

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CS - 353 - 2004

BYTE INTERNATIONAL GROUP LTD PLAINTIFF

VERSUS

WILKEN TELECOMUNICATIONS LTD DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T :

The plaintiff company which provides internet café services brought this suit for breach of contract against the defendant company which installs internet equipment.

The case for the plaintiff is that some time in October 2003, it contacted the defendant company to install iway equipment for it at Hoima in Western Uganda and Kitintale in Kampala.

It is the case of the plaintiff that the cost of the equipment would be US\$2450 for each of the two sites/locations. The plaintiff paid a deposit of Ushs.2,000,000/= by way of a post dated cheque against this cost and the balance was to be paid in installments. It is also

the case for the plaintiff that the installation for Hoima was to be completed by the end of March 2004 and that of Kitintale would be completed by the 4th April 2004. However, in breach of these understandings Hoima was completed on the 12th April 2004 while the work at Kitintale only started on the 10th May 2004. Furthermore, it is alleged that the defendants reneged on the agreed prices by increasing the installation cost and user prices.

The defendant denies that they are in breach of contract as alleged. The defendants aver that any delays were occasioned by the lack of funds on the part of the plaintiff. The defendant further avers that despite this situation with funds the defendant installed the Hoima site and started on the Kitintale site until its order was cancelled. It is this delay that led to the escalation of prices and ultimately leading to the cancellation of the Kitintale site order. The defendant however counterclaims for the sum of US\$3,200.30 being the outstanding cost of installation and US\$585.10 as service fee for the period 13th April to 11th July 2004.

The parties agreed to the following issues for trial;

- 1- What were the terms of the contract between the plaintiff and the defendant.
- 2- Whether it is the plaintiff or defendant who breached the contract.
- 3- What remedies (if any) are available to the parties.

Mr. E. Tuma appeared for the plaintiff and Dr. J. Byamugisha appeared for the defendant.

Issue No. 1: What were the terms of the contract between the plaintiff and the defendant?

This issue with the greatest of respect to the parties is very broad. From the evidence it is clear that whereas this transaction was going ahead the parties were still in a state of negotiation. The main problem is that this contract was not reduced into writing. Its terms therefore of necessity will have to be construed from commercial documents, a vast exchange of e-mails and telephone calls between the parties. It may not be possible to establish all the terms of this contract as a result. However, based on the pleadings of the parties it appears to me that the breaches that are being cited in the three areas of price, the terms of payment and the commissioning dates.

It is these three areas therefore that court will investigate.

It is not in dispute that the parties did not enter into a formal written agreement. It is not in dispute either that even without a formal written agreement the parties did intend to create a legal relationship.

Counsel for the plaintiff submitted that the price of the equipment; installation and site survey; monthly usage and fees to The Uganda Communications Commission all amounted to US\$4,200.30. This quotation is embodied in exhibit P.1 dated 17th March 2004 and was valid for 90 days which the plaintiff accepted.

Counsel for the plaintiff submitted that the same quotation was valid for both the Hoima and Kitintale sites.

Counsel for the plaintiff further submitted that in disregard of this agreement the defendant made a radical increase in price. Mr. Patrick Kaija (PW1) the Executive Director of the plaintiff, testified that he was notified by one Carlos Byamugisha of the defendant that price of the equipment had gone up from US\$2,450 to US\$3,200 an increase of US\$750. Furthermore that the price of the agreed bandwidth was also increasing from US\$250 to US\$850 per month

which was an increase of US\$600 per month. Mr. Kaija testified that this was outside their agreement.

As to the terms of payment Mr. Kaija testified that the two parties agreed that they would operate on a credit basis. In this regard Mr. Kaija with respect to Hoima issued the defendant a post dated cheque (dated 26th March, 2004) Exhibit P.2 for Ushs.2,000,000/=.

He also issued another post dated cheque with respect to Kitintale dated 15th May, 2004 (Exhibit P.4). However, Mr. Kaija testified that it was agreed that further payments for Kitintale would be paid out of the internet sale receipts from that site.

Counsel for the plaintiff dismissed the testimony of Mr. Edward Mukasa Bulwadda the defendant's Chief Accountant that there was any requirement by the defendant to make a 50% deposit before work commenced and then to pay the final 50% when the work was completed. He further submitted that it was Mr. Carlos Byamugisha and not Mr. Mukasa Bulwadda who conducted the negotiations with Mr. Kaija and so the evidence of Mr. Mukasa Bulwadda was largely hearsay.

Counsel for the defendant submitted that the e-mails between Mr. Kaija and Mr. Carlos Byamugisha show that the plaintiff was operating under financial constraints when contracting the defendant.

Counsel for the defendant referred court to exhibit P.5 and P.10 an e-mail dated 30th April, 2004 where Mr. Byamugisha pointed out to Mr. Kaija that the original costings that he had given were mere estimates. Counsel for the defendant also submitted that the plaintiffs were aware that they were dealing with an estimate because in the same exhibits Mr. Kaija by e-mail replied Mr. Byamugisha that he had no problem with the additional cost only that it should be US\$500 and not US\$700. Counsel for the defendant submitted that the plaintiff in spite of issuing post dated cheques to the plaintiff in reality had no money to pay for the said installations. He referred court to exhibit P.9 where Mr. Kaija for the plaintiffs wrote an e-mail stating that he hoped to raise Ushs.2,500,000/= from the Uganda Communications Commission and a loan from M/S Stanbic Bank at the end of June 2004 to clear the outstanding sums for both Hoima and Kitintale. Counsel for the defendant pointed out that the plaintiffs with regard to the Kitintale

site proposed a staggered payment plan to be generated out of their sales.

It is clear to my mind that the price of the installation and service including the terms of payment in this contract were dynamic. This is not withstanding a quotation exhibit P.1 that was made by the defendant to the plaintiff. Apart from setting the price of US\$4,200.30-, the said quotation also had terms that;

- “- *The above prices include VAT*
- *Equipment is ex-stock and carries a one year warranty*
- *Installation and commissioning are shown separately as above.*
- *This quotation is valid for 90 days. ”*

Judging from the correspondence in this matter this quotation was indicative of the possible price, and its terms.

Black's Law Dictionary 7th edition inter alia defines a quotation as

“...The amount stated as a stock's or commodity's current price.

A contractor's price for a given job... sometimes shortened to quote...”

It is the case for the plaintiff that this quotation should have been valid from 17th March, 2004 for 90 days (i.e. until 17th June, 2004) but that the defendants did not hold the prices. The plaintiff may have a point there.

A review of the evidence however has some interesting revelations. Exhibit P.5 dated 30th April, 2004 shows correspondence to the effect that the defendant no longer had equipment in its stock and had to source it from elsewhere hence the increase in price. It would also appear that the defendant did not bill for the extra cost complained about with regard to the Hoima site. A summary of the outstanding bills by the plaintiff made by the defendant in exhibit D.1 shows that the defendant issued the plaintiff invoice No. 3950 dated 14th May, 2004 for equipment and installation at Hoima for US\$4,200.30-.

This is the exact amount in the quotation dated 17th March, 2004. Consequently I am at a loss what the dispute as to price is for the Hoima site. I find that on the basis of the evidence before me that the price of installation and equipment for Hoima was US\$4,200.30- as quoted for. A review of the evidence also shows that the price for equipment in Kitintale was never billed.

The reason for this according to Mr. Edward Mukasa (DW1) the Chief Accountant of the defendant was that the defendant company had run out of equipment stock and would therefore have to source it from another company leading to an increase in the cost of US\$750-. In such a situation it is clear that the quotation of 17th March, 2004 would not hold as the said equipment would not be “*ex-stock*”.

As to the terms of payment Mr. Mukasa testified that the company policy was that a customer on receiving a quote would be required to pay 50% of the cost as a deposit and then 50% after installation. I have not been able to see evidence of this mode of payment in the correspondence. Indeed even the tax invoices (see exhibit D.1) No. 3950, 3951 and 3967 all show that invoices must be paid within 30 days.

On the contrary the evidence shows that the parties were continually negotiating what they called a payment plan to settle these bills. Mr. Kaija for the plaintiff made quite a number of proposals for payment as seen in exhibits;

P.15(a) and (b) (dated 3rd January, 2004)

P.3 (dated 23rd March, 2004)

P.9 (dated 23rd April, 2004)

P.10 (dated 30th April, 2004). All these proposals were made to one Carlos Byamugisha a Marketing Executive of the defendant. Reading Exhibit P.10, it would appear that Mr. Carlos Byamugisha could not commit himself as to any of the proposals without first consulting the company “*M.D. or Chief Accountant*”. The evidence of Mr. Mukasa the Chief Accountant of the defendant was not clear in this area either. What appears to have happened I believe, can be best deduced from the testimony of Mr. Mukasa in cross-examination when he said

“...it is true we connected (the plaintiff) without receiving money but this was a special arrangement...”

It is therefore appears that the defendants were aware that the plaintiff had special challenges as to funding and therefore in reality simply chose to accommodate them as long as they paid something. In other words payment was based on credit. This is borune out by the statement of outstanding bills exhibit D.1 which shows how the invoices were issued and how the payments were made. Court can

only say that on the evidence, payments were to be made within a reasonable time of invoicing.

As to the dates of commissioning, Counsel for the plaintiff submitted that it was agreed that the Hoima site would be commissioned by the 30th March, 2004 while the Kitintale site would be commissioned by the 4th of April. As it is the Hoima site was commissioned on the 13th April 2004 (i.e. 14 days later) while work did not begin on the Kitintale site until the 10th May 2004 but was never completed due to the cancellation of the order.

Mr. Mukasa for the defendants does not in substance dispute these dates but only adds that the installation work was greatly affected by the limited funds that the plaintiff had. Court will therefore find that in principle the parties had agreed that the Hoima site would be installed by the 30th March, 2004 and the Kitintale site by the 4th May, 2004, but that this was subject to the availability of funds and stock.

Issues No. 2: Whether the defendant or plaintiff breached the contract.

I have already found that there was no formal contract and that this whole transaction was largely informal in nature. Any breach will have to be viewed against that background.

Counsel for the plaintiff submitted on three breaches by the defendant. The first being the failure of the defendant to install the equipment at the Hoima and Kitintale sites on time. Secondly hiking the price of equipment for the Kitintale site. Thirdly increasing the cost of the bandwidth of the original quotation. The defendants disagree that they were in breach and that any delays if any should be attributed to the absence of funding by the plaintiff.

I am inclined to agree with the defendants in this regard. I have already found on the evidence of Mr. Mukasa that this was a special arrangement between the plaintiff and the defendant. In the case of Hoima, work did not commence until a post dated cheque had been issued by the plaintiff to the defendant. I am convinced upon the evidence that the plaintiff wanted the defendant to install both the Hoima and Kitintale site on some sort of credit and then pay off his costs out of the proceeds of the internet cafes.

I find it difficult to find that the defendants can be held to be in breach where they were doing installations on such liberal credit terms. In the case of the Hoima site the installation was done 14 days later than expected while in the case Kitintale the whole order had to be cancelled because the cost went up as a result of sourcing equipment from a third party. One cannot hold not expect the defendant to hold prices for stock that was not for them; even the quotation was clear on this point.

To my mind the defendant substantially performed its side of the bargain in the case of

Company Profiles V Mansoor Nyera & Anor high court Civil Appeal No. 4 of 2007.

I held that if one party has substantially completed its side of the bargain leaving a minor omission or fault, the court may accept such performance as discharging his obligations, subject to the innocent party's rights to deduct a sum to cover the fault.

This is the principle in the case of **Dakin V Lee** [1916] I.K.B 566.

In this case I find that not only had the defendant substantially performed their side of the bargain in this informal contract, but also I find that they cannot be held to be at fault in what they did.

As to the defendant's counter claim of US\$2,415.82- the plaintiff's do not contest this and so I award it to defendants.

Remedies.

The plaintiff's claim general damages for breach of contract, disruption of business and loss of income. To booster their claim for damages the plaintiffs provided their profit and loss accounts (Exhibit P.11). The plaintiffs project through their profit and loss account a loss of Ushs.4,870,305/=. Given my findings above I am unable to award these damages. This would have been possible if the plaintiffs instead of trying to get a special bargain from the defendants actually paid for the installation and then held the defendants accountable for their time lines. However, this was not the case. I hereby therefore dismiss the claim in the plaint with costs.

As to the counterclaim I award defendant/counter claimant the sum of US\$2,415.82- with interest at 4% p.a. (being an award in dollars) from the date of filing the suit until payment in full. Court was not addressed on the issue of damages in the counter-claim, so I consider it abandoned and grant none. I award the defendant/counterclaimant the costs of the counterclaim.

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Geoffrey Kiryabwire

JUDGE

Dated: 17/06/08