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Greenboat Entertainment Ltd V City Council of Kampala- HCT-00-CC-CS-0580-2003 [2007] UGCommC 20 (27 February 2007)

THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0580-2003

Greenboat Entertainment Ltd Plaintiff
Versus
City Council of Kampala Defendant

27th February 2007

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JU D G M E N T:

The plaintiff's claim against the defendant is for special and general damages for breach of contract, recovery of money owed under the contract and costs. From the pleadings, the defendant contracted the plaintiff to manage street parking in Kampala for four years under an agreement commencing on 1/7/98. The contract expired on 30/6/2002. The defendant re-advertised the tender in October, 2002. The plaintiff was one of the bidders. It continued managing street parking pending completion of the tendering process. The tender was awarded to Multiplex (U) Ltd on 20/2/2003 and the plaintiff was asked to hand over to the new tenderer.

At the scheduling conference, the parties agreed that:

(i). There was a contract between the parties dated 17th July, 1998.
(ii). There was a re-advertisement of the tender in October, 2002.
(iii). The plaintiff participated in the bidding.
(iv). The tender was awarded to Multiplex (U) Ltd.
(v). On 28/2/2003 the plaintiff was instructed by the defendant to stop its activities.

There are two issues for determination:
1. Whether the contract between plaintiff and defendant was breached by the defendant.
2. Whether the plaintiff is entitled to the remedies sought.

Counsel:
Mr. John Mike Musisi for the plaintiff.
Mr. Nelson Nerima for the defendant.

Before I delve into the assessment of evidence in this case, I consider it necessary to state the law on some aspects of this case.

First, the burden of proof.

In law a fact is said to be proved when Court is satisfied as to its truth. 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 such a person adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. The standard of proof is on a balance of probabilities. Relating the above principle to this case, the plaintiff has alleged breach of contract. The burden rests on it to prove that allegation.

Second, the parole evidence rule. This rule is to the effect that evidence cannot be admitted (or even if admitted, it cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, it means that where a contract has been reduced to writing, neither party can rely on evidence of terms alleged to have been agreed, which is extrinsic document, that is, not contained in it. Where, however, there is a dispute as to what transpired between the parties, as in the instant case, evidence can be admitted to show that a written contract has been varied or even rescinded. I now turn to the issues.

As to whether the contract between the plaintiff and the defendant was breached, the question that comes to one's mind is, which contract? From the pleadings and the evidence, the contract dated 17/7/98 was for a period of four years, effective from 1/7/98. It therefore expired on 30/6/2002. It automatically terminated upon expiry of the contract period of 48 months. If there was any breach, therefore, it was not in respect of this four year contract. This contract was performed by the parties. Any breach can only be in reference to the alleged renewed contract. The issue as I see it is whether after the expiration of the initial contract, the contract was renewed by the parties.

In law, when we talk of a contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable, there must be: capacity to contract; intention to contract; consensus and idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract.

Learned counsel for the plaintiff's argument is that the contract was supposed to expire on 30/6/2002 but the plaintiff continued in operation under the same terms until 28/2/2003 when the defendant's town clerk wrote a letter terminating the contract. It is the plaintiff's case that its continued service to the defendant followed verbal re-assurances from the various concerned authorities of the defendant that the contract had been renewed.

From the records and the evidence presented to Court, the contract was not merely supposed to expire on 30/6/2002; it actually expired on that date. There was a mechanism for its renewal. The parties agreed on that mechanism. Under clause 2 thereof, at the expiry of the contract, the same was subject to review for purposes of renewing or re-tendering. The parties agreed under clause 17 that the contract was terminable at the expiry of the contract period or any other period over and above the contract period that may be agreed upon by both parties in writing. That the parties continued operating on the same terms as the expired contract till 28/2/2003 is not in dispute. There is evidence that in January 2003, the defendant's town clerk wrote to the plaintiff as follows:

> "You will therefore continue to pay the contract sum as agreed upon and execute other conditions of the contract as spelt out."

From the evidence, however, this letter written on 2/1/2003 was not the basis for the alleged renewal of a contract that expired on June 30th, 2002, in view of the uncontroverted evidence that between June 2002 and December 2002, the plaintiff continued operating as before. By January 2003, the contract had either been renewed or it hadn't. So what is there to show that it had been renewed?

The plaintiff relies on alleged re-assurances from the various concerned authorities of the defendant that the contract had been renewed. It does not name any of the officials of the defendant who may have been the source of the said re-assurances to raise the inference that the alleged re-assurances were binding on the defendant. In general, oral contracts are just as valid as written ones. An oral contract is a contract the terms of which have been agreed by spoken communication, in contrast with a written one, where the contract is a written document. In my view, whether a contract is oral or written, it must have the essentials of a valid contract, which I have already spelt above. In my opinion, even if I were to accept that any such re-assurances were given as alleged, but I don't, it is clear to me that they lacked sufficient certainty of terms until January 2003 when the town clerk advised them that they were to continue to pay the contract sum as agreed upon.

I have devoted considerable attention to P. Exh. 111, a letter from the defendant which the plaintiff is heavily relying on as evidence of a negotiated contract. I find it necessary to reproduce it here to emphasize my point. It reads:

> "January 2, 2003
> The Managing Director
> Green Boat Entertainment Ltd
> **Kampala**
>
> ADVERTISEMENT OF TENDER FOR MANAGEMENT AND CONTROL OF STREET PARKING AND REQUEST FOR REVIEW OF CONTRACT SUM
>
> I refer to yours GB/TC/2002 of 1st November, 2002. I regret to have responded to it late but I had to study the issues which you raised to which I respond as follows:
> 1. Whereas advertising for new bids could have negative effects, as contract Managers, it is your responsibility to take control of issues 1 – 3 because the contract is still in your hands. The machinery to deal with culprits is still in place. Indeed, my revenue staff have been in the field to verify the claims and have found them baseless. <u>You will therefore continue to pay the contract sum as agreed upon and execute other conditions of the contract as spelt out</u>. (emphasis mine).
> 2. Regarding issues you raise on page 2 of your letter, I like wise respond as follows:
> a. The contract sum was agreed upon in Uganda shillings and any devaluation in the Uganda shillings equally affects the Council as well as the firm-yourselves.
> b. .....
> c. .....
> d. .....
> Council will therefore not entertain any more proposals from changes in the contract sum because the listed issues are within your means.
>
> G.T. Mwesigye
> Town Clerk."

From the tone of the letter, the parties were re-negotiating the deal. The first contract had expired and the parties, in accordance with clause 2 of the main agreement, were in the process of reviewing their performance under the expired contract for purposes of renewing or re-tendering. Under the expired contract, the plaintiff had been paying a fee of Shs.35m per month. In the contract under negotiation, the plaintiff wanted the fee reviewed down wards. The prayer for the revision of the contract sum was in accordance with clause 5 of the main agreement. The defendant rejected the proposal. In my view, therefore, the plaintiff's argument, based on this letter, that the defendant had given them a go ahead to pay the contract sum as agreed upon, cannot be sustained. The defendant

is being quoted out of context, given that as at 2/1/2003, the intended renewal of the contract was a matter still under negotiation. I would agree with learned counsel for the defendant's submission that renewal of the contract could only be done under clause 17.1.1. for another period agreed upon in **writing**. The contract document provided so. Accordingly, the alleged oral re-assurances, even if any had been proved to have been made, cannot be used to add to, vary or contradict the written agreement. Court is satisfied that at the time the plaintiff was asked to wind up, there was no new period agreed upon in writing. Accordingly, while it is true that the plaintiff continued operating the service, there was no agreement in writing on the duration/period as clause 17.1.1 required. If it had been renewed, the plaintiff would be talking about a definite period the parties had agreed upon. No such period has been mentioned by any of the plaintiff's witnesses.

DW2 Basil Bataringaya Rwankwene testified that after the expiry of the initial contract, the plaintiff continued until the tendering process was to be completed. I accept this evidence. From the evidence, the defendant awards contracts through a tender board. In the performance of its functions, the board has to conform to the standards established by the Central Tender Board for procurement of goods, services and works. Section 91 (7) of the Local Governments Act, Cap. 243, is clear on this. There is no evidence that the said board ever sanctioned the renewal. The matter was subjected to competitive bidding. There is evidence that the plaintiff participated in the bidding process, without raising any query as to any existence of another valid contract between the parties. They lost the bid. I have been invited by learned counsel for the defendant to find that the only reasonable conclusion which can be drawn is that at the time the plaintiff was stopped, the written contract had long expired. That the contractual relationship between the parties was now based on an oral understanding. Form the oral evidence presented to Court and the documentary exhibits, I accept the submission. In my view, to hold that the contract had been renewed would be to re-write P. Exh. 1 for the parties. I'm unable to do so.

Counsel for the plaintiff has argued that notice was required to terminate the contract. I have already said that there was no contract in place by the time the plaintiff was stopped; just an oral understanding between the parties to continue operating until the tendering process was to be completed. The notice referred to in clause 17.1.2. is couched in the following terms:

> "17.1.2 if either party commits a breach of any of its obligations the aggrieved party shall give to the other six months notice from the date of receipt of the notice of its intention to terminate the contract, such notice shall be in writing."

It is submitted for the defendant that the notice required in the above clause only applied when the party was in breach. I'm inclined to the same view. From the evidence, there was no termination due to breach. The plaintiff's services to the defendant came to the end when the tender was awarded to another company after a competitive bidding process in which the plaintiff unsuccessfully participated. Clause 17.1.2 is therefore inapplicable.

PW1 Moon testified that the nature of the business required notice. That the plaintiff had made orders of materials unique to the business they were doing, which materials, if they had been given a notice of six months, they would not have purchased. By this evidence, I have understood the plaintiff to mean that whether or not they lost the subsequent tender, there was still need for a notice of six months to enable them wind up its activities and dispose of any unused materials.

I have looked at the pre-qualification tender documents, D. Exh. 1, which the plaintiff submitted to the defendant. In these documents, the plaintiff credits itself with a wealth of experience in the 'Parking Service' industry. It lists a number of world cities, including Seoul, where it had carried out similar business. I would think that the award to them was, among other factors, based on the said wealth of experience in the industry. It has not been indicated to me that K.C.C had any comparable experience in the same field. In view of this claim of experience, I find it strange that

the plaintiff did not find it necessary to include in the contract document provision for any notice period, in the event that they lost the subsequent tender, in which they would be enabled to wind up their operations in the manner claimed herein. In my view, it was up to the plaintiff, drawing from its own experience, if any, to demand from the defendant a term in the contract giving it notice before they could hand over to any new contractor in case their subsequent bid for the renewal of the contract was unsuccessful; or even demand for an automatic renewal for a stated period.

It is trite that Courts must be cautious in their approach to implying additional terms into the contract before them. In my view, while it was perhaps reasonable to include such a term in the contract, it is not open to this Court to imply it therein, without re-writing the agreement for them. When all is said and done, I find that at the time the plaintiff was stopped on 28/2/2003, the written contract had long expired. The service relationship between the parties thereafter was based on an oral arrangement between them, pending formalization of the next tender award to the plaintiff or any other company that would win the tender. Having participated in the bidding process without protesting that its old contract had been renewed, the plaintiff is in my view estopped from claiming unlawful termination of its relationship with the defendant. Accordingly, while there was a contract between the parties for the four year duration, there was nothing more than an administrative arrangement, call it agreement if you may, for the subsequent period of 8 months in which the tender for the next awardee was being processed. While, in my view, any work done by the plaintiff during that period, merited recognition by the defendant, it by no means meant that the expired contract had been renewed. My conclusion on this point is fortified by the fact that legally, every contract involves an agreement much as not every agreement amounts to a contract: the element which converts an agreement into a legally enforceable contract being the intention of the parties to enter into legal relations and thereby bind themselves to carry out the agreement. With all respect to the plaintiff, I have not seen any such intention in the impugned arrangement. There was a clear lack of consensus ad idem; the contract, if any, lacked fresh consideration; and the agreement lacked certainly of terms. It lacked, so to say, most of the essentials of a valid contract.

I would therefore answer the first issue in the negative and I do so.

As to whether the plaintiff is entitled to the remedies sought, its cause of action is based on an alleged breach of contract. Having held, as I have done, in issue No. 1, that there was no breach, I find that the reliefs sought by the plaintiff are not available to it. I would find no merit in the suit and dismiss it with costs to the defendant. However, in the event of a successful appeal, since the plaintiff had prayed for damages, special and general, I shall try to address the issue of damages as well.

I will start with special damages. The rule has long been established that special damages must be pleaded and strictly proved by the party claiming them, if they are to be awarded. The special damages claims are particularized under heads A-D.

Claim (a) for Shs.1,000,272,258- is for loss of income in lieu of six months' notice. The plaintiff in such case must prove the net income lost as a result of a breach of contract, that is, gross income less expenses. The evidence of PW2 Mugenyi shows essentially the plaintiff's gross earnings. It does not show expenditure. The plaintiff did not produce records showing its cash flow at the time. From the evidence of PW2 Mugenyi, the sum of Shs.166,712,000- per month on which this claim is based was gross income. It was not a profit because they would have to deduct so many other expenses. I think the plaintiff would have done better than it did if it had tendered books of accounts, even if for a couple of months, showing profits at the time of termination. This would have given Court background information as to daily income, and, consequently, monthly income. Accounts of receipts against outgoings can be proved to arrive at a net figure. If no accounts were kept, then a claim in general damages should be considered. In these circumstances, I agree with

learned counsel for the defendant that this claim is highly speculative.

Claim (b) is for Shs.2,740,027,200- being funds due to abrupt termination of the agreement. It is a claim for reasonably recoverable defaults. It is for years 2001, 2002 and 2003. I have genuinely not appreciated the plaintiff's inclusion of his claim herein because the plaintiff is a limited liability company which, the termination notwithstanding, could still recover the funds from the defaulters. In my view, even after determination, the plaintiff was not barred from recovering any such money from the defaulters themselves as long as they had evidence of any such defaulters. I notice that in its submissions, the plaintiff down played this claim in preference for an award of general damages.

Claim (c) is for Shs.8,918,000- being alleged loss of investment by abrupt closure of contract. I have already indicated that the termination was not abrupt. It was systematic. The plaintiff was given time to submit proposals for another term. The proposals were unsuccessful after a period of about 8 months. By the time the plaintiff went in for another round of bidding, it ought to have been aware that the tender bid could either succeed or fail, in the absence of a right to automatic renewal of the contract. This claim would also fail.

Claim (d) is a road marking claim of Shs.180,311,300-. Court has seen correspondence appearing to suggest that the defendant's official had considered paying the plaintiff for road marking, a clear responsibility of the plaintiff under the contract. From the records, the tender obliged the plaintiff to do road marking and provide road furniture, earn money from it and pay a percentage of it to the defendant by way of a monthly fee of Shs.35m. From the contract document, therefore, the plaintiff was under duty to do what it is now claiming from the defendant for. In any case, Shs.180,311,300- was submitted to the defendant as a mere cost estimate. It does not represent the actual costs for the work done. The payment was stopped before it materialized. Whoever stopped the payment appears to have been suspicious of it. This Court is equally suspicious of it. I would reject the claim for lack of substantiation.

There is then a claim under (d) of Shs.6,850,000- for the EADB parking slots up to January 2003. The plaintiff alleges that EADB remitted funds to K.C.C. in respect of some parking slots which it (K.C.C) did not pass on to the plaintiff. It does not say how much it was. From the evidence of PW1 Moon, he did not know details of the arrangement between K.C.C and EADB on the matter. Clearly, the claim is highly speculative.

Finally, there is a claim of Shs.13m in respect of a private park at Wandegeya. From the evidence, K.C.C allowed the plaintiff to develop the park and collect proceeds from it for a period of two years. The plaintiff claims that UTODA frustrated its efforts by continuing to illegally occupy the park despite a directive from K.C.C to quit. The plaintiff's evidence falls short of proof that UTODA was the defendants agent in this regard to raise inference that the defendant is vicariously liable for its tortious acts. It was, in my view, up to the plaintiff to use all legal means at its disposal to cause the eviction of UTODA from its premises. I have not found this claim proved either.

In all these circumstances, Court is inclined to the view that there was pleading but no strict proof of special damages. None would be awarded.

As regards general damages, these are at large and the quantum would be within the discretion of Court. Evidence has been led that the plaintiff suffered inconvenience and has been deprived of its rights under the contract. Working on the assumption that the plaintiff is entitled to damages, I would have awarded them nominal damages assessed at Shs.2,000,000-, with interest and costs of the suit.

For the reasons I have endeavoured to give, the suit stands dismissed with costs to the defendant. I

so order.

Yorokamu Bamwine
J U D G E
27/02/2007

27/2/2007
Order: I direct that the judgment be delivered on my behalf by the Registrar of this Court on the due date.

Yorokamu Bamwine
J U D G E
27/2/2007