THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0638-2004

MAMBA POINT LIMITED :: **PLAINTIFF**

VERSUS

DOMUS AUREA LIMITED :: **DEFENDANT**

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT:

The plaintiff's claim against the defendant is for special damages in the sum of Shs.57,330,237/=, general damages for breach of contract by the defendant, interest thereon and costs of the suit. It is the plaintiff's case that it entered into contracts with the defendant for various works and that the defendant breached the said contracts and is as a result indebted to the plaintiff in the sums set out in the plaint.

The defendant denies the alleged breach. It therefore denies any indebtedness to the plaintiff in any sum whatsoever. The defendant instead claims in the counter-claim that it is the plaintiff who breached the contract and that as a result thereof the plaintiff is indebted to the defendant/counter-claimant in the sum of Shs. 130,063,434/=.

At the conferencing, the following were agreed as undisputed facts:

1. The parties entered into a contract for the defendant to supply doors, windows, door frames, window frames,furniture and fittings to the plaintiff. This was on 17/12/2001.

2. Pursuant to the agreement, the defendant issued to the plaintiff a proforma invoice listing the items and quantity with the prices.

3. The plaintiff made an advance payment of USD 22000 (equivalent to Ug.Shs.37,400,000/=) in accordance with the terms of the contract.

4. On 1/08/2002, the plaintiff advanced an additional sum of Shs.11,000,000/= to the defendant to make a total of Shs.48,400,000/=.

5. On 20/11/2002, the parties agreed that the balance due to the defendant be assessed and paid within 6 months from the completion of delivery of the furniture and fittings contracted for. Any variation had to be ratified by the plaintiff within one week of signing the memorandum (that is, 20/11/02).

6. The defendant supplied all the window and door frames and the plaintiff acknowledged receipt of them.

7. When the defendant presented the updated proforma invoice for ratification by the plaintiff, the plaintiff refused to do so.

8. On 4/03/02 the plaintiff engaged the defendant to carry out extension work on its terrace restaurant at a cost of Shs.5,912,800/= and the defendant was fully paid.

9. The parties also agreed that the defendant carries out rehabilitation of a restaurant at a cost of Shs.3,029,832/=.

Issues:

1. Whether the defendant breached the contracts.

2. Whether the contracts were terminated and by who?

3. Whether the parties are entitled to the reliefs claimed in the plaint and counter-claim.

Representations:
Mr. David Mulumba for the plaintiff.
Mr. Brian Kaggwa for the defendant.

Before I turn to issues, I consider it necessary to comment on some difficulties this court has encountered in the course of trying to find a solution to the dispute between the parties. As the record shows, the plaintiff's last witness, PW3 Paul Moores, gave evidence on 01/11/2007. This was in the absence of the defendant and his Counsel. The case was then adjourned till 11/12/2007 for his (PW3's) cross-examination. Mr. Kaggwa's personal assistant was present. Come 11/12/2007, Mr. Kaggwa did not appear. He was said to be out of the country. Subject to the defendant's right to seek recall of the witness, the case was adjourned till 09/04/2008 for defence. Come this date, hearing flopped on account of Mr. Mulumba's absence and Mr. Kaggwa's lack of preparedness to proceed with the conduct of the defence case. The case was therefore adjourned till 19/06/2008 for his cross-examination. The record is silent as to what happened on 19/06/2008. It is possible that there was no court sitting. But the case came up again on 20/06/2008. Neither the defendant nor his Counsel showed up. Court invoked 0.17 r.4 of the Civil Procedure Rules and closed the matter for written submissions. As I write this judgment, only the defendant has managed to file submissions. There is no explanation as to why the plaintiff's Counsel who was in court on 20/06/2008 did not file written submissions.

I will do the best I can in the unique circumstances of this case.

Issue No. 1.: <u>Whether the defendant breached the contracts.</u>

In law, breach of contract means actual failure by a party to a contract to perform his/her obligations under that contract or an indication of his/her intention not to do so. It is, so to say, the violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. Breach can therefore be by non-performance, or by repudiation, or both. Every breach gives rise to a claim for damages, among other remedies.

The contract between the parties is in writing. It is trite 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, i.e. not contained in it. The rationale for the rule is the promotion of certainty by holding that parties who reduced a contract to writing should be bound by the writing alone.

From the contract documents, Exhibit P1 and Exhibit P3, the time within which the contract was to be performed was not stipulated. In the absence of any express provision in the contract as to time, I would imply into it a term that the contract would be performed ***'within a reasonable time.'***

PW1 Notari's evidence is that the defendant was supposed to complete the works by August 2002. I have already indicated that this evidence is extrinsic the two documents, exhibit P1 and exhibit P3. It is, however, evident from the evidence of PW1 Notari and PW2 Rezida that by August 2002, the performance of the contract was sluggish and behind schedule. Curiously, when they sat down again, this time with the assistance of their mediator, PW2 Rezida, they did not set any performance deadline.

It is conceded on behalf of the plaintiff that by 20/12/2002, all doors and window frames had been delivered at site and installed and/or fixed. Even then it would appear to me that time was a problem to the defendant.

I now turn to the issue of quality.

The thrust of the plaintiff's pleadings and evidence on this point is that the products supplied by the defendant were warped and/or defective. The defendant contends in reply that the frames were fitted without problems apart from minor masonry mistakes while fitting them. The defendant appears to suggest that the mistakes were corrected quickly and with ease. Evidence of the corrections is not on record. However, I have not appreciated why if the plaintiff considered the defects to be major and fundamental, it allowed the alleged faulty frames to be installed.

Be that as it may, testifying on the issue of the defects, Notari said:

> ***"….just towards Christmas of 2002, during a joint site visit carried out by Casadio and myself. I discovered that the majority of the frames had warped, that is, had bent. I was dismayed. He said he would fix the issue with a few bags of cement. Nothing happened. As of 21/2/2003, none of the window and door frames had been put right. And none of the remaining fixtures and furniture had been delivered either."***

I have already indicated that in law breach of contract refers to breaking of the obligation which the contract imposes, which confers a right of action for damages on the injured party. It also entitles him to treat the contract as discharged if the other party renounces the contract, or makes its performance impossible, or totally or substantially fails to perform his promises.

In the instant suit, the parties through their officials, PW1 Notari and PW2 Casadio, acted belligerently towards each other throughout the hearing. The hearing was characterized by unfriendly and aggressive exchange of words. It is little wonder that the contract itself could not be performed to completion.

Be that as it is, the defendant is accused of failure to deliver materials that had been paid for. Learned Counsel for the defendant has submitted that the contract between the parties can be evidenced from oral, documentary evidence and subsequent conduct of the parties. I agree.

Exhibit P1 formed the contract between the parties. It clearly stated that the quotation was valid for 30 days. As regards payments, the parties agreed:

> **"(i).** ***35% in advance upon confirmation of our quotation by means of written confirmation or counter-signing it;***
>
> ***(ii). Balance of each item payable prior to collection."***

As for the defects, the parties agreed as follows:

> ***"Domus Aurea shall provide a 180 (one hundred and eighty) days limited warranty on the items, starting from the day of their collection or delivery. Such limited warranty includes any defect in the material workmanship and assembly."***

Exhibit P1 is augmented by Exhibit P3, a Memorandum of Understanding dated 20/11/2002. In this Memo the parties agreed:

> ***".....Domus Aurea Limited has provided a scheme for completion detailing a total cost of Shs.77,369,461/= as well as a time frame for each of the remaining works. The said scheme will be binding on Domus A urea provided that Mamba Point Limited avails the required funds on a weekly basis in advance....."***

In another paragraph the parties agreed:

".....on the issue of the supply of doors, windows, internal fittings and furnishings for a total of U.Shs.108,343,200/= exclusive of VAT, which Domus A urea Limited undertook to supply on credit, Mamba Point Limited has already paid U.Shs.48,400,000/=. The balance shall be assessed at the time of the completion taking into account any possible changes and it shall be paid within 6 months from the completion of delivery of said doors, windows, internal fittings and furnishings, as well as their installation where applicable. These are reflected in a Domus A urea Limited proforma invoice dated lit,, December 2001 with variation, which have to be ratified by Mamba Point Limited one week from the date of signing this Memorandum.

From the evidence, Exhibit P3 was prompted by the constant bickerings between the parties. Following execution thereof, the parties hoped to make a break through. This was not to be. The plaintiff raised fresh concerns about non-delivery of the materials and non-compliance with what had been agreed upon in Exhibit P3.

On the mechanism for payment of funds, it is PW2 Rezida's evidence that it was such that every Saturday the parties were to meet, review work done between Monday and that Saturday, using the scheme of work provided by the defendant as the bench mark. Upon certification that the bench marks had been realized, the plaintiff would be obliged to release money for the following week, to cover money listed for that following week as per the scheme.

The position is contained in Exhibit P3. As regards implementation PW2 testified:

"There was no doubt that the defendant was lagging behind in terms of the weekly works. No doubt at all and it was not disputed. Defendant nevertheless wanted money to start on other works for that week even through the review showed that the previous week's works had not been satisfactorily completed. Plaintiff refused saying that what they had agreed be followed."

Commenting on the supply of doors, windows, internal fittings, etc, the witness (PW2 Rezida) said there was a delay although the defendant kept giving assurances that its supplier had assured them that timber was coming.

He testified:

> ***"He said they had timber in workshop at 6th Street Industrial Area, Kampala, he would make up for the lost time. When we received those fresh concerns, we again prevailed on the two parties to ensure that the project was on course. For a short while, we continued but delays persisted."***

On faulty workmanship, the witness testified:

> ***"I remember vividly there were issues to do with non-compliance with roofing specifications. E.g. specifications talked of using one sheet, contractor instead used iron sheets of half length and this necessa ted using more. It was done without consultation."***

On the supply of doors, the witness (PW2 Rezida) said there was always a promise to deliver them. He said:

> ***"At one time, the defendant told me through its Managing Director that timber had been received in their workshop and he was sure that their part of the project would proceed well. After a week or so, I rang the defendant. I wanted to plead for him before the plaintiff. He assured me there was substantial progress. I paid visit to the workshop physically with the hope of being in a better position to prevail upon the plaintiff that I had seen substantial progress defendant had been talking about. Unfortunately, there wasn't much to show for that alleged progress. It was now becoming difficult to keep prevailing upon plaintiff well knowing that Barclays Bank Officials were revisiting the site to see progress of the works."***

I noted the demeanour of PW2 Rezida as he testified. He impressed me as a candid, frank and truthful witness. He stood in the middle of both parties during the performance of the contract and was very conversant with its terms. I have seen no reason to doubt his evidence at all. It shows very clearly that the defendant was to blame for the non-performance of the contract.

Learned Counsel for the defendant has submitted that the proposed terms failed as was clearly exhibited by the conduct of the parties who in no uncertain terms failed to comply and agree to the new terms contained therein. That the said Memorandum of Understanding, Exhibit P3, having collapsed by the non-compliance and in the absence of any other credible and/or agreed terms between the parties, court must resort to the provisions of Exhibit P1.

This in my view is where the problem lies. The parties with their eyes wide open, I presume, sat down and revised the performance of the contract as contained in Exhibit P1. Under this new arrangement, Exhibit P3, the defendant provided a scheme for completion detailing a total of Shs.77,369,461/= as well as a time frame for each of the remaining works. The problem with the earlier arrangement was that no time frames had been set. The said scheme was binding on the defendant ***provided*** that the plaintiff availed the required funds on a weekly basis in advance. The parties agreed that ***at the end of each and every week*** and prior to disbursement of further funds both parties would review the week's works and confirm that the envisaged works have been completed. The defendant failed to deliver anything to the plaintiff against which any payment would be effected. And after things have failed to work out, the defendant wants to jump out of the obligations imposed upon it under Exhibit P3 and resort to Exhibit P1 which contained no time frames. It is too late for the defendant. We cannot talk of any contract between them without giving due regard to the two documents, ***Exhibit P1*** and ***Exhibit P3.*** This being the position, the defendant's failure to comply with the terms in Exhibit P3 was the source of the problem, not the plaintiff whose obligation was to provide funds after the defendant's due performance of its obligations. Subsequent impossibility or frustration brought about by the conduct of one of the parties will as a rule amount to a breach of contract by him and will not excuse his non- performance, though it may release the other party from his obligation to perform his promise: ***Halsbury's Laws of England, Vol. 9 1 Re-issue 4th Edition paragraph 891.***

Since the defendant by its own act or omission failed and/or refused to make the deliveries envisaged under the contract, this amounted to a breach of the contract.

From the contract documents, there was room for the defendant to revise the quotation. However, the defendant had to submit a revised Quotation within a week from 20/11/2002, the date of signing Exhibit P3. The defendant did not do so till 21/02/03. There could not have been a worse breach of the undertaking.

On 21/02/03, in an apparent attempt to salvage what was left of the contract, the plaintiff wrote to the defendant, Exhibit P9, pointing out what it considered to be acts of breach on the part of the defendant. The defendant's response was (Exhibit P8):

> ***"We cannot and wish not to complete the work on your guest house after you terminated our contract by substituting us with Renofin."***

There is evidence that at some point in time the plaintiff appointed a consultant, Renofin Ltd, to assess those issues of delays and poor workmanship. They (the consultants) pointed out to PW2 Rezida obvious warping of timber used by the defendant. It would appear to me that DW1 Casadio did not like this. He considered it to be undue interference with his work.

PW3 Paul Moores, a practicing Architect, compiled a report of his findings, Exhibit P6. He noted a number of deviations in the designs and specifications. His evidence was not challenged. It is in my view immaterial that the defects could be remedied or that the plaintiff acknowledged receipt of the faulty materials. In my view, even if the attempted repairs had succeeded, the defendant would still have been in breach of the contract given the said glaring defects. Only that in that event court would have been willing to treat the breach as that of a warranty rather than a condition.

Given the state of the materials as assessed by PW2 Rezida and PW3 Paul Moores; and given that the defects remained uncorrected; and, in view of the non-delivery of the remaining

items and non-completion of the works by the defendant, court is satisfied on the balance of probabilities that the defendant breached the contract.

I would answer the first issue in the affirmative and I do so.

Issue No. 2: ***Whether the contracts were terminated and by who?***

I have already stated that the plaintiff wrote to the defendant pointing out to them areas which required remedies. In response the defendant sent a letter, Exhibit D7 with an updated proforma invoice indicating the total amount this time as Shs.152,532,850/= exclusive of VAT, up from the original Shs.108,343,200/=. When the plaintiff rejected it, the defendant wrote back [Exhibit P8] stating that they could not and wished not to complete the work. From the evidence, this marked the end of the relationship.

Learned Counsel for the defendant has submitted that the plaintiff rescinded the contract by virtue of a letter dated 13th July, 2004 from its lawyers and that this action amounted to a termination of the contract. I do not accept this argument. By then the contract had long been terminated by the defendant in February 2003. The termination had nothing to do with the plaintiff's alleged impecuniosity or otherwise because according to Exhibit P3, the balance between Shs.108,343,200/= (the advance payment) was to be ***assessed at the time of completion taking into account any possible changes and it shall be paid within 6 months from the completion of delivery of the said doors, windows*** *.....*" ***(emphasis mine).***

From the evidence also, Renofin Limited was engaged by the plaintiff to carry out a consultancy to assess issues of delays and poor workmanship. It was not engaged to replace the defendant. If this had been so, it would be documented.

In these circumstances, court is satisfied on the balance of probabilities that the contract was terminated by the defendant in writing, Exhibit P8.

Issue No. 3: ***Whether the parties are entitled to the reliefs claimed in the plaint and counter-claim.***

The plaintiff's first prayer is for Shs.57,330,237/= being special damages particularized as follows:

(i). Deposit paid for the supply of doors, windows and internal fittings and furnishings…….. Shs.48,400,000/=.

(ii). Deposit paid for the terrace extension works.....Shs.5,277,695/=.

(iii). Payment towards roof rehabilitation…… Shs.3,029,832/=.

(iv). Payment for removal of paint and repainting……..... Shs. 622,710/=.

Total <u>Shs.57.330,237/=</u>

I have scrutinised Exhibit P1 and Exhibit P3. None of them gave the client the right to recover the deposit in the event of total failure of consideration or at all. It would appear to me therefore that the plaintiff is seeking recovery thereof as money had and received, an equitable relief. In an action for money had and received, liability is based on unjust benefit or enrichment, that is, the action is applicable whenever the defendant has received money which, in justice and equity, belongs to the plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the plaintiff, e.g. where money is paid by A to B on a consideration which has wholly failed.

The instant case is not a typical example of consideration which has wholly failed. There is evidence that the defendant performed some obligations, though evidently to the dissatisfaction of the plaintiff. There is for instance evidence of materials whose value has not been ascertained being supplied, and terrace extension works and roof rehabilitation and

painting being done. In all these circumstances, to seek recovery of the entire amount as if the plaintiff derived no benefit from the contract is grossly unrealistic. Given that special damages must be pleaded and strictly proved, I am inclined to the view that the entire prayer for special damages ought to fail and it fails.

The plaintiff has also sought general damages for breach of contract.

General damages consist, in all, items of normal loss which the plaintiff is not required to specify in his pleading in order to permit proof in respect of them at the trial. With regard to proof, general damages in breach of contract are what a court may award when it (the court) cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man.

In the instant case, the defendant having acted in breach of the contract is liable to the plaintiff in general damages. The general principle is that general damages are awarded to compensate the plaintiff, not to punish the defendant.

I have already indicated that learned Counsel for the plaintiff did not file any submissions. No figure has therefore been suggested to me as general damages. Doing the best I can and taking into account the parties already alluded to belligerent attitude towards each other, I consider a sum of Shs.1O,000,000/= (ten million only) reasonable compensation to the plaintiff. There will be interest on the award at the rate of 22% per annum from the date of judgment till payment in full.

The plaintiff shall also have the costs of the suit.

As regards the defendant/counter-claimant, it seeks special damages in the sum of Shs.130,063,434/=. It was pleaded that this sum was the difference between the advance sums paid and the sums in the updated proforma invoice, implying that the defendant

manufactured all the wood works stated in the updated proforma invoice.

I have already commented on PW1 Notari's negative reaction to the said updated proforma invoice, Exhibit D7. Therein the defendant's Mr. Casadio informed the plaintiff that at completion of every item and delivery ex-workshop, a full settlement would be required before collection. The defendant did not inform the plaintiff that any materials were available for the plaintiff's collection. This was on 2 1/02/03. There was indeed uncertainty of delivery as at that date. A few days later, to be exact on 04/03/2003, Mr. Casadio in his own hand declared to the plaintiff that the defendant could not and wished not to complete the work. He did not indicate in that letter that any of the items under the contract was available awaiting correction.

Learned Counsel for the defendant has submitted that the law is that if a party to an entire contract performs part of the work that he has undertaken and is then presented by the fault of the other party from proceeding further, the law does not allow him to be deprived of the fruits of his labour. I agree. The injured party is entitled to recover damages for breach of contract in such a situation, and alternatively he can recover reasonable remuneration on a quantum meruit for what he has done.

In the instant case, by the time the defendant terminated the contract, it had already received a sum of Shs.48,400,000/= and some other extras for the additional works. The defendant's evidence is short of proof that the materials supplied to the plaintiff before termination exceeded Shs.48,400,000/= in value.

In the circumstances, it cannot be said that the defendant/counter- claimant has proved the plaintiff's indebtedness to them in the sum of Shs.130,063,434/= or at all.

I would disallow this claim and I do so.

As regards the prayer for an order of specific performance, learned Counsel has submitted that the defendant was still ready to perform and refused to accept the plaintiff's breach as a discharge of the contract. He has submitted further that the parties live up to their bargain and be ordered accordingly. I have already made a finding that it was the defendant and not the plaintiff who acted in breach. In view of this finding, the prayer for specific performance is misplaced and so are the prayers for general damages for breach of contract, interest and costs. The loss in my view ought to fall where it lies. The long and short of all this is that the entire counter-claim lacks merit. It is dismissed with costs to the plaintiff/defendant by counter claim.

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

(i). General Damages: Shs.1O,000,000/= (ten million only). (ii). Interest on (i) above at the rate of 22% per annum from the date of judgment till payment in full.

(iii). Costs of the suit and the counter-claim.

Yorokamu Bamwine
JUDGE
22/12/2008

Order:
This judgment shall be delivered on my behalf by the Registrar of the Commercial Court on the due date.

Yorokamu Bamwine
JUDGE
22/12/2008