THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 438 - 2010

(Arising out of CA No. 02 OF 2004)

ALPHA GAMA ENGINEERING ENTERPRISES LED :::::::::: PLAINTIFF

VERSUS

ATTORNEY GENERAL :: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Alpha Gama Engineering Ltd herein after called the Plaintiff in these proceedings sued the Attorney General for recovery of Ug.Shs. 340,448,110/= VAT inclusive and interest there on at 25% general damages for breach of contract and costs.

The background to this suit as got from the pleading is straight forward and briefly the government of Uganda desiring to construct regional offices in Arua and represented by the Solicitor General contracted the Plaintiff to do the construction at a contract price Ug.Shs. 984,618,278/=.

During the construction, for reasons that were given which included price increase of fuel, timber products, cement, steel products and others like sand and stone, the Plaintiff wrote to the Project Manager seeking the contract price to be varied from Ug.Shs. 984,618,278/= to Ug.Shs. 1,132,311,019/= which was a 15% rise intended to cater for the effects caused by market price fluctuations, Exh. P.3.

By a letter, Exh. P.4 dated 20th April 2009, the Solicitor General agreeing with the proposal wrote to the Plaintiff. Part of the letter reads;

> *"In the appeal you requested for an upward contract sum adjustment of 15% (Ug.Shs. 147,692,741/=) (18% VAT inclusive) above the original contract price, i.e. a revision from Ug.Shs. 984,618,278/= to Ug.Shs. 1,132,311,019/= due to the rise in the prices of construction materials and fuel costs.*

This is to inform you that the Ministry's Contracts Committee met on 16th April 2009 and approved your proposal of an upward adjustment of 15% (18% VAT inclusive) as the ultimate and final adjustment.

The Plaintiff executed the building works completing the construction and the building was commissioned in a ceremony on the 15th September 2009. A contractor's report was read at the commissioning, Exh. D.2. By the time of handover, the Plaintiff had received Ug.Shs. 754,025,725/=. Contending that he was entitled to all the contract sum as varied in Exh. P.4, the Plaintiff demanded for a balance of Ug.Shs. 378,285,294/= which sum included VAT. In

response to this, on the 15th March 2010, the Defendant paid a further Ug.Shs. 110,050,414/=.

Going by the claimed varied figure, the Plaintiff contended that he was still owed Ug.Shs. 268,234,880/= which figure included 18% VAT. The Plaintiff also demanded for Ug.Shs. 72,213,000/= a penalty due to URA on retained and unpaid VAT. He therefore sought the recovery of a total of Ug.Shs. 340,448,110/=. The Defendant did not pay this sum of money resulting into this suit.

The Defendant on its part contended that it did not owe any money having paid all that was due to the Defendant as demanded for in the final certificate dated 3rd March 2009. It further contended that it had also paid the VAT.

At the scheduling, two issues were agreed upon, namely;

a) Whether the Plaintiff was entitled to the sum claim?
b) What were the remedies available to the parties?

Beginning with the 1st issue, it is not in dispute that a building contract was reached between the Plaintiff and the Defendant, Exh. P.1.

It is also not in dispute that the Plaintiff in the course of construction applied for a variation of the contract price, Exh. P.2 and P.3.
That the prayer for variation was granted is clearly seen in Exh. P.4 where in the Solicitor General wrote to the Plaintiff approving the upward adjustment of the contract price.

It is clear from the record, as evidenced by the contractor's report on commissioning of 5th September 2009 that the Plaintiff executed the construction and handed over the finished office block to the Defendant.

As to payments, it is not in dispute that by the time of handover, the Defendant had paid the Plaintiff Ug.Shs. 754,025,725/=. What remained to be resolved was whether the Plaintiff was entitled to more payment.

Indeed he must have been entitled because on the 15th March 2010, the Defendant paid a further Ug.Shs. 110,050,414/= as the Plaintiff himself conceded.

In the Plaintiff's claim, he said he was owed retained VAT and the penalties that accrued from delayed payment.
During the hearing however, the Plaintiff conceded that VAT was indeed paid by the Defendant to the tune of Ug.Shs. 176,569,455/=.
He said the Defendant now only owed him Ug.Shs. 5,605,617/=. Since the Defendant did not dispute the VAT owed, the Plaintiff is awarded Ug.Shs. 5,605,617/= as VAT unpaid.

Further, during the trial, he told court that the total amount paid to him so far was Ug.Shs. 907,472,772/=. It is therefore the difference between this figure and the contract sum as varied to Ug.Shs. 1,132,311,019/= which must be resolved.

His contention now is that the difference between this total figure and the contract sum as varied must be paid.

To decide whether the Plaintiff is entitled to further payment, it is important to look at the terms of the contract.
The method of payment was by presentation of payment certificates. The relevant provision 42.1 is reproduced here for ease of reference.

> *"42.1 The contractor shall submit to the Project Manager monthly statements of the estimated value of the work executed less the cumulative amount certified previously.*
>
> *42.2 The Project Manager shall check the contractor's monthly statement and certify the amount to be paid to the contractor.*
>
> *42.3 The value of work executed shall be determined by the Project Manager.*
>
> *42.4 The value of work executed shall comprise the value of the quantities of the items in the Bill of Quantities completed.*
>
> *42.5 The value of work executed shall include the valuation of Variations and Compensation events.*
>
> *42.6 The Project Manager may exclude any item certified in a previous certificate or reduce the proportion of any item previously certified in any certificate in the light of later information."*

From the record, it is clear that the Defendant effected payment on presentation of payment certificates duly checked and certified by the Project Manager.

In a contract where payment is based on certificates, the contract price simply remains an estimate. I can say further, that it remains an estimate even after variation. The contract price in this case was varied by 15% of the original contract price. This brought the figure to Ug.Shs. 1,132,311,019/=. While this meant he could claim payment upto that figure, he could only do so by resenting certificates duly endorsed by the Project Manager.

The Plaintiff's final certificate issued by the Project Manager was dated 3rd September 2009. It mentioned the contract price and also referred to the variations.

By its wording, it could only have been presented as the final certificate. It in part reads;

> "I/We certify that final payment as shown is due from the employer to the contractor."

It then went ahead to include

> *"Value of the work executed as per final statement attached (including variations and price adjustment)"*

The only interpretation is that words under this contract are given their natural meaning. Naturally this meant that this certificate was the last certificate carrying the final payment in respect of construction of the office block and in satisfaction of the contract between the Plaintiff and the Defendant.

The Plaintiff had every right to complain but it would seem that at that time, he was satisfied with the final certificate because a few days later, he handed over the building to the Defendant and the contractor's report written by him clearly stated the project cost and in particular, the certified total project cost as Ug.Shs. 930,753,017/= which sum included VAT.

This report confirmed the figures on the final certificate. If there had been a discrepancy, the wordings and figures in the commissioning report which came in after the final certificate would have been different.

In any case, there was a procedure of complaint specifically for disputes such as the one the Plaintiff complained of to handle decisions that were wrongly taken.

Clause 24 of the Contract document, headed "Disputes" provides as follows:

> *"If the contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Project Manager decision."*

That being the procedure, the Plaintiff had every right if he felt that the figures arrived at in the final certificate by the Project Manager were not correct, to refer the matter to an Adjudicator within 14 days

from learning the contents of the Project Manager's final certificate, and if not satisfied to an arbitrator. He did not do this. Furthermore, since the payment was based on certificates, the Defendant could not be held liable for nonpayment beyond the certified amount.

The certified amount was given to this court in Exh. D.2 as Ug.Shs. 930,753,017/=. This document which formed the commissioning report and which was authored by the Plaintiff on 5th September 2009 days after the final certificate had issued is the most reliable evidence as to the certified amount. It is therefore this amount, less Ug.Shs. 907,472,772/= already recovered, that forms the money owed to the Plaintiff by the Defendant.

The result is Ug.Shs. 23,280,245/=. But this amount includes the unpaid VAT of Ug.Shs. 5,605,617/= which if subtracted from the sum owed, leaves, Ug.Shs. 17,674,628/= and it is the sum of money awarded as special damages.

Turning to the prayer for general damages, it is trite that general damages are the sums which in the circumstances fall to be paid by reason of some breach of duty or obligation as imposed by the contract, **Hall Brothers SS Company Ltd V Young** (1939) 1 KB 748.

Damages are compensatory and not a punishment. Their purpose is to place the Plaintiff in as good a position as to the extent that money could do if the breach complained of had not occurred.

Damages are therefore measured by material loss suffered by the Plaintiff. In awarding damages, the court must ensure not to

unnecessarily enrich the Plaintiff but in the same vein not to deny him appropriate compensation.

These damages must therefore be a direct, natural or probable consequence of the breach that has caused the dispute, **Storms V Hutchinson** (1905) AC 515.

The contract that the Plaintiff and Defendant entered into was a building contract whose works were to be executed by the Plaintiff who was well known by the Defendant as a person in the construction business. His earning therefore were for and as a result of a commercial undertaking. To deprive him of his earning however, small was to deprive him of a chance to multiply that earning and he has suffered damages.

Counsel for the Plaintiff did completely nothing by way of guiding the court on the quantum of damages.
Nonetheless, the court cannot deny him what is due to him, whatever difficulties it faces in assessment. Court must therefore fall back to its own discretion to decide what to award, **Bhandeha Habib Ltd V Commissioner General – URA** (1997 – 2001) UCL 202.

As I said, the Plaintiff's counsel was uncharacteristically unhelpful with regard to the quantum. But the Plaintiff has been deprived of his Ug.Shs. 17,674,628/= since 5th September 2009 close to 4 years. He would have put this money to some other use.

Considering that the Plaintiff did not testify nor call any witness to testify to this claim of damages, it is my view that an award of

general damages of Ug.Shs. 10,000,000/= is appropriate which I then award.

Turning to the issue of interest, the Plaintiff prayed for interest on the decretal sum at court rate of the decretal sum till payment and 25% interest on special damages from 3rd September 2009 till full payment.

It is important to note that an award of interest is discretionary. Lord Denning had this to say on interest in **Harbutts Plasticine Ltd V Wyne Tank and Pump Co. Ltd** (1970) 1 CHD 447;

> "An award of interest is discretionary. It seems to me that the basis of an award of interest is that the Defendant has had the use of it himself. So he ought to compensate the Plaintiff accordingly."

In the instant case, the Plaintiff has been awarded general damages sufficient to cover whatever loss he suffered when he was deprived of the decretal sum. Nonetheless, the Plaintiff was a businessman and told court he had borrowed money at big interest rates for commercial purposes. In my view, he deserves something more than just the court rate. Since however he has got general damages, I would find 25% per annum too high.
Because of the foregoing, I find interest at the rate of 10% appropriate and I accordingly award that to run from 5th September till payment in full.

In the sum total, judgment is entered in favour of the Plaintiff against the Defendant as follows:-

a) Ug.Shs. 5,605,617/= towards VAT

b) Ug.Shs. 17,674,628/= as special damages.

c) Ug.Shs. 10,000,000/= as general damages

d) Interest on (b) above at 10% per annum from 5th September till payment in full.

e) Interest on (c) above at court rate from judgment till payment in full.

f) Costs of the suit.

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David K. Wangutusi
JUDGE

Date: 19 - 12 - 2013