THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION CIVIL SUIT NO.120 OF 2009

BIFRA INVESTMENTS LTD::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

ROM EAST AFRICA (U) LTD::::::::::::::::::::::::::::::::::DEFENDANT

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGEMENT

The plaintiff sued the defendant for special damages of **US$ 86,587.8,** general damages, interest and costs arising from breach of contract. On or about 26th May 2008, the defendant who was contracted by Uganda Telecom Limited (UTL) to erect GSM Sites subcontracted the plaintiff to erect four of the sites at Mulago, Seeta, Nkokonjeru and Zirobwe. The defendant issued four Local Purchase Orders (LPOs) on 26th May 2008 in respect of the civil works to be done by the plaintiff in each of the four sites indicating the nature of work to be done, the amount to be paid and the payment terms. For Mulago site, the amount stated in the LPO was **US $ 17,838** while for Nkokonjeru, Seeta and Zirobwe it was **US $ 28,199** for each of the sites. The payment term for each of the LPOs was stated as 20% down payment with P.O. and 80% on site PAC by UTL.

The plaintiff embarked on the work and 20% down payment was made to it as per the LPO for Mulago, Seeta and Nkokonjeru sites. Work at the Zirobwe site was not done save for clearing the site and so it appears the 20% down payment was not made. The plaintiff completed work at Mulago and Seeta sites and presented two invoices to the defendant in respect of the work done in those sites. For the Nkokonjeru site which was not completed, an invoice in respect of the work done was also presented to the defendant pending fence installation whose materials were to be provided by the defendant. The invoices presented were not honoured by the defendant hence this suit which was filed on 8th April 2009.

The defendant filed a written statement of defence where existence of the sub-contract was not denied. The defendant however alleged that the plaintiff entered into that contract well knowing that the payments were coming from UTL and on condition that it would bear with the delays in payment. It was further alleged that since the plaintiff did not complete work at the Nkokonjeru site, no further payments could be made by UTL. As regards Zirobwe site, it was contended that the plaintiff abandoned the site after clearing the bush because it did not have the equipment to

excavate the rock which was at that site. That consequently the defendant was forced to award the contract to another contractor after waiting for a period of three months.

No specific mention was made by the defendant on work at Mulago and Seeta sites apart from a general allegation that the plaintiff failed to perform the agreed works on the respective sites with the agreed time lines and specifications of the defendant's principal resulting into further delay in processing payments.

It appears during the mandatory court annexed mediation the parties expressed a desire to settle the matter out of court and a private meeting was held by the parties where they reached an agreement. The plaintiff's counsel vide a letter dated 12th October 2009 informed court of this development and prayed that the defendant who had failed/and or refused to sign the consent agreement be summoned to show cause why the draft agreement could not be signed and effected. In that letter, counsel also informed court that some payments were made by the defendant to the plaintiff under the consent agreement to the tune of **UShs. 76,481,500=** which was converted to **US$ 35,572.70** and a balance of **US$ 32,296.7** plus cost of **Shs. 3,200,000=** was stated to be outstanding. The draft consent judgment and copies of the cheques issued to the plaintiff were attached.

Court was later informed that failure to sign the consent agreement aborted the amicable settlement process and so the matter was fixed for scheduling. It appears the plaintiff failed to serve the defendant in the normal way because it had changed business address and its counsel had lost touch with it. An application for substituted service was successfully made and a hearing notice subsequently advertised in the newspaper twice but the defendant did not appear on those two occasions. This prompted counsel for the plaintiff to apply to proceed ex parte and his application was granted.

At the scheduling, three issues were framed, namely;

1. Whether there was breach of contract.
2. If so, whether the defendant was liable.
3. What remedies are available to the parties?

At the hearing, the plaintiff's only witness was its Managing Director Mr. Biryomumaisho Francis. He testified about how the contract was procured using four LPOs which he said was a common form of agreement used in the construction industry when the contract is not very big. That when an LPO is issued, it is a confirmation that work should start. He further testified about the details of work his company was supposed to do as well as the amount of money to be paid for each site and the payment terms as already indicated herein above. He also testified about completion of work at Mulago and Seeta sites as well as the work done at Zirobwe site for which the defendant had agreed to pay **US$3,180**.

He also testified about developments that took place subsequent to filing of this suit. That following the complaints made by the defendants about completion of the work at Nkokonjeru site, he met with the defendant and it was agreed that his company should complete the work. That the work was completed, inspected and approved by the defendant's staff. That a letter was written by the plaintiff to inform the defendant about the completion and photographs showing different stages of the completed work were attached as proof. A letter dated 17th June 2009 signed by the witness in his capacity as Managing Director of the plaintiff company was exhibited as P5 together with the photographs that were attached.

The witness further testified that out of the **US$ 74,931.3** originally demanded, the defendant had since the filing of this suit paid a sum of **UShs. 55,000,000=** in April 2009 and **Ushs. 76,481,500=** leaving an outstanding balance of **US$ 32,229.6** which his company was claiming. At the end of his evidence, court asked the witness to confirm the total amount of money his company had received and whether the balance claimed included Value Added Tax (VAT) and he responded as follows:-

> *"We have received **US$ 35,572.00.** After getting difficulty in recovering the money what is claimed now does not include VAT. It is the balance as per the LPOs".* (Emphasis added).

At the conclusion of hearing evidence, counsel requested to file a written submission and he was allowed to-do so. In his submission, he addressed the first and second issues together basing on the testimony of the witness. He concluded that the defendant's conduct at all material times showed that its management had substantially accepted the plaintiff's works save for the incomplete Nkokonjeru site which the plaintiff subsequently completed. That the defendant reneged on its obligation to pay for the works and the payments so far made are a result of this suit. That consequently, the defendant breached the contract and it is liable to the plaintiff for that breach.

On the third issue regarding remedies available, counsel submitted that the payments so far made by the defendant namely; the 20% down payment whose amount he did not disclose, **Shs. 55,000,000=** and **Shs. 76,481,500=** converted at the respective prevailing rate at the time they were paid all total to **US$ 35,565** leaving an outstanding balance of **US$ 32,229.6** which the plaintiff was entitled to as special damage. He submitted that since this claim was not challenged it should be awarded to the plaintiff or the equivalent in Uganda Shillings at the prevailing exchange rate.

On general damages, he prayed that **Shs. 20,000,000=** be awarded to the plaintiff taking into account the fact that it was tossed up and down in following up the payment until it resorted to court for redress where the defendant did not even show any remorse.

Counsel also prayed for interest at 25% per annum on the special damages from September 2008 when the payment ought to have been made till payment in full. He further prayed for interest on general damages at court rate from the date of judgment and costs of the suit.

It is not in dispute that the parties entered into a contract where the plaintiff was to erect the four GSM Sites. The defendant in its written statement of defence did not deny completion of work at Mulago and Seeta sites. What is in dispute is the completion of work at Nkokonjeru and the amount of work done at Zirobwe for purpose of determining its value.

In dealing with the first and second issues, I looked at the pleadings and the evidence adduced and concluded that the work at Mulago and Seeta sites were completed to the satisfaction of the defendant and that is why the allegations in the plaint in respect of these sites were never specifically replied to in the written statement of defence. On these two sites I find that the plaintiff did the work as per contract but according to the pleadings and the evidence led, payments were not made for the work as per the terms stated in the LPOs. Breach of contract is defined in ***Black"s Law Dictionary 7th Edition*** at ***page 182*** as:-

> *"Violation of a contractual obligation, either by failing to perform one's own promise or by interfering with another party's performance".*

In view of that definition, I find that the defendant breached the contract by not paying the 80% balance in accordance with the agreed terms and it is liable to pay the plaintiff if at all the payments so far made after this suit was filed did not offset the amount claimed.

On Nkokonjeru site, I have looked at the evidence adduced by the plaintiff on the work done particularly the letter from the plaintiff to the defendant communicating completion of work and the photographs attached as proof. I do not have any reason to doubt that the work was subsequently completed after the filing of this suit. It therefore follows that the defendant was under no obligation to pay for the balance of 80% of the contract price at the time of filing the suit because work had not yet been completed to the satisfaction of the client as per the terms in the LPO. As such, I find no breach of the contract by the defendant at that time. However, upon subsequent completion of the work, I find that the 80% balance became due and the defendant would be liable to pay the plaintiff if at all the amounts so far paid did not cover it.

As regards Zirobwe site, the plaintiff contended that it cleared the site and excavated the rock that was there but was stopped by the defendant from continuing with the work. The defendant in its written statement of defence denied that allegation and contended that the former only cleared the site but failed to excavate the rock because it lacked the equipment. Further that the defendant had to allocate that site to another contractor after waiting for three months without any work being done by the plaintiff. The plaintiff did not file any reply to the written statement

of defence to controvert this allegation. Instead it was testified and submitted for the plaintiff that the defendant agreed to pay the plaintiff **US$ 3,180** for the work done. No evidence was led to show how that figure was arrived at neither was any document exhibited to prove that the defendant had agreed to pay that amount.

I am more inclined to believe what was stated by the defendant that the plaintiff only cleared the site but did not excavate the rock. I therefore find that there was no breach by the defendant. How can it pay for work which was clearly not done? Instead I would find breach on the part of the plaintiff who failed to do the work as per the contract and if there was a counter-claim in that respect, I would have found the plaintiff liable for the breach.

Following my findings that the defendant is liable to pay the plaintiff in respect of work done at Mulago, Seeta and Nkokonjeru sites, I will now look at the remedies available to the plaintiff as the last issue taking into account the fact that some payments were made after the filing of this suit.

As regards the prayer for special damages, it is trite law that special damages must not only be specifically pleaded but must be strictly proved. (See: ***Kyambadde v Mpigi District Administration (1983) HCB 44***). In ***WestLink Uganda Limited v Magezi Charles HCCS No. 140 of 2001*** (unreported) it was observed that this principle applies to defended as well as undefended suits. I would hasten to add that for undefended suits like this one where the benefit of cross-examination of the witnesses is lacking, a sixth sense would be required to discern authenticity of each claim.

Applying that sixth sense, I have critically examined the amount so far paid vis-a-vis the amount being claimed as outstanding and I find some serious disparity. The witness testified that the plaintiff was given 20% down payment for Mulago **($3,567**), Seeta **($5,639**) and Nkokonjeru **($5,639**) all totaling **US$14,845** which he said was paid in U-Shillings to the tune of **16,381,914=**. He testified that nothing was paid for Zirobwe.

He further testified that upon filing the suit, the defendant made two payments. The first one of **Shs. 55,000,000=** was paid using two cheques of Shs. 20,000,000= each and one cheque of 15,000,000=. That the cheques which were all dated 4th April 2009 were received by the plaintiff's lawyer on the 21st April 2009. That the second payment of **Shs. 76,481,500=** were made using 4 cheques dated 3rd July 2009 three of which were for **Shs. 20,000,000=** each and the forth one for **Shs. 16,481,500=.** He then concluded that the payments so far made converted at the respective prevailing foreign exchange rates at the time they were paid all total to **US$ 35,565** leaving an outstanding balance of **US$ 32,229.6.**

I wish to point out that while the payments as per the LPOs were quoted in United States Dollars, these payments were actually made in Uganda Shillings. This posed a big challenge to this court

given that payments were made at different times and there have been fluctuations in the foreign exchange rate since then. Both the witness and counsel did not help court by indicating the exchange rates they used to convert the payments made to US dollars. But so as to be guide in order to arrive at a just, fair and equitable decision, I took the initiative to search the Bank of Uganda Archives on www.bou.org.ug for the prevailing foreign exchange rates at the different times payments were made.

I also critically observed that the plaintiff's exhibits P7 (i) (being cheque payment voucher dated 10/06/2008 prepared by the defendant company for down payment on account in respect of Zirobwe, Seeta, Nkokonjeru and Mulago sites) and P7 (ii) (being cheque payment voucher dated 27/08/2008 prepared by the defendant company for final payment-down payments for Seeta, Mulago, Nkokonjeru) show that the plaintiff received **Shs. 12,000,000=** and **Shs. 16,381,914=** respectively on the said dates.

My simple understanding of this is that the plaintiff received the 20% down payment on two installments. The first installment was **Shs. 12,000,000=**and the second installment was **Shs. 16,381,914.** In fact the second voucher indicated that the total amount was **Ushs. 28,381,914** and the amount earlier advanced was **Shs. 12,000,000=** leaving a balance of **Shs. 16,381,914=** on the down payment which was paid through that voucher. Both the testimony of the witness and the submission of counsel only acknowledged payment of **Shs. 16,381,914=** but were deliberately silent on the first payment of **Shs. 12,000,000=**.

This concealment of vital evidence in my view was done in bad faith with the intention of cheating the defendant company merely because it was not available in court to challenge the claim. I believe it was the invisible hand of God that prompted counsel for the plaintiff to exhibit this voucher in order to expose the ill intention of the plaintiff. Since credibility of the plaintiff's witness is now in doubt because his testimony does not tally with the documents exhibited in support of the plaintiff's claim, I will rely mainly on the documents exhibited. Exhibit P7 (i) and Exhibit P7 (ii) as indicated above show that a total of **Shs. 28,381,914=** was paid to the plaintiff as 20% down payment.

Using my simple arithmetic, I have added **Shs. 28,381,914=** plus **Shs. 55,000,000=** plus **Shs. 76,481,500=** and found a total of **Ushs. 159,863,414=** as the amount paid in total in Uganda Shillings. The claim as testified by the witness is now based on the amounts in the LPOs since the claim for VAT was abandoned. The total amounts in the LPOs for the three sites that were completed are **US$74,236** (arrived at by adding **US$ 17,838** (Mulago), **US $ 28,199** (Seeta) and **US $ 28,199** (Nkokonjeru)). In order to offset the amount so far paid from the total contract sum for the three sites as per the LPOs, I have converted the amounts paid in Uganda Shillings to US dollars at the respective foreign exchange rate at the time of payments as indicated in the table below.

No. of installments	Date of payment	Amount Paid in UShs.	US $ Exchange Rate Used	Amount Paid in US$
First	10/06/2008	12,000,000=	1593.60	7,530.12
Second	27/08/2008	16,381,500=	1632.81	10,032.70
Third	4/04/2009	55,000,000=	2133.45	25,779.84
Forth	3/07/2009	76,481,500=	2052.05	37,270.78
TOTAL				**80,613.44**

If the total of **US$ 80,613.44** paid by the defendant is deducted from the amount claimed of **US$74,236** as per the LPOs there would be a net surplus of **US$ 6,377.44** representing excess payment over and above what is claimed! Even if for argument sake, the **Shs. 12,000,000=** is not included, still the total amount paid would be **US$ 73083.32** and if this is offset from the amount claimed the outstanding balance from the plaintiff would be **US$ 1,152.68** as opposed to the **US$ 32,229.6** being claimed.

I have failed to comprehend the exchange rate used by the plaintiff to convert the **Ushs. 147,863,000=** (which was admitted to have been paid in total) so as to get its equivalent as **US$35,565**. My finding based on the above calculation is that the plaintiff is not entitled to any special damage of **US$ 32,229.6** as claimed or at all. On the contrary if there was a counter claim I would have ordered the plaintiff to refund the **US$ 6,377.44** paid in excess.

Be that as it may, I now turn to consider the plaintiffs prayer for award of general damages to the tune of **Shs. 20,000,000=**. According to ***Black's Law Dictionary*** (supra);

> "*Every breach gives rise to a claim for damages, and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages*".

I have already made a finding on the first and second issues that there was breach by the defendant in respect of two sites which as indicated above was remedied by payments being made about nine months from the time of breach in September 2009 but hardly three months after the suit was filed. In the circumstances, it is my considered opinion that a nominal damages of **Shs. 5,000,000=** would be adequate. This amount should be offset from the excess payment of **US$ 6,377.44** already received by the plaintiff from the defendant. I make no order on the prayer for interest on general damages because the money is already with the plaintiff.

As regards costs of the suit, I wish to point out that this suit should have been withdrawn after the last payment was received in July 2009. Its continuance was an abuse of the court process motivated by an ill intention to gain dishonest and unjust enrichment from the defendant. If I

were to award cost, I would do so from the time of filing the suit up to July 2009 when the last payment was made. However, I am not inclined to award cost because even after offsetting the **Shs. 5,000,000=** awarded as general damages, the plaintiff will still remain with approximately **Shs. 11,900,000=** (using today's exchange rate of **US$ 2650** per shilling) which can offset its costs.

In the final result, I enter judgment in favour of the plaintiff for only general damages of **Shs. 5,000,000=** which for avoidance of doubt is to be offset from the excess payment. I make no order as to costs.

I so order.

Judgment delivered in draft in open court in the presence of Mr. Kenneth Tumwebaze for the plaintiff and Ms. Ruth Naisamula-Court Clerk.

Hellen Obura
JUDGE
30/06/2011