IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Civil Suit No. 0111 OF 2017

In the matter between

MERIDIANA AFRICA AIRLINES (U) LTD **PLAINTIFF**

And

AVMAX SPARES (EA) LTD **DEFENDANT**

Heard: 30 March, 2022.
Delivered: 19 January, 2024

Contract Law *— Breach of contract — waiver of a contractual term can happen if the party deliberately fails to take certain actions or to take a positive act to strictly enforce the terms of a contract — The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or conduct as warrants the inference of the relinquishment of such right.*

Quantum Meruit — *Quantum meruit is restitutionary and the measure of relief in a quantum meruit is the actual value of the work done or goods supplied — the profitability of the contract is irrelevant. — What the concept of monetary restitution involves is the payment of an amount which constitutes a fair and just compensation for the benefit or "enrichment" actually or constructively accepted.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The plaintiff is a company incorporated and operating in Uganda while the defendant is a company incorporated and operating in Kenya. The plaintiff was engaged in air travel business under the brand name “Air Uganda” until its licence was revoked sometime during the year 2014. The defendant deals in the supply of new and refurbished aircraft parts, among other business. For a long period of time while “Air Uganda” was still operational, the two companies occasionally had business transactions between them involving the defendant’s leasing out to the plaintiff, various aircraft spare parts that were used and returned. They also carried out repairs and maintenance on the parts of the planes belonging to the plaintiff.

[2] On or about 27th November, 2014 the plaintiff executed an Asset Transfer Agreement with the defendant by which the defendant agreed to purchase an assortment of aviation equipment, machinery, fixtures and fitting from the plaintiff. Prior to the execution of that agreement, the defendant had inspected the items constituting the subject matter of the agreement. The purchase price was agreed at US $ 900,000 to be paid as follows; a sum of US $ 100,000 at the execution of the agreement, and the balance of US $ 800,000 on or before 19th December, 2014. In the event of delay, the defendant was to pay a sum of US $ 100,000 for every month the balance remained unpaid.

[3] Subsequently an addendum to the agreement was executed by which it was agreed that the defendant was to retain 10% of the contract sum, i.e. US $ 90,000 to enable it undertake confirmatory tests of the equipment to be transferred, provided that the sum so retained was to be paid not later than 31st December, 2014. Following the execution of that agreement and its addendum, the defendant made only two payments; in the sum of US $ 100,000 on 3rd December and US $ 709,985 on 17th December, 2014 leaving an outstanding balance of US $ 90,000.

[4] The parties thereafter had discussions regarding the rest of the aviation equipment, machinery, fixtures and fittings that had not been the subject of the Asset Transfer Agreement of 27th November, 2014. In discussions that took place between the respective Managing Directors of the two companies between 26th December, 2014 and 28th December, 2014, it was agreed that the items would be sold/purchased "as is" at the price of US $ 60,000 to be paid on 20th January, 2015. The defendant dully collected all the items and the consolidated outstanding amount thereby became US $ 150,000. The plaintiff thereafter made multiple demands for payment of that balance, to no avail. The plaintiff has since paid only US $ 11,336 hence the claim for US $ 138,664 as the current outstanding balance.

The defence to the claim.

[5] By its written statement of defence, the defendant denied liability for the claim made by the plaintiff. The defendant contended that during the month of January, 2015 it paid a sum of US $ 11,336 out of the then outstanding balance of US $ 90,000. The sum of US $ 78,649 of that amount was applied toward liquidation of the debt M/s Air Uganda owed the defendant. That offset was done with the plaintiff's acquiescence. During negotiations for the balance of US $ 90,000 between the parties, it was brought to the attention of the plaintiff's C.E.O then, Mr. Cornwell Muleya that the plaintiff had unpaid invoices due to the defendant to a tune of US $ 78,649 for parts and services provided to the Plaintiff. The plaintiff's C.E.O confirmed the same. The C.E.O of the plaintiff then consented to the defendant paying the balance due from the asset transfer agreement, less any invoices due to the defendant that was US $ 78,649. This set-off was put in writing and the Defendant was asked to pay US $ 11,336. The Defendant duly paid the sum of US $ 11,336 on 19th February 2015 effectively putting an end to the defendant's obligations under the Asset Transfer Agreement. As regards, the items that were not the subject of the Asset Transfer Agreement of 27th November, 2014 the plaintiff failed to deliver a number of them which remain missing to-date. That occurrence rendered reconciliation of the transaction inevitable, pending which the

defendant withheld the payment. The defendant thus counterclaimed a sum of US $ 78,649 for goods and services unpaid for but delivered to the plaintiff by the defendant.

The questions for determination;

[6] By their joint scheduling conference memorandum filed on 21st October, 2020 the parties submitted the following issues for the Court's determination, namely;

1. Whether the defendant breached the agreement.
2. Whether the plaintiff is entitled to recover the sum of US $ 138,664 with interest as claimed.
3. Whether the defendant is entitled to recover the sum of US $ 78,648.99 with interest as counter-claimed.
4. What remedies are available to the parties?

[7] In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant liable for the relief claimed. Generally, the plaintiff in the instant suit must show: (i) the existence of a contract and its essential terms; (ii) a breach of a duty imposed by the contract; and (iii) resultant damages.

The submissions of counsel for the defendant;

[8] The Court directed the parties to file their respective final written submissions. Counsel for the plaintiff's was to file by 22nd April, 2022 while that of the defendant was to file by 13th May, 2022 and a rejoinder if any by 18th May, 2022.Counsel for the plaintiff did not file their final submissions. Counsel for the defendant submitted that the defendant did not breach the terms of the Asset Purchase Agreement and duly performed its part as had been agreed to. The plaintiff therefore is not entitled

to the sum of US $ 138,649 claimed. The parties entered into two different and distinct agreements. The first agreement being the Asset Purchase agreement dated 27th November 2014 and the second agreement was the email agreement wherein the Defendant agreed to purchase various assets and parts from the plaintiff which was concluded on or about 28th December, 2014.

[9] The sum of US $ 78,649 which the plaintiff alleges is due and owing was paid to the plaintiff by an agreed set-off between the parties upon reconciliation of the outstanding invoices issued by the defendant to the plaintiff in the sum of US $ 78,649 for services and spare parts offered to the plaintiff. The C.E.O of the plaintiff entered into both an oral and written agreement varying the terms of the asset purchase agreement ·and allowed a setoff to the tune of US $ 78,649. This is the evidence of D.W 2 Mr. Cornwell Muleya, who was the Chief Executive Officer of the plaintiff at the time this set off was allowed. The C.E.O was the one that executed the agreement on behalf of the plaintiff as an authorised signatory as he had the power to bind the company. This was never controverted by the plaintiff. He also further executed the addendum to the agreement on behalf of the plaintiff. This fact was also never disputed.

[10] In paragraph 13 of his witness statement, Mr. Cornwell Muleya admitted having consented to the defendant offsetting the plaintiff's debt against the balance of US $ 90,000 that was due and owing in his authority as the C.E.O. The C.E.O of the plaintiff had the authority and power to enter into an agreement with the defendant on behalf of the plaintiff company. This was further confirmed by P.W.1 Mahmood Manji when he stated that Cornwell Muleya negotiated and signed all agreements and had authority to do so on behalf of the plaintiff company. Therefore, to the extent that the parties agreed to a setoff of the amounts due to the defendant. The set-off for the sum of US $ 78,649 was rightfully authorised by the plaintiff's C.E.O.

[11] Although Clause 1.5 of the Asset Transfer Agreement provides that "all sums payable shall be paid without deduction, withholding, set off or counterclaim

whatsoever," it was varied by the parties allowing the defendant to off-set amounts due and owing to them and hence the defendant\s payment of the balance of US $ 11,336. It was held in *Beatty v. Guggenheim Exploration Co (1919) 225 NY 380* at 387-388 that those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. 'Every such agreement is ended by the new one which contradicts it. Further, by virtue of section 67 of *The Contracts Act* the parties were at liberty to vary the said agreement as and when they deemed it fit to. We submit that the parties have a right to vary the contract. Consequently, the defendant did not breach the Asset Transfer Agreement.

[12] The plaintiff waived its right to the liquidated damages that would be owing to it for late payment when it entered into negotiations to conduct a reconciliation of accounts regarding the payment that culminated into the variation to the agreement that allowed the set off and also extended time for completion. D.W 2 testified that the parties agreed to extend the payment date to 28th February, 2015 due to the ongoing negotiations around the payments due and owing to both parties. Essentially, as soon as the parties came to a conclusion on the negotiation and allowed a set off, the defendant effected the payment of the balance due.

[13] During the Course of performance of the Asset Purchase Agreement, the parties entered into a new agreement for the purchase of various left over aviation assets. The plaintiff provided the defendant with a list of items that they sought to dispose of. Following various correspondences, the parties finally agreed to a sum total of US $ 60,000 as payment for the items as listed by the plaintiff. However, the plaintiff did not meet its part of the contract and only delivered part of the items. This was brought it to the attention of the plaintiff's officials who promised to revert but never did. The items that were left out were some of the most highly valued items that included the Red lined borescope that comprised at least 50% of the total market value of the left-over goods that the defendant sought to purchase. It is the above that prompted the defendant to withhold payment of the US $ 60,000.

[14] The email agreement was an “entire obligation contract” that required that the plaintiff delivers all the goods as stipulated in their negotiations and the list before the defendant could make any payment. In *Hydro Engineering Services Co v. Thorne International Boiler Services HCCS 818 of 2003* it was held that in an entire contract, complete performance by one party is a condition precedent to the liability of the other. The email agreement was for a lump sum payment of USO 60,000 with no particular value for each of the goods. It is impossible to break down the items to give each a value hence the definition “lump sum” agreement. The plaintiff, having failed to meet the terms of the contract cannot be allowed to benefit from his own wrong and recover the sum of US $ 60,000.

[15] The plaintiff does not dispute that the defendant actually carried out repairs and services and also offered them parts. They also do not dispute the amounts sought therein. The defendant has attached the invoices, coupled with the necessary loan Orders, Exchange Orders and various correspondences all pointing to the fact that the two parties were in business, together and the invoices are due and payable. The defendant has discharged its burden to prove that the plaintiff owes the said US $ 78,649. The plaintiff is not entitled to any of the remedies as sought. The plaintiffs have failed to establish its case against the defendant to the requisite standard and is therefore not entitled to any of the reliefs sought.

The decision;

First issue; whether the defendant breached the agreement.

Second issue; whether the plaintiff is entitled to recover the sum of US $ 138,664 with interest as claimed

[16] Being correlated, these two issues will be addressed concurrently. A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract, and this includes circumstances where an obligation that is stated in the contract is not completed on time. It is a failure, without legal excuse, to perform any promise that forms all or part of the contract. This includes failure to perform

in a manner that meets the standards of the industry. The facts at hand entail two agreements and court shall address them separately.

i. The Asset Transfer Agreement of 27th November, 2014

[17] The fact of execution of the Asset Transfer Agreement dated 27th November, 2014 (exhibit P. Ex.1) is not in dispute, nor are its terms nor the items in the inventory which includes 48 items categorised as "Controlled Life Tools"; 110 items categorised as "General Tools"; 158 items categorised as "Air Uganda MBK Kit CRJ 200" and 3,238 items in varying quantities categorised as "Consumables." It is the performance of the defendant's obligation to pay in full that is contested. While the plaintiff claims the defendant still owes a sum of US $ 138,664 under that agreement, the defendant contends it was paid by way of an agreed offset of an outstanding debt of US $ 78,649 that the plaintiff owed the defendant, such that the defendant's payment of the balance of US $ 11,336 on 19th February, 2015 constituted a final and full payment of that debt.

[18] By the parties' agreement as amended by the addendum, the defendant was obliged to pay US $ 90,000 on or before 19th December, 2014 failure of which the defendant was to pay a sum of US $ 100,000 for every month the balance remained unpaid. It turns out that the payment the defendant contends was the final instalment was paid about two months later, on 19th February, 2015. This prima facie is a beach of the obligation on the part of the defendant to pay by the specified date. The defendant advances two arguments to justify the prolonged delay; the fact that the parties thereafter engaged in a prolonged negotiation over an offset of mutual debts and that thereafter the plaintiff waived the delay.

[19] As regards the negotiation over an offset of mutual debts justifies the delay, the Court needs to examine the facts first. As a general rule, in order to vary a contract, both parties need to agree to this prior to the changes taking effect, preferably in writing. It was the testimony of D.W.2 that that the parties agreed orally to extend

the payment date to 28th February, 2015 due to the ongoing negotiations around the payments due and owing to both parties. There is no evidence to show that there was ever any further agreed extension of time beyond that date. The defendant intends that the court deduces from the plaintiff's unconditional acceptance of the sum of US $ 11,336 on 20th February, 2015 as a waiver of the obligation to pay by 19th December, 2014.

[20] In the first place, there is evidence on record to show that the negotiations continued into the month of February, 2015. D.W.2 Mr. Cornwell Muleya testified that the verification ended on 13th February, 2015. It was the testimony of D.W.1 Ms. Lucy Wawira Mwaniki that by the email dated 11th February, 2015 (exhibit P. Ex.8) from Mr. Azizz Ratansey to the defendant's MD concerning the US $ 90,000, the plaintiff allowed the defendant to offset the debt the plaintiff owed the defendant, whereupon the defendant immediately paid the balance which was US $ 11,336. The plaintiff's exhibit P. Ex.9 a SWIFT funds transfer dated 20th February, 2015 corroborates the testimony of D.W.1 that the payment followed immediately after the final agreed position, upon that mutual process of reconciliation of accounts and the plaintiff's permission for the off-set.

[21] Where a debtor has specific deadlines to meet, if following the expiry of the agreed period but without an express agreement to extend, the parties continue to perform their respective contractual obligations, it is likely that there will be an implied extension for a reasonable period. Unless the contract provides otherwise, the specified deadline would be replaced with a duty to perform within a reasonable time. What is reasonable time is a question of fact to be determined in the light of all the circumstances. After the lapse of a reasonable time for performance the creditor could and can give notice fixing a time for payment. This must itself be reasonable, notwithstanding that *ex-hypothesi* a reasonable time for payment has already elapsed in the view of the creditor. It would be most unreasonable if a party, having been lenient and waived the initial expressed time, should, by so doing, have prevented itself from ever thereafter insisting on reasonably quick

payment. Such a party is entitled to give a reasonable notice, making time of the essence of the matter (see *Charles Rickards Ltd v. Oppenheim [1950] 1 KB 616; [1950] 1 All ER 420*). In the instant case, the payment made within one week of concluding the reconciliation of accounts and mutual agreement to an offset, cannot be deduced as a breach.

[22] Secondly, a waiver of a contractual term can happen if the party deliberately fails to take certain actions or to take a positive act to strictly enforce the terms of a contract. In order to constitute a legal release or waiver of the contract rights, this action must be intentional and voluntary. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right. It means the forsaking of the assertion of a right at the proper opportunity, for example by a party forbearing from insisting on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its tenor (see *Agri-Industrial Management Agency Ltd v. Kayonza Growers Tea Factory Ltd and another, HCCS No. 819 of 2004* and *Andes (EAS) Ltd v. Akoong Mulik Systems and two others, H. C. Civil Suit No. 184 of 2008)*. Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estopped. An estoppel may result though the party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in question.

[23] In the instant case, by the email dated 11th February, 2015 (exhibit P. Ex.8) from Mr. Azizz Ratansey to the defendant's MD concerning the US $ 90,000, the plaintiff allowed the defendant to offset the debt the plaintiff owed the defendant, the plaintiff unconditionally expressed willingness to receive US $ 90,000 less "any invoices that may be pending for payment," which is an act of forbearance from

insisting on the mode of performance hitherto fixed by the contract. A party seeking to rely on waiver does not need to show that they relied on the other party's conduct, or that they suffered any particular detriment; the conduct itself is sufficient.

[24] On the other hand, estoppel as defined by section 114 of *The Evidence Act,* requires a declaration, act or omission, by which one party intentionally caused or permitted the other to believe a thing to be true and to act upon that belief. In such a case neither the party so declaring, acting, or omitting nor his or her representative is allowed, in any suit or proceeding between himself or herself and that other party or his or her representative, to deny the truth of that thing. Consequently, the plaintiff having expressly allowed the defendant to offset all its outstanding invoices with the defendant against the then outstanding sum of US $ 90,000 which left a balance of only US $ 11,336 that was duly paid on 20th February, 2015 as per exhibit P. Ex.9. Therefore, the plaintiff cannot now revert to Clause 1.5 of the Asset Transfer Agreement which required all sums payable to be "paid without deduction, withholding, set off or counterclaim whatsoever." The defendant having relied on the plaintiff's representation in doing that, the plaintiff is now estopped from reverting to the original position stated in the contract.

ii. <u>The email-exchange-based Assets Transfer agreement of 28th December 2014 or thereabout.</u>

[25] The second transaction is an outcome of an exchange of a series of email correspondences between the parties, that started around November, 2014 culminating in one that is dated 27th December, 2014 by which the plaintiff accepted to receive US $ 60,000 for the "left-over assets, on as-is basis" provided payment was made by 31st December, 2014. By an email dated 28th December, 2014, the defendant counter-offered to effect payment on 20th January, 2015 because they needed to receive the inventory first (exhibit P. Ex.8 also marked as exhibit D. Ex.13). That some of the items on the inventory eventually supplied by

the plaintiff on 2nd January, 2015 (exhibit D. Ex.17) were missing, was communicated to the plaintiff by emails dated 4th April, 2015 where it was stated; "I had sent the list of all missing tools. We need some kind of answer before we go any further," and another dated 9th April, 2015 (with the list attached).

[26] This was further referenced in the email dated 2nd September, 2015 relating to a proposed transaction between the defendant and another airline based in Burkina Faso (exhibit D. Ex.14). It is repeated in a similar emails dated 18th September, 2015 (exhibit D. Ex.15), 18th November, 2015 (exhibit D. Ex.14), 20th November, 2015 (exhibit D. Ex.16) and 8th December, 2015 (exhibit D. Ex.16). There is no direct communication between the plaintiff and the defendant concerning any missing items on the inventory relating to the transaction whose terms concluded on 28th December 2014. The tone of all these emails is that the defendant was using its experience in the two transactions it had previously had with the plaintiff, to explain its conduct in dealing with the transaction of purchase of similar equipment from the Burkina Faso based Airline.

[27] It all started with an expression of interest by the Fleet Manager of M/s Finaircraft S. A, the holding company for the Burkina Faso based airline, in his email dated 12th May, 2015 where he stated that "after the successful conclusion of the sale to AvMax of the Air Uganda stock, I wanted to check if an interest might exist at AvMax to consider the purchase of similar packages coming from the other two airlines." The above inference can then be deduced from the defendant's response in expressions such as that in the email dated 2nd September, 2015 to the effect that "I am sorry for the lateness of my quote, but our experience with Air Uganda was so so. Some of the parts was (sic) missing, also on the tools, half of them we could not find especially a borescope that we needed,"; "Also included [are] the parts [which] were missing on the Air Uganda deal. The one that we are sore about is the red lined borescope. Let me know if you can find it. Enclosed are all the pieces [which] were missing. The borescope is the major one highlighted with red," in the email dated 18th September, 2015 at 7.42 am; and "if we could revisit the

Air-Uganda problem" in the email dated 18th September, 2015 at 12.41 pm, to which the response from M/s Finaircraft S. A was "this is to confirm that we are currently doing our best to find a compromise for the issue with [the] Air Uganda transaction" in the email dated 8th December, 2015.

[28] On record, evidence of the rest of the complaints about missing items from an inventory supplied by the defendant all pre-date the transaction whose terms were concluded on 28th December 2014. They are emails dated from 28th March, 2014 to 30th June, 2014 at pages 93 to 99 of the defendant's trial bundle. By the dates appearing on these emails, they can only relate to the transaction of 27th November, 2014 whose accounts were closed by the reconciliation that culminated in the defendant's payment of US $ 11,336 on 20th February, 2015. The defendant cannot raise any shortages they encountered during that closed transaction as a basis for withholding payment of the agreed US $ 60,000 which it ought to have paid, latest 20th January, 2015.

[29] Alternatively, liability to a third party arises in situations where the third party is in as proximate a position to the advocate as he would have been had he been the advocate's client, such as where the advocate acts for both parties to the transaction, in which case it is reasonable in itself for the purchaser to have relied on the vendor's advocates and agents, to have acted competently in that regard. The Court is deciding whether to treat the advocate as having assumed legal responsibility to the third party, non-client, for his or her actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair.

[30] The plaintiff has on record a couple of email correspondences transmitted to the defendant on 7th January, 2015, 18th January, 2015 and 11th February, 2015 (at page 14 of the plaintiff's trial bundle) to which the defendant responded by emails dated 4th April, 2015 and 9th April, 2015 concerning items listed in the inventory but

found to be missing. There is no evidence to show, as the defendant claims, that the plaintiff has acquiesced the defendant's withholding of that payment. It is the defence though that this was an entire contract in respect of which the defendant's performance is predicated on the plaintiff's delivery of all the missing items.

[31] A contract may be either "entire" or "severable." In an entire contract, the whole contract stands or falls together (see *Cutter v. Powell (1795) 6 T.R.319; 101 E.R.573 and Poussard v. piers (1876) 1 Q.B.D. 410)*. In a severable contract, the failure of a distinct part does not void the remainder. An "entire" contract is said to be one and indivisible while a "severable" contract indicates an entire contract which, based on the apportion ability of the items in the promise on the one side to the items in the promise on the other, may for the purposes of justice be severable. The character of the contract in such case is determined by the intention of the parties ascertained from the construction of the contract and any evidence legally admissible on that topic. *Chitty on Contracts, 25th Edition (1983),* defines an entire contract as one which requires "complete performance by one party as a condition precedent to the liability of another." Whenever there is a contract to pay a gross sum for a certain and definite consideration, which is not susceptible of apportionment on either side, the contract is entire. In the instant case, there are no prices attached comprehensively to all the individual items of inventory sold to the defendant. The gross sum of US $ 60,000 requires delivery of all items listed in the inventory. Therefore, the contract is entire.

[32] The theoretical basis given for the rule relating to the enforcement of entire contracts by one of the legal authors has been widely accepted. *Cheshire and Fifoot in Law of Contracts 10th Edition (1981) at page 590* say: -

> If the parties have agreed as a term of the contract that entire performance is required by C, then C cannot sue upon *a quantum meruit* to recover the value of the work that he has done. The reason is that such an action is founded upon an implied promise by the other party to pay a reasonable sum for the work actually done ….. Such an implication is impossible so long as the express contract to pay the full amount remains in existence. Nothing

> can be implied which is inconsistent with the express contract ... Where the parties have provided that certain work shall be done for a lump sum, no Judge can assert that it was their intention that a reasonable sum should be paid for each part of the work as it was performed: Dr. G.L. Williams commenting on *The Law Reform (Frustrated Contracts) Act, U.K.*

[33] On the one hand to allow a party to stop performance when he or she pleases and sell his or her part performance at value fixed by the Court countenances unfaithfulness and may be regarded in effect as imposing a new contract on the defendant. On the other hand, to deny the party in default any recovery will often give the defendant far more than fair compensation for the non-completion of the contract and impose on the plaintiff an unjust forfeiture. As a result, one of the exceptions which the Courts have developed to mitigate the harshness of this rule is that of substantial performance, common in building cases and cases generally for work and labour done where there is relatively minor incompleteness or defect in performance, not rendering the work useless, and the owner has taken the benefit of the work done under the contract or where the nature of the defects and the cost of remedying them do not amount to substantial performance (see for example *Bolton v. Mahadeva [1972] I W.L.R. 1009*). The exception is applicable where the defaulting party's obligations are entire as to quantity, but not as to quality.

[34] To compel an arbitrary, mechanical, automatic forfeiture of all pay where the defendant has received and keeps the benefit of valuable goods, especially where the contract is nearly completed, is crudely severe. When there is substantial performance of an entire contract in which the defaulting party's obligations are entire as to quantity rather than quality, the Court has wide powers to make restitutionary orders based on the notions of unjust enrichment, and including orders for payment for part performance (see *Consultants Ltd v. Empire Insurance Group S.C. Civil Appeal No. 9 of 1994*). The basis of restitution is that if one person has benefited at the expense of another and it would be unfair for him to retain that benefit for nothing, he must make restitution, especially where a person actually or constructively accepts a benefit in circumstances where the recipient would be

unjustly enriched at the expense of the plaintiff if recovery were not permitted specifically or by the payment of the money value of the benefit he has received. In the instant case, the defendant actually accepted a benefit by taking the goods supplied by the plaintiff in circumstances where it would be unjustly enriched at the expense of the plaintiff if recovery were not permitted.

[35] If the benefit consists simply of a sum of money received by the party from whom restitution is sought, there is no difficulty in determining this amount. If the benefit consists of something else, however, such as services or property, its measurement in terms of money poses serious problems. As a general rule a party who has partly performed an entire contract is not entitled to a *quantum meruit.* The exceptions are when the other party has wrongfully repudiated the contract and when the other party has elected to accept the benefit of the part performance in circumstances which justify the implication of a new contract. *Quantum meruit* being an equitable remedy targets unjust enrichment and therefore covers actual services rendered or materials supplied (see *Bison Consult International Limited v. Salim Construttori SpA, C.A. Civil Appeal No. 77 of 2013* and *Banque Financiere de la Cite SA v Parc (Battersea) Ltd [1999] 1 A.C. 221*). That the amount awarded is to be "reasonable recompense" or "reasonable value" suggests that the value is to be assessed objectively. The purpose of *quantum meruit* is to recompense the party for the value of the work which he has done, material or goods supplied, i.e. to restore the party to the position which it would have been in if the contract had never been made. In other words, damages are compensatory, while *quantum meruit* is restitutionary. The measure of relief in a *quantum meruit* is the actual value of the work done, material or goods supplied; the profitability of the contract is irrelevant. What the concept of monetary restitution involves is the payment of an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or "enrichment" actually or constructively accepted.

[36] The leading case regarding the method used for assessing the *quantum meruit* is *Lodder v. Slowey [1904] A.C. 442* where the plaintiff had entered into an entire

contract with the defendant Council to do construction work. The Council wrongfully prevented the plaintiff from completing the work. There were disputes about “extras" and the unexpected collapse of a tunnel through no fault of the plaintiff. The plaintiff sued the Council in the Supreme Court of New Zealand for damages for breach of contract and alternatively for a *quantum meruit.* No evidence was given which would have enabled the trial judge to assess damages. The claim proceeded on the basis of *quantum meruit*. On appeal the Privy Council upheld the decision of the Full Court of New Zealand which had held: -

> The measure of damage in such an action is the actual value of to the work labour and materials, and it is immaterial whether the contractor, if he had been allowed to complete the contract, would have made a profit or loss.

[37] The courts have not provided a definitive set of rules to determine how a claim for a *quantum meruit* or “reasonable sum” is to be calculated. The assessed amount will turn on the particular facts of the case. A *quantum meruit* is to be valued objectively (i.e. according to “going rates,” awards, etc.) but the contract price is evidence relevant to the value to be allowed in cases where there is no external measure of value such as an award. Where the nature of the contract renders difficult to assess a precise for the individual items involved, the court is entitled to make a global assessment or to assess what can be proven and then adjust that amount to reflect a fair and reasonable value. In the instant case the value of the contract for all items listed in the inventory is US $ 60,000. The inventory has 28 items categorised as “Furniture & Fixtures”; 5 items categorised as “Data Handling Equipment”; 6 items categorised as “Machines and Equipment,” inclusive of one motor vehicle, and 41 items categorised as “Ground Support Equipment.” It is the latter category that included the borescope.

[38] Out of all those items, it is only the 28 items categorised as “Furniture & Fixtures,” the 5 items categorised as “Data Handling Equipment” and the 6 items categorised as “Machines and Equipment,” where each individual item was valued, to yield a

total of shs. 319,965,750/= (equivalent to US $ 117,637.47 hence the exchange rate at the time was US $ 1: 2,719/=) which the plaintiff discounted at 18% on basis of which they presented an asking price of US $ 96,460.26 that was eventually bargained to the US $ 60,000 that is now the subject of this contract. Although the defendant claimed the borescope is the most valuable item on the list, a scan of price offers for aviation borescopes available on the internet places them in the range of US $ 2,576.00 - $ 3,174.00, which represents approximately 5% of the contract price. In the absence of an itemised list, I am inclined to allow another deduction of 5% for the missing not so valuable items. The plaintiff is thus entitled to be paid 90% of the agreed purchase price on a *quantum meruit* basis. In conclusion therefore, I find that the defendant breached the second agreement by its failure to pay the sum of US $ 54,000 to the plaintiff on or about 20th January, 2015.

[39] Interest is a standard form of compensation for the loss of the use of money. The award should address two of the most basic concepts in finance: the time value of money and the risk of the cash flows at issue. A plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011* and *Kinyera v. The Management Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013*).

[40] Interest can be awarded by virtue of a contract, express or implied, or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid. Interest falls due when money is wrongfully withheld and not paid on the day on which it ought to have been paid (see *Carmichael v. Caledonian Railway Co. (1870) 8 M (HL) 119).* If a party does not pay a sum when it falls due the aggrieved party is entitled to interest from the time

payment is due to the time of payment. The other justification for an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly. An award of interest is compensation and may be regarded either as representing the profit the plaintiff might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation (see *Riches v. Westminster Bank Ltd [1947] 1 All ER 469 at 472*).

[41] As per the coerced loan theory, the plaintiff was effectively coerced into providing the defendant with a loan at the date of the original breach, and therefore deserves to earn interest on this forced loan at the unsecured borrowing rate. Compensation by way of interest is measured by reference to a party's presumed borrowing rate in the relevant currency because that rate fairly represents the loss of use of that currency (see *Dodika Limited & Others v. United Luck Group Holdings Limited [2020] EWHC 2101 (Comm*). The unpaid party to a contract is entitled as of substantive right to interest from the time when payment is contractually due. The plaintiff is accordingly awarded interest on the decretal sum at the rate of 8% per annum, from 20th January, 2015 until payment in full.

[42] The plaintiff is not entitled to any additional general damages. The common law does not award general damages for delay in payment of a debt beyond the date when it is contractually due (see *President of India v. La Pintada Compagnia Navigacia SA ("La Pintada") [1985] AC 104*). In special circumstances where the loss did not arise from the ordinary course of things, general damages are awarded only for such losses of which the defendant had actual knowledge (see *Hungerfords v. Walker (1989) 171 CLR 125*). The plaintiff not having proved such special circumstances beyond losses arising from the ordinary course of things when there is delay in payment of a debt beyond the date when it is contractually due, it is not entitled to the award of general damages.

Third issue; whether the defendant is entitled to recover the sum of US $ 78,648.99 with interest as counter-claimed

Fourth issue; whether there are any available remedies for the parties.

[43] The two issues will be considered concurrently. The defendant raised a counterclaim based on averments that on various dates between the month of July, 2014 and January 2015, the defendant provided spare parts and services to the plaintiff and issued invoices for the goods and services. This was supported by copies of invoices marked as exhibits D. Ex.6 to D. Ex.12. The defendant avers that despite several reminders, the plaintiff refused, failed, or neglected to settle the above invoices for the goods and services consumed by the plaintiff.

[44] This is a classic case of attempting to eat one's cake and have it at the same time. It was the testimony of D.W.1 Ms. Lucy Wawira Mwaniki that by the email dated 11th February, 2015 (exhibit P. Ex.8) from Mr. Azizz Ratansey to the defendant's MD concerning the US $ 90,000, the plaintiff allowed the defendant to offset the debt the plaintiff owed the defendant, whereupon the defendant immediately paid the balance which was US $ 11,336. I find that the counterclaim was extinguished by that off-set which concluded the initial transaction. Accordingly, there is no basis for the counterclaim. It is dismissed with costs to the plaintiff.

[45] The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule.

Orders:

[46] Therefore in conclusion, judgment is entered for the plaintiff against the defendant, as follows;

a) Payment of a sum of US $ 54,000.

b) Interest thereon at the rate of 8% per annum, from 20th January, 2015 until payment in full.

c) The costs of the suit and of the counterclaim.

Delivered electronically this 19th day of January, 2024 ……Stephen Mubiru……

Stephen Mubiru
Judge,
19th January, 2024.

Appearances

For the plaintiff : M/s Shonubi Musoke & Co. Advocates and Solicitors

For the defendant : M/s K & K Advocates (formerly Kiwanuka & Karugire Advocates)