

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)
CIVIL SUIT NO. 622 OF 2021

ANHUI SIJAN HOLDING

GROUP CO. LTD :..... PLAINTIFF / COUNTER DEFENDANT

VERSUS

RIKY BUILDING MATERIAL LTD :..... DEFENDANT/COUNTER CLAIMANT

(Before: Hon. Justice Patricia Mutesi)

JUDGEMENT

Introduction

The plaintiff filed the above suit against the defendant seeking damages for breach of a contract which was entered into by the parties on 10th April 2022. In reply the defendant filed a Written Statement of Defence contending that the suit against it was misconceived, bad in law and did not disclose a cause of action. They also instituted a counter claim against the plaintiff for recovery of UGX 160,961,166.37 (Uganda Shillings One Hundred Sixty Million Nine Hundred Sixty-One Thousand One Hundred Sixty-Six and Thirty-Seven Cents only) as the outstanding amount for construction works executed the contract. The counter claimant further averred that the plaintiff / counter defendant had breached the contract by forcing the defendant off the site and hence unilaterally terminating the contract, and sought general damages for breach of contract, interest thereon and costs of the counterclaim.

The plaintiff / counter defendant filed a Reply to the WSD and counter claim, but thereafter they did not file any other documents. Whereas the parties were directed to file their witness statements, trial bundles and Joint Scheduling memorandum, only the defendant / counterclaimant complied with the directions, while the plaintiff / counter defendant did not file the said documents. On 20th October 2022 the plaintiff's suit was dismissed with costs on grounds of non

appearance of the plaintiff and their counsel in court despite proof of service on court record.

When the suit came up for hearing on 7th December 2022, the counter claimant prayed that the counter suit proceeds *ex parte* under Order 9 rule 20 (1) (a) of the Civil Procedure Rules, due to the non appearance of the plaintiff / counter defendant and their counsel in court, despite being duly served as per the affidavit of service on record filed on 6th December, 2022. The court found that there was evidence of service and that no reason had been advanced for the plaintiff's non appearance, and it accordingly ordered that the counter suit proceeds *ex parte*.

Representation and hearing.

The counter claimant was represented by Richard Rubaale of M/s Sendege & Co. Advocates. The counter claimant produced two witnesses namely Tejash Jitendra Kumar Shah the claimant's managing director (**PW1**) and Paddy Mulamba the claimant's project consultant (**PW2**). Counsel for the counter claimant filed written submissions which I have duly considered together with the pleadings and evidence on record.

Issues for determination by Court

1. Whether the Counter Defendant breached the contract dated 10th April, 2020?
2. Whether the Counter Claimant is entitled to the remedies sought?

Determination by Court

Issue 1: Whether the Counter Defendant breached the contract dated 10th April, 2020?

The witness statements of PW1 and PW2 show that on 10th April 2020 the parties to this suit entered into a construction agreement (**Exhibit P1**) whereby it was agreed that the counter claimant would construct an office block on Plot 13 Naguru Summit View Road, Nakawa Division. The counter claimant duly executed the works until 19th May, 2020 when the counter defendant unilaterally terminated the contract when it forcefully took over possession of the construction site on the ground that the counter claimant was required to concentrate on another project which had earlier been separately contracted to the counter defendant. After the counter claimant demanded for payment for the work so far done, a joint re-

measurement exercise was carried out by both parties to determine the value of the works done by the counter claimant up to the point of termination. In an email letter dated 3rd August, 2020 (**Exhibit P2**) the counter defendant's Quantity Surveyor indicated that the value for the work done was UGX 425,261,424.37/= (Uganda Shillings Four hundred million twenty five million two hundred sixty one thousand four Hundred twenty four and thirty seven cents) which valuation was accepted by the counter claimant. Later, the counter defendant informed the counter claimant about defects in the completed works and the parties agreed that the counter claimant would work on these defects at a cost to be agreed on by the parties. The amount which was proved and agreed upon in respect of the cost of repairing defects was USD 8,836.21 (United States Dollars Eight thousand, eight hundred thirty six and Twenty one cents). Out of the total outstanding amount of UGX 425,261,424.37 due to the counter claimant, the counter defendant was supposed to deduct USD 8,836.21 being the cost of repairs, plus the value of the materials supplied by the counter defendant during the performance of the contract which were valued at UGX 232,489,901/= (Uganda Shillings Two hundred thirty two million, Four hundred eighty nine thousand, Nine hundred one only). After taking into account the said deductions the counter defendant was indebted to the counter claimant for the sum of UGX 160,961,166.37 (Uganda Shillings One hundred sixty million, Nine hundred sixty-one thousand, One hundred sixty-six and Thirty-seven cents only). Despite several demands having been made for payment, the counter defendant has refused or failed to pay the said outstanding amount to date.

Counsel for the counter claimant submitted that the evidence from PW1 and PW2 proves that the counter defendant's breach of contract is two-fold i.e. termination of the contract without citing any reason for such as specified under Clause 25 of the agreement and the counter defendant's refusal to pay UGX 160, 961,166.37 to the counter claimant as the amount due for the work done up to the point of termination of the contract. Counsel relied on the case of **Nsibambi Mudashiru v Kasule Joseph HCCS No. 244 of 2014** where **Justice Bashaija K. Andrew** held that a breach of contract is a legal cause of action in which a binding agreement or bargain for exchange is not honored by one or more of the parties to the contract by their non-performance or interference with other party's performance. He therefore invited this court to find that the counter defendant breached the contract dated 10th April 2020.

Section 10 of the Contracts Act 2010 defines a contract as an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object with the intention to be legally bound. Therefore, an agreement becomes enforceable by law when it fulfills these conditions as stated in the definition.

In an old case of **Printing and Numerical Registering Co. v Simpson (1875) LR 19 Eq 462**, Sir George Jessel stated that;

“ If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contracts, when entered freely and voluntarily, shall be held sacred and shall be enforceable by Courts of Justice”

In the instant case, Clause 25 of the agreement (**Exhibit P1**) between the parties specified the circumstances which the counter defendant could have relied on to terminate the contract, but none of these was cited upon termination. From the evidence of PW1 and PW2 the counter defendant did not give any reason but simply instructed that the counter claimant was required to concentrate on another project which had earlier been contracted separately. Thus the counter defendant unilaterally terminated the contract for a reason which did not fall within the circumstances provided under Clause 25 and accordingly the termination amounted to a breach of the contract.

As regards non-payment of the amount due to the Counter Claimant, **Section 2 of the Contracts Act 2010**, defines consideration to mean a right, interest, profit or benefit accruing to one party or forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party. An agreement is legally enforceable only when the parties thereto give something and get something in return. That is consideration and the same must be legal. In the instant case the counter claimant was contracted to execute construction works and in return the counter defendant was to pay for the work done. It is not in dispute that at the time of the termination of the contract, the counter claimant had performed part of the works. PW1 and PW2 testified that following the contract termination the parties jointly carried out a re-measurement exercise to ascertain the value of the works done by the counter claimant and the counter defendant's Quantity Surveyor confirmed in an email (**Exhibit P2**) the value of works done as UGX 425,261,424.37 which the counter claimant accepted. Further that after the parties held meetings to reconcile their figures, they agreed on USD 8,836.21 as the cost of repairs. That

the counter claimant was supposed to deduct the said USD8,836.21 for repairs, plus UGX 232,489,901 being the value of materials supplied to the counter claimant from the total outstanding amount of UGX 425,261,424.37 which would leave an unpaid balance of UGX 160,961,166.37. However that despite the counter claimant's demands for payment the counter defendant has refused or failed to pay this sum.

In **Black's Law Dictionary 8th Edition, at page 200**, a breach of contract is defined as a legal cause of action in which a binding agreement is not honored by a party to the contract by non-performance or interference with the other party's performance. (Also see **Cargo World Logistics Limited V Royale Group Africa Limited HCCS 157 of 2013; Michael Katungye v Fred Byamukama & Another HCCS No. 706 of 2020.**)

Accordingly, in consideration of the evidence on record and the law above, I find that the counter defendant's unilateral termination of the contract dated 10th April, 2020 and their further refusal/failure to pay the outstanding amount of UGX 160,961,166.37 to the counter claimant amounted to breach of contract. Issue 1 is accordingly answered in the affirmative.

Issue No. 2: Whether the counter claimant is entitled to the remedies sought?

Section 61 (1) of the **Contracts Act 2010** provides that where there is breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her.

Having determined in Issue 1 that the counter defendant breached the contract by non payment for the contract works executed by the counter claimant, I find that the counter claimant is entitled to payment for the sum of UGX 160, 961,166.37 (Uganda Shillings One hundred sixty million, Nine hundred sixty one thousand, One hundred sixty six, and Thirty seven cents) which was proved in evidence as the value for the work done before termination of the contract.

General Damages.

The counter claimant claimed for general damages for breach of contract and inconvenience. Counsel for the counter claimant submitted that an award of UGX 50,000,000/= would be adequate in general damages, considering the conduct of the counter defendant in terminating the contract and how it caused loss and damage to the counter claimant.

General damages are the such as the law will presume to be the direct natural or probable consequence of the act complained of. In determining these damages, the court using its discretion and basing on the available evidence, decides what could have been the total convenience and probable loss due the acts of the party at fault (See **Stroms V Huthcinson (1905) AC 515**). General damages include damages for pain and suffering and inconvenience (**Kiwanuka Godfrey T/A Tosumi Autospares and Glassmart V Arua District Local Government HCCS No. 186 of 2026**).

From the evidence presented, the counter claimant was in the midst of performing his obligations part when the counter defendant terminated the contract without any justifiable reason and outside the contract terms. Furthermore the counter defendant has to date failed or refused to pay the amount due for the works that had been performed. PW1 in his witness statement averred that due to the counter defendant's said breach, the counter claimants business was adversely affected and it was forced to borrow money to cater for the monetary obligations arising from the contract.

Basing on the loss and inconvenience that the counter claimant has been subjected to by the counter defendant's conduct, I award the counter claimant general damages of UGX 15,000,000/= (Uganda Shillings Fifteen Million) which amount I deem to be reasonable in the circumstances.

Interest

The counter claimant prayed for interest of 30% p.a. on the outstanding contract amount from 19th June 2020 until payment in full. He also prayed for interest of 30% on general damages.

Under **Section 26 (2)** of the **Civil Procedure Act Cap 71**, courts have discretionary powers in so far as there is a decree is for the payment of money, to order interest at such rate as the Court deems reasonable to be paid on the principal sum. The basis of an award of interest is that the plaintiff has been kept out of his money (aSee **Ecobank Uganda Ltd V LB Construction & Others; HCCS No. 574 of 2012**)

The counter claimant having been kept out of the outstanding contract sum since termination to date, is entitled to interest on the said amount. Accordingly, I award the counter claimant interest at the rate of 15% per annum on the outstanding amount of UGX 160, 961,166.37 from the date of filing the suit until payment in

full. I also award the counter claimant interest on general damages at a rate of 10% per annum from the date of judgment until payment in full.

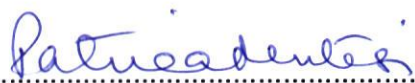
Costs

In accordance with Section 27 of the Civil Procedure Act Cap 71, costs follow the event unless Court for good cause orders otherwise and accordingly the Counter Claimant being the successful party is therefore awarded Costs of the suit.

In the result, judgement is entered for the counter claimant in the following terms;

- a. The counter defendant shall pay the counter claimant **UGX 160, 961,166.37 (Uganda Shillings One hundred sixty million, Nine hundred sixty one thousand, One hundred sixty six and Thirty seven cents only)** as the amount due in respect of the works done before termination of the contract.
- b. Interest is awarded on (a) above at the rate of 15% per annum from the date of filing the suit until payment in full.
- c. The counter claimant is awarded general damages of **UGX 15,000,000/= (Uganda Shillings Fifteen Million)**.
- d. Interest is awarded on (c) above at the rate of 10% per annum from the date of judgment until payment in full.
- e. The counter claimant is awarded the costs of the suit.

Dated at Kampala this 21st day of March 2023


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Hon. Justice Patricia Mutesi