

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

HCT - 00 - CC - CS - 11 - 2008

CONSOLIDATED CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF KAMPALA.....DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

The plaintiff company sued the City Council of Kampala (hereinafter referred to as KCC) for breach of contract involving the upgrading of certain roads in the Ntinda and Kyambogo areas of Kampala City.

The case for the plaintiff is that KCC entered into a contract entitled “Upgrading of Gentex Drive and factory Drive and factory lane in Nakawa Division contract No.KCC/HQ/RDS-01” with the plaintiff on the 20th May 2005. The roads which were to be upgraded were Gentex Drive, Kyambogo Link Road, Factory Drive and Factory Lane (herein after referred to as the “Suit Roads”).

The contract price was shs.700, 753,240/= (Shillings seven hundred million seven hundred fifty three thousand two hundred forty only) payable against certificates issued to the contractor by the project manager who was the city engineer at the same time.

The source of funding was a contribution of 50% from the industrialists in Kyambogo Industrial Area where the roads in question are situated and 50% from Kampala City Council.

The plaintiff secured a performance guarantee form Excel Insurance Company limited wherein the insurer guaranteed 20% of the contract price which was handed over to the defendant who acknowledged receipt of the same through a letter dated 27th May 2005.

The plaintiff using its own funds completed the setup stage by sub-contracting service providers, supervisors, managers and consultants in performance of the contract. However the defendant has since then failed or ignored to pay the plaintiff.

The Plaintiff's claim is mainly for recovery of 335,456,300/- being special damages, interest at commercial Banking rate of 26%p.a. from 18th August 2005 till payment in full, general damages, interest on general damages and costs.

The Defendant KCC denied the claim.

The parties agreed to the following issues for trial

- 1. Whether the plaintiff complied with the conditions precedent to the contract?**
- 2. Whether the plaintiff executed the contract and if so, how much?**
- 3. What remedies?**

At the trial the Plaintiff was represented by Mr. R Tusingwire and Mr. G. Kandebe while the defendant KCC was represented by Mr. J. Sendege. The Plaintiff called two witnesses namely Mr. Wilson Kashaya (PW1) the Managing Director of the Plaintiff company and Mr. Moses Zirimwanguyiza an Engineer formerly working with KCC and supervising engineer of the project; while the defendant called five Witnesses namely Ms Edith Ssemakula (DW1); Mrs Petuwa Kateeba (DW2) an industrialist; Mr. Mohan Kiwanuka (DW3) Mr. John Bosco Sempijja (DW4) a lawyer with MTN and Eng Abraham Byandala (DW5) a former City Engineer at KCC.

ISSUE No. 1: Whether the plaintiff complied with the conditions precedent to the contract

The issue here was whether or not the plaintiff's secured a Performance Bond as a condition precedent under **Clause 51** and **52** of the contract.

This issue was conceded by the defence and so Court need not make any further finding on the matter.

Issue No. 2. Whether the plaintiff did the contract work and if so how much?

It is the case for the plaintiff that at the prompting of the defendant KCC on signing the contract but before being paid they carried out preliminary work on the suit roads presented their bill to the City Engineer but were not paid to date. Mr Kashaya for the plaintiff testified that his company did mobilization, site clearing, earth works, some drainage and some priming under the contract. The plaintiff's then made a claim for Shs 335,456,300/= for this work. He further testified that the Project Manager who was an employee of KCC Mr. Zirimwanguyiza came and inspected the works since it was him who was supervising the works.

Mr. Zirimwanguyiza who had worked for KCC but testified for the plaintiff confirmed that he was the project manager on the contract and verified the claim of the plaintiff. He testified that he adjusted the claim to the figure of Shs 335m/= and forwarded it to his boss the City Engineer for processing.

Counsel for the plaintiff submitted that according to “Exhibit p.7” (Eng. Kinyera the Director of Works & Urban Planning KCCA’s letter of 9/4/2009), it stated that the plaintiff;

“... (h)carried out some scarification works and regravelling.

(i) Kampala City Council did not provide the contractor with the advance payment requested for due to lack of funding and therefore the contractors stopped work.”

Counsel for the plaintiff submitted that it is clear that the plaintiff did the preliminary work and that the defendant breached the contract by failing to issue the certificate. He submitted that where part of the contracted work is done but there is no payment that amounts to breach of contract. He referred court to the case of The **Hon Justice Madrama** in **Mohammed Saru T/a Moonlight Transporters and Contractors V Jinja Central Division Council** HCCS 223 of 2009. He further submitted that the principle of quantum meruit would apply to this case.

For the defence two prominent industrialists Mrs Kateeba and Mr. Kiwanuka testified that their community of industrialist had agreed to a partnership with KCC to repair the roads in their area which were in a sorry state. They however do not recall works of the magnitude claimed by the plaintiff as having been executed.

Ms Ssemakula a secretary in the office of the Town Clerk queried whether the plaintiff ever wrote to KCC making a claim for payment as she did not recognize the stamp of KCC on the letter of the plaintiff making a claim for payment dated 18th August 2005 (exhibit P 5).

Mr Sempijja of the MTN phone net work also testified that the MTN 077 series bearing 10 digits were first introduced on 1st November 2005 and so the said letter had the new series 49 days before their official activation.

The former City Engineer Eng. Byandala who appeared for KCC did not contest the bills of the plaintiff and testified that in his opinion

“... KCCA should sit down with Engineer Moses Zirimwanguyiza, go through the bills of quantities, if you have some engineering intelligence you can make some arguments with him. He says it was done you can argue with him and come to something, but I don’t think somebody was a fool to sit somewhere and reproduce all these Bills of Quantities (BoQ) for nothing. I don’t think somebody can just do that!”

Counsel for the defendant submitted that the plaintiff was trying to claim money way beyond the set up stage of the contract yet in reality it did not do the work. He further submitted that no signed work forms were ever done in accordance with the contract to trigger payments and the plaintiff merely submitted one general claim instead because they could not satisfy the contractual terms.

I have reviewed the evidence on this issue and perused the submissions of both counsels for which I am grateful.

It is clear that this contract arose from a partnership between KCC and industrialists in the Ntinda/Kyambogo industrial area to repair their roads which were in a bad state of repair. Both parties were to share in the cost of the repairs. The contract to carry out the repairs was however made between the plaintiff and KCC on the 20th May 2005. On the face of the signed contract you could not tell that there was a partnership between KCC and the industrialists for funding the works. The project management was also handled in house. By a letter dated 27th May 2005 (exhibit P3) the City Engineer then Eng. A. Byandala acknowledging that the performance security had been procured by the plaintiff and gave them possession of the contract works (i.e. the roads).

However by 8th April 2005 by a letter from Mr. Mohan Kiwanuka to his fellow industrialists in the area it was apparent that despite the contract having been signed work had not began and the industrialist too had not made their contributions. By another letter dated 20th September 2005 (exhibit D3) from the Principal Assistant Town Clerk KCC Mr. Tumuwine to Mr. Kiwanuka the position had not changed even at that date. Even though the contract did not have a definitive completion date it is clear to my mind that for a contract that was signed in May 2005 problems had set in. It would appear that this would bear out the testimony of Mr. Moses Zirimwanguyiza the KCC Project Manager at the time that there was no money to kick start the contract. He nonetheless testified that he supervised works and adjusted a bill of about Shs 335m/= for payment. There is also evidence that the plaintiff began some mobilization and work without receiving any advance payments.

The work does not seem to be much because Mrs Kateeba and Mr. Kiwanuka who work in the contract area contested that repair work were done.

However, the evidence on record suggests that Eng Byandala (then City Engineer KCC); Mr. Moses Zirimwanguyiza (then Project Manager KCC) and Eng. Kinyera the Director of Works & Urban Planning KCC by his letter Exh. P7) all agree that some work was done. If that work was not certified as testified then the plaintiff would be entitled to payment on the basis of the legal principal of quantum meruit for the actual work done. That would only be equitable. I think it was a big error on the part of the defendant not to certify whatever work was done and billed in a timely manner as provided for under the contract to avoid any doubt. If no work was done the certificate should have shown zero work and materials.

I am not however inclined to believe in light of the above testimony that the plaintiff company could have done some work and not made the demand of the 18th August 2005. That would not have been business like.

No other figure has been put forward to account for whatever work was done except that of the plaintiff. In fact Mr. Moses Zirimwanguyiza in his testimony seems to suggest that the said figure is the scope of work he supervised. That being the case I find on the strength of the evidence before me that the plaintiff indeed did some preliminary work and I find that it was Shs 335,456,300/= as claimed.

Issue No. 4: Remedies

The plaintiff prayed for both special and general damages.

I based on my findings above grant the plaintiff special damages of Shs 335,456,300/= as prayed. The plaintiff further prayed for interest at 26% (I believe they meant per

annum) from the 18th August 2005 until payment in full. I accept that as a reasonable and so grant it as prayed as well.

As to general damages counsel for the plaintiff submitted that Shs 300,000,000/= would suffice but did not address court as to how he arrived at that quantum. I think that is very excessive. Given that at the core of this contract was a partnership between KCC and industrialist that for reason did not take off I would award general damages of Shs 5,000,000/= with interest at 8%pa from the date of Judgment until payment in full.

I award the plaintiff costs of the suit

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Geoffrey Kiryabwire

JUDGE

Date: 04/02/2013

04/02/13

9:40

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

- L. Adoch for the Plaintiff

In court

- Kashaya for Plaintiff
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 04/02/2013