

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HCTOO-CCCS4782005**

SETRAMACO INTERNATIONAL LTD::::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. BOARD OF DIRECTORS/HEADTEACHER

LUBIRI SECONDARY SCHOOL

2. KIYEGA ROBERT ::::::::::::::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

JUDGMENT

The Plaintiff company brought this suit against the first Defendant senior secondary school and the school’s Deputy Headmaster for the recovery of Shs. 19,152,246/= for breach of contract. The case for the Plaintiff is that in May 2005 it was contracted on the strength of two local purchase orders (hereinafter referred to as “LPO”) to supply spares for and repair the school’s boilers. The said spares were supplied and boilers repaired but the Defendants refused to pay the invoiced amount for the work done.

The defendants deny that there was a contract between them and the Defendants. The Defendant’s in the alternative pleaded that if there was a contract it did not conform to the school’s procurement procedures. In the further alternative the Defendant’s plead that the spares supplied did not conform the alleged contract’s specifications.

At the pre-trial scheduling conference the parties agreed to engage The Uganda National Bureau of Standards (hereinafter referred to as “UNBS”) as a neutral expert to establish whether the alleged contracted work was performed as contracted for. This was because the alleged contract was fairly technical involving electrical engineering work. The following

terms of Reference were agreed to

1. Whether the Plaintiff supplied spare parts for the six boilers in accordance with LPOs Nos. 1941 and 1942 and installed them?
2. Whether the six boilers were repaired in accordance with the contract.

The neutral expert was given 45 days to carry out its investigations and report to court. The parties were to share the costs 50/50. As it transpired the Plaintiff unilaterally pulled out of this exercise but the Defendants proceeded to engage the neutral. This was a set-back for the management of this case but since a consent order was not extracted court treated the neutral expert as a witness for the Defence.

The parties agreed to the following issues for trial;

1. Whether the Plaintiffs supplied spare parts for the six boilers in accordance with the local purchase orders numbers 1941 and 1942 and installed them?
2. Whether there was a valid contract between the parties
3. Remedies.

Mr. J. P. Baingana appeared for the Plaintiff while Mr. P. Musoke appeared for the Defendant. I shall first deal with the issue number 2 before addressing the rest of them.

Whether there was a valid contract between the parties

The case for the Plaintiff is fairly straight forward. It is their case that they were issued two local purchase orders (LPOs) by the first Defendant namely No. 1941 worth Shs.4,478,428/= and 1942 worth 14,673,818/= making a total of Shs. 19,152,246/. The Plaintiff then delivered the spares and installed them in the boilers. In this regard the Plaintiff issued Delivery notes No. 1209 and 1210 which were acknowledged by the Defendants. The plaintiff invoiced for the work but has to date not been paid. Mr. Robert Wasike DW1 the plaintiffs Managing Director testified on behalf of the Plaintiff.

The Defendant called witnesses namely; George Wamala (DW1) the Headmaster of the first Defendant, Ms, Margret Namubiru (DW2) the Deputy Headmaster (administration) of the first Defendant, Eng. Wassanyi Sserukenya a Board Member of the first Defendant. The Second Defendant also a Deputy Headmaster of the First Defendant did not give evidence. It is the case for the Defendants that there was no valid contract because the first Defendant being a Government School is subject to the provisions of The Public procurement and Disposal of Assets Act of 2003 (PPDA ACT) with regard to the procurement of services such as are the subject of this dispute which Act was not followed.

Counsel for the Defendant submitted that S.26 of The PPDA Act and Reg. 41 of the regulations there under made the Headmaster (DW 1) the accounting Officer for purposes of the Act with the legal responsibility to initiate all procurements for the school and to sign the contracts. In this case it is further submitted by Counsel for the Defendants that no procurement cycle was conducted in this dispute according to the mandatory provisions of The PPDA Act and the Headmaster did not sign the contract thus making the contract illegal and unenforceable.

I have addressed my mind to the evidence on record and to the submissions of both Counsels on this issue. To my mind at the heart of this issue is whether if the provisions of The PPDA Act are not followed a resultant service that is provided or contract that is entered into, is illegal and unenforceable?

Mr. Wamala the Headmaster testified that he received the Defendant's Managing Director in his office in April of 2005 when the Defendant came to inquire whether he could repair the school's boilers. Mr. Wamala testified that he requested the Second defendant his deputy (in charge of academics) to take the Defendant to see the Boilers and thereafter to make a report

which he would use to start the procurement cycle as expected under the PPDA Act through the school's contracts committee. Mr. Wamala testified that he was surprised to see that a LPO was issued from the school without passing through the required procurement procedures which LPO he did not sign as he was out of the school at the time. He testified that the Second Defendant his deputy and an accounts clerk signed the LPO instead of him and the School Bursar which was irregular. Mr. Wamala testified that he only got to learn of the work when the Plaintiff brought to him its invoices for payment which he rejected and ordered that the boilers not be used while this dispute subsisted.

Counsel for the Plaintiff submitted that the non compliance with the PPDA Act does not vitiate a contract and the only action that the first defendant can take in these circumstances is to discipline the officials of the school who failed to comply with the procurement law and not the innocent supplier. However in this case there was no evidence that the second Defendant was ever disciplined for not following the PPDA Act. Actually by the Second Defendant did not testify so this area was not well covered in court probably that was the defence strategy. Counsel for the Plaintiff moots the position that the application of the PPDA Act is an internal matter for the defendants and cannot be used against the Plaintiff who did the work.

It is not contested that LPOs numbers 1941 (Exh. D3) and 1942 (Exh. 4) were issued by the first Defendant school. There is no evidence on record that they were forged and or fraudulently issued. The only quarrel that Mr. Wamala had was that the correct procedure was not followed. Ms Namubiru the Deputy Headmistress (Administration) during cross examination conceded that that she knew the boilers were being worked on. Eng. Sserukenya a Board Member of the defendant school testified that the Headmaster brought this problem before them at the Board. He testified that the Board asked the headmaster whether the boilers were working. When the Board was told that the boilers were not working then the Board directed that the contractor be summoned to certify and justify his work.

It would appear to me that looking at the facts on the whole it is true that the second defendant went ahead to procure the services of the plaintiff on behalf of the school without following the correct procedure and or getting the express consent of the Headmaster. The

Plaintiff worked with the second Defendant who was the deputy of the Headmaster and who was introduced to him by the Headmaster. Without the evidence of the second Defendant it is not clear what the scope of his instructions were. There is also further evidence that part of this transaction was done when the Headmaster was not at the school. The LPO by its very wording required it to be approved and signed by the School's Headmaster and in this case the two LPOs were signed and stamped by the school's deputy Headmaster.

The author Robert Lowe in his book **Commercial Law** 5th ED Sweet and Maxwell pages 25 to 26 writes

'.. in the vast majority of cases... the principal authorizes the agent to do an act and the agent does it. Sometimes however, the power arises as a result of the conduct of the principal/ which creates the appearance of authority a/though it does not in fact exist. If the principal induces a third party to believe that the agent has authority and the third party relies and acts upon this so called "apparent authority" the principal/ will be estopped from denying the authority and will be liable accordingly..'

On the evidence before me I find that it is safe to find that the second defendant was clothed with apparent authority by the Headmaster to engage the Plaintiff to repair the boilers and that is what he did.

As to the PPDA Act I find in it no express provision that states that non compliance with the Act makes a contract illegal and or indeed unenforceable.

In answer therefore to the first issue I find that there was a valid contract between the Plaintiff and the Defendant.

Whether the Plaintiffs supplied spare parts for the six boilers in accordance with the local purchase orders numbers 1941 and 1.942 and installed them?

It is not in dispute that the Plaintiff supplied spare parts as evidenced in two delivery notes namely; Nos. 1209 and 1210 (Exh. P 2 and 3 respectively). The delivery notes were counter signed by the second Defendant the Deputy Headmaster on behalf of the school. A careful look at the delivery notes will show that delivery note No. 1209 corresponds with LPO No 1942 while delivery note No. 1210 corresponds with LPO No. 1941. The dispute as I see it is more technical. This is where technical expert evidence was necessary. As it is the Plaintiff did not submit to a joint expert which was not very helpful to court.

The court none the less received expert evidence from the Uganda National Bureau of Standards (UNGS) through its officer Mr. Bernard Mukwaya an electrical engineer. The report of the UNBS (Exh. E. 1) stated as follows;

“6) Conclusion:

- i. *There was no evidence to show that ii (eleven) heating elements had been supplied and installed.*
- ii. *There was evidence showing that 18 pilot lamps had been supplied and installed.*
- iii. *Although there was evidence that 6 isolators had been supplied and installed, they were substandard (of inferior quality) and did not conform to the required specifications in the LPOs.*

- iv. *There was no evidence to show that 18 switches had been supplied and installed*

- v. *Although there was evidence to show that 18 fuses were supplied and installed in the 6 switch boxes, the fuses were substandard and did not meet the specified requirements*

7) Recommendations.

It is recommended that while considering the case... the High Court (commercial Division) takes into account the following:

- a) *That 11 heating elements, 18 switches be regarded as not having been supplied and installed.*

- b) *That 18 pilot lamps be regarded as having been supplied and installed*

- c) *That the 6 isolators and 18 fuses in the switch boxes though supplied be regarded as not meeting the specified requirements and therefore not fit for use in the boilers...”*

Engineer Sserukenya a Board member of the school and who gave technical advice to the Board on this dispute also testified that no new heating elements had been supplied because when he inspected the boilers he found them to be open circuited. He further testified that 32 amp isolators were supplied instead of 60 amps as specified in the LPO.

Counsel for the Defendant submitted that this was a “*supply and fix*” contract and yet the plaintiff admitted that he changed some of the specifications in the LPO. He further submitted that as a result of the changes the goods supplied did not correspond to the description in the LPO contrary to S. 14 of the Sale of Goods Act and also were not reasonably fit for the purpose for which they were bought contrary to S. 15 (a) of The sale of

Goods Act.

Mr. Wasike (PW.1) an engineer and the Managing Director of the Plaintiff conceded that he changed the specifications of the isolators from 60 amps to 32 amps but defended his move on the grounds that 32 amps was the original rating for the isolators in the first place. Mr. Wasike further testified that he had notified the second defendant about these changes. Mr. Wasike testified that 4 boilers were not working but when he installed the spares all 4 of them starting working. He further testified that he commissioned the boilers after repair in the presence of the second Defendant, the Deputy Headmistress and the bursar. He further testified that when the Headmaster refused to pay him he was told to remove his spares which thought was unfair.

Mr. Wasike faulted the UNBS report on the grounds that he was not interviewed before it made its findings. Furthermore the report was inaccurate as to the number of heating elements per boiler which were 9 and not 3 as indicated in the report.

Counsel for the plaintiff submitted that Mr. Wasike had executed his work professionally and that the boilers had been commissioned so the plaintiff had to be paid. He further submitted that under S.35 of the sale of Goods Act the school was deemed to have accepted the goods as they were delivered to the school and they were estopped from denying this.

I have perused the submissions of both Counsel and the evidence before the Court on this issue. It is clear from the evidence that this was a contract involving both the supply of goods and services. In this particular case there was no formal written contract although there was an exchange commercial documentation to that effect. There was therefore a lot that was done orally between the parties. That notwithstanding the law will imply some terms and conditions to such contracts under the Sale of Goods Act (Cap. 82 Sections 9 to 16).

One such implied condition relates to the goods being reasonably fit for the purpose under section 15 (a) of the sale of Goods Act. There is evidence by way of delivery notes that required spares were supplied to the school. There is a discrepancy relating to the isolators that were supplied. However the evidence of the parties is at variance when it comes to installation and quality. The UNBS report significantly faults the work done by the Plaintiff

Company. The only item the UNBS report does not fault is the supply and installation of 18 pilot lamps. The rest of the items were either not installed or were installed but were substandard. Even though the Plaintiff was not interviewed before the report was released for their input, certain points are glaring. First was the non cooperation of the Plaintiff to deal with UNBS in the first place after originally agreeing before Court to do so. Secondly the Plaintiffs testified that they substituted the 60 amps isolators with the 32 amps on professional grounds and with the oral consent of the second Defendant. However the Plaintiff's two tax invoices of the 23 May 2005 still show that they charged for the 60 amps isolators when they admit to have supplied 32 amp isolators. Whereas I agree with the Counsel for the Plaintiff that S.35 of The Sale of Goods Act deems a buyer to have accepted goods inter alia when those goods are delivered to the buyer, this should be read together with S. 34 of the same Act where the same buyer must also be afforded a reasonable opportunity of examining those goods for purposes of ascertaining whether they are in conformity with the contract. In a contract such as this one it is legally simply not enough for the supplier to supply the spares and get a delivery note signed for the supply. When the Board detailed one of its members with technical expertise to examine what the Plaintiffs had done they found it to be wanting and so did the UNBS. I find the UNBS report to largely be more credible when compared to the explanations given by the Plaintiff.

I accordingly find that apart from the 18 pilot lamps the rest of the items were not supplied and installed in accordance with the LPOs Nos. 1941 and 1942.

Remedies.

The Plaintiff prays for judgment in the sum of Shs.19,152,246/= (his invoice price), general damages and interest at 30% from the date of breach until payment in full.

I have already found that of the invoiced amount the Plaintiff is only entitled to the payment for 18 pilot lamps which is ShS.216,000/= which were delivered and correctly installed and they can be deemed to have been accepted under S. 35 of The Sale of Goods Act.

As to general damages Counsel for the Plaintiff did not address Court on the issue so in my discretion, I shall award the sum of Shs.84,000/= for nonpayment.

I shall award the Plaintiff interest at 21% p.a. on the Shs.216,000/= from the 23rd May 2005 until payment in full and 8% on the general damages from the date of Judgment until payment in full.

As to costs since most of the Plaintiff's claim has largely been disallowed I will only award him one third of its taxed costs.

That is the Judgment of the Court.

Justice Geoffrey Kiryabwire

JUDGE

Date: 20/01/09