THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HIGH COURT CIVIL SUIT NO. 425 OF 2002

M.H. CONSTRUCTION CO LTD ……..…….. PLAINTIFF

VERSUS

PETRO UGANDA LTD ……...……... DEFENDANT

Before: The Hon. Mr. Justice E.S. Lugayizi

JUDGMENT

This judgment is in respect of a suit the plaintiff filed against the defendant seeking Court's remedies as follows:

1. Payment of a sum of shillings 37,667,730/= as special damages.
2. General damages for breach of contract.
3. Interest on the items in paragraphs 1 and 2 above at 36% per annum from the date of filing the suit till payment in full.
4. Costs of the suit.

In its Written Statement of Defence the defendant denied the above claim and averred that the plaintiff was not entitled to any of the remedies it is claiming because it breached the contract. It then counter-claimed against the plaintiff for a penalty of shillings lm/ every day of default, general damages for breach of contract and costs of the counter-claim.

At the Scheduling Conference the parties agreed to admit the following facts:

1. That there was a contract between the plaintiff and the defendant dated l9" November 2001 wherein the plaintiff undertook to construct a petrol station for the defendant at Plot 34 Block 232 Jinja Road.

2. That on 13th June 2002 a final Certificate of Settlement was concluded between the plaintiff and the defendant. The said certificate was to the effect that if the plaintiff completed the listed works in ***"the snag list"*** within 10 days, the defendant would pay the plaintiff a sum of shillings 32,245,4301= plus VAT (17%) after deducting 5% as retention fee and making the final figure payable shillings 35,840,796/=.

3. That on Saturday 29th June 2002 the defendant paid the plaintiff a sum of shillings 6,392,000/=.

4. That on 12th July 2002 the legal officer of the defendant communicated to the plaintiff the defendant's intention to terminate the contract on l3 July 2002.

5. That on 13th July 2002 the defendant duly terminated the contract as it had indicated it would do.

The parties also agreed to admit the following documents without formally proving them:
1. A Certificate of Settlement dated 13th June 2002 as Exhibit P1.
2. A snag list as Exhibit P2.
3. A letter from the defendant dated 12th July 2002 and addressed to the plaintiff as Exhibit P3.
4. A contract document dated l9 November 2001 as Exhibit Dl.

Lastly, the parties also agreed that the following would be the issues for determination:
1. Whether the defendant terminated the contract before the expiry of the agreed 10 days.
2. Whether the plaintiff was in breach of the contract
3. The remedies available.

During the hearing of the suit the plaintiff called two witnesses in support of its case namely, Gurbax Singh (the Managing Director of the plaintiff) as PW1 and John Bakuzi (the plaintiffs supervisor of the work in question) as PW2. In very brief terms the plaintiff's case was as follows:

On 19th November 2001 the plaintiff and the defendant signed an agreement whereby the plaintiff agreed to construct a Petrol Station for the defendant at Banda for a sum of shillings

217,231,829/=. The agreed period for the construction of the Petrol Station was 2 months. Consequently, the plaintiff was supposed to hand over to the defendant the completed job on 20th January 2002. The plaintiff took possession of the site on 20th November 2001 and began to do the agreed job. By 20th January 2002 the plaintiff had not yet completed the job. All the same, the plaintiff continued with the job until June 2002 when it thought it had completed it, but on inspection the defendant was not satisfied with it. Accordingly, on 13th June 2002 the plaintiff and the defendant signed an understanding (Exhibit P1) whereby they agreed that the plaintiff would complete the works in the snag list (Exhibit P2) in 10 days before the defendant paid it the sum of shillings 35,840,7961=. The defendant then gave the plaintiff a cheque of shillings 6,392,000/= dated 29th June 2002 to enable it to buy the necessary materials for the remaining works. However, since 29 June 2002 was a Saturday, the plaintiff did not bank the cheque until Monday (1st July 2002). The cheque took 3 days to mature and to credit in favour of the plaintiffs bank account. Consequently, the plaintiff did not draw the money from its bank account for buying the materials for the works in question until 4th July 2002. It then bought the necessary materials and began doing the said works. In the plaintiffs opinion if one excluded Sundays the plaintiff was supposed to finish the works in question on 17th July 2002. To the plaintiffs surprise on l2 July 2002 the defendant served it with a termination notice. It then proceeded to evict it from the site on 13th July 2002 when the plaintiff was only left with cleaning and handing over the site to the defendant, thereby breaching the contract. For that reason the plaintiff implored Court to grant it the remedies it prayed for in the plaint. That was the plaintiff’s case.

The defendant’s case was slightly different. It based it on the testimony of two witnesses namely, Umo Maheswara Rao Bolle Palli (the Project engineer of the defendant) as DW1 and Caleb Mwesigwa (the defendant’s legal officer) as DW2. In brief the defendant’s case was as follows:

It is true the parties herein entered into the agreement referred to above. The deadline for handing over the finished job was 20th January 2002. In case of default there was a penalty clause under which the plaintiff was supposed to pay a sum of shillings 1,000,000/ each day it defaulted. Irrespective of the above provisions the plaintiff did not honour the deadline, but because of the penalty clause in the agreement the defendant decided to leave the matter of default until the time of final payment when it would take everything into account. In May and June 2002 the plaintiff

tried twice to hand over work, but the defendant found it incomplete. Finally, on 13th June 2002 the two parties entered into an understanding (Exhibit P1) whereby they agreed that the plaintiff would do the works listed in the snag list within 10 days. In turn, the defendant would pay the plaintiff the sum of money agreed upon in the understanding of 13th June 2002 (Exhibit P1). On 29th June 2002 the defendant advanced the plaintiff a sum of shillings 6,329,000/= by way of a cheque and expected it to complete the job by 12th July 2002. However, despite the promise it had made to complete the works in 10 days the plaintiff did not hand in the finished works on time. Instead, 12th July 2002 it wrote a letter (Exhibit D2) requesting for 7 more days within which to complete the works. On receipt of the above letter the defendant terminated the contract and engaged someone else to complete the works. For those reasons, the defendant insisted that the plaintiff breached the contract and must, among other things, pay the penalty stipulated, under the contract. Finally, the defendant prayed Court to dismiss the plaintiff's case and to grant it the remedies under the counter-claim. That was the defendant's case.

After considering the evidence on record, Court thought that it was prudent to amend the issues slightly. (See **Order 13 rule 5 of the Civil Procedure Rules).** Court was satisfied that amending the issues would not prejudice the interests of any of the parties involved in the dispute. Instead, it would safeguard the said interests because the amended issues would enable Court to deal with every aspect of the matter before it. Accordingly, the amended issues are follows:

1. Whether the plaintiff breached the contract.
2. Whether the defendant was entitled to terminate the contract.
3. Whether there is merit in the defendant's counter-claim.
4. The available remedies.

Court will dispose of the above issues in that order.

With regard to the first issue **(i.e. whether the plaintiff breached the contract)** both parties to the suit held different views. The plaintiff insisted that it did not breach the contract. However, the defendant disagreed. It pointed out that under the contract (Exhibit Dl) the plaintiff had to complete the specified job and hand it over to the defendant on 20th January 2002 but it failed to do so. Thereafter, the plaintiff continued to drag its feet until the two parties entered an understanding (Exhibit P1) under which the plaintiff was supposed to complete the works in the

snag list (Exhibit P2) in 10 days before the defendant paid it. The plaintiff failed to complete the said works within the agreed period of 10 days. Accordingly, the defendant terminated the contract and engaged someone else to complete the works.

It is not disputed that the agreement dated l9th November 2001 is the initial one the parties entered into in respect of the job in question and that under it the plaintiff had to complete the job by 20th January 2002, but it did not. It is also not disputed that despite the plaintiff's failure to complete the job in time the defendant did not do anything about the matter until 13th June 2002 when the parties entered into an understanding (Exhibit P1) that fixed a new deadline for the completion of the job. By its conduct, therefore, it is apparent that the defendant waived the breach of contract that occurred on 20th January 2002. Accordingly, it should not be heard to raise that breach against the plaintiff, for in law the defendant's conduct created an estoppel, which bars it from raising the said breach. (See section **114 of the Evidence Act Cap. 6)**

However, it is the events that took place after the parties signed the above understanding (Exhibit P1) dated 13th June 2002 that Court must now examine with a view to determining whether or not the plaintiff breached the contract. A perusal of the above understanding reveals that the parties did not specify when the 10 days for perfecting the works in question was supposed to begin running. However, it is not disputed that the cheque that was intended to facilitate the 10 days' works was dated 29th June 2002, which day (according to the evidence on record) fell on a Saturday. It is also not disputed that the plaintiff could not have banked the said cheque during the weekend. For that reason it banked it on Monday (1st July 2002). Further, there is undisputed evidence on record to the effect that the said cheque matured on 4. July 2002. Consequently, if one allowed the plaintiff a free day (i.e. 5th July 2002) for the purposes of drawing money, buying materials and delivering them on the site the plaintiff ought to have started doing the works in question on 6th July 2002. Further, if one gave the plaintiff allowance for another free day in respect of an intervening Sunday it is obvious that the plaintiff ought to have completed the works in question by 16th July 2002. However, the evidence on record shows that 12th July 2002, under its letter Exhibit D2, the plaintiff clearly indicated to the defendant that it would not complete the said works by 16th July 2002. For the sake of clarity, Court will reproduce the relevant parts of that letter below. They read as follows:

"M.H. <u>CONSTRUCTION LIMITED</u>

July 12, 2002

The Legal Officer

Petro Uganda Limited

Attn: Caleb Mwesigwa

RE: EXTENSION OF TIME OF OUR CONSTRUCTION CONTRACT FOR BANDA PETRO STA TION:

Reference is made to our letter dated July 4, 2002 specifying the completion time for Banda Petro Station.

We had agreed to complete within the (10) ten days but due to Disturbance of flow of traffic coming for fuel and rain, we are unable to finish.

We are therefore asking for more one week to complete the work.

Thanks for your consideration.

Gurbax Singh

FOR: M.H. CONSTRUCTION CO. LTD

c.c. Director Petro Uganda Ltd

c.c. The Operation manager Petro Uganda Ltd

c.c. The Financial Manager Petro Uganda Ltd

c.c. The Project Engineer Petro Uganda Ltd"

Form the contents of the above letter it seems that the earliest date on which the plaintiff might have possibly completed the works was now 20th July 2002, of course, once again giving allowance for another intervening Sunday of no work done. Therefore, when the defendant received the plaintiff's letter of 12th July 2002 it became evident that there was anticipatory breach. At this point in time, the defendant was at liberty to sue the plaintiff for breach of contract. **(See The Law of Contract - Sixth Edition - by Cheshire and Fifoot at pages 501**

and 502).).

All in all, it is clear from the foregoing that the plaintiff breached the contract in question. That finding takes care of the first issue.

With regard to the second issue **(i.e. whether the defendant was entitled to terminate the contract)** again the two parties were at variance in respect of this aspect of the case. The plaintiff insisted that the defendant was not entitled to terminate the contract since the plaintiff had fully performed its part under it and merely remained with cleaning the site and handing it over to the defendant.

The defendant did not agree with the plaintiff's version above. Its two witnesses Palli (DW1) and Mwesigwa (DW2) maintained that the defendant was entitled to terminate the contract because the plaintiff had committed a serious breach of the contract by failing to complete the works in the agreed period of time.

Be that as it may, it is quite obvious that not every breach of contract entitles the innocent party to terminate the contract. It is only serious breaches that entitle the innocent party to terminate the contract. (See **The Law of Contract supra).** The question to answer, therefore, is whether the plaintiff's breach was so serious as to entitle the defendant to terminate the contract. Court thinks that the answer to the said question is in the affirmative because the evidence on record, particularly the plaintiff's letter dated 12th July 2002 (Exhibit D2), suggests that at that point in time the plaintiff had not done much to complete the works agreed upon. Indeed, if, by 12th July 2002 the plaintiff had completed a substantial part of the works it is doubtful that it might have found it necessary to request the defendant for such a long extension (i.e. 7 days) to enable it to complete the works in question. In the circumstances, Court is persuaded to conclude that the breach the plaintiff committed was so serious as to entitle the defendant to terminate the contract.

With regard to the third issue (i.e. **whether the defendant's counter-claim has merit)** Court has this to say. The area of the defendant's counter-claim relating to the penalty for breach of contract has no merit and these are Court's reasons for that view. Since Court made a finding under the first issue that the defendant waived the initial breach of contract it is also logical to say that the said waiver affected the penalty for the breach. For the breach and the penalty go

hand in glove under the contract in question. Consequently, Court has no hesitation in concluding that the defendant's stroke that waived the initial breach is the same stroke that tacitly waived the penalty for the said breach.

Even if the above line of argument were to be found wanting or questionable, Court would still maintain that the area of the defendant's counter-claim relating to the penalty has no merit because the defendant failed to justify the imposition of the said penalty. A perusal of clause 22 of the contract, which is the basis of the penalty referred to above, is quite instructive. It provides as follows:

"Damages for non-completion.

> ***22. If the Contractor fails to complete the Works by the Date for Practical Completion stated in the appendix to these Conditions or within any extended time fixed under Clause 23 of these Conditions and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, the Contractor shall pay or allow the Employer a sum calculated at the rate stated in the said appendix as liquidated and Ascertained Damages for the period during which the Works shall so remain or have remained incomplete, and the Employer may deduct such sum from any monies due or to become due to the Contractor under the Contract"***

It appears from the foregoing that before a penalty could be imposed upon a Contractor for non-completion of a job within a specified period of time under the contract, there must be certification by ***"the Architect"*** in writing to the effect that the work lying uncompleted ***"ought reasonably...to have been completed"*** in the time agreed upon. Needless to say, in the instant case, the defendant did not produce such certification and there is none to that effect on record. For that reason, it seems that legally no penalty could be imposed under clause 22 of the contract in the circumstances of the case that is the subject of this judgment.

In short, the defendant failed to prove that it is entitled to impose the penalty referred to in clause 22 of the contract. Therefore, as earlier on pointed out the part of the defendant's counter-claim relating to the penalty for breach of contract has no merit.

As far as the part of the defendant's counter-claim relating to general damages is concerned Court has this to say. Since Court made a finding earlier on that the plaintiff breached the understanding of 13th June 2002, it follows that the defendant's claim for general damages in respect of that breach of contract has merit.

All in all, the above findings wholly take care of the third issue.

With regard to the fourth issue **(i.e. the available remedies)** Court has this to say. The sum total of the foregoing is that the plaintiff's suit has failed and Court must dismiss it with costs, but the defendant's counter-claim has succeeded in the area of general damages. Therefore, Court must give the defendant an award in respect thereof.

According to Mwesigwa (DW2), as a result of the plaintiffs failure to complete the agreed works in time the defendant suffered inconvenience in that he had to engage some other persons to complete the said works. For that reason, the defendant insisted that it was entitled to an award of general damages for the inconvenience it suffered on account of the plaintiff's breach of contract.

The plaintiff did not, in any way, contradict the defendant's evidence referred to above. Therefore, Court must find that the defendant suffered inconvenience as a result of the plaintiff's failure to complete the works specified under the snag list (Exhibit P2) in the agreed time of 10 days. Therefore, taking into account all, Court thinks that a sum of shillings 5,000,000/= is adequate to compensate the defendant for the inconvenience it suffered as a result of the plaintiffs breach of contract. The above sum of money will attract interest at Court rate from today until the plaintiff fully pays it.

In conclusion, Court must make the following orders:

1. Court hereby dismisses the plaintiffs suit with costs and enters judgment in favour of the defendant on the counter-claim for the sum of shillings 5,000,000/= as general damages.

2. The plaintiff will pay the defendant interest on the sum of money referred to in paragraph 2 above at Court rate from today until payment in full.

3. The plaintiff will also bear the costs of the counter-claim.

E.S. Lugayizi

(JUDGE)

14/2/2005

Read before: At 9. 38 a.m.

The plaintiff's rep.

The defendant's rep.

Mr. Nyombi for the plaintiff

Mr. Kandebe for the defendant

Mr. Sewanyana c/clerk

E.S. Lugayizi

(JUDGE)

14/2/2005