MUJUNI RUHEMBA

v

SKANKA JENSEN (U) LTD

COURT OF APPEAL OF UGANDA AT KAMP ALA

CIVIL APPEAL NO. 56 OF 2000

ON APPEAL FROM HIGH COURT CIVIL SUIT No. 104 OF 1999

BEFORE:

HON. MR. JUSTICE G M OKELLO, JA
HON. LADY JUSTICE A E M MPAGI-BAHIGEINE, JA
HON. MR. JUSTICE A TWINOMUJUNI, JA

March 6, 2002

JUDGMENT

G M OKELLO, JA: This is an appeal against the decision of the High Court dated September 28, 1999 in Civil Suit No. 104 of 1999 whereby the appellant's suit was dismissed with no order as to costs.

The summary of the background facts of the case may be stated thus: -

On March 3, 1998, the appellant and the respondent executed a contract of sale of sand. Under the contract the appellant was to supply to the respondent natural sand at its construction site in Mbarara at the agreed cost of shs.3200 per cubic meter inclusive of VAT at the prevailing rate during the delivery period. The respondent was to provide transport for the first calendar month of the contract from the initial date of delivery. Thereafter, the appellant was to assume responsibility for the provision of a suitable vehicle for the purpose of delivering the material and was to continue to do so throughout the supply period. Where the appellant provided transport, he was to be entitled to shs.8000 per cubic meter of the material for its transportation for the duration of the supply period. However, where the respondent provided his own transport for the delivery of the material, then the appellant was not entitled to charge for any transportation costs.

The appellant alleged that after two days of the first calendar month of the contract the respondent failed to provide the transport and that by an oral agreement the parties varied the

contract whereby the appellant was to provide transport for delivering the material at the cost of shs. 60,000 per trip. The appellant supplied the material using his own transport. Receipts of the goods were acknowledged by the respondent's agent. Payments were made on account.

A dispute later arose between the parties on a balance of payment amounting to shs.18,760,130. Appellant sued the respondent in High Court Civil Suit No. 104/99 to recover that amount. By consent of the parties, the trial court appointed an auditor to determine the point of disagreement between them. The auditor carried out his task and submitted his report which was received in evidence as Exhibit No.1. According to the report, the point of disagreement between the parties arose out of the rate of transport charges. The trial judge heard the case and dismissed the appellant' claim thus giving rise to this appeal.

The memorandum of appeal comprises the following six grounds: -

1. “The learned trial judge erred in law and fact by relying on the auditor's report without subjecting the auditor to cross-examination.

2. The learned trial judge erred in law and fact in relying on the auditor's report based on a contract, some of whose terms were disputed by the plaintiff.

3. The learned trial judge erred in law and fact in holding that there was no variation of the Contract when no evidence was called by the respondent in contravention of the variation pleaded by the plaintiff.

4. The learned trial judge erred in law and fact in relying on the evidence of counsel for the respondent called from the bar.

5. The learned trial judge erred in law and in fact in failing to properly evaluate the evidence on the record.

6. The learned trial judge erred in law and fact in holding that both parties bear their own costs.”

Upon those grounds, the appellant proceeded to pray this Honourable Court to allow the appeal set aside the decision of the High Court and to order the respondent to pay to the appellant the balance of payment claimed general damages for breach of contract and interest on the decretal amount from the date of judgment till payment in full. He also prayed for costs here and in the High Court.
At the hearing of the appeal, Mr. Kiryowa, learned counsel for the appellant, argued grounds 1 - 5 together under the heading "the learned trial judge erred in law and fact in failing to properly evaluate the evidence on the record."

He complained that the learned trial judge placed too much weight on the report of the court appointed auditor without scrutinizing and weighing it against the other evidence oral or documentary that was on record. He pointed out firstly that the report covered the period from March to August 1998 when the claim covered the period from March to September 1998.

Secondly, the report did not make a definite finding on the amount of money owing but merely stated that it was about eighteen (18) million shillings. Thirdly, though the auditor's evidence showed that payment was on account with difference which persisted and the figure did not tally with the claim when the trial judge made no reference to that evidence and instead relied on the statement of counsel for the respondent from the bar and thereby erroneously found that the contract was not varied. He merely stated that the report did not support the claim when the report itself was uncertain of the definite claim. Learned Counsel argued that the above instances show that the trial Judge did not scrutinise the report.

He further complained that the learned trial judge did not consider the issues that were framed at the beginning of the hearing of the case. He criticised the learned trial Judge for not acting on the evidence on record. According to counsel, though the appellant adduced uncontroverted evidence which showed that the contract between the parties was varied as to the transport cost. The learned trial judge ignored that evidence and instead relied on the statement of counsel for the respondent from the bar and thereby erroneously found that the contract was not varied.

Mr. Wambuga, learned counsel for the respondent did not agree with Mr. Kiryowa's submissions. He submitted that the auditor's report was subjected to scrutiny as each party was given opportunity to cross-examine the auditor on the report but both declined to do so. He denied that the auditor's report was relied on to determine the three issues that were raised at the trial. According to him, the purpose of the auditor’s report was to determine the point of disagreement between the parties. The trial judge never stated in his judgment that he relied on the report to decide the issues before him.

On variation of the contract learned counsel contended that this was not pleaded" However, the auditor’s report established that the point of dispute between the parties was only about the transport charges The appel1ant was charging higher than what was agreed on yet no material evidence was adduced to prove variation of the contract. Though the appellant testified that the variation was written, he failed to produce the written evidence of variation" Instead, counsel for the appellant sought to rely on the conduct of the respondent's agent in signing acknowledgment on the delivery notes as proof of variation.

Mr. Wambuga disagreed with Mr. Kiryowa that the instant contract is a simple contract which could be varied even by oral evidence. He argued that by section 6 of the *Sales of Goods Act Cap 79* the variation of this contract which is itself in writing had to be in writing as the value of the goods" the subJect matter of the contract exceeds two hundred shillings. He relied on *Morris v Baron & Co* (1918) AC 1 at 15; *United Dominion Trust (Jamaica) Ltd v Shoucair* (1969) AC 340 at 348 as authorities for that proposition. He denied that he ever gave evidence from the bar. He submitted that what Mr. Kiryowa referred to as evidence was his submission regarding the note in respect of supply of fuel. The note was tendered in evidence and his interpretation was that- that note was not intended to vary the contract. That was not evidence and the trial judge agreed with his interpretation. He finally submitted that the trial judge properly evaluated the evidence on record and rightly came to the irresistible conclusion that the appellant failed to prove his claim and was therefore, not entitled to the remedies he claimed

It is now a well established principle based on numerous authorities that a first appellate court, like this one, has a duty to reappraise or re-evaluate the entire evidence on record and to make its own finding of facts on the issues, while giving allowance for the fact that it had not seen the witnesses as they testified before it can decide on whether the decision of the trial court can be supported. The following are a few of the many cases in which the principle was stated:

Peter v Sunday Post (1958) EA 242;
Selle & Another v Associated Motor Boat Co Ltd (1968) EA 123;
Banco Arabe Esponal v Bank of Uganda. Supreme Court Civil Appeal No. 8 of 1998 (Unreported)

From the above arguments the primary issue that crystallised. is whether the contract to supply sand between the parties dated March 12, 1997 was varied by a subsequent agreement between the parties. The law governing variation of contract was stated in CHESHIRE AND FIFOOT, LAW OF CONTRACT**,** 9th Edition p. 535 that

> "an oral variation leaves the written contract intact and enforceable".

That means that a contract which by law is required to be in writing can only be varied by a subsequent written agreement. Oral agreement cannot vary such a contract. The same principle was stated in *Morris v Baron & Co.* (1912) AC 1.

In that case, the House of Lords was considering an appeal involving the interpretation of a provision of their Sales of Goods Act 1893. LORD FINDAY LC stated thus:

> "A contract which is required to be in writing though it cannot be varied, may be recinded by a parol contract: *Goss v Lord Nugent* (1833)5 B & Ad 58, 65…….Further, assuming that the new contract amounts to a mere variation of the old contract, under S. 4 of No. .. Sales of Goods Act 1893 (which follows the language of S. 4 of the Statute of Frauds) except for the purpose of being enforced by action a contract which does not comply with the requirements of the section is perfectly good."

The learned trial judge dealt with the issue of variation in his judgment as follows:

> "Looking at the evidence regarding variation of the contract, this court is not satisfied that there was in fact such variation in view of the express stipulation in the written contract. The note on the file record relates to a single supply or authority for fueling of a truck which is consistent with schedule of the Report of the auditors indicating various fueling incidents between March and August 1998. The fuel was also paid for and was included in the total sum of shs.60,139,268 paid to the plaintiff".

It is interesting to note that the question whether this contract is subject to section 6 of the *Sales of Goods Act* Cap 79 was not canvassed before the trial judge. There, the issue of variation "was fought on availabi1ity or non-availability of evidence to prove it. It is thus not surprising that the

trial Judge made no reference in his judgment to the section. It explains why the above passage in the trial judge's judgment considered the issue of evidence and found that variation of the contract was not proved.

Be that as it may, section 6 of the Sales of Goods Act Cap 79 provides as follows: -

> "6.
>
> (1) A contract for the Sale of any goods of the value of two hundred shillings or upwards shall not be enforced by action unless the buyer shall accept part of the goods so sold and actually received the same or give something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.
>
> **(2)** The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made procured or provided or fit or ready for delivery or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.
>
> (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not".

Mr. Kiryowa submitted that the above section is not applicable to this contract because the respondent had accepted the goods sold. I am unable, with respect to agree with this argument because the main contract was reduced into writing in accordance with that section. The acceptance of the goods by the respondent was thus on the basis of the written contract. It is incumbent upon the appellant to establish by written evidence that the contract was varied.

In his examination in chief the appellant stated thus:

> "We made variation in the contract where the supplier Ruhemba provided both transport and material. The cost of transport was shs.60,000 per load of Tata Lorry."

Under cross-examination he stated thus: -

> "Skanska failed and we revised the contract. The revised agreement was written. I have here a note to the effect that fuel would be given me".

The trial judge considered the above evidence and found that it does not establish variation of the contract I cannot fault him on that. The law stated above is clear. Since this was a written contract in accordance with the requirement of the law its variation can only be by a written

agreement evidence of such agreement was adduced. That being so, the appellant had failed to prove the variation of the contract. The trial judge therefore, rightly found so.

Mr. Kiryowa's complaint that the trial judge put too much weight on the report of the court appointed auditor without scrutinising and weighing it against other evidence on record was prompted by the remark of the trial judge in his judgment that "This claim in this suit must fail or succeed depending on the audit of record of transactions between the parties curried out by the court appointed auditor." Then he found agreeing with the report that the respondent had fully discharged its obligations under the contract. I reviewed the record and found that the auditor was availed to counsel for both parties for cross examination on his report but they declined to do so The effect of that decline is that they accepted the report as correct. The auditor stated that the respondent discharged its obligations contract. I reviewed the record and found that the auditor was availed to counsel for both parties for cross examination on his report but they declined to do so. The effect of that decline is that they accepted the report as correct. The auditor stated that the respondent discharged all its obligations under the contract. According to him, the dispute between the parties arose from excess charge on transport than what was agreed on. On his part, the appellant claimed that this was due to the variation of the contract to accommodate transport charge. The rate to charge for sand delivered was agreed on and specified in the contract per cubic meter. Similarly, the rate for transport, where he used his own transport was also specified In the contract per cubic meter of the material delivered. The report covered the period from March to August 1998 yet the claim covered up to September 1998. Schedule 1 of the report shows summary of payment for sand delivered and for transport as from March to August 1998 as per the invoices. Claim for the period from September 1 – 8, 1998 as per invoices received is not paid despite the report stating that the respondent discharged all its obligations under the contract.

The trial judge stated in his judgment thus:

> "The auditors received invoices from the plaintiff (schedule 1) record of payments to him (schedule 2) and a summary of claims schedule 2. According to the auditors, the defendant paid a total of shs.60,139,268 to the plaintiff made up of sand values (shs. 13,491,338) and transport at agreed rates of (Shs.43,485,000). The total payment included advances not invoiced for and the rest matched exactly with the invoices submitted".

As was pointed out earlier in this judgment, the report covered the period from March to August 1998. The invoices computed were the invoices issued during that period. They excluded the invoices issued for deliveries made from September 18, 1998. No explanation was given for this omission. I think this was an error because the appellant is entitled to payment for the sand he delivered. In my judgment, this complaint was well taken. Ground 6 complained against the order of costs. Mr. Kiryowa submitted that the trial judge erred in not ordering for costs since normally costs should follow the event.

The trial judge made the following order as to costs:

> "I make no order for costs, however, in the interest of commercial justice that

must lean in favour of local supplier engaged by a giant international company"

It is a well settled principle that an order for costs is a matter for the discretion of the trial judge. Normally costs follows the event. In the instant case, the appellant had lost his suit and in the ordinary parlance of things, the trial judge should have ordered him to pay costs of the suit to the respondent. The trial judge, however exercised his discretion to make no order as to costs. I am surprised that counsel for the appel1ant should complain against that order which was in favour of his client.

A court of appeal does not interfere with the exercise of discretion of a trial judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or it is manifest from the case as a whole that he has been clearly wrong in the exercise of his discretion and that as a result there has been a misjustice.

In the instant case, there is no evidence that the trial judge misdirected himself in some matter in exercising his discretion or that it is manifest from the case that he was clearly wrong. He exercised his discretion properly in my view. This ground therefore, would also fail.

In the result, I would allow the appeal in part. I would direct that the trial judge with the assistance of the court appointed auditor should determine the rightful amount due to the appellant for the sand he delivered between September 1-8, 1998 to be paid to him.

Since the appeal has succeeded partially, I would order that each party bears his own costs. As Bahigeine, JA and Twinomununi, JA both agree the appeal is allowed in part on the above terms.

MPAGI- BAHIGEINE, J.A.: I have perused the judgment of OKELLO, J.A, I agree that the appeal should succeed in part as proposed by him.

TWINOMUJUNI, J.A: I have read, in draft, the judgment of My Lord Justice G.M. OKELLO, J.A, I agree with the reasoning and the conclusion therein. The appeal should be allowed in part and each party should bear own costs.

MUJUNI RUHEMBA

v

SKANSKA JENSEN INT. (U) LTD.

HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)

HIGH COURT CIVIL SUIT NO. 104 OF 1999

MUJUNI RUHEMBA

v

SKANSKA JENSEN INT. (U) LTD.

(BEFORE: HON. MR. JUSTICE OKUMU WENGI)

September 14, 1999

JUDGMENT

OKUMU WENGI, J: The plaintiff brought this suit to claim special and general damages for breach of contract. In his claim he pleads that in March 1998 an agreement was entered into between him and the defendant for the supply to the construction site at Mbarara of construction sand, A written contract was annexed to the plaint detailing the terms, He further claimed that he supplied sand to the value of Shs, 66,171,202/=)comprising sand and transport costs), Out of this total the plaintiff states that he was only paid shs. 47,411,072/= leaving a balance of Shs, 18,760,130/= outstanding for July, August and September 1998 as particularized in delivery notes.

According to the written agreement executed between the parties on 26/2/98 the plaintiff undertook to supply 2500 tonnes of natural sand. As delivery was to be measured in cubic metres and the cost of the material was to be Ug. Shs 3,200/= per M inclusive of VAT. Payments were to be effected periodically on presentation of detailed invoices, The defendant agreed to provide a vehicle for the transportation of the sand after which the plaintiff would use his own sourced vehicles up to the end of the contract. The supplier (plaintiff) when so using his own sourced transport vehicles would be entitled to claim shs. 8000 per M for the transport cost element. As it came to pass an interlocutory judgment was entered in default and the case set down for formal proof as the defendant sought to file a WSD out of time. The WSD was filed later by consent of both parties and interlocutory judgment set aside.

By agreement of both counsel the dispute was referred to a firm of auditors to establish the claims by each side. M/J J.W & Partners were accordingly appointed to carry out an audit to guide the parties and the court. Mr. Ochola of the audit firm then appeared and presented his report on oath. He stated that from his audit there was no dispute as to the quantity of sand delivered. The dispute he said arose out of claims for transport which rose to about Shs. 8 million. Mr. Ochola presented a written report and concluded that the contract had been validly

carried out by the defendant who had paid all along on account. However the plaintiff claimed more than what had been agreed on for transport. The plaintiff arrested that the higher transport charges had been invoiced and signed for and pleaded a variation in the terms of the contract to accommodate this,

In the address to court by both counsel the following were agreed facts.

1. There was a contract between the parties for the supply of sand.
2. Annexture A to the plaint the contract agreement for the supply of sand was admitted by the defendant.
3. All the annexed invoices were admitted except for the transport cost element.

Consequently only two issues were set out for settlement namely whether the disputed transport cost element as invoiced was accepted by the defendant and whether the defendant was liable to pay for it. Secondly whether there had been a variation in the
terms of the contract in particular whether transport costs were agreed upon as revised and accepted by the parties and if so whether the defendant was bound thereby to pay the plaintiff.

In support of his case Mr. Mujuni Ruhemba described the execution of the contract. In his testimony whereas the supplier had undertaken to provide transport for the first month, it did so far only two days. As this led to the stoppage of supplies Mr. Ruhemba testified that he approached the defendant with an offer to use his own transport at the rate of 60,000/= per toad of Tata Lorry of 5-6 tonnes per trip. He further testified that in the varied contract it was agreed that one of the plaintiffs trucks would be fueled by the defendant. His total claim therefore totaled shs. 18,760,130/=. The evidence of this witness was largely the basis of the plaintiffs written submissions in which the variation of the terms of the contract formed the basis of the claim by the plaintiff. In his reply Mr. Wambuga counsel for the defendant contended that a scrutiny of the claim shows that the claim being pressed includes sand deliveries (besides transport) and are therefore untenable. He also pointed out double invoicing and altered claims. The ,learned counsel also submitted that the note whereby the defendant offered to fuel plaintiffs vehicle was just for one day which was an exception and did not amount to a general variation of the contract. According to the note on the court record dated 9/3/98 an official of the defendant had authorised issue of 80Litres of diesel for a sand delivery vehicle UZO 126. The vehicle took 26litres. Mr. Wambuga also contended that whereas the plaintiffs vehicles were of 6 tonnes capacity there could be no delivery above 4.8 cubic metres if one ton was equivalent to 1.3 cubic meters. According to him the records also showed that there was no truck delivering 6 tonnes as this would have been 7.8 cubic 3,metres. He asked court not to believe the plaintiff's evidence and to reject the alleged variation of contract as there was no oral or written agreement to evidence it.

The claim in this suit must fail or succeed depending on the audit of records of transactions between the parties carried out by the court appointed auditors. The auditors received invoices from the plaintiff (Schedule 1) record of payments to him (Schedule 2) and a summary of claims schedule 2. According to the auditors the defendant paid a total of shs. 60,139,268/= to the plaintiff made up of sand values (shs. 13,491,338) and transport at agreed rates (of shs. 43,485,000). The total payment included advances not invoiced for and the rest matched exactly with the invoices submitted. According to the auditors there was a higher billing rate for

transport which was not in the contract. This claim arose therefore from the plaintiff charging for transport at a higher rate then that stipulated in the contract while the defendant carried out the terms of the contract.

Looking at the evidence regarding variation of the contract this court is not satisfied that there was in fact such variation in view of the express stipulation in the written contract. The note on the file record relates to a single supply or authority for fuelling of a truck which is consistent with schedule 2 of the Report of the auditors indicating various fuelling incidents between March and August 1998. The fuel was also paid for and was included in the total sum of shs 60,139,268 paid to the plaintiff. This court can therefore find no breach of contract or a claim that the written contract was varied to accommodate a risen transport claim. The claim itself of shs. 18 million is not verified separately from the total contract sum and the differential if any was not authorized by the contract. In consequence this claim must fail. It is dismissed.

I make no order for costs however in the interest of commercial justice that must lean in favour of a local supplier engaged by a giant international construction company. It is so ordered further due to the interventions and concessions given that interlocutory judgment on default was entered and set aside.