THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL N0. 88 OF 2009

BETWEEN

AKKERMANS INDUSTRIES ENGINEERING:::APPELLANT

AND

ATTORNEY GENERAL:::RESPONDENT

(On appeal from a judgment of the High Court of Uganda (Kiryabwire, J.) (as he then was) dated 19th January 2009)

JUDGMENT OF HELLEN OBURA, JA

I have had the benefit of reading in draft the judgment of my brother Egonda-Ntende, JA and I concur with his conclusion that this appeal be dismissed with costs.

Dated at Kampala this....19th....day of....Sept.....2019.

....

Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke and Obura, JJA)

CIVIL APPEAL NO. 088 OF 2009

(Arising from High Court Civil Suit No. 333 of 2004)

BETWEEN

AKEMANS INDUSTRIES ENGINEERING:: APPELLANT

AND

ATTORNEY GENERAL:: RESPONDENT

(An Appeal from the Judgment and Decree of the High Court of Uganda, [Kiryabwire, J] (as he then was) dated 19th January 2009)

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft the judgment of my brother, Fredrick Egonda- Ntende, JA with which I agree. I have nothing useful to add.

Dated at Kampala this 19th day of Sept. 2019

Elizabeth Musoke

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL NO. 88 OF 2009

(Arising from High Court Civil Suit No.333 of 2004)

BETWEEN

AKKERMANS INDUSTRIES ENGINEERING ═══════ APPELLANT

AND

ATTORNEY GENERAL ═══════ RESPONDENT

(On appeal from a Judgment of the High Court of Uganda, (Kiryabwire, J., (as he then was) dated 19th January 2009.)

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

1. The appellant instituted H.C.C.S. No. 333 of 2004 against the respondent seeking the recovery of a sum of € 1,804,710.03 being unpaid consultancy fees for services rendered to the Ministry of Education and Sports, general damages and interest.

2. The brief facts of this case are that the appellant entered into a contract with the Ministry of Education and Sports dated 21st June 2002 to provide consultancy services for the installation and commissioning of equipment supplied under the 1st Procurement cycle for Makerere University and Uganda Polytechnic Kyambogo. The contract was for a sum of €275,172.32 and was for a fixed period of three months. Generally, the appellant was to inspect the machines, identify the required missing spares parts, install and commission the machines, train staff and provide operating manuals and a performance warranty. On the other hand, the Ministry of Education and Sports was to provide spares and purchase other

equipment and accessories for installation on the recommendations of the appellant.

3. The contract was supposed to end in September 2002. However, this was not possible because the Ministry failed to provide some of the spare parts within the contract time. The appellant contended that the delays led to the parties agreeing to extend the contract for two months and thereafter twelve and half months. The appellant claimed a total sum of €1,804,710.03 as payment for the extra months basing on the initial contract rates. The respondent generally denied this claim.

4. The trial court in its decision held that the contract was not extended. However, it awarded the appellant a handling fee of 10% as reasonable compensation for work done. The appellant being dissatisfied with the decision of trial court has appealed to this court on the following grounds:

> '(1) That the learned trial Judge erred in law and fact when he found that the Contract between the parties dated 21 June was not extended.
>
> (2) That the learned trial Judge erred in law and fact when he held that a handling fee of 10% was a reasonable compensation in quantum merit, for the extra work done by the appellant over the additional period of 14.5 months that the appellant spent on the respondent's job.
>
> (3) That the learned trial Judge misdirected himself by failing to properly evaluate and analyse the evidence on record and consider the appellant's evidence and thereby came to the wrong decision.
>
> (4) That the learned trial Judge erred in fact and law and the appellant in holding that the appellant was not entitled to the reliefs claimed in quantum merit.'

5. The respondent opposes the appeal.

Submissions of Counsel

6. At the hearing the appellant was represented by Mr. Andrew Lumonya and the respondent by Mr. Wanyama Kodoli. The parties adopted their written submissions.

7. With regard to ground 1 counsel for the appellant submitted that the contract between the parties had initially been extended for two months and subsequently for twelve and half months at the existing man month's rate. The appellant had a meeting with the respondent on 29th November 2002 where the parties agreed on extending the contract for two months. In addition, the appellant received several letters from the respondent indicating that the contract had been extended. These included a letter from the Project Implementation Director Mr. John Nakabago dated 14th February 2003 and one from the Permanent Secretary of the Ministry of Education and Sports dated 14th April 2003 in which it was communicated that the contract had been extended. Counsel for appellant therefore contended that the contract was effective until November 2003 when it was terminated at the request of the respondent.

8. Counsel for the appellant agreed with the reasoning of the learned trial Judge that estoppel is an equitable remedy and ought to be invoked as a shield and not a sword. However, he argued that this case falls under the exception to this principle. Counsel for the appellant relied on Mears Ltd v Shoreline Housing Partnership Ltd [2015] EWHC 1396.

9. On grounds 2 and 4 counsel for the appellant contended that the evidence adduced in court shows that in the extended period, the appellant brought the x-ray tube for the x-ray spectrometer machine and identified M/S Panalytical Ltd from South Africa to install and commission the machine yet the award of 10% was insufficient to cover the actual services rendered and as such was unreasonable. Counsel for the appellant relied on William Lacey (Hounslow) Ltd v Davis [1954] 1 Q.B 428 and Alfa Insurance Consultant's Limited v Empire Insurance Group S.C.C.A No.9 of 1994 for this submission.

10. Turning to ground 3 counsel for the appellant referred to the evidence of PW1 and basically reiterated the submissions in support of the ground 1. He further submitted that it is the duty of the trial court to evaluate the evidence as a whole. However, that the trial court fell short of this duty. Counsel for the appellant relied on Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123 and Sanyu Lwanga Musoke v Sam Galiwango SCCA No. 48 of 1995. He therefore invited this court to re-evaluate the evidence on the record and make its own findings. He relied on Ephraim Ongom Odong & Estermoa Mugumba v Francis Binega Donge, SCCA No. 10 of 1987 (unreported). In conclusion, counsel for the appellant concluded that this appeal has merit and prayed that it is allowed.

11. In reply to ground 1 and 3 it was counsel for the respondent's submission that the learned trial Judge properly evaluated the evidence on record and arrived at the right conclusion that the contract was not extended. He argued that Clause 2.4 read together with Clause 6.1 of the contract required such a modification to the contract to be in writing and the parties to have obtained the consent of the African Development Bank. The appellant did not adduce evidence to that effect and what was relied on is merely a proposal to extend the contract but not an approval to extend the contract as stipulated in the terms of the contract. Counsel for respondent further submitted that only a written contract can vary a contract in writing and relied on Mujuni Ruhemba v Skanka Jensen (U) Ltd (1997-2001) UCLR 92 for this proposition.

12. Counsel for the respondent cited Hilas v Arcos Ltd 1932 Allr 499, Novartis v Marphil 20229/2014 (2015) ZASCA and Bastian Financial Services (pty) v General Hendrik Schoeman Primary School (2008) ZASCA 70 for the proposition that while interpreting the terms of the contract, courts should be careful not to destroy the terms of the bargain entered into by the parties. Courts ought to be objective when interpreting the terms of the contract. In addition, that estoppel cannot be used as a sword and cannot be relied on to defeat the law. Counsel for the respondent argued that Baliks Consolidated Co. v Tomkinson (1893) AC 396 is not applicable in this case as there was no false representation to the appellant by the respondent. The parties were aware at all times that the extension of the contract was subject to the written approval of the African Development Bank. The officers who wrote the letters from the Ministry of Education and Sports did not have the authority of ADB that was financing the contract. Counsel for the respondent relied on Bandali v Lombark Tanganyilka Ltd [1963] EA 30.

13. In reply to grounds 2 and 4, counsel for the respondent submitted that the principle of *quantum meruit* is an equitable doctrine that measures recovery under implied contracts to pay compensation as reasonable value of services rendered. In the extra fourteen and half months, the appellant only purchased spares for the x-ray machine. The x-ray machine was then fixed by a South African firm, M/S Panalytical Ltd. who had been sourced by the appellant and only arrived for a week to carry out the work which does not justify holding workers on site for fourteen and half months. Therefore, counsel for the respondent contended that the learned trial Judge properly held that a handling fee of 10% was reasonable compensation in *quantum meruit*.

14. Counsel for the respondent finally submitted that this appeal had no merit and prayed that it be dismissed with costs.

Analysis

15. As a first appellate court, it is our duty to re-evaluate the evidence as a whole and arrive at our own conclusion bearing in mind that the trial court had an opportunity to observe the demeanor of the witnesses and we have not. See Banco Arabe Espanol v Bank of Uganda, (S.C.C.A No.8 OF 1998) [1999] UGSC 1, Rwakashaija Azarious and others v Uganda Revenue Authority, (S.C.C.A No. 8 of 2009), [2010] UGSC 8; and Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] EA 123. I now proceed to do so.

Ground 1

16. Exhibit P.1 is the contract that was entered into between the parties. The contract was for consultancy services for the installation and commissioning of scientific equipment supplied under ADB 1st cycle to Makerere University and Uganda Polytechnic Kyambogo. Under the special conditions of the contract (part 111) clause 2, the contract was to run for a period of 3 months commencing on the date of signing. Part 11 of the appendix to the contract contains the general conditions of the contract. Clause 2.4 stated:

> 'Modification of the terms and conditions of this Contract, including any modification of the scope of the Services or of the Contract Price, may be made by written agreement between the Parties and shall not be effective until the consent of the Bank or of the Fund, as the case may be, has been obtained.'

17. Clause 6 stipulated:

> '6.1 Lump Sum Remuneration
> The Consultant's total remuneration shall not exceed the Contract Price and shall be a fixed lump sum including all staff costs, Sub – consultants' costs, printing, communications, travel, accommodation, and the like, and all other costs incurred by the Consultant in carrying out the Services described in Appendix A.
> Except as provided in Clause 5.2, the Contract Price may be increased above the amounts stated in Clause 6.2 if the Parties have agreed to additional payments in accordance with Clause 2.4.
>
> 6.3 Payment for Additional Services

> For the purpose of determining the remuneration due for additional services as may be agreed under Clause 2.4., a breakdown of the lump sum price is provided in Appendices D.'

18. From the above it is evident that the parties had to seek the written approval of the African Development Bank before an extension of the time of contract. This is because such a modification would definitely affect the contract price that had been specifically set in the contract at €275,172.32 for the three months the contract was to run. Having perused through the record of appeal I find that there is no evidence to support the appellant's contention that the contract was extended for fourteen and half months.

19. From the testimonies of PW1, DW3 and DW1, it appears that there was an intention between the parties to extend the contract as some of the work under contract had not been completed within the time stipulated in the contact. The fault was attributed to the failure by the respondent to provide spares within the contract time. PW1 testified that upon expiration of the contract, the parties held a meeting on the 29th November 2002 where it was agreed that the contract be extended by two months and increase the fees according to the man month rates. The minutes of the meeting were adduced into evidence as Exhibit P.13. Looking at Exhibit P.13 under part B that contains the way forward, paragraph 5 states:

> ' 5. It was proposed to extend the duration of the contract by two months and increase the fees according to the existing man month rates.'

20. Further the letter from the Ministry of Education and Sports, Project Implementation Unit to the appellant (exhibit P.2) states:

> 'Dear Sirs,
> Strengthening of Scientific and Technical Teachers' Education Project ADF Loan No.F/UGA/EDU/90/27
> Installation of the Scintillation Detector
> Reference is made to your letter dated 31st January 2003 presenting a proforma invoice for the scintillation detector and your claim for money as fees and expenses.
> As far as we are concerned, we have already increased your contract by two man-months and we expect you to use these funds to provide us with the best possible service, which includes hiring and paying expenses for your staff.
> In this respect, therefore, we can only consider, the costs of supply of the scintillation detector.
> We hope this now clarifies the matter.'

21. Exhibit P.3 on which the appellant is also relying on is a letter from the Ministry of Education and Sports to the appellant. It states:

> **'Re: Consultancy Services for Strengthening of Scientific Technical Teachers' Education Project ADF Loan No. F/UGA/EDU/90/27**
> **Installation and Commissioning of Scientific Equipment Supplied to Makerere and UPK under ADF 1st Procurement Cycle.**
>
> Please refer to your letter dated 8th April 2003.
>
> This is to inform you that the operation of the agreement has not ceased. We are also informing you that when we receive a response from ADB, we shall advise you accordingly.'

22. The evidence above does not show that the parties obtained the necessary consent to extend the contract. It is clear that there was a proposal to extend the contract and that at all material times the parties were alive to the fact that approval by the bank had to be obtained before such modification would take place. The appellant cannot rely on estoppel. The equitable doctrine of estoppel should only be invoked as a shield and not a sword and is therefore not applicable in this case.

23. I would dismiss ground 1.

Ground 2 & 4

24. From the evidence adduced it is clear that the appellant rendered services to respondent after the expiration of the contract at the request of the respondent for which the respondent is bound to pay a reasonable price on a *quantum meruit* basis. Common law will not allow a person to retain a benefit from another person without compensation on the grounds that it is outside the terms of the contract. In Fibrosa Spolka Akcyjna vs Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 at page 134, Lord Wright held:

> 'It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to

fall within a third category of the common law which has been called quasi-contract or restitution...'

25. The Black's law dictionary 6th edition at page 1243 defines *quantum meruit* as :

'Quantum meruit as amount of recovery means as "much as deserved" and measures recovery under implied contracts to pay compensation as reasonable value of services rendered... An equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under those circumstances, the law implies a promise to pay a reasonable amount for the labor and the materials furnished, even absent a specific contract thereof...'

26. PW1 in his testimony stated that the firm was supposed to install thirteen machines under the contract. However, they were only able to install ten machines because two machines were obsolete and the third one lacked spare parts which the respondents failed to provide on time. That at the request of the respond, the appellant continued working under the contract for fourteen and half months after the expiration of the three months. That during this period, they mostly carried out procurement work. That they linked up with suppliers and manufacturers to get spare parts and quotations so as to complete the installation of the x-ray spectrometer machine in Makerere

27. DW1 testified that upon the recommendation of the appellant, the Ministry contracted the appellant separately to procure an x-ray tube, computer and software which the spectrometer needed to complete its installation. However, the software that was procured failed to work leading to the procurement of other software from M/s Panalytical Ltd on the recommendation of the appellant. However, to guarantee the software, M/s Panalytical Ltd had to install it itself. That therefore M/s Panalytical Ltd entered into a separate agreement with the respondent to install the machine.

28. In light of the above evidence, during the extended period, it appears that the appellant bought an x-ray tube and software for which it was paid under a separate contract and procured M/S Panalytical Ltd, a South African firm to install the machine. In computing the amount to be deemed as reasonable compensation for services rendered, court ought to take into consideration the communication between the parties showing their intention. See Way V Latilla [1937] 3 All ER 75. In my opinion, the learned trial Judge properly found that the appellants are entitled to a handling fee of 10% of the amount paid to M/S Panalytical for

services rendered to the respondent as reasonable compensation. Under part B (paragraph 4) of exhibit P.13 containing the minutes of the meeting held on 29th November2002, the appellant proposed a handling charge of 10%.

29. Grounds 2 and 4 are answered in the negative. Grounds 1, 2 and 4 sufficiently dispose of ground 3. I find that the learned trial Judge properly evaluated the evidence before him and arrived at the right decision. Therefore ground 3 has no merit.

Decision

30. As Musoke and Obura, JJA, agree this appeal is dismissed with costs.

Signed, dated and delivered at Kampala this 19th day of Sept. 2019

Fredrick Egonda-Ntende
Justice of Appeal