THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 96 - 2008

PEGASUS INTERNATIONAL (U) LTD. .....PLAINTIFF

VERSUS

THE UNITED METHODIST CHURCH OF UGANDA ..... DEFENDANT

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

J u d g m e n t

The plaintiff PEGASUS INTERNATIONAL (U) LTD filed this suit against the defendant THE UNITED METHODIST CHURCH OF UGANDA for special damages of USD 376,570 and Ushs 100,000/=, general damages and costs arising from breach of contract.

The case for the plaintiff is that by an agreement dated 24th May 2007, it hired a hydraform brick making machine (hereinafter referred to as the "machine") from the defendant at a consideration of Ushs USD 3000 for a period of one month. The plaintiff avers that under the contract, the machine had to be verified by both parties before use. Furthermore, that the machine would work for at least eight hours a day and that the defendant was responsible for servicing the machine. The plaintiff also avers that despite satisfying its obligations under the contract, the defendant delivered a faulty machine which could not operate for eight hours a day as stipulated in the contract. The plaintiff further avers that the defendant on several occasions promised to repair the machine but did not. The plaintiff avers that the machine had several mechanical problems as assessed by the mechanic, and that owing to the defendant's failure to repair the said machine, the contract was terminated by the plaintiff's client in Juba Mr. Remmy Oller Itorong resulting into loss of business for the plaintiff. The said Mr Itorong went further and confiscated the machine for the non performance of his contract.

The defendants in their defence admit the existence of the contract dated 24th May 2007. The defendant contends that on 11th December 2006, it received a communication from the plaintiff requesting to hire the machine, and the contract for the same was executed that same day. The

defendant contends that after the expiry of the contract, the plaintiff requested to have the contract renewed for another period of one month, and the said contract was renewed on 24th May 2007. The defendant denies breach of contract on its part and contends that the machine was verified by both parties and ascertained to be in a good working condition before delivery to the plaintiff. The defendant further contends that the machine was vandalized by the plaintiff's employees because of non payment. Furthermore the defendant's supervisor found the machine's hammer mould removed, and the starter missing. The defendant however states that it is the plaintiff on the other hand that breached the contract by failure to deliver the machine to the defendant upon expiry of the contract as stipulated under the contract.

The defendant in this suit also filed a counterclaim, seeking for an order of return of the machine which was said to have been confiscated. The defendant/counter claimant avers that under the contract, the plaintiff/counter defendant was only entitled to use the machine for one month and thereafter return it to the defendant/counter claimant but did not.

In reply to the defence and counterclaim, the plaintiff contends that the machine was confiscated by Mr. Remmy Oller Itorong, the Deputy Speaker of the Republic of South Sudan, and another client whose contracts the plaintiff failed to perform. In further reply to the counterclaim it is the case for the plaintiff/ counter defendant that the defendant acknowledged the poor mechanical condition of the machine, thereby waiving the right to claim any remedies for breach of contract.

At the hearing, the plaintiff was represented by Mr. Otim while the defendant was represented by Mr. Tumwesigye. The plaintiff called one witness Mr. Simon Onyut (PW1), while the defendant called two witnesses; Reverend James Mwoho (DW1) and Mr. Christopher Tamale (DW2). The parties filed written submissions. The issues raised by the parties for determination at the scheduling are as follows:

1. **Whether the defendant was in breach of the agreement dated 25th May 2007.**
2. **Whether any loss was attributable to this breach if there was breach.**
3. **If there was no breach, whether there was any loss to which the defendant can be held liable.**
4. **Whether the defendant can claim for non delivery of the machine.**
5. **What are the remedies available to the parties?**

The evidence in this case was taken by the Hon Justice Anup Singh Choudry but was reallocated to me on his assignment of other judicial duties. I shall therefore proceed under Order 18 rule 11 to conclude the suit.

ISSUE ONE: Whether the defendant was in breach of the agreement dated 24th May 2007.

Mr. Simon Onyut (PW1) the Managing Director of the plaintiff in his witness statement testified that by a letter dated 13th March 2007, the plaintiff sought to renew the contract for the hire of the machine, and pointed out that the machine had developed mechanical problems but the defendant could not verify this since they had no supervisor on site. Furthermore, that on 12th March 2007, at the insistence of the plaintiff, the defendant's representative Mr. Arnold Sway wrote a report to Pastor Ssajjabi Robert, of the plaintiff church based in Kampala to explain the condition of the machine. Mr. Onyut further testified that about the same time the contract was negotiated, Pastor Ssajabi at the insistence of the plaintiff flew to Juba, visited the site, inspected the machine and made two reports dated 12th March 2007 and 21st May 2007. Furthermore, that the second report stated that the machine was not working.

Mr. Onyut testified that the second contract was signed on 24th May 2007, but the defendant breached its obligations under the said contract by failing to fix the problems with the machine by 4th June as agreed, and therefore the machine never worked. Furthermore, that a meeting was held on 25th October 2007, in which the defendant promised to repair the machine within 10 days but it was not repaired. Mr. Onyut testified that as a result of all of this, from 13th March 2007 through to the 21st November 2007, the machine was not repaired and therefore, the plaintiff was unable to make blocks.

During cross examination, Mr. Onyut testified that that during the negotiations for the renewal of the contract, the plaintiff's supervisor wrote a report detailing the condition of the machine and four days later, the contract was signed on the understanding that by 4th June 2007, it would be repaired by the defendant. Mr. Onyut testified that the machine however was not repaired. Mr. Onyut further testified that the promise by the defendant to repair the machine was specified in the negotiations, but not in the contact.

Counsel for the plaintiff submitted that Clause 7 of the contract required the defendant to ensure that the machine would work for at least 8 hours a day when the engine runs, clause 10 further required the defendant to share or contribute to repairs of the machine if it broke down without negligence of the operator. Furthermore, that clause 11 of the contract required the defendant to service the machine.

Counsel for the plaintiff submitted that according to the evidence of Simon Onyut PW1, the Project Manager of the plaintiff, the machine never worked from the time of execution of the contract, and that the contract was signed on the understanding that the machine would be fixed within 10 days of execution of the contract. According to counsel for the plaintiff, this was confirmed by Pastor Robert Sajjabi the Supervisor and employee of the defendant, appointed by the defendant to oversee the running of the machine in his reports dated 12th March 2007 and 21st March 2007.

Counsel for the plaintiff submitted that the defendant did not perform its obligations under the contract dated 24th May 2010, and that this amounted to breach of contract

Reverend James Mwoho (DW1) who testified for the defendant, in his testimony stated that when the contract was renewed, the machine was in good working condition and the plaintiff even made some blocks after which, the contract dated 24th May 2007 was executed. Furthermore, that after some days, the plaintiff complained about some defects in the machine, and the defendant sent a mechanic Mr. Tamale (DW2) who found that the problem was that the moulds needed replacement, a mechanical problem whose obligation to deal with lay on both parties under the contract. Rev. Mwoho testified that the moulds were replaced and the plaintiff continued using the machine, although the plaintiff continued to complain that the machine did not work to its expectations.

Mr. Christopher Tamale (DW2) the mechanic testified that in April 2007, he was called upon to go to Sudan and make repairs and service the machine pending the renewal of the contract. Furthermore, that when the contract was renewed the machine was in good working condition and the plaintiff continued to use it to make blocks. Mr. Tamale further testified that in June 2007, he was again called upon to fix the machine which needed new moulds, and the moulds were replaced.

Counsel for the defendant submitted and pointed out that before the second contract was executed, the plaintiff was already in possession of the machine by virtue of the previous contract executed on 11th December 2007 and therefore, there could be no further delivery of the machine, pursuant to the new contract. Counsel for the defendant submitted that on this basis the defendant cannot be said to have delivered a faulty machine. Counsel for the defendant further submitted that clause 5 of the contract required that the condition of the machine be verified before the contract was executed and the fact that the parties executed the contract means that the machine had been ascertained as being in good condition and with no problems. Counsel also submitted that it was unlikely that the plaintiff could renew the contract when they knew that the machine was not working properly. Furthermore, that Mr. Tamale the mechanic went to Sudan and repaired the machine and therefore, the plaintiff must have signed the second contract because the machine was in good condition.

Counsel for the defendant further submitted that the defendant had no obligation to carry out repairs on the machine but was only obliged to meet half the cost of repairs as stipulated in the contract and that the defendant would respond whenever they were called upon. Counsel for the defendant submitted that the problem was not with the servicing of the machine, but that the plaintiff's staff vandalized the machine. Furthermore, that the plaintiff could not rely on the reports made by Pastor Ssajjabi because he was not the supervisor during the second contract.

I have carefully considered the evidence and the submissions in respect if this issue for which I am grateful.

The existence of the contract dated 24th May 2007 is not in dispute. The parties entered into a contract dated 11th December 2006, for hire of a hydrafoam machine and the same was renewed on 24th May 2012 for a period of one month. It is this renewal of the contract that is the subject of this case. I have perused the contract dated 24th May 2007 marked Annexture A to the plaint and I find that the terms, which are the subject of the dispute are as follows;

Clause 5 of the contract provides that,

> ***"The condition of the machine should be verified by both parties prior to the delivery of the machine and the client before use and to the owner after expiry of the contract. (make sample blocks)"***
>
> **Clause 7,**
>
> ***" The machine should work for 8 man hours a day when the engine runs."***
>
> **Clause 10,**
>
> ***"In case of machine breakdown during the cause of work in the contract both-, (sic) parties should share the expenses incurred which is not due to the negligence of the operator."***

Clause 11,

> ***"Servicing the machine has to be done by the owners of the machine"***

The case for the plaintiff is that at the time the contract was renewed, the machine was not working, and that the plaintiff renewed the contract on the promise of the defendant that the machine would be

repaired by 4th June 2007. There are several correspondences between the parties regarding the repair of the machine, which I have had the opportunity to peruse.

First and foremost, the letter of the plaintiff dated 13th March 2007 (Annexture D to the plaint) written before the renewal of the contract states that the machine had problems. It reads in part as follows,

> *"**As per the agreement signed with you on the 11th December, 2006, the current contract will be expiring soon and we now write to inform you of our intention to renew it, and pay up for the next extension.***
>
> ***We have had various problems with the machine which your supervisor is aware of and we have sent a requisition for repairs and services of the machine…"***

Furthermore, there are two reports about the state of the machine, dated 12th March 2007, a day before the letter of the plaintiff expressing interest to renew the contract and the other on 21st May 2007. Both reports are made prior to the renewal of the contract. In both reports, it is stated that the moulds need replacement. In the report dated 12th March 2007 (Annexture C to the plaintiff's reply to the written statement of defence), it is stated that the condition of the machine is not so bad, but some parts need replacement and the parts are listed. Furthermore, the report provides that as follows;

> ***"1. If the servicing is done, the machine can continue to work for another one month before the replacement of the mould.***
>
> ***2. If it is in the interest of the board; you can go ahead and renew the contract with the client.***
>
> ***3. The mould and both rims need replacement as soon as possible not later than two months ahead"***

In this report, it is clear that the machine was still working although there were some problems with it. However, the report I find most relevant is the one dated 21st May 2007, just before the renewal of the contract on 24th May 2007. It states that following the report dated 12th March 2007, the machine continued to work for 13 days and it gives several dates from 13th March to 17th April, both dates inclusive. However after that at the time of signing the report the machine was reported not to be working because "… the mould is worn and needs replacements…" . I find that at the time the contract was renewed, the machine was not working.

There is also a letter dated 5th June 2007, from the plaintiff to the defendant (Annexture C2 to the plaint) which reads as follows;

> *"**RE: HIRE OF HYDRAFORM MACHINE***
>
> ***Reference is made to the above subject. On 25th June (sic clearly an error must have meant May) 2007, the contract to hire the hydraform machine was renewed for a period of one month which begun on 4th June 2007. The machine at the time of signing the contract was not in good mechanical condition and you promised to send a mechanic to fix it to start work on 4th June 2007. However, till today the mechanic has not arrived to fix the machine and this is causing unnecessary delays in our works as well as costs."***

This is followed by two other letters from the plaintiff dated 25th June 2007 (Annexture C1 to the plaint) and 20th August 2007 (Annexture C3 to the plaint) stating that the defendant had promised to repair the machine by 4th June 2007 but had not. There are replies from the defendant dated 27th June 2007 (Annexture E1 to the plaint) and 6th June 2007 (Annexture E2 to the plaint) promising to repair the machine. In fact in the letter dated 6th June 2007, Rev. James Mwoho indicates that the defendant has reliable information that despite the few mechanical problems, the machine was in operation although for few hours a day, and that it was being operated by the plaintiff's personnel illegally without the presence of the plaintiff's operator.

Clause 5 of the contract required the machine to be verified by the parties prior to delivery. Of course at the time of the renewal of the contract in May 2007 the said machines were already in the possession of the plaintiff so delivery was not in question. This was simply a "cut and paste" clause from the original contract dated 11th December 2006. Clearly the intention of the parties was that a verification to ascertain the condition of the machines would be necessary before the signing of the contract. The verification showed the machine was not working because the moulds were worn out. The defendant undertook to and indeed was obliged to repair the said machine as a result as he accepted to be paid the full value of the hire. It was also agreed to use the machines for a few hours a day as the replacement parts were brought in from Uganda (see letter of the 25th June 2007). To my mind this is sufficient to signify default of the contract and answer the issue in the affirmative even though the plaintiff chose to mitigate that damage by using the machine for a few hours a day as he already had signed out construction contracts in South Sudan which he had to fulfill.

ISSUE TWO: Whether any loss was attributable to this breach and if so, whether the defendant can be held liable.

Having found that there was breach by the defendant, it follows that the plaintiff could not fulfill its contracts in South Sudan. In particular there was a contract between the plaintiff and Mr. Remmy Oller Itorong to construct a residential house dated 18th May 2007 which had to be complted in 3 to 5 months. It is not contested that the plaintiff failed to complete this construction contract and the machine was then confiscated by Mr. Itorong as a result. This too my mind is directly attributable to the breach of contract.

ISSUE THREE: Whether the defendant can claim for non delivery of the machine.

Counsel for the plaintiff submitted that under clause 12, USD 1000 was deposited by the plaintiff to secure the return of the machine after the expiry of the contract and therefore, the defendant could have collected the machine but did not because it was aware that the machine was not repaired and could not collect it before fulfilling its obligations under the contract. Counsel for the plaintiff submitted that the defendant was liable for breach of contract and therefore, was not entitled to any remedies in the counterclaim. Counsel referred to the case of **HAJJI ASADU LUTALE V MICHEAL SEGAWA** (HCCS 292 of 2006).

On the other hand, Counsel for the defendant submitted that it was clearly stipulated under clause 6 of the contract that the plaintiff had to deliver the machine to the defendant upon expiry of the contract, but the plaintiff did not and therefore, this amounted to breach of contract. Counsel for the defendant submitted that there is a provision in the contract that the plaintiff would pay a post dated cheque of Ushs 40,000,000/= as guarantee for the delivery of the machine, and a further USD 1000 to transport the machine in case it was not delivered to the defendant. Counsel for the defendant however submitted that the defendant could not cash the cheques because the plaintiff was supposed to ask their bankers to write to the defendant confirming the worthiness of the cheque and that money was available, but this was not done.

I have considered the evidence and the submissions of the parties on this issue.

According to Clause 6 of the contract, it expressly provides that

"The client will be responsible for the loss or theft of the Hydraform machine. The Client will be responsible for the delivery of the machine to the owner after the expiry of the contract."

I find that the responsibility to deliver the machine at the expiry of the contract lay on the plaintiff. Counsel for the plaintiff submitted that the plaintiff made a deposit of a post dated cheque of Ushs. 40,000,000/= as guarantee for the delivery of the machine, and a further USD 1000 to transport the machine in case it was not delivered to the defendant.

The fact that the said machine was eventually confiscated in South Sudan means to my mind that it was as good as lost and therefore could not be returned to the defendant. I accordingly so find.

ISSUE FOUR: What are the remedies available to the parties?

The Plaintiff prayed for USD 376,570 as special damages, USD 200 per day as confiscation charges levied against them by Mr. Itorong, general damages and interest.

According to the particulars of special damages pleaded in the plaint the break down of these damages relate to

1. Land leased in Juba but not used $ 4,800
2. Profit on the Itorong contract $ 15,000
3. Confiscation fees from 31st Aug 2007 to 2nd April 2008 $ 66,400
4. Maintenance of 20 workers July to August 2007 $ 6,200
5. Stand time of 20 workers July and August 2007 $ 6,200
6. Lost opportunities on projects $ 258,920
7. Outstanding contractual days -17 for hire of machine $ 1,700
8. Telephone calls to the defendant UG SHS 100,000

It must be borne in mind that the renewed contract was for one month only. It also appears to me from the evidence on record that he plaintiff was contracted to build residential houses yet its contract with the defendant was for a machine that produced bricks only so the whole of the construction loss can not be put on the break down of the machine after all it envisaged that such bricks would be made in 30 days. In my view a contract extended for just one month to make bricks to build a residential house

(several actually) means that the bulk of the brick making work had been completed. The cost estimates for the residential house of Mr Itorong for example also include earthworks, plumbing, electrical works and painting which did not require bricks from the machine. I find therefore that the particulars of special damages claimed to be too wide for this breach.

A review of the evidence in this case shows that a lot of emphasis was placed on showing the existence of breach of contract and not much evidence was adduced to support the claim for special damages. In the case of **Kyambadde V Mpigi District Administration [1983] HCB 44** Masika CJ (as he then was) held that special damages must be strictly proved but they need not be supported by documentary evidence in all cases. That position which I agree too not withstanding it is incumbent on the parties and their Counsels to put before Court evidence that such damages are awardable. In this case based on the contract sum for hire it is fair to say that since the machine did not work properly the outstanding claim for 17 days hire of the machine for USD $ 1,700 is acceptable as a special damage. The machine according to the claim was confiscated by Mr. Itorong and decided to charge the plaintiffs USD 200 a day from the 4th June 2007. Mr. Itorong is said to be a Member of Parliament and Speaker in South Sudan both of which are powerful positions. The evidence around this was fairly consistent. Since the contract was to expire on the 24th June 2007 that means that it can be said that the plaintiff would be entitled to 20 days of refund which is USD $ 4,000. The rest of the claims do not meet the standard of proof for special damages and so I only award a total of USD $ 5,700 under this head.

The plaintiff also prays for general damages Counsel for the plaintiff submitted that general damages are compensatory and in the discretion of Court. Counsel for the plaintiff however did not guide at all as to what the quantum should be. This is counsel's duty not the Court to argue and substantiate quantum. In this regard without the requisite assistance of Counsel I can but just award a nominal figure of USD 1,000.

Counsel also prayed for interest at 22%pa on both special and general damages from the date of filing until payment in full. I agree that interest would awardable but the rate of 22%pa on United States Dollars is a too high. I accordingly award interest at 10%pa on special damages from the date of filing until payment in full and 8%pa on general damages from the date of judgment until payment in full.

I award the plaintiffs the costs of the main suit.

As to the counterclaim, this about the return of the machine which the plaintiff was obliged to do under the contract when it ended. The evidence on record is clear machine was not returned because it

was confiscated. Though not expressly provided for in the contract the parties agreed that a cheque of Ug.Shs. 40,000,000/= be deposited by the plaintiff to the defendant as security for the value of the machine. This was done but the cheque was not cashed by the defendant because there no confirmation of funds being on the plaintiffs account to cash it. Clause 12 of the contract also provided for the plaintiff to deposit USD 1,000 to secure delivery of the machine to the defendant after the contract. In this regard the plaintiff also wrote the defendants a cheque. Counsel for the plaintiff submitted that the contract was terminated by the plaintiff so the defendant should have used the USD $ 1,000 to go and collect it from South Sudan. I find this argument of the plaintiff untenable. Clause 12 of the contract squarely put the obligation of transporting the machine on the plaintiff. This claim for the machine is akin to one of detinue and I find that the defendant/counter claimant is entitled as a special damages to the value of the machine which as agreed at Ug.Shs. 40,000,000/= and I so award it. The claims USD $ 191,000 being income it would got if the machine was returned to them and they hired it out. This figure constitutes 1277 days from the time the contract would have expired to 31st December 2007 at the rate of USD 150 per day. Counsel for the plaintiff/ counter defendant submitted that this figure was not specifically pleaded as a special damage and so cannot be awarded by Court. I agree with that position as it is the law and hence disallow the claim for USD $191,000/=.

The defendant also counter claimed for general damages for breach of contract. As in the case of the main suit counsel for the defendant did not address Court on the quantum to be paid. Once again without the requisite assistance of Counsel I can but just award a nominal figure of Ug Shs 5,000,00/= as general damages.

The defendant/Counter claimant also prays for interest at 20%pa on the awards of damages from the date of filing until payment in full. I agree that interest is awardable and grant interest at 20%pa on the value of the machine from the date of filing until payment in full and 8%pa on general damages from the date of Judgment until payment in full.

I also award the defendant/counter claimant the costs of the counter claim.

…….

Justice Geoffrey Kiryabwire

JUDGE

Date: 26/06/12

26/06/12

4:20

Judgment read and signed in open court in the presence of;

- Otim G. for Applicant

In Court

- None of the parties
- Rose Emeru – Court Clerk.

……
Geoffrey Kiryabwire
JUDGE

Date: 26/06/2012