THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 0130 - 2011

1. **DHL GLOBAL FORWARDING (U) LTD**
2. **DHL GLOBAL FORWARDING (K) LTD :::::::::::::::: PLAINTIFFS**

VERSUS

VAMBECO ENTERPRISES LTD :::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

DHL Global Forwarding (U) Ltd and DHL Global forwarding (K) Ltd are clearing and transportation companies registered in Uganda and Kenya respectively. They will be referred to in these proceedings as the Plaintiffs. They bring their claim against Vambeco Enterprises Ltd who are hereinafter referred to as the Defendants. The Plaintiff's claim against the Defendant is for recovery of US$ 127,269.96. they also seek general damages for breach of contract and interest on both above at a commercial rate from August 2010 till payment in full. The Plaintiff also prays for costs of the suit.

The background to the dispute as got from the pleadings is that in 2007 the Defendant and Plaintiff entered into a contract wherein the Plaintiff agreed to receive, clear, transport and deliver to the Defendant in Uganda goods namely; water pipes and their accessories. The contract sum was US$ 202,300-.

The Plaintiff alleged that the contract price was subsequently varied to US$ 529,269.96-. The Plaintiff in justifying the variation, pushed the blame on the Defendant saying that the Defendant were slow in their operations namely that the documents, specifically the Bill of Lading was given to them, 15 days after the arrival of goods at Mombasa.

Furthermore, that the documents had not been endorsed by the Standard Chartered Bank to which the order had been consigned which caused the documents to be sent back to Uganda and it wasn't until 21 January 2008, 45 days after the goods had arrived in Mombasa that they got a properly endorsed Bill of Lading. All this time, the goods were attracting a surcharge.

The other reason that they forwarded was that because of the delay, the post election fever that had seized Kenya following the December 2007 elections had turned into chaos and anarchy making the roads dangerous to ply and causing an almost stoppage of operations at Mombasa and along the routes to Uganda. Since the goods could not move, they attracted a storage charge and the transporters imposed a security surcharge. Furthermore, it was realized that the actual tonnage of the goods was much higher than that stipulated in the contract.

The Plaintiff also added that the packaging which was expected to be in bulk was not so since the goods were in singles scattered all over the dock yard. All these combined, the Plaintiff contended, necessitated the variation.

The Defendant denied all the foregoing and contended that the goods that were not unloaded and ended up in South Africa were as a result of the negligence of the Plaintiff which led the Defendant to suffer freight charges to SPEDAG for bringing back the pipes at a cost of US$ 110,000-. This sum of money, the Defendant claimed by way of counterclaim.

The Defendant also contended that they had entered into a contract with the Government of Uganda with fixed timelines of performance and penalties in the event of over shooting the set time of completion. He further said that because of the delay of delivery of the pipes to Kampala, they were unable to perform their contract with the Ugandan government within the stipulated time and they were subjected to a penalty of Ug.Shs. 61,733,000= which amount they claimed from the Plaintiff.

Lastly, by way of counterclaim, the Defendant alleged that they had paid US$ 200,000 over and above the contract sum which they did under duress. They wanted that money refunded. They sought general damages and costs.

The parties came up with the following issues;

1- Whether the Defendant is indebted to the Plaintiff in the sums demanded.

2- Whether the Defendant is entitled to recover the sums paid in excess of the total estimated cost

3- What were the obligation of the parties to the contract?

4- Whether the Defendant is entitled to special damages

5- What remedies are available to the parties?

As to whether the Defendant is indebted to the Plaintiff in the sums demanded;
There is no doubt the parties entered into a contract. That this contract was ex vessel from Mombasa to Kampala of 1700 metric tones at US$ 119 resulting into a contract price of US$ 202,300-. It is also quite clear that the Plaintiff was eventually later, for various reasons, not satisfied with the price in the agreement and asked the Defendant to vary the same to US$ 529,269.96.

The Defendant contended that the sum of money in the agreement was unchangeable and that if there was any variation, it could only have been done in writing by a subsequent agreement between the parties. This position seems to be in agreement with the law governing variation of contract as stated in CHESHIRE AND FIFOOT, LAW OF CONTRACT, 9th Edition p. 535 that "an oral variation leaves the written contract intact and enforceable".

Going by this, one would say that since the contract between the two was in writing, the Plaintiff could only claim the new figure of US$

529,269.96 only if the two parties again wrote a new agreement or came up with an addendum.

This principle however, would only apply if the figure referred to in the contract was a fixed sum and not an estimate.

The figures that were agreed upon between the Plaintiff and the Defendant were estimates to which the Defendant agreed as stated in Exh. P.1 in the following words;

> *"I/We hereby accept this estimate and acknowledge that I have read and understood the terms and conditions".*

The sum in the contract was therefore an estimate which could change for various reasons.
Furthermore, that the sum could be varied in a form other than written is fortified by Section 67 of the Contract Act No. 7 of 2010 which provides that

> *"where any right, duty or liability would arise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract."*

It follows that the manner in which the parties dealt with each other through correspondence, through payment, through deliveries could constitute a variation of the agreement notwithstanding its unwritten nature.

In the present case, the Plaintiff contended that there were delays, that some goods remained on the ship and went upto South Africa only to come back much later, that there were post election riots in Kenya which made transportation difficult because of insecurity on the roads and which created a slow down in the operations, resulting in transporters imposing a security surcharge and accumulating a storage charge. These were certainly grounds of an increased cost of operation. The foregoing also increased the transport costs because of a change in fuel prices. According to the remark 'D' in Exh. P.1, the agreed contract sum was based on *"current Mombasa Port Tariff costs, current fuel price in Kenya and Uganda, and presently applicable road tolls and boarder fees subject to change without prior notice"*.

Furthermore, remark 'E' of Exh. P.1 excluded container demurrage and port storage in case of wrong or late documentation.

The foregoing provisions of the contract document envisaged variation in prices if the circumstances under which that contract was entered, changed.

That these circumstances changed is no longer in doubt because the riots indeed took place changing the cost of operation and delaying delivery. Most importantly too, the Bill of Lading that should have been endorsed by Standard Chartered Bank which was consignee on account of the Defendant went unendorsed, was returned for endorsement and was only ready for use after 45 days from the time the ship docked and 30 days from the time the Plaintiff was instructed.

This improper documentation and the changed circumstances due to political activities gone wrong in Kenya cannot be visited on the Plaintiff neither can the increased cost be borne by the Plaintiff.

Budget Mugabwire (DW2) was alleged by PW2, to have gone to Mombasa to discuss a variation of the agreed fees. DW2 denied ever discussing a variation. I do not believe DW2 as truthful because of the following reasons;

On the 7 March 2008, Geoffrey Luyuku of the Plaintiff company wrote to the Defendant as follows;

> *"Please refer to meeting last week before your departure to Kampala where we agreed that we have to revise our invoicing since quotation was done per tone while CBM was actually manifested and turned to attract more charges to Kpa, other factors like skirmishes from elections held to introduction of OPS, Risks, Surcharge by transporters".*

While DW2 denied receiving the email, the behavior of the Defendant by paying and paying beyond the originally agreed price would seem to point to the fact that a discussion and an agreement to vary the rate upward indeed took place.

On payment beyond the agreed price, the Defendant said it was the non delivery of the pipes which subjected them to penalties in Uganda for non completion of their contract that forced them to pay what had not been agreed upon. I again find this unbelievable because the last delivery of pipes was made in June 2008 which in mu opinion would have ended the duress, if it existed at all.

The Defendant continued making payments even after there were no more pipes to be delivered, which in my view could only be, because the variation was not only suggested by the Plaintiff but it was even agreed upon by both parties. That further payment was made after

delivering was got from DW1 evidence. It also meant that when effecting payment, the Defendant was paying because it knew it owed that sum of money to the Plaintiff.

Lastly, the Defendant cannot say that the delay caused the payment because in any case, as a transporter, the Plaintiff had a right to hold the goods in lien of the transport charges.

In this, I am fortified by Section 155 of the Contract Act which provides for lien of an agent on property of principal.
It states;

> *"In the absence of any contract to the contrary, an agent is entitled to retain the goods of a principal, whether movable or immovable, received by the agent, until the amount due to the agent for commission, disbursements and services in respect of the goods is paid or accounted for by the principal."*

In light of the above, if the Plaintiff was holding onto the goods, it ws doing so lawfully, pending payment.
The original contract was in tonnage. But there is evidence on record as given by PW1 which evidence remained undisturbed, that while the Bill of Lading had indicated tonnage it was found out that declaration by the supplier to the Port Authorities was in cubic metres.

According to PW1, and I have no reason to disbelieve him, the transport charges ceased to be based on tonnage and now reverted to cost per truck load transported.

The change to truck loads was communicated to the Defendant in Exh. P.4. Although the defendant deny receiving Exh. P.4, they made payments based on it, which in my opinion means they indeed saw this document. Exh. P.4 provides how much per truck load will cost, agency fees to be paid, bond fees.

Exh. P.4 is important in that it enabled the calculation of the sum of money that would be paid. Also relevant to this matter, is found in Exh. P.9, the cargo delivery report which does not mention weight but mentions the delivered goods in number of pieces delivered and the number of trucks.

In all, according to Exh. P.9, the Plaintiff delivered 88 trucks a position which was not disputed by the Defendants. Exh. P.5 clearly shows the transportation charges, the agency fees, delivery order fee, KPA charges, bond fees, clearance cost, storage charges, surcharges, and equipment management fees totaling to US$ 529.269.96-.
It is therefore from this total that the money already paid, US$ 402,000- be subtracted leaving US$ 127,269.96. From the foregoing, it is clear there was a contract between the parties, accordingly varied and subsequently breached by the Defendant.
It is therefore the courts finding that the Defendant is indebted to the Plaintiff in the sum of US$ 127,269.96-.

Turning to the issue of whether the Defendant is entitled to recover the sums paid in excess of the total estimated cost, court having found that the Plaintiff was entitled to the varied sum of money, the Defendant's prayer in the counterclaim for what he called excess payment cannot stand and is rejected.

On the issue of whether the Defendant is entitled to special damages.

The Defendant sought for special damages and the sum paid over and above the contract sum of US$ 200,000-, penalties for delay to complete the water project it had embarked on in Uganda for Ug.Shs. 61,733,000= and freight charges paid to SPEDAG to bring pipes from South Africa to Kampala of US$ 110,000-.
The solution to this question can be found in Exh. P.1 which spelt out the terms of the agreement. It was an agreed term that the documents required for clearing the goods at Mombasa which comprised of original Bill of Lading, suppliers invoice and packaging list, Insurance Certificate, Company Certificate of Incorporation, Certificate of Incorporate, VAT and TIN number, exemption certificate if any were to be delivered to the Plaintiff 10 days before the vessel docked at Mombasa. These would enable the Plaintiff to prepare to receive and verify the goods delivered.

Furthermore, since the Bill of Lading was consigned to the order of Standard Chartered Bank (U) Ltd on the account of the Defendant, the Bank first had to endorse the Bill of Lading before the Plaintiff could use it. Without this endorsed Bill of Lading, the Plaintiff could not take possession of the property and therefore could not know whether all the goods that had been brought to Mombasa had been off loaded and much so since the agreement was ‘ex vessel’.

Furthermore, the ship docked in Mombasa on 9 December 2007. It is in evidence which has not been disputed that the document was

delivered to the Plaintiff on the 24 December 2007, 15 days after the docking and departure of the ship that delivered the goods.

In any case, evidence shows that the Bill of Lading was delivered to the Plaintiff, unendorsed by the Bank and therefore inoperative in as far as clearing the goods were concerned.

PW1, in his evidence, which evidence is not disputed, said that they had to send back the unendorsed document and it was not until the 21 January 2008 that the endorsed document was returned to them.

The Plaintiff therefore could not have verified whether the goods that had been delivered were all that had been expected and in any case, they received the instructions to clear and transport the goods on behalf of the Defendants on the 21 February 2007, long after the ship had left Mombasa.

Even if it had been there at the time the agreement was entered into, the endorsed Bill of Lading that was a requirement for the clearance and therefore verification of the goods was not available until 21 January 2008.
Entering into an agreement after the ship had already left cannot be used to fault the Plaintiffs. There is no evidence whatsoever that the Plaintiffs were negligent and allowed the ship to go before verifying the amount of goods that had been off loaded. There was no ground for their agreement to operate retrospectively as to hold the Plaintiff's liable for an activity that was totally beyond them since the ship had already left. This extra cost that was incurred by paying SPEDAG by

way of loss of time can only be placed on the shoulders of the Defendant who engaged the Plaintiffs late.

Furthermore, there is nothing to show that the Defendant paid this penalty to Government.
The sum total is that the counterclaim is dismissed.

The Plaintiff also prayed for general damages.

The damages expected in this situation are compensatory and their primary function would be to place the Plaintiff in as good a position as to the extent money could do if the breach complained of had not occurred. While doing this, court must look at the material loss suffered by the Plaintiff. In this regard, court is expected to ensure not to unnecessarily enrich the Plaintiff nor deny him appropriate compensation. Such damages are therefore expected to be the direct natural or probable consequence of the breach that the Plaintiff complained of, **Storms V Hutchinson** (1905) AC 515.

The Plaintiff have established that the Defendant owes them US$ 127,269.96-. It has been due since June 2008. The Defendant knew that it was dealing with transporters and that the money that they worked for was necessary for the smooth running of their businesses.
This made the losses of non use of the money a most proximate and direct result of the breach of the contract, **Hadley V Baxendale** (1843 – 60) All ER 46.

The Plaintiff's advocate did not help this court on the issue of quantum. The court therefore in reaching at any figure, has to fall back to its own

discretion, **Bhadeha Habib Ltd V Commissioner General URA** (1997 – 2001) UCL 202 using Shs. 2500 as a basis for converting the US$ 127,269.96- into Uganda Shillings. Court finds that the Plaintiff was deprived of the equivalent of about Ug.Shs. 318,172,500=.

Considering that the Plaintiff did not testify nor call any witnesses to testify to this claim of damages, but also that the Plaintiff was deprived of the use of his money for about five and a half years, I find that an award of general damages of Ug.Shs. 30,000,000= appropriate which I hereby award.

Turning to the issue of interest, the Plaintiff prayed for interest on special damages and general damages at a commercial rate, from August 2010 till payment in full.

An award of interest is discretionary. On the issue of interest, **Lord Denning** in **Harbutts Plasticine Ltd V Wyne Tank and Pump Co. Ltd** (1970) 1 ChD 447 described it in the following words

> *"An award of interest is discretionary. It seems to be that the basis of an award of interest is that the Defendant has kept the Plaintiff out of his money and the Defendant has had use of it himself so he ought to compensate the Plaintiff accordingly".*

In the instant case, the Plaintiff would therefore deserve interest. This interest however, comes after an award of general damages which award puts the Plaintiff almost in the position he would otherwise have been in.

Having considered all the surrounding circumstances of the case and the fact that general damages have been awarded, it is my view that interest at a commercial rate would be unjust and I find that 6% p.a. on special damages to run from 11 April 2011 when the suit was filed till payment in full and 6% p.a. on the general damages from date of judgment till payment in full appropriate.

In deciding the dates when interest is payable on special and general damages, I am fortified by the decision in **National Bank of Kenya Ltd V Devji Bhiriji Shanghani** (1994) EA 13 where it was held that

> *"interest on special damages in payable from the date of filing the suit and that on general damages from the date of judgment."*

I would therefore enter judgment in favour of the Plaintiff against the Defendant in the following terms;

1- Special damages of US$ 127,269.96
2- General damages of Ug.Shs. 30,000,000=.
3- Interest on special damages at 6% p.a. from date of filing the suit till payment in full.
4- Interest on general damages of 6% p.a. from date of judgment till payment in full.
5- Costs of the suit.

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David K. Wangutusi
JUDGE

Date: 23 - 01 - 2014