IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORUM: MANYINDO, D.C.J., ODOKI, J.S.C., TSEKOOKO, J.S.C.,)

CIVIL APPEAL NO. 23 OF 1993

BETWEEN

ARCONSUIT ARCHITECTS:: APPELLANT

AND

A. BAUMANN (U) LTD ::: RESPONDENT..

(Appeal from Judgment and Order of sigh Court at Kampala (Kireju J) dated 25th June, 1993.)

IN

CIVIL SUIT NO. 404 OF l992.)

JUDGMENT OF TSEKOOKQI J.S.C.

The appellant is a firm of architects. The Respondent is a limited liability company and proprietor of building situated on Plot No, 7 Parliament Avenue, Kampala.

The appellant sued the respondent in the High Court claiming for US $14156 or its equivalent in Uganda Shillings alleged to be due for Professional Service rendered pursuant to a contract made between the appellant and the respondent, on 6th March, 1989.

The facts as found by the learned trial Judge and as gathered from the proceedings are these. The respondent desired to make vertical extension on the main Office block of the said building by addition of an extra floor. The respondent also desired to convert two rear car parking blocks into Offices. I will hereinafter refer to the two sets of buildings as main office block and the car shed respectively.

The respondent o 6/3/1989 appointed the appellant to execute the architectural work on the jobs (see Exh P.1). The two jobs were treated as two contracts. The jobs involved securing from the Kampala City Couni1 (KCC) the planning permission, the building construction permission, the drawing of requisite documents (drawings) and supervision of the buildings. The two parties held discussions on 24th, 27th and 28th February, 1989, prior to appointment of the appellant as architects. The agreed position was reduced into writing on l/3/1989 (see Exh Dl). During those discussions, it was agreed that the respondent would pay the appellant by way of fees a certain

percentage of the (estimated) project cost.

The appellant secured from KCC the planning permission drew the requisite drawings for construction and secured KCC approval for building construction in respect of vertical extension on the main office building and paid the appellant for its architectural work in respect thereof.

The respondent was unable to proceed with construction work on the car shed. According to the evidence of DW2 (Ronnie Anglezarks Richardson) construction work on car shed did not proceed because "the work was gong to be expensive. Thus stoppage, of work was choice of the respondent.

On July 11th, 1991, the appellant submitted to respondent Fee Note NO. 1A (Exh. P.4) for US $14156. The fee was made up of 5.4% of the quantity surveyors estimated cost of he conversion of the car shed into the office (i.e. on sum of Shs. 240,560, 920/=) plus disbursements. Evidence shows that the parties agreed at the inception of the contracts that the, remuneration of the appellant would be in accordance with the Conditions of Engagement and the Scale of Professional Fee, Rules set out by the Commonwealth Institute pf Architects as adopted in Uganda. The relevant rules are contained in Exh. P.3. Exh P.5 is subject to modification by Exh. P.2 dated l//l990 and Exh P.3 dated 2/7/1990.

The respondent refused to pay the fees demanded by appellant in Exh. P.4. The appellant then filed the suit in the High Court to recover the money.

In the High Court, four issues wore framed for determination.
These were: -

1. Whether the Plaintiff completed the work.

2. Whether the defendant refused to pay.

3. Whether it was a term of the contract that the Plaintiff's fee would be paid in stage as works progressed.

4. Is the Plaintiff entitled to amount claimed?

After the evidence had been given by both sides during which DW2 eventually conceded that he was prepared to pay appellant $2,065,66 only, counsel for both parties submitted that the question to be decided by the learned trial Judge was the

amount t which the appellant was entitled. The learned Judge awarded the appellant She 4,972,307/= in respect of Professional fees and disbursement. The Appellant appealed against that award.

The memorandum of appeal contains two grounds of appeal. These are that: -

"1. The learned Judge erred in law when she criticised the appellant for having raised his fee note after a year, which lead her in error in holding that the architect's fee was based on She 150m/= instead of She. 240,560,920/= which was calculated by the quantity surveyor.

2. The learned Judge erred in law and in fact in the assessment of damages."

During the hearing of the appeal the two grounds were argued together by Mr. Kateera, Counsel for appellant. The gist of Mr. Kateera's submission on behalf of the appellant is that the learned trial Judge erred when she based the award as remuneration of the appellant in Shs 150m/= instead of 240,560,920/=. In learned counsel's view the evidence of PW1 shows that She l50/= included in the papers submitted to KCC for the purposes of securing approval of the plans from KCC. He argued that Shs 240, 560, 920/= was the proper estimate quantified by the quantity surveyor as the cost of the construction of the car shed offices and therefore the learned Judge should have based her award on Shs 240,560,920/= Mr. Kateera further criticised the learned Judge because of her reliance on the fact that the appellant the fee note (Exh P.4) a year late after approval of the drawings. Learned Counsel contends that this was an extraneous matter.

For the respondent Mr. Kibuka Musoke submitted that during the preparation of the plans the appellant consulted DW2 about the jobs which would be Shs l50m/ and that the respondent (through DW2) accepted that position in effect before appellant Used the plans. I must say I have not found evidence to support this submission. I think that this was based in DW2's wishes. Mr. Kibuka Musoke submitted further that as the appellant had been paid for plans used on the work of the main offices, the respondent assumed that the appellant was not entitled to any further payment or would not ask for more payment. Learned counsel further argued that the learned Judge was placed in a dilemma because of the two figures presented by the appellant and (presumably) she had to choose one of the two.

Let me dispose of the last point first. I have found nothing in the judgment of the learned Judge which suggests that she was in a dilemma in any way. Her view in effect is that she preferred Shs 150m/- as the estimated cost of construction because,

the figure of She 240, 560, 920/= was submitted one year late. In my considered view, and with respect to the learned Judge, she erred in refusing the award of remuneration for the appellant on fee note NO. 1A because of its delayed submission. It is true that the fee note was submitted after a year, but there is nothing in rules contained in the schedule of scale of fees (Exh P.5) which barred the appellant from late submission of the fee note NO. 1A to the extent that the appellant would be disentitled from basing the claim on any legitimate of the costs. From contents of Exh P.2 the respondent was aware that the "percentage are based on the estimate or cost of the project." Cost of estimate is made by quality surveyor, an expert.
The point of delayed submission of the fee note was not even put to PW1 when he testified on behalf of the appellant.

When he gave evidence PW1 testified that "fees are demanded during construction." He was not cross examined on this.
DW2 appears to have decided late against the construction of car shed. This appears to have influenced PW1 in submitting the fee note No. 1A.

Fee note 3 relating to main office block was paid; neither side sought to show the basis upon which that fee note (No. 3) was paid t. illustrate the fault of the appellant, if for nothing else other than to show the point at which fee note NO. 1A should have been submitted ad the coat upon which the calculation for fees was based. It would have been of interest though not decisive in this dispute.

When Exh P.4 was submitted to DW2 he appears to have simply kept quiet about it. There is no evidence that he challenged the validity of the claim when he received it on basis of its lateness or impropriety. In fact Exh P.4 was admitted in evidence without any objection from the defence. Objection came up half heartedly when DW2 testified. DW2 appears to agree with PW1 that the figure of Shs. 240,560,920/= was computed by a quantity surveyor, whose job it is to compute such figures. The quantity surveyor was an employee of the respondent. There is no evidence that the appellant or any body on behalf of appellant improperly influenced the quantity surveyor in making the estimates of Shs. 240,560.920/=.

Paragraph 3.7 and 3.8 of Exh P.5 are pertinent to this case. They state that:-

"3.7 Total Construction Coats See 8.4 but shall be broadly based on final coat of works when completed or, if, abandoned, upon the architect's estimate of costs.

3.8 The Normal Service

(a) The work described in Part 4 of this Schedule is required for any building project and unless the architect is specifically informed to the contrary he may assume

the client intends the execution of any works he is commissioned without substantial alteration within twelve months. Any fees paid under clause 3.11 of this Schedule shall rank solely a payment on account towards the total fees payable on the execution of such works and calculated on the total construction cost."

The effect of the above passages is that even if the appellant had submitted fee note 1A earlier, initial payment would be an instalment. He would be entitled to claim more fees depending on what would be the final cost of construction of the project.

This is supported by similar statement in Halsburys Law of England Vol. 3(3rd Edition). In Paragraph 1088 and 1089 at page 541, it is stated there in relevant part:-

"1088 - Where an express agreement has been made as to the remuneration to be paid to an architect ..... he must be paid accordingly. 1089 in the case of architects the usual Professional charge for designing and superintending the construction of building is based en a percentage of the total cost of the workman. Such charge has been sanctioned by the Royal Institute of British Architects in a scale of Professional charges issued by them.

This scale is therefore binding on an employer who has either expressly or impliedly agreed to be bound by it."

In the recent case the, scale is set out in paragraph 4.9 of Exh P.5. The learned Judge found as a fact that the appellant's work reached stage "D". Remuneration is based en that stage according to Exh P.5.

Once there is an agreement whether oral or written about payment, the parties are bound by the agreement. Mr. Kibuka Musoke reiterated before us an argument which was in effect rejected by the learned Judge that the appellant was not entitled to fees because Of non use of plan for the car shed plans. The case of Stovin-Brodford VS Volpoint Ltd (1971) 1 Ch 1007 shows that where the architect has complied with instructions and produced the work such as drawings for which he was commissioned, he is entitled to payment even if the plans are not utilized. In that case the parties had agreed to be governed by the scale of Professional fees as in this case. Lord Denning indicated (at page 1014) in effect that the architect was entitled to charge fees for the work done up to the stage the architect stopped. A situation similar to facts of the present case is found in Thomas VS Hammersmith Borough Council (1938)3. All E.R. 203. The summary of the facts as they appear in the report were these:-

The defendants employed the plaintiff as an architect in connection with the erection f a new town hall. It was agreed that his fees should be in accordance With the scale of Professional Fee charges of the Royal. Institute of British Architects. This scale provided that in cases where the project was abandoned the fee payable depended upon the stage of the work that had been completed, being in this (Thomas) case (a)

for preparing sketch design and making approximate estimate, one quarter of the total fee, and (b) for preparing drawings and particulars sufficient to enable, quantities to be prepared, two thirds of the total fee. When stage (a) ha been completed and stage (b) nearly so, the defendants-abandoned the scheme. They contended that as stage (b) had not been completed, no fee was due to the Plaintiff in respect of that stage, and that the only amount due to him was that due in respect of stage (a).

The Court of Appeal upheld the decision of the trial judge by holding that the defendants, having instructed the plaintiff to proceed with stage (b), had lost their right to abandoning and terminating his employment at the end of stage (a). They were therefore under an obligation to allow him to earn the fee for stage (b), and, having broken their contract they were liable to pay him for the work actually done in respect of stage (b). See also Landless VS Wilson (1880), 8 R (Ct Sess) 288 summarised in Vol. 7, English and Empire Digest, page 465 (case 1027)

The scales of fees referred to in Thomas case (supra) are in substance the scales used in our case. The contents of the conditions are the elder version and similar to those contained in Exh. P5. As found by the judge, the appellant in the present case had advanced to stage (d) before the present respondent abandoned the project.

In terms of condition contained in Exh P.5 and accepted by both the appellant and the respondent, the appellant was entitled to be paid 7% of the full fees; (see clause 5.3 (b)). The appellant charged 5.4% for reasons explained in evidence by PW1. In Building Contracts by D. Keating, 4th Edition, (page 220 to 222), the same matter is discussed. Thus in my view the appellant is entitled to its fee according to the work done.

Since in my considered view there is no evidence suggesting that the alleged delay in submitting fee note No. 14 by the appellant is responsible for the failure by the respondent to execute the construction, I am unable to see any justification for denying the appellant the amount of fees claimed in fee Note No. 1A. If the respondent had so wished, the respondent could have carried on with the construction, soon after it received drawings approved by the KCC.

With respect to the learned judge I think that she erred in depriving the appellant the proper remuneration as claimed.

For the reasons I have given, I would allow this appeal set aside the judgment and orders of the High Court. I would substitute judgment for the appellant in the sum of US $14256 or its equivalent in Uganda currency, (namely Shs l7,685,000/=) with interest thereon at the rate of 20% p.a. from date of judgement in the High Court, I would grant costs of this appeal and in the Court below to the appellant.

Dated at Mengo this 9th day of November 1994

J.W.N.TSEKOOKO.

JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT This IS A TRUE
COPY OF THE ORIGINAL.

À.L. KYEYUNE,
AG.ASST. REGISTRAR
9/11/994

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IN

CIVIL SUIT NO. 404 OF l992.)

JUDGMENT OF ODOKI JSC

I have had the opportunity of reading in draft the judgment prepared by Tsekooko JSC. I agree with it and the orders proposed by him.

Dated at Mengo this 9th day of November 1994.

B.J. ODOKI

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A true
COPY OF THE ORIGINAL.

A.L. KYEYUNE,
AG. ASST. REGISTRAR.
9/11/1994.

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CIVIL SUIT NO. 404 OF l992.)

JUDGMENT OF MAMYINDO, DCJ

I read the judgment of Tsekooko, JSC in draft and agree that this appeal must succeed. As Odoki, JSC also agrees there will be judgment in terms proposed by Tsekooko, JSC.

Dated at Mengo this 9th day of November 1994.

S.T. NANYINDO

DEPUTY CHIEF JUSTICE.

I CERTIFY THAT THIS IS A TRUE
COPY OF THE ORIGINAL.

A.L. KYEYUNE,
AG. ASST, REGISTRAR.