

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

HCT - 00 - CC - CS - 0253 - 2004

BURONGO CONSTRUCTION CO. ::: PLAINTIFF

VERSUS

THE ATTORNEY GENERAL ::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The Attorney General is being sued in his representative capacity for the Uganda Virus Research Institute Entebbe (hereafter called "UVRI"). The case for the plaintiff is that in October 2003 they entered into an agreement with UVRI to supply them 220 metres of 300 m² Copper Single Core PVC cables. The invoice price was Shs.9,000,000/= covering the cables, cable glands and lugs. The plaintiffs supplied a sample of the cable which was accepted and the supply of the said cable in conformity with the invoice and sample was approved by UVRI. The said goods were supplied and the plaintiffs got a delivery note dated 10th November, 2003 for the supplies made.

However the Director of the UVRI by letter dated 26th November, 2003 rejected the cables as not conforming to the sample and refused to pay for them hence the suit.

The defendants pleaded that the goods did not conform to the specifications and samples agreed upon in which case the said goods were rejected.

The parties agreed to the following facts;

- 1) There was an agreement between the plaintiff and the defendant for the supply of 220 meters of 300 mm² of copper single core P.V.C insulated cable worth Ug.Shs.9,000,000/=.
- 2) The plaintiff supplied the cable.
- 3) The plaintiff has demanded for payment and the defendant has not paid to date.

As a result of the technical nature of the goods to be supplied, the parties agreed to the joint appointment of an expert witness as a neutral for an expert opinion on the goods that were supplied.

The terms of reference (TOR) were enclosed in a joint letter from counsel referenced CV/KAS/2004/272 of the 23rd February 2005 to Dr. Terry Kahuma (Executive Director) Uganda National Bureau of Standards (hereinafter called UNBS) and were;

*" (b) **TERMS OF REFERENCE***

*You are expected to look at both the sample and the bulk of the cable supplied and make a report in answer to **WHETHER the bulk of the goods supplied (cable) conform to the sample earlier provided by the supplier...***

The parties then agreed to the following issues for determination.

1. Whether or not the goods supplied by the plaintiff conform to the sample delivered to the defendants by the plaintiff.
2. Whether or not the goods supplied conform to the description given to the plaintiff by the defendant.
3. What remedies, if any are available to the plaintiff.

Mr. Patrick Nyakaana appeared for the plaintiff and Ms. Susan Odong appeared for the Attorney General.

Issue No. 1: Whether or not the goods supplied by the plaintiff conform to the sample delivered to the defendants by the plaintiff.

Paragraph 3 of Dr. Kahuma's report reads;

"No samples previously given to the purchaser were available so a comparison of sample with bulk was not carried out..."

Counsel for the plaintiff argued that Dr. Kahuma by failing to carry out the comparison did not comply with the TOR. He further argued that the sample was with the defendants and disappeared in their hands. This Counsel for the plaintiff was a deliberate act by the defendants and therefore the defendants have failed to prove that the cable supplied did not conform to sample.

However Dr. Kahuma in his report made the following observations in para 1.

"...I carefully perused the background to the case, the terms of reference and the methodology contained in the instructions. In the interest of a reasonable professional opinion and in the spirit of rendering professional guidance that will assist resolution of the dispute, I recommended that consideration be given to not only comparison of the bulk of cable with sample, but also the condition of the bulk. My recommendation is premised on the fact that for cables, handling, straightness, surface condition, continuity and presence or absence of defects on the insulation affect the application and suitability of the cable and these would not be seen in a short sample provided..."

Dr. Kahuma at para "4.0 conclusion" writes;

- "...(i) In terms of specifications of order, the cable conforms to ordered details i.e. 300 mm² single core, P.V.C. insulated copper cable.*
- (ii) The cable condition considering the short lengths it comprises of, the kinks and rough surfaces is not consistent with normal expectations of a purchaser, sample notwithstanding...*
- (iii) It is recommended that based on the foregoing issues of condition, particularly the "pieces" forms, this cable is not suitable as an item supplied in a normal purchase and therefore not be acceptable. The "pieces" form could not have been detected in a short sample provided even if this was available at site..."*

Counsel for the plaintiff submitted that in making the above conclusions Dr. Kahuma without approval or consent of the parties extended his TORs to ensure that he comes out with a report yet he had not seen the sample. Counsel for the plaintiff submitted that Mr. Kahuma as a neutral should have strictly adhered to the TORs and since he did not his report *"...is not relevant to the matters in issue..."*

Counsel for the defendant on the other hand submitted that the report of the neutral could not be disregarded. She submitted that;

"...with all due respect to Counsel (for the plaintiff), conformity cannot be limited to mere comparison of items but of statements and testimonies of parties. Both the plaintiff and the defendant did not have any problem with the sample that was presented. However according to their testimonies there was a problem with the bulk..."

She argued that based on the report of the neutral and evidence adduced the delivered cable differed from the sample in quality.

I have read the submissions of both Counsels on this issue and reviewed the evidence before Court. The discussion of this issue has been made easier by the agreed facts of the case in particular that the said goods were supplied. The case for the plaintiff as I see it is that since the defendants through are Sylvan Rwaihyoro DW1 received the goods and signed the plaintiff's delivery note No. 031 and signed it on the 10th November 2003 then the defendants accepted the goods and should pay for them. Mr. Rwaihyoro DW1 who works as Head of Maintenance at UVRI testified that he

received goods because the UVRI Director was away at Munyonyo. He therefore received it for safe custody and signed the delivery note. He however insisted that only the Technical Committee of UVRI could formally accept the cable. It was this technical committee which looked at the cables and rejected them.

Dr. Miph Musoke DW1 who was the acting Director of UVRI at the time. He testified that he was away from station attending the National Health Assembly when the cables were supplied. He further testified that the Technical Committee rejected the cable because whereas the sample provided was new, the cable supplied looked used, twisted and had abrasions on it.

Dr. Musoke testified that he got a formal letter demanding payment (Exh. P.5) dated 14th November, 2003 and he replied by letter (Exh. P.5) dated 26th November 2003 rejecting goods and asking that they be removed from the institute.

Section 35 of the Sale of Goods Act (Cap 82) on acceptance provides;

"The buyer is deemed to have accepted the goods when he or she intimated to the seller that he or she has accepted them or when the goods have been delivered to him or her, and he or she does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that he or she has rejected them."

I agree with Counsel for the defendant that this was a sale by sample within the meaning of Section 16 of the Sale of Goods Act. That being so according to Section 16(2) of the Sale of Goods Act it is an implied condition that the bulk would correspond to the sample.

In such a situation I find that mere talking of delivery of the goods cannot amount to acceptance. There must be satisfaction by the buyer through an inspection or other process.

Indeed in a letter to UVRI from the plaintiff before delivery dated 31/10/05 (Exh. D1) by David Kasagambe PW1 it is stated;

"...You should communicate to us the convenient day to receive the cable and have some one on the site ready to inspect and if possible test the cable..."

Clearly the plaintiff also expected the cables to be inspected and tested to ensure conformity to the sample.

It is the case for the defendants that the cable failed their inspection. The neutral Dr. Kahuma also said in his report that even though the cable met the specifications it failed his standard mainly because;

- 1) It was cut yet it should have been continuous and wound on a drum as is the usual practice for delivery.
- 2) It has kinks and a rough surface.
- 3) It lacked armour.

Counsel for the plaintiff faulted him for making the finding without seeing the sample thus going out of the TORs.

However, Dr. Kahuma a well qualified electrical/electronic engineer testified that in his professional opinion he would not have made a different opinion if he had seen the sample. He testified that he sought to give opinion as he did because of his expertise.

I find that since the parties were all agreed on the sample, it is possible for a professional like Dr. Kahuma to have still made his opinion in relation to the bulk based on the uncontested information both parties gave him about the sample. I do not see it as a diversion from the TORs and even if it is, it was well explained.

Most important of all there is no allegation of compromise or misconduct against the neutral so I accept his report. I also find that the defendants rejected the cables within a reasonable time after a demand for payment was made. However, before I leave this issue, most of the evidence related to the cables but the supply was wider including 8 lugs and 4 cable glands. These in effect are cable connectors. The total cost of these was small Ug.Shs.440,000/= . However there was no adverse evidence towards them though they were not sold by sample.

In his letter of rejection Exh. P.5 Dr. Musoke requested to remove all the materials supplied (this would include the lugs and glands) from UVRI premises without delay.

I think this was a reasonable demand since the supply was made as a package.

These lugs and glands should be returned to the plaintiff or otherwise paid for. Save for that I find the cables supplied by the plaintiff did not conform to the sample.

Issue No 2: Whether or not the goods supplied conform to the description given to the plaintiffs by the defendants.

Both Counsel referred me to Section 14 of the Sale of Goods Act in answer to this issue. They then added submissions on the implied condition as to fitness for purpose and merchantability within the meaning of Section 15 of the Sale of Goods Act.

Section 14 of the Sale of Goods Act basically states that if a sale is by both description and sample (as is the case here), then the sale must comply to both the description and sample.

Since the cables did not conform to the sample I find that it is not sufficient that they did conform to description which in this case they did.

In accordance to Section 14 of the Sale of Goods Act the goods did conform to description but not to sample and therefore that is not sufficient for the defendants to pay.

As to fitness for purpose and merchantability this was not an agreed issue for trial and in any event the issues as framed are sufficient to dispose of the case.

Issues No. 3: What remedies, if any are available to the plaintiff.

I answer this in the negative none. I accordingly dismiss this case with costs.

Geoffrey Kiryabwire

JUDGE

Date: 21/08/06

J U D G M E N T