

**THE REPUBLIC OF UGANDA,**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT NO 60 OF 2009**

**KENCOM (U) LTD}..... PLAINTIFF**

**VS**

**OTADA CONSTRUCTION CO LTD}..... DEFENDANT**

**BEFORE HON. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiff's suit against the Defendant is for recovery of the sum of Uganda Shillings 98,176,027/=, interest thereon and costs for breach of contract. The plaintiff avers that in April 2008, the Defendant subcontracted the Plaintiff to construct the Ikumba-Ruhija-Hamayanja road measuring a distance of 73 km for consideration of Uganda Shillings 390,000,000/=. Under the agreement, the construction would be executed in phases and payments to the Defendant would be made by the main contractor, Ministry of Works and Transport against interim certificates issued by it and the Defendant would pay to the Plaintiff 66% thereof. Upon completion of the works on which the first interim certificate is based, the Defendant paid Uganda Shillings 109,700,000/= to the Plaintiff in instalments between May and October 2008. This led to delay in completion of the works. The Plaintiff continued to carry out the works and site inspections were carried out by engineers of the Ministry of Works between July and September 2008.

On the 29<sup>th</sup> January 2009, payment was made to the Defendant against interim certificate No. 2 amounting to Uganda Shillings 124,509,132/= from which the Employer deducted Uganda Shillings 14,000,000/= which had been advanced to the Defendant, leaving a balance of Uganda Shillings 110,509,132/= which was paid to the Defendant. The Plaintiff contends that there was no justification for the Defendant's refusal to pay Uganda Shillings 98,176,027/= to it when it had carried out the works and demanded for payment on 29<sup>th</sup> December 2008 and 11<sup>th</sup> February 2009 respectively. The Plaintiff stopped carrying out the works and the Plaintiff withdrew its equipment from the works site due to failure by the defendant to pay it. The Plaintiff claims the cost of withdrawing the equipment of Uganda Shillings 15,000,000/= and Uganda Shillings 82,176,027/= being 66% of the certificate sum; and Uganda Shillings 1,000,000/= for transporting and accommodating one Mr. Kibuuka to retrieve samples and test murrum and compaction obtained from the site.

The Defendant's written statement of defence denies the claims and includes Counterclaim against the Plaintiff. The Defendant's case is that the Plaintiff has no valid claim against it. It

admitted the amounts due from Ministry of Works and averred that the sum of Uganda Shillings 14,000,000/= was advanced to the Plaintiff and the sum of Uganda Shillings 82,176,027/= was not due to the Plaintiff under the subcontract. It was a salient feature of the subcontract clause 10 thereof which required the Plaintiff to complete the works within 3 months, i.e. by 15<sup>th</sup> July 2008. The Plaintiff without any justifiable reason failed to execute the works as agreed, thereby causing damage and costs to the Defendant. Upon breach of covenant to complete the works, the Defendant executed the works and interim certificate No. 2 was based on the Defendant's works. Additionally the Ministry of Works and Transport levied liquidated damages against the Defendant for the failure to complete the works in time. The Defendant had already made an advance payment of Uganda Shillings 14,000,000/= to the Plaintiff and the Plaintiff is liable to refund it.

The Defendant's counterclaim is for general damages, costs, a refund of Uganda Shillings 14,000,000/=, interest thereon, penal costs and damages imposed by Ministry of Works and Transport against the Defendant for the Plaintiff's breach of contract. The counterclaimant's contention is that failure to complete road construction works within three months as contracted and the failure to carry out the works resulted in extra costs and penal damages against the Defendant imposed by the Ministry of Works which amounted to breach of contract. The reasons advanced by the Plaintiff for the delay of construction works were untenable and unjustifiable.

In reply the Plaintiff denied having received an advance payment of Uganda Shillings 14,000,000/= from the Defendant. Secondly that time was not of the essence and there was provision for extension of time. The Defendant never terminated the subcontract for failure to comply with the time schedule or failure to complete the works as alleged. The works were executed by the Plaintiff and by letters dated 29<sup>th</sup> December 2008 and 11<sup>th</sup> February 2009, the Plaintiff demanded for payment but the Defendant did not pay but this did not indicate that the Defendant had terminated the contract. The Defendant neglected to seek extension of time from the Ministry of Works in spite of warnings from the Plaintiff.

In its defence to the counterclaim, the Plaintiff contends that the delays in completion of the works were caused by rains and landslides that damaged the bridge and at no time did the Defendant dispute the factors which caused delay. Secondly time was not of the essence and the subcontract was never terminated by the Defendant for any reason inclusive of delays in completion of work. The Plaintiff continued to work on the road and at all times, the project manager from Ministry of Works inspected the works and signed the Plaintiff's visitor book. Furthermore, the Defendant duly paid the Plaintiff for the works carried out under interim certificate No. 1 between May 2008 and October 2008, but in instalments, a factor which slowed the progress of the works on the site hence the delay. The Defendant did not suffer any penal costs or liquidated damages and even if they did, it was self-inflicted.

The Plaintiff was represented by Counsel Gilbert Nuwagaba while the Defendant was represented by Counsel Salim Makeera

## Issues

1. Whether the Plaintiff was in breach of the subcontract made by the parties on 15th of April 2008.
2. Whether the Defendant was in breach of the sub contract made on 15th of April 2008.
3. Whether the Plaintiff is entitled to payment for the work done.
4. Whether the parties entitled to the remedies sought.

## Agreed Facts

In the joint scheduling memorandum signed by Counsels for both parties there are some agreed facts. These are that the Defendant subcontracted the Plaintiff to carry out works on 73 km on Ikumba – Ruhija – Hamayanja at a total cost of Uganda shillings 390,000,000/= being 66% of the total contract price. The Plaintiff was paid a sum of Uganda shillings 109,700,000/= on the first interim certificate by the Defendant. The Defendant received payment under a second interim certificate in the sum of Uganda shillings 110,409,132/=. The Ministry of works had deducted Uganda shillings 14,000,000/= the same having been earlier advanced to the Defendant. The Plaintiff left the site and is no longer carrying out works under the subcontract.

The Plaintiff called two witnesses namely Mr. Ernest Kayiira its Managing Director (PW1) and Engineer Lakonyero, the Project Co-ordinator from Ministry of Works and Transport (PW2). The Defendant called one witness Hon. Sam Otada Amooti Owor its Managing Director (DW1) who signed a witness statement and was cross examined. Counsels filed written submissions.

## Agreed issues for trial:

- 1. Whether the Plaintiff was in breach of the subcontract made by the parties on 15/4/2008 and;**
- 2. Whether the Defendant was in breach of the subcontract made on the 15/4/2008.**

## Submissions of the Plaintiff's Counsel

PW1 Mr. Ernest Kayiira testified that under the agreement the Defendant would make payments to the Plaintiff depending on the amount of work done and thoroughly accomplished subject to the certificate of payment from the Ministry of Works and Transport. The Plaintiff did the work pursuant to the subcontract and was paid Uganda shillings 109,700,000/= on the 1<sup>st</sup> interim certificate. The amount in dispute is Uganda shillings 82,176,000/= which is 66% of the 2<sup>nd</sup> interim Certificate admitted as exhibit P4 for Uganda shillings 124,509,132/= inclusive of the Uganda shillings 14,000,000/= that had been deducted before payment. Work was done and at all times PW2 inspected the works and signed the Plaintiff's visitors' book admitted as exhibit P2. The Defendant failed to pay in breach of the agreement.

Other instances of the Defendants breach are the failure to supply 10,000 litres of fuel in time and the failure to provide a grader. The grader provided by the Defendant was faulty. The

Defendant delayed to provide a low bed to carry machines and fuel money was paid in instalments thereby delaying the mobilisation process. The Defendant alleges that the Plaintiff's breach delayed the works which was not completed in time. However there was no commencement date in the agreement although it is clear that the works were to last for 3 months. PW1s evidence is that the works were largely carried out in Queen Elizabeth National Park and as such the site camp was about 45 kilometres away. The construction was affected by heavy rains and landslides which blocked the road and time was spent on unblocking the road instead of carrying out the works. The rains also damaged the completed works. Prior to the construction the Plaintiff found that a bridge had been swept by water and spent 2 weeks before the Ministry of Works constructed an emergency bridge. Exhibit P.3 was tendered to prove that Plaintiff communicated several times to the Defendant about the difficulties faced and it was advised by the Defendant to seek an extension of time. These difficulties were also experienced by the Defendant who eventually abandoned the works for being economically no viable to continue. No letter was written by the Defendant to the Plaintiff expressing its displeasure with the works or even terminating the subcontract for delays and therefore, the Court can only presume that there was no material breach by the Plaintiff. On the contrary, the Plaintiff did work for which it was not paid. The allegations of the Defendant's witness, that the hiring of a backhoe, low bed and motor grader from the Defendant was not mandatory because it was the intention of the parties that they would be hired from elsewhere is incorrect because the agreement does not mention this intention.

### **Defendants Submissions**

On behalf of the Defendant, it was submitted that the salient conditions in the contract between the parties (Exhibit P.1) provided that; firstly, the construction of the road by the Plaintiff shall be completed within three months; secondly under the contract payments to the Plaintiff were dependent upon the amount of work done and subject to issuance of a certificate of payment from the Ministry of Works and Transport. There was no provision in the contract for advance payment though the Defendant advanced some money to the plaintiff. The plaintiff did not prove any work done so as to entitle it to payment under interim certificate No. 2. On the other hand, DW1 Hon. Otada proved that the Defendant, even when it was not required under the contract, advanced to the Plaintiff Uganda Shillings 31,000,000/= and the receipts thereof were exhibited as exhibits D15 (i) - (viii) issued to the Plaintiff. Clause 1 (b) of the contract required the Defendant was to contribute to the subcontractor 10,000 Litres of fuel at prevailing fuel prices as an advance on the contract price. Clauses 2, 3 and 4 of the contract required the Defendant to hire the Plaintiff a Back-hoe at Uganda shillings 300,000/= per day, a Low bed at Uganda shillings 500,000/= per day and a Motor grader at Uganda shillings 500,000/= per day and it was the intention of the parties that there was no restriction on where to hire the machines from.

The Defendant, upon signing the agreement hired and facilitated the hire of a grader and low bed at a total cost of Uganda shillings 19,000,000/= to enable the Plaintiff perform the contract according to Exhibit D7. Mr. Kayiira in his testimony does not deny receipt of the facilitation

and payments from the Defendant. Although Mr. Kayiira testified that the grader was in Mbarara and was faulty at the time their team reached there, no such complaint or averment was ever made to the Defendant at the time of delivery of the machines. It was also the Plaintiff who had a contractual obligation to maintain the machinery and they could hire machinery elsewhere since there was also no restriction under the contract.

Fifthly, under paragraphs 6 & 7 of the contract, the Plaintiff was solely responsible for human resource mobilization, management of the project and maintenance of the machinery at the site and had received some advance payment to enable the same. It was because of the Plaintiff's inability to do the necessary mobilization of manpower, poor resource management and coordination on the site that delayed the work in breach of the subcontract and as evidenced by exhibits D3 and D16. Sixthly under paragraph 11 of the contract, the Plaintiff is obliged to indemnify the Defendant for any loss owing to any encumbrance or defect in the work done.

Time was of the essence under the contract and prior to signing the agreement; the parties negotiated and agreed that the construction would start immediately on execution of the agreement since, in light of the contract between the Defendant and Ministry of Works which had a limited time frame to do the work. Mr. Kayiira in his testimony does not deny the meeting between the parties prior to the contract although the Plaintiff denies agreement on a commencement date/time under the contract. DW1 proved that he informed Mr. Kayiira about the existence of a contract between the Defendant and Ministry of Works and explained the salient terms therein including the commencement date and duration. The necessity of entering into the contract on 15<sup>th</sup> April, 2012 was to promote the intention of the parties; i.e. that the works were to commence immediately, in light of a contract between the Defendant and the Government of Uganda, therefore, the Plaintiff is merely bringing up the issue of a 'commencement date' to avoid liability and to benefit from its fault.

The parties were both intimately acquainted with the course of business in the construction industry and the nature of the trade/work owing to their experience as construction companies. In the industry, time is of essence. The Plaintiff agreed to do the work and promised to perform the contract in accordance with all the stipulations therein. Although officially the contract between the Defendant and Ministry of Works (Exhibit D2) commenced on 2<sup>nd</sup> May 2008, it was agreed that it was the duty of the Plaintiff to be at the site immediately after signing the agreement and commence mobilization. The Plaintiff is estopped from exploiting the silence in the agreement on the commencement date.

The Plaintiff's 'Inspection Book' Exhibit P2 shows that works had not commenced by 11<sup>th</sup> June 2008 and PW1 testified that the Plaintiff reached the site on 26<sup>th</sup> June 2008. Therefore, the first breach by the Plaintiff was that the works commenced way behind the contractual schedule and no sustainable reason for delay had been advanced by the Plaintiff despite the Defendant giving advance facilitation.

Counsel submitted that the principle that time is of essence in a contract is an implied term. These principles explained in several authorities referred to by Hon. Justice James Ogoola as he then were in the case of **Afro Print Ltd vs. New Vision Printing and Publishing Corporation H.C.C.S. No. 513 OF 1996 [1997-2001] UCLR 169**. They include case of **Reigate vs. Union Manufacturing Company (Ramsbottom) Ltd [1918] 1 KB 592**, where Scrutton LJ held that a term can only be implied if it's necessary in the business sense to give efficacy to the contract. In **Shirlaw vs. Southern Foundries [1934] 2 KB 206 at 227**, Mackinnon LJ held that "Prima-facie that which any contract is left to be implied and need not be expressed is something so serious that goes without saying." In **Trollope and Colis Ltd vs. North West Metropolitan Regional Hospitals Board [1973] 2 ALL ER 268**, where Lord Pearson held that "an unexpressed term can be imposed if and only court finds that the parties must have intended that term to form part of their contract".

Another condition that went to the root of the contract is that the main contract was to be discharged through performance by the Plaintiff. The Plaintiff was required under the contract to complete the construction of the 73km road. Payment was conditional on performance and based on certificate of completion from the Ministry of Works. The contract died a natural death when the Plaintiff failed to perform it in accordance with the agreement. Counsel submitted that a contract is discharged by performance and failure to perform is breach of contract.

The Plaintiff did not continue with the works after payment under interim certificate No.1. There was no extension of time for completion of the work. In October 2008 the Defendant took up the construction and had to personally remobilize and set up machinery and human resource in time to resume the works since the Plaintiff had left the site and carried away all their machines. It is on this basis that interim certificate No. 2 admitted as exhibit D15 was approved and issued to the Defendant on 29<sup>th</sup> January 2009. The works remained uncompleted with only 27% of the work done until the end of 2008 when the contractual performance was reviewed by the Ministry of Works officials on 18<sup>th</sup> August 2008, exhibit D6. This percentage represents a sum of Uganda Shillings 105, 300,000/= out of the total price of Uganda Shillings 390,000,000/= and the Defendant had already paid Uganda Shillings 109, 700,000/= to the Plaintiff. The Plaintiff had barely done any substantive amount of work to entitle it to any further payment under Certificate No.2. as stated in the Review Summary Form dated 21<sup>st</sup> January 2009 and a letter by Permanent Secretary, Ministry of works dated 21<sup>st</sup> January 2009 marked exhibit D16 and 17, and the testimony of Mr. Kayiira. It was impossible for the Plaintiff to complete the work within the time stipulated in the agreement and the Defendant could not advance the Plaintiff money to complete the works since this was not provided for under the contract.

In the case of *Sumter vs. Hedges* (1898) 1 QB 673, CA, also cited in *Max and Young*, "Cases And Material In Contract Law" at page 459, on the subject "partial performance of an entire contract", the Plaintiff builder who had contracted with the Defendant to build two houses and stables on the Defendant's land for the sum of 565 pounds, did part of the work, amounting to about 333 pounds and had received payment of part of the price. He then informed the Defendant

that he had no money to continue with the work. Collin LJ found that he had abandoned the contract.

In this case, the entire framework of the agreement was based on the understanding that the Plaintiff had substantial resources, human resource and expertise that could enable it carry out the works and therefore, it could only be paid after thorough completion of the work and upon obtaining a payment certificate from the Ministry of Works. There was no need for the Defendant to terminate the contract in writing since there was nothing to terminate, the contractual period having lapsed and the Plaintiff having abandoned the contract. The Defendant was only obliged to pay the Plaintiff upon any amount of work done and thoroughly accomplished and in the circumstances; the Plaintiff cannot be entitled to any payment as claimed in the plaint. Upon breach by the Plaintiff, the Defendant entered fresh negotiations with the Ministry of Works and Transport as seen in the Performance Bond/Security dated 21/1/2009 Exhibit D13, Counter guarantee Exhibit D11, Personal guarantee Exhibit D12 and Debit Note D19.

PW2 testified that in a meeting he chaired held on 21<sup>st</sup> June 2008 when the Plaintiff was at the site and in charge of the construction, (Minutes are marked Exhibit D3), one Namumungu Mathias, the Defendant's representative attributed the delay to machine break down and absence of a site agent to coordinate activities on the site, but Mr. Lakonyero noted that the mobilization, which was a contractual obligation of the Plaintiff had not been done satisfactorily. The Defendant communicated the Plaintiff's reasons for delay to the Ministry of works in a letter dated 27<sup>th</sup> August 2009 (Exhibit D18), but the Ministry rejected the same as seen in the letter marked Exhibit D9 and the testimony of Mr. Lakonyero. Furthermore, the Plaintiff had knowledge of the area's terrain and weather conditions before accepting to undertake the works and therefore, cannot rely on these reasons to justify the delay.

**Issue three: Whether the Plaintiff is entitled to payment for the work done.**

On issue 3 the Plaintiff's Counsel submitted that paragraph 1 (a) of the agreement provided that the Plaintiff is entitled to payment for the works done and thoroughly accomplished subject to a certificate of payment from the ministry of Works. Every certificate is issued after assessing the work done. Interim Certificate No. 1 was issued by Ministry officials and the Plaintiff was paid more than Uganda Shillings 109,000,000/=. The 2<sup>nd</sup> Certificate arose from works carried out and assessed and verified by the Project Manager Mr. Lakonyero (PW2). The Interim Certificate No.2 was for a total sum of Uganda Shillings 124,509,132/=:, out of which the Plaintiff was entitled to 66% as provided in the contract.

On the other hand, Counsel for the Defendant submitted that the Plaintiff's acts and or omissions occasioned a fundamental breach of the contract between it and the Defendant when they failed and neglected to perform the contract and they only have themselves to blame and are therefore not entitled to any relief from the Defendant. Instead it is the Plaintiff who is liable to pay to the

Defendant all the sums claimed and proved by the Defendant as prayed in the counterclaim and other sums proved by Hon. Otada in evidence as due against the Plaintiff.

**ISSUE 4: Whether the parties are entitled to the remedies sought.**

Counsel for the Plaintiff submitted that the Plaintiff is entitled to Special damages **being** 66% of the sum certified by the Ministry of Works in line with Clause 1 (a) of the agreement as submitted in issues 2 & 3. He further prayed that the Court orders refund of moneys expended in demobilizing the machinery from the site under clause 7 of the agreement which provides that maintenance and mobilization of the machinery is the responsibility of the sub contractor. Clause 3 of the Agreement provides that it was the Defendant to provide a low bed to the Plaintiff at a cost of Uganda Shillings 500,000/= per day. The Plaintiff would ordinarily spend Uganda Shillings 1,500,000/= for the 3 trips made to demobilize the machines after the termination of the subcontract without payment.

The Plaintiff prays for Uganda Shillings 15,000,000/= being the cost of hiring vehicles from M/s Lukwago, to bring back the grader, wheel loader and roller. This was an unexpected expenditure considering that works were abruptly stopped by the Defendant for non payment. The Plaintiff also prays for Uganda Shillings 1,000,000/= being the cost of inspection by laboratory experts to inspect and approve the road before the issue of certificate No.2, as testified by Mr. Kayiira PW1.

**General damages:** Considering the Defendant's breach of the contract, it ought to pay to the Plaintiff general damages for the inconvenience and loss suffered as testified by Mr. Kayiira.

**Interest and costs:** The Plaintiff prayed for interest on special and general damages, and costs.

The Defendant amended its claim to alter the figure claimed from Uganda Shillings 14,000,000/= to Uganda Shillings 19,000,000/= without giving particulars of the Uganda Shillings 19,000,000 /=. In the counterclaim Uganda Shillings 14,000,000/= is pleaded as an advance payment whilst in the witness statement, the sum of Uganda Shillings 19,000,000/= is a claim for hiring a low bed and grader. In any case, during cross examination, Mr. Kayiira acknowledged receipt of payment of more than Uganda Shillings 110,000,000/=, but most of it was deducted by the Defendant at source to pay for such services. There has not been any attempt to prove the claim of Uganda Shillings 19,000,000/= as an advance payment to the Plaintiff by the Defendant.

As far as claim for costs for renewing the performance bond is concerned, no particulars of the same were pleaded as special damages and as such cannot be granted. The claim for costs for renewal of performance bond are between the Defendant and Ministry of Works after the Defendant took over the subcontract upon its expiry in July 2008 and therefore, the Plaintiff cannot be responsible for the penal costs with effect from 1<sup>st</sup> October 2008.



In reply the Defendant's Counsel submitted that the Defendant did not breach the contract and it is the Plaintiff who breached and the Plaintiff is not entitled to any of the reliefs sought. On the other hand it is the Defendant who is entitled to reliefs prayed for in the counterclaim and proved by the testimony of DW1. This claims include excess money paid to Plaintiff on Payment Certificate NO.1 amounting to Uganda Shillings 1, 000,000/= i.e. Uganda Shillings 110,700,000/= less Uganda Shillings 109,700,000/=, the cost of hiring Low bed and Grader amounting to Uganda Shillings 19,000,000/=.

It is not proper for the Plaintiff to claim the sum of Uganda Shillings 15,000,000/= as alleged costs for transport of machines back to the site and Uganda Shillings 1,000,000 as alleged cost for murrum tests because this was part of the contractual price and even if it may have accrued, it was already catered for under payment of certificate No.1 since the transportation for the machines and tests were in respect of works done under payment certificate No.1. The Plaintiff having breached the contract is not entitled to it. Further to that the claims are extraneous claims not pleaded at all by the Plaintiff and amount to a clear departure from their pleadings, hence this honourable Court should not allow these prayers.

### **Judgment**

I have duly considered the pleadings of the parties, the evidence on record and the written submissions of the Counsels of both parties. The first two issues deal with whether there was any breach of contract by any or both of the parties and are intertwined. The first issue is whether the Plaintiff was in breach of the subcontract made by the parties on 15<sup>th</sup> of April 2008. The second issue is whether the Defendant was in breach of the sub contract made on 15<sup>th</sup> of April 2008. Both parties submitted on the first and second issues concurrently.

The question of whether any of the parties is liable for breach of contract requires an appreciation of the salient provisions of the contract executed between the parties and admitted in evidence as exhibit P1. The question of when the contract commenced is relevant as the parties submitted on whether time was of essence, when the works commenced and particularly when to start reckoning time under the subcontract.

Firstly it is an established fact and there is no controversy surrounding or relating to the issuance of the first certificate that the work in respect thereof was carried out by the Plaintiff prior to the issuance of interim payment certificate No. 1. The Plaintiff was paid and there is no dispute about the work or payment for it. Consequently, the claim of the Plaintiff and the controversy between the parties relates to the second interim certificate in so far as the Defendant claims that the work relating to the issuance of the interim certificate was done by the Defendant after the Plaintiff abandoned the works. As to when the work relating to the second interim certificate was done is material. There are controversies on questions of fact about when the works, the subject matter of the contract between the parties, commenced. There is provision in the subcontract that the works would be executed within three months. Secondly the issue is whether there was any

extension of the subcontract. The Defendant submits that the contract was time bound and time was of essence while the Plaintiff submitted that time was not of essence.

Exhibit P1 was executed by the parties on 15 April 2008. The contract value is Uganda shillings 390,000,000/= and it is indicated that the Defendant was willing to subcontract the construction of the road of 75 km to the subcontractor who was willing to carry out the works at the agreed price. Clause 1 of the agreement paragraph (a) provides that payments are dependent upon the amount of work done and thoroughly accomplished subject to a certificate of payment from the Ministry Works and Transport of the Ugandan Government. In other words, payments came from the Government of Uganda and are based on certificates of payment upon certification of the construction works actually carried out by the Plaintiff and verified by government officials. The subcontract provided that at the commencement of the construction works, the Defendant shall contribute as part payment of the Plaintiff 10,000 litres at prevailing prices. The Defendant was required to hire to the subcontractor a Back Hoe at a rate of Uganda shillings 300,000 per day. The words used in the contract are "shall hire the subcontractor a Back Hoe" secondly the Defendant was to hire the subcontractor a low bed vehicle at the rate of Uganda shillings 500,000/= per day. Additionally the contractor was to hire the subcontractor a Motor Grader Cat 140 G at a rate of Uganda shillings 500,000/= per day to be inspected by a clerk from the Defendant on a day to day basis.

Clause 5 of the agreement is of special mention because it provides that the retention from the Ministry Works and Transport shall also apply to the subcontractor as it applies to the Defendant. The Plaintiff is the subcontractor. However, the contract between the Ministry of Works and Transport and the Defendant was not adduced in evidence. Retention is 5% of the total amount of each interim certificate in interim payment certificate numbers 1, 2 and 3.

Clause 7 of exhibit P1 provides that maintenance of the machinery and mobilisation shall also be the responsibility of the subcontractor/Plaintiff.

The testimony of PW1 the managing director of the Plaintiff is summarised in the submissions of the Plaintiff's Counsel. On the face of exhibit P1 the agreement between the Plaintiff and the Defendant was executed on 15 April 2008. Counsel submitted that there was no commencement date. The de facto commencement is mentioned in the testimony of PW1. He stated that they started on the site on 24 June 2008 and in fact the engineer from the Ministry of works PW2 Mr. Lakwonyero reached the site on 26<sup>th</sup> of June 2008 that is when he got instructions to commence the work. Consequently the testimony of the Plaintiffs witness PW1 is that works commenced on 26<sup>th</sup> of June 2008. Exhibit P2 which is the visitor's book of the Plaintiff shows that the engineer from the Ministry of Works and Transport PW2 made comments on 11 June 2008 that both the agent and his assistants were not on the site and no work was going on. It was a disappointing site. His comments dated 27<sup>th</sup> of June 2008 in the visitor's book were that there was a relatively good progress within that period. On 9 July 2008 his comments show that there was no work due to lack of fuel on the site. On 31 August 2008 PW2's comments are to the effect that the progress

is not impressive and the contract was ending in two days. Those comments indicate on matters of fact that the contract was ending on 2 September 2008. PW2 further testified that the people on the site were the agents of the Defendant as he did not know the Plaintiff. He was however able to identify PW1 the Managing Director of the Plaintiff as one of the people on the site.

The Defendant's documents give the foundation of the subcontract. Exhibit D1 dated 12<sup>th</sup> of February 2008 and addressed to the Managing Director of the Defendant by the Permanent Secretary Ministry of Works and Transport and is a notification of tender award shows that on the 6<sup>th</sup> of February 2008 the Contracts Committee approved a tender for the maintenance of Ikumba – Ruhija – Hamayanja Road, a distance of about 73 km. The tender price was **Uganda shillings 595,028,574/=** and the Defendant was required to submit a performance bond within two weeks from the date of the letter. The performance bond was to be 10% of the contract price if issued by a reputable bank or 30 % of the contract price if issued by a reputable insurance firm. The Defendant was invited to sign a contract as soon as the contract document was ready. Secondly exhibit D2, a letter dated 29<sup>th</sup> of April 2008 and addressed to the Defendant Company is an order of commencement of works issued by the Resident Engineer/Project Manager. It shows that the contractor is the Defendant and was instructed to commence work on the project. The date of commencement was to be the 2<sup>nd</sup> of May 2008 and the date of completion was to be 2<sup>nd</sup> of September 2008. The order of commencement demonstrates that the contract was for a period of four months as far as the Ministry of Works and Transport is concerned. These facts tally with the comments of PW2 in exhibit P2 which is the visitor's book of the Plaintiff that the contract was to expire in two days time. His comments were made on 31 August 2008.

Exhibit D4 dated 25 August 2008 is a letter the Defendant's managing director wrote to the Permanent Secretary Ministry Works and Transport for extension of the contract duration by 32 days. The gist of the application for extension of works is that extra quantities had not been included in the bill of quantities. Secondly there were adverse weather conditions namely heavy rains and because of the rate of evaporation being low, the work progress was retarded by about 19 days. Thirdly massive lands slides were experienced and falling trees blocked the road. Clearing landslides and trees set back the progress by 12 days. Additionally exhibit D5 which is the Interim Payment Certificate No. 1 shows that the commencement date of the contract was 2<sup>nd</sup> of May 2008 and completion dates 2<sup>nd</sup> of September 2008. DW1 attached a revised work schedule for the extended period. Exhibit D9 has two documents namely a letter dated 21<sup>st</sup> of January 2009 attached to the letter of 5<sup>th</sup> of May 2009. In the letter of 21<sup>st</sup> of January 2009 and addressed to the Managing Director of the Defendant, the Permanent Secretary Ministry of Works and Transport ruled that the completion of the contract was long overdue. The letter reads in paragraph 1 thereof as follows:

"As you may be aware, the completion of the above contract has been long overdue. When you applied for an extension of time earlier on, you advanced several reasons for the delays. We have evaluated your application and the reasons you advanced are not

convincing. Therefore liquidated damages would be levied with effect from 1 October 2008..."

In the letter the Defendant was asked to provide a revised and realistic work frame within one week from the date of the letter and to extend the performance bond to cover the period, to fully mobilise and exhibit presence on the site by the end of the first week of February 2009. The letter of 5<sup>th</sup> of May 2009 which made reference to the letter of 21<sup>st</sup> of January 2009 is also addressed to the Managing Director of the Defendant by the Permanent Secretary Ministry Works and Transport. It discloses some significant facts namely that liquidated damages came into force on the 1 October 2008. Secondly liquidated damages amount to 5% of the contract price and is reached after a delay of 100 days which clocked on 8 January 2009. Furthermore there was a commitment to complete the works by the end of May 2009. The letter also refers to clause 49.1 of the Conditions of Contract but none of the parties exhibited the main contract. The Defendant was given up to 31<sup>st</sup> of May 2009 to complete the works.

From the evidence gleaned from the documents referred to above the next material question of fact is when the Plaintiff left the works. In the plaint itself the Plaintiff avers that on 29 January 2009 payment of Uganda shillings 110,509,132/= against interim certificate number two was made to the Defendant. This amount was less Uganda shillings 14,000,000/= that had been advanced to the Defendant and therefore the correct figure was Uganda shillings 124,409,132/=. It is pleaded in paragraphs 5 and 6 of the amended plaint that the Plaintiff made a demand for payment on 29 December 2008 and 11<sup>th</sup> of February 2009. Upon failure to pay the sum by the Defendant, the Plaintiff was forced to abandon the works on the road and withdrew the equipment from the site at substantial costs. Notice of intention to sue was communicated to the Defendant on 13 February 2009. There is therefore a strong inference that the Plaintiff left the site at the beginning of the year 2009.

If we are to go by the testimony of PW1, the Plaintiff began works on the 27<sup>th</sup> of June 2008. The contract exhibit P1 gives duration in paragraph 10 thereof of three months for the execution of the construction works. It provides that the construction of the road shall be completed within a period of three months and the certificate of completion at the end shall be issued by the Ministry of Works and Transport. If paragraph 10 of exhibit P1 was adhered to, the contract would have come to an end by the 26<sup>th</sup> or 27<sup>th</sup> of September 2008. Because the contract ended on 2<sup>nd</sup> September 2008, the delay by 24 days would not have attracted a penalty and none of the parties would have been adversely affected. PW1 testified that on 27<sup>th</sup> of August 2008 they wrote requesting for extension of works. This was admitted as exhibit P3. Exhibit P3 is a letter written to the Managing Director of the Defendant by the Managing Director of the Plaintiff. The Plaintiff's managing director sought for extension of time through the Defendant and giving reasons for the delay in execution of the works. The first was that there was damage to a bridge which made the site inaccessible for a period of not less than two weeks. Secondly there were landslides along the road which interfered with site activities and the estimated loss in time was 4 calendar weeks. Lastly there were intermittent rains which led to loss in time of 4 calendar

weeks. A further coincidence in dates is exhibit D4 which is a letter from the Defendant to the Permanent Secretary Ministry of Works and Transport in which the Defendant sought for extension of time by 32 days. It is quite strange that this letter was written before the letter of the Plaintiff which is dated 27<sup>th</sup> of August 2008. It only shows that the Defendant was in touch with the Plaintiff on the issue of delays. The evidence adduced by the Defendant exhibit D9 shows that the request for extension of time was rejected in a letter dated 21<sup>st</sup> of January 2009. In fact the ministry applied liquidated damages with effect from 1 October 2008 for the delays. It is most probable that the Plaintiff was on the site by 21<sup>st</sup> of January 2009. The strong inference that can be drawn is that by February 2009 the Plaintiff had fallen out with the Defendant. The basis of falling out is the Plaintiffs claim for payment under interim certificate number 2 and failure or refusal of the Defendant to pay.

Exhibit D6 is a letter by PW2 which gives the report of what had transpired by 18<sup>th</sup> of August 2008 in the road construction works. It shows that the contract was for the duration of four months and commenced on the 2<sup>nd</sup> of May 2008. It shows that the contractor is the Defendant. The engineer noted that the contract was so much behind schedule that the work was not going to be completed within the contract period. There is overwhelming evidence that the contract was not executed within the periods contracted with the Ministry Works and Transport. Secondly, liquidated damages were applied for the delays. Thirdly the Plaintiff did not complete the subcontracted works within the periods stipulated in the sub contract exhibit P1. Fourthly paragraph 1 of the contract exhibit P1 clearly stipulates that payments were dependent upon any amount of work done and thoroughly accomplished subject to any certificate of payment from the Ministry Works and Transport. It is a fact acknowledged by both parties that interim certificates of completion of works were issued by the Ministry Works and Transport. It is a correct inference based on the testimony of PW2 that certificates were issued for completed works only, a fact that is consistent with clause 1 of the sub contract exhibit P1. Exhibit D5 is interim certificate number 1 and was issued on 18<sup>th</sup> of August 2008. It is also a relevant fact that the relationship between the parties is based on a written subcontract whose terms cannot be varied by oral testimonies under section 91 and 92 of the Evidence Act. That subcontract by its nature and purpose could only be for carrying out the terms of the main contract. In other words the timelines of the main contract are by necessary implication implied in the subcontract. The subcontract could not be implemented in such a way as to be in breach of or in conflict with the terms of the main contract. This is because, if the main contract was terminated, it is automatic that the subcontract would cease to exist and would in effect be terminated as well. Irrespective of the provisions of the subcontract, the proper interpretation is that the contract is deemed to have commenced in May 2008 and ended on 2<sup>nd</sup> of September 2008. By necessary implication the subcontract also ended on the 2<sup>nd</sup> of September, 2008. For emphasis, the subcontract is a contract to implement the main contract. However, because penalties were applied for delayed works, such a delay would spill over to the sub contractor who was assigned the task of executing the work in the main contract within the terms of the main contract and not in contravention thereof. In other words the subcontract cannot be severed in any meaningful way

to be in conflict with the terms and conditions from the main contract which is the governing relationship between the Defendant and Ministry of Works and Transport. The subcontract implements the main contract.

The testimony of PW1 is that the Plaintiff commenced construction works on 27 June 2008 but did not finish the work. This was because they worked in spurts of disjointed time and when they reached the middle they were paid in bits. It did not complete the work within the first three months because rain started affecting the construction works. When they finished some work the rain would damage the road. They would wake up and find that the road would be blocked by landslides and they had to unblock it for vehicles to pass. Their machines would sometimes be blocked and they hired men to remove soil from the road. Secondly the construction was taking place at a distance of about 45 km from the camping area not inhabited by people. He testified that DW1 the managing director of the Defendant informed him that the contract had been extended. The Plaintiff covered the road with murrum for about 20 km upon which they requested the Ministry of works officials in Mbarara to come and inspect the work. A few days later they informed PW2 that they had money constraints because the construction had cost so much money. When they went to DW1 with the request for 40,000,000/= to complete the work within the three weeks remaining, he informed PW1 that he had no money. The three weeks remaining puts this period within August 2008. I have further examined the documentary exhibit namely the receipt of money by the Plaintiff from the Defendant. Receipt dated 2<sup>nd</sup> October 2008 and number 059 issued by the Plaintiff to the Defendant shows that the Plaintiff received the sum of **Uganda shillings 40,000,000/=** from the Defendant for road works. This is exhibit D15 (VIII). As to whether this was the money requested for by the Plaintiff's managing director PW1, is not apparent.

On cross examination by the Defendants Counsel PW1 testified that the Plaintiff did not start work until two months after signing the contract. He admitted that the managing director of the Defendant did not write to him extending the contract. PW2 on the other hand testified that the Ministry/Employer considered the 2<sup>nd</sup> of May 2008 as the commencement date of the construction works. The representative from of the Ministry of Works and Transport never knew that there was a subcontract. The witness confirmed exhibit D2 which was an order for commencement of works and indicated that the works were supposed to commence on 2<sup>nd</sup> of May 2008. The witness also confirmed exhibit D4 which is the letter of the Defendant requesting for extension of time and is dated 25 August 2008. The letter is consistent with the duration of the contract which was supposed to end on 2<sup>nd</sup> of September 2008. PW2 further testified that the reply to the Defendants request for extension of time exhibit D9 is that they did not accept the explanation of the Defendant for the delay of the works. This is because the contractor is supposed to know the weather pattern and unless there was an unusual weather compared to the weather patterns before, the reasons were not convincing. As far as landslides were concerned, he testified that the contractor ought to have visited the site and should have incorporated the

possibility of landslides in the programme. Last but not least liquidated damages were a penalty levied on the contractor for delay in completing the works.

According to the testimony of DW1 the Defendant took up the work to beat the deadline and personally mobilised and set up machinery and human resource in order to resume works and upon accomplishing a targeted amount of work, interim certificate number 2 was approved and issued to the Defendant on 29<sup>th</sup> of January 2009. The interim certificate is exhibit D15 and shows that it was issued on 29<sup>th</sup> of January 2009. A total of **31,265,285/= Uganda shillings** was deducted from the interim certificate. Out of these **Shillings 14,362,707/=** was a retention of 5% of the amount. Damages of Uganda shillings 2,902,578/= were also applied. Lastly **Uganda shillings 14,000,000/=** was retained as advance payment. On 29 December 2008 the managing director of the Plaintiff wrote to the managing director of the Defendant submitting a request for payment in respect of payment certificate number 2. Evidence however shows that payment certificate number 2 was issued on 29<sup>th</sup> of January 2009. Subsequently in a letter dated 11 February 2009 the Plaintiff claimed **Uganda shillings 82,176,027/=** being payment for executed works on the subcontract. Apparently the Plaintiff had got wind that payment was being processed to the Defendant and requested for payment immediately the certificate had been honoured with payment.

As far as the issue on the commencement of works is concerned, the sub contract was executed on the 15<sup>th</sup> of April, 2008. The works were supposed to commence according to the main contract on the 2<sup>nd</sup> of May, 2008. The evidence is that the main contract was for the period of four months. The subcontract however was for three months only.

It is the finding of this court that the delay in the commencement of the subcontract does not mean that the subcontract was not in force. What it means is that the construction works began late after the commencement of the subcontract. In any case it is very clear from the preamble to exhibit P1 which is the subcontract agreement that the Defendant was subcontracting the main works or the main contract to the Plaintiff. It was the intention of the parties in the preamble that the Defendant was willing to subcontract the construction of the road and the subcontractor was willing to take over the construction works from the Defendant for consideration of **Uganda shillings 390,000,000/=**. It is therefore clear from the contract itself that the Plaintiff took over the construction works contracted to the Defendant by the Employer. It follows that the obligation for compliance with the main contract between the Defendant and the Ministry of Works and Transport became the obligation of the Plaintiff under the terms of the subcontract. The subcontract merely provided the terms of the subcontract without detracting from the main contract. Consequently and by necessary implication the date of commencement of the main contract is applicable to the subcontract as well to avoid conflict with or breach of the main contract. However, because the main contract run for a period of four months, it is appropriate to assume that the delays in commencement of works by the plaintiff were accommodated and the subcontract begun later than the main contract. The plaintiff could not contractually commence works later than a month and a delay of one month could be accommodated. Consequently the

latest that the subcontract could meaningfully commence in order to remain within the confines of the main contract was by the 2<sup>nd</sup> of June, 2008. Even if we assume that the Plaintiff commenced works or the subcontract commenced on the 27<sup>th</sup> of June, 2008, it should have ended by the 27<sup>th</sup> of September 2008, which would be a period of three months from the commencement date. However, any delayed work beyond the 2<sup>nd</sup> of September, 2008 was bound to attract penalty for delays under the main contract. Indeed penalty for delays were applied by the Employer with effect from the 1<sup>st</sup> of October 2008 thereby accommodating the subcontract period without any conflict.

Notwithstanding the above finding, PW 2 the project coordinator conclusively testified that the weather conditions, landslides etc were not good reasons for delays. In any case they were not acceptable reasons to the Ministry of Works and Transport. It follows that the Plaintiff was in breach of the covenant to complete the works within the stipulated time of three months. The breach of contract was failure to execute the main contract within the time contracted. The reasons that there were adverse weather conditions causing landslides in any case were not acceptable to the employer and penalties were applied for the delay. The parties could not lawfully override the terms of the main contract relating to the duration thereof. The Plaintiff was therefore in breach of contract for delays in construction of the works.

Alternative arguments were advanced on behalf of the Plaintiff to the effect that the delays were caused by the Defendant's failure to pay. Clause 1 (a) of exhibit P1 provides as follows:

“That any payments to be made are dependent upon any amount of work done and thoroughly accomplished subject to the certificate of payment from the Ministry of Works and Transport of the Uganda government”

The sub contract does not generally make provision for advance payment. It only makes provision under clause 1 (b) of exhibit P1 for a contribution from the contractor/client as part payment of 10,000 litres of fuel at prevailing fuel rates. An overall assessment of the evidence is that the delays were not due to the lack of fuel but mainly due to adverse weather conditions. The reasons for the delay are contained in the report of PW 2 exhibit D6. The report is dated 18<sup>th</sup> of August, 2008. It indicates that the duration of the work was four-months and the commencement date was 2<sup>nd</sup> of May, 2008. Clause 4.1.2 provides that the level of mobilisation of plants and equipment is inadequate. It further provides in clause 4.1.3 that the material resources were adequate according to the contract requirements therefore delays on grounds of lack of fuel are not applicable. He noted that the contractor was so much behind schedule that it was not going to complete the works within the contract period. Consequently there was the observation that the mobilisation of plants and equipment was inadequate. I have further examined the comments of the inspectors in exhibit P2 which is the visitors' book of the Plaintiff. On the 11<sup>th</sup> of June, 2008 PW2 writes that both the site agent and his assistants are not on the site and no work was going on. On the 27<sup>th</sup> of June, 2008 he noted that there was relatively good progress during that period. On the 9<sup>th</sup> of July, 2008 he noted that no work was



going on due to lack of fuel on the site. It is not clear how long there was no fuel on the site. However on the 15<sup>th</sup> of July 2008 which is barely eight days later he noted that there was very slow progress and mobilization. No work was going on due to breakdown. On the 23<sup>rd</sup> of July, 2008 the district engineer wrote that good work was going on in terms of grading but bush clearing was lacking. Another official on the same day wrote that the works so far were good but what was contained in the bills of quantities was not satisfactory. On the 13<sup>th</sup> of August, 2008 PW 2 wrote that there was good work generally but there must be improvement on the progress. Again on the 31<sup>st</sup> of August, 2008 he noted that the progress was not impressive and the contract was ending in two days. On the 27<sup>th</sup> of September 2008 on site inspection revealed that the works had stopped for the last three weeks the reason being that there was no fuel. This meant that the road works had stopped in the first week of September 2008. The Plaintiff was however paid in October 2008 Uganda shillings 40,000,000/= according to exhibit D15 (viii).

There is some difficulty from the evidence on record on how to establish how much fuel was advanced to the Plaintiff by the Defendant under clause 1 of the subcontract. What is firmly established is that the fuel advanced was part payment by the defendant to the plaintiff under the subcontract. The following payments were admitted in evidence as exhibit D15 (I) – (VIII). On the 17<sup>th</sup> of May, 2008 receipt number 060 the Plaintiff received a sum of Uganda shillings 15,000,000/= from the Defendant being payment on the site. On the 21<sup>st</sup> of May, 2008 the Plaintiff received 15,000,000/= from the Defendant on receipt number 061. On the 27<sup>th</sup> of May, 2008 receipt number 062 the Plaintiff received a sum of Uganda shillings 1,000,000/= being spare parts for motor graders. On the 19<sup>th</sup> of July, 2008 receipt number 055 the Plaintiff received Uganda shillings 2,500,000/= for the road works. On the 25<sup>th</sup> of July, 2008 the Plaintiff received 5,500,000/= for the road works and the receipt number thereof is 056. On the 25<sup>th</sup> of July, 2008 under receipt number 057 the Plaintiff received Uganda shillings 13,700,000/= from the Defendant. On the 20<sup>th</sup> of August, 2008 under receipt number 058 the Plaintiff received from the Defendant Uganda shillings 18,000,000/=. On the 2<sup>nd</sup> of October, 2008 receipt number 059 the Plaintiff received from the Defendant Uganda shillings 40,000,000/=. The total amount of money contained in exhibit D15 is Uganda shillings 110,700,000/=. Interim certificate number 1 was for Uganda shillings 153,136,550/=. In accordance with the contract the Ministry of Works and Transport retained a sum of Uganda shillings 7,656,828/= being 5% of the amount. The Defendant was paid Uganda shillings 145,479,723/=. 66% of this amount is Uganda shillings 96,016,617/=. 66% of 153,136,550/= is Uganda shillings 101,070,123/=. The Plaintiff was therefore fully paid under interim certificate No. 1 according to the subcontract. Fuel of 10,000 litres was part payment and the question is whether it can be deemed incorporated under the payment in the first certificate. No evidence was led as to how much fuel was used for the first part of the work leading to interim certificate no 1. In any case more work was yet to be done and fuel as part payment may be part of the subsequent works which were not completed. The court need not reach a finding on this issue as no evidence was led thereon and the court was not addressed by Counsels on the issue.

Exhibit P1 which deals with the hire of equipment for the construction works and clause 2 provides for the hire of a back hoe at the sum of **Uganda shillings 300,000** per day. Secondly there was supposed to be hire of low bed at a rate of **Uganda shillings 500,000** per day and thirdly is supposed to be a hire to the subcontractor of motor grader Caterpillar 140 G. The testimony of DW1 is that the Defendant was supposed to hire the above items but the Plaintiff could as well get them from elsewhere. The Plaintiff was responsible for maintenance of the equipment. The testimony of PW1 on the other hand the responsibility of hiring the equipment was that of the Defendant. The work was supposed to begin after obtaining 10,000 L of fuel, vehicles to carry machines and the grader and back hoe. The grader was in Mbarara but the engine was spoilt and had to be repaired. The back hoe was faulty and also had to be fixed. The fuel was provided after a month of execution of the agreement. My conclusion is that delays were accommodated within the extra month in the main contract. That is the period between 2<sup>nd</sup> of May and the 2<sup>nd</sup> of June 2008. PW 1 had testified that they accepted the contract because they had run a project on far less money before. It follows that fuel was not the major cause for the delays if at all it caused any delay; it was only for a few days. Consequently the conclusion is that delays were caused by adverse weather conditions, something that was not acceptable to the Employer. The Plaintiff was therefore in breach of contract for delaying the works. The Defendant was not in breach of contract as far as the delays in the works are concerned.

The second finding of the court is that construction works relating to the issuance of interim certificate number 2 had been done prior to January 2009 when the Plaintiff was on the site. The Defendant was in breach of contract for not paying the Plaintiff under the interim certificate Number 2. This payment was due before the Plaintiff abandoned the construction and demobilised from the site. I do not believe the testimony of the Defendant that it carried out the construction works leading to the issuance of interim certificate number 2. Under clause 1 of exhibit P1, payments are made at the end and upon any amount of work done and thoroughly accomplished subject to a certificate of payment from the Ministry of Works and Transport of the Uganda Government. The Plaintiff is entitled under the above clause to payments for the work done and certified by the Ministry of Works and Transport. The question of the extent of the liability of the Defendant will be determined in resolving the question of damages. This is because liquidated damages had been levied against the Defendant for delays in the works.

Issue number 3 is **whether the Plaintiff is entitled to payment for the work done and issue 4 is whether the parties are entitled to the remedies sought.**

Issues number 3 and 4 will be handled together since they both deal with remedies available to the parties. Issue number 3 has already been resolved by finding that the Plaintiff is entitled to payment for any amount of work done and thoroughly accomplished and as certified by the Ministry of Works and Transport under clause 1 of exhibit P1. It has been established by the evidence that the work relating to the issuance of Interim Certificate number 2 was done prior to January 2009. It has also been established from the evidence that a certificate of completed works would not be issued and paid unless the ministry of works officials have verified the

works actually done. The further controversy relates to the claim of the Plaintiff for Uganda shillings 15,000,000/= being the cost of hiring vehicles to bring back the grader, wheel loader and roller. Secondly the Plaintiff claims for Uganda shillings 1,000,000/= being fees for inspection costs for testing murrum by the laboratory experts. The defence of the Defendant is that this claim is part and parcel of the contractual responsibility of the Plaintiff.

I have carefully assessed the evidence on record. The relationship between the parties is based on the contractual terms of exhibit P1, the subcontract. This further claim of the Plaintiff does not arise from paragraphs 2, 3 and 4 of the subcontract which deal with the hire of equipment. Secondly under paragraph 7 of the subcontract the maintenance of machinery and mobilisation is the responsibility of the subcontractor/Plaintiff. There is no provision for the hire of equipment to demobilise from the construction site. Moreover the plaintiff abandoned the works for alleged non payment. The Defendant further argues that the additional amounts claimed by the Plaintiff are not pleaded. Paragraph 6 of the amended plaint does plead the above claims. The question therefore is whether the Plaintiff was entitled to these amounts under the subcontract. It can easily be seen that the sum of one million Uganda shillings for laboratory tests by experts is not expressly catered for by exhibit P1 and is deemed to be part of the work contracted out by the Defendant to the Plaintiff.

Furthermore the claim of Uganda shillings 15,000,000/= arises from hire of vehicles to transport equipment. The basis of the claim is the alleged breach of contract by the Defendant. In paragraph 6 of the plaint, the Plaintiff avers that it was forced to stop all works on the road and withdraw its equipment due to failure to pay on the second interim certificate. In paragraph 4 (e) of the plaint, the Plaintiff avers that the interim certificate was issued on the 29<sup>th</sup> of January, 2009 after a deduction of 14,000,000/=. The Plaintiff further avers that it demanded for payment on the 29<sup>th</sup> of December, 2008 and 11<sup>th</sup> of February, 2009. On questions of fact, the Defendant could not have been paid by the 29<sup>th</sup> of December, 2008 and there could not have been a failure to pay the Plaintiff by that date. There is no averment in the plaint as to when the Defendant was paid after the issuance of the interim certificate dated 29 January, 2009. It should be assumed that payment was made immediately after the interim certificate. Apparently the Plaintiff had demobilised from the site by February 2009. At worst, by the time the Plaintiff left the site, there may have been a delay in payment of the Plaintiff under the second interim certificate. However that delay was not more than one month's delay. Secondly the Defendant contests the right of the Plaintiff to payment under this second interim certificate. The Defendant's evidence shows that a third interim certificate had been issued to the Defendant. The basis of the interim certificate was the work done by the Defendant after the Plaintiff had withdrawn from the construction site. Paragraph 13 of the witness statement of the Defendant's managing director DW 1 is to the effect that the works remained pending and uncompleted throughout and until the end of 2008 when the contractual performance was reviewed by the Minister officials. It was very much behind schedule with only 27% of the work done by the end of the year 2008. The witness referred to exhibits D16 and D17.

The letter of the Permanent Secretary Ministry of Works and Transport dated 21<sup>st</sup> of January 2009 as attached to exhibit D9 rejects the reasons advanced by the Defendant for the delay of works and holds that liquidated damages are to be applied by 1 October 2008. It recommended that the Defendant provides a revised and realistic work programme within one week from the date of the letter and mobilise and exhibit presence on the site by the first week of February 2009. Failure to do so would lead to termination of the contract. The evidence strongly suggests that the Defendant started work after giving a revised program to the Ministry of works. It is quite unfortunate that the Defendant never adduced the main contract in evidence. We therefore do not know the terms of the main contract other than the offer letter and order for commencement of works. It is inevitable that it has to be assumed that the Defendant had to be paid after doing the works as stipulated in exhibit P1 clause 1 thereof which is the subcontract provision for payment. The summary of works dated 21<sup>st</sup> of January 2009 by the Minister works and transport referred to in the testimony of PW1 shows that the total cost of the contract was for **Uganda shillings 595,028,574/=**. The date of commencement was second of May 2008 and was to be completed by 2 September 2008. It shows that by this time the overall physical progress of the work was 49.5%. Furthermore it shows that the contractor is behind schedule. The summary of works was issued on 21<sup>st</sup> January 2009 and it is correct to assume that it was issued while the Plaintiff was still on the site. The Defendant never did any works until after the Plaintiff had demobilised from the site. It follows that the work relating to the issuance of the second certificate was done by the Plaintiff.

Furthermore the work relating to the third interim certificate exhibit D8 was done by the Defendant. Interim payment certificate number 3 was issued in May 2009. It shows that it was for an amount of **Uganda shillings 398,657,090/=** out of which the 5% retention was **Uganda shillings 19,932,855/=**. The Ministry of Works and Transport levied damages of **Uganda shillings 6,000,000/=** and further recovered **31,000,000/= Uganda shillings** as advance payment to the Defendant. The total reduction was **Uganda shillings 58,932,855/=**. The Defendant was therefore paid **Uganda shillings 85,735, 381/=**. Exhibit D9 dated 5<sup>th</sup> May 2009 is addressed to the Managing Director of the Defendant by the Permanent Secretary Ministry of Works and Transport. It shows that the Defendant had committed itself to finish the contract by the end of May 2009. It further showed that the Defendant was meant to be charged maximum liquidated damages in accordance with clause 49.1 of the Conditions of Contract which has not been exhibited in evidence. Secondly the Defendant was warned that failure to complete the works by the end of May 2009 would mean that the Employer would proceed to terminate the contract in accordance with clause 59 of the Conditions of Contract. Interim certificate number 3 was issued subsequent to the warning letter to the Defendant.

My overall conclusion is that the Plaintiff left the site in February 2009. By January 2009 Ministry of works officials had certified some works leading to the issuance of interim certificate number 2. These works were done when the Plaintiff was still on the site and it is most probable that they were done by the Plaintiff. In accordance with clause 1 of exhibit P1 the Plaintiff is

entitled to payment of 66% of every interim certificate for work actually done by the Plaintiff and certified by Ministry officials. However the question of how much the Plaintiff is entitled to out of the certificate must be determined by the liability to pay damages imposed on the Defendant due to delays initially caused by the Plaintiff. The question of damages further requires the court to assess the overall picture. This overall picture is more difficult to determine due to the fact that the negotiations between the Defendant and the Ministry of Works and Transport is not part of the overall picture. Particularly this is in light of any concessions by the Ministry of Works and Transport relating to any additional works ordered. There is no evidence to support the ordering of any additional works and therefore the escalation of the costs for the construction works. However doing the best I can, it is necessary to assess the overall amount of money in the interim certificates.

There are three interim certificates in total and none of them refer to any additional works. Secondly the overall amount in the three interim certificates of payment can be compared with the overall contract sum to which the Defendant would have been entitled had it conducted the construction works without subcontracting it to another person. Exhibit D2 which is the order for commencement of works dated 29<sup>th</sup> of April 2008 indicates that the contract sum was **Uganda shillings 595,028,574/=**. The amounts on the three certificates on the other hand are as follows:

The First Interim Certificate exhibit D5 was for a sum of **Uganda shillings 153,136,550/=**. The second interim certificate which forms the basis of the Plaintiffs claim is for a total of **Uganda shillings 287,254,140/=**. The third interim certificate exhibit D8 is for a total of **Uganda shillings 398,657,090/=**. It is therefore necessary to go through all the interim certificates to establish the ingredients of each certificate in order to assess any damages.

On the first interim certificates exhibit D5 issued on 18 August 2008 the total sum was **Uganda shillings 153,136,550/=**. Out of this sum 5% was a retention fee amounting to **Uganda shillings 7,656,828/=** giving a total of **Uganda shillings 145,479,723/=** paid. The Plaintiff acknowledges payment under the certificate of 66%. 66% of the total sum is **Uganda shillings 101,070,123/=**. This is without deducting the retention fee of **Uganda shillings 7,656,828/=**. The Plaintiff acknowledges a sum of **Uganda shillings 109,700,000/=**. The Plaintiff received more according to the admission by **Uganda shillings 8,629,877/=**. However the total amount of money received by the Plaintiff from the Defendant and proved by exhibit D15 is **Uganda shillings 110,700,000/=**. Consequently the Plaintiff was paid more money than the 66% by **Uganda Shillings 9,629,877/=**.

On the second interim certificate the total amount inclusive of the previous interim certificate is **Uganda shillings 287,254,140/=**. The certificate gives the value of the work executed up to the time of the second interim certificate. It deducted the previous sum of **Uganda shillings 145,479,723/=**. Secondly it applied a retention fee of **Uganda shillings 14,362,707/=** on the total amount inclusive of that in the first interim certificate. It deducted an amount of **Uganda shillings 14,000,000/=** being advance payment and applied damages amounting to **Uganda**

**shillings 2,902,578/=**. There was a total deduction of **Uganda shillings 31,265,285/=**. The previous deduction of **Uganda shillings 7,656,828/=** as retention fee which is incorporated in the 5% deduction. Secondly it aggregates the first and second certificates. Consequently the amounts due to the contractor is **Uganda shillings 110,509,132**. 66% of this net amount is **Uganda shillings 72,936,027/=**. If you add **Uganda shillings 14 million** being the advance payment which is in dispute you get a total of **Uganda shillings 124,509,132/=** and if you apply 66% it you get a total of **Uganda shillings 82,176,027/=**. In either case the amounts are less the damages of **Uganda shillings 2,902,578/=** applied by the Ministry of Works and Transport against the Defendant.

Additional facts from the first two certificates are as follows. In the first certificate to the Defendant was worth a total of **Uganda shillings 153,137,550/=**. In the second certificate the amount is worth a total of **Uganda shillings 134,117,590/=**. These two certificates collectively amount to **Uganda shillings 287,254,140/=** the amount indicated in the second certificate. Consequently the actual retention amount on the second certificates is **Uganda shillings 6,705,879/=**. If damages of **Uganda shillings 2,902,578/=** is applied as a deduction, the total amount due to the Defendant less retention and damages is **Uganda shillings 124,509,133/=**. The issue of whether the Plaintiff was advanced **Uganda shillings 14,000,000/=** can be treated separately. In real terms, the total available to the Defendant at the time of the second certificate was **Uganda shillings 110,509,133/=**.

On the third certificate, damages of **Uganda shillings 6,000,000/=** was deducted. This is presumably the total damages applied to the entire sum of **Uganda shillings 398,657,090/=** so far paid to the Defendants account for works certified by Ministry of Works and Transport officials.

In conclusion, the Defendant was issued an interim payment certificate worth **Uganda shillings 134,117,590/=** under interim certificate number 2. The amount of money deducted as retention fees was **Uganda shillings 6,705,879/=**. In the first interim certificate, the question of retention of 5% of the amount was not addressed and none of the parties has raised it. Before dealing with the actual amount due to the Plaintiff for work actually done, if the retention fees is deducted the Defendant would have received the sum of **Uganda shillings 124,411,711/=**. 66% of the amount is **Uganda shillings 84,091,729/=**. The court has so far established that the Plaintiff has been paid more than the sums admitted in the plaint and also due under the first interim certificate. The Plaintiff was paid more by **Uganda shillings 9,629,877/=** over and above its entitlement of 66% on the first interim certificate. The sums are deemed to be sums paid for execution of works that culminated in the issuance of the second interim certificate. The Defendant has therefore proved some of the sums claimed by way of counterclaim against the Plaintiff. The Defendant has also proved that it has suffered damages of **Uganda shillings 6,000,000/=** charged under the main contract for delays in execution of the works. The Plaintiff testified that the Defendant did not complete the works. Consequently the total works executed by the Plaintiff and the Defendant jointly amount to a total of **Uganda shillings 398,657,090/=**. The sum of money

deemed to have been advanced to the Plaintiff as indicated above and liquidated damages levied by the Ministry of Works and Transport for delays in execution of the works will be deducted from the sums due and owing to the Plaintiff for execution of the works leading to the issuance of the second interim certificate of payment. The Plaintiff claimed special damages amounting to **Uganda shillings 82,176,027/=**. This amount has been proved to the required standard by the evidence on record.

In the premises the Plaintiff is awarded a sum of **Uganda shillings 82,176,027/=** as special damages. On the other hand it has been established by the defence of the Defendant and evidence on record that in addition to the sums due as 66% under the first interim certificate the Defendant paid the Plaintiff additionally **Uganda shillings 9,629,877/=**. The Defendant has also proved that it was charged liquidated damages of **Uganda shillings 6,000,000/=**. Advances to the Plaintiff of Uganda shillings 14,000,000/= was not established other than **Uganda shillings 9,628,877/=** set out above. The Defendant is entitled to a counterclaim sum of Uganda shillings **9,628,877/=**. The Defendant further claimed a sum of **Uganda shillings 19,000,000/=** for hire of machinery. Paragraphs 2, 3 and 4 of exhibit P1 only shows that it is the obligation of the Defendant to hire the machinery indicated. It does not indicate that the sums used to hire the machinery were advances to the Plaintiff. The person responsible to hire the machinery indicated in exhibit P1 is the contractor/client who is the Defendant. In any case the words used: "the contractor/client shall hire the subcontractor" is not very clear. The sum claimed of **Uganda shillings 19,000,000/=** is therefore disallowed.

As far as general damages are concerned, the Defendant has established the amount levied as damages for delays in the works. Additionally the Defendant is entitled to damages for loss due to delays. The contract sum was **Uganda shillings 595,028,574/=**. Certified works in total amounted to **Uganda shillings 398,657,090/=**. This implies that the Defendant lost the remaining contract amounting to **Uganda shillings 196,371,484/=**. The Defendant is awarded 10% of this amount as general damages. The court has discretionary power under section 26 (2) of the Civil Procedure Act to award reasonable interest and the decreed sums shall carry reasonable interest as herein below. The summary of the above decision is as follows:

1. The Plaintiff is awarded a sum of **Uganda shillings 82,176,027/=** as special damages under clause 1 (a) of the sub contract 15<sup>th</sup> of April 2008 for works done and certified by the Ministry of Works and Transport in interim certificate No 2 which works were executed before the Plaintiff abandoned the works.
2. The Plaintiff is liable for breach of contract by way of delays and is not entitled to any general damages.
3. The Defendant has proved that the Plaintiff breached the sub contract by failure to execute it within the period stipulated in the subcontract thereby attracting damages under the main contract.

4. The Defendant is awarded **Uganda shillings 9,629,877/=** on account of monies advanced to the Plaintiff beyond its entitlement under the first interim certificate of payment.
5. The Defendant is awarded general damages of **Uganda Shillings damages of 6,000,000/=** levied by the Employer and 10% of the amount of **Uganda shillings 196,371,484** which amounts to **Uganda shillings 19,637,148/=**. The total amount of general damages is **Uganda shillings 25,637,148/=**
6. The amounts awarded in paragraphs 1, 4 and 5 above carry interest at 21% per annum from the date of filing the suit till date of judgment.
7. The decreed sums from paragraph 1, 4, 5 and 6 shall carry interest at 14% per annum from the date of Judgment till payment in full.
8. Each party shall bear its own costs.

Judgment delivered in open court on the 15<sup>th</sup> of March 2013

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Charles Okuni: Court Clerk

Gilbert Nuwagaba for the plaintiff

Salim Makeera for the defendant

Hon. Sam Otada MD of the defendant in court

**Christopher Madrama Izama**

**Judge**

15<sup>th</sup> of March 2013