THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0269 OF 2005

ANNETTE TUMUSIIME :::::::::::::::::::: PLAINTIFF

VERSUS

1. LUIS GUGONES ARANEL]
2. LOBO BUILDERS (U) LTD] ::::::::::::::: DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The Plaintiff is a business woman. The first Defendant is a Filipino with a residence status in Uganda and the Managing Director of the second Defendant, a construction firm. The Plaintiff's action is for recovery of Shs.18,192,000-, interest at the rate of 22% being monies advanced to the Defendants for the construction of Plaintiff's house at Lweza, Kajansi, Wakiso District, less the estimated value of the shell hurriedly put up by the Defendants, general damages for breach of contract and fraudulent misrepresentation, punitive and exemplary damages, an order of accounts and costs.

The Defendants had services of a lawyer, one Mr. Munyani. However, as soon as the case was fixed for a scheduling conference, the lawyer disappeared. The first Defendant decided to go it alone for sometime until he also disappeared. In the end, Court decided to dispose of the case in accordance with 0.15 r 4 of the Civil Procedure Rules. Hence this Judgment.

Under the above law, where any party to the suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Before the Defendants disappeared, the parties had agreed:

1. That there was a contract between the Plaintiff and Defendant whereby the Defendant would build a house for the Plaintiff.
2. That the 1st Defendant is the Managing Director of the 2nd Defendant.
3. That the contract was between the Plaintiff and the 2 Defendants.
4. That the Plaintiff has so far disbursed Shs.36m to the Defendants.

ISSUES:

1. Whether the Defendants are guilty of any breach in the performance of the contract.
2. Whether the Plaintiff is entitled to the reliefs sought.

First, whether the Defendants are guilty of breach of contract in their performance thereof.

I have considered the evidence of the Plaintiff, PW1 Annette Tumusiime. It is that on 13/7/2004, the 1st Defendant was introduced to her as a skilled constructor who would assist her build her house. She gave him the specifications. Consequently, the 1st Defendant and the Plaintiff discussed the way forward. They agreed that the Defendants construct for her a three bed roomed house, including a store, without a garage, for a consideration of Shs.36,000,000-. The work was to be accomplished in 6 months. PW1 then partly paid the Defendants in the sum of Shs.18m initially. She took the 1st Defendant to the plot and work commenced. She had an approved plan. Along the way the Plaintiff made further payments which added up to another Shs.18m. However, it is her evidence that after 2 months, she realised that the Defendants could not do what they had contracted to do. In her assessment, the 1st Defendant had erected a shoddy structure. She took issue with it and as time went by, the 1st Defendant started dodging her. He shifted from his residence and switched off her phone. In the end, she decided to seek a judicial remedy on the matter.

PW2 Engineer Mujugumbya inspected the structure and found that it had not been constructed according to the Bills of quantities, P. Exh. 11 as well as the approved plan, P. Exh. 111. He summed it up as evidence of poor

workmanship where the walls had several cracks, and the roof had already started sagging due to heavy weight of the tiles which could not be supported by the thin walls.

Another witness, PW3 Eddie Nsamba Gayiiya, testified to the same effect. He inspected the property on 22/5/2005 and was of the view, as PW2, that the Defendant had done shoddy work. He too noted that the walls had not been structured the way the approved plan required: they are too thin to carry tiles. These two experts were of the view that the structure would be unfit for human habitation unless overhauled.

This is a civil case. The standard of proof is on a balance of probabilities. A fact is said to be proved when the Court is satisfied as to its truth. The evidence by which that result is achieved is the called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof. In other words, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. In the instant case, the 1st Defendant held himself out as a competent constructor. The Plaintiff entrusted the construction of her house to him and his company, the 2nd Defendant. The burden lies on her to prove on a balance of probabilities that the Defendants did not do what they were contracted to do.

She has given evidence that shows that the Defendants did substandard work. Her evidence shifts the burden of proof to the Defendants to show, first, that they were not in breach of any duty; and second, that the damage suffered by the Plaintiff did not result from the breach. A constructor owes a duty to his client to observe precautions which are normal in the course of such construction. From the evidence, the Defendants failed to observe these precautions. The performance of the terms of the contract in terms of time and the quality of work fell far short of the Plaintiff's expectations. The evidence of the experts confirms it.

In these circumstances, Court holds that the Defendants' poor workmanship of the construction work on the Plaintiff's house amounted to a breach of contract on the part of the Defendants. I would answer the first issue in the affirmative and I do so.

Second, whether the Plaintiff is entitled to the reliefs sought.

The law is that when a party fails to do what he/she agreed to do or does not do it properly, he/she is said to be in breach of the contract. He will be liable to pay damages to the aggrieved party to compensate him for any loss occasioned. The damages which the other party ought to receive in respect of such a breach should be such as may fairly and reasonably be considered as either arising naturally, that is, according to the usual course of things,

from such a breach itself or such as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract as a probable result of its breach.

PW2 Paul Mujugumbya testified that when he compared the Bills of Quantities, P. Exh. 11, and the work done, he was of the opinion that the work if properly done was worth Shs.22m. In view of the poor workmanship he had talked about, he reduced this by a factor of 20% and it came to some Shs.17m. This witness is a lecturer at Makerere University and a practicing consultant Engineer. His co-witness, PW3 Eddie Nsamba – Gayiiya, an equally experienced valuer of repute was of the considered opinion that the value of the building on the basis of the accomplished works is in the region of Shs.22m. Unlike his counterpart, PW2, he did not apply any factor to reduce the value.

I have considered the first Defendant's assertion at the scheduling conference that he completed the work, except the ceiling which if he was given Shs.4,200,000- he would be able to complete it. As fate would have it, he disappeared before giving his own evidence or that of an expert to support his version of the story.

I have also considered the visual appearance of the house in photographic form; and the fact that the Plaintiff should have been there to see what was

going on instead of raising complaints after the event. Finally on this point, I have considered the fact that the experts' findings are at best their considered opinions which are not binding on this Court but certainly offer useful guidance to Court.

Taking into account all the above factors and doing the best I can, I have come to the conclusion that the value of the building on the basis of the accomplished works is in the region of Shs.26m. In view of the Plaintiff's payment up front in the sum of Shs.36m, Court is of the view that an order to the Defendants, jointly and severally, to refund Shs.10,000,000- (ten million only) to the Plaintiff would meet the ends of justice. I order so.

The Plaintiff in her evidence testified that she had paid the Engineer (PW2) and the valuer (PW3) a sum of Shs.600,000- for their services. Court is satisfied that she incurred that expense. A sum of Shs.600,000- (six hundred thousand only) shall therefore be refunded to her by the Defendants.

The Plaintiff further testified that she wasted a lot of time tracing the 1st Defendant; that she expected that by end of January 2005 she would have started letting out the house to tenants at a rate of Shs.400,000- per month. I found her claim of Shs.5,600,000- in counsel's submissions highly speculative. In any case, there was no prayer for it in the plaint. I'm inclined not to award it and I don't.

As regards general damages, these are within the Court's discretion. It is that sum of money which would put the party who has been injured, or who has suffered any injury, financial or otherwise, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. General damages are not easily quantifiable in money terms. Court decides how much the injured person deserves in compensation for his pain and suffering, which the Court assumes the Plaintiff did sustain.

Counsel did not suggest to Court any figure he would consider to be appropriate for the loss suffered by the Plaintiff. Court is of course cutely aware that damages are intended as compensation for the Plaintiff's loss and not a punishment to the Defendants. Taking into account all the circumstances of the case again and doing the best I can, I consider a sum of Shs.2,000,000- (two million only) adequate compensation for the said breach. It is awarded to her.

In the plaint, the Plaintiff had prayed for punitive and exemplary damages, an order of account and general damages for fraudulent misrepresentation. Counsel did not address Court on these prayers in the Plaintiff's final submissions. The presumption is that he abandoned them. Considering the

over all justice in this case, Court is of the view that this was a well thought out course to take.

Finally, the Plaintiff has prayed for interest of 22% from the date of filing the suit till payment in full and costs of the suit.

An award of interest is discretionary. Damages had to be assessed by Court. The right to those damages does not normally arise until they are assessed. In such event, interest should only be given from the date of Judgment. She is entitled to the rate prayed for (that is, 22% per annum) from the date of Judgment till payment in full.

The Plaintiff shall also have the costs of the suit.
I so order.

In the final result, Judgment is entered for the Plaintiff against the Defendant in the following terms:

a. Special damages: Shs.10,600,000- (ten million six hundred thousand only).

b. General damages: Shs.2,000,000- (two million only).

c. Interest on (a) and (b) at the rate of 22% per annum from the date of Judgment till payment in full.

(d). Taxed costs of the suit.

Yorokamu Bamwine

J U D G E

18/04/2006