

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
[COMMERCIAL COURT DIVISION]  
CIVIL SUIT NO. 67 of 2012**

**CRYSTAL CONSULT (U) LTD }::::::::::::::::::::::::::::::::: PLAINTIFF  
VERSUS  
MTN UGANDA LTD }::::::::::::::::::::::::::::::::: DEFENDANT**

**BEFORE: HON. LADY JUSTICE HELLEN OBURA**

**JUDGMENT**

The plaintiff, Crystal Consult (U) Ltd seeks damages for breach of contract due to the alleged failure of the defendant, MTN Uganda Ltd to supply a purchase order and pay for goods that the plaintiff allegedly delivered on 13th April 2011 to the defendant's warehouse. The plaintiff claims that upon request for a quotation ("RFQ") for network items from the defendant, it supplied the quotation, and the defendant called by telephone to order the specified items with a promise that a purchase order would be issued later. Further, that upon receiving the defendant's order by phone, the plaintiff supplied the goods without the purchase order under the belief that it would be supplied at a later date as had been promised. No purchase order or payment was ever given to the plaintiff by the defendant and several reminders about the same yielded no fruits, hence this suit.

The defendant denied the claim and maintained that no goods were ever ordered from the plaintiff, and that none were supplied to the defendant's warehouse.

The agreed facts as stated in the Joint Scheduling Memorandum and confirmed at the scheduling conference are that the defendant sent RFQ to the plaintiff while the issues that were agreed upon are:

- i. Whether the plaintiff entered into a contract of supply of goods with the defendant and, if so whether the defendant breached the same.
- ii. Whether the plaintiff is entitled to the remedies sought against the defendant.

At the hearing, the plaintiff was represented by Mr. Wadembere Nuhu from M/S Mugisha, Namutale & Co. Advocates assisted by Mr. Sserwanja Joseph while the defendant was represented by Mr. Andrew Kibaya from M/S Shonubi, Musoke & Co. Advocates. The plaintiff produced three witnesses while the defendant produced four. Following closure of hearing evidence, the parties filed written submissions which have been duly considered in this judgment.

I now turn to consider the issues in the same order in which they were framed and argued.

**Issue 1: Whether the plaintiff entered into a contract of supply of goods with the defendant and if so whether the defendant breached the same.**

I will consider this issue under two sub-issues since it has two parts. The first part will be whether the plaintiff entered into a contract of supply of goods with the defendant and the second part will be whether the defendant breached the contract.

**Issue 1 (i): whether the plaintiff entered into a contract of supply of goods with the defendant.**

**Black's Law Dictionary, 8<sup>th</sup> Edition** defines a contract as; *“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”* Section 2 of the **Contracts Act 2010** read together with section 10 defines a contract as; *“an agreement made with the free consent of parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.”*

In **General Insurance Company v Kasanda Cotton Company 166 (1) A.L.R Comm 2292**, court stated that a contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties. A contract may be inferred from the conduct of the parties from general or local custom governing such bargains or from a recognized course of dealing between the parties.

A valid contract must contain all the three essential elements of formation of agreement, namely; offer and acceptance, intention to be bound by the agreement and consideration. I will handle each of these essential elements separately hereunder.

## **Offer and Acceptance**

**According to Davies on Contract by Robert Upex and Geoffrey Bennett 10<sup>th</sup> Edition at page 7**, a contract is based on an agreement, which arises from offer and acceptance. One person makes an offer; another person accepts that offer. When that happens, and provided that the other necessary factors, consideration and intention to contract, are present, there is a contract.

**G.H Treitel, the Law of Contracts, 10<sup>th</sup> Edition Page 8** defines an offer as “*an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed*”, “*the offeree*”. The expression of an offer may take different forms such as a letter, news paper advertisement, fax, email and even conduct, as long as it communicates the basis on which the offeror is prepared to contract.

**Geoff Monahan Essential Contract Law 2<sup>nd</sup> Edition page 12** defines acceptance as, “*an absolute and unqualified assent to all the terms that comprise an offer.*”

Therefore an offer will not ripen into a contract until it is accepted by the offeree and communicated to the offeror. This is the necessary ingredient for turning an offer into an agreement. There may be question however as to whether the offeree’s action amounts to an acceptance. To do so, it must be made in response to the offer and must correspond to its terms. This means that if, for example, the offeree tries to introduce different terms, his action may be treated as a counter offer which puts an end to the original offer.

Two questions therefore arise in the instant case, namely:

- i. Was there an offer and,

- ii. If so was there acceptance which was communicated to the offeror?

## **Offer**

PW1, Mr. Robert Bbale in his examination in chief stated that there is a business relationship between the plaintiff company and the defendant company in a way that the former deals with the latter in respect of supply of telecommunication products directly and indirectly. He stated that on the 11<sup>th</sup> day of April 2011, he received an e-mail from Mr. John Banyenzaki to provide quotation for assorted telecom materials by 12<sup>th</sup> April 2011 and he responded promptly by sending Exhibits P2, P3 and P4 being the quotations. Mr. Banyenzaki then called and told him to prepare to deliver the items as the purchase order was on the way.

It was his evidence that he told Mr. Banyenzaki that they didn't have all the items in their store but the next day 13<sup>th</sup> April 2011 they would be able to supply what they had and he would be in position to inform him of what they would be able to supply. PW1 testified that on 13<sup>th</sup> April 2011 they arranged and instructed one of their staff Mr. Kawooya Denis to deliver the items to the defendant and in fact he delivered all the items that were quoted worth US\$ 120,300 before value added tax (VAT) and they retained a copy of the delivery note that was stamped by the defendant's stock controller.

On cross examination, PW1 stated that the plaintiff supplied everything on their quotations but not everything on the MTN RFQ. He explained that item No. 14 (3<sup>rd</sup> last item) on the delivery note was not on the RFQ but he supplied it because when he met Mr. Banyenzaki at the MTN warehouse when he had come to deliver the items on 13<sup>th</sup> April 2011 he requested him verbally to include it in the supply.

According to **GH Treitel, An Outline of the Law of Contract 5<sup>th</sup> Edition at page 8**, the essential features of an offer is that the person making it must (actually or objectively) intend to be bound without further negotiation by a simple acceptance of his terms.

**P.S Atiyah in his book "An Introduction to the Law of Contract" 5<sup>th</sup> Edition at page 57**, states that the issue of a catalogue or circular of goods for sale even with a price list

attached, does not usually amount to an offer. The catalogue is held to mean no more than this: *“I have these goods for sale at the listed price, and if you care to make me an offer to buy some of them I shall do my best to supply them i.e. I may accept your offer, but I am not bound to do so.”*

On the basis of that legal position, the quotation the plaintiff sent to the defendant was nothing more than an invitation to treat. For an offer to be made, the defendant needed to request for the goods to be supplied either in writing, word of mouth or by conduct. It is contended by the plaintiff that the defendant acting through its agent Mr. Banyenzaki (DW1) called the plaintiff’s director Bbale Robert on telephone on the 12<sup>th</sup> day of April 2011 and requested him to supply the items.

On the other hand, the defendant denies making an offer to the plaintiff to supply the items. Mr. Banyenzaki (DW1) who is said to have requested for supply of the goods on phone stated in paragraphs 11, 12 and 13 of his witness statement as follows:-

*“11. That I did not ask Mr. Bbale to supply any material either indicated in the RQF, or in the plaintiff’s quotation or not.*

*12. That I did not promise Mr. Bbale that the defendant will issue a purchase order nor did I authorize the plaintiff to supply goods without a purchase order.*

*13. That I have no power in the company/defendant to dispense with the procedures such as purchase order before one supplies goods.”*

With that vehement denial, it is now PW1’s words against that of DW1. I must point out that DW1 conceded that the RFQ he made was urgent and he even called Mr. Bbale to confirm if the plaintiff had received the RFQ. He stated this in paragraph 6 of his witness statement and even confirmed it during cross examination when he stated thus; *“I only sent RFQ to the plaintiff and not other suppliers. The timeline for the supply was urgent say within one week.”*

He also testified that he did the request on behalf of his colleague Mr. Edisons Tushabirehamwe who had requested him to do so as he was away. He testified in re-

examination that when Edisons came back he handed over the process to him and he did not know what took place thereafter. Earlier during cross examination he had said that he could not confirm that the goods were delivered. However, he emphasized that it would be impossible to deliver the goods without a purchase order except in emergency situations. He also said it was impossible to deliver the goods to MTN warehouse and not get a goods received note (GRN).

He explained the procedure they follow in emergency situations which entail giving a written communication authorized by the head of procurement to the supplier. He referred to Exhibit 18 and explained that according to the email from Edisons which he was copied in, supplies were made without a purchase order. He clarified during re-examination that he did not know whether supplies were made without a purchase order. He also said he did not know if PW2, Allanjob Abili, the then Senior Stock Controller of the defendant was given authority to receive goods without a purchase order.

All the other three witnesses of the defendant testified to the fact that the supplies could not have been made without the purchase order implying that the only mode of making an offer for purchase of goods by the defendant is by issuance of a purchase order. The exception is said to be when there is an emergency situation in which case an authorized written communication would be made unlike in this case where an alleged telephone communication is being relied upon to prove an offer.

Could it therefore be said that the procurement in this case was an emergency situation where an offer could be made without a purchase order? To answer this question, I have critically evaluated the evidence on record and I find that there is ample evidence to show that that matter was urgent. This is attested to by DW1 and the e-mail correspondences found in Exhibit P16 (ii) (a more detailed copy provided by the defendant). I will reproduce the different e-mails in that Exhibit hereunder to bring out the aspects that show out the urgency of the procurement.

On Thursday April 7, 2011 at 7.08 am Allanjob Abili wrote to Yasin Ismail Ramadhan and copied in John Tumusiime; Edisons Tushabirehamwe and Paul Mbulyo on the subject; *“Upgrade Materials required”*. He listed twelve different items and the

quantities and requested that they should be replenished as they were required for the current upgrade going on. On the same day at 8.06 Yasin Ismail Ramadhan replied to Allanjob Abili and copied to the same people plus two others. He stated thus: “As discussed, please out through procurement request form **to have these urgently procured as upgrades are on stand still now.** Thx.” [Emphasis added.]

Edison then wrote at 8.16 am on the same day to Yasin Ismail Ramadhan, Allanjob Abili; Moses Byaruhanga; Joseph Walakira and copied in a number of people including Rami Farah and others that Mr. Abili and Yasin had copied in their earlier mails. Edisons stated thus:

*“Dear Moses;*

*Kindly help us and follow this up. We shall need the PR forms written and approved by the CTO. **We should not put the up-upgrades to a standstill.**”*

[Emphasis added.]

On the same day at 8.46 Moses Byaruhanga then replied to all;

*“Hi Edissons,*

*These materials are used for upgrades, of which this has been catered for. Maintenance needs few cables, connectors etc which they need to order, Joseph please assist.”*

At 8.49 am Joseph wrote;

*“Team,*

*For maintenance purposes, having x-checked with Rebecca on the orders with Ericson. It is only item highlighted green on the attached PR that is catered for by the order placed with Ericsson.*

*AllanJob, please compare the attached PR with your list so we can come up with a comprehensive request that will meet the maintenance requirements as well.”*

At 3.05pm same day, AllanJob stated that they had to add the power cable to some five items which he listed in his e-mail. At 3.26 pm Yasin stated; *“Thx Allan. Joseph please add and push through to procurement.”*

At 3.27 Rami Farah wrote to Yasin and Allanjob with copies to the rest as follows; ***“Edison, please man, help us get this equipment ASAP.”*** [Emphasis added].

Finally, on that series of communication, Edison replied; *“Chief; If I can have the PR form this morning, then we can arrange with our local suppliers who have supplied before.”* [Emphasis added].

It is the evidence of DW1 that Edisons went away but he had requested him to issue the RQF which he sent to the plaintiff company only. Edisons also confirmed this when he said in the 4<sup>th</sup> paragraph of his witness statement that he travelled to South Africa and left DW1 to handle the matter. It is clear that the matter was very urgent and I would dare call it an emergency situation because efforts were being made by the different officers to ensure that the upgrades were not brought to a standstill.

It is also clear that a number of senior officers in the audit and procurement departments including Edisons Tushabirehamwe, John Tumusiime and Joseph Walakira were copied in the e-mails and were aware of what was going on and some of them gave the clearance they needed to give as requested in those mails. It is against this background that RQF was made to the plaintiff on 11<sup>th</sup> April 2011 by DW1 who again followed it up with an email on the same day to confirm whether the RFQ had been received and stated that it was very urgent. In fact it was his evidence that he also made a follow up on phone. PW1 and DW1 confirmed that the quotation was given as per Exhibits P2, P3 and P4. While DW1 testified that he did not pursue the matter beyond that point because Edisons came back and he handed it over to him. PW1 testified that DW1 went ahead to request for supply of the items quoted on telephone.

Of course, it would be an uphill task to try and prove that a telephone call was made to that effect and it would be unreasonable to insist on such proof yet that is the alleged mode of offer in this case. To my mind that leaves this court with no option but to apply *“the objective test”* discussed in **Smith v Hughes (1871) LR6 QB 597** to determine



whether there was a valid offer in this case. In that case, the court emphasized that the important thing in determining whether there has been a valid offer is not the party's own (subjective) intentions, but how a reasonable person would view the situation. Unless the offer included the key terms of the contract, it cannot be the basis of a binding contract. For example as a minimum requirement for sale of goods contract, a valid offer must include at least the following 4 terms; delivery date, price, terms of payment that includes the date of payment and detail description of the item on offer including a fair description of the condition or type of service.

In this case, at least by the RFQ and quotations given to the defendant, the lead time for delivery was known to be four days, the items and quantities required and their prices were already known to the parties. What remained was the offer to buy them which is now being contested. It is pertinent to point out that DW2 testified that where items are delivered in their warehouse without a purchase order they are put under quarantine and returned to the supplier immediately.

However, it is curious to note that in this case DW2 vide his e-mail dated May 01, 2011 at 7.43 am (Exhibit P18) requested his colleagues to scan and deliver to him the delivery and goods received note of the items already supplied by the plaintiff. By that time he was aware that some goods had already been supplied by the plaintiff and his concern as per that email was that the plaintiff is not the authorized distributor of Andrew in Uganda so they would need to have other competitive quotes. A reply to that mail by John Tumusiime on May 01, 2011 indicated that the plaintiff had done a partial delivery and their deliveries were not complete so there was no GRN. Tumusiime said they would ask the plaintiff to invoice them on what they had so far delivered. Edisons then replied that he just wanted to know what they had delivered and directed that they should not deliver any other thing without a purchase order.

Two fundamental questions arise from the above communications which in my view provide an answer to the question of offer. Firstly, could the plaintiff have on its own volition just gone ahead to supply whatever it had partially delivered to the defendant which is acknowledged in that e-mail without any request by the defendant? Secondly, if at all those supplies were made without an order, why was DW2 only stopping further

delivery of items instead of directing that what had been supplied be put under quarantine and returned to the plaintiff immediately which according to him would be the procedure.

My answer to the first question is that the plaintiff could not have supplied the items without being asked to do so. There was already a procurement process going on and the items were urgently required as already stated above. Under those circumstances, I am more inclined to believe PW1 that DW1 called him and made the order orally.

The evidence by DW1 that when DW2 who had requested him to send the RFQ on his behalf returned he handed the matter back to him is not helpful to this court because he did not state when DW2 returned. For that reason, this court is not in a position to state whether or not he returned before the alleged order was made by DW1. Any attempt by this court to do so would be mere speculation. I find the evidence of the plaintiff that the oral order was made on the very day the quotation was provided more convincing given the urgency of the matter as demonstrated in the e-mails reproduced above and the follow up phone calls by DW1.

In answer to the second question, if at all the supplies were made without an order as alleged, the defendant would have returned them as already discussed above. Since the items were not returned it can be safely concluded that the defendant had requested for them without a purchase order as this was an emergency situation. In any event, an offer does not necessarily have to be written or in the form of purchase order as it can even be by conduct. It was not the plaintiff's duty to ensure that the internal policies and procedures of the defendant as relate to procurement is complied with. Neither can the plaintiff be blamed for the failure by the defendant's servant to follow its internal policies and procedures. (**See: Royal British Bank v Turquand (1856) 6 E& B 327**).

The above findings lead me to conclude that there was an offer made by the defendant for supply of the goods and I so find. I now proceed to the next question of whether or not there was acceptance.

## **Acceptance**

According to **Davies on Contract** (supra) just as an offer may be made by conduct, so may an acceptance. In **Brogden v Metropolitan Railway Co (1877, HL)**, where Brogden had for years supplied the railway company with coal without a formal agreement. The company wished to regularize the situation, and so they sent a draft form of agreement to Brogden. He inserted a new term into the draft and returned it, marked “approved”. The company’s agent put it on his desk and it laid there for two years. For two years Brogden sent, and the company paid for, deliveries of coal in accordance with the terms of the draft. Then a dispute arose and Brogden denied that any binding contract existed. The House of Lords held that a contract had been created by conduct, and that it came into existence either when the company ordered its first load of coal upon the terms of the draft or at least when Brogden supplied it.

First of all, the courts take an objective, rather than a subjective, view of agreement and if a person has conducted himself as to give the appearance that he has agreed, then he may be held to have agreed, even though, in his own mind, he has not.

**G,H Treitel** (supra) at page 10 states that;

*“The most important rule with regard to acceptance is that it must correspond with the offer. If it seeks to qualify or to vary the offer, it is ineffective as an acceptance ... consequently a purported acceptance which introduces different terms is not in law an acceptance but a counter offer. As such it may have two legal consequences. First it rejects the original offer, so that the original offeree cannot subsequently accept it, secondly it amounts to a fresh offer, which the original offeror (who has now become the offeree under the counter-offer) may accept. A counter offer may be followed by a further communication of the same character.*

*The rules relating to counter offers are particularly important in the increasingly common situation commonly known as the ‘battle of forms’ in which each party sends the other a previously prepared form containing the terms on which he is prepared to contract.....This counter*

*offer may be accepted by conduct when the buyer takes delivery of the goods. In that event, there will be a contract on the terms of the seller's form (British Road Services V A V Crutchley Ltd [1967]2 ALLER 785 at 787)"*

In the instant case, the acceptance of the offer would be by supplying what the plaintiff was requested to supply. PW1 testified that John (DW1) called him telling him to prepare for delivery as the purchase order was on the way and he (PW1) told him that they did not have all the items in store but the next day they would be able to supply what they had and he would be in a position to inform him on what they could supply. He further testified that on the 13<sup>th</sup> April 2011 they arranged and supplied everything on their quotations but not everything on the defendant's RFQ.

When PW1 was referred to item No. 14 (3<sup>rd</sup> last item) on the delivery note and asked to state whether it appeared on the RFQ (Exhibit P.1) he answered that the item is not on the RFQ but when he met DW1 at the MTN warehouse on 13<sup>th</sup> April 2011 he requested him verbally to include it in the supply. The plaintiff's proof of supply is the delivery note (Exhibit P15) allegedly prepared by the plaintiff and signed by the defendant's employee PW2 in acknowledgment that he had received those items. The defendant denied the alleged deliveries and contended that PW2 signed Exhibit P15 well knowing that no deliveries were actually made. The defendant's counsel submitted that there were other delivery notes prepared by the plaintiff and signed by PW2 indicating that the same items were supplied on 13<sup>th</sup> April 2011 and subsequent dates. Those delivery notes were admitted in evidence and marked Exhibits D5, D6 and D7.

There are so many contradictions in the plaintiff's evidence about the items that were delivered. While PW1 testified that as on 12<sup>th</sup> April 2011 when they were requested to supply the goods they did not have all the items in the store, PW3 stated that all the items were in the store and he spent some time sorting them out. He stated that some of the things he sorted out were in their store for over a month and others had come a day before, that is, on 12<sup>th</sup> April 2011. He did not say anything about ordering for some of the items from Nairobi as had earlier been testified by PW1. At first PW1 said it was only PW3 who delivered the goods to the defendant's warehouse but on a further cross

examination about item No. 14 on the delivery note which was not included in the RFQ, he stated that he had come along with PW3 to make the deliveries and DW1 told him to supply it as well.

Another unbelievable thing is the evidence of PW3 that PW1 remained at the defendant's warehouse from 11.00 am when they delivered the 1<sup>st</sup> batch of the items until about 5.00 pm when he (PW3) delivered the 2<sup>nd</sup> batch. That means PW1 waited for about six hours and yet it was the evidence of PW1 that he did not enter the warehouse when they came to deliver the items. One wonders how he managed to hang outside there for those good six hours just waiting to insert the last three items on the delivery note since they had originally not been included.

A careful evaluation of the evidence both oral and documentary shows that the plaintiff actually did not have most of the items alleged to have been supplied in its stores and as such all of them could not have been supplied on the 13<sup>th</sup> April 2011 as alleged. What is more probable is that some items that were available were supplied and others were acquired later and supplied but even then not all the items requested for were supplied. The evidence this court has already alluded to in the course of discussing whether there was an offer shows that some partial deliveries were made by the plaintiff. I am therefore more inclined to believe that the plaintiff made some partial deliveries as contained in Exhibits D5, D6 and D7. To my mind those delivery notes were based on actual supplies made and acknowledged by the defendant in Exhibit 18 as opposed to Exhibit P15 which is not supported by any other credible evidence.

In light of that partial delivery, would it then be said that the plaintiff accepted the offer made by the defendant or can it be said that based on the above explanation by **G,H Treitel** (supra), the acceptance to sell fewer items and lesser quantities than what was requested for amounted to a counter offer? PW1 testified that he informed DW1 that they did not have all the items in their store but the next day they would be able to supply what they had which were jumper cables, some of the connectors and some feeder cables. Although he testified to supplying all the items on 13<sup>th</sup> April 2011, this court has already

made a finding that only the items listed in Exhibits P5, P6 and P7 were actually supplied and received by the defendant at its warehouse. This evidence shows that the defendant was willing to take whatever was available in the stores as arrangements were being made to acquire others and in my view the plaintiff's response to supply the goods though not all the quantities required as well as the defendant's receipt of the goods supplied amounts to acceptance of the offer.

Having established that there was offer and acceptance. The parties thereby intended to create binding legal relations and the consideration was that the plaintiff would supply the goods and the defendant would pay for them. In the premises, it is my finding that there was a binding contract between the parties. This answers the 1<sup>st</sup> leg of issue one in the affirmative and leads me to consider the 2<sup>nd</sup> leg of this issue.

**Issue 1 (ii) whether the defendant breached the contract.**

In the law of sale of goods, there are a number of duties and obligations that arise by the very existence of the contract of sale of goods. Among these is the duty of the buyer to pay for the goods supplied by the seller.

However, before I consider the issue of payment in this case, I must point out that there were some fraudulent actions by the plaintiff of falsifying documents to show that all the items requested for were supplied. Exhibit P15 is a product of that action. I agree with the defendant that there is no way the plaintiff could have imported some of the goods from Nairobi and supplied them to the defendant in a matter of hours as the plaintiff would want this court to believe. As stated earlier, only the items in Exhibits P5, P6 and P7 were supplied and that would be the ones to be paid for by the defendant. The plaintiff however claimed for payments for other items that were not supplied and that sparked off the delay and failure by the defendant to pay for what was actually supplied. I believe if the plaintiff had been honest enough to concede that it did not supply all the items and just invoiced the defendant for what was supplied as had been intimated by John

Tumusiime in his e-mail of of May 01, 2011, he would have been paid and this suit would have been avoided.

That was not to be. Greed must have motivated someone to take advantage of the situation and claim for more than what was due by alleging that all the items had been supplied. With that background in mind, can it be said that the defendant breached the contract by not paying for what was supplied? I am afraid my answer would be a plain no. In the first place the plaintiff itself is guilty of breach because it did not perform its part of the contract. It did not supply all the goods requested for. Secondly, it falsified the documents and made false claim that raised a query which it failed to answer satisfactorily and so the defendant could not have paid for what was not proved to have been supplied.

I must also point out that in aid of the plaintiff's fraud, PW2 prepared a GRN (Exhibit P8) which the plaintiff had the courage to adduce in court to prove delivery when it was obvious that the same was issued much later to help the plaintiff build its false claim. The period the GRN Book was in use and the dates in the previous and subsequent pages with Serial Numbers 12775 and 12777 betrayed the author of the GRN and the intended beneficiary of the fraud. The GRN Book Serial Numbers 12751-12800 was for the period June 2011 and the GRN Serial No. 12776 issued by PW2 was almost in the middle of that Book. It was purported to have been issued on 13<sup>th</sup> April 2011 and yet the previous one No. 12775 was issued on 14<sup>th</sup> July 2011. One therefore wonders how a subsequent GRN would bear an earlier date.

For the above reasons, I find that the defendant did not breach the contract.

**Issue 2: Whether the plaintiff is entitled to the remedies sought against the defendant.**

The plaintiff in its plaint sought for:

1. Special damages of US\$ 145,376 being the value of the goods/items supplied to the defendant.
2. General damages for breach of contract.
3. Interest at 25% from the date of instituting the suit till payment in full.
4. Costs of the suit.
5. Any other relief that this Honourable Court deems fit in the circumstances.

### **1. Special damages**

As discussed above, the plaintiff has not proved to this court on a balance of probabilities that it supplied the items in Exhibit P15. What this court is satisfied has been proved on a balance of probabilities to have been supplied are the items indicated in Exhibits D5, D6 and D7. I therefore find that the plaintiff is entitled to be paid the value of those items as per its quotations in Exhibits P2, P3 and P4. For avoidance of any doubt the plaintiff supplied the following items as per those exhibits:

1. 34 pieces of male connectors for 7/8 on 13<sup>th</sup> April 2011.
2. 166 pieces of male connectors 7/8 (AVA 5-50 feeder) on 14<sup>th</sup> April 2011.
3. 100 pieces of 3 meter jumper cable (straight) bal. 31 pieces on 14<sup>th</sup> April 2011.
4. 35 pieces of 7/8 earthing kits bal. 20 pieces on 14<sup>th</sup> April 2011
5. 80 pieces of universal weather proofing on 20<sup>th</sup> April 2011.

Accordingly, judgment is entered for the plaintiff for the value of those items and the defendant is ordered to compute the then actual value of the quantities supplied based on the quotations as stated above and pay to the plaintiff. The claim for all the items listed in Exhibit P15 is rejected for the reason that they were not actually supplied.

Before I take leave of this matter, I must observe that if the plaintiff's claim had not been based on a legal right arising from a contract I would have declined to award



any claim in equity such as *quantum meruit* because the plaintiff has not come to court with clean hands.

## **2. General damages for breach of contract**

Following my finding that the defendant did not breach the contract this relief is denied as there would be no basis for awarding the same.

## **3. Interest**

The plaintiff company is a business entity whose sole purpose of doing business is to have a quick turn over and maximize profit. Therefore, any delay in receiving payments for its supplies would be contrary to that objective and in normal circumstances would have to be compensated by an award of interest at commercial rate. However, in the instant case I would be reluctant to award interest at commercial rate in view of the fraudulent actions by the plaintiff which caused the delay and the eventual refusal to pay the money.

In the circumstances, since the claim is in US Dollars I would only award a small interest at 5% per annum on the special damages from the date of filing the suit until payment in full and it is so awarded.

## **4. Costs**

Even though the plaintiff is the successful party, I decline to award costs to it for the reason that its fraudulent actions gave rise to this suit. I therefore order each party to bear its own costs.

I so order.

Dated and signed this 20<sup>th</sup> day of November 2015.

Hellen Obura

**JUDGE**