

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

HCT - 00 - CC - CS - 939 - 2004

COMBINED SERVICES LTD ::: PLAINTIFF

VERSUS

THE ATTORNEY GENERAL OF UGANDA ::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T :

The plaintiff company brought this suit against the Attorney General of Uganda (hereinafter referred to as “AG”) in his representative capacity for breach of contract.

The case for the plaintiff is that on the 20th May 1999 it entered into a contract (No. DWD/STWSP/CTN20/98) with the Government of The Republic of Uganda represented by the Ministry of Water, Lands and Environment for the construction of water supply systems and reservoirs in Ntungamo Town in Western Uganda. The plaintiff avers that it substantially finished the work but was only partially paid. The plaintiff claims as outstanding the sum of US\$23,548- under

certified payment Certificate No. 14 (dated 13th July 2000) and US\$11,021- being retention money under the final certified payment Certificate No. 15 (dated 15th August 2000).

The plaintiff also claims damages for breach of contract and interest. The defendant in their amended written statement of defence deny the plaintiffs claim. The defendant on the other hand counter-claims that the plaintiff were in breach of a similar contract for Luwero town in Central Uganda.

The defendant/counter-claimant seeks as result of the alleged breach of the Luwero contract the recovery of an advance payment of Ushs.41,306,428/= and the sum of Ushs.5,064,918/= paid to another contractor to complete the unfinished work of the plaintiff at Luwero town.

At the pre-trial scheduling conference the defendant produced some banking documents showing that US\$11,021- had been paid to the plaintiff. The plaintiff disputed the documents. The defendants also sought to offset the US\$23,548 against the money claimed by the defendant in the counter-claim which was not agreed to by the plaintiff.

The parties then agreed to the following issues for trial;

- 1- Whether US\$11,021- was paid to the plaintiff. If not, whether the same is due to the plaintiff.
- 2- Whether US\$23,548- due to the plaintiff can be offset against the defendant's claim under the contract for Luwero Water Supply System.
- 3- Whether the plaintiff is entitled to interest and damages.
- 4- Costs.

At the trial, the defendant did not open their defence and lead evidence. After several adjournments the court decided to proceed with the determination of the case under Order 17 Rule 4 of the Civil Procedure Act.

Mr. Moses Kimuli appeared for the plaintiff while Ms. Susan Odong appeared for the defendant.

Issue No. 1: Whether US\$11,021- was paid to the plaintiff. If not whether the same is due to the plaintiff.

From the evidence put before court it appears that it is not in contest after all as to whether the US\$11,021- was payable to the plaintiff under certificate No. 14. It was. It transpired that the defendants actually believe that they paid the money. The plaintiff however

testified that they did not receive the said money. Mr. Richard Irumba PW1 The Managing Director of the plaintiff company testified that payments to his company in United States dollars were made by telegraphic transfers (TTs) to the plaintiff bank account at the then Uganda Commercial Bank (UCB) International Division Account No.

655. Mr. Irumba further testified that his said company account was closed some time around the 15th November 2000 without receiving the said US\$11,021-.

He further testified that it was the practice of the bank to notify him about any such transfer of money to this account but in this case he did not receive any notification.

During cross-examination Mr. Irumba was shown Exhibit D2 which comprised

- 1- An instruction letter dated 7th December 2001 to the Manager of M/S Standard Chartered Bank Kampala to pay the plaintiff company the sum of US\$11,021- by transfer to his UCB Account No. 655.
- 2- A Standard Chartered Bank application form for remittance dated 7th December 2001 of the said US\$11,021-.
- 3- A photocopy of a cheque (No. 127533 and dated 12th December 2001) drawn on Standard Chartered Bank for the

- 4- A Standard Chartered Bank statement for the “*Small Towns Water and Sanitation Project*” showing its account debited with the amount US\$11,021- on the 19th April 2002.

Counsel for the plaintiff submitted that the above documents do not show that the said money was received by the plaintiff company. Mr. Irumba PW1 testified that the company had closed the UCB account No. 655 in 2000. He relied on a company resolution to that effect dated 15th November 2000 and filed with the Registrar of Companies on the 18th December 2000. The said resolution reads in part

“...That the company close the foreign account No. 655 with UCB International Division and transfer the balance to UCB, I.P.S branch No. 41-0005-8...”

This is clearly a perplexing situation. There is evidence before court that the US\$11,021- was sent to the plaintiff’s UCB account No. 655 on the 19th April 2002. However, there is also evidence that the said account was closed in December of 2000.

Objectively, one cannot expect that this amount of US\$11,021- would have been credited by the bank on an account that had been closed for a period of 2 years. The defendants have not provided court with an alternative explanation to prove payment. I therefore find that there is no proof before court that the plaintiffs' received the said money.

In answer therefore to the first issue, I find that the US\$11,021- was not paid to the plaintiff and therefore is still outstanding.

Issue No. 2: Whether US\$23,548- to the plaintiff can be offset against the defendant's claim under the contract for Luwero.

This issue relates to the counter-claim of the defendant/counter-claimant.

Counsel for the plaintiff submitted that the counterclaim was an abuse of court process because it was substantially the defence in HCCS No. 657 of 2003 – **Combined Services Ltd V AG**. He further submitted that the AG's defence in that case did not contain a counterclaim.

I shall address this attack on the counterclaim first. It seems to me that it is correct that the counter-claim is substantially reflects the defence in HCCS No. 657 of 2003. However, it must be recalled that counsel for the AG applied to amend the defence in this present case just to do that. The plaintiffs did not object to the amendment.

Furthermore the plaintiff's did reply to the counter-claim and did not raise this objection. Since the transactions involving the parties in both cases are related and in a bid to completely and finally determine their disputes without allowing for a multiplicity proceedings within the meaning of Section 33 of The Judicature Act, I do not view this counterclaim as an abuse of court process. It would have been an abuse if HCCS 657 of 2003 carried the same counterclaim which it does not.

Counsel for the defendant at the pre-trial scheduling conference did not challenge the allegation by the plaintiff that the sum of US\$23,548- under certificate No. 14 was not paid. This is why this second issue was framed as it was. In any event the defendant did not adduce any evidence to contrary. Therefore for completeness of this dispute I do find that the sum of US\$23,548- is due and owing to the plaintiff. The issue now is whether this can be used to offset the claim in the Luwero contract?

Counsel for the plaintiff says; it cannot because the defendant has made no claim against the plaintiff in this regard.

Mr. Irumba PW1 testified that no formal demand to pay any of the counter-claim was made on plaintiff company. He however testified that the parent ministry of the project on the 15th January 2001 made a claim against an advance payment bond of M/S Empire Insurance Co. Ltd for Ushs.41,306,428/= for recovery of the advance payment made to the plaintiff company.

Mr. Irumba conceded during cross-examination that his company had received a 20% advance payment on the Luwero contract. He further conceded that the plaintiff company did not complete that job because the defendant terminated the Luwero contract and gave it to another company.

Exhibit P.8 is a letter of demand by The Ministry of Water, Lands and Environment to the Managing Director of Empire Insurance Group Ltd and it reads in part

“...As you have already been informed, the ministry has terminated the above contract due to poor performance by the contractor. The ministry has recovered Ushs.196,140,152/=

from the contractor through deductions made on the interim payment certificates leaving a balance of Ushs.41,306,428/= unrecovered. I hereby demand from yourself the unrecovered advance payment amounting to Ushs.41,306,428/= (Uganda Shillings forty one million, three hundred six thousand four hundred twenty eight only) payable... as per your insurance guarantee bond...”

Clearly there evidence to suggest that sum of Ushs.41,306,428/= was claimed against M/S Empire Insurance Group Ltd, under an Insurance Guarantee Bond. The insurance company being in a position of guarantor under the bond does not relieve its principal the contractor (the plaintiff in this case) of its primary obligation to refund the advance payment. A claim on the guarantor is therefore primarily a claim on the contractor (the plaintiff in this case). So where the guarantor fails to pay then the contractor has a primary obligation to make good that claim.

In this case therefore given the concessions of the plaintiff, I find that the defendant is entitled to offset the US\$23,548- against the claim for the advance payment bond based on the documentary evidence

before court, in the event that it has not already been paid by the insurance company.

The defendant also claims the sum of Ushs.5,064,918/= being the sum incurred in hiring another contractor for the Luwero contract. No evidence was adduced in court as to how this Ushs.5,064,918/= comes about. This being a special damage, I find that it has not been specifically proved.

Issue No. 3: Whether the plaintiff is entitled to interest and general damages.

Counsel for the plaintiff submitted that under clause 43.1 of the contract the plaintiff would be entitled to interest on late payments. Clause 43.1 provides that interest is payable

“...at prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made...”

Counsel for the plaintiff prays for interest at 30% p.a. on the US\$23,548- from the 11th August 2000 and on the US\$11,021- from 29th November 2001. I agree that interest should be paid. I however find that the rate of 30% p.a. to be way above the commercial borrowing rate for the United States Dollar. I accordingly award interest from the dates pleaded on both amounts at 4% p.a.

As to general damages the plaintiff prays for US\$10,000- as general damages. I think this is on the high side and will award general damages of US\$5,000- with interest at 4% p.a. from the date of judgment until payment in full.

Issue No. 4: Costs.

The plaintiff prays for costs of the suit. I so grant the plaintiff costs in the main suit.

Remedies in the counterclaim.

Even though the defendant did not call oral evidence, court is satisfied on the documentary evidence before it that the defendant is entitled to Ushs.41,306,428/= being recovery of the advance payment made to the plaintiff. I hereby award this sum to the defendant, if it has not been paid, with interest at the rate of 24% p.a. from the 15th January 2001 until payment in full.

I also award the defendants half of the costs of the counter-claim.

I so order.

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Geoffrey Kiryabwire

JUDGE

Dated: 14/02/08

14/02/08

9:45am

Judgment read and signed in Court in the presence of:

- S. Kisubi h/b for Mr. Kimuli for plaintiff
- S. Odong for defendant / A.G.
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire
JUDGE

Date: 14/02/08