

UGANDA / JUDGMENT

Mectron Technical Services Ltd v Jevi Media Solutions Ltd & Ors (Civil Suit No. 516 of 2013) [2015] UGCommC 152 (13 November 2015)

[2015] UGCommC 152

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Civil Suit No. 516 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO.516 OF 2013

MECTRON TECHNICAL SERVICES LTD PLAINTIFF

VERSUS

JEVI MEDIA SOLUTIONS LTD & ANOTHER.....DEFENDANT

AND

KAMPALA CAPITAL CITY AUTHORITY.....THIRD PARTY

BEFORE THE HON. MR JUSTICE HENRY PETWER ADONYO

JUDGMENT

1. Background:

The plaintiff instituted this suit against the defendants jointly and severally seeking to recover Ug. Shs.134, 154,377- (Uganda Shillings One Hundred Thirty Four Million One Hundred Fifty Four Thousand Three Hundred Seventy Seven Only) being the contractual price under a sub-contract agreement between the plaintiff and first defendant, weekly penalty interest, interest on contractual sum and costs of the suit.

The brief background to this suit is that the plaintiff on the 1st day of September 2012 through the 2nd defendant entered into a sub-contract agreement to construct Watoto Island along Watoto-Kyagwe road junction. The consideration for the work was agreed at Ug.shs.135,824,000/- exclusive of VAT. It was also a term of the sub-contract agreement that the sub-contractor shall

charge interest of 6% of the total contract value per week entered not paid within a period of 30 days of receipt of invoice of the full amount as per the contract/quotation given to the main contractor. The plaintiff executed the works as agreed and issued a Certificate of Completion on 2nd April 2013. Upon completion of the works, the plaintiff invoiced the defendants for payment of the contractual price but the defendants were unable to pay prompting the plaintiff evoke clause 7 of the sub-contract agreement by referring the matter to the third party. Upon the matter going through arbitration, the third party advised that the defendants pay the plaintiff the amount owing but the defendants were unable to pay hence this suit.

1. The Consent:

Several attempts were made towards having the parties' reach an out of court settlement in the earlier stages of the suit but the same did not materialise. The court then set the matter for trial and on the 16th day of June 2015, the matter came up for scheduling. However, before the scheduling could be conducted, Mr. Dennis Byaruhanga who appeared for the third party informed court that there had been negotiations between the third party and the defendants on a possible out of court settlement and that on 12th June 2015, the third party had communicated to the 1st defendant that the management of the 3rd party had approved compensation in the sum of Ug.shs.683,970,750/- and that the third party was ready to make payments in instalments with a proposal that by the 28th June 2015, the third party would deposit Ug.shs.50,000,000/- and by the last day of every month effective July 2015, the third party would deposit shs.52,830, 895/-. Mr. Okurut for the plaintiff informed court that the plaintiff was not privy to the negotiations between the third party and the defendants but that notwithstanding, there were issues which were unresolved more so as regards to which account the amount so proposed would be deposited. Mr. Okurut then proposed that if that was the true position from the third party, the amounts so proposed be deposited on the court or the plaintiffs' account awaiting the final decision in the matter. Court made orders that the matter was to proceed to hearing but the third party was to deposit the amount of Ug.shs.683,970,750/- being the indemnity to the defendants into court by way of the proposed instalments until the completion of the matter or until further orders of court.

On the 13th day of October 2015 when the parties appeared before court for the hearing of the matter, issues of a possible out of court settlement again arose and the court directed the parties to appear before the registrar of this court for a possible meeting to enable any possible settlement and if no settlement was reached, then the matter would go for a full trial. On 16th October 2015, the parties and their respective counsel appeared before the registrar and it was agreed that the defendants pay the plaintiff the contractual sum of Ug.shs.134,154,377/- and the issue of interest be litigated upon. A Consent Decree was extracted in those terms and the issue that remained pending before this court was the question of interest. The court then directed parties to file submissions in respect to the issue of interest.

1. The submissions:

For the plaintiffs, it was submitted that the sub contract agreement between the plaintiff and the 1st defendant was couched and framed by the first defendant itself. That in the agreement, it was agreed in clause 2(c) that a weekly penalty interest of 6% on the contractual price shall accrue 30 days from the date of receipt of the invoice till payment in full. That the 1st defendant breached the subcontract agreement which has run for 122 weeks i.e. from 2nd may 2013 to 13th November 2015 the proposed date of judgment of this suit. That 6% of 134,154,377 for the said period translates to Ug.shs.994,231,680/-. To support this argument, the plaintiff cited the case of **Godfrey Magezi & Another v Sudhir Ruparelia SCCA No.16 of 2001** where Karokora JSC citing Chitty on Contracts 27th Edition stated that the object of all construction of the terms of a written agreement is to discover there from the intention of the parties to the agreement.

It was further submitted for the plaintiff that the reading of the sub contract agreement provides clear and express understanding of the intention of the parties thereto and that in construing that agreement, court should confine itself within the four corners thereof as there is no ambiguity whatsoever. That the agreement the subject of this suit was for construction works and that in order to meet the time lines specified therein, the plaintiff had to pre-finance the sub contract works by obtaining a loan facility of Ug.shs.100,000,000/- from Orient Bank limited whose outstanding balance at the time of filing this suit had accumulated to Ug. Shs.220,541,667/-. That it was an express term of the agreement that penalty was to be imposed in case of delay of payment and that this was intend to prevent default of payment by the defendants and cater for loses such as the one stated above. That clause 2(c) of the agreement was to provide for a compensatory remedy to the plaintiff should the 1st defendant breach the contract. That parties envisaged that there may occur breach on the part of the 1st defendant and clause 2(c) was inserted to cater for the consequences thereof. Further, it was submitted that by the 1st defendant itself inserting clause 2(c) in the subcontract agreement is estopped from avoiding the operation of the said clause. That as such, the rate payable by the 1st defendant in the said agreement as penalty for late payment is a genuine pre-estimate of the loss which parties at the time of the contract envisaged to directly flow from the breach and is recoverable without necessarily proving actual loss. That the plaintiff has demonstrated a special loss and inconvenience which must have been foreseen at the time the of contract as the consequence of non-payment or breach which would be remedied by the penalty payment. That as such, the penalty interest due to the plaintiff is recoverable owing to the late payment of breach by the 1st defendant.

The plaintiffs in its submissions framed another sub issue which read as to whether the plaintiff is entitled to interest on the contract price. In support of this sub issue, the plaintiff cited **Halsbury's Laws of England, 4th Edition reissue Volume 12 (1) paragraph 1063 page 484** where it is stated that upon breach of the contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interest from the time when it became payable under the contract or as the court may allow. The plaintiff further submitted that this principal was reinstated in the case of **Excel Construction Ltd versus Attorney General HCCS. No.3 of 2007**. The plaintiff also cited the case of **Bank of Baroda Ltd v Wilson Buyonja Kamuganda SCCA No.10 of 2004** where it was held that where there is no agreement between the

parties as to the interest or rate payable, the award of interest by court is discretionary and the discretion must be exercised judiciously.

For the defendants, it was submitted that clause 2(c) of the subcontract provided for a weekly penalty interest of 6% on the contract sum which sum accrued as a result of the default at Ug.shs.994,231,680/-. That this figure is almost ten times the contract sum owing to the fact 6% weekly translated into annual interest would be 288% which is way above the commercial interest rate of 24%. That section 26 of the Civil Procedure Act provides that where an agreement for the payment of interest is sought to be enforced and the court is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest as it may think just.

Further, it was submitted for the defendants that the Blacks Law Dictionary at page 1526 defines unconscionability to mean extreme unfairness and unconscionable as having no conscience, unscrupulous, affronting the sense of justice, decency or reasonableness. That in the Kenyan Case of **Elson Plastics of (k) Ltd versus National Water Conservation and Pipeline Corporation C. S No.641 of 2009**, Justice Gikonyo stated that unconscionability or extreme unfairness of a contract should be discernable from the plain sight of the bargain that not any fair or honest person would make such offer or demand from another, its oppressive and unreasonable. The defendants went further to demonstrate unconscionability by citing the case of **Alice Okiror & another versus Global Capital Save 2004 Ltd & another Civil Suit No.149 of 2010** where court found the interest of 12% per month which translated to 144% per annum to be harsh and unconscionable and instead awarded the interest of 25% per annum. The defendants cited more authorities such as **Mariam Naigaga v Orient Bank Ltd Civil Suit No.464 of 2013**, **Dauson Muruiki Kihara v Amos Gathua Gatuigo [2012]EKL**R and **Anjeline Akinyi Othieno versus Malaba Malakasi Farmers Co-op Union ltd [1998]EKL**R all of which dealt with the question of unconscionable interest.

The defendants further submitted that section 26 of the Civil Procedure Act was to guard against unjust enrichment by those who seek to charge excessive and exorbitant interest rates like the one in the instant matter. That this provision of the law gives court wide discretionary power to re-open transactions and agreements and consequently award just interest rates, a clear exception to the notion of freedom of contract. That from the above authorities, the interest rate agreed between the parties should be found harsh and unconscionable and that court should award the interest at the commercial rate of 24% per annum. That however, should court be inclined to award any interest to the plaintiff, the same should be paid by the 3rd party exclusive of the 683,970,750/- it is already paying in court owing to the fact that that sum was premised on receipted works submitted by the defendant to the 3rd party and the same excluded interest. In conclusion, the defendant prayed for the dismissal of the suit with costs.

In rejoinder, the plaintiffs submitted that each case must be decided on its own peculiar facts or nature. That the subcontract agreement was drawn by the defendants themselves and the plaintiff merely consented to the said term and signed the agreement. That the court should consider and address its mind to the peculiarity of this case and the nature of the transaction of

the subject suit. The plaintiff reiterated its earlier submission emphasising that the subcontract agreement giving rise to the dispute was purely for construction works where time was of the essence and value for money was guaranteed. That the plaintiff has and continues to suffer loss or injury directly flowing from the defendants breach both in form of debt and inconvenience arising from financial stress. That whereas section 26 of the civil procedure Act is against the harsh and unconscionable interest, it's the plaintiff's submission that not every interest which is over and above the commercial rate should be deemed unconscionable and therefore unenforceable at law. That owing to the defendant's breach, the plaintiff's lawyers have been served with a letter from Orient Banks' lawyers demanding for 266,917,439/- being the outstanding loan balance and the lawyers' fees. That the plaintiff has demonstrated the actual loss and inconvenience suffered which is greater than the amount it would recover by way of statute i.e. by section 26 of the civil procedure Act. It was further submitted for the plaintiff that the delay of payment of penalty interest of 6% per week is enforceable and recoverable. That in the alternative but without prejudice, if the court were to find that the claimed Ug.shs.994, 231,680/- is harsh and unconscionable, then it should award the plaintiff Ug.shs.683,970,750/- as the 3rd party has already approved and is depositing the same in court. The plaintiff concluded its submissions by making prayers that court awards late payment interest at the rate proposed by the 1st defendant and agreed by the parties, that court awards interest on the consented contractual sum at its discretion and that the plaintiff be awarded costs of the suit since the defendant the issue as to costs.

1. Resolution

In resolving this matter, I have taken into consideration both the plaintiff's and defendants submissions.

Section 26(1) of the Civil Procedure Act where it is provided that where an agreement for the payment of interest is sought and the court is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just.

Further, the courts have held that the guiding principal in awarding interest is that an award of interest is discretionary as the holding in the case of **Uganda Revenue Authority v Stephen Mbosi SCCA No. 26 of 1995** and like*in* all other discretions however, the court's discretion must be exercised judiciously taking into account all the circumstances of the case. **See: Liska Ltd v DeAngelis [1969] E. A 6, National Pharmacy Ltd versus KCC [1979] HCB 256 , Superior Construction & Engineering ltd versus Notay Engineering ltd HCCS No.24 of 1992.**

In the instant matter, it is the agreement of the parties dated the 1st day of September 2012 clause 2(c) thereof that the subcontractor shall charge interest at a rate of 6% of the total contract value per week entered not paid within 30 days of receipt of the invoice for the full amount as per the contract/quotation given to the main contractor and the same was to continue until all overdue payments plus interest charges are paid in full.

The plaintiff argues that this term of the sub contract agreement was inserted by the 1st defendant itself and the plaintiff just consented to the same. That each case must be decided on its own peculiar facts or nature and the the court should consider and address its mind to the peculiarity of this case and the nature of the transaction of the subject suit. That as such, the defendant cannot be seen to deny a contract to which it freely entered into as the same binds it.

The defendant however argues that the interest as agreed to in the contract is harsh and unconscionable and as such, the same is unenforceable. That translated into annual interest, it would mean an interest rate of 288% which is way above the commercial interest rate of 24% per annum. To the defendants, section 26 of the Civil Procedure Act is intended to guard against unjust enrichment by those who seek to charge excessive and exorbitant interest rates like the one in the instant matter. That this provision of the law gives court wide discretionary power to re-open transactions and agreements and consequently award just interest rates, a clear exception to notion of freedom of contract. In **Tomas Kalinabiri v George William Kalule Civil appeal No.19/2010**, the court citing **Scott v Brown Dowering MC-NABE Co.(1892) 2 QB 724** where Lendly LJ noted that court is there to enforce illegal contracts. Thus to award the plaintiff an interest rate of 6% per week which would translate into 288% per annum would surely be enforcing an illegality which would go against the well laid down principal in the case of **Makula International ltd v His Eminence Cardinal Nsubuga & Another, [1982] HCB 11**. However, the plaintiff has in its submissions showed that to have the sub contract executed, it had to borrow from Orient bank Ltd the sum of Ug.shs.100,000,000/- whose outstanding balance at the time of filing this suit had accumulated to Ug. Shs.220, 541,667/-.

In its rejoinder the plaintiff explained that the lawyers of Orient Bank had served upon it a demand note in which the plaintiff is required to pay to Orient Bank Ug.shs. 266,917,439/- plus the lawyer's fees of 25,000,000/- and to prove this assertion, the plaintiff attached annexure 'D' to the submissions in rejoinder. The plaintiffs' contention is that it is because of the defendants' breach that it defaulted to pay Orient Bank the amounts borrowed which has now accumulated to over shs. 266 million.

In the circumstances of the instant matter, the justice of the case would demand that the plaintiff be awarded a penalty interest which is legal and fair before the law and in view of that fact the plaintiff shall be awarded 24% penalty interest per annum from the time when the cause of action arose till payment in full.

In the same vain since the defendant agreed to pay the plaintiff the contractual sum of Ug.shs.134,154,377 by virtue of the consent executed before the registrar of this court on the 16th day of October 2015, the same shall attract an annual interest of 24% from the date of filing this suit till payment in full.

As to costs, its trite law that costs follow the event as per the provisions of **Section 27(2) of the Civil Procedure Act** and ***Jennifer Behingye, Rwanyindo Aurelia, Paulo Bagenzi v. School Outfitters (U) Ltd., C. A. C. A No.53 of 1999 (UR)***.

In the instant case, the plaintiff shall be awarded costs of the suit owing to the protracted twist of possible out of court settlements which however never materialised in time.

1. Orders:
2. Uganda Shillings One Hundred Thirty Four Million One Hundred Fifty Four Thousand Three Hundred Seventy Seven Only (Shs.134, 154,377-) at 24% penalty interest per annum which encompasses all interests claimed by the plaintiff as assessed by the court and this would therefore arise from the time when the cause of action arose till payment in full.
3. The Plaintiff is awarded costs of the suit as against the Defendants.

I do so order accordingly.

HENRY PETER ADONYO

JUDGE

13TH NOVEMBER, 2015

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