IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: MUSTAFA, J.A.; KISANGA, J.A. AND OMAR, J.A.

CIVIL APPEAL NO. 24 OF 1984

BETWEEN

G.B.L. & ASSOCIATES LTD. . . . . APPELLANT

AND

TANZANIA PORTLAND CEMENT CO. . . . . RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam) Mr. Justice A. Bahati) dated 25th day of April, 1984

in

Civil Case No. 9 of 1982

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The appellant is a company of consulting engineers and architectural consultants and had entered into a written agreement dated 12.12.1980 with the respondent, a company dealing with cement manufacture. The appellant was according to clause 2 of the agreement to

> "survey the Wazo Hill area to produce plans, drawi etc. which will enable to obtain lease (Right of Occupancy) of detailed and designed drawings for proposed future roads, drainages, car parks etc. (hereinafter called the works) all in accordance with the employer's requirements".

Clause 13 reads:

> "All general conditions of this agreement shall be interpreted with the ACE regulations, together with the agreed correspondences between the parties hereto shall form part of Agreement".

The appellant as plaintiff sued the respondent in the High Court for unpaid fees amounting to Shs. 3,567,200 later corrected to Shs. 3,367,200 for work carried out for the respondent in accordance with the agreement.

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The appellant alleged that it was entitled to payment in respect of fees and disbursements in the total sum of Shs. 5,842,200 and that it had received payment from the respondent a sum of Shs. 2,275,000, leaving the balance of Shs. 3,567,200 (corrected to 3,367,200/=) claimed. The appellant alleged that it had completed all the work it had undertaken to do in terms of the written agreement.

In its defence the respondent denied that the appellant had completed its work. It contended that only the main boundary survey, i.e. the external survey was completed by the appellant. The respondent further alleged that

> "the purpose of the survey was to enable the defendant to procure a Right of Occupancy and not the registration of the survey. No right of occupancy has been procured yet".

The respondent alleged that it had paid the appellant a sum of Shs. 3,410,351/70, and had in fact overpaid the appellant by Shs. 2,103,351/70. The respondent counterclaimed against the appellant for two items, the alleged overpayment of Shs. 2,103,351/70 and a penalty or liquidated damages assessed at Shs. 500/= per day in terms of clause 6 of the agreement for the delay by the appellant in completing its work. According to clause 3 of the agreement the work was to commence on 12.12.1980 and to be completed on 12.2.81.

The appellant succeeded in the High Court, on a preliminary objection, to have the counterclaim of the respondent struck out as being not maintainable. The order dismissing the counterclaim by the respondent was dated 10.8.82.

There were a number of issues in dispute between the parties at the trial. Eventually the trial Judge found as follows: The Judge held

> (1) That the survey was of two categories, an external survey and an internal survey. The appellant has completed the external i.e. the boundary survey which was required for the issuance of an offer of a Right of Occupancy by the Ministry of Lands.

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(2) The internal survey, consisting inter alia of detailed and designed drawings of future drainage, car parks, roads etc. was incomplete, as roads and drainages were still to be done.

(3) That the survey was for the purpose of obtaining a Right of Occupancy of the area by the respondent, and that it was the responsibility of the appellant to procure it.

(4) That internal survey was not to be carried out until an offer of a Right of Occupancy has been obtained and that the appellant knew or should have known this.

(5) That if the Right of Occupancy was not obtained or not obtainable no payment for the internal survey carried out by the appellant was payable.

(6) That the fee for the external survey was Shs. 775,000, and this sum was payable by the respondent.

(7) That, as regards the charges for the internal survey, the appellant had claimed an excess of Shs. 572,000, being charges for 52 blocks for which no survey had been carried out.

(8) That the appellant was liable to pay a sum of Shs. 499,000 to the respondent as penalty for delay in completing the work. Further penalty at shs.500/- per day was to continue from date of judgment i.e. 25.4.84 until the work was completed or the contract rescinded.

(9) That the appellant, on completion of the internal survey and on obtaining the Right of Occupancy, was entitled to his claim of Shs. 3,367,200.

(10) That the respondent had paid the appellant, in respect of the work in terms of the contract, a total of Shs. 2,475,000 for both the external and internal survey. The appellant was only entitled, as at the date of the filing of the suit, to Shs. 775,000/- in respect of the external survey, and that the respondent had overpaid the appellant the sum of Shs. 1,700,000, which the appellant has to refund.

(11) That a fee of Shs. 1,500,000 is due and payable for obtaining a Right of Occupancy, which fee the appellant should pay from the excess payment it had received from the respondent.

(12) That the appellant has to pay the respondent the sum of Shs. 499,000 being penalty for delay and Shs.572,000/- for overcharging for 52 blocks.

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(13) Should the Right of Occupancy be procured and the internal survey completed in respect of roads and drainages, the appellant would be entitled to be paid the net sum of Shs. 3,796,200.

(14) Should the appellant fail to complete the internal survey and to obtain the Right of Occupancy the respondent would be entitled to rescind the contract and the appellant liable to pay the respondent the sum of Shs. 2,771,000.

The Judge granted the costs of the suit to the respondent. From that judgment the appellant has appealed to this court.

We will have to examine the written agreement of 12.12.1980. In terms of Clause 2, already quoted, the survey and the production of the plans, drawings etc. were to "enable to obtain lease (Right of Occupancy)" of the area. It was unclear who was responsible to procure the Right of Occupancy. However the respondent alleged that the appellant was responsible, and a letter written by the appellant to the respondent dated 21.12.1981 stated inter alia "The issue of Right of Occupancy is our job and we shall finalise it without problems".
This was after the respondent had written to the appellant on several occasions enquiring about the Right of Occupancy, on 20.5.1981, 9.6.1981, and 18.12.1981. We are satisfied that the Judge was right in holding that the survey was for the procurement of a right of occupancy over the Wazo Hill area and that the appellant was responsible for obtaining it. There was evidence that a sum of Shs. 1,500,000 would be required for the issue of the Right of Occupancy, and we think that the Judge was right, on the evidence adduced, to conclude that the respondent was not informed nor asked by the appellant to produce that sum. Despite the assurance given by the appellant in its letter of 21.12.81, the appellant had not even obtained an offer of a right of occupancy, let alone a right of occupancy.

Both Counsel agree that the work consisted of an internal and an external survey. Two witnesses P.W.1 and D.W.2 testified that the offer of a right of occupancy was obtainable when an external survey was done, and an external survey was done in is case.

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There was evidence, by P.W.1 and D.W.2, both qualified surveyors, and accepted by the Judge, that an internal survey is carried out only after a right of occupancy has been obtained (per P.W.1) or after a right of occupancy has been offered (per D.W.2), D.W.2 also stated that professional surveyors, and the appellant was engaged as such, were supposed to know this. The trial Judge had erred when he stated that "The regulation prohibiting internal survey until there is a right of occupancy obtained is a sound regulation", as there was no "regulation" as such. But in effect he came to the right conclusion, as, although it was not a regulation, it was a matter of common practice that no internal survey is carried out until a right of occupancy has been granted or at least offered. The reason is clear. If no right of occupancy is obtained, all the expenses incurred in an internal survey would be wasted and the survey would be of no value at all. In any event, the demand for payment for the internal survey was premature in the circumstances.

The Judge held that if no right of occupancy is obtained, the appellant would not be entitled to any payment for the work done on the internal survey, on a quantum meruit or any basis. We think thiw was going too far. It is true that as professional surveyors the appellant ought not to have commenced the internal survey until it had ensured that at least an offer of a right of occupancy was obtained. However if the right of occupancy is unobtainable due to any act of commission or omission on the part of the respondent, then the appellant would probably be entitled to payment for work done on the internal survey even if no right of occupancy is obtained. Apart from this qualification we agree with the trial Judge that the appellant was responsible for obtaining the right of occupancy, that no internal survey ought to have been done without obtaining at least an offer of a right of occupancy and in the circumstances, no money for any internal survey was payable to the appellant by the respondent at the time the suit was filed.

Since the respondent was not liable to pay for the internal survey at this stage, it is not necessary to decide whether work on 28 or 50 blocks was carried out, although from the evidence it would seem work on only 28 blocks was done.

We think that the Judge was right in holding that the fee for the external survey was Shs. 775,000/-. The appellant was entitled to payment of this sum.

The Judge also ordered the appellant to repay the respondent a sum of shs. 1,700,000 which he found was overpaid, as well as shs. 499,000 being penalty for delay in carrying out the contract work.

Mr. Kumwembe for the appellant rightly attacked this part of the judgment. The respondent was not allowed to proceed with his counterclaim, which included these two items, and in the circumstances, it is difficult to understand how the judge could order the appellant to pay these two sums to the respondent. This order, together with the order to the appellant to pay 1.5 million shillings to procure the right of occupancy, is clearly untenable. All the judge could do would be to declare that the respondent had overpaid the appellant the sum of Shs. 1.7 million.

The order, or more correctly, the declaration that the appellant, on completion of the internal survey and on obtaining the right of occupancy would be entitled to the sum of Shs. 3,796,200, was unnecessary and indeed irrelevant. If and when the appellant completed the work in terms of the contract and the respondent does not pay, it is up to the appellant to take whatever steps would be necessary, but that is not a matter with which the trial court or this court is concerned.

The appellant had sued for a sum of money i.e. Shs.3,367,200, and the trial judge in effect found that the appellant was only entitled to Shs. 775,000 and not more. He also found that the respondent had paid an excess of shs. 1.7 million to the appellant. The judge should have made an order giving judgment only for the sum found due, and made a declaration that an overpayment of shs. 1.7 million had been made.

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In the result we dismiss l with costs. We also set aside the judgment and dec : High Court, except its order for costs, and substitu r an order allowing the appellant's claim at Shs. 775 We also declare that the respondent had overpaid tl ınt a sum of shs. 1.7 million.

The respondent is at lib apply for the refund of the money, if any, it had deposited urt.

DATED at DAR ES SALAAM thi 3th day of June, 1985.

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JUSTICE OF PPEAL

R. H. KISANGA
JUSTICE OF APPEAL

A. M. A. OMAR
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(B. P. MOSHI)
SENIOR DEPUTY REGISTRAR.