

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT No. 634 OF 2013

KWALNET TECHNOLOGY LTD ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

PLESSY UGANDA LIMITED ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON MR. JUSTICE B.KAINAMURA

JUDGEMENT

The plaintiff brought this case against the defendants seeking orders for; (a) recovery of UGX 415, 360,000/=-, (b) Interest at 30% per annum from the date of breach till payment in full, (c) general damages (d) Interest on the general damages at the rate of 30% per annum from the date of judgment until payment in full, (e) costs of the suit and any other relief court may deem fit.

The Complaint sets out the facts constituting the cause of action as:-

The plaintiff company was contracted by the defendant company to provide services among others, to install aerial cables and permanent poles with accessories to allocated areas for a contract price of UGX 830,720,000/=-. The plaintiff ordered for raw materials and engaged subcontractors for the purpose of the contract. The plaintiff after entering into the contract performed the contract and carried out installation of aerial cables, planting of permanent poles among others at Airtel-Nzengo, Nyendo, Rwagajju-Ntungamo-Katuna achieving 81.56% of the entire contract. However, in August 2013 the defendant suspended the work pending an investigation and later on 14th October 2013 the plaintiff received a letter from the defendants terminating the contract and asking them to leave the site without payment of the outstanding sum. The plaintiff demanded for its outstanding sum which

at that time stood at UGX 415,360,000 but in vain. It now seeks to recover the outstanding balance, general damages and interest plus costs.

The defendant filed a written statement of defence in which it stated that;

The plaintiff was awarded a contract under P.O Nos. 07546, 07547 and 07517 to carry out contracted works.

The plaintiff's performance fell below known and recognised standards of performance characterised by delays and non-payment of labourers on site.

The plaintiff was paid 50% of the contract sum but failed to produce for certification a proportionate volume of the contracted works commensurate to the said payment.

There was no requirement for the plaintiff to purchase materials since all materials for the contracted works were supplied by the defendant.

The defendant held several meetings with the plaintiff to rectify the breaches on its part but to no avail.

There was a substantial failure in performance of the contract by the plaintiff justifying the takeover by the defendant to mitigate loss.

The defendant denies that the plaintiff suffered any loss and/or any special loss and damage as alleged in the plaint and will be put to strict proof.

At the commencement of the trial the following issues were framed,

- 1. Whether or not the plaintiff performed the contract to completion as agreed***
- 2. If not, what percentage of the contracted works was done by the plaintiff***
- 3. whether there was a breach of contract, if any and by which party***
- 4. What remedies are available to the parties***

At the trial, Mr David S. Kaggwa represented the Plaintiff while Mr Richard Okallany represented the defendant.

The parties filed witness statements upon which the witnesses were cross examined.

Issue one, whether or not the plaintiff performed the contract to completion as agreed

The plaintiff called one witness Herbert Mugerwa (PW1) who testified that he was one of the directors of the plaintiff company. He stated that the defendant company contracted the plaintiff company to provide services which included among others, installation of aerial cables and permanent poles with accessories at allocated areas such as Nzengo, Nyendo, Rwagajju, Ntungamo up to Katuna. He added that they immediately ordered raw materials and hired labourers as well as engaged sub-contractors for the purpose of the contract. He testified that they had achieved a substantial percentage of 81.5% of the entire contract works before they were stopped by the defendant. He stated that they had satisfactorily performed all their obligations under the said contract and issued periodic reports.

In cross examination, PW1 testified that he had performed 81% of the contract.

The defendants called three witnesses, Mr Johannes Petras Jordan testified as DW1, Bryan Power as DW2 and Alexi George Potieter as DW3.

DW1 testified that the contractual works had to be complete by 25th August. However, on the 7th of October 2013 after an inspection, the defendant found out that approximately 45% of the work was complete. He stated that he found out that the plaintiff did not employ the 50% down payment made to it at the inception of work. He further testified that the defendant came to a conclusion that there was a substantial failure in performance of the contract by the plaintiff justifying the takeover by the defendant to mitigate loss.

DW2 testified that the defendant awarded the plaintiff a contract in July 2013 and was required to have completed the works by August 2013 but by 1st October 2013 they had not done so. He added that he instructed the defendant's supervisor DW3 an employee of Infocom to carry out an inspection which was done. He stated that a written report was made which showed 45% of the work was complete and the balance was incomplete. He added that he carried out an inspection thereafter from the 2nd to 15th October and found the report by A.G Potieter (DW3) was correct.

Dw3 testified that he was tasked by Brian Power (DW2) the Country Manager of the defendant company to carry out an inspection. He stated that he did that inspection and came to the conclusion

that there was a substantial failure in the performance of the contract since the completed works amounted to 45% as opposed to 100% required by the completion date of 25th August 2013.

Counsel for the plaintiff submitted that PW1, Herbert Mugerwa the Managing Director of the plaintiff testified that the defendant offered purchase orders to the plaintiff for the sums of UGX 166,144,000/=, UGX 132,915,200/=, and UGX 531,660,800/= . He added that after the issuance of the orders the plaintiff ordered for raw materials for the project, hired labourers and engaged sub contractors which was a clear indication of the readiness of the plaintiff to perform the contract to its completion. He submitted further that PW1 testified that the plaintiff performed the contract by installing aerial cables, planting of permanent aerial poles and fixing all accessories. He stated that the work was with challenges. Nevertheless the plaintiff achieved 81.56% completion of the project but was unlawfully stopped by the defendant on the 14th of October 2013. Counsel made reference to ***Black's Law Dictionary 7th Edition at page 14443*** which defines a substantial performance as:-

“if a good faith attempt to perform a contract does not precisely meet the terms of the agreement, the agreement will still be considered complete if the essential purpose of the contract is accomplished.....”

He further submitted that according to **Chitty on Contracts Vol 2, 28th Edn Chapter at page 37** the learned authors opined that;-

“Unless the breach goes to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross claim for the defects and omissions, or alternatively, set them up in diminution of the price”.

He submitted that since the plaintiff attained 81.56% of the contract it is entitled to the full outstanding sum on the contract of UGX 415,360,000/= under the doctrine of substantial performance.

Counsel for the defendant submitted that the defendant issued to the plaintiff three purchase orders and made a down payment of 50% between 7/7/13 and 4/10/2013. He added that the defendants' witnesses testified to the fact that the plaintiff only managed 45% of contracted works. He stated that the evidence adduced by the plaintiff to prove the work accomplished only proves that the plaintiff

dismally performed in execution of the works. Counsel cited **Section 101 and 103 of the Evidence Act** and argued that *the burden of proof as to any particular fact lies on the person who wishes court to believe in its existence*. In ***M'mairanyi & Others Vs Blue Shield Insurance Co. Ltd (2005) 1 EA 280*** court held that:-

“As a general proposition the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue”.

He submitted that the commercial object, intent and purpose of the contract was not achieved by the time of filing this claim in that the plaintiff failed to install the aerial fibre optic as contracted despite taking 50% of the contract price, in an apparent unjust enrichment scheme. He further stated that the doctrine of substantial performance does not come to the aid of the plaintiff whose hands are soiled or dirty. The plaintiff breached the contract and that is how it was discharged. He concluded that the issue should be answered in the negative.

In rejoinder, Counsel for the plaintiff submitted that the plaintiff did not complete the work because it was stopped by the defendant from proceeding with the works. He added that the doctrine of substantial performance is applicable to this case. He argued that in the present case the defendant is responsible for not bringing to life the commercial purpose of the contract. He prayed that the issue be answered in the affirmative.

Issue two - If not, what percentage of the contracted works was done by the plaintiff

PW Herbert Mugerwa testified that 81.56% of the contract was achieved till the defendant ordered the plaintiff to stop.

In cross examination, PW1 stated that they arrived at 81.56% by looking at a daily update sheet sent to the defendant on a daily basis showing the works done the previous day.

DW1 Johannes Petrus Jordan testified that the defendant carried out an inspection of the works done and found out that only 45% of the works was complete.

DW2 Brian Power testified that he was briefed by A.G Potieter that 45% of the work was complete. He added that he carried out an inspection from 2nd October to 15th October 2013 and confirmed that the report by A.G Potieter was true.

DW3 A.G Potieter testified that he did the inspection of the sites, made a report and came to a conclusion that there was substantial failure of the contract since the completed works amounted to 45% as opposed to the expected 100% required by the completion dated 25th August 2013.

Counsel for the plaintiff submitted that it was PW1's evidence that 81.56% of the contract was performed. He added that the plaintiff based this on a daily update sheet which he sent to the defendant on a daily basis. He submitted that the defendant neither challenged the daily sheet nor produced any evidence to contradict it and is therefore estopped from denying that the plaintiff achieved 81.56% of the works. He quoted the case of ***Pan African Insurance Company (U) Ltd Vs International Air Transport Association HCCS No.667 of 2003*** where the Learned Judge held that the doctrine of estoppel by conduct prevents a party against whom it is set up from denying the truth of the matter. In conclusion, Counsel submitted that the plaintiff performed 81.51% of the contract works and the defendant failed to challenge this in evidence.

Counsel for the defendant in reply submitted that the defendant admits to the fact that the plaintiff undertook some works but the burden of proof rests on the plaintiff to prove on a balance of probabilities the extent of works completed. Counsel relied on **Sections 101, and 103 of the Evidence Act** and the decision in ***M'mairanyi & Others Vs Blue Shield Insurance Co. Ltd (2005) 1 EA 280*** to buttress his argument. He submitted that the plaintiff is required to produce cogent evidence giving a detailed quantification of the works accomplished and how it arrives at 81.56%. He further stated that the assertion that 81.56% was completed remains an unproved assertion since the plaintiff's failed to produce ample proof that the completed works were up to 81.56%. He submitted that the defendant only admits 45% completion and the plaintiff cannot prove 81.56% completion.

In rejoinder, Counsel for the plaintiff reiterated his submission that the plaintiff completed the works to a level of 81.56%. He submitted that there is no basis for the 45% being the percentage of the works done by the plaintiff.

Issue three - whether there was a breach of contract, if any and by which party

Counsel for the plaintiff submitted that the defendant breached the contract by terminating the contract without notice and refused to pay the balance of UGX 415,360,000/-. He added that the plaintiff had performed 81.56% and the completion was made impossible by the defendant. He

quoted the case of ***Uganda Building Services Vs Yafesi Muzira t/a Quickest Builders 7 Co. HCCS No. 154 of 2005*** where court held that:-

“A breach of contract occurs when one or both parties fail to fulfil the obligations imposed by the terms of the contract”.

Counsel submitted that the defendant only managed to pay 60% of the price on PO07517. In conclusion, Counsel submitted that the plaintiff had proved completion of works up to 81.56% which was a substantial performance of the contract which entitles the plaintiff to 100% payment of the contract price.

Counsel for the defendant submitted that it was agreed under the contract that payment was upon completion of the works generally. He added that the plaintiff also did not meet the deadline of end of August to complete the work as agreed which led the defendant to terminate the contract. He relied on the case of ***Osman Vs Mulangwa (1995-1998) 2 EA 275 (Scu)*** where it was held that performance must be completed upon the precise date specified; otherwise an action lies for breach. In conclusion, Counsel submitted that failure by the plaintiff to accomplish the commercial purpose of the contract, its object and intent coupled with the failure to achieve completion by end of August deadline constituted a breach of contract as discharged by breach. The defendant was entitled to terminate it by cancelling the purchase orders and take over the sites.

In rejoinder, counsel for the plaintiff submitted that the contract was extended in an email dated 30th August 2013 from Joshua Kasakwa. Therefore, the premature termination of the contract constituted breach of contract.

Issue four - what remedies are available to the parties

Counsel for the plaintiff submitted that since there was breach of contract by the defendant, the defendant is liable to pay the plaintiff damages.

Regarding special damages for the balance on the contract price, Counsel submitted that the plaintiff pleaded a sum of UGX 415,360,000/- being the outstanding payments on the contract price. He added that the defendant paid 50% of the contract price leaving a balance of UGX 415,360,000/- on the contract price which the defendant did not deny at the trial. Counsel cited the case of ***Roko Construction Co. Vs A.G HCCS No.517 of 2008*** where it was held that:-

“where payments were indeed delayed and the figure was pleaded and had not been challenged by the defendant, the plaintiff had proved the claim to the satisfaction of court”.

Counsel submitted that the plaintiff performed its side of the bargain but has been denied use of their money since 2013. He added that the plaintiff has lost professional services time by attending to this case. Additionally, Counsel submitted that the plaintiff had to solicit for funds by obtaining loans to pay the wages of the different workers and sub-contractors.

Counsel also prayed for general damages of UGX 50,000,000/- for the loss and inconvenience caused by the defendant to the plaintiff which the plaintiff had showed.

Counsel prayed for costs arguing that under **Section 27 (2) of the CPA** costs follow the event and a successful party should not be deprived of costs except for a good cause.

Counsel for the defendant submitted that the plaintiff admitted having not completed the contracted job and cannot claim pay for unfinished work. He submitted that there is no evidence to prove such level of completion. He added that it is trite law that special damages need not only be specifically pleaded but also strictly proved which has not been done by the plaintiff. He cited the case of ***Registrar of Buildings Vs Bwogi (1986-1989)1 EA 487*** in support of this. He submitted further that the fibre optic cable was not fully installed and operationalized as per the commercial purpose and factual background of the contract between the parties. He added that it is actually the defendant that should have claimed for money had and received by the plaintiff. Regarding the prayer for general damages, counsel submitted that the plaintiff cannot benefit from its breach since it did not finish the work within the required time. He prayed that the plaintiff's case be dismissed with costs to the defendant.

In rejoinder, Counsel for the plaintiff reiterated his earlier submissions. He submitted that based on the principle of substantial performance, the plaintiff is entitled to special damages of UGX 415,360,000/- and that the plaintiff should be granted the reliefs sought for.

JUDGMENT

I have carefully considered the facts and arguments of both Counsel. The brief facts as stated are that the plaintiff was contracted by the defendant to install aerial fibre optic cables and permanent poles

with accessories for a contract price of UGX 830,720,000/=. The defendant paid the plaintiff 50% of the contract price totalling to UGX 415,360,000/=. The plaintiff started the work till the defendant suspended the works pending an investigation and later in October 2013 wrote a letter terminating the contract. The plaintiff seeks the balance of UGX 415,360,000/= of contract sum under the principle of substantial performance as well as damages and costs of the suit.

The issues are;

- 1. Whether or not the plaintiff performed the contract to completion as agreed***
- 2. If not, what percentage of the contracted works was done by the plaintiff***
- 3. whether there was a breach of contract, if any and by which party***
- 4. What remedies are available to the parties***

I will address the first and second issues together.

The plaintiff's witness testified that they had achieved a substantial percentage of 81.5% of the entire contract works before they were stopped by the defendant. The evidence adduced points to the fact that the defendant terminated the contract before it was completed. The issue of whether the contract was performed to completion can therefore only be answered in the negative. However the plaintiff relies on the doctrine of substantial performance and accordingly claims it is entitled to payment of contract price in full.

With regard to the question of the percentage of works performed, I agree with Counsel for the defendant's position of the law that the burden of proof to prove a fact lies on a person who wishes court to believe in its existence. The plaintiff's witness only alleged performance of the contract by 81.5% but the plaintiff failed to produce evidence to that effect. On the other hand the defendant relied on reports made after inspection of the work done by the plaintiff which were produced in evidence and they clearly indicate that the work done was 45%. The defendant further produced evidence of communications between the plaintiff's agents and the defendant's agents which point to the fact that the defendant was dissatisfied with the plaintiff's services. For example in an email dated August 18, 2013 Ex D1 (d) under the subject: Re: Daily updates: it was stated:-

“Thanks Kwalnet but it’s still too slow please push and remember the time line end of August 2013”

The plaintiff in my opinion failed to fully discharge its duty of proving the fact that it actually accomplished 81.56% of the contract. **Section 103 of the Evidence Act Cap 6** provides;

“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”.

Counsel for the plaintiff submitted that the plaintiff substantially performed the contract. The plaintiff alleges to have completed 81.56% of the work but as determined above failed to prove the assertion. On its part the defendant acknowledges the plaintiff completed 45% of the work. Can that be stated to be substantial performance? Clearly not.

In ***Fire Masters Limited Vs Huawei Technologies Co. Ltd HCT-00-CC-CS-119-2009***; at pgs 4-5 of court while considering a similar issue of substantial performance held that;

“.....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.....”

As seen above, the percentage of work completed was only 45% leaving a balance of 55% which by no stretch of imaginations can be termed “minor”.

I am therefore not persuaded that the plaintiff has proved that the works it carried out amount to substantial performance.

What remedy then is available to the plaintiff?

In the case of ***Hoeing Vs Isaacs [1952] ALL ER 176*** court held that:-

“the contractor can then only succeed in getting paid for what he has done if it was the employer’s fault that the work was incomplete or there is something to justify the conclusion that the parties have entered into a fresh contract or the failure of performance is due to impossibility or frustration”.

The facts of this case point to the fact that the work was to be done by end of August 2013 but was not complete even by October 2013 when the contract was repudiated. Counsel for the defendant submitted that the evidence on record shows that an inspection was done at the different sites and a report showed that only 45% of the work was done. The events that preceded the repudiation point to the fact that there was no evidence that point to the fact that it was the fault of the defendant that led to the failure by the plaintiff to fulfil its part of the contract. In this regard, I hold that the contract was not completed as agreed by reason of the failure of the plaintiff to fulfil its obligations under the contract. The plaintiff is not entitled to payment of the whole contract price as prayed for.

On the 3rd issue, Counsel for the plaintiff submitted that the defendant breached the contract by terminating the contract without notice and refused to pay the balance of UGX 415,360,000/=. Counsel for the defendant submitted that the plaintiff breached the contract by failing to meet the deadline of completion of the contract and by failure to serve the commercial purpose of the contract.

Breach of contract is defined in **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“.

Basing on the evidence adduced by both parties, i am of the view that the said evidence points to the fact that it was the plaintiff who failed to meet its obligations in time and therefore, it is my considered opinion that the plaintiff breached the contract.

However since the defendant did not make a counter claim this will remain, but a statement of fact.

On issue of remedies available to the parties, the **Contracts Act in section 61(1)** provides that the party who suffers the breach is entitled to receive from the party who breaches the contract compensation for the loss or damage caused to him or her.

Counsel for the defendant submitted that it was agreed in the contract that payment was upon completion of the works generally. The plaintiff prayed for payment of the contract price regardless of the fact that the contract remained incomplete. The plaintiff relied on the principle of substantial performance of the contract which as we have seen earlier is not legally tenable. In the case of **Cutter Vs Powell (1795) 101 ER 573**, the claimant's husband agreed by contract to act as a 2nd mate

on a voyage which was to take eight weeks and he was to be paid on completion. However the condition was to pay 10 days after the ship arrives. Six weeks into the voyage the claimant's husband died. The wife brought an action to claim the money for the voyage covered before her husband's death. Her action failed because the payment was on condition that he worked the ship to Liverpool.

Similarly, the plaintiff in this case did not complete the contract works as agreed for reasons already stated in this judgment. It is not in dispute that the plaintiff was paid a down payment of 50% of the contract price. However as rightly submitted by Counsel for the defendant the commercial object, intend and purpose of the contract was not achieved (as seen from the evidence adduced) and as such no payment of the balance is due (see *Kagezi & Another Vs Ruparelia (2005) 2 E A 156*).

In the result i dismiss the suit with costs to the defendant.

B. Kainamura

Judge

18.08.2015