

**THE REPUBLIC OF UGANDA,**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**

**HCCS NO 1 OF 2011**

**LIBERTY CONSTRUCTION COMPANY LTD}.....PLAINTIFF**

**VS**

**DR. DANIEL ONEN KAITAITA}.....DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiff initially commenced this action against Dr. Daniel Onen Kaitaita and Centenary Bank Ltd. The plaint originally was for an order directing the Defendant to pay the Plaintiff a sum of Uganda shillings 141,334,582/=, an order to the first Defendant to deliver to the Plaintiff its excavator, and for special and general damages, interest and costs. Subsequently the Plaintiff amended the plaint and dropped the claim against Centenary Bank Ltd. In the amended plaint the claim is for special and general damages, interest thereon and costs. The Plaintiff claims special damages of Uganda shillings 263,377,900/= arising out of an alleged failure to release an excavator to the Plaintiff by the Defendant and costs arising. The Plaintiff further seeks general damages and interest at the rate of 25% per annum from 15 December 2010 and on general damages at court rate from the date of judgment till payment in full as well as costs of the suit.

The Plaintiff executed a contract with the government of Uganda for the construction of Bushenyi Aquaculture Research and Development Centre. The shareholders of the Plaintiff were initially Mr Edmund Mabiho who held 98 shares and Mr Dennis Kalikola who held 2 shares. The shareholders were also the directors. Subsequently the Plaintiff Company appointed the Defendant and one Damalie Namirembe as non shareholding directors. In the course of performing the contract the Plaintiff Company entered into an arrangement with the Defendant for the Defendant to participate in the performance of the contract. As part of his participation the Defendant contributed a sum of Uganda shillings 50,000,000/= for the performance of the

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contract. Furthermore it was subsequently agreed that the Defendant would take over the entire project and perform its remaining components to completion. The Plaintiff company undertook to advance a sum of Uganda shillings 88,531,262/= to the Defendant as full and final settlement of all his claims against it and to discharge all debts the company had incurred in the project which the Defendant was inheriting. Secondly it was agreed that the first payment that would be received from the government of Uganda in respect of the project would be paid to the Plaintiff by the Defendant in the sum of Uganda shillings 141,324,582/=. The Defendant also undertook to remit retention money held by the government in the sum of Uganda shillings 38,405,143/= upon completion of the project. It was agreed that until the Plaintiff disbursed a sum of Uganda shillings 88,531,262/= to the Defendant, the Defendant would continue to hold as security one excavator with the Plaintiff had left on the project site and would release the same to Edmund Mabiro as soon as he received the money.

The commitment of the parties was reduced in writing in a schedule of sharing proceeds executed on 5 October 2010 between Edmund Mabiro and the Defendant. Secondly an agreement between Edmund Mabiro and the Defendant also dated 5<sup>th</sup> of October 2015 was executed. In addition the Plaintiff executed and delivered to the Defendant two documents namely a special power of attorney dated 5<sup>th</sup> of October 2010, appointing the Defendant to represent the company in all its dealings relating to the contract and to open an account with Centenary Bank through which payment from government would be received and the agreed portion thereof would be channelled to the Plaintiffs bank at DFCU bank. Secondly a resolution authorising the Defendant to open the said account as a sole signatory was executed by the Plaintiff. On 20 October 2010 Edmund Mabiro on behalf of the Plaintiff paid to the Defendant Uganda shillings 88,431,262/=. Furthermore the Defendant processed a standing order for Centenary Bank to transfer the agreed sum as soon as payment from government was received. On the basis of an apprehension that the Defendant was not going to honour its obligation to the Plaintiff to transfer Uganda shillings 141,334,582/= the Plaintiff wrote to the bank reminding them of the Defendant's obligations according to the resolution. The Plaintiff averred that on 14 December 2010 payment was actually received into the account the Defendant opened in the Plaintiff's names. The Plaintiff reported the matter to the police. Subsequently the Defendant was removed by resolution of the Plaintiff Company from being a director in the Plaintiff

Company. The documents were served on bank branch manager. The bank refused to allow the Plaintiff to operate the account under the new mandate.

Upon suing the bank, Centenary Bank agreed to and released the funds and the suit was withdrawn against it by consent. Secondly the Plaintiff in Miscellaneous Application Number 1 of 2011 obtained an order for the release of its excavator. The Plaintiff however avers that there was disregard of the ruling of the court and the Defendant refused initially to release the excavator. The order was made on 24 June 2011 and the excavator was released on 4 July 2011. The Plaintiff carried out an evaluation of the excavator and claims for replacement of new batteries at the cost of Uganda shillings 420,000/= as well as repairs due to alleged careless use or tampering with the excavator to the tune of Uganda shillings 60,657,900/= according to a report produced to that effect. The Plaintiff also claims the daily cost of hiring similar equipment at Uganda shillings 1,000,000/= on account of being idle for 199 days from 15 December 2010 when the works were completed and when the Defendant ought to have handed over the excavator. Consequently though the money on the account was recovered, the Plaintiff claims loss and inconvenience on the basis of which it claims special and general damages indicated above amounting to Uganda shillings 263,377,900/=, general damages and interest at 25% per annum from 15 December 2010 till payment in full as well as interest from the date of judgment till payment in full on the interest.

In reply the Defendant denies the claim and avers that the excavator was in a very sorry state and developed mechanical problems from the time the Defendant attempted to use it. Secondly the Defendant invested a lot of his personal resources to maintain the excavator in working condition. While the excavator was in use the Plaintiff's agents vandalised it. The Defendant seeks to have the suit dismissed and filed a counterclaim for special and general damages. The Defendant claims Uganda shillings 43,429,611/= being the difference between the sum of Uganda shillings 184,764,193/= received by the Centenary Bank on account number 3010310655 on 14 December 2010 and the sum of Uganda shillings 141,334,582/=. The Defendant also seeks a declaration that he is entitled to proceeds under a contract for the construction of Bushenyi Aquaculture Research and Development Centre. He prays for a permanent injunction restraining the respondent to the counterclaim or its agents/employees from interfering with the counterclaimant's prayer to receive and enjoy the said proceeds. General

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damages for breach of contract and interest at 30% per month from 14<sup>th</sup> of December 2010 till full payment and interest on general damages from the date of judgment till full payment as well as costs of the counterclaim.

The Defendant averred that he had been doing business with the Ministry of Agriculture, Animal Industry and Fisheries since 2006. He admits that the Plaintiff through its directors approached him and offered him 5% shareholding and directorship in the Plaintiff Company. The Defendant discovered that though he was appointed a director, the Plaintiff's directors did not formalise the Defendant's 5% shareholding in the Plaintiff Company. On the basis of assurance of the Plaintiff's directors that he had been appointed a director within 5% shareholding in the Plaintiff Company, the Defendant actively participated in the management of the Plaintiff Company and committed financial resources therein. The Defendant's participation in the affairs of the Plaintiff's Company was not limited to the Bushenyi project. At the time the Defendant joined the Plaintiff, the Plaintiff was in a poor financial situation aggravated by the fact that its majority shareholder Mr Edmund Mabiho had been jailed for several months in prison.

The Plaintiff's directors requested the Defendant to commit funds to facilitate tendering for contracts at the Ministry of Agriculture, Animal Industry and Fisheries for the rehabilitation of Kasolwe Ranch, construction of a water dam at Isingiro and rehabilitation of the fisheries training centre at Entebbe. The Defendant paid Uganda shillings 20,000,000/= and two of these tenders were awarded to the Plaintiff and were valued at Uganda shillings 400,000,000/=. In the year 2007 the Defendant rented out his property at Plot 17 B Mutungo Hill View Butabika Road for the period of over three years. The Plaintiff through its directors/shareholders agreed that the Defendant would be paid in due course by October 2010 the Plaintiff owed the Defendant Uganda shillings 152,120,000/=.

In March 2010 the Plaintiff through its directors informed the Defendant of lack of funds to complete ongoing projects, legal suits and cancellation of some contracts whereupon the Defendant contributed Uganda shillings 12,000,000/= to restart work at Kasolwe Ranch. In August 2010 the Plaintiff again borrowed from the Defendant Uganda shillings 50,000,000/= from a non bank moneylender to further facilitate the work at Kasolwe and Bushenyi sites and to pay legal fees of the Plaintiff. The loan was secured by the Defendant's property at Butabika.

The Defendant avers that due to his contributions to the Plaintiffs business, the Plaintiff experienced tremendous business volumes including construction business contracts of a total value of Uganda shillings 17,000,000,000/=.

In October 2010 in a meeting of directors and shareholders the Plaintiffs managing director informed the meeting that the Defendant did not hold 5% shares in the Plaintiff Company and that the managing director had 98% shares while Dennis Kalikola held 2%. A proceeds sharing agreement dated 5<sup>th</sup> of October 2010 was executed as pleaded in the plaint. The Plaintiff acting through its directors/shareholders assigned the proceeds of the Bushenyi project valued at Uganda shillings 700,000,000/= to the Defendant. To ensure that the Defendant exclusively accessed the proceeds, it was further agreed that the Defendant would open a separate bank account with Centenary Rural development Bank Entebbe road branch for the purpose of handling the Bushenyi project. Furthermore the Plaintiff would pass a resolution authorising the Defendant to operate the account as a sole signatory. Thirdly the Plaintiff executed a power of attorney giving the Defendant authority to represent, negotiate and deal with all matters related to the Bushenyi project. The power of attorney was irrevocable until the Bushenyi project was fully executed. On the signing of the proceeds sharing agreement, the Plaintiff was required to pay the Defendant Uganda shillings 88,531,262/= to enable the Plaintiff pay off the moneylender to recover his property which he mortgaged to raise Uganda shillings 50,000,000/= that was lent by the Defendant to the Plaintiff.

The Plaintiff failed to pay the money as agreed and instead gave the Defendant registration book for the Caterpillar excavator number UAK 413X. However the Defendant never took physical possession of the excavator as at the same time it had earlier been impounded in Karamoja. It was further agreed that all equipment at the Bushenyi site including an excavator would remain for use at the said site until the conclusion of the project at no charge to the Defendant. The Defendant was to provide security and maintenance and eventual demobilisation at the end of the project. On 20 October 2010 a sum of Uganda shillings 88,531,262/= was handed over to the Defendant in cash. The Plaintiffs agent demanded that the Defendant sign a standing order instructing Centenary Bank Ltd to transfer Uganda shillings 41,324,582/= on 4 November 2010 to the Plaintiffs account at DFCU bank before he could pay to the Defendant the sum of Uganda shillings 88,531,262/= which the Defendant did.

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The Defendant further avers that he was at all material times willing to transfer to the Plaintiff Uganda shillings 141,324,582/= and the Plaintiff's apprehension was speculative. Whereas the Plaintiff anticipated that the government of Uganda would pay the Defendant under the contract sum of about Uganda shillings 180,000,000/= by 4 November 2010, the said money was not paid and the standing order expired on 4 November 2010. Furthermore the moment the payment from the government of Uganda was received on the designated account the Plaintiff through its directors fraudulently or wrongfully blocked or caused to be blocked the Defendant's access to the proceeds of the Bushenyi contract contrary to the terms of the Proceeds Sharing Agreement and Memorandum of Understanding. It was therefore the directors of the Plaintiff who blocked the Defendant from accessing the funds or effecting transfer of funds to the Plaintiff.

The Defendant further avers that the Centenary Bank has since paid all the funds received on the designated account to the Plaintiff. In breach of the proceeds sharing agreement the Plaintiff has neglected, failed or refused to remit to the Defendant the balance of Uganda shillings 43,429,611/= out of the total sum of Uganda shillings 184,764,193/= received on the Centenary Bank Account 3010310655 on 14 December 2010. Furthermore the Defendant paid to the Plaintiff retention money in the sum of Uganda shillings 38,505,143/= paid by the government of Uganda.

The Defendant considers the blocking of the designated account through the Plaintiffs action fraudulent based on the chronology of events from the signing of the proceeds sharing agreement, memorandum of understanding, power of attorney and the resolution to the blockage of the account.

Last but not least the Defendant denies being liable to the Plaintiff for any damage to the excavator and instead asserts that by the time the Defendant took possession of the excavator, it was in the sorry state. It developed mechanical problems the very first day the Defendant attempted to use it at the Bushenyi site. The Defendant invested a lot of his personal resources to maintain the excavator in working condition. While the excavator was in use on a number of occasions, the Plaintiff's agents attacked and vandalised it and it was reported to the police. On one of the occasions the Plaintiff's agents attempted to forcefully take it away and the attempt was resisted by the Defendant with the help of the police. The Defendant was forced to again

invest a lot of his personal finance to put the excavator back into a working condition. Allegations that the Defendant kept the excavator idle are false. At all material times there were ongoing works at the site which required the use of the excavator. Following a joint inspection of the site meeting of 1<sup>st</sup> of April 2011 the Defendant was instructed to carry out further works. The additional works required the use of the excavator. The Defendant was forced to obtain another excavator for use at the site. Wherefore the suit ought to be dismissed with costs.

In the counterclaim the Defendant claims Uganda shillings 43,429,611/= being the difference between the sum of Uganda shillings 184,764,193/= received on the centenary bank account number 3010310655 on the whole about 14 December 2010 and the sum to be paid to the Plaintiff amounting to Uganda shillings 121,334,582/=. The counterclaimant also seeks a permanent injunction to restrain the Defendant to the counterclaim or agents from interfering with the counterclaimant's right to receive and enjoy the proceeds from the Bushenyi contract. He seeks a declaration that the counterclaimant is entitled to the proceeds of the Bushenyi contract. Furthermore the Defendant sues for general damages for breach of contract and interest at 30% per annum from 14 December 2010 till payment in full on the claim for special damages. He further seeks interest on the claim for general damages for breach of contract from the date of judgment till payment in full and costs of the counterclaim.

In reply to the amended written statement of defence, the Plaintiff avers that the excavator was the property of the Plaintiff in law and equity and was registered in the Plaintiffs' claims. The Defendant is barred by the doctrine of estoppels from denying the Plaintiff's title to the excavator which he received from the Plaintiff. The Defendant is being mischievous because he is aware of the fact of ownership of the excavator. Furthermore the Plaintiff has no knowledge of the alleged invaders on the site and in any event it was illogical to suppose that the owners of the machine should try to vandalise it. When Edmund Mabiro the managing director of the Plaintiff sought to take away the excavator from the site, the Defendant reported to Bushenyi police an attempt to steal company property. The Defendant also secretly reported to CID headquarters that the managing director Mr Edmund Mabiro had stolen a number of company properties including the excavator.

In reply to the defence of the respondent to the counterclaim, the Defendant/counterclaimant reiterates that by the time the Defendant took possession of the excavator it was in a sorry state. Secondly the excavator developed mechanical problems the very first day the Defendant/counterclaimant attempted to use it. The counterclaimant invested a lot of his personal resources to put the excavator into and maintain it in a working condition. On a number of occasions while the excavator was in the Defendants/counterclaimants possession, the Plaintiffs agents attacked and vandalised it. Again the Defendant/counterclaimant invested a lot of his personal resources excavator back into and maintains it in a working condition.

The Plaintiff called three witnesses while the Defendant called four witnesses.

The Plaintiff was originally represented by Counsel Benson Tusasirwe of Messieurs Tusasirwe & Company Advocates while the Defendant is represented by Andrew Kabombo of Messrs Kateera & Kagumire Advocates. Eventually the conduct of the Plaintiff's suit was taken over by Kasiisa Ronald of Messrs Kasiisa & Co. Advocates.

Issues agreed for resolution of the dispute are:

1. Whether the Defendant breached his obligation to pay the sum of Uganda shillings 141,334,582/= to the Plaintiff in accordance with the agreement between the two?
2. Whether the Plaintiff prevented the Defendant from accessing the funds received under the contract, and transferring the same to the Plaintiff as agreed?
3. Whether the Defendant wrongfully continued to retain the excavator after completion of the performance of the contract?
4. Whether the Plaintiff wrongfully neglected/refused/failed to remit the balance of the monies received from Centenary Bank to the Defendant?
5. Whether the Plaintiff is entitled to the remedies sought in the plaint?
6. Whether the Defendant is entitled to the remedies sought in the counterclaim?
7. Quantum of damages if any?

The court was addressed in written submissions.

The basic facts are not in dispute as the parties rely on documentary evidence. The Plaintiff's case is that it is a company engaged in construction business. In the year 2010 it had amongst its

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directors Mr Edmund Mabiwo and Dr Daniel Onen Kaitaita who is the Defendant. A schedule of sharing proceeds was executed for two projects the company was running at the time namely Bushenyi ARDC project in the Bushenyi district and Kasolwe AGRC project in Kamuli district. Both projects dealt with earthworks and roads as components. In the schedule of sharing proceeds it was agreed among other things that the Defendant take over the Bushenyi ARDC project and would be advanced Uganda shillings 88,531,262/= for purposes of facilitating earthworks. The Defendant would keep the excavator which was at the site and he would demobilise to Kampala after use. The contract was to be completed by 15 December 2010. The Plaintiff issued special powers of attorney to the Defendant for purposes of the Bushenyi ARDC project and made the Defendant the sole signatory of the Centenary Bank account in the names of the Plaintiff company to facilitate remittance to the Plaintiff of a sum of Uganda shillings 141,334,582/= at the first opportunity. The Defendant was also required organise standing instructions in favour of the Plaintiff to ensure that Uganda shillings 141,334,582/= would be remitted to the Plaintiff company by 4 November 2010. The Plaintiff company on information that the money was to be wired to the account on 14 December 2010 in the amount of Uganda shillings 156,554,825/= established that there was no valid instruction to remit the money to the Plaintiff as agreed. The Plaintiff instituted the suit on 3 January 2011 originally against the Defendant and Centenary Bank Ltd for payment of Uganda shillings 141,324,582/= and for the release of the excavator. The suit against Centenary Bank Ltd was withdrawn by consent of 24 February 2011. By this time Uganda Revenue Authority issued a third-party agency notice of Uganda shillings 82,722,897/= dated 17<sup>th</sup> of January 2011 and cashed on 20 January 2011. The Plaintiff only managed to recover Uganda shillings 73,831,928/= from the account.

The Plaintiff's case is that the contract had lapsed on 15 December 2010 and there was evidence to this effect that the Defendant did not demobilise the excavator to the Plaintiff in Kampala as agreed. The Plaintiff Company had other ongoing projects notably the Kasolwe AGRC in Kamuli district and the construction of the valley dam in Karamoja at which the services of the excavator were needed at the same time. The Plaintiff had to hire an excavator at Uganda shillings 1,000,000/= per day from a company from Sri Lanka engaged in building dams. Consequently the Plaintiff filed Miscellaneous Application Number 1 of 2011 and got an order releasing the excavator as against the Defendant on 24 June 2011. The Defendant only complied

with the court order on 14 July 2011. Before taking possession of the excavator the Plaintiff engaged an expert to assess its condition and the expert assessed the cost of repair and replacement at Uganda shillings 60,657,900/=.

On the other hand the Defendant's case is that the Plaintiff sought to recover Uganda shillings 141,324,582/= from the Plaintiffs own bank account number 30103110655 at Centenary Bank Ltd. The Defendant was the sole signatory to this account. The matter would have ended by the Plaintiff simply taking the sum of Uganda shillings 141,334,482/= and the letting the Defendant have whatever balance there was on the bank account. Unfortunately the Plaintiff under the said bank account had more money than what it was claiming. Faced with the Defendant's counterclaim for the difference between the money the Plaintiff was claiming and a higher amount on the account, the Plaintiff devised steps in bad faith to ensure that no single penny was returned to the Defendant. In that spirit the Plaintiff amended the plaint and introduced a frivolous additional claim for Uganda shillings 263,377,900/= that triggered the filing of large volumes of documents on the court record.

According to the Defendant the crux of the matter is that the Defendant started dealing with the Plaintiff around the year 2005. At that time the Plaintiff's directors led the Defendant to believe that he was joining as a shareholder with a 5% shareholding stake in the company and a directorship in the company. On the basis of these representations, the Defendant committed a lot of his personal funds and property, time and business connections to make the Plaintiff more profitable. For about three years, the Plaintiff took benefit of the Defendant's funds, labour and good business connections so that the Plaintiff experienced tremendous business output. The years 2009 and 2010 were particularly not good for the business of the Plaintiff. In October 2010 at one of the meetings of the directors/shareholders of the Plaintiffs, the Plaintiff's directors informed the Defendant that he did not hold 5% shares in the Plaintiff as he had been led to believe. The Defendant decided to quit the Plaintiff Company and demanded from the Plaintiff's shareholders/directors compensation for his investment into the company up to that stage.

It was a measure to compensate the Defendant that it was agreed that the Defendant would take over one of the projects running at the time namely the construction of the Bushenyi Aquaculture Research and Development Centre (Bushenyi ARDC) valued at around Uganda shillings

700,000,000/=. The Defendant was required to finance the project completed in the names of the Plaintiff and the proceeds would be the full and final settlement of all that the Plaintiff owed the Defendant. The arrangement was formalised through a proceeds sharing agreement of 5 October 2010. Two aspects of the proceeds sharing agreement led to the dispute before the court namely:

It was agreed that the equipment at Bushenyi ARDC site including the excavator would remain in use until completion of the project. The Defendant would provide security and maintenance and eventually demobilise it at the end of the project. Whereas it is alleged that the Bushenyi ARDC project ended by 15 December 2010 and the excavator ought to have been returned to the Plaintiff by that date, the Plaintiff seeks special and general damages for the period between 15 December 2010 and 4 July 2011 when the excavator was finally returned. However the Defendant's evidence adduced at the trial proves that the Bushenyi ARDC contract was extended beyond 15 December 2010 and even beyond 4 July 2011 and the during the extended period the Defendant needed the services of an excavator which he had to hire after returning the Defendants excavator in July 2011. Regarding the poor condition of the excavator the Defendant's evidence is that it was handed over to him in the same or even a worse mechanical condition and the Defendant spent a lot of money to restore it and keep it in a fairly good working condition.

Secondly to ensure that the Defendant made his obligations under the proceeds sharing agreement an account was opened with Centenary Bank Entebbe road branch in the name of the Plaintiff for the sole purpose of handling the Bushenyi ARDC project. Secondly it was further agreed that the Plaintiff would pass a resolution authorising the Defendant to operate the account as the sole signatory thereof. Thirdly the Plaintiff executed a power of attorney giving the Defendant authority inter alia to represent the Plaintiff and negotiate and decide all matters related to the Bushenyi ARDC. The power of attorney was irrevocable until the Bushenyi ARDC project was fully executed. The Defendant was required to remit to the Plaintiff Uganda shillings 141,334,582/= before any other debit on the account. The Defendant was required to execute a standing instruction authorising payment by the bank to the Plaintiff of the said amount by 4 November 2010. The standing instructions expired by 4 November 2010 when payment from the government for the Bushenyi ARDC contract had not yet been received on the account. The money was eventually received on 14 December 2010. The Plaintiff claims that the Defendant

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wanted to breach the obligation to pay the money of Uganda shillings 141,334,582/= whereupon it filed a complaint with the police and caused the account to be blocked. They also passed resolutions removing the Defendant as a signatory to the said account. To date the Defendant has never received any part of the funds paid on to the bank account. The Defendant claims the difference between the amount on the account in excess of Uganda shillings 141,334,582/= together with interest, general damages and costs.

Issues number 1 and 2 were handled together. Submissions on the issues:

1. Whether the Defendant breached his obligation to pay the sum of Uganda shillings 141,334,582/= to the Plaintiff in accordance with the agreement between the two?

On this issue the Plaintiff's Counsel relies on the obligation of the Defendant to remit the sum of Uganda shillings 141,334,582/= according to the bank resolution passed by the Plaintiff on 5 October 2010 exhibit P4 as well as the memorandum of acknowledgement of payment made on 20 October 2010 exhibit P5. As far as exhibit P4 is concerned it is provided in paragraph 3 thereof that the Defendant would remit the said amount to the Plaintiff to its account in DFCU bank at the first opportunity. As a sole signatory of the account Defendant would execute standing instructions at the onset to facilitate the debit and electronic transfer of the amount of Uganda shillings 141,334,582/= to the Plaintiffs DFCU bank account number 01L 2595081870. In exhibit P5 it is provided that the Defendant has obligation to remit the said amount on the basis of the previous documents and that he assures Mr Edmund Mabiwo and Liberty Construction Company Ltd that he has already issued irrevocable standing instructions to the bank to remit the amount the Plaintiff according to a copy of the instructions duly received by the bank on 20 October 2010.

Counsel submitted that the Defendant sole obligation under the agreement was to ensure that he maintained standing instructions with the bank to facilitate remittance of Uganda shillings 141,324,582/= to the Plaintiff when the first payment from the government is credited on the account. The Defendant on 20 October 2010 requested Centenary Bank to place a standing order on the Plaintiffs account number 3010310655 according to exhibit P6 and exhibit P7. Contrary to the clear agreements and assurances the Plaintiff in exhibit P5 did not issue an irrevocable standing order but rather according to his testimony issued one which was to be implemented

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once on 4 November 2010 and which lapsed. The Defendant took benefit of exhibit P4 and exhibit P5 and achieved the status of a sole signatory to the Plaintiff's account. Counsel submitted that the Defendant altered the position by issuing a close ended standing order which lapsed on 4 November 2010 before the first payment was made on the account.

The Plaintiff's Counsel further submitted that the Defendant took full benefits of the documents executed between the parties and is estopped from denying his failure to facilitate remittance of the amount mentioned above to the Defendant at the first opportunity. For the proposition that the Defendant cannot be permitted to approbate and reprobate Counsel relies on section 114 of the Evidence Act Cap 6 laws of Uganda on the doctrine of estoppels as well as the case of **Harrington versus Wells (1966) 3 All ER 524** where it was held by Salmon LJ that the rule of estoppels is well founded and is on the well-known principle that one cannot approbate and reprobate. It would be unjust to allow a man who has taken full advantage of the lease for instance to come forward and seek to evade his obligations under the lease by denying the purported landlord was the landlord. Counsel further relied on the case of **Mumbai International Airport PVT Ltd versus Golden Chariot Airport Civil Appeal No 8201 of 2010** where the Supreme Court of India applied the doctrine.

In the premises the Defendants Counsel prayed that the court ought to be persuaded by the decisions and finds that the Defendant violated his obligation under the undertakings to facilitate remittance of the money to the Plaintiff. Furthermore the Plaintiff's Counsel submitted that the Plaintiff only wrote to the bank out of despair to refresh that it owed obligation on the account. This was in exhibit PE 8 and exhibit P9 and was prompted by the Defendant defiance and deliberate failure to maintain the requisite standing instructions with the bank. On 14 December 2010 the account was credited with Uganda shillings 156,554,825/= in exhibit P 27. Because the bank was intimidated it could not honour the Plaintiff's pleas and the Plaintiff sought assistance of the police to avert the risk of the money being dealt with otherwise in exhibit P10 and exhibit P 11. The police assistance was temporary. In the meantime the third-party agency notice exhibit D9 for Uganda shillings 82,722,897/= was issued on 17 January 2011 and served on the bank on 18 January 2011 and was cashed on 20 January 2011. The Defendant's lapse of not having in place a valid standing instruction had manifestly started to bite and had led the Plaintiff to a precarious position.

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It was not until the Plaintiff filed this suit that the bank considered paying the money to the Plaintiff in line with the bank resolution whereupon there was a consent withdrawal of the suit against the bank. Due to the implementation of the third-party agency notice, the Plaintiff only recovered Uganda shillings 73,831,928/= instead of Uganda shillings 141,324,582/=. The Plaintiffs demands the outstanding sum of Uganda shillings 67,502,654/= from the Defendant. The Defendant had over a month from 4 November 2010 when the standing order lapsed on 14 December 2010 when the first payment was placed on the account no standing order for remittance of the money to the Plaintiff. This left room for the third-party agency notice to operate before the Plaintiff received its money.

The oral evidence of the Defendant to the contrary is intended to vary the clear terms of the written undertakings and ought to be disregarded. Counsel relied on the case of **Green Boat Entertainment Ltd versus City Council of Kampala [2007] 2 HCB 81** where it was held that oral evidence cannot be admitted or used to add to or vary or contradict the terms of a written instrument. The Plaintiff never varied any of the terms requiring for standing instructions to be in place and the Defendant cannot be allowed to rely on his concocted allegations to the further injury of the Plaintiff. In the premises Counsel prays that the court be pleased to answer issue number one in the affirmative and order the Defendant to pay Uganda shillings 67,502,654/= being the balance between Uganda shillings 141,324,582/= that the Plaintiff was to receive at once and Uganda shillings 73,831,928/= which has so far been recovered from the account.

**Issue 2: Whether the Plaintiff prevented the Defendant from accessing the funds received under the contract, and transferring the same to the Plaintiff as agreed?**

The Plaintiff's Counsel further relies on the submissions on the first issue and adds that after the Defendant failed to heed the obligation to have in place valid standing instruction to facilitate remittance of Uganda shillings 141,324,582/= to the Plaintiff, he was in breach and the Plaintiffs taking of remedial actions cannot be thought of retrospectively as barring the Defendant from being compliant. The Defendant relies on exhibit P7, P8 and P 10 to assert that he was willing to transfer the money to the Plaintiff but was prevented by the Plaintiff from assessing the funds.

The Defendant alleges in paragraph 5 of the written statement of defence that it was the Plaintiff's lawyers who demanded that he instructs the bank to have in place a standing order

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which expired on 4 November 2010. The Defendant's obligation is to have in place the instructions to facilitate instant remittance of the money to the Plaintiff and not to walk to the bank and transfer money to the Plaintiff. The bank was merely going to enforce the standing instructions by remitting the money. The requirement of the Defendant of having a valid standing instruction was not pegged to any time. In exhibit P5 the Defendant represented and assured the Plaintiff that he had in place irrevocable standing instructions with the bank. The question was whether there was any truth in this assurance. The Defendant does not dispute the fact that the standing order lapsed on 4 November 2010. The Plaintiff's Counsel further again relies on the case of **Mumbai International Airport PVT Ltd versus Golden Chariot Airport** (supra) for the doctrine of election. He submitted that the Defendant agreed to be a sole signatory of the Plaintiff's account in Centenary Bank. He received Uganda shillings 88,431,232/= and was required to have in place a standing order. He represented to the Plaintiff that he had placed an irrevocable standing order which he failed to ensure. The Defendant's pleadings and evidence contrary to exhibit P4 and exhibit P5 cannot stand together. The basis upon which the Defendant was to remit Uganda shillings 141,334,582/= is documentary and the Defendants contrary evidence ought to be disregarded. Furthermore the Defendant's pleadings and parole evidence suggest that the Plaintiff through its lawyers then demanded for a standing order for the 4<sup>th</sup> of November 2010 and should not be entertained. The parole evidence cannot amend the written agreement according to the authorities referred to of Green Boat Entertainment Ltd versus City Council of Kampala (supra). The Defendant did not have in place standing instructions.

The question is whether the Plaintiff overreacted when it sought police intervention to block the account. The bank did not heed to the Plaintiffs request for payment and the Defendant had already defaulted. The Plaintiff did not overreact when it removed the Defendant from its directorship and changed the mandate of the account. This effort to obtain payment came long after the Defendant had not fulfilled his obligations. Counsel suggested that if the Defendant had maintained a standing order in place, the Plaintiff would not have written to the bank to refresh his obligation on the account and it would not have sought police assistance. It would not have changed the mandate on the account or instituted the suit against the Defendant to recover the money. However because of the lapse, the Defendant invited this action and cannot be heard to

conveniently say that he was prevented from transferring the money by the Plaintiff. Issue number two ought to be answered in the negative.

### **Reply of Defendant to issues 1 and 2.**

In the reply the Defendant's Counsel opposed the above submissions and handled issue number 2 as well. Issue number two is whether the Plaintiff prevented the Defendant from accessing the funds received under the contract and transferring the same to the Plaintiff as agreed?

He submitted that the obligation of the Defendant was to remit the sum of Uganda shillings 141,334,582/= as set out in the resolution authorising the opening of the bank account in the name of the Plaintiff in Centenary Bank according to exhibit P4. Defendant's Counsel also relies on the Memorandum of Acknowledgement of Payment dated 20<sup>th</sup> of October 2010 exhibit P5. He contended that the resolution of the issue relies on the proper interpretation of exhibits D4 and exhibit P5. As far as exhibit P4 is concerned it requires payment to the Plaintiff before any other debit transaction a sum of Uganda shillings 141,324,582/=. Secondly the Defendant was required to execute standing instructions and facilitate the debit and electronic transfer of the funds as a priority to other debit transactions.

In exhibit P5 it is provided that the Defendant had the obligation to remit the amount to the Plaintiff as soon as he receives the first payment under the contract described therein. The standing instructions were issued on the understanding that payment would have been received. Counsel emphasises that both parties anticipated that payment would have been received on the account from the government before payment of the Plaintiff. Payment was expected by 4 November 2010 at the latest. The standing instruction with the expiry date of 4 November 2010 was accepted by the Plaintiff before the Plaintiff signed exhibit P5. The Defendant presented the Plaintiff a certified copy of the standing instructions received by the bank dated 20<sup>th</sup> of October 2010 before executing exhibit P5. Surprisingly the Plaintiff attacks the Defendant for issuing a close ended standing order which expired on a specific date. The Plaintiff is barred by the doctrine of estoppels from complaining about the form or content of the said standing instructions.



Even before the awaited money from the government was paid on that account the Plaintiff was taking steps to make sure that the Defendant did not get a single penny. Therefore the focus of the court should shift to the conduct of the parties after the much awaited payment from the government was deposited on the account. By the Plaintiff's own admission even before the payment hit the account, the Plaintiff suspected that the Defendant was planning to renege on the undertaking to transfer the money undertaken to be paid to the Plaintiff. The Plaintiff took certain steps according to paragraph 4 (m) of the Plaintiff to prevent this. The Plaintiff reported to the police a case of attempted theft of Uganda shillings 141,334,582/=. Thereafter on the basis of the complaint against the Defendant the account was blocked/frozen according to the very averments in the plaintiff and exhibit P10 and exhibit P 11. Secondly the Plaintiff through its shareholders removed the Defendant as director of the Plaintiff and also as a signatory to the said account. This is also pleaded in the plaintiff as well as contained in exhibit P12. Centenary bank allowed the Plaintiff to operate the account and the Plaintiff was able to access the funds on the account.

The Defendant's Counsel submits that this was a well orchestrated scheme to make sure that the Defendant did not get a single penny out of the funds received from the government on the said account. The Plaintiff is simply playing the victim to mislead the court. There is no evidence as to the nature of the "indications" prior to the blocking of the account which motivated the Plaintiff speculatively to take steps to block the Defendant from accessing the funds on account.

The Defendant's Counsel further referred to the correspondence between the Plaintiff and Centenary Bank Ltd exhibit PE 8 which does not indicate exactly where the Plaintiff learnt about the intention of the Defendant not to honour its commitments to the Plaintiff. Furthermore in exhibit P9 the Plaintiff mistakenly asserts that the Defendant had cancelled the standing instructions. The standing instructions were meant to expire on 4 November 2010 which it did. The Plaintiff had accepted the standing instructions as it was and was fully aware of the expiry date. Consequently the Defendant's Counsel asserts that this is a case of broad daylight dishonesty on the part of the Plaintiff misrepresenting to the bank the cancellation of the standing instructions. Whereas the Plaintiff PW1 testified that he relied on SMS messages from Dr Mwine, the messages were sent on 18 October 2010 and there is another SMS message from the Defendant on 22 December 2010. It is not the SMS messages which motivated the Plaintiff to

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block the account. By 26<sup>th</sup> of November 2010 the Plaintiff wrote to the bank about an intention not remit Uganda shillings 141,334,582/= to the Plaintiff in exhibit PE 8. On 13 December 2010 the Plaintiff moved to block the account by writing directly to the bank in exhibit P9 and exhibit P 11. The account was blocked on 14 December 2010 (referred to exhibit P 10 and exhibit P7). By 17<sup>th</sup> of December 2010 the Plaintiff had already removed the Defendant as a director in the Plaintiff and as a signatory to the account and had replaced him. 18 December and 22 December 2010 the Defendant had no power to dictate conditions to the Plaintiff for re-opening the account. The Defendant could not propose to pay the sum in instalments because he was in no position to do so because he was no longer a signatory to the account. Exhibit P9 was written even before the first instalment from government was deposited on the account. The Plaintiff wrote that the instalment/funds were expected on the account of 14 December 2010. A complaint was made to the police on 13 December 2010 again before the funds reached the account. Yet the case reported by the Plaintiff was that of "attempted theft". There was therefore clear mala fides on the part of the Plaintiff. The obligation of the Defendant was to transfer part of the money that was received on the account. The Defendant was never given any opportunity to perform this obligation. How could the state of affairs be the Defendant's fault?

In addition to removing the Defendant as a director and a signatory to the account of the Plaintiff, the Plaintiff also revoked the power of attorney which authorised the Defendant to take all major decisions pertaining to the Bushenyi ARDC project. The bank account had been opened for the sole purpose of handling financial transactions for completion of the Bushenyi ARDC project. The Defendant was the sole signatory to the account and the account could only be closed upon completion of the contract. This was supposed to be irrevocable and tuneful execution of the contract. The Plaintiff was in clear breach of the obligations set out in the proceeds sharing agreement exhibit P1.

An additional matter submitted on was the third-party notice. The Defendant's Counsel contends that the Plaintiffs prayer appears for the first time for the Defendant to pay the balance of Uganda shillings 67,502,654/= upon execution of the third-party notice by Uganda Revenue Authority. It is not pleaded in the plaint that the money was removed from the account on the strength of a third-party notice. The claim that a third party notice was enforced is an afterthought. It came about for the first time in the testimony of PW1 and is a departure from the

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pleadings. The Plaintiff cannot adduce evidence of what is not pleaded in the plaint. Secondly the prayer to pay the sum of 67,402,654/= was not pleaded and is being raised for the first time. In the premises it should be rejected.

Without prejudice the payment of taxes is a statutory obligation. Part of the said sum of Uganda shillings 141,324,582/= was taken from the account to settle the Plaintiffs tax obligations. It makes no difference that part of the money was confiscated by Uganda Revenue Authority and applied to settle the Plaintiff's tax liability.

The Plaintiff's case is that the taxes relate to taxes for the Bushenyi ARDC project and were the Defendant's responsibility. The whole claim relating to the third party notice was not pleaded in the amended plaint. The third-party notice does not state that it was issued in respect of the proceeds from Bushenyi ARDC project. The least that the Plaintiff could have done was to call a witness from Uganda Revenue Authority which issued the third-party notice to prove that it was taken out in respect of the proceeds from Bushenyi ARDC. Obviously the Plaintiff was on the run from the Uganda Revenue Authority and having previously issued cheques which were dishonoured according to exhibit D14. Alternatively the Plaintiff could at least have made an effort to prove that it settled its tax obligations in respect of all other projects it undertook except the Bushenyi ARDC project. The allegation that the third-party agency notice was in respect of taxes due from the Bushenyi ARDC is a made up allegation. The Plaintiff did not discharge the burden of proof since there are cheques written by the Plaintiff in favour of Uganda Revenue Authority which were returned unpaid.

The Defendant's Counsel also invited the court to take judicial notice of **HCCS 331 of 2014** between the Plaintiff as Plaintiff, the Defendant to this suit and the Attorney General as Defendants. The Plaintiff claims in paragraph 6 thereof of the plaint Uganda shillings 401,811,994.1/= as special damages which it was to pay to Uganda Revenue Authority as taxes for the Bushenyi ARDC which the Defendant failed to promptly remit to the Uganda Revenue Authority as required by the law. He asserts that the Defendant's failed to pay any of the taxes of Bushenyi ARDC as required by the law and the same is still outstanding and the Defendants are liable to pay the same. Why then is the Plaintiff inviting the court to pronounce itself on whether or not the Defendant paid taxes to the Bushenyi ARDC when the same is directly in issue in

HCCS 331 of 2014? This only reinforces the submission that the Defendant's claims are driven by mala fides. The court should not be drawn into pronouncing itself on payment or non-payment of taxes on the Bushenyi ARDC as it would avert a potentially embarrassing situation where the court might give conflicting decisions in two separate suits.

In conclusion on issues number 1 and 2 the Defendant's Counsel reiterated submissions that there was no breach of the Defendant's undertaking to remit the sum of Uganda shillings 141,334,582/= to the Plaintiff. The Plaintiff's case is that the Defendant did not remit the money. Before the payment from government reached the account, the Plaintiff caused it to be blocked. It remained blocked until the Plaintiff removed the Defendant as a sole signatory to the account, installed its directors as new signatories thereto and accessed funds on the account. Secondly on the face of it Uganda Revenue Authority could not enforce the third-party agency notice on the account as the Plaintiff claims. There can be no suit based on alleged failure on the part of the Defendant to remit Uganda shillings 141,334,582/= to the Plaintiff. The Plaintiffs claim that the tax allegedly recovered under the third-party agency notice was the Defendant's liability is not tenable in these proceedings.

**Rejoinder on issue number 1 and 2 by the Plaintiff's Counsel:**

The Plaintiff's Counsel submitted that he had inadvertently maintained that the Plaintiffs claim was Uganda shillings 141,324,528/= only and the Defendant in the counterclaim claims for Uganda shillings 43,429,611/= as the balance out of Uganda shillings 184,764,123/= which was purportedly received on the account. However the bank statement exhibit P 27 tendered by PW1 shows that the amount credited on the account was Uganda shillings 156,000,000/= and it also reveals that the shillings 82,722,897/= only had been debited and transferred to Uganda Revenue Authority according to exhibit D9. In fact the Plaintiff had only received part of Uganda shillings 141,334,528/= only contrary to the positions agreed to in exhibit P4 and P5. The Plaintiff only managed to recover Uganda shillings 73,831,928/= out of the total sum due. In the premises Uganda shillings 67,502,654/= only is due and outstanding.

Counsel further submitted that issues number 1 and 2 were agreed to in the written scheduling conference notes but it did not take into account the incontrovertible facts revealed in the course of the trial. Nonetheless the issue concerned Uganda shillings 141,324,528/= only.

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Counsel reiterated submissions made on the basis of the agreements and resolutions of the parties in which the Defendant was required to maintain standing instructions on the account to which he was a sole signatory. He submitted that the Defendant unilaterally vitiated the agreement he had with the Plaintiff when issued standing instructions that commenced and lapsed on the same date that is 4 November 2010. This left no room for the money being transferred at the first opportunity to the Plaintiff as envisaged in exhibit P4. In the premises he argued that the Plaintiff's officials cannot be blamed for taking positive steps to secure due payment especially when the Defendant was vigilantly soliciting help to the contrary. Secondly the Defendant was only stripped of his directorship after failing to make provision for payment of the Plaintiff. He was obliged to facilitate that payment. This alone would have avoided debit on the account occasioned by the third-party agency notice which was the Defendant's liability only. That notwithstanding exhibit P3 and paragraph 2 thereof specifically restricted all liability under the contract to the Defendant.

It was erroneous to submit that the debit on the account by the third-party agency notice was for taxes of other projects other than the Bushenyi ARDC project. No evidence was led to prove that the Defendant cleared taxes for the Bushenyi project.

Regarding Civil Suit Number 331 of 2014 between Liberty Construction Company Ltd versus Dr Daniel Onen and the Attorney General, the Defendant seeks to give the impression that the current suit was seeking similar remedies. This interpretation is false and misleading because in this suit the Plaintiff seeks to recover money whose loss the Defendant occasioned. In HCCS No 331 of 2014 the Plaintiff seeks to recover value added tax and withholding taxes which are the outstanding components of the tax on the Bushenyi project for onward payment to Uganda Revenue Authority to enable the Plaintiff obtain a tax clearance certificates to be able to trade with the government once again. The suit was invited when the Defendant proclaimed in the current suit that he ate the money for taxes because it was part of the proceeds. In the premises the court be pleased to allow the Plaintiff's claim for Uganda shillings 67,502,654/= only which remained outstanding and indicating with the intention of the parties in exhibit P4 and P5.

### **Resolutions of Issues Numbers One and Two:**

I have carefully considered the arguments on the two issues which were handled together. I have also considered the evidence and the law. For ease of reference the two issues are:

**Whether the Defendant breached his obligation to pay the sum of Uganda shillings 141,334,582/= to the Plaintiff in accordance with the agreement between the two? The second issue is whether the Plaintiff prevented the Defendant from accessing the funds received under the contract, and transferring the same to the Plaintiff as agreed?**

As can be seen from the above two issues, they are interrelated in that the first issue relates to whether there was breach of an obligation to pay a contractual sum to the Plaintiff in accordance with written agreements the two had executed. The second one is simply whether the Defendant has a defence to failure to remit the contractual sum on the ground that the Plaintiff prevented the Defendant from carrying out his obligations to remit the sum of Uganda shillings 141,334,582/= to the Plaintiff under the agreement.

There are fundamentally no factual controversies about the contract between the parties as well as the chronology of events. The documents relating to these transactions were admitted and are not in dispute. I will start with an analysis from the contents of the documents by establishing what the obligations of the parties were under the agreements or undertakings.

I have duly considered the evidence that the parties namely the Plaintiff and the Defendant had an agreement pursuant to a prior relationship in which the Defendant was invited to participate in the projects of the Plaintiff Company. The prior arrangement did not work out as expected pursuant to which the parties on 5 October 2010 executed various documents. The first document is exhibit P1 which is entitled “sharing proceeds from Bushenyi ARDC project in Bushenyi district and Kasolwe Agricultural Project in Kamuli district”. The agreement is between Edmund Mabiho and Dr Daniel Onen Kaitaita. Relevant to the agreement is the fact that Mr Edmund Mabiho held 98% shares in the Plaintiff Company Messieurs Liberty Construction Company Ltd and another 2% was held by one Kalikola. The background to the agreement is that the Defendant had been made a director in the Plaintiff Company for purposes of his participation in the projects of the Plaintiff. The Defendant had also contributed some money towards implementation of the projects. For the moment it is not material to go into how much the Defendant contributed to the projects of the Plaintiff. What is material is that the parties decided

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to split. Whereas the Defendant was a director, he was not a shareholder in the Plaintiff Company.

In exhibit P1 which has been dubbed the "Proceeds Sharing Agreement" it was agreed that the settlement would be in full and final settlement of all the interest in and debts from the Plaintiff Company to Dr Daniel and Edmund Mabiro until completion of the projects. The completion of the project would be guided by the schedule of terms. It was agreed that the responsibility for completion of Bushenyi ARDC project would be entirely borne by Dr Daniel Onen Kaitaita, the Defendant herein. The responsibility for completion of Kasolwe AGRC project shall be entirely borne by Edmund Mabiro.

In paragraph 3 of the schedule of sharing proceeds agreement exhibit P1 it is written that the proceeds from Bushenyi ARDC shall be taken by Dr Daniel, the Defendant herein subject to deduction of retention money in the sum of Uganda shillings 38,502,143/= previously kept by the Ministry of Agriculture, Animal Industry and Fisheries. It is further written that this is contained in section 7<sup>th</sup> dated September 20<sup>th</sup> 2010 and other dues "All hereby guaranteed to be paid to Edmund Mabiro by Dr Daniel Kaitaita as stipulated in this schedule". In paragraph 4 the proceeds from Kosolwe project shall be taken by Dr Edmund Mabiro unconditionally. In the following paragraphs particularly paragraph 5 it is written that the Plaintiff shall advance to Dr Daniel the Defendant herein Uganda shillings 88,531,262/= to facilitate recovery of property mortgaged while borrowing Uganda shillings 50,000,000/= spent to do work at the Bushenyi ARDC project prior to the agreement or to use it for completion of the Bushenyi ARDC at his own volition. In paragraph 6 it is written that the first release of the retention money kept by Ministry of Agriculture, Animal Industry and Fisheries amounting to Uganda shillings 38,402,143/= shall be remitted to Edmund Mabiro. In the meantime Dr Daniel Kaitaita shall additionally guarantee the remission of these monies by open cheques payable to Edmund Mabiro "and/or irrevocable standing instructions for the bank to remit the same".

In paragraph 7 it is agreed that for purposes of facilitating execution of earthworks the excavator shall remain at Bushenyi ARDC site and be used at no charge to Dr Daniel Kaitaita. The Defendant shall be responsible for its maintenance, security and demobilisation from site to Kampala after use. Furthermore completion and demobilisation from Bushenyi ARDC project

shall be the responsibility of the Defendant whereas the completion and demobilisation of Kasolwe AGRC project shall be the responsibility of Edmund Mabiho. Any other services rendered in kind by either Edmund Mabiho or Dr Daniel to ensure completion of the party's project shall be deemed voluntary and there would no charge in any event. For purposes of accountability not one had the right to withhold any certificate, correspondence, instructions and reports between the Ministry of Agriculture, Animal Industry and Fisheries and Liberty Construction Company Ltd from the other party. In paragraph 11 it is stipulated that any existing debt from either side shall be settled by the person responsible for that respective site. The agreement is dated 5<sup>th</sup> of October 2010. It is executed by the shareholders of Liberty Construction Company Ltd and the Defendant.

Again on the 5<sup>th</sup> of October 2010 an agreement was executed between Edmund Mabiho and Dr. Onen Kaitaita, the Defendant herein concerning construction equipment namely excavator Caterpillar registration number UAK 413X.

It is clearly agreed that the Caterpillar was intended to guarantee that Liberty Construction Company Ltd (the Plaintiff) would advance to the Defendant Uganda shillings 88,531,262/= to facilitate recovery of property mortgaged to borrow Uganda shillings 50,000,000/= used to do work at the Bushenyi ARDC project prior to the agreement or to use it for the completion of the Bushenyi ARDC project as the Defendant so wishes. It was further agreed that immediately upon the Plaintiff remitting the sum of Uganda shillings 88,531,262/= to the Defendant, the Defendant would relinquish the excavator to Edmund Mabiho with all attendant documents including open transfer forms unconditionally and in any case not later than within two days. It was the responsibility of the Defendant to keep the excavator safely and securely during the tenure of the agreement and to indemnify the Plaintiff Company or the owner in the event of breach of the same. Fourthly the excavator would not be deployed to execute works anywhere else other than for the completion of the pending earthworks at the Bushenyi ARDC site and under no circumstances would excavator or its documents be transferable to any other person or entity other than what was agreed in the agreement. The Defendant was to meet the costs of transferring the excavator from Bushenyi to Kampala after execution of the works. Again the contract is signed by the shareholders of the Plaintiff and the Defendant.



To facilitate the agreement in exhibit P3 the Plaintiff company by special powers of attorney appointed the Defendant to be its true and lawful attorney in replacement of Edmund Mabiwo for the sole purpose of handling matters in the contract number 0157/WRKS/FDP/06 – 07 LOTIV CONSTRUCTION OF BUSHENYI AQUACULTURE RESEARCH AND DEVELOPMENT CENTRE between the Ministry of Agriculture Animal Industry and Fisheries and Messieurs Liberty Construction Company Ltd. The Defendant was given power to represent, negotiate and decide all matters related to the contract except termination of the contract. Secondly he was given power to sign and execute all documents that are necessary or incidental for the purposes of securing credit, mortgage or such incidental interest in relation to the contract and to guarantee that all liability is limited within the confines of the final contract and that this liability shall not be transferable to another company's interest or individuals elsewhere. Secondly to cause the opening of a current account with the Centenary Rural Development Bank, Entebbe Road Branch for the sole purpose of handling financial transactions for the contract. The company undertook to ratify whatever the attorney did in execution of the contract and finally wrote as follows:

"AND WE declare that this power of attorney shall remain irrevocable till full execution of CONTRACT NO 0157/WRKS/FDP/06 – 07 LOTIV with the Ministry of Agriculture, Animal Industry and Fisheries."

The fourth document is a resolution to open a bank account exhibit P4 of the Plaintiff Company dated 5<sup>th</sup> of October 2010. The resolution specifically concerns the project at Bushenyi and provides that the company shall open a current bank account with Centenary Rural Development Bank Entebbe road branch for the sole purpose of handling financial transactions for completion of the contract. Secondly it provides that the Defendant shall be the sole signatory of the account. Thirdly in paragraph 3 thereof it provides that as a priority before any other debit transaction a sum of Uganda shillings 141,324,582/= must be remitted to Liberty Construction Company Ltd to a specified account. The sole signatory was required to execute standing instructions at the outset to facilitate the debit and electronic transfer of the amount. The bank account would be closed upon completion of the contract at Bushenyi.

Again on 20 October 2010 Edmund Mabiho on behalf of the Plaintiff and the Defendant executed a Memorandum of Acknowledgement of Payment tendered in evidence as exhibit P5. The memorandum recites and makes reference to the agreements of 5 October 2010 and the agreement for the Defendant to remit a sum of Uganda shillings 141,324,582/= to the Plaintiff upon receipt of the first payment from the Ministry of Agriculture, Animal Industry and Fisheries. It is acknowledged that the Defendant received a sum of Uganda shillings 88,531,262/= in cash pursuant to the schedule of sharing proceeds dated 5<sup>th</sup> of October 2010. Secondly it is provided that the Defendant was still obliged to remit to the account of the Plaintiff a sum of Uganda shillings 141,334,582/= as soon as he receives the first payment under the contract described and also referred to in this judgment as the Bushenyi project. Thirdly it was provided that to secure the undertaking of the Defendant to remit the sum, the Defendant ensures the Plaintiff and Mr Edmund Mabiho that he has already issued irrevocable standing instructions to the bank to remit the agreed amount to the Plaintiff and it shows that the Defendant presented a certified copy of the instructions received by the bank dated 20<sup>th</sup> of October 2010. Secondly upon receipt of the sum paid by the Plaintiff of Uganda shillings 88,531,262/= the Defendant delivered to Mr Edmund Mabiho the original registration book for the excavator number UAK 413X, transfer forms from the previous registered owner Mrs Agnes Kebirungi which was signed. It was also acknowledged that the obligation of the Defendant to remit the sum of Uganda shillings 38,402,143/= to the Plaintiff remained at the date of the acknowledgement agreement.

The certified copy of the Centenary Rural Development bank Ltd Entebbe road branch form requesting for bank standing order dated 20<sup>th</sup> of October 2010 is exhibit P6. The contentious paragraph in the request for bank standing order is the second paragraph thereof which provides that with effect from 4 November 2010 the bank would transfer to Liberty Construction Company Ltd in account number 0IL 2595081800 DFCU Nsambya branch on the 4<sup>th</sup> day once a sum of Uganda shillings 141,324,582/=. It is further provided that the order is to remain in force until cancellation by the Defendant in writing. Specifically and of interest at the last paragraph (i) and (ii) where it is provided that the applicant understood that the bank does not undertake to effect any payment, which has not been effected on the due date due to lack of funds. Secondly the bank reserved the right to cease or suspend such payment at any time at the discretion of the

applicant for any reason whatsoever on account of fear that the applicant would eventually suffer some financial loss by continuation thereof.

The instructions of the applicant to Centenary Rural Bank is signed by the Defendant but is of course in the names of the Plaintiff which is the owner of the account and indicates that the standing orders would be enforced on the 4<sup>th</sup> of November 2010 by remittance of the sum of Uganda shillings 141,334,582/=. This document was also admitted in evidence as exhibit P7.

In a letter dated Friday, November 26, 2010 Messieurs Ntende, Owor and Co Advocates wrote to the Corporation Secretary Centenary Rural Development Bank Ltd on the subject of the account of Liberty Construction Company Limited, bank account number 3010310655. The letter was received by the bank on the same date. It drew the attention of the Corporation Secretary to the Memorandum of Acknowledgement of Payment dated 20<sup>th</sup> of October 2010; the requests for bank standing order dated 20<sup>th</sup> of October 2010; the other agreements and resolutions dated 5<sup>th</sup> of October 2010 respectively. They wrote that it had come to the company's knowledge that the Ministry of Agriculture Animal Industry and Fisheries was due to settle part of the claims due to the company and they were to ensure that the bank debited the account with the agreed sum. They wrote that their client had learnt of the intention of the operator of the account not to honour his commitment and conditions under which the account was opened.

It is apparent from this letter that by 26<sup>th</sup> of November 2010 the Plaintiff had not yet received any remittance from the Ministry of Agriculture Animal Industry and Fisheries on the Centenary Rural Development Bank Account Number 3010310655. Just as asserted by the Plaintiff, the standing instructions request exhibit P6 and P7 was to be enforced on the 4<sup>th</sup> of November 2010. By this time the date for transferring the money from the Plaintiff's account to DFCU bank Nsambya branch had expired. The letter is exhibit P8.

In a letter dated 13<sup>th</sup> of December 2010 to the Managing Director of the Plaintiff Company Mr Edmund Mabiho again wrote to the Operations Manager Centenary Rural Development Bank Ltd, Entebbe road branch informing the Operations Manager that the standing order for debit of Uganda shillings 141,334,852/= to transfer funds to the Plaintiff account in DFCU bank issued by the Defendant was cancelled contrary to the company resolution. He wrote that accordingly the company resolution and other documents received by the bank on November 26, 2010; the

Defendant had no powers to cancel the standing order without consulting other directors. He also wrote that they had learnt that the money from African Development Bank would reach the account on 14 December 2010 and was therefore prone to misappropriation. He requested the bank not to debit the account operated by the Defendant pending further investigations by the relevant authorities. He threatened that the Plaintiff would hold the bank liable if the warning was not heeded and money taken by the Defendant. The notice to the Plaintiff's bank with Centenary Bank was admitted in evidence as exhibit PE 9.

From the letter it is again apparent that no money had been remitted to the Plaintiff's account with Centenary Rural Development Bank as had been anticipated by the parties to the suit by 13 December 2010. The Plaintiff in the effect made efforts to stop the Defendant from accessing the account or even operating the account by 13 December 2010. The Plaintiff followed this up with a report to the police. In a letter dated 14<sup>th</sup> of December 2010 the Assistant Inspector General of Police/CID wrote to the Manager Centenary Rural Development Bank, Entebbe road branch Kampala on a case of suspected attempted theft of Uganda shillings 141,334,582/= from account number 3010316055 in the names of Liberty Construction Company Ltd by the Defendant. The suspect in the allegation is Dr Daniel Onen Kaitaita, the Defendant herein. They informed the manager that the Directorate of CID was investigating a matter of an attempt to withdraw the sum of Uganda shillings 141,334,582/= without the consent of the other Directors. They requested the Manager to take immediate action of blocking the account pending further investigations or court orders and inquiries. The letter from the CID headquarters is exhibit P10. In fact an order was issued by the Magistrates Court of Kampala at Buganda Road and also served. The order was that transactions on the account are stopped pending the outcome of investigations in the case mentioned therein. The court order freezing the account is exhibit P11.

In a letter dated 20<sup>th</sup> of December 2010 the Plaintiff's lawyers wrote to the Company Secretary Centenary Rural Development Bank Ltd, Entebbe road branch, Kampala transmitting a change of mandate for operation of account number 3010310655 in the names of Liberty Construction Company Ltd. The letter for change of mandate is exhibit P12. Attached to exhibit P12 is a resolution dated 17<sup>th</sup> of December 2010 removing the Defendant as a director in the Plaintiff Company. This came together with the notification of Change of Directors or the Secretary in the

particulars dated 17<sup>th</sup> of December 2010 as well as a Special Resolution dated 17<sup>th</sup> of December 2010 changing the mandate of the Plaintiff for operation of account number 3010310655.

From the above documents the following facts are proven.

By exhibit P1 proceeds of the Bushenyi ARDC Project were to be taken by the Defendant subject to certain remittances to be paid to the Plaintiff and Edmund Mabiro. The Defendant agreed to remit a sum of 38,502,143/= retention money with the Ministry of Agriculture Animal Industry and Fisheries. The money was to be paid by the Defendant to Edmund Mabiro, the Managing Director of the Plaintiff by the Defendant.

Secondly the Defendant was supposed to receive Uganda shillings 88,531,260/= from the Plaintiff to redeem his property by which he had obtained Uganda Shillings 50,000,000/= to invest in the Plaintiff. He could also use the money for completion of the Bushenyi ARDC project. The Defendant subsequently acknowledged receipt of Uganda Shillings 88,531,262 in the Memorandum of Acknowledgement of payment dated 20<sup>th</sup> of October 2010 exhibit P5.

Thirdly the Defendant was supposed to keep a Caterpillar excavator as security for the payment of the above sum. Secondly the Defendant was to use the excavator to complete earthworks on the Bushenyi ARDC project and hand it over to the Plaintiff only upon completion of the works. This was to be at no charge except that the Defendant was required to provide security and maintenance and transport the excavator back to Kampala after agreed use.

Fourthly an account was opened in the names of the Plaintiff at Centenary Rural Development Bank Entebbe Road Branch in Kampala to be operated solely by the Defendant. The Defendant was a director of the Plaintiff. It was also agreed that upon payment to the Defendant of Uganda shillings 88,431,262/= the Defendant would relinquish any rights to Mr Edmund Mabiro of the Caterpillar excavator by handing over transfers duly executed.

The Defendant was required to either issue open cheques for the remittance of the money payable to Mr Edmund Mabiro or irrevocable standing instructions for the remittance of Uganda shillings 38,502,143/=.

Upon opening the account with Centenary Rural Development Bank it was resolved by the directors that the Plaintiff would remit through the sole signatory who is the Defendant a sum of Uganda shillings 141,334,582/= to the Plaintiff's account with DFCU bank Nsambya branch.

Finally the Defendant in accordance with the undertakings instructed the Centenary Rural Development Bank Ltd to remit the above sum to the Plaintiff on 4 November 2010. I have carefully considered the standing instructions. I have also quoted above paragraph 2 thereof instructing the bank to remit Uganda shillings 141,334,582/= to the Plaintiff's account at DFCU bank Nsambya branch. In the place where it is written in the form how many times it is to be remitted whether every month or quarterly etc, it is written that the remittance was to be once. This was in line with the agreement that the sum of Uganda shillings 141,334,582/= was the amount to be remitted to the Plaintiff. Therefore by writing "once" it meant that the standing instructions would only operate to remit the specified sum once. The bank undertook not to undertake to effect the payment if there were no funds on the account. It also reserved the right to suspend the payment at any time at the instructions of the Defendant who was the sole signatory. The document itself is a request for bank standing order form in which hand the written notes are filled in. Most importantly it is written as follows: "With effect from 4th day of November 2010 please pay/transfer to Liberty Construction Company Ltd... ". The amount could be remitted on the basis of the instructions after the 4<sup>th</sup> of November 2010.

It is a matter of fact that is proven from the documents that no funds were received on the account as envisaged by the parties by the 4<sup>th</sup> of November 2010. In fact the correspondence of the Plaintiff to the management of Centenary Rural Development Bank Entebbe Road Branch, Kampala clearly demonstrates that by the 13<sup>th</sup> of December 2010, no money had been remitted by the Ministry of Agriculture, Animal Industry and Fisheries to the Plaintiff on the account operated by the Defendant. By this time even if any money came into the account, the Plaintiff had removed the Defendant and rendered it impossible for him to operate the account.

The court can only speculate as to what would have happened had the Defendant remained a signatory to the account. In any case it was impossible for the Defendant to fulfil his obligation to the Plaintiff because the Plaintiff blocked the account and changed the mandate on the account by inter alia removing the Defendant as a signatory. The Plaintiff took the law into its hands and

cannot advance the argument that the Defendant breached his obligation to pay the sum of Uganda shillings 141,334,582/=. It was not possible for the Defendant to fulfil any obligation to the Plaintiff before the Plaintiff blocked the account and changed the mandate of the account removing the Defendant as a director of the Plaintiff company and signatory to the account at Centenary Rural Development Bank, Entebbe road branch Kampala. There was no action on the part of the Defendant. For emphasis the documents reviewed above clearly specify that the remittance of the money was to be made by the Defendant upon receiving money from the Ministry of Agriculture, Animal Industry and Fisheries on the said account from the Bushenyi project. For that reason the Defendant was not in breach of any obligations to pay the sum of Uganda shillings 141,334,582/= to the Plaintiff in accordance with the agreement between the parties. Issue number one is answered in the negative.

Regarding issue number two whether the Plaintiff prevented the Defendant from accessing the funds received under the contract and transferring the same to the Plaintiff as agreed, I have already demonstrated above that the funds were blocked due to the action of the Plaintiffs directors and the Defendant was removed as a director in the Plaintiff Company. Secondly the Defendant was removed as a sole signatory to the relevant account and the mandate on that account was replaced by making other directors signatories to the account. Effectively the Plaintiff prevented the Defendant from accessing the funds received under the contract and transferring the same to the Plaintiff as agreed because the funds were received on 14 December 2010 after the actions of the Plaintiff blocking the account prior to that date. Issue number two is answered in the affirmative.

**Whether the Defendant wrongfully continued to retain the excavator after completion of performance of the contract?**

On this issue the Plaintiff's Counsel submitted that the Defendant's obligation to demobilise the excavator after execution of earthworks was created in the schedule of sharing proceeds made on 5 October 2010 exhibit P1. It is provided therein that for purposes of facilitating execution of earthworks the excavator shall remain at Bushenyi ARDC site and be used at no charge to the Defendant. Furthermore it is provided that the Defendant shall be responsible for the maintenance, security and demobilisation from the site to Kampala after use. The relevant parts

of the Plaintiff's pleadings on the issue are paragraphs 9, 10 and 11 of the amended plaint. On the other hand the Defendant averred in paragraph 5 (f) (vi) that the excavator was to remain for use until the conclusion of the Bushenyi ARDC project at no charge. The Plaintiff filed Miscellaneous Application Number 1 of 2010 and led evidence that the works had been completed by 15 December 2010. The court agreed and found that the works had been completed by 15 December 2010 and ordered the release of the excavator to the Plaintiff. The Defendant preferred no appeal against the court's ruling and additionally complied with the release order exhibit P 18. Counsel submitted that there is no doubt that the completion occurred on 15 December 2010 and there were no earthworks pending according to exhibit P 14 and exhibit P18 as well as exhibit P 26. The Defendant's obligation under exhibit P1 was inter alia to demobilise the excavator after execution of the earthworks. In the absence of that the court ordered the Defendant who was still holding onto the excavator to hand it over. Counsel prayed that the court be pleased to find that the Defendant wrongfully continued to retain the excavator after completion of performance of the works.

In reply the Defendant's Counsel relies on clause 7 of the proceeds sharing agreement exhibit P1 and specifically the phrase that the Defendant would be responsible for its maintenance, security and demobilisation from the site to Kampala after use (the excavator). The Plaintiffs claim rests on the performance of the Bushenyi ARDC contract having ended by 15 December 2010. It claims that beyond this date, the Defendant wrongfully retained the excavator at the site. On the other hand the Defendant adduced evidence agreeing that the execution of the works was initially scheduled to be completed by 15 December 2010. However in the testimony of DW1 the contract document exhibit D15 was considered. The Ministry of Agriculture, Animal Industry and Fisheries approved variation in the works. This led to the signing of an addendum to the original contract on 10 December 2010. Under the said addendum the completion date for the ADR DC contract was extended to 30 December 2010. On 16 December 2010 the Ministry of Agriculture Animal Industry and Fisheries approved further extension of the completion date for the Bushenyi ARDC contract by a further 12 weeks. This is according to the testimony of DW1 by letter dated 16<sup>th</sup> of December 2010 from the Ministry of Agriculture, Animal Industry and Fisheries addressed to the Defendant exhibit D19. In a letter dated 15<sup>th</sup> of December 2010 from the Defendant addressed to the Ministry of Agriculture, Animal Industry and Fisheries together



with the work program attached thereto exhibit D17 and exhibit D 18 the testimony of the Defendant was that at all material times when the excavator was at the site there were ongoing works that required the use of the excavator. The work program indicates that additional works were sanctioned by the Employer for execution by the Defendant during the 12<sup>th</sup> week extension which included excavation of storm water drain, 400 m long and excavation of pumping chamber. Following joint instruction of the site and meeting of first of April 2011 the Defendant was instructed to carry out the following further works described by Counsel that I do not need to refer to in writing. The point is that the variations required the excavator.

After the excavator the subject matter of the suit was handed over to the Plaintiff by order of the court in Miscellaneous Application Number 1 of 2011, the Defendant was forced to obtain another excavator to use at the site. The Defendant had to find and hire another excavator from Joseph Muwonge who testified as DW2. DW2 confirmed that the Defendant had his excavator during the period after the excavator in issue was handed back to the Plaintiff. DW 4 Mr Goodwin Kiiza testified that after the excavator was taken back to Kampala, the Defendant brought another excavator with an operator called Joseph Muwonge (DW2). He was deployed to work with the DW2 on the excavator until the work was completed.

On the submission that the issue was decided when the court ordered the Defendant to release the excavator to the Plaintiff in High Court Miscellaneous Application Number 1 of 2011, in that application the Defendant was called to justify why it should continue to have custody of the excavator at the Bushenyi ARDC site. In the main suit the Defendant is being called upon to justify why he continued to have custody of the excavator beyond 15<sup>th</sup> of December 2010 until the same was released. The application was an interlocutory matter and was decided on the basis of the evidence presented therein. In the main suit, a specific issue of whether the Defendant wrongfully continued to retain the excavator after the performance of the contract was framed for determination. Evidence has been led on either side to prove facts relevant to the issue. The issue should finally be decided on the basis of the evidence.

The further evidence proves that the Plaintiff is not honest namely the Managing Director thereof in his claims. The Plaintiffs Managing Director very actively participated in the process leading up to the signing of the addendum number 1 of Bushenyi ARDC contract by which the

completion date was extended according to exhibit D16. Many documents which form part of exhibit D16 were signed by PW1, the Managing Director of the Plaintiff. The approved variations included excavation works. The Plaintiff's Managing Director had previously dismissed the Defendant's claim during the defects liability period.

Regarding contention that there was payment of Uganda shillings 40,101,221/= being the retention sum in respect of the Bushenyi ARDC contract under the final certificate, PW1 testified that the payment signalled the end of the works under the Bushenyi ARDC project. The Defendant testified that the said payment did not signal completion of the works and this is the reason why the payment of retention was secured by a bank guarantee from Barclays bank exhibit D27. In the minutes attached it is clearly indicated that works at the site were not completed the old contractors were fully paid against a bank guarantee. This was for fear of losing the loan funds. The Defendant attended the meeting so did engineer Kakiiza Robert who allegedly authored a letter dated 28th of March 2011 by which he declared that works at the Bushenyi ARDC contract were completed by 15 December 2010. It is the same engineer who authored the letter dated 4<sup>th</sup> of April 2011 instructing the Defendant to undertake further works at the Bushenyi ARDC project exhibit D13. The Principal Contractor is the Plaintiff and the Defendant was performing the contract on behalf of the Plaintiff. In the premises the excavator was lawfully in the custody of the Defendant until it was returned to the Plaintiff.

In rejoinder the Plaintiff's Counsel submitted that ample evidence was led to show that the works had been completed by 15 December 2010 as held by the court. The Defendant accused the Plaintiff of dishonesty. He argued that an extension was granted and the Plaintiff's Managing Director actively participated according to exhibit D16. However exhibit D16 of the Defendant's additional documents bears the Defendant's signature. At page 175 of the additional documents he signed as the Managing Director. The Defendant was never elevated to this position. If the real Managing Director participated as alleged why did he not sign the documents? The Defendant argued that PW1 knew that the extension was necessary. Secondly the documents relied upon were executed before October 2010 and do not show that the MD of the Plaintiff had knowledge about any variations. In the premises Counsel reiterated submissions that the contract was completed on 15 December 2010 and the excavator was to be returned and thereafter.

### **Resolution of issue number 3.**

I have carefully considered the issue of whether the Defendant wrongfully continued to retain the excavator after completion of the performance of the contract.

The question of whether the contract was completed or not by 15 December 2010 is a question of fact. The Plaintiff's Counsel contended that the court had made a finding of fact in its ruling in HCMA Number 1 of 2011 in which the Plaintiff sought a mandatory injunction for the release of the excavator pending the hearing of the main suit. The application succeeded. However having succeeded the question is whether the finding of the court is conclusive on matters of fact.

In that application I followed principles of law in the precedents cited which hold that a mandatory injunction or a prohibitory injunction is granted on the same principles and considerations. According to Philip Pettit in the book **Equity and the Law of Trusts** Fourth Edition at page 401, there is no distinction in principle between granting a prohibitory and a mandatory injunction. The same principles for grant of a prohibitory injunction such as the restraint of the Defendant respondent from doing something equally apply to a positive order for the respondent to do something.

I further relied on Order 41 rule 2 (1) of the Civil Procedure Rules which permits a restraint order to prevent breach of contract. Furthermore under section 37 (1) of the Judicature Act Cap 13 the High Court may grant an order of mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to be just or convenient to do so. I also found persuasive the decision in the case of **Margaret, Duchess of Argyll (feme Sole) v Duke of Argyll and others [1965] 1 ALL E.R. 611** between pages 634 – 636, where it was held that the foundation for the grant of an injunction is the protection of a legal right. Finally the applicant has to demonstrate an arguable case or a prima facie case to succeed. These principles are laid out in **Giella v Cassman Brown And Company Ltd [1973] EA 358** by the Court of Appeal and in **Noormohamed Janmohamed vs. Kassamali Virji Madhani [1963] 1 EACA 8** where it was held that the purpose of a temporary injunction is to maintain the status quo until the dispute is finally resolved. The court relies on affidavit evidence which is not tested through cross examination.

In Paragraph 7 of the relevant “Proceeds Sharing Agreement” exhibit P1 relied on by both Counsel it is provided that:

“For purposes of facilitating execution of earthworks the excavator shall remain at Bushenyi ARDC site and used at no charge to Dr. Daniel Kaitaita. Nonetheless Dr. Daniel Kaitaita shall be responsible for its maintenance, security and demobilization from its site to Kampala after use”.

In considering the phrase ‘after use’, I held that it meant after execution of earthworks. Finally the court relied on supplementary affidavit of Edmund Mabiwo and annexure “B” being a letter from the Permanent Secretary Ministry of Agriculture, Animal Industry and Fisheries dated 28<sup>th</sup> March 2011 which communicated that “Messrs Liberty Construction Company Ltd completed the whole of the referred works on the 15<sup>th</sup> of December 2010.”

I agree with the Defendant’s Counsel that because this was an interlocutory finding of court, the Defendant was entitled to adduce evidence to show that the works continued. The law is that a prima facie case can be rebutted by the defence. Secondly where the court holds that there is an arguable case, it means there is a controversy that can be tried. Once the controversy is tried the final conclusion of court is directed by the evidence adduced and in which veracity of the testimony of witnesses are tested through cross examination.

Counsel for the Plaintiff in the rejoinder did not even bother to dispute the evidence that the Defendant continued with the works after 15 December 2010. The evidence of the Defendant is unchallenged that the works were extended and secondly that payment for the contract was secured by a bank guarantee from Barclays bank. Therefore payment for all the work done was secured. It did not prove that the Employer did not seek an extension or variation of the works. The addendum to the contract in which the Defendant had authority to contract on the behalf of the Plaintiff clearly indicates that on 10 December 2010 there was a variation of the works. The fact that the Defendant signed as Managing Director is obviously generated by the special power of attorney where he was mandated to sign all documents on behalf of the Plaintiff as far as the Bushenyi ARDC project is concerned. Such documents could have been signed by the Managing Director had it not been for the special power of attorney to the Defendant. In the premises I do not agree with the criticism of the Plaintiff’s Counsel that the signature on the addendum is that

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of the Defendant. The Defendant was fully authorised to sign on behalf of the Plaintiff Company for purposes of completion of the Bushenyi ARDC contract. The schedule of variations includes a letter dated 3<sup>rd</sup> of December 2010 addressed to the Permanent Secretary Ministry of Agriculture, Animal Industry and Fisheries by the Solicitor General, clearing addendum Number 1 to the contract. It is clearly noted by the Contracts Committee decision that the contract was due to end on 15 December 2010.

I have considered the letters at page 202 – 209. The first is a letter dated 20<sup>th</sup> of December 2010 addressed to the Inspector General of Police from the Permanent Secretary Ministry of Agriculture, Animal Industries and Fisheries showing that the Ministry had information about the disagreement between the directors and the blockage of the account. It indicated that the works were to be completed by 31st of December 2010 consistent with the testimony of DW1. He requested the accounts to be unblocked to enable the Plaintiff Company complete the remaining project within the remaining time.

I have further considered a letter dated 10th of August 2012 from the Permanent Secretary Ministry of Agriculture, Animal Industry and Fisheries addressed to the Managing Director of the Plaintiff and to the attention of the Defendant at Mbarara. The letter gives the Plaintiff Company two weeks from the 15<sup>th</sup> to 27 August 2012 to finalise the remaining works and handover to the client. At page 204 - 205 I have considered the minutes of the meetings between the stakeholders. It shows that there were ongoing infrastructure works.

In the premises the Defendant adduced additional evidence showing that the contract did not end on 15 December 2010 as held by the court in its interlocutory finding in Miscellaneous Application No 1 of 2011. Because in an application for a temporary injunction the court considers whether there is a prima facie case or whether there is an arguable case, the conclusion of the court is not conclusive on matters of evidence. Evidence is adduced at the hearing and subjected to cross examination and fresh scrutiny before a final conclusion can be reached. The final conclusion is therefore that the works did not end by 15 December 2010. The works were supposed to end by 15 December 2010 but were extended by the Employer being Ministry of Agriculture, Animal Industry and Fisheries. Secondly I believe the testimony of the Defendant that payment for the initial contract before extension was secured by a bank guarantee from

Barclays bank. Furthermore where an order is made in an injunction the person suffering loss may be compensated by an award of damages if the suit goes in his or her favour.

In the premises issue number 3 of whether the Defendant wrongfully continued to retain the excavator after the completion of the performance of the contract can only be considered on whether the Defendant was entitled to retain the excavator until full completion of the contract. In exhibit P1 and particularly paragraph 7 thereof the parties envisaged that for facilitating excavation of works, the excavator was to remain at the Bushenyi ARDC site and used at no charge to the Defendant. Secondly in paragraph 8 of exhibit P1 it was envisaged that the completion and demobilisation from the Bushenyi ARDC project was to be the responsibility of the Defendant. In exhibit P2 which specifically concerns the excavator it was agreed in paragraph 3 thereof that the Defendant would keep the excavator safely and securely during the tenure of the agreement. In paragraph 4 thereof it is provided by the parties that the excavator shall not be deployed to execute works anywhere else other than for the completion of pending earthworks at Bushenyi ARDC site. The only question was whether by the extension there were other pending earthworks.

The only finding that I can reach is that further works were ordered by the Employer. Because extension of the works was made within the contract, it was within the contemplation of the parties and therefore the additional works ordered were within the contemplation of the words "completion of the contract". In the premises issue number three is answered in the negative. The Defendant was lawfully keeping the excavator in accordance with the contract of the parties in exhibit P1 and P2 and other documents by the time it was removed by order of court.

**Whether the Plaintiff wrongfully neglected/refused/failed to remit the balance of the monies received from Centenary Bank to the Defendant?**

The Plaintiff's Counsel submitted that in the counterclaim raised by the Defendant, it is contended that the Plaintiff is in breach of the Proceeds Sharing Agreement, and neglected, failed or refused to remit to the Defendant the balance of Uganda shillings 43,429,607/= out of a sum of Uganda shillings 184,764,193/= received on the Centenary Bank Account Number 3010310655 on or about 14 December 2010. Counsel contended that the Defendant had the legal and evidential burden of proof to adduce evidence in support of the counterclaim. The testimony

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of the Defendant varied between a credit on that account of Uganda shillings 186,000,000/= and 184,764,193/= on or about 14 December 2010. In cross examination the Defendant claimed lack of knowledge and chose to demonstrate that he had no idea how much money had actually been deposited on the account. He however professed a thorough knowledge of the circumstances surrounding the third-party agency notes exhibit D9. Why did he file a counterclaim which he could not substantiate wondered the Plaintiff's Counsel? He contended that the counterclaim was intended to throw the proverbial kitchen sink at the Plaintiff without regard on how to justify the claims. The Defendant alleged fraud and theft on the part of the Plaintiff and its officers but did not substantiate or even demonstrate alleged fraud. Counsel submitted that fraud must be proved strictly and the burden is higher than that on the balance of probabilities generally applied in civil cases according to the case of **Mpungu and Sons Transporters Ltd versus Attorney General and another [2006] 1 HCB 26**.

The Plaintiff's Counsel further submitted that the relevant account was only credited with Uganda shillings 156,554,825/= according to exhibit P 27. Secondly a third-party agency notice requiring Uganda shillings 82,722,897/= was issued and cashed according to exhibit D9 against that account. It demonstrates that the Plaintiff only recovered Uganda shillings 73,831,928/= instead of the agreed Uganda shillings 141,334,582/=. In the premises the Defendant still owes the Plaintiff Uganda shillings 67,502,654/= and the court should be pleased to find that the Defendant is not entitled to the alleged Uganda shillings 43,429,607/= and it is the Defendant who owes the Plaintiff.

In reply the Defendant's Counsel reiterated submissions on issues number 1 and 2. He contends that by the Plaintiff's own admission total sum of Uganda shillings 156,602,825/= was received on the Bushenyi ARDC account. In terms of the Memorandum of Acknowledgement Executed on 20 October 2010 and which is exhibit P5, out of the said sum of Uganda shillings 156,602,825/= the Plaintiff was entitled to take Uganda shillings 141,334,582/= leaving a balance of Uganda shillings 15,216,243/=. The Plaintiffs claim is that the balance forms part of the money that was taken from the account by Uganda Revenue Authority under a third-party agency notice. It was demonstrated in the submissions on issues number 1 and 2 that the Plaintiffs claim that the taxes in recovered by the third-party were the Defendant's liability lacks merit and is untenable in these proceedings. In the circumstances the court should find that the

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Plaintiff wrongfully neglected/refused/failed to remit the balance of monies received from Centenary Bank to the Defendant.

In rejoinder the Plaintiff's Counsel submitted that there is revealed an unfortunate consequence occasioned by the advocates in not considering the amounts actually credited and debited on the account while framing the issues. The Defendant questions the Plaintiffs claim for Uganda shillings 77,502,654/= only based on the fact that it had so far recovered Uganda shillings 73,831,928/= only out of the agreed Uganda shillings 141,334,528/=. On the basis of that the Defendant changed and seeks to recover only Uganda shillings 15,268,243/= only instead of 43,429,611/= as claimed in the counterclaim. He contended that this contradictory conduct is astonishing. Quoting from the case of **Mumbai International Airport PVT Ltd** (supra) it was wondered whether an action at law is a game of chess and whether a litigant can change or choose its stand to suit its interests.

He contended that the question was whether the Plaintiff received the entire amount of Uganda shillings 141,334,528/= only whose remission it is agreed with the Defendant? Was the Defendant allowed to make any deductions from the Uganda shillings 141,334,428/= only? The answer was no. He contended that the Defendant was obliged to pay the Plaintiff Uganda shillings 141,334,528/= only and nothing more or nothing less. Considering the fact that after the third party notice the Defendant received only Uganda shillings 73,831,928/= only, he prayed that the Defendant is ordered to pay the balance of Uganda shillings 67,502,654/= only which remained outstanding.

#### **Resolution of issue number 4.**

I have carefully considered the submissions of Counsel as well as the evidence and the law on this issue. On the face of the record it is agreed by both Counsel after considering the bank statement relating to the Plaintiff's account at Centenary Rural Development Bank, Entebbe road branch account number 3010310655 as well as exhibit P 27 that on 14 December 2010 by loan grant number 2100150006950 LDV the Plaintiff's account was credited with Uganda shillings 156,554,825/=. At the time of the credit the account only had Uganda shillings 47,000/= on the credit side. After applying the necessary charges amounting to Uganda shillings 6000/= by 31 December 2010 the Plaintiffs account number CA 3010310655 had a credit of Uganda shillings

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156,495,825/=. The counterclaimant/Defendant concedes to this information. I have noted that by this time the counterclaimant/Defendant was not a signatory to the account and the Plaintiff had taken over management of that account.

This issue will be resolved on the effect of the third-party notice. As far as the Plaintiff is concerned, the third-party notice exhibit D9 is the responsibility of the Defendant. Secondly the counterclaimant asserts that the third-party agency notice is the responsibility of the Plaintiff. In other words it settled the liability of the Plaintiff. The Defendant's Counsel further cautioned the court not to rule on the matter because the Plaintiff filed HCCS 331 of 2014 against the Defendant and the Attorney General claiming taxes comprising of VAT and withholding tax. In fact the Plaintiff claims special damages of 401,811,944.1/= Uganda shillings in the pending suit.

It is a fact that this suit High Court Civil Suit No 1 of 2011 was filed prior in time and the question of the third-party notice is a matter for consideration in this suit. I cannot have regard to a subsequent suit filed in 2014 to consider an issue arising in the suit that was filed in the year 2011. In the premises I will consider exhibit D9 that was adduced in evidence by the Defendant. The third-party agency notice was issued on 17 January 2011 and is addressed to the Manager Centenary Rural Development bank Ltd. It was issued by the Uganda Revenue Authority by virtue of section 106 and 132 of the Income Tax Act Cap 340 and it demanded payment of Uganda shillings 82,722,897/= from any monies which may at any time from the date of service be held by the bank and due to Liberty Construction Company Ltd. The payment was to be made on behalf of Liberty Construction Company Ltd and the demand took precedence over claims of any other party including the account holder. The third-party agency notice was copied to Liberty Construction Company Ltd. The received stamp shows that it was received by the Plaintiff on 19 January 2011.

The first glaring fact is that the account holder is the Plaintiff as far as account number 3010310655 with the Centenary Rural Development Bank Entebbe road Branch is concerned. Secondly by the time of the agency notice the Plaintiff had changed the mandate for operation of the account and had all the funds on the account at its disposal. The Defendant was no longer the account controller or signatory by 14 December 2010. The account had been frozen by the Plaintiff's own actions. Thirdly section 106 of the Income Tax Act cap 340 laws of Uganda gives

the Commissioner of Uganda Revenue Authority power where a taxpayer fails to pay income tax on the date on which it becomes due and payable and where the tax payable is not the subject of the dispute, to issue a third party notice requiring any person owing or who may owe money to the taxpayer or owing or who may subsequently hold money on account of some other person for payment to the taxpayer, or who holds or subsequently holds money on account of some other person for payment of the taxpayer or having authority from some other person to pay money to the taxpayer, to pay this money to the Commissioner on the date set out in the notice.

Under section 106 (3) of the Income Tax Act the taxpayer is entitled to a copy of the notice. If the tax is not due the Plaintiff ought to have challenged its assessment for tax. A third-party notice is only issued in respect of a tax which is not the subject of a dispute. Before a third-party agency notice is issued, there must be an assessment under section 95 of the Income Tax Act. The assessment has to be served on the taxpayer under section 95 (6) of the Income Tax Act. Under section 99 of the Income Tax Act a taxpayer who is dissatisfied with an assessment may lodge an objection to the assessment with the Commissioner within 45 days after service of the notice of the assessment. An objection decision may be made and where the taxpayer is aggrieved, he or she may still appeal to the High Court or The Tax Appeals Tribunal under section 100 of the Income Tax Act. The third-party agency notice cannot be issued where the tax is in dispute. Where the tax is not in dispute, then the third-party agency notice may be issued calling on anybody owing money to the taxpayer to pay the money to the Commissioner of Income Tax.

The income is assessed from the overall tax liability of the taxpayer and does not relate to any specific activity but to a year of income. In the premises the only plausible argument would have been that the Defendant was liable to pay the income tax of the Plaintiff. I have considered exhibit P1, exhibit P2, exhibit P3 and P4 and I find nothing that expressly suggests that the income tax would be payable by the Defendant. The Defendant is obliged to pay his own income tax and all their business transaction are to be disclosed to Uganda Revenue Authority. In the premises, because the Plaintiff is legally liable to pay Uganda shillings 82,722,897/= to Uganda Revenue Authority unchallenged, the application of the third-party notice leads to the legal conclusion that that money belonged to the Plaintiff and was used by Uganda Revenue Authority to offset the Plaintiff's income tax liability. Obviously as a matter of hypothesis the subsequent

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suit relates to VAT and withholding tax. That the suit is still pending cannot be affected by the holding in this case that the Plaintiff paid and indeed the records of Uganda Revenue Authority would show that the Plaintiff paid Uganda shillings 82,722,897/= as income tax in January 2011 through enforcement of a third party notice.

In the premises the Plaintiff received all the sum of Uganda shillings 141,334,582/= from account number 3010310655 in the names of the Plaintiff at Centenary Rural Development Bank, Entebbe Road Branch, Kampala. Secondly under the agreement of the parties, the Defendant is entitled to the balance on that account which is not the subject matter of the claim of Edmund Mabiho for Uganda shillings 38,402,143/= being the retention money for the Bushenyi ARDC project. This money was supposed to be paid direct to Edmund Mabiho according to exhibit P5 being the Memorandum of Acknowledgement of Payment. The Defendant having conceded that the amount received on the account of the Plaintiff is Uganda shillings 156,595,825/= he is only entitled to Uganda shillings 15,261,243/= in the counterclaim.

By the same token the claim of the Plaintiff against the Defendant on the basis of its being a balance of the Uganda shillings 141,334, 582/= being a claim of Uganda shillings 67,502,654/= is misconceived and hereby dismissed.

The counterclaimant/Defendant is entitled to payment by the Plaintiff/respondent to the counterclaim of the sum of Uganda shillings 15,261,243/=.

## **Issue number 5**

### **Whether the Plaintiff is entitled to the remedies sought in the plaint?**

As far as the claim for payment of Uganda shillings 67,402,654/= by the Defendant is concerned, the issue has already been resolved. The Plaintiff is not entitled to the special damages and the same is dismissed.

I will consider the claim of Uganda shillings 263,377,900/= comprising of Uganda shillings 2,800,000/= being money incurred in hiring a low bed truck, Uganda shillings 500,000/= being fuel for travelling from Kamuli to Bushenyi and back and Uganda shillings 420,000/= being the cost of the replacement of two batteries as well as Uganda shillings 60,657,900/= being the cost

of repair of the excavator and Uganda shillings 199,000,000/= being losses for money use of the excavator.

As a result of my judgment on issues number 1, 2, 3 and 4 above, part of the claims of the Plaintiff has already been determined. The claim for the hire of alternative excavator amounting to Uganda shillings 199,000,000/= claimed as losses for non-use of the excavator cannot be allowed because the Defendant was entitled to retain the excavator on the basis of the finding that the contract for the Bushenyi ARDC project did not end or terminate on 15 December 2010 but was extended. By the time of the mandatory injunction in Miscellaneous Application Number 1 of 2010 where an order was made returning the excavator to the Plaintiff, the contract had not yet been completed. The Defendant is entitled to compensation for the loss of the excavator.

I would therefore only consider the claim for costs of repair of the excavator amounting to Uganda shillings 60,657,900/=. Secondly the claim for Uganda shillings 2,800,000/= money for hiring a low bed truck, 420,000/= being the cost of two replaced batteries and Uganda shillings 500,000/= being fuel for travelling from Kamuli to Bushenyi.

The Plaintiff's Counsel submitted that the contract was completed by 15 December 2010. This submission has already been determined. However he submitted that the Plaintiff had the obligation to demobilise the excavator to Kampala after completion of the earthworks according to exhibit P1. It was the Plaintiff who moved the excavator from Bushenyi to Kamuli. Consequently he prayed that the court be pleased to award the claim for Uganda shillings 2,800,000/= for the hire of a low bed truck and Uganda shillings 500,000 which is for the fuel.

As far as the claim for Uganda shillings 60,657,900/= being the cost of repair is concerned, the Plaintiff replaced two batteries at Uganda shillings 420,000/=. Secondly Counsel submitted that the Defendant was obliged to maintain the excavator in good working condition. However at the time the Plaintiff recovered the excavator, it was in poor working condition. When the excavator was returned with 4 July 2011 it was difficult to start the engine and that is the report by PW2 exhibit P 17. In the process of repair of the equipment the Plaintiff incurred Uganda shillings 60,657,900/= and the repairs were not contested. He prayed that the above amounts be awarded to the Plaintiff.

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In the reply the Defendant's Counsel submitted as far as the claim for the hiring of a low bed truck amounting to Uganda shillings 2,800,000/= and Uganda shillings 500,000/= being fuel for travel from Kamuli to Bushenyi is concerned, that the claims relate to the several botched attempts by the Plaintiff to forcefully take away the excavator from Bushenyi ARDC site. However because the excavator was in the lawful custody of the Defendant, there were attempts by Edmund Mabiro trying to forcefully take away the excavator on 17 December 2010 and the claim should be rejected.

Regarding the cost of replacement of two batteries amounting to Uganda shillings 420,000/= and the sum of Uganda shillings 60,657,900/= the Plaintiff did not adduce evidence of the condition of the excavator before the Defendant took over the Bushenyi ARDC site. PW2 Moses Joseph Ntende testified that he never had any opportunity to assess the condition of the excavator before he make the report. He saw the excavator for the first time when the same was delivered to the Plaintiff. On the other hand the Defendant testified that before the excavator was taken to Bushenyi ARDC, it had been for repairs at Nalukulongo. The next day it was shifted to Bushenyi when it was in a poor functioning condition and required urgent repairs and replacement of some parts. The Defendant travelled to Bushenyi in the company of one Kiiza and it was established that there was a weak and old battery. There was a malfunctioning ignition system, overheating of the radiator system, low levels of hydraulic and engine oil, non- functioning work hour service meter. One Kiiza requested for Uganda shillings 1,500,000 to rectify or reduce some of the problems noted on the excavator for it to commence works on the site. He travelled to Kampala to get some parts for replacement and later returned and fitted the parts but the improvement in the functionality of the excavator was minimal and all the problems persisted. The company did not have money to hire another excavator and the Managing Director Mr Edmund Mabiro advised that the excavator can still be used as it is because it was cheaper than hiring one from elsewhere.

The excavator could not be started using the normal ignition key. The engine sound was abnormally very loud and exhaust gas consisted of extremely thick black smoke. The engine would shut down after two or three hours of continuous running and was cooled by pouring several jerry cans of water on the radiator followed by one hour of air cooling and keeping the engine cover open during operation. In some days the arm and cabin would fail to rotate and a

vehicle electrical technician would come and fix the fault before the work would resume. The engine oil needed daily top up because the oils were seeping into the radiator system. The worn out hydraulic hosepipes were a constant menace as it would burst needing repair and replacement. The faulty excavator was used as it is for the months of August, September, until December 2010. Even when the Defendant took over the site in October 2010 Kiiza Imran, Bahati and Ismail were still in charge of operating the machine as instructed by Edmund Mabiuro. The only ceased to operate the excavator after they vandalised it in the course of a failed attempt to remove it from the site.

DW1, the Defendant herein further testified that on a number of occasions while excavator was in use, person's claiming ownership of the excavator or the Plaintiff's agents forced themselves into the Bushenyi ARDC site and attempted to forcefully take away the excavator or vandalised the same. The Defendant reported these incidents to the police. On 15 December 2010 the Plaintiff's agents, forced themselves onto the Bushenyi ARDC site and attempted to forcefully take away the excavator. The Defendant and subsequently with the help of police successfully resisted the Plaintiffs unlawful acts. Apparently in a bid to prevent the Defendant using the excavator, the Plaintiff's agents left the excavator vandalised.

DW1 further testified that Edmund Mabiuro, Kiiza Imran, Bahati, Ismail and Others attacked and raided the Bushenyi construction site at night. They took several construction equipments and also attempted to forcefully remove the excavator. Police arrived on the site and prevented them from taking the excavator but they escaped with some parts including the battery, wires and the ignition systems rendering the machine totally unusable. The Defendant brought in new operators one Edwin Kamugisha and another Kiiza from Bushenyi. The excavator was repaired and the same was used at the Bushenyi ARDC site until it was returned to the Plaintiff in spite of the fact that major art works were still ongoing. The excavator was handed over to the Plaintiff in a much better state than when they left it in the Bushenyi on 5 October 2010 because the Defendant continuously serviced and repair data using competent personnel.

The testimony of the Defendant on the state of the excavator is corroborated by the evidence of Juliet Masaba DW3 who was in charge of supervising the works at the Bushenyi ARDC site.

Secondly it is corroborated by the testimony of DW4 Mr Goodwin Kiiza was at all material times assigned to assist the main operator of the excavator.

It is the Defendant's case that the Defendant had occasion to access the condition of the excavator even before it was taken to Bushenyi ARDC site when it was in a very poor mechanical condition. The excavator was deployed at the site anyway for lack of a better option due to the Plaintiff's very bad financial situation. The mechanical problems persisted both before and after the Defendant took over the site exclusively. The Plaintiff admits having attempted to forcefully remove excavator from the site. In the process it was vandalised. The Defendant expended resources to repair and service excavator to make sure it was in a good working condition. The excavator was returned to the Plaintiff in a better state than it was when it was first deployed at the Bushenyi ARDC site.

The Defendant's Counsel further submitted that the Plaintiff has no locus standi to bring an action claiming Uganda shillings 420,000/= being the cost of the replacement of two batteries, Uganda shillings 60,657,900/= being the cost of repair of the excavator as well as to Uganda shillings 199,000,000/= from non-use of the excavator, general damages and related residual claims. He relies on the Uganda Revenue Authority search results for Excavator registration number UAL 490 4B exhibits D 20. The summary of the transfer history shows that the Plaintiff last owned the excavator on 10 September 2008 up to 5 November 2008. Since that time it changed hands four times from one Muwumuza Jecco on 5<sup>th</sup> of November 2008 to 16 December 2008. Then it was transferred to Edmund Mabiuro on 16 December 2008 to 30 April 2009. Then it was transferred again to Muwumuza Jecco from 30 April 2009 after 17 August 2011. Finally it was transferred to Kizza Mulani from 17 August 2011 up to date. He submitted that at the material time the excavator was deployed at the Bushenyi ARDC site, the registered owner was Muwumuza M Jecco. Furthermore the said Muwumuza Jecco is a fictitious person. This is because the photo attributed in the identity card of the said Muwumuza is that of Edmund Mabiuro with the Plaintiff's Managing Director. There is another identity card supposedly issued by TSG (U) Ltd where a totally different face is attributed to Muwumuza Jecco. The holder sign on the two identity cards is the same. In the premises Counsel submitted that the excavator had changed ownership four times since November 2008 when the Plaintiff last owned it. The least the Plaintiff could have done is to offer a little explanation as to where it derives the locus standi

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to sue on the basis of the excavator. Finally the Defendant's Counsel submitted that illegality once brought to the attention of the court overrides all issues of pleadings, evidence as well as admissions according to the case of **Makula International versus Cardinal Nsubuga (1982) HCB 11**. Furthermore the Defendants Counsel maintains that PW1 Mr Edmund Mabiho is implicated in the clear forgery/fraud and illegality according to his demeanour and his evidence must be treated with a lot of suspicion. The same should apply to the testimony of PW3 Mr Kiiza Mulani.

In rejoinder the Plaintiff's Counsel reiterated that the excavator ought to have been returned on 15 December 2010 as a matter of course. He further contended that in HCMA No 1 of 2011 the Defendant led evidence to show that the excavator was in a good working condition according to exhibit P 28. At the hearing of the case he changed his view about the condition of the excavator. He submitted that whatever the condition of the excavator prior to and during the Defendant's usage, the Defendant was meant to maintain it. Given the fact that it was handed over by the Defendant in a poor state due to disrepair, the Plaintiff is entitled to reimbursement for all the money it spent in repairing the excavator. In the agreement exhibit P1 the Defendant was only allowed usage of the excavator by the Plaintiff and as such only the Plaintiff has locus to claim for losses it suffered. As regards allegations of fraud in the transfer of ownership of the excavator, the Defendant did not plead this. Fraud requires a higher standard of proof.

### **Resolution of Issue:**

I have carefully considered the main issue of whether the Plaintiff should be compensated for certain repairs done on the excavator the subject matter of exhibit P1. It is not in dispute that the Defendant had custody of the relevant excavator after execution of exhibit P1, the proceeds sharing agreement. The Defendant was entitled to keep the excavator for earthworks until completion of the Bushenyi ARDC project.

I have already held that the Plaintiff is not entitled to claim for unlawful keeping of the excavator by way of hiring costs of an alternative excavator for its own works for the period the excavator remained in the hands of the Defendant because the contract had not ended. I find the Plaintiffs evidence incredible because of his conduct to block the Defendants use of an agreed account, the



conduct to accuse the Defendant of attempted theft and attempts to forcefully remove the excavator.

In the proceeds sharing agreement exhibit P1 and clause 7 thereof it is provided that the Defendant shall be responsible for the maintenance, security and demobilisation from the work site to Kampala after use of the excavator. Secondly in exhibit P2 which concerned specifically excavator number UAK 413X it was agreed in clause 3 thereof that it was the responsibility of the Defendant to keep the excavator safely and securely during the tenure of the agreement and shall indemnify the Plaintiff or the owner in the event of breach of that agreement. Secondly the Defendant undertook to meet the cost of transferring the excavator from Bushenyi to Kampala after execution of the works at Bushenyi ARDC site.

I have considered the objection to any claim relating to the excavator on the ground of the locus standi of the Plaintiff. On the basis of the agreement, the Defendant agreed to indemnify Liberty Construction Company or the owner in the event of breach of the undertaking of the Defendant to keep the excavator safely and securely during the tenure of the agreement according to clause 3 of exhibit P2. Yet it is the Plaintiffs agents attempted to remove the excavator without consent of the Defendant.

An agreement operates as estoppels to assert a different position from that in the agreement and therefore for authority, section 114 of the Evidence Act Cap 6 Laws of Uganda which imports the doctrine of estoppels and is applicable. I also agreed with the law submitted by the Plaintiffs counsel. By that agreement the parties agreed that a certain excavator would be handed over to the Defendant. I agree with the Plaintiff's Counsel that the Defendant cannot turn round and challenge the authority of the person from whom he got the excavator. However the situation is not as simple as that because there is a question of identity of the excavator and the ownership thereof which arises from the documents and the evidence.

The agreement exhibit P2 is between Edmund Mabiwo and the Defendant. A careful scrutiny of the agreement also shows that it was signed by Edmund Mabiwo in his personal capacity and the Defendant in his personal capacity. Secondly I have considered the fact that the proceeds sharing agreement is between Edmund Mabiwo and the Defendant (that is exhibit P1). In exhibit P5 which is the memorandum of acknowledgement of payment executed on 20 October 2010 the

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agreement is signed by Edmund Mabiho on his own behalf and on behalf of Liberty Construction Company Ltd and the Defendant. I have particularly considered paragraph 4 thereof which deals with the excavator. It is written as follows:

"Dr. Kaitaita has, upon receipt of the sum mentioned in paragraph 1 above, delivered unto Mr Mabiho the original registration book for Excavator registration number UAK 413X, transfer forms from the previous registered owner and Ms Agnes Kebirungi had signed, and which had been given to Dr. Kaitaita to secure Mr Mabiho's undertaking that has hereby been performed and discharged."

In the proceeds sharing agreement exhibit P1 the registration number of the excavator is not mentioned. However exhibit P2 specifically deals with another excavator Caterpillar CAT320 Registration Number UAK 413X. It is this excavator described which seems to form the subject matter of a different agreement between Edmund Mabiho and Dr Daniel Onen Kaitaita. Yet the Plaintiff used these documents without much clarification initially. In the opening paragraph of the agreement exhibit P2 it is provided that on 5 October 2010 the described excavator and all documents pertaining to its ownership was handed over by Ms Agnes Kebirungi of P.O Box 26534 Kampala to Dr Daniel Onen in Kampala as security in the following terms. A consideration of the terms paragraph 3 thereof provides that it is the responsibility of the Defendant keep the excavator safely and securely during the tenure of the agreement and the Defendant shall indemnify Liberty or the owner in the event of breach of the same. Secondly it is provided that the excavator shall not be deployed to execute the works anywhere else other than the completion of the pending earthworks at Bushenyi ARDC site. Apparently this excavator was not used and cannot form the subject matter of this suit. Lastly both Counsels submitted on the basis of paragraph 5 of exhibit P2 which provides that the Defendants remit the cost of transferring the excavator from Bushenyi to Kampala after execution of the mentioned works. In paragraph 4 (i) of the amended plaint, the Plaintiff relies on an agreement between Edmund Mabiho and the Defendant dated 5<sup>th</sup> of October 2010 marked annexure "B". This agreement was admitted in evidence as exhibit P2. In paragraph 5 of the plaint it is apparent that the undertaking to hand over the excavator to Edmund Mabiho is based on the said agreement exhibit P2 which refers to a different excavator than the one claimed for compensation for costs of its repair.

I have again considered the Plaintiffs written submissions on issue number three in which it relies on exhibit P1 and paragraph 7 thereof which talks about an excavator without giving its registration numbers. I have carefully considered the written testimony of Edmund Mabiho filed on court record on 4 February 2013 and at page 3 thereof he testified that it was agreed that the Defendant would continue to hold as security one excavator which the Plaintiff had left on the project site but would release the same to him personally as soon as they received the money (Uganda shillings 88,421,262/=). He goes on to say that the commitments were reduced into writing and include documents namely a schedule of sharing precedents executed on 5 October 2010 between himself and the Plaintiff exhibit P1 and an agreement between him and the Defendant also dated 5th of October exhibit P2. He further testified that on 20 October 2010 they had effected payment of Uganda shillings 88,531,262/= to the Defendant as agreed and whereupon the two of them executed a memorandum of acknowledgement of payment by which the Defendant renewed his commitments.

The Plaintiff relies among other things on exhibit P 17 which comprises of receipts for repair of a chain excavator. The chain excavator assessed by N.E Engineering Company Limited in an invoice dated 5<sup>th</sup> of December 2011 is of UAL 494 B. Similarly the receipt for Uganda shillings 17,994,500/= concerns UAL 494 B. The entire report relied on by the Plaintiff exhibit P 16 which is entitled Chain Excavator Conditions Assessment Report at page 39 of the trial bundle concerns a Chain Excavator Registration Number UAL 494 B. The receipt attached relate to the same equipment. The search documents relied on by the Defendant relates to excavator registration number UAL 494 B. However the certified copies I have examined being application for duplicate registration number plates relate to UAL 494 B. On the face of the documents these two Caterpillar excavators cannot be the same since they have different registration numbers. Exhibit P2 relates to UAK 413X.

The Defendant's defence relates to the same caterpillar excavator. Particularly I refer to exhibit P28 which is the affidavit in reply of Dr. Daniel Onen Kaitaita in High Court Miscellaneous Application Number 1 of 2011. In paragraph 3 thereof he disclosed that the excavator in his possession at the Bushenyi ARDC site is registration number UAL 494B, secondly that it was handed over to him under the proceeds sharing agreement dated 5th of October 2010.

I have carefully considered this evidence together with the evidence produced by the Defendant about who is the real owner or the registered owner of the excavator UAL 494B. There is inconsistent evidence about the terms of the agreement relied upon. Those terms cannot be of exhibit P2. PW 1 in his cross examination testimony testified that the Defendant knew where the excavator was (see page 16 of the transcript of proceedings). Furthermore the excavator was handed over by one Kebirungi as a guarantor to the Defendant. He agreed upon being referred to page 3 of the trial bundle that the excavator had the registration number UAK 413 X. Page 3 of the joint trial bundle has exhibit P2. Later he testified that the excavator at Bushenyi was a different excavator. As for the excavator at Bushenyi he did not recall who the owner was and whether it was registered in the names of the Plaintiff. It is this testimony that I find unreliable. If he did not know the owner why does he claim for its repair costs?

The only conclusion I can reach is that the Plaintiff relies on exhibit P2 as well as exhibit P1. Exhibit P1 does not describe the excavator number and it is possible that the number may indeed be different from exhibit PE 2. However exhibit P2 is also the excavator which was supposed to be demobilised from the Bushenyi ARDC site upon completion of the project and there is a different registration number. Thirdly the agreement for handing over the excavator was made between Edmund Mabiwo and the Defendant. The excavator was supposed to be handed over to Edmund Mabiwo.

The Contracts Act 2010 Act 7 of 2010 now permits a third party to sue upon a contract to which he or she is not a party but to which he or she is a beneficiary subject to certain limitations. This is provided for by section 65 which provides that:

65. Right of third party to enforce contractual term.

(1) Subject to this Act, a person who is not a party to a contract may in his or her own right enforce a term of the contract where—

(a) the contract expressly provides that he or she may do so; or

(b) subject to subsection (2), a term of the contract confers a benefit on that person.

(2) Subsection (1) (b) does not apply where on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by a third party.

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(3) A third party shall be expressly identified in a contract by name, as a member of a class or as answering a particular description; but need not be in existence at the time the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract except where the term is subject to and in accordance with any other relevant term of the contract.”

Clearly the Plaintiff is a third party because the beneficiary to exhibits P1 and P2 as well as P5 is Edmund Mabiwo as far the two excavators are concerned. Secondly the agreements were executed between Edmund Mabiwo and the Defendant. Thirdly the contract does not expressly provide that the Plaintiff is a beneficiary or has a right to sue. The right should be to enforce a term in a contract. The contract provides that where there is breach of a term for safe keeping Liberty or the owner may sue. There is some doubt as to who the owner of the vehicle is. Secondly the contract which provides for indemnity is exhibit P2 and clause 3 thereof which deals with excavator Caterpillar CAT 320 Registration No. UAK 413 X. This term cannot be imported to a different excavator. In paragraph 4 of exhibit P5 the beneficiary of the excavator is Edmund Mabiwo and it was used to secure his undertaking and not that of the Plaintiff. The parties clearly intended the matter to be between Edmund Mabiwo and the Defendant as far as both excavators are concerned.

In the premises I uphold the objection of the Defendants on the ground of lack of locus standi of Liberty Construction Company Ltd to sue the Defendant both on the agreement exhibit P1 and P2 as well as on the fact that the beneficiary for handing over the excavator is Edmund Mabiwo.

Having come to the above conclusion the only claim that is conceded to by the Defendant is that for demobilisation of the excavator from the site. The Plaintiff is entitled to the cost of demobilisation being Uganda shillings 2,800,000/= for hiring a low bed truck to transport an excavator back from Bushenyi and as well as Uganda shillings 500,000/= being the cost of fuel from Kamuli to Bushenyi.

Interest is awarded on the said amount from July 2011 at the rate of 21% per annum up to the date of judgment.

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Further interest is awarded at the rate of 21% per annum from the date of judgment till payment in full.

The rest of the Plaintiff's suit is dismissed with costs.

As far as the Defendant's counterclaim is concerned, the counterclaim succeeds in part on the basis of the actual figure which was received on the Plaintiff's account on 14 December 2010. The Defendant is entitled to Uganda shillings 15,268,243/= which is hereby awarded to the Defendant.

Interest is awarded on the said amount from 14 December 2010 up to the date of judgment at the rate of 21% per annum. Further interest is awarded at the rate of 21% from the date of judgment till payment in full.

General damages.

The Defendant seeks general damages of Uganda shillings 200,000,000/= for having the Plaintiffs account unlawfully blocked when the Defendant was the sole signatory and which account was opened to facilitate the completion of the project. The Defendant's Counsel further refers to the chronology of events in which resolutions were passed removing the Defendant as a director of the Plaintiff Company and the revoking powers of attorney putting the Defendant in a very bad light as a conman masquerading as an authorised agent of the Plaintiff. The Defendant had an uphill task continually being questioned about his authority to receive the money. A criminal case was reported against the Defendant of attempted theft of Uganda shillings 141,324,582/=. The actions were based on pure speculation. The Plaintiff wrongfully lodged complaints with the police in respect of cheques properly drawn by the Defendant on the Bushenyi ARDC bank account and as a result the Defendant was imprisoned and later prosecution was discontinued by the DPP. Furthermore the resultant delays in the finishing the Bushenyi ARDC works affected the Defendant's prospects of getting more business. The Plaintiff through its Managing Director acted irrationally and in bad faith.

I have carefully considered the holding of the court on the first four issues. Clearly the problem between the parties was generated by the Plaintiff. Secondly the Defendant was clearly inconvenienced by the high-handed actions of the Plaintiff. The Plaintiff unilaterally revoked and

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frustrated certain arrangements by which the Defendant was the sole signatory on the Plaintiff's account meant to facilitate completion of the Bushenyi ARDC project. In the premises I agree with the Defendant's Counsel that the Defendant should be awarded general damages in addition to the balance of the money on the Plaintiff's account at Centenary Rural Development Bank Entebbe Road branch, Kampala. The question is only related to what the quantum of damages should be awarded. In **Johnson and another v Agnew [1979] 1 All ER 883** Lord Wilberforce held an award of general damages is compensatory and:

“... the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed.”

The Defendant had to hire another excavator from July 2011 because the contract had not ended apart from the inconveniences suffered by him. In the premises general damages of Uganda shillings 40,000,000/= is awarded to the Defendant in the counterclaim taking into account that the Defendant does not complain about failure to receive the rest of the money out of the Bushenyi ARDC project.

Interest is awarded on the above figure and the rate of 21% and from the date of judgment till payment in full.

As noted above apart from the costs of 3,300,000/= awarded to the Plaintiff the rest of the Plaintiff's suit is dismissed with costs. Secondly the Defendant's counterclaim succeeds with costs.

Judgment delivered in open court on 1 March 2016

**Christopher Madrama Izama**

**Judge**

**Judgment** delivered in the presence of:

Kasiisa Ronal Counsel for the Plaintiff

Edmund Mabiho MD of Plaintiff is present in court

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Counsel Binomugisha Caroline holding brief for Andrew Kabombo Counsel for the Defendant and Counterclaimant.

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**1<sup>st</sup> March 2016**