THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0020-2010

1. **ARCH. JOEL KATEREGA** **]::::::::: PLAINTIFFS**
2. **DR. HANNINGTON SSENGENDO** **]**
   T/A. ECO-SHELTER &
   ENVIRONMENTAL CONSULTANTS

VERSUS

UGANDA POST LIMITED **]::::::::: DEFENDANT**
T/A POSTA UGANDA

JUDGEMENT

The plaintiff brought this suit against the defendant for special damages amounting to Ug. Shs. 128,066, 655/=, general damages for loss of income on exchange rate, interests on alternative financing, interest on special and general damages and costs arising from breach of contract.

The plaintiffs' case is that on the 26th of September 2005, by a written contract the defendant contracted them to provide various consultancy services on the refurbishment of Postel Building. The services included preparation of outline designs, scheme designs, detailed building plans, specifications, cost estimates, bills of quantities and three dimensional architectural drawing, civil/structural drawings and electrical/IT/ mechanical service drawings to be used in the refurbishment of the defendant's Postel Building.

The plaintiffs were also contracted separately to supervise the external renovation of Postel Building, this assignment was paid for as per Exhibit P.6. The plaintiffs

partially performed the contract of 26th September 2005 but the services were not paid for. The plaintiffs' claim therefore arises from unpaid invoices pursuant to the consultancy services vide Invoice No. 213 amounting to Ug. Shs. 88,832,725/= marked as Exhibit P.5 and Invoice No. 231 amounting to Ug. Shs. 39,233,930/= marked as Exhibit P.7.

The defendant in its brief Written Statement of Defence (WSD) did not specifically deny that it entered into contract with the plaintiffs but generally denied that it breached the contract. It also denied owing the plaintiffs any special or general damages, interest or costs or the amount claimed.

The agreed facts which form the background of this case are that:-

1. The defendant and the plaintiffs entered into a consultancy service agreement on the 26th September 2005. The said agreement was for the provision of specific consulting services by the plaintiffs for the purposes of the refurbishment of the property of the defendant known as Postel Building comprised in plots 67-75 Yusuf Lule Road/Plots 18-26 Clement Hill Road.
2. The terms of the payment under the contract were that the plaintiffs were to be paid a contract sum of Ug. Shs. 296,109,082/= including 18^ Value Added Tax (VAT).
3. An advance payment of 20% of the contract sum was to be paid by the defendant to the execution of the contract as a mobilization and commitment fee, conditional on the plaintiffs supplying the defendant with a bank guarantee or security bond acceptable to the defendant.
4. In a separate arrangement, the defendant contracted the plaintiffs to supervise the refurbishment of the 2nd and 11th floors of the building and the plaintiffs were fully paid for their services thereon.
5. The defendant duly terminated the contract where upon the plaintiffs instituted this suit against the defendant claiming Ug. Shs. 128,066,655/= inclusive of 30% of the contract sum, general damages, interest and costs.

There were originally four agreed issues for determination but at the scheduling with guidance from court both counsel agreed to recast the first issue and merge the 2nd issue with the 3rd issue. The three agreed issues were therefore as follows:

1. Whether the Consultancy Service Agreement dated 26th September 2005 was performed by either of the parties.
2. If so, whether the said contract was breached by the defendant not paying 30% of the contract sum.
3. Whether the plaintiffs are entitled to the remedies sought.

It is noteworthy that counsel for both parties submitted on the original four issues prior to the amendment at the scheduling. However, I will determine the three agreed issues at the scheduling in this judgment.

ISSUE 1: Whether the Consultancy Service Agreement dated 26th September 2005 was performed by either of the parties.

The plaintiff called one witness Arch. Joel Katerega (PW). He testified that the terms of payment in the agreement entered into by the parties on 26th September 2005 were that the client would pay 20% of the contract sum as advance payment. That the plaintiff never received it but instead received a letter instructing them to start the project. That after receiving the letter they embarked on the technical drawings showing the building plan and section among others. The technical drawings were marked Exhibit P.17. Exhibit P. 16 is the 3 dimension drawing of the building.
He further testified that they submitted the documents to the defendant for purposes of getting a loan from East African Development Bank (EADB). Upon cross examination, he stated that the plaintiffs are not claiming 20% of the contract price as per the agreement.

The defendant called two witnesses namely; Mr. Daniel Onyango (DW1) and Mr. Charles Barongo (DW2). DW 1 stated that he is a Procurement Officer heading the Procurement Unit of Posta (U) Ltd since 2009. He testified that Exhibit P2 was submitted

by the plaintiffs for refurbishment of Postel Building and that the defendant received it. He further stated that to the best of his knowledge the project never started and that instead the plaintiffs were contracted to do two floors at the Postel Building. That the 20% advance payment was not paid because the contract never took off as there was no funding.

On cross examination, DW1 was referred to Exhibit P.8 paragraph 2 upon which he changed his testimony and stated that he did not maintain his earlier position that the project never took off.

DW2 basically testified about the services rendered in regard to the 2nd and 11th floor, which was an agreed fact any way.

Counsel for both parties agreed to file written submissions and they were allowed to do so. The plaintiffs were represented by Mr. David Kaggwa and the defendant by Mr. Enock Barata. Counsel for the plaintiff argued that once PW's testimony and evidence on record are weighed together, it only leads to one conclusion, that the plaintiffs performed 30% of the contract; that the plaintiff drew the architectural drawings, bills of quantities, plumbing, mechanical and electrical specification and handed them over to the defendant. As a result, the defendant promised to pay the plaintiffs for their services vide a letter dated 22nd December 2008 and marked as Exhibit P.44. He further argued that the defendant cannot claim that the plaintiffs did not perform the contract and are thus estopped by both their conduct and by acquiescence.

He relied on S.114 of the Evidence Act Cap 6 which provides that;

> "***When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she or his or her representative shall be allowed in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing."***

It was his argument that the principle was re-emphasized by **Justice Lameck Mukasa** in the case of **Pan African Insurance Company (U) Ltd vs International Air Transport Association HCCS No. 667 of 2003,** where the learned Judge held that;

> "***The doctrine of estoppel by conduct prevents a party against whom it is set up from denying the truth of the matter. The principle is that where a party has by his declaration, act or omission intentionally caused the other to believe a thing to be true and to act upon such belief he cannot be allowed to deny the truthfulness of that thing."***

He further argued that most importantly, the defendant had by Exhibit P.23 demanded from the plaintiffs Bills of Quantities to be used in support of a loan application which the defendant submitted to East African Development Bank. The plaintiffs obliged and handed over the said document. It is therefore evident that the plaintiffs performed their obligations up to 30% of the contract and are entitled to payment on a *quantum meruit* basis, since the defendant benefited from their services. He cited the case of ***Buildtrust Constructions Limited vs Martha Rugasira HCCS N0. 288 of 2005*** where **Justice Kiryabwire held that;**

> **"*Where a person derived a benefit from another, like in this case, following a renovation of a house, and retains that benefit, the common law will not allow that person to retain the benefit without compensation on grounds that it is outside the terms of the contract."***

In the above case, the trial judge cited with approval the English decision of **Fibrosa Spolka vs Fairbain Lawson Combe Ltd [1943] AC 32 at 61** where **Lord Wright** held that;

> ***"It is clear that any civilized system of law is bound to provide remedies for unjust benefits. Such remedies in English Law are generally different from the***

remedies in contract or Tort and are now recognized to fall within the third category of Common Law which has been called Quasi- contract or restitution."

It was therefore his submission that the defendant benefited from the plaintiffs' work and it is at liberty, any time, to retain a contractor to refurbish their building using the plaintiff's drawings and specifications. He contended that the defendant did not adduce any evidence to challenge the fact that it was the plaintiffs' drawings and specifications that were used to refurbish and partition the 2nd and 11th Floor of the defendant's building and prayed that since the defendant benefited, justice would demand that it pays the plaintiff for those services otherwise it would amount to unjust benefit.

Furthermore, counsel for the plaintiffs submitted that the plaintiffs had proved performance of their obligations under the contract which the defendant ought to have adduced evidence to rebut but failed. He relied on the case of **J.K Patel vs Spear Motors SCCA No. 04 of 1991** where **Justice Seaton J.S.C** held on the principal of burden of proof that;

"...it rests, before evidence is gone into upon the party asserting the affirmative of the issue; and it rests after evidence gone into, upon the party against whom the tribunal at the question arises, would give judgment if no further evidence were adduced..."

It was his argument therefore that the plaintiff had at closure of their case discharged their burden by showing that they had performed the contract and immediately the burden oscillated to the defendant who failed to prove that the plaintiffs did not perform the contract. He concluded that the state of affairs would in his humble submission entitle the plaintiffs to judgment since they had proven their case.

In reply, counsel for the defendant submitted that all the evidence before court points to the unassailable fact that the contract of 26th September 2005 was never performed by either party to it. That PW1 conceded to the non performance of clause 6.1.1(b) of the agreement which provides:

> ***"An advance payment of 20% of the above total contract sum shall be paid to the consultant on signing the contract as mobilization fee and as commitment by the employer. The advance payment shall be paid against an acceptable insurance bond or bank guarantees presented by the consultant."***

He argued that it was testimony of PW 1 that the defendant did not have the monies to perform the contract and was seeking a bank loan which it failed to obtain. He submitted that the performance of the contract required the defendant to commit itself and it did not. It also required the plaintiffs to supply the guarantees and they did not. He contended that both DW1 and DW2 testified that the contract never took off. In other words, it was abandoned.

He contended that the drawings claimed are properties of the defendant and were procured from the defendant. Further that PW1 testified that he designed the building and made its drawing in his earlier years as the employee of the defendant and he sought copies of the same while working on the 2nd and 11th Floor and Exhibit P19 was documentary proof. He argued that the Bills of Quantities, cost estimates and specifications relate to the works on the 2nd and 11th floors and not the contract of 26th September 2005. It was his conclusion that the Consultancy Service Agreement was not performed.

In rejoinder, counsel for the plaintiff submitted that the defendant waived clause 6.1.1(b) about 20% advance payment and that the defendant did not plead it in its defence. He relied on Black's Law Dictionary where waiver is defined to mean the voluntary relinquishment or abandonment (express or implied) of a legal right or advantage. It also defines implied waiver as a waiver evidenced by a party's decisive, unequivocal conduct reasonably inferring the intent to waive.

He then submitted that it is evident that both parties were aware of the contractual requirement for advance insurance bond to be provided by the plaintiff. However,

according to Exhibit P.15, this was only conditional upon the defendant stating clearly that they are ready to disburse the 20% advance payment to the plaintiffs. As it turned out, while the defendant was chasing for a loan from East African Development Bank, it also wanted the plaintiffs to commence work as per the contract.

He contended that accordingly, the defendant unequivocally waived the requirement of the plaintiffs to provide the insurance bond as evidenced by Exhibit P.8 and P.14. He further argued that the defendant is therefore estopped at this stage of submission to allege that there was failure by the defendant to provide an insurance bond. Further that even then, this fact has caught the plaintiffs by surprise since it was not even pleaded in the WSD.

He submitted at length that the defendant made general denials in its WSD and failed to comply with the provisions of Order 6 rule 8 which makes it mandatory for the defendant to specifically deny the allegations made in the plaint. He relied on **Nile Bank Ltd vs Thomas Katto HCMA No. 1190 of 1999 rising from HCCS 685 of 1999** where **Lady Justice Arach Stella** quoted with approval an extract from **ODGERS PRINCIPLES OF PLEADING AND PRACTICE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE 22nd Edition, Stevens at page 136** that;

> ***"It is not sufficient for a defendant in his defence to deny generally the allegations in the statement of claim, or for a plaintiff to deny generally the allegations in a counterclaim, but each party must traverse specifically each allegation of fact which he does not intend to admit. The party pleading must make it quite clear how much of his opponent's case he disputes. Sometimes in order to obey the rule and deal specifically with every allegation of fact of which he does not admit the truth, it is necessary for him to place on record two or more distinct traverses to one and the same allegation. Merely to deny the allegation in terms will often be ambiguous.***

It was his submission that the defendant did not comply with the above rules and was not entitled to lead evidence on performance, estoppel, and abandonment of contract, lack of

an insurance bond or even failure to obtain a loan by the defendant. He further argued that the defendant's submissions contravene the law. Counsel for the plaintiff in support of this argument relied on the authority of **Sietco vs Noble Builders (U) Ltd; SCCA No. 31 of 1995** as per **Justice Wambuzi CJ.**

Counsel prayed that since all evidence adduced by defendant was not pleaded it should be struck out and plaintiffs' evidence be regarded unchallenged.

I will deal with this matter first before I consider the first issue. I have had the benefit of reading the leading judgment of ***Wambuzi CJ*** **(**as he then was) in ***Sietco vs Noble Builders (U) Ltd*** (supra) which I compared with a more recent decision of the Supreme Court in ***Kabu Auctioneers and Court Bailiffs & Another v FK Motors Ltd S.C.C.A No. 19 of 2009*** as per ***Tsekooko, JSC.*** It appears the Supreme Court's earlier rigid position in **Sietco vs Noble Builders (U) Ltd** was relaxed as discerned from the observation of Tsekooko, JSC that:-

> ***"……..The matter of Shs. 2,300,000,000/= was addressed upon in the trial court. It therefore became an issue and it was left to the trial court for decision. Odd Jobs v Mubia [1970] EA 476*** **and** ***Nkalubo v Kibirige [1973] EA 102 are authorities for the view that a court may base a decision on an unpleaded issue if it appears from the course followed at the trail that the issue has been left to the court for decision…."*** **(Emphasis added).**

In my humble view, that subsequent Supreme Court decision seems to suggest that even though a matter was never pleaded, if the parties make it an issue for trial and leaves it to the court for decision it should be decided upon. In the instant case, I have already observed in this judgment that the defendant merely made blanket denials of the plaintiffs' claim without specifically traversing each of the allegations made in the plaint. However, at the trial, its counsel led evidence in answer to issue number one to try and buttress the defendant's contention that the contract was never performed. In other words

the defendant was trying to show what happened to the original consultancy agreement that was signed on 26th September 2005 by leading evidence to prove that it was abandoned. Counsel for the plaintiffs did not object to that evidence being led.

In my view even without that matter being pleaded, this court would be interested in knowing what became of the contract from the party who is alleging that it was never performed. On that basis alone, I will, at an appropriate time, consider that evidence in this judgment for whatever value it adds to the defendant's case.

I will now turn to consider the first issue beginning with the argument on waiver. I have carefully looked at all the evidence adduced by both parties and considered the submissions of both counsel on the allegation of waiver. The issue of waiver was exhaustively discussed by **Kiryabwire, J** in **Agri-Industrial Management Agency Ltd v. Kayonza Growers Tea Factory Ltd & Anor HCCS NO. 819 of 2004** where he held that;

> ***"'Waiver' in contract is most commonly used to describe the process whereby one party unequivocally, but without consideration grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived."***

This court also recently dealt with the issue of waiver in ***Andes (ESA) Ltd v Akoog Wat Mulik Systems Ltd H.C.C.S No. 184 of 2008*** where it referred to ***Chitty on Contracts, 28th Edition, Vol. 1, 1999 page 1158 paragraph 23-039*** which states that;

> ***"where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its tenor.***

The effect of waiver is that a party cannot later seek a remedy for breach of the term that

was waived. This was stated by **Kiryabwire,J** in **Three Way Shiping Services (Group) Ltd v China Chongaing International Construction Corporation HCCS 538 of 2005** to the effect that:-

> ***"What is waived therefore is the right to rely on the term waived for purposes of enforcing his remedy for the breach made."***

As counsel for the plaintiffs rightly submitted, the defendant waived compliance with clause 6.1.1(b) which required the plaintiffs to pay the insurance bond or bank guarantee upon the payment of the 20% advance. In my view, the parties also varied the contract to provide for new mode of implementation other than what was originally agreed. Contrary to the provisions of clause 6.1.1(b), the defendant vide Exhibit P.8 instructed the plaintiffs to commence works on the 2nd and 11th floor which was part of the general refurbishment work. In effect it varied the mode of implementation of the contract and thereby waived the requirement for strict compliance with clause 6.1.1(b) as well as some provisions of the TOR which provided for chronological stages of work.

This court is alive to the parole evidence rule which is to the effect that variation of a written contract can only be done by a subsequent written agreement. This was also the holding in ***Mujuni Ruhemba v Skanka Jensen (U) Ltd Civil Appeal NO. 56 of 2000*** as per Okello, JA (as he then was) and the observation of Kiryabwire, J in ***Agri-Industrial Management Agency Ltd v. Kayonza Growers Tea Factory Ltd & Anor HCCS No. 819 of 2004***. See also section 91 and 92 of the Evidence Act Cap. 26 of the Laws of Uganda.

In the instant case, the defendant vide Exhibit P.8 being a letter dated 29th June 2006 written by Mr. Winston Sibo, the Managing Director of the defendant company requested the plaintiffs to commence with the works on the 2nd and 11th floors. That letter was addressed to the Manager Eco-Shelter & Environmental Consultants (the plaintiffs). Paragraph 2 of that letter which is relevant to this issue states as follows:-

> ***"During the meeting, the tenant requested to commence works on the 2nd and 11th floor of the above building in order to meet its urgent office***

requirements. Since this is part of the refurbishment work which are expected to start soon after completing the negotiations for the required funds of this project, we request you and your team to commence with the works on those two (2) floors while waiting for the payment of the 20% advance of your consultancy fee as stipulated in subsection (b) of 6.0 of the signed contract Consultancy Services Agreement with you. We anticipate to complete the negotiation with the bank and release of funds within the next four months from now". **(Emphasis added).**

In yet another letter dated 1st July 2006 still from the defendant's Managing Director to the Team Leader, Eco-Shelter & Environmental Consults on the subject; "***Refurbishment 2nd and 11th Floor Postel Building"*** (Exhibit P.14), it was stated in paragraph one as follows:-

"We refer to your letter of 30th June 2006 accepting to start consultancy services while awaiting for completion of negotiations with EADB to release the 20% advance payment of your fees".

Unfortunately, the letter of 30th June 2006 was never adduced in evidence so this court never had the benefit of looking at its exact wordings. But it suffices to conclude as stated in that letter that the plaintiffs indeed accepted to commence work without receiving the 20% advance as seen from their subsequent conduct.

From the content of these letters especially the phrases which I have put in bold, it is clear that first of all refurbishment of the 2nd and 11th floor which the plaintiffs were requested to commence with was part of the main contract as clearly stated therein. By addressing Exhibit P14 to the "Team Leader" I believe the author could have only been referring to the team as constituted under clause 4.1.2.3 of the contract of 26th September 2005. This further exemplifies the fact that indeed work on the 2nd and 11th floor was part of that contract. I therefore do not agree that it was a separate arrangement as stated in the agreed fact number four.

With due respect, PW and both counsel misdirected themselves on this matter. If at all that was a separate arrangement, I believe there would have been a separate document giving Terms of Reference (TOR) for the consultants as well as provision for the consultation fees payable and related expenses.

Secondly, when the plaintiffs were requested to start work without the 20% deposit and they accepted to do so, the parties thereby granted each other a concession or forbearance by not insisting upon the precise mode of performance provided for in the contract. In other words, by a subsequent agreement, they agreed to vary the mode of performing the contract and waived the requirement for strict compliance with clause 6.1.1 (b) of the contract that provided for advance of 20% of the contract sum which was to be paid against an acceptable Insurance Bond or Bank Guarantee presented by the plaintiffs. What should have been done first was deferred by a subsequent agreement which had the effect of varying the contract. It is therefore my firm view, that none of them can now raise that clause to defeat the others claim.

PW in re-examination testified that they prepared a scheme for refurbishment of the entire Postel Building then they extracted the 2nd and 11th floors to take care of the specifications required by the Prime Minister's Office which is located on those two floors.

I find that on the basis of Exhibit P8, the plaintiffs having accepted the new mode of performing the consultancy agreement swung into action and prepared some drawings which did not only cover the 2nd and 11th floors but was typical for the entire building. I believe they did that in anticipation that work on the other floors would also start soon as had been assured by the defendant.

On the whole as regards the issue of waiver, I find that it has been proved on a balance of probability. In the circumstances, the doctrine of estoppel precludes the defendant from relying on clause 6.1.1 (b) as it expressly waived strict compliance with it and the right to allege breach of it.

That leads me to consider the argument for the defendant that the contract was abandoned and the contention by the plaintiffs that it was performed. To my mind, the defendant's daring attempt to show that the contract was abandoned vis-a-vis the overwhelming evidence to the contrary was just an exercise in futility. I find that the evidence adduced by the plaintiffs (including correspondences from the defendant) to show what the parties subsequently agreed to do and actually did clearly contradict the defendant's evidence and argument that the contract was abandoned. I am of the firm view that the contract was merely varied in which case strict compliance with some provisions was waived. It was indeed never abandoned.

On this point, counsel for the plaintiff relied on Exhibit P.10 and argued that if at all the contract was not performed then why did the defendant's Company Secretary give notice of termination of the contract. He referred to last paragraph on page 1 of Exhibit P10 and submitted that the defendant unequivocally agreed to pay the plaintiffs their remuneration, reimbursable expenses and all reasonable costs. I find that argument very logical because if a contract was never performed then why did the defendant make a firm commitment to make payments to the plaintiffs as indicated in that letter.

Exhibit P10 is a notice of termination of consultancy services agreement given to the plaintiffs by the defendant. It is dated 26th August 2009 almost four years from the date the contract was signed. In fact, to be more precise it was written after exactly three years and eleven months! The simple question that comes to mind is if at all the contract was abandoned, then why was it being terminated? Just to develop this argument further, I find it necessary at this point to define the key words "*abandon*" and "*terminate*" even though it may appear to be so elementary.

Black's Law Dictionary 8th Ed at page 1511 defines the verb "*terminate*" as; "***To put an end to; to bring to an end. To end or conclude***". It also defines the noun "***termination"* as; *"an act of ending something***".

Meanwhile, ***Cambridge International Dictionary of English*** defines the objective "*abandon*" as:- *"to leave (a place, thing or person) forever, or to stop doing (something) before you have finished it"*.

Black's Law Dictionary (supra) at page 2 defines the noun "*abandonment*" as; "*the relinquishing of a right or interest with the intention of never again claiming it*".

Going by those definitions, if indeed the parties had left the contract forever or relinquished their rights or interest in it, why then was the defendant seeking to bring it to an end and even pay remunerations and reimbursable expenses? I find the defendant's arguments on this point rather contradictory and unconvincing and for that matter this court cannot accept it.

Consequent upon receipt of the termination letter and the unequivocal commitment of the defendant to pay, the plaintiffs by a letter dated 24th September 2009 (Exhibit P. 11) forwarded their final invoice No. 0231 dated 24th September 2009 for a sum of Shs. 39,401,930/= to the defendant. That was stated to be the outstanding payments with a break down as follows; Project Quantity Surveyors Inputs after 10th December 2007 for Shs. 3,024,000; Project Architects Inputs after 10th December 2007 for Shs. 6,250,000/= and Reimbursable/Interest/Loss of money value of unpaid invoice since 10th January 2008 for Shs. 23,127,636/=. It was the plaintiffs' evidence that the defendant neither paid the money nor responded to their letter.

I also noted with keen interest that subsequently the defendant put up a notice in the New Vision newspaper of 19th April 2012 by which it invited all its debtors and creditors that appeared in the schedule to urgently report to the office of the Head of Finance at General Post Office Building on Plot 39, Kampala Road to verify the amount they owe or are owed by Posta Uganda as at 30th June 2009. The plaintiffs' consultancy firm ECO-Shelter & Environment appeared in the schedule as number 43.

It was the testimony of PW during cross examination that upon seeing their firm listed among the creditor's of the defendant in that notice, he wrote to the Managing Director of

the defendant to prove that the plaintiffs were indebted to it. When he was shown a letter dated 26th June 2010 (Exhibit P.25), he confirmed that it was the one.

I have had the benefit of looking at that letter where in the 1st paragraph PW referred to the advertisement by the defendant in which the plaintiffs' firm was listed as number 43. In the 2nd paragraph he referred to their earlier letter of Ref: JK/PUL/09/637 dated 24th September 2009 in which they had given details of the monies owed to them, in form of unpaid fees for consultancy services they rendered under signed contract for the proposed refurbishment of Postel Building. He then went ahead to give details of what was owed as per the two invoices earlier issued to the defendant all totaling Shs. 128,066,655/=.

I also to refer an earlier dated 11th November 2006 on the subject; "***Actualised Bills of Quantities for Postel Renovation/Refurbishment*** (Exhibit P.23), where Mr. Collins Oneko who signed as Managing Director of the defendant company reminded the plaintiffs to return the revised bills of quantities for the works in order to assess the sufficiency of their loan facility on offer with EADB.

To my mind this letter also confirms that some work on the contract was already going on at that point. Under clause 5.3.2.3 (c) on stage 3 of the contract, the plaintiffs were required to prepare Specifications and Bills of Quantities. Exhibits P.14 and P. 18 are the Specifications and Bills of Quantities that was prepared by the plaintiffs I believe in accordance with the terms of the contract. My understanding is that in a Consultancy Agreement of this nature, Bills of Quantities can only be generated from some kind of designs or drawings. I am therefore inclined to believe the plaintiffs' contention that they prepared outline designs, specifications and costs estimates with Bills of Quantities.

DW2 on cross examination confirmed that the drawings done by the plaintiffs could be used for the entire building. The evidence of PW on this matter was neither challenged in cross examination nor contradicted by any credible evidence adduced by the defendant apart from an unsubstantiated allegation by DW2 and submission by counsel that the drawings were not done by the plaintiffs but were got from the original drawings provided by the defendant.

If that argument were to be believed, to my mind it would be illogical that the defendant would engage a consultant to make drawings which it already had. In the TOR attached to the contract as Appendix 1, the objective of the consultancy as stated in clause 5.2 required the consultant to prepare technical designs among other things. There were also many other clauses in the TOR that required drawings to be made.

I therefore take it that by the plaintiffs preparing and submitting outline designs and drawings that was typical for the entire building they were performing their part of the bargain in the contract as varied. Even if the argument that the work done was only for the 2nd and 11th floor, in my view, computation of work done for payment purposes would still be based on percentage of the scope of work in the main contract as earlier agreed.

I wish to observe that no evidence was adduced in court to show that the defendant disputed the plaintiffs' claim at any one time. The plaintiffs in all their letters that forwarded invoices or reminded the defendants to pay were referring to performance of the consultancy services contract signed between the parties as the basis of their claim. In fact invoice No. 0213 was in respect of 30% of the scope of work and the relevant section of the original contract TOR was quoted in it. If at all the defendant felt that the work the plaintiffs had done was not part of that contract, it should have at least replied the plaintiffs' letters and corrected that impression. It did not. It is now when the matter is before court that it wants to rely on non-performance of the contract to defeat the plaintiffs' claim.

I am not at all convinced by the unsubstantiated argument that the contract was never performed and I decline to find so. Instead, I find that there is proof on a balance of probability that the contract was partly performed in accordance with the agreed new mode of performance. That disposes the first issue which is answered in the affirmative.

ISSUE 2: If so, whether the said contract was breached by the defendant not paying the 30% of the contract sum.

PW testified that 20% advance payment was not paid but they went ahead to perform the contract. That they had not computed the value of their services until they realized that four months had lapsed without payment. It was his evidence that when they computed after about a year, 30% of the work had already been done. They then issued an invoice of 30% as opposed to the advance pay of 20%. The invoice is marked Exhibit. P5. He further stated that they have not received any payment.

On breach of contract, counsel for the plaintiff submitted that since the plaintiffs have proved that they performed the contract, it is the defendant who refused or failed to pay for the services rendered by the plaintiff under the said contract and there by being in breach. He further submitted that the defendant admitted breach of the contract vide its letter dated 22nd December 2008 marked Exhibit P.44 and promised to pay the same money in installments based on payment plan which it failed to produce.

He further argued that as further proof of its indebtedness, the defendant published a list of creditors and debtors in the New Vision of Monday 19th April 2010 (Exhibit P.26) and in it the plaintiffs were requested to submit their claim. Accordingly the plaintiffs wrote to the defendant and forwarded their unpaid invoices but in utter breach of contract, the defendant refused to pay.

In support of his argument counsel for the plaintiffs relied on the authority of **United Building Services Ltd v Yafesi Muzira T/A. Quickset Builders & Co. HCCS No. 154 of 2005** where **Justice Lameck Mukasa** held that a breach of contract occurs when one or both parties fail to fulfill the obligations imposed by the terms of the contract. It was therefore his humble submission that the defendant breached the contract by failure to honour its obligation of paying the plaintiffs professional fees.

On the claim for 30% of the contract sum as stated in the invoice, counsel for the plaintiffs submitted that the plaintiffs performed their obligation and issued invoices to the defendant who did not challenge them but instead promised to pay. He argued that the defendant neither rejected the said invoices nor alleged in its defence that it had either settled it or that the figures were excessive.

In support of this argument counsel relied on the decision of **Hansa & Lloyds Ltd vs Aya Investments Ltd HCCS No. 857 of 2007** where **Kiryabwire, J** held that; the fact that the defendant did not deny receiving invoices from the plaintiff was proof of dealings and the end result was that the defendant was ordered to pay for the outstanding invoices for the services provided. It was therefore counsel's prayer that court finds that the plaintiffs are entitled to 30% of the contract sum plus the 18% VAT.

In reply, counsel for the defendant submitted that the Consultancy Service Agreement was never performed and prayed that the court finds that there was no breach of the same. He therefore submitted that there is no basis whatsoever for the plaintiffs claim of 30% of the contract price against the defendant. He maintained that if the contract had been performed any monies due would have been claimed as such rather than as a percentage figure. According to him the plaintiffs came up with a percentage figure and then set out to justify it with baseless invoices.

I have already made a finding that the contract as varied was partly performed by the plaintiffs. According to the evidence of the plaintiffs the work they had so far done exclusive of the 2nd and 11th floors was 30% of the total contract sum in respect of which they submitted invoices which were never paid. I must point out that I have found some difficulty in synchronizing the evidence of PW that they were fully paid for the work they did on the 2nd and 11th floor and yet invoice No. 0213 which is the basis for the claim of 30% of the contract sum indicates that it was for the work done on those two floors.

I have already found for the plaintiffs that the work they did was not only for the 2nd and 11th floors but was part of the work for the entire building as there were definitely overlaps. However, since it is admitted that work for the 2nd and 11th floors were fully paid for, I expected this claim to be for the extra works that was not paid for in which case the defendant's breach would be in respect of that outstanding amount. PW explained that putting the 2nd and 11th floor on that invoice was an error.

Be that as it may, I have taken into account the argument of counsel for the plaintiffs that the 30% claim is based on the principle of quantum meruit. In the case of ***Alfa Insurance Consultants Ltd v Empire Insurance Group Supreme Court Civil Appeal No. 9 of 1994***, ***Manyindo, D.C.J***. (as he then was) observed that the principle of quantum meruit is applied as a possible measure of restoration in case of unjust enrichment or measure of payment where a contract has no fixed a price.

As stated in the case of **Builtrust Constructions Limited vs Martha Rugasira (supra)** relied upon by counsel for the plaintiffs, common law will not allow a person to retain the benefit without compensation on grounds that it is outside the terms of the contract. I find that principle very instructive in determining this issue because the defendant who benefitted from the plaintiffs' services should not be allowed to unjustly enrich itself by not paying for it.

Although the contract in dispute clearly provided for the mode of performance and payment, it was the defendant that initiated distortion of that mode and the whole contract by issuing instructions contrary to the terms of the contract which the plaintiffs accepted. The defendant therefore cannot now turn around to argue as contended by its counsel that the plaintiffs should not claim a percentage figure for the work it did.

In addition to the foregoing, I have already made an observation herein above that the plaintiffs forwarded their invoices to the defendant and it was never at any one point challenged. In fact the plaintiffs wrote to the Managing Director of the defendant on 7th November 2008 (Exhibit P. 28) to remind him about the unpaid invoices for consultancy services in the following words:-

> "….***SUB: 2ND REMINDER OF THE UNPAID INVOICES FOR CONSULTANCY SERVICES***
>
> ***We wish to remind you for the 2nd time of our unpaid Invoices No. 0213 dated 10th December 2007 amounting to Eighty Eight Million, Eight Hundred and Thirty Two Thousand, Seven Hundred and Twenty Five***

Shillings Only (88,832,725/=) *and Invoice No. 0214 dated 11th December 2007 amounting to* ***Thirty Four Million Five Hundred and Seventeen Thousand Five Hundred and Ninety Nine Shillings (34,517,599/=).***

This invoices have remained unsettled up to now which is almost a year, which is unfortunate having rendered the services you requested, especially when Posta Uganda was under immense pressure by both the Office of the Prime Minister and Kampala City Council to renovate (facelift) your Postel Building, which was a requirement in preparation for the CHOGM conference.

We worked around the clock to specify and supervise the contractors to turn the building to its presentable appearance and it is only fair that Posta Uganda pays for our services. You could start off at least with settling the Invoice with a small amount of Thirty Four Million Five Hundred and Seventeen Thousand Five Hundred and Ninety Nine Shillings (34,517,599/=).

Please note that those invoices contain VAT which is also being demanded by Uganda Revenue Authority from us.

We therefore request you to clear it before the end of this month as we shall be closing our office for end of year by mid December 2008.

We look forward to your maximum co-operation and fast action on this matter….”

The Company Secretary Mr. Samuel Kaali Esq. responded to that letter on the 22nd December 2008 (Exhibit 44) as follows:

“The Managing Director

M/S Eco-Shelter & Enviroment Consultants

P.O. Box 10744

Kampala

FAO: Arch. Joel Katerega

Dear Sir,

RE: PROPOSED PLAN TO SETTLE THE OUTSTANDING INVOICES FOR CONSULTANCY SERVICES PROVIDED ON POSTEL BUILDING RENOVATION WORKS.

We acknowledge receipt of your letter Ref: JK/UPL/08/453 dated 7th November 2008, regarding the above subject matter. Following further information provided by yourself on this subject matter, we propose to pay the total amount in installments starting with Ten Million Shillings (10,000,000/=) which we plan to settle before end of next month (Jan 2009). The rest of the payment will be settled based on a payment plan proposed by Posta Uganda and agreed upon by both parties…." **(emphasis added).**

Clearly from the content of that letter the defendant understood the claim of the plaintiffs as contained in all the invoices and proposed to settle it in installments. In effect the defendant admitted its indebtedness to the plaintiffs as had earlier been stated in the letter dated 7th November 2008 in respect of invoice No. 0213 dated 10th December 2007 for Shs. 88,832,725/= (Exhibit P.5) and Invoice No. 0214 dated 11th December 2007 for Shs. 34,517,599/= (Exhibit P.6).

It was the evidence of PW that the plaintiffs did not receive the payment plan as promised but the amount in Invoice No. 0214 was largely paid and there was only a small balance which he could not recall. I must however point out that contrary to PW's evidence that there is a small balance it was pleaded in paragraph 4(h) of the plaint that the amount in that invoice was duly paid in three installments between the 22nd day of December 2008 and 26th August 2009. What was pleaded as outstanding in addition to Invoice No. 0213 is the Final Invoice No. 0231 for Shs. 39,233,930/= dated 24th September 2008 (Exhibit P.7). I will consider that amount when dealing with the issue of remedies.

It has not been explained to this court why the defendant instead of clearing all the debt that was unequivocally acknowledged changed its position that the entire contract was not performed. Without any such explanation to the satisfaction of this court, I find that the defendant breached the contract by not paying the defendant for the work it had so far done. I therefore find that the plaintiff is entitled to 30% of the contract sum which was admitted by the defendant vide its letter dated 22nd December 2007. I also find that the allegation that the contract was not performed was just an afterthought intended to defeat the plaintiffs' claim. These findings answer the second issue in the affirmative.

Issue 3: Whether the Plaintiffs are entitled to the remedies sought.

Special Damages

Counsel for the plaintiff submitted that the plaintiffs pleaded, particularized and proved a sum of Ug. Shs. 128,066,655/= being special damages. He further submitted that the invoices clearly stated the items billed for and the defendant did not deny the same at the trial. He relied on the case of ***Roko Construction Co. v Attorney General HCCS No. 517 of 2008*** where court held that where payments were indeed delayed and the figure was pleaded and had not been challenged by the defendant, the plaintiff had proved the claim to the satisfaction of the Court.

Counsel for the defendant submitted that the special damages had not been strictly proved since the invoices upon which the claim for special damages was based had no connection to the suit contract.

The law on special damages is that they must be strictly pleaded and proved as per ***Eladam Enterprises Ltd v S.G.S (U) Ltd & others Civil Appeal No. 20 of 2002*** . In view of my earlier finding that the amount stated in Invoice No. 0213 (Exhibit P.5) was admitted by the defendant, I find that that amount has been proved to the satisfaction of this court and they are entitled to it.

As regards Exhibit P.7, this was an invoice submitted by the plaintiffs in response to the defendant's notice of termination of the consultancy services agreement dated 26th August 2009. In that notice, the defendant stated in the last four paragraphs in so far as is relevant to this issue as follows:-

> ***"….Pursuant to this article and in conformity with its provisions, this is to notify you that the said Consultancy Services Agreement will TERMINATE on 25th day of September 2009.***
>
> ***The employer will comply with the provisions of payment on termination as stipulated in article 12.1.0:-***
>
> ***"On termination of this contract pursuant to the provisions contained herein, the Employer shall make these payments to the Consultant:-***
>
> ***(i) Remuneration pursuant to the provisions herein for services satisfactorily performed prior to effective termination.***
>
> ***(ii) Reimbursable expenses pursuant to the provisions herein for expenses actually incurred prior to effective termination.***
>
> ***Reimburse all reasonable costs incidental to the prompt and orderly termination of the Contract, which are actually incurred…"***

The plaintiffs upon receiving that letter responded by letter dated 24th September 2009. They reminded the defendant that it could only terminate the contract after settling the long outstanding Invoice No. 0213. They stated that the only obligation on their side was to submit the Final Invoice for the defendants to settle. By that letter, the plaintiffs submitted Exhibit P.7 for a total sum of Shs. 39,233,930 which was stated to be in three parts comprised as:

(1) Project Quantity Surveyors inputs after 10/12/2007.....3,024,000/=;

(2) Project Architects input after 10/12/2008……6,250,000/=;

(3) Reimbursables/Interest/loss of money value of the unpaid Invoice No.0213 that has remained unpaid for over 20 months (2,400,000/=+20,727,636/=) ……..23,127,636/=.

It is true that remuneration of professional staff was provided for under the Financial Proposal submitted by the plaintiffs and accepted by the defendants (Exhibit P. 3). However, I have found difficulty in appreciating how the figure claimed by the plaintiffs for the Project Quantity Surveyors and the Architects were calculated. The plaintiffs would have greatly assisted this court which does not have expertise in this area by clearly showing how the figures in the invoice were derived.

The financial proposal provided the rate of remuneration per week for the key consultants as well as the technical and support staff for all stages of the contract. The Team Leader/Project Architect was to be paid Shs. 3,600,000/= per week while the Architect and the Quantity Surveyors were to be paid Shs. 2,700,000/= per week. The Architect/CAD Expert was to be paid Shs. 2,160,000/= per week and the IT Specialist was to get Shs. 1,800,000/= per week. Assistants were to be paid Shs. 1080,000/= per week. That rate is applicable in all the seven stages of the contract.

I would have expected the plaintiffs to outline the activity undertaken and indicated the number of staff that carried it out so as to make a claim that is ascertainable under the contract. Absent of that, I find that the claim for remuneration of the Quantity Surveyors and Project Architect as stated in the 1st and 2nd part of Exhibit P.7 has not been strictly proved to the satisfaction of this court.

As regards the claim for reimbursables, interest and loss of money value, from the way the invoice was written, it appears the reimbursables are the Shs. 2,400,000/= and interest plus loss of money value is Shs. 20,727,636/=. My understanding of reimbursable is that it is expenses incurred by the plaintiffs that need to be reimbursed by the defendant. The defendant's letter (Exhibit P.10) referred to clause 12.1.0 of the contract which provided for payment of reimbursable expenses for the expenses actually incurred prior to the

effective termination as well as reasonable costs incidental to the prompt and orderly termination of the Contract, which are actually incurred.

The emphasis on both is that it must have been actually incurred. To my mind the only proof of actual expenditure or costs is by attaching the necessary receipts or some kind of acknowledgment. I would have therefore expected the plaintiffs to clearly specify those reimbursables and attach receipts as proof. Short of that, I find that the applicants have also miserably failed to prove their claim for reimbursables.

As regards the claim for interest and loss value of money, there is also no indication of how the amount claimed was derived. Nonetheless, I believe that since the plaintiffs have claimed for interest from 2007 when the amount became due till payment in full and general damages, that claim will be taken care of under those remedies.

On the whole under special damages I find that the plaintiffs have only managed to strictly prove the claim for Ug. Shs. 88,832,725/= as per Exhibit P.5 and it is accordingly awarded to them.

General damages

Counsel for the plaintiffs prayed for general damages of Ug. Shs. 50,000,000/= In support of this claim counsel for the plaintiffs submitted that the general principle behind an award of general damages is that of restitution integrum or to try as much as possible to place the injured party in good position in money terms as he would have been if the wrong complained had not occurred. He argued that the plaintiffs practice their profession for gain and have incurred operational expenses which included paying their external consultants who constituted the contractual team. It was argued that the plaintiffs have been denied use of their money for 5 years and have lost professional time.

I have considered counsel's submission and claim. The award of general damages is in the discretion of court as per **Benedicto Tejuhikirize vs U.E.B Civil Suit No. 51 of 1993.**

Paragraph 812 of Harlsbury's Laws of England Vol. 12(1) provides that general damages are losses, usually but not exclusively non-pecuniary which are not capable of precise quantification in monetary terms.

Considering the circumstances of this case, I find the amount of Ug. Shs. 50,000,000/= prayed for by the plaintiffs is on the higher side. To my mind an award of Shs. 10,000,000/= would adequately compensate the plaintiffs for the inconveniences and hardship they were subjected to by the defendant's failure to pay them.

Interest

The plaintiffs prayed for interest on damages at 30% per annum from date of judgment until payment in full and costs. Like interest, an award of costs is a matter of discretion of Court which discretion has to be exercised judiciously. *See.* **Superior Construction and Engineering Ltd v Notay Engineering Industries (Ltd) High Court Civil Suit No 702 of 1989**.

With all due respect to counsel for the plaintiffs, the interest rate of 30% prayed for on special damages is rather too high and I accordingly reject it. Taking into account the fact that the defendant denied the plaintiffs use of their money from December 2007 when the invoice for the same was issued, I find that the plaintiffs are entitled to interest at a more reasonable rate of 18% per annum from that date until payment in full and I accordingly award it.

I also award interest on general damages at 8% per annum from the date of this judgment until payment in full.

Costs

The general principal on costs is that it should follow the event unless otherwise directed by the court. Since the plaintiffs are the successful party in this suit, costs are awarded to them.

In the result, judgment is entered for the plaintiff in the following terms:-

1. It is declared that the Consultancy Services Agreement was partly performed.
2. It is further declared that the Consultancy Services Agreement was breached by the defendant.
3. The plaintiffs are entitled to the 30% of the contract sum as claimed and to that end special damages of Ug. Shs 88, 832,725/= is awarded to the plaintiffs.
4. General damages of Ug. Shs. 10,000,000/= is awarded to the plaintiffs.
5. Interest is awarded on (3) above at a rate of 18% per annum from December 2007 until payment in full.
6. Interest is awarded on (4) above at 8% per annum from the date of this judgment until payment in full.
7. Costs are awarded to the plaintiffs.

I so order.

Dated this 12th day of July 2012.

……..

Hellen Obura

JUDGE

Judgment delivered in chambers at 3.00 pm in the presence of:

1. Mr. David Kaggwa for the plaintiffs.
2. Ms. Belinda Nakiganda for the defendant.
3. Arch. Joel Kateregga-1st plaintiff.

JUDGE

12/07/2012