THE REPUBLIC OF UGANDA

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

CIVIL SUIT NO. 0735 OF 2022)

FENGHUA LIMITED :: PLAINTIFF

VERSUS

MODENA MN GROUP CONSTRUCTION
UGANDA LIMITED :: DEFENDANT

AND

1. POLAT YOL YAPI SANAYI VE TICARET A.S. :::::::::::::::::::::: 1ST THIRD PARTY
2. SERIN AND SON SERVICES LIMITED :::::::::::::::::::::: 2ND THIRD PARTY

(Before: Hon. Lady Justice Patricia Mutesi)

JUDGMENT

Introduction

1. The Plaintiff's case is that sometime in November 2021, it entered into contracts to rent out its equipment to the Defendant. The equipment was used to execute earthworks at 3 (three) of the Defendant's sites, i.e. Muyembe, Adjumani and Kampala Nsambya Flyover. The Defendant failed to pay most of the agreed rent which forced the Plaintiff to withdraw the equipment from the sites and file this suit seeking the recovery of rent arrears of UGX 454,216,118 and USD $23,027, and a refund of UGX 30,000,000 being the money spent in returning the equipment to its offices.

2. The Defendant's case is that on 11th November 2021, it entered into a contract with the Plaintiff to rent earth-moving equipment in order to work the subcontracts it signed with the third parties. The Defendant claims that the equipment was often faulty and not used on some days. That despite these hiccups, some works were executed but these were later halted due to lack of funding from the third parties. As works continued to stall, in a bid to

lessen the resultant financial implications, the Defendant handed over the projects to the third parties.

Representation and hearing

3. The Plaintiff was represented by Mr. Agaba Gerald Kakima of M/S KASGA Advocates while the Defendant was represented by Mr. Ayebare Matuza of M/S V. Agaba Advocates and Legal Consultants. The Defendant applied for and obtained an order to add Polat Yol Yapi Sanayi Ve Ticaret A.S., the Contractor on the Muyembe site, and Serin and Son Services Limited, the Contractor on the Adjumani site, as third parties.

4. The 1st third party filed a defence and a counterclaim but it did not appear at the hearing to prove the same. The 2nd third party was represented by Mr. Kigenyi Emmanuel of M/S Alma Associated Advocates. It filed a defence denying any liability to the Plaintiff and Defendant. It averred that in breach of the subcontract, the Defendant went to the site one month late and commenced work after another month. A few days after commencing work, the Defendant told the 2nd third party that it was unable to continue. That a joint verification exercise later revealed that the Defendant had only performed 12% of the expected works which were later rejected by the Project consultant for being shoddy and substandard.

5. At the hearing, the Plaintiff relied on the testimonies of Zhang Sunny, its director, and Baguma Michael, its on-site manager. The Defendant relied on the testimony of Abdulkhafed Ali, its Business Development Manager. The 1st Third Party filed a witness statement sworn by Silas Kalule who never appeared at the hearing. The 2nd third party also filed a witness statement signed by Frank Muhumuza who never came for the hearing.

6. During the hearing, the Plaintiff adduced the rental agreements, invoices and time sheets, among others. The Plaintiff's documents were admitted as Exhibits AX – P. The Defendant relied on its two subcontracts with the third parties, one of the Equipment Rental Agreements, a photograph allegedly

showing the Plaintiff's worker with stolen fuel jerrycans, worksheets and a receipt for part payment of rent, among others. These documents were admitted as Exhibits A – J. The 2nd third party relied on its subcontract agreement with the Defendant, the report for works performed, pictures showing site construction by the 2nd third party and lab tests indicating the quality of works performed. These documents were also admitted into evidence as Exhibits SS1 – SS4.

Issues

The parties framed the following issues for Court's determination:

1. Whether Defendant is liable to the Plaintiff for the sum of UGX 454,216,118/= and USD 23,027.
2. Whether the third parties are liable to indemnify the defendant.
3. What remedies are available to the parties.

Issue 1: Whether the Defendant is liable to the Plaintiff for the sum of UGX 454,216,118/= and USD 23,027.

7. At scheduling, the Defendant acknowledged that it rented equipment from the Plaintiff to be used on three road construction projects, i.e. the Kampala Nsambya Flyover Project, the Adjumani Project and the Muyende Project. It is not disputed that the Plaintiff and the Defendant are parties to equipment rental agreements. In my considered view, these agreements amount to 'contracts' within the meaning of **Section 10(1)** of the **Contracts Act, 2010**. The Court shall determine whether or not the Defendant complied with the rent payment terms under the agreements.

8. In **Mogas Uganda Limited v Benzina Uganda Limited, High Court Civil Suit No. 88 of 2013**, this Court defined 'breach of contract' to mean 'the breaking of an obligation which a contract imposes and which confers a right of action for damages on the injured party.' Out of the claimed UGX 454,216,118 and USD $23,027, the Defendant has, in its written submissions, admitted breach

of the equipment rental contracts by acknowledging that it is yet to pay UGX 75,200,000 in rent arrears. The Plaintiff has requested the Court to accordingly enter a judgment on admission against the Defendant.

9. For judgment to be entered on admission, such an admission must be explicit and not open to doubt (see **Miraj Barot v Salvation Army, High Court Civil Suit No. 713 of 2015)**. I find that the admission by the Defendant, in its submissions, constitutes an explicit and unequivocal acknowledgment of indebtedness to the tune of UGX 75,200,000. Accordingly, judgment on admission is entered against the Defendant for the sum of UGX 75,200,000 pursuant to **Order 13 rule 6** of the **Civil Procedure Rules S.I. 71-1**.

10. The Court will now determine whether the Plaintiff is entitled to the remainder of its claim, to wit, UGX 379,016,118 and USD 23,027. In its submissions, the Defendant argued that the Plaintiff did not satisfy its burden of proof to the required standard. **Section 101(1)** of the **Evidence Act Cap 6** provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts that he or she asserts must prove that those facts exist. Therefore, in the instant facts, the Plaintiff had the duty/burden to prove its claim. Furthermore, in civil suits of this nature, the plaintiff must satisfy the burden of proof on a balance of probabilities. This means that a plaintiff must adduce evidence that forms a reasonable basis for a definite conclusion on the fact desired to be proved (see **Olanya James v Ociti Tom & 3 Ors, High Court Civil Appeal No. 0064 of 2017**).

11. I note from the onset that the Plaintiff only adduced four equipment rental agreements in respect of 7 machines/vehicles yet the summary of demanded amounts as at 23rd August 2022 (Exhibit XX) includes two additional machines/vehicles, to wit, a wheel loader Reg. No. UBF 889D and a grader (number plate not provided in Exhibit XX). However, I also note that the Defendant did not dispute having received and utilized the wheel loader and the grader. Exhibit XX which includes these two machines was corroborated by paragraph 12 of DW1's witness statement and DW1's admission in cross-

examination, which were to the effect that the Defendant used the wheel loader and the grader, respectively. The rent rates for the grader and the wheel loader are set out in Exhibit XX as being UGX 1,350,000 per day and USD 230.77 per day. These rates were not challenged in any way during the cross-examination of PW1 and PW2.

12. I turn now to the 7 machines/vehicles whose rental agreements were adduced and admitted into evidence. These agreements are constituted in Exhibits AX, BX, CX and DX. The terms of the agreements are substantially identical. Exhibit AX dated 11th November 2021 is in respect of Truck Reg. No. UBF 640B which was hired at the rate of USD 180 per day. Exhibit BX dated 22nd November 2021 is in respect of a Road Roller Reg. No. UBF 003D which was hired at the rate of USD 6,000 per month. Exhibit CX dated 22nd November 2021 is in respect of an Excavator Reg. No. UBG 647M which was hired at the rate of UGX 1,300,000 per day. Finally, Exhibit DX dated 11th November 2021 is in respect of 4 Sino Trucks. Two of the Trucks (Reg. No. UAV 366Y and Reg. No. UAV 311V) were hired at the rate of UGX 1,000,000 per day while the other two Trucks (Reg. No. UBB 640B and Reg. No. UAW 183X) were rented at the rate of UGX 850,000 per day.

13. At the hearing, the above rates were not in issue. The gist of the Defendant's contestation was the computation of the number of days worked leading up to the accumulated arrears. While Zhang Sunny, the Plaintiff's Director, (**PW1**) maintained that the computation in Exhibit XX was that the accrued rent for the Sino Trucks in Exhibit DX was in respect of 28 days, Abdulkhafed Ali, the Defendant's Business Development Manager, (**DW1)** maintained that only 19 days could be taken into account. It is clear to me that this mix-up arises from an interpretation of Articles 4.6 and 4.8 of AX which is in *pari materia* with all the other 3 agreements.

14. Article 4.6 of Exhibit AX relieved the Defendant from any rent for a day on which rain on the site does not allow the Defendant to use the machine, but if the Defendant still went ahead and used the machine on such a day, rent

would be charged. Article 4.8 also relieved the Defendant from any rent for a day on which a machine/vehicle could not be used due to mechanical failure or maintenance. Therefore, to determine the accuracy of the remainder of the Plaintiff's claim, the Court will have to assess if of the exceptions in Articles 4.6 and 4.8 applied to any of the days in which the machines/vehicles were at the sites, and thus, which days to take into account in calculating rent arrears.

15. Both the Plaintiff and the Defendant adduced differing time sheets in a bid to show which days ought to be included in the tabulation. Unfortunately, the respective time sheets were not countersigned by either party. Additionally, both PW1 and DW1 were not physically present at the sites. For this reason, I find the testimony of PW2 to be instructive. PW2 was Baguma Michael, the Plaintiff's on-site Manager. At all material times, his duty was to be present at the respective sites where the machines/vehicles were working. He told the Court that he always used to record the days and hours of work while at the various sites of the Defendant and then report to PW1. He was also the supervisor of all the Plaintiff's staff manning the machines/vehicles at the different sites. Although he did not present his own daily notes and time sheets to the Court for review, PW2 confirmed the authenticity and accuracy of Exhibit XX (summary of amounts demanded by Plaintiff) and told the Court that the same is a true account of what happened on the sites.

16. On its part, the Defendant adduced what it called the original time sheets from the sites (Exhibit F) which were allegedly authored by PW2. Regrettably, the Defendant did not cross-examine PW2 on these time sheets in Exhibit F yet they were allegedly written by him. If the Defendant intended to disprove the accuracy of Exhibit XX, it ought to have put PW2 to test at trial to explain why Exhibit XX was different from their own Exhibit F. It is trite law that an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to an inference that the evidence is accepted, subject to it being assailed as inherently incredible or possibly untrue (see **James Sawoabiri & Another v Uganda S.C. Criminal**

Appeal No. 5 of 1990). Therefore, I am inclined to interpret the Defendant's omission to cross-examine PW2 on the discrepancies between Exhibits XX and F as an admission to the genuineness of Exhibit XX. I accept Exhibit XX as an accurate record of the computable number of days for rent arrears as far as the exceptions in Articles 4.6 and 4.8 of the equipment rental agreements are concerned.

17. The Defendant also went to great lengths to prove and argue that further exceptions ought to apply in respect of fuel shortages and the alleged theft of fuel by the Plaintiff's employees. First, I note that DW1 acknowledged in cross-examination that those alleged exceptions were not provided for in the rental agreements. Second, with specific regard to the alleged fuel shortages, Articles 4.3 and 4.5 of the four agreements placed the obligation of providing fuel for the machines/vehicles on the site on the Defendant. Any challenges which the Defendant could have faced in procuring fuel, leading to redundancy of the machines/vehicles on the sites, ought to have been immediately reported to the Plaintiff so that the two parties devise a solution to mitigate the resultant financial implications.

18. It is trite law that contractual obligations may be modified from time to time to deal with changes in circumstances so as to effectuate the greater purpose of a contract. A party who fails or neglects to reach out to his or her contractual counterpart to negotiate a modification of the terms, in circumstances where performance of those terms becomes cumbersome, remains liable under those terms. To allow such a party to unilaterally wriggle out of the ramifications for breach of those terms would defeat the legal implications and purpose of the contract.

19. Third, with specific regard to the alleged theft of fuel, Article 9.3 of the agreements makes the Defendant liable for any civil and criminal liabilities that could arise out of the possession of the machines/vehicles. DW 1 confirmed to the Court that the Defendant never made any complaint to the Police regarding the alleged theft of fuel. Without a police investigation

report or a conviction of any of the alleged culprits by a court of competent jurisdiction, this Court is inclined to reject the genuineness of the claims of theft of fuel. In any case, the rental agreements did not anticipate 'theft of fuel' as an exception to rent liability. The Court therefore rejects the claims of fuel shortage and theft as factors in mitigating the Defendant's liability in rent.

20. In conclusion, this Court accepts Exhibit XX as an accurate record of rent arrears due to the Plaintiff. The Plaintiff is entitled to the balance on the claimed amount which is UGX 379,016,118 and USD 23,027.

Issue 2: Whether the third parties are liable to indemnify the defendant.

21. Indemnity is the shifting of responsibility from one party to another. It is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person. While a claim for indemnity often arises out of contract, it may also arise in cases where the relationship between the parties is such that, either in law or in equity, there is an obligation upon one party to indemnify another (see **Oyester International Limited v Air Guide Services Limited, High Court Civil Suit No. 424 of 1994** and **Jacquiline Pimer v Isaac Bakayana & 4 Ors, High Court Civil Suit No. 0319 of 2019**).

22. It is also trite law that a right to damages is not a right to indemnity. This means that while a defendant may have a right to damages against a third party, that does not necessarily mean that that defendant has a right against the third party to be indemnified against any liabilities from another party.

23. Since the Defendant's subcontracts with the third parties do not expressly accord the Defendant any right of indemnity against claims from other parties like the Plaintiff, the express indemnity doctrine does not apply to this case. What remains to be determined is whether the implied indemnity doctrine is applicable. This doctrine effectuates equitable principles and maxims by

allowing the Court to look beyond the absence of an express indemnity clause in search of a more equitable solution. For the implied contractual indemnity doctrine to apply, a defendant must prove that it discharged an obligation which is identical and co-extensive to an obligation owed by a third party, that the discharge of the obligation was under circumstances that the obligation should have been discharged by the third party and that the third party will be unjustly enriched if he or she does not reimburse the defendant to the extent that the third party's liability has been discharged (see **Jacquiline Pimer v Isaac Bakayana & 4 Ors, supra).**

24. Relating those principles to the instant facts, the Defendant has made part payment of the rent arrears to the Plaintiff. For the Defendant to perform the subcontracts, it was reasonably expected that it would purchase/hire the necessary machines/vehicles. Rent was an expense supposed to be drawn out of the Defendant's overall proceeds from the subcontracts. In principal, it would be unjust for a subcontractor to bear the costs associated with performing work under a subcontract without being paid by the contractor or employer. Therefore, the Defendant would ordinarily have benefitted from the equitable implied indemnity doctrine in respect of its liabilities with the Plaintiff.

25. However, it is not clear to Court whether the Defendant has proved if any money is actually owing from the third parties. In its defence and counterclaim, the 1st third party asserted that the Defendant breached the subcontract through delayed completion of works. Additionally, Exhibit SS2 which was the joint measurement report for the works done by the Defendant for the 2nd third party showed that the Defendant grossly underperformed the subcontract when it executed only 12% of the expected works before throwing in the towel. The Report was countersigned by the Defendant's engineer. There is also proof that the said works were rejected by the Project Consultant as being shoddy and substandard.

26. The Defendant's justification for under-performance which is non-payment for work by the third parties does not seem to be sound. Clause 3 of Exhibit A (the Defendant's subcontract with the 1st third party) provides that it is an admeasurement contract in which payment is to be made after measurement and verification of works done. 50% of the contract sum was to be released upon practical completion of works. Clause 2.1 of Exhibit B which is the Defendant's subcontract with the 2nd third party also states that payment was to be made after approval of fully completed works. No upfront payment/deposit before works was anticipated in Exhibit B. For these reasons, the Defendant's excuse for under-performance and poor performance cannot be lack of payment from the third parties and it would be most absurd for this Court to allow contractors/subcontractors to condition the quality of their work on the availability of funds from the employer, especially in an admeasurement contract.

27. This Court finds that the Defendant does not have clean hands which would justify invoking the equitable implied indemnity doctrine. There is, apparent before this Court, evidence of poor performance and gross underperformance by the Defendant. He who seeks equity must do equity. Equity must also be sought with clean hands. In the absence of an express indemnity clause in favour of the Defendant in the subcontracts, the shield of equity cannot protect a subcontractor like the Defendant who is guilty of poor performance and underperformance.

28. The Defendant is at liberty to pursue its rights to damages, if any, against the third parties. As far as indemnity is concerned, this Court will not extend any equitable assistance to the Defendant to require the third parties to settle the Plaintiff's claims. For these reasons, the third parties are not liable to indemnify the defendant.

Issue 3: What remedies are available to the parties.

Rent arrears

29. This Court has found that the Plaintiff is entitled to the admitted rent arrears of UGX 75,200,000. Court has also found that the Plaintiff is entitled to the remainder of the arrears to the tune of UGX 379,016,118 and USD 23,027.

Special damages

30. It is trite law that special damages ought to be specifically pleaded and proved. The Plaintiff's claim for UGX 30,000,000 in transport costs for the machinery falls far below this legal standard. The claim was not specifically pleaded and particularised in the Plaint. No specific proof of the said transport expenses was led at the trial. The claim is thereby rejected.

General damages

31. General damages are awarded in respect of the non-quantifiable loss or injury which a party suffers as a natural result of the breach of its rights. In this case, the Defendant admitted non-payment of rent arrears despite receiving and utilising the Defendant's machines on its sites. Aware that there were outstanding arrears, the Defendant could still have engaged the Plaintiff earlier so that this dispute is settled amicably in order to preserve the Court's time. However, the Defendant waited until the stage of submissions to accept its wrong and admit part of the Plaintiff's claim. The Plaintiff lost time, money and business opportunities which it could have pursued if it this matter had been amicably settled earlier. For this loss, I award general damages of UGX 30,000,000.

Interest

32. The Court has the discretion to award interest on sums due to a successful party. Interest is meant to compensate the Plaintiff for the deprivation of the use of his money that remained unpaid at the time of institution of the suit (see **Esero Kasule v Attorney General, High Court Miscellaneous Application No. 0688 of 2014**). This Court deems it fair and just to award interest at the rate of 18% per annum on the rent arrears from the date of filing this suit until full payment. The Court also awards interest on general damages at the rate of 8% per annum from the date of judgment until payment in full.

Costs of the suit

33. Costs ordinarily follow the event unless the court or judge shall, for good reason, order (see **Ruryabeita Frank v Beyunga Kenneth & 3 Ors, High Court Civil Appeal No. 59 of 2020**). I find no reason why the Plaintiff should not recover the costs of the suit. Since the 1st third party did not appear in Court to prove its case, it shall bear its own costs. While the 2nd third party appeared in Court through its advocates, it failed to present any witnesses to prove its case and will only recover half of its costs in this case.

Reliefs

34. Consequently, I make the following orders:

    i. The Defendant breached various contracts with the Plaintiff when it rented various construction equipment from the Plaintiff for use at its construction sites and failed/refused to pay rental fees.

    ii. Judgment on admission is entered against the Defendant for the payment of UGX 75,200,000 in rent arrears.

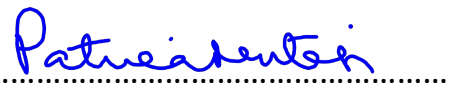
    iii. The Defendant shall pay to the Plaintiff a sum of UGX 379,016,118 and USD 23,027 being rent arrears.

    iv. The Defendant shall pay UGX 30,000,000 in general damages to the Plaintiff for all non-quantifiable loss/injury arising from its breach of the equipment rental agreements.

    v. The Defendant shall pay interest on all rent arrears at the rate of 18% per annum from the date of filing this suit until payment in full.

vi. The defendant shall pay interest on the general damages at the rate of 8% per annum from the date of judgment until payment in full.

vii. The Defendant shall bear the Plaintiff's costs and one-half of the 2nd third party's costs. The 1st third party shall bear its own costs.



Patricia Mutesi

(JUDGE)

30/09/23