

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT HOIMA
CIVIL SUIT NO. 99 OF 2022
(Formerly MSD Civil Suit No.13 of 2020)

MUMBERE ABDUL COMPANY LTD :::::::::::::::::::::::::::::::::::PLAINTIFF
VERSUS
CHINA RAILWAY NO. 5 ENGINEERING GROUP CO.LTD::::DEFENDANT

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] The Plaintiff filed this suit claiming special damages of **Ugx 186,942,750/= (One hundred Eighty Six Million, Nine Hundred Forty Two Thousand and Seven Hundred Fifty Shillings)**, general damages for breach of contract and costs of the suit.

- [2] The Plaintiff and the Defendant entered into 4 sub contracts specifically; 2 Edge beam contracts, 1 Stone pitching contract and 1 Bus bays contract. All the four contracts were entered into on different dates and on different terms.

- [3] On 25th January 2018, the parties entered into the 1st Edge beam contract for 1000 metres at a rate of Ugx 8,000/= per metre **(P.Exh.1(a))**. On the 15th January 2019, the parties entered the 2nd Edge beam contract for 6000 metres to be paid after completion of every 3000 metres at a rate of Ugx 9000/= **(P.Exh.1(b))**. On 17th November 2018, the parties entered a Stone pitching contract for 700 metres at a rate of Ugx 30,000/= per sq.metres **(P.Exh.3)**. On the 16th July 2018, the parties entered the Bus bay contract to construct 26 bus bays at a rate of Ugx 2,200,000/= which was later, with effect from January 2019

revised to Ugx 5,783,550/= as per the addendum signed between the parties (**P.Exh.2**).

- [4] It is the Plaintiff's case that twenty one (21) units of Bus Bays /Load Areas were constructed at **UGX 5,783, 550/= (Five Million, Seven Hundred and Eighty Three Thousand, Five Hundred and Fifty Shillings Only)**, for each unit based on the revised rate as per the addendum thus totaling to **UGX. 121,454,550/= (One Hundred Twenty One Million, Four Hundred Fifty Four Thousand, Five Hundred and Fifty Shillings Only)**.
- [5] That the Plaintiff also constructed 11078 metres of concrete edge beams each metre at **UGX. 9000/= (Nine Thousand Shillings Only)** totaling to **UGX. 99,702,000/= (Ninety Nine Million, Seven Hundred Two Thousand Shillings only)**. That the Plaintiff further constructed 648m of stone pitching head wall at access culverts, 168M stone pitching drainage on the road side at the defendant's camp in Buhimba and 331.54 square metres stone pitching drainage on the road side at Buhimba Trading Centre, each square metre at **UGX 30,000/= (Thirty Thousand Only)** totaling to **UGX 79,786,200/=**.
- [6] That in keeping with clause 6 of the said agreement, the Defendant supplied the Plaintiff with construction material to wit cement, stone aggregate, quarry dust and diesel totaling to **UGX. 110,000,000/=** which the Defendant was mandated to deduct from the total contract sum. That under the said contract, the Defendant was supposed to pay to the Plaintiff its contract money monthly. That however, contrary to the said contract and in total breach of the same, the Defendant only paid to the Plaintiff **Ugx 17,000,000/=** and has refused and or neglected to pay the balance.
- [7] The Plaintiff contends that the Defendant's actions are wrongful and amount to breach of contract for which the Plaintiff holds the Defendant liable. The Defendant breached the contract for the Bus Bays /Load Areas, Concrete edge beams, Stone pitching head wall at

access Culverts and Stone pitching drainage on the road side for which the Plaintiff claims for special and general damages.

- [8] The Defendant filed a Written Statement of Defence and averred that the Sub-Contract works undertaken by the Plaintiff have never been completed, measured or handed over to the Defendant in accordance with the sub-contract agreement and hence the suit before this honorable court is pre-mature. That the plaintiff's performance of the sub-contract agreements was below expectations and the quality of the work was poor. The Defendant prayed that the Plaintiff's suit be dismissed with costs.

Legal representation:

- [9] At trial, the Plaintiff was represented by **Mr. Hatega Robert of M/s Baryabanza & Co Advocates, Hoima** while the Defendant was represented by **Mr. Kinali Albert of M/s Eaton Advocates, Masindi**. Both counsel filed their respective submissions for consideration in the determination of this suit.

Issues for trial

- [10] The following issues were framed for determination by this court:
1. Whether the Defendant breached the contracts signed with the Plaintiff.
 2. Whether the Defendant is indebted to the Plaintiff and if yes, to what extent.
 3. What remedies are available to the parties.

Partial consent settlement

- [11] On record, it is shown that the parties on 22.9.2020 consented in part to settle this suit. This consent settlement was endorsed by the Assistant Registrar **His Worship Simon Kintu Zirintusa**. By the

consent terms, the Defendant undertook to pay for the disputed works thus;

- i. 17 bus bays
- ii. Approved metres of edge beams done and
- iii. All stone pitch works.

This consent settlement has never been set aside. The Defendant still did not work out the necessary consented to modalities to enable the payment of the Plaintiff for the agreed upon works executed in the consent settlement. It is however the finding of this court that the execution of the consent settlement settled the facts in the consent. What remained for trial were the unapproved works as I shall determine later in this judgment. The consent settlement entitled the Plaintiff to a decree on the agreed upon works and the same is passed in the terms of the consent settlement on record dated 22.9.2020.

Burden of proof

- [12] It is trite law that the burden of proof in civil matters is on the Plaintiff to prove his/her case on the balance of probabilities. Under **Ss.101-103 of Evidence Act**, whoever desires court to give judgment as to his/her legal right or liability must produce evidence to prove the existence of the facts he or she asserts exist, **Lugazi Progressive School & Anor Vs Serunjogi & Ors [2001-2005] HCB 12**.
- [13] In the instant case therefore, the burden of proof is squarely on the plaintiff to prove its entire case that the Defendant breached the contracts it signed with the Plaintiff and that the Defendant is indebted to the Plaintiff to the tune of a total of **Ugx 186,942,750/=** on a balance of probability.

Consideration of the issues

- [14] The issues framed for decision by this court are inter-related. They will be addressed together. A breach of contract occurs when one party in a binding agreement fails to deliver according to the terms of the agreement. In the case of **MOGAS (U) LTD VS. BENZINA (U) LTD, CIVIL**

SUIT NO. 88 OF 2013, [2017] UGCommC 92, Christopher Madrama Izama, J defined breach of contract as;

“Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to treat the contract as discharged if the other party renounces the contract or makes the performance impossible or substantially fails to perform his promise; the victim is left suing for damages, treating the contract as discharged or seeking a discretionary remedy.”

- [15] From the evidence on record, the Plaintiff and the Defendant signed four contracts on different dates.

Edge beam Contract

- [16] This was the first contract and according to the evidence of **PW1**, it was signed on the **25th day of January 2018**. Under **Clause 2** of the agreement (**P.Exh.1**), the quantity of work for the edge beam given to the sub-contractor (Plaintiff) was one thousand (1,000) metres (15-500-16-000 LHS & RHS).The agreement was for trial in respect of 1000 metres which were done by the Plaintiff. The trial phase, according to **P.Exh.1** was only 1,000m. At **page 47 of P.Exh.1 (a)**, it is shown that the work was approved and as per the results from the laboratory reports which were signed by the Materials Technician and the Materials Engineer representing the contractor (Defendant) and the consultant, the materials used were of the required quality as accordingly approved.
- [17] Established from the evidence on record, is the **second Agreement P.Exh.1. (b)** dated 15th January 2019, which the parties executed after the Plaintiff completed the trial section of 1000m. It is also born out of the evidence on record that by the time this agreement was given to the Plaintiff, she had already worked in excess of 3000metres (3km). The 3000m section was valued at **9000/= (Nine thousand shillings)**.

The Plaintiff made the required requests showing that the work done by the Plaintiff was approved. This evidence is not disputed by the Defendant. The results from laboratory by the contractor and consultant that confirmed the work done are at pages 22, 30, 31, 35, 36, 41, 47, 48, 49, 50, 51, 52, 53, 54, 55, 60, 61, 62, 65 & 66 of the Plaintiff's trial bundle as reflected on the concrete cubes of **P.Exh.1 (c)** show the quality of the work done. These are results of the daily works by the Plaintiff done in the presence of the consultant and the contractor which further prove that the Plaintiff executed the works undertaken in the contracts.

[18] At pages 20, 21, 23, 24, 25, 26, 38, 43, 56 of the Plaintiff's trial bundle of **P.Exh.1 (c)** also show that some work was not approved for reasons stated therein. However, the Plaintiff testified that the works specified therein above were executed or done by the Plaintiff in the presence of the representatives of the contractor and the consultant; (Materials Technician and Materials Engineer). The Chief Surveyor and Inspector were also always present while the work was being done and did not query it. The work done was also always inspected by the Resident Engineer every morning and not queried. No evidence was adduced by the Defendant to the contrary.

[19] The first agreement (**P. Exh 1. a**) on the trial section of 1000m was at the rate of 8,000/= per unit. This was a total of eight million shillings only (**8,000,000/=**). Under the second agreement, also on edge beams dated 15th January 2019, the Defendant was supposed to pay the Plaintiff for every 3000m and the Plaintiff worked **17,043m** at the rate of **9,000/=** (Nine Thousand Shillings Only). The total amount owed is shillings under this agreement is **Ushs. 153,387,000/=**. Thus as per the Edge beam agreements, the total sum due is **Ugx 8,000,000 + 153,387,000 = 161,387,000/=**.

Bus Bays Contract/Loading area

[20] As regards the Bus bay agreement **P. Exh.2** dated 16th July 2018, the trial was at the rate of Ugx 2,200,000/= per unit. Then after the trial,

the rate was revised to Ugx 5,783,550/= as per the addendum to the agreement. The Plaintiff was required to do 26 bus bays. Out of the 26 bus bays, the Plaintiff claim to had completed 21 bus bays which were accordingly approved. The reason given by the Plaintiff why the five (5) were not done was because that section of the road had not been worked on by the Defendant. According to him, the 21 bus bays that were done were not paid. The amount of money payable in respect of the Bus bay agreement is at the rate of Ushs 5,783,550/= per unit (as per the addendum). However, as per the partial consent entered by the parties, 17 bus bays were agreed to by the defendant to had been done and approved. No evidence was adduced by the Plaintiff in form of exhibits that show completed work of the 21 Bus bays he claims to had completed. In the premises, the Plaintiff would only be entitled to the conceded to 17 Bus Bays as per the partial consent settlement. This gives him **Ugx 98,320,350/=**.

Stone pitching contract

- [21] As per the partial consent on record, all stone pitch works were approved and therefore, the Plaintiff was entitled to payments of the work done. This was the last agreement (**P. Exh. 3**) dated 17th November 2018. The contract comprised of works of 53 access culverts which were all approved. The agreement (stone pitching agreement) was for 2659.54 square metres access culverts and drainage stone pitching at the rate of 30,000/= shillings as per the Plaintiff's **paragraph 4(iv) of the pleadings**. Though the Plaintiff did not lead evidence as to how he arrived at the 2659.54m² as the covered work, his requisitions of work done as per **P.Exh.3**, upon computation, show that he covered **1692.70m²** which gives the total amount of **Ugx 50,781,000/=** as the due sum.

Materials supplied by the Defendant

- [22] As per the contracts between the parties i.e, **P.Exhs.1(a), P.Exh.1(b), P.Exh.2 & P.Exh.3**, it was agreed that the Defendant would supply the Plaintiff with materials listed in each of the contracts and the value of

the material supplied would be deducted from the price of the work done by the Plaintiff.

- [23] The burden is on the Defendant to prove the materials that were supplied to the Plaintiff for the agreed upon works because, he who asserts must prove and secondly, it is the Defendant who had a duty to prepare and have custody of the catalog of the materials supplied so as to be able to deduct the cost of the materials from the Plaintiff's contract price. Counsel for the Defendant submitted that the Defendant supplied the Plaintiff with all the necessary materials in accordance with the contracts to enable the plaintiff do the works and the value of the materials was laid down in the contracts totaling to **Ugx 163,890,879/=**. This is however not correct. **P.Exh.4** is a reflection of the materials that were expected to be supplied to the Plaintiff and these are; hard core/aggregate stones, quarry dust, cement and diesel. The Defendant did not adduce any evidence regarding the cost value of the allegedly supplied materials for purposes of having the cost deducted from the Plaintiff's work price of the approved work. This is further evidenced in the partial consent on record which stayed on record pending reconciliation of the costs of the materials supplied for the agreed works. It is therefore not clear, though there is evidence of supply of the materials, as to how **Yang Gang** (DW1) in his evidence came to arrive at **Ugx 163,890,879/=** as the total value of the materials supplied to the Plaintiff without adducing evidence of the cost value of each of the materials allegedly supplied.

Money advanced or paid to the Plaintiff

- [24] According to **DW1**, the Plaintiff was paid **Ugx 28,033,100/=** reflected as Annexure 'G'. Annexure 'G' referred to by **DW1** however, was not tendered in Evidence. It is a general rule that documents adduced in court are to be proved through primary evidence (**S.61 U.E.A**), See **Kagoye Francis Vs Uganda, Crim. Appeal No.31 of 2019 (SC)**. In the instant case, there was no attempt made to have Annexure 'G' admitted as either primary or secondary evidence as required by

Ss.61-64 of the U.E.A. Pleadings and attachments thereto have never amounted to evidence unless they are conceded to as such by the opposite party and admitted as exhibits by court, **Kamugira Vs National Housing Construction, HCCS No.27/2008 (Land Division)**. So, mere annexing of photocopied receipts to the pleadings by the Defendant is no proof of those receipts. Besides, it is apparent that some of the monies reflected in this **annexture** are controversial, for example **Ugx 200,000** and another **50,000/=** which was paid to a one **Jude Kavuma** apparently without authority of the Plaintiff and **Ugx 1,075,000/=** wrongly reflected as **1,750,000/=** signifying an increment of **675,000/=**. The above controversy of the figures would require an explanation if the annexture had been properly adduced and admitted in evidence. As a result, I find that there is no evidence that the Plaintiff was advanced and or paid a sum of **Ugx 28,033,100/=**. In his evidence, the Plaintiff admitted to had only been paid **Ugx 17,000,000/=**.

Defence of the Defendant

- [25] The Defendant claim that the Plaintiff was advanced sum of money amounting to **Ugx 28,033,100/=**, there is however no evidence to support such a claim. The claim by the Defendant that the Plaintiff was supplied materials worth **Ugx 163,890,879/=** is also not supported by any evidence and **DW1's** conclusion that the total work done by the Plaintiff and approved by the consultant is **Ugx 170,938,383/=** is also not supported by any evidence. It is not clear how DW1 came to arrive at these figures. In the premises, I find that it cannot be correct that it is instead the Plaintiff who is indebted to the Defendant to the tune of **Ugx 20,985,596/=** as **DW1** claimed. Besides, the entire of **DW1's** evidence was a departure of the Defendant's pleadings. The Defendant's **WSD** is a mere evasive denial which did not answer the Plaintiff's points of substance regarding his claim. Such a defence offends **O.6 r.10 CPR** as it does not disclose a reasonable answer to the plaint. In **Ben Byabashaija & Anor Vs A.G, (1992) 1 KALR 161** citing from **Joshi Vs Uganda Sugar Factory (1968) EA 570 at 572**, Spry J.A, held that

“the issue was whether the defendant can call evidence where his written statement of defence was merely a general denial without raising any defence. It was held that the defendant would not be given leave to call evidence since in his written statement of defence there was no specific denial.”

See also **Odgers Principles of Pleadings & Practices 22nd edn pg 136** it is stated thus,

“It is not sufficient for a defendant in his defence to deny generally the allegations in the statement of claim or for the plaintiff in his reply to deny generally the allegation in a counter claim but each party must traverse specifically each allegation of what or which he does not intend to admit.”

It is trite law that parties are bound by their pleadings, **Semalulu Vs Nakitto, HCCA No.4 of 2008**. In this case, nowhere in its defence does the Defendant plead that he advanced the plaintiff the sum of **Ugx 28,033,100/=**, supplied him materials worth **Ugx 163,890,879/=** and or that the Plaintiff was the one instead indebted to the Defendant to the tune of **Ugx 20,985,596/=**. Therefore, to raise these claims in evidence **DW1** was departing from the Defendant's previous pleadings which offends **O.6 r.7 CPR**.

- [26] As regards the Defendant's indebtedness to the Plaintiff, as already found, the Plaintiff has established a total amount owed for the Edge beams work/contract as **Ugx 161,387,000/=**, the amount owed in respect of the Bus bay contract for the conceded to **17** bus bays at the rate of **Ugx 5,783,550/=** per unit as **Ugx 98,320,350/=** and the amount of money owed on Stone pitching agreement as **Ugx 50,781,000/=**. The Defendant did not adduce evidence to prove that the above sum was paid or rebut the Plaintiff's evidence about the execution of the works. As a result of the above, I find that the Defendant was in breach of the contracts he signed with the Plaintiff upon failure to pay him the agreed respective contract price. The total amount owed by the Defendant to the Plaintiff therefore is **Ugx 161,387,000 (Edge beams) + 98,320,350/= (Bus bays) + 50,781,000/= (Stone pitching) = Ugx 310,488,350/= less 17,000,000/= (the sum advanced to him) thus Ugx 293,488,350/=** as the extent of the sum owed to the Plaintiff.

[27] In his pleadings, the Plaintiff is claiming recovery of **Ugx 186,942,750/=**. Since this figure is less than the amount calculated owed to him by the Defendant, in the absence of evidence of the cost value of the materials supplied to the Plaintiff by either party, probably the difference between the calculated sum owed and the claim which is **Ugx 106,545,600/=** accounts for the cost value of the materials supplied.

[28] As a result, I find the Defendant is indebted to the Plaintiff **Ugx 186,942,750** as claimed by the Plaintiff as special damages.

General damages.

[29] The Plaintiff prayed for general damages. Counsel for Plaintiff submitted that the position of the law is that the award of general damages is at the discretion of court and are always as the law will presume to be the natural consequence of the defendant's act or omission, See **James Fredrick Nsubuga Vs. Attorney General, HCCS.NO. 13 of 1993**). Secondly, in the assessment of the quantum of damages, courts are mainly guided inter alia, by the value of the subject matter, the economic inconvenience that a party may have been put through and the extent of the conduct of the defendant, See **Uganda Commercial Bank Vs. Kigozi [2002] 1 EA 305**. A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in the same position she or he would have been had she/he not suffered the wrong, See **Charles Acire vs. Myaana Engola HCCS NO. 143/1993, Kibimba Rice Scheme Ltd Vs. Umar Salim, SCCA NO. 17/1992**. According to the case of **Haji Asuman Mutekanga vs. Equator Growers (U) LTD. SCCA No. 7/1995** it is held that

“with regard to proof, general damages in a breach of contract, are what a court (or jury) may award when it cannot point out any measure by which damages are to be assessed, except the opinion of and judgment of a reasonable man”.

[30] This court finds that the Plaintiff Company is a business entity. **PW1** testified at length how the Plaintiff did work for the Defendant as had been agreed. It is now common knowledge that the project in question was fully completed signifying that the Defendant was fully paid for the project. The Plaintiff was still not paid even after the Defendant handing over the road to government as completed work. The road is open for public use and the Defendant benefitted from the Plaintiff's works. In the premises, I find that the Defendant company wilfully intended to breach the various contracts it entered with the Plaintiff and in my view, this type of conduct justifies enhanced damages. Contrary to the agreements executed by the parties, the Defendant refused to pay a total sum claimed. This occasioned the Plaintiff inconvenience, torture, stress for fear of loss of business and business disruption. Counsel for the Plaintiff proposed general damages of Ugx 100,000,000/=. I however find no evidence adduced by the Plaintiff to justify the sum. In the exercise of my discretion, I consider and award the Plaintiff general damages in the sum of **Ushs. 60,000,000/=**.

Interest

[31] The Plaintiff claimed for interest. Interest is regarded as representing the profit a party might have made if that party had use of the money or conversely the loss the party suffered because of the non-use of the money, **Spring Freight Logistics Ltd Vs Holdings International Ltd & 2 Ors, HCCS No. 0556 of 2019 (Commercial Division)**. The Plaintiff would have explored a number of investment options in its business lines to grow its income and investment portfolio. This would have greatly enhanced the business and profit potential of the plaintiff company. The Plaintiff was kept out of its money which was her due entitlement. I thus consider and award interest to the Plaintiff at a rate of **18% per annum** on the sum of special damages from the time of institution of this suit and on general damages from the date of judgment until full payment.

Costs

- [32] It has been consistently held by this court under **Section 27(2) of the Civil Procedure Act Cap 71** that costs follow the event unless for some reasons court directs otherwise, (See **Jennifer Behange & Others Vs School Outfitters (U) Ltd, CACA NO. 53/1999**. This court having found that the Defendant breached the contract between her and the Defendant by refusing to pay for the works done; the Defendant pays costs of the suit to the Plaintiff.
- [33] In conclusion, Judgment is given in favour of the Plaintiff with the following orders;
- a) The Defendant breached its various contracts with the Plaintiff and as a result, the plaintiff is awarded Special Damages of **Ugx 186,942,750/=**.
 - b) The Plaintiff is awarded general damages of **Ugx 60,000,000/=** for breach of the contracts.
 - c) The Special and General damages are to carry interest at the rate of **18% p.a** from the date of the institution of the suit and the date of judgment respectively till payment in full.
 - d) Costs of the suit are awarded to the Plaintiff.

I so order

Dated at Hoima this 17th day of November 2023.

.....
Byaruhanga Jesse Rugyema
JUDGE.

17/11/23

Plaintiff's representative: Mr. Muhwezi present

Mr. Robert Hatega for the Plaintiff

Mr. Benjamin Asasira holding brief for counsel Kinali for the Defendant.

Court: Judgment read and given to the parties in open court.

Signed

Byaruhanga Jesse Rugyema

JUDGE.