THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 0232 – 2012

FORESTRY ENGINEERING ::: PLAINTIFF

VERSUS

A2Z MAINTENANCE ::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

M/S Forest City Engineering Technical Services Ltd a limited liability company hereinafter called the Plaintiff, sued A2Z Maintenance and Engineering Servicing Limited, the Defendant in this case. The Plaintiff's claim against the Defendant is for recovery of UShs. 842,229,728=, general damages, interest thereon and costs. The Plaintiff also claimed for UShs. 19,500,000= being the cost of hiring its truck at a rate of UShs. 500,000= per day. The facts that emerged from the pleadings were as follows:

The Republic of Uganda in its bid to roll out rural electrification awarded the Defendant the tender to construct 33 KV high voltage power lines as well as low voltage network of its Rural Electrification Project. The construction was to cover the distance between Katakwi and Moroto with tee-offs to Matanyi and Lorrengedwat. Speed was of

the essence and so on 15th September 2010, the Defendant subcontracted the work measuring 151 kilometers - Katakwi to Moroto with Matanyi and Lorrengedwat inclusive to the Plaintiff at a contract sum of UShs. 1,320,280,170=

This was reduced into writing on 15th September 2010 – Exhibit 'A1'. The payment was broken into 3 parts; Clause 16 of A1 provided as follows:

16.0 TERMS OF PAYMENT

a) Fifteen percent (15%) Mobilization Advance subjected to receipt of Performance Bond of the same amount from refuted Bank.

b) Seventy five percent (75%) of the measured value of work performed by the contractor as identified in the said programme of performance, during the preceding month, as evidenced by our authorization of the contractor's application, will be made monthly within thirty (30) days after receipt of invoice.

c) Ten percent (10%) of the total or pro rata value of installation services performed by the contractor as evidenced by use of the contractor's monthly applications, upon issue of the Operational Acceptance Certificate, within Thirty (30) days after receipt of invoice.

The contract included the survey work at a cost of UShs. 41,860,500= which was part and included in the contract price.

In addition to the survey, the Plaintiff was to erect poles. This was to be followed with the dressing and stringing. The other work to be done was installation of equipment like transformers. The fifth stage was termed “the finishing” and the last stage was the testing and handing over the line. All this work was to be completed within nine (9) months, that is by 15th July 2011.

A week after the signing of the contract, the Plaintiff commenced work until the 16th March 2012 when the contract was terminated. The Plaintiff complaining that the unilateral termination of the contract was unlawfully done and that the Defendant refused to pay for the works that had been fully performed, brought this action.

In its defence, the Defendant countered the Plaintiff’s claim denying liability alleging that the Plaintiff itself had fundamentally breached the contract by failing to complete the work within the nine (9) months they had agreed. That these delays without justification coupled with neglect and refusal to perform the work as agreed resulted into shoddy work, erection of wrong structures, poor pole profiling, wrong soils for back filling, leaning poles, shallow pits, poor size selection, discontented labour due to non payment which made it necessary to terminate the contract.

The Defendant further alleged that by the time the contract was terminated, the Plaintiff had received UShs.603,972,471= as payment from the Defendant. The Defendant specifically contended that the Plaintiff had received an advance payment of the sum of UShs.140,000,000= advanced for payment of the bank guarantee and only UShs. 76,241,354= was ever recovered by the Defendant

leaving on outstanding balance of UShs.63,758,846=. The Defendant also contended that the Plaintiff had obtained cash and cheque advances of UShs.205,145,000= and the Defendant had only recovered UShs.92,986,600= leaving an outstanding balance of UShs.112,158,400=. That adding these balances namely; UShs.63,758,846=, UShs.112,158,400= to money received UShs.603,972,471= which totaled UShs.779,889,717=. And that at the time of termination, the Plaintiff was not entitled to any more money. Moreover, the termination was for a legal and just cause.

By way of counterclaim the Defendant claimed that the Plaintiff had committed fundamental breaches namely; delays, failure in execution of their work, abandonment of the contract and failure of fulfilling the time spans that had been agreed upon in the progress schedule. Crowning all this with the failure to pay workers and service providers. The Defendant also claimed that it had supplied the Plaintiff with construction materials worth UShs.372,284,812= which the Plaintiff never used but never returned to the Defendant when the contract was terminated.

Furthermore that because of the shoddy work, the Defendant was forced to employ extra workers to rectify it which cost them UShs.112,050,298=. As a result, the Defendant sought the dismissal of the Plaintiff's claim and orders that the contract was legally terminated, UShs.63,758,846= being balance on advance payment made to the Plaintiff, UShs.112,158,400= being advanced payment by cash and cheques, UShs. 372,384,812=, the cost of material supplied to the Plaintiff which was not used but never returned to the Defendant and UShs. 112,050,298= as money paid to rectify faulty

works occasioned by the Plaintiff. It also sought money paid by the Defendant to Uganda Revenue Authority. Furthermore aggravated damages, general damages, interest on the decretal sum and costs of the suit.

The issues that arose and were agreed upon by the parties for resolution were the following;

1. Whether the contract was lawfully terminated?
2. Whether the parties are entitled to any payment?
3. What remedies are available to the parties?

Issue No. 1: <u>Termination</u>

It is not in dispute that the Plaintiff and the Defendant entered into a contract under a memorandum of agreement dated 15th September 2010. It is also not in doubt that the Defendant subcontracted to the Plaintiff the work of erecting a 33 KV high voltage power line from Katakwi to Moroto with tee offs to Matanyi and Lorrengedwat.
This work as provided for was supposed to be finished within nine (9) months. Evidence on record however shows that the work continued unfinished until it was terminated by the Defendant on the 16th March 2012.

In the letter of termination, the Defendant wrote (sic):

> *"Hereby we are confirming you that for the above said job, M/S Forest City Engineering and Technical Services Ltd (U) is no*

more our sub contractor. We are terminating you (sic) as our subcontractor due to the following reasons:-

- *We had paid subcontractor on the regular basis for his work done on the above mentioned site but his labour is on strike at Matanyi site due to not proper facilitation of wages to them. Now the labour is so frustrated with him they even attack on our (A2Z) employees on ground and not allowing us to get the work completed by any other labour in respect of this. Our employees are not safe on the ground and work is also stuck in particular Matanyi and nearby areas.*

- *As per discussion with REA officials, I had communicated to subcontractor to come to REA to resolve this issue on 15th March 2012 but he denied to me to come to your office."*

The Plaintiff contended that this termination was unlawful in as much as it was based on no substance. PW1 stated that the delay in payment of wages to the workers was occasioned by the delay of payment to the Plaintiff by the Defendant. That the meeting that the REA officials called had not been communicated to the Plaintiff and therefore it could not be held responsible for failure to attend. In evidence DW1 stated that termination of the Plaintiff was because of failure to fulfill its obligation, shoddy work, breach of timelines, failure to pay workers resulting into unpaid workers revolting and attacking the Defendant's workers on site.

Shoddy work

The inspection of the work was done was Multi Consults Limited who on the 27th February 2012 found the quality of work and workmanship wanting. The consultant wrote:

> *"It was noted that the quality of work and workmanship was not acceptable in some sections of the project mainly due to the following;*
> - *Earthing of 33 KV line had not been done at pole erection.*
> - *Wrong structures had been erected*
> - *Poor pole profiling*
> - *Bad clay soils used for back filling instead of imported murrum.*
> - *Poor plumbing/leaning poles*
> - *Transformer structures not matching main land structures*
> - *Poor pole size selection.*
> - *Shallow pits (specified pole depths) not achieved in some instances."*

This finding was left undisturbed by the Plaintiff's cross examination. It is a finding that could only be described as shoddy work.

Further evidence of shoddy work is seen from the observations of Multi Consult Ltd who was the clerk of works. In a report to the Project Manager dated 2nd May 2012, the Clerk of works observed that there were anomalies in the work the Plaintiff had done. He had found the Defendant rectifying faults that had been occasioned by the Plaintiff. These were in relation to unnecessary angles and sagging of lines between Katakwi and Lorrengedwat, Matanyi junction to Kangole and areas towards Moroto town. He further observed that the trees were very near the line which meant bush clearing had not

been done properly by the Plaintiff. He observed that line stays were missing in some places and murrum bands had not been applied to some places as required.

On another occasion, in a meeting on 29th August 2011 – A23 between the Plaintiff, Defendant and the Clerk of works, the consultant stated that the work by the Plaintiff was not satisfactory and gave them a final warning. He said;

> *"This is final warning from M/S A2Z to M/S Forestry to improve the progress or the work order will be cancelled between both companies or reduced as per the requirement of the project"*

The Plaintiff was party to these proceedings and endorsed them. Considering the foregoing, it is my finding therefore that in some areas, the quality of work exhibited by the Plaintiff was wanting.

Time element:

DW1 testified that one of the reasons why the contract of the Plaintiffs was terminated was because the progress was slow. PW1 told court that they were slow because the Defendant failed to give them advance money in time and was not in position to provide the 14 ft poles required for the project.

On the poles, it is true that originally it was that 14m poles be used for the erection of the line. It is also true that the poles were at one time not available. DW1 in his testimony testified that these poles were delayed for not more than two (2) weeks and that this could therefore not be claimed to be the main cause of the delay.

That the poles delayed only for two (2) weeks is clearly seen in the minutes of the site inspection and meeting No. 2 of 10th February 2011 where in Multi Consult Ltd at Pg 8 citing that the programme had been affected by the scarcity of 14m poles which had caused a delay of 2 weeks.

Indeed in the evidence of PW2, 60 poles were received and further stated that 130 more was expected within 2 weeks.
In my view therefore the absence of poles for 2 weeks could not be said to be the overall cause of the slow progress of the work.

Multi Consult also found that the pace of electric line erection was far below the agreed speed. It wrote:

> *"It was noted with deep concern that there was hardly any work going on the main 33 KV Katakwi to Moroto line despite the fact that a lot remains to be done within the limited time to the intended completion date."*

The consultant demanded for "a written explanation of your current poor performance and the immediate remedial measures you intend to take to complete the project otherwise we will have to advise the employer to take appropriate punitive actions as provided by the contract.

One of the reasons of the slow progress as advanced by the Plaintiff was the constant sit down strikes of the workers due to none payment.

The question that arises is whose responsibility was it to pay the workers. Clause 1 of the contract document provided that it was the duty of the Plaintiff to mobilize skilled and unskilled manpower at the site for the execution of the job.

Clause 15 provided for the payment of wages as follows:-

a) You will pay wages as per payment of Minimum Wages Act …

Clause 15(f) obligated the Plaintiff to pay monthly wages to the labourers irrespective of payment received from the Defendant. It specifically provided; *"we will not be responsible for any labour payment whatsoever."*

From the proceedings, it is seen that the constant strikes for wages did not only result into sit downs but the workers even went ahead to attack other workers of the Defendant who were willing to continue with their work.

It also led to the rioting workers impounding and holding property of the project. The Resident District Commissioner who received these complaints wrote several letters warning the Defendant of the danger of non-payment of these workers. In a letter dated 8th November 2011 to the Defendant at Pg 35 of the Defendant's list of documents, the Resident District Commissioner wrote:-

> *"My office has become an extension of Forest City in handling the crisis they are causing to service providers ranging from failure to pay bills in restaurants, accommodation, individual care to the personnel, borrowed fuel and inability to pay for storage facility. The worst is the inhumane treatment of the*

hired labourers who come from as far as Western Uganda and Central."

In yet another dated 25th March 2012, the Resident District Commissioner wrote:-

"The current fiasco which has resulted in the gang from Napac holding our property in Matanyi and the threat of destroying the vehicle should be enough reason to execute this request. If firm action is not taken A2Z will find itself facing greater disaster and paying unnecessary costs out of the problems caused by Forest City."

Clause 5(b) of the contract was to the effect that the Plaintiff would be responsible for the provision of housing first aid and hospitalization of the workers. This meant it was the Plaintiff's duty to pay rent and meet the hospital bills. DW1 in his evidence stated that the Plaintiff also failed to house his workers or pay rent for his workers which also affected the progress of the work. In this he received support from the Resident District Commissioner, Joseph Arwata as seen from his letter dated 12th November 2011 in which he wrote to the Defendant:

"Following unceasing complaints which have come to my office more than 3 times, from a cross section of people ranging from casual labourers, lodge owners, restaurant operators, clinic operators who offered services to Forest City personnel through its management. I, wish to appeal to you to see how you can verify these complaints and pay genuine cases."

Exhibiting his unhappiness against the Plaintiff he added:

> *"This request comes at a point where I find my office overwhelmed with desperate people whose plight should be addressed and this office cannot act as an auxiliary organ of FOREST CITY."*

It is therefore Court's finding that the Plaintiff breached the terms of the contract by failing to pay his workers their medical services and accommodation costs. Indeed as the termination letter stated, the Plaintiff's contract was terminated as a result of non-payment of workers.

Counsel for the Plaintiff submitted that non payment of workers was not one of the provisions for termination of the contract in the agreement. Termination referred to as cancellation of the order is provided for under Clause 13 of the contract document.

Clause 13(a) empowers the Defendant if the parties fail to execute the work in a proper manner and promptly.

Clause 13(b) provides for if any of the parties becomes bankrupt or goes into liquidation or becomes insolvent
13(c) provides for if any of the parties causes a fundamental breach of the contract.
13(d) provides for if a force majeure arises.

In the instant case Clause 13(a) and (c) are the most relevant. This court has found that the work was shoddy in some instances. It has

also found that the progress was not as had been agreed. In my view, failure to pay workers leading to sit down strikes and molestation of others causing work to slow down or even stop is a fundamental breach of the contract that 13(c) is intended to resolve. The end result is that the Defendant in basing itself on the breaches aforementioned acted lawfully and within the contract confines in terminating the services of the Plaintiff.

Issue 2: Whether the parties are entitled to any payment?

Plaintiff's Claims:

a) Motor vehicle use by the Defendant

The Plaintiff claimed that in the course of its work, the Defendant hired the Plaintiff's crane lorry at a cost of Shs.500,000/= per day. PW1 testified that their vehicle UAP 304P Mitsubishi Fuso, a crane carrier which was being used in Luwero was requested for and hired by the Defendant to go and offload stores at Katakwi. Further that the lorry was taken on 25th February 2012 and was kept for 40 days.

DW1 in his statement at Par 41 accepted that the Defendant had used the lorry for only 1 days and paid the Shs.500,000/= that was due. The issue now before court is not whether the Defendant hired the lorry or not. DW1 admitted hiring the lorry but for only 1 day. The work was in Katakwi, the lorry in Luwero. It certainly could not be one day if the lorry had to travel work for a day then travel back. The least it could be in the Defendant hands was 3 days. PW1 said the lorry was hired for 40 days but during cross-examination he

conceded that it was 29 days instead and the mention of 40 days was a miscalculation. It is not in dispute that the lorry was hired on the 25th February 2012.

From the evidence of PW1, the lorry is said to have been returned on 26th March 2012. DW1 as stated earlier claimed it was kept by the defendant for 1 day. One day would have meant the lorry was returned on 26th February 2013.

Annexture 'C' to the Plaint which was not disputed by the Defendant suggests that the lorry must have stayed for more than 1 day. On 6th March 2012, PW2 wrote to the Project Manager of the Defendant a letter headed: 'Delay to return our truck Reg. No. UAP 304P' which I reproduce hereunder:

> *"I refer to the above subject and wish to remind you that the truck has spent more days than anticipated. We need to use the truck in Kampala you had said it would work for you in the stores at Katakwi for a few days.*
>
> *Remember the rate at which we agreed to let the truck is UShs. 500,000/= per day and the amount has now reached UShs. 15,000,000/=*
>
> *Let me hope you will take note of this and respond accordingly.'*

The letter was received by DW1 on which he noted:

"Received and noted for action."

This is not an answer expected for a person who had hired a vehicle for one day and yet the letter claimed as at that time UShs.15,000,000/=. If that were the case, he would have replied denying liability. This was on 6th March 2012, several days after they had taken possession of the vehicle.

By the conduct of DW1 in telling court that he had used the vehicle for only one day yet by the reaction of the demand note it was all clear that it had been for several days. I am inclined to disbelieve DW1 and believe the evidence of PW1.

It is my finding therefore that the motor vehicle which came into possession of the Defendant on 25th February 2012 was returned on 25th March 2012 – 29 days later.

Going by the cash voucher attached to Annexture 'C', the rate of hire was UShs. 500,000/= per day; 29 days therefore amounted to UShs. 14,500,000/= from which one would subtract the UShs. 500,000/= already paid leaving UShs. 14,000,000/= as unpaid money due and owing to the Plaintiff by the Defendant.

b) Survey

The Plaintiff claimed that they had done the survey of the line at a cost of UShs. 41,860,500/= and had been paid UShs. 28,320,000/= leaving a balance of UShs. 13,540,500/=. PW1 testified that at the time they were given the subcontract, the survey work had not been done. The Plaintiff did the survey and drew a working drawing. Work was initially 151 km to which were added the distances of Nadiket Seminary and Nawatanwo Primary School. These two additions changed the distance. To prove the distance the Plaintiff tendered

the legend showing the proposed 33KV single line diagram from Katakwi to Moroto. The exhibit showed that it had been received by the Defendant on 8th December 2010. It was not disputed by the Defendant. It showed that the survey was from Katakwi to Moroto with tee – offs to Matanyi and Nadiket.

The diagram showed that a distance of 236km were surveyed. DW1 stated that the initial survey was of 151km but the Defendant had approved 160km when the Plaintiff's presented their claim for payment. The diagram however clearly indicated that a total of 236.5km were surveyed. The Defendants received this document which was presented in Court during cross-examination and DW1 did not fault the document. It follows therefore that while the original contract was to survey 151km, additional work was given to the Plaintiff's to survey. Approving 160km instead of the 151km initially agreed is in itself indicative that the Defendant had subsequently increased the distance to be surveyed by the Plaintiff which distance DW1 during cross-examination admitted when he looked at the legend. Since the legend gives a total distance of 236.5km, this court is convinced and finds that the distance surveyed by the Plaintiff was 236.5km. PW1 told court that each kilometer was being surveyed at Shs.150,000/=. This figure was not disputed by the Defendant. In the premises it is Court's finding that each kilometer was being surveyed at Shs.150,000/=. Shs.150,000/= multiplied by 236.5 would give Shs.35,475,000/=. The Plaintiff also had to pay VAT of 18% subjecting Shs.35,475,000/= to 18% VAT would give Shs.6,385,500/= which all totaled to Shs. 41,860,500/=. The Defendant paid Shs. 28,320,000/= a figure that is disputed by none

of the parties. This left a balance of Shs.13,540,500/= due and owing to the Plaintiff.

c) 247 pieces of stubs

The Plaintiff also claimed to have supplied stubs for making stays. They claimed they had supplied 247 stubs at a cost of Shs. 35,400/= each tax inclusive.

Further that the transportation of the stubs was agreed at Shs. 1,257,000/= which all totaled to Shs. 10,000,800/=. The Defendant did not deny receiving the stubs as Annexture 'O' to the Plaint namely; Purchase Order showed which document was endorsed by both the Plaintiff and the Defendant. 247 stubs had been supplied by the Plaintiff to the Defendant worth Shs.8,743,800/=. The purchase order also indicated that the Defendant would pay Shs.1,257,000/= for transport. DW1 in his witness statement at Paragraph 30 stated that the Plaintiff's claim was based on a Purchase Order which had been forged. He stated that the signature purported to be that of the Defendant's Site Manager on the purchase order could not have been his because he was stationed at Katakwi – Moroto and not at Kamdini where the Plaintiff purportedly delivered the stubs.

It is surprising that DW1 would come up and refer to the signature as a forgery of the Defendant site manager yet the signature on the purchase order was stated to be his. The signature which appears on the purchase order was said to be that of Gaura Baweja who was DW1.DW1 does not deny that this is not his signature. Secondly, he does not deny that stubs were not supplied.

Thirdly, he does not deny that part payments were made under that purchase order.

For the Defendant to rebut the authenticity of the purchase order would have called the site engineer whose signature he claimed to have been forged. In my view he was not called because the signature was said to belong to DW1 and not his colleague.
Counsel for the Defendant submitted that there were contradictions in the Plaintiff's claim and the evidence of PW1 in respect of money due on the stubs. While it is true that there are contradictions, it is also true that there were purchases of stubs by the Defendant from the Plaintiff.

By Clause 15 in the purchase order, it is clear that the Plaintiff received Shs.1,000,000/= on signing for the delivery of the stubs. It is also clear from the cash voucher dated 17th February 2012 that the Plaintiff was paid Shs. 500,000/= also towards transport which he acknowledged.

Having received Shs. 1,500,000/= the remaining claim of money due and owing on the stubs supplied is Shs. 8,000,000/=

d) Line Hardware Material

The Plaintiff's claimed 108,044,500/= in respect of stay rods, guy grips, pole top make and stay insulators which were materials used in holding wires. They alleged that the Project Manager had asked them to supply them. To support their claim, the Plaintiff's provided Annexture 'E' of two hand-written acknowledgements by Ashwani Khosla of Shs. 13,044,500/= and Shs.15,000,000/= dated 2nd

February 2011 and 5th February 2011 respectively. DW1 did not say anything about this claim in his evidence nor did he dispute these acknowledgments.

The Defendant's counsel however submitted that the claim could not stand because it was not supported by any invoice or demand for payment. With due respect, I wish to disagree with this submission. The Plaintiff produced two acknowledgments showing that the Defendant was indebted as a result of materials received from the Plaintiff. In one of them, the engineer on site Ashwani Khosla indicated that the money would be paid off later. Both were headed materials received from Forest City Engineering and Technical Services Ltd. The fact that they were handwritten did not vitiate their authenticity. Their authenticity could only be challenged by calling Ashwani Khosla. This was not done and Counsel's submission at the bar could not dislodge them. It is therefore my finding that the Plaintiffs supplied materials worth Shs.108,044,500/= to the Defendant.

e) Recovery of UShs. 842,229,728/= being the outstanding balance due and owing to it for services rendered to the Defendant.

The contract between the Plaintiff and the Defendant was for a sum of UShs. 1,320,280,170/=. The Plaintiff told Court that out of the contract sum the Defendant paid UShs. 439,124,342/= leaving a balance of UShs.842,229,728/=. It is this balance that he claimed.

The work the Plaintiff was supposed to do included a survey of the line together with the Defendant, to do drawings, transport material and equipment from site to site, assembling, erection cabling,

grounding, lightening protection system, pre-commissioning checking, dismantling, drilling of holes, stringing, testing and commissioning. During the hearing, DW1 clarified on these duties and categorized them under 6 headings.

He stated that the initial work was survey;

2nd stage – Pole erection

3rd stage – Dressing and stringing

4th stage – Installation of major equipment like transformers

5th stage – Finishing

6th stage – Testing and handing over the line.

It is clear in the evidence that the Plaintiff did not do all the work. That is why when their contract was terminated they demanded that they be allowed to finish the work. Indeed PW1 during cross-examination admitted that the time the contract was terminated, they had done 80%. DW1 disagreed. He stated that they had done erection of poles by 90%, that in any case, they could not have done 100% of the erection of poles because their scope of work was reduced and therefore the payment that had been made for erection of poles was sufficient since the work was even shoddy.

DW1 further testified that the 4th stage which comprised installation of major equipment was never done by the Plaintiff. The Plaintiff did not do the finishing nor the testing nor the handover because they had been terminated before they reached that stage.

From the evidence, what DW1 seems to suggest is that the Plaintiff stopped at the stringing.

It is evident from the agreement dated 13th February 2012 that by that date the Plaintiff had not done the finishing. In that agreement, the Plaintiff was to provide workers and the Defendant was to pay them on its (Plaintiff's) behalf.

It is also DW1's evidence that the Plaintiff did not provide the workers because he wanted to pay them himself by first receiving it from the Defendant and passing it on to the workers; something that the Defendant resisted for fear that like in the past, the money would not reach the workers. Because of the stalemate that resulted from this misunderstanding, I am convinced that the Plaintiff did not go to the next stage; that of installation of major equipment and if he did not do the installation, he certainly did not do the finishing, nor the testing nor the handover.

It is therefore evident that the Plaintiff did 3 stages, out of the 6 stages. None of the parties helped this Court work out the percentage of each stage. It is therefore left to this Court to strain itself in considering how much work is involved at a particular stage. It is my belief that the erection of poles is a strenuous and hazardous part and cannot be said to be equal to the other stages in the installation of the line.

That notwithstanding, the 80% claimed by the Plaintiff would be too high. Taking into account that they covered only 3 stages, doing the erection, considering all the circumstances surrounding this case, I would find 60% an appropriate percentage of the work done by the Plaintiff.

Thus 60% of total contract sum of UShs. 1,320,280,170/= amounts to UShs. 792,168,102/=.
Considering that the Plaintiff had already received UShs. 478,050,442/=, the same is deducted from UShs. 792,168,102/= which leaves a sum of UShs. 314,117,660/= as the total outstanding amount due to the Plaintiff for services rendered to the Defendant.

Defendant's Claims:

a) Unused material worth UShs. 327,387,491/=.

In the counterclaim, the Defendant claimed for UShs. 372,284,812/=. He alleged that in the course of their business relationship, they supplied various materials which materials he listed in Annexture 'AZ13'. In the evidence DW1 told Court that to reach that figure, they went through a calculation by looking at what was utilized, subtracting it from what had been supplied and that at the end of it all, a deficit of materials worth UShs. 372,284,812/= was unaccounted for.

PW3 told Court that all the materials, that had not been utilized were collected by employees of the Defendant namely; Chandaras & Kahn. He said they went to Olilim, Matany & Lorengedra & collected all the materials that had not been utilized.

DW3 admitted that they had collected materials but that not all of it was found. PW3 said all the materials were signed for and produced Annexture 'M' as the document that had been used when the

materials were collected and signed by the employees of the Defendant. On the document, the following words are written:

"All materials held by Forest City Engineering have been taken"

Under this was the signature of the recipient dated 19th April 2012. A similar collection is shown on 'M' dated 20rh April 2012.
On the contrary, although DW1 claims not all the materials were collected, he produced no document to show that they had not collected all their materials; there were no figures given during cross-examination to indicate how much materials were not collected. The materials were not even collected by him but neither Chadras nor Khan were summoned to testify as to how much material was collected and how much went missing.

Furthermore, when DW1 was asked whether he ever complained or demanded for the missing materials, he said he did not.
This is surprising because having terminated the contract and having collected the balance of materials and taking into account that their relationship had been severed, the expected reaction would have been to demand for materials that he said were missing. Silence on his part meant he was satisfied with what had been recovered. Since Annexture 'M' received no resistance and it indicated that all the remaining materials had been collected, the most appropriate conclusion is that the Plaintiff does not owe the Defendant any materials that remained at the time of termination of the contract.

b) Advance Payments:

The Defendant sought to recover from the Plaintiff UShs. 112,158,400/= and UShs.63,758,646/= as balance of money advanced by cheque/cash and bank guarantee respectively.

The Plaintiff admitted through a detailed schedule of money they received. It comprised cash, cheque and labour payment amounting a total of UShs. 143,026,000/= from which UShs.34,385,600/= was deducted from bills leaving a balance of UShs. 108,640,000/= as at the 18th September 2011.
This evidence was not disputed.

DW1 also testified that the Plaintiffs received further advances after the 18th September 2011. This received support from the cash voucher and acknowledgement receipts from the Plaintiffs which amounted to UShs. 43,506,000/= as shown in the Annextures of Defendants documents; 101 – 107. The evidence was not disputed by the Plaintiff.

DW1 also told Court that other advances were made out vide Cheque No. 5 on 4th October 2011 of UShs. 5,000,000/= and No. 167 on 22nd December 2011 of UShs. 10,000,000/= this payment received support from the Defendant's bank statements on pages 153 and 160 of the Defendant's Annextures to the Defence.

The advances UShs. 43,506,000/=, UShs. 15,000,000/= and UShs. 143,026,000/= aforementioned totaled to UShs. 201,532,000/=.

The Defendant stated that out of that sum, the Plaintiff only refunded UShs. 92,986,000/=. The Plaintiff's only contention of the UShs. 201,532,000/= was that it was not the Defendant's obligation to pay the taxes.

He did not deny that they were paid nor say that he was still indebted to URA for the VAT. Since the payment of VAT was a legal obligation which the Plaintiff could not avoid it was only just that the Defendant recovers. The Plaintiff having paid back UShs. 92,986,600/=, he remained indebted in UShs. 108,545,400/= as advances under cheques and cash.

DW1 told Court that the Defendant advanced the Plaintiff UShs. 141,000,000= as advance payment.

This was conceded to by PW1 in para 24 of his witness statement. The figure he admitted though was UShs. 131,600,000/= if added to 6% withholding tax of UShs. 141,000,000/=, that is UShs. 8,400,000/= the total goes back to UShs. 141,000,000/=. The Plaintiff in paragraph 37 of his witness statement under item Less balance on initial advance," stated that they had paid back UShs. 68525,503.72/=. This deducted from UShs. 141,000,000/= leaves a balance of UShs. 72,474,496.28/=. This figure added to UShs. 108,545,400/= results into UShs. 181,019,896.28/= advances not paid.

c) <u>Additional costs of completing works</u>

The Defendant in his counterclaim sought to recover from the Plaintiff UShs. 112,050,298/= which he claimed was money he spent to rectify the faulty and poor work done by the Plaintiff in some areas. He also alleged that he spent some of this money on finishing work that was pending at the time of termination of the contract. To support this, DW2, a Managing Director of UK General Services Ltd a company the Defendant employed to do the works mentioned herein above told Court that UK General Services was a company registered to do works of electrical installation. That he was asked by the Defendant to do work on the 33 KV distribution network and LV works. For these he was paid UShs. 23,474,920/= on 7th November 2011; UShs. 8,267,552/= on 11th November 2011, UShs. 32,998,467/= on 21st November 2011. Other payments were reflected in the invoices of 14th January 2012 – Ushs. 16,461,472/=, 1st March 2012 – Ushs. 16,033,600/=.
1st March 2012 - Ushs. 1,586,400/=
29th March 2012 – Ushs. 3,130,624/=
10th April 2012 – Ushs. 8,668,752/=
17th May 2012 – Ushs. 5,378,912
15th Mary 2012 – Ushs. 19,550,240/=
26th June 2012 – Ushs. 2,336,400/=
26th June 2012 – Ushs. 6,586,288/=
This totaled to UShs. 144,473,624/=

It is not in dispute that at the time of termination of the contract there was pending work and errors to be corrected. To do these corrections to finish the work, the Defendant had to find other contractors. Although the amount paid to UK General Services totaled to UShs. 144,473,624/=, the Defendant only claimed UShs.

112,050,298/=. This discrepancy of UShs. 32,423,326/= could have been because they were payments that did not touch on the work originally assigned to the Plaintiff. In the circumstances it is my finding that the Defendant is entitled to only UShs. 112,050,298/= which he claimed under this head.

Issue 3: What remedies are available to the parties?

Plaintiff:	Motor vehicle use by Defendant	-	13,540,000/=
	Survey works	-	13,540,000=
	247 Stubs	-	8,000,000=
	Line hardware material	-	108,044,500=
	60% contract performance	-	314,117,660=
	Retention	-	171,532,946=
			Ushs. 629,235,106=

Defendant:	Advance payments	-	175,917,046=
	Money spent on other contractors	-	112,050,298=
			Ushs. 287,967,344=

This would therefore satisfy the counter claim.

To set off the Defendant's claim from that of the Plaintiff's an adjustment would be imposed to reduce the Plaintiff's claim. Thus UShs. 629,235,106 – 287,967,344 = 341,267,762=

Accordingly, the Plaintiff is entitled to recover from the Defendant UShs. 341,267,762/=.

The Plaintiff sought general damages for breach of the Memorandum of Agreement. Since it has been established the same was lawfully terminated, the Plaintiff is not entitled to any general damages.

The Plaintiff further sought interest at a rate of 25% per annum from the date the Cause Of Action arose till payment in full.
An award of interest is discretionary and the basis of an award of interest is that the Defendant has kept the Plaintiff out of his money and the Defendant has had use of it himself, so he ought to compensate the Plaintiff accordingly. **Begumisa Financial Services Ltd V General Mouldings Ltd & Another [2007] 1 EA 28.**

If the Plaintiff was claiming a rate of 25% it would have referred to that rate of interest in its evidence to justify the award of interest above the Court rate: See **Highway Furniture Mart Ltd V The Permanet Secretary Office of the President & 3 Others [2006] 2 EA 94.**

Considering that the Plaintiff has been kept away from his money since 2012, I would find interest at a rate of 10% per annum appropriate.

In conclusion, judgment is entered in favour of the Plaintiff against the Defendant in the following terms;

a) UShs. 341,267,762/=
b) Interest on (a) 10% per annum from the date of termination of the contract till payment in full.
c) Costs of the suit.

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David K. Wangutusi

JUDGE

Date: 13/11/2014