THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
CIVIL SUIT NO. 728 OF 2019

REENBOOG CONSTRUCTION SERVICES LIMITED..... PLAINTIFF

VERSUS

AEVAR ENGINEERING SERVICES LIMITED ..... DEFENDANT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

JUDGMENT

Introduction

The Plaintiff's claim is for;

a) Recovery of UGX 167,967,000 (One Hundred Sixty-Seven Million Nine Hundred Sixty-Seven Thousand Shillings) being the balance due and owing on a construction sub contract.
b) Interest at a commercial rate of 20% per month from when the amount fell due till payment in full
c) A declaration that the defendant is indebted to the Plaintiff
d) A declaration that the defendant is in breach of contract
e) General damages
f) Costs of the suit

The Defendant counterclaimed for breach of Contract as well, general damages, special damages and costs of the suit.

Background

The Plaintiff is a limited liability construction company which avers that on the 12th March 2019 it entered into a formal subcontract construction agreement with the Defendant. The contract was to construct a 6 classroom Block in Yumbe at the projected sum of UGX 485,000,000/= (Four Hundred Eighty-Five Million Shillings). This contract originated from a main contract between UNICEF (known as the "Employer") and the Defendant where the Defendant was contracted to build the six classroom blocks at UGX. 584,782,380/=. The sub-contract projected sum was to be paid according to the following schedule;

1) Phase 1- UGX 175,434,714 upon the subcontractor submitting Interim Payment Certificate (IPC) for completion of laying the slab.
2) Phase 2- UGX 176,434,714 upon the subcontractor submitting the IPC for completion of roofing
3) Phase 3 – UGX 124,430,572 upon the subcontractor submitting the IPC for completion of finishes
4) Phase 4- UGX 9,700,000 retention money to be paid at the end of the defect liability period.

Under the terms of the agreement, it was agreed that;

i) The Contractor is obligated to pay the subcontractor within three (3) calendar days of the main contractor receiving payment for the respective phases from the employer. This is based on the expectation that the employer will pay the main contractor within 14 calendar days of the subcontractor submitting the IPC to the main contractor.
ii) In the event that the main contractor does not receive payment from the employer within 14 calendar days of the submission of the IPC by the subcontractor within a period not exceeding 30 calendar days from the submission of the IPB by the subcontractors.
iii) The said sums of money and any such other due to the subcontractor, shall be paid by the main contractor to the subcontractor on a Housing Finance Bank account; Account number 1100122009 in the name of Reenborg Construction Services Limited.

The Plaintiff claims that as a form of follow-up of payment, it was agreed that the plaintiff's managing director a one Mariam Namiya be made signatory to the defendant's bank account in to which the employer (UNICEF) would be remitting payments to the defendant. A board resolution to that effect was duly registered and copied to the Defendant's bank.

The Plaintiff contends that the contract period was extended from the 15th May 2019 to 6th June 2019. However, the main agreement between the Defendant and the employer (UNICEF) was terminated on 13th July 2019 and by this time the Plaintiff had completed 96% of the projected works in relation to the first phase which was the equivalent of the UGX 167,967,000/=, which it claims. It is alleged by the Plaintiff that despite constant reminders, the defendant has refused to pay the UGX 167,967,000/=.

The Plaintiff contends that the Defendant, in further breach of the agreement went on to effect a change of signatories on its DFCU account by dropping the Plaintiff's managing director as a signatory.

The Plaintiff further contends that the Defendant is aware and admits indebtedness to the Plaintiff but is unjustifiably attempting to reduce the amount to UGX123,750,250/=

The Defendant denies the claims and includes a Counterclaim against the Plaintiff. The Defendant's case is that the plaintiff has no cause of action against it. The Defendant denies any admission to being indebted to the Plaintiff to the amount of UGX 123,750,250/=.

The Defendant avers that time was of the essence in execution of the subcontract and that works were supposed to be completed by 15th May 2019 but the Plaintiff failed to hand over the sites with completed works. The time/deadline was further extended to 6th June 2019 but still the Plaintiff failed to have completed works by this date.

The Defendant avers that the Plaintiff breached the subcontract due to its delay in constructing the classrooms therefore leading to the termination of the contract.

The Defendant's counterclaim against the Plaintiff is for a declaration and orders that the Plaintiff/Respondent;

i) Breached the subcontract
ii) Induced breach of the contract between the Counterclaimant and the employer
iii) An award of general damages
iv) An award of special damages
v) Interest on the damages above
vi) Costs of the suit

The Counter Claimant maintains that because of the Plaintiff/Respondent's delay to complete the works, the contract was terminated by the employer which led to the automatic termination of the subcontract thus occasioning loss to the counterclaimant.

Furthermore, the counterclaimant avers that it hired its motor vehicle truck UAV 020J HINO Forward model for 35 days to the Plaintiff for use at the site. Further, when it was discovered that the Plaintiff had not paid the workers at the site more money was advanced to a one Mutumba Julius to assist in the completion of the work.

The Counterclaimant pleads special damages as follows;

a) Retention on paid works UGX 8,398,350/=

b) The truck hire UGX 5,250,000/=
c) Cost of removing the container from the site UGX 5,000,000/=
d) Cash paid to Mutumba Julius UGX 1,400,000/=
e) Commission on the subcontract UGX 33,593,400/=

In its Reply to the counter claim, the Plaintiff/counter-defendant avers that it has a cause of action premised on breach of contract. Furthermore that, the payments were to be made at every level completed as indicated in the subcontract and that an obligation had risen for the Defendant to make payments basing on the quantum of work done.

Representation

At the hearing, the Plaintiff / Counter-defendant was represented by Abbas Bukenya while Jason Kiggundu appeared for the Defendant.

Issues for Determination

The parties agreed upon the following issues in their Joint Scheduling Memorandum filed on 7th December 2021:

1. Whether the Plaintiff has any claim against the Defendant
2. Whether the counter Defendant is in breach of the sub contract.
3. Whether the Counter Defendant is entitled to remedies sought.

I shall modify the above issues for a more comprehensive resolution of the dispute as follows:

1. Whether the Defendant breached the sub contract.
2. Whether the Plaintiff breached the sub contract.
3. Whether either party is liable for unjust enrichment.
4. What remedies are available to the parties?

Resolution

Issue One: Whether the Defendant breached the sub contract.

It is agreed by both parties that they entered into a sub contract on 12th March, 2019 for construction of six classroom blocks in Yumbe by the Plaintiff for UGX. 485,000,000/=. In paragraph 4(g) of the plaint, non-payment of UGX. 167,967,000/= as money owing out of construction of Phase 1 of the building project is the first allegation of breach of contract.

The Plaintiff's Managing Director, PW1 testified under paragraph 6 of her witness statement that at the time of termination of the contract, the Plaintiff had

completed 96% of the Phase 1 works, and as such the Defendant owed the Plaintiff UGX. 167,967,000/= for work done. She made it clear in paragraph 11 of her witness statement that the Defendant has not made any payment to the Plaintiff in this regard.

In response to the Plaintiff's claim, the Defendant under paragraph 4 of the WSD stated that the Plaintiff has no cause of action against it, and claimed in paragraph 5 that it is instead the Plaintiff who breached the sub contract when it delayed to complete construction of the classroom blocks. I shall deal with the contents of paragraph 5 of the WSD under issue 2. For now, I will look at the defense in paragraph 4, and 11 of the WSD-that any loss occasioned to the Plaintiff was self-inflicted.

DW1 testified in paragraph 10 of his witness statement that at the time of termination of the contract, the Plaintiff had completed 26% of Phase 1 of the construction project. He stated in cross-examination that UNICEF conducted an assessment of work done at time of termination and it was at 25%. When tasked to point this court to a document detailing the assessment, he stated that he had no document in court showing the formal assessment by UNICEF but that Exhibit D3 showed this at page 5 of the Defendant Trial Bundle.

The first question in relation to the alleged breach by the Defendant is whether the Plaintiff in fact completed 96% of the Phase 1 project works, and is therefore entitled to the UGX. 167,967,000/= claimed.

PW1 testified during examination in chief that her company had completed 96% of Phase 1 project works. What this court can infer from reading Clause 3 of the sub contract is that Phase 1 works required completion of laying the ground slab. The Plaintiff adduced photographic evidence as proof that it had completed 96% of the Phase 1 project work at time of termination, and PW1 made reference to these photographs in cross examination. These photographs are at page 38 of the Plaintiff's trial bundle marked as part of P4. These pictures show completion of slab work for two blocks, and partial completion of the other blocks' slab work.

The Defendant's witness on the other hand relied on an assessment by UNICEF referenced in an email marked part of D3 for the assertion that the Plaintiff had only completed 25% of Phase 1 project works at the time of termination. That email dated 24th June, 2019 from one Jon Blasco at UNICEF to the DW1 states in part that: "*We have noted that for the Yumbe lot there has been very limited progress, not reaching even 25% according to our assessment, which is very far from the project timeline agreed upon at the last amendment.*"

This email does not confirm that the Plaintiff had only completed 25% of Phase 1 works as claimed by the Defendant. It only states that on ground was "not even

reaching 25%" of the project works in total. This is not clear, and there is no accounting for whether that is in relation to Phase 1 projects which phase both sides agreed was the only one covered. What is clear though is that the Plaintiff did carry out some works. P4 and the email of 24th June, 2019 that is part of D3 confirm this. The question of work done at time of termination is further confirmed by PW1's testimony in cross examination that UNICEF first terminated the contract and then assessed the work done. The Defendant did not counter this evidence. The court therefore finds that the "not even 25%" assessment referenced in D3 is not an accurate assessment. This is especially so in light of the fact that DW1 did not produce an official assessment of work done at time of termination by the UNICEF.

Therefore, I am compelled by the Plaintiff's evidence that there was 96% completion of Phase 1 construction works by the Plaintiff.

Next is for me to determine the value attached to this amount of work so as to decide money owed to the Plaintiff.

Clauses 1,2,3 of the subcontract marked P1 provide for payment of work done by the Plaintiff. They provided:

> "1. The Contractor is obligated to pay the Subcontractor within 3 calendar days of the main Contractor receiving payment for the respective phases from the Employer. This is based on the expectation that the Employer will pay the main contractor within 14 calendar days of the subcontractor submitting the Interim Payment Certificate (IPC) to the Main Contractor.
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> 2. In the event that the main contractor does not receive payment from the Employer within 14 calendar days of submission of IPC by the subcontractor, the main contractor shall pay the subcontractor within a period not exceeding 30 calendar days from the submission of the IPC by the Subcontractor.
>
> 3. The payment will be in 4 [four] phases, as follows:
>
> - Phase 1: UGX 175,434,714 upon the subcontractor submitting IPC for completion of laying of ground slab.
> - Phase 2: UGX 175,434,714 upon the subcontractor submitting IPC for completion of Roofing.
> - Phase 3: UGX 124,430,572 upon the subcontractor submitting IPC for completion of Finishes.
> - Phase 4: UGX 9,700,000 retention money to be paid at the end of the defects liability period."

In the above clauses, the Employer is UNICEF, the main contractor is the Defendant, and the subcontractor is the Plaintiff. The above clauses give the narrative that the Defendant was to receive payment for each phase of work done from UNICEF. What was expected then was for the Defendant to remit the monies owed to the Plaintiff within three calendar days from date of receiving money from UNICEF. That is deduced from clause 1 above. Clause 1 however does not state the sums owed for each phase referred to. Therefore, it can only be reasonably inferred that clause 1 refers to the four phases spelt out in clause 3 of the contract. By that reasoning, the Plaintiff was owed 96% of UGX. 175,434,714/=.

This though is subject to the Plaintiff submitting the IPC for completion of the laying of the ground slab. Neither party gave evidence on whether this IPC for ground slab work was ever submitted. It is clear from the undisputed photographic evidence in P4 and PW1's testimony in cross-examination that there was completion of slab work for two blocks, and partial completion of the other four blocks. The Plaintiff has proved on a balance of probabilities and in the failure by the Defendant to prove that that the Plaintiff did not actually complete the same, that it concluded 96% of the ground slab work, as already pointed out. Therefore, this court must be compelled to cause payment to the Plaintiff for work done in line with the subcontract.

On that premise, I find that the Plaintiff is owed payment worth 96% of UGX. 175,434,714/= which comes down to UGX. 168,417,325/=.

Breach of contract occurs when one party neglects, refuses or refrains from carrying out its duties under a contract. See **Ewadra Emmanuel –v- Spencon Services Limited, Civil Suit No. 022 of 2015.** The Defendant was, under the contract, obligated to pay the Plaintiff UGX. 168,417,325/= for work done which according to the record it did not. The Defendant's defense that the payment dates and schedules were not applicable in the context of the case due to the Plaintiff's breach (see paragraph 6 of the WSD) is untenable. After all, for as long as there was an agreement for one party to pay for services rendered by another, payment should be made to the extent of services rendered.

In conclusion, I find that the Defendant breached the subcontract when it did not pay for 96% of Phase 1 works done by the Plaintiff.

The Plaintiff also claims in paragraph 5(a) of the plaint that the Defendant breached the sub contract when it removed Mariam Namiya as a signatory to their account. The Defendant contends in paragraph 12 of the WSD that the removal of Mariam Namiya as a signatory was in good faith since the contract had been terminated.

The relevant clause here is Clauses 5 of the sub contract which stated:

> "5. Ms. Mariam Namiya shall become a co-signatory to the company account in the names of AEVAR ENGINEERING SERVICES LIMITED with account number 01103551408120 in DFCU BANK within 5 days of contract signing for a period until all payment to the subcontractor for all works is fully effected. No resolution shall be made within this period to remove Ms. Mariam Namiya as a co-signatory to this account as such will be null and void." (Underlined for emphasis.)

By this clause, the Defendant was obligated to appoint Ms. Namiya as a co-signatory to its account from start of the contract until the subcontractor, that is the Plaintiff, had been fully paid for the works. The Plaintiff also claimed the in paragraph 7 of its Reply to the WSD and counterclaim. As already stated above, the Plaintiff was not paid by the Defendant. As such, the sub contract anticipated Ms. Namiya would stay on as a co-signatory until payment of the Plaintiff in full. By removing Ms. Namiya as a co-signatory before the Plaintiff was fully paid, the Defendant breached the contract.

Issue 1 is answered in the positive.

Issue Two: Whether the Plaintiff breached the sub contract.

This issue is generated from the Defendant's counterclaim under paragraph 2 of the counterclaim. The particulars of breach are spelt out in paragraph 3 of the counterclaim as follows:

a. Failure to complete works on the due date 15th May, 2019
b. Failure to complete works by 6th June 2019 the new extended date.
c. Failure to pay workers who abandoned the site.
d. Inducing breach of the main contract by failure to perform on due date.

I shall deal with claims (a) & (b) together first. The facts as represented in P1 and P3 are that the parties agreed under clause 8 of the subcontract that works must be completed by 15th May 2019 as per the work schedule. This timeline was not met and the Defendant agreed on 15th May, 2019 per document marked P3 to extend the completion date and validity of the contract to 6th June, 2019. Therefore, with regard to claim (a) I find that there was no breach of contract because the extension was agreed upon by the Defendant.

In relation to claim (b) I find that the Plaintiff breached clause 8 of the subcontract read together with P3 by failing to complete works by 6th June, 2019. From the subcontract read together with P3, completion of works meant delivery of completed six classroom blocks to the Defendant by 6th June, 2019, which

was not done. By 24th June, 2019 when the contract was terminated, the Plaintiff had only built two complete ground slabs, and four partially completed ground slabs. This is according to PW1's testimony in cross examination and P4. PW1 admitted in cross examination that by time of termination, the Plaintiff company had only concluded 96% of the Phase 1 work.

Therefore, the Plaintiff breached the sub contract when it failed to complete works by 6th June, 2019 as agreed by the parties.

I shall now determine the Defendant/Counterclaimant's claim in (c) above that the Plaintiff breached the sub contract when it failed to pay the workers who abandoned the site. Per DW1's admission in cross-examination, the site workers were employees of the Plaintiff, and therefore were to be paid by the Plaintiff. The Defendant per paragraph 6 of DW1's witness statement discovered that the Plaintiff had not paid workers on site and money was given to one Mutumba Julius, the foreman, to assist in completion of the works. It appears to me, that the Defendant undertook payment of the Plaintiff's workers on its own volition. It appears that from reading paragraph 6 of DW1's witness statement that this was the Defendant's efforts at getting as much work done on the project so as to avoid termination of the main contract.

The Plaintiff's Managing Director, PW1 admitted to having not paid the workers in cross-examination but explained that this is one of the reasons the Plaintiff is demanding for money owed to it; that is to in part pay its workers. I find this explanation sufficient. The Defendant does not state when it paid the site workers. If it had been done before 6th June, 2019 then this court could have been compelled to believe that the Defendant in paying the site workers carried out a duty which was part of the Plaintiff's duty to carry out construction with utmost good faith.

I have read the sub contract and there is no clause relating to payment of site workers. Breach of contract only relates to breach of contractually agreed terms. The Plaintiff and Defendant agreed that the sub contract constituted the entirety of their agreement. Therefore, this court is only obligated to give life to the terms spelt out in the sub contract. In that vein therefore, I find that the Plaintiff did not breach the sub contract when it failed to pay the site workers.

Lastly, the Counterclaimant/Defendant claims that the Plaintiff breached the sub contract when it induced breach of the main contract by failure to perform on due date. I disagree with this claim. The sub contract, which is the subject contract of this suit, makes no mention of the main contract between the Defendant and UNICEF. It only recognizes UNICEF as the employer in the contract, who was to pay money to the Defendant for each phase of the project, out of which money the Defendant would then pay the Plaintiff accordingly. See

clause 1 above. DW1 was asked during cross-examination whether there was a tripartite agreement between the Plaintiff, Defendant and UNICEF, to which he answered no. That being the case, this court can only find that there is no basis for breach of contract in this regard as claimed by the Defendant/counterclaimant.

In conclusion, issue two is answered in partly in the positive partly in the negative.

Issue Three: Whether either party is liable for unjust enrichment.

Unjust enrichment is defined by Black's Law Dictionary, 9th Edition as the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected. To borrow from the High Court of Kenya in **Madhupaper International Ltd & Another –v- Kenya Commercial Bank Ltd & Others [2003] 2 EA 562,** the following principles are based upon to determine existence of unjust enrichment:

> "From the now abundantly available literature on the subject of restitution on account of unjust enrichment in North America and the common law Diaspora, established judicial recognition and exposition and a vibrant academic scholarship shown in esteemed monographs and a stream of learned articles in world class journals and reviews whose citation is encouraged by the courts as helpful guides, one sees that the law on unjust enrichment or unjust benefit is aimed at preventing a person from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. From these sources, it is possible to highlight, albeit in summary fashion (for in this space of a judgment) some of the common unjust factors which the law recognizes as calling for restitution. You may call them grounds which form the basis of a restitutionary claim. At the moment I sample the following:
>
> "1. Non-voluntary conferment of a benefit, such as through mistake or on account of compulsion, necessity, or in ignorance, or due to an unequal condition between the payer and payee.
>
> 2. Voluntary conferment of benefit for total failure of consideration.
>
> 3. Benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust.
>
> 4. Ultra vires demand.
>
> 5. Abuse of a power entrusted to the defendant by Parliament or by a contractual instrument such as a debenture or other agreement.

6. Illegitimate use of self-help sanctions.

7. Vindication of equitable title to property".

In short, on the part of the plaintiff there must be found, in truth, factors which negative the voluntary character of the transfer of benefit to the defendant. The plaintiff must be found to have had a qualified or vitiated intent that the defendant should be enriched. On the side of the defendant, there must have been free acceptance of the transfer, in the sense that the defendant had a choice whether to accept or reject and had sufficient knowledge of the facts to make that choice a real one. The defendant must know that a benefit is being offered to him non-gratuitously and, having the opportunity to reject, elect to accept." (Underlined for emphasis.)

Both parties in this case make claims for unjust enrichment against the other. The Plaintiff claims in paragraph 7(c) of the plaint that the refusal or failure by the Defendant to pay the Plaintiff amounted to unjust enrichment by the Defendant as against the Plaintiff.

Indeed, I find that the Defendant received the Plaintiff's construction services, well knowing that they were not offered as a gift, and elected not to pay for the services. This court cannot allow for the Defendant to enjoy the product of the construction services by the Plaintiff, and at the same time retain money owed to the Plaintiff for that service.

The Defendant as part of its defense in paragraph 2 of the WSD contended that the Plaintiff's claim amounted to unjust enrichment and extortion which illegality this court cannot aid. The Defendant did not expound on the basis of these claims in the WSD, and neither did counsel for the Defendant in submissions. The court is unclear on the basis of this claim, and finds that the same is unnecessary.

In conclusion of issue three, this court finds that the said issue is not properly supported by either party and is therefore not going to be granted to either party.

Issue Four: What remedies are available to the parties?

The Plaintiff prayed for the following remedies:

(a) Recovery of UGX. 167,967,000/= being the balance due and owing on a construction sub-contract.
(b) Interest thereat commercial rate of 20% from date when the monies fell due for payment.
(c) A declaration that the Defendant is indebted to the Plaintiff.
(d) A declaration that the Defendant is in breach of contract.

(e) General damages.
(f) Costs of this suit.

Prayer (a) has been answered in resolution of issue 1 above. The Plaintiff seeks 20% interest on sums recovered which it claims to be the commercial rate. The commercial rate refers to the interest rate by the central bank. Currently, Bank of Uganda's interest rate is at 6.5%. Therefore, the Plaintiff's claim cannot be sustained.

Additionally, however, an award of interest on sums recovered is within the court's discretion. See **Harbutt's Plasticine Ltd –v- Wayne Tank and Pump Co Ltd [1970] 1 All ER 225.** That said, this court is of the opinion that a prayer for 20% and above interest rate should be justified by the party praying for it. See **Juma –v- Habibu [1975] 1 EA 108** (High Court of Tanzania).

The Plaintiff only states in paragraph 8 of PW1's witness statement that it has been denied access to the beneficial use of its money and therefore seeks interest at 21% per annum. I should point out that this is different from the interest claimed in the plaint. The law is clear that parties are bound by their pleadings and so this court shall give consideration to the 20% interest rate claimed. See **Interfreight Forwarders (U) Ltd –v- East Africa Development Bank** above.

The Plaintiff's witness claimed in paragraph 10 of her witness statement that the Defendant has long been aware that the money it used to finance the construction project was a loan with interest which caused her to mortgage securities. She referenced Exhibit P8 in support of this. P8 however is a letter claiming for payment for the construction done. I have looked at Exhibit P9 which is a bank statement for the Plaintiff's Housing Finance Bank account onto which payments for the construction project were to be made, and find that there is no evidence of a loan advanced before the time of the contract. There is only a loan extended to the Plaintiff on 27th June, 2019 which is after the sub contract had been terminated.

Therefore, the Plaintiff has not adduced any evidence to show that it has inordinately been kept out of use of its money that a high interest rate is warranted.

The Plaintiff sought also for general damages. General damages are awarded at the court's discretion. General damages are intended to restore the injured party to the position he or she would have been at had there been no breach of contract. See **Gullabhai Ushillingi –v- Kampala Pharmaceuticals Ltd, SCCA No. 6 of 1999.** General damages are not intended to exorbitantly enrich the injured party beyond their actual losses but neither are should the sum awarded

be less than the Plaintiff's actual loss. The amount of general damages awarded is also at the court's discretion.

The Plaintiff has indeed suffered some injury due to the Defendant's failure to pay the sums due for the works completed. I will therefore award general damages.

The Defendant in its counterclaim made a claim for the following remedies:

(a) A declaration that the Respondent breached the sub contract
(b) A declaration that the Respondent induced breach of the contract between the Counterclaimant and the employer
(c) An award of general damages
(d) An award for special damages in paragraph 4 above
(e) Interest on the damages above
(f) Costs of the suit
(g) Any other reliefs as this court deems fit.

Having found that the Plaintiff breached the sub contract when it failed to complete construction of the six classroom blocks within the agreed period of time, I find that the Defendant is entitled to some damages. The Defendant claims to have suffered loss because he was blacklisted by UNICEF and could not bid for any other UNICEF projects. See paragraph 12 of DW1's witness statement. DW1 was asked in cross examination whether he had any proof that he applied for other UNICEF projects and was rejected which he said he didn't have. He also did not have any documentary proof that his company was black listed My reading of the email exchanges between UNICEF and the Defendant as seen in D3 and D5 is one of continuing cordial relationship. In fact, in D3 upon termination of the main contract, UNICEF kept the Defendant as the contractor for another project in Arua, Rhino Camp. The email exchanges in D5 also depict a cordial relationship between the Defendant and UNICEF. Therefore, there was no loss in the way of the Defendant's relationship with UNICEF.

The Defendant claims general damages also for the money paid to the laborer that the Plaintiff had left on the site unpaid. DW1 claimed under paragraph 11 of his witness statement that UNICEF directed the Defendant to pay these laborers. As already held above, the Defendant elected to pay these workers of his own volition and cannot be compensated for that. PW1 in cross examination testified that the Plaintiff was waiting on the money from the Defendant to pay these laborers. There was willingness by the Plaintiff to pay the laborers, but the Defendant chose to pay the Plaintiff's workers without notifying the Plaintiff. The Defendant company cannot then claim a loss it undertook on another's (UNICEF) instruction from the Plaintiff.

The Defendant also claimed damages to compensate for loss arising out of the temporary injunction issued against it. DW1 stated in paragraph 15 of his witness statement that the Plaintiff got an injunction against the Defendant which froze the Defendant's account, which account was also a loan account accruing interest. This according to DW1 occasioned loss upon the Defendant for which it should be compensated.

On file is Miscellaneous Application 747 of 2019 which is an application under Order 40 Rules 1,5, and 12 of the Civil Procedure Rules, SI 71-1 for attachment before judgment of UGX. 167,967,000/= on the Defendant's accounts by the Plaintiff. The application was heard by the Deputy Registrar of this court who granted the application in part and ordered for the Defendant not to remove the suit sum from its Dfcu bank account until hearing of the main suit. I believe it is the effects of this order for which the Defendant seeks compensation.

This court cannot grant compensation for the result of a lawful order executed in line with the law. The Defendant should have sought recourse under the law by way of appeal or any other recourse. To uphold this claim for compensation would amount to reviewing the Deputy Registrar's order in a manner not prescribed by law. This claim for general damages fails.

That said however, the Defendant did suffer some loss in that it had its main contract with UNICEF terminated because of the Plaintiff's failure to honor the terms of the sub contract. For that the Defendant is entitled to an award of general damages.

The Defendant sought the following special damages under paragraph 4 of the counterclaim:

a) Retention on paid works UGX. 8,398,350/=
b) The truck hire UGX. 5,250,000/=
c) The cost of removing the container from the suit land worth UGX. 5,000,000/=.
d) Cash paid to Mutumba Julius UGX. 1,400,000/=
e) Commission on the sub contract UGX. 33,593,400/=.

I should point out that DW1 sought additional special damages under paragraph 14 of his witness statement. These were UGX. 1,400,000/= as cash paid to Mutumba Julius, and UGX. 9,800,000/= paid to workers. These claims for special damages will not be considered by this court because they were not pleaded in the counterclaim. As a rule, special damages must be specially pleaded in the plaint or counterclaim and specifically proved in evidence. See **Musoke –v- Departed Asians' Property Custodian Board & Anor, Supreme Court Civil Appeal No. 1 of 1992** reported in **[1990-1994] 1 EA 419.** These

special damages claimed as part of paragraph 14(d) & (e) of DW1's witness statement were not specifically pleaded, and this court will only consider those laid out in paragraph 4 of the counterclaim.

The Defendant did not provide specific proof for any of the sums claimed above. For example, he was asked during cross examination whether there was a motor vehicle hire between the Plaintiff and Defendant and he answered in the negative. In the absence of this agreement or any other form of documentation to prove that the Defendant was entitled to UGX. 5,250,000/= claimed, I find that the claim is unproved. Concerning the claim for retention of paid workers, this court is unclear on what it entails. No evidence was led to explain this further, and neither was any receipt or other documentation provided to back it up. It also fails. There is also no receipt or invoice for the cost of removing the container from the suit land or even the circumstances under which this event occurred. It also fails. The UGX. 1,400,000/= that the Defendant claims to have paid to Mutumba Julius the foreman was also not receipted. From paragraph 6 of DW1's witness statement, this money was advanced to Mutumba Julius to assist in completion of the work. Once again, the Defendant of its own volition chose to pay money that was not expected of it for reasons best known to it. This alone would fail the claim, but in addition, the fact that money was not receipted or further proved, the claim fails. The commission of UGX. 33,593,400/= that the Defendant claims is the difference between the main contract price, and the sub contract price. However, it is not clear why the Defendant seeks to recover this commission. It can only be as some form of lost expected profit.

Whereas it is true that special damages may be proved by way of witness testimony as was in **Kampala City Council –v- Nakaye [1972] 1 EA 446**, it is not always the case. Oftentimes, special damages are proved by way of documentary evidence, because this is the best way for the court to ascertain the sums claimed. Proof of special damages by way of witness testimony is an uphill task which the Defendant has not successfully achieved.

Concerning costs, it is clear that this case has been resolved partly in favour of each party. That being the case, this court exercises its discretion under Section 27(2) of the Civil Procedure Act, Cap 71 and orders that each party bears its own costs.

Conclusion

This matter is hereby resolved as hereunder and the following orders are made:

a) That the Defendant breached the sub contract
b) That the Plaintiff breached the sub contract

c) The Defendant is hereby ordered to pay the Plaintiff the sum it claimed was outstanding, that is, UGX. 167,967,000/= as money owing for 96% of Phase 1 works done under the subcontract.
d) Interest on the sums in (c) above is hereby granted at 6.5% per annum from the date of this Judgment until payment in full.
e) General damages to a tune of UGX. 1,000,000/= (One Million Only) are hereby awarded to the Plaintiff
f) The Defendant is hereby awarded general damages of UGX. 10,000,000/= (Uganda Shillings Ten Million Only) for breach of the sub contract by the Plaintiff.
g) Interest on damages in (f) above is granted at 6.5% per annum from date when breach occurred until payment in full.
h) Each party shall bear its own costs.

I so order.

Jeanne Rwakakooko
JUDGE
29/07/2022

This Judgment was delivered on this 29th day of July, 2022