THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0809-2012

NEC HEALTH WORLD PHARMACEUTICALS LTD .....……PLAINTIFF

VERSUS

ENGINEERING CONSTRUCTION CO. LTD .....……...… ...DEFENDANT

BEFORE HON. MR. JUSTICE MASALU W. MUSENE

JUDGEMENT:

The plaintiff filed this case in this court on the 15 day of October 2007 against the Defendant seeking recovery of **USD, 131,800 (one hundred thirty one thousand eight hundred united states dollars**) as special damages, value Added Tax (VAT) on the said dollars, general damages, interest on the said United States Dollars and general damages at a commercial rate from the ate of judgement till payment in full and cost of the suit. According to the plaintiff's case, these prayers are premised on breach of contract of the construction of the perimeter wall and road works (hereafter called "**the contract**") entered into between the plaintiff company and the defendant company on the 7th day of July 2006.

In the written statement (WSD) and counterclaim filed on the 20th day of October 2007, the Defendant denied having breached the contract and instead brought a counter claim against the plaintiff claiming among others, special damages on an unpaid sum of money of **USD3,790,00** (**Three thousand seven hundred ninety United Stated Dollars**) and **USD 6,145** (**six thousand one hundred forty five United States Dollars**) as value of major tools and equipment. The counterclaim further prayed for an order for return of book of accounts, general damages for inconvenience and non-payment of monies, interest on all monies claimed at 30 percent from the date of filing the counterclaim until payment in full, costs of the suit and any other suit and may other relief that this honourable court may deem fit and proper.

At the scheduling conference, the agreed facts were that the plaintiff and the defendant on the **7th day of July 2008** executed a written agreement for the defendant to carry out construction works on and around the plaintiff's premises to which the defendant was paid **USD 43,000 (Forty Three Thousand United States Dollars)** as full consideration to construct a perimeter wall on the plaintiff's premises and an advance of **USD 32,000 (Thirty Two Thousand United States Dollars)** to effect road works at the plaintiff's premises. The rest of the facts were disagreed.

After scheduling of this case attempts to have the matter heard failed as the case was fixed for hearing and either counsel for the plaintiff was not ready or was unavailable. This explains why this case now forms part of the backlog and when it was fixed for hearing as part of the backlog cases, counsel for the plaintiff did not appear as he had earlier in a letter dated the **28th** day of **November 2011** notified this court that they lost contact with the plaintiff. This court upon an oral application made by counsel for the defendant under **Order 9 r 22 of the Civil Procedure Rules (CPRs) S.I 71-I,** went ahead and dismissed the plaintiff's suit for non appearance and failure to prosecute the same.

The defendant had a counterclaim in this case and made a prayer to proceed exparte on the counterclaim. This court allowed the prayer and the counterclaimant called only one witness and that was one **Madhavan Ramakrishnan** a Managing Director of the defendant company who filed in a witness statement on oath on the **12th** day of **April 2013** and confirmed the same to court on the **15th** day of **April 2013.** Counsel for the counterclaimant/defendant was directed by this court to file Written Submissions and the same was done on the **17th** day of **April 2013.**
This Judgement is therefore on the counterclaim.

BRIEF FACTS

The counterclaimant contends that on the **7th** day of **July 2006**, the plaintiff contracted it to construct a perimeter wall around its premises located at **Plot 38-40 Mulwana Road, Industrial Area** at a value of **USD 47,000 (Forty Seven Thousand United States Dollars).** It is further contended by the counterclaimant that the plaintiff subsequently contracted the defendant to construct a road and pavement around its building and that on the **16th day of June 2006**, the plaintiff locked out the defendant/counterclaimant and its workers from its premises. Part payment of **USD 105,008.71 (One Hundred Five Thousand Eight dollars and Seventy One cents)** was made by the plaintiff and the counterclaimant contends that the road works and bin construction including all miscellaneous works were valued at **USD 132, 986.00 (One Hundred Thirty Two Thousand Nine Hundred and Eight Six United States Dollars)** as damages for the failing bin wall and incomplete road works. The defendant/counterclaimant disputed the claim and by way of counterclaim sought the sum of **USD 27,897.29 (Twenty Seven Thousand Eight Hundred Ninety Seven Dollars and Twenty Nine cents)** as the outstanding sum on the contract plus **USD 3,790 (Three Thousand Seven Hundred and Ninety United States Dollars)** being the defendant's raw materials and work tools and equipment valued at **USD 6,145 (Six Thousand One Hundred Forty Five United States Dollars).**

ISSUES

At the scheduling conference held interparties on the **09th day of April 2009**, the following issues were framed for determination by this court.

i. **Whether the defendant substantially performed the contract?**
ii. **Whether the defendant breached the construction agreement? And**
iii. **What remedies are available to the parties?**

The Last (third issue) can be modified as follows;
iii. Whether the defendant is entitled to the prayers in the counterclaim?

RESOLUTION

This court will separate **issue (i) & issue (ii)** and resolve them separately though counsel for the counterclaimant in his Written Submissions resolved them together.

ISSUE 1: WHETHER THE DEFENDANT SUBSTANTIALLY PERFORMED THE CONTRACT?

This court has in its earlier decision of **KAMPALA CAPITAL CITY AUTHORITY VS. ZIMWE ENTERPRISES, HARDWARE & CONSTRUCTION LTD HCT-00-CC-MA-0494-2012** considered the doctrine of substantial performance of a contract. At **Pg. 3** of its ruling, this court relied on **CHITTY ON CONTRACTS and the case of DENIS SEMAKULA VS. MASAKA DIOCESE & 2 ORS (1998) 11 KALR 128** where court held that **where the plaintiff has substantially performed the contract and further performance was deliberately made difficult by the defendant himself then the plaintiff was entitled to an order for the full contract price under the doctrine of substantial performance.**

In FIRE MASTERS LIMITED VS. HUAWEI TECHOLOGIES CO. (U) LIMITED HCT-00-CC-CS-119-2009: Hon Justice Geoffrey Kiryabwire at Pgs 4-5 of his judgment while considering an issue similar to the present issue held relying on the author **R. W. Hodgin** in his book **LAW ON CONTRACT IN EAST AFRICA, KENYA LITERATURE BUREAU at page 172:**

> **"...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 same rule applied in **DAKIN VS. LEE [1916] 1 KB 566 and MARSHIDES MEHTA and CO. LTD VS. BARON VERHEGEN 21 EACA 153.**

Counsel for the counterclaimant relied on the decision of **NOBLE BUILDERS VS SIETCO HCCS NO. 174 OF 1990;** wherein **Hon. Mr. Justice Egonda** relying on the decision of **WALJI JETHA KANJI VS. ELAIS FREED (1959) EA 1071** held:

> **"It is, I think, well established that where a lumpsum contract is substantially completed, liability cannot be repudiated on the ground that the work, though substantially completed, is in some respects not in accordance with the contract."**

According to the evidence of **DW1** one **Madhavan Ramakrishnan,** the road works, wall construction including all miscellaneous works were valued at **USD 132,986.00 (One Hundred Thirty Two Thousand Nine Hundred and Eight Six United States Dollars).** This was tendered in court and exhibited as **"DE3".** That on the **29th** day of **May 2007**, the agreement was varied to permit for settlement of the past accounts and a copy of the minutes of the meeting was exhibited as **"DE4".**

That on the **16th** day of **June 2007,** the plaintiff locked out the defendant companies workers from its premises and kept the defendant's raw materials valued at **USD 3,790 (Three Thousand Seven Hundred and Ninety United States Dollars)** and work tools and equipment valued at **USD 6,145 (Six Thousand One Hundred Forty Five United States Dollars).** A schedule of the materials and equipment was exhibited as **"DE5".**

That the plaintiff paid to the Defendant a sum of **USD 105,008.71 (One Hundred Five Thousand Eight dollars and Seventy One cents)** and left unpaid the sum of **USD 27,897.29 (Twenty Seven Thousand Eight Hundred Ninety Seven Dollars and Twenty Nine cents)** being the sum due on the road construction. **A copy of the account was exhibited "DE3".**

In its entire evidence adduced in court, the counterclaimant in the entire witness statements of its witness **Madhavan Ramakrishnan** does not prove to court that he made a substantial performance of the contract. It is merely pleaded in the WSD and counterclaim that the counterclaimant substantially performed the contract.

In his written submissions, counsel for the counterclaimant contends that a substantial part of the contract was performed but does not bring out to this court the evidence leading to such a claim. This therefore remains merely argumentative. It is a reknown principle or rule of evidence that he who alleges must prove.

Sec. 101 of the Evidence Act Cap.6 provides that;

> **(1) "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist."**
>
> **(2) "When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."**

Sec. 103 of the Evidence Act Cap.6 provides that;

> **"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person."**

From the evidence given, the defendant has not proved his allegations and therefore this court is left with no option rather than disallowing the prayer for payment of the whole contractual price.

ISSUE 2: WHETHER THE DEFENDANT BREACHED THE CONSTRUCTION AGREEMENT?

In his evidence **DW1** testified that following the contract to construct perimeter bin wall entered into between the defendant and the plaintiff's company, the defendant executed its part of the contract and was later frustrated when the plaintiff locked out the Defendant Company's workers from its premises and keep the Defendant's raw materials valued at **USD 3,790 (Three Thousand Seven Hundred and Ninety United States Dollars)** and work tools and equipment valued at **USD 6,145 (Six Thousand One Hundred Forty Five United States Dollars). A Schedule of the above materials and equipment was exhibited as "DE5".**

The plaintiff though denied this contention in its reply to the WSD and Counterclaim, did not come to court to prove the same. This leaves the counterclaimant's evidence uncontested.

Breach of contract is defined by the **Black's Law Dictionary, 8th Edition, Page 200** as;

> **"Violation of contractual obligation by failing to perform one's own promise, by repudiating it or by interfering with another party's performance".**

Also in RONALD KASIBANTE VS SHELL UGANDA LTD HCCS No. 542 of 2006 [2008] ULR 690 cited in the decision of this court in **ANDES (EAS) LIMITED VS. AKOONG WAT MULIK SYSTEMS LTD & OTHERS HCCS NO. 184 OF 2008** by **Hon. Lady Justice Hellen Obura on PG. 7,** a breach of contract is defined to mean;

> **"...the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party…"**

From the above definitions, it is clear that the conduct of the plaintiff stopped the Defendant from performance of the contract as earlier on agreed and this cannot be interpreted to be breach on the part of the defendant save on the plaintiff's part. This issue is therefore resolved in the negative. That is, there was no breach of contract on the part of the defendant.

ISSUE 3: WHETHER THE COUNTERCLAIMANT IS ENTITLED TO THE PRAYERS IN THE COUNTERCLAIM?

Sec. 61 (1) of the Contracts Act gives the consequences for loss or damage caused by breach of contract. It provides:

> **"Where there is breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her."**

Section 61 (2) however provides that ***the compensation referred to in subsection (1) is not to be given for any remote and indirect loss or damage sustained by reason of the breach.***

Section 61 (3) of the same Act provides that:

> **"When an obligation similar to that created by contract is incurred and is not discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if that person had contracted to discharge it and had breached the contract."**

In **HADLEY VS BAXENDALE [1845-1860] ALLER 461 cited in ANDES (EAS) LIMITED VS. AKOONG WAT MULIK SYSTEMS LTD & OTHERS HCCS NO. 184 OF 2008** (Supra) it was stated that:

> **"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonable be considered either arising naturally i.e. according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. .....if special circumstances under which the contract was made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would**

> **be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known to the party breaking the contract…"**

Following the above principle, the conduct of the plaintiff stopping the defendant from completing the construction work occasioned him general damages and thus court will award general damages of **UGX.5,000,000/= (Uganda Shillings Five Million only).** The claim by counsel for the counterclaimant of **UGX 15,000,000/= (Uganda Shillings Fifteen Million only)** is on a higher side as it is not commensurate to the contractual sum of **UGX. 22,298,000 (Uganda Shillings Twenty Two Million Two Hundred Ninety Eight Thousand only)**

Counsel for the counterclaimant also prayed for special damages. In **RONALD KASIBANTE VS. SHELL UGANDA LTD (Supra)** court noted that;

> **"Special damages must be pleaded and strictly proved by the party claiming them. The plaintiff to succeed in the instant case ought to have put before court materials which indicated the average sales of fuel or airtime for a month, indicating margins of fuel sale and overhead costs to prove possible future loss."**

In the instant case the counterclaimant attached materials of the same and claimed recovery of **USD 27,897.29 (Twenty Seven Thousand Eight Hundred Ninety Seven and Twenty Nine Cents)** as special damages. This court will allow special damages of **USD.10, 000 (Ten Thousand United States Dollars)** as special damages.

The counterclaimant also prayed for interest on special damages at a rate of **30% per annum** from the date of cause of action, **27th October 2007** till payment in full.

The award of interests is a matter of discretion of court which discretion has to be exercised judiciously. This is the position in **SUPERIOR CONSTRUCTION AND ENGINEERING LTD VS. NOTAY ENGINEERING INDUSTRIES (LTD) HCCS**

NO.702 OF 1989 cited in **COPCOT E.A LTD VS. GODFREY SENTONGO & ANOR HCCS NO.118 OF 2008 (See Pg.10).**

The rationale for awarding interest stated in the case of **MASEMBE VS. SUGAR COOPERATION AND ANOR [2002] EA 434** where **Oder JSC** quoting **Lord Denning** in **HAMBULTS'S PLASTICINE LIMITED VS. WAYNE TANK AND PUMP COMPANY LTD [1970] 1 QB 447** stated that;

> **"It seems to me that the basis of an award of interests is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."**

Similarly in the case of **RUTH ALIA & 136 OTHERS VS. ATTORNEY GENERAL, CIVIL SUIT NO.1100 of 1998: Tabaro J** stated that **it is apparent that now days interest is payable for the deprivation suffered by the person to who payment should have been made.**

In the instant case, there is no indication that the counterclaimant demanded his money from the plaintiff so it cannot be said that it deprived the counterclaimant what was due to it. In my view, it was the counterclaimant who sat on rights to recover its money and waited for the counter-defendant to bring a suit against it before it could claim its money. This court will therefore only award interest on the special damages from the date of this judgement at a rate of **10% per annum** till payment in full.
Costs are awarded to the counterclaimant.

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

1. The plaintiff shall pay the counterclaim a sum of Ugx 5,000,000/= (Uganda shillings five million only) as general damages.
2. The plaintiff shall pay the counterclaimant a sum of USD.10,000 (Ten thousand United States Dollars) as special damages.

3. Interest in awarded on the special damages at 10% per annum from the date of this judgment till payment in full.
4. An order for the return of books of account by the plaintiff to the defendant.
5. Costs are awarded to the counterclaimant.

Hon. Mr. Justice W.M. Musene

HIGH COURT JUDGE

24.4.2013