THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0028-2005

Andreas Wipfler T/A Wipfler Designers & Co. Plaintiff

Versus

Meera Investments Ltd Defendant

BEFORE: THE HONOURABLE MR. JUSTIC FMS EGONDA-NTENDE

JUDGMENT

1. The plaintiff brought this action against the defendant seeking to recover Shs.385,896,000.00, general damages, interest and costs of this suit in respect of a contract for design services and construction work done by the plaintiff at Munyonyo at the defendant's request and instance. The defendant in its defence denied that the plaintiff was ever engaged as an architect and contractor at the same time. It contended that the plaintiff was engaged as a supervisor of the works but which job the plaintiff abandoned leaving the country. The defendant denied that it was indebted to the plaintiff in anyway.
2. At the start of the hearing of this case before the completion of testimony of the first witness the parties reached an agreement on resolution of the dispute between them. The agreement on resolution was set out in a letter to an expert they appointed to come out with a report that would bind the parties. The letter, signed by both counsel in the matter is dated the 20th July 2006. It is written on the letter heads of Nangwala, Rezida & Co. Advocates. I shall set it out in full.

> 'The Managing Director,
> Buildecon East Africa,
> Kampala.
> Dear Sir,
> RE: EXPERT OPINION ON CONSTRUNCTION OF THE SPECIFIC PROPERTY AT SPEKE RESORT AND COUNTRY LODGE, MUNYONYO Please refer to the above matter where we act on behalf of the our respective clients. We are appointing you as an expert to give us your professional assessment of the dispute relating to specific works

accomplished at Speke Resort, Munyonyo and outlined below.
It is averred by Andreas Wipfler, the Plaintiff in H.C.C.S. No. 2 of 2004 that he did carryout the said works for which he was not fully paid. On the other hand Meera Investments Ltd, the Defendant avers that it did fully pay Andreas Wipfler for the work that he did and that he did not do al the work he claims he did. There was no agreed contract price.
The works Andres Wipfler claims to have done are the following:
1. Design, drawings, materials and construction work on Horse Stables, Stores, Office, Boy Quarters, Toilets, 2 septic tanks, fencing and grass umbrella. 2. Design, Drawings, Materials and Construction work on 10 cottages.
3. Design, Drawings, Materials and Construction work on the Boat Ramp and Retaining Wall. 4. Design, Drawing and Supervision of the construction of the Gate Roofs and 2 offices. 5. Design, Drawing and Supervision of the construction of 2 Gates, Toilet Building, Water Tank Building, Apartment Building (4 Floors), Apartment Building (2 Floors), Stage Building (3 Floors) and Retaining Walls.
On the basis of this claim Mr. Wipfler is claiming Shs.385,896,000/= as unpaid balance.
On the other hand Meera Investments Ltd claims it had an arrangement with Mr. Wipfler whereby it paid/remunerated him for his labour and an in addition provided materials and money for workers as such and not as a contract price for the work. This, according to Meera Investments deposited money on an account operated by Mr. Wipfler for this purpose but this arrangement was changed in December 1997 on account of failure to account. A new arrangement was put in place. Under the new arrangement Mr. Wipfler was directly paid a fixed sum per month for his labour, given accommodation and a pick up. Meera Investments Ltd further claims that Mr. Wipfler did not build all the cottages and structures as he claims partly because of failing behind schedule and partly because he left the country for a long time. Other Contractors were engaged on the project.
It is mutually agreed that: a) The parties should be guided by the industry practices where there is no written contract. b) A mode of availing each party’s side of the story with supporting documents be agreed upon. c) When necessary access to the site will be accorded to you.
d) The report you will give will be binding on the parties. You will also be at liberty to interview the parties and obtain from them documents and other materials you may need to conclude your assignment. You will have to advise the parties of your fees, which if acceptable, will enable you to begin the assignment.
Yours faithfully,
(signed)
Kawenja Othieno & Co. Advocates

(signed)
Nangwala, Rezida & Co. Advocates.'

3. A report, or a copy of the report, produced by Buildecon East Africa was filed in this court on or about 5th September 2007 with a forwarding letter addressed to both counsel in this matter and copied to the Registrar of this court. The letter containing the terms of reference and agreement between counsel is appendix 25 to that Report.
4. Prior to the submission of the report, counsel for both parties were before the court on the 15th May 2005 and reported that they had agreed to appoint an expert to prepare the report to be ready by 30th June 2006. The court adjourned the case sine die. Having not heard from the parties for sometime the court fixed the hearing of the case for 19th September 2006, and notified the parties accordingly.
5. On 19th September 2006 counsel for the parties appeared and Mr. Rezida learned counsel for the defendant said:

> 'My Lord when we were last here in (on) 15th May 2006, we sought your indulgence to allow us to appoint an expert to review the matters in issue and give a report. My Lord we did develop the terms of reference and we found a mechanism of appointment of that expert which we had agreed upon and appointed Buildecon East Africa who are quantity surveyors to review the dispute as designed in the terms of reference, look at the documents, interview the parties and give a report **which will, we undertake, will be binding on the parties.** My Lord that is ongoing and we expect the report by 30th October this year-2006. In the circumstances we are seeking an adjournment to allow time for that report to be produced and presented to court.'

6. Mr. Othieno, learned counsel for the plaintiff, agreed that that was the position. I adjourned the matter to 9th November 2006. On that day only Mr. Othieno turned up. I was informed the report was not ready and I adjourned the matter sine die.
7. Having not heard from the parties the court on its own motion fixed this case for hearing on 14th June 2007. Counsel turned up on that day, and Mr. Rezida, for the defendant stated in part:

> 'My lord my information is that they should be about to complete the report now. And if it is a date immediately after Friday probably for mention my understanding is when Mr. Rugumayo submits his report it is a draft report, and parties make comments in (on) the report itself. Then he can make a final report for submission to court. So if he gives it by next Friday we probably need a week to comment on it…….after the comment that would wish to bring it to court…'

8. After a prolonged discussion between the parties and the court as to how to proceed once the report is submitted, the court adjourned the hearing of the suit to the 28th August 2007. On that day for some reason the case was not called but it came up again on 6th September 2007. Mr. Othieno for the plaintiff informed court that the report was ready and he had received his copy. He was ready to make his comments on the report. Mr. Rezida for the defendant stated that it is true the report is ready but they had not got a copy of the report essentially because the defendant had not paid his part of the fees for the expert's work.
9. After some dialogue the court asked the parties, 'So the report is not to court, the report is to you. So what do you want me to do?' Mr. Rezida responded, 'To give us time finalise that last bit. The good thing is that the report is there.' I adjourned the hearing of the case sine die.
10. Having not heard from the parties the court fixed this case for hearing on 7th February 2008. Counsel turned up on that day. Mr. Rezida stated that he was not prepared to go with the report, and I will set out his statement verbatim:

> 'My lord concerning this report, we have had issues with the process; one it was our strong view that the author of that report ought to have met the parties first given the fact that there was no formal contract between the parties other than simply looking at documents and trying to ascertain terms and so on. Two, we had hoped that there would be a draft report given to both parties for their comments before the final report is made, if they had any comments to make to obviate any questions that arise out of what should be a draft report. That was not followed. The other serious matter was rather internal in a sense that there was a disagreement on the terms with Buildecon on payments and that raised a number of issues so they held back the report from us which we have up to now not seen at all. Mr. Othieno probably ten days ago or so did inform me that, I think that was a first time we had received a hearing notice for the 4th, he did inform me that he had forwarded the report to court, certainly not to us. So as far as the report is concerned we have not seen it, we have not made our comments if there are any to make and so we are not prepared to move with that report. If they are inclined to leave it and we go for hearing we are prepared for that, but the proper thing would have been to make comments on that report.

11. Mr. Othieno responded that:

> 'My lord, I do not think that is true because the person we appointed was the managing director of the firm and that is the person actually who made the report eventually. So to say that the person we agreed on was different is not saying the truth and secondly my lord we agreed that that on the fees each party will

> pay half of the expert's fees. On our part we paid, we paid our half that is why the report was handed over to us. The defendant has to date, for reasons best known to them, refused to pay the expert and may be this is the defendant's practice of always not wanting to pay people for services they render. So really there is no reason as to why the defendant has not got the report up to now.'

12. Mr. Othieno then applied that judgment be entered in terms of the report given. He relied on Order 12 Rule 1(2) of the Civil Procedure Rules. He cited the case of *David Kulabako v Sadolin Paints, Court of Appeal Civil Appeal No.65 of 2004* in support of his submission. He stated that a court is free to enter judgement on the basis of a report that parties agreed will be binding upon them as long as the parties have had an opportunity to comment on it.
13. Mr. Rezida stated that as far he is concerned there is no report before the court. And there was really nothing to talk about.
14. I have examined Order 12 Rule 1(2) and Order 15 Rules 5 and 7 which are the rules that are referred to in Order 12 Rule 1(2) of the Civil Procedure Rules as providing the procedure court will follow. I am satisfied they do not apply in the circumstances of this case, as clearly there is some disagreement about the status of the report before the court. *D Kulabako v Sadolin Paints* (supra) referred to above discusses the procedure of the court under Order 12 Rule 1(2) of the Civil Procedure Rules and is therefore not helpful to the issues now under consideration.
15. It is clear that early on when this case came up for hearing counsel reached an agreement on resolving this dispute. That agreement was before this court. They stated that they will retain an expert who will inquire into the dispute and that they will be bound by the report of that expert. That agreement was subsequently reduced in writing in their joint instructions to the Managing Director Buildecon East Africa that I have set out above.
16. M/s Buildecon East Africa issued a report in accordance with their instructions. Counsel for the Defendant complains that as a result of disagreement over fees he has not received a copy of that report. He raises a number of other objections to the report but what is clear is the defendant has not performed its part of the agreement with regard to payment of fees, and consequently it does not have the report.
17. I am not sure what has given rise to this breakdown of the process but as far as I see it the expert appointed by the parties performed the task put before him. As far back as 6th September 2007 Mr. Rezida informed this court that they had received notification that

the report was ready, and he stated that he had issues of payment to iron out. He prayed for more time to be able to finalise those issues.

18. It is clear that by the 7th February 2008 the defendant had not moved at all from the position they were in on the 6th September 2007. There is simply no satisfactory explanation from Mr. Rezida as to why there is no movement. Mr. Rezida has had ample opportunity to obtain a copy of the report from the expert they appointed. More than 5 months ago he was aware the report was available. He acknowledged availability of the report in court on 6th September 2007.
19. Mr. Rezida or the defendant has had ample time to raise with the expert all issues they desired, had they cared to do so. They did not do so. Mr. Rezida or his client has simply stalled the process originally agreed. In my view the defendant and or his counsel are the architect of this situation. The rules of natural justice demanded that the parties be provided an opportunity to receive the report on the terms that they had agreed upon.
20. The opportunity was availed to both parties. The defendant chose not to avail itself of the opportunity to receive the report and be heard in respect of any matter raised therein.
21. Originally I was of the view that I should then set down this suit for hearing but on second reflection I find that there is actually a binding agreement between the parties that I can give effect to even though one of the parties has developed cold feet. Had the parties expressly proceeded under Order 47 of the Civil Procedure Rules, (Arbitration under Order of Court); judgment would have been entered under Order 47 Rule 16 of the Civil Procedure Rules. I will not seek aid of the same.
22. The parties agreed to be bound by the report of the expert. In substance the parties appointed an arbitrator between them. In Alternative Dispute Resolution arbitration is the process where a third party agreed between the parties issues a binding award. The report before the court has established the total value of the works done by the plaintiff to be shs.1,015,213,000.00. It has found that the defendant paid to the plaintiff shs.842,442,707.00. It has determined that the amount due to the plaintiff is shs.172,770,293.00.
23. Applying the inherent jurisdiction of this court, I uphold the agreement the parties made before this court to be bound by the report of the expert that they jointly appointed. As the expert has found in his report that the sum of shs.172,770,293.00 is due to the plaintiff from the defendant, I enter judgment for the plaintiff in that sum with costs of the suit. The decretal sum shall bear interest at court rate from today till payment in full.

Signed, dated, and delivered this 24th day of June 2008

FMS Egonda-Ntende
Judge