THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HIGH COURT CIVIL SUIT NO 223 OF 2009

MOHAMMED SARU

T/A MOONLIGHT TRANSPORTERS AND CONTRACTORS}..... PLAINTIFF

VERSUS

1. **JINJA CENTRAL DIVISION COUNCIL}..... DEFENDANT**
2. **THE ATTORNEY GENERAL}..... THIRD PARTY**

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The plaintiffs plaint against the defendant was originally framed as a suit for recovery of **Uganda shillings 283,653,587/=** or *quantum meruit* for construction works done by the plaintiff for the defendant, interests and costs of the suit. The claim is based on a contract dated 12th of June, 2003 by which the defendant contracted Messrs Building Services Ltd for construction of the defendant's office block at plots 2 Bell Avenue Jinja. Messrs Building and Services LTD assigned the contract to the plaintiff and for the plaintiff to complete the defendants suit premises for a total consideration of **Uganda shillings 523,523,370/=** exclusive of VAT. The plaintiff commenced construction and substantially performed the contract. The defendant acting on the recommendation of the Inspector General of Government stopped the plaintiff from further construction and directed it to guard the building and properties therein.

In April 2008 the Ministry of Works and Transport valued the works done by the plaintiff and recommended that the cheapest way of closing the contract was to negotiate an amicable settlement with the plaintiff. Based on the Ministry of Works and Transport report the plaintiffs agreed to hand over the site to the defendant and the defendant undertook to verify the plaintiff's claims for payment. The contract was terminated through a memorandum of understanding. The plaintiff then handed over the premises to the defendant and demanded for payment of Uganda shillings 283,653,457/= from the defendant who declined to pay.

In its written statement of defence, the defendant denies the plaintiffs claims and contends that the suit is barred by the Civil Procedure and Limitation (Miscellaneous Provisions) Act. The defendant further contends that the suit is barred by the Inspectorate of Government Act and ought to be rejected. Furthermore that the recommendations of the IGG cannot be overridden by the recommendations of the Ministry of Works and Transport and a memorandum of understanding executed between the parties. Consequently the defendant pleads that there is no legal and enforceable contract between the parties under the provisions of the Local Governments Act. Last but not least the defendants contended that the executed works were not in accordance with the contract if any and it was not liable to pay for the same.

On the application of the defendant the Inspectorate of Government was joined as a third-party. The written statement of defence of the third-party was that the prayers of the plaintiff were not recoverable from the defendant or through third-party indemnification to the defendant. The IGG carried out investigations of the alleged irregular implementation of the Jinja Central Division office block and its report was issued on 26 August 2005. Investigations and recommendations were made pursuant to the constitutional and statutory functions and powers of the IGG. Furthermore, that there was no legally binding contract between the plaintiff and the defendant as alleged in the plaint. Furthermore that the issue of third party liability or indemnity of the defendant does not arise against the IGG and the plaintiff could obtain a different remedy against the IGG. In the course of the proceedings and pursuant to the Supreme Court decision in Civil Appeal No. 6 of 2008 Gordon Sentiba and 2 others versus Inspectorate of Government the Supreme Court had decided that the Inspectorate of Government was not a Corporation capable of suing or being sued and consequently, the IGG was substituted by the Attorney General.

At the scheduling conferencing inter parties, Counsel for the Defendant did not object to most facts and documents in the plaintiff's trial bundle which had been filed in court.

The agreed facts are that the plaintiff was assigned all the rights in the main contract for construction of the defendant's office block. The plaintiff commenced construction and part performed the contract by building the defendants office block. The defendant acting on the report and recommendations of the Inspector General of Government and by letter dated 7th of June 2005 stopped the plaintiff from further construction and directed the plaintiff to keep guard of the building and properties therein. In April 2008 the Ministry of Works and Transport valued the works carried out by the plaintiff. By a memorandum of understanding dated 5th of August 2008 the plaintiff agreed to hand over the site to the defendant and the defendant undertook to verify the plaintiffs claim for payments. Thereafter the plaintiff demanded for payment but the defendant did not comply. From the defendant's agreed facts, the Ministry of works recommended compensation to the plaintiff of **Uganda shillings 146,905,595/=** for which the defendant contends that it is not liable.

At the hearing of the suit the plaintiff was represented by Kibedi Muzamil of Kibedi and Co Advocates, the defendant was represented by Geoffrey Komakech of Messrs Victoria Advocates, while the Attorney General was represented by Elisha Bafirawala Senior State Attorney. Learned counsels opted to file written submissions after the plaintiff called its witnesses PW1 Saru Muhammed and Magala Dauda PW2. The defendant opted not to call any witnesses and relied on the agreed facts and documents. The Attorney General also opted to rely on the admitted facts and documents.

In their written submissions the following issues were addressed.

1. The quantum of damages that the plaintiff is entitled to; and
2. Who is liable to pay the plaintiff?

On the first issue as to quantum of damages that the plaintiff is entitled to, learned counsel for the plaintiff submitted that initially the plaintiff sought recovery of **Uganda shillings 283,653,557/=** from the defendant as prayed for in the plaint. The amount was the total calculated in accordance with exhibit P9. The plaintiff had the burden to prove the claim but at the hearing PW1 informed the court that the plaintiff abandoned part of the claim amounting to

Uganda shillings 130,383,724/= and settled for **Uganda shillings 153,269,833/=** in accordance with the report made by the building Department of the Ministry of Works and Transport. The report was admitted as exhibit P6. The total claim of **Uganda shillings 153,269,833/=** is contained in the summary appearing at page 82 of the trial bundle. Learned counsel contended that this amount is lower than the original claim by the plaintiff for compensation in respect of interest on delayed payments, idle Labour, idle plant, head office costs of the contract, demobilisation and loss of profit or works not executed plus VAT.

Learned counsel for the submitted that though the defendant acknowledges its liability to pay **Uganda shillings 6,364,238/=** out of a total sum of **Uganda shillings 153,269,833/=** set out in the report of the Ministry of Works. However he submitted that the defendant would not reject its own report/evidence because exhibit P6 is a joint exhibit of both parties. Secondly a technical report can only be rebutted using contrary technical court expert reports. The defendant did not produce any other technical report to contradict the one prepared by Ministry of Works and therefore lacked the evidential basis for denying the findings and recommendations in the Ministry of Works report. Learned counsel further contended that the third-party is estopped from denying the report of the Minister of Works as to what is due and owing to the plaintiff under section 113 of the Evidence Act. Furthermore, the claim is based on an equitable claim of *quantum meruit* which entitles a plaintiff to compensation from one who enjoyed the services. He prayed that the court finds that the plaintiff is entitled to judgement of **Uganda shillings 153,269,833/=** arising from the terminated contract. Secondly that the defendant has an obligation to pay the benefits it derived from the plaintiff. Furthermore learned counsel submitted that page 13 of the IGG'S report writes that the faults identified were not fundamental to warrant condemnation and demolition of the building. Consequently a new team of contractors only commenced work from where the plaintiff ended.

Interest

Plaintiff's Counsel submitted that section 26 of the Civil Procedure Act gives the court discretion to award interest. This discretion is explained in the case of **Bank of Baroda Uganda Ltd versus Wilson Buyondo Kamuganda Supreme Court civil appeal number 10 of 2004** at pages 26 – 27. Counsel prayed for interest at commercial rate of 25% per annum from the date of

demand for payment on 5th September 2008 till payment in full. He submitted that the commercial rate of interest was intended to take into account the rising inflation and depreciation of Uganda shillings. Learned counsel relied on court exhibit number 1 giving the current commercial rate of interest at 27% per annum. He further prayed for interest on costs at court rate from the date of judgement till payment in full. Interest on costs under section 27 of the Civil Procedure Act is 6% per annum and he prayed that the plaintiff be awarded interest on costs.

Costs

Learned Counsel submitted that the general rule is that costs follow the event under section 27 (1) and (2) of the Civil Procedure Act. He submitted that a successful party is entitled to costs of the suit unless the court otherwise orders. In this case, there are no special circumstances warranting refusal to the plaintiff of the costs of the suit.

In reply learned counsel for the defendant submitted that the initial claim of the plaintiff is for a sum of **Uganda shillings 283,653,557/=.** However because it was not specifically pleaded it could not have been sustained in law. He relied on the case of **Jivanji v Sanyo Electrical Co. Ltd [2003] 1 EA** for the proposition that special damages must be pleaded and strictly proved. The degree of certainty and particularity depends on the circumstances and the nature of the act complained of. Secondly none of the plaintiffs witnesses could demonstrate how the sum of money claimed was arrived hence abandonment of the claim.

As far as the claim on the first issue is concerned *quantum meruit* is defined by Black's Law Dictionary as:

> "much as he has deserved or reasonable value for services, damages award in on amounts considered reasonable to compensate a person who has rendered services in a quasi contractual relationship."

Learned counsel submitted that the claim is based on services rendered, which is for the benefit that the defendant derived from the plaintiff and not the services not consumed by the defendant. The remedy for *quantum meruit* is not intended to enrich either party. He contended that according to **Cheshire and Fifoot's Law of Contract** page 598 the remedy is for labour that the

plaintiff has already provided/services and rendered not in the future. The plaintiff's witnesses did not show to the court that the services were rendered.

At page 78 of the trial bundle where the conclusion at page 82 is referred to by the plaintiff, the plaint is for items such as loss of profits on the remaining work, head office costs among other things totalling **Uganda shillings 125,560,337/=**. These were services rendered to the defendant to warrant the remedy. Learned counsel submitted that PWI 1 and PWI 2 could not justify the amount.

Furthermore the recommendation of the Ministry of Works is not binding neither is it persuasive to this court. As far as the report is concerned, it was not final or conclusive. The report talks about probable liability and shows that it should be subject to negotiations. This explains the parties entering into a memorandum of understanding dated 15th of August, 2008 exhibited as exhibit P7 and found at page 192 of the trial bundle. This memorandum of understanding was executed nearly four months after the report of the Ministry of Works. Under the remedy of *quantum meruit* one claims for services rendered. However the claim of **Shs 153,169,883/=** does not reflect what work was rendered to the defendant. According to the report the rendered services is valued at **Uganda shillings 6,364,238/=**. The other probable claim would have been for guarding and keeping the site according to the letter dated 7th of June, 2005 exhibit P5. The plaintiff however did not specially plead or prove this. Consequently learned counsel submitted that the claim for **Uganda shillings 153,269,833/=** is untenable in law because it was not pleaded or proved.

Interest

Defence Counsel agreed that interest is at the discretion of court. Because the plaintiff failed to prove its claim, no interest should be awarded. He further submitted that the court be pleased to award interest only on the sum of Uganda shillings 6,364,238/= which is the value of work actually done by the plaintiff.

Furthermore learned counsel contended that the contract was principally terminated because of the breach of the plaintiff by failure to comply with the terms of the agreement. The plaintiff could not therefore benefit from its wrongs. If however, court exercises its discretion to award costs, the discretion should be exercised judicially and an award of a reasonable rate that was not

punitive to the party paying be made. He contended that the case of **Bank of Baroda Uganda Ltd. Vs. Wilson** (Supra) emphasises this point. Counsel contended that the plaintiff did not prove the claim of **Uganda shillings 146,905,595/=** and no award of interest should be made on it.

Issue number 2 on who is liable to pay

Counsel for the plaintiff submitted that liability to compensate the plaintiff is based on court establishing against whom the plaintiff had a legal right or cause of action from which the plaintiffs claim arose. Under paragraphs 3 and 4 (h) of the plaint, the plaintiff had a right to recover the sums claimed from the defendant under the principle of *quantum meruit*. The original contract was concluded by the defendant and the assignment of the contract was approved by the defendant. The defendant is the sole beneficiary of the office block that was partially constructed by the plaintiff. Learned counsel submitted that in those circumstances the defendant is the person obliged to compensate the plaintiff for unpaid work, attendant expenses and costs arising there from. Counsel prayed that judgment is entered for the plaintiff for the sums claimed as set out in the submissions.

In reply, learned counsel for the Defendant submitted that much as the defendant approved assignment of the agreement from the original contractor, the letter dated 27 September, 2004 which was exhibited as exhibit P3 at page 50 of the trial bundle does not automatically make it liable. He contended that the issue for determination was who was responsible for the termination of the contract.

Learned counsel submitted that the defendant performed all its obligations under the contract and this is supported by the report of the ministry of works which shows that at the termination the only work executed by the plaintiff and not paid for was **Uganda shillings 6,364,234/=.** Furthermore the termination of the plaintiffs contract was purely based upon the orders and recommendations of the IGG. The IGG is independent in the performance of its duties under section 10 of the Inspectorate of Government Act. Under section 21 of the said Act, the finding of the IGG cannot be challenged or reviewed. The IGG carried out an investigation on the performance of the contract between the plaintiffs and the defendant and came to the conclusion that the plaintiffs work was substandard and recommended its termination. The plaintiff did not

complain about the termination. The defendant therefore merely implemented the recommendations. The recommendations also affected officials of the defendant.

Because the plaintiff did not challenge the recommendations and report of the IGG, it is implied that the report was accurate and the plaintiff cannot fault the defendant or the third-party who recommended termination of the contract.

Learned counsel concluded that should the court award any other sum other than Uganda shillings 6,364,238/=, it should be awarded against the third party.

Costs

Learned counsel agreed that costs follow the event. He submitted that the report of the Inspector General of Government was accurate and therefore the plaintiff cannot benefit from its wrong. In the circumstances of each party shall bear its own costs.

Submissions of the Attorney General/Third Party

Learned Counsel for the Attorney General submitted that the plaintiffs suit was initially for recovery of Uganda shillings 283,653,557/= for the construction works done in respect of the defendant's office block, interest and costs of the suit. It is the contention of the defendant that the contract was halted on the instructions of the Inspectorate of Government. The defendant terminated the contract of the plaintiff pursuant to the recommendations of the Inspectorate of Government. The relevant recommendation is contained in paragraph 7.1 (b) of the IGG's report. Consequently the issue as between the defendant and the third-party is whether the sum of Uganda shillings 283,653,557/= is grounded on the actions directly or indirectly caused by the third-party. The plaintiff discontinued claim for Uganda shillings 283,653,557/= in favour of Uganda shillings 153,269,833/= as recommended by the report of the Ministry of Works and Transport in 2008.

Counsel submitted that the defendant terminated the contract in accordance with the recommendations of the Inspectorate of Government. The letter of termination exhibit P5 dated 7th of June 2005 went beyond the recommendations and requested the plaintiff to keep guard of the building and properties therein. It also requested the plaintiff to ensure that this site is well lit and properly secured against all sorts of vandalism. The defendant admitted liability for Uganda

shillings 6,364,238/= and judgement on admission was accordingly entered against the defendant. The court was left to the issue of whether the defendant was liable for the sum of Uganda shillings 146,905,595/= as contained in the report of the Ministry of Works and Transport at page 82 paragraphs 32.9 of the plaintiffs trial bundle. Counsel submitted that the compensation costs were recommended by the Ministry of Works and Transport. Learned counsel submitted that the constituents of the claim in the report of the Ministry of Works and Transport contained on pages 164 at page 174 clearly show that the figure was not incurred as a consequence of the recommendations of the Inspectorate of Government. The report never recommended keeping guard of the premises against any sort of vandalism. The expenses/costs were therefore voluntarily incurred by the defendant outside the scope of the recommendations of the Inspectorate of Government. The defendant opted not to adduce evidence. There is therefore no evidence on record to show that the defendant is entitled to indemnity by the third party.

Learned counsel submitted that the third party proceedings are a mini suit between the defendant and the third-party. The defendant is therefore treated as plaintiff and the third-party as the defendant. The defendant failed to discharge the burden of proof on the balance of probability to show that the third-party is supposed to indemnify it in the circumstances of the case.

As far as the report of the Ministry of Works and Transport is concerned, it's report was not made as a government agent but as an independent expert in that particular area. However the plaintiff has no cause of action against the third party to compel it to admit a report from the said Ministry. Consequently learned counsel prayed that the claim by the defendant against the third-party be dismissed with costs.

Judgment

I have carefully considered the written submissions of the plaintiff, defendant and third party counsels. I have also considered the documentary evidence on record and the testimonies of the plaintiff’s witnesses.

At the commencement of the proceedings, the defendant admitted liability for a sum of **Uganda shillings 6,364,238/=** as the outstanding contractual balance. I agree with learned counsel for the

Attorney General that the remaining issue relates to liability for termination and the subsequent costs/compensation if any.

I will not follow the approach taken by counsels in first arguing the issue of the quantum before dealing with the question of who is liable if at all. I would begin by first determining the question of liability. The question of liability is preliminary to establishing the quantum if any. The fact that the plaintiff was lawfully contracted or assigned the contract to carry out the works is not in dispute and there is no need for a background to the contract. The background in any case has been sufficiently given at the beginning of this judgment.

Briefly the defendant wrote to the plaintiff in a letter dated 7th of June 2005 and exhibit P5 stopping the plaintiff from further construction works of the office block. The letter reads as follows:

> "STOPPAGE OF WORK ON THE SITE
>
> For reasons beyond our control we are directing that all works on the site stop immediately until further notice.
>
> You will however keep guard of the building and properties therein. For clarity please ensure that the site is well lit and properly secured against all sorts of vandalism."

The letter is signed by the Assistant Town Clerk of the defendant. The letter did not terminate the contract. What the letter did was to direct the plaintiff to stop all works on the site until further notice. Thereafter the defendant wrote a letter dated 17th of November 2005 attached to the report of the Ministry of Works as annexure 1 terminating the contract. It reads as follows:

> "RE: TERMINATION OF THE CONTRACT FOR THE CONSTRUCTION OF OFFICE BLOCK
>
> I have been instructed to terminate your contract of the construction of the Office Block.
>
> This is in line with the IGG's recommendations as outlined in her report.

> Please make the necessary arrangements to hand over the site to Council and should be done within 7 days from this date. Attached find a photocopy of the relevant recommendations."

The letter is signed by the Senior Asst Town Clerk of the defendant. Apparently the plaintiff and the defendant did not consider the letter of 17 November 2005 as sufficient to terminate the contract. Therefore on 5 August 2008, the parties signed a memorandum of understanding again stating that they were terminating the contract. The memorandum of understanding reads as follows:

1. Both Parties have mutually agreed that upon signing of the memorandum the building contract for the construction of Jinja Central Division Office Block shall stand terminated forthwith.
2. The Moonlight Transporters and Contractors shall hand over the site to Jinja Central Division starting from Monday 4th of August, 2008. The programme for handover shall be worked out by both parties.
3. Jinja Municipal Council undertakes to verify the claims of Moonlight Transporters and Contractors if any and settled them within the shortest possible time.

The memorandum of understanding is signed by the Senior Asst Town Clerk of the defendant and PW1 of the plaintiff. This document was admitted as exhibit P7. What is implicit in the letter is a question of fact that the plaintiff had not yet handed over the site to the defendant by August 2008. Thereafter the handover report which is dated 12th of August 2008 is signed by the plaintiff and the defendants officials namely the Municipal engineer, the Town Clerk, the Senior Asst Town Clerk and the Divisional Engineer of the defendant. The handover report is exhibit P8. It partly reads as follows:

> "Further to the Memorandum of Understanding between Moonlight Transporters and Contractors and Jinja Central Division dated 5th of August, 2008 and signed on 7 August 2008. It was mutually agreed that after signing the memorandum, Messrs Moonlight transporters and contractors hands over the office block to Jinja Central Division.
>
> Today the 12th day of August 2008 Messrs Moonlight Transporters and Contractors hands over the office block to Jinja Central Division in the following visual physical state.…"

Termination of the contract by the Employer/defendant is catered for by clause 25 of the main contract exhibit P1. Clause 25 (1) of the contract gives the grounds for termination by the Employer. It provides inter alia that "*if the contractor without reasonable cause wholly suspends the carrying out of the works before completion thereof," or, (b) if he fails to proceed regularly and diligently with the works, or (c) If he refuses or persistently neglects to comply with a written notice from the Architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the works are materially affected, or (d) if he fails to comply with the provisions of clause 17 of these conditions."* Clause 17 of the contract is inapplicable as it deals with assignment of the contract without consent of the Architect.

In writing to the plaintiff, the defendant did not specify whether any of the grounds for termination of the contract by the employer provided for under clause 25 of the contract had occurred. Secondly, the defendant did not comply with the requirement of notice under clause 25 of the contract. Clause 25 requires the architect to give notice of the default requiring the contractor to remedy the default. Clause 25 (3) (d) further provides that the employer/defendant shall reconcile accounts with the contractor/plaintiff. If it is established that the plaintiff owes the defendant/employer, the plaintiff shall make good the difference by paying the employer. If on the other hand it is established that the employer owes the plaintiff, then the employer shall pay the plaintiff the amount established through the reconciliation exercise. This provision may be read in conjunction with the clause dealing with sectional completion. Sectional completion is provided for by clause 16 and allows the evaluation of the works part completed and payment therefore.

In this case it cannot be said that the defendant complied with clause 25 of the contract and lawfully terminated it in accordance with the rights of termination provided for under that clause. It is an agreed fact that the contract was terminated on the recommendations of the Inspectorate of Government. This fact is also stated in exhibit P6 a report of the Ministry Works and Transport. Paragraph 1.1 of the report provides that investigations conducted in the years 2004/2005 by the Inspector General of Government recommended consultancy services for design and supervision by Messrs TEK Consult Uganda Ltd should be cancelled and the consultants blacklisted for unethical and unprofessional conduct. Secondly the construction contract was to be procured afresh for completion of the construction of the building.

Furthermore it recommended that the works be re-advertised. The report of the Inspector General of Government was admitted by consent of the parties and the executive summary thereof makes a technical evaluation of the works of the plaintiff. Their finding is that the plaintiff's manager Mr Saru Mohammed lacked the technical expertise to undertake the project. At page 14 recommendations are in the following words:

> "The Division should procure afresh, the services of a competent firm to complete the project of the construction of the office block, to safeguard the interest of the Council and to avoid loss of public funds and ensure accountability. This will call for re-advertisement of the tender."

The findings of the Inspectorate of Government were forwarded by letter dated 26th August 2005 and addressed to the Chairperson of Jinja District Service Commission. The letter reads as follows:

> "This is to forward to you the report of investigations into the allegations captioned above for your perusal and the implementation of the recommendations contained therein.
>
> All concerned officials are urged to ensure that the recommendations are implemented without undue delay. Please notify this office of the action taken as soon as possible."

The Inspectorate of Government did not direct the mode of termination of the services of the plaintiff. The letter of termination dated November 17, 2005 written by a senior assistant town clerk to the plaintiff explicitly indicates that the letter was in line with the recommendations of the Inspectorate of government as outlined in the report. The letter further indicates that copy of the recommendations was attached. What is material is that the letter does not indicate who instructed the termination. It only indicates that it is in line with the recommendations of the Inspectorate of Government. The conclusion is that the Inspectorate of Government recommended termination of the plaintiff's contract by advising that a new contractor be procured. The recommendations were addressed to the defendant for implementation.

We have already demonstrated that the Inspectorate of Government did not direct how the defendant was to terminate the contract. Secondly, the contract which was binding on the defendant was not complied with. This is further evidenced by the report of the Ministry of

Works and Transport exhibit P6. Before concluding issue number 2 it will be necessary to review the report of the Ministry of Works and Transport on this question.

Item 1.1 of the report reproduces the recommendations of the Inspectorate of Government which is that the services of a competent firm were to be procured afresh for completion of construction of the building of the office block. In item 1.2 the report notes that the defendant issued letters dated 17th of November 2005 to the Consultant and the Contractor respectively seeking to cancel the construction contract as recommended by the Inspectorate of Government. The report further notes in paragraph 1.3 that the attempted termination of the construction contract was contested by the contractor in a letter dated 28th of November 2005. This letter was annexed as annex 2 to the report. They conclude that the defendant apparently re-considered the issue and reverted to some form of mutually agreed termination of contract rather than the attempted unilateral cancellation. This is evident from the memorandum of understanding exhibit P7 dated 5th of August 2008 and the handover report exhibit P8. It is also apparent that the plaintiff remained in possession of the site until it handed it over in August 2008, a period of about three years from 17 November 2005 the time when letter of termination was written. Furthermore, prior to writing the letter of termination, the plaintiff was stopped from carrying out any works. Needless to say the letter of the plaintiff dated 28th of November 2005 contested termination of contract on the ground that it was contrary to the provisions of the contract. Particularly at page 2 of that letter item 1.4 the plaintiff quotes clause 25 of the contract which gives the grounds for termination of contract unilaterally by the employer/defendant. I accordingly agree with the conclusion in the report of the Ministry of Works and Transport paragraph 1.3 that the defendant apparently re-considered the issue of termination and reverted to some form of a mutually agreed termination of contract.

As a question of fact, the Inspectorate of Government did not direct how the contract was to be terminated and it must be assumed that the contract was supposed to be terminated in accordance with the contract or lawfully. Furthermore, the court is to address the alternative submissions of the defendant's counsel that the defendant was merely following the directives of the Inspectorate of Government and therefore was not liable for the plaintiffs claim. Additionally, the defendant did not call any witnesses but relied on agreed facts and documents exhibited by consent of the parties.

The resolution of the question of liability must firstly be informed by the statutory provisions governing the powers and jurisdiction of the Inspectorate of Government. The powers and jurisdiction of the Inspectorate of Government seems to be primarily flow and be over officials of government and is concerned with how they perform their duties. This can be discerned both from the Inspectorate of Government Act 2002 and the Constitution of the Republic of Uganda. We need to examine these powers starting with the Constitution of the Republic of Uganda. Article 226 of the Constitution provides that:

> "The jurisdiction of the Inspectorate of Government shall cover officers or leaders whether employed in the public service or not, and also such institutions, organisations or enterprises as Parliament may prescribe by law."

The first part of the article primarily gives jurisdiction over officers or leaders, i.e. real people and not legal fictions. The officers or leaders covered may be employed in the public service or not. The second part of the article includes such other institutions or organisations or enterprises as may be prescribed by Parliament by law. The latter part of the clause does not apply to the local government. Secondly article 230 gives special powers to the Inspectorate. Article 230 (1) gives power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution of officers or leaders in respect of cases involving corruption, abuse of authority or of public office. These special powers relate to officers or leaders involved in corruption, abuse of authority or of public office. It may however be argued that even a company may be prosecuted. Secondly article 230 (2) gives powers to the Inspectorate of government in the course of his or her duties or as a consequence of his or her findings, to make such orders and give such directions as are necessary and appropriate in the circumstances. In this case recommendations were made to the local government to bring the contract to an end.

Article 231 provides for reports of the Inspectorate of Government. Article 231 (2) provides that where the report relates to the administration of any local authority, an extract of the portion of the report on the matter shall be forwarded to the local authority. What is significant is that the office is obliged to report to Parliament on the performance of its functions every six months. The report shall contain such recommendations as the officer considers necessary and containing such information as Parliament may require. It is only when the report relates to a local

government that they shall be entitled to a copy. Last but not least article 231 (4) of the constitution provides that a Local Government shall every year submit a report to Parliament on actions taken on any report submitted by the Inspectorate of Government relating to the local authority. In other words the Local Government is expected to take action and report the action taken to Parliament yearly.

It is implicit in the above provisions that the local authority has the mandate to take the appropriate action recommended by the Inspectorate of Government. Additionally under section 6 of the Local Governments Act cap 243:

> Every local government council shall be a body corporate with perpetual succession and a common seal, and may sue or be sued in its corporate name.

The section makes the point that every local government is an independent corporation which may sue or be sued in its own name and is responsible for its own actions. We shall windup the argument by examining the pertinent provisions of the Inspectorate of Government Act 2002 which makes operational the constitutional provisions reviewed above. Section 8 of the Act *inter alia* gives the function of the Inspectorate as the elimination and fostering the elimination of corruption, abuse of authority and of public office. The IGG should promote fair, efficient and good governance in public offices. It should also enforce the Leadership Code Act. It gives powers of investigation of any act, omission, advise, decision or recommendations by a public officer or any other authority in the exercise of administrative functions.

Section 9 of the Inspectorate of Government Act provides that "*the jurisdiction of the Inspectorate shall cover officers and leaders serving in the following offices –…"* It goes on to give a list of institutions and departments which include a local government council or local government unit or a committee of such council or unit. Section 14 of the Inspectorate of Government Act further casts light on the special powers of the Inspectorate. It does not suggest anywhere for instance that the Inspectorate handles the action required of the authority or person. It only directs the authority or person to do some act that is appropriate in the circumstances.

The conclusion is that the Act does not envisage any liability of the Inspectorate of Government for any orders made or directions given pursuant to the special powers of the Inspectorate or pursuant to the recommendations made. Such recommendations as in this case are supposed to

be implemented by the local government or authority which is obliged to report the actions taken in line with recommendations of the Inspectorate to Parliament. Having reached this conclusion, the Inspectorate of government cannot be held liable for recommending termination of the contract of the plaintiff. It was the duty of the local government to implement that recommendation in accordance with the contract and the law. Because the Inspectorate of government cannot be held liable in the circumstances of the case, the Attorney General is not liable for the actions of the local authority/defendant. If anything, the defendant is obliged to report to Parliament the actions it took on the recommendations of the Inspectorate of government. It is Parliament as the supreme law making authority which may take any appropriate measures that it deems necessary after receiving any of the reports mentioned above.

As far as the question of liability is concerned, the defendant commissioned Ministry of Works and Transport to assess the work undertaken by the Contractor. This is contained in paragraph 1.6 of the report of the Ministry Works and Transport. The letter of instructions is annex 3 to the report. The letter is dated 20th of October 2006 and is addressed to the Permanent Secretary Ministry of Works and Transport. The letter reads as follows:

> "The contract for Jinja Central Division office block was terminated on the recommendations of the IGG.
>
> The contractor had done some work which had not been paid. There is need for your ministry officials to come and assess and certify the works done by the contractor so that it can be paid and the project re-advertised.
>
> The purpose of this letter is therefore to request you to avail us with the team of your officials to work with our Engineers to certify the works done with the contractor.
>
> Your officials will be facilitated by the Jinja Central Division…"

The request of the defendant to the Permanent Secretary Ministry Works and Transport was made when the plaintiff was still on the site and long after the recommendations of the Inspectorate of government. This request was made approximately one year after the letter of 17 November 2005 purporting to terminate the contract which letter never took effect. This is

because the plaintiff remained on the construction site until 2008 and the parties opted for an alternative method of termination of the contract.

The report of the Ministry of Works and Transport paragraph 33.1 is very explicit about the termination of the contract using the provisions of the contract. They find as follows:

> "***33.1 Grounds do not exist for JCD to terminate the contract using the provisions of the contract.***
>
> ***33.2 On the other hand and in view of the weaknesses noted regarding handling of the contract as exhibited by JCD and JMC, a unilateral termination of the contract can be successfully challenged by the contractor with considerable costs to JCD. This unilateral approach to termination is not recommended and should be avoided in the circumstances.***
>
> ***33.4 A mutually agreed termination of contract is preferable and should in the circumstances be adopted."***

The report of the Ministry of Works and Transport was prepared in January 2008 while the plaintiff was still on the site. It is therefore clear that the recommendations of the Inspectorate of Government were not adhered to immediately. Instead and probably influenced by the recommendations of the Ministry of Works and Transport, the defendant opted for a mutually agreed termination of contract as contained in the recommendations 33.4 quoted above. Something should be said about the implications of the method of termination of contract chosen by the defendant. It was argued strongly for the defendant that the plaintiff was incompetent and that there were defects in the work of the plaintiff. In cross examination of PW 1 and PW 2 the defendants counsel pointed out the comments and findings of the Inspectorate of Government on the state of the constructed building. On the other hand the report of the Ministry of Works and Transport criticised the consultant and supervisor of the works. In other words the works were being supervised and the quality of the work depended on TEK Consult Uganda limited. They also found that multiple teams set up by the Jinja Central Division ended in an unclear structure for managing the contract. The management organisation was contrary to regulations, confusing and without clear technical accountability. The conclusion was that the supervisors were accountable for the outcome of the work. Secondly, when the Inspectorate of Government

recommended termination of the contract, the defendant did not adhere to the contract provisions for termination by the employer namely clause 25. It was upon the defendant to notify the contractor of any defects and require the contractor to make good such defects. Additionally, there is a contractual provision for defects liability. None of these provisions were adhered to by the defendant and as noted above the contract was brought to an end by agreement which has clear terms of termination.

Consequently, it is my finding that the defendant is liable in accordance with the mutually agreed termination of contract for any liability assessed in accordance with the memorandum of understanding. Secondly, the defendant is liable for additional works done by the plaintiff after the plaintiff was stopped from carrying out any further construction work. As far as facts are concerned, it is the defendant who commissioned the Ministry of Works and Transport to carry out an assessment and certify the works done by the plaintiff. However, the memorandum of understanding terminating the contract was executed after the report of the Ministry of Works and Transport. To be precise, the defendant undertook to verify the claims of the plaintiff and settle them within the shortest possible time under clause 3 of the memorandum of understanding exhibit P7 at page 192 of the plaintiffs trial bundle. The defendant did not have the claims of the plaintiff verified or pay them within the shortest possible time as agreed in the memorandum of understanding.

The quantum of damages if any

The Plaintiffs claim against the defendant is for recovery of Uganda shillings 283,653,557/= or *quantum meruit* for construction works, interest and costs of the suit. Learned counsel for the defendant objected to the claim or two principal grounds. The first ground is that the claim is a special damage which was not specifically pleaded or proved and cannot be sustained in law. Learned counsel contended that none of the plaintiff's witnesses could establish how the amount was arrived at. As far as *quantum meruit* is concerned, learned counsel submitted that it did not include services not consumed by the defendant. Consequently basing on that principle, he submitted that the plaintiff is entitled to a sum of Uganda shillings 6,364,238/= for services rendered. This is based on the recommendations of the Ministry of Works and Transport the

breakdown of which is found at paragraph 32.9 of the report. The demand constitutes work executed by the contractor but which remained unpaid at the time of termination of the contract. PW1 Mohammed Saru testified that the plaintiff had abandoned the original claim and substituted it for a claim of **Uganda shillings 153,269,833/=** which comprises the sum of Uganda shillings 6,364,238/= for works executed by the contractor but remained unpaid and compensation costs to the contractor amounting to Uganda shillings 146,905,595/=. In other words the plaintiff sought to rely on the recommendations of the ministry of works and transport.

Having conceded that the plaintiff is entitled to **Uganda shillings 6,364,238/=,** it is a concession that the plaintiff is entitled to be paid for work executed by the contractor but unpaid. This amount was verified by the Ministry of Works and Transport in their report and their conclusion in paragraph 32.9. In the same paragraph, the ministry of works and transport recommended compensation costs to the contractor amounting to **Uganda shillings 146,905,595/=** which was to be subject to negotiations. In other words it was a guideline to the defendant on what could be a reasonable compensation in the circumstances of the case. The remaining issue is therefore whether the plaintiff is entitled to compensation costs.

As far as the pleadings are concerned, the plaintiffs claim is not for special damages as such but it is a claim for recovery of the price or *quantum meruit* for construction works done by the plaintiff for the defendant, interests and costs of the suit. There is no claim for special damages and the submission that the claim should be barred on the ground that it is a claim for special damages is misplaced. If there was any claim for special damages, it was an admitted claim by the defendant and it is for work actually done under the terminated contract. The plaintiffs claim is also additional to the work actually done under the contract. This is clear from the testimony of PW 1 and PW2. The facts of the plaintiffs claim are pleaded in paragraph 4 (f) (g) and (h) of the plaint. The facts are that in April 2008, the Ministry of Works and Transport valued the works carried out by the plaintiffs and recommended that the cheapest way of closing the said contract was to negotiate an amicable settlement with the plaintiff. On the basis of the report the plaintiffs agreed to hand over the site to the defendant and the defendant undertook to verify the plaintiffs claim for payments. Thereafter the contract was terminated in accordance with a memorandum of understanding dated 5th of August, 2008. The plaintiff then demanded from the defendant the sum of **Uganda shillings 283,653,557/=.** This is clearly based on Annexure “D”

which was a photocopy of the ministry of works and transport report dated 11th of April, 2008. In other words the plaintiffs claim is based on the recommendations of the ministry of works and transport, a report which was annexed to the plaint as Annexure "D". The report was pleaded and proved in evidence.

In substance the plaintiffs claim is for compensation. The plaintiff also relies on *quantum meruit*. According to **Cheshire and Fifoot's Law of Contract 10th edition London Butterworth's 1981**, the common law has provided a convenient remedy where the plaintiff seeks, not a precise sum alleged to be due to him but a reasonable remuneration for services rendered. The authors note that there is confusion in classifying the cases to which the remedy of *quantum meruit* applies because of its dual character. Sometimes it operates as a legitimate remedy in contract and sometimes as a quasi contractual remedy. At page 597 the authors note that the incidence of *quantum meruit* cuts across the logical distinction between contract and quasi contract. They observe that *quantum meruit* may avail to a plaintiff where the original contract to which the plaintiff is a party was replaced by a new one and the plaintiff seeks payment for work done or goods supplied under this substituted agreement. The authors note that if the plaintiff has made an agreement to work for the defendant in return for a specified fee and sues on *quantum meruit* for extra work done he must satisfy the court that the original contract has been discharged. According to **Halsbury's laws of England volume 9 (1) 4th edition (reissue)** paragraph 1155, the term *quantum meruit* is used in three distinct senses at common law. Firstly it denotes a claim by one party to a contract, for example on breach of a contract by the other party, for reasonable remuneration for what he has done. Secondly the mode of redress on a new contract which has replaced the previous one and thirdly a reasonable price of remuneration which will be implied in a contract were no price or remuneration has been fixed for goods sold or work done.

In this particular case, the defendant first stopped the plaintiff from doing the work. However the defendant advised the plaintiff to maintain the site. Thereafter the plaintiff was advised in writing on 17 November 2005 by the defendant that the contract had been terminated. However, the plaintiff complained about the alleged termination on the ground that it was not in accordance with clause 25 of the contract. The plaintiff remained on the site with the consent of the defendant and brought the contract to a mutual end by a memorandum of understanding. During

the time the plaintiff was maintaining the site, it was required to render services to the defendant. These included guarding the premises, keeping the premises well lit and preventing all kinds of vandalism of the defendant's property. The plaintiff maintained its staff and equipment on the premises. The maintenance of the staff and equipment by the plaintiff was at the instance of the defendant. At page 598 **Cheshire and Fifoot** (supra) notes that:

> ***" The second instance of the use of quantum meruit as a quasi contractual remedy is to be found where the plaintiff has rendered services in pursuance of the transaction, supposed by him to be a contract, but which, in truth, is without legal validity. The rationale here is similar to that employed support an action for money paid in respect of an 'ineffective' contract and the first from it only in the circumstance that the plaintiff sues, not for the return of a precise some, but for a reasonable remuneration."***

Consequently even if provisions for the execution of contracts were not complied with by the defendant local government, a claim for *quantum meruit* would still be possible. According to the report of the Ministry of Works and Transport, the plaintiff kept the premises for a period of about 34 months. In those circumstances, by keeping the plaintiff on the premises and having directed the plaintiff to maintain the site free from vandalism, the defendant rendered itself liable for the extra costs incurred by the plaintiff under the doctrine of *quantum meruit.* Reasonable remuneration is the same as compensation.

Secondly, the memorandum of understanding operates as estoppels against the defendant from denying the claims of the plaintiff. The obligation of the defendant under the memorandum of understanding terminating the contract was prompted by the report of the Ministry of Works and Transport that the contract should be brought to a mutual end as the grounds for termination under clause 25 of the agreement was not available to the defendant. Inasmuch as this was erroneous in view of the clear recommendations of the Inspectorate of government, the memorandum of understanding, though in line with the recommendations of the Inspectorate, was executed too late after the plaintiff had been instructed to keep the premises and avoid all kinds of vandalism of the defendant’s property. Prior to the memorandum of understanding, the defendant gave clear instructions to the plaintiff to maintain the premises and remain on the site. In those circumstances, the plaintiff would be entitled to compensation in addition to the claim of

Uganda shillings 6,364,238/= under the previous contract. It should further be emphasised that the contract itself is deemed to have come to an end in August 2008 nearly 3 years after the recommendations of the Inspectorate of government though no further construction work was done after June 2005 when the work was stopped.

Whereas the Ministry of works and transport recommended compensation costs of about 146,905,595/= in the circumstances, it would be necessary to work out the various items making this figure. The breakdown of the figures is as follows:

1. interest on delayed payment – 4,013,278/=
2. maintenance of the site for 34 months – 27,200,000/=
3. cost of idle labour for five months – 19,377,500/=
4. costs of idle plant for five months – 15,180,000/=
5. head office costs for 34 months – 14,773,000/=
6. demobilisation costs – 6,970,000/=
7. loss of profit on remaining work – 38,046,559/=

The Ministry of works further added 17% VAT. The conclusion in paragraph 31.4 was the previous payments amounted to 359,555,650/= and the net value of the calculations due was 130,999,857/= plus VAT of 22,269,976/= giving a total amount estimated due to the Contractor at the termination of the contract of Uganda shillings 153,269,833/=.

The report further gives the rationale for the estimates in the interest on delayed payments was based on the contract and accrued to the contractor at the time of suspension of the contract in June 2005. Secondly Jinja Central Division instructed the contractor to maintain the site until further notice, beginning from the time of suspension of the works in June 2005. Thirdly, from the order to suspend works there was a period of five months, the contractors Labour and plant were held idle on the instructions of Jinja Central division. Furthermore they factored in head office costs beginning from suspension of works up to the anticipated termination or handover of the site run for a period of about 34 months. They noted that the contractor's office incurred small overheads in attending to the contract, even though it was in abeyance. Lastly, they factored in demobilisation costs which were incurred. The defendant does not object to the amount of **Uganda shillings 6,364,238/=** and interest thereon standing at **Uganda shillings**

4,013,278/= at the time of the report**.** Interest on delayed payments was based on the sum of **Uganda shillings 6,364,238/=** and accumulated up to the time of writing the report dated 11 April 2008. The plaintiff is awarded a total of **Uganda Shillings 10,377,516/=** which comprises of money for unpaid work done by the plaintiff together with interest on delayed payments up to April 2008 upon the concession of the defendant.

As far as the claim for compensation is concerned, I have carefully considered this evidence and I agree with the findings of the experts. The Attorney General's submissions agree that the plaintiff was kept at the site on the instructions of the defendant and incurred costs pursuant to the said instructions.

In the circumstances, the only item which was not earned is loss of profit on remaining work amounting to *Uganda shillings 38,046,559/=*. This claim cannot arise under the doctrine of *quantum meruit* and is disallowed. In the premises, the plaintiff is entitled to compensation as spelt out in the report of the Ministry of Works and Transport based upon maintenance by the plaintiff of the site for a period of about 34 months, guarding the premises, keeping the premises well lit, and guarding the defendants' premises against all kinds of vandalism. The particulars of compensation are:

1. Interest on delayed payment – 4,013,278/= up to April 2008 (already awarded above)
2. Maintenance of the site for 34 months – 27,200,000/= up to April 2008
3. Cost of idle labour for five months – 19,377,500/=
4. Costs of idle plant for five months – 15,180,000/=
5. Head office costs for 34 months – 14,773,000/= up to April 2008
6. Demobilisation costs – 6,970,000/=

Total **83,420,500/=**

In the premises the plaintiff is entitled to compensation of **Uganda shillings 83,420,500/= which** amount is less interest on delayed payment already taken care of above and the said sum of Uganda Shillings **83,420,500/=** is hereby awarded.

As far as the claim for interest is concerned, it is the law that interest is at the discretion of the court, which discretion has to be exercised judicially. Section 26 (2) of the Civil Procedure Act provides that:

> ***"Where and in so far as the decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged 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 a 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 an earlier date as the court thinks fit."***

In the case of **Bank of Baroda Uganda Ltd. vs. Wilson Buyonjo Kamuganda Civil Appeal No. 10 of 2004**, Tsekooko who delivered the judgment of the court held at page 26 of the judgment that where there is no agreement on the rate of interest payable, an award of interest by the court is discretionary and that discretion must be exercised judicially. He summarised the provision of the law in a Civil Procedure Act quoted above as providing for the award of interest in three circumstances. Interest may be awarded on the principal sum prior to the institution of the suit; it may be awarded on the principal sum at a given rate from the date of filing a suit and lastly interest on the aggregate sum reflected in the Decree may be awarded until payment or earlier. He concluded that in awarding interest and at what rate the court is guided by the circumstances of each case.

In this case the plaintiff prayed for interest at commercial rate of 25% per annum from the date of demand of payments on the 5th of September, 2008 till payment in full. Counsel for the plaintiff submitted that the commercial rate of interest was intended to take into account the rising inflation and drastic depreciation of the Uganda shilling. He relied on court exhibit number 1. Learned counsel for the defendant did not dispute the principles upon which courts may award interests. He submitted that the court should only be pleased to **award interest on Uganda shillings 6,364,238/=** which amount is for work done by the plaintiff. As far as the rest of the claim is concerned, he submitted that the plaintiff could not benefit from its on wrong because the contract was terminated due to its own breach.

Court exhibit 1 is a letter from the of Bank of Uganda to the Solicitor General Ministry of Justice and Constitutional Affairs dated 7th of May, 2012 giving the commercial bank prime lending rate for the week ending 20th of April, 2012. It also gives the CBR and bank rate for the period of interest. Generally the average rate was 27%. In the circumstances of the plaintiffs, the contract was terminated by mutual consent and subsequently the plaintiff made a demand for payment. In the memorandum of understanding by which the contract was terminated, the defendant was supposed to verify the claims of the plaintiff and pay immediately. The defendant neither verified nor paid the plaintiffs claims. The memorandum of understanding is dated August 2008. If verification had been made, payment would have proceeded immediately thereafter. It should be noted that the Ministry of Works and Transport report was commissioned by the defendant. It recommended negotiations with the plaintiffs. However, no negotiations were carried out to ascertain the amount of money payable. Negotiations only lead to the mutual termination of the contract with an agreement for verification of the plaintiffs claim and immediate payment. The plaintiff was entitled to immediate payment after the 5th of August, 2008. In the circumstances, it would be just to hold that the verification of the plaintiffs claim would not have taken more than three months. This is in line with the fact that the defendant had commissioned a technical study to assess the plaintiff's claims. Recommendations were made as to how the contract should have been terminated. Clause 30 (1) (b) of the contract provides as follows:

> "If a certificate remains unpaid beyond the period for honouring certificates stated herein, the employer shall pay or allow to the contractor interest on the unpaid amount for the period it remains unpaid at commercial bank lending rate in force during the period of default."

The Ministry of works and transport assessed interest only on unpaid work of Uganda shillings 6,364,238/= under this clause. This interest only applied up to the time of April 2008. From May 2008 further interest may be applied in accordance with the terms of the contract and the concession of the defendant. Further interest is therefore awarded on the sum of Uganda shillings 6,364,238/= at commercial bank lending rates in force of about 25% per annum from May 2008 till payment.

As far as compensation claims are concerned interest will be awarded from December 2008 up to the date of judgment at the rate of 25% per annum on the amount of **Shs 83,420,500/=** which amount is less the amount of interest on delayed payment on **Uganda shillings 6,364,238/=** already taken into account separately.

Further interest is awarded on compensation costs at 21% per annum from the date of judgment till payment in full. For avoidance of doubt this does not include interest on delayed payment conceded to and already awarded separately.

The defendant shall pay the costs of the suit to the plaintiff and the third party.

Ruling read in open court this 17th day of August 2012.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Baiga Irene State Attorney holding brief for Bafirawala Elisha SSA

Waiswa Salim holding brief for Muzamil Kibedi for the plaintiff

Muhammed Saru plaintiff in court.

Okuni Charles Court Clerk

Hon. Mr. Justice Christopher Madrama

17th August 2012