

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

**HCCS NO 0331 OF 2012**

**ENGINEER INVESTMENTS LTD}.....PLAINTIFF**

**VS**

**1. ATTORNEY GENERAL}  
2. KAMPALA CAPITAL CITY AUTHORITY}.....DEFENDANTS  
BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**FINAL JUDGMENT**

This final judgment follows a partial judgment on points of law delivered on the 15<sup>th</sup> of December 2015. The points of law raised for determination were

1. Whether the contract in question was illegal on two grounds namely:
  - a. Failure to obtain the consent of the Attorney General under article 119 (5) of the Constitution of the Republic of Uganda;
  - b. Where it is a nullity for non compliance with the provisions of the Public Procurement and Disposal of Public Assets Act 2003.

On the first issue of whether the failure to obtain the consent of the Attorney General was fatal rendering the contract illegal and unenforceable was resolved against the Defendants. The second limb of the point of law was stayed because there were insufficient agreed facts to resolve the point of law.

Initially Counsels of the Parties had agreed on the facts for resolution of the points of law. The agreed facts are:

1. The Plaintiff entered into a contract for the provision of solid waste management services with the then Kampala City Council and the Ministry of Local Government.
2. The Plaintiff provided solid waste management services to the second Defendant.
3. The Plaintiff was issued a certificate of completion on 17<sup>th</sup> March 2005 by the Project Manager of the second Defendant, an Engineer of Kawempe division.
4. A sum of Uganda shillings 30,000,000/= was paid by the Defendants to the Plaintiff as part payment for the services rendered, leaving a balance of Uganda shillings 41,312,436/=, payable within a prescribed time but attracting interest thereafter if not paid.

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5. The Defendants declined to pay the outstanding amount and requested the Plaintiff to refund the amount paid to them on the ground that the contract signed between them is illegal and unenforceable for non-compliance with the procurement process and in particular failure to obtain the advise and or approval of the Solicitor General.

The agreed issues are:

- (a) Whether the Defendants are in breach of their contract with the Plaintiff?
- (b) What are the remedies to the aggrieved party?

It is issue number (a) which formed the basis of the point of law. It was submitted for the Defendants that an illegal contract was unenforceable and therefore issue number (a) could be resolved on the basis of whether the contract was unenforceable for illegality. Otherwise it is an agreed fact that the Plaintiff had not been paid the balance of Uganda shillings 41,312,436/=. Pursuant to the partial judgment on a point of law the Plaintiff and second Defendant's Counsel agreed to file a supplementary memorandum of facts to resolve the remaining point of law. Counsels further informed Court that no further submissions were necessary and the Court can finalise the judgment on the agreed facts and documents.

For this purpose the relevant facts and submissions in the partial judgment of 15<sup>th</sup> December 2015 will be reproduced for ease of reference as far as is relevant to the remaining issue and to provide the basis for finalising remaining point of law.

The Plaintiff's action against the Defendants jointly or severally is for breach of contract and the recovery of **Uganda shillings 139,981,222/=**, interest thereon at 23% per calculated from 14<sup>th</sup> June 2010 until payment in full, general damages and costs of the suit.

It is averred by the Plaintiff in the plaint that on the 3<sup>rd</sup> of May 2004, the Plaintiff, Ministry of Local Government and Kampala City Council executed a contract for solid waste management within Kawempe Division with the contract identification number as ASD/SWM.K AW – 01. The Plaintiff executed the assignment and upon completing it was issued with a certificate of completion on 17<sup>th</sup> March 2005 by the Project Manager. On 19<sup>th</sup> October 2006 and on 27<sup>th</sup> July 2009, the Plaintiff made a demand for payment from the second Defendant for an outstanding amount of Uganda shillings 71,312,426/=. Subsequently, the Plaintiff upon acknowledgement of the debt by the second Defendant received Uganda shillings 30,000,000/= being part payment of the 71,312,426/= Uganda shillings.

Thereafter Defendants denied further liability to the Plaintiff. The second Defendant does not deny the facts but asserts that it is a Procuring and Disposal Entity whose procurement activities are regulated by the applicable procurement laws of Uganda and that there was no observance of the process prescribed by the law. That is when the second Defendant's Kawempe Division Council purported to engage the Plaintiff to offer services of garbage collection. The Defendant admits the facts of the execution of the contract as well as the partial payment of Uganda

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shillings 30,000,000/= but denies that the Plaintiff is entitled to payment of the sum of Uganda shillings 41,312,430/= that was outstanding. Instead the Defendant counterclaimed for recovery of the partial payment of Uganda shillings 30,000,000/=. This is on the ground that the contract was illegal and irregular and the payment was an illegality/irregularity. The second Defendant prays that the counterclaim should succeed with interest at commercial rate from the date of judgment until payment in full and costs of the counterclaim.

The Plaintiff is represented by Counsel Isaac Bakayana while the Attorney General is represented by State Attorney Sandra Mwesigye. Counsel Dennis Byaruhanga represented the second Defendant.

All three Counsels agreed that the suit should be determined on points of law and further filed a memorandum of agreed facts and issues for the points of law to be resolved. Subsequently after 15<sup>th</sup> December 2015 and the partial judgment of the court in which this court held that a Local Government was not Central Government under article 257 of the Constitution and that article 119 (5) applied to Central Government and not a local government, the Attorney General lodged a Notice of Appeal against the decision to the Court of Appeal on the 11<sup>th</sup> of January 2016. Subsequent to the ruling of 15<sup>th</sup> December 2015 staying part of the point of law for want of facts, the Plaintiff and Defendant's Counsels filed an additional memorandum of agreed facts to avail what they considered are the facts for purposes of disposing of the second point of law which is whether the contract was illegal for failure to comply with the Public Procurement and Disposal of Public Assets Act 2003 and Regulations made there under. The subsequent memorandum of agreed facts was filed on court record on the 15<sup>th</sup> of July 2016 and was signed by the Plaintiff and First Defendants Counsels. The agreed facts are as follows: "...

1. In January 2003 the City Council of Kampala under the local government development programme CR. 3295 – UG invited for bids for solid waste management services in Kawempe Division.
2. The said invitation for bids was dated January 2003 and was published indicating there-in a pre-bid meeting on Friday, 21 February 2003 at 10 AM in Room B207, City Hall.
3. That on the 3<sup>rd</sup> day of May 2004, the Plaintiff, Ministry of Local Government and Kampala City Council (then) executed a contract for the provision of solid waste management services.
4. That the Plaintiff provided solid waste management services to the second Defendant.
5. That the Plaintiff was issued a certificate of completion on the 17<sup>th</sup> day of March 2005 by the project manager of the second Defendant, which Project Manager was an engineer with Kawempe division.
6. That a sum of shillings 30,000,000/= (Uganda shillings thirty million) was paid by the Defendants to the Plaintiff as part payment for the services rendered, leaving a balance of Uganda shillings 41,312,436/= (Uganda Shillings Forty One Million Three Hundred Twelve Thousand Four Hundred Thirty Six).

7. That clause 43.1 of the contract stated that "the employer shall pay the contractor the amount certified by the project manager within 56 days of the date of each certificate. If the employer makes a late payment, the contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made."
8. That the said Uganda shillings 30,000,000/= was paid on 14 June 2010."

In the Attorney General's defence it is averred that the Plaintiff is not entitled to any of the remedies sought because the contract is illegal. The Attorney General averred that the Plaintiff's suit is barred in law, misconceived, frivolous and vexatious and ought to be dismissed with costs.

The court was addressed in written submissions and I will only reproduce the submissions in relation to the second point of law as to whether there was failure to follow the provisions of the Public Procurement and Disposal of Public Assets Act 2003 and if so whether it rendered the contract a nullity and made it unenforceable.

#### **Whether the Defendants are in breach of the contract with the Plaintiff?**

The contention of the Defendants is that there can be no breach of contract because the contract was illegal and unenforceable. The Plaintiff's Counsel relied on section 57 of the Evidence Act Cap 6 Laws of Uganda for the submission that facts the parties agree to admit at the hearing need not be proved in any proceedings between the parties. Secondly, he contends that it is trite law that parties are bound by the terms of the contract that they execute according to the Court of Appeal decision in **Behange versus School Outfitters (U) Ltd (2000) 1 EA 20**. In the relevant agreement dated 3<sup>rd</sup> May, 2004, the parties agreed that the Employer (Ministry of Local Government and Kampala City Council) would pay the Contractor upon completion of the works and the remedying of defects under clause 4 of the agreement. Under clause 43 and section III of the conditions of contract, the employer was supposed to pay the contractor the amount certified by the project manager within 56 days of the date of each certificate. On 17 March 2005 the project manager issued a certificate of contract completion. Thereafter in line with clause 23 of the agreement, the Defendants were to pay the Plaintiff within 56 days. The Defendants as at 11<sup>th</sup> March, 2005 according to their own document were indebted to the Plaintiff to and owed Uganda shillings 71,312,436/= to the Plaintiff.

In the premises the Plaintiff's Counsel submitted that the Defendant is obliged to pay the sums outstanding with interest and costs of the suit. By failure to meet contractual obligations, the Defendants are in breach of their contractual obligations to the Plaintiff (**see United Building Services Ltd versus Yafesi Muzira t/a Quick set Builders and Company HCCS 154 of 2005**).

Regarding the point of law of the second Defendant averred in the WSD paragraphs 4 (a), (b) and 5 it is averred that the procurement process was not followed. In his submissions the Plaintiff's Counsel prayed that the argument should be rejected. According to him the law prevailing at the time of the procurement of the Plaintiff's services was the Public Procurement and Disposal of Public Assets Act, 2003. Section 55 thereof provides that all procurement was to be done in accordance with Part V and the second Defendant has not stated in its defence which specific part was not complied with. On the other hand the Plaintiff in the reply indicated that there was a public advertisement inviting bidders to supply solid waste management services in Kawempe and the advertisement copy was attached. Consequently a bid was submitted to the second Defendant who considered the same and made the contract award to the Plaintiff.

The Plaintiff's Counsel submitted that the court shall not permit the Defendants to benefit from the Plaintiff's services without paying for it as held in **Finishing Touches versus Attorney General Civil Suit 144 of 2010**. Secondly, the Defendants would on the principle of *quantum meruit* still be obliged to pay the sums due to the Plaintiff. The Plaintiff's Counsel invited the court to read **Black's Law Dictionary at page 1361** for the definition of *quantum meruit*. He further relied on the Kenyan case of **Nabro Properties Ltd versus Sky Structures Ltd and Two Others (2002) 2 KLR** for the Maxim of law recognised and established that no man shall take advantage of his own wrongs. In the premises the Plaintiff asserts that the Defendants are in breach of the contractual duty to the Plaintiff and should settle all sums due to it in accordance with the terms of the contract executed between the parties.

**In reply the Attorney General's Counsel** submitted that with reference to the decision of this court in **Finishing Touches versus Attorney General HCCS 144 of 2010**, it was held that the question as to whether a provision is mandatory or directory is decided by the court through examining the purpose of the enactment and the importance of the condition imposed in the section or rule. The court also considers the claims of public interest in the enactment. The whole scope and purpose of the enactment has to be considered to assess the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the enactment.

The Attorney General further submitted that the contract was never approved by a properly constituted contracts committee as required by section 55 of the Public Procurement and Disposal of Public Assets Act which provides that all public procurement and disposal shall be carried out in accordance with the rules set out and any regulations made there under. The Local Governments (Public Procurement and Disposal of Public Assets) Regulations S.I. Number 39 of 2006 and particularly regulation 17 (1) outlines the role of the Contracts Committee to include approving pleading and contract documents. Sub-regulation 2 thereof provides that the Contracts Committee shall award contracts in accordance with applicable procurement and disposal procedures as the case may be. Counsel contended that from the evidence on record, there is no minute by the Kawempe Division Contracts Committee awarding the contract to the Plaintiff

Company and the illegality renders the contract invalid. He relied on the celebrated case of **Makula International Ltd versus Cardinal Nsubuga and another (1982) HCB 11** where the Court of Appeal held that a court of law cannot sanction what is illegal and an illegality once brought to the attention of the court, overrides all questions of pleading including any admissions made thereon. In **Eladam Enterprises Ltd versus SGS (U) Ltd, SGS (K) Ltd, Societe General De Surveillance (SA)** the Supreme Court held that damages flow from liability whether in contract or in breach of a statutory duty where such liability is established.

In the case before the court the contract between the Plaintiff and Kawempe division is a nullity and the Plaintiff should not be able to derive any benefit from it. The Defendants should therefore not be held liable for damages arising from breach of an illegal contract.

Regarding the principle of quantum meruit as defined; it is defined as "as much as the service" and is an equitable doctrine where someone who has provided services may be able to recover from an opponent who has breached the contract. The Attorney General contends that common law principles cannot override the statutory provisions which render the actions of the procuring authority and the Plaintiff null and void. He relied on **Mark Foley versus United Africa Company Ltd (West Africa) PC 27** Nov 1961 where Lord Denning held that where an act is void and is in law a nullity, it is not only bad but incurably bad.

He further submitted that the Plaintiffs claim is based on a nullity and the contract is therefore unenforceable. Counsel supported the Attorney General's defence with the case of **Kisugu Quarries versus Administrator General (1999) 1 EA 158** where it was held that the court cannot be used to enforce an illegal contract even if both parties executed it willingly.

#### **Reply of the second Defendant's Counsel.**

The second Defendant's Counsel submitted that a contract is an agreement made with the free consent of the parties who have the capacity to contract and with a lawful object and an intention to be legally bound under the provisions of section 10 (1) of the Contracts Act 2010. Obviously the Contracts Act 2010 is not applicable since we are considering a contract of 2004 though it codifies the common law applicable on the definition of a contract. Nonetheless and second Defendant's Counsel relies on section 3 of the Public Procurement and Disposal of Public Assets Act 2003 on the definition of a contract. A contract is an agreement between the procuring and disposing entity and a provider resulting from the application of the appropriate and approved procurement or disposal procedures and proceedings as the case may be, concluded in pursuance of the bid award decision of the Contracts Committee or any other appropriate authority.

The second Defendant's Counsel further relies on the provisions for initiation of procurement or disposal requirements under section 59 of the Public Procurement and Disposal of Public Assets Act 2003. Under that provision initiation is done by the Accounting Officer prior to the commencement of any procurement process.

He further reiterated submissions that there is no evidence on court record that the procurement processes were adhered to and there is no decision of the Contracts Committee awarding the contract or approving any procurement method.

The second Defendant's Counsel further relied on the case of **Clear Channel Independent Uganda Ltd versus Public Procurement and Disposal of Public Assets Authority HCMA 380 of 2008** for the holding that if a statute prescribes statutory rules or regulations binding on a domestic tribunal the procedure to be followed, that procedure must be observed. Finally he reiterated submissions that the court cannot sanction that which is illegal and an illegality once brought to the attention of the court overrides all questions of pleading, including any admissions made thereon according to the case of **Makula International Ltd versus His Eminence Cardinal Nsubuga and another (supra)**.

He contended that the action of the officers of the Defendants cannot fetter the law and the court should not rely on the mistakes of a public officer in deciding a matter of this nature. He submitted that requisitions for the services were illegally made.

#### **Submissions of the Plaintiff's Counsel in rejoinder:**

In rejoinder to the second Defendant's submissions which were filed earlier than the rejoinder to the first Defendant's submissions, Counsel submitted that reference to section 59 of the Public Procurement and Disposal of Public Assets Act, 2003 was cited without demonstrating its relevance to the case before the court. He contended that the provision is irrelevant.

Regarding submissions on the basis of regulation 17 (1) of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations S.I No 39 of 2006, they were irrelevant because they did not have retrospective effect. The regulations were passed in 2006 and do not apply to a contract dated 3<sup>rd</sup> of May 2004.

Furthermore he submitted that the processes of the Contracts Committee, procurement and disposal units were all the responsibility of the second respondent and its predecessor in title namely Kampala City Council which was internal to it. Under section 65 (2) of the Local Government Act, the designated accounting officer is the Town Clerk. Under section 26 of the Public Procurement and Disposal of Public Assets Act 2003, the accounting officer has the overall responsibility of the execution process of the procurement entity. Furthermore Article 174 (1) of the Constitution provides that the Ministry or Department of the Government of Uganda shall be under the supervision of the Permanent Secretary. The Town Clerk and the Permanent Secretary officials with their statutory role to do what is stated above did sign the contract and must have satisfied themselves with the internal processes that the Defendant refers to. He contended that it is unimaginable that the second Defendant can now seek to question the Plaintiff on account of processes that the Plaintiff has no mandate or control over.

The Plaintiff's Counsel further contended that under section 86 (1) of the Kampala Capital City Authority Act, the authority took over all rights, liabilities and obligations of the former Kampala City Council and this included the acknowledged debt owing to the Plaintiff. Section 86 (1) of The KCCA Act does not permit the second Defendant to question the Plaintiff's contract.

Counsel further sought to distinguish the case of **Clear Channel Independent (U) Ltd** (supra) on the ground that the PPDA made a report highlighting specific incidents of non-compliance with the Act. The trial judge held that there were procedural flaws in the entire tender process and held that the process had not been done in strict compliance with law.

Counsel further submitted that the entire defence is premised on the single assumption that the proper channels of authority were never sought and given prior to the execution of the agreement. The second respondent admits executing the contract and admits that the Plaintiff performed the contract. Counsel submitted that the court has a duty to ensure that such unfairness is not perpetrated in Uganda's legal system otherwise the Defendants would keep seeking services and refuse to obtain the first Defendant's approval whereupon they would turn around and claim that the contract is illegal and refuse to pay the contractual sums.

## **Judgment**

### **Whether the Defendants are in breach of the contract with the Plaintiff?**

I have carefully considered the point of law agreed to by Counsel for resolution of this suit.

In the written statement of defence of Kampala Capital City Authority the point of law is raised in paragraph 5 of the written statement of defence. The Defendant after admitting that a certificate of completion of work worth Uganda shillings 71,312,436/= was issued to the Plaintiff out of which Uganda shillings 30,000,000/= was paid leaving a balance of Uganda shillings 41,312,436/=-, it discovered that the award of contract to the Plaintiff did not follow the Procurement Procedures or Guidelines Contract of the Public Procurement and Disposal of Public Assets Act, 2003 and the Local Government Public Procurement and Disposal of Public Assets Regulations 2006. In the premises it refused to pay the Plaintiff and has counterclaimed for refund of Uganda Shillings 30,000,000/- it had paid to the Plaintiff under the contract.

The second Defendant averred that the contract was illegal and irregular under the PPDA Act and regulations made there under. The controversy raised, as far as the second Defendant is concerned, relates to the procedure for the procurement of services under the Public Procurement and Disposal of Public Assets Act, 2003 and regulations made there under. As far as pleadings go, the Plaintiff in reply to the WSD and Counterclaim averred that that sometime in early 2003, the Kawempe division through its advertisement invited for bids from eligible bidders for execution of solid waste management services within Kawempe division according to annexure "J" which is an invitation for bids published in the newspapers. The invitation for bids was



published in January 2003 and invitations and pre-bidding meeting were supposed to be held on Friday 21<sup>st</sup> of February 2003.

It was submitted that a court of law cannot sanction an illegality according to **Makula International versus His Eminence Cardinal Nsubuga and another (1982) HCB 11** and an illegality once brought to the attention of the court overrides all questions of pleadings including any admissions made therein. Regarding the contention that the bidding process and award of contract under the Public Procurement and Disposal of Public Assets Act 2003 was not followed, Counsels for the parties filed an agreed memorandum of facts and issues on the court record on 16<sup>th</sup> September 2015 and thereafter addressed the court in written submissions. In the partial judgment I considered the question as to whether the agreed facts were sufficient and not controversial to form the basis for considering the issues of law that the parties have agreed to. I found the facts insufficient to consider whether the relevant procedure under the PPDA Act 2003 and Regulations there under was followed. The first observation made was that the question of when the contract was executed is not specifically included in the memorandum of agreed facts though the second Defendant in the written statement of defence admits executing a certain contract with the Plaintiff. The Plaintiff attached a copy of the contract described as identification number ASD/SWM.KAW – 01 in paragraph 5 (a) of the plaint as annexure "A". It is dated 3<sup>rd</sup> of May 2004. The second Defendant admits this contract in paragraph 4 (b) of the written statement of defence. The second Defendant also admits that a certificate of completion was issued by Kawempe division on 17<sup>th</sup> March, 2005 certifying the successful completion of the works. The certificate of completion has the further detail that it concerns solid waste management services rendered in October 2004 according to a letter of the Plaintiff attached. I noted that it was crucial that the facts in support of a point of law are either agreed to at the scheduling conference or admitted in the pleadings. In the absence of such an agreement, the point of law ought to await the trial of the suit because there could be a necessary fact not agreed to in controversy and I relied on the decision of the East African Court of Appeal in **NAS Airport Services Limited v The Attorney-General of Kenya [1959] 1 EA 53** that the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved.

Despite my misgivings about the adequacy of facts the Plaintiff and second Defendant again agreed to proceed to resolve the point of law on the factual basis of the following supplementary or additional agreed facts which they subsequently filed on record namely:

1. That in January 2003 the City Council of Kampala under the local government development programme CR. 3295 – UG invited for bids for solid waste management services in Kawempe Division.
2. The said invitation for bids was dated January 2003 and was published indicating there in a pre-bid meeting on Friday, 21 February 2003 at 10 AM in Room B207, City Hall.

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3. That on the 3<sup>rd</sup> day of May 2004, the Plaintiff, Ministry of Local Government and Kampala City Council (then) executed a contract for the provision of solid waste management services.
4. That the Plaintiff provided solid waste management services to the second Defendant.
5. That the Plaintiff was issued a certificate of completion on the 17<sup>th</sup> day of March 2005 by the project manager of the second Defendant, which Project Manager was an engineer with Kawempe division.
6. That a sum of shillings 30,000,000/= (Uganda shillings thirty million) was paid by the Defendants to the Plaintiff as part payment for the services rendered, leaving a balance of Uganda shillings 41,312,436/= (Uganda Shillings Forty One Million Three Hundred Twelve Thousand Four Hundred Thirty Six).
7. That clause 43.1 of the contract stated that "the employer shall pay the contractor the amount certified by the project manager within 56 days of the date of each certificate. If the employer makes a late payment, the contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made."
8. That the said Uganda shillings 30,000,000/= was paid on 14<sup>th</sup> June, 2010."

I have carefully reconsidered the issue and reproduced part of the relevant judgment which was inconclusive on the question of whether the PPDA Act procedure was followed. Before I conclude on whether the second set of facts resolve the issue I raised of the adequacy of facts requirement, I want to make a few observations that arise from the further agreed facts. The first is that there was an advertisement inviting bid for the services that had been published in the newspapers. The invitation for bids was in January 2003. Thereafter there was a pre – bid meeting in February 2003. On the 3<sup>rd</sup> day of May 2004, the Plaintiff, Ministry of Local Government and Kampala City Council which is the predecessor in title of the second Defendant executed a contract for the provision of solid waste management services. The submissions of the Counsels are not supported by facts relating to what actually happened in the bid and procurement process. Facts which are not proved or agreed cannot form the basis of submissions on points of law.

It is an agreed fact that after the advertisement inviting bids and the signing of the contract that the Plaintiff provided services and the services were certified by the Project Manager. I have considered the agreed contract dated 3<sup>rd</sup> May 2004. It was executed over one year after the invitation for bids. The recital of the contract clearly stipulates that: "the Employer accepted the bid by the Contractor for the execution and completion of works..." In paragraph 2 of the contract it is further provided that the following documents shall be deemed to form and be read and construed as part of the agreement, viz:

1. Letter of Acceptance
2. Contractor's Bid
3. Contract Data
4. Conditions of Contract
5. Specifications
6. Priced Bill of Quantities; and
7. Any other document listed in the Contract Data as forming part of the Contract.

These documents were not adduced in evidence. From the contract it is admitted that there was a letter of Acceptance and a Contractor's Bid. The Plaintiff bid for the services and the bid were accepted and the Plaintiff wrote a letter of acceptance after the offer of the second Defendant. The contract expressly provides that the Employer accepted the bids. It is an agreed fact that the bids were advertised and a copy of the advertisement was admitted in evidence.

I do not find any evidence for the assertion that the Contracts Committee does not have a minute awarding the contract. It is not material for the Plaintiffs case to produce the minutes of the bid award. What is material is that the contract document itself says the second Defendant accepted the bid. The burden of proof shifted to the 2<sup>nd</sup> Defendant to prove that the Public Procurement and Disposal of Public Assets Act procedures were not followed by producing the evidence of this. On the face of it, it was sufficient for the Plaintiff to prove the contract which shows that there was a bid and a bid award which the Plaintiff accepted.

There are provisions of the Evidence Act Cap 6 Laws of Uganda which I find relevant. First of all no details of other relevant facts were admitted. The contract executed was admitted and it contains facts which cannot be rebutted in submissions and without evidence. I make reference to the best evidence rule under section 91 of the Evidence Act. This rule does not only apply to the terms of a contract but also to other matters such as facts contained in the contract unless the facts are inaccurate. It provides as follows:

“91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, *or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.*” (Emphasis added)

The contents of the document are admitted. Why should the court accept other evidence? In any case the bid process is in the allegations of the Defendant. The Plaintiff was awarded the contract

and that is what the contract document says. Secondly, the contract document confirms that there was a bidding process and the Plaintiff's bid was accepted. Thirdly, the Plaintiff accepted the offer of the Defendant. From these facts the Plaintiff has a written contract that can only be challenged by other relevant facts which are not in evidence. Fourthly, section 94 of the Evidence Act excludes other facts which contradict facts in the document itself. It provides as follows:

“94. Exclusion of evidence against application of document to existing facts.

When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to those facts.”

Thirdly, from the above provision the Defendants could aver and say as they did that the contract document does not apply accurately to existing facts. If that is so, the burden shifts to the Defendant to adduce the evidence. This suit proceeded by way of agreed facts and I stayed the point of law on the ground that there were insufficient facts to deal with the issue of procurement law. The first Defendant and the Plaintiff filed supplementary facts. These facts support the finding that there was a bid process and the contract was awarded to the Plaintiff. Thereafter the burden was that of the Defendant to prove any failure to comply with the law. This burden was not satisfied by the agreed facts. Namely sections 101 – 103 of the Evidence Act are relevant and they provide as follows:

“101. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

The burden is on the Defendant to prove that the award was not in compliance with the PPDA Act because they want to prove that the contract was not awarded according to law.

Secondly, this is supported by section 102 which further prescribes on whom the burden of proof lies. The second Defendant's defence is bound to fail unless it can prove that the contract is illegal. To prove that the contract is illegal it must produce facts to support the ingredients of the alleged illegality. Section 102 of the Evidence Act provides that:

“102. On whom burden of proof lies.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

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Lastly the above two sections are further supported by section 103 which deals with the burden to prove particular facts and which provides as follows:

“103. Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

In the agreed facts the Defendants do not have any facts about the contracts committee and how the contract was awarded. The only agreed fact was that the consent of the Attorney General under article 119 (5) of the Constitution of the Republic of Uganda was not obtained prior to signing the contract. This issue of the Attorney General’s consent was resolved against the Defendant in my ruling of 15<sup>th</sup> December 2015. The Attorney General’s State Attorney submitted without evidence that the contract was never approved by a properly constituted Contracts Committee as required by section 55 of the Public Procurement and Disposal of Public Assets Act which provides that all public procurement and disposal shall be carried out in accordance with regulations made under the Act. She cited Regulation 17 (1) and (2) of the Local Government (Public Procurement and Disposal of Public Assets) Regulations S.I. No. 39 of 2006. I have already ruled that these Regulations of 2006 cannot apply to a contract of 2004 since they do not have retrospective application. Secondly, it was submitted that there was no minute in evidence of Kawempe Division Contracts Committee awarding the contract. There is no evidence adduced to support and the submission.

As far as the second Defendant is concerned, its Counsel relied on section 3 of the Public Procurement and Disposal of Public Assets Act for the definition of a contract as the result of the procurement and disposal procedures and proceedings. The contract had to be a contract executed pursuant to a bid award of the Contracts Committee. Secondly, the Defendant’s Counsel relies on section 59 of the Public Procurement and Disposal of Public Assets Act for the submission that all procurement shall be approved by the Accounting Officer prior to the commencement of any procurement process. However no evidence was adduced about what actually happened.

The submissions of the Defendants are submissions from the bar. In the premises there is no relevant fact to consider under the provisions of the PPDA Act and therefore the facts as they stand show a valid contract after a bid award and acceptance of offer executed by the Second Defendant through its Accounting Officer the Town Clerk and the Permanent Secretary Ministry of Local Government.

I further make reference to evidence admitted in the form of a certificate of completion of works issued to the Plaintiff. The certificate is dated 17<sup>th</sup> March 2005 and was issued by the Division Engineer/Project Manager and it is written there under as follows:

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“Pursuant to clause 55.1 of the Conditions of Contract, it is hereby certified that the Contractor M/s Engineers Investment Limited has satisfactorily completed the above works to the satisfaction of the supervision and in accordance with the contract agreement.”

The evidence is proof from the person responsible for certifying whether the works had been done to the requisite standard and whether the Plaintiff satisfactorily carried out the contract. The contract was necessary hence the invitation for bids which is an admitted fact. The invitation for bids was advertised in the Newspaper forms part of the agreed facts. The attached advertisement reads as in part as follows:

"(i) The City Council of Kampala's mission statement is to provide and facilitate the delivery of quality, sustainable and customer oriented services efficiently and effectively. The City Council of Kampala (KCC) intends to contract out the provision of Solid Waste Management Services in Kawempe Division. This is one of the measures to ensure that the management of solid waste in the division is carried out to acceptable standards.

(ii) The Government of Uganda has received a credit from the International Development Association (IDA) towards the cost of the Local Government Development Programme Cr. 3295 – UG and intends to apply part of the funds to cover eligible payments under the contract for Solid Waste Management Services in Kawempe Division, Contract Identification No. ASD/SWM/KAW – 01.

(iii) The Ministry of Local Government and Kampala City Council (the Employer) invites sealed bids from eligible bidders for execution of the Solid Waste Management Services in Kawempe Division (hereinafter also referred to as "The Works")...."

There are 11 paragraphs in the advertisement which include a notice to the public that the bids will be valid for a period of 105 days after the deadline for bids submission and must be accompanied by a bid security of Uganda shillings 25,000,000/= or its equivalent in a freely convertible currency. It was further written that the bids would be submitted not later than 20<sup>th</sup> of March 2003 at 10.00 AM at which time they would be opened in the presence of the bidders who wish to attend.

Last but not least the responsible persons under the PPDA Act 2003 namely the Town Clerk as the accounting officer and the PS Ministry of Local Governed signed the contract in which it is represented that the Plaintiff's bid was accepted and the contract was offered to the Plaintiff and the Plaintiff accepted. The burden shifted to the Defendants and in the absence of any other evidence to counter the Plaintiffs evidence the issue of alleged illegality does not arise and the Plaintiff's suit for payment and consequential orders will succeed.

In case I am wrong on the issue of lack of evidence I note that the second Defendant and the Ministry of Local Government represented in the advertisement to the public that funds were

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available for the project and a credit had been received by the Government from IDA for purposes of the project. Secondly, further evidence from the admitted facts in the certificate of completion admitted, prove that the Plaintiff carried out the work to the satisfaction of the Defendant. Thirdly, the question is what would motivate the Defendants to deny the Plaintiff payments after satisfactory performance? Fourthly, the practical result has been to deny the Plaintiff funds meant for the project after the work has been satisfactorily done. The work was done to the satisfaction of the person appointed by the second Defendant to evaluate the works and issue a certificate of completion. Fifthly, the Plaintiff was paid Uganda shillings 30,000,000/= in part payment and the amounts owing to the Plaintiff are not denied.

There are several unanswered questions that the court is confronted with. For instance was the money that was advertised for the knowledge of the public and potential bidders ever appropriated to and reflected in the budget of the second Defendant? Specifically was it appropriated to the project under the budgetary rules? If so what happened to the money for the project after the work was done to the satisfaction of the Defendants? What do the accounting rules and procedures provide? These questions ought to be answered before an inquiry into any illegality can be concluded. The purpose of every statute is deemed to be the good of society to which it applies. This good intention is deemed to be part of the objective of the Public Procurement and Disposal of Public Assets Act 2003.

Section 55 quoted by the first Defendants Counsel just provides that:

“All public procurement and disposal shall be carried out in accordance with the rules set out in this Part of the Act, any regulations and guidelines made under this Act”.

It does not give the consequences of non compliance. Secondly section 59 (3) quoted by the second Defendant’s Counsel provides that:

“All procurement or disposal requirements shall be approved by the Accounting Officer prior to the commencement of any procurement or disposal process.”

As we noted above the Town Clerk signed the contract. The Town Clerk is an accounting officer under the Local Government Act

I am of the firm view that unless a statute expressly forbids something and even provides a sanction for disobedience, what it forbids may not necessarily be void for non compliance, neither is it an illegality. Secondly non compliance with the statute should not be used to defraud persons of what they have earned with the consent of the Defendant who hired them and approved their services. The claimant in such cases can claim under a void contract under the principle of *quantum meruit* since the contract is not illegal. Thirdly, a statute should not be used as an instrument to perpetrate fraud against persons who have been hired to provide services and who provided those services to the satisfaction of the procurement and disposal entity.

I will start with the first issue as to whether the statute expressly forbids something and whether breach is an illegality. The question of whether a statute prohibits something and makes breach illegal depends on the language used. I considered the same point in **Finishing Touches vs. Attorney General** (supra) where I quoted from several authorities and will repeat some here.

Ordinarily non observance of a mandatory condition is void and not necessarily illegal. According H.W.R. Wade in his textbook, Administrative Law Fifth Edition at page 218:

"Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose."

He further noted that the same condition may be mandatory and directory at the same time; it may be mandatory as to substantial compliance, but directory as to precise compliance." In **Cullimore v Lyme Regis Corporation [1961] 3 All ER 1008** Edmund Davies J at pages 1011 – 1012 reproduced the principles for determining whether an enactment is mandatory or directory enactment from Maxwell on Interpretation of Statutes as follows:

Maxwell on Interpretation of Statutes (10<sup>th</sup> Edition), at p 376:

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment ... *But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.*"

It was not upon the Plaintiff to get the minutes of the contract committee. It was the duty of the Accounting Officer who is the Town Clerk to inform the Plaintiff of the award and to write a letter of offer of the contract. In other words the Plaintiff had no control over the internal process of the second Defendant and should be satisfied by the representations, if any, of the Town Clerk about the award of contract. Furthermore in **Cullimore v Lyme Regis Corporation [1961] 3 All ER 1008** Edmund Davies J referred to the judgment of Sir Arthur Channel, in *Montreal Street Railways Co v Normandin* ([1917] AC at pp 174, 175) where Maxwell on Statutes is quoted to the effect that:

"... *where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those*

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*entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only.” (Italics mine)*

The principle is also set out in **Halsbury's laws of England Fourth Edition Reissue volume 44 (1) paragraph 1238:**

"Requirements are construed as directory if they relate to the performance of a public duty, and the case is such that to hold void acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without at the same time promoting the main object of legislature."

Innocent third parties should not suffer losses or be deprived of their money earned due to the culpability of officials in the procurement and disposal entities. To make third parties liable, it should be shown that they participated in the breach of the relevant statutory provisions. According to H.W.R. Wade (supra) very often legislature does not prescribe the consequences of non compliance and the court must determine the question. He wrote at page 219:

"It is a question of construction, to be settled by looking at the whole scheme and purpose of the Act and by weighing the importance of the condition, the prejudice to private rights and the claims of the public interest."

I have carefully considered the statutory provisions quoted by both Counsels. These are sections 55 and 59 (3) of the Public Procurement and Disposal of Public Assets Act 2003. Starting with section 55 of the Public Procurement and Disposal of Public Assets Act 2003, does it forbid anything? Section 55 provides as follows:

“All public procurement and disposal shall be carried out in accordance with the rules set out in this Part of the Act, any regulations and guidelines made under this Act”.

The section does not forbid anything. It provides that procurement and disposal shall be done according to the Act. There is in any case no evidence to suggest that the Act was not complied with. Even if it was not, the consequences of disobedience was not provided for or quoted by the Defendants Counsel. The question I had was consequence of disobedience to which provisions? The regulation quoted by the first Defendants Counsel was promulgated in 2006 after the contract had been executed and a certificate of completion issued. This is Regulation 17 (1) and (2) of the Local Government (Public Procurement and Disposal of Public Assets) Regulations S.I. No. 39 of 2006.

Secondly, section 59 (3) quoted by the second Defendant's Counsel provides that:

“All procurement or disposal requirements shall be approved by the Accounting Officer prior to the commencement of any procurement or disposal process.”

I noted that the Accounting Officers namely the Town Clerk for the second Defendant and the Permanent Secretary Ministry of Local Government signed. There is no evidence that the procurement was not approved. It was even advertised and the advertisement was admitted in evidence. Third parties cannot know whether the accounting officers approved the procurement prior to commencement of the procurement or disposal process or not. That notwithstanding was it an illegality?

What is an illegal contract? According to the case of **Bostel Brothers, Ltd versus Hurlock [1948] 2 All ER 312**, work was done under a licence in contravention of a statutory provision and the Defendant succeeded in avoiding the contract. The applicable law is that a contract executed in violation of a statutory provision is void. In the words of Somervell L.J at page 312:

“What is done in contravention of the provisions of an Act or Parliament cannot be made the subject-matter of an action.”

There has to be a contravention of the provision of an Act of Parliament for the contract to be illegal. In **Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1987] 2 All ER 152** Kerr LJ held that it is settled law that any contract prohibited by statute, either expressly or by implication is illegal and void.

In the instant case the Plaintiffs contract was not prohibited by statute. It was in fact advertised for bids to be made for an award of the contract. Finally I find support for this view in the textbook of D.J Bakibinga; **Law of Contract in Uganda, Fountain Publishers 2001** where he wrote at page 93 that:

“A contract which is illegal is void. Illegality may manifest itself in four main ways. First, in the formation of the contract e.g. where an unlicensed moneylender makes a loan. Second, in the performance of the contract e.g. a contract to commit a crime. Third, in the consideration for the contract. Finally, illegality may be evident in the purpose for which the contract is made; for instance where a vehicle is hired for the purpose of smuggling items into the country. The contract is illegal if it is (i) contrary to public policy and (ii) forbidden by statute.”

Finally according to Halsbury’s Laws of England 4<sup>th</sup> Edition reissue Volume 9 (1) Paragraph 836 at page 595:

“Some contracts may be illegal in the sense that they involve the commission of a legal wrong, whether by statute or the common law or because they offend against the fundamental principles of order and morality. Less objectionable contracts may be simply void by common law or statute”

In the Plaintiff's case what is alleged in the prohibition of statute. However, there is no evidence of illegality in formation of contract. The contract was executed after bids were invited. Secondly, the performance was approved through a certificate of completion. Thirdly, the consideration is an agreed contract sum and not illegal. The purpose of the contract is legitimate service of Solid Waste Management. The contract was not contrary to public policy. It was simply for services to the community. The contract was not prohibited by statute. What the Defendants alleged is that the due process was not followed by the second Defendant's officials in the award of contract and I have dealt with that issue above. The Plaintiff should not be penalised for the culpability, if any, of the Defendant's officials.

The way the provisions of the Public Procurement and Disposal of Public Assets Act 2003 were applied by the second Defendant was meant to defraud the Plaintiff of the consideration for services provided. In **Rochefoucauld vs. Boustead [1897] 1 Ch. 196** Lindley L.J. agreed with the Plaintiff on the general principle that a statute should not be used as an instrument of fraud. In that case, the Plaintiff has made a conveyance to the Defendant and it was not in writing as required by the Statute of Frauds. The conveyance was to the Defendant to hold the land in trust for the Plaintiff. The Defendant eventually sold the land and claimed that it was his as a beneficiary. He had a defence to the action under section 7 of the Statute of Frauds which as judicially interpreted provided that it was necessary to prove by some writing signed by the Defendant that the conveyance to him was subject to some trust. It was submitted that the Statute of Frauds could not prevent the proof of a fraud and it was fraud for a person to whom property had been conveyed to hold as a trustee for the benefit of the transferor to claim the land himself. Lindley L.J. held that other evidence was admissible to prove the fraud to prevent the Statute of Frauds being used to commit a fraud.

The services in question were advertised. There is no evidence of what happened except that the Plaintiff and the second Defendant's officials signed a contract which purports to include a bid offer acceptance and other documents used in procurement. Secondly, the second Defendant's official issued a certificate of completion showing that the work was done to satisfaction. The Plaintiff demanded payment and Uganda shillings 30,000,000/= part payment was made to it. The balance was subsequently denied and the Defendant counterclaims for it. The second Defendant wants to keep money for services received and enjoyed to satisfaction. This is a clear case of an attempt to defraud a person who has provided satisfactory services under a contract awarded by and executed by the Defendant.

In the premises, as I held above in case I am wrong on the holding that there is no evidence to rebut the Plaintiff's claim and that there was an illegality it would be my holding that the Public Procurement and Disposal of Public Assets Act 2003 cannot be used in the manner the second Defendants officials have done to defraud a person who has provided satisfactory services after the Defendants officials awarded the contract, executed a written contract, certified that the work was done to satisfaction, make partial payment and then attempted to rely on their own illegality

to deny the Plaintiff the fruits of its labour. Moreover, it was represented to the public that credit was obtained for the project and money was available to make the payment. It is the Defendant's officials in case of any culpability who should be punished.

In the absence of any evidence of corruption on the part of the Plaintiff the Plaintiff's suit succeeds with costs and the second Defendant's counterclaim is dismissed with costs.

#### Remedies:

I have carefully considered the issue of remedies. I will start with the admission of fact that the Plaintiff was issued a certificate of completion on 17<sup>th</sup> March, 2005 by the project manager of the second Defendant. Secondly it is provided in paragraph 6 of the supplementary memorandum of agreed facts that a sum of Uganda shillings 30,000,000/= was paid by the Defendants to the Plaintiff as part payment for the services rendered. This left a balance of Uganda shillings 41,312,436/=. It is further agreed that that clause 43.1 of the contract stipulated that the employer shall pay the contractor amounts certified by the project manager within 56 days of the date of each certificate. Secondly if the employer makes a late payment the contractor shall be paid interest on the late payment in the next payment. Interests shall also be calculated from the date by which the payment should have been made up to the date when delayed payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made. Uganda shillings 30,000,000/= was paid on 14<sup>th</sup> June, 2010.

The parties agreed what would happen if payment is delayed and that interest would be charged on delayed payments at commercial rates of interest.

The Plaintiff submitted that the Defendant admitted being indebted to the Plaintiff in the amount of Uganda shillings 71,312,436/= out of which they paid the Plaintiff Uganda shillings 30,000,000/= on 14<sup>th</sup> June, 2010 leaving a balance of Uganda shillings 41,312,436/=. Secondly in, there is with clause 43.1 of the conditions of contract, the Defendants were obliged to pay interest at the prevailing rate to the Plaintiff if the payments under the payment certificate were not made within 56 days. The Plaintiff's Counsel submitted that the prevailing rate of interest was at 19.5% which makes up for the figure of Uganda shillings 139,181,202/= at the date of filing the suit.

Applying the rate of interest of 26% per annum from 14<sup>th</sup> June, 2010 when the last payment was made until payment in full on the compounded basis, interest for the period June 2010 to 2011 will be Uganda shillings 32,195,676/=. For the period 2011 to 2012 it will be Uganda shillings 39,600,682/=. For the period 2012 to 2013 would be Uganda shillings 48,208,839/= and for the period 2013 to 2013 would be Uganda shillings 59,911,872/=. Finally for the period 2014 – 2015 it from Uganda shillings 73,691,602/=.

Counsel prayed that the Defendants are ordered to pay interest to the Plaintiff to the tune of Uganda shillings 254,108,674/= by 22<sup>nd</sup> September, 2015. He submitted that the interest should continue and accruing until payment in full.

The Plaintiff further prays for the award of general damages on account of the inconvenience it has been subjected to as a result of being kept out of its money by the Defendants. Finally the Plaintiff's Counsel prays for costs of the suit.

In reply the second Defendant's Counsel submitted that the remedies are not available to the Plaintiff because the Plaintiff cannot benefit from its own illegality and they prayed that the suit is dismissed with costs.

For the Attorney General is part, the state attorney submitted that the rate of interest of 25% per annum does not appear in evidence and is speculative. Secondly an award of interest is discretionary and according to the case of **Harbutts Plasticide Ltd versus Wayne Tank and Pump Company Ltd (1970) 1 QB 447** where Lord Denning held that the basis for an award of interest is that the Defendant has kept the Plaintiff out of his money and the Defendant has had the use of it himself. She prayed that the prayer for interest is disallowed.

Lastly the Attorney General's Counsel prayed that general damages are also disallowed and the suit should be dismissed because the Defendant's contention is that the Plaintiff is not entitled to any of the reliefs prayed for.

### **Resolution of the issue on available remedies**

I have carefully considered the issue. The Plaintiffs claim is for the balance of the amount on the certificate, interest, general damages and costs. I considered a similar matter in **Excel Construction Ltd vs. Attorney General HCCS No. 3 of 2007** where I held that the amount for damages was the amount agreed to as interest charged on any delayed payments according to the relevant contractual clause. In this case the parties have agreed to the amount chargeable as damages for any delay in payment in paragraph 43.1 of the Conditions of Contract. Upon breach of the contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interests from the time when it became payable under the contract or as the court may allow (See In **Halsbury's laws of England fourth edition reissue volume 12** (1) and paragraph 1063 thereof page 484). Furthermore Paragraph 1065 of Halsbury's laws of England fourth edition reissue volume 12 (1) paragraph 1065 at page 486 provides that:

"The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach, then it represents the agreed damages, called liquidated damages, and it is recoverable without the necessity of proving the actual loss suffered."

In the case of **Suisse Atlantique Société D'armement Maritime S A v N V Rotterdamsche Kolen Centrale [1966] 2 All ER 61** HL Viscount Dilhorne held at page 69 that the Plaintiffs cannot recover more than the agreed damages in the contract. He said:

“Here the parties agreed that demurrage at a daily rate should be paid in respect of the detention of the vessel and, on proof of breach of the charter party by detention, the appellants are entitled to the demurrage payments without having to prove the loss which they suffered in consequence.

Clause 43.1 of the general terms of contract speaks for itself and provides as follows:

“Payments shall be adjusted for deductions for advance payments and retention. The Employer shall pay the Contractor the amounts certified by the project manager within 56 days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date at which payment should have been made up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made.”

I considered the very same wording of clause 43.1 in *Excel Constructions vs. Attorney General* (supra) when I said:

“In the context of the clause the answer is provided by the method prescribed for calculation of interest under clause 43.1 itself. It is provided that *"interest shall be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made."* It is apparent from the contractual provision that interest is calculated from the date when payment is considered delayed which is 28 days after each certificate up to the time when delayed payment is made.”

In the above judgment I held that there was no provision for compound interest under the clause. Interest was simple interest on the delayed amount.

It is an agreed fact that the Plaintiff was issued a certificate on the 17<sup>th</sup> of March 2005. Payment was made on the 14<sup>th</sup> of June 2010 of Uganda shillings 30,000,000/=. On the 19<sup>th</sup> of Oct 2006 the Plaintiff claimed 71,312,436/=.

It is clear from the pleadings that Defendant did not include interest for delayed payments when it was made on the 14<sup>th</sup> of June 2010. What is clear is that only a portion of the total claim was paid and the total claim of Uganda shillings 71,312,436/= is the amount pursuant to the certificate of completion as we shall note below. The plaintiff on the other hand sought payment

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of interest on an amount of Uganda shillings 139,981,202/-. I have failed to establish how this amount was arrived at.

However from the admitted facts the Plaintiff is entitled to 41,312,436/= pursuant to a certificate of completion dated March 2005 and which amount is the balance after payment of the Uganda shillings 30,000,000/=. Interest on the delayed amount starts running in May 2005. The claim was however made in 2006 and is pleaded in Paragraph 5 (c) of the Plaint as an amount by that time of Uganda shillings 71, 312,436/=. This amount is admitted in paragraph 5 (d) of the Written Statement of Defence of the second Defendant where it is averred that the certificate was equivalent to a total of Uganda shillings 71,312,436/=. Secondly it is admitted in paragraph 4 (c) that the certificate was issued on the 17<sup>th</sup> of March 2005 signifying the successful completion of the works.

Interest on delayed payment therefore started running 56 days after the certificate of completion was issued.

I will therefore award interest on the principal sum of Uganda shillings 41,312,436/= at 19.5 % per annum from the 1<sup>st</sup> of June 2006 until when the suit was filed in August 2012 as expressly agreed in clause 43.1.

It follows that the first instalment paid was also delayed and interest is also awarded on the delayed amount of Uganda shillings 30,000,000/= already paid at a rate of 19.5% per annum from 1<sup>st</sup> June 2006 till when it was paid on the 14<sup>th</sup> of June 2010.

Further interest is awarded at the rate of 21 % per annum on the aggregate amount at the time of filing the suit in August 2012 till date of judgment.

Last but not least interest is awarded on the aggregate amount at the date of judgment at the rate of 20% per annum from the date of judgment till payment in full.

With regard to the claim for general damages, because the parties agreed on the rate of damages for delayed interest the Plaintiff is not entitled to general damages.

Costs follow the event and the Plaintiff is awarded costs of the suit.

Judgment delivered in open court on the 7<sup>th</sup> of October, 2016

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

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Counsel Isaac Bakayana for the Plaintiff.

Ritah Mutuwa on brief for Dennis Byaruhanga Counsel for KCCA

Attorney General is absent

None of the Parties are present

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

7<sup>th</sup> of October, 2016