

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL COURT DIVISION)**

**CIVIL SUIT NO 569 OF 2012**

**ZEBRA ASSOCIATES LTD ..... PLAINTIFF**

**VERSUS**

**LINKSOFT COMMUNICATIONS SYSTEM LTD..... DEFENDANT**

**BEFORE HON. LADY JUSTICE HELLEN OBURA**

**JUDGMENT**

The plaintiff brought this action against the defendant claiming special damages of US \$ 20,388.48, and UGX. 11,253,896/=, general damages and costs of the suit.

The background of the plaintiff's case is that sometime in 2011, the defendant company entered into a construction contract with Airtel Company to construct masts for the latter company. On the 8<sup>th</sup> day of April 2012, the defendant company subcontracted the plaintiff company to construct those masts for five sites in northern Uganda namely Agelo, Arinyapi, Achwa, Pawel and Ater. The terms of payment were stipulated in the purchase orders authorized by the defendant's country manager and checked by the defendant's finance manager. It is the plaintiff's case that the parties agreed as per the purchase order that the plaintiff was to be paid 30% down payment (DP), 55% on partial acceptance certificate (PAC) and 15% on final acceptance certificate (FAC) upon completion of all works, bringing the total contractual price to US\$125,924.

The plaintiff contends that the defendant did not make the initial deposit of US\$ 8,703.09 on any of the projects and as such the plaintiff injected its own capital to have the work started. The plaintiff also alleges that it was verbally instructed to supply materials to the site of the defendant worth UGX. 11,253,896/= which it did but was never paid for. The plaintiff contends further that it made several unfruitful attempts to recover the outstanding sums hence this suit. The summons

to file a defence was duly served on the defendant who did not file a defence whereupon the plaintiff applied for and obtained a default judgment against the defendant and the matter was set down for formal proof. When the matter came up for scheduling and hearing, the plaintiff was represented by Mr. Francis Bwengye assisted by Ms. Nabitaka Eva. Counsel stated that the defendant upon being served with the summons made deposits on the plaintiff's account totaling US \$ 14,884.41 which reduced the outstanding balance to US \$ 5,518.79 and UGX. 11,253,896. He applied to amend the plaint to reflect that balance and this court allowed him to do so.

The amended plaint was filed and the matter was set down for formal proof. At the scheduling conference three issues were framed for determination, namely;

- 1) Whether the defendant breached its contract with the plaintiff.
- 2) Whether the defendant is indebted to the plaintiff to the tune of US\$ 5,518.79 and UGX. 11,253,896/=.
- 3) Whether the plaintiff is entitled to the remedies sought.

#### **Issue No.1**

##### **Whether the defendant breached its contract with the plaintiff**

To prove its case, the plaintiff called one witness, that is, its project manager Mr. John Kiwagama (PW). He testified that in March 2011 the defendant as a main contractor for Airtel gave them drawings for the five sites in northern Uganda for the plaintiff to make quotations and subsequently subcontracted the plaintiff company to erect masts at the sites. It was his evidence that the plaintiff started the works before the purchase orders were issued and according to him that was the trick of the defendant to delay payments. He stated that the total contractual sum for all the four purchase orders was US\$ 125, 924.88. He also stated that while they were still at the sight they were told to supply other materials to the defendant worth UGX 11, 252,896/= which they did and a local purchase order was issued to that effect.

It was the evidence of PW that under the contract, the defendant was to pay an advance payment of 30% on each site in order for the work to begin and another 55% upon connection of the masts and a final payment of 15% upon completion of the work. He buttressed his evidence with the

purchase orders addressed to the plaintiff company detailing the work to be done at each site and the above payment schedules which were admitted as Exhibits P1-3.

It was his evidence that the defendant did not make the 30% down payments and the additional 55% as stipulated but some payments were made subsequently leaving an outstanding balance of US \$ 5518.79 and UGX. 11,253896. He further stated that the defendant even failed to fully pay for the works when the Completion Certificates were issued on the 15<sup>th</sup> day of May 2012 upon completion of the works. He said at that point they should have been paid the 15% FAC as per the terms of the contract. It is therefore contended that there was a breach of contract by the defendant as a result of failure to pay the plaintiff upon completing the works.

It was submitted that the defendant breached its contract firstly by failing to pay the monies owed to the plaintiff as and when they fell due, secondly by neglecting and refusing to pay the outstanding balance of US \$ 5518.79 and UGX. 11,253896.

Having carefully considered the evidence and the plaintiff's submissions, I resolve this issue as hereunder. A breach of contract occurs when a party to the contract without lawful excuse fails or refuses to perform the contract. When parties enter into a contract, they are expected to perform their duties or obligations in strict compliance with the terms of the contract. If one of the parties performs his/her part, he/she alone is discharged and will be entitled to sue the other party if that party fails to perform his/her part of the contract. This is the long established principle of contract that, "*performance under the contract must be complete*". That is, it should be in accordance with the terms of the contract. Where it is incomplete or is not in accordance with the terms of the contract, then the party in breach may be sued for damages for breach of contract.

Pursuant to the requirement that a contract must be performed in accordance with its exact terms, a contract must be performed at the time agreed upon. Where a specific date or a specific time is mentioned, then time is of the essence and completion in accordance with the time or date is a fundamental condition of the contract.

PW in his evidence as summarized above explained that for the plaintiff to start the work at Pawel, the 30% should have been paid on the date of the purchase order as a down payment. However, from the plaintiff's evidence all down payments that were made on all the sites were

late payments as seen from the plaintiff's bank statement which indicates the earliest payment by the defendant as being made on the 27<sup>th</sup> day of May 2011. By that time the defendant had already issued the plaintiff with three purchase orders for four sites, namely; Pawel, Angelo, Ariyapi and Achwa.

PW further testified that the delayed payments were not only on the 30% but also on the 55% and 15%. He stated that the plaintiff company made several verbal and written demands for their outstanding balance. The demand letter written by PW on the 1<sup>st</sup> day of November 2011 relating to Ater site where the defendant had neglected to pay the plaintiff's 30% and 55% as per purchase order AC/ADM/LPO769 was admitted in evidence as Exhibit P6.

In the letter the plaintiff also pointed out that;

*“Your obligation towards effecting our payments for the finished work is blurred, for long we have been communicating with the finance manager but it seems clear that he does not have a clear program...”*

The plaintiff contended that the defendant company was fully aware of its indebtedness that had been communicated to it through its finance manager on numerous occasions and following that demand, the defendant then made a partial payment of US\$ 8,826 on the 18<sup>th</sup> day of January 2012. The plaintiff also sent a tax invoice (Exhibit P5) dated 16<sup>th</sup> May 2012 demanding for the 15% FAC payment for Agelo site which was duly received by the defendant company but the same was not paid.

In **Davies v Davies (1887) Ch.D 359**, court stated that where the contract is in writing, its terms can be ascertained by means of documentary evidence. Where these are clear, a court must give effect to the terms. It is not the duty of the court to rewrite an expressly stated contract for the parties.

It is a common law principle that a party who had only partly performed his duty under the contract could not recover the agreed fee (**Curter v Powell (1795) 6 T.R 32**). However this principle has been subjected to a number of exceptions among which is divisible contracts. Where there is part performance of divisible contract, the plaintiff may be entitled to recover for work already performed even if part of the contract remains to be done. While it may be difficult

to determine when the contract is divisible or not, this may be gathered from the intention of the parties.

Under the contract in this case, the defendant was to make an advance payment of 30% on each site in order for the work to begin and another payment of 55% upon connection of the masts and a final payment of 15% upon completion of the work. This was evidenced by Exhibits P1-3 being the purchaser orders addressed to the plaintiff company detailing the work to be done at each site. This evidence illustrates the fact that the parties intended the contract to be divisible. However, these sums were not paid as and when they fell due.

It is therefore clear from the above discussion that there was a contract between the plaintiff and the defendant to make payments on specific stages of work which was not done in such strict compliance as the law requires. Consequently, there was a breach of contract and I so find. This resolves issue one in the affirmative.

## **Issue No.2**

**Whether the defendant is indebted to the plaintiff to the tune of US\$ 5518.79 and UGX. 11,253,896/=.**

It was the plaintiff's submission that the defendant was served with a notice of intention to sue on the 6<sup>th</sup> day of November 2012 to recover US\$ 20,403.20 and UGX. 11,253,896/= which was duly received by the defendant on the same day however, the defendant did not reply to the same. Instead the defendant made another payment of US\$14,884.39 on 13<sup>th</sup> November 2012, leaving a balance of US\$ 5518.79 and UGX 11,253,896/=. If indeed there was no money owed to the plaintiff, the defendant would have replied the demand notice; secondly if the total outstanding amount was US\$14,884.39, upon being served with the plaint on 8<sup>th</sup> December 2012, the defendant would have filed a written statement of defence denying indebtedness to the

plaintiff but this was not done. The plaintiff's bank statement gives details of the monies paid by the defendant whose total together with what was acknowledged as paid in cash comes to US\$ 120,406.09 as opposed to the total sum of US\$ 125, 924.88 which the plaintiff said was the contract sum. To my mind this is enough proof that the defendant is indeed indebted to the plaintiff to the tune claimed in the amended plaint.

However, I need to point out that there are four purchase orders that were exhibited in evidence, namely; LPO NO: AC/ADM/LPO/696 dated 8<sup>th</sup> April 2011 for US\$ 29,010.30 inclusive of 18% VAT (Exhibit P11 (i)), LPO NO: AC/ADM/LPO/702 dated 11<sup>th</sup> April 2011 for US\$ 29,010.30 inclusive of 18% VAT (Exhibit P11 (ii)), LPO NO: AC/ADM/LPO/735 dated 19<sup>th</sup> May 2011 for US\$ 59,047.20 inclusive of 18% VAT (Exhibit P11 (iii)), and LPO NO: AC/ADM/LPO/769 dated 23<sup>rd</sup> June 2011 for US\$ 29,523.60 inclusive of 18% VAT (Exhibit P11 (iv)). My own addition of the amounts in the above purchase orders gave me a total sum of US\$ 146,591.4 instead of the US\$120,406.09 which the plaintiff said was the total contract sum.

Be that as it may, I will use the plaintiff's figure as I determine this issue considering that the plaintiff also led evidence to that effect. It is possible that there could have been some adjustments on the contract sum which was not disclosed to the court. In the premises, upon evaluating the evidence as above, I am satisfied that the plaintiff has proved on a balance of probabilities that the defendant is indebted to it to the tune of US\$ 5518.79 which remains outstanding from the contract sum and I so find.

As regards the claim for UGX. 11,253,896/=, I have also had the opportunity of looking at LPO NO: AC/ADM/LPO/1065 dated 7<sup>th</sup> May 2012 issued by the defendant for supply of assorted items worth UGX. 11,253,896/=. In addition, there is a Completion Certificate dated 15<sup>th</sup> May 2012 and the project name was materials supplied to all sites: Agero, Pawel, Achwa and Ater Airtel. I therefore have no doubt that the materials were supplied as ordered and delivery certified. The plaintiff said they were not paid for those items. The defendant had the opportunity to say whether it paid for the same or not but it opted not to file a defence. Therefore, based on the evidence on record, I am convinced that the defendant is also indebted to the plaintiff in the sum of UGX. 11,253,896/= and I so find. The above findings answer the 2<sup>nd</sup> issue in the affirmative.

### **Issue No.3**

#### **Whether the plaintiff is entitled to the remedies sought.**

The plaintiff prayed for the following remedies:

- 1. A finding that the defendant breached the contract.**

This has been extensively discussed in the first issue and it is the finding of this court that the defendant breached the contract.

- 2. General damages**

In this case the wrong complained of is the defendant's consistent late payments for works completed by the plaintiff and their unjustified refusal and or neglect in paying the outstanding balance owed to the plaintiff. The plaintiff did plead that it suffered financial loss and damages (paragraph 7 of the amended plaint) and PW also asked court for damages.

This court in **Dada Cycles Ltd v Sofitra S.P.R.L Ltd H.C.C.S 656 of 2005** found that there was breach of carriage contract by the defendant and stated that there was no doubt that the plaintiff had suffered loss as a result of that breach. The general rule is that whenever there is breach of a contract by one party, the other is entitled to bring an action for damages. I must however point out that each case must be determined according to its peculiar facts and circumstances. In a case where it is shown that the plaintiff has actually suffered no loss from the breach, then such plaintiff would only be entitled to nominal damages, that is, damages which simply recognize he has suffered a legal infringement of his right. This view is based on the proposition that damages are only awarded to compensate the plaintiff. Therefore, damages are based on the loss to the plaintiff and not the gain to the defendant.

According to **Halsbury Laws of England 4<sup>th</sup> Edition Volume 12(1) paragraph 1063 page 484** upon breach of the contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interest from the time when it became payable under the contract or as the court may allow.

In the instant case, the plaintiff's claim as stated in the pleadings and evidence is delayed payment or neglect to pay within time. Therefore, the claim for general damages is for the injury

allegedly suffered as a result of that delay. It is clear from the evidence that no down payment was made before the works under each of the contracts commenced as stipulated in the purchase orders which according to the evidence of PW were even issued after works had commenced. It must also be noted that the purchase orders were issued on different dates and at the time the plaintiff did not appear to have any problem with commencing works before they were issued and the down payments made. I therefore do not agree that the plaintiff was injured by the delayed payment to the extent that it attracts general damages. I say so because if there was such injury the plaintiff would not have continued taking on new sites without first receiving the payments as stipulated. To my mind the injury suffered, if any, can be adequately compensated by an award of interest. For that reason, I decline to award any general damages.

### 3. Interest

The plaintiff prayed for interest at commercial rate of 21% per annum on the amount originally claimed from the date of filing the suit till judgment and interest at court rate of 6% per annum on the decretal sum from the date of judgment till payment in full.

The rationale for awarding interest is that the defendant has kept the plaintiff out of his money and the defendant has had use of it himself so he ought to compensate the plaintiff accordingly. (See *Masembe v Sugar Corporation and Another [2002] EA 434*). The plaintiff in this case has been kept out of its money by the defendant since 2012 when it became due. Therefore, it should compensate the plaintiff accordingly.

In the case of **Roko Constructions Co Ltd v A.G H.C.C.S 0517 of 2005** it was held that the principle that emerges from decided cases is that where a person is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit.

I note from the evidence that as at the time of filing the suit on 23<sup>rd</sup> November 2012 the defendant had already paid a total sum of US\$ 120,406.09 leaving an outstanding balance of US\$ 5518.79 on the contract sum and UGX 11,253896/= for the materials supplied to the sites. Although the plaintiff stated that some payment was made after the suit was filed, this court was not provided with the evidence of that payment. The US\$ 14,884.39 which according to paragraph 6 of the plaint was alleged to have been paid after the defendant learnt that a default



judgment was made in this case was actually paid on 13<sup>th</sup> November 2012 ten days before the original plaint was filed. This is clearly reflected in the bank statement admitted in evidence as Exhibit P2. It is therefore not true that as at the time of filing the suit the outstanding balance was US\$ 20,388.48 as claimed in the original plaint.

For that reason, I decline to award any interest on that amount. I am only inclined to award interest on what was outstanding as at the time of filing the suit. Accordingly, interest is hereby awarded on the sum of US\$ 5518.79 at the rate of 8% per annum and on UGX 11,253896/= at the rate of 21% per annum from the date of filing the suit till payment in full and I so order.

#### 4. Costs

As far as costs are concerned, Section 27 (1) of the Civil Procedure Act Cap. 71 provides that costs are at the discretion of the judge. According to **Francis Butagira v Deborah Namukasa (1992-1993) HCB 98** costs should follow the events and a successful party should not be deprived of costs except for good cause.

In the premises, costs are awarded to the plaintiff as the successful party.

In the result, judgment is entered for the plaintiff with the following orders:-

- i) The defendant shall pay the plaintiff the outstanding sums of US\$ 5518.79 and UGX 11,253896/=.
- ii) The defendant shall pay interest at the rate of 8% per annum on US\$ 5518.79 and 21% per annum on UGX 11,253896/= from the date of filing the suit till payment in full.
- iii) Costs are awarded to the plaintiff.

I so order.

Dated this 30<sup>th</sup> day of October 2015.

Hellen Obura

**JUDGE**