THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 151 OF 2008

BOSCHCON CIVIL & ELECTRICAL
CONSTRUCTION COMPANY (U) LTD………………………PLAINTIFF

VERSUS

SALINI COSTRUTTORI SPA……………………………….DEFENDANT

BEFORE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff/counter defendant (hereinafter referred to only as plaintiff) sued the defendant/counterclaimant (hereinafter referred to only as defendant) seeking for recovery of the sum of Shs. 2,463,448,778 being special and general damages for alleged breach of contract and costs of the suit.

The brief background of the plaintiff's case is that under two separate agreements, the plaintiff was sub-contracted by the defendant to carry out construction of residential camp houses at Bujagali Hydroelectricity Plant in Njeru Town Council. The first subcontract was signed on 30th July 2007 for work to be executed within a period of 149 days ending on 26th December 2008 while the second sub-contract was executed on the 15th October 2008 for work to be executed within 141 days up to 4th March 2008.

In the letter of intent, the contract sums were stated to be plus VAT but the subcontracts were silent about the issue. The plaintiff received supplies that included VAT and when it submitted its first certificate with a component on VAT refund it was rejected on the basis that the defendant was VAT exempt. There were unsuccessful attempts to sort out the issue. To mitigate the loss that the plaintiff would incur as a result of the unresolved VAT issue, the parties agreed that the defendant would purchase supplies on behalf of the defendant and offset the costs from payments due to the plaintiff.

In the course of the works there were delays that prompted new programmes of works to be submitted. Disputes later arose between the parties regarding unreconciled store supplies on the basis of which the defendant withheld payment on two of the plaintiff's certificates on the ground that the stores were in debit. Meetings were held unsuccessfully to try and resolve the problem. The plaintiff then wrote to the defendant on 16th May 2008 stating that due to the failure of the parties to resolve the outstanding issues regarding reconciliation of the stores supply it was declaring a dispute and works on site would be suspended as at close of shift that night.

The defendant responded the next day by terminating the contract on the ground that the plaintiff had acted unilaterally to suspend work at the site and yet it was behind the contract completion date.

The defendant in its written statement of defence denied the contract sum alleged by the plaintiff and insisted that the phrase "exclusive of VAT' was not used in the contract. The defendant also denied making representations that it was liable to pay VAT. In further answer to the claim, the defendant contended that the variations made by the plaintiff were paid for and that it was the plaintiff who breached the contract. It was contended further by the defendant that the decision to terminate the contract was induced by the plaintiff's unilateral withdrawal from performance of the contract on the 16th of May 2008.

The defendant also filed a counter claim basing on the plaintiff's alleged repudiation of the contract and failure to complete the work by the stipulated date. It claimed for special damages, general damages, interest and costs of the suit.

The plaintiff in its defence to the counterclaim denied the allegations and claimed that the delays in executing the work was caused by the defendant's own delay in effecting payments to the plaintiff and its failure to disclose its VAT status prior to the execution of the sub-contracts, inflation of the materials delivered to the plaintiff by the defendant, over pricing of the said materials by the defendant, delay in supplying the said materials by the defendant, defendant's failure to effect payments for works executed, inclement weather and other factors over which the plaintiff had no control.

I must observe at this juncture that I took over this case after it had been scheduled and part heard by another judge. I only had the opportunity of listening to the plaintiff's sixth and last witness and the defendant's two witnesses who were cross-examined since parties had earlier filed witness statements. It is therefore noteworthy that I did not have the benefit of observing the demeanor of five of the plaintiff's witnesses.

At the scheduling, seven issues were framed for trial, namely:-

1. Whether the termination of the contract by the defendant was lawful or not.

2. Whether the plaintiff is entitled to the remedies sought.
3. What is the appropriate quantum of the remedies sought?
4. Who caused the delay in completing the contract?
5. Whether there was misrepresentation on both sides (VAT and financial status).
6. Whether the defendant is entitled to the counter claim.
7. What is the appropriate quantum of the counter claim?

Both counsel filed written submissions on the issues in that order and it turned out to be very lengthy and repetitive. That could have been avoided if some of the related issues were consolidated. For purposes of this judgment I will reorganize the issues and consolidate related ones so as to avoid that pitfall.

I believe the 1st, 4th and 5th issues can be comfortably dealt with together and similarly the 2nd and 3rd issues are related so there is no need to separate them. The last two issues will also be dealt with concurrently. In effect I have consolidated the seven issues into three and I now proceed to consider them.
At the scheduling it was an agreed fact that there were two sub-contracts between the parties which were terminated. The ground for termination of the contract as stated by the defendant in Exhibit P.17 was the unilateral suspension of work by the plaintiff and yet there was already delay in completing the work. It was the plaintiff's case that the defendant caused the delay by several of its acts that caused cash flow problem to the plaintiff. First on the list was the issue of VAT refund. Others were withheld payments on the certificates, delayed supplies, unilateral deductions from certificates to offset costs of supplies.

Issue 1

(a) Misrepresentation on VAT Claim

As regards VAT claim, PW1 stated in his witness statement that during the negotiations, the plaintiff was led to believe that the contract price was plus VAT. The letter of intent, Exhibit P2, dated 23rd July 2007 indicated that the contract price would exclude VAT. The subcontract was signed on 30th July 2007, seven days after the letter of intent and was silent on the issue of VAT. It was PW1's evidence that the defendant's principle officers did not disclose that they had solicited for VAT exemption and that he was repeatedly told that the construction of the residential camp was not part of the hydro power project.

PW1 further testified that the plaintiff commenced the project and incurred VAT on the purchases for the first two weeks amounting to Ushs 100,244,422. He stated that the plaintiff's first certificate of payment was rejected by the defendant on the ground that it was inclusive of VAT refund claim yet the defendant company was VAT exempt. PW1 stated further that he

immediately raised the concern that the failure by the plaintiff company to receive the refund of the VAT would strain its cash flow and the defendant advised that they would get a solution.

The evidence of PW1 was corroborated by that of Carolynn Joan Bosch, PW6 who testified that the letter of intent (Exhibit P 2(ii)) unequivocally stated that the agreed lump sum contract price was plus VAT.

Counsel for the plaintiff argued that although the final subcontract which was executed on 30th July 2008 was silent on whether the quoted lump sum price was VAT exclusive or inclusive, it was only natural for the plaintiff to incur VAT in the subsequent purchases of goods, materials and services to be used in the execution of the subcontract agreements. It was his submission that it was a misrepresentation for the defendant to include VAT in the letter of intent and disclose no contrary position including the efforts to obtain an exemption.

It was argued for the plaintiff that had the defendant notified the plaintiff of its efforts to secure an exemption on VAT, the plaintiff would not have incurred VAT and its cash flow would have remained stable and ultimately the agreed programme of work of Phase I would have been complied with.

DW1 Marco Faggiani testified that on the 17th August 2007, the defendant notified the plaintiff by a letter that it was VAT exempt. According to him the plaintiff received this information through the project developer, BEL, which was responsible for all tax matters. Indeed the contents of Exhibit D13 confirm what DW1 stated in evidence.

Counsel for the defendant submitted that the VAT (Amendment) Bill now Act No. 6 of 2007 was published on the 15th June 2007 and the commencement date in section 1 was 1st July 2007. His view was that ignorance of the law by one party is not a ground for termination or breach of contract. He submitted further that the defendant did not misrepresent its VAT position since the VAT Act exempting the defendant from VAT came into force prior to the execution of the subcontracts that were concluded on the basis of a lump sum price and did not provide for payment of VAT. He maintained that the plaintiff was duly notified by the defendant of the relevant law exempting it from VAT.

Cheshire & Fifoot on Law of Contract, Eleventh Edition at page 257 defines representation as follows;

> ***"A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue."***

Similarly it is stated in **Harlsbury's Laws of England 4th Edition Vol. 31 at page 461** that;

> *"A representation is deemed to have been false and therefore a misrepresentation, if it was at the material date false in substance and in fact. For the purpose of determining whether there has or has not been a misrepresentation at all, the representor's knowledge, belief or state of mind is immaterial…The standard by which the truth or falsity of a representation is to be judged is that if material circumstances are incorrectly stated, that is to say, if the discrepancy between the facts as represented and the actual facts is such as would be considered material by a reasonable representee, the representor is false if otherwise, it is not…"*

As a general rule silence is not a misrepresentation, see **Fox v Mackreth (1788) 2 Cox Eq. Cas 320** however according to **Cheshire & Fifoot on Law of Contract, 1972** silence affords a ground for relief where the silence distorts positive representation.

It is trite that a party who alleges misrepresentation has the burden to prove it. **Harlsbury's Laws of England** (supra) at page 462 states:

> ***"Since in every form of proceeding based on misrepresentation a misrepresentation of some kind must be established, it follows that the burden of alleging and proving that the degree of falsity which is required for the representation to be a misrepresentation rests, in every case, on the party who sets it up".***

I have had the benefit of looking at Exhibit P1 being the plaintiff's tender submission for the subcontracts dated 14th June 2007. Clause 5 was on price and it specifically stated that the lump sum price of Shs. 1,781,096,736 (One billion seven hundred eighty one million ninety six thousand seven hundred thirty six) quoted by the plaintiff was exclusive of VAT.

Upon receipt of the tender submission and subsequent negotiations, the defendant sent to the plaintiff a letter of intent to enter into a partial contract agreement with it dated 28th June 2007 (Exhibit P2 (i)). It was stated in the last paragraph of that letter that the notice was intended for the plaintiff company to start organizing the human resources from South Africa and Kenya as indicated by the plaintiff. By another letter dated 23rd July 2007 (Exhibit P2 (ii)), the defendant communicated to the plaintiff that it would sign a formal subcontract agreement in the form already in the plaintiff's hands with the principal agreed conditions that were specified in that letter. The first condition was stated as-

> ***"Fixed price on Lump Sum basis for an amount of 1, 692,016,250 Ushs (one billion six hundred ninety two million sixteen thousand two hundred fifty)***

> ***after the agreed discount of 5% on your offered price, plus VAT"* (emphasis added).**

Although the subcontracts which were subsequently signed were silent on VAT, this court is convinced from the evidence on record that the plaintiff was made to believe that the contract price would be exclusive of VAT as earlier represented by the defendant.

It is also pertinent to note that Exhibit D13 was prepared on 17th August 2007, yet the first subcontract had been signed on 30th July 2007. Prior to 17th August 2007 when the VAT position of the defendant was communicated to the plaintiff, the plaintiff had already incurred VAT arising from the indication on the letter of intent that the lump sum was plus VAT. This was a representation that was untrue. The defendant ought to have indicated to the plaintiff the true state of its VAT affairs. Apparently this happened at a later stage. I find that the plaintiff has proved that the defendant misrepresented its VAT status in its letter of intent but the subcontracts were subsequently silent on the matter.

It is stated in Chitty on Contracts Volume I General Principles Paragraph 6-085 at page 378 that;

> ***"It has now become that a special relationship, giving rise to a duty of care, may subsist between parties negotiating a contract if information is given in connection with the contract".***

I must however, observe that the plaintiff also contributed to this state of affairs by just signing the subcontracts without ensuring that one of the principle conditions stated in Exhibit P2(ii) regarding VAT was included. If the plaintiff had raised the issue I believe the subcontracts would have been explicit about the matter.

Be that as it may, I find that it was the defendant's misrepresentation on the issue of VAT that induced the plaintiff to enter into the subcontracts and incur costs that could not be refunded. That admittedly must have caused financial challenges to the plaintiff which negatively impacted on the timely performance of the contract. All the other subsequent problems of store supplies reconciliation, withholding of payments, delay in completion of works and the ultimate effect that led to termination of the contract would have been avoided if the VAT issue had been properly sorted out at the time of signing the contract.

(b) Misrepresentation of the Plaintiff's Financial Status

It was also alleged by the defendant that the plaintiff company misrepresented its financial status to the defendant. Counsel for the defendant submitted that the conduct of the plaintiff leading to execution of both subcontracts constituted a misrepresentation on its part as to its capacity to execute all the works. He referred to PW1's cross examination where he contradicted himself on

the amount of money the plaintiff had before the signing of the subcontracts. Counsel for the defendant also based his submission on the testimony of PW1 that the plaintiff did not need a bank guarantee even when clause 8 of the sub contract required it.

The plaintiff denied that it made any misrepresentation regarding its financial status. According to PW6, at all material times before entering into the subcontract with the plaintiff company the defendant's principal officers were aware that they were dealing with a company whose financial capacity was modest. Counsel for the plaintiff submitted that to stem financial challenges envisaged by the plaintiff and appreciated by the defendant, clause 8 of the subcontract was modified to allow payments to the plaintiff every fortnight instead of every month as per the sub contracts.

I have looked at the tender submission made to the defendant by the plaintiff and evaluated all the other evidence before this court and I do not quite see any evidence of misrepresentation of the plaintiff's financial status. I therefore find that the defendant has not proved that the plaintiff misrepresented its financial status at all. It appears to me that the defendant's officers were well aware of the financial status of the company they were dealing with and that is why they allowed modification of clause 8 on terms of payments to accommodate the plaintiff's modest funding.

(c) Delay in Completing the Contract

Evidence was adduced by the plaintiff's witnesses attributing the delay to the defendant. Counsel for the plaintiff also submitted that the defendant should be held responsible for the delays and eventual failure to complete the execution of the contract on time.

Counsel for the defendant submitted that the plaintiff's submission above was not supported by any of the plaintiff's pleadings. He invited court to disregard the plaintiff's submission that the delay in completing the works was caused by the defendant because this was not included in the plaintiff's pleadings. He relied on **Interfreight Forwarders (U) Ltd Vs East African Development Bank SCCA No. 33 of 1993** for the position that a party is bound by its pleadings and will not be allowed to succeed on a case not set up by him. He prayed for the dismissal of the plaintiff's submission according to Order 6 rule 7 of the Civil Procedure Rules.

I have perused the plaint and find that there is no pleading regarding delay as attributed to the defendant. However, in the reply to the counterclaim, the counter defendant/plaintiff pleaded the cause of the delays and in fact attributed it to the defendant.

The plaintiff called two witnesses who testified as to the cause of delay. PW1 in his witness statement testified that the refusal to pay certificates coupled with the inflated debits on supplies allegedly delivered to the plaintiff company made it difficult for the plaintiff to pay its wages leading to labor unrest that delayed the construction work. In addition, it was his evidence that on

various occasions, the defendant's agents delayed the execution of works by their failure to promptly deliver supplies requisitioned for, late turn up for handover of houses completed and continuous requests for additional variations on the works being carried out. He testified further that the delay was also due to the disappearance of some senior laborer on the constructions site who always ended up as employees of the defendant company.

According PW6, the inability to resolve the stand-off over the payments of VAT by the defendant company contributed substantially to the delays in execution of the works. She explained that the plaintiff's cash flow was severely affected and the payments of laborers at the construction site became difficult on some occasions leading to sit down strikes.

On the part of the defendant DW1 also testified that by October 2007, there were more significant delays on the part of the plaintiff and the defendant requested the plaintiff to address them. However during cross examination DW1 and DW2 conceded that in a construction project, delays are normal if there are reasons.

The plaintiff's story as to the delay is believable. The delay was sparked off by various actions of the defendant. For instance as regards the disagreement over VAT payment, if the defendant had made its VAT obligations clear to the plaintiff, perhaps the plaintiff would not have incurred the VAT. This payment as testified by PW1 and PW6 affected the plaintiff's cash-flow to the extent it could not meet its wage bill. As if that was not enough, the defendant held onto two payments due to the plaintiff and was not prepared to sort out the store supplies issues. This was being done amidst variation of works, which though acceptable was done without availing funds to cater for the extra costs. In the circumstances, execution of the works was bound to be delayed. For those reasons, I find that the defendant was responsible for the delay and eventual failure to complete the execution of the contract on time.

(d) Termination of the Subcontracts

Clause 17 of the subcontract agreements provided grounds for termination of the contract. It was the evidence of DW1 that as a result of the delays the defendant requested the plaintiff to provide a revised programme of works indicating the time within which the work would be completed.

Counsel for the plaintiff submitted that the revised programme of works amounted to an alteration of the contract such that the completion date was no longer 26th December 2007. He argued that it was therefore wrong for the defendant to maintain that because no houses were handed over by 26th December 2007, there was delay and as such breach of contract.

Counsel for the plaintiff submitted that delay could not stand as a ground for termination because the contract had envisaged delays and provided for liquidated damages under clause 15 of the sub-contract agreement, Exhibit P.3. Thus there were no grounds for termination.

It was PW1's evidence that having terminated the contracts the plaintiff's officers including the managing director were forcefully evicted from the site with armed guards reinforced by UPDF soldiers without allowing them chance to take stock and pick their personal documents. As a result, the plaintiff's construction equipment and materials were confiscated and the construction site placed under armed guards.

Counsel for the plaintiff submitted that this implicated the defendant as having acted emotionally and unreasonably and that the defendant did not intend to reconcile outstanding claims but rather throw out the plaintiff company without payment. He relied on the case of **Kituni Construction Company Ltd vs. Julius Okeny (HCT-00-CC-CS-0250-2004)** where the defendant had chased the plaintiff contractor away from the premises of the construction it was held that chasing the contractor from the construction site was part of a long thought out plan to get a free service. The court found that there had indeed been a breach of contract by the defendant.

Counsel for the defendant basing on exhibit P14 submitted that both sub-contracts were repudiated by the plaintiff's unilateral decision to suspend all work on the site and to abandon the site on 16th May 2008 after declaring a dispute between the parties. He argued that in the circumstances, the defendant was left with no other option but to terminate both subcontracts in response to the plaintiff's decision that was intended to cause further delay.

He submitted that the case of **Kituni (Supra)** was distinguishable from the current case because it was admitted by PW1 that after the plaintiff's email dated 16th May 2008, the plaintiff received communication from the defendant to return to the site and take stock of the materials and equipment. It was submitted that having refused to return to the site upon receiving communication from the defendant, the plaintiff's workers were not expected on the site since all subcontract work had been suspended. It was conceded that the defendant enforced contract termination with the assistance and deployment of its guards and explained that this was intended to avoid and/or contain any threatened acts of violence during the takeover of the site. In the defendant's view the termination of the contract was both lawful and in accordance with the contract termination clause in both subcontracts.

According to **Chitty on Contracts, 28th Edition Vol. 2 at page 598** repudiatory breach occurs where one party so acts or expresses himself as to show that he does not mean to accept the obligations of the contract any further, then this may depending on the circumstances, amount to a repudiatory breach of contract. Where there is a breach of a condition of the contract, then there will be a repudiatory breach entitling the innocent party, on acceptance of the repudiation, to treat the contract as at an end. The act of repudiation may consist of a clear unqualified

refusal, but will more probably involve some other breach which goes to the root of the contract, or may be such as to indicate an intention no longer to be bound by the contract.

In considering whether there was repudiation of the subcontracts as alleged in this case, it is necessary to look at the conduct and circumstances of the parties as a whole. Exhibit P14 is an email sent to the defendant by the plaintiff declaring a dispute and suspending work on the site with effect from 16th May 2008. In a contract whose purpose was the construction of residential blocks, this conduct meant that the contract was halted.

During cross examination DW1 testified that when they received Exhibit P14 they decided to terminate the contract on 17th May 2008. He agreed that there was a request by the plaintiff for a meeting in order to solve the pressing matters and that this meeting was held which resulted into their decision to terminate the contract.

The defendant treated this suspension of works as repudiation of the contract. It is the view of this court that the defendant greatly contributed to what constrained the plaintiff to write Exhibit P14. According to that letter whose content was never disputed, there was an outstanding dispute over reconciliation of the stores with the effect that supplies were no longer being made to the plaintiff to enable it continue with the work. In such a situation, there was urgent need to resolve that dispute since the plaintiff could not continue performing its part of the contract without supplies of materials. Naturally any contractor put in the plaintiff's position would have suspended work and given priority to sorting out the issues. From Exhibit P14, it would even appear that there was no work going on at that stage.

In view of the contention that the plaintiff repudiated the contract by declaring a dispute and also suspending works, it would be necessary to determine the intention of the plaintiff at the time the works were suspended. It would therefore be pertinent for this court to look at the meaning of the two words in issue namely; "*suspend*" and "*repudiate*".

Black's Law Dictionary, 7th Edition defines the word "suspend" as:

1. *To interrupt; postpone; defer.*
2. *To temporarily keep (a person) from performing a function, occupying an office, holding a job, or exercising a right or privilege.*

The term "repudiation" is also defined by **Black's Law Dictionary, 7th Edition** as *to reject or renounce (a duty or obligation) especially to indicate an intention not to perform (a contract).*

Clearly from the wordings of Exhibit P14, the plaintiff indicated that it was suspending works. This means that it intended to resume works after the resolution of the dispute between themselves and the defendant. Thus, the plaintiff only sought to defer performance of the contract until the dispute that had been declared were resolved in accordance with the contract.

The plaintiff even alluded to their rights to seek for arbitration and mediation to settle the dispute in case their own efforts failed.

In view of the above circumstances, it was wrong for the defendant to treat the subcontracts as repudiated. I believe the defendant was just waiting for an opportune moment to terminate the contract and it did all it could to push the plaintiff to the wall until Exhibit P14 was written thereby presenting an opportunity for the defendant to execute its plan. That over reaction was not at all justified in the circumstances of this case as highlighted above. The defendant should have objected to the suspension of work instead of terminating the contract. I therefore find that the termination of the contract by the defendant was emotional, unjustified and unlawful.

Before I take leave of this issue, I wish to observe that the subcontracts were very explicit in clause 15 on the remedies available to the defendant in the event that there were unjustifiable reasons for delay in executing the subcontracts. The defendant instead accommodated the delays by not enforcing that clause and even wrote Exhibit D2 requesting the plaintiff to re-submit a new programme of works. In my view, by that action the terms of the contract as relates to completion date were varied and that is why the plaintiff continued performing the contract way beyond the completion date until it was terminated in May 2008.

Issue 2: Whether the plaintiff is entitled to the remedies sought.

The plaintiff has claimed for the following remedies:

a) Special damages in the sum of Ushs 713,448,778/=
b) General damages in the sum of Ushs 1,750,000,000/=
c) An order that the defendant returns the plaintiff’s equipment.
d) Costs of the suit
e) Interest on (a) and (b) above at the rate of 30% per annum from the date of filing the suit till payment in full

1) Special damages in the sum of Ushs 713,448,778/=

It is trite law that special damages must be specifically pleaded and strictly proved.
Particulars of special damages were pleaded in paragraph 23 of the plaint as follows:

i. VAT paid on purchases - Ushs 100,224,441/=
ii. Additional Variations - Ushs 227,490,242/=
iii. Outstanding payments - Ushs 172,063,466/=
iv. Value of materials on site - Ushs 213,650,628/=

i. VAT paid on purchases (Ushs. 100,224,441/=)

A finding has already been made above under the first issue that the defendant made a misrepresentation to the plaintiff regarding the issue of VAT. Consequently the plaintiff made purchases and payments of VAT for goods, materials and services to be used in the execution of the subcontract agreement. It was submitted for the plaintiff based on the evidence adduced that when the plaintiff approached the defendant for settlement of its dues, the defendant intimated to the plaintiff that it would not be paying VAT since it was VAT exempt. The plaintiff's attempts to recover the VAT paid have proven futile causing a loss of **Ushs 100,224,441/=.**

It is not in dispute that the plaintiff incurred those costs in VAT which has never been refunded. The two reasons advanced for rejecting the plaintiff's VAT claim are firstly that the plaintiff ought to have known that the defendant was VAT exempt and secondly, that clause 4 of both subcontracts provided for a lump sum contract price.

I reiterate my earlier finding that the defendant wrongly led the plaintiff to believe that the contract sum excluded VAT in which case it expected a refund. Since the plaintiff incurred the loss, it should be reimbursed for the VAT payments made on account of the defendant's actions. The plaintiff is therefore entitled to recover the sum of **Ushs. 100,224,441/=** from the defendant.

ii. Additional Variations - Ushs 227,490,242/=

It was agreed at the scheduling conference that there were variations to the specifications of the contract. The consultants (KK Partner Architects) evaluated the contract works and subsequently adjusted the final payment certificates upwards to include unmeasured work and unmeasured variations. These adjustments were included in the final measurements. It was the evidence of PW1 in his witness statement paragraph 13 that during the execution of the subcontracts the defendant requested for various variations of the materials or building designs originally agreed upon in the sub contracts especially the window designs, doors and type of timber. He stated further in paragraph 14 that the defendant company consistently refused to include the cost of the windows and doors after variations to the tune of Ushs 227,490,242/=.

In his witness statement DW1 stated that the payment for any approved and executed variations would be included within the relevant Interim Payment Certificate.

It was submitted for the defendant that every payment for additional work done up to point of measurement of work executed was included in the relevant Interim Payment Certificate by the defendant.

I have addressed my mind to Exhibits P15 (i), (ii), (iii) and (iv) in which the defendant requested the plaintiff for variations of different kinds of work. It would have been helpful to the plaintiff's claim if the Interim Payment Certificates were availed to court to account for the payment made

including those for the variations. It was the plaintiff's duty to prepare those certificates and submit them to the defendant for approval before payment could be effected.

It is not clear whether any Interim Payment Certificates were prepared and submitted to the defendant for the claim of Shs. 227,490,242. However, from a copy of the Interim Payment Certificate No.5 which is part of Exhibit D7, it would appear that costs of variations were included in those certificates as stated by the defendant. It was the duty of the plaintiff to prove that they were not included by producing samples of the certificates as evidence. Since no evidence has been led to that effect this court has no basis for allowing this claim and it must fail. I so find.

iii Outstanding Payments

The plaintiff claims from the defendant outstanding payments to the tune of Ushs. 172,063,466/=. It was an agreed fact that at the time of the termination of the subcontracts, there were payments outstanding and due to the plaintiff which still remained unpaid.

The defendant's case is that the above amount was not payable under clause 8 of the subcontracts on account of the plaintiff's stores being in debit.
Clause 8 of the subcontract provides inter alia:

> ***"The amount of the certificate will be subject to any addition or deduction as may be due, in the opinion of the main contractor, under the provisions of this subcontract".***

I agree with the submission of the plaintiff's counsel that the stores supplies reconciliation remains unresolved. The defendant withheld payment due to the plaintiff on the allegation that the plaintiff's stores were in debit. Without reconciliation of the stores supplies being carried out, it is not clear how much the plaintiff's stores were in debit. Much as the defendant was entitled to make deductions from the outstanding amount in the payment certificates in pursuant to clause 8 of the subcontracts, in my view that could only be done after the actual amount had been ascertained by both parties. In this case, the defendant chose to withhold the whole outstanding amount even when there was disagreement on the stores debit. I find that the unilateral manner in which the amount was determined and payments due withheld was not justifiable.

Counsel for the plaintiff in his submission in rejoinder changed his position from completely denying that the defendant was entitled to any amount in the counterclaim and conceded that the agreed stores due to the defendant was Shs. 502, 401,289/=. He also conceded to other claims and made some calculations where he put together what was in his client's view owing to the defendant and offset it from what in his client's view was owing to the plaintiff. To my mind all

this should have been articulated in his earlier submission so as to give the defendant's counsel chance to respond to it.

Nevertheless, since the defendant has a counterclaim which is a separate issue, I will deal with the question of offsetting under that issue. As regards this issue, I find that the plaintiff's outstanding amount of Ushs. 172,063,446/= is payable and it is awarded to it.

iii. Value of Materials on Site

The plaintiff also claimed a sum of Ushs 213,650,628/= for value of materials that were on site at the time the contract was terminated. It was the evidence of PW6 that at the time of termination of the subcontracts, the plaintiff company had materials on site worth Ushs. 228,950,840 and not Ushs 213,650,628/= as stated in the plaint. However the plaint was never amended to reflect that sum. It was also her evidence that the materials supplied to the plaintiff by the defendant which were not yet paid for at the time of termination were worth Ushs 502,401,289/=. According to PW6, the figure of Ushs 502,401,289/= includes materials left on site by the plaintiff and used by the defendant to complete the works.

It was the defendant's evidence that it purchased materials for use by the plaintiff and the value of materials would be recovered from the Interim Payment Certificates. DW2 testified that at the time the contract was terminated the defendant had purchased materials on behalf of the plaintiff in the sum of Ushs. 1,064,196,412/= and only Ushs. 461,494,012/= had been deducted leaving an outstanding balance of Ushs. 536,627,369/=.

Clause 17 of the subcontracts provided for various events whose occurrence would amount to default by the subcontractor and lead termination of the subcontract and what would follow.

The part relevant to this claim states that:

> ***"Thereupon, without prejudice of any other right and remedies upon the termination of the subcontract, the Main contractor may take all subcontractor's materials and equipment on site and use them for purpose of executing the works and remedying any defects therein."***

The subcontracts in the above provision envisaged situations where the contract is terminated but materials are still available on the site. Since parties are bound by their contract, I find that the defendant, having terminated the subcontracts, exercised its rights under clause 17 by taking all the plaintiff's materials on the site and using them to complete the works. For that reason the claim for materials on site is denied.

2) General Damages in the Sum of Ushs 1,750,000,000/=

The plaintiff prayed for an award of general damages amounting to Ushs 1,750,000,000/= (One billion seven hundred and fifty million only). It was submitted that this arose from losses in business and equipment as a result of termination of contract by the defendant.

Having found that the defendant unlawfully terminated the contract, I now address the question of general damages that the plaintiff is seeking for. The principal that governs award of general damages are now settled. In the case of **Kituni Construction Company Ltd v Julius Okeny (Supra)** Bamwine J. stated that general damages are awarded to compensate the plaintiff, not to punish the defendant, and that the general effect of an award for general damages is to place the plaintiff in the same financial position as if the contract had been performed. It is trite law that general damages are awarded at the discretion of the Court.

Mc Gregor (Harvey Mc Gregor), McGregor on Damages, 7th Edition, Sweet & Maxwell, London 1997 suggests factors to be considered in the calculation of damages in building/construction contracts, where the breach is occasioned by the owner/client resulting in non completion of the building project. According to Mc Gregor, the general principles should put the normal measure at the contract price less the cost to the builder of executing or completing the work. He suggests two measures alternative to this one and these are:

(a) The net profit which the builder could have made on the whole contract plus his expenditure in part performance.

(b) For the work done, such proportion of the contract price as the cost of the work done bears to the total cost of the whole contract, plus, for the work remaining, the profit that would have been upon it.

In the case of **Lodder v Slowey [1904] A.C 442** where a contractor was prevented from completing the contract, it was held that the proper measure in assessing damages for loss of profit should be the actual value of the work and materials. The appellate court held that it was immaterial whether the plaintiff, had he been allowed to complete, would have made a profit or a loss. What is important is that the plaintiff did work and spent materials to the benefit of the defendant, and these ought to be compensated.

The general principle is that, in exercising its discretion to award the plaintiff general damages, court should not punish the defendant for the breach of the contract but rather the plaintiff should be compensated so that he/she is placed in the position he/she was prior to the termination of the contract.

Counsel for the plaintiff broke down the claim for general damages as follows:

- Profits expected from complete performance of the two subcontracts – Ushs 450,000,000/=

- Value of detained machinery - Ushs 282,318,400
- Value of materials left on site - Ushs 228,950,840
- Income from the use of detained machinery
- Lost opportunities from termination of the joint venture with Juokos Engineering Limited
- Injury to the plaintiff's financial reputation
- Inability to tender for any other construction works since May 2008 due to the retention of the plaintiff's machinery
- Forceful eviction of the Plaintiff's company officers
- Looting and destruction of the plaintiff company's records, which remain inaccessible to the present day.

In my view the claim for the 2nd and 3rd items should have been made under special damages and strictly proved. The plaintiff chose to tactfully bring it under general damages hoping to get away with the requirement for strict proof. I find this unacceptable and for that reason those claims are rejected. This court cannot award the value of equipment which has not been proved to court as there would be no basis for the figure awarded. Since it is not in dispute that the defendant detained the plaintiff's construction equipment and machinery to date, I will instead order that they should be returned to the plaintiff with immediate effect.

I also wish to point out that the plaintiff has not at all assisted this court by placing before it materials that could be used to evaluate it damages in relation to the first item. I would have been inclined to apply the principal of substantial performance and award the full contract price less what was paid but the plaintiff did not provide information on the payments it had received up to the time of terminating the contract.

I do not know the basis for the outstanding contract sum calculated by counsel for the plaintiff and so I cannot rely on it. It is information that this court was not assisted to appreciate since no evidence was led to prove them.

Doing the best this court can in the circumstances of this case and given the evidence available, I have taken into account the inconveniences and hardships suffered by the plaintiff as a result of the unlawful termination of the subcontracts and retention of the plaintiff's equipment to date. In my view, an award of a block figure of Shs. 300,000,000/= as general damages would be adequate.

(3) Interest

The plaintiffs also sought for interest on (a) and (b) above at the rate of 30% per annum from the date of filing the suit till payment in full. It was submitted for the plaintiff that settlement of debts owed to the plaintiff by the defendant would not be sufficient in compensating the plaintiff for the loss incurred.

In **Harburr's Plasticine Ltd v Wyne Tank & Pump CO. Ltd [1970] 1 QB 447** Lord Denning held:

> ***"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."***

This principle has been applied in various cases in our jurisdiction. See **Kituni Construction Company Ltd vs Julius Okeny (Supra), Petrocity Enterprises (U) Ltd v Security Group (U) Ltd Civil Suit No. 869 of 2004.**

It is trite law that an award of interest by court is discretionary. The plaintiff's failure to use its monies unjustifiably held by the defendant should warrant an award of interest. In the premises, the plaintiff is awarded interest at a rate of 25% per annum on the special damages from the date of filing the suit till payment in full and 21% on the general damages from the date of judgment till payment in full.

Issue 3: Whether the defendant is entitled to the counter claim.

In its counterclaim, the defendant prayed for an award of special damages of UShs. 740,884,628/=, general damages, interest and costs of the suit.

The defendant contended that it was entitled to recover damages it claimed under the counterclaim because it was the plaintiff that unilaterally repudiated both subcontracts by declaring a dispute, suspending all work followed by the abandonment of the site. It was contended further that the defendant was left with no choice but to take over and assume responsibility for the completion of works under both subcontracts at additional costs. It was argued that the defendant as the innocent party was entitled to be compensated by an award for the additional costs incurred to complete the work.

Counsel for the plaintiff submitted that the plaintiff neither repudiated the contract nor abandoned the site but was rather removed from the site by the defendant and so the latter could not claim for damages for breach of contract.

I have already considered the question of repudiation under issue one above and found that the contract was not repudiated. Therefore the claim of damages for breach of contract is not tenable in my view. However, I will proceed to specifically consider each of the defendant's claims as below.

1. **Special damages**

The counter claimant claimed for special damages particularized as follows:

- Liquidated damages - 217,009,445/=
- Additional costs of completion after termination of contract - 238,367,340/=
- Balance on the cost of construction materials purchased by the counter claimant- 275,507,843/=
- Credit facility to the counter defendant - 10,000,000/=

TOTAL - **740,884,628/=**

(a) Liquidated Damages

On the claim for liquidated damages, the defendant led evidence through DW2 Salman Aziz who testified that due to the delay by the plaintiff to complete the works on time, the subcontracts provided that such delays would be compensated for by the enforcement of the liquidated damages clause.

Counsel for the plaintiff submitted that clause 16 of the subcontracts was invoked by both parties and a period within which the contract was to be performed was renegotiated. I am inclined to agree with this position because no evidence was led to show that any liquidated damages were ever claimed by the defendant when actually the plaintiff was behind schedule in completing the work. That is why under the first issue I found that the defendant by its actions varied the terms of the contracts as relate to completion date and accommodated the plaintiff up to the time of termination. I also found that actions of the defendant largely contributed to the delay in execution of the works. It is my considered view that by doing so, the defendant waived its rights to recover liquidated damages under the contract and it cannot raise it at this point.

In reaching the above conclusion I was fortified by a passage from **Chitty on Contracts, 28th Edition, Vol. 1, 1999 page 1158 paragraph 23-039** which states that;

> ***"where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its tenor.***

In addition, I also wish to observe that the defendant did not try to mitigate its loss which all along was foreseeable. The mitigation rule as stated in **Chitty on Contract, 28th Edition, Vol. 1, 1999 at pg 1317 paragraph 27-086 and 27-087** imposes on a plaintiff (counterclaimant) the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.

To that end, I found very instructive the decision of Hodson LJ in **Compania Naviera Maropon S.A v Bowaters Lloyd, Pulp and Paper Mills Ltd [1955] 2 QB 68** that if the plaintiff (read counterclaimant) causes the damage by acting unreasonably in the circumstances in which he was placed, or failed to mitigate the damage, the defendants (read counter defendant) would be relieved from liability which would otherwise have fallen on them.

This principle was applied in the case of **African Highland Produce Ltd v Kisorio [2001] EA 1** where it was held that;

> ***"It was the plaintiff's duty to take all reasonable steps to mitigate the loss he sustained consequent upon the wrongful act in respect of which he sued, and he could not claim as damages any sum that was due to his own neglect. The question of what was reasonable was not a question of law but of fact in the circumstances of each particular case, the burden of proving being on the defendant.***

Based on the above principle, I am of the view that having failed to mitigate its loss the defendant cannot now in its counterclaim seek to be compensated in liquidated damages and it is accordingly denied.

(b) Extra Costs of Completion

The defendant also sought special damages of UShs. 238,367,340/= as extra costs for completing the work. Exhibits D32 and D33 were relied upon to show the quantity and types of materials purchased and used to complete the works. Counsel for the defendant submitted that his client was entitled to the sum as pleaded in paragraph 8(b) of the counterclaim.

Counsel for the plaintiff on the other hand submitted that the counter claim is not justified. He relied on the evidence of **Abele Zubair** who testified that the plaitiff's stores were looted by labourers who were on the site after the termination of the subcontracts and others used by the defendant. Counsel for the defendant did not cross examine that witness when given the opportunity. He stated that he had no problem with the evidence. In effect, the sworn testimony of that witness stands uncontroverted.

On the authority of **Samwiri Masa v Rose Achieng [1979] HCB 29** such facts are presumed to be admitted. I therefore accept the evidence that some materials were looted while others were used by the defendant after breaking into the plaintiff's stores. The plaintiff had ceased control of the construction site with the termination of the subcontracts and eventual takeover of the site by the defendant. There was therefore no way the plaintiff could have prevented the stores from being looted.

Besides, it was the defendant who stopped the plaintiff from completing the works by unlawfully terminating the contract. For those reasons, there is no justification for the plaintiff to be condemned to pay additional costs for the materials procured by the defendant and so the claim is denied.

(c) Balance on the Costs of Materials

The defendant also claimed payment of UShs. 275,507,843/= as balance on the cost of construction materials it purchased for use by the plaintiff. Counsel for the defendant submitted that his client delivered materials worth UShs. 1,064,196,412/= out of which the defendant had only been able to recover UShs. 461,494,012/= leaving an outstanding balance of Ug. Shs 602,702,400/= to be recovered from the plaintiff. He contended that during reconciliation and at the trial PW1 and PW2 conceded to the value of the materials supplied to the defendant as UShs. 963,895,301/=. According to him, when the amount of Shs. 461,494,012 is deducted from UShs. 963,895,301/= the net figure to be recovered from the plaintiff on account of materials purchased would be UShs. 502,401,289/=.

Counsel for the plaintiff submitted that the value of stores owed to the defendant was UShs. 273,450,449/=. He relied on the evidence of PW 6 who was the Finance Director of the plaintiff. She testified that the materials supplied to the plaintiff by the defendant which were not paid for at the time of termination were worth UShs 502,401,289/=. It was also her testimony that the figure of UShs 502,401,289/= includes materials worth UShs 228,950,840/= which were left on the site by the plaintiff and used by the defendant to complete the works. According to her the money which the defendant was entitled to was Ug. Shs 273,450,449/=. This evidence was not shaken during cross examination.

During his cross examination Mr. James Okurut (PW2), also testified that after reconciliation of the stores accounts, it was agreed by both parties that the total supplies made to the plaintiff by the defendant were worth UShs. 963,895,301/=. It was also his evidence that after what had been deducted from the certificates at that point in time, the stores supplies was worth Ug. Shs. 502,401,289/=. Basically, he corroborated the testimony of PW6 that at the time of termination, the balance on materials supplied by the defendant was UShs. 502,401,289/=.

This amount was also conceded by counsel for the plaintiff in his submission in rejoinder with a rider that the costs of materials left at the site should be offset from it to leave a balance of UShs. 273,450,449/= that PW6 testified about. It is also noteworthy that this figure is quite close to the amount of Shs. 275,507,843/= pleaded by the defendant in its counterclaim and not UShs. 502,401,289/= as submitted by its counsel. I am therefore inclined to accept the sum of UShs. 273,450,449/= as the correct outstanding amount on stores and it is accordingly awarded to the defendant with interest of 21% from the date of filing the suit until payment in full.

(d) Credit Facility to the Plaintiff of UShs.10,000,000/=

The final claim of special damages by the defendant was a sum of UShs. 10,000,000/= alleged to have been a credit facility advanced to the plaintiff.

Counsel for the defendant submitted that evidence was led to the effect that upon request from the plaintiff to ease it cash flow, an amount of Ug. Shs. 10,000,000/= was advanced the defendant by cheque.

It was submitted for the plaintiff that the allegation was false. Counsel relied on the evidence of PW6 who testified that during the performance of the works on the site, the plaintiff requested the defendant to provide food to its casual labourers on the site and that the sum of UShs. 10,000,000/= was paid out by cheque for that purpose.

It was also submitted for the plaintiff that the payment was out of mutual agreement outside the contract for construction and was used for the above stated purpose for which the defendant could not now demand as having been used to ease the plaintiff's cash flow.

It is not in dispute that a payment of UShs. 10,000,000/= was made to the plaintiff for the purposes of feeding the casual labourers on site. However, I am not convinced that it was a credit facility advanced to the plaintiff as alleged as no proof was availed to court. Since there is doubt as to the terms of the mutual agreement between the parties regarding this payment, I will give the plaintiff the benefit of the doubt and hold that it was not payable. The claim is therefore denied.

2. General Damages

The defendant sought general damages on the basis that the plaintiff breached the subcontracts by failing to complete the works within the agreed time frame. The defendant also sought to be compensated in general damages for expenses incurred due to the breach of contract.

Having found that it was actually the defendant who terminated the contract, unlawfully, I do not find that it suffered inconvenience which should be visited on another party. The defendant should bear the consequence of its unjustified action and so the claim for general damages is also denied.

***3.* Costs**

Since costs follow the event, on the basis of my findings as above the plaintiff is awarded 80% of the costs of this suit since the counterclaim was partly successful.
In the result,

1) Judgment is entered for the plaintiff in the main suit with orders that the defendant pays the plaintiff

(a) Ushs. 100,224,441/= being the unpaid VAT refund.
(b) Ushs 172,063,466/= being the outstanding payments on the certificates.
(c) Ushs. 300,000,000/= being general damages for unlawful termination of the subcontracts.
(d) Interest at 25% per annum on (a) & (b) above from the date of filing the suit till payment in full.
(e) Interest (c) above at 21% from the date of judgment till payment in full.
(f) 80% of the taxed bill of costs.

2) The defendant is ordered to return the plaintiff's construction equipment and machinery it detained to date with immediate effect.

3) Judgment is entered for the defendant in the counterclaim for Shs. 273,450,449/= being the outstanding costs of materials supplied to the plaintiff. Interest is awarded on that amount at 21% per annum from the date of filing the suit till payment in full. The total amount will be offset from what is awarded to the plaintiff above.

I so order.

Dated this 7th day of November 2012.

Hellen Obura
JUDGE

Judgment delivered in chambers at 4.00 pm in the presence of Mr. Arthur Mpeirwe for the plaintiff/counter defendant and Mr. Patrick Alunga for the defendant/counterclaimant. Both parties were absent.

JUDGE
7/11/2012