

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
[COMMERCIAL DIVISION]

H.C.C.S No. 429 OF 2012

5 COASTA CONSTRUCTION SERVICES LTD ::::::::::::::::::::::::::: PLAINTIFF

VERSUS

NATIONAL WATER AND SEWERAGE COPORATION ::::::::::::::::::: DEFEDANT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

10 JUDGMENT

The plaintiff filed this suit against the defendant seeking recovery of a sum of UGX 126,211,120/= general damages, interest and costs of the suit. The plaintiff claims UGX 19,190,240/= for alleged unpaid works, UGX 31,308,806 as alleged withheld retention, UGX 24,843,142/= loss of profit, UGX 6,608,000/= being compensation for delays on the site and
15 UGX 44,260,933/= being interest on late payments on certified amounts.

According to the plaint, the plaintiff's cause of action arose as follows:

On the 4th November 2009, the defendant and the plaintiff entered into a contract for construction of a chemical store at Gaba water works. The agreed contract price was UGX 439,508,057/=. It was agreed that the works were to be completed within 4 months from November 2009.

20 That the defendant was required to hand over the site to the plaintiff within 3 days after signing the contract and the works were to commence within 5 days from site hand over and be completed within 120 days.

That the contract provided for payment of interest on late payments at the prevailing rate of interest for commercial borrowing calculated from the date at which payment should have been
25 made up to the date when the late payment is made.

That performance of the contract was beset by several breaches of the defendant including delayed site hand-over, failure to provide adequate drawings and specifications, submission of poor structure designs and unclear bills of quantities, failure to certify variations, delayed responses to site queries, poor project planning and failure to make timely payments.

- 5 That in accordance with contract requirements, the plaintiff notified the defendant of its breaches on several occasions.

That no payments were made within 30 days of certification, the defendant failed to make timely payment when it fell due under the agreement, for example whereas certificate no. 1,2,3 and 4 were issued on the 26th April 2010, 18th November 2010, 18th November and 14th September 2011
10 respectively, payments were not effected until 2nd July 2010, 11th February 2011, 10th June 2011 and 7th February 2012 respectively. The plaintiff terminated the contract, disengaged from the project and took its workers off the sight. They allege that it was because of the plaintiff's defendants.

That as a result of the defendant's breaches, the plaintiffs was ultimately constrained to terminate
15 the contract on 25th November 2011.

That the termination resulted in the total value of works being UGX 313,088,060/= as opposed to UGX 443,299,349/= reducing what would have been due to the plaintiff by an amount of UGX 124,215,509/=

That at the time of termination, the defendant still owed the plaintiff the sum of UGX
20 42,712,568/= for actual works completed out of which UGX 23,522,328/= has since been paid.

That the defendants also continues to withhold UGX 31,308,806/= being ten percent of the total payments that were certified under the contract, an amount the plaintiff avers the defendant has no justification to withhold any longer.

The plaintiff contends that the defendant breached the contract and is indebted to the plaintiff in
25 the amount of; UGX 19,190,240/= for alleged unpaid works, UGX 31,308,806 as alleged withheld retention; UGX 24,843,142/= loss of profit; UGX 6,608,000/= being compensation for delays on the site and UGX 44,260,933/= being interest on late payments on certified amounts.

The plaintiff also contends that the defendant has refused to pay the sum owed despite several demands and reminders.

The defendants on the other hand in the WSD contends that the plaintiff's claim is misconceived as it is not premised on the contract and that there is no proof that the parties agreed to the payments in issue. The defendant further contends that all payments due to the plaintiff were settled in the partial consent judgment entered on the 22nd March 2013 and that there is no outstanding payment due to the plaintiff.

Following mediation, the parties entered into a partial consent judgment by the terms of which the defendant paid UGX 64,544,847/- in his testimony, Jonathan Wanzira Managing Director of the plaintiff (PW1) states that the plaintiffs claim is UGX 57,001,921/= and not UGX 126,211,120/= as set out in the plaint.

Issues arising

The following issues were agreed on during scheduling;

1. *Whether the defendant owes the plaintiff any monies and if so what?*
2. *What remedies are the parties entitled to?*

The plaintiff called one witness, its Managing Director Jonathan Namugowa Wanzira (PW1). The defendant called one witness, Zachary Anyaliel (DW1). The court gave directive for the parties to file written submissions. Counsel for the plaintiff did not file the submissions and counsel for the respondent filed submissions.

Issue one: *Whether the defendant owes the plaintiff any monies and if so what?*

In the plaint, the plaintiff claims that the defendant owes the following sums:-

UGX 126,211,120/= general damages, interest and costs of the suit. The plaintiff claims;

UGX 19,190,240/= for alleged unpaid works.

UGX 31,308,806 as alleged withheld retention

UGX 24,843,142/= loss of profit

UGX 6,608,000/= being compensation for delays on the site and

UGX 44,260,933/= being interest on late payments on certified amounts.

In the plaintiff's testimony, PW1 states that the plaintiffs claim is UGX 57,001,921/= and not UGX 126,211,120/= as set out in paragraph 3 of the plaint. The claim for unpaid works also
5 reduced to UGX 12,118,447/= under paragraph 79(a) of Pw 1's witness statement. The claim was broken down to include:

- i. UGX 12,118,447/= for alleged unpaid works and compensation for delays;
- ii. UGX 11,031,820/= as alleged interest on unpaid works;
- iii. UGX 9,180,240/= as alleged interest on half payments under consent judgment;
- 10 iv. UGX 3,871,899/= as alleged interest on half retention;
- v. UGX 24,843,142/= as alleged 20% of the difference between the contract price and the eventual value derived following termination.
- vi. General damages.

The plaintiffs claimed for UGX 19,190,240/= for alleged unpaid works which was later reduced
15 to UGX 12,118,447/=. The defendant alleges that the claim is a special damage which must have been specifically pleaded to and proved but was not. There were no particulars set out in the plaint. That paragraph 4 of the plaint simply states a general sum to the tune of UGX 19,190,240/- as money demanded for unpaid works.

PW1's evidence in chief does not explain at all how this sum is arrived at. Paragraph 80 of his
20 statement simply throws figures on different claim heads. No evidence was adduced to prove that these sums are due. Therefore according to the defendants, the plaintiff did not discharge their burden of proof.

I am inclined to agree with the defendants that the plaintiff did not prove the claim. PW1 in his evidence stated that there were works that had been done that had not been paid yet. He stated
25 that there was a lot of profit arising out of the frustration of the contract by the defendant. However, this was just stated and not proved.

Further Pw1 stated that the claim of UGX 50,000,000/- arose from the work done but could not prove it. When asked in cross examination to prove it, he alluded to letter reference 0904 B51

page 125 which speaks of the total amount of the claim and it's a demand notice indicating that he had terminates the contract.

PW1 stated that under the interim valuation number 6, they had a claim of UGX 153,000,000/= under the consent judgment. Some money were paid out and in the process of
5 verifying and certifying, they came up with new figures UGX 64,000,000/= was paid under the consent judgment leaving UGX 57,000,000/= as outstanding. After they went through the final valuations, they came up with revised claim of UGX 54,544,847/= plus UGX 57,002,921/= however UGX 26,000,000/= had been paid on 14th September.

Of the UGX 57,000,000/=, UGX 12,000,000/= was for unpaid works. Pw1 when asked in cross
10 examination how he came to that figure, he stated that UGX 450,000/= was for re-location of the house UGX 3,000,000/= was unpaid work for the gate, UGX 900, 000/= was compensation for delays specifically night watching from 25th November 2009 at 21st January 2010 and UGX 5,504,547/= was a cost of relocating the building.

DW1 testified that the plaintiff was fully paid its dues and that the claims by the plaintiff were
15 not agreed on by the parties. Particularly DW1 stated that the amount claimed for unpaid works on the site house of UGX 1,250,000/= is unjustified. The contract price for the construction of the site house was UGX 2,500,000/=

That the claim for UGX 455,000/= on account of relocation of the site house was not part of the contract. Firstly, there was no agreement by the parties on this amount and secondary, the
20 relocation was part of plaintiffs' work. DW1 further stated that the claim for UGX 3,000,000/= for unpaid works was equally misconceived. The defendant was paid in the partial consent agreement. The UGX 900,000/= claim being alleged payment for night guards is not provided for in the contract. The plaintiff was duty bound to provide security for its machinery while on site. This was not the defendant's responsibility.

25 Further, DW1 stated that the claim for UGX 5,504,547/= for relocating the building was unfounded. That there was no relocating the building. There is no justification for this particular claim.

The principle governing the award of special damages is well settled. A claim for special damages must specifically be pleaded and strictly proved. The plaintiff had the duty to prove special damages. It is not enough to write down particulars, throw them at the court and say “*this is what I have lost I ask you to give me these damages*”. They have to be proved. This however
5 does not mean that proof of special damages has to be by documentary evidence in all cases. (see ***Nalwadda Vs Uganda Aids Commission (CIVIL SUIT NO. 67 OF 2011)***)

Since the plaintiff in my view failed to prove this claim, I find no merit in it and it is disallowed.

Secondly, the plaintiff claimed UGX 31,308,806/= as withheld retention. The defendants stated
10 that this particular claim has no basis and was not specifically pleaded or proved as required by the law. They further assert that it was fully provided for in the consent judgment.

Paragraph 1 (i) of the consent judgment states that; UGX 29,039,240/= being full and final payment for retention. During cross examination, PW1 stated that the plaintiffs still have a claim of UGX 3,871,899/- claim on retention arising out of interest. The plaintiff averred that the
15 plaintiffs are estopped by the consent judgment from making further claims on the matter. I am inclined to agree with the defendants. The consent judgment clearly provided that the sum therefore was full and final payment for retention. This means that any claim for retention was catered for and the parties agreed that it was fully paid. They cannot again come around and claim for it yet they agreed on UGX 29,039,240/= to be full and final payment. If there is any
20 other claim for retention, the plaintiff should have raised it during the negotiations. I agree with the defendants that this claim has no basis and cannot stand. It is accordingly disallowed.

The plaintiff thirdly claimed for UGX 24,843,142/- being alleged loss of profit. The defendants contend that the claim is ambiguous. PW1’S testimony does not demonstrate how this claim comes about. PW1’s witness statement states that the plaintiff anticipated a net profit of 20% of
25 the value of work and that as a result, it suffered a loss of UGX 24,843,142/=. During cross examination, Pw1 testified that, the 20% of the value of works as loss in case of termination is not in the contract and was not agreed on.

It is trite law that damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental stress, pain and

suffering. General damages must be pleaded and proved. (See ***Kampala District Land Board & George Mitala Vs Venansio Babweyana SCCA 2/2007; Assist (U) Vs Italian Asphalt & Haulage & Another HCCS 1291/1999; Moses Kizige Vs Muzakawo Batolewo [1981] HCB***).

The plaintiff did not prove this claim. I agree with the defendants that this ought to have been proven specifically. The plaintiff agreed that the sum was not contractual and thus not agreed upon by the parties. To that therefore, the plaintiff ought to have proved the loss of profit and not to just state to court that they anticipated earnings of a net profit of 20%.

The plaintiffs also claimed UGX 6,608,000/= being alleged compensation for delays on site. The defendant stated that this claim is not proved. PW1 in paragraph 80 (d) of his witness statement testified that the claim for unpaid works and compensation delays arises from UGX 900,000/= compensation for delays specifically money for night guards from 25th November 2009 to 21st January 2010. Paragraph 4 of the Plaint seek the recovery of UGX 6,608,000/= as compensation for delays on site. However, this particular claim is not mentioned anywhere in PW 1'S evidence. PW1 only mentions UGX 900,000/= as compensation for the service of night guards. This however is not supported by any evidence. This was not agreed by the parties at all. DW1 in his witness statement states that the service of security guards was the duty of the plaintiffs and was not under the circumstances the duty of the defendants. Since this sum was never agreed on by the parties, i am inclined to agree with the defendants that this claim has not been sufficiently proved. Accordingly it is also disallowed.

The plaintiff also made a claim of UGX 44,260,933/= being alleged interest on late payments of certified amounts. The defendant averred that no evidence was adduced to prove this claim. Item 1(iv) of the partial consent judgment provided thus:

“The defendant pays the plaintiff on or before the 25th March 2013, a sum of UGX 64,544,847/=(sixty four million five hundred forty thousand eight hundred forty seven) covering the following aspects of the plaintiffs claim.

UGX 16,846,369/= being full and final settlement of interest on certified delayed payments under certificates No. 1,2,3 and 5”.

The defendants contend that the plaintiff agreed to the above payment in full and final settlement of interest on delayed payments. The agreement was acted on by the defendant as agreed according to the testimony of PW1. The plaintiff is therefore estopped from making further claims in this regard.

- 5 The consent judgment was agreed upon by all parties. The provision the UGX 16,846,369/= as full and final settlement of interest on certified delayed payment fully catered for any claims for delayed payments. Any other claim on delayed payments should have been raised by the plaintiffs while agreeing on the consent judgment but since they did not, they cannot again come and claim further payments.
- 10 In conclusion therefore, since the plaintiff has failed to prove the several claims, I find no merit in them and they are accordingly disallowed.

Issue two: What remedies are the parties entitled to?

- The plaintiff prayed for special damages of UGX 126,211,120/= which were reduced to UGX 15 57,000,000/=, general damages, interest and costs of the suit.

Special damages

- The principle of law in awarding special damages is well settled. A claim for special damages must be specifically pleaded and strictly proved. If the plaintiff brings an action for special damages, it is for him or her to prove the special damages. Although special damages must be 20 strictly proved they need not to be supported by documentary evidence in all cases. In the instant case, the plaintiff did not lead in any evidence to prove the basis of his claim. As already indicated above the claim for special damages fails and is dismissed.

General damages.

- General damages are those that the law presumes to arise from direct, natural or probable 25 consequences of the act complained of by the victim. They follow the ordinary course and relate to all other terms of damages. Whether pecuniary or none pecuniary, general damages may

include future loss as well as damages for loss and suffering. See: ***Uganda Commercial Bank Vs Deo Kigozi (2002) EA 293***. General damages are awardable by court at large after due court assessment. They are compensatory in nature in that they should offer some satisfaction to the injured plaintiff. Since there hasn't been any proof of special damages and the claim is dismissed, I am unable to award general damages.

Costs

The general principle under ***Section 27 (2) of the Civil Procedure Act (supra)*** is that costs follow the event and a successful party should not be deprived of costs except for good reasons. In the instant case, the defendant is the successful party and is accordingly awarded costs of the suit.

In the result the suit is dismissed.

The defendant is awarded costs of the suit.

B. Kainamura
Judge
9.07.2017