

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
H.C.C.S. 299 OF 1993

KANOBLIC GROUP OF COMPANIES (U) : : : : : P L A I N T I F F
VERSUS
SUGAR CORPORATION. OF UGANDA LTD. : : : : : DEFENDANT

BEFORE: THE HON. MR. JUSTICE G.M. PKELLO

JUDGEMENT:

The Plaintiff claim from the defendant general, special and punitive damages for an alleged breach of contract. They averred in paragraph 3 of their plaint that the defendant in breach of contract failed to pay the Plaintiff for the work executed by the Plaintiff at the instance and request of the defendant. In their W.S.D. the defendant admitted that there was a contract between the parties but denied any breach of it by the defendant.

At the trial, the Plaintiff called the evidence of one witness Anatoli Kamugisha (PW1), the Managing Director of the Plaintiff Company. He testified that by a Written contract (Exh P1) the Plaintiff and the defendant entered into agreement whereby the Plaintiff agreed to construct for the defendant at Lugazi a Dining Hall in return for payment. The defendant provided the plan for the Dining Hall. The estimated value of the job was 6.5 million Uganda shillings but the actual amount was to depend on the measurement of the work actually done and completed by the contractor. Under the contract, the work was to be completed within 45 calendar days from the date of the contract. PW1 further testified that because of the alterations in the plan and the delay in the supply of specific materials by the defendant, the Plaintiff completed the work **36** weeks late. On completion of the work the plaintiff submitted their final bill to the defendant for payment. But the defendant did not fully pay the plaintiff for the work done. Instead the defendant fraudulently inflated the quantities and prices of the materials like G1 sheets, Round Bars., cement

sand and stone Aggregates which they supplied to the Plaintiff, This was aimed at reducing the final amount payable to the Plaintiff. The Plaintiff (PW1) further testified that the defendant also fraudulently charged the Plaintiff 10% over and above the cost of the materials supplied to the plaintiff. The 10% charge was alleged to be handling charge when the parties had not agreed on that issue.

The defendant called two witnesses: - The first was J.K. Mitra (DW1), He was the defendant's Manager civil. He admitted in his evidence that there was a contract between the parties. That the work order Exh P1 was revised. P2 and the corresponding Revised plan (Exh. P2b) for the Dining Hall increased the volume of work. In consequence the estimated value of the job was also increased from 6,5 million shillings to 15.7 million shillings. That the time within which the work was to be completed was also extended by 29 weeks. But that despite that extension the plaintiff still did not complete the work and the defendant hired other people to complete the work which the plaintiff did not complete. DW1 denied that the defendant was fraudulent. He explained that though the parties did not agree on the 10% handling charge for the materials supplied to the Plaintiff from the defendant's store, it was the established practice in the defendant Company to charge that rate to cover the cost incurred by the defendant in transporting the materials to the defendant's store and in storing them.

The second witness for the defendant was Francis Obala-Ofono (DW2). He was the defendant's Deputy Manager for store. In his evidence he explained the procedure of requisitioning materials from the defendant store. He produced some copies of requisition Receipts showing the materials supplied by the Defendant to the Plaintiff.

At the commencement of the hearing the following issues were agreed upon the parties to be determined by the court.

(1) whether the amount of money claimed by the plaintiff tallies with the work done by them,

(2) Whether or not there was work uncompleted by the Plaintiff worth Uganda Shs.405,100/=.

(1) Whether the defendant was fraudulent

A glance at the pleadings shows that the first and foremost issue should have been "whether the defendant committed a breach of the contract". Paragraph 3 of the Plaintiff alleges breach of contract. This allegation was denied by the defendant in their W.S.D. So the question of breach of the contract by the defendant became an issue. I shall start by considering this issue first.

The Plaintiff admitted that they completed the work after 36 weeks delay. They blamed the delay on the defendant for:-

(a) Alterations of the work order and the plan for the dining Hall

(b) Delay in supply of specific materials like G.1 sheets, Ridges and Roofing Nails.

The plaintiff contended that in causing the above delay, the defendant was guilty of breach of the contract.

The defendant conceded that the work order and the plan for the dining Hall were revised. The revised work order (Exh P2) and the revised plan (Exh P2) increased the volume of work to be done under the contract and needed more time. In view of that, the defendant also extended by 29 weeks the time within which the work was to be completed. The plaintiff replied that there was no such extension of time as it was not reflected in the revised work order (Exh P2.).

The revised work order Exh. P2 incorporated the terms and conditions of the contract in the following words "Terms and conditions will be the same as those stated in the above mentioned work order".

It is plain from the above quotation that the Revised work order inherited the terms and conditions of the contract as stated in the original work order Exh. P1.

For ease of reference, the terms and condition of the contract as spelt out in Exh. P1 are reproduced here below:-

"You will have to finish the job within 45 calendar days from the date of acceptance of the work order .

The Contractor will be full responsible for any kind of accident fatal to himself, his staff or any third person. In all such cases, the contractor will keep the client absolutely indemnified and free from responsibility.

The estimated value of the job is approximately Ug. shs. 6,500,000/= (Uganda shillings six million five hundred thousand only) Final billing for work done will be as per the actual measurement. Penalty will be charged at the rate of per week of the total cost of project after completion of 45 days.

If you are agreeable to the above terms and conditions, please sign the duplicate copy of this work order and retain to us as a taken of acceptance".

The Plaintiff signified his acceptance of the above by signing the relevant copy of the work order and returned it to the defendant. The extension of the time within which the job as stated in the Revised work order, was to be completed was not stated in the Revised work order Exh. P2. But DW1 testified that there was such extension. The evidence of DW1 regarding the extension has the effect of varying the condition of the contract. The imposing question to ask is to what extent can a wholly written contract be varied by oral evidence.

The general rule of law is that where a contract has been wholly reduced into writing, no oral evidence shall be allowed to vary the terms of the contract (S,90 + 91 EA). There is however exceptions to the above general rule; For example the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved. In doing so, consideration is to be given to the degree of formality of the document. S. 91 proviso (b) E.A.

In the instant case, the revised work order (Exh. P2) increased the volume of work under the contract. But it is silent about the time within which the increase of work was to be completed. Under the above proviso to section 91 of the Evidence Act, oral evidence showing oral agreement on the extension of time within which to complete the increased work can be admitted. That is not inconsistent with the terms of the contract.

In VALLABHDAS PRAHJI VS. NASANI LUBEGA (1964) EA where the action arose out of a mortgage for advance of money, oral evidence was admitted to show that though the defendant signed for sh. 15.000/= only shs. 10,000/= was actually advanced. This evidence was admitted under the proviso of section 91 EA.

In light of the above authorities, I find that the evidence showing that there was extension of the time within which the increased volume of work should be completed is admissible. The extension of the time is not inconsistent with the terms of the contract. From that evidence I find that there was such an extension of the time within the job was to be completed.

The Plaintiff further contended that the defendant delayed in Supplying to the plaintiff specific materials like Gl. sheets, Ridges and Roofing nails. That the delay also caused a delay in the Plaintiff completing the work in time. That in that delay the defendant breached the contract.

The defendant denied that it was under an obligation to supply the Plaintiff materials. They submitted that they only agreed to supply to the Plaintiff materials which were available in their store. That even these were supplied on the understanding that the Plaintiff would pay for them,

I have had the chance to read the contract documents Exh. P1 and Exh P2.

They do not show that the defendant was under obligation to supply materials to the contractor. DW1 testified that the defendant only supplied to the Plaintiff materials which, were available in the defendant's store. That where the materials were not available in the defendant's store, the defendant was not under any obligation to supply them. In that case, the Plaintiff was free to purchase them from elsewhere. Indeed, the evidence on record shows that the defendant had been supplying materials to the Plaintiff from the defendant's store. But there is no evidence to show that the defendant was under obligation to supply the Plaintiff with materials. In the absence of such evidence, the Plaintiff has no right to complain if the defendant delayed to supply him with materials. It would appear to me that the defendant's supplying the plaintiff materials available in the defendant's store was merely to save the plaintiff the inconvenience of

having to look for materials. But this is not a duty. From the above evidence, I find that the defendant was not blameworthy for their alleged delay in supplying the Plaintiff with materials they were not under a duty, to supply them.

The next question is whether the Plaintiff completed the job under the contract.

It was contended for the Plaintiff in the positive. But the defendant contended that the Plaintiff did not complete the work. That the defendant hired other people to complete the work left by the Plaintiff.

Whether the Plaintiff Completed his job under the contract or not is a

question of fact to be proved by evidence, belief of it one way or the other

depends on the credibility of the witnesses testifying on matter. PW1 testified when the plaintiff completed the work they notified the defendant of the fact. That the defendant responded by

sending their Manager civil to inspect the work to confirm whether or not the Plaintiff, did complete the work. That DW1 inspected the work of the Plaintiff and verbally confirmed that the Plaintiff did complete their work under the contract. The Plaintiff further testified that upon that confirmation, the Plaintiff submitted their final bill to the defendant for payment. That defendant raised the question of non completion of the work only after they had disagreed with the plaintiff over the amount payable to the Plaintiff and the latter had filed this suit. Even then, the Plaintiff testified that despite several demands, the defendant never showed the Plaintiff the uncompleted work DW1 admitted in cross-examination that the defendant truly never showed to the Plaintiff the uncompleted work. That was strange in my view. I would have expected that if a contractor did not complete his work under a contract, the client would after inspection and on detecting the non-completion of work inform the contractor of that fact at the earliest opportunity and even show them the part uncompleted. In this case neither of these was done and no explanation was even attempted at the failure. The issue of non-completion of the work was even raised after a disputed had erupted between the parties over the amount payable to the Plaintiff and after the Plaintiff had already filed this suit. Even at this time despite several demands, the defendant still failed to show the Plaintiff the uncompleted work. These were strange conducts. If there was any work left uncompleted by the plaintiff why should the defendant be reluctant to show them? In these circumstances the only possible inference that can be drawn from them is that there was no work left by the Plaintiff uncompleted. This answers issue No.2 in the negative,

This leads me to the 3rd issue which is whether the defendant was fraudulent. The plaintiff contended that the defendant was fraudulent. The defendant denied this contention and put the Plaintiff to strict proof thereof

The law is that allegation of fraud must be strictly proved. In **R.O. Patel vs. L. Mukanyi** (1957) EA 314 it was held that allegation of fraud must be strictly proved. The standard of proof required to establish allegation of fraud is less than beyond reasonable doubt but beyond a mere balance of probabilities.

In the instant case, the Plaintiff sought to show by the evidence of PW1 that the defendant fraudulently inflated the quantities and prices of the materials they supplied from their store to the plaintiff. PW1 tried to show that the quantities of materials received by the Plaintiff were more in the list (Exh- P11) prepared by the defendant than in the list (Exh P 12) prepared by the plaintiff. For example while in Exh. P11 the defendant shows that the Plaintiff received 522 bags of cement and 120 G1 Sheets, Exh. P12 shows that the Plaintiff received only 502 bags of cement and 82 G1 sheets.

The evidence of DW2 shows that a Recipient of materials from the defendant's store was given the fourth copy of the Requisition Receipt. This evidence was not refuted by the Plaintiff. It is however interesting to note that the Plaintiff who must have taken the fourth copies of the requisition Receipts for all the materials they received from the defendant's store, did not produce those copies of the Requisition to show that the figures shown in the list (Exh. P12) prepared by them were more correct than those shown in the list (Exh P11) prepared by the defendant. In the absence of such evidence, the proof adduced did not reach the accepted standard required to establish fraud.

The Plaintiff further alleged that the defendant fraudulently inflated the prices of materials supplied by them to the Plaintiff. The defendant denied this allegation. The Plaintiff relied on the evidence of PW1 and by it tried to show that the defendant inflated the prices of the materials they supplied to the plaintiff. They produced a price list (Exh P10) from Shelter Ltd.

No objection was raised against the admissibility of this exhibit in evidence from nobody from Shelter Ltd. was called to explain how the prices listed were arrived at. There was therefore no independent evidence to show that the prices charged by the defendant for the materials supplied to the plaintiff were unreasonably higher as compared to the prices in the open market at the time. In those circumstances I find that the evidence adduced by the Plaintiff in this regard again fall too short of the standard required to establish fraud.

The Plaintiff still further alleged that the defendant fraudulently charged the Plaintiff 10% over and above the prices of materials they supplied to the plaintiff when the parties did not agree on that charge. The defendant conceded that 10% was charged over and above the prices of the material supplied by them to the Plaintiff. They however denied that there was fraud in charging out.

They admitted that there was no agreement between the parties for that charge. But DW1 explained that it was the practice in the defendant company to charge 10% over and above the prices of the material supplied to a contractor from the defendant's, store to cover handling cost.

I do not find anything fraudulent above charging 10% to cover handling costs.

The evidence shows that the defendant was under no obligation to supply material/ to the Plaintiff. If they (defendant) bought materials in open market and stored them, it would be reasonable to charge 10% over and above the prices of those materials if supplied to the Plaintiff from the defendant's

store.

This would cover the cost incurred by the defendant in transporting the materials and storing them. There was in my view no sufficient evidence to establish fraud by charging 10% over the materials supplied to the Plaintiff,

The next issue is whether the amount of money claimed by the Plaintiff tallies with the work done by them.

The Plaintiff claims shs. 4,395,715. They contend that that amount tallies with the work they did.

The defendant is of the view that that amount was excessive.

The Plaintiff (PW1) testified that on completion of their job under the contract, they submitted their final bill of shs. 16,319,583 to the defendant for payment. From that amount, they expected to be deducted shs. 3,732,101 being advance payment made to them in the course of the work shs. **285,819/=** being retention fee; and the cost of building materials received by the Plaintiff from the defendant's store. That the balance payable to them would be shs. 4,395,715/= . But that because of the fraudulent inflation by the defendant of the quantities and prices of the materials received by the Plaintiff from the defendant's store, the defendant paid the plaintiff only shs. 577,218/= The Plaintiff treated this as part payment and sued for the balance.

The defendant denied that the Plaintiff completed the work. They also denied that the cost of material was fraudulently inflated by the defendant. As has already been stated here earlier the Plaintiff completed their work under the contract. The reasons for that finding were given here earlier and I need not repeat them. The plaintiff's fees would therefore be assessed at the full value of the work less any advance payment and cost of materials given to them by the defendant. The Parties do not agree on the cost of the materials received by the Plaintiff from the defendant's store. According to the defendant, the Plaintiff received from the defendant's store materials worth shs. 11,411,037/= (Exh. P11). The Plaintiff on the other hand **contended** that the figures in Exh P11 were fraudulently inflated by the defendant. According to the Plaintiff the cost of materials received by from the defendant's store stand at shs. 7,395,715/=.

As had seen pointed out earlier, allegation of fraud must be strictly proved.

In this case the Plaintiff did not adduce sufficient evidence to discharge that burden. He did not lead sufficient evidence to attain the standard of proof required to establish fraud. No sufficient evidence was adduced to establish that the figures shown in Exh P11 were fraudulently inflated. In view of that from the final Bill of shs. 16,319,585 the following would be deducted to <rive what should be due to the Plaintiff.

- (a) advance payment - shs. **3732,101/=**
- (b) Retention fee - 285,819/=
- (c) Cost of Materials from Defendant's store
11,411,037/=

$$16,319,583 - 15,428,952 = 890,628/=.$$

The Plaintiff admitted that the defendant paid them shs. 577,218/= which the plaintiff treated as part payment. The amount is to be deducted from the total amount payable to the plaintiff to find the balance left unpaid: - **890,628** - 577,218 = 313,408/=

The answer to the 1st issue is therefore that the amount of money claimed by the Plaintiff does not tally with the work done by them. After all due deductions, the defendant still owes the plaintiff a further sum of shs. 313,408/= but not 4,395,715/= as claimed.

There was no evidence to establish the breach of the contract by the defendant as alleged in the Plaintiff. The defendant was not under any obligation under the contract to supply materials to the plaintiff. Consequently the Plaintiff's claim for general damages for breach of contract must fail. In any case the Plaintiff did not show what he actually lost as a natural result of the alleged breach.

The Plaintiff claimed default penalty damages. Damages under the penalty clause. The clause provided a charge of 1% of the total cost of the job per week after the 45 days on the defaulting party. The Plaintiff alleged that the defendant was guilty of delay in the supply of specific materials which caused the plaintiff a delay in completing his work. He therefore claimed damages under this penalty clause from the defendant,,

It has already been found earlier in this judgment that the Defendant was not guilty of delay in the supply of materials to the Plaintiff. They were not under any obligation to supply materials to the Plaintiff.

A sum agreed upon by the parties to a contract as penalty may be liquidated damages if it is a genuine pre-estimate of damage likely to be suffered. However if it is an amount intended to punish the defaulting party for not performing his contractual obligation, the sum was recoverable (See *Sutton and Shannon on Contract* 7th Ed. (Page 42)).

In this case a charge of 1% per week of the total cost of a job worth **16.7** million shillings is too colossal to be a genuine pre-estimate of the damages likely to be suffered by the non defaulting party. That is more intended to punish the defaulting party for not performing his part of the contract than compensating the other party. This would not have been recoverable even if the defendant had been found to have defaulted as this is clearly a punishment.

All in all the action is allowed in part. The defendant is to pay the Plaintiff the balance of shs.313,408/= due to him. Cost is a matter of discretion of the court. In this case, the Plaintiff only succeeded in part. For that reason, I exercise my discretion by ordering each party to bear his cost of this suit.

G.M. OKELLO

JUDGE

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