



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

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CS No. 876 of 2018

BUNYONYI ENGINEERING WORKS LTD:.....PLAINTIFF

VERSUS

KAMPALA CAPITAL CITY AUTHORITY:.....DEFENDANT

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BEFORE HON. JUSTICE RICHARD WEJULI WABWIRE

JUDGEMENT

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This suit was commenced by the Plaintiff against the Defendant for breach of contract, general damages, interest and costs of the suit. In their written statement of defence, the Defendant denied the claim and contented that the Plaintiff was not able to complete the work within the agreed period.

At the hearing the Plaintiff was represented by M/s Sebbowa & Co. Advocates while the Defendant was represented by the Directorate of Legal Affairs of the Defendant.

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The Plaintiff filed a witness statement deponed by Festo Musiime the managing director of the Plaintiff and the Defendant filed a witness statement deponed by Patrick Kaweesa an engineer with the Defendant. The Plaintiff addressed the court in written submissions.

Neither the Defendant nor their representatives appeared at the hearing. As such on the Plaintiff's prayer, the court ordered that the suit proceed *ex parte*.

25 The agreed facts of this case as presented in the parties' Joint Case Scheduling Conference Memorandum are that the Plaintiff was contracted by the Defendant to carry out works on Kirombe, Bukasa, Nalubaale and Amka roads for a period of four months with the contract starting on 10th August 2012 and ending on 10th December 2012.

30 Three issues as raised for determination in the Joint Scheduling Memorandum were as follows;

1. Whether the Defendant breached the suit contract.
2. Whether the Plaintiff is entitled to payment for additional works done.
3. Remedies available to the parties.

35 **Issue 1**

Whether the Defendant breached the suit contract.

The Plaintiff's Counsel submitted that the Defendant breached the contract with the Plaintiff through the following ways;

- a. Failure to pay to the Plaintiff certified sums under the first payment certificate
40 within the contractually agreed time of 30 days from certification as agreed in Clause 43.1 of the contract.
- b. Failure to pay interest on the late payment of the certified sums as agreed in Clause 43.1 of the suit contract.
- c. Failure to pay to the Plaintiff in full the certified sums under the first payment
45 certificate.
- d. Failure to pay the Plaintiff the retention money in the time and manner contractually agreed.
- e. Failure to compensate the Plaintiff for loss and damage to its equipment occasioned by the fault of the Defendant.
- 50 f. Failure to give the Plaintiff possession of the contract sites to enable the contract works commence on the date contractually agreed.

Resolution

Counsel cited the case of **Ewadra Emmanuel versus Spenco Services Limited HCCS 22/2015 at page 2** where Justice Mubiru defined breach of contract to mean a situation
55 when a party to a contract neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. According to the parties' agreed facts in their joint scheduling memorandum, a contract existed between the parties. The question therefore, is on whether that contract was breached and if so, by whom. I will start with breach (a) and (c) as raised
60 by the Plaintiff. That is the Defendant's failure to pay to the Plaintiff certified sums under the first payment certificate within the contractually agreed time of 30 days from certification as agreed in Clause 43.1 of the contract and the Defendant's failure to pay to the Plaintiff in full the certified sums under the first payment certificate. Clause 43.1 of the suit contract (PEX1), provides that;

65 *"...The employer shall pay the contractor the amounts certified by the project manager within 30 days of the date of each certificate...."*

Page 1 of PEX1 shows that the Defendant is the employer while the Plaintiff is the contractor. In essence therefore, the Defendant was obligated to pay to the Plaintiff the amounts certified by the project manager within 30 days of the date of each
70 certificate. According to the evidence on record as PEX14, the Plaintiff issued to the Defendant a payment certificate of Uganda Shillings 147,180,978/ on the 18th October 2012. According to the above clause, the payment certificate marked PEX14 was supposed to be paid within 30 days from 18th October 2012. That would mean that the payment was supposed to have been made by 18th November 2012.

75 According to the Plaintiff's testimony in Paragraph 25 of the Plaintiff's Witness statement, out of the Uganda Shillings 147,180,978/ indicated in the payment certificate, the Defendant paid a sum of Ushs. 70,475,518/ on 6th December 2012. This was not objected to by the Defendant who opted not to file written submissions. This

80 payment was therefore not made within 30 days from issuance of the payment certificate and it was not paid fully as implied in the clause above.

Counsel cited the case of **Omega Construction Company Limited versus Kampala Capital City Authority HCCS No. 780/2015** which had a similar clause breached. In that case, Justice Madrama (as he then was) in interpreting a contract that contained a clause worded in exactly the same manner as Clause 43.1 of the suit contract held that;

85 *"As far as issue number one is concerned, because the employer who is the Defendant did not pay the sums certified by the contractual manager, and particularly because the payment was not made within 30 days as envisaged in the contract, then prima facie that would amount to a fundamental breach of the contract and issue number 1 of whether there was breach of the contract in issue ought to be answered in the affirmative if all evidence is consistent with the*
90 *conclusions based on interpretation of the contract and law."*

With the above case in mind, I find that the Defendant's failure to pay to the Plaintiff in full the certified sums under the first payment certificate within the contractually agreed time of 30 days from certification as agreed in Clause 43.1 of the contract, without any legitimate legal excuse amounted to a fundamental breach of the contract.

95 Another breach, (c), raised by the Plaintiff was the Defendant's failure to pay interest on the late payment of the certified sums as agreed in Clause 43.1 of the suit contract. In respect to interest, Clause 43.1 of the suit contract provided that:

"...the Contractor shall be paid interest on the late payment in the next payment...."

100 In Paragraph 26 of the Plaintiff's witness statement, the Plaintiff stated that the Defendant did not pay the commercial lending interest on the late payment of Ushs. 70,475,518/ as agreed in the contract. This was not disputed by the Defendant who opted not to file written submissions.

Premised on the foregoing, my conclusion is that by the Defendant's failure to pay the commercial lending interest on the late payment of Ushs. 70,475,518/ as agreed in the contract, the Defendant breached the contract.

Another breach raised by the Plaintiff was the Defendant's failure to pay the Plaintiff the retention money in the time and manner contractually agreed, contrary to clause 48.1 and 48.2 of the contract. The said clauses provide as follows;

"48.1 If so, stated in the SCC, the employer shall retain from each payment due to the contractor the proportion stated in the SCC until completion of the whole of the works.

48.2 On completion of the whole of the works, half the total amount retained shall be repaid to the contractor and half when the Defects Liability Period has passed and the project manager has certified that all defects notified by the project manager to the contractor before the end of this period have been corrected."

According to clause GCC 48.1 of the SCC it was stated that the proportion of payments to be retained was 10%. The employer was therefore to retain from each payment due to the contractor the proportion of 10% until completion of the whole works.

Clause 48.2 states that on completion of the whole of the works, half the total amount retained shall be repaid to the contractor, who is the Plaintiff, and the other half when the Defects Liability Period has passed and the project manager has certified that all defects notified by the project manager to the contractor before the end of this period have been corrected. Clause GCC 35.1 of the SCC provides that the defects liability period is 6 weeks.

The Plaintiff's contention is that the Defendant breached the suit contract by making payment of the final installment of the retention four (4) years after the defects period had lapsed on the 31/05/2018.

PEX34 shows that on 31/05/2018, the defects liability period had ended and the works were okay and attached a copy of the contract and Bills of Quantities. This meant that the other half of the retention money was now due at that point.

130 PEX31 shows that the retention money of Ushs. 17,430,443/was paid to the Plaintiff on 31st May 2018.

Clause 48.2 of the contract states that this payment was to be made before the end of the Defects Liability Period. In my view this clause is quite unclear on what it is supposed to mean because it does not expressly state that the retention money after
135 the defect liability period was to be paid within a given period. It is therefore my view that the Defendant did not breach this clause as alleged by the Plaintiff.

Another breach raised by the Plaintiff was the Defendant's failure to compensate the Plaintiff for loss and damage to its equipment occasioned by the fault of the Defendant.

140 The Plaintiff submitted that under Clause 11.1 (b) of the contract, if the Plaintiff's equipment was destroyed due to the fault of the Defendant, the Plaintiff would be entitled to compensation for such destroyed equipment from the Defendant.

Clause 11.1 (b) of the contract provides as follows;

145 *"The risk of damage to the works, plant, materials and equipment to the extent that it is due to a fault of the employer or in the employer's design, or due to war or radioactive contamination directly affecting the country where the works are to be executed."*

In Paragraphs 10 & 14 of the Plaintiff's witness statement, the Plaintiff stated that on reporting to the third contract site at Kirombe road, the Plaintiff's employees were denied possession and stopped from accessing the contract site, assaulted and their
150 hired equipment vandalized by the occupants of the land neighboring the contract land.

PEX5 is a Police Report showing the damage caused from the above.

PEX7 is a correspondence dated 3/09/2012 from the Plaintiff to the Defendant requesting for payments as a result of obstructions at sites. In that correspondence, a
155 proforma invoice marked PEX9 was attached showing a total of Ushs. 94,000,000/-. The Plaintiff also attached a receipt for repairs dated 1/09/2012 marked as PEX8.

In Paragraph 11 & 12 of the Plaintiff's witness statement the Plaintiff stated that the damage to the equipment of the Plaintiff was the fault of the Defendant who had failed to sensitize the persons occupying the land affected and neighboring the contract
160 works that the contract works would not involve any compulsory acquisition of the said persons' land.

I am in agreement with the Plaintiff's submission in respect to the fact that the Defendant had an obligation of sensitizing the neighboring community. The failure to do so, was a breach of their duty to the Plaintiff which caused loss and damage to the
165 Plaintiff as a result. Therefore, the Defendant's failure to compensate the Plaintiff for the loss and damage caused was a breach of Clause 44.1 (j) of the contract which states that effects on the contractor of any of the employer's risk is one of the compensatory events.

Another breach raised by the Plaintiff was the Defendant's failure to give the Plaintiff
170 possession of the contract sites to enable the contract works commence on the date contractually agreed.

That the Defendant breached the contract by failing, neglecting and omitting to hand over possession and access of the contract sites to the Plaintiff by the 19th day of July 2012. The Plaintiff's Counsel submitted that this was contrary to Clause 21.1 of the
175 General Conditions of the suit contract which provides that the Employer shall give possession of all parts of the site to the contractor.

Clause GCC 1.1 (ee) of the Special Conditions of the suit contract provides that the start date shall be seven (7) days from the signing of the contract document and an acceptable performance guarantee.

180 According to page 1 of the suit contract, the contract was signed on 12th July 2012. This means that the contract's start date was supposed to be 19th July 2012. In Paragraph 6 of the Plaintiff's Witness Statement, the Plaintiff stated that by 8th August 2012, the Defendant had failed to hand over the contract sites to the Plaintiff to enable it commence the contract works.

185 According to Clause 21.1 of the General Conditions of the suit contract, the Defendant was contractually obligated to hand over possession of the contract sites to wit; Kirombe, Bukasa and Nalubale to the Plaintiff within seven 7 days of signing/executing the suit contract, that is by or on the 19th day of July 2012 to enable the commencement of the suit contract and works thereunder. PEX3 is a letter dated
190 8th August 2012 in which the Plaintiff was reminding the Defendant that two weeks had elapsed since the signing of the contract. PEX4 is a hand over letter from the Defendant to the Plaintiff dated 13th/August/2012 in which the Defendant handed the sites officially to the Plaintiff. Clearly, by the time of the handover, the 7 days from the signing of the agreement had already lapsed.

195 In my view therefore, the delay to hand over the contract sites was a breach of Clause 21.1 of the General Conditions of the suit contract and Clause GCC 1.1 (ee) of the Special Conditions of the suit contract.

On that basis therefore, court finds that the Defendant breached the suit contract.

Issue 2

200 **Whether the Plaintiff is entitled to payment for additional works done.**

The Plaintiff's Counsel submitted that it was the undisputed evidence of the Plaintiff that on the 19/12/2012 and 22/01/2013 it was instructed to carry out additional emergency works not contained in the suit contract. That upon carrying out the said works his request for the payment for the said works was ignored by the Defendant.

205 He submitted that he is entitled to payment for the above-mentioned additional works it did on behalf of and under the instructions of the Defendant.

I have looked at PEX19 and PEX21 which are the additional emergency works that the Defendant assigned to the Plaintiff dated 19/12/2012 and 22/01/2013 respectively. Upon completion of the said works, in a letter dated 6th March 2013 (PEX23), the Plaintiff requested for payment in respect of that work. They also attached a proforma invoice marked as PEX24 showing that the Plaintiff was supposed to be paid a sum of Ushs. 33,150,000/ in respect of that work.

It is the Plaintiff's submission that the Defendant ignored the Plaintiff's letter and invoice. This evidence was not disputed by the Defendant. As such, I am in agreement with the decision in the case of **M/s Akkermans Industrial Engineering versus Attorney General CS No. 333/2004**, in which Justice Kiryabwire (as he then was) held that;

"...if services are supplied at the request of the recipient, or if they are freely accepted by him, he will be bound to pay a reasonable price for them. This is the principle of quantum meruit."

On that basis of the principle of quantum meruit therefore, I find that the Plaintiff is entitled to payment for additional works done.

ISSUE 3:

What are the available remedies?

The Plaintiff's Counsel prayed for payment of Uganda Shillings 77,305,461/ being the outstanding balance under the first payment certificate, compensation of Uganda Shillings 193,000,000/ for the damage caused and or resulting from the destruction of the Plaintiff's equipment due to the failure to sensitize the persons affected by the works, general damages, interest and costs.

Payment of Uganda Shillings 77,305,461/ being the outstanding balance under the first payment certificate.

PEX14 which is the first payment certificate contained a figure of Uganda Shillings 147,180, 978/ as the certified sum. As established in issue 1, out of the stated sum the

235 Defendant paid a sum of Ushs. 70,475,518/. In my calculation this left an outstanding balance of Ushs. 76,705,460/. As such it's my finding that the Plaintiff is entitled to the residual payment of Ushs. 76,705,460/ not Uganda Shillings 77,305,461/ as claimed being the outstanding balance under the first payment certificate.

Compensation of Uganda Shillings 193,000,000/ for the damage caused and or resulting from the destruction of the Plaintiff's equipment due to the failure to sensitize the persons affected by the works

240 As established under issue 1, the Plaintiff is entitled to receive compensation from the Defendant. The question therefore is on how much compensation they are entitled to. The Plaintiff submitted that they are entitled to compensation of Uganda Shillings 193,000,000/ for the damage caused and or resulting from the destruction of the Plaintiff's equipment due to the failure to sensitize the persons affected by the works.

245 The Plaintiff presented various exhibits to prove the loss for which they should be compensated. PEX5 shows that on 24th March 2014 the Plaintiff's Managing Director paid a sum of Ushs. 60,000/ to Kitintale police where the Plaintiff reported a case of malicious damage. He also presented PEX8 which was a receipt dated 1/09/2012 for repairs amounting to Ushs. 48,000,000/. He also presented PEX9 which is an Invoice
250 showing different repairs dated 3/09/2012 amounting to Ushs. 94,000,000/.

The Plaintiff's Counsel further submitted that in Paragraph 4 of the Plaintiff's witness statement the Plaintiff's managing director stated that;

'In order to perform the suit contract, the Plaintiff hired from Hardrock Technical Services Limited the machinery below for 10 days:

- 255 (a) A grader at Ushs. 1,000,000/ per day;
(b) A water bouser (lorry with water) at Ushs. 400,000/ per day;
(c) A roller at Ushs. 1,000,000/ per day;'

Counsel stated that the Plaintiff had made prior payments to Hardrock Technical Services Limited amounting to Uganda Shillings 36,000,000/ for equipment to use in

260 the performance of the contract starting on the 12th day of July 2012. PEX32 is the contract between Hardrock Technical Services Limited and the Plaintiff confirming the Plaintiff's testimony in Paragraph 4 of the Plaintiff's witness statement. Counsel stated that the equipment was not utilized because the contract sites had not been handed over to the Plaintiff by the Defendant which led to a loss of Uganda Shillings 265 36,000,000/ to the Plaintiff. That the Plaintiff was constrained to make a further payment of Uganda Shillings 36,000,000/ to hire the vehicles/equipment when the contract sites were eventually handed over by the Defendant. This evidence was not disputed by the Defendant.

In issue 1, it was established that the Defendant breached the suit contract when it 270 failed to hand over the contract sites in the time and manner contractually agreed to under PEX1. That being the case, the Defendant caused a loss of Uganda Shillings 36,000,000/ to the Plaintiff who had already paid Hardrock Technical Services Limited. Furthermore, when the sites were finally handed over, the Plaintiff had to hire the same equipment which means that another sum of Uganda Shillings 36,000,000/ was 275 paid for the Plaintiff to re-hire the machine and perform the work on the site.

Therefore, in line with Clause 44.1 (j) of the contract which states that effects on the contractor of any of the employer's risk is one of the compensation events, the Plaintiff is entitled to compensation for the above-mentioned Uganda Shillings 36,000,000/ which he would not have lost had there not been a breach of contract and the contract 280 sites handed over to it in time. An addition of the above sums brings the total of the compensation to Ushs. 178,060,000/ not Ushs. 193,000,000/as claimed by the Plaintiff. Court accordingly awards compensation of Ugshs. 178,060,000/to the Plaintiff.

The Plaintiff's Counsel submitted that the Plaintiff is also entitled to payment for the additional works that it carried out for the Defendant.

285 In that respect, the Plaintiff attached a pro forma invoice marked as PEX24 showing that the Plaintiff was supposed to be paid a sum of Ushs. 33,150,000/ in respect of that

work. Based on the findings in issue 1, I find that the Plaintiff is entitled to payment of Ushs. 33,150,000/for the additional works that it carried out for the Defendant.

General damages

290 The Plaintiff prayed for general damages for the loss and damage to its equipment occasioned by the fault of the Defendant and prayed for general damages of Uganda Shillings 193,000,000/ in respect to the vandalized equipment. In the case of **Kibimba Rice Ltd Vs. Umar Salim SCCA No.17/1992**, court held that general damages are meant to put the victim back into the position they would have been had they not
295 suffered the loss by the other party. Having been awarded special damages for repair of the damaged equipment, an award of general damages as sought would be in offence of the long established principle of the law on damages.

I find it reasonable to award general damages of Ushs. 20,000,000/.

Interest

300 The Plaintiff's Counsel submitted that given that the above payment delayed, the Plaintiff is also entitled to interest at an annual commercial rate of 29% on the said Uganda Shillings 77,305,461/ from the date it was due in 2013 to date it is paid in full, interest at the annual commercial interest rate of 29% from 30th June 2013 to 30th May
305 years after the Plaintiff qualified for the same from the Defendant.

On the basis of the fact that the Defendant has kept the Plaintiff out of his money and the Defendant has had the use of it himself, the Defendant is hereby ordered to pay an interest of 18% per annum on the outstanding amount of Ushs. 76,705,460/ from the date it was first due till payment in full. The Plaintiff is also ordered to pay an
310 interest of 18% per annum on the retention payment of Uganda Shillings 17,430,443/ that was made four years after the Plaintiff qualified for it, to be paid from 31st May 2018 when the defects liability period ended till the payment. Interest on the general damages from the date of judgment till payment in full.

Costs

315 The Plaintiff prayed that costs of the instant suit be granted to the Plaintiff.

According to **S.27 of the CPA Cap.71**, the costs of the suit shall be in the discretion of the court and that costs of any action shall follow the event unless the court or judge shall for good reason otherwise orders.

The Plaintiff being the successful party in this case, I find no good reason to deny them
320 costs.

Costs are accordingly granted to the Plaintiff.

Delivered at Kampala and signed copies for the parties placed on file this
.....^{14th} day of July, 2021.

325 RICHARD WEJULI WABWIRE
JUDGE