

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

HCT - 00 - CC - CS - 0120 - 2004

BALIRUNO INVESTMENTS LTD PLAINTIFF

VERSUS

ATTORNEY GENERAL DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The plaintiff company (hereinafter called plaintiff) brought this suit against The Attorney General in its representative capacity (hereinafter called the defendant) to recover the sum of Ug.Shs.100,000,000/= being the value of his house and Ug.Shs.63,225,113/= being special damages for breach of contract, interest thereon and the costs of the suit. According to the amended plaint filed in court the case for the plaintiff is as follows. By a written contract No. MOH/442/97 dated 7th May 1998 the plaintiff agreed with the defendant or his agent to construct a classroom block and pit latrine at Bulera Primary School, at Kisozi for the sum of Ug.Shs.87,250,235/=. The contract was entered into with The Ministry of Works and Housing but was actually commissioned by State house. The plaintiff contends that it

completed the work but that the defendant in breach of the contract refused and neglected to issue a final certificate for the work done which remains unpaid to date. The plaintiff also during the trial complained that he was not being paid on time.

The plaintiff further claims the sum of Ug.Shs.100,000,000/= being the value of a house belonging to its Managing Director Mr. Luwaga (PW1) that was sold in foreclosure by M/s Greenland Bank Ltd (in liquidation) to recover an unpaid mortgage. The plaintiff contended that it took the loan from the bank on account of the said construction contract in issue at the instigation of officials from state house. The plaintiff further pleaded that this was because the said officials informed him that due to financial constraints at the treasury his company could not be paid on time.

The defendant's admit that there was a contract entered into with the plaintiff for the said construction work at the sum of Ug.Shs.87,250,235/=. However the defendants contend that the plaintiffs failed to complete the works on the contracted date of 27th July 1998. The defendants also plead that even though they took possession of the said works, the workmanship was substandard and shoddy. The defendant's also deny that they were privy to the arrangement that the plaintiffs had with Greenland Bank and so should not be held responsible for the sale of the property of the plaintiff's director.

The parties were accorded an opportunity to have their dispute mediated under the court's annexed mediation project but the mediation totally failed. At the pre trial

scheduling conference the parties did however agree on the following facts relating to their dispute;

- 1- A contract for Ug.Shs.87,250,235/= was signed.
- 2- Some payments were made under the contract but that no figure is agreed.
- 3- The final completion certificate was not issued.
- 4- The buildings the subject of the dispute were built and are being used.

The parties then went on to frame the following issues for trial.

- 1- Whether the work had been completed on the 27th July 1998?
- 2- Whether the work done by the plaintiff was shoddy or unsatisfactory?
- 3- Whether the 2nd certificate as issued for the principal and interest was paid.
- 4- Whether the defendants are liable for the plaintiff's house sold by Greenland Bank for failure to pay for the works that were executed.
- 5- Remedies.

I must however for the record point out that counsel for the plaintiff in their written submissions addressed other issues from what was agreed at the pre trial scheduling conference. Fortunately the issues as addressed by counsel for the plaintiff in substance were not too dissimilar from those framed before court. To address this contradiction counsel for the Attorney General decided to adopt the new issues framed by counsel for the plaintiff. The new issues framed by counsel for the plaintiff and now agreed to by counsel for the defence which court will address are as follows:-

- 1- Whether or not the defendant breached the contract.
- 2- Whether or not the plaintiff's house was sold by Greenland Bank as a result of non payment by the defendant.
- 3- Whether the defendant is entitled to special damages.
- 4- Remedies available to the plaintiff.

This I suppose can be attributed to the fact that three different lawyers appeared for the plaintiff at different times; one of whom as it turned out was not licensed to appear in court. Be that as it may Mr. Musamali was the final counsel on record for the plaintiff and Ms Kaahwa appeared for the Attorney General.

Issues No. 1: Whether the defendant breached the contract?

According to Para 7 of the amended plaint the particulars of breach are as follows:-

- 1- Failing to issue a final certificate
- 2- Failing to pay the contract price
- 3- Failing to refund the retention money.

According to the amended statement of defence filed by the Attorney General Para 3, 4, 5, 6 and 9 it is denied that the plaintiff completed the work on time. It is further averred that the defendant was paid the second certificate in full and lastly that the plaintiff's work was substandard or "shoddy". In monetary terms according to paragraph 8 of the plaint which gives particulars of special damages (i.e. the actual amounts due to the plaintiff) the breach of contract would be;

- “ i) *Balance of Ug.Shs.6,000,000/= on certificate*
No II plus Ug.Shs.16,000,000/= interest thereon..... 16,000,000=
- ii) *Amount due on completion certificate*
Ug.Shs.14,529,914 plus interest thereon.....31,024,119=
- iii) *Retention money Ug.Shs.8,924,051/=*
plus interest thereon.....16,400,000=

However at the pre trial scheduling it was conceded by the Attorney General that a final certificate had not been issued to the plaintiff and that there was some payment to the plaintiff (though it is not known how much) which was to be determined at the trial.

According to the testimony of PW1 Mr. Solomon Kaddu Luwaga the Managing Director of the plaintiff company his company was paid some money against the certificates though the payments were paid in installments and not within the 45 days as provided for by the contract.

He said that certificate No. 1 of Ug.Shs.36,034,660/= was paid though it took a year to cover the amount. Mr. Luwaga said that when certificate No. 2 was issued it was paid leaving a balance of Ug.Shs.6,000,000/=. However subsequently another Ug.Shs.1,000,000/= was paid leaving a balance of Ug.Shs.5,000,000/= at the time the case was filed in court. However during cross examination at the time of the trial Mr. Luwaga further conceded that the balance of Ug.Shs.5,000,000/= was also paid.

Mr. Luwaga also testified that he was issued with certificate No. 3 which was for interest on the late payments made to him, as at 19th September 2001 for the value of Ug.Shs.8,924,051/= which remains unpaid to date and continues to earn interest. Mr. Luwaga also testified that the completion and final certificate were not given to him. He said that the completion certificate is given as soon as the works are finalized and that the final certificate is given 6 months later and it is at that time that the retention money is released. According to Mr. Luwaga the completion certificate would have been for Ug.Shs.12,059,828/= and the final certificate would have allowed a further payment of Ug.Shs.7,406,962/=.

According to Mr. Luwaga the reason he did not get a completion and final certificates was that Mr. Kyeyune DW1 the Senior Private Secretary to H.E. The President in charge of welfare originally refused him to get final certification from the Ministry of Works and Housing. Mr. Luwaga testified that Mr. Kyeyune told him that his office would confirm for itself that the works had been completed. Mr. Luwaga testified that he regarded the view of Mr. Kyeyune "as unguided" and still went to the Ministry to have his work certified. This led to a letter from the Ministry to the Comptroller of State House dated 19th September, 2001 Exh. P16. Exhibit P16 was actually a letter for *"interim certificate No.3 for interest on overdue payments"* according to its heading. However in first paragraph the Permanent Secretary Mr. Muganzi writes

"The work was completed, except for a few defects whose rectification is to be verified before issuing the final certificate. The classroom block is already being used by the school..."

No computation or estimates were made with regard to the final certificate.

It is Mr. Luwaga's testimony that the defects were corrected.

For the defence Mr. Kyeyune DW1 a Senior Private Secretary to His Excellency The President in charge of welfare gave the side of the story from the defendant. Mr. Kyeyune testified that when he took up his current post he found this contract on going. At the time he took over there was a balance of Ug.Shs. 33,651,762/= to be paid to the plaintiff which was then fully paid. He took trouble to list the following payments.

- 1- Cash payment on 27/11/98 when he assumed office.....10,000,000=
- 2- Bank of Uganda cheque No. E003250412 of 2/3/00.....5,000,000=
- 3- Bank of Uganda cheque No. E00325502 of 28/7/00.....5,000,000=
- 4- Bank of Uganda cheque No. E003274620 of 5/7/01.....3,651,762=
- 5- Bank of Uganda cheque No. E003344532 of 7/8/01.....4,000,000=
- 6- Bank of Uganda cheque No. E00379004 of 2/5/02.....1,000,000=
- 7- Bank of Uganda cheque No. E00394715 of 11/7/02.....5,000,000=

This gave a total of Ug.Shs.33,651,762/= completing the obligations.

Mr. Kyeyune testified that it is this Ug.Shs.33,651,762/= that was reflected as the unpaid balance in interim certificate No. 2 (Exh P7). He however said that in paying the certificate it was assumed that the work had been completed whereas not. Mr. Kyeyune said this is the reason that no final certificate was given to the plaintiff. He testified that when visited the site in 2001 he found *"...the walls were cracking,*

the newly finished cemented floors were becoming dusty because the surface was peeling off..."

Mr. Kyeyune testified that even certificate No. 2 would not have been paid had it not been for the plaintiff seeking the intervention of higher authorities. He said Mr. Luwaga on behalf of the plaintiff wrote an apology letter dated 23rd November, 1998 (Exh. P2) for the shoddy work promising to rectify it. It is after the letter that further payments were made under certificate No. 2.

Mr. Kyeyune denied refusing the plaintiff from getting a final certificate from the Ministry of Works and Housing but said that he wanted an officer from his office to oversee the process.

During cross examination Mr. Kyeyune said that in his opinion the 10% retention money was paid as part of the balance of Ug.Shs.33,651,762/= on certificate No. 2.

He however testified that he had never seen certificate No. 3 (Exh. P12) for interest. He agreed that no interest was paid. Mr. Kyeyune however testified that in his view payment of interest would have been justified if the plaintiff had done the work in time but since was not so, there was no justification for the plaintiff to be paid interest. He actually stopped short of criticizing the Ministry of Works and Housing for issuing the certificate.

Giving in sight to the contract Mr. Kyeyune pointed out that the school was in reality a donation by H.E. The President to the community of Bulera in Kisozi. He said that the money could simply have been given to the community to manage but he did not know why a contract was entered into with the Ministry of Works and Housing. I need to observe here that a close look at the Central Tender Board authority of 23rd April 1998 attached to the contract shows that it was "to pay" the plaintiff the contract sum. There is no reference to a contract. Furthermore it is also interesting to also observe that nearly all certificates are endorsed "payable by State House" and not the Ministry of Works and Housing.

I have pursued the submissions of both counsel and the evidence before court.

Let me deal with the alleged breaches in chronological order – it is alleged that the defendants failed to pay the contract price. The contract Exh. P1 was for the price of Ug.Shs.87,250,235/=. Annexed to the contract is a letter from The Central Tender Board giving retrospective authority dated 23rd April 1998 to the State House comptroller for the price of Ug.Shs.87,250,235/= VAT inclusive (VAT was Ug.Shs.12,677,385/=). The actual contract price is shown as Ug.Shs.74,572,850/=. The evidence shows that both certificate No.1 and 2 were paid. I find the evidence of Mr. Kyeyune emphatic and believable given that he was able to draw court to the actual payments.

During his testimony Mr. Luwaga said that in his opinion, the completion certificate would have been Ug.Shs.12,059,828/= and the final certificate as

Ug.Shs.7,406,962/=. He said that the reference to a final payment in Para 5 the plaint of Ug.Shs.14,529,914/= was a mistake. This creates some degree of contradiction between Mr. Luwaga's pleadings and his testimony.

The claim with regard to the final certificate this is fairly straight forward. On the evidence it was not issued. As to why it was not issued, the evidence shows that there was a running dispute between the plaintiff and his employers as to the quality of the workmanship.

On the 23rd November, 1998 (over four months after the contracted completion date of 27th July, 1998) the plaintiff apologized in writing for its unsatisfactory work (Exh. D2) and promised to rectify the work within 14 days. Mr. Luwaga testified that he wrote this letter under duress. That with the greatest of respect I find very unlikely. Indeed much later in 2001 (three years later) when the Ministry of Works and Housing issued certificate No. 3 (dated 19th September, 2001) to State House the Permanent Secretary wrote;

"...The work was completed, except for a few defects whose rectification is to be verified before issuing the final certificate. The classroom block is already being used by the school..."

It is important to observe that this letter does not mention the other contracted buildings like the pit latrine and whether they were completed. It is clear to my mind

therefore that even up to 2001 there were defects that had not been rectified and that is why no certificate of completion was issued.

During the trial no snag/defects list was provided and indeed no value was attached. If the defects were rectified then the onus was on the plaintiff to have them certified. On the evidence therefore before court it appears that even after 19th September, 2001 the defects were not rectified. In my view given the age of the contract (about 8 years) it is unreasonable to expect that in these circumstances a final certificate shall be issued. In such a situation it is best to close the contract and for the employer to rely on the retention fund to complete the contract using other means. In any case since part of works were occupied by the employer then that would be deemed to be a sectional completion of the works within the meaning of clause 16 of the contract, for which payment would have to be made.

Clause 30 of the contract provides for a cash security or bond

“...in the sum equivalent to ten percent (10%) of the contract sum of the due performance of the contract until the issue of the certificate of practical completion...” emphasis mine.

Since the letter of Permanent Secretary dated 19th September, 2001 refers to

“...The work was completed, except for a few defects...” which had to be rectified and verified on the legal principle of quantum meruit I find that the plaintiff would be entitled to the contract sum less the retention sum that is

Contract sum (with VAT)	87,250,235
Less 10% retention	8,725,024

	78,525,211
Less paid	59,561,045

Amount due	18,964,166

The issue of interest on the retention amount as prayed for by the plaintiff therefore does not arise.

As to interest payment, certificate No. 3 (Exh.P5) has a certified amount of Ug.Shs.8,924,051/= as at 19th September, 2001. Though Mr. Kyeyune was of the view that the plaintiff would not be entitled to interest because the contract was not finished on time, it is a certified amount and therefore according to clause 29(1) of the contract the plaintiff would be entitled to payment. I therefore find that the plaintiff is entitled to payment of interest as certified in certificate No.3.

Issue No. 2: Whether or not the plaintiff's house was sold by Greenland Bank as a result of non payment by the defendants.

The case for the plaintiff is that the house of its Managing Director Mr. Luwaga (PW1) was mortgaged to Greenland Bank in order to get facilitation from the bank for plaintiff to complete the works. According to Mr. Luwaga this was at the request of the defendant as they were not able to pay the plaintiff's certificate No. 1 on time.

He testified that he was authorized to get the bank facility by The Rev. Rubunda the then Private Secretary to H.E The President in charge of welfare at the time. The house was professionally valued at Ug.Shs.91,500,000/= though Mr. Luwaga was of the view that its true the value was over Ug.Shs.100,000,000/=.

Mr. Luwaga however testified that since he did not get his payments on time, his house was put up for sale by the bank to recover the loaned money. Mr. Luwaga then sought the intervention of his employers to persuade the banks to hold on a bit and not immediately sell his house. He referred court to Exh. P9 a letter purportedly written by Mr. Kyeyune on the 28th June, 1999 to the Manager Bank of Uganda (in charge of Greenland Bank) and it reads

"Re: Mr. Kaddu Luwaga/Baliruno Investments Ltd.

The above was contracted by this office to build a school (Bulera Primary School) in Kisozi.

Due to financial constraints, we have not been able to pay him all his dues, and we understand he borrowed some money from Greenland Bank to complete the work.

We expect to finalise payment worth Ug.Shs.23,000,000/= in two months time.

The purpose of this letter therefore, is to request you to bear with him as we finalise his payment.

Thanking you for your cooperation.

(pp) Sikubwabo – Kyeyune

PS/SOCIAL & WELFARE TO H.E. THE PRESIDENT "

The letter was signed (pp) by an unidentified person on behalf of Mr. Kyeyune (DW1). Mr. Kyeyune in his testimony does not deny the letter. He states that the letter was written at the request of Mr. Luwaga who told him that even though the government owed him money he would clear the loan through other sources.

Counsel for the defendant submitted that there was no evidence that the defendant authorized the plaintiff to take the loan and that the plaintiff took the loan on his own accord. She referred court to Exh. P.15. The Statutory Notice on foreclosure dated 8th September, 2000 for the sum of Ug.Shs.9,603,363.01. It shows that the mortgage was entered into by the plaintiff with the bank on 5th June, 1998 about one month after signing the contract.

Furthermore the Statutory Notice is in the name of Mr. and Mrs. Kaddu Luwaga and not in the name of the plaintiff company. This she submits shows that the loan was a personal one and not that of the plaintiff company. She therefore submits that the defendant cannot be responsible for the sale of the house.

I have reviewed the evidence brought to court on this matter and the submissions of both counsel. The sale of this house was clearly a traumatic experience for Mr. Luwaga (PW1) given his testimony.

However court needs to establish if there is any legal link between the sale of this house and liability on the part of the defendant.

The evidence before court on this matter is curious to say the least. It appears to predate the official signing of the contract (7th May 1998) and the official date according to the contract of possession of the site which is the 24th September, 1997 (according to the Appendix to the contract page 41).

On the 17th September, 1997 Mr. Luwaga (in his personal capacity not on behalf of the plaintiff company) wrote to the P/S Welfare to the President (that is 7 days before the contractual date for possession).

"The P/S Welfare (sic) to the President

State house

Kampala.

Dear Sir,

Re: Construction work at Bulera Kisozi

This is to bring to your attention that the construction work is approaching the roofing stage. And for work to continue non-stop, I approached my bankers for some facilities, who also acted positively, but requested me that you forward the November cheque, that is payment to me, with the presence of their staff. This is to guarantee them that it has to be banked with them.

I hereby request you that you forward the November payment in the presence of an officer from Greenland Bank.

Yours faithfully

S. KADDU LUWAGA

"

What a strange letter and request. It shows that work had begun at the primary school well ahead of the contract! It also clearly shows that Mr. Luwaga in his personal capacity took out the loan. It is not clear whether he was mixing his personal with his company business side. Even if this was so (which in my view it should not be as a company is a separate legal entity) by the date of the Statutory Notice of 8th September, 2000 government had already starting paying him on his balance of certificate No. 2, way in excess of the notice sum of Ug.Shs.9,603,363.01! It is not clear why he did not use those payments to pay off the loan.

I therefore agree with counsel for the defendant that the defendant cannot be liable for the sale of the house by the bank in these circumstances.

Issue No. 3: Whether the plaintiff is entitled to special damages.

Based on my findings above I find that the plaintiff is entitled to the sum of Ug.Shs.18,964,116/= on the contract sum and interest of Ug.Shs.8,924,051/= both as at 19th September, 2001 the date of certificate No. 3.

Issue No. 4: Remedies.

I grant the plaintiff the following remedies.

Special damages

- 1- Ug.Shs.18,964,116 as the unpaid contract price and interest thereon at 22% p.a from the 19th September, 2001 until payment in full.

- 2- Ug.Shs.8,924,054/= as interest certificate No.3 and interest thereon at 22% p.a from 19th September, 2001 until payment in full.

General damages

The plaintiff prayed for general damages but did not address court on quantum. Given that there were breaches on both sides I will grant the plaintiff nominal damages of Ug.Shs.500,000/= from the date of this Judgment until in full. General damages will attract interest at court rate of 8% p.a.

Costs

Given that the works were not fully executed and that greatly affected the running of this contract I exercise my discretion to award the plaintiff ½ of its taxed bill of costs.

Geoffrey Kiryabwire

JUDGE

Date: 27/11/06

27/11/06

9:50am

Judgment read in open court and signed in the presence of:

Matsiko for the AG/Defendant

Counsel for Plaintiff absent

In Court

No principal parties

Rose Emeru – Court Clerk

.....
Geoffrey Kiryabwire

JUDGE

27/11/06