THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - CS - 288 - 2005

BUILDTUST CONSTRUCTION (U) LTD. ::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

MARTHA RUGASIRA ::: DEFENDANT

BEFORE: <u>THE HON. JUSTICE GEOFFREY KIRYABWIRE.</u>

J U D G M E N T:

The plaintiff brought this suit against the defendant for the sum of Ushs.63,353,571/= being unpaid costs for the renovation of the defendant's residential house.

The case for the plaintiff is that by a written contract dated 20th June 2002 the defendant contracted the plaintiff to renovate her house at Plot 13 Luthuli (Hunter) Avenue in Bugolobi, Kampala. The contract was to be a fixed price contract of Ushs.115,000,000/= based on agreed bills of quality which were to remain unchanged except with the defendant's written instructions. The contract period was for 5 months.

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The plaintiff avers however that the defendant continued to give it verbal instructions for variations thus altering and increasing both the scope of work and its cost. In this regard the scope of work was varied and the price increased from Ushs.115,000,000/= to Ushs.220,696,325/=. When presented with the final bill the plaintiff further avers that the defendant rejected it and sought an independent valuation from the firm M/S Barker, Barton & Lawson (BBL). M/S BBL valued the work at Ushs.198,832,579/= which figure the plaintiffs consented to. The plaintiff now avers that it was paid a total of Ushs.135,500,000/= which when deducted from the BBL figure of Ushs.198,832,579/= leaves an outstanding unpaid amount of Ushs.63,353,579/=.

The defendant on the other hand in her pleadings denies the said variations to the value alleged by the plaintiff. The defendant avers that it is the plaintiff which is in breach of contract. The defendant further avers that all variations by the contract had to be in writing and that she at all material times signified her consent to a variation by endorsing her signature against the figures presented to her as the cost of the additional works. The defendant contends that not all the additional works she agreed to, like installing aluminum

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mosquito roller shutters, were done and that in any case all the additional work worth Ushs.23,252,000/= were paid for. She further avers that by reason of the above, the whole renovation work was greatly delayed.

The defendant counter claims the sum of Ushs.64,271,000/= being rental income cost as a result of the delayed work for 10 months and costs of completing the work the plaintiff failed to do.

At the scheduling conference the parties agreed to the following facts:-

1- The parties entered into an agreement for renovations of a house at Plot 13 Luthuli Avenue at a fixed cost of Ushs.115,000,000/=.
2- Any instructions in the agreement were to be upon written instructions.

There was clearly no agreement as to the payment of these alterations and the parties agreed to the following issues for trial.

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Main Suit/claim

1- Whether or not the contract was varied in respect to works to be carried out and if so to what extend.

2- Whether or not the plaintiff is entitled to the reliefs sought.

Counterclaim

3- Whether the plaintiff (defendant by the counterclaim) is in breach of contract?

4- Whether the defendant (plaintiff by the counterclaim) is entitled to the relief sought?

Mr. C. Alaka appeared for the plaintiff while Mr. K. Kiwanuka appeared for the defendant.

Issue No. 1: Whether or not the contract was varied in respect to the works to be carried out and if so to what extend?

On reflection this issue as to whether or not the contract was varied is redundant. The defendant did in her pleadings (para 6 of the written statement of defence) and her own testimony concede that she did sanction some additional works. That means that the

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contract was indeed varied and I so find on that basis. The real issue to address is to what extent was the contract varied? Here is where both parties disagree. This is largely an evidential question. The defendant contends that any variation by contract had to be in writing and she only accepts bills that she signed/endorsed against as valid alterations. The plaintiff while conceding that some bills were endorsed by the defendant insists that some other instructions were given orally and no endorsement made. In any event counsel for the plaintiff submitted that the writing refer to in the contract did not mean endorsement. Counsel for the plaintiff submitted that all variations in effect were as a result of the defendant issuing various oral instructions.

From the evidence before court both parties also agree that this contract was also characterized by the giving of oral instructions. The difference between the parties as to the effect of these oral instructions is as follows.

The defendant testified that she would originate the idea verbally, which the plaintiff would then reduce in writing and seek the defendant's acceptance by endorsing the quotation. Counsel for the defendant further submitted

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"…The instructions given by the defendant did not vary the contract as they were mere supplements for work within the ambit of the work contracted, that is, the parking yard, laundry, rock garden and garden wall do (not) amount to "renovation works". This was in conformity with the terms of the contract…"

Mr. Apollo Awayi PW1 a Director of plaintiff company on the other hand testified that they received a lot of oral instructions from the defendant. They carried out the said instructions because of the relationship they had with the defendant's family. He further testified that on the 4th December, 2002 the parties held a meeting where the plaintiff's concern about issuing oral instructions was raised. Mr. Awayi testified that the defendant replied that her policy was not deny her instructions but she would give written instructions in future.

Counsel for the plaintiff submitted that

"…it appears from the defendant's testimony that she erroneously though(t) (and) believed that the endorsement on the plaintiff's letters for confirmation amounted to her giving written instructions for the charge of scope of works. It is therefore not

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surprising that the documents C1-C10 she relied upon to prove her allegation that she did issue written instructions were all authored after the plaintiff's queries in the meeting of the 4th of December, 2002...."

As to the law, Mr. Kiwanuka for the defendant referred me to the case of

Mujuni Ruhemba V Shansha Jensen (U) Ltd CA No. 56 of 2000 (unreported)

for the proposition that *"contracts required to be in writing can only be varied by a subsequent written agreement. Oral agreements cannot vary such written contracts..."*

It was Mr. Kiwanuka's view that Building and Engineering contracts, such as the one in this case, fall within the above definition of contract. It was therefore his submission that the contractor (in this case the plaintiff) was entitled to refuse to comply with the defendant's verbal instructions. In this regard I was referred to the writings of the learned authors of Halsbury's Laws of England Vol 3 P.436 on the right to reject such instructions.

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On the other hand if the contractor did comply with the order, then Mr. Kiwanuka submitted that the question would arise as to whether the original contract is rescinded or not by the variation. He submitted that if the substituted work (with its terms relating to payment, approvals etc) can be traced into the work specified in the original contract then the variation will remain binding. However, if such alterations are so sweeping that the original work can no longer be traced, then the original contract will be held to be abrogated. In this case, Mr. Kiwanuka submitted that there is no evidence that the original contract was abrogated.

He further submitted that the wording of the agreement in this case should be given their import unless they are contradictory in which case recourse will be had to what the intention of the parties were. In this regard I was referred to the text of the learned authors in Chitty on Contract 3rd ed P.286 para 609.

In response Mr. Alaka counsel for the plaintiff submitted that the contract detailed the scope of work to be done. He submitted that the plaintiff pleaded and testified to 32 additional items of work which are different thus pointing to the existence of a completely new contract from the original one.

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I have addressed my mind to the pleadings and evidence regarding this issue.

I note that this dispute is typical of the disputes that arise in construction contracts whose terms are not followed. The contract is supposed to detail the agreement of the parties inter alia such as to the scope of work, duration and payment terms. It therefore protects both the contractor and the employer. It is therefore important that the scope of work in particular is agreed upon before any work commences. The problem that the courts all too often are faced with is when the original scope of work is not well thought out and therefore regardless the written agreement, the scope of works continues to be perfected as the work progresses. This leads to escalation of costs which then becomes the subject of dispute. In other words this is a problem of contract management.

I have already found that there were variations of work and the question is; what was the extent of the variation. Before I deal with that there is the general legal argument by the defendant that variations not consented to in writing should not paid and those consented to in writing were paid. There is also the legal question as

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to whether the said variations are part of the original contract or are part of a different contract altogether?

I agree that the agreement dated 20th June 2002 provided under para (b) that

> *"The contract is a fixed price contract and scope of works outlined in the bills of quantities and summarized in the attached sheet, shall remain unchanged unless with the clients written instructions…"*

It further provided that the contract price was Ushs.115,000,000/=, that there would be an advance payment of Ushs.25,000,000/= (para e) and that the work would be for a duration of 5 months (para f). These were the basic parameters of the contract. To get a sense of how the contract was complied with one has to look at the contract as whole. In other words how was the compliance to the contract as a whole. Whereas the defendant did pay the advance payment sum by the end of 5 months contract period the contract was not at an end and Ushs.50,000,000/= in total had been paid. Exhibit D1 a letter dated 9th December, 2002 from the plaintiff to the defendant seems to shed some light as to what was happening at least from the plaintiff's view. It reads in part

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"…we do acknowledge that the project completion date was agreed for 30th November 2002. However, we would like to bring to your notice that there has been a number of hindrances on site that have grossly affected the smooth running of the project, which will need a lot of input from your nominated consultants at site
Some of which include

a) *Outstanding details*

To date we have not received detailed drawings from your consultants for the following:-

[Lists 8 items]

b) *Alteration*

[Lists 8 items]

…on receipt of all remaining outstanding information, we shall expodite to complete the works by 15th January 2003 provided no other variations will be instructed…

Signed

Peter Andres
Managing Director. "

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It would appear to me that by the 9th December, 2002 the contract was already off course. It is further clear that even the adjusted date of 15th January, 2003 was not met as there is a handover certificate dated 29th August, 2003 (though it is not signed by the defendant). It is however equally important to note that none of the parties to the agreement invoked paragraphs (i) and (j) to terminate the agreement. Instead the evidence shows that both parties continued with the agreement.

Indeed on the 20th October, 2003 on receipt of the final bill from the plaintiff the defendant wrote the following to the plaintiff in annexture "F".

> *"…This is to acknowledge receipt of your final invoice for the renovation of the house on plot No. 13 Luthuli Avenue, Bugolobi,*
>
> *I however dispute the billing which is unreasonably high and some costs are unexplainable.*
>
> *I am currently with another firm and will let you know when the report is out*
>
> *Thank-you*
>
> *Signed*
>
> *Martha Rugasira"*

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She then instructed M/S BBL to look into the matter. I find that in these circumstances, that this was a wise move by the defendant if only to reconcile the positions of the parties. M/S BBL acted as an external expert to provide a solution to the problem. This is not altogether uncommon in building and construction contracts such as this.

What however is clear to court is that the dispute is not so much about doing unauthorized variations, but rather the cost as being unreasonably high. From the evidence adduced at the trial, the clearest contest against a variation was the supply of roofing files from M/S Allied Clays Limited instead *"Kajjansi".* The plaintiff stated that the supply of *"Kajjansi"* tiles were causing a delay in the work so they went for the comparable but slightly more expensive *"Allied Clays"* tiles (which price was absorbed by the plaintiff). However, there was no evidence that these tiles were rejected and replaced by the defendant.

The defendant still has them on the roof of her house and therefore she is actually benefiting from the said tiles. In my view the evidence does not show any other comparable unauthorized work. The only

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complaint is about unfinished or not properly done work which is a different matter.

Where a person derives a benefit from another, like in this case following a renovation of a house, and retains that benefit the common law will not allow that person to retain that benefit without compensation on the grounds that it is outside the terms of the contract.

In the celebrated judgment of Lord Wright in

Fibrosa Spolka V Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 at 61

he held

> "*…it is clear that any civilized system of law is bound to provide remedies for… unjust benefit… Such remedies in English law are generically different from remedies in contract or in tort and are now recognized to fall within a third category of common law which has been called quasi – contract or restitution…"*

I agree with that view. If renovations were done at a house and they are accepted by the house owner outside the parameters of the renovation contract then the common law will impose a quasi-

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contract to pay for the said renovations. In this case the defendant has benefited from the renovations and so should pay for them. The question then is how much. In this regard I was asked to review the invoices under annex C and determine them on the basis of what was and was not endorsed by the defendant. As I have found above it is more important to determine whether not the work was done or not. In this regard I am persuaded to take the view of the plaintiff throughout this case and go with the recommendations in the BBL report dated 26th July 2004. Though not perfect, the report was commissioned by the defendant and accepted by the plaintiff. It must be remembered that justice is not a perfect science and that we all strive to achieve it whether in court or outside court. This was an attempt by the parties themselves to resolve the dispute outside court using a reputable third party expert.

In the case of

Muhammed Mohammed Al Hassan **V** **Ibrahim Al Gasim** HCCS No. 504 of 2005 (unreported)

I held that court has a duty under Article 126(e) of the Constitution of The Republic of Uganda 1995 to see that reconciliation between parties should be promoted. In effect this in my view means that if

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the parties use alternative dispute mechanisms, like in this case a reputable third party expert, to resolve their dispute then court will promote that reconciliation by giving effect to it unless there is good reason not to do so. In the Ibrahim al Gasim Case (supra). The parties to the dispute called in their fellow Sudanese community in Uganda to resolve their dispute and this resulted into an agreement. Court agreed to enforce this agreement and hence the reconciliation of the parties done outside court.

In this case as stated above the plaintiff has accepted the BBL report which recommended that the final account be put "in the region of Ushs.198,000,000/=..." instead of the plaintiff's own billed figure of Ushs.220,696,325/=. Court will in promoting reconciliation between the parties now accept the figure of Ushs.198,000,000/= as the total contract figure inclusive of the variations. I see no valid reason to by pass this settlement of the parties themselves nor allow any of the parties to run away from it. That means that there is an outstanding of Ushs63,353,571/= as claimed by the plaintiff. I so find and order.

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Issue No. 2: Whether or not the plaintiff is entitled to the relief sought?

In additional to above the plaintiff seeks

1- General damages for inconvenience suffered.

2- Interest at 28% p.a.

As to general damages, the plaintiff's counsel did not submit as to the quantum. I think that the plaintiff would be entitled to general damages as it has been kept out of money for some time. I would award general damages of Ushs.6,000,000/=.

I will also award interest at 23% p.a. on the outstanding amount from the date of the BBL report of the 24th July 2004 until payment in full. I will also award interest at 8% p.a. on the general damages from the date of judgment until payment in full.

I will award the plaintiff the costs in the main suit.

I shall how address my mind to the counter-claim of the defendant/plaintiff.

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Issue No. 3: <u>Whether the plaintiff (defendant by the counterclaim) is in breach of contract?</u>

The defendant in para 30 of the written statement of defence, avers that the plaintiff failed to execute the works within the agreed time, expected quality and gave no satisfactory reason for doing so. As a result the plaintiff was in breach of contract, the particulars of which are

a) Failure to complete the work within the agreed duration.

b) Failure to install the mosquito roller shutters.

c) Failure to extend the lounge

d) Failure to use Kajjansi tiles as agreed

e) Failure to properly construct the external storm water drainage.

f) Failure to install mosquito nets above the windows

g) Failure to complete the plumbing and electrical schedule as per contract.

This is a particularly long list of particulars. However, the defendant/counter-claimant relies on a shorter list in their claim for special damages for loss and damage as part of the counterclaim, namely;

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-	Loss of rental for 10 months	UG x 51,600,000
-	Cost of Kajjansi tiles and ridges	UG x 11,460,000=
-	Cost of plumbing correction	UG x 961,000=
-	Cost of electrical correction	UG x 250,000=

		UG 64,271,000=
		==============

Counsel for the defendant largely submits around the delay in completing the renovation work. He refers me to the case of

Walji Jetha Kanji & Others **V** **Elias Freed** [1959] EA 1071

Where it was held by the Court of Appeal that ordering additional work set the time completion time at large but the appellants were under an obligation to complete the work within a reasonable time.

This also appears to be the position of taken the learned authors of Halsbury's Laws of England 3ed Vol 3 p. 443 at para 840.

Counsel for the defendant/counter-claimant submits that the contract was delayed by 10 months. The defendant says because of the delay she was unable to rent out the house at US$2,000- per month which at the time would translate to a loss of Ushs.5,160,000/= per month or Ushs.51,600,000/= in 10 months. I however think the exchange rate of US$ 1 = Ushs.2,500/= used is

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too high to arrive at this figure. The court from its own experience believes that the exchange rate was lower at the time.

Counsel for the plaintiff/counter – defendant argues that the delay was caused by the defendant and so cannot claim the 10 months.
I have considered these rather brief submissions as to the delay. The 10 months comes about because the BBL report in reviewing the project history states that

> *"…the project was substantially completed on 6th September 2003 ten months late…"*

The report however does not apportion responsibility for the delay.

I agree with the Jetha Kanji Case (supra) that in such a situation a reasonable time for the completion of work should imputed. Counsel for the defendant only sticks to the contract completion date which in the words of the Jetha Kanji Case (supra) was now *"at large"* and therefore could not hold.

I have read through all the documents submitted as evidence to court to see if a reasonable completion time can be discerned. There are 3 documents in this regard.

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1- There is exhibit D1 a letter dated 9th December, 2002 from the plaintiff that puts the new completion date at 15th January 2003 provided no other variations are instructed.

2- There is exhibit D2 another letter dated 23rd January 2003 canceling the completion date of 15th January 2003 because of instructions an additional works.

3- Site meeting minutes of 15th February 2003. Under minute 1.0 *"work program"* the contractor gave a new completion date of 9th March 2003. This is the last date that I can find.

Given that I found that there were variations, I think it is reasonable to take the 9th March 2003 as the final completion date as the minutes do not show any protest from the defendant. The minutes simply show;

> *"…The client requested an additional work program reflecting weekly site progress…"*

I accordingly find that 9th March, 2003 was a reasonable time to complete the renovations and additional works. That means there was a delay of 6 months going by the BBL report completion date of

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6th September 2003. Since there is evidence that the defendant was able to immediately rent out the house to Uganda Telecom Limited (UTL) at US$2000 per month that means the defendant incurred a foreseeable loss of US$12,000 which I award to her payable in United States Dollars or its equivalent in Uganda Shillings at the prevailing exchange rate offered by a commercial bank.

As to the claim for the cost of Kajjansi tiles, as I have found earlier in my judgment there is no evidence on record that the defendant had to buy the Kajjansi tiles to replace the Allied Clays tiles put on the roof of her house. This is a special damage and has to be proved specifically. This has not been done so I do not award it.

The plaintiff claims Ushs.961,00/= as the cost of electrical corrections and Ushs.250,000/= for plumbing corrections being a total of Ushs.1,211,000/=.

Unfortunately the evidence adduced in this area was not very detailed. Be that as may, the defendant provided court with a hand written quote for electrical and plumbing work from one Andama Chandim for the sum of Ushs.1,211,000/=. The electrical part of the quotation has the following items charged (variously).

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1- A change over switch

2- Underground armoured cable

3- Cable glands

4- Cable lugs

5- Remote controlled electrical door bell

The plumbing part has the following item

1- Connecting and installation of hot and cold water to washing machine.

I have gone through the original scope of works and clearly it did not include the above work done by Mr. Chandin. I have also gone through all the various variations (a momoth task!) quoted and site meetings minutes that were put in evidence. The above work done by Mr. Chandin in my view was not a variation that was discussed. I therefore find that the claim for electrical and plumbing variations has not been proved.

That is where the defendant/counter-claimant's counter-claim, as pleaded stands; as the rest of the particulars of breach are not quantified in monetary terms.

The defendant/counter-claimant also prays for damages for breach. No quantum was given to court. Court shall then exercises its

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discretion to award Ushs.2,000,000/= as general damages on account of the delay to the defendant/counter-claimant.

As to interest I hereby award the defendant/counter-claimant interest of 4% p.a. on the award of US$12,000- from the 9th March, 2003 until payment in full.

I also award the defendant/counter-claimant interest of 8% p.a on the general damages from the date of judgment until payment in full. I also award the defendant/counter-claimant the costs of the counter claim.

....

Geoffrey Kiryabwire

JUDGE

Dated: ....

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23/01/08

9:15am

Judgment read and signed in Court in the presence of;

- O. Kambona for plaintiff
- A. Ssekatawa for defendant
- Rose Emeru – Court Clerk

……………………………………

Geoffrey Kiryabwire

JUDGE

Date: 23/01/08

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