THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HIGH COURT CIVIL SUIT NO. 184 OF 2008

ANDES (EAS) LIMITED:::::::::::::::::::::::::::PLAINTIFF/COUNTERDEFENDANT

VERSUS

AKOONG WAT MULIK

SYSTEMS LTD OTHER:::::::::::::::::::::::::DEFENDANTS/COUNTERCLAIMANT

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff, hereinafter called the "counter defendant" sued the first defendant hereinafter called the "counterclaimant" together with its directors for breach of contract claiming USD 43,000/= being money received, general damages, interest and costs. The counterclaimant then filed a defence denying the allegation and made a counterclaim for USD 256,043 or UGX. Shs. 417,350,090/=, general damages, interest and costs. The counter defendant in its reply denied the counterclaim in toto.

The counter defendant participated in the proceedings of this case till 2nd June 2010 when its director undertook to instruct another advocate to take over conduct of the case from M/S Muwema, Mugerwa Advocates who had conflict of interest. A notice of change of instructions was subsequently filed by M/S Okecha Baranyanga & Co. Advocates on 24th June 2010. However, when the firm was served with a notice of scheduling conference for 30th March 2011, they wrote to the registrar of this court on 24th March 2011 stating that they were withdrawing from the conduct of this case because they had lost touch with the client. Counsel for the counterclaimant

undertook to serve the counter defendant through its director whose office was known to the counterclaimant's directors. On the next hearing date counsel for the counterclaimant reported that they had not located the plaintiff's director and therefore had failed to serve. An order for substituted service was made and the counter defendant was served by advertising the hearing notice in the New Vision newspaper.

When the suit came up for hearing on 7th September 2011, neither the counter defendant's directors nor its counsel were present. Upon an application by counsel for the counterclaimant, this court dismissed the plaintiff's suit with costs under Order 9 rule 22 of the Civil Procedure Rules and ordered that the counterclaim proceeds for hearing ex parte. This judgment is therefore in respect of the counterclaim hence the reference counterclaimant and counter defendant only.

The background of the counterclaim as stated in the pleadings and the evidence adduced is that the counterclaimant, a limited liability company incorporated in Uganda on 14th May 2007 was awarded a contract by the Government of Southern Sudan herein after called "GOSS" to construct two education centres in Warrap State, Southern Sudan. The contract that was admitted in evidence as Exhibit CC12 was executed on 11th November 2007 and its performance was to commence 21 days from that date, that is, by 1st December 2007. The contract was to be completed within 150 days (approximately six months as stated in the contract although when you convert 150 days into months you get only five months and two days) from commencement. To secure its obligations, the counterclaimant took out a performance bond executed by M/s Leads Insurance Limited Kampala in favour of GOSS for a sum of USD 67,043 which was 10% of the contract sum as per Exh. CC 1 (i).

The counterclaimant did not have funds for the construction and had to look for a financier or partner. To that end, the counterclaimant identified the counter defendant with whom it entered into a Memorandum of Understanding (MOU) on the 20th February 2008. By that MOU which was admitted as Exhibit CC 3, the counter defendant undertook to provide a loan facility of USD 100,000 within 5 days from the date of execution by depositing it in the bank account of the counterclaimant at Barclays Bank.

According to the terms of the MOU, the counterclaimant was to use the funds and repay at a compound interest of USD 160,000 within a period of 90 days from the date of execution of the MOU. In addition, the counterclaimant was to pay the counter defendant 30% of the gross profit realized from the project.

However, according to the evidence of the counterclaimant's only witness, the counter-defendant failed to avail the money within the agreed time whereupon the counter-defendant offered to purchase some of the essential equipment for construction and the counterclaimant agreed to it although that was not in the MOU. The purchase was to be done jointly in that the counterclaimant would do the sourcing jointly with the counter defendant who would then effect the payment. Under that arrangement, the counterclaimant sourced for 2000 bags of cement for which the defendant was to pay Ug Shs. 44,000,000/= but only Ug. Shs. 20,000,000/= was paid. Even then, the counter defendant later ordered the supplier not to release the cement to the counterclaimant.

The counter defendant also paid USD 16,700 for purchase of an Isuzu Forward Tipper Truck for re-export to Southern Sudan to facilitate transportation of materials. An additional USD 6,000 was spent on repair of the truck by the counter-defendant. According to the counterclaimant, it was also prevented from re-exporting the same when the counter defendant filed a complaint with Police and Uganda Revenue authority (URA) as per Exhibit CC 17 (i-x) and Exhibit CC 8. The counter defendant further spent Shs. 4,500,000/= on purchase of other materials which were also never received by the counterclaimant. It is the counterclaimant's case that its failure to perform the contract with GOSS was a direct consequence of the counter defendant's failure to deposit the money as per the MOU and avail to it the items bought under the alternative arrangement. Consequently, the contract between the counterclaimant and GOSS was terminated as per Exh.CC 14.

The three issues agreed upon in the joint scheduling memorandum and modified at the scheduling conference are:

1. Whether there was a valid contract between the counterclaimant and counter defendant.
2. Whether the counter defendant breached the contract.
3. Whether the counterclaimant is entitled to the remedies sought.

ISSUE 1: Whether there was a valid contract between the counterclaimant and the counter defendant.

The counterclaimant called only one witness Mr. Maiso Fred one of its directors (CW) to prove its case. The gist of his testimony is already summarized above in the background to the counterclaim.

Mr. Benson Tusasirwe, counsel for the counterclaimant submitted that the counter defendant did not explicitly deny the existence of the contract in their pleadings. He contended that indeed in paragraph 4 (c) of the plaint, the counter defendant conceded to the existence of the joint venture agreement but contended, as per paragraph 6, that the same was vitiated by misrepresentation which if proved would render the agreement void. Particulars of the alleged misrepresentation were stated as using the company name Akoong Wat Mulik System Limited to defraud the counter-defendant of its hard earned cash, misrepresenting facts on the status of that company and the 2nd, 3rd and 4th defendants representing themselves as directors of a company which had won a tender to construct classroom blocks in Southern Sudan whereas not.

He submitted that it was the counter defendant's case that there was a totally different company in Sudan called Akoong Wat and Mulik System Limited and that it was that company that had a contract with GOSS and not the counterclaimant. Further that those allegations were not substantiated.

He further submitted that the counterclaimant in its pleading and evidence demonstrated that the allegation was unfounded. He relied on Exhibit CC 13 and stated that it shows that the contract with GOSS was executed by the counterclaimant whose directors as CW testified were CW, Luchep, Kigenyi and Wol Akech Reng. Further that the contract on its face shows that it was signed by Wol Akech Reng on behalf of the counterclaimant and his signature was witnessed by Kigenyi Livingstone and another co-director.

While relying on CW's testimony, counsel submitted that the counterclaimant after executing the contract with GOSS decided to incorporate a company in Southern Sudan under which it hoped to

perform the contract. He pointed out that all the dealings whether with GOSS or the counter defendant were by the counterclaimant and not the company in Southern Sudan which remained idle. He argued that in the circumstances, the counter defendant could not have been misled by the counterclaimant and its directors.

Counsel relied on ***Cheshire & Fifoot on Law of Contract, Eleventh Edition*** which defines misrepresentation on page 257 as;

> ***"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."***

He submitted that since the counterclaimant did not make any misrepresentation to the counter defendant the MOU executed by them was never vitiated by misrepresentation. He concluded on the first issue that the MOU remained a legally binding contract between the parties and prayed that court finds so.

I have carefully studied Exhibit CC 12 and I find that it was a contract between the GOSS and Akoong Wat Mulik System Limited the counterclaimant in this suit. All the correspondences from GOSS in respect of that contract were made to the counterclaimant. Likewise, the MOU was made between the counterclaimant and the counter defendant. I therefore do not find any basis for the counter defendant's allegation that the counterclaimant made misrepresentations that vitiated the contract.

For purposes of the contract between the counterclaimant and GOSS I do not even see any nexus between the counterclaimant and AKOONG WAT AND MULIK SYSTEMS COMPANY LIMITED which was registered in Southern Sudan after the contract had already been signed. They are two separate companies notwithstanding that their directors could be the same persons. I believe the counter defendant could have pleaded misrepresentation simply to justify its own failure to comply with its obligation under the MOU.

As rightly submitted by counsel for the counterclaimant, there was no misrepresentation on the part of the counterclaimant. 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…"***

Moreover, the burden to prove misrepresentation was on the counter defendant who alleged it. It further stated in **Harlsbury's Laws of England** (supra) at page 462 that;

> *"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".*

It's my considered opinion that although the counter defendant pleaded misrepresentation, clearly from the documents presented before this court there was no proof of it. I believe even if this matter was heard inter partes my finding and conclusion would still be the same for reasons already stated above. On the other hand, the counterclaimant has proved that it was awarded the contract by GOSS and it entered into an MOU with the counter defendant. In the circumstances, I find that in the absence of proof of misrepresentation, which was the only defence of the counter defendant, there was a valid contract between the parties. This disposes the first issue which is answered in the affirmative.

Issues 2: Whether the counter defendant breached the contract.

On this issue, CW testified that the counter defendant did not deposit the money as agreed in the MOU. Further that even the offer to purchase some essential construction material did not materialize as the counter defendant prevented the counterclaimant from accessing the materials bought. He stated that at the point of accepting that alternative offer the counterclaimant no longer expected the counter defendant to give the USD 100,000 agreed upon in the MOU.

Counsel for the counterclaimant submitted that the counter defendant simply promised funds it did not have and that the counterclaimant accommodated the counter defendant's difficulties but still there was non-performance. He concluded that there was fundamental breach of the agreement by the counter defendant and prayed that court finds so.

Breach of contract was defined in **Ronald Kasibante v Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690** it was stated that:-

> *"Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party…"*

Black's Law Dictionary* 8*th* *Edition at ***page 200***; defines breach of contract as:

> ***"Violation of contractual obligation by failing to perform one's own promise, by repudiating it or by interfering with another party's performance".***

From the MOU and the testimony of CW, the counter defendant was to deposit USD 100,000 within five days from 20th February 2008 when the MOU was made. This means that the money should have been deposited by 25th February 2008 failure of which the counter defendant would have violated a fundamental term of the contract that goes to its core or substance. That amount was never deposited at all. This, in my view, was a fundamental breach which entitled the counterclaimant as the innocent party to treat the contract as repudiated and rescind it and sue for damages. However, that did not happen. I find it necessary and important at this point to highlight the course taken by the parties instead.

According to the testimony of CW, the parties entered into another arrangement whereby they agreed that instead of depositing the money the counter defendant would purchase some of the essential equipment for construction. An extract from CW's testimony so far as it is relevant to this issue is as follows:-

> ***"The counter defendant did not deposit the money as agreed. They kept promising to deposit the money but they never did so…………On 6th March 2008, two directors of Andes (ESA) Ltd namely; Maganda M. and Alex Waimana travelled with one of our directors Andrew Lucep to Southern Sudan to Ministry of Education to ascertain whether the contract was valid. On coming back we waited for them to deposit the money on the account but they did not. This was after they had verified that the contract was there".***

Further that:-

> ***"In the meantime, the counter defendant offered to purchase some of the essential equipment for construction although this was not in the MOU. Because time for performance was against us and the funds were not forthcoming, we agreed to the offer and we were supposed to do the purchasing jointly…."***

He then gave details of the items and how they were purchased but added that they were not handed over to them except the Isuzu Truck which they were given but prevented from re-exporting to Southern Sudan. It is noteworthy that CW further testified that:

> ***"At this point we were not expecting the USD 100,000 to be deposited on the joint account because of the new mode of operation we had adopted".*** **(Emphasis added).**

Subsequently, by a letter dated 3rd April 2008 (Exhibit CC7), the counterclaimant formerly reminded the counter defendant about its obligation under the MOU and threatened to

terminate the contract if the counter defendant did not carry out its obligation by 7th April 2008. Of course the counter defendant did not carry out its obligation by that date or at all. The alternative arrangement to purchase essential equipment did not also work out well. According to the evidence of CW, when the counterclaimant wrote Exhibit CC7, the counter defendant instead reported to the Police and URA that one of the counterclaimant's directors was trying to take away without their knowledge (steal) the Isuzu Truck which was bought under that arrangement.

As far as the contract between the counterclaimant and GOSS was concerned it was the evidence of CW that no work had started at the site by that time which was already four months into the contract period. By a letter dated 24th April 2009 (Exhibit CC9) more than ten months after the contract period had expired, GOSS sent a warning letter to the counterclaimant for the delay in starting and completing the work. The counterclaimant was requested to show cause why the contract should not be terminated immediately with costs. It was given up to 1st May 2009 to respond. There is no indication that the counterclaimant responded to that letter.

The contract was subsequently terminated by the letter dated 15th May 2009 with the consequence that the counterclaimant would stand no chance of working with GOSS again. A warning was also made about the legal action that would be taken against the counterclaimant by GOSS. There was no evidence adduced to show whether the threatened legal action was actually taken.

Meanwhile, as far as the MOU between the counterclaimant and the counter defendant is concerned, it appears the counterclaimant just decided to treat it as a bad deal and let things lie. Although notice was given, CW did not give any evidence of the formal termination of the agreement by the counterclaimant on account of the breach that had been committed by the counter defendant. It was only when the counter defendant sued the counterclaimant together with its directors for breach of contract in July 2008 that the counterclaimant made this counterclaim alleging breach by the counter defendant.

In the circumstances of this case as highlighted above, I find that no doubt there was breach of the contract by the counter defendant. However, from the evidence of CW, it appears there was waiver of the right to treat the counter defendant's conduct as breach and claim for damages. Although waiver was never pleaded by the counter defendant, I find overwhelming evidence that there was waiver which this court cannot just turn a blind eye to. I will therefore consider it in this judgment.

Chitty on Contracts, 28th Edition, Vol. 1, 1999 page 1158 paragraph 23-039 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.***

Further at page 1161 paragraph 23-045 on waiver of breach, it is stated that one party may waive his right to terminate a contract consequent upon a repudiation of the contract by the other party. Where the waiver is by estoppels the innocent party waives not only his right to terminate performance of the contract but also his claim for damages for the breach.

Words and Phrases Legally Defined 4th Volume at P. 404 defines waiver as

> ***"the abandonment of a right in such a way that the other is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted and is either express or implied from conduct".***

Black's Law Dictionary 8th Ed at page 1611 defines waiver as*;*

> ***"the voluntary relinquishment or abandonment express or implied of a legal; right or advantage".***

It states further that;

"an implied waiver may arise where a person has pursued a course of conduct as to evidence an intention to waive a right or where his conduct was inconsistent with any other intention than to waive it".

Waiver must however be distinguished from variation. In **Agri-Industrial Management Agency Ltd v. Kayonza Growers Tea Factory Ltd & Anor HCCS NO. 819 of 2004**; Kiryabwire, J stated that;

> ***""'waiver' in contract is most commonly used to describe the process whereby one party unequivocally, but without consideration grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived. Waiver is however to be distinguished from consensual variation. Consensual variation is where the parties to a contract agree in a subsequent simple contract to vary its terms as between the parties to the original contract by way of a second contract, and as opposed to waiver, the agreement for variation must possess the characteristics of a valid contract. Where the contract is still executory on both sides, however, consideration may be found in the mutual surrender of rights or the conferment of benefits on each party by the variation."***

The position on variation was also discussed in **Mujuni Ruhemba v Skanka Jensen (U) Ltd Civil Appeal NO. 56 of 2000** where **Okello, JA** (as he then was) stated that;

> ***"The law governing variation of contract was stated in CHESHIRE AND FIFOOT, LAW OF CONTRACT, 9th Edition p. 535 that "an oral variation leaves the written contract intact and enforceable". That means that a contract which by law is required to be in writing can only be varied by a subsequent written agreement. Oral agreement cannot vary such a contract."***
> **(Emphasis added).**

Based on that authority which is also in line with the provisions of section 91 and 92 of the Evidence Act, Cap 6, I find that the alternative verbal arrangement made by the parties in this case did not vary the original written agreement in the MOU. There is however evidence of waiver as already indicated above.

The effect of waiver is that a party cannot later seek a remedy for breach that was waived. **Kiryabwire, J** stated in **Three Way Shipping Services (Group) Ltd v China Chongaing International Construction Corporation HCCS 538 of 2005** that;

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

For there to be waiver, **Black's Law Dictionary, 7th Edition at page 1574** states that the party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it. Upon looking at the facts of this case, I am convinced that the counterclaimant was well aware of its rights under the contract and that is why it gave the notice of termination. Its subsequent conduct as per the evidence of CW shows that it also intended to waive the breach which it knew had taken place after the counter defendant failed to deposit the money as agreed.

By accepting the alternative arrangement made by the counter defendant and not insisting upon the precise mode of performance provided for in the MOU, the counterclaimant by conduct waived its rights and cannot now claim damages for breach on the same contract. To my mind, what now comes to play is the doctrine of estoppel by election which is defined by **Black's Law Dictionary, 8th Edition at page 590** as;

> ***"the intentional exercise of a choice between inconsistent alternatives that bars the person making the choice from the benefits of the one not selected".***

In that context the counterclaimant is estopped from even alleging breach of the contract at

this point since it chose not to treat the contract as repudiated and rescind it when its fundamental term that went to its root was violated. It had the right to do so but it impliedly relinquished it. Issue two is therefore answered in the negative in the context of what is explained above.

ISSUE 3: Whether the counterclaimant is entitled to the remedies sought.

In view of the answer to issue two, it would not have been necessary for me to consider this issue. But just in case the appellate court finds that this court erred in reaching that conclusion, it is important for me to consider this issue basing on the assumption that issue two is answered in the affirmative.

The counterclaimant sought for special damages of USD 256,043 or UGX 417,350,090/=, general damages, interest and costs.

I wish to observe from the outset as I consider this issue that the counterclaimant has contended that the delay that led to the termination of the contract was fully caused by the counter defendant's failure to give it money as agreed. It is contended that the counterclaimant would have still completed the work within the 3 ½ months left from the time of making the MOU had the counter defendant availed the money to it as agreed. Further, that as a result of that breach, the contract with GOSS was terminated and a projected profit of USD 270,000 was lost. The claim for all the other heads of damages and interest are also based on that contention.

I find it very difficult to fully attribute failure of the counterclaimant to perform the contract with GOSS to the counter defendant's breach. To my mind, the counterclaimant did not at all try to mitigate the loss. The contract between the counterclaimant and GOSS had to be performed within 150 days. The commencement date which was stated to be 21 days from the date of execution was 1st December 2008. The counterclaimant did not get a financier until 20th February 2008 when it made the MOU with the counter defendant. In effect the MOU was signed 82 days into the contract period!

As if that delay was not bad enough, when the counter defendant failed to deposit the money on the agreed account within five days, the counterclaimant, according to the evidence of CW, kept waiting for the money as the counter defendant made empty promises that were never fulfilled. It was only on the 3rd April 2008 (125 days into the contract period), that the counterclaimant sent a notice of termination of the contract after it had first of all wasted time accepting an alternative arrangement which was contrary to the terms of the MOU and even did not materialize.

I believe any prudent business person would have known that time was of the essence in the contract and taken steps to ensure that performance of the contract was at least commenced so as to bargain for more time to complete the work. Once it became clear to the counterclaimant that the counter defendant had failed to comply with the terms of the MOU, it should have elected to treat the contract as repudiated and rescinded and sought alternative ways of raising funds for the project. It should not have taken over one month for the counterclaimant to realize that the counter defendant was not going to deposit the money as agreed as time was of the essence.

Besides, the counterclaimant did not explain to GOSS the challenges it was facing with a view of seeking for an extension of time. Having failed to take any of the above steps that would have mitigated its loss, I do not agree that the counter defendant is fully to blame for the delay that led to termination of the contract. I find that the counter claimant's own lack of prudence both before and after the MOU was signed contributed to more than 70% of the delay that led to termination of the contract. I would only hold the counter defendant responsible for the delay from 20th February 2008 when the MOU was signed to the time it violated its fundamental term by failing to deposit the money as agreed. To me that period should not have extended beyond one week after expiration of the five days before the counterclaimant could exercise its right to rescind the contract in order to mitigate the loss. Its failure to do so escalated the loss so the counter defendant cannot be said to be fully responsible.

In reaching the above position, I was guided by the mitigation rule stated in **Chitty on Contract,** (supra) **at pg 1317 paragraph 27-086 and 27-087** to the effect that;

> ***"wherever the innocent party, following the defendant's breach, is able to find substitute performance from a third party, the mitigation rules give him a strong incentive to accept the substitute…..the first rule imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequently on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.***

I am also fortified by the decision in **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.***
>
> ***The plaintiff did not take reasonable steps to mitigate the loss; he had the opportunity to retrieve his car from the garage after 21 days. The plaintiff was entitled to damages for loss of user for 21 days only, the balance of loss being upon him for failure to mitigate the loss."***

With the above position in mind, I now proceed to consider the specific claims by the counterclaimant under this issue.

As regards special damages, the principle that governs it is that it must be specifically pleaded and strictly proved by the claimant as observed by Byamugisha JA, in ***Eladam Enterprises Ltd v S.G.S (U) Ltd & others Civil Appeal No. 20 of 2002 [2004] UGCA 1.*** See also ***KCC v Nakaye (1972) EA 446***

The counterclaimant claimed USD 270,000 as projected profits in the counterclaim less 30% which would have been paid to the counter defendant leaving a balance of USD 189,000.

Counsel for the counterclaimant submitted that the law governing claims in contract is restitutio in intergrum as the court ought to award the claimant a sum sufficient to put him in a position he would have been in had there been no breach on the part of the defendant. He relied on **Hadley v Baxendale [1843-1860] ALLER 461** where it was stated that;

> ***"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonable be considered either arising naturally i.e. according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. ....if special circumstances under which the contract was made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known to the party breaking the contract…"***

It was counsel's submission that the damages awarded should be able to cover all losses naturally and directly resulting from the breach as long as they are foreseeable. He contended that it was within the contemplation of the counter defendant that if it did not perform its promise to fund the performance of the contract with GOSS, the counterclaimant would suffer all losses it has pleaded for.

While I agree with the principle stated in **Hadley v Baxendale** (supra), it is also prudent that a party claiming lost profits as in the instant case should prove the general assessment of such profits. The claimant should adduce documentary proof as to how such claimed amount was calculated such that court is not misguided.

As was held in **Ronald Kasibante v Shell Uganda Ltd** (supra), materials upon which court can assess the special damages must be made available. In that case it was held as follows:-

> ***"Special damages must be pleaded and strictly proved by the party claiming them. The plaintiff to succeed in the instant case ought to have put before court materials which indicated the average sales of fuel or airtime for a month, indicating margins of fuel sale and overhead costs to prove possible future loss."***

This court has been provided with a projected cash flow statement for six months (Exhibit CC 10) allegedly prepared by M/S Francis, Mathias & Co., Certified Public Accountants, the counterclaimant's accountant. That cash flow statement which was not even signed by the author qualifies as an expert opinion which should have been tendered in court by the maker who would have also explained how he arrived at the figure. This is because accounting is a technical discipline that not everyone understands. However, the author was never called to do so. Absent of that, this court is not at all convinced that; first of all it was made by the firm that is alleged to have made it and; secondly, that the content is true since it was not proved in court. Consequently, this court cannot rely on that document to assess the special damages claimed as lost profit. There being no other evidence to prove that claim, I would find that it has not been strictly proved as required and decline to award it.

In light of my conclusion that the counterclaimant did not mitigate its loss, if issue two had been answered in the affirmative and the special damages relating to lost profit had been satisfactorily proved; I would have awarded only 30% of the net expected profit claimed by the counterclaimant. But as already stated above, since it was not proved the counterclaimant would not be entitled to any special damages under this head of its claim.

The counterclaimant also claimed special damages of USD 67,043 as contingent liability on the counter guarantee. Counsel for the counterclaimant adopted the same authority of **Hadley v Baxendale** (supra) and submitted that the counter defendant was aware of the contract with GOSS and the provision of a performance guarantee as well as the counter guarantee and hence losses arising there from were foreseeable.

The Performance Insurance Guarantee (hereinafter called guarantee) was admitted in court as Exhibit CC1 (i) and the amount stated in it is USD 67,043. CW also testified to the securing of the guarantee from Leads Insurance Limited (Leads). However, no evidence was adduced to show that GOSS recalled that security and it was paid by Leads. Neither was there any evidence to show that Leads demanded for a refund of the same from the counterclaimant. All that was submitted by counsel from the bar was that the counterclaimant had claimed for *"USD 67,043 being the contingent liability it* ***will have to suffer*** *on the counter guarantee it made in favour of Leads which sum* ***the counterclaimant is bound to pay if*** *the Insurance* ***Company is made to honour*** *the guarantee". (Emphasis added).*

The phrases in bold clearly show that this claim is based on speculation that GOSS will recall the performance guarantee. This court cannot assess damages based on speculative future events. In any case, according to the last paragraph of the guarantee, it was valid until 28 days from the date of issuance of the Taking-Over Certificate, calculated based on a copy of such Certificate which would be provided to Leads, or on the 22nd September 2008 whichever occurred first. Any demand for payment was to be on or before that date.

It is clear from the facts of this case and the evidence adduced that no Taking-Over certificate was issued as work was never even commenced. In the circumstances, the guarantee was only valid until 22nd September 2008. The contract was terminated by GOSS on 15th May 2009 long after the guarantee had expired. There is therefore no way GOSS can recall the same and in the circumstances, the speculative claim by the counterclaimant cannot be justified. I would therefore decline to award it.

On general damages, counsel for the counterclaimant submitted that the counterclaimant, as testified by CW, went through a lot of troubles that include; verifying the existence of the contract in Sudan, sourcing materials and equipment, only for the counter defendant to turn around and block receipt of the same. Consequently, the counterclaimant lost the contract with GOSS and cannot now face it to bid for another contract after not performing the one that gave rise to this suit.

I believe the same finding and conclusion that the counterclaimant did take steps to mitigate its loss equally applies in determining the counterclaimant's entitlement to general damages

and the quantum. The counterclaimant adduced evidence to show that it suffered inconveniences that made it fail to perform the contract due to the counter defendant's violation of its contractual obligations. If issue two had been answered in the affirmative, I would have taken into account the counterclaimant's failure to mitigate its loss and awarded Shs. 10,000,000/= (ten million shillings only) as general damages.

The counterclaimant also sought for interest and costs. Like interest, an award of costs is a matter of discretion of court as was noted by Okello J (as he then was) in the case of **Superior Construction and Engineering Ltd v Notay Engineering Industries (Ltd) High Court Civil Suit No 702 of 1989**.

If the counterclaimant had been successful in this suit and also strictly proved special damages, I would have awarded interest on the special damages at 10% from the date of filing the counterclaim till payment in full and on general damages at 6% from the date of this judgment until payment in full.

As regards costs, due to my finding that the counterclaimant did not mitigate its loss, I would have awarded to it only 30% of the costs.

Be that as it may, due to the finding of this court that the counterclaimant waived its right to claim for breach, it has not succeeded in its counterclaim and it is accordingly dismissed. I make no order as to costs since the matter proceeded ex parte from the time of scheduling until it was heard and finalized.

I so order.

Dated this 5th day of June 2012.

Hellen Obura

JUDGE

Judgment delivered in chambers at 3.00 pm in the presence of Mr. Benson Tusasirwe for the counterclaimant whose officials were absent.

JUDGE
5/06/2012