaintiffs: Judith Ulomi, Advocate

For Defendants: Stephen Kimaro, Erick Haule, State Attorneys

B/C: E. Mkwizu

Court: Judgment delivered today, this 09th February 2024 in the presence of Judith Ulomi, counsel for the plaintiffs, and Stephen Kimaro, Erick Haule, State Attorneys for the Defendants.

U. J. AGATHO

JUDGE

09/02/2024