

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 106 OF 2002**

TOM MUKOMAZI:..... PLAINTIFF

VERSUS

JINDA INTERNATIONAL TEXTILE CORPORATION:..... DEFENDANT

BEFORE: THE HON. MR. JUSTICE OKUMU WENGI.

JUDGMENT:-

FACTS :-

The Plaintiff sued to recover a sum of Shs. 87,241,095/= and general damages from the Defendant. The suit arises from a January 2001 building contract by which the Defendant expected the Plaintiff to carry out extensive refurbishment of the buildings of the Uganda Spinning Mills factory in Lira. It is alleged that out of the total invoiced sum of Shs. 147,541,095/= the Defendant paid only Shs. 60,300,000/= leaving the claimed sum unpaid, hence this suit. The Defendant denied liability contending that the Plaintiff did not carry out the works as expected or properly and laid a counterclaim for Shs. 91,785,091/=. At the outset it was agreed that a building surveyors Registration Board nominated M/s DEC Consultants a firm of Building Economists who went and carried out the survey and make a report. The lead consultant r. C.I. Inyangat presented the written report in court, which was duly exhibited, and he was cross-examined on it. The surveyors also file their bill for Shs.

13,301,569/= on 11/7/2002. By their letter of 17/2/2003 the consultants reported that matter of the parties had paid out their fees as ordered to be settled on an equal basis. Although no issues were framed the idea was that the valuer would report on if the works had been done and their values. After he was cross-examined the Plaintiff called one witness while the defendant called two. Each counsel then filed their written submissions.

2. The Quantity Surveyors Report.

According to Mr. Cyprian Igulot Inyangat, he obtained a first class Honours Degree in building Economics from Nairobi University in 1975. He is also a member of the Architects Association of Kenya and Uganda. The witness had presented a report on 6/8/2002 for filing in the Commercial Court Registry having been appointed on 27/6/2002 to do the job. The report provided an executive summary with details of Contract, Works carried out, Quality of materials and workmanship. He also provided a valuation method used as well as the valuations themselves. According to Mr. Inyangat he travelled to Lira with representatives of both parties after prior meeting, discussion and agreement of method of work. He went on to state that verification was done on site in the presence of people whose names are set out in the report.

The witness explained that he was given a full access having set out the results of his verification exercises. He told court in cross-examination: -

“I am not aware of the contest of quality of work. I am aware they were contesting the values of the works. I made valuations on the basis of the contract prices. I did not use prices outside the contract ... I did not understand that the court wanted us to alter prices. We agreed on site to use contract rates. Only on quantities did we do our verification. Prices are for the parties. We could not invent our own prices. The court order required me to make a valuation report. The value of the work had to be in accordance with the values in the contract. I read the contract. The Plaintiff was required to ensure good workmanship and materials at clause 4 C.”

The witness then conceded that the work done was poor and poor in the absence of quality specifications. He went on: -

I would say the work was incomplete. But to the stage it was done, it was not properly done. It was below standard. There is absence of standards specification to be met in the contract. To me it was below standard. It is a subjective issue. I would say work that is below is good. There was no complaint to me that the work was poor. ... We did quantities and the quantities were correct. I still maintain that the parties signed for no rules. The quality was subjective. Workmanship of any grade is paid for. Parties signed for what they got. There was no specification at to standard. The document I was given did not give me standards.”

The Quantity Surveyor gave his verdict. He suggested that the work done was valued at Shs. 144,667,452/=. There is also a statement regarding the quality of work. And the figure given does not exclude money paid by the Defendant to the Plaintiff.

3. The Case of the Plaintiff: -

The Plaintiff then called Tom Muwanga Kabogoza (PW1) a Consultant businessman who also doubles as a vehicle and parts importers. The witness told court that the total contract price was Shs. 339,717,740/=. He explained the works done claiming that it totalled Shs. 147,000,000/= out of which Shs. 60,300,000/= was paid leaving the balance sued for outstanding. The witness in cross-examination told court: -

“In this contract there was a requirement of verification. Yes, payment was to be done after verification. We put in our claims. ... To my knowledge, I don’t know if verification was ever done. ... The Employer was to verify. We were not to be present. We don’t have a document from them that verification was done. From the contract we were required to ensure good workmanship, the use of good materials.”

He then argued for his work contradicting the report of the Quality Surveyor appointed by court.

“The work was not below standard. To me one would not be telling the truth if he said the work was below standard. If a report stated that the work was below standard, I would not ask court to rely on it.”

The witness then went on to state that he had carried out extra works. He also changed his mind to say that while the Quantity Surveyors report was correct, the work was standard. HE also denied receiving payment of Shs. 87,055,250/=.

4. The Defendant’s Case.

Mr. Guo Dong testified for the Defendant as DW1. He told court that he was the Defendant’s Managing Director. He said: -

“I contracted Plaintiff to carry out certain works. I did agree on quotations for the work. The Plaintiff did not carry out the work. He just start and stopped. At very beginning it stopped. Not reach to any of what it in bill of quantities. I made payments. We saw him very active at beginning, then we paid him deposit. ... I stopped paying in end of year. He just pulled out and we stopped payment as we also saw no work done. This was in September. We found job never done. He is just like in the beginning. Our Surveyor advised us our payment was too much for job done. Before paying we did not inspect.”

The witness then told court that he had engaged the Lira District Engineer who had advised that the job was valued at only Shs. 5 million. He insisted that substantial work had been done.

The Defendant then called Engineer Paul Sesanga a former Lira Resident District Commissioner (RDC) had directed him to verify the civil works in dispute. He said that he

did so and submitted a report estimating the work at 10% of the value in the Bills of Quantities namely Shs. 5.9 million only. He later told court that further work added the figure to Shs. 24 million. He conceded in cross- examination that he could revise the figure upwards.

5. The submissions of Counsel —

(a). For the Defendant: -

The Defendant first contended that the plaint did not disclose a cause of action in as far as payment of claim was dependent on determination of contract sum and verification of works. He contended that there were conditions precedent. Secondly the Defendant contended that the Plaintiff's witness Tom Mukomazi (PW1) had failed to establish conditions precedent had been fulfilled and if he had ensured good workmanship over which his evidence was in contradiction with that of the Quantity Surveyor.

It was further contended that a claim for Shs. 54 million to cover extra works had not been agreed on. As such this claim would be excluded. He also argued that the valuers report should not be relied upon, as instead of valuing the work done he had applied prices in the bills of quantities. He then claimed that Shs. 91,789,091/= had been over paid to the Plaintiff as advances. He argued that the sum of Shs. 87,055,250/= be paid in a decree in favour of the defendant on his counterclaim.

(b). For the Plaintiff:-

It was argued that the Plaintiff had proved his case and was entitled to the sum claimed on the basis of evidence of the Quantity Surveyor. It was then contended that no evidence had been led to explain the Shs. 91,789,091/= pleaded in the counterclaim.

6. Opinion of Court: -

From the evidence there was a contract for Civil Works intended to renovate the Uganda Spinning Mills, which the Plaintiff executed with the Defendant. It was in writing and there were bills of quantities as well as a total sum agreed to. The Plaintiff did some work, made claims, but was paid part of his claim. Plaintiff admits receiving Shs. 60,300,000/= out of a total claim of Shs. 147 million. From the receipts exhibited I have found that between May

and August 2001, the Defendant paid to the Plaintiff a sum of Shs. 88,795,250/=. This includes the figure of Shs. 18,535,250/= paid on 17/8/2001. Some payments are said to have been made but Plaintiff did not sign for them. These were not set out. Then there is a payment of US\$ 9,000 made on 1/5/200 1, out of which Shs. 9,260,000/= was to be applied to the contract according to notes as Exhibit D.2. The total would then be Shs. 98,055,250/=.

According to the Quantity Surveyor the work done was worth Shs. 144,667,452/=. This would leave a balance of Shs. 46,612,202/=. There is an item for extra works, which totalled Shs. 24,287,445 according to the Quantity Surveyor. The District Engineer could not contradict this.

Now firstly, I do not agree that the plaint discloses no cause of action. The contract sum was ascertained and the exercise of verification was not a mutually executory item as it was left to the employer. The employer did verify in his own way and decided to terminate the contract and to withhold further payments. He engaged his own assessment and used a Civil Servant to support his decision. It is my view that a claim for unpaid balance of work done would be sustained on the pleadings. The extra works would not be excluded and would tend to point to the fact that perhaps the contract had more flaws to itself than even the Quantity Surveyor has pointed out, namely the extent of work required was not thoroughly negotiated as were other aspects of such civil works contracts. The Defendant was to some extent not there to continually check on the work done and may have over trusted the businessman contractor. As such the workmanship did not appear to conform to the expectations of the employer. But the safeguards for this were neglected and the contractor could have taken full advantage of the laxity around the works to do less than what he ought to have done. The valuer was of the opinion that absence of standards specification led to poor materials procurements as the quantities were not tied to any quality and workmanship to the prudent view of the contractor.

I have been quite impressed by the cold professional way in which the Quantity Surveyor did his work. I think he did it more than satisfactorily. He was also not the flattering type as he clearly told court that the work was below standard. He however certified that work had been

done although its quality would tend to negate its wholesomeness.

In conclusion, and to do justice I would be of the view that I would deduct from the Plaintiff's claim a total of Shs. 12,612,202/= being about 25% of Shs. 46,612,202/= on account of poor workmanship and materials used. This would leave the liability of the Defendant to the Plaintiff at Shs. 34,000,000/= only. I am unable on the evidence to say that the counterclaim has been sustained. In the result I enter judgment for the Plaintiff against the Defendant in the sum of Shs. 34,000,000/=. Each party shall pay 50% of the fees of the Surveying Consultants. No further order as to costs will be made, as the suit is only partially successful.

JUDGE

4/4/2003.