

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL SUIT NO 377 OF 2009**

**COMMERCIAL DIVISION**

**ALPHA GAMA ENGINEERING ENTERPRISES)..... PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL)..... DEFENDANT**

**BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA**

**JUDGMENT**

The Plaintiff, a limited liability Company incorporated in Uganda, brought this action against the Attorney General of Uganda hereinafter referred to as the Defendant in his representative capacity pursuant to the provisions of the Government Proceedings Act cap 77. The Plaintiff claims a sum of Uganda shillings 24,750,967/= retention fees, Uganda shillings 154,971,760/= being the costs of additional works in the construction of an administrative block at Masindi. The total claim of the Plaintiff is Uganda shillings 179,705,727/= shillings. The Plaintiff claims interest from 14 November 2008 at 25% of till payment in full, general damages and costs of the suit.

The Plaintiff avers that in September 2007, it executed a contract with the Government of the Republic of Uganda represented by the Ministry of Internal Affairs for the construction of an administrative block at Kabalye PTS Masindi and the contract price was Uganda shillings 419,220,252/=. The Plaintiff executed all the contract works and completed the construction of the administrative block as proven by a letter dated May 2008 and on the 20 September 2008; it handed over the premises to the Ministry of Internal Affairs, Uganda Police Force. At the time of the said handover the Plaintiff had only been paid Uganda shillings 398,258,791/= leaving a balance of Uganda shillings 20,961,461/= out of the contract price. However before completion of the construction works sometime

in March 2008, the Plaintiff was requested by the Defendant's servants to carry out additional works. The additional works inclusive of VAT cost **Uganda shillings 151,157,000/=**. Instructions to carry out additional works were confirmed by letter dated 14<sup>th</sup> of May 2008. Additionally on 6 June 2008 the Plaintiff Company received a letter from the Project Manager giving the Plaintiff a go ahead to execute the works. Additionally on 21 October 2008 the Project Manager requested the Plaintiff to finalise the extra works in time for the visit of his Excellency the President of the Republic of Uganda to Kabalye PTS Masindi. On 4 January 2008 the Project Manager wrote to the Undersecretary, Police Headquarters specifying the extra works and recommending that the Plaintiff be paid **Uganda shillings 154,971,760/=**.

The administration block constructed by the Plaintiff was commissioned by the President of the Republic of Uganda on 2 December 2008 and is in use. On 21 August 2008, the plaintiff avers that the director of logistics and engineering Uganda Police wrote to the Permanent Secretary Ministry of Works and transport stating and advising that the interim payment certificate number four corresponding to accomplished works is **Uganda shillings 47,495,864/=** far less than what the Plaintiff is entitled to and has also never been paid. Consequently the Plaintiff suffered a lot of inconvenience, and damages as a result of the Defendant's failure to pay the Plaintiff the said money and the prayers in the plaint are for:

1. Uganda shillings 154,971,760/= being the costs for additional works of construction of administrative block at Kabalye PTS Masindi.
2. Uganda shillings 24,733,969/= inclusive of VAT being the retention fees withheld beyond the defects liability period for the construction of the administrative block under the original contract.
3. Interest at 24% per annum on items 1 and 2 from 14 November 2008 till payment in full.
4. General damages
5. Costs of the suit.

In its written statement of defence the Attorney General agreed that the Plaintiff executed a contract with the Government of the Republic of Uganda represented by Ministry of Internal Affairs for the construction of an administrative block at Kabalye Police Training School (PTS) in Masindi. The written statement of defence denies that the Ministry of Internal Affairs ever requested the Plaintiff Company to carry out extra works over and above the works the subject matter of the contract between the Plaintiff and the Defendant. The Attorney General avers that the Force Estates Officer of the Uganda Police Force had no authority to commit the Government of the Republic of Uganda for the Plaintiff to carry out extra works in the sum of **Uganda shillings 151,187,000/=** without securing the necessary authority from the Accounting Officer/Permanent Secretary of the Ministry of Internal Affairs and/or the Contracts Committee of the Ministry of Internal Affairs. Consequently the Defendant's position is that the Plaintiff carried out the purported extra works without lawful instructions from the Government of Uganda as represented by the Ministry of Internal Affairs.

Several attempts were made to have the hearing take of when the matter came for hearing. The suit was originally for trial by Honourable Lady Justice Stella Arach prior to her elevation to The Court of Appeal when it came for formal proof on 15 February 2010. A representative of the Attorney General Mr Elisha Bafirawala negotiated for a belated written statement of defence. The learned State Attorney submitted before Court that the Plaintiff's suit was a proper case for settlement out of Court and sought an adjournment to enable him seek instructions to that effect. Honourable Lady Justice Stella Arach judge of the High Court as she then was adjourned the matter to 15 March 2010 at 10 AM for mention to record a settlement or proceed if no settlement had been reached. She also set aside the default judgment.

Before the matter was concluded Honourable Lady Justice Stella Arach was elevated to the Court of Appeal and the suit file assigned to me for trial. Several attempts were made to have the Attorney General's representative attend Court but in vain. On 20 December 2011 this suit proceeded ex parte after satisfaction of the Court through the affidavit of service dated 22<sup>nd</sup> of November 2011 and filed on Court record on 20 December 2011 attaching the acknowledgement of

the Attorney General's Department of Civil Litigation for service of the notice of hearing date. The Plaintiff called one witness Eng Paschal R Gakyaro PW1 and closed its case. Counsel put in written submissions and the Court directed that the Attorney General be served with the written submissions. This was at the discretion of the Court. The Plaintiff filed written submissions on 11 January 2012 while the Attorney General filed submissions on 9 February 2012. At the hearing learned Counsel Francis Katabalwa represented the Plaintiff.

### **Written Submissions of the Plaintiffs**

In his written submissions learned Counsel for the Plaintiff Company submitted on the following issues:

1. Whether the Plaintiff Company was instructed by the Government of Uganda as presented by the Ministry of internal affairs to execute extra works worth Uganda shillings 151,187,000 At Kabalye Police Training School Masindi.
2. Whether the Plaintiff Was Paid by the Government of Uganda Represented by the Ministry of Internal Affairs for the Additional/Extra Works for the Administration Block at Kabalye Police Training School, Masindi.
3. Whether the Plaintiff is entitled to protection fee of shillings 24,732,969/=
4. Remedies.

After reviewing the testimony of PW1 learned Counsel for the Plaintiff submitted on the issues as follows:

**Whether the Plaintiff Company was instructed by the Government of Uganda as presented by the Ministry of internal affairs to effect extra works worth Uganda shillings 151,187,000 At Kabalye Police Training School Masindi.**

Counsel contended that the Plaintiff Company was instructed by the Government of Uganda as represented by the Ministry of Internal Affairs - Uganda Police Force to effect additional works on the Administration Block at Kabalye Police Training School work **Uganda shillings 154,971,764/=**. Counsel contended that exhibit P5 dated 14<sup>th</sup> of May 2008 from the Force Estates Officer Mr E Richard to the

Managing Director of the Plaintiff Company and exhibit "P2" and annexure P2 dated 7<sup>th</sup> of May 2008 confirmed the instructions to do the additional works.

Furthermore exhibit P6 dated 6<sup>th</sup> of June 2008 the last and second last paragraph at the bottom is further evidence that the Plaintiff was given extra works to do. It reads as follows:

"Based on the above work requirements, you are given a go ahead to proceed and execute the works by the decision of the Project Manager".

"As per recommendations of the site inspection dated 30 March 2008, you have accordingly submitted the cost implication resulting from the expected extra works dated 1st April 2008"

Counsel submitted that annexure 8 which is exhibit P8 dated 4<sup>th</sup> of January 2009 from the Project Manager Mr E Richard to the Undersecretary Police Headquarters in the last paragraph thereof proposed that direct procurement be invoked to award this works to the Plaintiff who is executing the work and this is what was done.

On the second issue of whether the Plaintiff was paid by the Government of Uganda represented by the Ministry of Internal Affairs for the additional/extra works for administration block but at Kabalye Police Training School Masindi, Counsel submitted that the Plaintiff was already paid **Uganda shillings 47,000,000** for the additional works out of the total of **154,971,760/=** leaving a balance of **Uganda shillings 107,971,160/=** unpaid according to the testimony of PW 1. **Uganda shillings 47,000,000/=** was paid to PW 1's Company after the instant suit had been filed in Court on the 13<sup>th</sup> of October, 2009.

On the third issue as to whether the Plaintiff is entitled to the retention fees of **Uganda shillings 24,733,969/=**

Counsel referred to the testimony of PW 1 that during the six months defects liability period he repaired all the defects that had emerged but he was not paid money due amounting to **Uganda shillings 24,733,969/=** during the execution of the original contract signed on the 6<sup>th</sup> of September, 2007 and exhibited as

Plaintiffs exhibit P1. Submitted that according to clause 48.2 at page 24 of exhibit P1 it is provided by that:

"On completion of the whole of the work; half the total amount of retained shall be repaid to the contract and half when the defects liability period has passed and the Projects Manager has satisfied that all defects notified by the Project Manager to the Contractor before the end of this period have been corrected".

PW1 testified that after six months he was called upon to work on the defects according to the contract which he did but he has never been paid for the monies withheld to date. In the premises Counsel for the Plaintiff submitted that the Plaintiff is entitled to a sum of **Uganda shillings 24,733,696** being the retention fee supposed to be paid after the defects liability period and upon correction of all defects which the Plaintiff did.

#### Remedies

In the premises Counsel for the Plaintiff submitted that the Plaintiff is entitled to:

- (1) **Uganda shillings 107,971,160/=** as being costs of the additional works done on the Administration Block.
- (2) **Uganda shillings 24,733,969/=** retention fee withheld beyond the defects liability period under the original contract dated 6th of September 2007.
- (3) Interest at 24% on items 1 and 2 above.
- (4) General damages
- (5) Costs of the suit

On the 9 February 2012 the Attorney General's representative filed written submissions in reply. On the 20<sup>th</sup> of December 2011 when the suit came for hearing the Attorney General was not represented. The affidavit of Fred Kironde paragraph 3 thereof showed that the Attorney General had been served on 25 October 2011 and the suit was also cause listed. Learned Counsel for the Plaintiff then applied under order 9 rule 20 (1) (a) of the Civil Procedure Rules for the hearing to proceed ex parte. I directed that the written submissions of the Plaintiff be served on the Attorney General. It is after service of the written

submissions on the Attorney General's Chambers that the Attorney General decided to file written submissions in reply. I saw no impediment to justice in admitting the written submissions of the Attorney General in the circumstances.

### **Written submissions of the Attorney General**

In the written submissions the Attorney General writes that the suit was referred for mediation under mediation reference number 164 of 2010 and mediation summary was filed on 30 March 2010. The Plaintiffs served the Attorney General with scheduling notes on 28 September 2011. Counsel submitted that the Court should note that both the Plaintiff Company and the Attorney General were pursuing different avenues of settling the suit and both parties were at an advanced stage. Learned Counsel submitted that it was a surprise when they were served on 31 January 2012 with a letter dated 27<sup>th</sup> of January 2012 from the Court directing the Plaintiffs to serve the Attorney General with written submissions and informing the Attorney General that this matter was coming up for judgment on 10 February 2012. The Attorney General's written submissions stresses that they were never served with any hearing notices regarding the hearing of the matter as submitted by the Plaintiff. Secondly, that they were served with the Plaintiffs written submissions on 31 January 2012.

This is rather surprising in view of the fact that that Counsel for the Attorney General goes ahead to make written submissions in reply to the submissions of the Plaintiff. Order 9 rules 27 of the Civil Procedure Rules permits a Defendant who was not duly served to apply to set aside the order to proceed ex parte upon showing sufficient cause. This is not done in written submissions but in an application to set aside the order to proceed ex parte.

Notwithstanding the above, the Attorney General has opted to file written submissions in reply to the Plaintiff's submissions. It is therefore presumed that the Attorney General has suffered no prejudice and the filing of written submissions is sufficient to represent the Attorney General's interest in the matter.

Counsel for the Attorney General submitted that the first and second amendment of works did not obtain the approval of clearance from the Public Procurement and Disposal of Public Assets contrary to section 59 (2) and (3) of the Public Procurement and Disposal of Public Assets Act cap 2003 and there was no clearance obtained from the Attorney General. The Plaintiff was itself at all material times aware of this. Counsel therefore submitted that since the clearance of the Attorney General, from the PPDA was not acquired, the first and second amendment of the contract was illegal and therefore any obligations arising from this illegal contract/transaction cannot be enforced or sanctioned by Court. Counsel referred to the case of **Nsimbe Holdings limited versus Attorney General, Constitutional Petition number 2 of 2006 at pages 8 - 9**, where it was held that under article 119 of the 1995 constitution of the Republic of Uganda, any contract, agreement, treaty, convention or document of whatever name called to which government is the party shall not be concluded without the legal advice from the Attorney General and it is therefore unconstitutional to proceed without the legal advice of the Attorney General. In **Kisugu Quarries Limited versus Administrator General, Supreme Court civil appeal number 10 of 1998, [1999] 1 EA 153** it was held that: "no Court to enforce an illegal contract or allow itself is to be made an instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal if the legality is duly brought to the notice of Court and if the person invoking the aid of the Court is himself not implicated in the illegality."

Learned Counsel submitted that the Plaintiff is not entitled to any payment of the works made on the first and second amendment and as such is not entitled to the sum of **Uganda shillings 107,675,805/=** since it is a transaction arising out of an illegal transaction/contract and the Court cannot be seen to sanction an illegality or any obligations arising from it.

Resolution of issue number 3.

Clause 48.2 of exhibit P1 provides that:

"On completion of the whole of the work, half of the total amount retained shall be repaid to the Contractor and half when the defects liability period

has passed and the Project Manager has certified that all defects notified by the Project Manager to the Contractor before the end of the dispute have been corrected."

Learned Counsel submitted that the Plaintiff did not obtain the certification from the Project Manager that all defects as notified to him by the Project Manager had been corrected. Section 2 (n) of the general conditions of contract, exhibit P1 provides that a defects liability certificate is issued by the Project Manager upon correction by the Contractor/the Plaintiff. Therefore in the absence of the above Counsel submitted that the Plaintiff is not entitled to the retention of **shillings 24,733,969/=** as claimed. And further where the Plaintiff corrected any defects arising from the first and second amendment of works he is not entitled to this fee since it was performing an illegal contract/transaction.

As far as remedies are concerned learned Counsel for the Attorney General submitted that the Plaintiff is not entitled to any remedies sought.

#### **Plaintiffs Written Submissions in Rejoinder:**

The Plaintiff was lawfully instructed by the Government of Uganda as represented by the Ministry of Internal Affairs to execute the works at Kabalye Police Training School in Masindi.

According to the contract executed between the Plaintiff and the Government of Uganda, the general conditions of contract with the procurement of works exhibit P1 clause 4 thereof at page empowered the Project Manager except as otherwise specifically stated in the said contractual matters between the employer (Government of Uganda) and the Contractor in the role in representing the employer. Clause 4.2 thereof the Project Manager would have obtained the express approval for any of the decisions specified in the special conditions of contract SCC. Counsel submitted that from the foregoing the instructions for the extra works were lawfully made under the general conditions of contract which empowered the Project Manager to make such instructions.

Secondly, Counsel submitted that as to whether the Project Manager obtained the employers approval as required under clause 4.2 of the general conditions is a

matter which the Plaintiff had no control of. It would be an internal matter/internal procedure within the institutions of the employer. And the Contractor could not be made a party to such procedures. Counsel contended that in this case and in March 2008 and before completion of the works according to the contract the Defendant was requested to carry out extra/additional works as stipulated in the plaint. On 14 May 2008 Mr Edyegu Richard the Force Estates Officer wrote to the Plaintiff confirming the instructions to carry out additional works, and that on 6 June 2008 the Plaintiff received a letter from the Project Manager Mr Edyegu Richard giving the Plaintiff a go ahead to execute the extra/additional works. On 21 October 2008 said Project Manager wrote to the Plaintiff asking it to finalise the additional works. All these show that the Project Manager had authority based on clause 4 of the general conditions of contract.

The case of **Nsimbe the Holdings Limited vs. Attorney General** (supra) was not properly applied by the Defendants Counsel to the facts of this case. It was said in that case under article 119 of the Constitution of the Republic of Uganda a contract/agreement, treaty, convention or document or whatever name called to which the government is a party shall not be concluded without the legal advice from the Attorney General. It is not disputed that the agreement/contract which the Plaintiff Company and the Government of Uganda as represented by the Ministry of Internal Affairs entered into on the 6<sup>th</sup> of September 2007 was with the legal advice of the Attorney General. The contract made with the advice of the Attorney General is the one which empowered the Project Manager in the clause 4 of the general conditions of contract to decide contractual matters between the employer and the Contractor in the role representing the employer.

Counsel submitted that the case of **Nsimbe holdings limited vs. Attorney General** does not apply where legal advice of the Attorney General was already given.

Learned Counsel for the Plaintiff contended that the Defendant as presented by the Ministry of internal affairs, attempted to settle this claim amicably and later on paid **Uganda shillings 47,000,000/=** out of a sum of **shillings 154,971,760/=** after the suit was filed. They could therefore not claim that the same contract was an illegality yet work was done as instructed.

About issue number 3 Counsel submitted that the Plaintiff Company was not paid the retention fee of **Uganda shillings 24,733,969/=** arising from the original contract. The assertion that the Plaintiff did not obtain a certificate from the Project Manager after the defects had been corrected is false and is evidence from the bar which is inadmissible.

Lastly Counsel protested the allegations by the Attorney General that they were never served with a hearing notice this matter. Learned Counsel contended that the Court record is clear that whenever the case was fixed for hearing, they were hearing notices extracted and served on the Attorney General who acknowledged receipt as evidenced from the affidavit of service filed on the Court record.

Finally the learned Counsel for the Plaintiff submitted that it is not true that the Plaintiff Company and the Attorney General were pursuing different avenues of settling the suit and that the settlement was at an advanced stage. He contended that mediation failed.

### **Judgment**

I have carefully considered the pleadings of the parties, the testimony of PW1, the documents exhibited and the written submissions of Counsel.

In the Attorney General's written submissions learned Counsel makes reference to evidence that is not before the Court. The affidavits of service of hearing notices on the Attorney General's chambers are sworn by Fred Kironde, a Law Clerk employed by Messrs Katabalwa and Company Advocates. In an affidavit sworn on 26 September 2011 he avers that on 29 August 2011 he served hearing notices on the Attorney General's Chambers and attached a stamped copy of the acknowledgement dated 29th of August 2011 which stamped reads Ministry of Justice and Constitutional Affairs Directorate of Civil Litigation and is signed. This affidavit was filed on Court record on 29 September 2011. Again in an affidavit sworn by the same law clerk filed on Court record on 20 December 2011 it is averred that on the 25th day of October 2011 he served the hearing notices on the Attorney General wherein the Clerk in the registry took it to the State Attorney works of service by signing and stamping on his copy which is attached

to the affidavit. This dumb acknowledgement of the hearing notice has the stamp of Ministry of Justice and Constitutional Affairs Directorate of Civil Litigation and dated 25th of October 2011. The hearing notice is for the 20th day of December 2011. Also attached to the affidavit of service is a letter of the Plaintiffs lawyers addressed to the Acting Director Civil Litigation dated 21st of October 2011 which is also acknowledged on 25 October 2011 with the stamp of the Directorate of Civil Litigation. The letter reads in part and I quote:

"We refer to the above matter where we act for the Plaintiff.

Following the failure of the Attorney General to be represented in Court whenever this matter comes for hearing, the trial Judge on 29 September 2011 directed us that we serve you directly with a hearing notice for the hearing you on 20th of December 2011.

Kindly accept service."

On 20 December when the matter came for hearing, learned Counsel for the Plaintiff applied to proceed ex parte when there was no representative from the Attorney Generals Chambers. The Court accordingly on been satisfied that service had been effected and all efforts had been made by the Plaintiff to procure the attendance of the Attorney General's representatives, ordered the suit to proceed ex parte. When the matter proceeded ex parte the Plaintiff called PW1 and closed its case. No additional evidence was produced after this. The learned Attorney General's representative can only refer to the evidence on record and any reference to any other evidence not adduced in Court orally or by way of documentary evidence would be ignored for purposes of this judgment.

The major ground of attack of the Attorney General's Chambers is that the contract for additional works was an illegal contract. The Attorney General's contention is that the requisite consent of the Attorney General was not obtained and alternatively the Project Manager had no authority to order for additional works as he did in this case.

The background to the suit is that on 6<sup>th</sup> September 2007 an agreement was executed between the Government of the Republic of Uganda represented by the

Ministry of Internal Affairs and Messrs Alpha Gama Engineering Enterprises Ltd to execute the works for the construction of an Administration block at Kabalye Police Training School (PTS) Masindi. This agreement was exhibited as exhibit P1 and is not in dispute. What is in dispute is whether additional works were carried out by Alpha Gama Engineering Enterprises Ltd and whether the Government is liable to pay for additional works. Reference to additional works is made in exhibit P2 which is a letter to the Project Manager, Uganda Police Force by the Plaintiffs on the 7th of May 2008. The letter signed by PW1 and copied inter alia to the Undersecretary/Police reads in the second paragraph thereof as follows:

"The verbal instructions given in the site visit of 30<sup>th</sup> of April 2008 have been partially implemented and this is due to the delay in issuing written acceptance of proposals for costs implications for additional works. It is therefore our plea that you sort out the logistics regarding the additional works for parade ground, a parking yard and access road otherwise the remobilisation costs will have to be added after we have demobilised."

Again on 20 September 2008 the Plaintiff wrote to the Project Manager, Uganda Police Force, Estates Department in letter exhibited as exhibit P3 in which it gives the costs of the additional works. The Plaintiff relies on instructions letter dated 6<sup>th</sup> of June 2008. It indicates that it had completed the additional works. Exhibit P4 is a letter dated 1<sup>st</sup> of April 2008 and addressed to the Project Manager, Force Estates Officer, Uganda Police Force which reads as follows:

"RE:- CONSTRUCTION OF THE ADMINISTRATION BLOCK AT KABALYE PTS MASINDI.

EXTRA VARIATIONS.

During the site inspection by the IGP, it was observed that the parking yard, parade ground and access roads to the two places require enlargement to match the activities that will be taking place in the school.

Also the installations of curtain vertical blades instead of curtain boxes were preferred.

Based on the recommendations of the site inspection of 30th of March 2008 we are submitting the attached details as variations costs implications for your authorisation and approval.

The total cost implication for VO8 and VO9 shall be **Uganda shillings 151,187,000/=** excluding variations (VO1 to VO7) already submitted to you."

On the part of the Police several references were made to the additional works to be carried out by the Plaintiffs. The first reference is exhibit P5 being a letter from the Force Estates Officer dated 14<sup>th</sup> of May 2008 and addressed to the Managing Director Messrs Alpha Gama Engineering Enterprises Ltd . The letter makes reference to the letter of the Plaintiffs dated May 7<sup>th</sup> 2008 referred to above. It reads in part:

"Reference is made to yours unreferenced but dated May 7<sup>th</sup> 2008. My attention is also drawn to the verbal instructions on the date mentioned therein.

This is to confirm that the instructions still stand. Proceed and execute the works as agreed.

Forward the attendant bills of quantities which would be verified together with our team as soon as possible."

The letter of the Plaintiffs dated 7<sup>th</sup> of May 2008 refers to instructions to carry out additional works. The Project Manager/ Force Estates Officer in another letter dated 6th of June 2008 and written to the Plaintiffs refers to extra works. This letter was exhibited as exhibit P6. It reads as follows:

"RE:- CONSTRUCTION OF THE ADMINISTRATION BLOCK AT KABALYE PTS - EXTRA WORKS (VO 8 AND VO 9)

It has been found necessary to increase the parking and parade yard of the administration block in order to accommodate the anticipated recruits population and traffic volume. Secondly considering the resulting outlook of the new administration building, it was also recommended that instead of using cloth curtains, vertical blinds be used.

As per recommendations of site inspection dated 30<sup>th</sup> of March 2008, you have accordingly submitted a cost implication resulting from the expected extra works, dated first of April 2008.

*Based on the above works requirements you are given a go ahead to proceed and execute the works by the decision of the Project Manager.*

This being an admeasurements contract the quantity of the actual work done will be verified during site inspection for onward financial processing."  
(Emphasis added)

The letter is signed by one Richard Edyegu, ACP as Project Manager/FEO and copied to the Undersecretary/Police. The letter requests the Plaintiff to go ahead and proceed to execute the works by the decision of the Project Manager. It also refers to the cost implications of the additional works and provides that the actual quantity of the work done will be verified during site inspection for purposes of financial processing. In addition the Defendant's servants wrote another letter dated 21st of October 2008 addressed to the Plaintiffs about construction of Administration block at Kabalye PTS Masindi. It requires the Plaintiff to carry out the final touches on the building and its surroundings in preparation for the visit of his Excellency the President of the Republic of Uganda to Masindi district. The letter is written by the Project Manager/Force Estates Officer and was exhibited as exhibit P7. On 4 January 2009 the Project Manager/Force Estates Officer wrote to the Undersecretary Police headquarters giving details of the additional works carried out by the Plaintiffs. The letter notes that the changes and the corresponding costs implications arose due to a number of unforeseen changes which were recommended due to the site inspection by a team led by the Assistant Inspector General of Police, administration composed of the Undersecretary Police, Force Estates Officer, the Senior Water Engineer Masindi, and some police technical staff. The Project Manager noted that the detailed cost implication of the extra works exceeded 25% of the contract sum and as such required the input of the contracts committee. The last paragraph of the letter is material it reads: "it's our proposal that direct procurement be invoked to award

this works to Alpha Gama Engineering Enterprises Ltd who is executing this work." This letter was admitted as exhibit P8.

Eng Paschal R. Gakyaro PW1 adduced in evidence exhibit P1 the contract in issue and a letter dated 7<sup>th</sup> May 2008 from Plaintiff to the Project Manager Uganda Police Force which was tendered in evidence as Exhibit P2. Several other exhibits were tendered in evidence. These are Exhibit P3 letter dated 20<sup>th</sup> September 2008 from the Plaintiff to Project Manager Uganda Police Force; exhibit P4 a letter dated 1<sup>st</sup> April 2008 from the Plaintiff to Project Manager Uganda Police; exhibit P5 letter dated 14<sup>th</sup> May 2008 from Uganda Police Estates Officer to the Plaintiff; Exhibit P6 letter dated 6<sup>th</sup> June 2008 from the Project Manager to the Plaintiffs; exhibit P7 letter dated 21<sup>st</sup> October 2009 from the Project Manager to the Force Estates Unit addressed to the Plaintiff Company; exhibit P8 letter dated 4<sup>th</sup> January 2009 from Project Manager to Under Secretary Police headquarters; Exhibit P9 letter from director of Logistics and Engineering dated 21<sup>st</sup> August 2009 to PS Ministry of Works and Transport; and exhibit P10, a Statutory notice of intention to sue dated 16<sup>th</sup> February 2009.

PW1 testified that exhibit P1 which is a contract between Plaintiff and the Ministry of Internal Affairs to construct administration offices at Kabalye Police Training School was executed on 6<sup>th</sup> September 2007. The Plaintiff did the works described in the agreement exhibit P 1 and in addition after completion of the said works they were instructed to carry out additional works under a variation clause. Under this contract there is provision for the client to instruct the Plaintiff to do more work. The Plaintiff could not handover because the variations were related to the main contract. The extra works occurred when there was a site meeting with police officers and they decided that the Plaintiff constructs a parade ground, a parking yard, provide a bigger pipe for water to the building originally not there. The total amount of additional works was 151,000,000/=. But when the instructions came, it indicated 154,000,000/=. The final variation was worth 154,000,000/=. The site meeting was attended by the Under Secretary who is the Accounting Officer of the Police Force, the Project Manager Mr. Richard Edyegu and engineers representing the police force. There was the Assistant Inspector General of Police. PW1 attended with his site supervisors. That is when

the decision was taken. Exhibit P4 has the additional works. After the site meeting the Plaintiff proposed the costs and under exhibit P5 the Defendant answered and stated that the instructions still stood and the Plaintiff could proceed with the works as agreed. The Plaintiff executed the extra works and even after six months extension period they were asked to address some other defects which they did. PW1 testified that when they requested for payment, there was no response.

After the site meeting the Plaintiff mobilised and did the extra works because the project had a time frame and they did not want the matter to drag. Before they could complete, instructions came from the Project Manager on the 6<sup>th</sup> June 2008 exhibit P6 and they carried out the instructions as instructed. PW1 further testified that the buildings constructed were to be commissioned by HE the President and they added two items to provide extra terrazzo area and plague for commissioning the building. The amount went up by 3.7 million and the claim went up to 154,000,000/=.

Out of the money claimed the Plaintiff was paid Shs 47,000,000/= when the Plaintiff's lawyers wrote to them but they have kept quiet about the rest. The balance outstanding is **Shs 107,000,000/=** and **Shs 24,000,000** which was retained by them. The amount was retained under the main contract. PW1 made efforts to demand for this money but due to abrupt transfers and change of officers it was not processed. PW1 also went to the Force Estates Office and now called the Force Logistics Office and met other people. Mr. Bangirana the Chief Logistics Officer Uganda Police Force told PW1 to make the claim in Court because they would never pay.

Finally PW1 testified that the money involved in the contract was business money borrowed from creditors who want their money back but the Plaintiff does not have it. Interest rates have gone up. If the Plaintiff had this money and it would have multiplied it by 4 times. PW1 prayed that the Plaintiff is paid so that it can settle. The building was opened by His Excellency and it is being used.

The Attorney General submissions on this matter is that the first and second amendment of works did not obtain the approval of clearance from the Public Procurement and Disposal of Public Assets Authority contrary to section 59 (2)

and (3) of the Public Procurement and Disposal of Public Assets Act 2003. Secondly, the Attorney General contends that the Plaintiff had not got clearance for the agreement from the Attorney General. I have reviewed the authorities submitted by learned Counsel for the Attorney General namely **Nsimbe Holdings Limited versus Attorney General Constitutional Petition No 2 of 2006 at pages 8 to 9**. The Constitutional Court held that it was wrong for Nsimbe Holdings limited to enter into the transaction referred to in that suit without the advice of the Attorney General in accordance with article 119 (5) of the Constitution. This is that it was unconstitutional for National Social Security Fund to enter into a merger agreement with a private Company without submitting such agreement with the Attorney General for legal advice.

I have carefully scrutinised the contents of exhibit P1 which is the main agreement for consideration. It is not in dispute that the agreement exhibit P1 was executed with the requisite legal advice and participation of the Attorney General. What is disputed is whether the additional works required the consent and legal advice of the Attorney General. Clause 1.1 deals with definitions of words and expressions used in the agreement. The word "variation" is defined under clause 1.1 (hh) to mean "*an instruction given by the Project Manager which varies the Works*". Secondly clause 1.1 (E) defines "*compensation events*" as "*those defined in clause 44 here under*". The term Project Manager is also defined by clause 1.1 (y) S... "*... Is the person named in the SCC (or any other competent person appointed by the employer and notified to the Contractor, to act in replacement of the Project Manager) who is responsible for supervising execution of the Works and administering the Contract*". Section 1.1 (aa) defines SCC to mean "*the Special Conditions of Contract*". The SCC is found at page 25 of exhibit P1. It provides that the Project Manager is: "**The Force Estates Officer, Uganda Police Force Estates Department, Jinja Road, PO Box 7262, Kampala, and Telephone 041 - 231144.**

It follows that the letters written as spelt out above were written by the Project Manager defined in exhibit P1. Clause 40 of the agreement provides for payment for variations. Clause 40.1 provides as follows:

"40.1 The Contractor shall provide the Project Manager with a quotation for carrying out the variation when requested to do so by the Project Manager. The Project Manager shall assess the quotation, which shall be given within seven days of the request or within any longer period stated by the Project Manager and before the variation is ordered.

Clause 44 provides for compensation events. The factors provided for under the clause that are considered compensation events include under clause 44.1 (g) instructions given by the Project Manager for dealing with unforeseen conditions, caused by the employer, or additional work required for safety or other reasons. It reads as follows:

"the Project Manager gives an instruction for dealing with unforeseen condition, caused by the Employer, or additional works required for safety or other reasons."

It is therefore clear that the Project Manager has power to order for additional works for safety or other reasons. In this case the correspondence clearly shows that the Project Manager had ordered for additional works and unequivocally confirmed the order in a letter addressed to the Plaintiffs. The letter dated 6<sup>th</sup> of June 2008 clearly instructs the Plaintiff to go ahead with the execution of additional works. This letter is exhibit P6 and reads in part as follows:

"Based on the above works requirements you are giving a go ahead to proceed and execute the works by the decision of the Project Manager."

The Plaintiff was notified of the decision of the Project Manager to carry out additional works. It is clear from the submissions of the learned Attorney General's representative that the award of the contract to construct administrative building at Kabalye Police Training School is not in dispute in terms of article 119 of the 1995 Constitution of the Republic of Uganda. It is therefore clear that this contract exhibit P1 complied with the law. Secondly an analysis of the provisions of the contract shows that the Project Manager has powers under the main contract to order for additional works.

Secondly the issue is whether the additional works required the consent of the Employer. Learned Counsel for the Plaintiff submitted that the Project Manager is supposed to obtain the consent of the employer under clause 4.2 for any of the decisions specified in the Special Conditions of Contract. Under the special conditions of contract GCC 4.2 the Employer's specific approval is required for (b) variations of work resulting in an increase in the initial contract price. At first glance it would appear that the consent required is obligatory on both parties to the contract, namely the Plaintiff and the Defendant's representative, the Project Manager. This depends on the construction of the provisions dealing with the powers of the Project Manager to order for the variation of works. The definition of the term "variation" however is that: it is an "instruction given by the Project Manager which varies the works." An "instruction" in ordinary language means directions given for somebody to carry out specified acts or to abstain from carrying out specified acts. The word "instruction" has the same meaning as a "direction". It imports in it the ability to direct somebody to do something and does not connote an agreement between the person instructing and one receiving instructions. Chambers 21st Century Dictionary defines the word 'instructions' as: "a direction, order or command."

Even if one construes the terms that deal with variation of works under clause 44.1 (g) which provides for compensation events, the languages used negates any participation of the Plaintiff in obtaining consent for any variation. It reads as follows: "the Project Manager gives an instruction for dealing with unforeseen condition, caused by the Employer, or additional works required for safety or other reasons." It therefore follows that it is the Project Manager who gives instructions to carry out additional works. The duty to obtain consent is therefore upon the Project Manager. By the same analogy, the obligations of the Plaintiff as stipulated in the contract exhibit P1 is inter alia restricted to providing the estimates of costs for the additional works to the Project Manager. This is discerned from clauses 40.1 and 40.3 of the agreement exhibit P1. To crystallise the point, the said clauses are quoted in full here in below:

Clause 40.1 provides as follows:

"The Contractor shall provide the Project Manager with a quotation for carrying out the variation when requested to do so by the Project Manager. The Project Manager shall assess the quotation, which shall be given within seven days of the request or within any longer period stated by the Project Manager and before the variation is ordered.

It is the Project Manager who requests the Contractor for a quotation to carry out additional works. The Project Manager assesses the quotation. This quotation is to be provided within seven days of the request or a longer period determined by the Project Manager. The provision makes it crystal clear that the variation is ordered by the Project Manager. The duties between the Project Manager and the Contractor are further clear under clause 40.3 of exhibit P1 which provides as follows:

"If the Contractors quotation is unreasonable, the Project Manager may order the Variation and make a change to the contract price, which shall be based on the Project Managers forecast of the effects of the Variation on the Contractors costs.

The Project Manager assesses the quotation and takes into account the effect of the price on the main contract. The question of whether the additional costs will be within the costs of the main contract, or will exceed the costs of the main contract by over 25% is within the powers of the Project Manager. It is therefore the duty of the Project Manager to seek consent of the Employer under the Special Terms and Conditions. The conclusion is inevitable. There is no obligation on the part of the Plaintiff to seek consent of the Employer before embarking on the execution of additional works. It is sufficient for the Plaintiff to comply with the instructions or orders of the Project Manager to carry out additional works as the Project Manager deems fit. I would also add that the Plaintiff only needs to know what the Project Manager has determined. The Plaintiff has no duty to go behind the decision of the Project Manager to question whether he or she has obtained the requisite consent to give the instructions or order to carry out additional works.

Lastly two points may be made. The first one is that the arguments of the Attorney General's representative are not tenable under the provisions of the contract in that the contract has already made ample provision on how to deal with additional works or variations. This does not require the procedure stipulated under the Public Procurement and Disposal of Public Assets section Act sections 59 (2) and (3) on which the State Attorney relied. The provisions provide as follows:

S. 59. Initial procurement or disposal requirements and confirmation of funding

(1) All procurement or disposal requirements shall be documented prior to the commencement of any procurement or disposal proceedings.

(2) Procurement or disposal shall only be initiated or continued on the confirmation that funding, in the full amount over the required period, is available or will be made available at the time the contract commitment is made.

(3) All procurement or disposal requirements shall only be approved by the Accounting Officer Prior to the commencement of any procurement or disposal process."

What is of interest is that procurement or disposal may only be initiated or continued on the confirmation that funding in the full amount for the relevant period was available. Can it be said that procurement was being continued in this case? Because the contract had provided for ample provisions on how to continue with the variation of works, it cannot be said that this was a new procurement or that it had acquired another procurement process. Procurement had already been done and the contract had been signed pursuant to that procurement process. The contract is self executing and one only needs to look at the provisions of the contract for implementation. It would also amount to saying that the employee should apply for additional works to put the finishing touches on a substantial work that had been commenced and almost completed by the time additional works were ordered by the Project Manager. Secondly, I have already

held that it was incumbent upon the Project Manager to seek the requisite consent provided for under the contract for the variation of works under the special conditions of contract. Before winding up on this issue it is pertinent to define the term "contract". The term is defined by section 3 of the Act which defines the term "contract" to mean an agreement between a procuring and disposal entity and the provider, resulting from the application of the appropriate and approved procurement or disposal procedures and proceedings as the case may be, concluded in pursuance of the bid award decision of the contracts committee or any other appropriate authority:" it can be concluded that exhibit P1 was arrived at after due process defined by section 3 in the term "contract". The terms of the contract executed under this process is binding on the procurement and disposal unit. The procurement and disposal unit in this case is the Ministry of Internal Affairs, Department of Estates.

Last but not least the written statement of defence of the Attorney General does not seriously contest the Plaintiffs claim on a point of fact but only does so on a point of law. Paragraph 3 of the written statement of defence provides as follows:

"

- (a) That it is true that Government of Uganda represented by the Ministry of Internal Affairs entered into an agreement with the Plaintiff Company for the construction of administration block at Kabalye PTS in Masindi for a total consideration of Uganda shillings 419,220,252/= inclusive of VAT.
- (b) At no time did the Government of Uganda as represented by the Ministry of Internal Affairs ever request the Plaintiff Company to effect extra works over and above the scope of the works the subject of the agreement entered between the Plaintiff and the Defendant.
- (c) That the Force Estates Officer of the Uganda Police Force had no authority to commit the Government of Uganda to extra works in the alleged sum of Uganda shillings 151,157,000/= without securing the necessary authority from the Accounting Officer/Permanent Secretary of the Ministry of Internal Affairs and/or the Contracts Committee of the Ministry of Internal Affairs.

- (d) That the contracts committee which awarded the Plaintiff Company the initial agreement has never approved the extra works purportedly done by the Plaintiff Company.
- 4 The Defendant shall content and aver that the Plaintiff Company carried out the purported extra works without actual instructions from the Government of Uganda as represented by the Ministry of Internal Affairs
  5. That the Defendant shall therefore contend that it has never entered into a contract with the Plaintiff over the alleged extra works purportedly carried out by the Plaintiff."

It is therefore clear from the pleadings of the Attorney General that what is in issue is the authority of the Project Manager to instruct the Plaintiff Company to carry out extra works. The additional works of variation were ordered by the Project Manager pursuant to the provisions of the contract between the parties exhibit P1. The Plaintiff had no obligation to ascertain whether the Project Manager had obtained the necessary consent to give it directions. The Plaintiffs were instructed or ordered to carry out additional works. The Plaintiffs duly forwarded the costs of the additional works to the Project Manager as stipulated in the contract within seven days of the request. The instruction to execute additional works was confirmed in writing and is binding on the Government. The issue as to whether the Project Manager had the requisite authority is a disciplinary question the findings of which may make show some culpability on the part of the persons privy to the decision to order for variation of works such as the Project Manager or representative, the Undersecretary etc. Such culpability if any cannot be visited on the Plaintiff who was bound contractually to carry out the written instructions of the representatives of the Government under the contract exhibit P1.

Issue number one is therefore answered in the affirmative in that the Plaintiff Company was instructed by the Government of Uganda as represented by the Ministry of Internal Affairs to execute additional works worth Uganda shillings 151,187,000/= at Kabalye Police Training School, Masindi.

Issue number two

Whether the Plaintiff was paid by the Government of Uganda represented by the Ministry of Internal Affairs for the additional/extra works for the Administration Block at Kabalye Police Training School, Masindi?

Once the Court has established that the Plaintiff was instructed to carry out the additional works, the question of whether the Plaintiff was paid or not is not something proper for the adjudication of this Court. They learned representative of the Attorney General submitted that certain payments had been made to the Plaintiff. This can be verified by the accounting officer or the accounts department. The Court will not dwell on this matter and would only declare that the Plaintiff is entitled to be paid for the additional works as claimed. As to whether part of this money has been paid or not can be established from the State's accounts department.

### Resolution of Issue Number 3

It is the Attorney General's contention that the Plaintiff had not obtained the requisite certificate from the Project Manager that all defects as notified to him by the Project Manager had been corrected.

PW1 testified that was called upon by the Project Manager to correct some defects as stipulated in the contract which he duly did. The Plaintiff's Counsel submitted that the Plaintiff was entitled to the retention fee of **Uganda shillings 24,733,969/=** as claimed. This is based on clause 48.2 of exhibit P1. The Attorney General's submission is that the Plaintiff did not obtain the certification from the Project Manager that all defects as notified to him by the Project Manager had been corrected. Both Counsels agreed that the relevant provision is clause 48.2 of exhibit P1 which provides that:"

"On completion of the whole of the work, half of the total amount retained shall be repaid to the Contractor and half when the defects liability period has passed and the Project Manager has certified that all defects notified by the Project Manager to the Contractor before the end of this period have been corrected."

The learned State Attorney submitted that the Plaintiff did not obtain the certification as provided for in the clause. There is no evidence on record in support of the Attorney General's submissions. On the other hand PW1 testified that the building was commissioned and is now in use. No sufficient evidence was led relating to the issue of whether certification was obtained after the defects liability period that the Plaintiff corrected all the defects notified by the Project Manager. I would like to emphasise that the claim of the Plaintiff is based on paragraph 4 (X) of the plaint where it is averred:

"That from the original contract shillings 24,733,969/= (VAT inclusive) kept as retention fee only paid after the defects liability period of six months has not been paid to date despite the Defendants liability expiring on 14th of November, 2009, which the Plaintiff hereby claims from the Defendant."

Even if it is not categorized as special damages, what the Plaintiff claims is a special damage subject to the same principles as the claim for special damages. In other words it is a definite sum which is to be proved specifically. As submitted by the Attorney General the contract provides that the money is to be paid upon certification by the Project Manager that the defects have been corrected. In the absence of any proof of such certification, the special damage or liquidated amount has not been proved to the satisfaction of the Court. I will apply the principle in the case of **Uganda Telecom Limited v Tanzanite Corporation [2005] 2 EA 331 (SCU)** where the Supreme Court of Uganda per Justice Oder held that special damages have to be pleaded and strictly proved and at page 341:

"It is evident from the respondent's pleadings that their claims for loss of unused materials and for the unpaid bank loan were special damages. According to "Atiyar's Sale of Goods Act" (supra), "Special damages" is that damage in fact caused by wrong. It is trite law that this form of damages cannot be recovered unless it has been specifically claimed and proved.

In this case even though the claim had been pleaded, it has not been proved. In the absence of evidence this ground has not been proved to the satisfaction of the Court and therefore fails. However, if there is any certification that the Plaintiff corrected the defects as envisaged by clause 48.2 which certification is

not on record, the Plaintiff would be entitled to claim the retention fee of Uganda shillings 24,733, 969/=.

Remedies:

There is no dispute in the submissions of both Counsels that the Plaintiff was paid 47,000,000/= for the additional works leaving a balance of Uganda shillings 107,675,895/=. The Plaintiff is therefore entitled to a sum of Uganda shillings 107,675,895/= being the outstanding balance for the variation or additional works executed under the contract exhibit P1.

As far as the retention fees concerned, the Plaintiff can only be paid upon proof of certification from the Project Manager that the defects notified by the Project Manager had been corrected. In other words if the certification is obtained after a decision in this Court, a claimant may be made for payment by the Plaintiff.

Under section 26 of the Civil Procedure Act the payment of interest and the rate of interest is discretionary. Section 26 (2) of the Civil Procedure Act provides:

"Where and insofar as a decree is for the payment of money, the Court may, in the decree, order interest at rate as the Court deems reasonable to be paid on the principal sum from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit."

This is a discretionary power in which the Court assesses what is reasonable in the circumstances of the case. The Plaintiff was entitled to payment in the year 2009 and evidence shows that the Plaintiff spent money in executing the additional works ordered by the Project Manager. In addition it is a material fact that there is a rate of inflation that is assessed annually. Inflation erodes the value of a fixed sum of money. For the Plaintiff to be put into a position they would have been had the breach by failure to pay not occurred, the rate of interest should take into account the annual inflation rates. Any interest rate at the annual inflation rate

would only keep a fixed value of money from losing its value or purchasing power. It would not have earned any further value. In the case of **ECTA (U) Ltd vs. Geraldine and Josephine Namukasa S.C.C.A NO. 29 OF 1994**, it was held by ODOKI Ag C.J that the Court has discretion to award reasonable interest. A distinction however has to be made between awards that arise out of commercial transactions, which would normally attract a higher interest, and awards of general damages, which are mainly compensatory.

Having considered all the factors in this matter, the Plaintiff is awarded interest at 25% per annum from January 2009 to the date of judgment on the principal sum claimed.

The Plaintiff is further awarded general damages for inconvenience of Uganda shillings 21,000,000/=

The Plaintiff is additionally awarded interest at Commercial Bank of Uganda lending rate of 21 % per annum from the date of judgment to payment in full on the decreed sums.

The Plaintiff is awarded costs of this suit.

Judgment delivered at Kampala this 27<sup>th</sup> of April 2012.

Christopher Madrama

Judge

Judgment delivered in the presence of:

Ojambo Mokoha Court Clerk

Hon. Justice Christopher Madrama

27<sup>th</sup> of April 2012