THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0674 OF 2019

MEDICAL EQUIPMENT CONSULTANTS LTD ……. PLAINTIFF

VERSUS

ECOS MEDICAL FOUNDATION LIMITED ……. DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. The plaintiff's claim;

The plaintiff filed a suit under summary procedure seeking the recovery of a sum of US $ 66,290 and interest thereon at the rate of 25% per annum from August, 2013 until payment in full. The plaintiff's claim is that by an agreement dated 1st October, 2010 the defendant contracted it to supply a Phillips HD9 Ultrasound Machine, together with an assortment of accessories thereto. The machine was duly delivered to the defendant on 11th April, 2011 whereupon the defendant agreed to pay the purchase price of US $ 68,000 in monthly instalments of US $ 2,429 over a period of twenty eight (28) months, hence by 11th August, 2013. In the event of default, the defendant undertook to pay interest on the outstanding amount at the rate of 25% per annum. The defendant paid only US $ 1,709.4 and defaulted on the balance being US $ 66,290 hence the suit.

b. The defence to the claim;

Upon being granted leave to appear and defend the suit, the defendant in its written statement of defence stated that the agreement was signed on 23rd December, 2010 and not on 11th April, 2011 as claimed by the plaintiff. Performance of the defendant's obligation under that agreement was suspended when the parties subsequently entered into another agreement by which the plaintiff undertook to supply the defendant with a Duo-diagnostic x-ray machine, whose purchase required the defendant to secure a loan from M/s GroFin' (U) Limited. On 14th April, 2011 the parties executed an addendum to the original agreement wherein it was agreed that until the defendant ah paid the loan to M/s GroFin' (U) Limited in full, the plaintiff was not to seek recovery pf the

balance outstanding under the original agreement. Under a consent judgment between the defendant and M/s GroFin' (U) Limited, the defendant will clear the debt to the latter in November, 2022. Consequently the plaintiff's claim is not due yet and the suit is accordingly premature.

c. The issues to be decided;

In their joint scheduling memorandum, the parties agreed upon the following issues to be decided by court, namely;

1. Whether the plaintiff's suit is competent before court with a viable cause of action.
2. Whether the plaintiff is entitled to the claim of US $ 66,290 to the plaintiff.
3. What remedies are available to the parties?

During the hearing of the plaintiff's case, it became apparent that the facts are not in dispute. The only dispute was as to whether the addendum had the effect of extending the time for payment. According to section 61 of *The Civil Procedure Act* persons may agree in writing to state a case for the opinion of the court, which then has to try and determine the case in the manner prescribed. By Order 35 of *The Civil Procedure Rules* the parties may state the question(s) in the form of a case for the opinion of the court, by concisely stating such facts and specify such documents as may be necessary to enable the court to decide the question raised thereby. It was decided then that the parties address court on the question only, of whether or not the addendum had the effect of extending the time for payment.

d. The submissions of counsel for the plaintiff;

M/s Kakuru and Co. Advocates, counsel for the plaintiff, submitted that clause 4 of the addendum did not suspend clause 2 of the original contract. The plaintiff did not derive any benefit from the contract between the defendant and M/s GroFin' (U) Limited. The addendum expressly stated that the plaintiff, as guarantor of the defendant's performance of the contract between the defendant and M/s GroFin' (U) Limited, still enjoyed all its rights under the original contract. It is not the plaintiff's fault that the defendant undertook to service two loans at the same time. The plaintiff is not a party to the agreement between the defendant and M/s GroFin' (U) Limited which agreement

does not reference the one between the plaintiff and the defendant. The plaintiff is not a party to the consent judgment between the defendant and M/s GroFin' (U) Limited. The plaintiff is accordingly entitled to recover the outstanding amount as calmed in the plaint.

e. The submissions of counsel for the defendant;

M/s Tebusweke Mayinja, Okello and Co. Advocates, counsel for the defendant, submitted that in order to obtain financing from M/s GroFin' (U) Limited, the defendant sought and obtained a receipt from the plaintiff indicating, only for purposes of securing that loan, that the defendant had cleared the balance outstanding on the earlier purchase it had made from the plaintiff. It is for that reason that an addendum was made to the contract under which the debt owed to the defendant was subjected to clearance of that owed to M/s GroFin' (U) Limited, first. The plaintiff allowed the period of payment to M/s GroFin' (U) Limited as grace period or the recovery of its own debt. Knowing that the defendant was incapable of financing the two loans at the same time, the clause in the addendum was designed to defer recovery of the amount outstanding due to the plaintiff. Therefore as long as the defendant is still indebted to M/s GroFin' (U) Limited, the plaintiff cannot seek to recover its debt. For that reason the suit is premature and ought to be dismissed with costs.

f. The decision;

The dispute between the parties calls for the interpretation of clause 4 f the addendum viz-a-viz clause 2 of the original contract. Clearly, the rights and obligations of the parties to a contract must be established by considering the agreement as a whole rather than each clause in isolation. The object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them. In doing so, it has been said though that it is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written document (see section 92 of *The Evidence Act*; *Jacobs v. Batavia and General Plantations Trust [1924] 1 Ch 287*; *National Bank of Australasia v. Falkingham & Sons [1902] AC 585 at 591* and *Henderson v. Arthur [1907] 1 KB 10*). Words will be given their natural and ordinary meaning, and business common sense will be applied, when appropriate, to avoid an uncommercial result.

To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind. The intention of both parties is objectively ascertained (see *Zoan v. Rouamba [2000] 2 All ER 620*). The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.

The contextual scene is that the plaintiff supplied a Phillips HD9 Ultrasound Machine, together with an assortment of accessories thereto, at the price of US $ 68,000 to be delivered within sixty (60) days of signing the contract. The agreement was executed on 1st October, 2010. Clause 2 of that contract reads as follows;

> The price of the equipment is USD 68,000 which shall be paid by the buyer, by paying a monthly instalment of USD 2,249 with effect from the date of delivery of the machine to the purchaser until the full payment of the purchase price which shall be within 28 months. If the buyer defaults in payment of a single instalment or any part thereof, all the remaining instalments shall become due and payable immediately and shall be paid with interest at 25% per annum from the date of default until payment in full.

The equipment was delivered on 11th April, 2011 and the defendant made an initial payment of US $ 1,709.4 but it was soon found necessary to procure a generator and Duo-diagnostic X-ray machines, alongside the equipment. The defendant was unable to raise the necessary funds. It was then agreed by the parties that the defendant was to obtain credit from M/s GroFin' (U) Limited. As a condition for the extension of that loan, M/s GroFin' (U) Limited required the plaintiff to guarantee the defendant's purchase. To that end, by a letter stamped 15th January, 2011 the plaintiff wrote to M/s GroFin' (U) Limited, as follows;

> RE: <u>CO-FINANCING OF ECOS MEDICAL FOUNDATION LOAN</u>
>
> This letter serves to confirm the issues discussed with you regarding the above subject. We agreed on the following;
>
> - Medical Equipment Consultants Ltd (MECL) will co-finance the purchase of the equipment (Generator and Duo-Diagnostic X-ray machines) as per the

submitted invoices to the amount of UGX 250,000,000 (two hundred and fifty million).

- MECL will supply the equipment, install, provide technical assistance and warranty for two years.
- MECL's loan will be subordinate to the GroFin loan.
- Freight insurance is covered by MECL.

Pursuant to that understanding, the parties on 14th April, 2011 executed an addendum to their original contract. Clause 4 of that addendum reads as follows;

> The receipt issued by MEDICAL EQUIPMENT CONSULTANTS LTD is just a guarantee for ECOS MEDICAL FOUNDATION LTD to access a loan from GroFin but the guarantor (Medical Equipment Consultant Ltd) enjoys all rights under clause 2 of the main agreement, subject to the new loan from GroFin.

It is trite that an addendum to a contract cannot be legally enforced unless both parties fully understand the new terms and agree to them in writing. All parties who signed the original contract must also sign the addendum. In order to be enforceable, an addendum must be supported by a new promise or consideration in order to constitute a valid contract. The law of contract exists to enforce mutual bargains, not gratuitous promises. If one party wants to make modifications to the original contract, they must also furnish adequate consideration. There must be new consideration independent of the original consideration to modify a contract.

Consideration, which must be given in order to make a contract legally binding, is legally sufficient and bargained-for value, given by the promisor in return for the promisee performing or refraining from performing some act which results in a detriment to the promisee and/or a benefit to the promisor. Consideration exists if two conditions are met; (i) if the promisee, in exchange for a promise by the promisor, promises to do something the promisee has no legal obligation to do; (ii) if the promisee, in exchange for a promise by the promisor, does something the promisee has no legal obligation to do; and (iii) if the promisee refrains, or promises to refrain, from doing something the promisee has a legal right to do. The consideration given by the promisor must induce the promisee to incur a legal detriment and/or provide a legal benefit to the promisor, either

or both of which are sufficient to induce the promisor to make the promise. In the instant case, the defendant does not seem to have given any new consideration for that addendum.

However, when a promisor makes a clear and definite promise on which the promisee justifiably relies, the promisor is bound by the promise, even if it was insufficient to form the basis of a valid, legally binding contract. This is equitable relief. For the doctrine of promissory estoppel to be applied, the following elements must be established: (i) the promise was clear and definite; (ii) the promisee justifiably relied on the promise; (iii) the promisee's reliance was substantial and of a definite character; and (iv) enforcing the promise will serve the best interests of justice. In the instant case, it is parent that the defendant relied on the plaintiff's promise to subject its rights under clause 2 of the main agreement to the loan advanced by M/s GroFin' (U) Limited, the promise was clear and definite, the defendant justifiably relied upon it as the basis for its accessing a loan from M/s GroFin' (U) Limited, which is a definite and substantial reliance, such that enforcement of the addendum in the circumstances serves the best interests of justice.

Whereas the defendant argues that by that clause, payment under the original terms of the contract was suspended until the loan advanced by M/s GroFin' (U) Limited is cleared, the plaintiff disagrees and contends that its right to be paid in accordance with the terms as originally agreed was not affected by the addendum. The key phrase in resolving the dispute is; "but the guarantor (Medical Equipment Consultant Ltd) <u>enjoys all rights under clause 2</u> of the main agreement, <u>subject to the new loan from GroFin</u>" (emphasis added).

The phrase "subject to" when used in a contract, indicates that the current clause should be cross referenced with another clause elsewhere in the same contract, another contract or contractual document. The phrase "subject to" means conditional or being dependent upon something, and thus establishes the hierarchical priority between the two clauses to the extent that there is an overlap between the two. Its effect is that the rule in the clause cross-referenced is set out an exception to the main rule established in the current clause. The clause referenced takes priority over the current clause by introducing an exception to the rule contained in the current clause.

Where obligations contradict or overlap each other, the phrase "subject to" introduces a priority of clauses. Similarly if one event is subject to another event then by that phrase the holding of the first event depends on whether and how the second event happens; or depends on the stated thing happening.

Therefore, the plaintiff's enjoyment of all rights under clause 2 of the main agreement, was subjected to the new loan from GroFin. It follows that payment of the debt owed to M/s GroFin (U) Limited takes precedence over all the plaintiff's rights under the original contract, including that of recovery of the outstanding debt. The plaintiff cannot seek to recover payments outstanding under the terms of the original contract, until fill payment of the debt owed to M/s GroFin (U) Limited has been achieved. The issue is accordingly answered in the affirmative; the addendum had the effect of extending the time for payment of the amount due to the plaintiff from the defendant under the contract. It is then that the period of twenty eight (28) months agreed upon begins to run.

2nd issue; what remedies are available to the parties?

Having found that the plaintiff cannot seek to recover payments outstanding under the terms of the original contract, until fill payment of the debt owed to M/s GroFin (U) Limited has been achieved, the suit is premature and it is accordingly struck out with costs to the defendant.

Delivered electronically this 31st day of May, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
31st May, 2022.