

**THE REPUBLIC OF UGANDA**

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

**(COMMERCIAL DIVISION)**

**HCCS NO. 601 OF 2016**

**KIBOKO ENTERPRISES LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**PHILIPS EAST AFRICA LIMITED**

**PHILIPS LIGHTING EGYPT LLC ::::::::::::::::::::::::::::::::::: DEFENDANTS**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**J U D G M E N T:**

Kiboko Enterprises Limited the Plaintiff herein filed this suit against Philips East African Limited and Philips Lighting Egypt LLC herein referred to as the Defendants seeking a declaratory order that the Defendants breached the sub-contractual relationship between them and in respect of the contract for installation of solar street lights in Kampala city.

The Plaintiff also seeks payment of USD 2,004,305 for services rendered; incurred losses, purchased equipment, crystallized performance bond and payment guarantee as well as general damages, interest and costs of the suit.

The background to this suit as discerned from the pleadings is as follows Kampala Capital City Authority in preparation for the Pope's visit decided to light its streets. It therefore sought bids from companies that could execute those works. Following the bid process the 1<sup>st</sup> Defendant was awarded a contract worth UGX. 6,994,637,273/= for installation of street lights in Kampala by Kampala Capital City Authority. The two signed a contract on 22<sup>nd</sup> October 2015 **ExhP1**. The 1<sup>st</sup> Defendant being a foreign company sub contracted these works to the Plaintiff to procure the components and equipment and execute the civil works connected to such installation.

These instructions of the subcontract are clear in the letter dated 27<sup>th</sup> November 2015, **ExhP4** written to KCCA by the 1<sup>st</sup> Defendant giving transactional mandate on the tender for supply and installation of street lights in Kampala to the Plaintiff Company. The letter in part read;

*“Reference to the above captioned and the tender for supply and installation of solar street lights in Kampala of Reference No. KCCA/SUPLS/2015-2016/00213 which KCCA awarded to Philips East Africa Limited would like to mandate Kiboko Enterprises Ltd, a duly registered Company in Uganda and the official distributor of Philips in Uganda to undertake the transactional mandate on behalf of Philips, and as such payment to be effected to their bank accounts accordingly.”*

It further wrote;

*“The overall responsibility, warranty and guarantee as specified in the tender documents remains the full responsibility of Philips East Africa Limited.”*

The above letter had been preceded by a letter by the 1<sup>st</sup> Defendant to the Plaintiff dated 10<sup>th</sup> November 2015, **ExhP4** mandating the Plaintiff to undertake the contractual works between KCCA and the 1<sup>st</sup> Defendant. It in part reads;

*“Reference to the above captioned and the tender for supply and installation of solar street lights in Kampala of Reference No. KCCA/SUPLS/2015-2016/00001 which KCCA awarded to Philips East Africa Limited, Philips East Africa Limited would like to mandate Kiboko Enterprises Ltd, a duly registered company in Uganda, and the official distributor of Philips in Uganda to undertake the contract execution on behalf of Philips.”*

The components and equipment that were to be purchased were well laid out in the main contract and they included solar panels, batteries and luminaries, and that they were to be sourced from China.

This position is clear in the bid submission sheet dated 5<sup>th</sup> October 2015 under the price schedule for supplies and related services **ExhP1**.

The provisions in the main contract as to what was required by the 1<sup>st</sup> Defendant were well known to the Plaintiff. This knowledge is specifically provided for in clause 3.1 of **ExhP2** in these words;

*“The Subcontractor acknowledges and confirms that it has full knowledge and understanding of the provisions of the main contract.”*

Furthermore, the Plaintiff was to arrange the requisite performance bonds and payment guarantees. It is the Plaintiff’s claim that she performed her obligations by rendering the services required and importing the components agreed.

That although the Plaintiff performed her part of the contract the Defendants have refused and or neglected to pay. The Plaintiff therefore seeks the following; a declaration that the Defendant companies breached the subcontract in respect of the installation of solar street lights, payment of USD 2,004,305 for the services as mentioned above, losses incurred and the resultant crystallization of performance bonds and payment guarantee.

She seeks damages for breach of contract and interest on both the special and general damages with costs of the suit.

Denying liability, the Defendants contend that the main contract was awarded to the 1<sup>st</sup> Defendant who sub-contracted its execution to the Plaintiff. That the obligations of the 1<sup>st</sup> Defendant in the execution of the contract was to supply specified lighting components to the Plaintiff who was expected to pay for them once supplied by the 2<sup>nd</sup> Defendant and receive payments from KCCA as provided for in **ExhP4**.

According to the Defendants the main contract was initially to be executed by 22<sup>nd</sup> December 2015 however the execution period was, due to failure of completion of work extended by KCCA to 22<sup>nd</sup> January 2016. It was then extended to March 2016 and later April 2016 at the request of the Defendant so as to give the Plaintiff time to procure and ship components and equipment from China.

It is the 2<sup>nd</sup> Defendant's contention that she supplied the goods as specified by the sub-contract and issued invoices for payment to the Plaintiff but the Plaintiff declined to pay and the goods are at Multiple ICD Kampala. The Plaintiff's defence is that they were supposed to pay only after they were paid by KCCA.

The 2<sup>nd</sup> Defendant further contended that the termination of the main contract was caused by the unauthorized supply of project products (batteries and panels) by the Plaintiff who failed to procure "Philips" manufactured batteries and panels and insisted on procuring, without consent or approval of the Defendants, goods from India.

The issues as agreed by the parties for trial are;

- 1. Who, between the Plaintiff and the Second Defendant was responsible for the failure to perform the main contract in time?**
- 2. Whether the Defendants are liable for the breach of the main contract with KCCA, and hence its expiry before completion of the underlying services?**
- 3. Remedies available**

To determine who of the parties was responsible for non performance, it is important to scrutinize the sequence of events that led to the termination. According to **ExhP1** the 1<sup>st</sup> Defendant was expected to have completed the contract by 22<sup>nd</sup> December 2015. The same was not done and extension after extension took place as is clearly sequenced in **ExhP7**. This being an important point leading to the failure of the contract, I shall reproduce **ExhP7** which was not disputed by any of the parties. In this **ExhP7** the Executive Director KCCA explained how the contract ended unperformed in these words;

*"The above contract was entered into on the 22<sup>nd</sup> day of October 2015 between Kampala Capital City Authority (KCCA) and PHILIPS EAST AFRICA for the supply, installation and commissioning of Seven Hundred and Fifty (750) solar street lights for the sum of UGX. 6,994,637,275(VAT inclusive). The period of performance under the said contract was two (2) months with effect from the date of signature. A copy of the Contract is attached and marked " A" for your ease of reference.*

*At your request, and in accordance with the Contract provisions, an extension of time by one (1) month was granted, such that the new completion dates became January 22<sup>nd</sup>, 2016. A copy of the addendum that was signed is attached and marked “B” for your ease of reference.*

*Upon your failure to complete the performance of your obligations by the new completion date, KCCA invoked GCC 27 of the contract and levied liquidated damages from January 23<sup>rd</sup> January, April 6<sup>th</sup>, 2016.*

*The Contract period ( as extended) has already lapsed, and as of the date hereof there is not a single solar light that has been installed and commissioned as intended under the above reference Contract.*

*Accordingly, this is Notice that pursuant to GCC 18 of the Contract, KCCA shall immediately take steps to crystallize the Advance Payment and Performance Guarantee’s which were issued to protect KCCA against your failure to complete your obligations under the Contract.”*

The question that arises is who was responsible for the non performance that led to the lapsing of the contract leading to termination and crystallization of the Advance Payment and performance guarantees.

The Plaintiff contended that it was the Defendant’s fault. PW1 in his testimony stated that Ken Opiyo of the 1<sup>st</sup> Defendant informed the Plaintiff that only pre- inspected goods would be accepted by KCCA. That this information was kept away from them and they were not aware until the 15<sup>th</sup> January 2016 when Opiyo wrote to them. That their failure was as a result of the 1<sup>st</sup> Defendant’s failure to approve the use of components from India. In this he relied on **ExhP9** where third party components were referred to. **ExhP9** written by KCCA to the 1<sup>st</sup> Defendant reads;

*“In a follow up on works of this project, I noted that the components were originating from India and not from Shanghai, China (Bill of Lading enclosed)*

*I also observed that these were not from your company, Philips. These components include: Batteries, Solar Panels, Battery Boxes.*

*This is to notify you to ensure that as inspected, only products from your company as you stipulated in the submitted bid should be used for this project. Any other unapproved supplies will be rejected.*

*The pre-shipment inspection report (enclosed) approved the use of third party components as a stop-gap measure. These would be used only after approval from the Philips technical team.”*

In the evidence of PW1 I notice two things. One that the Defendant failed to inform the Plaintiff in time about the agreed provision to use the components from China. Secondly, that the refusal to approve their use should be faulted upon the 1<sup>st</sup> Defendant.

Firstly I do not agree with PW1 that they did not know of the need to procure components from China. PW1 Praveen himself in his testimony stated that they participated in the steps taken for KCCA and the 1<sup>st</sup> Defendant to arrive at **ExhP1**. Asked whether he participated in the tendering with the 1<sup>st</sup> Defendant, PW1 stated;

*“That is correct. We gave all the information to Philips; then Philips submitted the tender to KCCA and I went to the contract as a witness. Later the tender was given to Philips.”*

Asked whether they knew the terms of the main contract he stated;

*“We came to know at the time we were signing the main contract.”*

The Contract was signed on 22<sup>nd</sup> October 2015. The Plaintiff participated in its formation and later its Chief Executive Officer witnessed the signing. The Plaintiff can therefore not turn round to claim that it got to know of the very important clause concerning the source of the components

in January 2016. The Plaintiff knew all along that the components were to be procured from China.

On the issue of the 1<sup>st</sup> Defendant refusing to approve the third party components, it is evidently clear that the goods that were to be procured had gone through pre-shipment inspection by KCCA. The Plaintiff had no reason to divert from the agreed choice of KCCA. The 1<sup>st</sup> Defendant would require a strong reason to divert from the agreed position between itself and KCCA. Moreover as seen from the evidence of PW1, the Plaintiff had earlier participated in the Shanghai choice. No reason was given for the intended deviation.

The only reason given by the Plaintiff was that they had already ordered for supplies from India. This would have been understandable if at the time they ordered components from India they did not know that the goods agreed upon between KCCA and the 1<sup>st</sup> Defendant were from China.

Further the Plaintiff was aware of the requirement to import from China by way of **ExhP22** a Notice to cure Anticipatory Breach in which KCCA wrote to the 1<sup>st</sup> Defendant with copies to others including the Plaintiff.

In the notice the Executive Director KCCA wrote in part;

*“During the implementation of this project we have noted the following anticipatory breaches of the contract:*

- 1. Philips East Africa has not taken responsibility of directly performing obligations to deliver the project and has instead left the obligation to third party agents.*
- 2. Some of the products intended to be used on the project are non-Philips products originating from India and not the inspected samples and consignment from China as stipulated in the contract.”*

KCCA then threatened to invoke and enforce all its contractual rights and remedies in the event that they did not heed the notice.

This should have sounded a warning to the Plaintiff that non “Philip China” components would not be tolerated.

As it stands in this case the order made by the Plaintiff was done in complete defiance of the main agreement to which the Plaintiff as a company had given the 1<sup>st</sup> Defendant advise and the resultant agreement witnessed by no other than PW1 Praveen who was the Chief Executive Officer of the Plaintiff.

Moreover it is clear from the evidence of both parties that the 1<sup>st</sup> Defendant would benefit from supply of its own products from Philips China. There was no way without concrete reason like failure of performance by Philips China that would cause the 1<sup>st</sup> Defendant a business entity to approve supplies from another source.

There being no reasons forwarded in support of the change of source of the components, it is my finding that the 1<sup>st</sup> Defendant cannot be faulted for not approving the change of source from Philips China to some Indian Company.

As for the 2<sup>nd</sup> Defendant, it is admitted by all parties that she indeed imported the components expected of her. The Plaintiff contends that she should be held liable for the non performance because she refused to surrender the imported goods.

I have found nowhere in the proceedings obligating the 2<sup>nd</sup> Defendant to pay for the goods and recover later. What was expected of the 2<sup>nd</sup> Defendant was to deliver goods FOB. In this case the transit costs would be provided for. The cost of the actual goods however fell upon the Plaintiff. This position is supported by the manner of proceed sharing agreed upon by the parties.

The Plaintiff was supposed to pay for all the goods, cost of civil works, light installation and post installation maintenance. It is after these deductions that he would pay the Defendant their percentages from the profits.

The party to pay for the components was the Plaintiff. She could not shift the burden upon the 2<sup>nd</sup> Defendant.

The Plaintiff also contended that the 1<sup>st</sup> Defendant failed to get extensions and so the contract lapsed. Evidence on record however shows otherwise. It shows that the Contract signed on 22<sup>nd</sup> October 2015 was to end on 22<sup>nd</sup> December 2015. The Defendant requested for extension which was granted to 21<sup>st</sup> January **ExhD4**.



The 1<sup>st</sup> Defendant again sought another extension to March and lastly April 2016. There is no doubt that the 1<sup>st</sup> Defendant sought and obtained extensions.

Lastly, coming back to the real reasons why KCCA terminated the contract are laid out in **ExhD4** a Press statement by KCCA headed KCCA TERMINATES PHILIPS CONTRACT FOR SOLAR LIGHTS.

It in part reads;

*“After several communications, M/s Philips made various commitments to have the Project delivered by 4<sup>th</sup> April, 2016, which was not achieved. The contract went into the Liquidated damages period and eventually expired on 6<sup>th</sup> April 2016. The following was noted;*

- 1. Fraudulent behavior of the contractor on the product delivery.*
- 2. Irresponsible management of works and public safety by M/s Philips East Africa.*
- 3. Poor performance by Philips on delivery of lighting under the project*
- 4. Poor project management by Philips.”*

The foregoing were the reasons for termination.

The first reason which KCCA branded fraudulent behavior on product delivery can only be attributed to the Plaintiff, because she is the one that tried to substitute the Philip China components with those from India.

As for the management of site and otherwise, although KCCA refers to the 1<sup>st</sup> Defendant because she is the one with whom they entered the contract, it can only be attributed to the Plaintiff because **ExhP2** creating the sub-contract transferred the obligation of management to the Plaintiff.

The foregoing clearly shows that the responsibility of failure to perform can only be placed on the Plaintiff.

Taking all the circumstances of the case into consideration, it is this Court's finding that the Plaintiff's attempt to introduce unacceptable components into the contract was a breach that led to the failure of performance of the main contract.

That in my view also deals with the second issue.

It is true that the Plaintiff injected some money in the initial civil works. But it is also equally true that the Plaintiff received 50% of the contract price. This sum remains unaccounted for. No evidence has been led in respect thereof.

For those reasons, the Court finds no merit in the suit and it dismisses it with costs.

**Dated at Kampala this 3<sup>rd</sup> day of May 2019**

**HON. JUSTICE DAVID WANGUTUSI**

**JUDGE.**

