

TANZANIA / JUDGMENT

Africa Geophysical Services Limited v Pan African Energy Tanzania Limited Judgment1

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
DAR ES SALAAM COMMERCIAL CASE NO. 5244 OF 2024 AFRICA GEOPHYSICAL SERVICES
LIMITED.....PLAINTIFF VERSUS PAN AFRICAN ENERGY TZ LIMITED.....
DEFENDANT

JUDGMENT

Date of last order: 12/12/2024 Date of judgment: 07/02/2025 AGATHO, J.: On 14th March 2024, the Plaintiff filed a case against the Defendant, claiming several reliefs for unlawful termination of 3D Seismic Data Acquisition services Contract No. PAT-SS3DSDA-2022-001 at the Songo Songo Island (SSI) executed between the parties on 8th July 2022. The defendant disputed the allegation and raised a counterclaim against the plaintiff. Briefly, the plaintiff's claim against the defendant is for general damages and specific damages of USD 30, 270, 855.30, specific damage being specific damages she suffered due to the defendant's unlawful termination of the service contract. In addition to that the plaintiff claims 1 general damages to the tune of USD 100 million. Therefore, the plaintiff prays for judgment and decree against the defendant as follows:

- (i) Payment of specific damages to the tune of USD 30,000,000.00 as pleaded in paragraph 4(i)-4(v) of the plaint. (ii) Interest at the prevailing commercial rate on the amount claimed in (i) above from the date of filing the suit to the date of judgment and interest at the rate to be determined by the court from the date of judgment to the date of full payment. (iii) General damages as shall be assessed by the court. (iv) Costs of the suit
- (v) Any other relief(s) which this court may deem fit and just to grant in favour of the plaintiff. On her side, the defendant through her WSD denied the plaintiff's claims and raised a counterclaim against the plaintiff for a total of USD 5, 474, 923.00, being specific damages she has suffered due to the plaintiff's breach of the contract. Moreover, the defendant claims general damages to the tune of USD 25,800,000.00 from the plaintiff for the breach of the contract to be assessed by the court; interest on the decretal and on costs at the court rate of 12% per annum from the date of judgment to the date of full satisfaction; interest on

decretal sum from the date of the cause of action at the rate of 15% from the date the cause of action arose to the date of judgment; costs of this suit; and any other relief(s) which the court will deem just and fit to grant. Before commencement of the trial, the court with assistance of the parties framed the following issues for determination: 2

1. Whether there was a breach of contract by either side.
2. Whether termination of contract by the defendant was lawful or justified?
3. Whether the defendant (plaintiff in the counterclaim) caused variation of the terms and conditions of the contract which delayed the plaintiff to complete her contractual obligation.
4. Whether the plaintiff (defendant in the counterclaim) breached any contractual obligation against the defendant (plaintiff in the counterclaim)?
5. To what reliefs are the parties entitled to. In a bid to prove her case, the plaintiff brought two witnesses, William Macdonald and Nestory Mutabazi. The plaintiff's first witness to testify was one William MacDonald (hereinafter referred to as "PW1"). PW1 under oath 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 trained Surveyor by profession and Country Manager of the plaintiff. PW1 went on telling the court that his duties among others include managing the Plaintiff's business in the company's day-to-day operations, hence he conversant with the facts of this suit. It was PW1's testimony that on 7th July 2022, the plaintiff and Defendant executed a Service Contract for the purpose of providing a 3D Seismic Data Acquisition Services Covering Land, Transition Zone, and Marine. PW1 tendered in evidence Service contract which was admitted as exhibit P1. 3 Testifying on the performance of the contract, particularly the delay of mobilization, PW1 told the court that the mobilization of the project could not take place as agreed due to the long time it took to reach Mr. Lee Parker and the arrival of equipment in an incomplete state. Expounding on the said delay PW1 told the court that it was a requirement in Article 2.2 of the contract, that the Plaintiff in the performance of the contract shall use marine crafts, equipment and personnel described in Schedule C that is MV Geo Tiger, manufactured by Poseidon Marine Technology PTY Limited and built-in 2006 that has a shallow-draft Jet Drive, one local chartered vessel and Lady Anna II. According to PW1 these requirements were the reasons for the delay of commencement of mobilization because it was difficult to fulfill them as Mr. Lee Parker who was appointed as a consultant and the one identify equipment for the performance of the contract was not accessible within a reasonable time. PW1 tendered in evidence Email correspondence between PW1 and Mr. Lee Parker which was admitted as exhibit P2. Testifying further on the delay PW1 told the court that as means of solving the problem stated above, on 13th February 2023, the plaintiff via e-mail communicated to the defendant the difficulty experienced in getting hold of Mr. Parker and proposed that the Agreement be amended to remove the requirement of hiring Mr. Parker as a consultant. The defendant, through Andy Hanna, the project manager of the defendant, responded that he did not see how the issue of Lee Parker was delaying the project. PW1 went on with his

testimony that after a very long period, he got hold of Mr. Parker, who remotely advised that he had instructed one 4 Paul Mitchan to arrange for the equipment and other logistics for the shipment of the equipment. Despite hiring Mr. Mitchan, Mr. Parker was not communicating with him on time, causing a delay. PW1 tendered in evidence the email dated 14.02.2023 which was admitted as an exhibit p13c. Expounding on the reasons for the delay PW1 told the court that Mr. Mitchan, acting under instructions of Mr. Parker and at the Plaintiff's costs, shipped the equipment from the United States of America to Dar es Salaam. However, shipped parts were to be assembled in Dar es Salaam, and during reassembling it was observed that the shipped equipment was not suitable for the performance of the contracted work. PW1 added that apart from that it was noted that some parts were missing, so they had to import some parts, and others were bought locally in Tanzania. According to PW1 all these caused further delay in the mobilization process. Further testimony of the PW1 was that despite of pitfall encountered plaintiff completed the mobilization stage and after completion on 20th June 2023, the Defendant's Project Manager and PW1 signed MEMO 010 on acceptance of the mobilization subject to delivery of items indicated in the note. PW1 tendered in evidence a memo dated 20.06.2023 which was admitted as exhibit P3. PW1 went on testifying that on August 19, 2023, He prepared another Mobilization Acceptance document indicating the items delivered and the activities performed to complete the mobilization process but the Defendant refused to accept the completion of Mobilization and requested PW1 to give details in writing outlining point by point on compliance with the mobilization process. PW1 told the court that following 5 that request, PW1 prepared a detailed document as demanded and sent it to the Defendant's officer, but the Defendant refused to sign despite all the details provided and did not provide any fault on the process apart from claiming that there was no narrow shoot, the item which was not provided in the contract as a requirement for completion of mobilization. That is, the defendant's refusal to accept completion of mobilization. According to PW1 all the requirements depicted under Clause 4 of Schedule B of the contract were complied. Despite the defendant's refusal to sign the acceptance of completion of the mobilization, the Plaintiff continued with the production stage and issued a daily report on the production, and the daily reports were signed by an officer from Plaintiff jointly with an officer from the defendant to signify acceptance. PW1 tendered in evidence a timeline daily production sheets dated 21.07.2024, 17.08.2023, 19.08.2023, 20.08.2023, and 21.08.2023 which were admitted collectively as exhibit P4. Testifying on the production report and payment executed by the defendant, the witness told the court that the payments were an indication that two vessels were operating, and the production was in progress as such the mobilization stage had been completed. PW1 further testimony was that in the course of the performance of the contract, the defendant approached the plaintiff and requested for variation so as to have an alternate node because it was agreed that pingers should be after each node, but the defendant requested that pingers be put in each node. According to PW1 that variation increased the number of pingers required, and increased costs and time to perform the 6 contracted services. PW1 stated that the plaintiff accepted the requested variation with reservation that the project's completion time would be increased proportionally to the delay caused. But the defendant

unreasonably refused to allow Plaintiff to work 24 hours a day to ensure that wasted time would be properly compensated. PW1 admitted that there was a delay in the performance of the contract however, he pointed out that the delay was out of control of the plaintiff because it was the defendant who proposed the use of Geo Tiger equipment which turned to ineffective, and shooting took much time due to its ineffectiveness. However, the plaintiff had no alternative to change it because it was agreed in the contract that Geo Tiger equipment is the one be used. He added that to address the problem of nodes, the plaintiff rented some from PX Geo but in the course of the performance of the contract the owner needed those nodes in another project, and since it was not certain when the project in Tanzania would be completed, they opted to recall the nodes for their other use. PW1 went further telling the court that on 10th September, 2023 the Chairman of the Board of Directors of plaintiff informed the defendant by way of a letter that the owner of the Nodes which were used in the project had recalled them and the plaintiff was requiring sometimes to order new nodes. And therefore, he informed the defendant that there will be temporary suspension until Nodes are imported for continuation of the work. PW1 tendered in evidence the letter dated 10.09.2023 which was admitted as exhibit P5. That is notice of suspension of the contract. 7 PW1 went on to tell the court that on 18th September 2023, the defendant responded to the letter dated 10.09.2023 alleging that the plaintiff had failed to meet her obligations stipulated under Article 2.2 of the Agreement, Article 3.2 and Article 4.1 of Schedule B (Technical Specification and Standards) and gave the plaintiff up to 18th October 2023 to correct what was alleged breach of the contract. PW1 tendered in evidence the letter dated 18.09.2023 which was admitted as exhibit P6. This was notice of breach sent to the plaintiff. According to PW1, there was no breach by the plaintiff because she performed the contract as agreed which is why the defendant did not complain about an issue with the personnel and equipment used because he was aware of what was happening in the project until the nodes were recalled. Testifying on the suspension of the operation PW1 pointed out that the suspension of operation was caused by the recall of nodes used in the operation being recalled due to poor performance of Geo Tiger, which was used as per the contractual agreement by the parties. PW1 stressed that the plaintiff cannot be liable for the poor performance of Geo Tiger because the defendant proposed the equipment, and it was agreed by the parties to be used and the plaintiff could not make any unilateral change of equipment. He added that the recall of equipment after the commencement of the operation was an act beyond the control as such cannot be termed to have breached the contract. Further PW1 placed blame on the defendant that she terminated the Contract before the completion period because it was a common understanding that the project would be completed approximately within 8 77 days from the acceptance of completion of the mobilization. According to PW1 since the defendant had never accepted the completion of the mobilization, the 77 days to complete the project had never started to run per the Agreement. And, therefore, the defendant cannot claim that Plaintiff failed to complete the 3D seismic data acquisition. Testifying on the Defendant's unilateral and unlawful termination of the Contract, PW1 stated that Plaintiff, through its legal counsel, declared a dispute and invited Defendant to an amicable settlement. PW1 tendered in evidence the

letter dated 11.12.2023 and amicable settlement of the contract which was admitted as exhibit P8. However, an amicable settlement was not fruitful, and the defendant terminated the contract. PW1 tendered in evidence the letter dated 30.11.2023 admitted exhibit P9, letter dated 23.11.2023 admitted as exhibit P10, demand notice dated 7.11.2023 Admitted as exhibit P11, notice of termination dated 25 .10.2023 admitted as exhibit P12, the letter dated 19.02.2024, minutes dated 9.01.2024 admitted as exhibit P13(a) Minutes of the meeting dated 9th January 2024 between the defendant and the plaintiff was admitted as exhibit P13(b). A letter from PW1's attorney to the defendant's attorney dated 14th February 2024 was admitted as exhibit P13(c), A letter of response from PW1's attorney to the defendant's attorney dated 20th December 2023 was admitted exhibit P13(e) and a letter from defendant's attorney to the plaintiff's attorney dated 3rd January 2024 was admitted as exhibit P13(f). Testifying on the counterclaim PW1 testified that the defendant is not entitled to the sum of USD 2,337,757.00 being money alleged to have been 9 paid to the Plaintiff and USD 1,979,486.00 being money alleged to have been paid to EPI Group for consultancy services in managing the contract. He explained that USD 55,558.00 alleged to have been paid to Specialist Consultants' services supporting the project and USD 1,102,122.00 alleged to be incidental costs incurred in support of the project including hotel and lodging costs, airfares, customs duties, baseline studies, and Environmental Impact Assessment are not genuine claims because the payments made to the Plaintiff were payments for some of work. According to PW1 the rejection of two invoices is expressly clear that they are outstanding as a defendant is indebted to plaintiff. PW1 further stated that payments made to other third parties, for whatever reason, were not contemplated in the contract and the Plaintiff cannot be liable for such expenses. In addition to that he stated that there was no consultant involved in the project in the manner claimed, and if consultants were advising the defendant, such consultants are not recognized under the Agreement subject of this suit. PW1 tendered employee register which was admitted as exhibit P7 and in the end PW1 prayed for the court to grant the reliefs as contained in the plaint and dismiss the counter claim. Under cross-examination by Vitalis Timon Advocate for the defendant, PW1 told the court all equipment alleged to be ineffective were proposed by the defendant through Mr. Lee Parker who proposed for the use of Geo Tiger. PW1 when asked about appointment of Mr. Lee Parker he responded that it is the defendant who proposed Mr. Parker to be a consultant of the project for it was stipulated in the contract that Consultant shall be parker. However, he was quick to point out there was 10 no specific clause in the contract stating that Lee Parker had an obligation to source equipment. PW1 when shown the letter dated 14.02.2023 identified it and admitted that indeed plaintiff was asking the defendant to substitute Mr. Lee Parker with Paul Mitcham the proposal that was accepted. However, he was quick to state that despite the substitution Mr. Parker was not responding when consulted with Mitcham. PW1 when questioned on the completion date he replied that according to exhibit P1 and Gantt Chart, mobilization was supposed to be completed by 02/10/2022 but up that date there was no vessel or equipment at the site for plaintiff faced challenges in getting equipment, and non-availability of Mr. Parker. When PW1 referred to article 3.2 of the exhibit P1 read it and told the court that the seismic survey was supposed to

have been completed within 77 days with the exclusion mobilization and demobilization. According to PW1, 77 days were to be counted from the date of recording the first acceptance shot point. He added that the deadline set for recording the first acceptable shot point was 22/09/2022 however, the first accepted shot point was recorded on 19th July 2023 instead of 22nd September 2022 as such the project was to be completed on 9.12.2022. PW1 when pressed into further questions, PW1 admitted that on 13 July 2022 plaintiff was paid 50% of the mobilization fee. As he was being re-examination by Ngowi Advocate for the plaintiff, PW1 stated that the engagement letter between the plaintiff and Lee Parker and the defendant was not a party to the contract. He added that the plaintiff had an agreement with Lee Parker because he was proposed by the defendant and his name was written in the contract (project 11 contract). PW1 when further pressed in questions told the court that the plaintiff did not submit an amendment to the contract to substitute the name of Mr. Lee Parker but was removed from the contract by the owner of the company that employed him. PW1 when asked to read paragraph 4(b) on page 46 of exhibit P1, read it and stated that clause provides a list of all field equipment and spare parts provided by the contractor for the program because Paragraph 5(a) at page 47 of exhibit P1, states that all seismic equipment with comprehensive spare parts, field processing system, personnel and a full self-contained camp facility will be provided, with support services including messing, storage, water desalination and waste provisions. The next and last witness to testify for the plaintiff was Nestory Mutabazi (hereinafter referred to as "PW2"). PW2 under oath 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 financial manager of the plaintiff who is responsible for issuing invoices, arranging payments to suppliers, dealing with tax compliance. It was PW2 testimony that, among others, it was agreed under clause 12 of Schedule D that the defendant would make a payment of 50% of the mobilization fee upon execution of the Contract, Payment of 30% of the mobilization fee upon acceptance of first-shot-point, Payment of 20% of the mobilization fees upon acceptance of all equipment on Songo Songo Island (Specifically including the second Source vessel, Payment of monthly production per monthly standby completed, Payment of 70% of the demobilization fee upon acceptance of all work and removal of all equipment from Songo 12 Songo Island, Payment of 30% of the demobilization fee upon sign-off of remedial works and delivery of all deliverables. PW2 went on to tell the court that following that arrangement Plaintiff issued two invoices, Invoice No. AGS/2308/003 dated 1st September 2023 for the sum of USD 529,820.00 (inclusive of VAT) for the purpose of paying foreign suppliers, and invoice No. AGS/2308/004 dated 1st September 2023 for TZS 323,531,310 (inclusive of VAT) for paying a local supplier and the same EFD Receipts were issued for both invoices to enable Defendant to effect payments. It was PW2's testimony that despite of plaintiff issuing invoices the Defendant did not effect payments as invoiced as a result plaintiff suffered a loss of USD 101,014.69 being the taxes paid on the invoice while there was no actual income. PW2 tendered in evidence Invoice NO AGS/2207/PF01 dated 10th July 2022 is which was admitted as exhibit P14 (a), Invoice No. AGS/2208/002 dated 10th August 2022 which was admitted as exhibit P14 (b), Invoice No. AGS/2305/001PF dated 25th May 2023 which was admitted as

exhibit P14 (c), Invoice No. AGS/2307/001 dated 20th July 2023 which was admitted as exhibit P14 (d), Invoice No. AGS/2309/004 dated 2nd September 2023 which was admitted as exhibit P14 (e), Invoice No. AGS/2309/003 dated 2nd September 2023 which admitted as exhibit P14 (f), Invoice No. AGS/2308/002 dated 18th August 2023 which admitted as exhibit P14 (g), Invoice No. AGS/2308/001 dated 18th August 2023 which was admitted as exhibit P14(h), Invoice No. AGS/2308/004 dated 1st September 2023 which was admitted as exhibit 13 P14 (i) and Invoice No. AGS/2308/003 dated 1st September 2023 which was admitted as exhibit P14 (j). PW2's further testified that on 2nd September 2023, the plaintiff issued other Production Invoices for the month of August 2023, Invoices No. AGS/2309/004 for USD 50,829.91 (before VAT) and Invoice Na. AGS/2309/003 for USD 229,538.39 (Before VAT) but the defendant did not approve these production invoices as such still are unpaid. According to PW2 the total expenses incurred by Plaintiff during the performance of the project amount to USD 27,838,498.56 and not USD 26,311,830.48 as depicted in the plaint. He reasoned that the variation of the amount in the plaint and on what he was testifying was the slip of the pen. PW2 went on to tell the court that since the mobilization stage was completed then in terms of what was agreed defendant was supposed to pay plaintiff costs for mobilization, production, and demobilization but defendant had not effected the amount which stand at the tune of USD 23,413,881.02 being costs for mobilization and production. PW2 tendered in evidence Volume II AGS operational costs for January, February, and March 2023 which were admitted as exhibit P15 (a), Volume III is AGS operational costs for April and May 2023 which was admitted as exhibit P15(b), Volume IV is AGS operational costs for June, July, and August 2023 which was admitted as exhibit P15 (c), Volume V of AGS operational costs for September, October, and November 2023 which was admitted as exhibit P15(d), Volume VI of AGS operational costs from July to December 2022 which was admitted as exhibit P15 (e), Volume VII of AGS operational costs through cheques in TZS bank account from August 2022 14 to November 2023 which was admitted as exhibit P15 (f), Volume VIII of AGS operation costs through cheques in the USD bank account from August 2022 to November 2023 which was admitted as exhibit P15 (g), Volume IX of AGS operational costs through cash in USD from January to August 2023 is admitted as exhibit P15 (h),Volume X of AGS personnel costs and summary of bank statement for the whole project period which was admitted as exhibit P15 (i),Volume XI of all AGS shipping charges is admitted as exhibit P 15 (j),Volume XII is another set of AGS shipping charges which admitted as exhibit P 15(k), Volume XIII of AGS operational costs at the project site (SSI) from August 2022 to November 2023 which admitted as exhibit P15 (l), Volume XIV of AGS operational costs at the project site (SSI) from January to June 2023 which was admitted as exhibit P15 (m) and Volume XV of AGS operational costs at the project site (SSI) and air tickets which was admitted as exhibit P15 (n). Testifying further PW2 told the court that it was agreed under clause 10 of scheduled D that if there will be an event of termination, Defendant would pay the Plaintiff Mobilization Fee together with the demobilization fee and 10% of the acquisition fee if termination is after the recording of the first acceptable shot point. According to PW2 since termination was done after recording the first acceptable shot Defendant was obliged to pay Plaintiff the sum of USD 100,000.00 as demobilization costs. He added that Plaintiff is also entitled to an

amount equal to 10% of the contractual amount for early termination. According to PW2 since the contractual price was USD 18,176,023.00, the plaintiff was entitled to USD 1,817,602.30 being 10% of the contract price. Explaining on the claim of USD 1,817,602 15 PW2 told the court that it was expected the project to be completed within 77 days from the first acceptable shot point but the said project took longer than the expected 77 days because the equipment proposed by the defendant to be used under the contract could not perform efficiently as such Plaintiff had incurred costs and expenses that were higher than expected and therefore the Plaintiff is entitled to reimbursement. Testifying on the claim specific damages of USD 30,270,855.00 suffered by the plaintiff PW2 told the court that in terms of the document tendered before this court, it is indeed the actual amount suffered by the plaintiff. PW2 testified that Plaintiff also has suffered general damages due to loss of reputation following Defendant's publication that Plaintiff was not able to perform 3D Seismic data acquisition as a result the plaintiff has failed to get work from its customers and prospective customers, as such he has suffered damages.. On cross examination by Timon Vitalis, Advocate, PW2 stated that it was the plaintiff management who decided on damages to paid while specific damages was from his office. PW2 when asked about the system used to prepare invoices stated that during the preparation of invoices, he was guided by the instructions from his country manager after reading the daily reports of the project. However, he was quick to point that he had never come across with a single daily report of the activities of the project. PW2 when asked to read exhibitp1 at page 87 read it and told the court that the plaintiff could only invoice the defendant monthly for the data acquired and not for the costs incurred by her. PW2 when asked to read exhibit P14(a), P14(b), exhibitP14(d), he read it and admitted that indeed 16 the proforma invoice for 50% of the mobilization fee was paid, invoice for 30% of mobilization fee was paid also exhibits P14(g) and 14(h) which are production invoices were paid fully. According to PW2 exhibits P15(j) and P15 (k) cover both mobilization and demobilization. However, he pointed out that exhibits P14(e) and 14(f) were not approved by the defendant. PW2 when asked to read exhibit P1 particularly paragraph 6.3, he read it and told the court that the total acquisition fee stated in the contract is USD 18,176,023. Therefore, taking (mobilization, demobilization and acquisition the total contract price is USD 20,743,746. However, he was quick to point out that the total amount claimed as special damages is USD 30,597,661.92. Again, he pointed out that he the total expenses the plaintiff has incurred for the project amounted to USD 27,838,498.56 while the total loss suffered by the plaintiff is USD 23,413,881.02. PW2 when pressed into questions stated that plaintiff is demanding payment for losses, he suffered due to non-payment of two invoices (exhibits P14(e) and P14(f)) which he had already issued EFD. However, he was quick to point out that plaintiff is not claiming any VAT but rather is claiming payment for the two invoices. Under re-examination by Juvenalius Ngowi advocate for plaintiff PW2 told the court that plaintiff is claiming for the costs incurred due to termination of the contract and the amount sought is higher than the contract price because from the time of signing to the date of termination it was almost 1 year and 3 months. That marked the end of plaintiff case and the same was marked closed. 17 The defendant denied the plaintiff's claims, and in attempting to prove her counterclaim against the plaintiff she

brought four witnesses. Namely, Andrew J Hanna (DW1), Vincent Edward Mosha (DW2), Mwinshehe Saidi Kibao (DW3), and Malcolm Macdonald (DW4). The first to testify for the defendant was one Andrew J Hanna, (hereinafter referred to as “DW1”). DW1 under oath 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 Managing Director of Pan African Energy Tanzania Limited hence conversant with the facts of the case. DW2 went on telling the court that sometimes in 2022 defendant engaged EPI group as a consultant for provision of technical advice and project management who after consultation came up with the 3D seismic survey design. Explaining on the 3D seismic survey design, DW1 told the court that the design clarified the scope of work and technical specifications that was to guide the bidders in understanding the scope of project and prepare proper proposals for the tender. Further testimony was that after receiving the said proposal defendant did advertise the tender and plaintiff was awarded the tender and thereafter the Defendant and (Plaintiff) executed a service contract for the provision of 3D Seismic Data Acquisition services covering land, affiniton zone and marine at Songo Songo Island. It was DW1 testimony that, the contract vested full responsibility for provision of all equipment personnel and for delivery of the survey with the Plaintiff as the main contractor for the project and the Defendant appointed its own project manager to lead a team. DW1 told the court that it was agreed that amendment, modification or waiver of the terms and conditions of the 18 Contract could be binding upon the parties unless made in writing and duly signed by both parties. DW1 told the court that it was agreed further that the completion date of the project was approximately 77 days from the date of first acceptable shot point, (including 12-days standby, but excluding mobilization or demobilization. DW1 went on that despite the agreed time the first shot point was not recorded until 19 July 2023 and in what was agreed defendant was supposed to terminate the contract, but she did not terminate the contract because in terms of Clause 24 of the contract impair or operate as a waiver of the Defendant’s right to challenge the delay. DW1 contended that every change in scope, shooting parameters and assets required to execute the project were as a result of Plaintiffs failure to procure the correct type and number of marine nodes led to a change in shooting parameters. He added that the selected methodology by the plaintiff was the sole reason that led to the requirement for transponders to be placed on every node while originally denied this requirement but after review he accepted that they were wrong and transponders on every node were required. DW1 tendered in evidence A print out of email dated 11 May 2023 between DW1 and Mr. Willaim McDonald was admitted as exhibit D1(a). Testifying on variations of the contract DW1 told the court that on 11 August 2022, the Plaintiff informed the Defendant that it had failed to acquire the nodes required for the project per the contract and was searching for alternative nodes with other companies. DW1 testified that the change proposed by the Plaintiff required the use of two gunboats (Lady Anna II and GeoTiger I). DW1 testified that following that request 19 the defendant vide the letter dated 24 August 2022, agreed the Plaintiff to source alternate nodes and adopt an alternate shooting geometry. However, the letter stated clearly that there would be no change to the requirements of Article 3.2 and the 77-day acquisition timeline. DW1 tendered in evidence a

printout of email communications between plaintiff and defendant dated 15th August 2022 is admitted as exhibit D1(b). DW1 told the court 27th October 2022 Plaintiff applied for restoration of the original geometry design after it was unable to acquire 1,500 additional nodes from its supplier in the circumstance the second variation was executed in order to restore the original geometry design. DW1 tendered in evidence the second variation agreement dated 27th October 2022 which was admitted as exhibit D2(c). DW1 told the court that again on 11 January 2023, the third variation agreement was executed in order to extend the number of non-chargeable standby days provided under Schedule C, Clause 7.1 of the Contract from the initial 12 days to 16 days. DW1 tendered in evidence a letter dated 5th December 2022, subject matter and the third variation agreement dated 11 January 2023 which were admitted collectively as exhibit D2(d). DW1 added that apart from increasing the number of non-chargeable days, parties agreed to change the order of shooting from the South to the North as opposed to the previous shooting order, from North -South, without any additional costs to the Defendant. According to DW1 this was agreed so as to allow the plaintiff to gather some data on the southern block of the survey area which was required to plan a new drilling. DW1 told the court that second variation had no impact on the program timeline. DW1 tendered in evidence the variation agreement dated 24 August 2022 which was admitted as exhibit D2(b). DW1 testified further that, again at the request of the plaintiff on 20 June 2023, the fourth variation was made by amending Clause 5 of Schedule A of the Contract by replacing 3D patch design with 40-roll-l receiver lines and 40m group interval with 3D H-pattern design with 20- roll-l receiver lines and 40m shot interval with dual source vessels (one at the top and the other at the bottom) of each patch and a doubling of source effort from the initial 40- roll-l geometry. According to DW1 the fourth geometry design change was restoration of the second geometry design change. DW1 blamed the plaintiff that she is the one who breached the contract because she failed to procure or apply proper marine receivers (nodes) as agreed in Clause 2.2 read together with paragraph 5 of Schedule A to the Contract. DW1 tendered in evidence the fourth variation agreement dated 20 June 2023 which was admitted as exhibit D2(f). In his further testimony, DW1 admitted that the Plaintiff submitted to the Defendant a request for a permission to operate 24 hours per day, instead of the normal 12 hours day-time operations prescribed in the Contract the said request was declined because Plaintiff failed to submit risk assessment and it was defendant concern that 24-hour operations would have significantly affected local fishing and livelihoods in the Songo Songo area and conflicting with environmental obligations. DW1 tendered in evidence the letter dated 24th January 2023 with reference No. PAET/0211/2023 which was admitted as admitted as exhibit D2(g). 21 Testifying on the allegation that the mobilization was delayed because of unavailability of Mr. Parker within a reasonable time and was not responsive, DW1 told the court that Plaintiff was not restricted by the contract to solely engage with Mr. Lee Parker as its consultant the contract specifically stipulated that Lee Parker was one of such consultants but did not limit consultancy to him. In addition to that DW1 stated that Plaintiff asked for permission to use another consultant and the Defendant accepted the use of another consultant instead of Lee Parker with a condition that plaintiff to prepare a draft amendment but Plaintiff never

submitted a formal amendment to the contract and did not mobilize the project even after the Defendant's consent to use an alternative consultant. DW1 tendered in evidence a print out of email communications between the plaintiff and the defendant dated 13 and 14 February 2023 which was admitted as exhibit D1(c). On the allegation that the plaintiff's breached the contract of 3D seismic data acquisition service, DW1 told the court that it was the Plaintiff who actually breached the contract by not complying with the agreed timeframe for mobilization, failure to record first acceptable shoot for it was agreed that the first acceptable shot point was to be on 22 September 2022 instead the first acceptable shot point on 19 July 2023. According to DW1 this is the breach which is contrary to Clause 3.2 read together with Clause 16.4 of Service contract. DW1 tendered in evidence the daily operation report dated 19th July 2023 which exhibit D3(a). Explaining on the breach DW1 had it that in terms of Clause 3.2 of the Contract, the project should have been completed within 77 days from 22 the date of the first shot point however, by the time of termination of the contract, the Plaintiff had recorded approximately 5% of the contractual shot points. As such, counting 77 days from 22 September 2022, the contract should have been completed by December 2022 but Plaintiff failed to complete the project even within 77 days from the late first shot point recorded on 19 July 2023. DW1 tendered in evidence the summary of the daily operations report which was admitted as D3(b). It was further testimony of DW1 that The Plaintiff also breached the contract by its failure to fulfil its obligation for the acquisition of 3D land and marine seismic survey data described in Schedule A of the Contract. DW1 tendered in evidence the daily operations report and a letter dated 10 September 2023 which were admitted collectively as exhibit D3(c). DW1 added that the plaintiff breached the terms and conditions governing the specifications and standards of the equipment needed for performance of the contract because some of the equipment procured by the Plaintiff such as Geo Tiger I gunboat was not fit for service. According to DW1 Plaintiff failed to carry out adequate pre-contract inspection and testing of the operability of the Geo-Tiger I to confirm it was fit for service. As a result on arrival in Tanzania, it was unseaworthy as it missing significant items of key equipment and had not been put into an operating condition ahead of being shipped from Houston, USA. Further testimony of DW1 was that the Plaintiff is the one who terminated the contract by removing the equipment, assets and personnel from the site without notification to the Defendant and before the completion of the project he was assigned. DW1 told the court that on 10th 23 September 2023 Plaintiff had unilaterally suspended operations without any contractual right to do so and started removing vessels and some equipment back to Kigamboni. According to DW1 this act was a breach of Clause 2.2 of the contract. Following that breach the Defendant served plaintiff with 30 days' contractual notice to remedy the breaches but the plaintiff could not remedy the situation. This prompted the Defendant to give the Plaintiff notice of invitation to attend a meeting for the Plaintiff to provide an update on the project and future plans and how it intended to remedy its breaches. DW1 tendered in evidence letter dated 2nd October 2023 which was admitted as exhibit D4(a). DW1 told the court that Plaintiff and the Defendant held a dispute resolution meeting on 9th January 2024 but the Plaintiff never stated any basis for its claim or made any attempt to articulate why it

should be paid anything by the Defendant. DW1 tendered in evidence a letter dated 11th March 2024 which was admitted as exhibit D4(b). Concluding his testimony DW1 told the court that the Plaintiff is not entitled to any of the reliefs claimed in the plaint because the Contract was lawfully terminated due to the Plaintiff's own failures and she had been paid 80% of mobilization. In his view, the claim for withholding tax is illogical because it was the Defendant who was required to withhold tax from the payments it would have made to the Plaintiff and remit the said withheld tax to the tax authority. On the depreciation and production cost claimed by the Plaintiff, DW1 viewed them as part of consideration for the contract. At the end DW1 prayed for the court to dismiss plaintiff's claim and the reliefs prayed in counter claim be granted. 24 During cross examination by Mr. Ngowi Advocate for plaintiff, DW1 when shown exhibit P1 identified it and told the court that it is a contract in which terms and conditions we agreed mutually. When pressed with questions the witness told the court that some of equipment were identified by names in the contract and one of the consultants was mentioned by the name. DW1 when asked to read clause 3.2 of exhibit P1 read it and told the court that the period for completion of service was approximately 77 days. DW1 when pressed further into questions admitted that some of the amendments to the contract were done after 22nd September 2022 which was the date for expected first shot point and that the first acceptable shot point was not recorded on the agreed date it was recorded about 300 days later. DW1 asked to read clause 16.4, he read it and told the court that if the first acceptable shot point is not achieved by the date agreed, that is 22nd September 2022 then the defendant may terminate the contract. The next witness to testify was one Vincent Edward Mosha, (hereinafter referred to as "DW2"). DW2 under oath 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 Head of Sub-surface Gas Reservoir Monitoring and Development of the defendant hence conversant with the facts of this case. The rest of the testimony of the DW2 is a replica of that DW1 on the contract between the plaintiff and defendant, on what was agreed on in the service contract, on the four variations dated 24 August 2022, 27 October 2022, 11 January 2023 and 20 June 2023. However, DW2 in addition to DW1 testimony he added that despite of the 25 variations plaintiff still breached various terms and conditions pertaining to the timelines for mobilization, testing of the equipment and acquisition of data. As such, the plaintiff has no entitlement to reliefs claimed in the plaint because she is the one who breached the contract. DW2 in proof of the defendant's case tendered the following: PAET/AGS Gantt chart which was admitted as exhibit D5, email communication dated 25 August 2023 at 12:14 PM is admitted as exhibit D6(a), email communication dated 2 September 2023 at 08:57 admitted as exhibit D6 (b) affidavit of authentication admitted as exhibit D6(c) the daily operation dated 12 May 2023 to 27 May 2023 admitted as exhibit D7 (a), defendant's daily operations report dated 29 April 2023 and 14-16 August 2023 admitted as exhibit D7 (b), defendant's daily operation reports from quality control officers dated 31 August 2023 and 3 September 2023 collectively admitted as exhibit D7 (c) and the plaintiff's presentation dated 18th October 2023 admitted as exhibit D8. DW2 prayed the court to dismiss the plaintiff's claims. During cross examination by Mr. Ngowi, Advocate for plaintiff the witness told the court that his role in the project was

coordination coordinating plaintiff and the defendant's project manager as well as other service providers involved in the project such as environmental company, botanist and fisheries liaison personnel. DW2 when pressed into question told the court that he prepared the tender documents and the contract reflected the equipment that were proposed in the tender proposal. DW2 when pressed into further questions told the court that in the contract Geo Tiger I, Lady Anna II source vessel and the name of Lee Parker were 26 mentioned. However, he was quick to point that the function of Mr. Parker was not mentioned and neither did the contract limit the contractor to employ other consultants like Mr. Parker. When asked on mobilization deadline, DW2 told the court that there was no deadline for Mobilization. However, what was set was criteria for full mobilization. On re-examination by Timon Vitalis, Advocate for defendant, DW2 told the court that full mobilization was essential requirement in the performance of contract, that mobilization had criteria, and the performance had its own criteria. The mobilization had conditions set and criteria for its completion. While acquisition/performance has its own costs allocated for it, and criteria for payments as well. The third witness to testify for the defendant was one Mwinshehe Said Kibao (hereinafter referred to as "DW3"). DW3 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 Finance Director of the Defendant Company. DW3's testimony was replica to DW1 and DW2 on the execution of the contract, appointment EPI Group for 3-D Seismic Survey Design and project management. However, he added that in the execution of the contract defendant paid EPI Group a total of USD 1,979,486.21 for the services it offered to the Defendant. DW3 tendered in evidence payment transactions The payment transaction reports for payment to EPI Group admitted as exhibit D9(a) and the DW3's affidavit authenticating the above documents (payment transaction reports) was admitted as exhibit D9(b). Testifying, on agreed payments DW3 told the court that it was agreed in paragraph 5.6 of Schedule D to the Contract 27 that the Defendant was to pay the Plaintiff a total of USD 2,467,723 as mobilization fee. The Defendant paid the Plaintiff a total of USD 1,974,178.40 as 80% of the mobilization. The Defendant also paid the Plaintiff a sum of USD 363,578.14 as part payment of data acquisition making the principal amount paid to the Plaintiff being USD 2,337,756.54. DW3 tendered in evidence Summary of the payments for the project (journal label) admitted as exhibit D10 and payment transactions reports for payments to the plaintiff admitted as exhibit D11. DW3 added that apart from EPI Group which was engaged as a Seismic Consultant responsible for providing technical advice and project management, the Defendant had engaged various suppliers for provision of another services incidental to the project. It was DW3's testimony that the total amount paid by the defendant to other suppliers amounted to USD 1,157,680.25. DW3 tendered in evidence the payment transaction reports for payments to other suppliers exhibit D12. According to DW3 the total principal amount paid to the Plaintiff, EPI Group, and other suppliers for the project up to the date of termination of the agreement (25th October 2023) is USD 5,474,923.00. Further testimony of DW3 was that it was agreed under clauses 5.6 and 6.3 of the Contract that the total contractual consideration for provision of the 3D Seismic data Acquisition inclusive of the mobilization and demobilization fees was USD 20,743,746 and out of that amount USD

18,176,023 was a fee for the execution of the work; USD 2,467,723 was a fee for mobilization and USD 100,000 was the cost for demobilization. DW3 told the court that the costs of execution of the contract (USD 18,176,023) 28 was covering the cost of personnel, operational cost, finance cost, depreciation and other costs excluding mobilization and demobilization. He faulted the plaintiff for duplicating its claims on mobilization costs which were payable in three installments covering shipping costs. The separation of these items is duplication of mobilization costs which the Plaintiff admits having been paid 80%. Testifying on 20% of mobilization DW3 told the court that it was agreed that the last instalment of mobilization fee (20%) was to be paid upon fulfillment of the criteria stipulated under Paragraph 5 and 6 of Schedule B to the Contract and the 70% of the demobilization fee was payable following acceptance of full mobilization and upon removal of all equipment from Songo Songo Island including re-exportation and 30% of the demobilization fee was payable upon signing off of the remedial works and delivery of all deliverables. The Defendant never signed a certificate accepting full mobilization or removal of equipment from Songo Songo Island, as such Plaintiff had neither qualified for payment of the last installment of the mobilization fee (20%) nor installments of demobilization fee. On cross examination by Mr. Ngowi, Advocate for plaintiff, DW3 admitted that payment reports for the plaintiff and other suppliers that he tendered does not indicate that they are for SSI but some are pretty clear that they are fore SSI. We asked to read exhibits D9 and 10, DW3 read it and told the court that the last page of exhibit D9 shows the name of the beneficiary who work with defendant and plaintiff throughout the project. 29 The fourth and last witness to testify for the defendant was one, Malcolm McDonald (hereinafter referred to as "DW4"). DW4 under oath 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 Seismic Acquisition Project Specialist, with over 30 years of experience in the field of project management as a project manager in the oil and gas sector. The rest of the testimony of the DW4 is a replica of that DW1 on the contract between the plaintiff and defendant, on what was agreed on in the service contract and how the plaintiff breached the service contract. However, he added that he was an employee of EPI group as a project manager and one of his roles was to ensure that the plaintiff as a contractor was discharging its obligations under the Contract and meeting the needs and goals of the project. DW4 told the court that apart from the stated breaches the plaintiff never complied with the Gantt chart. He tendered in evidence Excel summary of the plaintiff's performance records that was admitted as exhibit D13. Further DW4 added that the plaintiff failed to fulfill its obligations under the contract as she failed to produce any usable data. He testified that being a project manager with the obligation to oversee the project and advise the managing director, he advised the defendant's Managing Director, Andy Hanna not to pay the plaintiff's alleged invoices pending a review of the situation at the project site, because all that the Plaintiff had produced was a compromised partial data set of no use to the defendant at the time when the marine nodes were pulled off the project. DW4 30 contended that the plaintiff is not entitled to any reliefs claimed because she is the one who breached the contract. Under cross-examination by Juvenalius Ngowi, Advocate for the plaintiff, DW4 told the court that in

the said project Mobilization was expected to be completed in 2022 and the first acceptable shot was expected to be recorded on 22nd September 2022. DW4 when pressed into question told the court that even though the contract did not set the exact time for completion of mobilization but the acceptable shot point was to be recorded and to achieve that the mobilization was to be completed first. That marked the end of hearing of the case. Gathering from the above evidence, the undisputed facts of the case are that on 8th July, 2022 the plaintiff and the defendant signed a service contract, Exh.P1 for provision of 3D Seismic Data Acquisition services covering land, transition zone and marine at Songo Songo Island. According to Article 3.2 of the Contract, the contractor (the plaintiff) was supposed to complete data acquisition exercise within approximately 77 days of recording the first acceptable shot point. Article 16.4 defined the deadline for recording the first acceptable shot point to be 22nd September

2022. But this was not absolute as there was room for extension. The contract was expected to be completed on 8th December 2022. The defendant signed a written acceptance of the first acceptable shot point recorded on 19th July 2023 which was beyond the date fixed on the contract. The bone of this case is the plaintiff's claim that the defendant unlawfully terminated the contract. The defendant disputed the allegations 31 and filed a counterclaim against the plaintiff. To determine the case, the following issues were raised:

1. Whether there was a breach of contract by either side.
2. Whether termination of contract by the defendant was lawful or justified?
3. Whether the defendant (plaintiff in the counterclaim) caused variation of the terms and conditions of the contract which delayed the plaintiff to complete her contractual obligation.
4. Whether the plaintiff (defendant in the counterclaim) breached any contractual obligation against the defendant (plaintiff in the counterclaim)?
5. To what reliefs are the parties entitled to. Following the completion of the trial the counsel representing the parties filed their respective final closing submissions. Delightedly, the submissions have been referred in this judgment. As preliminary, on 10 September, 2023, the plaintiff, by notice of suspension marked Exh.P5, notified the Defendant that she had suspended the project operations. In response to Exh.P5 and pursuant to Article 16.2 of the Contract, the Defendant served the Plaintiff with a notice of breach of contract marked Exh.P6 dated 18 September 2023 requiring the Plaintiff to remedy the breaches mentioned in that notice within 30 days. The breaches stated in the notice which the plaintiff was required to remedy includes: that Plaintiff had failed to meet her obligation under Article 2.2 of the contract to conduct the 3D, land and marine seismic 32 survey described in Schedule A (Scope of Work) using the land and marine crafts, equipment and personnel described in schedule C (Contract Equipment and Resources), that is mobilization. Delay in the completion of the project is another breach. The defendant alleged that the plaintiff had failed or could not meet her obligations under Article 3.2 to complete the 3D Seismic survey described in Schedule A (Scope of Work) within the approximated completion date set out in

Article 3.2 of the contract. The Notice further alleged that the plaintiff had failed or was unable to meet the obligations under Article 4.1 of the contract by failing to provide all equipment, accessories, personnel, material and all things necessary to complete the work as set out in Schedule B (Technical Specifications and Standards) of the contract. Contentiously, the defendant claimed that the plaintiff neither remedied the breaches nor responded to the notice of breach. Looking at the evidence adduced, the plaintiff has not disputed receiving the notice of breach. This notice came after the plaintiff had issued the notice to suspend the contract which as per PW1's testimony was given as the plaintiff could not secure replacement nodes timely. PW1 added that prior to issuing suspension notice, the plaintiff procured the nodes, but the owner recalled them. Later, she secured the nodes from the Russian company, which the defendant rejected. Upon the expiry of the notice of breach, on 25th October 2023, the defendant served the plaintiff with a notice of termination of the contract, Exh.PI2. But at trial the plaintiff vigorously disputed the alleged breaches of the contract. Following termination of the contract, the plaintiff served the 33 defendant with a demand notice marked Exh.P11. Thereafter, the parties convened a meeting attempting to resolve the dispute amicably but failed. The settlement meeting minutes were admitted as Exh.P13(b). And the subsequent letter from the defendant's lawyer marked as Exh.P13(d) asking the plaintiff to point out the basis of her claim in the demand notice. Following that the plaintiff filed the instant suit claiming the reliefs sought in the plaint. Let us now turn to the issues framed and the evidence to resolve them. In the analysis, and as rightly pointed out by the defendant, issues 1, 2 and 4 are intertwined. They point to breach of contract by either side. With that in mind, the evaluation of evidence begins with the first issue, whether there was a breach of contract by either side. To determine whether there was a breach of the contract, the evidence adduced by the witnesses in relation to actions or omission of the parties is examined. On this the question is whether the parties fulfilled their obligations under exhibit P1, the contract. It required the plaintiff to do mobilization of personnel and equipment at the SSI. Moreover, it required the seismic data acquisition process be done within a specified time that is 77 days from the date of recording the first acceptable shot point. After completion of the project, demobilization be done. The recording of the first acceptable shot point was almost a year later after signing of the contract. For various reasons that will be pointed out in due course the project execution delayed. Several variations were signed before and after recording the first acceptable shot point. Due to, among other reasons, failure to secure the replacement nodes the plaintiff suspended the SSI project. That irked the 34 defendant who following issuing the notice of breaches terminated the contract. This termination of the contract raises some questions. First, was the mobilization completed? Was the first acceptable shot point recorded on time as agreed in the contract? If not, why? Another intriguing question is what is the effect of accepting the 1st acceptable short point recorded beyond the time set in the contract? Who initiated variations of the contract? Does initiating variations constitute breach of contract? It is trite law that to constitute a breach of contract a party must fail to fulfil her obligation under the contract. Central to the first issue are the parties accusing each other of breaching the contract. According to the plaintiff, the defendant breached the Contract in four main

ways: (1) refusing to accept the completion of the mobilization, (2) making variations to the original contract which had effect of increasing operational cost and time, (3) refusing to make payments that were due and payable to the plaintiff per the contract, and

- (4) unlawfully terminating the contract. The defendant on her side claims that the plaintiff breached several Articles of the contract. These are Article 2.2 of exhibit P1 to which the breaches alleged are: the plaintiff (1) unilaterally suspended the contract;
- (2) removed the equipment and personnel without notifying or prior consultation with the defendant during pendency of the notice of breach (Exhibit P6). Breach of Article 3.2 of the contract, that is (3) failure to comply with the contractual timelines provided under Article 3.2 read together with Article 16.4 of the contract and the Gantt Chart marked Exh.D5. The defendant's allegations (4) of the breaches is the plaintiff's 35 failure to adhere to Gantt Chart; (5) breaching Article 4.1 of the contract on provision of equipment that the plaintiff failed to acquire and provide appropriate number and type of nodes prescribed in the contract; (6) she provided faulty equipment (Geo Tiger I with missing parts and not seaworthy); (7) failure to provide a functioning water desalination machine; and (8) failure to procure and provide sufficient spare parts. The court will scrutinize these points and evidence adduced before concluding from a legal perspective what in the circumstances of this case constitute a breach of contract and who breached the contract. Regarding mobilization, the plaintiff through PW1 testified in his witness statement and exhibit P3 comprised of MEMO 10. Memo 10 is a document dated June 20, 2023, and signed by William MacDonald (PW1) and Malcolm MacDonald (DW 4) that it was completed while the defendant rejected it stating that it was incomplete and hence declined to make payment of the remaining 20% of mobilization fee. She referred to the testimonies of DW1, DW2 and DW4 who testified that the plaintiff had not fully mobilized to qualify for payment of 20% of mobilization fee. These witnesses claim that the mobilization was incomplete at the time of termination of the contract. In expounding further exhibit P3 the plaintiff argued that in Memo 10 [exhibit P3], the parties agreed that the Plaintiff had to complete certain factors for mobilization to be completed. Part of Exhibit P3 is a sheet explaining that all factors had been met, giving details of all requirements that had been met. To plaintiff's dismay, the defendant refused to accept mobilization without any justification. The plaintiff went on arguing that the first acceptable shot point was 36 recorded in 19th July 2023. During cross-examination, DW2 testified that the purpose of the first acceptable shot was to confirm that all equipment had been tested and were of the quality agreed upon. DW4 testified during cross examination that to achieve the first acceptable shot point, mobilization was to be completed first. Along with that the plaintiff rightly submitted that there cannot be a first acceptable shot if mobilization is not completed. That explains why the project's completion period was to be computed from the date of recording the first acceptable shot point. Truly, the defendant's action of accepting the recording of the first acceptable shot point and refusing that mobilization was completed is a contradiction. At most it constitutes a breach of contract. Looking at paragraph 2.12 of the PW1 witness statement it restated the conditions required for the mobilization to be completed as per Clause 4 of Schedule B (page

46 of Exhibit P1). It is PW1's testimony that all these conditions were met. This testimony is supported by part of Exhibit P3, which shows what had been done to achieve complete mobilization. Exhibit P4 also includes test lines, antenna diagrams and the location of any navigation reference points surveyed. Exhibit P3, read together with Exhibit P4, proves the completion of the mobilization. This is cemented by the undisputed fact that parties registered the first acceptable shot point, and production commenced. Looking at Exhibit P4, it will be noted that the Parties' officers jointly signed the reports sample tendered to signify that the reports were correct. This replies to the defendant's argument that recording of the first acceptable shot is not the only criteria for completion of mobilization. 37 The defendant through paragraph 12 of DW4 witness statement alleged that the plaintiff failed to supply equipment, personnel, and accessories necessary to complete the work. However, during cross-examination, DW4 admitted that he did not substantiate his statement with any proof. As such, the statement did not even mention what equipment or personnel were missing. The allegation is therefore unsubstantiated. Through paragraph 2.2 (iii) of the PW2 witness statement the plaintiff refers to Clause 12 of Schedule D of the contract which provides that 20% of the mobilization fee would be payable upon acceptance of all equipment at Songosongo Island. Although the defendant refused to pay 20% of the mobilization fee, she did not tender any evidence to show missing equipment. Interestingly, the defendant holds the view that mobilization was not completed because there are conditions set in the contract (exhibit P1) for mobilization acceptance. That is why she refused to accept mobilization. The plaintiff on his side claims that mobilization was completed. While referring to page 46 of the exhibit P1 paragraph 4(b), PW1 testified during cross examination that as per that paragraph one of the criteria for mobilization was for the plaintiff to provide a list of all equipment and spare parts provided by the contractors for the program. He added that there was not a comprehensive list of spare parts because the contract did not require that. The spare parts were brought on a regular basis. The plaintiff could not keep a comprehensive list of spare parts. On refusing to accept mobilization, it is worth glance at pages 46-47 of the contract (exhibit P1) paragraphs 4, 5 and 6 of schedule B dealing 38 with requirements during mobilization, logistics during mobilization and minimum criteria for mobilization acceptance. They describe the plaintiff's obligations during mobilization. PW1 admitted that as paragraphs 4(b) and 5(a) of schedule B to the contract especially 5(a) the plaintiff had obligation to install a functioning water desalination at Songo Songo Island. He said they had a water desalination system, on site. But the pump broke down and they were under pressure to complete mobilization. in addition to that TPDC and the defendant provided them with desalinated water during the time when the pump broke down. PW1 testified that the pump was fixed two days before notice of termination of contract was issued. Notably, the defendant did not cross-examine PW1 on whether information about fixing the pump was communicated to her. For reasons stated above, this court finds merit in the plaintiff's view that the defendant's refusal to accept completion of mobilization and failure to pay 20% mobilization fee constitutes a breach of the contract. The plaintiff also claims that the defendant breached the contract by refusing to effect payments due and payable to her. PW2 testified that the plaintiff issued two

invoices, Invoice No. AGS/2308/003 dated 1st September 2023 for the sum of USD 629,820.00 (inclusive of VAT) for paying foreign suppliers exhibit P14(i), and the second was invoice No. AGS/2308/004 dated 1st September 2023 for TZS 323,631,310.00 (inclusive of VAT) for paying a local supplier, exhibit P14(j). See also paragraph 2.3 of the PW2 witness statement. These were production invoices. The defendant disputed the claim for unpaid invoices. She cited page 85 of Exhibit P1 shows that the contractual total acquisition fee for land and 39 marine was USD 18,176,023 meaning that the price of 1% of the data acquired by the Plaintiff was USD 180,000. PW1 conceded that the plaintiff acquired less than 1% of the data but was paid a total of USD 363,578 which exceeded the value of the data acquired. From an arithmetical viewpoint, the defendant suggested that the plaintiff owes the defendant an overpaid production fee. But in the court's view the defendant does not focus on the production invoices, instead she is dealing with the contractual sum. The plaintiff incurred some expenses by paying the suppliers (foreign and local) in execution of the contract. The said invoices ought therefore to be paid. The question of contractual sum is not relevant here. After all the execution of the contract was delayed which means costs will anyhow increase. The evidence of PW2 shows that on 2nd September 2023, the Plaintiff issued Production Invoices for August 2023, Invoices No. AGS/2309/004 for USD 50,829.91 (before VAT) and Invoice Na. AGS/2309/003 for USD 229,538.39 (Before VAT). The invoices were admitted as exhibit P 14 (e) and P 14(f). The defendant did not approve these production invoices for August 2023. There was no justification for non-payment of these invoices that were issued as per the contract. It is noteworthy that the defendant agreed to pay some of the production invoices. See paragraph 2.4 of PW2 witness statement. While the production invoices (exhibits P14(g) and P14(h)) were fully paid, the defendant refused to pay the other invoices mentioned above because she feared the contract price would burst. But since these invoices were raised while the contract was being implemented, the issue of the contract price bursting was to be resolved by parties. 40 When cross-examined, PW2 explained that the plaintiff would recover its costs through Production Invoices. This fact was also admitted by DW3 when cross-examined on how the plaintiff was supposed to recover her costs. Thus, refusing to pay production invoices meant denying the plaintiff the right to recover the costs incurred. It is concluded here that the defendant breached the contract by refusing to pay the production invoices. The plaintiff claimed that the defendant also breached the contract by giving different directives to change the original agreed plan. PW1, in his witness statement in paragraph 2.16, gives the details of the variation made by the Defendant. His testimony was substantiated by exhibit P2, particularly e-mails dated May 30, 2023, to June 4, 2023, with the heading —Optimised 20 roll 1(1799 max nodes)." In paragraph 2.17 of his witness statement, PW1 clearly states that the impact of variations requested by defendant was a need to have more working time, hence a request to operate for 24 hours. This request was refused by the defendant because as per DW1 operating at night will affect local fishing and livelihoods at Songosongo Island and may conflict with environmental obligations. Instead, the defendant approved 12 hours operations. On the allegation that the defendant gave different directives by changing the agreed plan, the court is of the view that once the directives given by the defendant were agreed upon by the plaintiff, they do not constitute a

breach of the contract. This stand is based on the doctrine of sanctity of contract. The parties' contract must be respected. See *Simon Kichele Chacha v. Aveline M. Kilawe*, Civil Appeal No. 160 of 2018 CAT at Mwanza. 41 Similarly, the parties executed variations. The plaintiff submitted that some of the variations (See exhibits D2 (a) to D2(g)) were agreed upon by both parties. It was the PW1's testimony that these variations impacted the performance and completion of the contract. The variations contributed to the delay. Despite the contract stating that variations should not lead to delay, that was lip service because considering the nature and extent of variations, delay was impliedly sanctioned. Since the parties agreed on the variations, the same does not constitute breach of contract. Equally, the delays that occurred due to the variations of the contract do not amount to breach of contract. However, the defendant's termination of contract under the guise of delay of completion of the contract is unlawful as the variations also impacted on the performance and completion of the said contract as rightly testified by PW1. It should be noted that the defendant cited plaintiff's breaches of the contract including providing faulty equipment (Geo Tiger I gunboat); failure to provide a functioning water desalination machine (this has been answered); and failure to procure and provide sufficient spare parts are among the indicators that mobilization was yet to be completed. The plaintiff disputed these allegations. PW1 testified that the gunboats: Lady Anna II and Geo Tiger I were procured following recommendations of Lee Parker, a consultant who was named in the contract itself. That was thus not a fault of the plaintiff. DW1 and DW2 objected to this view and testified that the plaintiff was not restricted from using Lee Parker as she could hire other consultants. But DW2 admitted that Lee Parker and Geo Tiger I were mentioned in the contract. To cement that, PW1 testified that the plaintiff 42 could not go against what is stated in the contract. Regarding the nodes, PW1 told the court that after the procured nodes were recalled by the owner, the plaintiff secured other nodes from a Russian company. But the defendant refused them due to international sanctions imposed by the USA Government on Russia. The rest, that is failure to provide a functioning water desalination machine and failure to procure sufficient spare parts have been objected to by PW1 as seen in his testimony. Notably, the defendant lamented that the plaintiff failed to observe Gantt Chart setting timeline for various milestones of the project. The question is as to when was the first acceptable shot point recorded? Is this recording relevant to mobilization? The first acceptable shot point was recorded on 19th July 2023 while according to Article 16.4 of exhibit P1 the agreed time for completing the acquisition of data was approximately 77 days from the date of recording the first acceptable shot point. As per that Article 16.4 the date for recording the first acceptable shot point was 22nd September 2022. If we count 77 days from that latter date the project ought to have been completed by 8th December 2022. But what one gathers from this turn of events as rightly testified by PW1 is that the moment the recording of the first acceptable shot point was delayed, the defendant had the option of terminating the contract under Article 16.4 of exhibit P1. However, instead of terminating the contract she continued to give directions and cooperate with the plaintiff, went on making payments and eventually accepted the first acceptable shot point that was recorded after a long delay. DW1 testified that the defendant opted not to terminate the contract

relying on Article 24 of the contract stating 'no waiver of 43 rights.' It was DW1's view that the defendant can still claim against the plaintiff's breaches of the contract. In contrast, the plaintiff argued that there cannot be a recording of the first acceptable shot point if mobilization was not completed. Truly, the recording of the first acceptable shot point implies that production has commenced at SSI. Moreover, signing the acceptance of the first acceptable shot point recorded beyond the date set in the contract is the alteration of the original date set for the first acceptable shot point. That is novation, which means substituting a new contract for it or rescinding or altering it, the original contract need not be performed. Section 62 of the Law of Contract Act [Cap 345 R.E. 2019] provides that: — Where the parties to a contract agree to substitute a new contract for it, or to rescind or alter it the original contract need not be performed." As per that provision, and in the court's view this amounts to variation in the written contract. See also parole evidence rule as stipulated in Section 101 of the Evidence Act [Cap 6 R.E. 2019] that a written contract cannot be altered by oral agreement. The doctrine of novation as held in *Settlement Fund v Nurani* [1970] E.A.562 has two elements: (1) consent of all the parties and (2) consideration for the extinguishment of the old obligation. See also CAT decision in *Isaka Commercial Agency (T) Ltd v Pangea Minerals Limited*, Civil Appeal No. 251 of 2021 CAT (judgment delivered on 14th May 2024) at page 13. The doctrine of novation states that parties signing an amendment to a contract relieves them from obligation under the old contract. The court is of the view that novation applies in the case at hand where the defendant signed the acceptance of the first acceptable shot point recorded on 19th July 2023 44 which was delayed. Consequently, that act relieved the plaintiff from observing the time set in the contract for recording the acceptable shot point which was 22nd September 2022. Simultaneously bars the defendant from alleging the plaintiff breached the contract by delaying recording the first acceptable shot point. Another applicable common law doctrine though not well developed in our jurisdiction is the affirmation of the contract by election. This operates against the defendant; in that she cannot opt for affirmation and still rely on the no waiver clause. It was held in the decision of the UK Court of Appeal in *Tele2 International Card Co SA and Others v Post Office Limited* [2009] EWCA Civ 9 (21 January 2009) on the doctrine of election in contract that where there is affirmation of the contract by election no waiver clause does not prevent a party from affirming the agreement by election. Once she does so she cannot rely on no waiver clause. I find this decision highly persuasive in that the defendant signed acceptance of the delayed recording of the first acceptable shot point. She cannot be allowed to come back and allege the breach of contract that she previously affirmed in writing by relying on no waiver clause. Yet another relevant doctrine is Estoppel. Promissory estoppel was well underscored by Bowen L.J. in *Birmingham & District Land Co. v L. & N.W. Rly. Co.* (1888) 40 Ch D 268,286. If a person who has contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some time, those people will be 45 allowed by the Court of Equity to enforce the rights until such time has elapsed. A similar position was earlier held in *Hughes v Metropolitan Railway Co.* (1877) 2 App Cas 439. The doctrine of estoppel seems to operate against the

defendant in the circumstances of the present case. The defendant ought to be estopped from treating the contract as breached by the plaintiff and hence justifiable to terminate the contract because she affirmed the contract while she was aware of her right to terminate it. When the recording of the first acceptable shot point was delayed, she had a right to terminate the contract, but her actions were inconsistent with her right to terminate the contract. She went on instructing the contractor and made some payments even after observing the delays. Further, DW1 admitted that the fourth and fifth variations of the contract were made after the expiry date for the first acceptable shot point. The defendant had a right to terminate the contract after noticing the breaches, but he chose to affirm the contract, he cannot afterward complain about the said breaches. By analogy, when a party has a right to rescind the contract, instead he affirms it, the right to rescission is lost. That was illustrated in *Long v Lloyd* (1958) 1 WLR 753. See also the case of *Renair Limited v Phoenix of Tanzania Assurance Company Limited* [2010] T.L.R. 358. From this it can be concluded that the defendant unfairly refused to accept mobilization completion. To be clear, once the first acceptable shot point was recorded that signals that production has commenced. There cannot be production commencement if mobilization is incomplete. Therefore, failure to accept mobilization and rejection to make payment of 46 the remaining 20% of mobilization fee is unlawful and constitutes a breach of contract by the defendant. The third issue is whether the Defendant caused a variation of the terms and conditions of the contract that delayed plaintiff from completing the contractual obligation. The parties were equally at loggerhead on the issue of variation. According to the plaintiff the variations made to the contract constitute the second allegation of breach of contract. She claimed that the defendant made variations on the original contract. However, plainly, the plaintiff's view is misleading because it sounds as if the defendant did the variations on her own. Regardless of who initiated them, the truth is that the variations were signed by both the plaintiff and defendant as per Article 26 of exhibit P1 at page 21 requiring an agreement in writing signed by both parties to make any variation or amendment to make the provision of the contract binding. Explicitly, the defendant refuted the allegation of making variations on her own and instead she submitted that it was the plaintiff's delay that caused the variations. That was supported by PW1's testimony during cross examination. However, DW1 admitted that if there were no delays in mobilization the parties would not have signed the third variation. The plaintiff complained that the variations caused the delay. The defendant on the other hand objects to that allegation. That necessitates examining the gist of these variations. To be clear, there were five variations: the first one is dated 24th August 2022, and it was admitted as exhibit D2(b). It covered the following: that the plaintiff was unable to deliver the services described under schedule A, B and C of the contract 47 (unable to supply the agreed model, type and number of marine receivers described in schedule C, section 1 - recording (3, 500 x MegseisFairfield 'z100' 4C marine nodes) and therefore cannot undertake the agreed shooting geometry (40-line receiver spread) in the agreed timeframe. The parties convened a meeting on 19th August 2022 where the plaintiff proposed alternative solution. The defendant accepted the alternative proposed. It contained alternative marine nodes to be procured and alternative shooting geometry and a doubling of source effort to maintain

fold, offsets and azimuthal coverage. The variation made also clear that Article 3.2 of exhibit P1 (the contract) prescribing the survey 77 days for 3D acquisition will remain valid and shall not change because of these changes. It was another term of the variation that the changes shall be deemed to have no impact on Article 7.4 in Schedule D of exhibit P1. Any increase in survey duration beyond the 77-days caused by the changes in nodes and configuration, and associated equipment or materials, will be considered the sole cause of the contractor. Despite that wording in the variation agreement, the plaintiff delayed, and the defendant continued to affirm these actions. The second variation agreement is dated 27th October 2022 admitted as exhibit D2(c). The amendments included schedule A - scope of work at page 35 item 5 on patch design, and marine nodes; schedule C - contractor equipment and resources. Usual caveats were included in the variation. That no impact on expected 3D acquisition duration (77-days) under Article 3.2 and Schedule D Article 7.4. any increase in the survey duration due to these amendments will be considered the sole cause of the 48 contractor. And no negative impact on the resultant acquired data such that the objectives of the company (defendant) are in no way compromised and there shall be no negative health, social, security or environmental impact. In his testimony, PW1 admitted that the second variation (exhibit D2(c)) was signed by the parties. Referring to paragraph 5, page 2/4 of the same document, PW1 testified that the variation was initiated by the defendant because she decided after signing of the contract (exhibit P1) that they required different equipment. The third variation (exhibit D2(d)) was signed for the purpose of increasing the number of nonchargeable standby days after the plaintiff delayed commencing data acquisition which would have increased number of chargeable days. PW1 admitted that the third variation agreement did not extend the period of mobilization, the date of recording the first shot point and the days of acquisition of seismic data. It was his view that the variation was intended to speed up the work. He also specifically admitted that it was the plaintiff's delay to commence acquisition that triggered the signing of Exhibit D2(d) and Exh.D2(e). The fourth variation is dated 24th January 2023 admitted as exhibit D2(e). The same was executed to allow the plaintiff to start acquisition from south of survey area and shoot north due to anticipated increasing inclement weather and late mobilization and commencement of data acquisition project. According to PW1 this caused an increase in work and time. See also PW1's witness statement paragraph 2.16. The fifth variation agreement dated 20th June 2023 was admitted as exhibit D2(f). This amendment focused on exhibit P1 schedule A - scope 49 of work and schedule C - technical specifications and standards. It is worth noting that DW1 conceded that the fourth fifth amendments were done after the expiry of the date fixed for recording the first acceptable shot point (22nd September 2022) and after lapse of the date for completion of the project, which is 9th December 2022. Despite that the defendant alleged that the variations were either initiated or attributed by the plaintiff's delay to commence acquisition before inclement weather. Although this may be true, the court is of the view that since the defendant accepted the said variations it makes no difference whether the variations were initiated by the plaintiff or not. Along with that the defendant ignored the fact that delay in commencement of seismic data acquisition was due to late mobilization which was attributed by many factors including

the faulty gunboats whose procurement was recommended by Lee Parker. Moreover, the nodes were recalled by the supplier, and the nodes supplied by the Russia Company were rejected by the defendant. These shortfalls were not within control of the plaintiff. It will thus be unfair to blame the plaintiff for such delays and variations. Besides, the variations were not useless considering that they contributed to the recording of the first acceptable shot point on 19th July 2023. For the above reasons, I find the defendant's claim that the plaintiff did not adduce evidence to substantiate how variations in Exh.D2(b), Exh.D2(c), Exh.D2(d), Exh.D2(e) and Exh.D2(f) caused the delay in mobilization and seismic data acquisition to be wanting. Furthermore, the plaintiff refuted this allegation through paragraph 2.16 of PW1's witness 50 statement explaining in detail how the defendant approached plaintiff several times and requested to agree on certain variations. These made it necessary that variations included changes in shooting parameters and changes in pingers on nodes. Further, the PW1 states that originally, pingers were to be after each node, but the defendant changed and requested that pingers be put in each node. This made it necessary for the Plaintiff to change the orders for nodes and pingers. Justifiably, the plaintiff is of the view that despite the variations documents saying that there should not be changes to timeline set, these changes had an impact on finance and time as explained in paragraph 2.16 (ii) of the PW1's witness statement. The defendant claims that she approved the variation to avoid the risk of delaying to commence acquisition before inclement weather window. This does not imply that the plaintiff breached the contract through variations. The defendant also did not challenge PW1 testimony, paragraph 2.16 of his witness statement. The Court is of the view that the defendant's allegation that the variation agreements were either initiated by the plaintiff or attributed to her delay and none of the variations had the direct or implied effect of delaying mobilization, recording of the first shot point or acquisition of seismic data is false. Firstly, the variations were signed by both parties. Second, the nodes were recalled by the owner. The plaintiff secured nodes from Russian company, but the defendant rejected them because of fear of international sanctions. Although the variations agreements said no changes to the timeline set, and as rightly testified by PW1 that by implication these variations affected the time. Moreover, the gunboats were 51 faulty, but these were procured under the recommendation of the consultant (Lee Parker) who is named in the contract. I find DW1's testimony that the plaintiff was not barred from employing other consultants to be flawed as parties to a contract are bound to comply with what is stated therein. Therefore, while the variations of the terms and conditions of the contract delayed plaintiff from completing the contractual obligation, both parties share the blame. As shown above some variations were initiated by the plaintiff while others were caused by the defendant. A conclusion on the third issue is that both parties were responsible for the variations and the delays. At this juncture, it can be concluded that the variations were agreed upon by the parties and the plaintiff can neither be blamed for that nor can the variations be regarded as breach of the contract regardless of who initiated them. The answer to the third issue is that both parties were responsible for variations. And the variations indeed contributed to the delay. Understandably, the defendant in her submissions combined issue No. 1, No.2 and No. 4.

According to her Exh.P6 shows that the contract was terminated due to the Plaintiff's breach of Articles 2.2, 3.2 and 4.1 of the Contract. The plaintiff on the other hand claims that the breaches were committed by the defendant and the termination of the contract was unlawful. It is worthy to examine these Articles of exhibit P1 that divide the parties. That said, now we turn to the defendant's claims and evidence on the Plaintiff breach Article 2.2 of Exh.P1. As mentioned earlier, the defendant identified several breaches attributed to the plaintiff. 52 First, the plaintiff is accused of unilaterally suspending seismic data acquisition without prior consultation or notification to the defendant. It is on record that PW1 conceded that there was no prior notice or consultation with the defendant before serving her with a notice of suspension marked as Exh.P5. The suspension notice did not specify the duration of suspension of operations or indicate the date of resumption of operations. The Plaintiff never stated the date of resumption of acquisition. To rebut the defendant's allegation, PW1 clarified that they had several engagements with the defendant prior to suspending acquisition. However, he admitted that he had not tendered any document in support as they were not written communication. However, the witness told the court that they suspended the contract because they needed more time to search for new nodes. This followed the recalling of nodes by the owner. And defendant's rejection of the nodes the plaintiff secured from the Russian company. I find this to be a fair attempt to salvaging the contract. Understandably, and in accordance with PW1's testimony, since the plaintiff did not know when exactly she will manage to get replacement nodes, the suspension notice could not tell when exactly the project will resume. Admittedly, this suspension sine die does not augur well with the contract itself which had set timeline and milestones. The suspension without engaging the defendant even with its good intent was unreasonable as it never stated the project's resumption date. Therefore, the plaintiff shares a token of blame. Besides notice of suspension of the contract, there is an allegation of the breach of Article 2.2 of the Contract. This Article provides as follows; 53 —2.2 the conduct of the 3D, land and marine seismic survey(s) described in Schedule A- Scope of Work hereto using the land and marine crafts, equipment and personnel described in Schedule C - Contractor Equipment and Resources hereto;" When cross-examined, DW1 admitted that the Notice had no details of the breach committed. Convincingly, the plaintiff submitted that looking at Exhibit P 6, there is no explanation of how the Plaintiff failed to meet the scope of work while the project's completion time was yet to lapse under the Contract. All parties do not dispute that the first acceptable shot point had been achieved and recorded on 19th July

2023. That is supported by paragraph 2.23 of PW1's witness statement. After recording the first acceptable shot, production started and as such, the defendant paid two invoices on production, before refusing to pay the rest of the production invoices. On production, exhibits P4 and D3(a) are daily operation reports and the test line report, which clearly indicate that production was in progress. The Plaintiff's argued that she was still within the contractually agreed- upon period for completing the project. PW1 testified in paragraph 2.23 of his witness statement, that the defendant terminated the contract before acceptance of mobilization. Therefore, 77 days, which was the approximated time for

completion of the project, had not started to run. It is uncontroversial that until the time of issuing the notice of termination, the defendant had not accepted that mobilization was completed. That is why she refused to pay the balance of 20% mobilization fee which was due. But interestingly the said defendant accepted, the first acceptable shot point recorded on 19th July 2023. 54 As regards the allegation that the plaintiff is responsible for variations, the testimony of DW1 confirms that there were five variations to the contract, the last of which was made on 20th June 2023, amending the scope of work (Schedule A). Strangely, the defendant has not given any evidence of how the plaintiff failed to adhere to the scope of work. This is logical considering that all variations on the scope of work were agreed upon by the parties except those unilaterally imposed by the defendant. The evidence and testimony of all witnesses, including defendant's witnesses, shows that the plaintiff was working within the agreed scope (including variations made that however did not change project time) and period for completion of the project was not over. Therefore, it was premature to claim that the Plaintiff had failed to achieve the scope of the work agreed. On the issue of equipment and personnel, gleaned on the evidence given in this case, the fact that the first acceptable shot point was recorded, and production had started, proves on the balance of probability that mobilization was completed. But the defendant, for reasons known to herself, refused to accept it. Aside from the plaintiff's claims, there are allegations against her that were raised by the defendant as breaches of the contract. These have been depicted but they too are worth summarizing. Among the complaints were the suspension of seismic data acquisition and removing equipment and personnel from the SSI without notice or prior consultation with the defendant during the pendency of the notice of breach marked as Exh.P6. Along with that the defendant tendered Exh.D3(b) and Exh.D4(a) to prove plaintiff's unlawful suspension of operations from 7th September 2023 55 and premature removal of equipment and personnel from the site. The defendant's view was that the oral evidence of DW1, DW2 and DW4 on breach of Article 2.2 was not controverted by the plaintiff, neither were the three defendant witnesses cross examined on their evidence regarding breach of Article 2.2 by the Plaintiff. Nonetheless, the court finds this to be inconclusive because PW1 testified that they removed the personnel at the site because it was expensive to keep them while there was no ongoing production at the site. As for the equipment, he testified that one gunboat Lady Anna II was at the project site (SSI). But the nodes they procured from Russian company was rejected by the defendant. DW1 during cross examination admitted that the notice of breach had no details of the breach committed. Exhibit P6 does not tell how the plaintiff failed to meet the scope of work (under Article 2.2 and Schedule A of exhibit P1) while the project's completion time had not lapsed because the first acceptable shot point was recorded on 19th July 2023. And after that the defendant paid two invoices for the production, before refusing subsequent invoices for the production. The defendant further attacked the plaintiff alleging that she breached Article 3.2 of contract. What constitutes the breach of Article 3.2 are inter alia, the plaintiff's failure to comply with the contractual timelines provided under Article 3.2 read together with Article 16.4 of the contract and the Gantt Chart marked Exh.D5. The allegation in exhibit P6 (Notice of Breach) is that the Plaintiff

failed or was unable to meet the obligation under Article 3.2 of the Contract (Exhibit P1) as described in Schedule A (Scope of Work) within the approximated completion date set out in Article 56 3.2. The Plaintiff was required to complete acquisition of data within approximately 77 days from the date of the first acceptable shot point. Article 16.4 defined the date of recording the first acceptable shot point as 22nd September 2022. Counting 77 days of acquisition from 22nd September 2022, the acquisition should have approximately been completed by 8th December 2022. To contradict the defendant's case, PW1 testified on the reasons for delay of mobilization. one being requirements set by the defendant on equipment, that is Geo Tiger I mentioned in the contract. And involvement of Mr. Lee Parker, a consultant who is also stated in the contract. Mr. Parker gave a recommendation that Geo Tiger I be procured. The equipment was faulty and many of its parts were missing. That contributed to the delay in carrying out the project. From legal perspective, the defendant's allegation of the plaintiff's failure to comply with contractual timelines is meritless as it is countered by the doctrine of novation and doctrine of affirmation of agreement by election elaborated previously. The doctrine of estoppel may apply too. The reason being that the defendant knew when the contract was to come to an end, yet she signed variations and went on making payments for the production. It is understood that there is a doctrine of sanctity of contract which safeguards no waiver clause, Article 24 of exhibit P1. But it would be unfair if a party affirms the breaches and yet finds refuge in the no waiver clause. That will defeat the principle of consensus ad idem, agreeing on something in the same sense which forms part of the bedrock of the law of contract. In pursuing her claims, the defendant included allegation of a breach 57 to Article 3.2 of the Contract. This article reads —the 3D seismic survey(s) described in Schedule A - Scope of Work shall be completed by the approximated completion date. The approximated completion date is defined as approximately 77 days shooting (including 12 days standby), but excluding mobilisation or demobilisation time) from the first acceptable shot point.” What stands out in Article 3.2 is that the completion date is approximately 77 days of shooting, (excluding mobilization time) from the first acceptable shot point which was recorded on 8th July 2023. Therefore, the project's completion date is computed from this date, but days for mobilization must be excluded. Undisputed by the parties is the fact that the defendant was yet to accept mobilization despite accepting the first acceptable shot and admitting that production had started. To the court's dismay, the defendant did not produce any evidence to show when the counting of 77 days started and when was it supposed to end considering that the first acceptable shot point was recorded on 19th July 2023. Consequently, the facts of the case do not support the defendant's allegation that the plaintiff failed to complete the project as agreed upon. It will be a guess to say that counting of 77 days started from 19th July 2023 while the defendant refused accepting mobilization completion. Another alleged breach is the plaintiff's failure to adhere to the Gantt Chart marked as Exh.D5 according to which the acquisition ought to have started on 29 September 2022 and completed by 8 December 2022. The first shot point was recorded on 19th July 2023, approximately 300 days after the date set in the contract and the Gantt Chart. The defendant 58 claims that this breach of contractual timeline and the Gantt Chart

by the Plaintiff was proved by Exh.P14(d), Exh.D3(a), Exh.D3(b) and Exh.D11 collectively (the payment transaction report to the Plaintiff dated 21 July 2023) and admitted by PW1 in cross examination. Clause 26 of the contract prohibits oral or implied variation of the timeline by conduct of the parties. For any change of the terms and conditions of the contract including the change of Article 3.2 and 16.4 to be binding upon the parties, such change had to have been in writing and signed by both parties. Additionally, Article 24 of the contract states that neither failure to exercise nor any delay in exercising any right or obligation under the contract by any party shall impair or operate as a waiver of a right to the contract in whole or in part. In my view this clause is unfair considering that the scope of the work and time had increased due to the variations. Nevertheless, PW1 admitted in cross examination that the contractual timelines were never varied and there was no application by the plaintiff to change any contractual timeline. Nor did the plaintiff submit proof of revision of the Gantt Chart marked as Exh.D5. This is also controversial because if the defendant was keen on the Gantt Chart, and knew that it was never followed why did she sign acceptance of the first acceptable shot point recorded beyond the time set in the chart? This not only confirms novation but also indicates laxity on the defendant's side. Apparently, the timeline was relaxed by the parties. In such circumstances it is difficult to defend the claim that time was of the essence. Therefore, I am not impressed with the defendant's view that in the circumstances of this case, the contractual timelines were of essence as 59 the delay to meet them was the main cause of variation agreements marked Exh.D2(d) and Exh.D2(e) which were signed in order to increase the number of nonchargeable standby days and the shooting direction respectively. The defendant cited the case of Debora James Ikhala v Nyasulu Enock Nkyapi, Civil Appeal No. 665 of 2023 [2024JTZCA 1143 (25 November 2024)] where the Court of Appeal held that the breach of timelines is fatal if: 1) The parties expressly stipulated that conditions as to time must be strictly complied with; or 2) the nature of the subject matter of the contract or surrounding circumstances show that time should be considered to be of essence; or 3) a party who has been subjected to unreasonable delay gives notice to the other party in default in making time of essence. These conditions for making time a matter of essence and justification for termination of the contract are in the alternative. It is the defendant's view that in this case, time was of essence because it impacted the number of chargeable standby days and shooting direction. Hence, termination for breach of the timeline was justified in the circumstances of this case. With utmost respect I beg to differ with the defendant's standpoint in that the parties signed variations which have implication on scope of work and time even though they cheated themselves by including the terms that time set will not be affected. Moreover, the defendant cornered herself by accepting in writing the first acceptable shot point recorded beyond the time set in the contract and Gantt Chart. In light of the Court of Appeal's decision in Pangea's case (*supra*) here there is novation. Therefore, the Court of Appeal decision in Ikhala's case (*supra*) is distinguished from the facts of the case at hand. 60 On top of that, it is not disputed by the parties that the original contract under Article 16.4 provided that the first acceptable shot point was to be recorded on 22nd September 2022. The Article reads: "16.4 Where CONTRACTOR has not recorded its first

acceptable shot point per the specifications by 22nd September 2022, COMPANY may terminate this Agreement with immediate effect upon delivery of the written notice, and COMPANY will pay any outstanding mobilization fees in accordance with Schedule D Remuneration. If CONTRACTOR does not record its first acceptable shot point by 22nd September 2022 on account of delay caused solely by COMPANY or delays caused outside the control of the CONTRACTOR, the 22nd September deadline shall be extended by a number of days equal to that delay. 16. " Explicitly, the above quoted Article has an inbuilt extension of time within it (in bold). PW1 testified that several things beyond the control of the plaintiff contributed to the delay. First, a delay of mobilization was mainly because the consultant (Lee Parker) who the parties agreed was not readily available, (see paragraph 2.6 of the PW1 witness statement). This subsequently led to a delay in recording the first acceptable shot point. Article 1 (b) of Exhibit P1 provided explicitly that the plaintiff shall employ Mr. Lee Parker. Accordingly, the plaintiff cannot be blamed for the unavailability of the consultant that was agreed upon by both parties. 61 Second, as the record shows that even the equipment (Geo Tiger I) used in the project had been agreed in the contract. The plaintiff could not change that equipment unilaterally. Therefore, when that equipment failed to perform in the manner expected, the plaintiff cannot be blamed because the parties had agreed on which equipment to deploy in executing the contract. Additionally, the defendant decried the plaintiff's breach of Article 4.1 of the contract. According to DW1 the plaintiff breached this article in that: she failed to provide the appropriate number and type of nodes prescribed in the contract. As a result, she made several applications for variations of the contract to change the geometry design. The first, second and fourth variation agreements marked Exh.D2(b), Exh.D2(c) and Exh.D2(f) respectively were all attributed to the Plaintiff's failure to acquire and provide the requisite type and quantity of the nodes prescribed in the contract. In contrast, PW1 testified that the nodes were hired from PXGeo (see paragraph 2.19 of the PW1 witness statement). After the commencement of production, the owner recalled them, as evidenced by Exhibit P5, a letter dated 10th September 2023, from plaintiff informing defendant about the owner's recall of the nodes. The plaintiff notified defendant that she was doing whatever possible to secure the replacement of the nodes (see paragraph 3 of exhibit P5). It should be noted that the nodes were recalled after commencement of production, hence, it does not mean that the equipment was not mobilized in the first place. The recall of nodes was after mobilization. The Contract had provided what should be done in a situation like this. Article 4. 8 of the Agreement states that 62 "CONTRACTOR shall make commercially reasonable endeavours to obtain the necessary access for the equipment. " What is more is that Article 4.1 of the exhibit P1 provides: "4.1 CONTRACTOR shall provide at its own cost and risk all equipment, accessories, personnel, material and in general all things necessary to complete the Work. CONTRACTOR shall perform the Work in accordance with the terms of this Agreement including the quality control and other criteria specified in the Schedule B — Technical Specifications and Standards hereto. The Parties hereto may agree on any changes to the criteria specified in the Schedules. CONTRACTOR shall use all reasonable efforts to implement such changes but shall not be required to incur any extra cost in

implementing such changes". As rightly pointed out by the plaintiff, the key issue in Article 4.1 is the provision of equipment per the terms of the Contract. During cross-examination, DW1, DW2, and DW3 conceded that the equipment deployed was the one agreed upon in the Contract (and any variation to the contract). The so-called Notice of Breach did not specify which equipment was not provided when executing the contract. It is in the evidence that the first acceptable shot, which was for purposes of proving availability, quality and standard of equipment, was recorded on 8th July 2023. This evidence proves on the balance of probability that Plaintiff met the criteria established under Article 4.1. Otherwise, defendant would not agree to sign and acknowledge the first acceptable point. 63 Frankly, as per the evidence adduced, the failure to acquire the nodes may not be a fault attributed to the plaintiff because the nodes owner PXGeo recalled the said nodes after commencement of production. That is as per exhibit P5 and paragraph 2.19 of PW1's witness statement. Besides that, as per PW1, the plaintiff searched for replacement nodes. She secured nodes from a Russian company and the defendant refused them. Another attack by the defendant was that the plaintiff provided faulty equipment. It is defendant's stand that DW1, DW2 and DW4 testified that both gunboats (Lady Anna II and Geo Tiger I) provided by the plaintiff had multiple technical problems which delayed the commencement of production. PW1 admitted that the gunboats mobilized had multiple technical problems which resulted into failure of the bubble tests between April 2023 and 19th July 2023 when the first acceptable shot point was recorded. The faults in the gunboats were supported by summary of the daily operations reports and the daily operations reports marked Exh.D3(b), Exh.D7(a), Exh.D7(b) and Exh.D7(c). Surprisingly, the defendant did not refer to exhibit D3(a), daily operations report dated 19th July 2023 which indicated the production was in progress. The defendant also contradicts herself in that she refused to accept completion of mobilization, but at the same she accepted the first acceptable shot point recorded on 19th July 2023. This signals commencement of production. Indeed, there cannot be production without completion of mobilization. The contract stipulated that the 77days exclude mobilization. As for the gunboats, these were procured based on the recommendations of consultant, Lee Parker. Thus, any fault with the gunboats was down to the 64 consultant's recommendations and the plaintiff cannot shoulder the blame. Turning to the Notice of breach of contract, the defendant alleges that the Plaintiff failed to comply with Schedule C of the contract. This schedule provides equipment and personnel. Surprisingly, the defendant has not substantiated which equipment and personnel the plaintiff was required to mobilize and failed. On the contrary, sufficient evidence shows that equipment and personnel had been mobilized as per the Agreement. PW1, in his witness statement (paragraph 2.11), gave the details of the mobilization done, and he prepared the list showing all items mobilized. (See part of Exhibit P3). The defendant refused to accept mobilization but did not indicate what was missing for mobilization to be completed. Moreover, the parties agree that the first acceptable shot was achieved and recorded. According to DW2, the purpose of the first acceptable shot was to confirm that the equipment was functioning properly and at the agreed quality. This proves that the plaintiff had complied with the requirements of

Schedule C regarding equipment. See also paragraphs 2.11 to 2.15 of the PW1 witness statement. The complaints about the plaintiff's failure to provide a functioning water desalination machine and failure to procure and provide sufficient spare parts. The points have been examined. But briefly on the spare parts, DW1 in his witness statement testified that the plaintiff failed to procure sufficient spare parts contrary to the requirement under paragraph 4(b) of Schedule B of the contract. PW1 conceded that the defendant through email marked Exhibit D1(d), requested the plaintiff to provide proof of auditor's confirmation of the availability of spare parts but the plaintiff did not provide the said proof. In rebuttal PW1 testified that they bought spare parts as needed. Besides, the contract paragraph 4(b), on page 46 of exhibit P1, enlists all field equipment and spare parts to be provided by the contractor. In my view PW1 testimony that the plaintiff procured the spare parts on a regular basis makes sense as the contract provided the list to guide her on what should be procured. If the spare parts were not there even the first short acceptable shot point would not have been recorded. As for the defendant's allegation that the plaintiff breached the contract for failing to provide a functioning water desalination machine. PW1 admitted that at the time of termination of the contract, there was no water desalination machine at the Plaintiff's camp because it was not operable. The plaintiff removed it because she did not want to pay rent for an inoperable machine. However, PW1 clarified that they had a water desalination pump which worked for only four months before it broke down. He added in his testimony that they took a pump for repair. He also testified that the plaintiff had other functioning water desalination pumps from the defendant and the TPDC. They thus had supply of desalinated water. Moreover, PW1 told the court that the plaintiff repaired the pump two days before the defendant issued the notice of termination. From the above analysis, the defendant's allegations that it is the plaintiff who breached the contract and her evidence leaves a lot to be desired. Hence, the lawfulness of the termination of the contract is questionable. The defendant breached the contract by refusing to accept mobilization completion, failing to pay some of production invoices. This takes us to the second issue whether the termination of the contract was lawful. Turning to the second issue whether the termination of the Contract by the defendant was lawful or justified, the plaintiff differed from the defendant's perspective. She submitted that the termination of the Contract by the Defendant was unlawful and unjustified. The defendant argued that there was no variation of the date of the first acceptable shot point. And therefore, recording the first shot point after 22nd September 2022 is a breach of contract. This irked the plaintiff who submitted that Article 16.4, quoted above, had already provided an extension of time in case factors outside the plaintiff's control caused a delay. The testimony of PW1 explained in detail the factors that caused the delay, and those factors were outside plaintiff's control. Namely, recalling of nodes by the owner, the unseaworthiness of Geo Tiger I, the equipment mentioned in the contract and its procurement was recommended by Lee Parker. Besides that, and while it is understood that as per exhibit P1 variations were to be in writing and signed by both parties, the defendant's conduct explicitly granted an extension of time either impliedly or expressly. For example, the defendant signed acceptance of the first shot point on 19th July 2023. The

affirmative action of signing to accept the first acceptable shot point impliedly extended or approved the delay. Logically, if the defendant had not extended the time, she would refrain from signing the acceptance of the recording of the first acceptable shot point. Undisputedly, the defendant entered into four variation agreements 67 (Exhibits D2 (a) to D2 (b)). Two of these variations were signed after expiry of the expected date of recording the first acceptable shot point. The logical conclusion on signing variation agreements was automatically extending the date for 1st acceptable shot point. If the defendant did not acknowledge that the time for recording the first acceptable shot point had been extended, she would terminate the contract immediately. On the contrary, she continued to cooperate with plaintiff to achieve the recording of the first acceptable shot. The plaintiff alleged that the defendant continued to conduct the project in a manner that clearly directed the plaintiff to continue with the project even after failure to meet the date, which was expected to record the first acceptable shot point. For example, the defendant signed part of Memo 10 on 20 June 2023 and at the last but one paragraph of page 2, the defendant directed the plaintiff to provide proof of the items stated in Memo 10 before mobilization was accepted. The directives given after the expected date for recording the first acceptable shot point could not mean anything else but instructions to continue with the project. Further, the defendant employed the Project Manager in January 2023. (See paragraph 4 of the DW 4 witness statement). Also, during cross-examination, DW4 admitted to having been employed as a consultant after 22nd September 2022, and therefore, he was employed while the deadline for the first acceptable shot had reached. Employing a project manager clearly indicates that the previously fixed deadline has been extended, and the plaintiff should continue with the execution of the project. The record shows that the defendant continued to effect payments 68 even after the expiry date fixed for recording of the first acceptable shot. In the evidence of PW2, the defendant effected payments for invoices issued on 18th August 2023 (production invoices for July 2023 and August 2023). [See paragraph 2.4 of PW2 witness statement]. This conduct proves that production was continuing, and the defendant accepted the activity to continue. The defendant should not be heard claiming that there was no extension of time granted. This has been explained above with reference to the doctrine of estoppel; the doctrine of novation; the doctrine of affirmation of contract by election; and cited Nurani's case (supra); Pangea's case (supra); and Tele2's case (supra). As for the fourth issue whether the plaintiff breached the contract for failure to record the first acceptable shot point on or before 22nd September 2022, this should not detain the court much. The evidence given shows that failure to record the first acceptable shot point on 22nd September 2022 was not the plaintiff fault. That is why the defendant accepted the recording of the first acceptable shot point on 19th July 2023. The recalling of nodes by the owner, the faulty equipment Geo Tiger I was also not the plaintiff's failure. Moreover, the delay in recording the first acceptable shot point does not amount to breach of contract because Article 16.4 of the contract had an extension effect if factors beyond the plaintiff's control caused a delay. Further, the defendant's conduct expressly shows that she was aware of and agreed to extend the time for recording the first acceptable shot. In the end the fourth issue is answered in the negative that the plaintiff did

not breach the contractual obligation save for the suspension of the contract prior to notifying the 69 defendant. In upshot on the balance of probability, this court concludes that the plaintiff has proved her case. The defendant's counterclaim lacks merit some of the claims were for payments to third parties not backed by the contract itself. Other expenses she incurred were part of the undertaking in the contract. Worse still, the defendant refused to accept mobilization completion without justification, refused to pay production invoices and remaining portion of mobilization fee, accepted delayed recording of the first acceptable shot point and above all terminated the contract unlawfully. Having analyzed the issues 1-4 on variations, breach of the contract and termination of the contract, the last issue is to what reliefs the parties are entitled. The plaintiff prays to the Court to grant prayers as contained in the plaint and to dismiss the Counterclaim. The defendant on her side prayed that the plaintiff's case be dismissed and the defendant's counterclaim be granted. In a nutshell, the plaintiff claims against the Defendant for both general and specific damages. The specific damages claimed amount to USD 30,270,855.30 and the general damages claimed amount to USD 100,000,000. In its counterclaim, the Defendant claims from the Plaintiff specific damages amounting to USD 5,474,923.00 and general damages to be assessed by the Court amounting to USD 25,800,000. Before addressing the evidential matters regarding the reliefs sought in the Plaint, the court finds it compelling to resolve the issues that the defendant raised in her final closing submissions. These issues concern general legal principles governing some of the reliefs sought in the Plaint. 70 Firstly, the defendant was concerned about the claim for general damages. According to her the law is settled that general damages cannot be granted conjunctively with specific damages. To buttress her stand the case of *Dharamshi v Karsan* /1974/ EA 41 was cited. The defendant also referred to a persuasive decision by the Court of Appeal of Kenya in *Kenya Women Microfinance Limited v Martha Wang'ari Kamau*

[2021] eKLR where it was held that general damages are not recoverable in cases of alleged breach of contract because in a claim for breach of contract, damages are capable of being quantified. With due respect, this court holds that the defendant's argument is misconceived. It has been reiterated by this Court and the Court of Appeal in various decisions that granting general damages is the discretion of the court. Such discretion should be exercised judiciously. This court adds that in granting general damages, the court considers circumstance and evidence in a particular case. General damages aim at compensating the person who is not at fault. Nevertheless, it is not intended to make them rich. General damages may be granted in addition to specific damages, that was the position in *Msemwa's case* (supra). Another case is *Tanzania - China Friendship Textile Ltd v Our Lady of Usambara Sisters* [2006] TLR 70 where the Court of Appeal held that a party is not required to state amount of general damages claimed. The Plaintiff claims for general damages amounting to USD 100,000,000.00 based on the fact that she is still incurring expenses even after termination of the contract. It was held in *Hass Petroleum (T) Ltd and Another v Richard Nehemia Gwau and Another* [2015] T.L.R. 71 316 that in

determining how much general damages should be awarded to the plaintiff, there should be some material upon which to peg the amount to award. PW2 when cross-examined by Defendant's counsel explained that up to the date of the trial, the plaintiff was still incurring expenses due to this project, which was unlawfully terminated. It is also in his testimony that the plaintiff suffered by losing prospective customers due to the defendant's publication that she cannot do a seismic survey. Her reputation has been damaged by the defendant's actions. PW2 opined that it will take years for her to recover from the damage done. He added that the loss of potential income is immeasurable as contract values and potential income have been severely damaged. However, I have not seen a printout of any email, webpage, or newspaper tendered in court that contain publication of plaintiff's incompetence in conducting seismic data survey alleged to have been done by the defendant. This is not to say that general damages cannot be granted in the case at hand. On the contrary, I am convinced that the loss and expenses that the plaintiff has and yet is incurring are worth compensation. I thus award the plaintiff general damages to the tune of USD 2,000,000. It is my view that this amount is fair. I also think awarding more will be unjust as the plaintiff too is blameworthy for issuing notice of suspension of the contract prior to consulting the defendant. Equally, interesting is the defendant lamentation on plaintiff's claim of the pre-judgment Interest. In paragraph ii, page 8 of the Plaintiff, the plaintiff claims from the defendant interest at the prevailing commercial rate on specific damages from the date of filing the suit to the date of judgment. In my view pre-judgment interest may be based on pleading 72 and evidence, mercantile practice or contract. If it is stated in the contract, then it should readily be granted. Generally, it is granted where a party has pleaded and brought evidence to support it. Regarding the award of pre-judgment interest based on mercantile practice, this has been upheld in debt recovery suits as held in *Yara Tanzania Limited v Ikuwo General Enterprises Limited* [2022] TZCA 604. Other than debt recovery claims where interest is based on mercantile practice, it is trite law that pre-judgment interest rate must be pleaded and proved. See *National Insurance Corporation (T) and Another v China Civil Engineering Corporation* [2010] TZCA 4. In *National Insurance Corporation Consolidated Holdings v Johannes Jeremiah and 2 Others* [2016] TZCA 844; *Yara Tanzania Limited v Charles Aloyce Msemwa t/a Msemwa Junior Agrovert* [2005] 2 EA 290; and *AMI Tanzania Limited v Prosper Joseph Msele* [2021] TZCA

668. In the case of *Ikuwo General Enterprises Limited* (supra) at pages 17-19 interest at commercial rate of 12% was pleaded, however, evidence was not given. The court granted it because the suit was based on debt. That is the position in several decisions of the Court of Appeal including *Engen Petroleum (T) Limited v Tanganyika Investment Oil and Transport Limited* Civil Appeal No. 103 of 2003 CAT (unreported) holding inter alia that in a dispute arising from a commercial relationship, especially debts recovery a winner may be granted interest at commercial rate. The case at hand though commercial, was not based on debt. Therefore, commercial interest based on mercantile practice does not apply automatically. The plaintiff ought to plead and prove a claim of pre- judgment commercial interest as

held in *Export Trading Co. Ltd v MZARTC Trading Co. Ltd* [2014] T.L.R. 240. I thus find merit in the defendant's argument that the plaintiff neither referred to a specific article of the contract (exhibit P1) nor led any evidence to prove the prevailing commercial interest rate which she claims to be awarded by the Court on her specific damages. I concur with the holding in *Bytrade Tanzania Limited v Assenga Agroviet Company Ltd and Another* [2022] TZCA 619 (7 October 2022); *Msolele General Agencies v African Inland Church* [1994] T.L.R. 192 (CA); and *Anthony Ngoo and Davies Anthony Ngoo v Kitinda Kimaro* [2015] T.L.R. 54 that interest at commercial rate must be specifically pleaded and proved. That said, the plaintiff's claim for pre-judgment interest (interest at commercial rate) is declined. Turning to the merits of the specific damages sought in the Plaintiff. These can be divided into the following items: PW2 in his witness statement with the aid of exhibit P 15 (a) to P15 (n) substantiated each amount claimed by the Plaintiff. The defendant argued that if the Contract Price was USD 18,176,023.00, how can the plaintiff claim the sum of USD 30,597,661.92 as specific damage? In paragraph 2.8 of his witness statement, PW2 explained that the contractual amount was based on an assumption that the work would be completed within 77 days from the date set in the contract for recording the first acceptable shot point that is 22nd September 2022. However, up to the termination date, the contract had lasted more than one year. This fact was also admitted by DW2 and DW3 during cross-examination. The amount claimed has increased because 74 the duration of the contract exceeded what was expected. When cross-examined, PW2 expounded that if the contract were not terminated, the plaintiff would also have recovered some of the costs when issuing production invoices. PW2 admits that if the contract had gone to an end, the plaintiff would not have recovered the full amount, but nevertheless, because the defendant unlawfully terminated the contract, the plaintiff is entitled to claim the full amount incurred as expenses. Apart from unmerited claims of breaches of the contract, the defendant did not rebut the evidence of PW2 which was corroborated by that of DW2 and DW3. What remains in the amount of specific damages to awarded to the plaintiff. But before doing so examining other reliefs sought may help. The plaintiff also claims 20% of the Mobilization Fee. This is granted as elucidated below. Proforma invoice and invoice for 20% of mobilization fee were admitted in evidence as Exh.P14(c), Exh.P14(i) and Exh.P14(j). Exh.P14(j), which is an invoice in US dollars described as "advance against mobilization invoice". The same words appear in the invoice marked as Exh.P14(i) which is in TZS. PW2 in cross examination admitted that invoice marked Exh.P14(i) was raised before the Plaintiff qualified for the payment of the 20% of the mobilization fee and that is why it was called advance against mobilization invoice. Since Exh.P14(i) and Exh.P14(j) are both dated 1st September 2023. The defendant argued that at the time of raising those two invoices, the Plaintiff had not fully mobilized to qualify for the payment of the 20% of the mobilization fee. Although PW2 admitted that the plaintiff never raised an invoice for the 20% of mobilization fee. That was supported by DW1, DW2 and DW4 75 evidence that the plaintiff never fully mobilized up to and until the time of termination of the agreement and could not raise an invoice for 20% of the mobilization fee. This view is incorrect because once the first acceptable shot point is recorded which it did then mobilization is completed. The first acceptable shot point could

not have been recorded if mobilization was incomplete. Again, the plaintiff could not raise the invoice because the defendant refused unfairly to accept mobilization completion. Thus, the plaintiff is granted 20% of the Mobilization Fee. The defendant argued in vain that the provision of the second gunboat within 30 days of the date of recording the first acceptable shot point is not the exclusive criteria or qualification for payment of the final 20% of the mobilization milestone payment. The criteria for payment of 20% of mobilization fee were provided under paragraphs 4, 5 and 6 of Schedule B to the contract which were also replicated in Memo 010 admitted as Exh.P3. The defendant never brought any evidence to show that equipment were not mobilized. Worrisomely, even the notice of breach did not mention which equipment was not mobilized. The bottom-line is that there cannot be production without mobilization being completed. Contradictorily, the defendant paid several production invoices. Besides that, the defendant accepted the recording of the first acceptable shot point. She cannot now turn back and claim that mobilization was incomplete. Yet, the defendant argued that the plaintiff is not entitled to the remaining 20% of mobilization, and demobilization costs after termination because demobilization was not completed, and termination was caused 76 under Article 16.2 (termination on breach). Considering the evidence adduced, the court is of firm view that apart from the plaintiff's unilateral suspension of the project, the defendant has not established any breach on the part of plaintiff. Therefore, purporting to terminate the contract under clause 16.2 is a misconception. And failure to establish that there was a breach of contract on the part of the plaintiff makes the termination unlawful. On that basis the plaintiff is entitled to costs of mobilization per Clause 10 of Schedule D (remuneration) because on the balance of probability mobilization was completed. Therefore, the plaintiff is entitled to the remaining 20% of the mobilization fees. As for the plaintiff's claim of two unpaid production invoices, these are granted for reasons indicated herein. Page 85 of Exh.P1 shows that the contractual total acquisition fee for land and marine was USS 18,176,023 meaning that the price of 1% of the data acquired by the Plaintiff was USD 180,000. PW1 conceded that the Plaintiff acquired less than 1% of the data but was paid a total of USD 363,578 which exceeded the value of the data acquired. Therefore, arithmetically it is the plaintiff who owes the Defendant for overpaid production fee. This argument is faulty because even if the value of the contract is USD 18 million that does not mean a party may not incur costs over and above that. In fact, PW1 testified that the plaintiff incurred a lot of expenses as the execution of the contract was not completed because it was terminated prematurely. The delay complained about was due to variations. Other reasons for the delay were beyond plaintiff's control e.g., lack of nodes in the market and faulty gunboats were not attributed to the plaintiff. The parties agreed that the 77 plaintiff should raise invoices for production which she did. Undisputedly, the defendant paid some invoices while declining others. Therefore, the court finds that the defendant's decision to refuse to pay the production invoices unjustifiable. The plaintiff is thus granted the production invoices to the tune of USD 913, 217.23 as claimed. Other claims of the plaintiff are personnel, finance, depreciation, and operational Costs. Some of these are granted while others are rejected. PW1 admitted that personnel costs (USD 3,788,552.47), finance costs (USD 558,560.17), depreciation costs (USD 652,943.69) and

operational costs (USD 20,473,064.22) claimed by the Plaintiff as separate items are part of the acquisition fee prescribed under paragraph 6.3 (page 85) and paragraph 12 (page 87) of Schedule D to the contract. Acquisition fee was payable on monthly basis depending on the quality and quantity of the data acquired. The Plaintiff was not paid the production fee in the form of reimbursement for the expenses incurred to acquire data. The defendant submitted that all the Plaintiffs expenses marked Exh.P15(a) to ExhP.15(n) are irrelevant as they purport to prove the plaintiff's expenses which was not the criteria for raising invoices. According to paragraph 9 of Exh.PI, the reimbursable charges could only be invoiced and paid for additional equipment or services requested in writing or previously agreed by the Defendant. It is her view that there was no reimbursable claim in this case and no invoice was raised for it. But PW1 testified that the plaintiff bought spare parts. It is also unclear how the plaintiff could claim reimbursement if the defendant refused to accept mobilization completion. Truly, the items for which invoices could have been raised by the plaintiff 78 were prescribed at page 87 of the contract. Personnel, finance, depreciation and operational costs are not mentioned on that page. Understandably, whereas personnel costs are under mobilization, finance and depreciation are part of operational costs under acquisition fee found under paragraph 6.3 at page 85 of exhibit P1 and cannot be charged separately. Hence, they cannot be granted. However, PW2, when responding to the question about specific damages claimed during cross- examination, he explained that the quantum of specific damages claimed has been arrived at by looking at the expenses incurred, and the amount paid to the Plaintiff. The difference is the loss suffered. Paragraph 2.5 of the PW2 witness statement gives details of each expense incurred. Proof of these expenses was admitted in Court as Exhibit P15 (a) to P15(n). The court is of the view that considering the finding that the defendant breached the contract which she eventually terminated unlawfully *versus* the plaintiff's credible evidence (exhibits p15(a) -(n)), I grant USD 18, 176, 023 operational costs and acquisition fee as stated in clause 6.3 at page 85 of the contract minus the amount already paid by the defendant to the plaintiff, that is USD 363,578. That makes the operational costs payable to the plaintiff to be USD 17,812, 445. As explained below shipping Costs is rejected. PW1 and PW2 supported the evidence of DW1 and DW3 that shipping costs are part of mobilization and demobilization costs. The defendant has also queried claim for shipping costs because they were paid as part of mobilization. The court holds that since the shipping costs are part of mobilization, they are rejected. 79 A claim for withholding Tax and VAT too are rejected as they were not pleaded in the plaint. The withholding tax was deducted by the defendant from the payments made to the plaintiff in accordance with paragraph 11.5 of Schedule D to the contract (page 87) and also in accordance with the terms of the invoices raised by the Plaintiff (Exh.PI4(a), Exh.P14(b), Exh.P14(d), Exh.P14(e), Exh.P14(f), Exh.P14(g), Exh.P14(h) Exh.P14(i) and Exh.P14(j) which subjected the payments to 5% of the withholding tax. PW2 admitted that the tax withheld was remitted to the revenue authority and formed part of Plaintiffs corporate tax. When cross-examining PW1 and PW2 by the counsel for the defendant on the issue of withholding tax claimed by the plaintiff the witness explained that the withholding tax claimed is coming from the services supplied to the plaintiff, and under the law, the

plaintiff is required to withhold tax and remit it to the Tanzania Revenue Authority. The amount claimed for withholding tax is not in respect to the payments made by defendant to plaintiff but in respect to invoices issued to plaintiff by her suppliers. Along with withholding tax the plaintiff claimed VAT, both were not claimed in the Complaint. Truly, the claims for the withholding tax and VAT were only raised in the witness statement of PW2. It should be remembered that parties are bound by their own pleadings as held in *Barclays Bank (T) Ltd vs Jacob Muro* (Civil Appeal 357 of 2019) [2020] TZCA 1875 (26 November 2020) at page 11-12 the CAT. For that reason, the claim for withholding tax and VAT is rejected. The plaintiff's claim for demobilization fee is granted as elaborated 80 herein below. Since the court found that the defendant terminated the contract unlawfully, it follows that demobilization fee ought to be paid. Paragraph 12 of Schedule D to the contract provides qualification for payment of demobilization fee. The payment of 70% of demobilization fee was supposed to follow- acceptance of all work and removal of all equipment from the site. The Plaintiff and the Defendant never signed certificate of acceptance for demobilization which was one of the preconditions for payment of demobilization fee. The prerequisite for payment of 30% demobilization fee was for signing of remedial works and delivery of deliverables. The defendant argued that the plaintiff did not adduce any evidence to prove the claim. This argument is flawed for it ignored the fact that the defendant breached and terminated the contract unlawfully. The demobilization is thus granted because the termination of the contract was unlawful. The plaintiff is thus granted USD 100,000.00 as the demobilization fee. It does not need rocket science to appreciate that after unlawful termination of the contract, the plaintiff demobilized the equipment and personnel from Songosongo Island. Regarding the plaintiff's claim of 10% of the Contract Fee for Premature Termination of the Contract, that is granted as explained hereunder. The Plaintiffs claim for 10% of the value of the acquisition fee is misconceived. Paragraph 10 of Schedule D to the contract (page 86) gave the Plaintiff the right to 10% of the value of the acquisition fee where the contract is terminated under Article 16.3 for the Defendant's convenience. While the acquisition fee is USD 18,176,023.00, its 10% is USD 1,781,244.49. Paragraph 2.1 of the termination letter marked Exh.P12 and 81 paragraph 1 and 3 of the notice of breach marked Exh.P6 categorically referred to Article 16.2 of the contract (Exhibit P1) which provided for termination for breach. Both Exh.P6 and Exh.P12 cited the articles that the Plaintiff breached. Additionally, PW1 admitted that the contract was terminated under Article 16.2 governs termination for breach. The defendant claimed that since the contract was terminated for breach by the Plaintiff, she is not entitled to 10% of the acquisition fee. The plaintiff disputed the defendant's argument by citing variations effected and the accepting of the first acceptable short point. Moreover, the faulty gunboat and the absence of nodes were not attributed to her. The plaintiff continued to conduct in the manner that assured the plaintiff that she should continue executing it. Therefore, the termination was premature. What sort of termination this was, the court concluded that it was unlawful termination. In addition to that for a termination to be regarded as termination under article 16.2 or under article 16.3 depends on its peculiar facts. It is not about how a party named the notice of termination, and the article of the contract cited therein, rather its about the evidence and

determination whether it was termination due to breach (Article 16.2) or termination by convenience (Article 16.3). The court has held that the termination here was unlawful and hence it was termination at the defendant's convenience. Consequently, the plaintiff is granted the 10% of the Contract Fee for Premature Termination of the Contract. Before penning off, a summary of findings suffices jotting. According to the evidence adduced, the delays complained about were not attributed to by the plaintiff. Another finding is that the faulty equipment (Geo Tiger 82 I) was due to the recommendations of consultant Mr. Lee Parker. The procurement and use of Geo Tiger I was agreed in the contract, and it was based on Lee Parker's recommendation. PW1 and DW1 testimonies. PW1 opine that the fault of such equipment cannot be attributed to the plaintiff. PW1 and exhibit P1. The court noted through PW1's testimony that the nodes were recalled by the owner. On the water desalination system, the pump broke down but there were alternatives from TPDC and the defendant) that the supply of desalinated water to the plaintiff was not halted. Another observation worth mentioning is the refusal to accept mobilization completion. Although the defendant refused to accept that mobilization was completed, it was indeed completed. With regards to the notice of suspension of the contract. according to PW1, the plaintiff issued notice of suspension of the contract to get more time to procure the nodes because the nodes they got initially were recalled by the owner and when attempt to procure others from other supplier they got from Russian company. But the defendant refused them fearing international sanctions imposed on Russia. Thar said still the plaintiff was not justified in issuing the suspension notice without prior consultation of the defendant. This act therefore constitutes a breach on the plaintiff's side. The defendant's on her side she breached the contract in the following manner: (i)unlawful termination of the contract; (ii) accepted the 1st acceptable shot point that was recorded beyond the time set in the contract; (iii) refused to accept mobilization completion, (iv) signed five 83 variations of the contract some after delayed recording of the 1st acceptable shot point; (v) paid various production invoices even after the delayed recording of the first acceptable shot point. The defendant's failure to terminate the contract after the plaintiff's delay in recording the first acceptable shot point amounts to affirmation or novation. As per Section 62 of the Law of Contract Act [Cap 345 R.E. 2019] the defendant's written acceptance of the first acceptable shot point recorded after the deadline set in the contract is novation. That means the deadline set for recording of the first acceptable shot point was amended or altered. In my view, Sectio 62 applies to situations including the one at hand where the term(s) of the contract was altered. That is the deadline of the recording of the 1st acceptable shot point from 22nd September 2022 to 19th July 2023. Neither party disputes that the defendant signed the said acceptance. Along with novation, the doctrine of estoppel may apply to estop the defendant from denying her conducts that encouraged the plaintiff to continue performing his obligations under the contract. She cannot claim that the plaintiff delayed recording the first acceptable shot point while she had the option to terminate the contract under Article 16.4 of the contract and she decided not to do so. However, she may also claim under Article 24 of the contract that her failure to exercise her right to terminate the contract does not amount to a waiver of her right to claim breach of contract. Article 24 of exhibit P1 provides

that: —No failure to exercise nor any delay in exercising any right or obligation under this Agreement by any party shall impair or operate as a waiver thereof in whole or in part." 84 Nevertheless, I find it to be unfair to let the plaintiff perform her obligations without protest from the defendant who noticed the breaches and affirmed them. I find refuge in the persuasive decision of the UK Court of Appeal in *Tele2* (supra) where the court applied the common law doctrine of election in the contract. That is affirmation of the contract by election. It is a trite law that waiver clause does not prevent a party from affirming the agreement by election. As final words, regarding the merits of the defendant's reliefs in its counterclaim, it is dismissed as noted hereinabove. I will, however, albeit briefly state hereunder. The defendant filed a Counter Claim claiming the sum of USD 2,337,757 paid to the Plaintiff. The Defendant also claims USD 1,979,486.00, alleged to be paid to EPI Group for consultancy services in managing the contract; USD 55,558.00, alleged to have been paid to Specialist Consultants services supporting the project; and USD 1,102,122.00, alleged to be incidental costs incurred in support of the project including hotel and lodging costs, airfares, customs duties, baseline studies and Environmental Impact Assessment. In attempting to prove specific damages claimed in the counterclaim, DW3 tendered the payment transaction reports for payments made to EPI Group, Exh.D9(a) collectively; payment transaction reports for payments made to the Plaintiff admitted as Exh.DI1 collectively; payment transaction reports for payments made to other suppliers who provided ancillary services to the project, exhibit Exh.DI2 collectively; and summary of all the payments for the project admitted as Exh.DI10. 85 This court is of the view that the defendant claims lack merits. It is on record that DW3 admitted that the payment transaction reports he tendered as evidence do not show the purposes of payments made. He also admitted that the defendant did not tender any agreement with the alleged consultants. There are no invoices tendered that would support the alleged payments and explain the purpose of such payments. Even if it is assumed that the documents tendered as exhibits prove payments to consultants, still the defendant would not be entitled to the refund of the fees paid. DW1 and DW3 during cross-examination admitted that each party had to pay for their respective consultants. In this case, it was the defendant who terminated the contract unlawfully and therefore she cannot be entitled to the refund of expense incurred. Similarly, there is no legal or contractual basis for the defendant to be refunded the money paid to the plaintiff. Since it has been held that the defendant's termination of the contract was unlawful. Being the one at fault she cannot benefit from her own wrongdoing. The court concludes that the defendant's counterclaim is dismissed for want of merit. Firstly, she instead of terminating the contract she affirmed the delays and shortfalls found in the plaintiff's execution of the project by accepting the first acceptable point recorded after long delay. That constitutes novation and affirmation of the agreement by election. Another affirmation of delays was through various variations signed by the parties. She also refused to accept mobilization completion and payment of 20% mobilization fee which amounts to a breach of contract. Above all, she terminated the contract after several affirmations of plaintiff's breaches 86 of the contract. The defendant is estopped from citing the plaintiff's breaches of the contract which she affirmed in the first

place. It is the court's observation that the termination of contract due to breaches which came after series of affirmations cannot be said to be lawful. I also disassociate myself with the view that general damages cannot be granted if there are specific damages granted. However, that does not mean that the plaintiff's case is fault free. The issuance of notice of suspension of the contract without prior consultation or notification of the defendant is a breach of the contract. But on balance the defendant has committed more breaches and fundamental ones than the plaintiff. It is the law under Section 73 of the Law of Contract Act [Cap 345 R.E. 2019] that a party not at fault shall be awarded compensation in case he suffers loss caused by the breach of contract including unlawful termination of contract. Since the defendant breached and terminated the contract unlawfully, the plaintiff deserves to be awarded damages both specific and general. Furthermore, a sum to be awarded as general damages is the discretion of the court. However, the court must consider evidence on record. The plaintiff through her witnesses has proved that she incurred production costs and operational costs from various suppliers before and after termination of the contract. For that matter, unlawful termination of the contract must be remedied, and the plaintiff should be granted specific and general damages. As to how much should be awarded as general damages, it all depends on the circumstance of the case as herein above shown. In the case at hand, the seismic data acquisition fee is USD 18, 176,023.00. The plaintiff is claiming general damages of USD 87 100 million. That is not only very high but also against the law. Nonetheless, the award of general damages is the discretion of the court. The court need not to be told how much should be awarded as general damages. Considering the circumstance of this case and given that the contractual sum is USD 18,176,023.00, and the defendant has already paid the plaintiff USD 363,578 for data acquisition, it is fair that USD 2,000,000 be granted as general damages. In the end the court declares, and orders as follows:

1. The plaintiff's case has merit. Judgment is entered in her favour.
2. The defendant's counterclaim is dismissed for lacking merits.
3. The defendant shall pay the plaintiff the following:
 - (i) Specific damages:
 - (a) Operational costs USD 17,812,445.
 - (b) 20% of outstanding mobilization fee USD 493,544.60
 - (c) The two unpaid production invoices USD 913,217.23
 - (d) The demobilization fee USD 100,000.00
 - (e) 10% contract fee for premature termination of the contract USD 1,781,244.49 (ii) General damages to the tune of USD 2,000,000.00 (ii) Interest at 7% court rate per annum on the decretal sum from the date of judgment to the date of full payment. (iii) The defendant shall bear the costs of this suit. Order accordingly. 88 DATED at DAR ES SALAAM this 7th Day of

February 2025. U. J. AGATHO JUDGE 07/02/2025 Court: Judgment delivered today, this 7th February 2025 in the presence of Alex Mgongolwa, and Kennedy Mgongolwa, Advocates for the Plaintiff, and Vitalis Timon, and Jasbir Mankoo, Advocates, for the Defendant. U. J. AGATHO JUDGE 07/02/2025 89

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