THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0250-2004

KITUNI CONSTRUCTION COMPANY LTD :::::::::::::::: PLAINTIFF

VERSUS

JULIUS OKENY :::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff seeks recovery of Shs.102, 528,500= as special damages, interest and costs of the suit from the defendant. Its claim is that on or about 28 March 2003, it was contracted by the defendant to construct a petrol station on the defendant's land in Soroti at Plot 143-145 Gweri Road at a price of Shs.102,528,500=. That in breach of the agreement, the defendant refused to pay the contract price or at all.

The defendant denies the claim. He claims that work was not executed as agreed and that the plaintiff abandoned the work after the first phase, before roofing the structure, the subject matter of the contract.

That the parties entered into a written contract for the works is not denied. It is also not denied that the defendant issued post dated cheques to the plaintiff covering the contract price, which cheques were dishonoured on presentation; or, that the plaintiff has not received any payment under the contract.

I have to decide:

1. Whether the agreement was breached and by who?

2. Whether the plaintiff is entitled to the whole contract price or at all.

3. Remedies.

Representations:

Mr. Ambrose Tebyasa for the plaintiff.

Mr. Andrew Lumonya for the defendant.

Issue No. 1: Whether the agreement was breached and by who?

I have already said that both parties agree to have entered into the impugned agreement, P. Exh. 1. It was signed on 28/3/2003 and it provides, inter alia, that:

> ***"4) This contract will commence within seven days after signing of the same by both parties.***
>
> ***5) This contract will expire on 10 July which date is referred to as the completion date.***
>
> ***6) This contract can be terminated by either party, provided that written notice is given to the other party at least two weeks in advance.***
>
> ***7) Section 6 shall not apply provided the contractor adheres to Section 4".***

The contract also contains a responsibility clause. Under this clause, the client (the defendant) undertook to pay the contractor the entire contract price, Shs.102, 528,500= in stipulated installments. The first installment of Shs.50m was to be disbursed within four weeks of the commencement of works at the site. On completion of works, the balance would be paid in six installments.

The client also undertook to designate a consultant, one Chris Ouma, to closely monitor the works, and have authority to give work orders in writing.

So then what went wrong?

According to PW1 Mukasa, the plaintiff's Managing Director (M.D), they moved to the site in time. On reaching there, they found that the ground, which they had not inspected prior to the execution of the contract, was soggy.

He testified:

"……. We agreed with defendant that the work down, to stabilize the area, was much more than we had anticipated. He advised that this would be compensated upwards".

Both parties agree that before the contract was signed in Kampala, there was no prior visit to the site. This evidence is crucial in view of the plaintiff's admission that they used bricks instead of blocks and wooden trusses instead of steel trusses, to keep within the contract price, something which was not in line with the contract agreement.
Counsel for the defendant has argued, quite correctly in my view, that in order for the plaintiff to go against the express provisions of the agreement, they had to show that the contract had been varied by consent of the parties. The defence argument is that no such evidence has been presented to Court.

It is argued for the defendant that in order for the defendant's alleged consent to amount to amendment of the contract in law, it had to be in writing, signed by both parties to the agreement. With the greatest respect to learned counsel for the defendant, this argument is not tenable in the absence of a provision in the written contract, express or implied, that neither party was to do anything not expressed in the writing. From my perusal of the service contract, the parties did not agree that any variation of the terms thereof had to be in writing, signed by both parties. Their agreement on this point was that the defendant would designate a consultant who would closely monitor the works. In case the consultant gave work orders, they (the orders) had to be in writing. It is evident that no consultant was stationed at the site, implying that the defendant remained personally responsible for the supervision of the works. Court is aware that under Sections 91 and 92 of the Evidence Act, Cap 6, oral evidence cannot vary the express terms of a written agreement.

However, under S. 92 (d) of the Evidence Act, oral evidence is admissible if the purpose is to prove variation or rescission of a written contract. In the instant case, there is no direct evidence of the agreement to vary the terms of the impugned contract in the sense of a written instrument to that effect. In the absence of direct evidence, I have directed my mind to the circumstantial evidence of the alleged mutual agreement to do so. Circumstantial evidence is sometimes regarded as of higher probative value than direct evidence, which may be perjured or mistaken. The plaintiff's evidence on this point as per the testimony of PW1 Mukasa and PW2 Ssali, an Engineer, is that upon reaching the site, they found the ground soggy, a condition they had not anticipated. That on so finding, they informed the defendant that they needed a lot of hardcore and murram in order to stabilize the ground but the defendant indicated that he had no money. That they agreed with him that instead of using

blocks, they were going to use bricks and instead of steel trusses they were going to use timber ones. The effect of this is that they would keep within the budgeted funds and they did. From the evidence, despite the defendant's failure to station a consultant at the site, which in itself was a breach of a term in the contract document, work progressed to roofing level. It is the evidence of PW1 Mukasa, PW2 Ssali and PW3 Lumanzi that the defendant routinely came to the site to see what was going on.

PW1 Mukasa put it this way:

> ***"We had agreed that he brings a neutral man to over see what we were doing. He never brought him. We would tell him and he would tell us not to worry, that he would attend to that later. On the day he stopped us, he came and told us to move away. We asked for payment and all he said was please move away".***

It is the evidence of this witness, and all the other plaintiff's witnesses, that they were stopped at the stage when they were about to do the roofing. Given the defendant's evidence that wooden trusses had been used instead of steel ones, there is no doubt in my mind that by the time the work ground to a halt at the site, all that was remaining was to roof.

From the evidence of the plaintiff's witnesses, which I have seen no reason to doubt, the defendant was personally monitoring work at his construction site. He did not delegate the task to any other person. He was present when the foundation excavation took place and he monitored the structure as it went up. In view of this evidence, I have not accepted his evidence that he found the plaintiffs raising the wall from the ground using bricks, ordered them to demolish it and they refused to do so. If they had disregarded his order, this was the time to order them off the site. He did not have to wait until they were about to roof and order them off. And given that the stoppage was in June, when the contract was coming to a close, the defendant cannot be heard to say that the plaintiff varied the terms of the contract without his knowledge. I noted his demeanour as he testified. He did not impress me as the type that would order rectification of any fault and it is not done. In my view, the stage at which the construction had reached when the defendant ordered the contractor off the site supports the contractor's evidence in very material particular that the defendant Okayed the materials used to that level. He is estopped from denying this fact. Assuming that the parties held no formal discussions on the issue of the variation, which I doubt, it is a fundamental rule of evidence that a person who stands by and keeps silence when he observes another person acting under a misapprehension or mistake,

which by speaking he would have prevented by showing the true state of affairs, can be estopped from later alleging the true state of affairs. He is estopped from denying the variation.

He failed to provide a consultant at the site for the entire contract period. By so failing, the plaintiff was denied a certificate for the completed work. Nandudu who allegedly gave him a report in June did not appear as a witness and in any case by June work had progressed to near completion. From the service contract document, the contract was terminable on written notice. None was given. In my view, the defendant's version of the manner in which the contract allegedly came to the end, that is, the alleged willful and voluntary abandonment of the site by the plaintiff, is false. The defendant chased away the plaintiff from the site in the manner described by PW1 Mukasa, PW2 Ssali and PW3 Lumanzi. The way he got rid of the plaintiffs has given me the impression that failure to provide a consultant to supervise the works was itself not merely an accidental omission but a long thought out plan to get a free service. Engaging a consultant would frustrate that plan, in the sense that he would be denied the opportunity to dispute the reasonable manner in which the contract had been performed, and it would deny him opportunity to raise these wild claims justifying the refusal to pay. The long and short of all this is that the defendant, and not the plaintiff, breached the contract. I so find.

Issue No. 2: Whether the plaintiff is entitled to the whole of the contract price or any sum at all.

In law, when a party fails to do what he agreed to do, he is said to be in breach of the contract, and will be liable to pay damages to the aggrieved party, to compensate him for any loss occasioned. Of itself, a breach does not discharge the contract. Thus *'discharge by breach'* is something of a misnomer. See: **Success in Law by Richard Bruce, 4th Edition at p. 286**. However, if the breach, as herein, is a serious one, the one lawyers say has gone to the root of the contract, the aggrieved party may, if he wishes, treat the contract as having been terminated by the breach. This is called repudiation. The aggrieved party will then be discharged from the further performance of his side of the bargain and claim damages, as herein. It is the plaintiff's case that it is entitled to the entire contractual sum as it had almost completed the work and had already availed and committed all the materials for the entire contract.

From the records and evidence, this was not a divisible contract, one separable into parts, so that different parts of consideration may be assigned to severable parts of the performance, as in an agreement to pay for each completed phase, before the contractor embarks on the next phase. All that was phased was the payment of the contract price, some installments payable even long after the completion of the works. In otherwords, the parties agreed that payment or no payment the works

would be done within the stipulated period, only that within four weeks of the commencement of the works, the first post dated cheque, in the sum of Shs.50m, would be realized.

From the evidence also, time was of essence. The contract was signed on 28/3/2003 and had to expire by July 10, 2003, a period of three months. For this reason, I do not consider it a material point that the plaintiff appears to have been ahead of schedule by the time the defendant stopped the work. All that was necessary was that quality was not compromised. The best person to ensure that quality was not compromised would have been the consultant. The defendant did not provide any. Impliedly, therefore, that which would have been done by the consultant was done by the client.

As to the nature of the contract, therefore, I make a finding that it was a lumpsum contract. In relation to lumpsum contracts, I make reference to the standard Text book on Contracts, **CHITTY ON CONTRACTS** (Vol. 2, 28th Edn) Chap. 37 para 008 (at page 516). The learned author states:

> ***"Lumpsum contract. In a lumpsum contract, the contractor is required to carry out and complete the entirety of the named contracts works for a fixed sum agreed in advance, or, as is more usual, if there are changes in the scope of the named contract works, for '……. such other sum as shall become payable ……. at the times and in the manner specified in the Conditions.' In the case of lumpsum contracts, the proposed contract works will be of a known extent (that is, not at the development/design stage) and described in a specification or Bill of Quantities. Where the specification or Bill of Quantities forms part of the contract, provided the work is sufficiently described, the contractor will be taken to have included for that work in his fixed price. Where work is not sufficiently described, and its existence is not reasonably to be inferred from the language of the contract, the contractor will be entitled to recover payment in addition to the fixed price. A lump sum*** **contract may include responsibility for design and management".**

I have already made a finding that the defendant was responsible for the breach. He did not give the plaintiff an opportunity to complete it. I refer again to the relevant passages in CHITTY, ibid, which set out the law on the degree of completion required. It is contained in para 009 (also at page 516):

> ***"An important question in the context of lump sum contracts is the extent to which completion of the entire contract must be achieved before the lump sum price is payable, assuming the absence of any right of the contractor to***

payment by installments. The general position is that where, on a true construction, a contract is an entire contract, then the contractor can recover nothing on the contract before work is completed. However, this does not mean that the employer will be able to avoid payment of the fixed price by reference to defects or omissions since:

" .. .. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach goes to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or, alternatively, set them up in diminution of the price …… "[Hoening –Vs- Isaacs [1952] 2 All ER 176, 181 per Denning L.J].

From the authorities reviewed in this case, notably **CHITTY ON CONTRACTS**, where the builder under a lump sum contract fails to perform some of the agreed work, then, subject to the doctrine of substantial performance, he can recover nothing for the work which was actually completed, despite the fact that the other party may have received substantial benefit therefrom. The learned author states that the building cases make the distinction between substantial non-feasance, where recovery is permitted subject to a cross-action for damages. From the authorities, if the builder under a lump sum contract is guilty of a serious misfeasance, so that work is substantially deficient, he can recover nothing. Relating the above principles of law to the facts herein, the parties agreed that the plaintiff does the work for a stated price of Shs.102, 528,500=. Pursuant to that agreement, the plaintiffs moved from Kampala to the site in Soroti and swung into action, buying all the needed construction materials. The defendant bought nothing. Considering that they had provided all the construction materials by the time they were ordered off the site; and, considering that they were in the process of roofing and the defendant has not led evidence of any materials he bought, Court is in agreement with the plaintiff that even the roofing material was already at the site when they were told to go. Assuming that the defendant used his own roofing materials, it was easy for him to lead such evidence by way of receipts. He didn't. I accept the evidence of the plaintiff's witnesses that they were simply ordered off the site, without being given any opportunity to access any materials they had bought but had not used, or even to make an inventory of the same. All their materials, including their records, were left at the site.

It is noteworthy that although the defendant claims that the plaintiff used unauthorized materials to his prejudice, he did not interfere with the structures they left at the site. From the evidence, they were left only with a few days to hand over to the defendant a finished product. To-date, the defendant has not paid even a single shilling towards the building the plaintiff left on his land. Their Lordships in **Bolton –Vs- Mahadeva [1972] 1 WLR 1009** observed (at page 1013), and I agree, that in considering whether there was substantial performance, it is relevant to take into account both the nature of the defects and the proportion between the cost of rectifying them and the contract price. In the instant case, other than the fact that bricks instead of blocks and timber trusses instead of steel ones were used, which in my view has been sufficiently explained, there is no evidence that the end product was shoddy and/or that any faults had to be rectified at a cost to the defendant. The work done was not subjected to any valuation to determine the percentage of work left undone either.

Learned counsel for the plaintiff has referred me to the doctrine of substantial performance as defined in Black's Law Dictionary. In the 7th Edition at p. 1443 the doctrine is explained as the equitable rule that, if a good faith attempt to perform does not precisely meet the terms of the agreement, the agreement will still be considered complete if the essential purpose of the contract is accomplished. It continues:

> ***"There has arisen in the United States an indefinite doctrine sometimes referred to as that of substantial performance. It is a doctrine that deals not with performance of a duty as a discharge thereof but with performance by the plaintiff as a condition precedent to the active duty of performance by the defendant. Where a defendant is sued for non-performance he cannot avoid paying damages by showing that he substantially performed or came near performing or gave something equally good; but he can always successfully defend if in fact some condition precedent to his own duty has not been fulfilled by the plaintiff."***

The doctrine has been a subject of discussion in our jurisdiction. In **Denis Senkungu –Vs- Masaka Diocese & 2 Others [1998] 111 KALR 128,** a case in which **Dakin H & Co. Ltd –Vs- Lee [1916] 1 KB 166** was considered, my learned sister Arach-Amoko, J. did not award the plaintiff the full contract price because the plaintiff had not substantially performed the contract. It is the view of this Court that in the instant case, the plaintiff substantially performed the contract and that further performance was made deliberately difficult by the defendant himself. Besides, the defendants in the **Senkungu Case** (supra) were supposed to avail construction materials to the plaintiff which was never done. In the

instant case, the plaintiff supplied the required materials. From the defendant's evidence, he did not interfere with the structure but rather started using the petrol station a few months later, in December 2003. In these circumstances, I agree with the submission of learned counsel for the plaintiff that the defendant took benefit of the plaintiff's materials and services and continues to enjoy the same without any pay for them to-date. In my view, to disallow the plaintiff's claim would be to sanction unjust enrichment of the defendant.

The plaintiff's evidence, especially that of PW1 Mukasa and PW2 Engineer Ssali, is that by the time the defendant unceremoniously chased them away, they had done most of the work under the contract. This included plastering the walls, fitting windows and doors, and applying undercoat in preparation for painting. I accept this evidence as truthful. It is noteworthy that they did all this work without any financial contribution from the defendant as regards the cost of materials and labour.

In all these circumstances, in the absence of any cross-claim for damages for defects and omissions to warrant off-setting the cost of putting them right from the contract price, and in view of the finding that the plaintiff did not abandon the site but was unfairly chased away, the plaintiff is in my view entitled to an order for the full contract price under the doctrine of substantial performance explained above. I so order.

As regards the claim for general damages, the general principle is that general damages are awarded to compensate the plaintiff, not to punish the defendant. Trusting as I do that the general effect of an award for general damages is to place the plaintiff in the same financial position as if the contract had been performed, and believing as I do that an order for payment of the full contract price to the plaintiff would have that effect, I do not consider it just and equitable to make an award of general damages whether it be nominal or substantial. I have therefore made no such award.

The plaintiff's other prayer is for interest. It is submitted that this will compensate the plaintiff for loss of use of its money since that time. Interest is a discretionary remedy in a case of this nature. In equity interest is awarded whenever a wrong doer deprives the other of money which he needs to use in his business. It is plain herein that the plaintiff should be compensated for the loss thereby occasioned to its business as mere recovery of the principal debt is not enough. I would for this reason award interest on the special damages at the rate of 20% per annum from the date of filing the suit till payment in full. I would also order that the defendant pays to the plaintiff the taxed costs of the suit.

In the final result, judgment is entered for the plaintiff against the defendant for:

(i) Shs.102, 528,500= as special damages.

(ii) Interest on (i) above at the rate of 20% per annum from the date of filing till payment in full.

(iii) Costs of the suit.

Yorokamu Bamwine

J U D G E

31/10/2007

31/10/07

- Ambrose Tebyasa for plaintiff
- Plaintiff's M.D. Mr. Mukasa present
- Defendant and Counsel absent

Court: Judgment delivered at 9:17am

Sgd: Y. Bamwine

JUDGE

31/10/07