THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 339 OF 2020

LYDIA MUGAMBE::PLAINTIFF

VERSUS

1. **KAYITA JAMES::DEFENDANTS**
2. **HALLMARK CONSTRUCTION & PAINTING COMPANY LTD**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff filed this claim against the defendants jointly and severally for special damages to the tune of UGX 323,100,000/= (three hundred twenty-three million one hundred thousand shillings only) general damages, aggravated damages, interest, and costs arising out of the torts of deceit, misrepresentation, interference with a contractual relationship and for breach of contract inter alia.

The plaintiff entered into a construction agreement with the defendants on 3rd July 2019 for the completion of finishing works on the plaintiff's ten apartment block in Bweyogerere, Kiira. It was agreed that these finishing works would be completed within 6 months for a total consideration of Ugx.450,000,000/=.

The plaintiff paid the sum of Ugx.320,000,000 by 12th November 2019 however the works on the said ten apartment block were never completed. The plaintiff accused the defendants of doing shoddy work that did more damage to the apartments that she asked them to leave the construction site. It is the plaintiff's case that both before and during the execution of the works contracted for, the defendants jointly committed various tortious actions and omissions including negligence, deceit, and misrepresentation besides the blatant breach of contract.

On the other hand, the defendants accused the plaintiff of failing to make payments that had become necessary given the stage of works, giving unreasonable and wrongful instructions in the course of doing construction works and failing to provide structural and architectural design drawings and supervising technical personnel that would help resolve the technical disagreements over the work that was being carried out.

The 2nd defendant filed a counterclaim for recovery of UGX 171,741,600 damages for breach of contract, aggravated damages for the counter defendant's conduct during the performance of the contract, interest, and costs of the suit. The counterclaimant contended that this arose out of incurred costs on works outside the contract that were to be reimbursed by the counter defendant as well as unpaid balance from the contract. During scheduling, the following issues were framed for determination by this court:

1. ***Whether there was a breach of contract, if so by whom?***
2. ***Whether the defendants negligently performed the construction works?***
3. ***Whether the 1st defendant misrepresented the 2nd defendant's technical capacity and capability to perform the contract.***
4. ***What remedies are available?***

The plaintiff was represented by *Counsel Jude Byamukama* and the defendants were represented by *Counsel Mugisha Patrick Machika* and *Counsel Bwesigye Enoch*.

The plaintiff led evidence of 4 witnesses in support of her case while the defendant also led evidence of 4 witnesses in defence and proof of the counter claim.

The parties filed written submissions that were considered by this court.

DETERMINATION

Whether there was a breach of contract, and if so by whom.?

The plaintiff contended that the 2nd defendant, in failing to complete the agreed works on the apartment block and carrying out shoddy works was in breach of the construction agreement for which it is liable for breach of contract.

Counsel for the plaintiff submitted that from the onset the plaintiff fully performed the construction contract by making all payments as required but the defendants jointly breached the contract. That the defendants did not only fail to perform the contract in

the stipulated time but also failed to supervise and direct the execution of the finishing works in a professionally acceptable manner. That the finishing works, as detailed by PW 1 Philly Mpaata in his testimony and report, were not only grossly incomplete but were also poor and of demonstrably bad quality.

According to the construction agreement, the defendants were required to employ their skills and perform their contractual obligations without unreasonable delay, supervise and direct the work using their best skills and attention. The performance of this contract was to be discharged within **6 months** from the execution of the contract.

It was also agreed that the scope of the works that had to be carried out by the defendants were as follows;

1. *Plastering, internal & external wall surfaces.*
2. *Painting of internal & external wall surfaces.*
3. *Wall tiling in bathrooms and kitchen.*
4. *Floor screeding & tiling.*
5. *Ceiling Plastering & Painting.*
6. *Balcony screeding & tiling.*
7. *Fixing of internal mahogany doors and frames.*
8. *Glazing of external doors & windows using glass.*
9. *Balustrading around staircases & balconies.*

It was the defendant's contractual obligation under clause 4.0 of the contract to supervise and direct the performance of the above-mentioned works using professionalism, skill, and experience. Unfortunately, the said works were either carried out or performed in a manner that was highly negligent and damaging of the site.

Counsel submitted that the 1st defendant further breached the construction agreement when he failed to supervise and direct the work using his best skills and attention. That the plaintiff testified that the defendants had incompetent and inexperienced workers on-site as supervisors in the form of who did not know much about construction and execution of finishing works as contracted for by the plaintiff.

That during the cross-examination of Julius Kalyesubula one of the site workers who testified as DW2, he testified that he was not a registered engineer and had little or no experience in construction works yet, he held out as a supervisor and engineer at the plaintiff's construction site. That he testified that he had completed university in 2019 and headed for the plaintiff's site as a supervisor. Counsel submitted that the testimony

sufficiently corroborated the plaintiff's assertions that the defendants hired incompetent and inexperienced workers on-site as supervisors.

Counsel submitted that there was overwhelming evidence that the 1st defendant actively stopped workers on site from correcting any defects since he was their employer. Counsel further submitted that the 1st defendant conceded to owning over 90% shareholding in the 2nd defendant's company which the plaintiff explained that the 2nd defendant was merely his business vehicle for executing the works.

Counsel concluded that the 1st and 2nd defendants jointly breached the construction agreement with the plaintiff when they failed to do the following; perform the contract within the stipulated time, correct errors in their work, supervise and direct works using the best skills and attention as well as perform the finishing works in a good and workmanlike manner. Therefore, the defendants were jointly and severally liable for breach of contract.

In response, counsel for the defendants submitted that counsel for the plaintiff failed to appreciate the import of clauses 5 and 8.0 of the agreement between the parties read together, which clearly meant that even upon the lapse of 6 months, the agreement was deemed to be automatically renewed if either of the parties had not, prior to the last date given 30 days' notice of the intention to terminate if such party was not intending not to renew the same. That the circumstances showed that neither party took the move to strike the contract at the lapse of 6 months, and the parties legally continued operating under the contract.

Counsel submitted that the fact that the parties opted to extend operations under the contract beyond the 6 months with the consent of the plaintiff hence the plaintiff's claim that the defendants exceeded the time limits in the agreement should fail.

On the allegation that the 1st defendant's workers did shoddy work with defects and of substandard quality is a question of fact. In the bid to prove her case the plaintiff submitted the evidence of one Mpaata (a quality surveyor) (PW1) and engineer Hans Mwesigwa (PW4).

Counsel submitted that it should be noted that the engineer's report (The structural integrity assessment report(SIAR) and structural investigations report (SIR), pages 164-289 of the plaintiff's trial bundle are irrelevant to the case in court which was about "plastering and finishing". Both reports were limited to determining the capacity of the structures "to carry the anticipated loading" PW4 conceded to this in his testimony during cross-examination, and indeed, both in his report and testimony, he did not

testify on the vertical and horizontal livings of the walls and floors which the 1st defendant's workers complained about while they worked. This was understandably so because this is not the work of engineers but for architects, and it was ably pointed out by DW3 (Arch. Muhumuza) in his concluding remarks of his report attached to his testimony which was unchallenged.

Counsel prayed that the engineer's report and evidence be overruled in this case as being irrelevant and worthless in resolving the issues before the court in this matter.

In regard to the quality or standard of work as purportedly evaluated by Mr. Mpaata (Quality Surveyor), counsel submitted that his statements were too subjective. That he did not state the quality or standard of work he was assuming. Counsel submitted that Mr. Mpaata stated in his report that the works were not to quality as per standard building specifications but did not state this standard or show which work did not meet which standard. That he also did not outline what he claimed was defective or damaged which left the claims as blank statements rendering his conclusions of damaged or defective works baseless and unreliable.

Counsel for the defendants submitted that the evidence of photographs adduced by the plaintiff included repetitive shots of the same items and damped debris and magnified cracks on walls that do not suggest even 2% of the whole area of the site. Counsel invited court to juxtapose the report of Mr. Mpaata with those of Architect Muhumuza and Mr. Kaigia, a quality surveyor which showed that the defects in the works were normal and inevitable within construction practice and a provision is always made for rectification of such. That Solomon Kaigia's report provided details in numeral of which items could have been damaged or affected by error and makes quantitative calculations of the works done and the cost of the works damaged or defective and the work not yet done. Counsel concluded that the defects or damaged works were within the provision of correction.

On the plaintiff's allegation that the tiles were substandard. That the plaintiff claimed that Spanish tiles were agreed but this was not in the agreement signed by the parties. The Bills of Quantities did not specify the make of tiles to be fixed but it was testified by the defence witnesses that the plaintiff approved the tiles which were bought, and she even made payments after almost all the floors had been tiled. She was therefore estopped from turning around and rejecting the same.

Counsel invited the court to find that the 2nd defendant had diligently carried out the constructed work until the plaintiff breached the contract.

Counsel also submitted that the claim that the 2nd defendant failed to deploy skilled workers was unfounded since finishing works constituted artisan work that did not call for engineers of a particular qualification or skill.

The 2nd defendant contended that the plaintiff was the one who breached the contract by making undue demands for alterations of work to wit-changing already laid tiles which were never contracted; insisting on making alterations on works not supported by technical advice and wrongfully chasing the 2nd defendant's workers out of site without justification.

DW1 and DW2 testified that the plaintiff kept on giving unfounded instructions to change certain works they pointed out to her the issue of structural lining which had paused a problem in finishing and asked for architectural and structural drawings as well as for an architect or engineer to provide supervision and help resolve these disagreements. She refused to do so and this evidence was unchallenged by the plaintiff. That the plaintiff admitted she had neither supervising engineer or architect and she failed to provide the architectural and structural drawings for the site in issue.

In the midst of this standoff, the National Building Review Board inspected the plaintiff's site in issue and established that the site was wanting in a number of requirements which are particularized in the letter from the National Building Review Board. That it will be noted that the plaintiff did not anyway challenge these findings of the Board but rather went on to do compliance remedials by obtaining the structural integrity reports. The plaintiff also admitted at the trial that she did not retain the services of the qualified engineer and architect for the site at the material times of operation.

Counsel cited Section 34 of the Building Control Act (2013) and Regulations 5,27,29, 36 and 42 of the Building Control Regulations (2020) which imposed the duty of availing the structural and architectural drawings and technical supervisory services of the engineer and architect.

The failure by the plaintiff to avail the drawings and services of the engineers and architect on site when demanded on site by the 2nd defendant constituted breach of contract on her part. That had she produced this the disagreements on the alleged errors and defects would have been defused and work on site would have gone on smoothly and on time, but due to her attempts to turn herself into a technical person and to purport to identify errors and order for rectification of the same without the advice of the technical personnel, the disputes escalated.

Counsel submitted that the plaintiff breached her part of the contract when she dismissed the 2nd defendant's team from the site and also confiscated the 1st defendant's materials and tools. That the defendant was not allowed sufficient time to correct any errors which is a standard practice in construction.

On the part of the 1st defendant being jointly liable with the 2nd defendant for the breach of the contract alleging that there was no practical distinction between the company and its managing director and majority shareholder the 1st defendant. Counsel submitted that Court is only empowered to lift the veil of incorporation against its shareholders or directors under Section 20 of the Company's Act 2012. The section provides that the High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where save for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil. Counsel submitted that the circumstances in this case did not warrant the exercise of these powers by this Honorable Court.

Counsel submitted that the case of Palmer Birch vs Michael Lloyd cited by counsel for the plaintiff was so distinct and could not apply in these circumstances. That in this case no evidence had been led to show that the 1st defendant runs the company since other officials of the company authored correspondences on behalf of the company. Counsel submitted that while the plaintiff claims that payments were personally made to the 1st defendant, it was clear that the money was received only once and on behalf of the company.

Counsel concluded that no evidence had been proved in this case to warrant lifting the veil of incorporation hence the suit against the 1st defendant be dismissed with costs.

In rejoinder, counsel for the plaintiff submitted that the structural integrity reports and PW4's Structural Investigations Report allegedly irrelevant according to the defendants' counsel were used by the plaintiff to demonstrate that the defendants' shoddy work on site was entirely a result of poor workmanship, lack of due diligence, lack of professional supervision and gross negligence on part of the defendants. The reports dispel the false notion advanced by the defendants that certain structural errors made it impossible for them to do the finishing works. The reports demonstrate that this was a lie from the defendants. That the reports were professionally prepared and relevant to the determination of this case and could not be overruled at the whims of the defendants.

Counsel submitted that the claim that the photographic evidence in PW1 Philly Mpaata's report was full of repetitive shots was false because there was no repetition of

a single photograph in the report. That the defendants did not demonstrate which of the pictures was repeated or similar because there was nothing repeated. That as it had been demonstrated during the locus visit, these photos were only some of the different captions of shoddy work forming the basis of the plaintiff's suit.

Counsel submitted that DW2 Julius Kalyesubula who the defendants claimed was/is an engineer who could competently supervise the defendants' work had admitted in cross-examination that he was not an engineer and could therefore not competently supervise the works on site at the time he was there. Further that DW2 had admitted that he went on the plaintiff's site in June 2020 which meant that was on the site for only one month several months after the contract had expired on 3rd January 2020.

Counsel reiterated that therefore there was absolutely no supervision carried out by DW 2 as he falsely claimed in his witness statement.

Counsel dismissed the defendants' claims that the plaintiff breached the contract with the defendants by making undue demands for alterations of work as well as sending the defendants' workers off the site unceremoniously as false. Counsel submitted that defendants were contracted to lay Spanish matt tiles but instead laid the lower quality and much lower priced Goodwill tiles. Further that the defendants' workers were never unjustifiably sent away from the plaintiff's site but had on the direction of the 2nd defendant refused to leave the site long after the contract had ended and after they had been categorically told to leave by the plaintiff.

Counsel for the plaintiff reiterated that the plaintiff had a duly qualified and registered engineer (Ephraim Turinawe) and architect (Moses Kinobe) who always reviewed the defendants' work and that it was from these professionals' reviews that she would identify errors to the defendants for the rectification.

Counsel also submitted that the plaintiff had never failed to avail the structural drawings stating that they had always been available and were presented in the first meeting between the parties but the defendants informed her that they never needed them for the finishing works they were contracted for. Counsel submitted that the defendants had not adduced any letter written asking for the said drawings.

The plaintiff's counsel also rebutted the defendants' submission that the National Building Review Board inspected the plaintiff's site in issue and established that the site was wanting. Counsel submitted that the Board had never officially visited the site as claimed. That the letter from the Board was at the instigation and connivance of the 1st

defendant with his personal contact at the Board in his grand scheme of blackmail and intimidation of the plaintiff to dissuade her from instituting the suit against them.

Analysis

Breach of contract occurs when one or both parties fail to fulfill the obligations imposed by the terms of the contract. The parties to the contract agree to be bound by the terms of the contract in order to contend and allege any breach of contract. Therefore a breach of contract will occur if a party to the contract without lawful excuse fails to perform his/her contractual obligations. **Section 33 (1) of the Contracts Act No. 07 of 2010** states that; **"The parties to a contract shall perform or offer to perform, their respective promises.."** This implies that both the Plaintiff and Defendants were duty bound to perform their respective bargains under the contract and any failure to perform results in a breach.

The parties to any contract and the court are bound by the terms or conditions in a contract, whether parole or written, between the contracting parties. The courts lack the power to add or subtract from the terms of contract of parties and parties thereto are not allowed to unilaterally alter them. This has acquired the sobriquet and mantra of sanctity of contract which is expressed in the maxim, *pacta sunt servanda*, which means the non-fraudulent agreement of parties must be observed. See ***Golden Construction Co. Ltd v Stateco (Nig) Ltd (2014) 8 NWLR (pt 1408)***

The court must treat as sacrosanct the terms of an agreement freely entered into by the parties. This because parties to a contract enjoy freedom to contract on their own terms so long as the same is lawful. The terms of a contract between the parties are clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document which constitute the contract are invariably the guide to its interpretation. When parties enter into a contract, they are bound by the terms of the contract as set out by them. It is not the business of the court to rewrite a contract for the parties. The court, however, has a duty to construe the surrounding circumstances including written or oral statement so as to discover the intention of the parties.

The plaintiff contended that failing to complete the agreed works on the apartment block and carrying out shoddy works was in breach of the construction agreement for which it is liable for breach of contract. It is true that the contract was to be executed within a period of six months but it was not possible on the part of the defendant. The defendant does not give any reason for the failure but rather contends that the plaintiff acquiesced with the delay. Terms of the contract cannot be unilaterally changed and

any party who wishes to alter or vary terms of the contract is supposed to do so in writing in order to avoid parole evidence contradicting the written agreement. According to Exh PE-1 it was provided that the period of 6 months was to be extended by agreement of the parties. I have not seen any written agreement allowing the extension of the contract period.

According to the construction agreement Article 4.2; the contractor undertook to not unreasonably delay to perform their obligation under the agreement. The parties agree that by the end of the contract period which was January 15, 2020, the finishing works had not yet been completed. However, counsel for the defendants submitted that the parties opted to extend operations under the contract beyond the 6 months with the consent of the plaintiff hence the plaintiff's claim that the defendants exceeded the time limits in the agreement should fail. The contract was in writing and any alteration ought to have been in writing to avoid oral variation which would be denied. In absence of any evidence to the contrary, this court would find the defendant to have been in breach by failing to execute the contract within the time set in the contract.

The plaintiff also contended that there was a breach of contract in the nature of the works executed which were not to the required standard. The 1st defendant breached the construction agreement when he failed to supervise and direct the work using his best skills and attention. That the plaintiff testified that the defendants had incompetent and inexperienced workers on-site as supervisors in the form of who did not know much about construction and execution of finishing works as contracted for by the plaintiff.

On the allegation that the defendants carried out shoddy work which was in breach of the construction agreement as well as the 1st defendant's failure to supervise and direct the work using his best skills and attention. The defendant had an obligation under Article 4.3 of the construction agreement to supervise and direct the work using the contractor's best skill and attention. The resultant work was short of that obligation and duty as seen from the nature of work executed.

There were glaring errors in the work which included unaligned plaster works, full of cracks that eventually began to crumble and fall off the walls in some places, and cracked door frames that were also poorly fitted.

The plaintiff led evidence of a *Technical Audit Report "Annexure F"* which report found the defects in the defendant's work with photographs showing cracked wall plaster, plaster peeling off the walls, cracked ceiling plaster, cracked ceiling cornices, defective door frames, cracked/ damaged floor tiles among others. The defendants however

asked this court to disregard the report and submitted that the defects were within the provision of correction. The court was able to visit the locus/site and see the different defects which were glaring and it is not true that the cracks were merely magnified to appear big.

The court finds that the defendant's poor workmanship resulted in defective work. Such defects could have been avoided by the defendant fulfilling their obligation to supervise and direct the work using the contractor's best skill and attention. The defendant, therefore, breached their end of the contract by giving the plaintiff defective works.

The plaintiff's allegation that the defendant's engineer was not qualified was unfounded since the engineer in question had the necessary qualifications despite the fact that he had recently completed school.

Further, on the allegation that the defendants fitted substandard tiles, there was no proof brought forward by the plaintiff to show that there was an agreement on which kind of tiles were to be fitted. The plaintiff did not adduce any evidence to prove that the agreed tiles were supposed to be Spanish titles as opposed to what the contractor opted to use good will titles made in Uganda.

On the issue of the plaintiff dismissing the defendant's employees, I find that this was a natural flow of events owing to the defendant's shoddy work. The defendants could therefore not claim breach of contract since they had failed to discharge their contractual obligations. The plaintiff was not in any breach against the defendant since the failure to perform their part of the contract resulted in the plaintiff's refusal to effect any payments as a mitigation for the loss or shoddy works.

The plaintiff as an innocent party elected to bring the contract to an end by accepting that the defendants had breached his contractual obligations and did not want him to continue with the shoddy works at the site. Therefore, the plaintiff as the innocent party who sustained losses as a result, is at liberty to seek damages to compensate for such losses.

I, therefore, find that the defendants breached their contract with the plaintiff.

Whether the defendants negligently performed the construction works?

The plaintiff contends that the defendants negligently performed the construction works which they contracted for when they breached their duty of care to perform the

contract in a professional manner as per the standard practice. Counsel submitted that kind of negligence fell outside the ambit of the contractual relationship between the plaintiff and the defendants.

It was the plaintiff's contention that upon execution of the construction contract between the plaintiff and the defendants, a duty of care to carry out the work in a professional manner following standard practice and procedures that a reasonable ordinary professional contractor would have done was expected of the defendants which was not done. That the construction contract did not exclude this duty of care that was imposed.

Counsel submitted that the negligent acts included; site workers who were not under supervision of a professional, works riddled with elementary building errors especially poor plastering works as well as hiring supervisors without any professional skills and experience such as DW 2 Julius Kalyesubula who had only completed school one year prior to his deployment on the plaintiff's site as a site supervisor.

It was counsel's submission therefore that the defendants negligently performed the finishing works on the plaintiff's ten apartment building and are liable for negligence. That the 1st defendant breached his duty of care owed to the plaintiff and is liable as a joint tortfeasor with his business vehicle, the 2nd defendant company.

In defence, counsel for the defendants submitted that the errors in the works that were on the site were as per the testimony of the architect normal and correction of the same was allowed in construction practice. Counsel submitted that it was the architect's assessment that the works were rectifiable and could therefore not be classified in negligence hence the plaintiff ought to have given the defendants chance to finish the work.

Counsel for the plaintiff rejoined; he submitted that the defendants' counsel had erroneously submitted that only an architect could assess whether the defects and errors of the finishing works were due to the negligence of the defendants and could be corrected. Counsel submitted that this was baseless in law or building practice.

Counsel submitted that PW1 and PW4 who are both competent professional and registered Quantity Surveyor and Civil Engineer respectively with a wealth of experience were competent enough to assess the quality of works done by others. That these witnesses had not only testified to the effect that a large portion of the defendant's work were defective or were done using poor works methodology but also showed that some existing works had been damaged by the defendants.

It was counsel's conclusion that the defendants negligently performed the construction contract by grossly deviating from the normal practice of performing such works.

Analysis

The test of whether an act amounts to professional negligence is that of the standard of an ordinary skilled man exercising and professing to have that specialty skill. Negligence is a question of fact not law and it is duty on who asserts to prove it. The plaintiff must prove that the defendant owed her a duty of care and was in breach of that duty. The defendants in their contractual relationship with the plaintiff undertook to supervise and direct the work, using the contractor's best skill and attention. PE-1. The contract in this case plays an important role in shaping the scope of negligence, in particular, the ambit of duty of care. Ascertaining the intention of the contracting parties is crucial for determining whether a duty of care in negligence should arise in a particular case.
The work executed by the defendants fell short of the standard they had undertaken and indeed left a lot to be desired. The walls were cracked on the wall plaster, plaster peeling off the walls, cracked ceiling plaster, cracked ceiling cornices, defective and uneven door frames, and unlevelled floor tiles or cracked/ damaged floor tiles.

Henderson vs Merrett Syndicates Ltd [1995] 2 AC 145 and Tesco Stores Ltd vs Costain Construction Ltd & Others [2003] EWHC 1487 (TCC) *"It is settled law that where by contract a party has agreed personally to do something and it is an express or an implied term of the contract that that thing will be done with reasonable care and skill, the party owes to other relevant contracting parties a like duty of care in tort unless the existence of such duty of care is excluded or modified by the contract."*

In this present case, there is concurrent liability both in contract and tort and the plaintiff was at liberty to sue in either contract or tort or both provided she could establish the requisite elements for each cause of action. The plaintiff rightly sued for breach of the contract based on its express or implied terms. In the context of professional work, there is generally an implied term that the professional (Contractor) will exercise care and skill in the provision of services unless this is modified by the express contractual terms. The contractual duties as agreed by parties may on their own give rise to a corresponding tortious duty of care in negligence. See ***Henderson v Merrett Syndicates Ltd [1995] 2 AC 145: Go Dante Yap v Bank Austria Creditanstalt AG [2011] 4 SLR 559***

A contractual obligation to carry out works with **reasonable skill and care** creates a performance obligation which is analogous to the standard of care in negligence. It is an implied

duty to exercise the level of skill and care expected of another reasonably competent member of the profession.

This court would not encourage 'reckless and hazardous' as well as economically inefficient behavior on the part of the defendants (contractor) as this would appear to condone unskilled personnel in the construction industry which may lead to loss of life and property in future due to collapsing buildings in Uganda.

As per my preceding findings, I found that there was evidence showing cracked wall plaster, plaster peeling off the walls, cracked ceiling plaster, cracked ceiling cornices, defective door frames, and unlevelled floor tiles or cracked/ damaged floor tiles among others. This is also evidence of negligently performing the construction works which can be faulted on the defendants jointly and severally.

Whether the 1st defendant misrepresented the 2nd defendant's technical capacity and capability to perform the contract?

It was the plaintiff's contention that the 1st defendant misrepresented the 2nd defendant's technical capacity and capability to perform the contract in issue. That the 1st defendant also misrepresented his own technical expertise and abilities in construction thereby inducing the plaintiff to enter into the construction contract with his company that was really his device, a sham for confusing clients.

That the plaintiff testified that the 1st defendant represented to her that he was a seasoned contractor who had successfully executed various projects and had the requisite capacity to complete plastering and finishing works on the suit property. That these claims of expertise were false since the 1st defendant was unprofessional and incompetent in execution of the job on the plaintiff's site due to the apparent errors earlier highlighted.

Counsel cited *Civil Suit No.151 of 2008 Boschcon Civil & Electrical Construction Company (U) Ltd v Salini Costruttori Spa* which concerned representations given by an employer of a building contractor as well as assurances made by the said contractor. Counsel also cited *Pasley vs Freeman, 3 T.R. 51. ER 450 (KB)* on the tort of deceit as well as [1963]2 All ER Hedley Byrne & Co. Ltd v Heller & Partners Ltd at page 575.

Counsel also cited **Esso Petroleum Co Ltd vs Mardon [1976] QB 801**, where it was held *that, during the course of pre-contractual negotiations, one party, who had special knowledge and expertise concerning the subject matter of the negotiations, made a forecast based on that knowledge and expertise with the intention of inducing the other party to enter into the contract, and in reliance on the forecast the other party did enter into the contract, it was open to*

the court to construe the forecast as being not merely an expression of opinion but as constituting warranty that the forecast was reliable.

Counsel submitted that the evidence conclusively proved that the 1st defendant lied to the plaintiff when he claimed to be an expert in carrying out finishing works. That this lie which was intended to procure a contract, resulted into serious financial loss on part of the plaintiff as she believed it and proceeded to award a contract to the 1st defendant and his company. That the 1st Defendant therefore committed the tort of deceit and the 2nd Defendant was vicariously liable for the same. That consequently, the defendants were jointly and severally liable for misrepresentation and deceit.

Counsel for the defendant on the other hand submitted that it was not true that the 1st defendant had made any representations as to qualifications of any personnel of the 2nd defendant nor did the plaintiff exhibit any. That the plastering, finishing and painting is artisan and the law does not impose any specific qualifications for the same to be undertaken. That no evidence was brought to show that 2nd defendant's engineer was incompetent.

Counsel submitted that the 1st defendant did not hold out himself as competent to assess capacities to do the plaintiff's work, nor did he offer any special information about the company. That the company was presented to the plaintiff as a prospective contractor and it was upon the plaintiff to assess and choose whether to agree to construct with it or not.

Counsel submitted that the authorities cited by counsel had no relevance or even similarities to the present case as they related to specific representations between the actual contracting parties or persons offering themselves as advisors. That in the present case, the 1st defendant had not at any point stood in the position of the plaintiff's advisor expressly or by any contract.

In rejoinder, counsel for the plaintiff submitted the defendants' assertions above were false and outright lies. The plaintiff testified that she was personally touted for business by the 1st defendant and his employees and the 1st defendant represented to her how he was a seasoned contractor who had carried out various painting and finishing works on many buildings and had the capacity to perform the contracted works in a timely and professional manner.

PW3 also confirmed to the court that the 1st defendant was the lead and only speaker at all the meetings with the plaintiff, he was the only one who communicated with the plaintiff in follow up, requested for and personally received payments from the

plaintiff. That the contract was executed and the defendants failed to perform it as agreed purely on DW 1's instruction and direction. Further that DW2 was not a qualified engineer since he was not duly registered by the Engineers Registration Board, as such he did not have the expertise to supervise the works by the defendants.

It was counsel's submission therefore that the 1st defendant misrepresented the capacity of both himself and the 2nd defendant to perform the works contracted and as a result this induced the plaintiff to enter into the construction contract. That the contract was breached as the defendants failed to perform it as per the representations fronted by the 1st defendant which made him personally liable.

That both defendants committed various negligent misrepresentations. That the 1st defendant committed the tort of deceit for which the 2nd defendant was vicariously liable.

Analysis

A misrepresentation has been defined by **Cheshire, Fifoot and Furmston's in The Law of Contract 14th edition,** as a representation that is untrue. It is not that every statement made to a party to a contract, will amount to misrepresentation so as to entitle the representee to relief.

Further **Cheshire, Fifoot and Furmston's** at pages 298-300, states that for a statement to amount to misrepresentation it must;

1. be a statement of an existing fact i.e. must not be a statement of opinion or law.
2. must be intended to induce the misrepresentee to enter into the contract statement
3. must have actually induced the representee to enter into the contract
4. the representation must be material.

Justice Yorokamu Bamwine in the case of **Esther Sempebwa v The Non-Performing Assets Recovery Trust HCT- 00 - CC - CS - 0954 - 2004** held that; "It is trite law that a representation is not a term, but a statement of fact made by one party, to the other, during their preliminary negotiations, which was intended to induce the other party, to enter into the contract and which did so induce the other party, to enter into that contract. "

It was alleged that the defendant represented to the plaintiff that he was a seasoned contractor who had successfully executed various projects and had the requisite capacity to complete plastering and finishing works on the suit property which induced the plaintiff to enter into a contract with the defendant. That these claims of expertise were false since the 1st defendant was unprofessional and incompetent in execution of the job on the plaintiff's site.

The plaintiff however did not show how the alleged statements were material and induced her into executing the contract with the defendant. There is no evidence to show how these representations were material in her decision to execute the contract with the defendant. There is no proof as how the misstatements or representations were made or whether the plaintiff sought any documentary proof of such executed works. The false representation must relate to facts , not mere opinion.

Where the representation is ambiguous, the representee, in order to prove that the statement was false, has to show that the representation was false in its ordinary meaning and also false in the sense in which she understood it. ***The Kriti Palm [2007] All ER (Comm) 667***

Furthermore, the errors and defects in the construction work that happened during the contract term cannot be termed misrepresentation as defined above that induced the plaintiff to execute the contract with the defendant. The plaintiff failed to prove that the representations were false. The tort of deceit or false representation seeks to protect a person from injury caused by another's deliberate lie. The plaintiff did not adduce any evidence to prove that the 1st defendant representations were false. The manner in which the defendants executed their work was mere negligence or poor workmanship due to failure in supervision and not the representation

I, therefore, find that the 1st defendant did not misrepresent the 2nd defendant's technical capacity and capability to perform the contract.

What remedies are available?

The plaintiff prayed for judgment against the defendants jointly and severally for special damages, general damages, aggravated damages, and the costs of the suit. Counsel for the plaintiff submitted that the plaintiff had discharged her burden to prove that she was entitled to judgment as prayed for.

Special damages

The plaintiff specifically pleaded the following particulars of special damages;

- Contractual sums paid to the 2nd Defendant- Ugx.320,000,000/=
- Sums paid to workers on site— Ugx.2,300,000/=
- Sums paid for purchase of building materials—Ugx.800,000/=
- Cost of structural integrity reports ---Ugx.32,000,000/=
- Fees paid for technical audit to quantity surveyor—Ugx.27,000,000
- Disbursements to rectify shoddy works---Ugx.64,000,000/=
- Cost of Mahogany wood for door frames—Ugx.27,900,000/=

Counsel submitted that the plaintiff had proved that she paid a worker on site Oloka John Bosco who acknowledged receipt of Ugx.1, 300,000 as remuneration of unpaid workers on site following the Defendant's failure to settle the same. Additionally, that the plaintiff prayed to be entitled to the sums of Ugx.64,000,000 to rectify the shoddy works as well as Ugx.27,900,000 to replace the wood in door frames that are not mahogany make as contracted. That the plaintiff was therefore entitled to the sum of *Ugx.489,330,000/=* in special damages.

Counsel for the defendants however prayed that the claim for special damages be disallowed. Counsel submitted that the plaintiff claimed the whole sum of UGX 320,000,000 which was paid to the 2nd defendant when even her own quantity surveyor acknowledged that work was done on the site and rated the work completion at 80% - 90%. That this was beyond the sum of UGX 320,000,000 claimed by the plaintiff hence the claim must fail.

That the plaintiff's claim of UGX 2,300,000 for payments to workers and UGX 800,000 for materials were not covered by contract and she must have incurred the same on a frolic of her own.

Counsel submitted that the claim for costs of the integrity report and technical audit were not pleaded nor were they specifically proved to have been properly incurred under any statutory fees chargeable by professionals.

That the claim for disbursements of UGX 6,000,000 for rectification of shoddy work and UGX 27,900,000 were by the testimonies of the carpenter PW1 and PW2 based on estimations that were excessively overstated in some parties. Counsel pointed out that the cement was quoted at UGX 280,000 which translated into an excess of over UGX 30,000,000. That such inaccuracies rendered the claim for special damages suspect and counsel prayed that the entire claim for disbursement be disallowed since no proof of such payments was provided.

Counsel also submitted that there was a claim for loss of rentals in the plaint but no evidence was adduced for such loss nor was it submitted on. Counsel was led to believe that the same was abandoned since no evidence was led as to the possibility that the apartments were worth such as rentals.

Plaintiff's counsel in rejoinder submitted that the plaintiff justifiably claimed the whole of the Ugx.320,000,000 paid to the defendants on grounds that their works on site were completely worthless and could hardly be salvaged. That this was confirmed in the professional reports of PW1 Mpaata and PW4 Engineer Hanns Mwesigwa and the testimony of PW2 the carpenter.

That the claims for the costs of the structural integrity reports (Ugx.32,000,000/=) and the technical audit (Ugx.27,000,000/=) performed by PW1 were specifically pleaded in paragraphs 51 and 53 of the reply to the counterclaim and defence. That the reply to the defence and counterclaim were also a pleading and consequently the claim that these figures were not pleaded was misplaced. The plaintiff also testified about them and the defendants did not challenge the said figures in cross examination. Further that, part of the defendants' challenge to the plaintiff suit was questioning the structural integrity of the apartment block in issue. That these costs were incurred as part of proving the defendants wrong and were incidental to the defendants' actions before court.

Counsel submitted that the thoroughness and detailed nature of the technical audit report PE7 was self-evident. The two receipts for the total payment of Ugx.27,000,000/= made to this expert Quantity Surveyor PW1 were admitted as exhibit PE18. That the claim therefore passed the test of having been specifically pleaded and proved.

That similarly, the documentary proof of the payments made for the Structural Integrity Reports (a total sum of Ugx.32,000,000/=) were exhibited as PE15 and PE16 in addition to being testified about by the plaintiff in paragraph 58 of her witness statement. That this claim was therefore specifically pleaded and proved as well.

Counsel submitted that the defendants' claims that the fees that these professionals were paid are on the high side are misplaced at this point. These payments were incurred because of the malicious actions of the defendants in raising frivolous complaints at the Building Review Board hence the need for structural integrity reports. Counsel invited the court to compare going market rates for similar professional work and reports by quantity surveyors and civil engineers.

Counsel submitted that the defendants' contention that the invoices of PW1 and PW2 were mere estimations and that PW2 conceded to over estimating costs was not true.

Counsel submitted that PW2, Ernest Bukenya had ably explained and justified his quotations as a carpenter regarding the works on door frames and the purchase of Mahogany wood required. That he testified about the same at length in his witness statement and it stood unchallenged even in cross examination.

Analysis

The power to award damages by the trial court is exercised in the circumstances of a judicious estimation of the loss to the victim once the breach of contract has been established. Special damages must be strictly proved meaning that evidence adduced on their proof must show particularity in accordance with the pleadings, and the claim must also be based upon precise calculation as to enable the defendant access facts which makes such calculation. Therefore, special damages are damages that are alleged to have been sustained in the circumstances of a particular wrong which must be specifically claimed and proved to be awardable.

The *ipse dixit* (that is, evidence of plaintiff) *simpliciter* led in proof special damages must be comprehensive and credible; and it must incorporate all the relevant conditions required in proof of special damages. Where various items are claimed under special damages, the plaintiff is entitled to be awarded any of the items which he could prove with sufficient evidence, even if he is not able to prove other or all the items.

Contractual sums paid to the 2nd Defendant- Ugx.320,000,000

I find it unfair to claim the contractual sums as special damages or seek a refund of the full amount that was so far paid by the plaintiff to the defendant for the part performance of the contractual works on the residential apartments. This is so because despite having performed the contract in an unsatisfactory manner, the defendants did some works on the building. The defendants engaged workers on the site and also bought materials that were used. According to the Technical Audit Report, the gross value of the works done was at UGX 211,479,830. The payments to date were at UGX 320,000,000.

Sums paid to workers on site— Ugx.2,300,000/= and Sums paid for the purchase of building materials—Ugx.800,000/=

The plaintiff did not attach evidence showing the payment made to the workers on the site as well as that of building materials. With no evidence attached, the court cannot conclusively determine if the same was paid or not. Secondly, I agree with the defendant's counsel that the actions of the plaintiff were done on frolic of her own since

these were employees of the defendants and the plaintiff did not know under what arrangement they were executing the work.

Cost of structural integrity reports ---Ugx.32,000,000/=

According to this report requested by the plaintiff, it was made for purpose of establishing the structural state of the existing structure; determining the comprehensive strength properties, reinforcement content of the different concrete elements, and material properties of the ground. It is fair to say from the purposes of this report that it was not concerned with the completion (finishing) works but rather the structure of the building which was not part of the contract between the plaintiff and the 2nd defendant.

The plaintiff as a party claiming damages had an onerous duty of taking reasonable steps to mitigate the expenditure and loss consequent upon the breach and debars her from claiming any damages which were unnecessary or due to her negligence.

I, therefore, cannot allow the cost of the structural integrity report to be a burden on the defendants since the same would have been incurred before the defendants had been engaged in the contract.

Fees paid for technical audit to quantity surveyor—Ugx. 27,000,000

The main objective of the technical audit report was to determine the net value of works executed by the contractor which included the value of works done, not done, the defective works, and the value of correcting the defective works. This was therefore pertinent to the defendant and can rightly be allowed as special damages. It was a genuine expenditure incurred by the plaintiff in order to assess the extent of the damage in the contractual duties of the defendants.

Disbursements to rectify shoddy works Ugx.64,000,000/= and Cost of Mahogany wood for door frames Ugx.27,900,000/=

The technical audit report showed that the cost for correcting the work done was UGX 58,927,000.

These claims are derived from the technical report. In my view these are not special damages since it is not money spent but only anticipated to be spent to correct and rectify the shoddy works.

The plaintiff is therefore allowed special damages proved of **UGX 27,000,000/=**.

General Damages

The principle of assessment of damages for breach of contract generally is *restituo in integrum;* that is the plaintiff should be restored as far as money can do it, to the correct position he would have been had the breach not occurred. The court has discretion as to the quantum of damages it would award in a claim of damages. The assessment does not depend on any legal rules, but the discretion of the court is however limited by usual caution or prudence and remoteness of damage when considering the award of damages.

In awarding general damages, the court would simply be guided by the opinion and judgment of a reasonable man in determining what sum of money will be reasonably awarded in the circumstances of the case. General damages are losses which flow naturally from the defendant's act. Therefore, general damages are damages which the law implies and presumes to have accrued from the wrong complained of or as the immediate, direct and proximate result, or the necessary result of the wrong complained of.

General damages are the direct probable consequence of the act complained of. Such consequences may be loss of use, loss of profit, or physical inconvenience. *Under S.61 (1) of the Contract Act,* ***"where there is breach of contract, the party who suffers breach is entitled to receive compensation for any loss or damage suffered".***

Construction claims ordinarily rest on the plaintiff establishing its entitlement under the contract which governs the parties' relationship. The principle of restitution for unjust enrichment refers to the reverse transfer of benefits from the defendant to the plaintiff where the defendant has been unjustly enriched, in the eyes of the law at the the claimant's expense.

The plaintiff led evidence through different experts who carried out evaluation of the work done assessed the damage to be redone/repeated. Most work was defective and was done using poor works. PW4-Eng Hans. J.W.B Mwesigwa in his testimony and report made on the work done by the defendants noted as follows;

- The poor workmanship and results have nothing to do with structural integrity of the building.
- The finishes as done by the contractor were very poor, showing lack of care, due diligence, poor expertise, poorly qualified manpower, wrong use of the materials and poor supervision.

In addition, the Technical Audit Report-PE-7 has assessed the cost of damage in the conclusion of the report where it was noted as follows;

> *"From findings as shown in the above sections of the report, it is clear that a large portion of the contractor's works are defective or have been done using poor works methodology and some existing works have been damaged by his works and these need to be corrected.*
>
> *Using the figures shown in the tables above, cost of correcting the defective works, cost of correcting the damaged existing finishes, and cost of correcting works bound to fail due to contractor's poor methodology is Ugx 169,871,116 which is about 80% of the gross value of works executed by the contractor to date."*

In addition, the plaintiff had proved on a balance of probabilities that she had suffered heavy financial losses as a result of the defendants' breach of contract, negligence, deceit in performance of this contract. The shoddy works by defendants would require the work to be redone/repeated which will definitely take some time and delay the plaintiff in recouping her investment.

The courts rely on common sense to guide decisions as well as whether any alleged breaches are a sufficiently substantial cause of the loss. HHJ Wilcox said in the case of *Great Eastern Hotel Co Ltd v John Laing Construction Ltd & Anor* [2005] EWHC 181:The Courts have avoided laying down any formal test for causation. They have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the Claimants' loss. The answer to whether the breach is the cause of the loss, or merely the occasion for loss must "in the end" depend on "the court's common sense" in interpreting the facts.

As is well known, the basic principle is that awards of damages for breach of contract are intended to put the innocent party in the position they would have been in had the contract been properly performed, so far as money can do this. The purpose of damages is to put the plaintiff back into the same financial position as he would have been in but for the breach. The purpose of damages is not to punish the defendant but to compensate the plaintiff/claimant.

The usual measure of damages for defective work or materials is either the diminution in value of the property which results from the defects, or the cost of putting the defects right, subject to considerations of reasonableness and mitigation of loss.

I find that these actions were of great inconvenience to the plaintiff and caused the plaintiff suffer damage financially and to her person. I, therefore, find the award of

UGX 225,000,000 as fairly adequate sufficient general damages to put the plaintiff in the position she would have been had the contract performed in accordance with the contract.

Counter-claim damages
The 2nd defendant made a counter-claim where the following claims were set out;

a) Outstanding balance on works done……shs 130,000,000
b) Slates (work inside finishings)……shs 7,500,000
c) Advance payment to plumber……shs 15,600,000
d) Water charges…….shs 5,000,000
e) Value of materials left on site……shs 10,641,000

Counsel submitted that the claim had not taken into account errors or damages works. That the 2nd defendant's quantity surveyor certified the claim and took into account all factors placed the same at UGX 47,865,032. That however that left out UGX 15,600,000 by the contractor for plumbing works and UGX 7,500,000 for stone works which were outside the terms of reference for the QS.

That the plaintiff in her own testimony and her quantity surveyor admitted to work being done by the 2nd defendant and retaining some materials which were on site.
Counsel submitted that the 2nd defendant/ counterclaimant was committed to seeing through her contract but was frustrated by the plaintiff/counter-defendant. That the plaintiff's failure to observe the legal requirements to readily avail the site drawings and supervising engineer and architect on her side even when requested for by the counterclaimant led to the escalation of the disagreements between the parties as to how to address site challenges which led to the collapse of the operations. That the plaintiff's ceremonial and unfounded decision to haul out the counterclaimant caused the 2nd defendant/ counterclaimant to lose business and image in business.

Counsel submitted that an award of damages within the region of UGX 150,000,000 would adequately atone for the general loss suffered by the defendant.

Counsel prayed that judgment be entered for the counterclaimant on the counterclaim in the sums proposed above, interest thereon at 28% pa, being a construction case and costs on both the head suit and the counterclaim. Counsel also prayed that the 1st defendant be awarded costs on the head suit.

On the other hand, counsel for the plaintiff/ counter defendant submitted that the claim was baseless as already highlighted in as far as it was the counterclaimants who breached the contract. Counsel submitted that the 2nd defendant's own architect and quantity surveyor had unanimously agree that they failed to perform the works as contractually required and instead owed the plaintiff money. That the claim for outstanding balance under the contract was therefore frivolous. Additionally, counsel submitted that the 2nd defendant had not led any evidence to justify the claimed special damages in the counterclaim.

Further, that the materials left on site were not property of the 2nd defendant since it was conceded that they were building materials for use on the plaintiff's site and had been purchased using funds paid by the plaintiff hence a claim for their recovery was misplaced. Counsel submitted that the defendants also had sufficient time to take whatever was their property from the plaintiff's site at the end of the contract on 2 January 2020.

Counsel concluded that the entire counterclaim was therefore misconceived and should be dismissed with costs in its entirety.

The defendant did not adduce satisfactory evidence to warrant grant of the monies sought in the counterclaim. Owing to the fact that the defendant breached the contract, they were not entitled to the balance of the contract sum. The other sums sought were also not proved by the defendant which left the court uncertain of the defendant's claims. The counterclaim stands dismissed.

A pertinent issue to be determined now is whether the 1st defendant is equally liable for the breach which was raised by the parties. The agreement was executed between the plaintiff and the 2nd defendant but the plaintiff asked the court to find the 1st defendant equally liable on account of him being the managing director and majority shareholder of the 2nd defendant. She alleged that there was no practical distinction between the company and the 1st defendant.

But the 1st defendant as the directing mind of the 2nd respondent executed the contract and it is not in despite that the same was executed in his personal capacity as KAYITA JAMES (CONTRACTOR). I don't think this was a mistake but rather the reflection of the true status of the 1st defendant as the contractor who would be liable in such circumstances. The defendants are jointly and severally liable for the breach and subsequent loss.

The court finds the defendants are liable for the breach of contract with the plaintiff and negligent performance of the construction works. The plaintiff is awarded special damages of **UGX 27,000,000/=**, general damages of **UGX 225,000,000/=.**

The plaintiff is awarded interest of 15% on the special damages from the date of filing and 20% is awarded on general damages from the date of judgment.

The plaintiff is awarded costs of this suit.

I so order.

SSEKAANA MUSA
JUDGE
8th August 2022