THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

CIVIL SUIT NO. 224 OF 2010

TAMP ENGINEERING CONSULTANTS LTD … PLAINTIFF

VERSUS

MACDOWELL LTD ……..…… DEFENDANTS

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

BACKGROUND:

The Plaintiff and the Defendant entered into a road construction agreement on 15.08.2008, whereby the Plaintiff was to rehabilitate the Hilaya-Ikwolos Tserenya, Madi Opej Road, in the Republic of South Sudan. The road covers a stretch of about 100.4 kilometers. The cost of the construction was Shs. 1,600,000,000/-.

The Plaintiff was given an advance payment of Shs. 700,000,000/- by the Defendant; and a work camp was established in South Sudan, ready to start work. Equipment and staff were moved to the camp.

The construction project was officially launched on 19.12.08 by the Governor of Eastern Equatorial State, South Sudan and the Plaintiff commenced work.

A further sum of Shs. __ was paid to the Plaintiff to cater for repair of broken down equipment.

On 20.12.08, work stopped for Christmas break and some of the Plaintiff's technical staff returned to Uganda for the holiday. Upon reporting back to Sudan on 18.01.09, the staff found that the Defendant had taken over the work operations using the Plaintiff's equipment.

All efforts to settle the matter proved futile hence this suit whereby the Plaintiff seeks to recover Shs. 372,452,331/- the contractual amount reminding unpaid, release of equipment, general and exemplary damages, interest and costs of the suit.

The Defendant denied the claim in its written statement of defence and contends that the Plaintiff was entitled to 50% contract price payable by issuance of payment certificates indicating deductions. That when the Plaintiff's equipment broke down and the Plaintiff requested for money for repairs, the money was availed by the Defendant but when the Plaintiff went to purchase the spares, the work was abandoned together with the workers and machinery for two months. It is the Defendants further contention that it was not its duty to take the Plaintiff's staff and machinery back to Kampala.

The Defendant further denies using the machines and states that the Plaintiff was paid 70% of the agreed sum of money and yet only carried out less than 15% of eth work and is therefore not entitled to the sum claimed.

Further, the Defendant denies that the claim arose in Kampala, the contract having been performed in South Sudan.

Upon the closure of the Plaintiff's case, Counsel for the Defendant stepped down on the ground that he had lost contact with his client. After two months of several adjournments and trying to contact the Defendants in vain, Counsel for the Plaintiff applied for the matter to be closed under 0.17 r 4 C.P.R and to be given time to file submissions. The application was allowed and Counsel for the Plaintiff filed submissions on 10.06.15.

During the scheduling, the following issues had been framed for determination.

1) Whether the court had jurisdiction to determine the matter.

2) Whether the Defendant breached the contract.

3) What remedies is the Plaintiff entitled to if any.

The issues will be dealt with in the order that they were set out.

Whether the court has jurisdiction to determine the matter.

As pointed out by Counsel for the Plaintiff and rightly so, the High Court has unlimited original jurisdiction in all matters. – s. 14 (1) Judicature Act and Article 139 of eth Constitution.

However, what court needs to determine is whether the parties to the contract stipulated in their contract what law should apply and in which case the matter should be litigated in case of a dispute. – Refer to the case of **Uganda Telecom Ltd vs. Rodrigo Chacon T/a Andes Alpes Trading.**

This is because ***"where parties expressly state that the contract shall be governed by a particular law, that law will be the proper law of contract, provided the selection is bonafide and then there is no objection on the grounds of public policy"*** – **Halsbury's Laws of England 3rd Edition. Vol. 7 page 73 paragraph 138.**

In the present case the contract between the parties Exhibit P_1 clearly indicates that the law applicable to the contract is the law of the Republic of Uganda. And according to the evidence of PW_1 Engineer Andrew Tadhuba, the contract was signed but the parties on 15.08.08 at Kampala at Emin Pasha Hotel. It was witnessed by Brigadier Otema.

It was the contention of Counsel for the Plaintiff that since the contract was signed at Kampala, the cause of action arose within the jurisdiction of this court since it has unlimited original jurisdiction under the laws already referred to in this judgment.

However, the Defendant under paragraph 9 of the written statement of defence denies that the cause of action arose in Kampala as the work was carried out in Southern Sudan outside the jurisdiction of this court. It is claimed that the Defendant Company is registered and operates in South Sudan and does not have offices in Uganda.

Be that as it may, there is no provision in the contract between the parties providing exclusive jurisdiction to the courts of South Sudan in case of a dispute between the parties. If there had been such exclusive jurisdiction clause in the contract, this court would still be guided by earlier decisions in finding a solution to the issue.

Courts have stated that ***"if contracting parties agree to give a particular court exclusive jurisdiction to rule on a claim between those parties , and the claim falling within the scope of the agreement is made in proceedings in the forum other than that which the parties have agreed, the*** **English** ***court will ordinarily exercise its discretion to secure compliance with the contractual bargain, unless the party suing in the non- contractual forum can show strong reasons for suing in that forum"*** – **Donoline vs. Armco. Inc. & Others [2002] ILLoys's Rep. 425 at 432 -433.**

There being no such exclusive jurisdiction clause in this case as already pointed out, and the parties having agreed that the contract would be governed by Uganda laws, the suit having been filed in Uganda where the contract was signed, and the Defendant having willingly participated in the proceedings submitted to the jurisdiction of this court to hear and determine the case.

And contrary to the claims of the Defendant, there is evidence that the Defendant Company is incorporated in Uganda – Exhibit P_3 – Certificate of Incorporation No. 44073 DATED 11.04.2000. The Defendant's principal places of business in Uganda that is Kampala and Kitgum – See ID.I.

For all those reasons set out above, this court finds that it has jurisdiction to hear this matter. The first issue is therefore answered in the affirmative.

Whether the Defendant breached the contract.

From the evidence available the contract between the parties was for rehabilitation of a road stretch of 100km. The Plaintiff was paid the agreed deposit to commence work and indeed mobilized equipment / machinery and personnel and moved to Sudan, set up camp and began work.

However, according to PW_1, it was found that the required work was not as stated by the Defendant. The actual work was construction and not rehabilitation as there was actually no road. Therefore that, the works progressed under very adverse conditions with the full knowledge of the Managing Director of the Defendant Company; who requested the Plaintiff to continue working.

Further that when the first 50km of the agreed stretch were done, the Defendant paid the Plaintiff more money. And according to the evidence of PW_2, the Managing Director of the Defendant Company, visited the site three times and commended the Plaintiff for a job well done.

On 19.12.08 the Road was commissioned. On 20.12.08, the Plaintiff's staff broke off for Christmas and returned to Kampala leaving a Store Keeper and Security Guard on site. While in Kampala, the parties met and agreed to make changed to the contract necessitated by lack of structural design. But in the meeting of 10.01.09 held at the premises of the Managing Director of the Defendant Company at Ntinda, the parties failed to conclude on the way forward as the Plaintiff did not have enough resources. It was agreed they would meet again and conclude the matter.

After the Christmas break PW1 organized his staff to return to the Sudan. They left Uganda on 15.01.09 and arrived on site on 18.01.09. However, the staff were surprised to find changes at the site. They informed PW_1 that there was another Manager at the site to whom the Plaintiff's Engineers were required to report. And all stores and stocks had been taken over. While all efforts to get in touch with the Defendants were in vain.

PW_1 did not return to Sudan because he contends he did not know how to handle a situation he had not agreed upon and more so since there had been no conclusion on the scope of work for the changes that were supposed to be made. As a result, PW_1's team of staff and equipment remained in Sudan as he could not bring them back due to the breakdown in communication with the Defendant. Before Easter 2009, most of the Plaintiff's staff were eventually sent back to Uganda while same were retained. But the equipment could not be returned to Uganda as it had been taken to the Sudan in the name of the Defendant Company.

PW_1 had sent a letter to the Defendant proposing changes to the scope of work but all his communication to the Defendant in January, 2009, was to no avail. As a result, PW1 never

went back to the Sudan and yet the camp site and equipment had never been handed over to the Defendant to before the staff left for Christmas 2009.

By the time PW_1 was informed that the site was taken over by the Defendant Company, the Plaintiff Company had wanted resources replenished because the work was to have been completed in six months yet three months had gone by. The letter / notice by the Defendant Company to the Plaintiff Company terminating the contract is dated 30.05.09. The reason for termination is abandonment of work – See P1D1.

The evidence of PW_1 is fortified by the evidence of PW_2 Fred Mwesigwa who confirmed the evidence of PW_1, adding that there was communication from the Defendant barring the Plaintiff Company from continuing with work.

Under clause 59.1 of the contract between the parties, each party had a right to terminate the contract if the other party caused a fundamental breach of the contract, thereby substantially depriving the other party of the principal benefit of the contract.

The categories of fundamental breaches of contract are set out in clause 59.2.

It is the Defendant's contention in paragraph 4(d) of the defence that after receiving extra funding, PW1 the Plaintiff's Managing Director left the site purportedly to purchase spares for the equipment but never went back to South Sudan thereby abandoning the contract, the equipment and the workers. That therefore, it is the Plaintiff who breached the contract by abandoning the site after receiving 75% of the agreed sum. The Defendant relied upon clause 59.2 (d) of the contract to claim the Plaintiff committed a fundamental breach of the contract which justified the Defendant to terminate the contract.

The clause is to the effect that there is a fundamental breach if "the contractor stops work for a continuous period of 28 days when such stoppage of work is not shown on the current programmer and the stoppage has not been authorized by the Engineer"

The question there is **whether the Plaintiff committed a fundamental breach of contract entitling the Defendant to terminate the contract**.

Fundamental breach has been defined as ***"a breach that has a serious effect on the benefit that the innocent party would have otherwise derived from the contract".*** – See **National Power PLC vs. United Gas Co. Ltd & Another [1998] AU ER (D) 231.**

In the present case though, the Plaintiffs un contradicted evidence is that they broke off from the works for Christmas holiday that is from 20.12.08 leaving security and some staff at the site and returned to Kampala. Upon the Staff returns to the site on 18.01.09, they found it taken over by the Defendant. This was communicated to PW1. It had been 29 days since Plaintiff had ceased works. All effort to communicate with Defendant Company proved futile.

The notice of termination of contract – ID $Exhibit_{II}$ is dated 30.05.09.

By the time the notice was received, the Defendant had long taken over the site and attendant work from the Plaintiff and was using some of the Plaintiff's staff. It is therefore the Defendant Company that barred the Plaintiff Company from continuing with or carrying on with work that P. 6 had been agreed upon. Barred from accessing the site, equipment and staff there was no way the Plaintiff could possibly continue performing its duties under the contract.

Under the circumstances this court finds that it was the Defendant that breached the contract. The Defendant took over the road works before the 28 days provided for in the contract had expired. The construction workers had gone for Christmas break of which the Defendant was fully ware and returned to site after 29 days. Their absence was coupled with the need to buy spares.

By taking over the works even before the 28 days the Defendant deprived the Plaintiff of "a substantial part of the benefit he expected from the reminder of the contract."

The period for which the construction / rehabilitation contract was to last was not indicated in the agreement between the parties. Meaning that there was no identified date for completion of work.

According to the principle set out in the case of **Part Land Hick vs. Raymond and Reid [1893] AC 22, 32** ***"If time does become at large" the contractors obligation is to complete***

within a reasonable time. What constitutes a reasonable time is a question of fact to be considered in relation to circumstances which existed at the time when the contract obligations are performed, but excluding circumstances which were under the control of the contractor".

But for the circumstances surrounding the execution of the work in the present case, that is construction as opposed to agreed rehabilitation, that resulted in breakdown of equipment and the need to purchase spares, the break off for Christmas that the workers of the Plaintiff entitled to; the failure by the parties to agree on a way forward that resulted into the breakdown of communication, the return of the Plaintiff's workers to the site only to find it taken over by the Defendant, and the fact that 50 km of the road had already been done, court finds that, if the Plaintiff had not been barred from accessing the site, equipment and workers, the contract would have been completed within reasonable time without depriving the Defendant of a substantial part of the benefit it was intended to receive from its road works.

As already pointed out herein, this court finds that it was the Defendant that breached the contract by taking over the site, equipment and workers and barring the Plaintiff from accessing the site, before formally terminating the contract.

What remains for this court to determine are the remedies the Plaintiff is entitled to:-

The Plaintiff seeks to recover special, general and exemplary damages, interest on the sums, return of its equipment and costs of eth suit.

Special Damages: It has been established by decided cases that special damages must be pleaded and strictly proved on the balance of probability. The rule applies where the suit proceeds inter parties or exparte; the Plaintiff bears the burden to prove its case to the required standard. The burden and standard of proof does not became any less – See **Haji Asumani Mutekanga vs. Equator Growers (U) Ltd SCCA. 07/95.**

In the present case, the Plaintiff claims Shs. 372,452,331/- as balance on the contractual sum of Shs. 1,600,000,000/-.

It was testified for the Plaintiff that out of the contract price Shs. 800,000,000/- was paid in advance and later a further sum of Shs. 400,000/- was paid.

However, Annexture B to the plaint indicates that Shs. 62,200,000/- Shs. 700,000,000/- Shs. 8,625,000/- and Shs. 50,000,000/- was received by the Plaintiff.

On the other hand, the Defendant states in paragraph 4(g) of the defence that the Plaintiff was paid more that 70% of the agreed sum, while in paragraph 6 it is claimed that the Plaintiff received 75% of the agreed sum.

Calculations indicate that the sum claimed to have been received by the Plaintiff is approximately 75% of the agreed sum.

Since both parties agree to the sum received, court finds that the Plaintiff proved to the required standard that the Defendant owes Shs. 372,452,331/- as the balance on the contract price, as special damages.

The sum is accordingly awarded to the Plaintiff.

General Damages

To support the claim for general damages, Counsel for the Plaintiff relied upon S. 61(1) of the Contracts Act, which provides that ***"where there is a breach of contract 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".***

Referring to clause 44 of the agreement, he further argued that the Plaintiff would be entitled to compensation for being barred from accessing the site which adversely affected them.

For definition of general damages, he relied upon **Halsburys Laws of England, Volume 12 (1).**

Decided cases have established that ***" breach of contract attracts general damages"*** – Refer to **Robbialac Paints (Uganda) Ltd vs. K.B Construction Ltd [1976] HCB 45** where Saied J stated ***" it is now settled law that substantial physical inconvenience is an even inconvenience that is not strictly physical, and discomfort caused by breach of contract will entitle the Plaintiff to damages."***

General damages have been defined as ***"what court may award when it cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable man".***

Court has already found in the present case that the Defendant breached the contract thereby greatly inconveniencing the Plaintiff. The Plaintiff is therefore entitled to recover general damages.

Counsel for Plaintiff did not propose any sum to be awarded to the Plaintiff. Court will revert to S.61 (4) of the Contracts Act, which provides that ***"in estimating the loss, the law allows the court to consider the means of remedying the inconvenience caused by non-performance of the contract which exists at the time"***

Shs. 20,000,000/- is awarded to the Plaintiff as general damages for the inconvenience occasioned to it for breach of contract.

Exemplary Damages

It was submitted for the Plaintiff in this respect that exemplary damages be awarded as "the Defendant calculated that it would benefit from it tortuous conduct in the circumstances "it was emphasized that the Defendant barred the Plaintiff from the site, made use of its vehicles, machinery and equipment and enjoyed the benefits of using the same without incurring any costs of paying the Plaintiff.

Court has to consider **whether the circumstances of this case justify the award of exemplary damages**.

Exemplary/Punitive damages ***"are intended to punish and deter"***. ***They are additional to an award that is intended to compensate a Plaintiff fully for the loss he has suffered, both pecuniary and non – pecuniary".***

Circumstances under which exemplary damages can be awarded include ***"wrongful conduct calculated to yield a benefit in excess of compensation likely to be payable to the plaintiff"***.

Return of Equipment:

The evidence of PW_1 shows vehicle and equipment of the Plaintiff that were transported to South Sudan and retained by the Defendant while on site – Exhibit P_1.

The Plaintiff sought for release of the vehicles / equipment or their purchase price.

Invoices used to clear the equipment / motor vehicles were also tendered as Exhibits P_{IXX} - $P_{XXIV.}$

The invoices in respect of immigration charges, insurance fees, road toll, road licenses, and agent fees were also exhibited as Exhibits P_I – P_{XVIII}.

The evidence indicates that all equipment and machinery transported to Sudan were registered in the names of the Defendant as per the agreement.

PW1 clearly testified that the equipment still in Sudan is the following:-

1) Motor vehicle Reg. No UAA 862 W Tata track water denser.
2) Motor vehicle Reg. No. UAH 329V Excavator
3) Motor vehicle Reg. No. UUG 520 Caterpillar Grader
4) Motor vehicle Reg. No. UAB 810G Toyota Hilux
5) Motor vehicle Reg. No. UAA 849 A Roller
6) Motor vehicle Reg. No. UAG 561P Isuzu Forward
7) Motor vehicle Reg. No. UAE 119Q Isuzu Forward
8) Motor vehicle Reg. No. UAK 285C Loader JCB Backhoe

That the Defendant withheld possession of the equipment/vehicles adversely to the rights of the Plaintiffs is not disputed. The Plaintiff demands for their return or the value thereof.

In actions of this nature (---) judgment may be given in one of the different forms:

1) For the value of the chattel as assessed and damages for its detention of the chattel.

2) For the return of the chattel or recovery of its valued assessed and damages for its detention; or

3) For the return of the chattel and damages for its detention. – See **General and Finance Facilities vs. Cooks Cars (Ramford) [1963] IW LR644.**

It should be noted that the damages to be awarded for d___ are a composite part of the ordinary award of damages for that. In the present case, court has already awarded general and exemplary damages and the awards will suffice to cater for damages for detention.

The value of the goods retained by the Defendant was not stated and the Plaintiff did not adduce any evidence to indicate the value of the equipment / vehicles still retained in the Sudan.

In the circumstances, the only remedy available to the Plaintiff is for the equipment to be returned.

While the Defendant in paragraph 7 of its defence contends that it had no obligation to ferry the Plaintiff's vehicles / equipment to Kampala, as it was not agreed upon, and that the Plaintiff is free to pick its equipment from the site in Southern Sudan, the argument is not sustainable. By taking over use of the equipment / vehicles the Defendant took on the responsibility of returning the vehicles to the Plaintiff in Uganda. In the alternative the parties should have the property valued and the value thereof paid to the Plaintiff.

Interest:

Under S. 26(2) C.P.A court has powers to award interest on the principal sum from the period prior to the institution of the suit, or from the date of filing the suit to the date of the decree, or on the aggregate sum adjudged from the date of the decree till payment in full.

The case of **Roko Construction Co. Ltd vs. Attorney General HCCS 517/2005** was relied upon for the holding that ***"where a person is entitled to a liquidated amount or specific goods and had been deprived of them through the wrongful act of another, interest should be awarded from the date of filing the suit.***

In the present case, Counsel argued that the Plaintiff has been deprived of the balance of the contractual sum and is entitled to interest at the rate of 21% from the date of filing the suit until payment in full as well as 6% on general damages from the date of the decree till payment in full.

There was no interest agreed upon by the parties in this case. Court will accordingly exercise its discretion under S. 26 (2) C.P.A to award interest. Taking into account the fact that the transaction was a commercial one, interest is awarded at the rate of 21% per annum from the date of filing the suit until payment in full.

Interest on general and exemplary damages is awarded at the rate of 6% per annum from the date of judgment until payment in full; as it is meant to be compensatory in nature.

Costs

Under S.27 (2) C.P.A costs follow the event unless for good cause court determines otherwise.

The Plaintiff in this case is therefore awarded costs.

Judgment is given for the Plaintiff in the following terms:-

1) Special damages of Shs. 372,452,331/-.

2) General damages of Shs. 20,000,000/-.

3) Exemplary damages of Shs. 5,000,000/-

4) Interest on those sums at the rate of 21% per annum on special damages from the date of filing suit until payment in full. On general and Exemplary damages at the rate of 6% per annum from the date of judgment until payment in full.

5) Return of the equipment left in Sudan or the value thereof.

6) Costs of the suit.

FLAVIA SENOGA ANGLIN
JUDGE
25.01.16