

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

**HCT - 00 - CC - CS - 034 – 2010**

**MOREX CONTRACTORS ..... PLAINTIFF**

**Versus**

**NAKAWA DIVISION LOCAL GOVERNMENT ..... 1<sup>ST</sup> DEFENDANT**

**KAMPALA CITY COUNCIL ..... 2<sup>ND</sup> DEFENDANT**

**BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE**

**J u d g m e n t**

The plaintiff MOREX CONTRACTORS LTD filed this suit against the defendants NAKAWA DIVISION LOCAL GOVERNMENT and KAMPALA CITY COUNCIL (KCC) for breach of a road construction contract in the first defendant's Division. The first defendant is a local Government and City division within the second defendant City Council.

The plaintiff's case is that on the 7<sup>th</sup> of July 2006, the plaintiff was awarded a tender by the 2<sup>nd</sup> defendant for single surface dressing of part of Mutungo tank hill/church Road measuring 500 metres, in the 1<sup>st</sup> defendant's division, under contract Identification No. LGDP2/NAK-DIV/DS-02/05/2006 for the contract sum of Ushs 147,593,050/=.

At the time of filing the suit the plaintiff's claim against the defendants was UShs 79,054,270/= being the unpaid certificates for work done and loss of future income.

The case for plaintiff is that it commenced the work on the 14<sup>th</sup> December, 2006 and the first defendant issued an interim certificate No 1 for the payment for the payment of Ushs 40,367,200/= with a retention of Ushs 4,036,720/=. Subsequently on the 29<sup>th</sup> March 2007 another interim certificate No. 2 was also approved for payment for the sum Ushs 35,787,000/= with a retained figure of Ushs 3,578,700/=.

Interim certificate No 1 was partially paid leaving a balance of Ushs 2,049,039/= and the retention. Interim certificate No 2 was paid late (less the retention) and work came to a stand still. Eventually a new contractor was hired by the defendants to complete the work and hence this suit for breach.

For the defendants it is averred that the plaintiff has no cause of action against them. The first defendant avers that the contract was made between the Plaintiff and the second defendant and not them.

The 2<sup>nd</sup> defendant contended that the plaintiff does not owe any money and that the plaintiff's works were never completed. Furthermore, that the plaintiff was paid all the money owing, for the quantity of work carried out, based on the quantum meruit principle.

The 2<sup>nd</sup> defendant in further alternative contended that the plaintiff breached the contract when it abandoned the site, and purported to revise the contract contrary to the terms in the agreement and the procurement laws.

At the Pretrial/scheduling conference of the case, judgment on admission was entered against the defendants for the sum of Ushs 2,049,039/= being the balance on certificate No. 1, which was deducted and withheld by the first defendant.

The parties then agreed to the following outstanding issues for trial;

1. Whether the retention of Ushs 7,615,420/= is payable to the plaintiff.
2. Whether there was breach of contract.
3. What are the remedies available to the parties?

At the hearing, the plaintiff was represented by Mr. Kavuma while the defendants were represented by Mr. Sendege. The plaintiff called one witness Mr. Mutazindwa the Director of the plaintiff, while the defendant called two witnesses; Mr. Higenyi (DW 1) and Mr. Jemba (DW 2).

**Issue one: Whether the retention of Ushs 7,615,420/= is payable to the plaintiff.**

The case the plaintiff is that the retention sums for the first and second interim certificates worth Ushs 7,615,420/= are due and owing to them.

Counsel for the plaintiff submitted that the retention was payable to the plaintiff in accordance with Clause 48 of the contract. Furthermore, that the defendant's engineer in a letter dated 29<sup>th</sup> March 2007 indicated that 51% of the work had been completed as per the specifications. Counsel for the plaintiff submitted that there was no justification for the withholding of the retention, when the contract between the parties had been terminated and a new contract awarded to a different company, hence the outstanding retention is of the plaintiff's unpaid accrued income.

Furthermore, that even if the plaintiff had breached the contract, then the defendant's engineer was mandated to issue a certificate under Clause 60 of the contract, notifying the plaintiff of any defect in the work and specifying the value of the work however to date, no certificate had been issued.

Counsel for the plaintiff further submitted that when a contract ends prematurely, irrespective of who is guilty of breach, the contractor has to be paid any outstanding monies accruing under it.

Mr. Higenyi (PW 1), the Senior Assistant Town Clerk of the first defendant and Edgar Jemba (DW 2), the Civil Engineer for the First defendant, testified that the defendants were not liable to pay the retention on the first and the second certificates because retention was meant to safeguard against any defects on completion of work. Furthermore, that the plaintiff did not complete the work, and part of the retention was used to obtain another contractor for the completion of the works, and that defects could not be assessed on an uncompleted contract.

Counsel for the defendants also submitted that the claim for retention can not be sustained because Clause 48 of the contract provides that half the amount for retention shall be repaid to the contractor on completion of the whole of the works and the remaining half, shall be paid when the defects liability period has expired and the Project Manager has certified that all defects notified by him or her to the contractor, before the end of this period have been corrected. Counsel for the defendants submitted that these two condition precedents stated in this clause were not satisfied because the works were not fully completed and as thus, the defect liability period could not arise. Furthermore, that the Project Manager could not issue a certificate confirming that all defects detected during the defects liability period had been corrected as stipulated in the clause because the works were not completed.

I have carefully considered the evidence and the submissions of both counsels for which I am grateful.

Clause 48 of the contract which provides for retention and states;

*“ Retention*

*48.1 The Employer shall retain each payment due to the Contractor the proportion stated in the Contract Data until completion of the whole of the Works.*

*48.2 On completion of the whole of the works, half the total amount retained shall be repaid to the contractor and half when the Defects Liability Period has passed and the Project Manager has certified that all Defects notified by the Project Manager to the Contractor before the end of this period have been corrected.*

*48.3 On completion of the whole Works, the contractor may substitute retention money with an “on demand” Bank guarantee.”*

From the above provision, it is clear that the retention was to be paid to the contractor on the completion of the works.

Furthermore, Clause 55 of the contract, which provides for completion provides as follows;

*“Completion*

*55.1 The contractor shall request the Project Manager to issue a certificate of completion of the Works, and the Project Manager will do so upon deciding that the work is completed.”*

In this case, no certificate of completion was issued by the project manager and therefore, this indicates that the work was not completed by the plaintiff. It would appear to me that based on two letters dated 29<sup>th</sup> March, 2007 from the First defendant and the 16<sup>th</sup> July, 2007 written by the plaintiff to the Principal Town Clerk of the 1<sup>st</sup> defendant 51% of the work had been done.

According to CHITTY ON CONTRACTS Vol. 2 at Paragraph 37-125, the term retention is defined as follows;

*“Monies held on account of retention form part of the sums certified by the contract administrator and earned by the contractor but which are not payable to the contractor until the final stages of the contract works.”*

Furthermore, at Paragraph 37-130 the learned authors write,

*“The stages at which retention typically becomes payable- practical completion and the issue of the certificate of making good defects- provide a clear indication that the practical purpose of retention is to ensure completion by the contractor and nominated sub-contractors.”*

That being the position of the law I find that the plaintiff did not complete the works. There is also no evidence that the parties when the contract was terminated were able to address what defects existed following the work that was done. What is clear is that the works had to be given to another contractor and therefore the plaintiff is not entitled to the sum of Ushs 7,615,420/= as retention.

**Issue two: Whether there was breach of contract.**

It is the case for the plaintiff that there was fundamental breach of the contract within the meaning of clause 59 of the contract as a result of the late payment of interim certificate No 2.

Counsel for the plaintiff submitted that the parties agreed that the non payment of a certificate, certified by the Engineer within 84 days constitutes fundamental breach of contract. According to counsel for the plaintiff, the second interim certificate was approved on 29<sup>th</sup> March, 2007 and thereafter, payment on 30<sup>th</sup> November, 2007, beyond the stipulated time amounted to fundamental breach.

Counsel for the plaintiff further submitted that, the defendant’s witnesses admitted to the delay in payment of the second interim certificate. He disputed the defendant’s assertions that the plaintiff abandoned the site upon submission of the second interim certificate, on 26<sup>th</sup> March, 2007. Counsel for the plaintiff submitted that the plaintiff remained on site and even wrote a letter on 15<sup>th</sup> February 2008, requesting for revision of the contract due to the increase of costs and materials, but there was no response from the defendants. Furthermore, that the defendants failed to comply with Clause 60

of the contract, because no certificate was issued by the defendant's engineer showing that the plaintiff was guilty of any breach.

Mr. John Higenyi on behalf of the defendants testified that he supervised the work through the Division Engineer as a technical person in that area. Mr. Higenyi testified that there was a breach of contract by both parties, and that on the part of the defendants; the breach was that they made payments on the second interim certificate late, but for reasons that were beyond the defendant's control. He insisted that on the part of the plaintiff, the breach was abandoning the site for a period of two years, fully aware of the contract period in the agreement.

Mr. Higenyi further testified that the 1<sup>st</sup> defendant did not terminate the contract but it was the plaintiff company that abandoned the work from the time the 1<sup>st</sup> defendant paid the second certificate in November 2007, to the time it advertised the works in 2009. Mr. Higenyi testified that contract was a fixed price contract and therefore could not have a price adjustment as demanded by the plaintiff. Furthermore, that the defendant did not inform the plaintiff that the contract was terminated before the defendant advertised for a new contractor, because the plaintiff had taken a long period without being at the site, and the date proposed for the completion of the works had passed.

I have carefully considered the evidence and the submissions of the parties on this issue for which I am grateful.

The contract provided for the circumstances that would amount to fundamental breach, thereby allowing any party to terminate the contract. Clause 59 of the contract provides as follows;

*“Termination*

*59.1 The Employer or the contractor may terminate the contract if the other party causes a fundamental breach of the contract.*

*59.2 Fundamental breaches of Contract shall include, but shall not be limited to, the following:*

*(d) a payment certified by the Project Manager is not paid by the Employer to the contractor within 84 days of the date of the Project manager's certificate...”*

Under the contract above, failure to make payments within 84 days of the issue of the interim certificate would amount to fundamental breach of contract.

It would also appear from the evidence on record that there was delay. The letter dated 16<sup>th</sup> July, 2007 from the plaintiff to the Principal Town Clerk of the 1<sup>st</sup> defendant indicates that interim payment certificate No. 2 was dated 30<sup>th</sup> March, 2007 and that 51% of the work had been done. Under the contract such a certificate would have to have been paid on or the 15<sup>th</sup> May, 2007 to avoid fundamental breach.

In another letter dated 15<sup>th</sup> February, 2008 from the plaintiff to the Principal Town Clerk of the 1<sup>st</sup> defendant, the plaintiff writes that even by that date certificate No 2 had not yet been paid.

From these letters, it is clear that the defendant had not made payments on the second interim certificate within 84 days required under the contract. I find that the delay of the defendant to make payment on the second interim certificate amounted to fundamental breach of contract, which gave the plaintiff the right to terminate the contract as provided under Clause 59.1 of the contract above.

**Issue three. What are the remedies available to the parties?**

From my findings above the plaintiff though not entitled to the retention money can call fundament breach for late payment of certificate No 2.

Clause 60 of the contract provided for payment where there is fundamental breach and states as follows;

*“60. Payment upon termination*

*60.2 If the Contract is terminated for the Employer’s convenience or because of a fundamental breach of Contract by the Employer, the Project manager shall issue a certificate for the value of the work done, Materials ordered, the reasonable cost of removal of Equipment, repatriation of the contractor’s personnel employed solely on the works, and the Contractor’s costs of protecting and securing the works, and less advance payments received up to the date of the certificate.”*

According to Clause 60.2 of the contract above, upon the termination of the contract, the Project Manager was required to issue a certificate for the value of the work done and the materials ordered. However this was not done. So only the certified amounts are provable. These amounts were paid leaving the issue of retention. That notwithstanding since there was contractual fundamental breach the plaintiff is entitled to compensation in that form. Counsel for the plaintiff submitted that if the contract had not been breached the plaintiff company would have earned Ushs 71,438,850/= on the contract sum of Ushs 147,593,050/=. He therefore suggests that Ushs 30,000,000/= would be adequate and fair as general damages. However since there was delay in paying the said certificate No 2 I award the plaintiff general damages of Ushs 10,000,000/= together with interest at 8%pa from the date of judgment until payment in full.

I also award the plaintiff the costs of the suit.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 27/08/2012

27/08/12

3:28 p.m.

Judgment read and signed in Court in the presence of:

- Kankaka h/b for Mr. Sendege for Defendant
- Tumusingize h/b for the Plaintiff

In Court

- Mutuzindwa Mohammed – Director of Plaintiff
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 27/08/12