

TANZANIA / JUDGMENT

## 20100924 TZHC Dar es Salaam

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TZHCDECIDED  
24 September 2010

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM  
COMMERCIAL CASE NO.7 OF 2010 . THE ATTORNEY GENERAL ..... ~ .....  
PLAINTIFF VERSUS M/S DENGARD SYSTEM (T) LTD ..... DEFENDANT Date of  
last order: 13/05/2010 Date of ex parte hearing - 13/05/2010 · Date of ex parte judgment -  
24/09/2010 ) JUDGMENT EX PARTE MAKARAMBA, J.: On the 8th day of February, 2010, the  
Plaintiff, the chief legal advisor of the Government, and by virtue of law responsible for  
instituting suits on behalf of the Government, filed a Complaint in this Court against Defendant. In  
this suit, the Plaintiff claims that on the 1st day of February 2005, the then Ministry of Works  
(now Ministry of Infrastructure Development) entered into a contract with the  
Defendant, M/S Dengard Systems (T) Ltd., a body corporate established under the Company Act  
[Cap.212 R.E. 2002], for the installation of ticket vending and validating machines at the  
Mago\_goni/Kigamboni Ferry in Dar es Salaam (hereinafter "the Contract). In this suit,  
the Plaintiff is suing the Defendant for sums of monies, specific damages, interest and general  
damages which the Plaintiff claims to have suffered due to delay in completion by the Defendant  
of the Contract, and for failing to complete the obligations stipulated in the Contract and hand  
over the project to the Plaintiff. In the Complaint filed in this Court on 8th day of February, 2010, the  
Plaintiff prays for Judgment and Decree against the Defendant for the following orders, namely:

- a) A payment of Two Hundred Two, Six Hundred and Eighty United States Dollars (USD 202,680) being advance payment made to the Defendant,
- b) Interest on the sum of Two Hundred Two, Six Hundred and Eighty United States Dollars (USD 202,680) at the rate of 30% per annum from the date of filing this suit until judgment,
- c) Interest on the decretal amount at the Court rate from the day of Judgment to the day of full payment, d) General damages to be assessed by the Court
- e) Costs of this suit be provided for
- f) Any other or further relief as this Honourable Court shall deem fit and just to grant As it turned out, efforts by the Plaintiff to serve the Defendant did not bear any fruits whereupon the Plaintiff prayed to serve the Defendant by way of substituted service by publication in the local newspapers which prayer this Court duly granted on the 4th day of March 2010. The Plaintiff then proceeded to publish the substituted service in the

MAJIRA: and MWANANCHI newspaper respectively, both of 1st day of March 2010. On the 29th day of March 2010, this Court granted the prayer by the Plaintiff to proceed by way of ex parte proof; which the Plaintiff did on the 13th day of May 2010 and hence this judgment. In this suit the Plaintiff was represented Mr. Gabriel Malata, learned State Attorney. The Plaintiff presented only one witness, Engineer Dr. John Ngunguru (PW1), a Director of Technical Services in the Ministry of Infrastructure Development (then Ministry of Works) since 2000, entrusted with among other tasks, supervision of mechanical engineering works and government buildings. The Plaintiff tendered in evidence a total of six documents. In his testimony while being lead by Mr. Malata PW1 stated that on the 1st day of February 2005, he witnessed the signing of a contract between the Ministry of Works (now Ministry of Infrastructure Development) and M/S Dengard Systems (T) Ltd., for the supply and installation of ticket vending machines at Magogoni/Kigamboni Ferry (hereinafter the Contract). PW1 testified further that, Engineer Kijazi signed the Contract on the part of the Plaintiff, and Mr. Deus Nyanza on behalf M/S Dengard Systems (T) Ltd. A copy of the Contract dated 1st day of February 2005 was tendered in evidence by PW1, which Mr. Malata learned State Attorney prayed that it be admitted under section 68 of the Tanzania Evidence Act [Cap.6 R.E. for the reason that the original of the Contract is still with the Controller and Auditor General for other official business. This Court duly admitted the Contract and marked it as Exhibit P1. PW1 testified further that the Contract sum was for US\$ 225,200 and its performance period was for eight weeks. PW1 testified further that the Contract specified that 10% of the Contract sum, to the tune of US\$ 22,520, was to be paid by the Plaintiff to the Defendant on the 9th day of February 2005, which sum PW1 testified further that it was duly paid by the Plaintiff to the Defendant in March 2005 after, the Plaintiff having received a request in writing by a letter dated 1st day of February 2005 from the Managing Director of Dengard Systems (T) Ltd to the Director, Electrical and Mechanical Division Ministry of Works. (now Ministry of Infrastructure Development). The said letter was tendered in evidence by PW1 and admitted and marked as Exhibit P3. PW1 testified further that the Contractor, M/S. Dengard Systems (T). Ltd, through its letter dated 13th day of March 2005, which was addressed to the Ministry of Infrastructure Development (then Ministry of Works), in which the Defendant requested from the Plaintiff an advance payment to the tune of US\$ 40,000, which request was considered by the Ministry and was duly paid. The letter dated 13th day of March 2005 by M/S Dengard Systems (T) Ltd applying for the advance. payment of US\$ 40,000 was tendered in evidence by PW1 and admitted and marked as Exhibit P4. PW1 testified further that in April, 2005, the Contractor, M/S Dengard Systems (T) Ltd submitted a Bill of Lading for the vending machines. PW1 testified further that as per the contractual term, the Contractor, M/S Dengard Systems (T) Ltd, was paid the balance of the contract sum, to the tune of US\$ 140,168. PW1 tendered in evidence payment vouchers in respect of the said payments, which this Court admitted and marked collectively as Exhibit P2 to substantiate the payment of the advance of US\$ 40,000 and that of the balance of US\$ 140,168. PW1 testified further that in total; the Plaintiff is claiming from the Defendant US\$ 202,680 and further that the service provider, Dengard Systems (T) Ltd, which is the Defendant, is not claiming anything from

. ' statement PW1 later retracted by correcting that the Contract was to have ... 0 ended on the 1 day of April 2005, reckoning from the 1st day of February st -: . ' 2005, which means eight weeks for the contract period. PW1 testified " " , , l fu~her t~t th~ c6ntractor, M/S Dengrad Systems (T) .Ltd, did not perform the contract . within . the agreed , , \_' period, . consequently, due ' , . to delays, the ' Plaintiff was forced to write the Contractor several reminders.. The ' .. reminder le~ers dated 21/09/2-007; 21/04/2008 and 08/06/2009 authored by P~l himself (Engineer J.S. Ngunguru), were tendered in evidence and ~- . . " admitted marked collectively as Exhibit PS. PW1 testified further that despite these reminders; still the Defendant did not respond. : . . ! . . . . o ~ : PW1 testified further dting but only a few of several instances of failure by the Defendant to finalize the Contract including the Defendant not finalizing a radio link between Kigamboni and Magogoni, Dar es Salai;im; . not providing warrant and spare parts for the machines he provided to the Plaintiff; and not conducting training for the workers who were stipposed\_ . to operate the machines.. Consequently; PW1 further testified, as a result of the Defendant failure to finalize the Contract the Plaintiff terminil:ted the Contract and resorted to court action against the Defendant to recover the total cost. of the contract. PW1. tendered in S evidence. a letter dated 26/06/2009 authored .by Engineer Omar Sham~o . . but not PW1, which Mr. Mala.ta prayed. that it be admitted as exhibit under. section 34(a)(i) of the. Janzania Evidence. Act. This Court duly admitted .it \_ and marked it- as, Exhibit. Pij. PW1 wound up his testimony in chief by- stating .that the Plaintiff is claiming from the Defendant for t\_he following: First the Defend?Jnt to pay USD 202,680 which was paid as advance payment by the Plaintiff to the defendant. PW1 testified that the envisaged services have not been. enjoyed by the intended clients as tfile Defendant . . . did n:ot hand: civer the project. PW1 testified, further that the s.um of USD 202,680, the Plaintiff is claiming from the Defendant was paid by the Plaintiff to the Defendant as evidenced by the vouchers PW1 tendered in evidence .. "Secondly, intereston the sum ofUSD 202,680 at the- rate of 30% per. annum from the date of filing this suit until judgment. Thirdly; interest on-the decr:etal amount at court's rate -from the date of judg.ment till full payment Fourthly, general damages to be assessed by the Court. PW1 . contended that the purpose of the project was the intention of the Plaintiff to control leakages in the collection of revenue at.the Magogoni Ferry and therefore in the a\_bsence of the 07achihe, the Government has continued to incur losses in revenue coUectibrn; PW-1 contended further that on average they are collecting around Tshs.6,00D,,000/= a day without the machines and the target was to collect Tshs.10,000,000/= a day. PW1 fr conte.nded. further that failure by the Defendant to complete the project has caus-ed di'scortifort to the paying: ferry passengers since the Plaintiff .. could not utilizethe 'intended modern technology; PW1 contended further. that the Plaintiff intended th.rough use of the machines to 'be able to know . the number of people using the ferry so that the Plaintiff could ascertain- . the actual ~evenue collected per day\_. PW1 surmised that if all had gone well -the:Pla intiff wou Id have started to enjoy the services from 01/05/2005,

which turned out not to be the case as a result of the Defendant's failure to

- PW1 complete: and hand over the project as per the contractual agreement. PW1 also prayed for costs of this suit and any other relief deemed fit and just. In this suit, the first issue for consideration is whether there was a contract between the Plaintiff and the Defendant and what were the terms of the contract. The second issue is whether the Defendant has breached the terms of the contract. The third issue is whether the Plaintiff has suffered general damages and the fourth issue is to what relief(s) is the Plaintiff entitled to. On the first issue whether there was a contract between the Plaintiff and the Defendant, the testimony of PW1 has amply established that the Plaintiff, the then-Ministry of Works (now Ministry of Infrastructure Development) on the 1st of February, 2005 entered into a Contractual Agreement with the Defendant for the supply and installation of ticket vending and validating machines at Magogoni/Kigamboni Ferry ... this is evidenced by a copy of the said Contractual Agreement titled "Contract for Supply and Installation of Ticket Vending Machines at Magogoni/Kigamboni Ferry Dar es Salaam" (hereinafter the Contract) which was tendered in evidence by PW1 and admitted and marked as Exhibit P1. The date indicated as the date for its conclusion is the 1st day of February 2005. In that Contract (Exh.P1), the Permanent Secretary, Ministry of Works, is the "Purchaser" on the one hand, and M/S Dengard System (T) Ltd, the Defendant is the "Supplier", on the other hand. The Contract was for the supply and installation of ticket vending machines at Magogoni/Kigamboni Ferry Dar es Salaam at a sum of US\$ 225,000 (say Two hundred twenty five thousand two thousand only), the "Contract Price." As PW1 testified the Contract was signed by John Kijazi, Permanent Secretary, Ministry of Works in the presence of John S. Ndunguru, Director (PW1), and Deus Nyanza for Dengard System (T) Ltd in the presence of Alvin B, Director OPA. The Contract (Exh.P1) had General Conditions of Contract (GCC) supplemented by Special Conditions of Contract (SCC). In the Bid Form and Price Schedules dated 27th October 2004 to the Director of Electrical and Mechanical in the Ministry of Works, which is annexed to Exh.P1, the Managing Director of the Defendant's company, having examined the bidding document including Addenda offered to supply and deliver Ticket Vending Machines at Magogoni/Kigamboni Ferry Dar es Salaam in conformity with the said bidding documents for the sum of US\$ 225,000 undertook, if the BID is accepted, to deliver the goods in accordance with the delivery schedule specified in the Schedule of Requirements and that if the BID is accepted, to obtain the guarantee of a bank in a sum equivalent to ten per cent of the Contract Price for the due performance of the Contract in the form prescribed by the Purchaser. According to Clause 1.1 of the set as per the GCC Clause 1.1, prices were to be in Tanzanian shillings and conversion to be made by application of exchange rate prevailing on the date of payment. The first payment of US Dollar was made by the Plaintiff to the Defendant vide Payment Voucher 3260/2 for a sum of US 22,520 ... (equivalent to Tshs.25,292,662.40 at an exchange rate of L 123.12 (Exhibit P3). This was in response to the request by the Defendant through its letter dated 01/02/2005 to the Plaintiff for payment of 10% advance of the contract sum. The second payment of USD

40,000 (equivalent to Tshs.44,706,400 at exchange rate of 1.117.66 (Exh.P2 collectively) was made by the Plaintiff to the Defendant following a request by the Defendant through its letter dated 13th of March 2005 for funds to facilitate the equipment importation as per performance bond dated 11/03/2005. The third payment was for USD 140,160 (equivalent to Tshs.157,791,637.40 at exchange rate of 1.125.79) (Exh. P2 collectively). The evidence on record therefore shows that in total the Plaintiff made payments to the Defendant amounting to USD 202,680, comprising of USD 22,520 (Exh. P3); USD 40,000 and USD 140,160 (Exh.P2 collectively), which is 90% of the contract sum of USD 225,200. The first issue whether there was a contract between the Plaintiff and the Defendant is therefore answered in the affirmative. The second issue is whether there was breach of the terms of the Contract by the Defendant. According to the testimony of PW1 and the evidence tendered in court, the Contract was for the installation of ticket vending and validating machines at the Magogoni/Kigamboni Ferry in Dar es Salaam. The Contract which was signed on 1st of February 2005 was to have ended on the 1st day of April, 2005; reckoning from the 1st day of February 2005, which means eight weeks for the contract period. As per the testimony of PW1 the Contractor M/S Dengard Systems (T) Ltd, despite having collected almost 90% of the contract sum did not perform the contract within the agreed period. As a result of the delay in completion of the contract by the Defendant, the Plaintiff was forced to write to the Contractor several reminders as evidenced by the letters dated 21/09/2007; 21/04/2008 and 08/06/2009 authored by PW1 himself (Engineer J.S. Ngunguru) (Exhibit PS collectively), which the Defendant does not seem to have ever responded to. PW1 testified on the particular breaches of the Contract which the Defendant committed which included in the Defendant not providing warrant and spare parts for the machines the Defendant provided to the Plaintiff; and the Defendant not conducting training for the workers who were supposed to operate the vending machines. As testified by PW1, clearly the services that the Plaintiff envisaged would have been enjoyed by its intended clients using the Magogoni Ferry were not realized as the Defendant did not hand over the project to the Defendant. If all had gone well as PW1 testified, the Plaintiff would have started enjoying the services 10 from 01/05/2005, which turned out not to be the case as a result of the Defendant's failure to complete and hand over the project as per the contractual agreement. The second issue is therefore answered in the affirmative. The third issue is whether the Plaintiff has suffered any general damages. PW1 testified only generally without giving any concrete evidence to substantiate the damage the Plaintiff suffered as a result of the failure by the Defendant to complete the project which PW1 claimed in his testimony that it has caused discomfort to the paying ferry passengers due to the Plaintiff not being able to utilize the intended modern technology. Furthermore, according to the testimony of PW1, the Plaintiff intended, through use of the modern vending machines at the Magogoni Ferry, to establish the number of people using the ferry daily so as to enable the Plaintiff ascertain the actual revenue collected per day; which PW1 put only generally at Tshs.10,000,000/- per day with the new vending machines instead without which the Plaintiff was only collecting Tshs.1,000,000/- per day but without providing the basis for the calculation of the said amount. In my view the general

statements by PW1 as to the discomfort the Plaintiff suffered as a result of the delay by the Defendant to complete the project as agreed to do not constitute a sufficient ground for this Court to exercise its discretion to award general damages. The third issue is answered negatively. The fourth issue is what relief the Plaintiff is entitled to. It has been amply established during the ex parte hearing vide both the testimony 11 of PW1 and the documentary evidence tendered that the Defendant has received from the Plaintiff payments to the tune of USD 202,680, constituting 90% of the contractual sum of USD '225,200 but the Defendant has failed to hand over the project to the Defendant and this despite several reminders by the Plaintiff which the Defendant has never bothered to respond to. In the event and for the foregoing reasons, judgment and decree is hereby entered for the Plaintiff against the Defendant as follows:

- a) The Defendant shall pay the Plaintiff USD 202/680 (Say Two Hundred Two1 Six Hundred and Eighty United States Dollars only) being advance payment made to the Defendant,
- b) The Defendant shall pay interest on the sum of USD 2021 680 (Say rwo Hundred Two1 Six Hundred and Eighty United States Dollars only) at the rate of 30% per annum from the date of filing this swt until judgment,;
- c) The Defendant shall pay interest on the decreta! amount at the rate of 12% per annum from the date of Judgment to the date of full payment;
- d) The Defendant shall pay the costs of this suit. It is accordingly ordered. -R.\t. MA,KARAM'BA, JUDGE- 24/09/2010 . 12 . t . -Judgment delivered .this 24th day, of September, 2010 in the presence of Mr. Chidowu; • State Attorney for the Plaintiff and Ex-pa rte for the - Defendant •~ • • {~ .... R.V. MAKARAMBA JUDGE 2\_4/09/2010 Words count: 3,097 13

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Prepared on 23 October 2026 · Esheria