

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

CIVIL SUIT NO. 852 OF 2014

KAMPALA CAPITAL CITY AUTHORITY ::::::::::::::::::::::: PLAINTIFF

VERSUS

FOSTER-A- LIGHT LTD :::::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

JUDGMENT

Introduction

The Plaintiff a body corporate filed this suit against the Defendant a limited liability company for breach of contract, recovery of UGX 1,658,293,630/=, general damages, interest and costs of the suit.

Background

The brief facts of the case constituting the Plaintiff's claim are that; on 23rd September 2008, the Defendant was contracted by the Plaintiff to install, manage and maintain both newly installed and existing street light poles and advertise on the said street light poles in the City of Kampala for 60 months from 1st October 2008. The Defendant was according to clause 6(iii) of the contract obliged to remit to the Plaintiff UGX 443, 268,000/= in the first twelve months of the contract period to be paid in 12 equal monthly instalments of UGX 36,939,000/= payable within the first week of the succeeding month. The Defendant was also responsible for the payment and settlement of all electricity bills for the street lights. However,

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5 the Defendant defaulted on its obligations hence breaching the contract to which the Plaintiff terminated the contract.

Representation

10 The Plaintiff was represented by Counsel David Oyo of the Directorate of Legal Affairs, KCCA. Initially, the Defendant was represented by M/s AF Mpanga, Advocates.

However, on 28th October 2021, when this matter came up for hearing, Counsel Allan Katangaza of M/s AF Mpanga, Advocates appeared and informed Court that instructions were withdrawn from them. On 22nd 15 February 2022, an order for substituted service was granted by Court and the same effected on 1st August 2022 by affixing the hearing notice on the Court Notice Board and a publication of the same in the New Vision Newspaper of 10th August 2022.

20 On 12th October 2022, after the Court was satisfied that service had been effected upon the Defendant, the matter proceeded ex parte against the Defendant under Order 9 Rule 20 (1) (a) of the Civil Procedure Rules.

Consideration of the issue of arbitration

25 The Defendant in its written statement of defence, disputed the procedure of termination of the contract in issue contending that the agreement between the Plaintiff and Defendant expressly provided for arbitration as the dispute resolution mechanism. Given the law relating to arbitration clauses in an agreement, I find it prudent to address this issue first before 30 delving into the merits of the case.

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5 **Viscount Simon L.C** in the case of ***Heyam and Another Vs Darwin's Ltd (1942) 1 All ER 337 at page 342*** defined an arbitration clause to mean a written submission agreed to by the parties to the contract and like other written submissions, arbitration, must be construed according to its language and in the light of the circumstances in which it was made.

10 Notably, arbitration agreements are purely matters of contract, and the effect of **section 5 (1) of the Arbitration and Conciliation Act** is to make contracting parties live up to their agreement by disallowing any of them to refuse to perform their contract when it becomes disadvantageous to
15 them.

It is trite that an arbitration agreement may cover not only “disputes” but also “disagreements” and “differences of opinion.” The existence and the validity of an arbitration agreement should be determined primarily in light
20 of the common intent of the parties, the requirement of good faith, and the belief that the person who signed the clause had the power to bind the company. (See: ***Premium Nafta Products Ltd and others Vs Fili Shipping Company Ltd and others [2007] UKHL 40; Fiona Trust and Holding Corporation Vs Privalov [2008] 1 Lloyd's Rep 254, [2007] 4 All ER 951***).
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As stated in the case of ***Vehicle and Equipment Leasing (U) Ltd Vs I Engineering Uganda Limited Misc. Application No. 1067 of 2021*** the Court stated at page 5 that:

30 “It is my understanding that the provisions of an arbitration clause in the agreement is binding on the parties thereto. The arbitration clause takes precedence in dispute resolution by the parties, unless

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5 *the Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed which, is not the case here.”*

10 The construction of an arbitration clause, therefore, should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they entered or purported to enter to be decided by the same tribunal. The clause should be construed following this presumption unless the language makes it clear that certain questions were intended to be
15 excluded from the arbitrator’s jurisdiction. This type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims.

20 In the instant case, clause 17 of the General Conditions of the Contract between the parties provides that:

17.1 *“The procuring and disposing entity and the provider shall make every effort to resolve amicably by direct informal negotiation any
25 disagreement or dispute arising between them under or in connection with the contract or interpretation thereof.”*

17.2. *“If the parties fail to resolve such a dispute or difference by mutual consultation within twenty-eight days from the commencement of
30 such consultation, either party may require that the dispute be referred for resolution in accordance with the arbitration law of Uganda or such other formal mechanism specified in the SCC.”*

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5 Furthermore, SCC 17.2 of the Contract provides that:

“Dispute settlement: The Dispute Settlement shall be in accordance with the Arbitration Law of Uganda.”

10 From the above, it is evident that the parties intended to arbitrate any dispute that would arise under the contract. The arbitration clause is explicit in its wording as to the resolution of any matter arising from the Agreement to arbitration as a mode of dispute resolution.

15 I have noted that the written statement of defence was filed on 7th January 2015. The letters marked “F1” and “F2” as attached to the written statement of defence that sought the pursuit of arbitration are dated 28th June 2012 and 27th July 2012 respectively.

20 As quoted by the **Court of Appeal** in the case of ***National Social Security Fund Vs Alcon International Ltd CA No.2 of 2008, David St. John Sutton in Russell on Arbitration, (22nd Ed. Sweet & Maxwell) paragraph 2-119***, page 80, states that:

25 *“...a party may abandon its right to arbitrate for example by delay or inaction, or by commencing court proceedings in breach of an arbitration agreement. However, the courts are slow to find such repudiation or abandonment without very clear evidence of an intention to abandon the right to arbitrate together with reliance by the other party to its detriment. Even if the right to arbitrate a particular dispute has been*
30 *abandoned, that does not necessarily mean that the arbitration itself has been abandoned.”*

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5 The question then is whether or not the Defendant waived its right to arbitrate by its conduct.

Section 5(1) of the Arbitration and Conciliation Act requires a Court before which proceedings are being brought in a matter which is the
10 subject of an arbitration agreement, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, to refer the matter back to the arbitration unless the Court finds; - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the
15 parties with regard to the matters agreed to be referred to arbitration.

While “inoperative” covers situations where the arbitration agreement has become inapplicable to the parties or their dispute, “incapable of being performed” relates to situations where the arbitration cannot effectively be set in motion.

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The term “inoperative” was considered in the case of **Broken Hill City Council Vs. Unique Urban Built Pty Ltd [2018] NSWSC 825**, where it was defined as “having no field of operation or to be without effect.” It covers those cases where the arbitration agreement has ceased to have
25 effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons, including; - where the parties have implicitly or explicitly revoked the agreement to arbitrate; where the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of *res judicata*); where the award has been set aside
30 or there is a stalemate in the voting of the arbitrators; or the award has not been rendered within the prescribed time limit; where a settlement was reached before the commencement of arbitration, and so on.

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The phrase “incapable of being performed” was considered in the case of ***Lucky-Goldstar International (HK) Ltd Vs NG Moo Kee Engineering Ltd [1993] HKCFI 14 and Bulkbuild Pty Ltd Vs Fortuna Well Pty Ltd & Ors [2019] QSC 173*** where it was said to relate to the capability or
 10 incapability of parties to perform an arbitration agreement; the expression would suggest “something more than mere difficulty or inconvenience or delay in performing the arbitration.”

There has to be “some obstacle which cannot be overcome even if the
 15 parties are ready, able and willing to perform the agreement.”

It applies to cases in which; - the arbitration cannot be effectively set in motion; the clause is too vague or perhaps other terms in the contract contradict the parties' intention to arbitrate; an arbitrator specifically named in the arbitration agreement refuses to act or if an appointing
 20 authority refuses to appoint; the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, and so on. These are situations in which the arbitration agreement is frustrated or becomes incapable of being fulfilled or performed, due to unforeseen contingencies. The grounds for holding that
 25 a contract has been frustrated apply to an arbitration clause. (See: ***Yan Jian Uganda Company Ltd Vs Siwa Builders and Engineers, H.C. Misc. Application No. 1147 of 2014***).

In the instant case, the Defendant according to the Court record,
 30 participated in mediation before a Court accredited mediator in respect of HCCS No. 852 of 2014. According to the report of the mediator (handled under the Commercial Court Division, Mediation Registry) dated 26th

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5 February 2015, both parties participated in the mediation and the Defendant was represented by M/s AF Mpanga, Advocates. Two mediation hearings were held on 5th February 2015 and 26th February 2015. The mediation failed and the Court accredited mediator returned the file to Court for proceeding with the scheduling conference.

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My view is that the Defendant waived the right to arbitrate and submitted to the jurisdiction of this Court by participating in part of the proceedings of Court. The Defendant's conduct in failing to raise the issue of arbitration during the Court assisted mediation hearings which it participated in and
15 failing to appear before Court subsequently after the matter was referred back to Court for the scheduling conference; shows that the right to arbitration had been waived and thus the arbitration agreement was rendered inoperative.

20 Having participated in mediation which failed, the mediator referred the matter back to the Judge for the scheduling conference which is part of the litigation process. The arbitration agreement in my view became inoperative in accordance with **Section 5(1)(a) of the Arbitration and Conciliation Act.**

25 In the premises, I shall proceed with considering the merits of the suit.

The Plaintiff had a sole witness Mr. Abudallah Ssenyonjo (PW1), the Supervisor of Electrical Engineering in the Directorate of Engineering and Technical Services of the Plaintiff, who affirmed and proceeded with a
30 witness statement as his evidence in chief.

Issues for determination

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5 In his submissions, Counsel raised two issues for the determination of this Court, that is;

1. Whether the Defendant breached the contract?

2. What are the remedies available?

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Plaintiff's submissions

Issue 1: Whether the Defendant breached the contract?

Relying on the case of ***Ewadra Emmanuel Vs Spencon Services Limited***
15 ***HCCS No.22 of 2015*** in which **Hon. Justice Stephen Mubiru** defined breach of contract to mean a situation when a party to a contract neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without legitimate legal excuse, Counsel for the Plaintiff submitted that the Plaintiff's only witness Mr. Abudallah
20 Ssenyonjo, testified in his witness statement under paragraph 3 that the Plaintiff executed a contract for the installation of street light poles, maintenance of both newly installed and existing street light poles and for advertising on the street light poles for a period of 5 years as evidenced by PExh.1.

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As per clause 6(iii) of PExh.1, the Defendant was obliged to remit to the Plaintiff UGX 443,268,000/= (Uganda Shillings Four Hundred Forty Three Million Two Hundred Sixty Eight Thousand Only), for the first twelve months of the contract period in 12 equal monthly installments and that
30 under clause 11, the Defendant agreed to pay all electricity bills for the street lights and submit evidence of payment on a monthly basis to the Plaintiff. Counsel further submitted that the Defendant defaulted in

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5 remission of the contract monthly instalments during the pendency of the contract.

Counsel submitted that the Defendant defaulted in its obligations to settle electricity bills for the various advertising tools under the contract and at
10 the time of filing this suit, had accumulated electricity bills worth UGX 537,423,007/=. He submitted that UMEME Ltd, by notice of 28th March 2014, demanded from the Plaintiff payment of electricity bill arrears which had accumulated to UGX. 628,908,658/=. Counsel submitted that to
15 avoid the disruption of socio-economic activity in Kampala due to disconnection of electricity to the street poles, the Plaintiff made a commitment to UMEME Ltd, to pay the outstanding bill owed by the Defendant with the intention of seeking reimbursement from it.

In conclusion on this issue, Counsel submitted that the Plaintiff has since
20 paid electricity bills due to the Defendant under the impugned contract to the tune of UGX 628,908,658/=.

Analysis and Determination

25 **Black's Law Dictionary, 9th Edition** defines a contract to mean an agreement between two or more parties creating obligations.

Section 10(1) of the Contracts Act, 2010 also defines a contract as an agreement made with the free consent of parties with the capacity to contract, for a lawful consideration and with a lawful object, with the
30 intention to be legally bound.

On the other hand, a breach of contract is where one or both parties fail to fulfil obligations imposed by the terms of the contract. (See: the case of

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5 ***Nakawa Trading Co. Ltd Vs Coffee Marketing Board Civil Suit No.137 of 1991).***

Lady Justice C. K. Byamugisha in the case of ***William Kasozi Vs DFCU Bank Ltd HCCS No.1326 of 2000***, stated that:

10 *“Once a contract is valid, it creates reciprocal rights and obligations between the parties to it.”*

In the instant case, as evidenced by PExh.1, the parties entered into a written contract. The clauses alleged to have been defaulted by the Defendant are clearly laid out under clauses 6 and 11 of the contract.

Clause 6 (iii) expressly states that:

- 15 • *“Shs 443,268,000/= (Uganda Shillings Four Hundred Forty-Three Million Two Hundred Sixty Eight Thousand Only) net of taxes and other costs shall be paid to the Council in the first 12 (twelve) months of the contract period.*
- 20 • *The Shs. 443,268,000/= (Shillings Four Hundred Forty-Three Million, Two Hundred Sixty Eight Thousand) shall be paid in 12 equal monthly installments of U. Shs 36,939,000/= (Shillings Thirty Six Million Nine Hundred Thirty Nine Thousand) and shall be apportioned to the five Divisions of the City in accordance to where it is generated from.*
- 25 • *The monthly installments shall be made within the first week of the succeeding month.”*

I have taken a keen look at the contract in issue and, a final demand notice for the debt owed to the Plaintiff by the Defendant dated 22nd October
30 2014. The said letter was received by M/s AF Mpanga, Advocates on the same day. I have also taken a look at the written statement of defence. The Defendant contended that the effect of the actions and omissions of KCCA

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5 singularly and cumulatively amounted to a breach of the Agreement and fundamentally varied, and also made further performance of the Defendant's obligations different from what was envisaged in the Contract.

The above assertions by the Defendant were not backed by any documentary evidence either by way of complaint or clarification in any
10 way hence unable to convince this Court to believe its statements.

In the circumstances, considering the evidence adduced by the Plaintiff, I find that the Defendant breached its obligations under clauses 6 (iii) and 11 of the contract in issue.

Issue No. 1 is answered in the affirmative.

15 **Issue 2**

What are the remedies available?

Special damages

In his submissions, Counsel submitted that the Plaintiff prayed for UGX 1,658,293,630/= (Uganda Shillings One Billion Six Hundred Fifty Eight
20 Million Two Hundred Ninety Three Thousand Six Hundred Thirty Only) as special damages due and owing to it. He further referred to paragraph 9 of the witness statement seeking payment of the accumulated amount of UGX 628,908,658/= (Uganda Shillings Six Hundred Twenty Eight Million Nine Hundred Eight Thousand Six Hundred Fifty Eight Only) in electricity
25 bills. The amount claimed for electricity bills of UGX 537,423,000/= was stated to be the outstanding electricity bills amount by the time the case was filed.

The plaint was filed on 9th December 2014 and yet the notice from UMEME Ltd with a higher amount in respect of electricity bills is dated 28th March

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5 2014 and the Plaintiff vide the response dated 8th August 2014 committed to pay UGX 628,234,031/= which had accumulated as a result of the Defendant's defaulting on payment. The Plaintiff committed to UMEME Ltd vide the aforementioned letter to remit UGX 100,000,000/= per month towards settlement of the outstanding amount of UGX 628,234,031/=. It is not clear why the Plaintiff did not claim for this amount in the plaint filed on 9th December 2014 and only raised it later in the witness statement and submissions. Court will therefore not delve into this in the Judgment.

It is trite and as was stated in the case of ***W.M Kyambadde Vs MPIGI District Administration [1984] HCB and Bonham Carter Vs Hyde Park Hotel Ltd [1948] 64 TLP 177*** the guiding principle is that special damages must be specifically pleaded and strictly proved. I have noted that the special damages claimed for in the plaint, specifically of UGX 1,658,293,630/= was inclusive of electricity bills as at the date of filing the suit. The claim as per paragraph 4 of the plaint was for recovery of UGX 1,120,870,623/= for breach of contract and UGX 537,423,007/= being amounts paid by the Plaintiff to UMEME Ltd for electricity bills for the various advertising tools erected by the Defendant under the contract all totaling to UGX 1,658,293,630/=. I will therefore restrict myself to awarding the amount of UGX 1,658,293,630/= as claimed in the plaint as special damages.

General damages

Counsel for the Plaintiff submitted that a Plaintiff who suffers damages due to the wrongful act of the Defendant must be put in the position he or she would have been if she or he had not suffered the wrong.

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5 Counsel submitted that in the instant case, the Plaintiff, lost revenue that would have been used for delivery of important services to the public and that the sums of money lost by the Plaintiff to the Defendant would have no doubt earned it interest or profit from 2008 to date.

It is trite that general damages are awarded at the discretion of the Court
10 to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. (See: the cases of ***Takiya Kashwahiri & Anor Vs Kajungu Denis, CACA No.85 of 2011, Hadley Vs Baxendale [1894] 9 Exch 341 and Kibimba Rice Ltd Vs Umar Salim, S.C. Civil Appeal No.17 of 1992***).

15 As laid out in the case of ***Uganda Commercial Bank Vs Deo Kigozi [2002] 1 EA 305***, in the assessment of such damages, the Court should be guided by the value of the subject matter, the economic inconvenience the Plaintiff has been put through and the nature and extent of the injury suffered.

20 Taking the above into consideration and having found the Defendant in breach of contract, I hereby grant general damages of UGX 20,000,000/= (Uganda Shillings Twenty Million Only).

Interest

Section 26 of the Civil Procedure Act, Cap. 71 empowers this Court to
25 award interest on a decretal sum.

In the case of ***Wallesteiner Vs Moir (1975) 1 All ER 849, Lord Denning M.R*** stated that:

30 *“In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs in its business. It is plain that the company should be compensated for the loss thereby*

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5 *occasioned to it. Mere replacement of the money - years later - is*
by no means adequate compensation, especially in days of
inflation. The company should be compensated by award of
interest... But the question arises; should it be simple interest or
compound interest? On general principles I think it should be
10 *presumed that the company (had it not been deprived of the money)*
would have made the most beneficial use open to it... It may be
that the company would have used it in its own trading operations
or that it would have used it to help its subsidiaries. Alternatively,
it should be presumed that the wrongdoer made the most beneficial
15 *use of it.”*

The Plaintiff claimed for interest on special and general damages at 24% commercial lending rate from the date of termination of the contract, that is, 23rd November 2012 until payment in full. I find the rate of interest of
20 24% per annum unjustified and Counsel did not provide any convincing justification for the same in the submissions.

In the circumstances, I find that a rate of interest of 8% per annum on the decretal sum/special damages from the date of filing the suit until
25 payment in full is sufficient. Furthermore, interest at the Court rate of 6% per annum is awarded on general damages from the date of Judgment until payment in full.

Costs

30 **Section 27 (2) of the Civil Procedure Act, Cap. 71** provides that costs of any cause follow the event unless otherwise ordered by Court. In the
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5 circumstances, since there is no reason to deprive the Plaintiff of the same,
it is entitled to the costs.

In the circumstances, I accordingly issue the following Orders:

1. The Defendant is in breach of its contractual obligations.
- 10 2. The Defendant shall pay the Plaintiff UGX 1,658,293,630/= (Uganda Shillings One Billion Six Hundred Fifty Eight Million Two Hundred Ninety Three Thousand Six Hundred Thirty Only) as special damages.
- 15 3. General damages, of UGX 20,000,000/= (Uganda Shillings Twenty Million Only) shall be paid by the Defendant to the Plaintiff.
- 20 4. Interest of 8% per annum on the sum in (2) above from the date of filing the suit until payment in full.
5. Interest of 6% per annum on general damages from the date of Judgment until payment in full.
- 25 6. Costs of the suit are awarded to the Plaintiff.

Dated, signed and delivered electronically this **15th** day of **January, 2024.**



30 Patience T. E. Rubagumya

JUDGE

15/1/2024