

TANZANIA / JUDGMENT

## ARIA

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT  
PAR ES SALAAM COMMERCIAL CASE NO. 34 OF 2023 BETWEEN ARIA INDUSTRIES EAST  
AFRICA LIMITED.....PLAINTIFF VERSUS 1 ELCAT BUILDERS  
LIMITED..... st DEFENDANT BRITAM INSURANCE TANZANIA  
LIMITED..... 2nd DEFENDANT

## JUDGMENT

Date of last order: 06/08/2024 Date of judgment: 06/09/2024 AGATHO, J.: The Plaintiff, ARIA INDUSTRIES EAST AFRICA LIMITED, on the 5th day of April 2023, instituted this suit against the Defendants jointly and severally seeking the following reliefs:

- i. For a Court declaration order that the 1st Defendant breached the construction contract executed by and between her and the plaintiff in the year 2022, ii. A court declare that the 2nd Defendant is in breach of the terms and conditions of the performance bond and advance payment bond, iii. A court declare that the plaintiff is entitled to recover a total TZS 105, 608,394.50 only being her rightful remedy resulting from breach of i the construction contract by the 1st Defendant. iv. A court order the 2nd defendant to pay the plaintiff a total amount of TZS 105, 608,394.50 only as specific damages pledged under the performance and advance payment bonds for breach of the construction contract by the 1st defendant.
- v. General damages to be assessed by the court arising from the damage suffered as a consequence of breach of the construction contract and for breach of the terms of the performance bond and the advance payment bond. vi. Interest on the decretal sum at the court rate of 12% from the date of filing this suit to the date of judgment. vii. Interest on the decretal sum at the court rate of 12% from the date of judgment to the date of full satisfaction of the decree. viii. Costs of this suit be borne by the 1st defendant and 2nd defendant. ix. Any other reliefs) as this court may deem just and fit to grant. The Defendants filed their written statements of defence disputing the Plaintiff's claims and sought dismissal of the same with costs. Furthermore, the 1st Defendant raised a counterclaim against the Plaintiff seeking, among other remedies, a declaratory order that the Plaintiff unlawfully terminated the agreement dated 19th July 2022; Payment of TZS 2 155,272,726.16 unpaid amount; general damages; interests and costs of the suit. The Plaintiff filed her written statement of defence denying the 1st defendant's counterclaim and prayed that all the reliefs

sought therein be dismissed with costs. In conducting the trial, learned counsel representing the parties were Mr. Nobert Mlwale and Kassim Musa Ititi appeared for the plaintiff; Mr Kelvin Kidifu and Mr. Amon Ndunguru represented the 1st defendant while Mr. Stephen Mwakibolwa stood for the 2nd defendant. I am grateful to meticulous final closing submissions of these trained legal minds. In a bid to prove the case the plaintiff paraded three witnesses: PW1

- PW3. Whereas PW1 - was Mr Devendra Burade, Managing Director of the plaintiff; PW2 - Joseph Mrisho, security guard officer from Unique Security; and Ashery Solomon - the plaintiff's quantity surveyor (QS). PW1 affirmed and tendered his witness statement which was recorded as his testimony in chief. The witness tendered 18 exhibits. P1 plaintiff's company certificate of registration; P2 the construction contract between the plaintiff and the 1st defendant; P3 the performance bond between the plaintiff and 1st and 2nd defendants and advance payment bond between The plaintiff and 1st and 2nd defendants. The other exhibits tendered by PW1 were P4- letters collectively; P5
- payment slip and swift copy; P6 - email correspondence dated 4th September 2022 and 13th September 2022; P7 - certificate of email authenticity; P8 collectively- email communications dated 21st September 3 ' 2022 regarding the concrete cube test report, email dated 22nd September 2022 regarding instruction on retaining wall casting. And email dated 26th September 2022 on different concerns observed at the site; P9 collectively
- a letter to OSHA dated 8th February 2023; and email to OSHA on same subject matter dated 13th February 2023, and a reply of PW1's email from OSHA dated 13th February 2023; P10 collectively - the concrete corset testing reports dated 7th November 2022 and 25th November 2022; P11 collectively - letters dated 1st November 2022 and its reply from University of Dar es salaam dated 22nd November 2022; P12 collectively - BoQ and labour summary sheet; P13 collectively - a letter dated 10th October 2022 and receipt from Tanzania Posts Corporation; P14 collectively - letters from Victory Attorneys dated 12th December 2022, 27th and 31st January 2023; P15 collectively - the letter from the plaintiff's lawyers to the 1st defendant's lawyers (BM Attorneys) dated 19th October 2022 response to demand notice for special performance of the contract and written apology, and the letter dated 3rd November 2022 notice of appointment of quantity surveyor for valuation of performed works; P16 collectively - the letters from BM Attorneys to chief executive officer of the plaintiff dated 10th October 2022 demand notice, and letter from BM Attorneys (1st defendant lawyer) to the plaintiff's lawyers dated 4th November 2022 titled your notice for appointment of quantity surveyor for valuation of performed works; P17
- the Board resolution of the plaintiff company dated 15th February 2023; and P18 - a certified copy of a part of the attendance sheet/ book of all persons visiting ARIA construction site dated 24/09/2022 to 27/09/2022. 4 PW1 testified that the plaintiff entered the construction contract with the 1st defendant on 19th July 2022. Under the contract, the first defendant was required to construct a boundary wall, retaining wall, and entrance gate at the plaintiff's project site plot No. 7 block K Kisemvule, Mkuranga, Coast region. The witness testified that

the first defendant as main contractor was awarded 98 days project. As per exhibit P2, the construction contract was worth TZS 301, 738, 270/=. It was PW1's testimony that the construction project was to be completed within 98 days from 18th August 2022 when advanced payment was disbursed to the first defendant. PW1 narrated further that on the 16th August 2022 the plaintiff, 1st defendant and the second defendant executed a performance bond Exhibit P3 collectively Number DSM/BOND/POL/0321520 worth TZS 30,173,827.0/=. It was agreed that whenever the first defendant default and declared by the plaintiff to be in default of his obligation under the construction contract, the second defendant a surety shall immediately and promptly remedy they default by paying the plaintiff TZS 30,173, 827.00. It was testimony of PW1 that on 16th August 2022 the plaintiff, first defendant and the second defendant executed advance payment bond Number DSM/BOND/POL/0321517. The same was admitted as exhibit P3 collectively. According to PW1 under the advanced payment bond the second defendant as surety and then consideration of the plaintiff advancing the sum to the 1st defendant as advanced money guaranteed that the second defendant would be liable for payment of any amount 5 which would have otherwise been paid by the plaintiff. The advance payment executed limited the liability of the surety, second defendant to the plaintiff to the amount not exceeding TZS 75,434,567.50. The performance bond and advanced payment bond were intended to ensure that the second defendant compensates the plaintiff when the first defendant fails to perform her contractual obligations. In such an event, the first defendant will be declared to be in breach of the contract and the second defendant shall pay the plaintiff the amount required to complete the project up to the sum not exceeding the amount secured under the two bonds. PW1 continued to testify that the first defendant failed to execute the construction contract contrary to what was agreed in the contract. He failed to complete the construction of the boundary wall and the entrance gate. Further to that she failed to meet the agreed standards in construction of the boundary wall retaining wall and entrance gate. In the PW1's view this was a breach of the contract. The particulars of the breach were communicated to the first defendant via e-mail dated 4th September 2022 which PW1 tendered as exhibit P6 see also exhibit P4 which is site findings and observations. The time sets for completion of the construction of the boundary wall, retaining wall, and entrance gate was 98 days from 10th August 2022 when the advance payment of TZS 74,156,016/= Which is exhibit P5 was paid to the first to defendant. The plaintiff communicated her dissatisfaction on the progress of the project to the first defendant in other emails dated 15th September 2022. In the correspondence: the plaintiff dissatisfaction included: Poor workmanship at the site, equipment availability, and absence of authorized personnel to coordinate meetings and the low speed of execution of the project. The plaintiff's engineer Swedy Mussa Noted and raised concerns and raised several irregularities including non-placement of spencer blocks in the framework, non-placement of dowels in the framework, and failure to fit the discharge pipes. These were communicated to the first defendant by emails dated 21st September 2022 and the 22nd September 2022 admitted as exhibit P8 collectively. PW1 testified that on 23rd September 2023 the plaintiffs sent a letter/email to 1st defendant's principal officer Mr Eliezer Mbatiani Msuya in which several concerns were raised. But

there is no reply from the first defendant. According to PW1 another complaint raised by the plaintiff to the first defendant was that despite having obligation to register the project with OSHA she did not do so. See Exhibit P9 request for confirmation of project registration by the contractor. That complaint is visible in the e-mail dated 13th September 2022 which is part of Exhibit P6 collectively. PW1 told the court that before 1st defendant raises an invoice there ought to be conducted joint inspection. The witness testified that after the plaintiff conducted the test of concrete superstructure at the retaining wall through two laboratories, the results indicated that the concrete grid used by the 1st defendant did not meet the standards. PW1 stated that the e-mail dated 21st September 2022 and the test report from the University of Dar es salaam contain the details. See the e- 7 mail dated 21st September 2022 which is part of Exhibit P8 collectively. The University of Dar es salaam informed the plaintiff via e-mail that the test report on the strength of concrete cubes was not prepared by that institution. See the e-mail, part of Exhibit P8 collectively and the letters to and from University of Dar es salaam admitted as exhibit P11 collectively. As per PW1's testimony the first defendant was required to appoint quantity surveyor (QS) for a balanced evaluation of the performed construction work. She delayed doing so. Eventually, she appointed the QS but placed the cost for the work on the plaintiff contrary to the construction contract Exhibit P2. PW1 testified without tendering any document for confirmation that the first defendant abandoned the construction site on the 1st October 2022 when the project was still incomplete and the projected time of 98 days for the project completion has not expired. The project timeline was expected to come to an end on the 25th November 2022. The witness lamented that no handover was done contrary to the construction project contract. It was PW1's testimony that's on 26th September 2022 the plaintiff issued a notice of intention to terminate the contract to the first defendant. A final notice of intention to terminate the contract was issued on the 10th October 2022. That notice was admitted as part of Exhibit P13 collectively. That is a letter of termination of contract as per PW1 which came after series of events, acts and the omission of the first defendant 8 which were contrary to the contract. Hence breach of the contract and it was a lawful remedy of the plaintiff under the contract - exhibit P2. After serving the 1st defendant with the notice of termination of the contract the plaintiff lodged bonding recovery with the second defendant which is exhibit P14. The second defendant informed the plaintiff that the claim is under investigation by the independent investigating firm. PW1 confirmed that the investigator by the name of Shaailesh Shah visited the project site on the 13th of January 2023 and interrogated one principal officer of the plaintiff. PW1 pointed out that the performance bond and advance payment bond were set to expire on 15th February 2023. According to him the plaintiff sought the extension of the bonds pending finalization of the investigation by the independent investigating firm. See a letter from the plaintiff's attorney dated 31st January 2023 part of the exhibit P14 collectively. PW1 told the court that no response was given by the 2nd defendant. But the official stamps of the second defendant bear witness that the letters were received by the 2nd defendant. The witness went on testifying that the plaintiff's complaint on a breach of contract by first defendant was received by second defendant on 12th December 2022. And the request for extension of time of bonds was received on the 2nd

February 2023. According to him the 2nd defendant failed to act on the plaintiff's claims and requests. He complained that the report from independent investigating firm has not been shared with the plaintiff. The 9 second defendant in the plaintiff's view breached the terms and condition of the bonds. PW2 - Joseph Mrisho, director and the security guard officer of unique security, a company providing security services at the plaintiff's construction site. His role include to ensure overall security and safety of the property and manpower. He also monitored and controlled entry and exit of the plaintiff's and the first defendant's manpower to and from the construction site. He told the court that he registered and monitored the attendance of all visitors at the construction site. And he inspected anything brought in or leaving or taken out of the construction site. PW2 testified that he monitored entry and exit of the 1st defendant's manpower, the equipment and material from the construction site. He testified that the first defendant manpower coming to site also signed the attendance sheet. He tendered an extract of attendance book/sheet which was admitted as exhibit P18. The witness went testifying that towards the end of September 2022, the first defendant's manpower stopped coming to the construction site. And by the beginning of October 2022, they had completely vacated the construction site. PW2 added in his testimony that the first defendant's workers were allowed to come to the site without any obstruction. The witness testified further that there was no single material or equipment lying out of the construction site. But he also stated that there is a small wooden structure which was used as a store by the contractor which is still closed and the keys are with the first defendant. 10 PW3 is Ashery Solomon. He is a quantity surveyor of the plaintiff. He is the last witness of the plaintiff. As a quantity surveyor, the plaintiff hired him to prepare bill of quantities (BoQs) for construction of boundary wall retaining wall and the entrance gate to the construction site. PW3 told the court that the plaintiff was in the process of constructing a battery manufacturing factory at the site. The witness went on testifying that he was hired again by the plaintiff on 8th November 2022 and the 9th November 2022 to conduct evaluation of the work done. The evaluation was done jointly with the first defendants quantity surveyor. The latter showed up only on day one. The next day he did not show up at the site. PW3 testified that as per the construction contract, before the invoice is raised by the 1st defendant there must be joint inspection, joint measurement and approval by the plaintiff's quantity surveyor. That marked the end of the plaintiff's case. Turning to the defendants' case, they had three witnesses. DW1 was Eliezer Mbatiani Msuya. He is the managing director of the 1st defendant. He testified that the plaintiff under the first defendant had a contract signed on 19th July 2022 for construction of boundary wall, retaining wall with the entrance gate. The price was TZS 301,738,270/=. Pursuant to construction contract parties: plaintiff, first defendant and the second defendant executed performance bond and advance payment bond covering remuneration of TZS 75, 434, 567.50 which was valid from 16/08/2022 to 15/02/2023. li DW1 testify that the first defendant raised invoices after the plaintiff i being satisfied with the Work done. The first defendant raised the invoice of TZS 75, 434, 567.50 VAT inclusive amount which the plaintiff refused to pay. Surprisingly, the witness sought to tender EFD receipt instead of the invoice. The court declined to admit it into evidence. DW1 went on testifying that on 23rd September 2022, Mr Burade , PW1 insulted him and

prohibited the first defendant from continuing with the work at the construction site. He also refused to release the first defendant's working tools, such as poker vibrator, sim tanks, reflectors, helmets, safety boots, marine board, iron sheets, public toilets and the first aid kits. DW1 testified that the plaintiff noted that the work has been partly done and she proposed appointment of quantity surveyor to do valuation of the work performed by the 1st defendant. Correspondences on this point are part of exhibit P15 collectively. DW1 continued to testify that the parties appointed an independent QS (as per exhibit P15 collectively) who evaluated the work done by the 1st defendant amounting to TZS 58, 638, 158.66 which the plaintiff refused to pay. This fact was also admitted by PW1 in his testimony. DW1 testified that the plaintiff breached the contract by restricting the first defendant's officers from continuing with the work at the construction site. It was his view that the termination of the contract by the plaintiff is unlawful. 12 The witness told the court that they served the plaintiff with the notice of intention to sue her as a recovery measure. That is found in exhibit P16. DW1 went on testifying that since the plaintiff breached the contract, the second defendant had no liability because the period of both bonds (performance and advance payment) had expired. DW1 claimed that the first defendant has suffered losses occasioned by the plaintiff's failure to repay the amount due. On the basis of the above the first defendant counterclaimed a total of TZS 155, 272,726.16 from the plaintiff for breach of the terms and conditions of the contract, loss due to her failure to use hired equipment from 23rd September 2022 at the rate of TZS 100,000/= per day making a total of TZS 21,200, 000/= at the time of filing the suit. He prayed that the plaintiff's suit be dismissed with costs and the first defendant counterclaim against the plaintiff be granted. The second defence witness, DW2, was Lulu Shaibu Mkwawa. She is the administration officer of the first defendant. She did not tender any exhibit. Her testimony is a replica of DW1. However, it has been noted that her testimony on the fracas between PW1 and DW1 was hearsay. DW3 was Elineema Msuya. He was a third witness for the defendants' side. He is a civil engineer and a construction site engineer for the first defendant. He testified that 60% of work done by the 1st defendant was already paid by the plaintiff. The witness testimony on the fracas between PW1 and DW1 is hearsay as he was not there when the 13 same occurred. His testimony was brief and the repetition of DW1 and DW2 testimonies. DW4 was Neema Mathayo. She is the claims manager of the second defendant. She testified that her duties include to receiving, reviewing and processing different claims lodged to the second defendant in accordance with the insurance policies for the respective claimant. The witness testified against the plaintiff's claim for payment of TZS 105, 608, 394.50 under the bonds as part of the construction contract between the plaintiff and the first defendant. DW4 testified that the amount claimed is neither justifiable nor legitimate under the bonds, exhibit P3 collectively. She testified that as per performance bond the second defendant guaranteed that in the event the first defendant defaults to finalize the construction project as per the contract with the plaintiff, the second defendant shall have option to complete the remaining work, obtaining bids to complete the remaining works or pay the plaintiff amount of money required to finalize the work, the amount which does not exceed TZS 30, 173, 827.00. Her further testimony was that under the advanced payment bond the second

defendant guaranteed to reimburse the plaintiff in the event the first defendant defaults commencing performing the work and that the plaintiff had made advance payment to start contractual obligation. In such a situation the second defendant could reimburse the plaintiff amount not exceeding TZS 75, 434, 567.58. 14 DW4 testified that under the bonds the task of the second defendant i in occurrence or happening of the default by the 1st defendant was to remedy the said default. That is found on the third paragraph of exhibit P3 collectively which is the performance bond. The witness told the court that the act of the plaintiff terminating the contract prior to triggering these clauses is a clear deviation from the contract (bond) between the first defendant and the second defendant for guarantee of the construction project contract. Regarding the advance payment, DW4 testified that the plaintiff has failed to establish that the advance payment paid to the first defendant was not utilized. According to her advance payment bond was set to cover instances where the plaintiff had paid advance to the 1st defendant to start the work, but the latter failed to do so. It was DW4's view that since the construction work started before the contract was terminated then the claim under advanced payment cannot stand. That said and done, the issues framed in respect of the main suit and 1st defendant's counter claim were:

1. Who breached the construction contract between the plaintiff and the 1st defendant?
2. Whether the termination of the construction contract by plaintiff was lawful?
3. Who is liable for the breach or the termination of the construction contract between the plaintiff and 1st defendant. 15
4. Whether the 2nd defendant has any liability to the plaintiff in respect of the performance bond and advance payment bond
5. Whether the plaintiff suffered consequential damage and to what extent.
6. To what reliefs are the parties entitled to. The first issue is, who breached the construction contract between the Plaintiff and the 1st DefendantPThere is no dispute that the plaintiff and the 1st defendant on 19th July 2022 entered into a construction contract, exhibit P2. Moreover, on 16th August 2022, the parties herein executed tripartite agreements, namely, performance bond and advance payment bond, exhibit P3 collectively, whose purpose was to rectify default, or reimburse the Plaintiff to the tune of the amount covered in the bonds in the event the 1st defendant default to perform her obligations under the construction contract. According to PW1 after the construction had commenced, the plaintiff communicated her dissatisfaction about the work progress to the 1st defendant via email dated 13th September 2022, Exhibit P6. In that email the plaintiff expressed her dissatisfaction on a number of issues:
  - i. Absence of site engineer/coordinator. ii. Fault workmanship. Hi. Failure to dispatch blocks to test laboratories. iv. Lack of work priority. 14 Absence of work schedule to follow. 16 vi. Lack of material reconciliation for quantity and quality control. vii. Non-compliance with statutory requirement. Besides exhibit P6, the plaintiff wrote the 1st defendant a letter,

exhibit P4 dated 23rd September 2022 restating the complaints enumerated herein above. The foregoing letter was the plaintiff's first warning to the 1st defendant on the non-compliance with Occupational Safety and Health Authority (OSHA), lack of enough manpower, lack of supervisor at the site and the slow pace of the construction work. The plaintiff's claims have been supported by DW3's contradictory testimony that he was a site engineer while among the complaints of the plaintiff to the 1st defendant was absence of site engineer. DW3 was neither at the construction site all the time, nor did he know if the project was not registered with OSHA. There is no evidence that the 1st defendant did attend to the plaintiff's complaints. The 1st defendant lacked evidence to show that she addressed the complaints even after the lapse of ten (10) days from 13th September 2022 when the complaint email, Exhibit P6 was communicated to her, to 23rd September 2022 when a reminder letter, Exhibit P4 was sent. Glancing on the evidence on record, there is no reason for the 1st defendant's failure to address and discharge her contractual obligations. That is perilous considering that the plaintiff had already played her part 17 including making the required payments. See the payment slips and payment schedule, Exhibit P5 collectively. There was no outstanding payment that could have halted the construction progress. Thus, the 1st defendant failed to register the project with the OSHA and also failed to dispatch and/or submit test reports from laboratories. See Exhibits P7, P8, P9 and PIO collectively. When cross examined by Mr. Kidifu counsel for 1st defendant, PW1 testified that the 1st defendant started the construction of the boundary wall, retaining wall and entrance gate but did not complete the work. None of defendant's witnesses testified that the 1st defendant completed the construction work. Consequently, the plaintiff engaged its quantity surveyor to evaluate the work done. PW1 testified that they engaged another contractor to complete the work. The new contractor demolished a part of the wall constructed by the 1st defendant. This testimony was not contested by defence witnesses. It may be concluded here that the 1st defendant inactions to address the defaults constituted a deliberate breach of construction contract. Breach of a contract occurs when a party to the contract fails to fulfil her obligations as specified under the contract. It is for this reason; the law compels parties to the contract to honour their contractual obligations. Section 37 of the Law of Contract Act [Cap 345 R.E. 2019] "herein 18 after the Act" is relevant as far as performance of a contract is concerned. The section provides and we beg to quote it verbatim: 37 (1) "The parties to a contract must perform their respective promises...under the provisions of this Act or any other law" (emphasis supplied) The above provision has been reiterated by the Court of Appeal of Tanzania in Abualy Alibhai Azizi vs Bhatia Brothers Ltd [2000] TLR 288 and Simon Kichele Chacha v. Aveline M. Ki I a we, Civil Appeal No. 160 of 2018 CAT at Mwanza. These two cases emphasized on the doctrine of sanctity of contract, that contracts must be respected. Accordingly, the 1st defendant defaulted in discharged her obligations under the contract. In the case of Simba Motors Limited versus. Joh Achelis & Sohne GMBH & Another, Civil Appeal No. 72 of 2020 CAT- DSM, the CAT guided by the decision of Lord Diplock in the case of Photo Production Ltd v. Securicor Transport Ltd [1980] 1. All ER 566, had this to say at page 12 of the judgment and we quote: "Every failure to perform a primary obligation is a breach of contract." (emphasis supplied) It follows that the 1st defendant's failure to

discharge her obligations contrary to the terms of the contract amounts to a breach of the contract. Undoubtedly, in this case and according to clause 5 of the construction contract Exhibit P2, time was of essence in execution of the 19 contract. The construction project under the contract was to be completed within ninety-eight (98) working days. The purpose of the project was to enable the plaintiff to erect a battery manufacturing plant. The Plaintiff had already paid a total of TZS 110,000,000.00 (see Exhibit P5 collectively) as of 23rd September 2022. To refute claim that the 1st defendant delayed and failed to complete the project, DW1 and DW2 testified that the 1st defendant was ordered by the plaintiff to stop the work. But nothing has been tendered in evidence as proof to that effect. In rebuttal to allegation that the 1st defendant breached the contract, DW1 during cross examination testified to the effect that the circumstance for termination of the contract is found in clause 13 of the contract, Exhibit P2. In his opinion, the clause states that the remedy available for delaying completing the work is for a client to demand a contractor to pay 0.5% per week of the delay subject to a total penalty of 10% of the total contract sum and contract shall stand null and void. It is from that clause that whereas the client can recover amount from the tender bond provided. The plaintiff never, controverted the preceding testimony. This clearly indicates that the plaintiff issuing of termination letter dated 10th October 2022 part of Exhibit P13 collectively contravened terms of the contract, Exhibit P2. All the same, delay to complete the construction work is one of and not the only reason for the plaintiff to terminate the contract. Exhibits P4, 20 P6 and P13 list several reasons: (1) Failure to address the concerns raised including quality of workmanship; (2) Slow progress; (3) Failure to register the project with OSHA; (4) Submission of documents with incorrect information; (5) No proper manpower management at the site; (6) Poor workmanship; (7) Non-accountability of material issued; (8) Not following suggestion/instruction even after repeated follow up; (9) Raising invoice without client consent or joint measurement contrary to the contract terms; and (10) Attacking client representative at workplace. Although some of the above stated reasons such (9) and (10) have been hotly contested by the 1st defendant, most of the complaints are well founded as confirmed by testimonies of PW1, PW3 and even DW1. The testimony of DW3, a site engineer confirmed that he was not on site most of the times. That supported the plaintiff allegation of lack of supervisor or engineer at the site. In respect of poor workmanship, that presupposes poor quality of work done by the 1st defendant. On this point, during cross examination PW3, QS testified that he was hired by the plaintiff to prepare the bill of quantity and to measure quantity of work done. He admitted that he did not know the details of the dispute between the plaintiff and the defendants. But he knew little that there were differences that led to work done at the site to be measured. He further admitted that he was not given any report from the structural engineer showing the variation in the design and actual construction. 21 It was PW3's testimony that he went to measure the quantity of work and not its quality. He told the court that measuring quality is the task of the architect. Surprisingly, in this case the architect was never called to testify on the quality of work done. Penning off on the first issue as to who breached the construction contract between the Plaintiff and the 1st defendant considering the totality of evidence as depicted hereinabove, the Court firmly holds that, it is the 1st defendant who breached the

construction contract. Having concluded that the 1st defendant breached the contract, the next question is whether the act of the plaintiff terminating the contract was lawful. That is the subject of the following section. The second issue goes thus whether termination of the construction contract by the Plaintiff was lawful. According to the testimony recorded Exhibits P4 and P6, the letter and email respectively, the Plaintiff had raised several complainants expressing her dissatisfaction with the progress of work. The 1st defendant did not provide any proof that the plaintiff's concerns were addressed. The complaints, as far as execution of the construction contract is concerned, are enumerated and elaborated under the Exhibits P4, P6 and P13. In contract law, termination is an act of putting a contract to an end. It is a right exercisable by either party thereto upon occurrence of events or circumstances stipulated under the said contract or under the law. The 22 aforesaid events may include a breach by one party, which prompts the other to terminate the contract. Termination is therefore a lawful remedy vested with either party to the contract. Under the contract in dispute, Exhibit P2, enumerated events and circumstances, whose occurrence, would entitle the plaintiff to terminate the contract. The relevant part under Exhibit P2 is clause 18, reproduced hereunder: 18 TERMINATION The Client may terminate this agreement at any time, without any liability, immediately by notice in writing.

- a) If the contractor is unable to perform a material portion of the Contract for a period of not less than fifteen (15) days; or
- b) If the contractor commits or allows to be committed any breach of the terms of this contract and do not remedy a failure in the performance of their obligations under the contract within five (5) days after being notified or within any further period, (emphasis supplied) c) n/a d)n//a The only question that remains, relative to the termination clause herein above quoted, is whether the event and circumstances enumerated under clause 18 of Exhibit P2, did exist to trigger termination of the contract. The answer to this question is not far-fetched. The plaintiff 23 informed the 1st defendant as early as 13th September 2022 via email, Exhibit P6, that the work performance was not in line with the terms of the contract. The same concerns were restated in a letter dated 23rd September 2022, Exhibit P4. The letter recaptured the events and trends constituting 1st defendant's breach of the contract. Unquestionably, conducting joint measurement of work done was a condition for the plaintiff to pay the 1st defendant under the contract, Exhibit P2. Therefore, prior to raising any invoice joint measurement must be conducted by QS from both sides, as per the contract. It is hence unsurprising that the plaintiff refused to pay the 1st defendant's invoice of TZS 75 million when she raised it without joint measurement. It is noted that there are instances when joint measurements were done. PW3 testified that during measurement of work done, on the first day, the 1st defendant's QS and DW1 were present. But, on day two, DW1 was present while the 1st defendant's QS was absent. While the 1st defendant clearly breached the contract, the plaintiff too contravened the terms of the contract. PW1 during cross examination testified on payment so far made by the plaintiff to the 1st defendant, that the plaintiff paid the 1st defendant approximately TZS 105 million without involving 2nd defendant. Moreover, the testimony of DW1 shows that the plaintiff failed to observe the

terms of the contract (Exhibit P2) on several occasions including that payment of TZS 105 million without joint 24 measurement. Corroborating that was the testimony of PW3, plaintiff's QS, who told the Court that he does not know how the plaintiff paid the 1st defendant TZS 105 million as he was not a party to that payment arrangement. Besides he was not called all the time to work for the plaintiff. To show further that even the plaintiff contributed to the breach of the contract, which turns the lawfulness of termination on its head. The 1st defendant raised the invoice for advance payment to the tune of TZS 75 million on 18th August 2022, which the plaintiff paid, as per exhibit P5. In cross examination, PW1 admitted that that payment was made without the involvement of QS and there was no joint measurement. PW1 also conceded that the plaintiff refused to pay TZS 58 million to the 1st defendant contrary to QS' recommendation claiming that there was no report certified by the quantity surveyor. That was intriguing because the plaintiff was not strictly observing the terms of the contract especially, when she paid TZS 105 million to the 1st defendant without QS involvement. Regarding termination of contract, PW1 testified during cross examination that the QS evaluated the work done in November 2022 while the termination of the contract was done on 10th October 2022 as per Exhibit P13. That means the contract was terminated before QS evaluating the work done. This is another detrimental indication that the 25 plaintiff was not abiding with the terms of the contract. Nevertheless, in execution of construction contract like the one at hand, it is agreeable that time is of essence. The evidence on record shows that the 1st defendant was sluggish in execution of the contract to the extent of being reminded more than twice. Eventually, the plaintiff resorted to exercising her right under clause 18 of the contract. She officially terminated the contract vide a letter dated 10th October 2022. Refer Exhibit P13 collectively. Therein she listed events and trends that constituted breach which then brought clause 18 of the contract into operation. In the case of Joeff Group (T) Limited versus. Temeke Municipal Council & The Attorney General, Mi sc Civil Case No. 158 of 2019, High Court of Tanzania, Dar es Salaam District Registry, (unreported) the court was called to determine the validity of the notice of termination of the contract issued by a party at the instance of breach by the other party to the contract. His Lordship, Mambi, J; had this to say at page 14 of the judgment: "The question to be determined here; is whether the act by the 1st defendant amount to fundamental breach of the contract warranting termination of contract by the plaintiff as stipulated under clause 62 (2) (d) of the contract. My answer to this issue is dear as I have already observed that since the 1st defendant had fundamentally breached the contract, the plaintiff was right in terminating the said contract. This is due to the 26 fact that the performance of the contract by the contractor depended on funds to be supplied by the 1st defendant" (emphasis supplied) While I have not reservation with the above holding, the concern the present case is whether the termination of contract was lawful. Apparently, one of the plaintiff's reasons for terminating the contract was the 1st defendant's delay to complete the contract. That to large extent justified termination of the contract. Yet still, the plaintiff completely ignored another remedy found in clause 13 of Exhibit P2 that could have been exhausted before terminating the contract. That is liquidated damage. It is this understanding that led the 1st defendant to contend that it was the plaintiff who breached

the contract. She thus suggested that the termination of the contract was unlawful. I proceed to reproduce clause 13 for clarity: "If the contractor fails to comply with the time for completion, for the whole of the works or, applicable, any section within the relevant time, then the contractor shall pay to the client 0.5% per week of delay subject to a total penalty of 10% of the total contract amount after which contract stands null and void and Client can recover amount from tender bond provided i.e. bank guarantee 25%." T1 From the above clause of the contract, it is clear that if there is delay in the completion of the contract or any section within prescribed time then plaintiff ought to have asked the 1st defendant to pay her 0.5% per week of the delay subject to a total penalty of 10% of the total contract after which the contract will become null and void. In addition to that the plaintiff can recover amount of 25% from bank guarantee provided. This remedy was never opted by the plaintiff. Instead, she went straight to terminating the contract. Understandably, presence of that clause is not an excuse for 1st defendant's non-completion of the construction work. Moreover, the contract must be read and interpreted holistically. The 1st defendant forgot that clause 13 of Exhibit P2 (the construction contract) applies only with respect to delays to completion of the project. Here there are multiple factors for termination not just delay in completing the construction project. Therefore, the 1st defendant cannot use clause 13 as shelter for the number of contractual breaches she has committed. Furthermore, Clause 18 of Exhibit P2 deals with termination of contract. It stipulates events that may lead to termination of contract and procedure for termination. Regarding termination, Clause 18 provides: "the client may terminate this agreement at any time, without any liability, immediately by noticing writing:

- (a) if the contractor is unable to perform material 28 portion of the contract for a period of not less than 15 days fifteen (15) days; or
- (b) if the contractor commits or allows to be committed any breach of the terms of this contract and do not remedy a failure in the performance of their obligations under the contract, within five (5) days after being notified or within any further as the client may have subsequently approved in writing; or (c) if the contractor becomes insolvent or bankrupt; or
- (d) if, as the result of force majeure. The contractor is unable to perform a material portion of the contract for a period of more less than a 30 days; or
- (e) if the client, in its sole discretion, decides to terminate this agreement. Termination of this agreement shall be without prejudice to other rights and remedies of the client arising out of any default, which occurred before the termination and shall be without prejudice to any claim for monies payable as at the date of the termination or in respect of work done all liabilities incurred based on the execution of item rates before the termination." 29

Considering the evidence adduced, the termination of the contract was lawful. However, the plaintiff too committed several fouls. These include payment of TZS 105 million to the 1st defendant without joint measurement, failure to pay the 1st TZS 58 million despite being endorsed by the QS, termination of contract prior to conducting evaluation, and plaintiff's failure to invoke clause 13 of the contract. Nevertheless, on the scale the 1st defendant

committed fundamental breaches that contributed to the termination of the contract. The third issue is who is liable for breach and/or termination of the construction contract between the Plaintiff and the 1st Defendant. This issue constitutes a fusion of the 1st and 2nd issues. No wonder in answering this issue, I will reiterate most of what has already been drawn hereinabove in respect of the 1st and 2nd issues. At this juncture, firstly, a distinction between the two legal terminologies: breach versus termination as applied in the law of contract is made. Termination of a contract occurs when either party, pursuant to a power created by the agreement or law, puts the contract to an end due to breach. Secondly, a breach of contract occurs when one party fails to fulfil her obligations in the contract. The Plaintiff presented her complaints to the 1st defendant enumerating a number of concerns for the attention of the 1st defendant. All the complaints were touching the performance of the construction 30 contract. Refer Exhibits P4 and P6. The 1st defendant did not address the concerns raised by the Plaintiff even after being reminded on 23rd September 2022. See Exhibits P4 and P6. It is also on the record that the 1st Defendant seem to have abandoned the site sometimes early in October 2022. See the attendance register Exhibit P18. There was no site hand over and the 98 days of time frame within which the project was to be accomplished has not lapse yet. Bad enough the construction project was incomplete. But it should be remembered that PW2 testified that there was fracas between PW1 and DW1 that led to PW1 asking PW2 to report the matter to police station at Vikindu. That indeed turned the construction site unpleasant. According to the contract, Exhibit P2, the 98 days for execution of contract were to be reckoned from the date either site hand over or the date on which advance payment was made whichever comes earlier. Looking at Exhibit P5, the advance payment was disbursed on 18th august

2022. Thus, the 98 working days started to run since then and they were expected to lapse towards the end of November 2022. The Attendance register sheet Exhibit P18, is crystal clear that the 1st Defendant's workmen were at the site up to sometimes 27th September
2022. Thereafter there is no proof that they were at the site in executing the obligations of the 1st Defendant. Reading the termination notice, Exhibit P13, it tells that some of the reasons for termination of the 31 contract are absence' of proper manpower management from the site and poor workmanship. It is the Plaintiff's view that the site was indeed abandoned prematurely. The premature abandonment of the site and failure to hand over the same to the Plaintiff, among other reasons, constituted fundamental breach of contract. The 1st defendant being a professional contractor was expected to undertake her dealings and relationship with the Plaintiff professionally. Referring to the case of Simba Motors Limited supra, there need not be multiple breaches for the act and/or omission to constitute breach. A single act and/or omission suffices to constitute breach that is why the case of Simba Motors Limited emphasizes, at page 12, that every failure to perform a primary obligation is a breach of contract. In the case at hand, the 1st defendant breached the contract. From that it may be concluded that it is the 1st defendant who is largely responsible for breach of contract for her deliberate failure to perform her obligations under the construction contract. Despite that her breach was a risk that was insured by the

performance bond, Exhibit P3 collectively. The question as to who breached the contract, that has been answered that it is the 1st defendant. Still and among others, the DW1's testimony that the plaintiff ignored clause 13 of the contract, Exhibit P2 stipulating plaintiff's relief in case the 1st defendant delay completing the construction work. This clearly indicates that the termination letter as per 32 Exhibit P-8 did not comply with the contract. This goes without saying that the Plaintiff also breached the terms and conditions of the construction contract. The delay in completing the construction project was not the only reason for the plaintiff to terminate the contract. See Exhibit P13 states clearly reasons for contract termination was due to 1st defendant's failure to address the concerns raised including quality of workmanship; slow progress; failure to register the project with OSHA; no proper manpower management at the site; non-accountability of material issued; not following suggestion/instruction even after repeated follow up; raising invoice without client consent or joint measurement contrary to the contract terms; etc. These complaints are genuine and were confirmed by PW1, PW3 and DW1 (to a certain extent) in their testimonies. The testimony of DW3, site engineer further confirmed that he was not on site regularly. Liability of 1st defendant hangs on a balance if one considers the testimony of PW2 who admitted that though he does not know the dispute between the plaintiff and the 1st defendant but went on telling the court that PW1 and DW1 had a fracas. He was asked by PW1 to report the matter at Vikindu police station where the Officer in Charge of the Station (OCS) advised them to resolve the matter at the construction site. He also conceded that after the fracas and by the beginning of October 2022 the 33 1st defendant workers completely left the construction site. However, he said he got this information about the leaving the site from the supervisor called Benjamin. Looking at the concerns raised by the plaintiff which ended in the deaf ear of the 1st defendant, the latter's failure to register the project with OSHA and other short falls enumerated in Exhibits P4, P6 and P13, while the court noted that there was a fracas that erupted at the construction site between PW1 and DW1, and that the 1st defendant's equipment are at the construction site, the plaintiff failed to pay the 1st defendant TZS 58 million sanctioned by the QS; she also ignored clause 13 of the contract, overall the 1st defendant is liable for the breach and termination of the construction contract. Seemingly, she pushed the plaintiff too far to continue sparing the contract. But that is not the whole story as it will unfold herein below. It is on record that the advance payment bond and the performance bond, Exhibit P3 collectively were executed to cover the 1st defendant's defaults in performing the construction contract. This lands us to the issue whether an insurer, the 2nd defendant, is liable to the plaintiff under the bonds. The fourth issue is whether the 2Pd Defendant has any liability to the Plaintiff in respect of the performance bond and advanced payment bond. A starting point in disposing this issue, is to examine Exhibit P2, the contract itself, and Exhibit P3 comprised of Performance Bond with reference No. DSM/BOND/P01/0321520 for a 34 period from 16th August 2022 up to 15th February 2023 and Advanced payment Bond of DSM/BOND/PL/0321/517 whose validity was from 16th August 2022 to 15th February 2023. Since the bonds were executed to secure the construction contract, a critical question is, did the plaintiff abide to the terms and conditions of the bonds before terminating the

construction contract? During cross examination by Mwakibolwa for 2nd defendant, PW1 testified that the plaintiff paid first defendant excess amount that is TZS 105 million advance payment contrary to the contract, Exhibit P2 to expedite the work at the site. This was a violation of the advance payment bond. Moreover, PW1 admitted that the 2nd defendant was not involved in the arrangement. He further admitted that it was in September 2022 when the plaintiff observed some faults in the work done at the site. PW1 continued to admit that at that time the plaintiff was aware of the terms and the conditions of the performance bond. Meaning the plaintiff's payment of TZS 105 million to the 1st defendant which was over and above the agreed amount in the advance payment bond was a deliberate breach of the said bond agreement. PW1 testified that the plaintiff notified the insurer, herein the 2nd defendant on 12th December 2022 (Exhibit P14) about the 1st defendant's defaults so that she can rectify it under performance bond contract. According to PW1, the letter dated 12th December 2022 to the 2nd defendant was for recovery under the performance bond. That letter was 35 not only written three months later from September 2022 when the defaults were observed for the first time at the site but also it was after the construction contract has been terminated, the termination was on 10th October 2022. Visibly clear is another letter by plaintiff through her lawyer, Exhibit P15 dated 19th October 2022 responding to the demand notice for special performance of contract and the written apology sent to the 1st defendant and copied to the 2nd defendant. This letter too was written after the contract had already been terminated. PW1 also testified during cross examination that there was yet another letter dated 1st October 2022 notice of appointment of quantity surveyor to do valuation, part of Exhibit P14 collectively, which reached the 2nd defendant on 3rd November 2022. It was addressed to 1st defendant's lawyers BM Attorneys and copied to the 2nd defendant. Interestingly, the letter dated 1st October 2022 reached the 2nd defendant after the contract has been terminated. Worse still that letter stated nothing about the defaults at the site or intention to terminate the contract. Nor did it request the 2nd defendant to intervene. It however stated that the plaintiff can engage another contractor. Nonetheless, there is no dispute that the letter dated 19th October 2022 echoed the 1st defendant's defaults in the construction work. But then again that letter was sent after termination of the contract. A close look at paragraph 3 of the performance bond part of Exhibit P3 collectively prescribes that the Surety, 2nd defendant was required to 36 promptly remedy the default(s) or shall promptly (1) complete the contract in accordance with its terms and the conditions; or (2) obtain a bid or bids from qualified bidders for submission to the Employer for completing the contract in accordance with its terms and conditions; or (3) pay the Employer amount required to complete the contract in accordance with its terms and conditions up to a total not exceeding the bond amount. It should be remembered that as per exhibit P3, the Employer is the plaintiff and the Contractor is the 1st defendant herein. The catch words of paragraph 3 of exhibit P3 are that whenever the Contractor shall be, and declared by the Employer to be, in default under the contract, the Employer having performed the Employer's obligation thereunder, the surety may promptly remedy the default or shall exercise either of the three above stated options. Reading these words, it is loud that the plaintiff was duty bound to notify

the 2nd defendant whenever the 1st defendant defaults in the performance of the construction contract. To ensure that the performance guarantee operates meaningfully by enabling the 2nd defendant to intervene in case of default by the 1st defendant then the plaintiff ought to notify the Surety about the that default. Indeed the 2nd defendant was required to rectify the 1st defendant's defaults. The Surety's intervention can only be done prior to termination of the contract. Since the life of exhibit P3 depended on the construction contract it was logical that the defaults ought to be communicated before termination of the construction contract. 37 Considering the defendant's witness, during cross examination, DW4 testified that the condition for indemnity was that the 1st defendant must have failed to perform his obligation under the construction contract, which is exhibit P2. That would have triggered the operation of bonds agreement under which the 2nd defendant had three settlement options stated earlier. DW4 admitted that Exhibit P14 includes a letter dated 12th December 2022 which notified the 2nd defendant of the plaintiff's intention to realize the bonds. DW4 conceded that the claim was registered before expiry of the bonds (that is 15th February 2023). Yet that does not make any better the plaintiff's failure to notify the 2nd defendant about the 1st defendant's default prior to termination of the construction contract. The witness admitted further that they eventually received the complaint of the plaintiff regarding the 1st defendant's default but there was no evidence of the default. However, she was quick to admit that the bonds operated as insurance. The witness claimed that Exhibit P13 the notice of termination of the contract, that is the plaintiff's letter to the first defendant was copied to the 2nd defendant, but they never received it. Looking at Exhibit P13 termination notice dated 10th October 2022, there is no evidence that the 2nd defendant received the same. What they received was Exhibit P14 which was performance bond recovery which is dated 12th December, 2022. According to DW4 the 2nd defendant received the plaintiff's claim; but 38 there was no evidence and confirmation of what has happened. She rightly testified that insurance claims require verification. DW4 testified that they processed the plaintiff's claim, and they found anomalies in the plaintiff's claim, that there was no proof. And then during the process the case at hand had already been filed in court. Further on DW4's testimony is that the 2nd defendant did not communicate their findings to the plaintiff she admitted further that the processing of the claim can be done even after expiry of the bonds if there is evidence. The witness testified that they did not complete investigation because they received a notice that there is a case in court. Intriguingly, DW4's testimony that the plaintiff did not send a letter seeking extension of bonds pending investigation was contradicted by a letter, part of exhibit P14 on paragraph 4 in which the plaintiff was requesting investigation of construction claims and the extension of bonds. This letter was received by the 2nd defendant on 2nd February 2023 as per her official stamp. But the witness admitted that the stamp seen on the letter belonged to the 2nd defendant. She also admitted that they did not inform the plaintiff that her claim is not justifiable and illegitimate because the investigation was ongoing when the case at hand was opened. DW4 told the court that in Exhibit P3 clause 3 the plaintiff was required to report or file a claim before the 2nd defendant prior to terminating the construction contract. According to the DW4 clause 4

for 39 advance payment bond part of Exhibit P3 required that the plaintiff to advance payment to the 1st defendant for starting the project if she fails then the plaintiff could claim reimbursement from the second defendant. DW4 testified on the criteria they used before reimbursing the claimant under the bonds. She stated that the claim has to be based on the contract and the proof that there is default in completion of the project or destruction and there should be a report from an expert verifying the default in the work which shall be accompanied with the bill of quantity. As for the advance payment bond, there should as well be evidence of the amount of work done and then the amount paid, and they certificate of completion because construction is done on phases. That would constitute proof of the amount of money claimed. The court noted that the testimony of DW4 was solid and unshaken. She gave credible evidence on advance payment and performance bonds, Exhibit P3 collectively. Understandably, these bonds operate as insurance contract. They carry their own terms and conditions. While it is true that the bonds were taken to insulate the 1st defendant from liability, they were intended to protect the plaintiff by ensuring that the 2nd defendant rectifies the defaults committed by the 1st defendant. The basis of liability of the 2nd defendant to the plaintiff was based on first with the advanced payment bond that the 1st defendant must have been paid advance payment by the plaintiff and that she has failed to commence the construction work. Under 40 this, it has been observed that the advance payment made by the plaintiff to the 1st defendant exceeded what was agreed in advance payment bonds without informing the 2nd defendant. That is not all, and as rightly testified by PW1 and DW1 the plaintiff effected advance payment to the 1st defendant without any certificate. PW1 admitted that the 2nd defendant was not part of that arrangement. DW1 also testified that the parties were not strictly observing the terms of the contract. Besides that, the work for which advance payment bond was issued commenced. Hence there was no default on the 1st defendant's side in starting the construction work. For that reason, the advanced payment bond could not be activated or triggered. Consequently, the 2nd defendant is not liable to indemnify the plaintiff under the advance payment bond. Turning to the performance bond, it was the fundamental term and condition under paragraph 3 of the performance bond part of exhibit P3 collectively that if the 1st defendant default in performing the contract, then the 2nd defendant shall be notified by the plaintiff prior termination of the contract so that she can rectify the default. The 2nd defendant had three options, as highlighted hereinabove. However, looking at Exhibit P13, termination letter/notice dated 10/10/2022, and notice: performance bond recovery - construction contract - contract breach ELCAT Builders (T) Limited, dated 12/12/2022 part of Exhibit P14, the termination of contract occurred prior to 41 informing the 2nd defendant about the 1st defendant's default. That surely exonerates the 2nd defendant from liability it would otherwise have towards the plaintiff on the performance bonds. The plaintiff may claim that the 2nd defendant was informed about the 1st defendant's breaches or default and may refer to a letter from her lawyers Victory Attorneys to the 1st defendant's lawyers BM Attorneys dated 19/10/2022 subject matter - response to the demand notices for special performance of the contract and written apology, part of exhibit P15 collectively. The letter dated 19/10/2022 bears the 2nd

defendant's stamp, and it also contains the issues that led to termination of contract. However, that letter was received after the termination of contract. Interestingly, Exhibit P5 also contains another letter from Victory Attorneys to BM Attorneys dated 01/10/2022 copied to the 2nd defendant subject - notice of appointment of a Quantity Surveyor for valuation of performed work. As per the 2nd defendant's stamp, the letter was received on 03/11/2022. The said letter did not provide details of the 1st defendant's default. Moreover, the said letter was received by the 2nd defendant almost a month later from the date of termination of construction contract. From that it follows that the 2nd defendant can hardly be held liable to indemnify the plaintiff under the performance bond due to the latter's own non-compliance with the said bond agreement. Turning to the issue whether the plaintiff suffered consequential damage and to what extent. This should not detain us much. The evidence is loud that the plaintiff sustained damage and to certain extent. Nonetheless, the loss suffered were contributed by her own non- 42 compliance of the contractual terms (in the main contract and the bonds). She breached the contract, Exhibit P2, on several occasions. She made payment without joint measurements; contravened clause 13 of the contract, terminated the contract prior to informing the 2nd defendant, surety. These among others render the loss suffered was due to plaintiff's contributory breaches of the contract. Lastly, is the issue to what reliefs are the parties entitled to. As custom dictates, we dive first into the reliefs the plaintiff sought. These are as follows:

- i. For a Court declaration order that the 1st Defendant breached the construction contract executed by and between her and the plaintiff in the year 2022, ii. The court declare that the 2nd Defendant is in breach of the terms and conditions of the performance bond and advancement payment bond. iii. The court declares that the plaintiff is entitled to recover a total TZS 105, 608,394.50 only being her rightful remedy resulting from breach of the construction contract by the 1st Defendant. iv. The court order the 2nd defendant to pay the plaintiff a total amount of TZS 105, 608,394.50 only as specific damages pledged under the performance and advance payment bonds for breach of the construction contract by the 1st defendant.
- v. General damages to be assessed by the court arising from the 43 damage suffered as a consequence of breach of the construction contract and for breach of the terms of the performance bond and the advance payment bond. vi. Interest on the decretal sum at the court rate of 12% from the date of filing this suit to the date of judgment. vii. Interest on the decretal sum at the court rate of 12% from the date of judgment to the date of full satisfaction of the decree. viii. Costs of this suit be borne by the 1st defendant and 2nd defendant, ix. Any other reliefs) as this court may deem just and fit to grant. As above shown, the plaintiff sought an order declaring that the 1st defendant breached the contract because she is the one that led to termination of the contract. In addition to that the plaintiff claimed specific damages from the 2nd defendant for extending bonds against the 1st defendant's default in the construction contract. The 1st defendant on her side sought the court order dismissing the plaintiff's case with costs and simultaneously finding merit in her counterclaim. And the 2nd defendant sought a court order dismissing the plaintiff's case

with costs. From analysis of facts, evidence and law as presented hereinabove, the plaintiff appeared to have a solid case and merit could have been found in her case. However, due to her own non-compliance with terms of bonds agreements and the main contract, that remained a daydream. The stated acts of non-compliance include terminating the contract prior to informing the 2nd defendant, surety was inappropriate and breached the terms of the 44 performance bond. As with regards to the advance payment bond, the money paid TZS 105 million to the 1st defendant as advance payment exceeded the amount TZS 75,434, 567.50 found in the advanced payment bond the arrangement which was done without involving the 2nd defendant. Along with that there is ample evidence that the advance payment effected to 1st defendant was properly utilized and hence the indemnity under the advance payment bond cannot be sanctioned. Consequently, the court declines to grant the specific damages claimed against the 2nd defendant. The plaintiff claimed general damages without stated against whom the general damages are claimed. But deducing from the evidence adduced the general damages to be assessed by the court arising from the damage suffered because of breach of the construction contract and for breach of the terms of the performance bond and the advance payment bond. Even though Here the claim is against both defendants, the evidence given proved on the balance of probability that the 1st defendant breached the contract. Had it not been for the bonds she would have been liable. The bonds were taken to cover the risk of default by the 1st defendant. Under section 73 (1) and (4) of the Law Contract Act, the law makes it clear that: 73 (1) " When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to 45 be likely to result from the breach of it" (emphasis supplied) 74 (1) "When a contract has been broken, if a sum is claimed in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract, reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated" ' (emphasis supplied) Much as the above provision is a good law, there are instances where a party who is entitled to general damages may be denied if he has contributed the breach of contract. Also, in insurance law, liability of a party at fault (insured) is covered by another party (insurer) that is the surety. Here we are referring to the 2nd defendant who granted advance payment and performance bonds to the 1st defendant to secure the construction project. That is how insurance contracts work. Despite the reality that the plaintiff might have suffered loss, the claim of general damages is rejected because the plaintiff too is blameworthy. She knew about the 1st defendant's default but failed to inform the 2nd defendant prior to termination of the construction contract. Under the bonds agreement the 2nd defendant committed herself to rectify the 1st defendant's default. Strangely, the plaintiff denied her that opportunity. The plaintiff also never exhausted clause 13 of the contract as explained 46 hereinabove which provides for remedy in case there is delay. Moreover, the plaintiff did not pay the 1st defendant TZS 58 million which was

approved by the QoS for work done. Furthermore, following the fracas involving PW1 and DW1, that led to the 1st defendant unceremonious exit from the construction site, the plaintiff retained 1st defendant's equipment as confirmed by PW2 that the facility used by contractor as a store is still at the construction site. As for the reliefs sought by the 1st defendant, her claims are for TZS 155, 272, 726.16 unpaid balance from the plaintiff for works done. But as stated earlier she is the one who breached the contract, had it not been for the performance bond and the plaintiff's contributory breach of the contract and non-observance of bonds terms and conditions she (1st defendant) would have been liable to pay specific damages and or general damages to the plaintiff. Since the 1st defendant breached the contract, her counterclaim is dismissed. The 2nd defendant sought dismissal of the main suit with costs. While the main suit is dismissed, she cannot be granted costs for a simple reason that she too exerted laxity in handling the plaintiff's claims. Even if the plaintiff informed her after terminating the contract, the 2nd defendant was duty bound to notify the plaintiff the outcome of investigation of her claim on the performance bond. It would be unfair to award costs to such a party. In the end both the main suit and counterclaim are dismissed for want of merit. Each party shall bear its costs. 47 Order accordingly. DATED at DAR ES SALAAM this 6th Day of September 2024. & U/J ./AGAT HO Date: 06/09/2024 Coram: Hon. U. J. Agatho J. For the Plaintiff: Kassim Musa Ititi, Advocate. For the First Defendant: Eliezer Msuya, Managing Director Second Defendant: Sikujua Clement, Advocate. C/Clerk: E. Mkwizu Court: Judgment delivered today this 6th September 2024 in the presence of Kassim Musa Ititi, counsel for the plaintiff, Eliezer Msuya, Managing Director of the first defendant and Sikujua Clement, counsel for the second defendant. U. IrAGATHO JUDGE 06/09/2024 48

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