

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

CIVIL SUIT NO. 331 OF 2014

LIBERTY CONSTRUCTION COMPANY LIMITED ::::::::::::::::::::PLAINTIFF

VERSUS

1. DR. DANIEL ONEN KAITAITA

2. ATTORNEY GENERAL::::::::::::::::::DEFENDANTS

BEFORE: HON. JUSTICE DAVID WANGUTUSI

JUDGMENT

Liberty Construction Company Limited herein the Plaintiff sued Dr. Daniel Onen Kaitaita and the Attorney General herein referred to as the 1st and 2nd Defendants respectively for; UGX. 276,777,135/= being Value Added Tax (VAT) of UGX.1, 814,427,885/= the contract sum, UGX. 12,126,852/= being 18% Value Added Tax (VAT) of UGX.67, 371,404/= the cost of approved variations, UGX. 108,865,673/= being 6% withholding tax of UGX.1, 814,427,885/= the contract sum, UGX. 4,042,284 being 6% withholding tax of UGX.67,371,404/= cost of approved variations, compound interest at the rate of 2% against the 1st Defendant for failure to pay tax within time and on the 2nd Defendant for failure to withhold tax and remit the same to Uganda Revenue Authority in time as prescribed by law, damages, costs of the suit and interest.

The background of the claim as discerned from the facts is that the 2nd Defendant contracted the Plaintiff to execute and complete construction of Bushenyi Aquaculture Research and Development Centre vide

Contract No. 0157/WRKS/FDP/0607 Lot IV. On the 11th December 2007 the parties signed an agreement, **ExhP1**.

The works to be done included; development of reservoirs, ponds embankments (approximately 1.0 ha), installation of infrastructure to support pond systems including water supply, drainage re-circulation and power supply, construction of hatchery offices, staff rooms & support building including fry building and brood stock shelters, equipment stores, field experiment sheds and quarantine areas, installation of boreholes and connection to local water main, security and road improvements.

The contract price was 1,814,427,885/= VAT inclusive. The contract further provided a breakdown as; total bid price less VAT being UGX. 1,537,650,750/=, VAT being 276,777,135/=. Payments would become due under the provisions of the contract at the times and in the prescribed manner. The currency was Uganda Shillings, **ExhP1**.

In a letter dated 3rd December 2010 the 2nd Defendant cleared the draft addenda to various contract agreements implemented under the Fisheries Development project inclusive of the Bushenyi construction of the Aquaculture research and development center at a revised contract price of UGX. 1,605,022,154/=**ExhP2**.

In addition to the contract an addendum was signed by the Plaintiff and the 2nd Defendant on the 10th December 2010 wherein the parties varied the contract to accommodate extra works in accordance with sub clause 32.1 of Exhibit P1. The clause required the contractor in the earliest times to submit a schedule of extra works that adversely affected the initial contract price. The price for variations was 67,371,404/=**ExhP3**.

It is the Plaintiffs claim that under the Bushenyi ARDC Contract Value Added Tax at 18% and Withholding tax at 6% were payable to Uganda Revenue Authority.

On the 5th October 2010 the Plaintiff, 1st Defendant and the director of the Plaintiff (Edmund Mabiyo) entered into a schedule for sharing proceeds from Bushenyi ARDC project and Kasolwe AGRC project in Kamuli District. The proceeds of Bushenyi ARDC project would be full and final settlement for all interests in and debts from the Plaintiff towards the 1st Defendant, **ExhP4**.

It is clear from ExhP4 which was headed schedule of sharing proceeds from Bushenyi ARDC project and Kasolwe AGRC project that the Plaintiff was indebted to the 1st Defendant and that therefore the proceeds from Bushenyi ARDC would meet that indebtedness.

The proceeds would be;

“As full and final settlement of all interests in and debts from Liberty Construction Company Limited towards Dr. Daniel O Kaitaita”

The 1st Defendant by ExhP4 took over from the Plaintiff the responsibility for completion of the Bushenyi ARDC project.

To facilitate this action the Plaintiff executed a special power of attorney dated 5th October 2010 appointing the 1st Defendant as its representative in all its dealings relating to the Bushenyi contract. This power of attorney was stated to be irrevocable in these words; **ExhP5**.

“And we declare that this power of attorney shall remain irrevocable till full execution of contract No.

*0157/WRKS/FDP/06-07 with ministry of Agriculture,
Animal Industry and Fisheries.”*

The parties agreed to clothe the 1st Defendant with the authority of a single signatory by opening an account through which payments from the employer would be received, **ExhP4**.

Lastly the parties agreed in clause 11 of **ExhP4** that the 1st Defendant would settle existing debts arising from activities of the Bushenyi contract.

It is not in dispute that when payments arose in respect of the Bushenyi contract the payments were made into the account where the 1st Defendant was sole signatory. The 1st Defendant in fact concedes that payment was made into the account until all that was due was exhausted.

It is also not in doubt that what would have constituted the tax arising from the Bushenyi project was also deposited on this account over which the 1st Defendant was sole signatory. In fact the 1st Defendant concedes that the tax money was paid over.

The Plaintiffs' claim is that the tax money that was deposited onto the account where the Defendant was sole signatory was not passed over to the revenue authority while the 1st Defendant claimed he was not obliged to pay the taxes.

The Plaintiff claims that because of the failure to pay taxes Uganda Revenue Authority appointed collecting agencies which impounded monies on her accounts.

The Plaintiff further avers that because of failure of the 1st Defendant to remit those monies to the revenue authority in time they have been

subjected or will be expected to pay penalties as provided for in the tax laws.

The Plaintiff also averred that because of failure to meet the tax obligations she has been denied tax clearance and therefore cannot undertake other projects or enter into contracts with government and or other bodies that prioritize tax clearance before awarding contracts.

That for those reasons she has been unable to undertake new contracts and therefore has suffered damages.

The Plaintiffs claim against the 2nd Defendant is that the 2nd Defendant failed to retain withholding tax and handed it over to the 1st Defendant fully knowing that the power of attorney between the 1st Defendant and Plaintiff had been revoked and in acting the 2nd Defendant did so in collusion which denied the Plaintiff from payment of tax.

For those reasons the Plaintiff filed this suit.

On the other hand the Defendants denied liability.

The 1st Defendant on her part denied having ever entered into any contract stating that the Plaintiff had never assigned or transferred any of its obligations or duties involving tax or contractual execution of what she had undertaken when she signed her contract with government.

The 1st Defendant contended that it was the Plaintiffs obligation to execute the contracts and meet all tax liabilities since she was the supplier of the services as regarded the contracts. That by virtue of the proceeds sharing agreement ExhP4 the 1st Defendant simply became an agent of the Plaintiff for purposes of execution without assuming any tax liabilities, that in any case by the 5th October 2010 when the schedule of the proceeds sharing agreement was signed the Plaintiff had already

received a substantial sum amounting to UGX 975,815,411/= which was part of the contractual sum of UGX. 1,814,427,885/=. That for those reasons the Defendant was not obliged to make any payments.

The 1st Defendant also contended that the Plaintiff is not entitled to claim or institute suits of tax for the Uganda Revenue Authority and that the contractor was at all times liable for the tax and performance of the tax obligations which she neglected.

The 1st Defendant therefore prayed that the suit be dismissed with costs

The 1st Defendant had also filed a counter claim seeking special damages, general damages and costs but when the matter came up for scheduling on the 22nd January 2019 counsel for the 1st Defendant withdrew the counterclaim.

The 2nd Defendant on her part denied liability and contended that she was not privy to the agreement between the 1st Defendant and the Plaintiff and was therefore not bound by it in any way in as far as taxes or debts are concerned.

She contends that the contract sum of UGX. 1, 814,427,885/= was VAT inclusive and that it was upon the Plaintiff to pay the taxes in respect of the amount received in compliance with the law

The 2nd Defendant further contended that she complied with the statutory and legal obligations under the contract as far as tax is concerned and cannot be held liable for the Plaintiff and 1st Defendants tax obligations.

She contended therefore that the actions had not caused any damage or injury to the Plaintiff. She therefore prayed that the suit against her be dismissed with costs.

When the matter came up for scheduling the parties agreed to the following issues for resolution;

a) Whether the Plaintiff is entitled to the special damages of UGX. 401,811,944.1/=

b). Remedies

In his written statement of defense the 1st Defendant makes several averments firstly; that the schedule of the preceding sharing agreement from Bushenyi and Kasolwe projects between the Plaintiff and the 1st Defendant did not in any way assign or transfer any of its tax liability obligations arising from any of the contracts to the 1st Defendant.

Secondly that the 1st Defendant never assumed any tax liability or any obligation.

Thirdly in paragraph 4(c) of the written statement of defense the 1st Defendant denies that the Plaintiff never assigned or transferred any of her services and contractual execution to the 1st Defendant.

And fourthly that the execution of the contract was by the Plaintiff and not him.

Going by those averments, whatever payments that were made should have gone to the Plaintiff. These payments included taxes that were passed over to the 1st Defendant.

The fact that taxes were paid to the 1st Defendant is conceded to by him during cross examination both in this court and earlier in *Civil Suit No.1 of 2011*. The 1st Defendant admitted having received taxes and eaten them.

As to whether there were taxes to be paid, it is answered by DW1 during cross examination when he stated that they issued cheques to ministry and there's no doubt that these cheques which bounced were meant for taxes.

As to what happened to the tax money is clearly explained by the 1st Defendant. When asked as to what happened to the tax money he replied;

"I ate the money"

When further asked why he ate the tax money he replied;

"I ate it because they were part of the proceeds"

His argument was that he had received money as part of proceeds and that in any case the sharing schedule did not include his payment of tax.

To begin on whether a person who received tax money would eat it other than pass it to the revenue authority, *Article 17(1) g of the Constitution of the Republic of Uganda* under duties of a citizen provides that;

"It is the duty of every citizen of Uganda to pay taxes."

This is a constitutional obligation which whoever received tax money cannot run away from paying it. This was considered in ***Uganda Projects Implementation & Management Centre vs Uganda Revenue Authority*** in which Hon. Lady Justice Kitumba held;

"According to Article 17 of the Constitution a citizen has a duty to pay taxes to do promptly so that government business can go on."

Lady Justice Kitumba emphasized the importance of payment of tax when she cited ***Metcash Trading Co. Ltd vs Commissioner for South***

African Revenue Services & Anor (2000) ZACC 21 in which the court had held that the tax payer was obligated to bow to the principal of "*pay now argue later*"

The implication of the foregoing is that it was every person's duty who receives tax money to ensure that it ended in the hands of revenue authority.

By this implication the person who received and kept tax money without passing it over to the revenue authority will have retained tax money and caused a delay in remission which would attract sanctions.

In the instant case the 1st Defendant in his defense stated that the responsibility to pay the tax was always upon the Plaintiff. He was therefore supposed to Passover the tax money to the Plaintiff so that the later would then remit it to revenue authority. The 1st Defendant would certainly be liable for the attendant penalties that would come as sanctions for such delay.

The 1st Defendant has however denied that in sharing proceeds agreement he was not obligated to pay taxes. He contended that taxes were not regarded as debts in clause 11 of the proceeds sharing agreement.

The Plaintiff however contended that on assuming responsibility of the Bushenyi ARDC project the Defendant also undertook to pay all the existing debts. The Plaintiff relied on Exhibit P4 clause11 which provided;

"Any existing debt from either site shall be settled by the person responsible for that respective site."

According to the 1st Defendant this did not include taxes.

The answer as to whether it included taxes lies in the definition of a debt.

Investopedia defines tax liability as total amount of tax debt owed by an individual, corporation or other entity of a tax liability.

When you have a tax liability you have a legally binding debt.

It is therefore clear from the foregoing definition that taxes are debts.

To decide otherwise would mean the 1st Defendant benefiting from the proceeds of the Bushenyi project without fulfilling the obligations that fall under that transaction.

Since the money that the 1st Defendant ate were payments for execution of the Bushenyi contract he was in the absence of an express exemption liable to pay the debt.

Since clause 11 of the schedule of proceeds sharing did not specify which debt, it can safely be taken to have included all debts including tax liability. In any case when payment was made following the Solicitor General's letter of guidance dated 17th January 2012, it included the taxes. The taxes are further conceded to by the 1st Defendant who clearly admits that it was paid and eaten by him.

For those reasons above and especially the constitutional provision under *Article 17(1) g* the 1st Defendant was liable to pay all tax money that he received as payment from the ARDC Bushenyi project.

But if the money was supposed to be paid to the revenue authority where then does the Plaintiff get locus to sue?

PW1 stated that the Plaintiff being the contractor who had entered into the agreement with the government to do the construction and as the one who had received tax clearance from revenue authority, she was

therefore the one expected to pay all taxes namely; Value Added Tax and withholding tax. She was the tax payer from which the revenue authority would recover the taxes. Indeed the revenue authority appointed collection agents in respect of the unpaid tax as evidenced by **Exhibits P23 & P40** and it is not in dispute that sums of money were collected from the Plaintiffs accounts.

The Plaintiff has also claimed that delayed payments attracted penalties of 2% compound interest and that since she was now indebted to revenue authority she had to pay this money. The penalties are statutory.

Section 65 of the Value Added Tax Act provides for penal tax, 65(3) reads;

“A person who fails to pay tax under this Act on or before the due date is liable to pay a penal tax on the unpaid tax at a rate specified in the fifth schedule for the tax which is outstanding.”

The fifth schedule provides the rate of interest chargeable as penalty to be 2% per month compounded.

The delayed payment of the taxes therefore automatically attracted penalty charges against the Plaintiff. The 1st Defendant therefore cannot run away from this obligation.

The Plaintiff calculated the special damages and came up with the claim of 401,811,944.1/= these were a result of 18% VAT of the contract price of 1,814,427,885/=, 18% VAT of 67,371,404/= which was an addition to the contract price by way of variation, 6% of withholding tax of all the contract sum. These sums were tax that should have been passed over to the revenue authority by the Plaintiff but were eaten by the 1ST

Defendant. Since the revenue authority proceeded to recover this money from the Plaintiff by appointing collecting agents, it is just and in order that the 1st Defendant who admittedly ate this money pays it over to the Plaintiff.

Late payment of this money statutorily attracted penalties under *Section 65(3)* which I have discussed above. The 401,811,944.1/= will therefore attract interest of 2% per month compounded running from the date when the 1st Defendant was paid up to the time when the Plaintiff effected payment if she has already paid in the absence of that payment till payment in full.

The Plaintiff sued the Attorney General together with the 1st Defendant. His claim against the 2nd Defendant is that the 2nd Defendant well knowing that she should not have Paid the 1st Defendant any money after the revocation of the power of attorney the 2nd Defendant in collusion with the 1st Defendant paid over the money which would have constituted withholding tax and that payment therefore resulted into failure to remit withholding tax to revenue authority and subsequently attracted penalties.

I have already discussed above that as a result of the proceeds sharing agreement the Plaintiff executed a power of attorney in favor of the 1st Defendant empowering him to execute the Bushenyi contract and receiving the payments thereof.

It is not in dispute that on 25th November 2011 the Plaintiff communicated a revocation of the power of attorney to the 1st Defendant and also the Permanent Secretary Ministry of Agriculture Animal Industry and Fisheries who received it on the 28th November 2011, **ExhP9** and acknowledged receipt of the same on 13 December 2011, **ExhP10**.

The Plaintiff contends that the Permanent Secretary having received the revocation of power of attorney she should not have effected payments to the 1st Defendant.

That because of the failure of the Permanent Secretary to countermand payment to the 1st Defendant the Attorney General would be held responsible for any losses that were occasioned.

The 2nd Defendant denying liability stated that all that she did was done within the 4 corners of the power of attorney. That the revocation was of no consequence in as much as it was an irrevocable power of attorney.

The parties that include a clause of irrevocability intend that the power of attorney should remain operative until the intended purpose of the execution of the powers of attorney is realized.

While it is true that a donor and a donee can include the clause of irrevocability it does not mean that the donor would be completely deprived of the power of revocation. The donor still has the power of revocation if the power of attorney simply empowers the donee to act on behalf of the donor for the benefit of the later. Where however the donor executes a power of attorney which is fully intended to benefit the donee then in the absence of fraud the donor cannot revoke that power of attorney unless the donee agrees to the move. An example is where the donor has borrowed money from the donee and because of the debt has empowered the donee through an irrevocable power of attorney to sale the donors land to recover his money. This the donor cannot revoke because it is to be executed by the donee and benefit him for the purpose was for him to recover money lent to the donor.

In the instant case the 1st Defendant had provided credit to the Plaintiff. In doing so he had put his land at risk. The contract that the Plaintiff

entered into with the 1st Defendant so as to recover what he had lent to the Plaintiff was to be executed by the 1st Defendant for his sole benefit. That being the case the Plaintiff could not revoke it because it was not power given to the 1st Defendant authorizing him to do business on the Plaintiffs' behalf and benefit.

It was an authority given to the 1st Defendant to do something on his account and for his benefit. It was intended for him to recover his money he had lent to the Plaintiff. In other words the execution of that contract and its earnings were security to the 1st Defendant. Where power had been given as security it could not be revoked as the indebtedness still subsisted.

As long as this indebtedness continued, the 1st Defendant was entitled to treat the Bushenyi transaction as his own and he would be the dominating power under the umbrella of that power of attorney. It is that interest which is pegged on the authority given under the power of attorney which prevents the donor from simply waking up one day and revoking the power of attorney because to do so would create insecurity and a danger to the benefit that the donee who has supplied consideration by way of loans to the Plaintiff was entitled to benefit.

The payment that was effected was on the advice of the Solicitor General and rightly so that the order of revocation was of no consequence.

In this I take comfort in the decision of **Wilde C.J in Smart vs Sanders 1848) 5 C.B** in which his lordship observed;

“Where a power of attorney whenever created is expressed to be irrevocable and is given to secure a proprietary interest of the donee of the power, or the performance of an obligation owed to the donee, then,

so long as the donee has that interest, or the obligation remains un-discharged, the power is irrevocable.”

I am in full agreement with the holding above, it is therefore my finding that the Plaintiff had no authority to revoke the power of attorney. In that case therefore when the Solicitor General advised that the Plaintiff could not revoke he did so on the right premise and the Permanent Secretary for Ministry of Agriculture Animal Industry and Fisheries was right in ignoring the revocation. That being the case I find no proof to hold that the 2nd Defendant colluded with the 1st Defendant to defeat the intentions of the Plaintiff.

It is my finding that the 2nd Defendant acted within the existing powers of attorney.

As for withholding tax payment was effected by the African Development Bank. The 2nd Defendant has no control over the bank when it comes to payment of money to service providers.

The Plaintiff therefore fails to prove the liability of the 2nd Defendant.

The Plaintiff sought general damages. These are damages that a Court awards in its discretion and will be presumed to be the natural and probable consequence of the Defendants act or omission, **James Fredrick Nsubuga vs Attorney General HCCS No 13 of 1993.**

It follows that a Plaintiff who has suffered damage due to the wrongful act of the Defendant must be put in a position as near as he or she should have been in had he or she not suffered the wrong. In assessing the quantum of damages, Courts are namely guided by the value of the subject matter, and the economic inconvenience that a party may have

been put through, ***Kibimba Rice Limited vs Umar Salim SCCA No 17 of 1992.***

In the instant case the Plaintiff a construction firm which required tax clearance before she could get any contracts in the country must have missed out on many contracts because Uganda Revenue Authority did not give her clearance due to failure of paying tax which resulted from the Bushenyi contract.

It is difficult to assess how much money they have lost but it is also defensible to say that they must have missed out on other contracts.

I say so because if they were able to satisfy Government of Uganda and the stringent rules of the African Development Bank to get the ARDC Bushenyi contract and Kasolwe AGRC contract then they were capable of getting other well-paying contracts.

Secondly being blacklisted by revenue authority reduced their status and integrity in the eyes of the public and potential employers. This was all occasioned by the 1st Defendants' failure to remit taxes which was in addition a breach of *Article 17(1) (g)* of the Constitution.

While the Plaintiff is entitled to general damages she did not guide court on the quantum neither did she site other contracts and their value such as to give this court a picture of what it has lost.

The only guidance that this court has is the sum in the Bushenyi contract but even in this one it does not show how much of it was profit.

Taking into account all the circumstances surrounding this case I find an award of UGX. 100,000,000/= appropriate.

The Plaintiff also sought interest.

Interest is at the discretion of court; ***Uganda revenue Authority vs Stephen Mabosi SCCA 16 OF 1995***. Like all other discretion it must be exercised judiciously taking into account all the circumstances of the case; ***Superior Construction Ltd vs Notay Engineering Ltd HCCS 24 OF 1992***.

The Plaintiff lost money in all respects because of the 1st Defendants conduct. She even lost a sum of UGX. 82,722,897/= to Uganda Revenue Authority through execution of a third party notice. This UGX.82,722,897/= has not been disputed by the Defendants. In fact it has been acknowledged as money received by the Uganda Revenue Authority.

The Plaintiff being a construction company was deprived the use of this money which it would have ploughed back into business.

For those reasons it deserves interest.

Furthermore being a construction company dealing in commercial ventures of construction this court finds it necessary to consider interest with a commercial lens. Considering the current bank commercial borrowing interest rates I find interest of 20% per annum appropriate.

For those reasons the UGX. 82,722,897/= will attract interest of 20% per annum from 17th January 2011 the date of appointment of collection agent till payment in full.

As for general damages the Defendant shall pay 6% per annum from date of judgment till payment in full.

In conclusion judgment is entered in favor of the Plaintiff and the 2nd Defendant in the following terms;

- a) The suit against the 2nd Defendant is dismissed with costs

- b) The 1st Defendant to pay the Plaintiff tax money of UGX. 401,811,944.1/=
- c) The tax money in (b) above to attract interest at 2% compounded monthly from date of default namely 17th January 2011 till payment in full.
- d) The 1st Defendant to pay the Plaintiff general damages of 100,000,000/=
- e) The 1st Defendant to pay interest on the UGX. 82,722,897/= at the rate of 20% per annum from the 17th January 2011 till payment in full.
- f) The Defendant to pay interest on general damages of 6% per annum from the date of judgment till payment in full.
- g) The 1st Defendant to pay costs of the suit to the Plaintiff and the 2nd Defendant.

Dated at Kampala this^{24th} day of ^{August}.....2021.


HON. JUSTICE WANGUTUSI DAVID

JUDGE