

THE REPUBLIC OF UGANDA
THE HIGH COURT OF UGANDA
(COMMERCIAL DIVISION)

HCT – 00 – CC – CS – 0717 OF 2007

NILE GUARD SERVICES PLAINTIFFS

VERSUS

ATTORNEY GENERAL DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

The Plaintiffs a Security company sued the Defendant for breach of a security services agreement, be had with the Ministry of Works and Transport (hereinafter referred to as “the Contract”). The Plaintiff’s claim is for the payment of interest as a result of late payment of bills under Article 5.4 of the contract amounting to Shs. 457,235,604/=.

The Defendant admit the agreement but pleaded that the total interest payable for the delayed payments for the months for which the Plaintiff is entitled to interest is Shs. 3,783,284.7/=. The rest of the claim was denied as payments were either made on time or the Plaintiff’s bills were not presented within a reasonable time.

At the Pre-trial/Scheduling Conference, judgment on admission was entered for the sum of Shs. 3,783,284.7/= in favour of the Plaintiff against the Defendant. The following issues were then agreed on for submission.

- 1) Whether the Defendant delayed payment under the contract for the months of September, October and November 2006 and the months of March, June, November and December 2007.***

2) Whether the Plaintiff is entitled to 10% interest on the delayed payments.

3) Whether the Plaintiff is entitled to the other remedies.

The Plaintiff was represented by Mr. Okello Oryem while the Defendant Attorney General was represented by Mr. Gantungo.

ISSUE No. 1: Whether the Defendant delayed payment under the contract for the months of September, October and November 2006 and the months of March, June, November and December 2007

Counsel for the Plaintiff submitted that the Defendants were to settle the Plaintiff's bills within 30 days of presentation under Article 5.2 of the contract but did not do so.

He submitted that for the months of September and October 2006 the bill of Shs.11,900,000/= was delivered on the 19th December 2006 but was not paid until the 7th February 2007. This under the terms of the contract was 20 days late.

He further submitted that the bills for November and December 2006 for Shs. 11,900,000/= was delivered on the 23rd January 2007 but paid on the 25th April 2007. This under the terms of the contract was 62 days late.

The bill for January 2007 for Shs. 6,660,949/= was delivered on the 27th March 2007 but paid on the 25th April 2007. This under the contract was 35 days late.

The bill for February 2007 for Shs. 6,660,949/= was delivered on 9th July 2007. This under the contract was 30 days late. The bills for March and April 2007 for Shs. 11,900,000 was delivered on the 23rd May 2007 and paid on the 9th July 2007. This under the contract was 17 days late. The bills for May and June 2007 for Shs. 11,900,000/= was delivered on the 31st May 2007 and paid on the 23rd July 2007. This under the contract was 23 days late.

The bill for October 2007 was delivered on the 12th November 2007 and paid on the 23rd April 2008. This under the contract was 31 days late.

The bills for November and December 2007 were delivered on the 4th January 2008 and paid on the 23rd April 2008. This under the contract was 79 days late.

Counsel for the Defendant submitted in reply submitted that payments under Articles 5.2 and 5.3 of the contract were to be made monthly in arrears and only if the request for payment were properly and correctly presented. He submitted that this applying the test of the officious by stander in **Shirlow V South Foundaries** (1926) Ltd [19392 KB 206] would mean that bills were to be presented at the end of each month which was not done. Counsel for the Defendant submitted that by the Plaintiff delaying to present its invoices, it waived its rights to interest under the contract.

Counsel for the Defendant that the submitted that the following invoices were submitted late after the services were consumed:-

- i) September 2006 by 19 days***
- ii) October 2006 by 19 days***
- iii) November 2006 by 1 month and 23 days***
- iv) March 2007 by 1 month and 23 days***
- v) November 2007 by 1 month.***

In the case of June 2007 Counsel for the Defendant observed that the invoice was submitted on the 31st May 2007 even before the service was consumed. He further submitted that time in the contract was of the essence both in respect of presentation and the payment of bills/invoices.

I have addressed my mind to the submissions of both counsel for which I am grateful. The contract provides that

“Article 5.2

Payments shall be made in within thirty days of receipt of a request for payment and correct vouchers and shall be deemed to have been made on the date on which they are debited to the Procuring Entity’s account. Payments shall be made monthly in arrears in respect of the services provided each month.

5.3

The Procuring Entity shall be bound to comply with payment periods only if the requests are properly presented at the address stated in Article 8 below ...”

It would appear from the contract that time will start to run in respect of payment on the day of “receipt of a request for payment” under Article 5.2. The only caveat under Article 5.3 is that

“The Procuring Entity shall be bound to comply with payment periods only if ... (they) are properly and correctly presented at the address in Article 5 ...” (emphasis and additions mine).

In this case there is no reference to wrongly addressed invoices/bills so the caveat is not applicable to this matter before court.

Counsel for the Defendant submitted at length that the requests for payments in most cases would come late after the month the services were consumed. Certainly some requests were made more than one month after the services were consumed. A review of the contract however shows that it does not provided a penalty for late submissions of invoices/bills.

That notwithstanding counsel for the Defendant submitted that time should be of the essence for both the payments and submissions of the bill.

In the case of **Aida Nunes V John Mbiyo Njonjo and Charles Kigwe** [19620] EA 88 (CA). It was held that where circumstances are not such as to make it obvious that time is of the essence, then the affected party cannot avoid it on the ground of unreasonable delay by the other party until a notice has been served on that party after the unreasonable delay making time of the essence.

I find that decision instructive in this case when it comes to delays in submitting the invoices/bills. There is no provision on the subject to make it obvious that time was of the essence and the Defendant did not protest or give notice to the Plaintiff on the issue of the delay and so cannot avoid the contract terms in that regard. I can only agree with counsel for the Defendant in respect of the month of June 2007 where the invoice was made slightly ahead of time on the 31st May 2007. That bill should be

deemed to be effective 30th June 2007 and payable by 30th July 2007. It was paid on the 23rd July 2007 and so was paid on time.

In this regard, I am therefore inclined to agree with the submissions of counsel for the Plaintiff the bulk of the Plaintiffs claim for payments contested in this case were affected by delayed payment.

ISSUE No. 2: Whether the Plaintiff is entitled to 10% interest on the delayed payment

The computation of interest has been the area of greatest contest in this case.

Counsel for the Plaintiff submitted that under Article 5.4, the Plaintiff was entitled to interest on a sliding scale up to 10% per day on the delayed payments. He further submitted that the totality of delay amount to 274 days. This equals to interest of Shs. 459,795,950/= inclusive of interest and the judgment on admission.

Counsel for the Defendant submitted that interest at 10% per day would amount to interest of 3,650% per annum which would be harsh and unconscionable. This would be contrary to Section 26(1) of the Civil Procure Act. He said the correct interpretation would be 0.05% per day which would amount to 18.5% per annum. This was then capped at 10% or 7 months (at 00.5% per day) which delay never happened. He submitted that such an interpretation made business sense.

I have addressed my mind to submissions of both counsel for which I am grateful. The operative Article on the subject of interest is Article 5.4 which provides

“... If the Entity delays to pay for the services in accordance with the contract, the Entity shall pay interest of 0.05% per day of the delayed payment up to a maximum of 10% ...”

Clearly, this Article could have been better drafted. The reference “to up to a maximum of 10%” is a little ambiguous. Is it per month or per day? That notwithstanding Paragraph 4 (b) of the Amended Written Statement computes the outstanding interest payable at the maximum of 10% for which judgment on admission has been entered for the figure of Shs. 3,783,280.7/=. That in itself is an

interpretation which is pleaded for which under order 6 rule 7 there should be no departure.

I certainly agree with counsel for the Defendant that the interpretation for which he has corrected calculated would be 3,650% per annum would be unconscionable by any economic and business standards in Uganda today court will not grant it.

I am inclined to and hereby grant under Section 26 (1) interest at 10% p.a. on late payments a delayed payments. Therefore in addition to December 2006, January 2007, February 2007, April 2007, May 2007 and October 2007 for which judgment on admission has been given for Shs. 3,783,284.7/= the following invoices also have to be added.

<u>Month</u>		<u>Invoice amount</u>	<u>Interest</u>
September	2006	11,900,000/=	1,190,000
October	2006		
November	2006	5,239,051/=	523,905.1
March	2007	11,900,000/=	1,190,000
April	2007		
November	2007	not provided	<hr/> 2,903,905.1 =====
December	2007		

The invoice amount for November and December 2007 was not pleaded by the Plaintiffs. The amount for June 2007 has been removed as paid on time.

ISSUE No. 3: Remedies

Based on my findings above, in addition to the sum of Shs. 3783,284.7/= granted to the Defendants as judgment on admission, I grant a further Shs. 2,903,905.1/= as proved special damages under para 2 of the plaint.

I further grant interest on the said amounts at 22% p.a. from the date of filing of the plaint until payment in full.

The Plaintiff also prayed for general damages but did not submit on the quantum to be assessed. I nonetheless grant Shs. 5,000,000/= as general damages for breach of contract. I further award interest at 8% p.a. on the sum of general damages from the date of judgment until payment in full.

.....
Justice Geoffrey Kiryabwire
JUDGE

Date: 20/12/2012

20/12/12

10:20

[File called no parties in Court]

- Rose Emeru – Court Clerk

Court: Judgment signed

.....

Geoffrey Kiryabwire

JUDGE

Date: 20/12/2012