THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 86 OF 2008

ENGINEER JOHN KAYIMA

t/a ENGIPLAN CONSULTANTS::PLAINTIFF

VERSUS

ATTOERNEY GENERAL::DEFENDANT

BEFORE: HON. LADY JUSTICE HELLEN OBURA.

JUDGMENT

The plaintiff brought this suit against the Attorney General seeking for recovery of special damages of Shs. 250,883,250/=, general damages, interest on special and general damages and costs of the suit.

The background of this case is that on or about 26/01/2002, the plaintiff submitted technical and financial proposals for the provision of consultancy services in respect of construction supervision for the completion of 15 dams and valley tanks under the Livestock Services Project in the Districts of Ntungamo, Mbarara, Sembabule, Mubende, Kiboga and Nakasongola which he won. Pursuant to that, on 27/05/2002, the Secretary Contracts Committee for the Ministry of Water, Lands and Environment wrote to the Directors in the Directorate of Water Development (hereinafter called DWD) of the same ministry recommending that contract negotiation be held with the plaintiff and it was held on 13/08/2002. On the 28/8/2002, the Director wrote to the plaintiff confirming the offer of the contract for consultancy services and the plaintiff accepted the offer by letter dated 28/08/2002. Thereafter, the plaintiff commenced work on the 1st phase of the project and submitted Fee Note No 1 in the sum of Shs. 33,520,500/= which was paid.

By a letter dated 1/11/2002, the Secretary Contracts Committee wrote to the Director, DWD informing him that the Contracts Committee at its 7th meeting held on the 18th September 2002 had approved the minutes of the negotiations and awarded the contracts to the plaintiff, the same was cleared/approved by the Solicitor General in his letter to the Permanent Secretary Ministry of Water, Lands and Environment dated 3/12/2002.

On 31/10/2003, the plaintiff submitted Fee Note No.2 in the sum of Shs. 83,801,250/= after submission of the Design Review Report and only part payment in the sum of Shs. 50,801,250/=

was made. The balance of Shs. 33,000,000/= was held after the officials of DWD asked the plaintiff to make some improvements on the Design Review Report.

On 9/02/2004, the plaintiff submitted Fee Note No.3 for the outstanding balance on Fee Note No. 2 following the approval of the Design Review Report which has remained unpaid to date. From then, construction of the valley dams and tanks stalled. The plaintiff avers that the defendant has breached the contract whose total sum was Shs. 335,205,000/= out of which only Shs. 84,321,750/= was paid leaving 250,883,250/= outstanding which is claimed in this suit.

In its written statement of defence, the defendant denied the claim and put the plaintiff to strict proof of the same. It contended that the suit is time barred and prayed that the same be dismissed with costs.

Issues

The following issues were agreed upon by the parties for determination of the court:-

1. Whether the suit is time barred.
2. Whether there was a valid contract entered into between the parties.
3. If there was a contract, whether or not there was a breach of contract by the defendant.
4. Whether or not the plaintiff is entitled to the damages claimed.

At the hearing the plaintiff was represented by Mr. Bernard Namanya while Ms. Susan Odongo appeared for the defendant but later Ms. Jane Frances Navuma took over conduct of the case from her. Upon conclusion of hearing of evidence, both counsel filed written submissions on the above agreed issues. I prefer to deal with the 2nd issue first because determination of the 1st issue will inevitably entail making reference to the alleged contract.

Issue 2: Whether there was a valid contract entered into between the parties.

I have carefully considered the arguments on this issue which is centered on the application of the Public Procurement and Disposal of Public Assets Act (hereinafter called the PPDA Act) to the transaction in dispute. According to the Public Procurement and Disposal of Public Assets Act (Commencement) Instrument, 2003 SI No. 10 of 2003, the PPDA Act came into force on the 21st day of February, 2003. However, a review of the exhibits relevant to this issue for example Exhibits P1, P2, P3, P4, P5, P6, P7 and P42 (letter of the Solicitor General approving the contract) indicate that all the bidding, negotiation, and implementation of the first phase and part of the 2nd phase of the project took place in 2002 as per the respective dates on those exhibits. I have thoroughly perused the PPDA Act and not found any provision that it would apply retrospectively to contracts that were already concluded and partly implemented.

I am therefore inclined to agree with counsel for the plaintiff's submission on this matter and it is my finding that the PPDA Act having come into force on the 21st day of February 2003 cannot

and could not run retrospectively to apply to the bidding and contract negotiations between the parties concluded way back in 2002.

The case of ***Ayigihugu Dushabe Julius Ceaser v Attorney General HCCS No. 11 of 2012*** is clearly distinguishable from the instant case in that the transaction in dispute in that case took place when the PPDA Act was already in force whereas it is not so in the instant case.

Following my finding that the PPDA Act is not applicable in this case, the applicable law would then be the common law principles as provided under section 2 of the Contracts Act Cap. 73. I would therefore rely on it to resolve this issue.

The plaintiff relied on the authority of ***J.K Patel v Spear Motors Limited, Supreme Court Civil Appeal No. 4 of 1999*** which laid down the principle that;

> ***"if there has been an offer to enter into legal relations on definite terms and the offer was accepted, the law considers that a contract has been made and whether there has been an acceptance of an offer may be inferred from words or documents that have passed between the parties or from their conduct."***

Further in Chitty on Contracts, 28th Edition, Volume 1, General Principles (1999) at Pages 89-90, the learned authors state thus;

> ***"There may be said to be three basic essentials to the creation of a contract: agreement, contractual intention and consideration…The normal test in determining whether the parties have reached an agreement is to ask whether an offer has been made by one party and accepted by the other…in deciding whether the parties have reached an agreement, the courts normally apply the objective test…Under this test, once parties have to all outward appearances agreed in the same terms on the same subject matter, then neither can, generally, rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of the contract".***

Applying the above two principles to the instant case, it can be clearly seen that there was an offer as per Exhibit P5, acceptance by the plaintiff as per Exhibit P6. The Contracts Committee of the Ministry of Water, Lands and Environment then met and approved the minutes of the negotiation and awarded the tender to the plaintiff as per Exhibit P7. The Solicitor General wrote on 3/12/2002 clearing the draft contract as per Exhibit P42. After which the plaintiff swung into action and completed 2 phases of the work. As a result, the defendant made full payment for phase 1 and part payment for phase 2.

Clearly to all outward appearances, there was an agreement between the parties to enter into a binding legal relations consequent upon which the plaintiff performed some works and the defendant partially paid for the same. It is therefore my finding based on the above evidence that there was a valid contract between the parties. This answers the 2nd issue in the affirmative and leads me to consider the 1st issue where I can now comfortably refer to the contract.

Issue 1: Whether the suit is time barred.

On this issue the plaintiff's counsel submitted that in order to determine whether or not the suit is time barred, it is imperative to establish the date on which the cause of action arose. Counsel submitted that the evidence on record shows that the plaintiff and the defendant exchanged letters on the outstanding balance on 21st November 2006 (Exhibits P43 (iv) and P43 (v) respectively) and as such the cause of action arose in 2007 as pleaded in paragraph 5(n) of the amended plaint and the plaintiff's suit is not time barred as the same was filed in April, 2008.

Counsel for the defendant contended that the plaintiff's suit is glaringly outside the time period (a period of 3 years from the time when the cause of action arose) as per section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap. 72 which provides;

> ***"No action founded on contract shall be brought against the government or against a local authority after expiration of three years from the date on which the causes of action arose"***

Counsel submitted that the plaintiff came to know about the government's inability to continue with the said transaction in 2003 and that the Exhibits P.43(i)- (v) were all in regard to outstanding payment on Fee Note No. 2 but not the whole value of the contract. According to counsel, this clearly shows that the plaintiff got to know about the termination/ repudiation of the contract in 2003.

I have carefully looked at the pleadings of the parties in this regard and also considered the submissions of counsel. I have also carefully studied the relevant documents. There were several correspondences and meetings between the parties with respect to the contract between January 2002 when the plaintiff submitted his technical proposal and 12th December 2003 when negotiation meeting between DWD and Basangira Building Contractors was held. Thereafter the only correspondence written in February 2004 was forwarding Fee Note No. 3. From then there appeared to be no formal correspondence or meeting between the parties until 7th December 2005 when the plaintiff wrote Exhibit P43(i) to remind the Director, DWD about the unpaid Fee Note No. 3. A reply requesting for some clarification on the matter was given on 15th December 2005 (Exhibit P43 (ii)). The plaintiff then provided the explanation by a letter dated 16th December 2005 (Exhibit P43 (iii)).

From the documents on court record, it appears the parties again never corresponded formally until 21st November 2006 when the Ag. Director, DWD wrote Exhibit P 43 (iv) to the plaintiff

informing him that they were reluctant to proceed with processing of the claim for outstanding payment unless he proved on the contrary that all the requirements were provided. He singled out the particular requirements they needed. The plaintiff responded by a letter dated 22nd November 2006 but no payments were made hence this suit.

Meanwhile in the meeting of 11th September 2003, (Exhibit P31) which discussed the approach to efficiently execute the works within the limits of budgetary provisions, it was agreed that Contract No. 1 that consisted of seven dams and two valley tanks would be split into two parts A and B—where part A would cover the urgent work on four dams while part B would cover the rest of the dams. Contract No. 2 covered six dams. At the same meeting, the schedule of executing the work agreed upon was that: Contract No. 1, Part A was to be immediate, that is, during the dry season of December 2003-March 2004 while Contract No. 1 Part B and Contract No. 2 were to be executed in the financial year 2004/5 as indicated at pages 4 and 5 of the minutes. The plaintiff attended that meeting and even signed the minutes which he adduced in court as Exhibit P31 and relied upon to prove that the design review stage was approved by DWD. Communication from the chair under minute 1 indicated that there was already delay on the implementation of the project by that time.

It is noteworthy that the terms and conditions of the offer made to the plaintiff according to the offer letter (Exhibit P5) was to be as prescribed in the negotiation minutes, the invitation of tender for proposals and the plaintiff's Technical and Financial Proposal. It is the view of this court that the implementation schedule agreed upon by both parties at the meeting of 11th September 2003 amounted to variation of the original agreement as embodied in the above three documents that contained the terms and conditions of offer by phasing out implementation of the project and setting new completion dates. In the absence of any subsequent written agreement varying the period of implementation of the project as had been varied in that meeting, failure to comply with the agreed schedule would amount to breach of contract.

Black's Law Dictionary* 8*th* *Edition at ***page 200***; defines breach of contract as:

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

It is not in dispute that both parts A and B of the Contract were not implemented. Part A of the Contract was to be implemented in the dry season of December 2003-March 2004. There were a number of activities geared towards procuring a contractor that took place up to December 2003. There is nothing on record to show that any further steps were taken beyond the negotiation meeting of 12th December 2003 already alluded to herein above. The plaintiff contends that the defendant breached the contract by failing to authorize the start of the construction work of the valley tanks and dams.

It is the firm view of this court that breach of the contract occurred when actual construction work did not commence as agreed in the meeting of 11th September 2003 where the schedule of

work was agreed. In respect to part A of Contract 1, even if this court takes a very liberal view of the agreed terms, by end of March 2004 which was the agreed completion time there was already breach as no work had commenced. The cause of action therefore arose and the three years started running from that time.

As regards Part B of Contract 1 and Contract 2 that were to be implemented in the financial year 2004/5, I would give allowance up to July 2004 when the financial year starts and find that failure to commence work within a period of three months from that time would be reasonable time for the plaintiff to conclude that the contract had been breached and exercise the options available to him under the law of contract. The plaintiff's excuse that officials of DWD kept telling him to wait until he was told verbally in 2007 that government was not interested in continuing with the project is unconvincing. It is the considered view of this court that it was clear from the conduct of the client that there was no intention of implementing the project. The plaintiff did not have to wait to be told four years later that there was no interest in continuing with the project. The writings were all on the wall as work did not commence and formal communication between the parties had ceased.

I would be inclined to believe the evidence of the defendant that the plaintiff was informed about the inability of the client to continue with the project way back in 2003. This is because in all the plaintiff's subsequent correspondences there was no mention of work on the remaining phases as had been agreed. His major concern was non-payment of the Fee Note that had been submitted in respect of the work done. At least he should have protested the delays formally in the same way he voiced his concern about non-payment. To my mind the concern that the contract was breached was an afterthought which came about when the plaintiff was constrained to sue for the outstanding payments for the work done.

In conclusion on this issue, I find that the cause of action for breach of contract for all the contracts as phased out arose in 2004. All in all the suit is time barred in so far as the plaintiff's claim for breach of contract is concerned. However, the claim for the balance on the Fee Note for work done which was even admitted by the defendant was brought in time as the three years started running in 2006 when the last communication on the subject was made.

Issue 3: If there was a valid contract, whether or not there was a breach of the contract by the defendant.

I have considered the submissions on this issue and the documents already alluded to while considering the first two issues. In view of my finding that the claim for breach of contract is time barred, I will only deal with the issue of breach in so far as the claim for the outstanding balance on the Fee Note is concerned. It was conceded by the defendant that the plaintiff did the first two phases of the project and he was not fully paid. Both parties are in agreement that the balance of Shs. 33,000,000/= remain outstanding on Fee Note No. 2 that was partly paid. DW2 (who was the acting Director, DWD in 2005 and 2006 when Exhibits P43 (i)–(v) were written)

testified that the technical team approved the work done by the plaintiff in the 2nd phase and forwarded his claim to accounts department for payment but he did not know why it was not paid.

In the premises, I find that the defendant breached the contract by not paying the plaintiff as had been agreed under Minute 5 of the negotiation meeting that took place on 13th August 2002 (Exhibit P4).

Issue 4: Whether or not the plaintiff is entitled to the damages claimed:

The plaintiff prayed for special and general damages

a) Special Damages

i) Shs. 33,000,000/= being the amount withheld after the defendant asked the plaintiff to make improvements on the Design Review Report. Since the defendant conceded that this amount is due and owing, judgment is entered for the plaintiff for that sum.

ii) Shs. 217,883,250/= (expected profit if contract had been fully performed).

This claim normally arises where there is a finding that the contract has been breached. However, in view of this court's finding that the claim for breach of contract is time barred, the plaintiff also loses the right to claim for lost profit. I would therefore decline to consider it.

But just in case I have misdirected myself on this matter, I have addressed my mind to the principles that govern such claims as stated in the cases of ***Shell (U) Ltd v. Mukiibi Civil Appeal No. 69/2004,*** **Kituni Construction Company Ltd v Julius Okeny HCCS No. 250/2004*****, Dada Cycles Ltd v. Softra SP.R.L Ltd CS No.656/2005*****,*** **and *Chitty on Contracts (Vol. 2, 28th Edn) Chap. 37 para 008 (at page 516).***

I am of the firm view that given the fact that this contract was phased out and payments were agreed to be based on completion of each phase and a Fee Note raised based on the agreed percentage, the plaintiff would not be entitled to claim the entire contract sum including the phases he did not implement. I would therefore decline to award this claim on that basis.

b) General Damages

As a general principle court has discretion to award general damages to compensate the plaintiff but not to punish the defendant. The plaintiff's counsel has proposed **Shs. 90,000,000/=** as general damages. I would decline to award general damages as the plaintiff has not shown any

justification for awarding it. I will instead award **Shs. 5,000,000/=** as nominal damages for the inconveniences suffered by the plaintiff in pursuing the payments. The loss occasioned by the delay in effecting the payments would, in my view be adequately taken care of by an award of interest on the special damages.

c) Interests

Counsel for the plaintiff prayed that interest of 24% per annum be awarded on the admitted sum of **Shs. 33,000,000/=** from 22nd November 2006 till full payment. Counsel for the defendant conceded that this court could award interest but at court rate on the outstanding balance from 4th February 2004 when the approval of the improvements on the design review report was made.

I have considered both arguments and the circumstances of this case. I would therefore exercise my discretion and award interest on the special damages of **Shs. 33,000,000/=** at the rate of 22% per annum from 22nd November 2006 till payment in full. Interest is also awarded on the nominal damages at 8% per annum from the date of judgment till payment in full.

c) Costs are awarded to the plaintiff as the successful party.

I so order.

Dated this 10th day of May 2013

Hellen Obura

JUDGE

Judgment delivered in chambers at 3.00 pm in the presence of Mr. Bernard Namanya for the plaintiff who was also present. Counsel for the defendant was absent.

JUDGE

10/05/13