

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 194 OF 2014

SBI INTERNATIONAL HOLDINGS (U) LTD.....APPELLANT

VERSUS

COF INTERNATIONAL CO. LIMITED.....RESPONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA
HON. MR. JUSTICE KENNETH KAKURU, JA
HON. LADY JUSTICE HELLEN OBURA, JA

*(Appeal from part of the Judgment of the High Court of Uganda at
Kampala delivered by Mr. Justice John Wilson Masalu Musene on the
10th September 2013 in H.C.C.S No. 779 of2006)*

JUDGMENT OF COURT

Background

This is an appeal from the decision of the High Court in High Court Civil Suit 25 No. 779 of 2006 before *Hon Justice Masalu Musene* dated 10th September 2013. The respondent sued the appellant for breach of contract and for recovery of Ug. Shs. 73,164,926/= and general damages. The appellant was subcontracted by the respondent to build water side drains in grouted stone pitching in one of the respondent's sites in Kasese District on 4th April, 2006.

There was a disagreement between the parties as to the payments, nature and quality of works executed. The respondent brought an action against the appellant for breach of contract, fraud, specific performance and special damages of Ug. Shs. 255,710,491/=. The respondent also sought orders for exemplary damages, punitive damages and general damages. The respondent 10 filed a plaint which was amended twice. The suit proceeded on the 2nd amended plaint dated 5th April, 2011.

The appellant filed a 2nd amended written statement of defence denying the averment in the plaint and set up a Counter-Claim seeking damages for breach of contract arising from the respondent's failure to complete the contract 15 within the contract period plus costs of the suit.

At the trial three issues were framed.

1. *Whether there was breach of the sub-contract.*
2. *Whether the plaintiff executed the same within the contract period.*
3. *Remedies available to the parties.*

The High Court found for the respondent and awarded Ug. Shs. 208,186,123/= as special damages and Ug. Shs. 30,000,000/= as punitive damages. The Counter-Claim was dismissed. Costs of the suit and counter-claim were awarded to the respondent.

Being dissatisfied, the appellant filed this appeal on the following grounds;-

1. *The Learned trial Judge erred in law and fact when he held that the appellant was in breach of the contract executed by the parties.*
2. *The Learned trial Judge erred in law by applying the Contract Act No. 7 of 2010 to a contract executed by the parties in 2006.*

3. *The Learned trial Judge erred in law and fact when he declined to address issue No. 2 which had been agreed to by the parties and court during a scheduling conference.*
4. *The Learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record.*
5. *The Learned trial Judge erred in law and fact when he awarded the respondent special damages in the sum of Ug. Shs. 208,186,120/= without proof of such damages having been suffered.*
6. *The Learned trial Judge erred in law and fact when he awarded the respondent general damages to the tune of Ug. Shs. 40,000,000/- and punitive damages to the tune of Ug. Shs. 30,000,000/=.*
7. *The Learned trial Judge erred in law and fact when he awarded the respondent interest at the rate of 10% per annum from the date of judgment.*
8. *The Learned trial Judge erred in law and fact when he dismissed the Appellant's counterclaim.*

Representation

At the hearing of the appeal, learned Counsel *Mr. Isaac Walukagga* appeared for the appellant while learned Counsel *Mr. Caleb Alaka* and *Mr. Vincent Opyene* appeared jointly for the respondent.

At the conferencing of this appeal, three issues were raised for determination by this Court. These were as follows;-

1. *Whether the Learned trial Judge erred in law and fact when he held that the appellant had under paid the respondent for works done to the tune of Ug. Shs. 208,186,120/=.*
2. *Whether the trial Judge had properly and exhaustively evaluated the evidence adduced to make the above finding.*
3. *Whether the trial Judge erred in law by awarding general damages in the sum of Ug. Shs. 40,000,000/= and punitive damages of Ug. Shs. 30,000,000/= to the respondent.*

Appellants case

The appellant's Counsel abandoned ground 3 and argued grounds 1, 2 and 4 together and the rest separately.

Counsel for the appellant submitted on grounds 1, 2 and 4 that, it was agreed by the parties that the appellant would pay the respondent Ug. Shs. 18,000/= per square meter of the road pitched with stone. The appellant was to also supply cement and diesel. The learned trial Judge found

that the work plan arrived at late was part of the agreement. Counsel argued that the said work plan could never have been part of the contract, as the one that was executed by the parties clearly spelt out the obligations of parties and was conclusive. In order to determine the measurements of the works executed, the learned trial Judge at the trial directed both parties to jointly ascertain the exact measurements for the works done. Both the appellant and the respondent's representatives jointly ascertained the measurements and submitted the same to Court.

Counsel submitted that a close look at the final payments for the works done, reveals that the respondent had actually been paid in excess of the amount he ought to have been paid even if the work plan had been part of the contract as contended by the respondent. He argued further that the finding by the trial Judge on the work plan and the inclusion of the 2.32 m was in error. This is because the trial Judge did not address his mind to the joint report on the exact measurements, the provisions of the original agreement and the certificates of completion of works upon which he was paid. Had the learned trial Judge done so, Counsel argued, he would have come up with a different finding. He submitted that the trial Judge made an erroneous finding that the appellant unilaterally increased prices of cement and diesel to the detriment of the plaintiff. The Judge was in error because he based his finding on the market prices which had not been provided for in the agreement.

In a nut shell in as far as grounds 1, 2 and 4 are concerned, counsel submitted that there was no evidence adduced to show that there was a breach of the contract by the appellant.

On ground 5, counsel argued that the trial Judge awarded a sum of Ug. Shs. 208,186,120/= as special damages without any legal basis as the same had not been proved. Counsel relied on the decision of *Omunyokol Akol Johnson Vs Attorney General, Supreme Court Civil Appeal No. 06 of 2012* where it was held that special damages have to be specifically pleaded and strictly proved.

Counsel submitted on ground 6 that the trial Judge erred in law when he awarded the respondent general damages to the tune of Ug. Shs. 40,000,000/= without evaluating the evidence and yet general damages are awarded to compensate a party and restore it to its original position. Counsel argued that it was sufficiently proved that the contract was not performed by the

respondent within the period set out in the agreement which was a breach. Further, that the appellant had paid the respondent the agreed upon contractual sum. He concluded that the trial Judge had erroneously dismissed the counter claim contending wrongly that it had been paid. He asked Court to find that the counter claim had been proved and to award appropriate general damages for the breach against the respondent.

On the 7th ground, Counsel faulted the trial Judge for being excessive in his awards to the respondents. The interest of 10% per annum from the date of the Judgment until payment in full was too excessive given the fact that on the special damages, general damages and punitive damages Court rate interest is way below 10% p.a .

Ground number 8 relates to a counter claim in which it was pleaded specifically that the respondent was in breach of the sub-contract having failed to complete the work within the 6 months agreed contract period. The learned trial Judge found that no evidence had been led on the counter claim and wrongly dismissed it yet the appellant adduced sufficient evidence on the counter-claim and the same had not been rebutted by the respondent.

In conclusion, Counsel prayed for the appeal to be allowed with costs.

Respondent's reply

In reply, counsel for the respondent submitted that the learned trial Judge correctly found that the appellant breached the contract. He contended that the contract provided that the contractor shall be entitled at any time during the execution of the works to require evaluation of the works and to give instructions to the sub-contractor without invalidating the agreement. Where the variations would involve additional costs, the additional payment would be agreed in advance. Counsel argued that no evidence was adduced of any agreement relating to price fluctuations in cement and diesel.

Further, that the issue of retention was not provided for in the contract even though the last certificate showed that it was paid. Counsel argued that the respondent paid the appellant Shs. 11 million as full and final payment on 6th February, 2007 for all the works executed by him (the appellant]. The evidence Counsel submitted that this is evidenced by the last certificate of completion of works dated 31st October, 2006 duly executed by the contractor and sub-contractor.

On ground 5, counsel submitted that the learned trial Judge was alive to the position of the law that special damages have to be specifically pleaded and proven. He further submitted that, the learned trial Judge rightfully reiterated the law on general damages and he was right when he held that there is no strict Rule of Law requiring particulars of general damages to be specifically stated in pleadings and that the award of the same is discretionary on the part of the Court. Accordingly the trial Judge was justified when he awarded the general damages that he did. He asked Court to dismiss the appeal.

Resolution

This being a first Appeal, we are required to reappraise all the evidence adduced at trial and to arrive at our inferences on all issues of law and fact. See: Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of 1997 and Pandya v. R [1957] EA 336, and Bogere Moses and Another v. Uganda, Supreme Court Criminal Appeal No. 1 of 1997.

The first argument of the appellant is that the learned trial Judge defined the sub-contract basing himself on the Contracts Act No. 7 of 2010 and yet the sub-contract was executed in 2006. Thus the Judge applied the said Act retrospectively contrary to the law. The issue here should be whether the definition of a contract in the old Contract Act, Cap 73 Act differs from the one in the Contract Act No. 7 of 2010 and whether or not had the Judge relied on the definition of "a contract" as given by the old Contract Act, Cap. 73, he would have come to a different conclusion on breach of contract.

A contract is defined under the Contract Act No. 7 of 2010 as;-

"an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound"

We note that the repealed Contract Act Cap 73 did not expressly define a contract but made reference to the English law of contract. Black's Law Dictionary, 9th edition, defines a contract to mean an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. In essence, the definition of a contract does not substantially differ regardless of the source. Whereas it was technically not right for the trial Judge to apply the Contracts Act No. 7 of 2010, to a contract executed in 2006 before the said Act was in existence, it would not change his finding and would also not, prejudice the appellant since in substance, the new Contracts Act No. 7 of 2010 did not change the traditional English common law definition of what a "contract" therefore the of repealed Contract Act, Cap 73 applied. We therefore reject this submission of the appellant.

The appellant also argued that the learned trial Judge wrongly held that the work plan was part of the contract yet it could never have been part of the contract and the respondent had been paid in excess of the total works done.

The issue here is whether there was a breach of contract and whether the variation was in accordance with the contract. Breach of contract is the failing by a party to perform any term of a contract, written or oral, without a legitimate legal excuse. It is a violation of contract through failure to perform, or through interference with the performance of the contractual obligations. Evidence on record indicates that there were additional instructions and a work plan was exhibited which, according to the trial Judge, formed part of the sub-contract. We do not accept the submission of Counsel for the appellant because when one examines the sub-contract, it gave room for the parties to vary the works for the better execution of the contract. Paragraph 6 of the sub-contract agreement states that;

"The contractor shall be entitled at any time during the execution of the works to require a variation to the works and to instruct the sub-contractor accordingly without invalidating this agreement where the variations would involve additional costs, the additional payment shall be agreed in advance..."

This in essence means that the work plan was for better execution of the contract and the respondent should not deny this. DW1 testified that the parties set out the retention percentage as 10% and that the appellant company made periodic deductions from the payments to the respondent. The appellant unilaterally without first agreeing in advance with the respondent as to the additional costs involved and how they would adversely affect what was due to the respondent, increased the prices of cement and diesel to the detriment of the respondent which was based on the market prices and not on the terms of the contract. This amounted to a breach of contract. We accordingly reiterate our earlier decision that the learned trial Judge rightly found for the respondent on the issue of breach of contract. We accordingly find that the learned trial Judge rightly found for the respondent on the issue of breach of contract.

With regard to the appellant's witness DW1, the learned Judge found and rightly in our view, that on the basis of the evidence adduced and admitted by DW1 himself he was at the material time, a student pursuing a diploma and he was not an engineer. We find no reason to fault the learned trial Judge on this finding of fact considering the fact that he had an opportunity to evaluate all the evidence including the demeanor and qualifications of the witnesses.

As to the submission that the trial Judge awarded a sum of Ug. Shs. 208,186,123/= as special damages without any legal basis. Appellant's Counsel cited the authority of *Omunyokol Akol Johnson Vs Attorney General, Supreme Court Civil Appeal No. 06 of 2012* where it was held that special damages have to be specifically pleaded and strictly proven.

We note that in the 2nd amended plaint dated 5th April, 2011 the respondent specifically pleaded for special damages in detail.

The trial Judge evaluated the evidence on record before when addressing the issue of special damages. He found for the respondent on breach of contract and further found that there was over pricing on fuel and cement and some square meters had not been paid for on each certificate. The respondent had in fact proved the special damages prayed for and we find no reason to fault the Learned trial Judge. Consequently, this ground also fails.

Having found that there was breach of contract, the trial Judge awarded general damages of Ug. Shs.

40,000,000/= and Ug. Shs. 30,000,000/= punitive damages. In *Uganda Revenue Authority Vs Wanume David Katamirike*, Court of Appeal Civil Appeal No.43 OF 2010, this Court held that an appellate court will not reverse a judgment on a question of damages unless the appellate court is satisfied that the trial Judge acted on a wrong principle or that the amount awarded was so extremely large or so very small as to make it, an entirely erroneous estimate of the damage resulting into a miscarriage of justice. See also: *Ahmed Ibrahim Bholm v Car & General Ltd*, Supreme Court Civil Appeal 10 No. 12 OF 2002.

General damages are compensatory in nature and they should offer indemnification to the injured party.

Punitive damages are damages awarded to a plaintiff in excess of compensatory damages in order to punish the defendant for a reckless or willful act. In the case of *Omunityokol Akol Johnson Vs Attorney General [Supra]*, Odoki, JSC in his Judgment cited *Crooks Vs Bernard [1964] AC 1131*, as setting out the aspects that a Court may consider to award such damages. These aspects are;-

1. *"Where the government servants had been guilty of oppressive arbitrary or unconstitutional action.*
2. *Where the "defendant's conduct had been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff;*
3. *Where such an award was sanctioned by Statute."*

We find that, on reviewing all the evidence that was adduced of all the circumstances of this case that the conduct of the appellant fell in category 2 above.

Accordingly we find that the learned trial Judge rightly awarded general damages, punitive damages as well as interest. We find no reason to interfere with the decision of the trial Judge. All the grounds of the appeal having failed, this appeal stands dismissed with costs to the respondent.

We so order.

Dated at Kampala this 23rd May 2018

**HON. JUSTICE REMMY KASULE,
JUSTICE OF APPEAL**

**HON. JUSTICE KENNETH KAKURU,
JUSTICE OF APPEAL**

**HON. LADY JUSTICE HELLEN OBURA,
JUSTICE OF APPEAL**

