THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 1416 OF 1999

1. **PAUL BYOMA**
2. **ABRAHAM RUGUMAYO ::::::::::::::::::::::::::::::::PLAINTIFFS**

VERSUS

GEORGE WILLIAM KATATUMBA::::::::::::::::::::::::DEFENDANT

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGEMENT

This is a claim by the plaintiffs against the defendants for specific performance, interest and costs, for alleged fraudulent/unreasonable removal of the plaintiff's from participation in a project for which both parties has been prequalified.

The facts giving rise to the above claim, as agreed by the parties, are that the plaintiffs are a firm of quantity surveyors, while the defendant is an architect. The defendants invited the plaintiffs on the 5/07/1999 to team up with him in prequalifying as consultants in a contract whose particulars the Judiciary Project Secretariat had published in the New Vision News paper. The plaintiffs supplied the defendant with the information required on their part to complete

prequalification documentation. The defendant's team, which included the plaintiff, was prequalified. However, by a letter dated 2/8/1999, the defendant informed the plaintiffs that he had submitted technical and financial proposals without including them and had replaced them for the reason that they had delayed to confirm their willingness to join the team. The plaintiffs then filed this suit.

The parties filed a Joint Scheduling Memo in which three issues were agreed as follows:

1) Whether the defendant was in breach of his agreement with the plaintiffs.
2) Whether the defendant was justified in removing the plaintiffs from the joint venture.
3) Remedies available to the parties.

The plaintiffs were represented by Dr. J.B. Byamugisha, while Mr. Bamwine Bernard represented the defendant. The parties filed written submissions in which they dealt with the above issues in that order, which same order the court will adopt.

On the first issue, it was the plaintiff's case that the invitation for letters of intent (Exhibit P.1), required eligible building consultants to undertake the project as **one entity** (emphasis added). And when the defendant and other consultants who included the plaintiff submitted the letter of intent, they were informed, vide Exhibit D7 that "we are pleased to inform you that **your group** has been short listed for consultancy services. You are required to submit a proposal based on the attached Guidelines and Terms of Reference; and appendices." (Emphasis provided). Therefore, in as far as the team was prequalified as a group, they were bound to submit their proposal as a group, and at that point their relationship in the joint venture was complete. The defendant was not entitled to act as the owner of the "group" as he did. In removing the plaintiffs from the project, the defendant was therefore in breach of the contract.

On the contention by the defendant in their Written Statement of Defence and testimony, that the plaintiffs had refused to enter a joint venture with him by objecting to the terms of the proposed joint venture agreement on 2/8/1999 and by failing to submit their commitment letter in exact terms of the draft letter (Exhibit P4) in ample time to enable the defendant prepare and submit

the proposal to the Judiciary, the plaintiff submitted that defendant had, as per his testimony, actually got in touch with Integrated YMR Partnership on the morning of 30/7/1999 and asked them to send him a letter in the form of Exhibit P4, which they did on that very day. The defendant had testified that they verbally asked the plaintiffs to return exhibit P.4 by 30/07/1999. So if it is the same day he had asked the plaintiffs to return Exhibit P4, why did he decide on the morning of that same day to replace them?

The plaintiffs argued that it was a breach of contract by the defendant to replace them on the 30/7/1999 after having written to them on the 29/7/1999 requiring them to submit Exhibit P4 on 30/7/1999 so as to enable him win a tender whose submission date was 3/4/1999. It is the plaintiffs' case that they were replaced before the date verbally given them had expired. Moreover, the defendant had given them only one day to submit Exhibit P4 to him. The plaintiff's case was that one of the reasons given for their replacement that they had objected to the terms of the joint venture agreement on the 2/8/1999 could not hold, since they were replaced on 30/7/1999 before the defendant received Exhibit P5 from the plaintiffs on 2/8/1999. To fortify further the argument that the defendant had in breach of contract decided to replace them, the plaintiffs submitted that according to the testimony of the PW1, 1st plaintiff, they had made desperate attempts to deliver the letter (Exhibit P5) confirming their agreement to form a joint venture to the defendant's office from Friday 30/7/1999, but the defendant who had assured the plaintiffs on phone that he would be in office until 8.00 p.m. that day, had locked up his office when the letter was taken to his office that day. It was only on Monday 2/8/1999, when the plaintiffs managed to deliver the same. Furthermore, the draft Joint Venture Agreement that was mentioned in the defendant's letter on 29/7/99 but not attached was only availed to the plaintiffs on 30/7/99, the same day they were replaced. Even then, the draft made reference to Terms of Reference which the defendant did not avail even on demand.

The plaintiff, therefore, concluded that the contents of their letter (Exhibit P5) and the terms of the joint venture were not relevant to their removal as they had been removed on 30/7/1999 before the 2/8/1999. There was therefore deceitful breach of contract by the defendants.

In future support of their claim for deceitful breach of contract, the plaintiffs argued that they were replaced with quantity surveyors who did not have the requisite qualifications to practice quantity surveying in Uganda, in the names of Mr. Eridad Nyanzi and Mr. Simon Hudd. Not only did Mr. Nyanzi not have the required certification of ARICS, he was not registered by the Surveyors Registration Board to practice in Uganda. Neither was Simon Hudd registered to practice in Uganda. Section 19(3) of the Surveyors Registration Board Act requires valid practicing certificates before anybody could practice in Uganda. Although in his testimony, the defendant claimed that the misrepresentation of Mr. Nyanzi's qualification in the summary was a typographical error, it was clear from his evidence that he never cared about who he replaced the plaintiffs with. The replacement of the plaintiffs was therefore fraudulent. The defendant had further committed an offence vide Section 37 of the Architects Registration Act which makes it an offence for any person to knowingly and wilingfully make any statement which is false in a material particular or misleading with a view to giving an advantage to himself for any other reason.

In further proof of the defendant's fraudulent conduct, the plaintiffs cited the fact that the defendant supplied incomplete documentation to them and yet required them to respond before availing them. Although the draft Joint Venture agreement was availed to the plaintiffs on 30/7/99, it did not have the terms of reference. This was made known to the defendant the same day. Instead in his testimony, the defendant falsely stated that the plaintiffs had asked for letters of appointments, drawings etc, which only came after appointment, and not before. The defendant also gave false testimony that the terms of reference did not exist as they had not won the tender, yet Exhibit D7 had required submission of a proposal "based on the attached guidelines and Terms of Reference for the Building Consultants; and appendixes,". The defendant admitted in cross-examination that when he received Exhibit D7, the appendices were attached. He therefore had the Terms of Reference when he refused to avail them to the plaintiffs.

Lastly, the plaintiffs submitted that even the alleged permission by the Estates Manager of the Judiciary to the substitution of the quantity surveyors by the defendant was not from the appointing authority who was the Judiciary Project/Danida. (See Exhibit D6 (a) and (b)). Even then, the appointing authority and defendant could not by law of contract have agreed to remove the plaintiffs' without their consent.

In response, the defendant, while agreeing that there was an oral agreement between himself and the plaintiffs when he asked them to team up with him for prequalification purposes and they accepted, submitted that the implied terms were that the plaintiffs would submit their documents to the defendant in a timely manner and in the form required by the defendant, and that he defendants would use the plaintiffs' documents either for prequalification or in the technical and financial proposals. However, when requested to submit to the defendant a letter on the lines of Exhibit P4, the plaintiff did not submit it on the 30th July 1999 as he had requested, but on 2/8/1999, and in their own format as shown in Exhibit P5. The plaintiffs therefore breached the terms of the oral agreement when they submitted Exhibit P5 instead of Exhibit P4 and moreover not on 30/7/1999, but on 2/8/1999. The plaintiffs wasted time in raising unwarranted objections since even the deadline for clarification of terms of reference had passed on 23/7/99.

The defendant further submitted that Exhibit P4 and the draft Joint Venture Agreement were required to be bound in the Technical and Financial Proposal, and other consultants submitted their letters timely and in the required form. Attachments like the letter of appointment and drawings required by the plaintiffs only came after the appointment.

The defendant therefore concluded that they were not the ones in breach of the oral agreement, but the plaintiffs as indicated above.

I have considered the submissions of both parties on this issue. The invitation by the Judiciary for letters of intent was for a group to take on the job as "**one entity**", and indeed they were shortlisted as a "**group**". They were therefore meant to act as a group from then on. According to Exhibit D7 they were required to submit a proposal based on the availed guidelines and Terms of Reference (TOR) and appendixes. If it was the "group" that was shortlisted, it meant that they had to participate in the process leading to the submission of the technical and financial proposal. The defendant, however, had a different idea for the running of the consortium. Granted that for a group of consultants, one of them ideally should take a lead. This did not however mean that the defendant who took on the role of Lead Consultant had to hijack the process, and only call upon the rest of the group to rubber stamp whatever decisions he took in respect of the bidding process, however unfair the others felt.

In his submissions the defendant stated that the deadline for the comments on the Terms of Reference was 23/7/1999 which meant that he had received the TOR much earlier than 23/7/1999. Why the defendant did not avail the same to the plaintiff for their comments since they were all meant to be part of the consortium beats one's understanding. Since the other members of the team signed Exhibit P4 without question, the court assumes that they had been availed all the required documents including the TOR. Otherwise I would not expect any professional worth his name to bind himself to abide by an agreement or terms of reference which he has not perused. To me waiting until the 29/7/1999 to ask the plaintiff to sign Exhibit P4 without availing the documents referred to in Exhibit P.4 and the TOR was clearly meant to achieve what the defendant achieved, that is to say, to have the plaintiffs raise objections to making them sign up obligations without knowing what exactly these were. Indeed by the date when the defendant expected the response, he had already enlisted the services of Integrated YMR Partnership to replace the plaintiffs. I find the conduct of the defendant very unreasonable, deceitful, bordering on being fraudulent, and in breach of the agreement with the plaintiffs to jointly bid for the job. In addition to the foregoing, the letter from the defendant asking the plaintiffs to sign Exhibit P4 mentioned the submission date as 3/8/1999. It is not in dispute that the plaintiffs submitted their confirmation to participate on 2/11/1999 and that by that time, even before the defendant saw the format of the letter sent by the plaintiffs, the plaintiffs had been

replaced. This means that the replacement was neither based on the failure to submit on 30/7/1999, nor on the contents of the plaintiff's letter, Exhibit P.5, which was only received by the defendant on 2/8/1999. It is clear from the evidence of PW1, the first plaintiff, and even the testimony of the defendant that what they required of the defendant was the TOR given by the Judiciary, and not the letter of Appointment and drawings as falsely portrayed in the defendant's (DW1) testimony and in the submissions. In his testimony the defendant further stated that he objected to Exhibit P5 because it was proposing that the JVC should be in accordance with the TOR which was not available at the time because they had not won the tender. This was a blatant lie because in the defence submissions it is stated that the deadline for comments on the TOR was 23/7/1999. Furthermore, the TOR was extensively dealt with in the technical proposal. Page 6 of Exhibit D1 paragraph 8.01(a) states:

> ***"(d) The Consultants have studied the extract of the survey carried out by Danida and their reports are given here below together with the comments on the Terms of Reference."***

From the above, the comments on the TOR were submitted on 3/8/1999, and therefore 23/7/1999 was not the deadline as the defendant indicated in the submissions.

On the aspect to attaching wrong qualifications to Mr. Eridad Nyanzi in the summary to the proposal, the defendant stated it was a typographical error. It is difficult to believe that this was an error, especially when the error had the effect of elevating Mr. Eridad Nyanzi to qualifications he required to become eligible to act as a quantity surveyor. And if that was to be taken as an error what about the fact that the two gentlemen, Mr. Nyanzi and Mr. Hudd, were not registered to practice in Uganda. Was the defendant not duty bound to ensure that he enlists only such professionals as are qualified and authorized to perform the required services. It may be true as the defendant submitted that the fact of fielding people who were not qualified and/or registered to act as quantity surveyors would be a matter for the Registrar or the Police, but what is

relevance here is that it shows the lack of good faith and integrity of the part of the defendant in that they used the plaintiffs who had the requisite qualifications and authority to practice, for purposes of prequalification, and then cunningly discarded them, replaced them with persons who could not have qualified to be shortlisted.

I find from the pleadings, testimony and submissions and documents that the failure to provide the relevant documents to the plaintiff's in time even when the defendant had then them in his possession was calculated to frustrate the plaintiffs, knowing that as professionals of integrity, the plaintiffs would not sign anything alleging to bind them to something they have not read. I find that the defendants breached their agreement with the plaintiffs. I will therefore answer the first issue in the affirmative.

The next issue is whether the defendant was justified in removing the plaintiffs from the Joint Venture. The plaintiffs' case is that judging from their submission on the first issue; the defendants were not justified in so doing. They contended that the defendant had designed to replace them with unqualified persons at all costs, and he did so. The defendant on the other hand submitted that he was justified in replacing the plaintiffs because not only was their submission of the required letter late but it varied from the defendant's required format sample in Exhibit P4 in the following respects:

1) Exhibit P5 didn't have the phrase "to be jointly and severely liable for all liabilities on this project."
2) Exhibit P5 didn't have any commitment. It is on the immediate start of the project. The defendant's submission that the absence of the above commitments was important to him and to the employer (Judiciary). Moreover the replacement only took place after 5.00 p.m. on the same day (i.e. 30/7/99).

If the plaintiffs had wished to stay part of the group they had to abide by all the requirements of the defendant as the lead consultant. The comments by the plaintiffs on Exhibit P6 were of such

a nature as could not be ironed out in the few remaining hours of 30/7/99. The defendant therefore concluded that he was justified in replacing the plaintiffs as he did.

I have already indicated that the format and content of Exhibit P5 did not have any bearing on the replacement of the plaintiff by the defendant since the replacement was done on the 30/7/99 and the letter was received by the defendant on 2/8/1999. The defendant, DW1, testified that his offices closed at 5.00 p.m. on 30/7/1999 as always, and he left for Mbarara and only returned to office on 2/11/1999. However, in their submissions on page 7, 3rd paragraph line 8, it is stated:

> "The replacement had not taken place at all. It only took place after 5.00 p.m. on the same day".

Then on Page 8, paragraph 2, line 8, the defendant states:

> "So the replacement of the plaintiffs with YMR took place after 5.00 p.m. on 30/7/1999 when the plaintiffs failed to hand in their letter."

However if the office was closed at 5.00 p.m. as usual and the defendant left for Mbarara then why is the defendant emphatic that the replacement took place after 5.00 p.m. on that day. This goes to confirm the testimony of PW1 that the defendant had assured them on phone that he would be in office that day until 8.00 p.m.

Be the above as it may, the important thing is that the substitution was done before the defendant ever received Exhibit 5. He could not have based the substitution on the contents of a document he has not seen.

The defendant further submitted that the comments made by the plaintiff were of such a nature as could not be ironed out in the few remaining hours of 30/7/1999. The question still remains why the defendant did not avail the documents to the plaintiffs well in time when all indications were that he received them well in time from the Judiciary.

On page 10, the defendant states:

> *"Although the Terms of Reference (TOR) were not provided to the plaintiffs, we submit that had they been provided still the plaintiffs would have failed to submit their letter on account of their objections to the terms of the Draft Joint Venture Agreement."*

The above was premeditated by the defendant whose aim appears to have been to replace the plaintiffs at all costs.

Lastly the acceptance by the Judiciary Estates Manager of the substitution must have been informed by the justification given by the defendant. Indeed the Estates Manager did not sign on behalf of the Project Coordinator, Judiciary Project (Danida), who was in charge of the project. In any case the alleged acceptance did not change the fact that the defendant had unjustifiably breached the terms of the agreement between him and the plaintiffs to act as a consortium to bid for the building consultancy on the project.

I conclude by resolving the second issue in the affirmative.

Lastly, on remedies available to the parties, the plaintiffs referred court to Exhibit D1, the financial proposal where the sum indicated for the quantity surveyors on the project was Shs. 24,412,500=. (Page 27). The plaintiffs claim they were denied the opportunity to earn this amount not only in breach of contract but also by fraudulent and illegal means, and that had they earned the money, they would have put it in their business and earned interest since 1999. The plaintiffs therefore prayed for an award of Shs. 60,000,000= plus interest at court rate and costs.

The defendant was of a different view. He submitted that the defendant had not breached any law whatsoever by substituting the plaintiffs with another consultant. Hence the plaintiffs were not entitled to any reliefs. The reliefs were neither pleaded nor proved. To get a remedy the plaintiff had to prove the terms of the contract, their breach by the defendant and the damage suffered.

It is not in dispute that there was an agreement between the parties; the only issue framed being whether the agreement was breached. The moment the defendant invited the plaintiffs to join him to send a letter of intent to undertake work on the Judiciary Danida Project, which they did, and were all pre-qualified as a group, an agreement/contract was thereby concluded between them with an implied term that all other things being equal, the group would bid together to do the work on the Project. I have further found that the defendant breached the agreement when they substituted the plaintiffs with other consultants for no valid reasons. They are entitled to damages. As to the quantum, in the ***Kenya case of V.R. Chande and others Vs EA Airways Corporation [1964] EA 78 at page 80 - 81 Mayer J. held:***

> ***"The general rule as to the quantum of damages to be awarded for breach of contract was stated by ALDERSON, B in Hadley B axendale [18854] 9 Ex 341 (156 E R 145 at p. 151] in the following terms: "Now we think a proper rule in such a case as the present is this; where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of***

> ***contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things from such a breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contracts the probable result of the breach of it".***

In this case the plaintiff has referred to Exhibit D1, financial proposal which quoted Shs. 24,412,500= as the sum allotted the quantity surveyors on the project. The above figure is to be used in assisting the court to arrive at what should be considered as a fair figure. From the evidence on record it would appear that the defendant deliberately denied the plaintiffs access to critical documents with the aim of forcing the plaintiffs out of the deal/contract. This certainly affected the projected income of the plaintiffs. Taking into account that not all the above figure would be profit since there are overheads and taxes to cater for, I would take a figure of Shs. 15,000,000= which is approximately two thirds of the Shs. 24,412,500= as a reasonable figure the plaintiffs would have ended up with as income. I shall therefore award Shs. 15,000,000= as general damages. I can not award both interest on the above amount and then at the same time make an award for what they have lost had they put the money into business. In my view both the above take care of one and the same thing.

Hence I shall award the plaintiffs interest at court rate from the date of filing this suit till payment in full. The plaintiff will have costs of this suit. It is so ordered.

Elizabeth Musoke

JUDGE

06/11/2009