

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

HCT - 00 - CC - CS - 0538 - 2005

THREE WAY SHIPPING SERVICES (GROUP) LTD PLAINTIFF

VERSUS

**CHINA CHONGAING INTERNATIONAL
CONSTRUCTION CORPORATION DEFENDANT**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

This claim was originally brought by way of summary suit for the sum of US\$7,459.80-. The case for the plaintiff is that they entered into a contract of haulage under which the plaintiff would transport the defendants road construction equipment from Mombasa Kenya, to Kasese in Uganda at the agreed sum of US\$39,912.62/=. The equipment was not delivered within the expected time. However the defendant by agreed minutes dated 2nd May 2005 was given a discount bringing the amount payable to US\$37,459.80-. The defendants then paid by cheque the sum of US\$30,000- leaving a balance of US\$7,459.80- which the defendants have todate refused to pay. The defendants on their part deny liability but counterclaim the sum of Ug.Shs.20,670,000- as special damages for the delayed delivery of the construction equipment, general damages and costs.

At scheduling the parties agreed to the following facts:-

- "(i) By a contract dated 16th December 2004 the defendant contracted the plaintiff to transport several road construction machinery and maintenance equipment from Mombasa to the defendant's site at Kasese district.*
- (ii) By a letter dated 8th April 2005 the plaintiff pledged to make full delivery under the contract by 17th May 2005.*
- (iii) The plaintiff made final delivery on the 26th May 2005.*
- (iv) The defendant vide a subsequent agreement dated 02nd May 2005 under took to unconditionally pay the whole outstanding US\$37,459.80- before the 30th of June 2005.*
- (v) The defendant made part performance of its undertaking by issuing the plaintiff Standard Chartered Bank Cheque No.000118 dated 6th July 2005 in the amount of US\$30,000- which was honoured upon presentment.*
- (vi) A sum of US\$7,459.80- remains owing to the plaintiff from the defendant. "*

The issues in dispute for trial were agreed as follows:-

1. Whether there was breach of contract and if so, by which party?
2. Whether the defendant is entitled to the set off and counterclaim.
3. Remedies available, if any.

Mr. Dan Wegulo appeared for the plaintiff and Mr. Mike Okua appeared for the defendant .

Issue No. 1: Whether there was breach of contract and if so, by whom?

The plaintiffs case is that out of the US\$37,459.80- only US\$30,459.80- was paid leaving a balance of US\$7,459.80 which is still outstanding and has to be paid. The defendants in their defence relating to this balance of US\$7,459.80- plead in para 4

"The defendant admits that a sum of US\$7,459.80- is owing to the plaintiff under their contract as alleged in para 4(b) of the plaint but denies that such sum is recoverable. In reply thereto, the defendant contends that it is entitled to set off the sum of Ug.Shs.20,670,000/= it incurred as hire charges against the amount claimed by the plaintiff in this suit..."

I find that this pleading amounts to an admission under order 13 rule 6. The counterclaim is another suit which stands on its own. It is also an agreed fact that the money is outstanding.

I accordingly find that the defendants are in breach of paying the plaintiffs the sum of US\$7,459.80- as haulage charges.

The defendants also allege that the plaintiffs breached the contract.

The case for the defendant dispute as I see it revolves around the delayed delivery of the road construction equipment. It is the case for the plaintiff that the haulage contract between the plaintiff and the defendant is evidenced in two documents Exh. P1 (the final quotation headed *"import price estimate 0091"* dated 15th December 2004 for the price of US\$78,015.62 exclusive insurance) and Exh.P2 the acceptance form signed by the defendant (dated 16th December 2004). The plaintiff's argue that the contractual documents read together are silent as to the time within which the final delivery was to be effected.

However, it is conceded that the plaintiff wrote a letter dated 8th April 2005 to the defendant's which stated

"Ref: TSS/Jbb-CCO 368 – 04

Chine CICO Engineering

Kasese Project

Kampala – Uganda

Attn: Mr. Zhang Zuwein

Dear Sir,

Re: Up Date on Shipment

Please be advised that the above shipment has been picked up from the port and delivery taken off to our yard in Mombasa. Please note shipment, arrived 29/03/05 and discharged was complete on 31/03/05.

Truck details will be available upon confirmation by Ministry of Works.

Shipment details

Wheel loader - 2 units
Road Roller - 1 unit
Motor Grader - 1 unit

We are finalizing with the Ministry of Works personnel on clearance of low loaders and expect to commence movement this Monday 11th April, 2005. We pledge to deliver entire shipment between the 15/04/05 and 17/04/05.

Thanking you for usual co-operation.

Sincerely,

Three ways Shipping Services (Group) Ltd

.....

James Bihamaiso Baitwa

Managing Director "

It is the case for the plaintiff that the defendant was under pressure from the Government of Uganda to work on the construction of a road they had contracted with the government to do. As a result of this pressure the plaintiff states that the defendant requested them to write the letter Exh. P3 to create an impression to the government that the plaintiff was taking all necessary steps, to ensure its performance of the road contract. It is the testimony of Mr. Baitwa (PW1) the Managing Director of the plaintiff that the said letter as understood by the parties was not to create a binding effect on them and was not to be part of the contract.

The plaintiffs however argue that their claim is based on agreed minutes signed by both the plaintiff and the defendant which read

"Meeting between CCO Kasese and Three ways Shipping Services Ltd.

Attendance

- 1. Oscar R. Baitwa*
- 2. Jeff B. Baitwa*
- 3. Mr. Xin (Financial Controller)*
- 4. Mr. Lee (Project Manager)*

Agreed to pay the balance of US\$37,459.80- after a discount bringing it to the above figure of US\$37,459.80- (initial figure was US\$39,912.62- hence discount of US\$2,459.82-).

Amount payable as follows and in cash form only.

Before 15th June 2005 = \$20,000

Before 30th June 2005 = \$17,459

N.B: On receipt of US\$20,000.

We return cheque of US\$30,000 for replacement with another of US\$17,459 payable before 30th June 2005.

Signed

Oscar Baitwa 02/05/05

Mr. Lee 02/05/05

Mr. Xin

Jeff Baitwa

Moses Twinomugisha "

Counsel for the plaintiff on the authority of the learned authors of Chitty on Contracts 2nd Edition Vol 1 para 1143 argued 2 propositions of law. First is that where a contract is silent as to the time of performance then the law implies that it shall be executed within a reasonable time, having regard to the whole circumstances of the case. The second is that where time in a contract is originally not of the essence and that one of the parties has been guilty of undue delay, then the other party may give notice requiring the contract to be performed within a reasonable time.

Counsel for the plaintiff argued that in this case no provision was given as to time and no notice of delay was furnished in court. He argued that the reference to mobile phone sms/text messages by the defendants but which were not availed to court do not amount to notice of delay.

Counsel for the defendant argued that based on Exh. P3 the delivery date of 17/04/05 was established as a term of the contract.

The fact that the defendants do not deny that delivery was actually made in late May 2005 is sufficient according to counsel for the defendant to establish breach of contract, by reason of delay.

I have read the submissions of both counsel on this issue and reviewed the evidence in court.

I agree with the position of the law cited from the treatise Chitty on Contract by counsel for the plaintiff. The question is did Exh. P3 address the issue of time with regard to this contract or it did not. The text that Chitty on Contract requires that regard be given to the whole circumstances of the case.

In this case there is no single contractual document. Indeed evidence of the existence of the contract of haulage is to be found in several documents namely Exh. P1 and Exh. P2 whereas it is clear that these documents do not provide for time of delivery of the cargo, provision is made as to the time for delivery of documents and the payment of taxes for which detention charges of US\$500.00 per day per vehicle is applicable in the event non payment. I find that in a contract of haulage such as this time as a general rule is of the essence. To my mind looking at the circumstances of this case the issue of the time of delivery of the cargo was set in yet another document, that is Exh. P3. The said letter details when the ship arrived and was discharged. The time of arrival and discharge was not known when Exh. P1 and 2

were made. Exh. P3 then makes a pledge by none other than the Managing Director of the plaintiff as to time of delivery of the cargo as follows;

"...we pledge to deliver entire shipment between the 15/04/05 and 17/04/05...".

This pledge is made to the defendants without copy to the government of Uganda. Objectively I cannot see how this letter could have been for the benefit of the Government of Uganda and not the defendant. Clearly Exh. P3 added a term to the contract as to the time of delivery.

Indeed delivery was made on the 26th May 2006 but according to PW1 the delivery had been held up by a week as the plaintiff's demanded for payment in full. That means that delivery could have been made by or about the 19th May 2005.

Clearly there was a delay in delivery and this amounts to breach of contract.

Issue No. 2: Whether the defendant is entitled to the set-off and counterclaim.

The defendants have a counterclaim for the sum of Ug.Shs.20,670,000/= being the hire charges for alternative equipment that they incurred by reason of the late delivery of their equipment by the plaintiff. The charges are to cover the period 17th April 2005 to 26th May 2005, the time between which the equipment should have been delivered and the time it was delivered.

Mr. Wang Xiaxin DW1 an Engineer with the defendant testified that the defendant had to hire equipment from a company of one Moses Lumala called M/s L.M. The defendant entered into a specific agreement with Mr. Lumala for the hire of a Compactor Caterpillar model CS-531D Exh. D3. The defendants also presented hire receipts for the Caterpillar hired in Exh. D4. The defendants also through a letter from their lawyers Exh. D1 wrote to the plaintiffs and put them on notice of their intention to pursue these costs.

The case for the plaintiff is that the defendant actually waived its right to enforce delivery of the equipment in a timely manner. The plaintiffs' argue that in a meeting between the plaintiff and defendant, I believe this to be the meeting of the 2nd May 2005, the defendant did not raise a complaint of delay but rather requested for and obtained a discount on the price. Counsel for the plaintiff argued that this meeting occurred 16 days after the alleged date of final delivery. He argued that this discount was a form of concession for the alleged delay. Counsel for the plaintiff argued that if the defendant was unhappy with the delay occasioned by the plaintiff they would have stopped the cheque of US\$30,000- that have been given to the plaintiff. This however they did not do so.

Counsel for the plaintiff referred me to the case of

Banning V Wright (Inspector of Taxes) [1972] 2 ALL ER 978 at 999

In that case **Lord Hailsham of St. Marylebone** held that waiver is the abandonment of a right. This can be seen from the conduct of the injured person.

What is waived therefore is the right to rely on the term waived for purposes of enforcing his remedy for the breach made.

I was also referred to Halbury's Laws of England 4th Edition para 574. The text referred to points out that waiver may be express or implied by conduct but must amount to an unambiguous representation by the party granting the concession with the full knowledge of all the material circumstances. Lastly the party to whom the concession is made must act in reliance of the concession.

I have read the submissions of both counsels on the issue and reviewed the evidence adduced. Court has been asked to look at the out come of the meeting of 2nd May 2005 Exh. P4 as evidence of the waiver.

The evidence of Mr. Baitwa Pw1 does not suggest, being a person who attended the meeting, that the meeting of 2nd May 2005 was to address the issue of delay but rather payment. Mr. Baitwa said that the General Manager of the defendant came to their offices to clear "*...all outstanding matters before going back to China for specialized treatment...*" if that is so then Exh. P4 should have addressed the issue of waiver.

Based on the legal authorities cited to me which I agree with, I think the tests to establish waiver whether it is express or implied are that

1. The waiver is or amounts to an unambiguous representation by the party giving it with full knowledge of all the materials circumstances.
2. The party to whom the waiver is made has acted in reliance on it.

In such a situation the waiver will act like estoppel against the person giving it.

In this case I am unable to find an unambiguous representation of waiver be it express or implied. The onus to prove that there was unambiguous waiver lies with the party who wishes to rely on it, in this case the plaintiff. I therefore find that the plaintiffs have failed to prove waiver on the part of the defendants.

Mr. Wang Xiaxin DW1 testified that they hired from Mr. Lumala what he termed a compacter/roller at a daily charge of 530,000/=. The defendants claim the charges for this compacter/roller between 17th April 2005 and 26th May 2005 as shown in the receipts in Exh. D4 (i.e.39 days). The only receipt which is part of Exh. D4 that falls within this period (though not entirely) is Exh. D4 (v) receipt No. 011 dated 12/05/05 which shows it is for

"...fifteen million nine hundred thousand only being payment of hire of roller for 30 days from 6th April up to 6th May 2005..."

This receipt covers only 20 days of the days of the period in question. That to my mind would not be a big issue. Furthermore Exh. D2 does confirm that one of the rollers (items No. 5 road roller Y216J) was delivered late on the 26th May, 2005. On the balance of probability I will grant the entire period of 39 days as there is specific evidence of payment. I do not think that every receipt must be produced in evidence to show actual payment in an order for award special damages, as long as there is specific evidence that payment was made, or was being made.

I therefore award Ug.Shs.530,000 x 39 days = 20,670,000/= as special damages under the counterclaim.

Issue No. 3: Remedies available if any.

From any findings in the foregoing issues, it is clear that both parties have proved their claim. I accordingly award the plaintiff their claim for US\$7,459.80 against the defendant being unpaid haulage charges. I also award the defendant the counterclaim sum of Ug.Shs.20,670,000/=.

Only the defendant prayed for general damages though counsel for the defendant did not submit on the quantum to be awarded.

I suppose the plaintiff did not pray for damages because the original suit was a summary one.

Be that as it may, at the meeting of the 5th May 2005 the plaintiffs offered the defendants a US\$2,459.82- discount on the price which they agreed to. I believe this discount was to atone for the delay in delivery and thus some form of liquidated/agreed damages.

I find that in light of that agreement it is inappropriate to award general damages for breach to the defendant. There was no prayer for interest so I award interest at 6% p.a to both award from date of Judgment until payment in full.

I award each party the costs of their claims

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GEOFFREY KIRYABWIRE

JUDGE

Date: 07/12/06

JUDGMENT

07/12/06

11:50am

Judgment read and signed in Court in the presence of;

- B. Bamwine h/b for P. Yehangane for the plaintiff
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

07/12/06