

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

CIVIL SUIT NO. 0483 OF 2020

NICE STAR INTERNATIONAL LIMITED ::::::::::: PLAINTIFF/COUNTER DEFENDANT

VERSUS

HUNAN ROAD AND BRIDGE CONSTRUCTION

GROUP CO. LIMITED ::::::::::: DEFENDANT/ COUNTER CLAIMANT

(Before: Hon. Lady Justice Patricia Mutesi)

JUDGMENT

Introduction

1. The Plaintiff brought this suit by summary procedure seeking the recovery of USD 215,370 being arrears for transportation fees. The Defendant successfully sought leave to appear and defend the suit vide Miscellaneous Application No. 575 of 2020. The Defendant then filed a defence to the suit and a counterclaim. The Plaintiff also filed a reply to the defence and a defence to the counterclaim.

Brief facts

2. On the 22nd April 2019, the plaintiff entered into a Contract with the Defendant for the transportation of construction materials from the Defendant's quarry in Mukono to its road construction project along Masaka – Bukakata road (hereinafter "the Contract"). The parties later executed a Memorandum of Cooperation (hereinafter "the Memorandum") which modified some of the terms of the Contract. The Plaintiff averred that the Defendant failed to pay all the transportation fees that accrued.
3. The Defendant denied any indebtedness to the Plaintiff in the amount claimed in the Plaint or at all. The Defendant averred that it is the Plaintiff

who breached the Contract and the Memorandum by failing or refusing to deliver the agreed number of trucks and also withdrawing the said trucks without mutual consultation with the Defendant as required under the contract thus causing loss and damage to the Defendant. The Defendant thus claimed USD 379,684.5 on account of the losses occasioned along with UGX 1,018,973,558.1/= being liquidated damages for delay as per its contract approved by Uganda National Roads Authority (UNRA).

Representation and hearing

4. The Plaintiff was represented by Ms. Kabatesi Evonnah and Mr. David Semanda of M/S Sky Advocates while the Defendant was represented by Mr. Samuel Kiriaghe of M/S MRK Advocates and Mr. Adoch Luwum of M/S Luwum, Rutaremwa & Co. Advocates. When the case was called on for hearing, the Plaintiff presented 4 witnesses but the Defendant did not present any witness.
5. PW1 was Kamugabire Emmanuel, the Plaintiff's clearing assistant. In his witness statement, he testified that at the commencement of the works, he was overseeing the Bukakata site remotely and would go there occasionally, but he moved there permanently in November 2019 and he stayed there until around July 2020. His work involved ensuring the effective performance of drivers, giving status reports about the transportation services to his bosses. Over time, the Plaintiff started experiencing many challenges like the regular breakdown of trucks due to poor roads, shortage of hardcore which often left the trucks idle, accidents, COVID-19 restrictions and rainy weather. In cross-examination, PW1 conceded that he had adduced any status report before the Court. He, however, clarified that he would often witness the loading and offloading of hardcore.
6. PW2 was Zhang Chunjiang, one of the Plaintiff's managers. In his witness statement, he stated that told the Court about the execution of the Contract and the Memorandum. He stated that the Plaintiff provided the Defendant with transportation services from May 2019 until 20th June 2020 and that the services were withdrawn in July 2020 due to the Defendant's continued non-

payment of accrued transportation fees. He also corroborated PW1's account of the challenges faced by the Plaintiff in providing the transportation services.

7. PW2 further told the Court that in spite of the signing of the Memorandum, the Defendant's delays in payment continued and that the Defendant's project manager, Mr. Zheng Heqiao, eventually asked the Plaintiff to stop work because the Defendant did not have money to pay them. PW2 added that on 11th July 2020, the Defendant signed an acknowledgment of the then outstanding amount which was USD 245,370 and made part payment of USD 3,000 on 14th July 2020 leaving a balance of USD 215,370.02. In cross-examination, PW2 satisfied the Court as to the genuineness of the WeChat messages between him and Mr. Zheng. However, he was unable to state how many tonnes of stones were delivered during the entire contract period and also acknowledged that he was not present when the delivery notes were being signed. In re-examination, PW2 maintained that although he did not need the Defendant's permission to withdraw the trucks, the trucks were withdrawn with the Defendant's knowledge and consent, and after the lapse of the payment grace period it had requested.
8. PW3 was Zhang Yingxing, the Plaintiff's marketing manager. In his witness statement, PW3 told the Court that he was one of the fleet managers who ensured that 15 trucks and more were sent to the Defendant's project along Masaka-Bukakata road. PW3 also testified that on 20th April 2020, via WeChat, he asked the Defendant's project manager to arrange payment of USD 48,407 as part payment of outstanding fees at the time, but the latter said the funds were not available and that he did not know when this status quo would change. On 14th May 2020, the said project manager confirmed that he was expecting some money and a payment was made on the same day. PW3 insisted that the Defendant pay at least USD 10,000 for the repair of the worn-out trucks but all in vain.
9. In cross examination, PW3 clarified that he always witnessed the loading of all the trucks though he only witnessed the offloading a few times. He

confirmed that there were some days when there were no deliveries made due to shortage of hardcore. He also confirmed that the Plaintiff outsourced some of the trucks and drivers for the project and that, in total, the Plaintiff transported and delivered approximately 70,000 – 80,000 tonnes of hardcore to the Defendant. In re-examination, PW3 emphasised that it was the Defendant's duty to provide hardcore for delivery and that the Defendant was liable for the days when delivery was hindered by shortage of hardcore. He stated that some of the trucks were outsourced from a company called "Frafor".

10. Finally, PW4 was Agaba James, one of the drivers of the Plaintiff's dump trucks. In his witness statement, PW4 told the Court that between February 2019 and July 2020, he was one of the drivers who delivered hardcore, stone base and stone dust to the Defendant's site along Masaka - Bukakata Road. The Plaintiff's trucks would always park in the Defendant's park yard waiting for material to transport. Initially, there were 15 trucks, but later these were increased to 25 trucks. He told the Court that sometimes there was not enough material to load and deliver which made the trucks idle. PW4 also told the Court that on every delivery, he would sign the delivery form which reflected his truck's registration number, the weight of the load carried, the set-off time, the arrival/delivery time and the spot for dumping the materials. In his cross-examination, PW4 confirmed that he would drive truck no. UBD541F during the day and another person would drive it at night.
11. The Plaintiff's documentary evidence included the Contract (both Chinese and English versions) (PE1), the Memorandum (both Chinese and English versions) (PE2), delivery notes (PE3), the project statements of account (PE4), the vehicle attendance and driver sign-in form (PE5), the financial confirmation letter (PE6), photos of truck accidents (PE7) and WeChat correspondences (PE8).
12. As stated above, the Defendant did not present any witnesses in support of its case and the Court expunged its witness statements from the record pursuant to **Order 18 rule 5A (5)** of the **Civil Procedure Rules**. Similarly, this

Court deems it fit to expunge the Defendant's exhibits from the record. It is trite law that the prior marking and admission of exhibits into evidence at scheduling is only prefatory and tentative and its sole purpose is to speed up the trial (see **Schedule 2 Part IV, Form 1B para. (j)** of the **Civil Procedure Rules (as amended)** and **Bipin Shantilal Panchal v State of Gujarat & Anor, Criminal Miscellaneous Petition No. 862 of 2001** (also).

13. Once a party fails to present a witness at trial to speak to and explain the contents of an exhibit earlier marked and admitted during scheduling, making it impossible for the opposite party to cross-examine the witness on the contents of the exhibit, the earlier tentative marking and admission of that exhibit is invalidated. In any case, it would be most unjust for a court of law to base its judgment on an exhibit upon which there has been no opportunity of cross-examination by the adverse party. Therefore, pursuant to **Article 28(1)** of the **Constitution of the Republic of Uganda, 1995** which guarantees every litigant right to a fair hearing, the Defendant's exhibits are expunged from the Court record.

Issues

14. The parties framed the following issues for Court's determination:
 1. Whether there was breach of the contract and memorandum of cooperation executed between the Plaintiff/Counter Defendant and the Defendant/Counter Claimant, and if so, by who.
 2. What remedies are available to the parties.

Resolution of Issues

Issue 1: Whether there was breach of the contract and memorandum of cooperation executed between the Plaintiff/Counter Defendant and the Defendant/Counter Claimant, and if so, by who.

15. 'Breach of contract' means 'the breaking of an obligation which a contract imposes and which confers a right of action for damages on the injured party' (see **Mogas Uganda Limited v Benzina Uganda Limited, High Court Civil Suit**

No. 88 of 2013). For this Court to find that any of the parties to this case breached the Contract and, or, the Memorandum, it must be satisfied that that party failed, refused or omitted to comply with a term of the Contract and, or, the Memorandum. While this issue is broadly raised, allowing this Court to consider possible breaches of contract by both the Plaintiff and the Defendant, the Court is constrained to only assess and evaluate the Plaintiff's claims and evidence since there is no evidence on the record in proof of any of the Defendant's claims.

16. The Plaintiff has alleged that the Defendant breached the Contract and the Memorandum when it failed to fully pay all the accrued fees for transporting construction materials from its quarry in Mukono to its project site along Masaka – Bukakata road. In both the Contract and the Memorandum, the Defendant was referred to as **"Party A"** while the Plaintiff was referred to as **"Party B"**. The payment terms in **Clauses 4 and 5** of the Contract were:

IV Price

1, The price for transporting rubbles is: \$0.11/ton/km (excluding tax)

2, The price for transporting stone 1 is: \$0.1/ton/km (excluding tax)

3, If Party A requires Party B to provide regular legal tax tickets, Party A shall pay the corresponding taxes and fees (18% VAT).

V Terms of payment

Party A shall complete checking last month's payment and paying before 25th of each month, by cheque or transferring."

17. The Contract was executed on 22nd April 2023 and the parties started performing their respective obligations. However, by February 2020, the contractual relationship between the Plaintiff and the Defendant had become strained due to the Defendant's continued delays in paying the transportation fees, among other challenges. In an attempt to salvage their common interest, the parties negotiated and signed the Memorandum on

25th February 2020 to modify the terms of the Contract and anticipate the challenges which had arisen in its performance. Prominently, the parties agreed to adjust transport rates. In relevant part, the Memorandum read:

“... Considering the difficult conditions and rugged road conditions in the early stage of the project, which caused frequent vehicle accidents, serious tire damage, arising high operating cost, the project cooperation cannot continue. In order to protect the common interest of both parties, the transportation price is adjusted as follows:

1, The price for transporting rubbles is: \$0.13/ton/km (excluding tax)

2, The price for transporting gallets is: \$0.105/ton/km (excluding tax)

3. The price for transporting base material (base gravel) is: 0.105\$/ton/km (excluding tax)”

18. Unfortunately, the Memorandum did little to improve the contractual relationship. Many of the earlier challenges continued and the Defendant's cash flow dried up. By the end of June, the contractual relationship had completely degenerated, and the spiralling coronavirus pandemic at the time did not make the situation any easier. The Defendant had insisted that the Plaintiff continues transporting the construction materials throughout the lockdown in the first half of 2020, but its fees payments were not forthcoming. The Plaintiff was left with many trucks which needed repairs and tyre changes but without the necessary liquidity to sustain the works due to the Defendant's failure to pay its transport fees. In the end, the Plaintiff was forced to withdraw all its trucks from the Defendant's quarry and project site and to terminate the transportation services around late June/early July 2020. Later in July 2020, the Plaintiff brought this suit for the recovery of its outstanding transport fees.
19. The contents of the Contract and the Memorandum are not contested. The heart of this dispute is the interpretation and performance of the Contract and the Memorandum. I have carefully examined the Plaintiff's oral and documentary evidence. The project statements of account were approved

and countersigned by the Defendant's representative and they show the different amounts in fees which accrued in the first half of 2020. The vehicle attendance and driver sign-in forms were the daily records of the different drivers and vehicles deployed by the Plaintiff to transport materials. The delivery notes contain the details of the deliveries made by the trucks.

20. Another piece of evidence which I found decisive is the WeChat correspondence between PW2 and the Defendant's project manager. It shows that the Plaintiff relayed to the Defendant the different challenges it faced in executing the contract, like poor roads leading to delays, accidents and tyre wear and tear several acknowledgments. To this end, it corroborates the testimonies of PW1, PW2 and PW4. It also reveals several acknowledgments of indebtedness and pleas for more time to clear the debt made by the Defendant's project manager. For example, on 10th August 2023, after this suit was filed, the Defendant's project Manager sent the following message to PW2 on WeChat:

"You see, let's sit down and discuss how to pay. Then you withdraw the lawsuit, and I also withdraw. There is no need to waste manpower and money, is there? I'm absolutely cooperating."

This message is an unequivocal acknowledgment of indebtedness on the part of the Defendant by its project manager.

21. Furthermore, the financial confirmation letter dated 11th July 2020 is very instructive, if not even conclusive, on the Defendant's liability. This letter was the result of discussions and reconciliation of the parties' accounts. It proves that the outstanding amounts stated therein were reviewed, verified and confirmed by both the Plaintiff and the Defendant. The letter was duly signed by representatives of both parties and stamped with the Defendant's company stamp. It confirms that, as of 11th July 2020, the Defendant was indebted to the Plaintiff to the tune of USD 245,370.02. The letter unequivocally evidences a meeting of minds between the Plaintiff and the Defendants as far as the Defendant's liability is concerned.

22. PW2 clarified in paragraph 20 of his witness statement that following that 3 days after the joint confirmation of the outstanding amount through the execution and endorsement of the final confirmation letter, the Defendant even made further partial payment of the debt in the amount of USD 30,000 on 14th July 2020. This reduced the outstanding amount to USD 215,370.02 which remained unpaid at the time this suit was filed.
23. In disregard of **Order 6 rule 8** of the **Civil Procedure Rules** which requires denials in a defence to be specific, the Defendant merely denied any indebtedness to the Plaintiff details in paragraph 6(i) of the written statement of defence without providing any further details or proof of full payment of all transport fees. The defence does not contain any retraction of, or contest to, the Defendant's assent to the financial confirmation letter. In any case, if the Defendant had indeed paid up all the transport fees due to the Plaintiff as insinuated by its defence, its project manager would not have been in messaging PW2 via WeChat inbox between the months of March and July 2020 acknowledging the Defendant's indebtedness, confessing the Defendant's lack of cash flow and begging for more time to clear outstanding transport fees. The WeChat correspondence completely obliterates the Defendant's bare denial of indebtedness in its defence.
24. Additionally, the Defendant did not specifically challenge the contents of the financial confirmation letter during its cross-examination of any of the 4 witnesses of the Plaintiff. 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 as true, 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**). This Court is inclined to interpret the Defendant's omission to contest the financial confirmation letter in its cross-examination of the Plaintiff's witnesses as an acknowledgment of the truthfulness of the letter.
25. The Court also finds that the Defendant's endorsement of the financial confirmation letter amounts to an admission under **Section 16** of the

Evidence Act. The endorsement gives an inference as to a fact in issue in this case which is the breach of the Contract and the Memorandum by the Defendant through non-payment of fees. It is an acknowledgment by the Defendant that it has arrears in transport fees due to the Plaintiff.

26. In conclusion, I am convinced that the Defendant breached the Contract and the Memorandum by failing to pay all the Plaintiff's transport fees. The Defendant is indebted to the Plaintiff in the amount of USD 215,370.02 being arrears of transport fees under the Contract and the Memorandum.
27. Without any evidence on record from the Defendant, the averments in the written statement of defence and in the counterclaim relating to alleged breaches by the Plaintiff are unproved and they, accordingly, fail.

Issue 2: What remedies are available to the parties.

28. The Plaintiff is entitled to outstanding transport fees in the amount of USD 215,370.02 from the Defendant as claimed in the Plaint and proved at trial.
29. The Plaintiff also prayed for penalties for delayed payment calculable at the rate of 5/10,000 per day. This remedy is provided for in **Clause 3** of the **Memorandum** which provides:

“... Based on what are agreed, Party B has the right to stop providing the transporting service at any time if any delay of payment of Party A's happens, and Party A shall pay Party B the penalties for breaching the contract at 5/10000 of the due payment per day.”


30. Under the said provision, the penalty for the respective delayed payments is calculable by applying the above rate of 5/10,000 to the due amount in view of the number of days the payment went unpaid. The Plaintiff did not state the number of days the respective payments went unpaid by the time of filing this suit. It also omitted to tabulate the amount due in penalties. Since the financial confirmation letter sets out the number of days the respective payments went unsettled up to 11th July 2020, the Court will use it as the yardstick for the tabulation of the penalties for delayed payment which accrued only until 11th July 2020.

31. The financial confirmation letter lists 4 different business periods from which the then outstanding fees (USD 245,370) had arisen as of 11th July 2020. First, by that date, the payment of USD 5,011 for the business period between 21st December 2021 and 20th January 2020 had been overdue by 91 days. The penalty for that delay is USD 228. Second, by 11th July 2023, the payment of USD 98,125.55 for the business period between 21st March 2020 and 20th April 2020 had been due for 61 days. The penalty for that delay is USD 2,992.83. Third, by 11th July 2020, the payment of USD 74,931.53 for the business period between 21st April 2020 to 20th May 2020 had been due for 31 days. The penalty for that delay is USD 1,161.44. Finally, by 11th July 2020, the payment of USD 67,301.65 for the business period between 21st May 2020 and 20th June 2020 had been due for one day. The penalty for that delay is USD 33.65. The total penalty payable by the Defendant for the delayed payments is, therefore, USD 4,415.92.
32. Furthermore, in their submissions, counsel for the Plaintiff also prayed for general damages and interest. However, these reliefs were not prayed for in the Plaintiff. It is trite law that a party is bound by their pleadings and cannot be allowed to adduce evidence or make submissions which are inconsistent with its pleadings at the commencement of the case (see **Order 6 rules 6 and 7 of the Civil Procedure Rules and Interfreight Forwarders (U) Ltd v East Africa Development Bank Ltd, Supreme Court Civil Appeal No. 33 of 1992**).
33. Additionally, the Supreme has severally guided that courts of law should not travel beyond the pleadings of the parties to concoct remedies which have not been prayed for in the pleadings (see **Order 7 rule 1(g) of the Civil Procedure Rules and M/S Fang Min v Belex Tours and Travel Limited, Supreme Court Civil Appeal No. 06 of 2013**). Therefore, the Plaintiff's prayers for general damages and interest must fail since they were not pleaded in the Plaintiff.
34. **Section 27(1) of the Civil Procedure Act** allows this Court the discretion to award the costs of a suit before it. The general rule is that costs must follow the event. This means that an award of costs will generally flow with the

result of litigation. The successful party is entitled to costs against the unsuccessful party, unless the Court, for good reasons, orders otherwise (see **Kwizera Eddie v Attorney General, Supreme Court Constitutional Appeal No. 01 of 2008**). I do not find any reason to deny the Plaintiff the costs of this suit. I, accordingly, award the costs of the suit to the Plaintiff.

Reliefs

35. Consequently, I make the following orders:
- i. The Defendant shall pay to the Plaintiff USD 215,370.02 being arrears of transport fees under the Contract and the Memorandum.
 - ii. The Defendant shall pay to the Defendant a penalty of USD 4,415.92 for the delayed payment of transportation fees.
 - iii. Costs of the suit are awarded to the Plaintiff.
 - iv. The counterclaim is dismissed with costs.


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Hon. Justice Patricia Mutesi

JUDGE

(30/09/23)