

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE
CIVIL SUIT NO. 016 OF 2022

UGANDA WILDLIFE AUTHORITY::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

ALEX TUKANCHUNGURWA COMPANY LTD ::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON.JUSTICE LUBEGA FAROUQ

JUDGMENT

1. Introduction

2. The Plaintiff brought this suit against the Defendant for a declaration that the Defendant is in breach of contract dated 14th June, 2018, an order compelling the Defendant to pay Ugx: 100,500,000 to the Plaintiff, interest of 30% per annum on the unpaid balance from the date of breach of contract until full payment, general damages, punitive damages and costs of the suit.

3. Background

4. The Plaintiff's cause of action is that it invited bids for the disposal by harvest of planted trees at Kapkwata within Mt Elgon National Park, vide: Disposal Reference Number UWA/Disposal/2017-18/00001. The Defendant was the successful company and it was awarded a contract which was executed between the Plaintiff and the Defendant on 14th June, 2018 for the harvest of 70 hectares of trees at Kapkwata at a consideration of Ugx: 465,500,000/=. The said trees on the 70 hectares were to be harvested on an "as-is" basis and according to the contract, the Defendant was supposed to pay 50% on receipt of fully signed contract within ten days and final payment of 50% after harvest of the trees. However, to date in spite of several repeated demands, the Defendant has failed or refused to pay the said balance of Ugx: 100,500,000/=. The Plaintiff contends that the Defendant's action amounts to a breach of contract.
5. The Defendant in its written statement of defence denied the Plaintiff's allegations and averred that it successfully bided for the harvest of 70 hectares of planted trees at Kapkwata within Mt. Elgon National Park and a contract was entered into and executed between the Plaintiff and the Defendant for a consideration of Ugx: 465,500,000/=. However, the Plaintiff without any explanation handed over only 65 hectares to the Defendant and allocated 5 hectares to another entity but the Defendant went ahead and harvested the trees and remitted payments to the Plaintiff. The outstanding balance would be Ugx: 70,500,000/= had the Plaintiff not breached the contract.

6. The Defendant further averred that in the process of harvesting the said trees, the Defendant discovered that out of the 65 hectares of forest handed over to them, there were gaps and rocky patches where no trees had been planted at all at the time of the establishment of the forest and neither could trees grow there. A joint survey was conducted and gaps were verified to include 15 hectares with rocks and no trees. Following that background, the Plaintiff wrote to the Defendant informing it that it had awarded the Defendant an additional 11 hectares of forest in lieu of the identified gaps to make good the losses but the 11 hectares were never handed over to the Defendant hence, the Defendant suffered losses due to the 5 hectares deficit as well as the empty gaps in the forest which affected the Defendant's ability to raise the would be balance of Ugx: 70, 500,000/= and not Ugx: 100, 500,000/= as claimed by the Plaintiff.
7. The Defendant contended that the Plaintiff varied the contract and it is estopped from insisting on any further payment of any sum without first allocating the additional 11 hectares of forest which have never been allocated to the Defendant by the Plaintiff and that the Plaintiff breached the contract by reallocating 5 hectares out of the Defendant's 70 hectares to another entity.

8. Counter- Claim

9. The Defendant also instituted a counter-claim where it prayed for the declaration that the initial contract was varied and the counter-defendant is estopped from claiming the balance of the contract price, a declaration that the Counter- defendant breached the contract by failing to allocate an additional 11 hectares to the Counter-Claimant and the failure or refusal to handover 70 hectares in full to the counter claimant was in breach of the contract. It prayed for an order that the Counter-defendant pays the Counter-Claimant Ugx: 480,000,000/= being the lost earning and profit the counter-claimant was expected to receive from the additional 11 hectares, general damages for inconvenience, interests and costs of the counter-claim.
10. The Counter-Claimant's cause of action is that the Counter-defendant having agreed to allocate an additional 11 hectares to the counter-claimant, failed to allocate the same which is a breach of the contract and the counter-claimant's right to legitimate expectations. Secondly, the Counter-defendant having allocated to the Counter- claimant 70 hectares and handing over to it only 65 hectares and re-allocating the 5 hectares to another entity constituted breach of contract.
11. **Reply to the written statement of defence**
12. The Counter-defendant denied all the allegations in the written statement of defence and averred that it never at any material time agreed to compensate the Defendant or give the Defendant 11 hectares

and no addendum was ever executed between the Plaintiff and the Defendant varying or changing the initial contract terms.

13. Reply to the counter-claim

14. The Counter-defendant denied the allegations in the counter-claim and averred that a pre-bidding meeting was held at Mt. Elgon National Park headquarters with all the companies and persons who attended were informed to place their bids for the harvest of softwood plantation trees in Kapkwata. That the Counter-claimants were present and were duly informed about the nature and topography of the given area by the Chief Warden, Mt Elgon National Park. That the bidders including the Counter-claimants were duly accompanied by the Uganda Wildlife Authority officials to Kapkwata to carry out the field operations and the Counter-claimant officials had the opportunity to visit and inspect the Kapkwata tree plantation within Mt. Elgon National Park for which it placed the bid for the harvest of the said trees. That the bid was for the harvest of planted trees on 70 hectares of planted trees which were duly allocated to the Counter-claimant and a contract was entered for the said trees.

15. Issues for the trial court's resolution

16. In the Joint Scheduling Memorandum parties agreed to the following issues-
- (a) Whether there was breach of the contract and if so, by whom?
 - (b) What is the available remedy to the parties?

17. Legal Representation

18. Counsel Kaffe Ndeke Chabita together with Counsel Abubaka Ibrahim represented the Plaintiff and Counsel Stanley Dumary represented the Defendant.

19. Submissions

20. At the conclusion of the hearing, both counsel were directed to file written submissions and they are all on the court record. I will consider them when writing this judgment.

21. Exhibits of the parties tendered in court.

22. Plaintiff's Exhibits

- (a) Minutes for pre-biding meeting held on 7/3/2018----- PEXH.1
- (b) A copy of the list of attendance for pre-bidding meeting---PEXH.2
- (c) Bid submission sheet-----PEXH.3
- (d) Contract agreement dated 14/6/2018-----PEXH.4

- (e) Harvest payment statement-----PEXH.5
- (f) Individual Receipts dated 26/6/2018-----PEXH.6
- (g) Individual Receipts dated 29/6/18-----PEXH.7
- (h) Receipts dated 17/9/18-----PEXH.8
- (i) Receipts dated 29/10/2018-----PEXH.9
- (j) Receipts dated 8/11/2018-----PEXH.10
- (k) Receipts dated 7/3/2019-----PEXH.11

Defendant' Exhibits

- (a) Bid submission sheet----- DEXH.1
- (b) Contract agreement dated 14/6/2018-----DEXH.2
- (c) All receipts admitted as PEXH.6 to PEXH.11 -----DEXH.3
- (d) Letter by Defendant dated 24/5/2019-----DEXH.4
- (e) Plaintiff letter dated 11/6/2019-----DEXH.5
- (f) Plaintiff letter dated 1/4/2020-----DEXH.6
- (g) Status Report dated 30/11/2018 -----DEXH.7
- (h) A letter dated 1/12/2020-----DEXH.8
- (i) Defendant's letter dated 3/12/2020-----DEXH.9
- (j) Defendant letter dated 11/12/2020-----DEXH.10
- (k) Defendant letter dated 29/01/2019-----DEXH.11

23. Issue No.1: Whether there was breach of the contract and if so, by whom?

24. The **Black Law Dictionary 2nd Edition** defines breach of contract to mean-

"Failure to live up to the terms of a contract. The failure may provoke a lawsuit, in which an aggrieved party asks a court to award financial compensation for the loss brought about by the breach."

25. The **Law.Com Legal Dictionary** defines breach of contract to mean-

"Failing to perform any term of a contract, written or oral, without a legitimate legal excuse. This may include not completing a job, not paying in full or on time, failure to deliver all the goods, substituting inferior or significantly different goods, not providing a bond when required, being late without excuse, or any act which shows the party will not complete the work ("anticipatory breach"). Breach of contract is one of the most common causes of law suits for damages and/or court-ordered "specific performance" of the contract."

26. In **Ronald Kasibante vs. Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690**, Honorable Justice Hellen Obura (as she then was) defined breach of contract as:

"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.”

27. Counsel for the Plaintiff submitted that the Plaintiff and Defendant signed the contract for the harvest of softwood trees on 70 Hectares at Kapkwata at a consideration of Ugx: 465,500,000/= dated 14th June, 2018 which in essence means that there were reciprocal rights and obligations created between the parties.
28. Counsel for the Defendant however submitted that whereas the contract indicated that the Plaintiff had allocated 70 hectares to the Defendant, the Defendant only received 65 hectares and the Plaintiff re-allocated the 5 hectares to another entity which was a clear breach of contract.
29. PW1 told court that it was agreed in the contract that the said trees on the 70 hectares were to be harvested on an “as-is basis”. He added that the Defendant was allocated 70 hectares as agreed upon signing the contract and it indeed harvested the said number of hectares.
30. DW1 said that the Defendant successfully bided and on 14th June, 2018, the Plaintiff entered into a contract with the Defendant for the harvest of 70 hectares of planted trees but the Plaintiff handed over 65 hectares and allocated the 5 hectares to another entity contrary to the terms of the bid contract
31. PEXH.3, 4 and DEXH.6 issued by the Plaintiff all indicates 70 hectares which were to be harvested by the Defendant. The same was confirmed by DEXH.7 prepared by the Defendant to the Plaintiff dated 30th November, 2018 and it stated that-

“I hereby submit my report to you on the findings on the status of the block that allocated to me and harvesting completed. The following facts were established physically on ground;

1. The total acreage of forest allocated and harvested was confirmed to be a block of 70 hectares

2.

Please note that the total acreage of the grassland portions is 8.0 hectares. This makes the total acreage of space devoid of trees to 15.25 hectares of the 70 hectares allocated.....”

(Underlined emphasis mine)

32. The above indicates that the Defendant was indeed given 70 hectares by the Plaintiff. The defendant’s allegation that it was given 65 hectares instead of 70 hectares as indicated in the contract agreement is not tenable,

and it is estopped from denying that it received the same. **See section 114 of the Evidence Act Cap 6.**

33. Counsel for the Defendant submitted that the Defendant did not breach the disposal contract but rather the Plaintiff misrepresented the main terms of the contract which rendered the contract avoidable. I do not agree with counsel in that regard. The terms of the contract were clear regarding the size of the hectares to be harvested and the same was confirmed by the Defendant as per DEXH.7
34. I will now handle the issue of *whether failure by the Defendant to complete payment as per the disposal contract amounted to a breach of the contract.*
35. At the onset, it should be noted that although according to the Plaintiff the Defendant's failure to make payment as per the disposal contract amounted to a breach of contract, the Defendant on the other hand alleges that it did not breach the contract since there was variation of the same.
36. Counsel for the Plaintiff argued that from the facts and evidence the Defendant without any justification failed to perform his obligation of making full payment of the contract price in spite of harvesting 100% of the trees as allocated to him hence breaching the contract.
37. Counsel for the Defendant submitted that the contract was varied by the Plaintiff thereby discharging it from paying the contract balance of Ugx: 70,500,000/= until the Plaintiff resolved the issue of the rocky patches and bare grounds raised which fundamentally affected the tree number and density in the contract and for which the Plaintiff claimed to have given additional 11 hectares but did not fulfil the promise.
38. PW1 said that on execution of the contract, the Defendant was supposed to pay 50% within 10 days and the final 50% after 50% harvest of the trees but the Defendant paid Ugx: 365,000,000/= leaving an outstanding balance of Ugx: 100,500,000/= which it has failed to pay despite several reminders to do so.
39. PW1's evidence was corroborated by PW2 as the Senior warden accounts who confirmed the amount so far paid by the Defendant to be Ugx: 365,000,000/=
40. DW1 said that the Defendant harvested the trees given to it and remitted payments to the Plaintiff totaling Ugx: 365,000,000/= leaving an outstanding balance of Ugx: 70,500,000/=. He told court that having agreed upon the amount to be paid upon harvesting, the Defendant discovered huge gaps and rock patches where no trees had been planted at all and the same challenge was communicated to the Plaintiff which did a verification exercise and varied the contract when it wrote to the Defendant

informing that it had been awarded additional 11 hectares of forest to make good the deficit.

41. DW1 further said that the Plaintiff never handed over the said 11 hectares which greatly affected not only the Defendant's expected revenue but also its ability to pay the outstanding balance of Ugx: 70,500,000/= which was to be raised out of the harvest of the trees.

42. According to the disposal agreement which is PEXH.4 or DEXH.1 the payment arrangement was as follows;

- **"50% down payment on receipt of fully signed contract within 10 days and**
- **50% final after 50% harvest."**

43. However, by 7th of March, 2019 the Defendant as per the receipts tendered in court had paid Ugx: 365,000,000/= and DEXH.11 which is a handover letter dated 29th January, 2019 states that-

ALEX TUCUNGURWA COMPANY LIMITED
P.O.BOX 9496, KAMPALA
29TH JANUARY, 2019

THE CHIEF WARDEN
MT. ELGON NATIONAL PARK
MBALE

Dear Sir,

REF: HANDOVER OF LOT 3 BLOCK A

*I write to your office as a handover of Lot3 block A" in Kapkwata forest. During the operations I was able to follow the guidelines as highlighted in **the contract till the end of the contract.** On the contrary there have also been shortcoming of the contract as below;*

Benefits:

Revenue generation has been done with many of the requirement as an obligation for the contract; I have been able to clear shs: 300,000,000/= as part of the instalments for Ugx: 464,000,000/= where I paid in instalments to the given amount.

.....
The rocky areas and gaps in the forest (15 hectares) have affected the money we have injected and the loss is attributed to empty gaps in the forest."

44. Following the above quoted letter and DEXH.7, it is clear that the disposal contract that was entered into between the Plaintiff and the Defendant on 14th of June, 2018 officially ended on 29th of January, 2019 and before its end, the Defendant ought to have completed payment as per PEXH.4.

45. The above quoted exhibit was corroborated by the evidence of PW1 who said that the Defendant was allotted 70 hectares as agreed upon in the contract and it indeed harvested the said number of hectares.



46. The Defendant did not however comply with the disposal contract regarding payments as clearly indicated in the quoted letter. PEXH.4 further in its contents indicates that the Defendant was to accept and harvest the forest on “as it is basis”.
47. The Defendant alleges that there was a variation in the disposal contract and that is why it was not able to complete payment since it was waiting for the 11 hectares that the Plaintiff promised to compensate it.
48. However, according to the exhibits adduced in court, the letter which the Plaintiff responded to and promised to task the project manager to verify the extent of the gaps, rocks and rivers affecting the trees density was written on 24th of May, 2019 and responded to on 11th June, 2019 much later, after the original contract had ended. Which means there was no contract to vary since it had already expired. See: DEXH.4 and DEXH.5.
49. I further note that under DEXH.7, the Defendant requested for the favorable consideration of the loss resulting from lack of trees for harvesting in the area which had been treated as containing trees. That request was however not responded to by the Plaintiff. This meant that the Defendant was still bound by the original disposal contract.
50. In any case, if there was any other arrangement of adding the Defendant the 11 hectares of forest as compensation as alleged, the same was a separate arrangement that was not part of the original contract.
51. In the case of **Omar Saleh Audalih & A besse & Co.Ltd (1960) EA 910** which cited the case of **L’Strange vs Gracoub Ltd [1934]2 KB 394** Scruton LJ in his lead judgment underscored the principle that; *“once an agreement is reduced into writing and executed by the parties, the parties are bound by its terms....”* See also **Section 10 (1) of the Contracts Act,2010**.
52. Therefore, according to PEXH.4 which is the disposal agreement, the Defendant was supposed to pay the final balance of the contract upon 50% harvest but it instead ended the contract on 29th of January, 2019 after full harvest with unpaid balance of Ugx: 100,500,000/= following PEXH.6 to PEXH.11 hence, it breached the contract.
53. Be the above as it may, what is pertinent to note is that the Defendant accepted the contract to harvest the forest on “**as is basis**”. Therefore, the issue of whether the forest had rocky and water patches which did not have trees is not sustainable. In **KC Ninan V. Kerala State Electricity Board & Ors. Civil Appeal No.2109-2110 of 2004** the Supreme Court of India stated that; where the contract is on as is basis *“...the purchaser would be acquiring the asset with all its existing rights, obligations and liabilities and when a property is sold on as is basis, encumbrances on the property stand transferred to the purchaser upon the sale.”*

54. It is therefore of no doubt that in the current suit, the Defendant accepted the 70 hectares of forest in the state it was.

55. **Counter-Claim**

56. Having resolved that the original contract had been concluded and that the defendant was in breach of the same, the existence of the other arrangement of the claim by the defendant for an extra 11 hectares would therefore be a separate arrangement which has no nexus to the main contract.

57. Accordingly, the counter claim is dismissed.

58. ***Issue No.2: What is the available remedy to the parties?***

59. **General damages:**

60. Counsel for the Plaintiff submitted that as a result of breach of the contract by the Defendant, the Plaintiff has suffered financial and economic loss which has affected its operation. He invited court to award the Plaintiff interest at the rate of 30% on the unpaid balance and further award general damages to compensate the Plaintiff. He cited **James Fredrick Nsubuga V. Attorney General, HCCS No. 13 of 1993** to support his submissions.

61. Considering the period, the Defendant has denied the Plaintiff use of its money, the Plaintiff is awarded general damages of Ugx: 10,000,000/= (Ten million shillings)

62. **Punitive damages:**

63. Considering the nature of this case, no punitive damages are awarded.

64. **Interests:**

65. The plaintiff prayed for 30% interest per annum on the unpaid balance from the date of breach of contract until full payment.

66. In **Tate & Lyle Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716** Forbes J held at page 722 that-

"I do not think the modern law is that interest is awarded against the Defendant as a punitive measure for having kept the Plaintiff out of his money. I think the principle now recognized is that it is all part of the attempt to achieve restitution integrum.... I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld."

67. In the case of **Attorney General versus Virchanda Mithalal & Sons Ltd Civil Appeal No 20 of 2007 [2009] UGSC 13** Honorable Justice GW Kanyeihamba JSC held inter alia that-

“The award of interest is based on one or more of a multiplicity of grounds such as the law applicable to the transaction, the nature of the business transacted or agreed between the parties, the construction of the agreement or contract between the parties, the trade custom of the business out of which the indebtedness arose, intention of the parties or the consequences of the commercial transaction that was concluded between them.”

68. The upshot of the above authorities cited is that an award of interest is meant to compensate the Plaintiff for the period it has been deprived of the use of the money which became due.

69. PW1 said that in a bid to protect the integrity of Mt. Elgon National Park and as a revenue income generating endeavor, the Plaintiff established a softwood tree plantation at Kapkwata.

70. The above therefore means that the Defendant has kept the Plaintiff out of use of its revenue for now 6 years.

71. It should however, be noted that the award of interest is at the discretion of court. **See: Omunyokol Akol Johnson v Attorney General [2012] UGSC 4.**

72. In the circumstance, the Plaintiff is awarded 10% interest per annum on the unpaid balance from the date of this judgment till payment in full.


73. **Costs**

74. **Section 27 (2) of the Civil Procedure Act Cap 71** is to the effect that the costs of any action, cause or other matter or issue shall follow the event.

75. Accordingly, costs of this suit are awarded to the Plaintiff.

76. In the final result, this judgment is entered in favour of the Plaintiff in following terms-

- (a) It is declared that the Defendant breached the contract dated 14th of June, 2018.
- (b) The Defendant shall pay the unpaid contract balance of Ugx: 100,500,000/= (One hundred, five hundred thousand shillings) to the Plaintiff.
- (c) The Plaintiff is awarded 10% interest per annum on the un paid balance above.



(d) The Plaintiff is awarded general damages of Ugx: 10,000,000/= (Ten million shillings)

(e) Costs of this suit are awarded to the Plaintiff.

I so order

.....
LUBEGA FAROUQ
JUDGE

DATE: 22th of March, 2024