THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION

HCT - 00 - CC - CS - 119 - 2009

FIRE MASTERS LIMITED ……..…..…….…. PLAINTIFF

VERSUS

HUAWEI TECHNOLOGIES CO (U) LIMITED ……..... DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J u d g m e n t

The plaintiff filed this suit against the Defendant for recovery of special damages of USD 82,440 being the outstanding balance on a purchase order, an order of specific performance, general damages for breach of contract, interest and costs.

The plaintiff avers that on 9th January 2008, it and the defendant entered into a purchase agreement by which the plaintiff was to supply the defendant with a customized Ansul fire proof auto fire fighting system at a sum of USD 113,297.95.

On 15th February 2008, the plaintiff was issued with a purchase order and a down payment of 40% of the agreed purchase order amount of USD 45,319.18 was paid by the defendant as agreed. The plaintiff avers that it imported the customized Ansul fire proof auto fire fighting system (herein after referred to as the "fire system"), ready for delivery to the defendant, who was notified of its arrival in June 2008 but the defendant delayed to take possession until 1st September 2008.

The plaintiff avers that in accordance with the amended terms of payment, 50% of the purchase order amount was payable upon delivery of the system, and the issue of a Preliminary Acceptance Certificate (PAC) which to date has not been signed and this amounts to fundamental breach of the contract.

The plaintiff further avers that on 2nd March 2009, it successfully installed the fire system at the defendant's site and it was commissioned by the plaintiff in the presence of the defendant. Thereafter the defendant only paid 40% of the outstanding amount.

In their defence the defendant denied the averments in the plaint and contended that the suit is misconceived, frivolous and vexatious, bad in law and does not disclose a cause of action against the defendant.

The defendant concedes that the plaintiff did install the fire system but failed to provide the defendant with the design report as was the industrial practice before the defendant could issue them with a preliminary acceptance certificate (PAC). I any event the defendant did issue the plaintiff with a PAC which the plaintiff again failed to sign. It is the case for the defendant that the 50% claimed by the plaintiff is not yet due under the contract, and that the further 10% which is part of the said 50% claimed by the plaintiff, is supposed to be paid within 15 days, after 9 months from the date of the issuance of the PAC. It is therefore the defence case that this claim is premature.

In the alternative, the defendant contended that even if the amount was due, it would have been M/S Huawei Technologies Co. Ltd (a company based in China) to pay and not the defendant Ugandan company. The defendant further contended that the parties agreed that the contract shall be governed by the Laws of Hong Kong, and any dispute arising from the contract would be resolved by the Hong Kong International Arbitration Centre.

In the further alternative, the defendant denied breach of the contract, contended that no notice of intention to sue was served and that it does not submit to the jurisdiction of this court.

At the hearing, the plaintiff was represented by Mr. Byemaro, while the defendant was represented by Mr. Busingye.

Pre trial hearing/scheduling conference

At the pre trial hearing/scheduling conference the parties informed court all monies due to be paid apart from the 10% retention fee had been cleared. That being so the court directed that the only issue to be tried related to the 10% unpaid amount. The issue then was whether the 10% was payable?

Before, I address the above issue above the defendant company in its written statement of defence raised some issues which were not taken up at scheduling or the submissions. These relate to Jurisdiction.The defendant contended that the parties agreed that the contract shall be governed by the Laws of Hong Kong, and that the defendant does not submit to the jurisdiction of this court. With regard to this issue, Order 9 r 3 of the Civil Procedure Rules requires objections to jurisdiction of this nature to be made in an application by way of Chamber Summons.

In the case of **MARK GRAVES V BOLTON UGANDA LTD** (HCMA 015 of 2008), Justice Lameck Mukasa found that an applicant who wishes to dispute the jurisdiction of the court must give notice of intention to defend the proceedings, and file the application within the time limited for service of the defence.

In this case, no such application was made before this court by the defendant, disputing the jurisdiction of the court. Furthermore a look at the Department of Justice website of The Government of Hong Kong Special Administrative Region (WWW.doj.hk/eng/legal/ accessed 23rd July 2012) shows that under that territory's "one country, two systems" principle Hong Kong like Uganda applies English Common Law. In this regard this court is competent to apply English Common Law.

In addition to this, the defendant in its defence further contended that, the parties agreed that any dispute arising from the contract would be resolved by the Hong Kong International Arbitration Centre. Section 5 of the Arbitration and Conciliation Act provides for stay of proceedings pending reference of a matter before arbitration. In this case there is no evidence of any reference to arbitration of this dispute by the parties. In fact the parties instead have been resolving this dispute up to the point that only 10% of the amount due is still outstanding.

Issue 1; whether the defendant is liable to pay the 10% outstanding amount claimed by the plaintiff.

Counsel for the plaintiff further submitted that all the documents required by the defendants, prior to the payment of the 10% outstanding sum including the invoice were supplied to the defendants who have not yet paid the said sum.

In reply, counsel for the defendant submitted that the amendment to the contract under Clause 4 provided that the 10% is due when the plaintiff has issued documents including an invoice which the plaintiff in this case, has declined to issue. Furthermore, that the defendant only became party to the amendment after 27th June 2008 and since then, the plaintiff has not demonstrated willingness to issue the said documents therefore, the suit is premature.

I have addressed my mind to the agreements and documents in question. The amendment to the purchase agreement provided that the payment of the 10% was to be made within 15 days after 9 months from the date of issuance of the PAC. The payment supporting documents to be provided were; one commercial original invoice, one copy of the Purchase Order, one copy of the PAC signed by the authorised representative of the buyer.

Counsel for the defendant submitted that the PAC was not yet due and therefore, the claim by the plaintiff is premature. Furthermore that even if the amount was due it would have been M/S Huawei Technologies Co. Ltd to pay and not the defendant.

I have not found a signed PAC attached to the documentation. It is not disputed that it is not there. There is an invoice under cover of a letter dated 30th August 2010 from Counsel for the plaintiff with an invoice that shows the 10% outstanding is US $ 11,329.

It appears to my mind that the 10% is not paid by the defendant company because it did not get all the required documentation to trigger the said payment. It is conceded that the installation work

however was done. The author R.W. Hodgin in his book LAW OF CONTRACT IN EAST AFRICA Kenya Literature Bureau at page 172 writes

> ***"…if one party has substantially completed his side of the bargain leaving a minor omission or fault, the court may accept such performance as discharging his obligations..."***

This is the rule in ***Dakin v Lee [1916] 1 KB 566*** of substantial performance which was also applied with approval in the case of ***Marshides Mehta and Co Ltd V Baron Verhegen 21 EACA 153.***

All the evidence in this case points to substantial performance of this contract and the absence of one or two documents given the facts of this case is a minor omission. There is no complaint even that the fire system is defective.

With regard to the averment by the defendant that, even if the amount was due, it would have been M/S Huawei Technologies Co. Ltd in China to pay not the Ugandan company I with the greatest of respect disagree. The amended agreement dated 27th June 2008 and signed by the parties shows the present defendant as the buyer and under clause 4, is bound by the terms of the original agreement signed by the Chinese company, which include payments. I therefore find the 10% payable.

Issue two; what are the remedies available to the parties?

Having found that the plaintiff is entitled to the outstanding payment of 10% I hereby award them the invoiced value of the said 10% being US $ 11,329 this being a special damage.

The plaintiff prayed for general damages but neither party addressed Court on the matter of quantum. However since the bulk of the payments were made by the time of trial and the plaintiff must also bear responsibility for the quality of their documentation I will award nominal damages at US $ 1,200.

I also grant interest at 11%pa on the special damages from the date of filing until payment in full and 6%pa on the nominal damages from the date of this Judgment until payment in full.

I award the plaintiff costs on the reduced claim of US $ 11,329.

…….

Geoffrey Kiryabwire

JUDGE

Date: 16/08/2012

16/08/12

10:25am

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

- Byamaro for Plaintiff
- Mude John Bosco for Defendant

In Court

- Mohammed Legal - Officer of Defendant
- Rose Emeru – Court Clerk

…….

Geoffrey Kiryabwire

JUDGE

Date: 16/08/2012