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Eclipse/EDIL Soil JVC Co. Ltd V Kampala City Council -HCT-00-CC-CS-0256-2005 [2007]
UGCommC 13 (9 February 2007).

THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0256-2005

Eclipse/Edil Soil Jvc Co. Ltd Plaintiff

Versus

Kampala City Council Defendant

9 February 2007

BEFORE: **THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE**

J U D G M E N T:

The plaintiff's case against the defendant is for recovery of Shs.18,626,292- as special damages, interest, general damages and costs of the suit arising out of an alleged breach of contract. The plaintiff's case is that it was awarded a contract for the periodic maintenance of Kisalosalo Rd, Kawempe Division at a contract price of Shs.24,720,675-. That it successfully executed the works to completion and satisfaction of the defendant but that the defendant managed to pay only Shs.5,994,383-. Its contention is that it was obliged to complete the said works and submit claim certificates to the defendant. That it did so and the defendant partly honoured the same. Hence this suit for the recovery of the balance.

Issues:

1. Whether there was a contract between the plaintiff and the defendant.
2. Whether the plaintiff performed its part of the contract.
3. Whether the plaintiff is entitled to the reliefs sought.

Counsel:

Mr. Robert Bautu for the plaintiff.

Mr. Sendege for the defendant.

Upon completion of oral testimony on 13/12/2006, both counsel were allowed to file written submissions. Mr. Bautu undertook to file the plaintiff's by 27/12/2006 and Mr. Sendege by 16/1/2007. In case of a reply, Mr. Bautu was to file it by 23/1/2007. Court reserved delivery of judgment on notice. As I write this judgment long passed the dates agreed upon by counsel, only Mr. Bautu has done the needful. I will do the best I can in the circumstances.

As to whether there was a contract between the defendant and the plaintiff, there is on record P. Exh. 1, a contract for the periodic maintenance of Kisalosalo Rd in Kyebando Parish, Kawempe Division. Throughout the hearing, no dispute was raised as to its execution. In view of this undisputed Exhibit, the Court's answer on the first issue is in the affirmative.

As to whether the plaintiff performed its part of the contract, I have considered the evidence of the parties.

First, the plaintiff's evidence, as contained in the oral testimony of PW1 Kato plus documentary evidence. From the evidence, Tender Board awarded the contract on 13/2/2003 and the decision was communicated to the plaintiff on 14/2/2003. However, the contract document was not signed till 14/4/2003. According to the plaintiff, the road needed a roller grader. It also needed murram. Part of the work required installation of culverts. It is his evidence that they installed 56 of them. He summarized the performance of the contract thus:

"There was a stretch of 5.5 sq metres to be scarified and compacted. We did that. Another part was to be graded and filled with murram. We graded it and filled it as required. The other part required grading, leveling and filling with murram. We did so. Final part was to replace services damaged in the process, e.g. water lines, telephone wires. We did so."

From the evidence of this witness, the picture he paints is a rosy one, of work successfully done but not paid for, except for the Shs.5,994,383- paid in November 2003. However, the evidence of Joseph Musoke, the Site Engineer points to the opposite direction. He testified that the work was never completed. That the contractor started the work sometime in April 2003; he was supposed to execute it within 2 months, but some where in May 2003, the contractor abandoned the work without giving any reason. Musoke's evidence on this point is of course problematic given that he himself states that he was on sick leave by then and one Richard Semakula was acting in his absence. From Musoke's evidence, he was involved in a road accident and for 2 months, May/June, he was on sick leave. The said Semakula did not appear as a witness. So Musoke's evidence on this point is largely what he was told happened while he was away.

The man said to have been on the ground, recording activities and reporting to the Division Engineer was DW2 Lwasi Samuel. From his evidence, he was not an employee of K.C.C. However, some how he got involved into the supervision of the road works on behalf of the Division Engineer. From the contract document, the duty of supervising the works was the Division Engineer's which DW2 Lwasi was not. It has been submitted to me by learned counsel for the plaintiff that whereas the Engineer could delegate his role to another person, he had to do so to somebody with requisite skill and knowledge, this being a technical project. From my own assessment of this witness, DW2 Lwasi, I'm unable to fault that submission. He did not impress me as someone fit for the task. He may have been asked to step in following Engineer Musoke's involvement in an accident, but certainly he lacked the competence for that task. He was not a suitable substitute for Musoke. Little wonder that things did not go as planned. I will point out a few instances that discredit Lwasi's performance. He claims to have been keeping a record of all on-going activities at the time. The daily activity reports/measurement sheets relied upon by the defence were neither signed by the contractor nor the Division Engineer. When PW1 Kato swears that no such reports were being made, his evidence cannot be disbelieved as long as they were never signed by him or any of the contractor's agents. The reports themselves are not free of suspicion. For instance, the purported activity report of 27/6/2003 indicates the first site meeting to have been held on 27/6/2006. How would the year 2006 come into the mind of the author in 2003? Likewise under the activities of 26/11/2003, the author indicates the murram to have been delivered on 24/11/2004. Without wasting more time and ink on this point, it appears clear to me that in a bid to bolster its case, the defendant looked for Lwasi in 2006. He sat down and compiled these so called activity reports, either from memory or sketchy notes which he made at the time without PW1 Kato's knowledge. They are not reliable records.

According to Article 5 of the contract document, signature of contract and payment of advance would constitute an implicit order to commence the works. From the records, the plaintiff was never paid anything till November 2003, implying breach on the part of the defendant to effect some

advance payment before the works could begin. The Engineer testified that they found that the contractor failed to complete the road. That where he attempted to bring murram for the surface, it was of poor quality. That much as contractually he was given 2 months in which to perform the contract, the little percentage of the work he did was outside the contract period. In my opinion the defendant cannot be heard to raise pertinent issues of delayed execution of the works when for the entire contract period (of two months) it never extended to the plaintiff any funds in accordance with the contract document. They submitted a bill in July 2003 and instead of processing payment within 28 days of its receipt, the defendant 'sat' on it till November 2003 when they released the first and only payment in the sum of Shs.5,994,383-. In these circumstances, I find it rather ironical that the defendant could expect works of excellent quality without any investment in them. They simply looked on as the plaintiff single handedly struggled to execute the works without any advance payment to them as agreed.

Learned counsel for the plaintiff has raised issue of DW1 Musoke's suitability for the job. He admitted at the hearing that he was not a registered Engineer by 2003 though duly qualified academically. It has not been shown, however, that lack of registration negatively impacted on his performance or that registration under the Act is a must for any person seeking to join the public service as an Engineer. He was an employee of the defendant, duly authorized to transact business on its behalf. The issue was never raised at the material time. Given that non-registration was never raised as an issue for Court's determination herein, I would over look it as a technicality curable under Article 126 (2) (e) of the constitution. I do so.

Finally on this point, the plaintiff evidently encountered problems in the performance of the contract. Firstly, the Division Engineer disappeared from them. They were left on their own, without any Engineer on the part of the Employer to supervise them in accordance with the contract terms. Secondly, the funds to facilitate them were not released as agreed. Clearly, through omission or commission, the defendant did not create the necessary conducive environment for excellent performance of the contract by the plaintiff. Even then Court is satisfied that they did something. They made substantial performance of the contract, contrary to the defence contention that they made a complete mess of it.

I have considered Engineer Musoke's evidence. At the hearing, he estimated the overall work done at 30%. In the report, D. Exh. 1, he puts it at 40%. In a letter to the Secretary Tender Board, Ruth Kijjambu, the then Principal Assistant Town Clerk, estimated it at 60%. Though perhaps less qualified than Musoke to make the assessment, she was more on the ground than him. Musoke relied on reports, most of them questionable. Ruth Kijjambu did not appear as a witness. Be that as it may, Court is satisfied on the balance of probabilities that performance of the contract was not 100%. Doing the best I can, I have assessed it at 70%, 10% above the Principal Assistant Town Clerk's assessed value. I so find.

As to whether the plaintiff is entitled to the reliefs sought, the plaintiff's head prayer is for special damages in the sum of Shs.18,626,292- and miscellaneous expenses in the sum of Shs.1,000,000-. It has not been indicated what that miscellaneous expense was. I disallow this claim. As to what remains of the plaintiff's claim for special damages, I have already indicated that this was a fixed, non-adjustable contract of the over all price of Shs.24,720,675-. The plaintiff performed 70% of the work. In practical terms, what they did was worth Shs.17,304,472- (that is Shs.24,720,675- x 70%). They were paid Shs.6,244,149- (less 4% withholding tax). I would deduct it from the amount they were entitled to and award them the balance in the sum of Shs.11,060,323- as special damages, inclusive of the 4% withholding tax in place at the time. The same is awarded to them on the principle of quantum meruit.

As regards general damages for breach of contract, the plaintiff submits that a figure of

Shs.10,000,000- would be an adequate award. Counsel for the defendant filed no submissions and therefore made no proposal. General damages are what may be presumed by law to be the necessary result of the defendant's tortious acts. The plaintiff may not prove that he suffered general damages. It is enough if he shows that the defendant owed him a duty of care which he breached. In the instant case, the plaintiff has shown to the satisfaction of Court that it did not receive payment commensurate with the work it did for the defendant. It was either assessed for work done by another company, Eastern Builders Construction Ltd, or the defendant was careless in arriving at a figure it did. I'm saying so because the figure of Shs.6,244,149- was unjustifiable and not based on any known criteria. The certificate on which it was based, known as Summary of Progressive Payment certificate (also dated 30/10/2003) gives the contract start date as 28/3/2003 and completion date as 28/05/2003. This information could not definitely have been in relation to the plaintiff company given that the start date of their contract was, according to Engineer Musoke's own report, 16th April, 2003 and the contract completion dated 16th June, 2003. Bearing in mind the facts of the case, the attendant loss the plaintiff is presumed to have suffered and doing the best I can, an award in the sum of Shs.3,000,000- would adequately compensate the plaintiff's loss as general damages. The same shall attract interest at the rate of 25% p.a. from the date of judgment till payment in full.

In the plaint, the plaintiff prayed for interest on special damages at Court rate. However, in the submissions, counsel has prayed for interest at commercial rate of 25% on the unpaid balance. The justification for this departure from own pleadings is that this was a contract of a commercial nature which ordinarily invites a commercial rate of interest. I have not been persuaded by this argument, given that the plaintiff knew the nature of the transaction at the time of filing. It is of course plain that it should be compensated for the loss thereby occasioned to its business. It is not enough that the money withheld from it by the defendant is by reason of this judgment to be replaced. In these circumstances, the plaintiff shall be compensated by an award of interest on the special damages at the Court rate as prayed in the plaint to be calculated from the date of filing till judgment and at a commercial rate of 25% per annum from the date of judgment till payment in full.

In view of partial success by the defendant on the quantum of damages, the plaintiff shall get two thirds of the taxed costs of the suit.

In the result, judgment is entered for the plaintiff against the defendant in the following terms:

- (i). Special damages: Shs.11,060,323- (4% withholding tax inclusive).
- (ii). General damages: Shs.3,000,000-.
- (iii). Interest on (i) at Court rate from the date of filing till judgment, and thereafter at commercial rate of 25% per annum on both (i) and (ii) from the date of judgment till payment in full.
- (iv). Two-thirds of the taxed costs of the suit.

Yorokamu Bamwine
J U D G E
9/2/2007

Order: This judgment shall be delivered by the Registrar on my behalf on the due date.
Yorokamu Bamwine
J U D G E
9/2/2007

9/2/2007
Robert Bautu for plaintiff.
Mutyaba for defendant.

Clerk – Milton.

Judgment read in open Court.