

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 481 OF 2014**

BM CONSULT (1999) LIMITED}PLAINTIFF

VS

UGANDA NATIONAL FARMERS FEDERATION}DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this action against the Defendant is for damages, interests and costs of the suit for breach of contract. The action as disclosed in the amended plaint is that sometime in 2007 the Defendant contracted and engaged the Plaintiff for provision of consultancy services in the form of a feasibility study for a proposed construction of a multi-storied building to be known as the Uganda National Farmers Centre at Plot 27 Nakasero Road Kampala. The feasibility study which was a pre-requisite to sourcing for a building project financier was completed in August 2007 and presented to the Defendant's National Executive Committee which unanimously approved it. The Defendant acting on the strength of the feasibility study applied for and was granted funding for the building project by the National Social Security Fund (NSSF). On 15th August, 2008 the parties executed a written contract which set out the party's rights and obligations in which clause 2 provided that the Defendant would remunerate the Plaintiff a gross fee of 2% of the total approved project cost value. The Plaintiff fully performed its obligations under the contract and on 4th and 11th October, 2008 presented 2 invoices for payment of UGX. 106,200,000/- and 417,368,454/- respectively though the Defendant refused to settle the payments due.

The Defendant filed an amended written statement of defence in which they deny the Plaintiff's claims. The content that the suit is premature and not properly before the court for failure to comply with clause 8 of the agreement and ought to be struck out with costs. The Plaintiff denies that the BOOT Agreement was as a result of the Defendant acting on the strength of the Plaintiff's feasibility study. The Defendant acknowledges receipt of Annexure A to the Plaintiff's amended plaint but avers that the same was an offer which was later revoked by the offeror. The Defendant avers that Annexure B to the Plaintiff's amended plaint the basis of the Plaintiff's amended plaint's paragraphs 4(c) and (d) which was a contingent contract whose material part failed to accrue thus rendering the contract void.

The Plaintiff is represented by Counsel Arthur Murangira of A. Murangira Advocates while the Defendant is represented by Counsel Ben Wacha of Victoria Advocates and Legal Consultants.

Issues:

1. Whether there was a contract between the parties?
2. Depending on the answer to issue (1) above, whether the contract was rendered void on account of failure of accrual of a material part thereof?
3. Depending on the answer to issue (1) and (2) above, whether the Defendant breached the contract?
4. What remedies are available to the parties?

I will start with the submissions of the Plaintiff's Counsel on the first issue as to **whether there was a contract between the parties** to which Counsel submitted that there is a valid and binding contract between the Plaintiff and the Defendant. In establishing what amounts to a valid contract Counsel made reference to the case of **Dr. Karuhanga vs. N.I.C & Another (2008) HCB at page 151** for the holding that no particular formality is required for creation of a valid contract. A contract may be oral, written, partly oral and partly in writing or it can be inferred from the conduct of the parties. With reference to the above authority Counsel submitted that PW1 testified that he as a director of the Plaintiff received a telephone call from the president of the Defendant with an offer to the Plaintiff for provision of consultancy services to the Defendant organisation to which payment was contingent upon the Defendant securing financing for the construction project. A written contract was concluded on 15th October, 2008. PW1 conducted a board meeting where the offer was accepted made and PW1 and PW2 were appointed as the Plaintiff's agents in the transaction. Payment due to the Plaintiff for services to be rendered was agreed and fixed at 2% of the total project cost which was fixed at USD 12,603,816 and payment for additional services rendered was agreed at UGX. 106,200,000. The Plaintiffs performed their part of the contract and delivered a feasibility study report which was then used by the Defendant to apply for and secure an offer for funding from NSSF as communicated by EXHIBIT P2.

He further submitted that both parties had capacity to contract. It is an agreed fact in the amended joint scheduling memorandum that both the Plaintiff and Defendant companies are duly incorporated and carry on business in Uganda and could enter into a legally binding contract. The evidence adduced is that the contract between the parties was partly in writing and partly oral where the written part is evidenced by Exhibit P3 and the oral under Exhibit P4 (b) which evidence remained unchallenged and the contract was a legal one for all purposes. Counsel pointed out that the Defendants challenged the validity of Exhibit P3 on grounds that it was signed by a person who is not a recognised official of the Defendant who is the Defendant's Chief Executive Secretary. He contended that only the President and General Secretary of the Defendant have the authority to sign a contract such as Exhibit P3. He relied on Section 33(1) (a)

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and (b) of the Companies Act Cap. 110 which concerns itself with authority which is either express or implied and submitted that the officials of the Defendant in particular the C.E.S had express or implied authority of the Defendant which they got from none other than the NEC which is for all intent and purposes the controlling mind of the Defendant in accordance with Article 6(i) and (iv) of Exhibit D1. In the alternative that even if it were taken that the C.E.S had no authority of the Defendant to sign Exhibit P3, evidence in Exhibit P8 shows that the unauthorised act was ratified by the Defendant which made the contract valid and invited court to find that there was a good and valid contract between the parties on the basis of the law and evidence before it and in signing Exhibit P3 the Defendant's C.E.S had actual authority or the ostensible authority to do so. The Defendant is barred by estoppels from denying the existence of the resultant contract.

In dealing with the second issue on **whether the contract was rendered void on account of failure of accrual of a material part thereof**. The Plaintiff's submission is that this issue must be answered in the negative because of the following reasons; The Defendant did not offer by way of pleadings the particulars of the so-called material part of contract that failed to accrue and no evidence was led by the defence to establish the existence of the material part of the contract or how it failed to accrue thereby rendering the contract void. He further submitted that it is trite law that he who alleges must prove therefore the burden of proof lay on the Defendant to supply evidence in support of the alternative defence and the Defendant failed in this duty, and that therefore the alternative defence must equally fail.

In regard to the issue on whether the Defendant breached the contract. In resolution of this issue Counsel made relied on **The Concise Law Dictionary, P.G Osborn, 5th Ed. Sweet & Maxwell at pg. 55** where breach of contract is defined to mean a breaking of the obligation which a contract imposes, which confers a right of action for damages on the injured party. He then submitted that on the facts in the case, it is clear that the Defendant had an obligation to pay the Plaintiff for work done by it especially following the materialisation of the contingency upon which the contract was premised which obligation they failed to perform. This is supported by the uncontroverted evidence of PW1 that on 4th and 11th October, 2008 he prepared and presented 2 invoices Exhibit P4 (a) and (b) to the Defendant for payment of USD 254,493 and UGX 106,200,000 respectively which they refused to settle. He therefore submitted that the Plaintiff has proved on the balance of probabilities that the Defendant is in breach of contract on account of its failure to meet its payment obligations there under.

In resolution of the issue on **what remedies are available to the parties**, the Plaintiff's Counsel submitted that by paragraph 3 of the amended plaint they claimed for damages for breach of contract, interest and costs of the suit and for an order for payment of USD 254,493/- as unpaid contract price and a further order for payment of UGX.106, 200,000/- also as unpaid contract price, general damages for breach of contract and interest on general damages.

In reply on the issue of **whether there was a contract between the parties**, the Defendant's Counsel pointed out that in their written submissions the Plaintiff attempted to depart from their pleadings and it is trite law that a party is bound by its pleadings and cannot be allowed to depart from them. The Defendant's Counsel relied on the case of **Kaggwa vs. Kolin Insaat Turizm and 2 others CS 318 of 2012**, where Masalu Musene held *that ...needless to emphasise parties are bound by their pleadings. That is the law practice...*

In the alternative he submitted on whether there was any oral contract between the parties. He submitted that during cross examination Mr. Deo Bigirwa testified that the offer was by phone from Hon. Frank Tumwebaze the then president of the Defendant which remains an allegation not proved by any evidence. He relied on Section 103 of the Evidence Act for the proposition of law that the burden to prove that such an offer was made by Frank Tumwebaze to a director of the Plaintiff lies on the Plaintiff and in the absence of testimony to that effect by Frank Tumwebaze that fact remains unproved. Because it was not proved that Frank Tumwebaze made any offer to the Plaintiff on behalf of the Defendant, any arrangement purportedly made by the Plaintiff with an unknown person cannot form the basis of a contract between the Plaintiff and the Defendant. He prayed that court finds that there was no verbal offer made by the Defendant to the Plaintiff as alleged and the same finding be made in respect of the offer alleged to have been made by Jotham Katumusiime on behalf of the Defendant to the Plaintiff since he was not called as a witness. The Defendant's Counsel further wondered whether there was a written contract between the parties. He submitted that Exhibit P3 on which the Plaintiff based the existence of a written contract is not duly executed because it was signed by someone who purports to be the Chief Executive Secretary of the Defendant who is not known to the Defendant and which person was not produced in court to own up to their document and the court cannot determine the connections between the owner of the signature and the Defendant. He further submitted that the said document was never proved before court as required by the provisions of Section 63 of the Evidence Act. This said document is witnessed by the same person who never testified as to how she was connected to the Defendant and whether she was given authority to witness. Counsel relied on a page from **Phipson on Evidence, 16th Edition Volume 3 paragraphs 40-3** that *the handwriting and signature of unattested document may be proved by calling the writer* and as such avers that there was no contract signed on its behalf in this suit and Exhibit P3 ought to be struck off the court record.

The Defendant's Counsel further submitted that under clause 1 of Exhibit P3 which is alleged to have been signed on 15th August, 2008, wording of the contract is that the production of a feasibility report was supposed to have been submitted 30 working days from 15th August 2008 but the Plaintiff failed to perform according to the terms of its contract and should not blame the Defendant for non-performance of its part.

In reply to issue 2 on **whether the contract was rendered void on account of failure of accrual of a material part thereof**, the Defendant's Counsel submitted that without prejudice *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~ *&*\$\$# xtra+ *maximum735securityx 2017 style*

even if it were to be found that EXP3 had any connection to the Defendant, the Defendant still avers that the contract is null and void in as far as its terms were depended on a condition precedent which never materialised. He submitted that as indicated under part (iii) of issue no. 1, there is no evidence that a feasibility study was carried out by the Plaintiff under the terms of the contract and no evidence was adduced by the Plaintiff to show that the project financiers ever approved a feasibility study carried out by the Plaintiff under this contract. He submitted that it was the responsibility of the Plaintiff to adduce evidence from the project financiers that they had approved the feasibility report produced after the 15th August, 2008 as stipulated in the contract. Counsel relied on **Game Concepts vs. Mweru Rogers HCCS No. 71 of 2012** where it was held that *the approval of the feasibility study having been stipulated as a condition precedent its non performance rendered the contract null and void*. He prayed that in answer to this issue court find that the contract is void.

In **reply** to issue 3 on **whether the Defendant breached the contract**, the Defendant's Counsel submitted that under issue 1 the Defendant was not a party to the contract with the Plaintiff and in issue 2 in the alternative submitted that the contract was void on account of non performance of a condition precedent as such it never breached any contract and the issue should be answered in the negative.

In **reply** to the issue on **remedies** the Defendant's Counsel asserted that the Plaintiff has no claims over it and the Defendant prayed that the suit is dismissed with costs to the Defendant.

In **rejoinder** the Plaintiff's Counsel submitted that there is no departure from the pleadings in the plaint as the Plaintiff's claim is founded on breach of contract and the contract was partly written and partly oral and its existence was never challenged in cross examination. He submitted that it is the law of the land that where an issue is omitted by the pleadings but evidence is led on it at trial the court can proceed to pronounce itself on it and this would not amount to a departure from the pleadings. On this note he made reference to the case of **John Nagenda Vs. The Editor of Monitor Newspaper and another(1995) KALR 334 at page 347-348** where on second appeal it was held that *even if any issue is not specifically raised in the pleadings or framed for the decision of the trial court, if evidence is led during the trial of the case on the unpleaded issue and parties canvass the issue or one of the parties does canvass the issue in the trial court, unless the party complaining about the irregular procedure was prejudiced by the irregularity, an appeal court will not interfere*.

Counsel also submitted that the case of **John Kaggwa vs. Kolin Insaat Turizm and another HCCS No. 318 of 2012** relied on by the Defendant's Counsel is not binding on this court and is wholly distinguishable from the facts of the present case. In the premises the Defendant has not demonstrated that it suffered any prejudice and the court should be pleased to apply the principle in **John Nagenda** (supra) and disregard the defence submission which is not followed by a prayer for the attended sanction against the Plaintiff.

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Counsel further submitted that the Defendant misconstrued an issue of whether there was any oral contract between the parties as the Plaintiff in resolving issue 1 asserted that it was a contract which was partly written and oral and not that they were 2 contracts between the parties. He further submitted that PW1's testimony as to the verbal offer made by the Defendant's president Hon Frank Tumwebaze is very clear and unambiguous and it is not in dispute that he was the president of the Defendant at the time. Therefore there was no need of producing him as a witness, if they had wished to dispute the verbal offer it was incumbent on them to produce him as a defence witness. He further relied on the English case of **Royal British Bank vs. Tarquand** and submitted that it is trite law that 3rd parties who deal with a company have no obligation to inquire into the internal affairs of the company beyond that which is made public by say registration with the Registrar of Companies. He then prayed that court be pleased to find that the Plaintiff sufficiently proved the existence of a valid offer which formed the basis of the contract between it and the Defendant.

In the reply to the issue of whether there was a written contract between the parties as raised by the Defendant, Counsel for the Plaintiff submitted that Exhibit P3 which is the written contract as proved by PW1 and PW2. It was Jotham Katumusiime who signed it on behalf of the Defendant who was the Chief Executive Officer of the Defendant at the time and the allegation that he is unknown to the Defendant is a departure from their pleadings and an afterthought which ought to be rejected. This is because in their amended written statement of defence under paragraph 6 they referred to him as the person who signed on behalf of the Defendant yet now they allege he did not have authority to do so.

In rejoinder to issue 2 on whether the contract was rendered void on account of failure of accrual of a material part thereof, Counsel submitted that the contract had a contingency element that the Plaintiff would be paid for the services rendered only in the event that the Defendant secured funding for its building project which contingency materialised. PW1 and PW2 further testified that after the production of the feasibility study report Exhibit P1 the Defendant basing on the same applied for funding from NSSF which accepted and communicated as much under Exhibit P2 followed by the signing of the BOOT Agreement Exhibit P5 upon which the Defendant's payment obligation was settled. He therefore submitted that whereas the contract had a contingent element to it, the same materialised as demonstrated and the Defendant became obligated to ensure that the Plaintiff was paid and prayed that the Plaintiff's version be accepted and court find in the negative on this issue.

In regard to issue 3 on whether the Defendant breached the contract, Counsel reiterated its earlier submissions and maintained that the Defendant breached the contract and is therefore liable.

In regard to remedies, in rejoinder the Plaintiff's Counsel reiterated their earlier submissions and prayed that court be pleased to enter judgment for it in the terms prayed for.

Judgment

I have carefully considered the Plaintiffs action as disclosed in the plaint and the defence as disclosed in the written statement of defence. Issues for resolution of any suit are derived from the pleadings under Order 15 rules 1 and 2 of the Civil Procedure Rules. The Plaintiff's claim is for damages, interests and costs of the suit arising out of the cause of action of breach of contract. Specifically the action is founded on the facts disclosed in paragraph 4 that sometime in 2007 the Defendant contracted and engaged the Plaintiff to provide consultancy services in the form of a feasibility study for a proposed construction of a multi-storey building to be known as Uganda National Farmers Centre. It is disclosed that the feasibility study was a prerequisite to source funding for a building project which financing was to be provided by the financier known as National Social Security Fund. The Plaintiff's case is that the feasibility study was completed in August 2007 and presented to the Defendant's National Executive Committee which Committee approved it. The Plaintiff alleged that the Defendant acting on the feasibility study applied for and was granted funding for the building project by National Social Security fund which entered into an agreement described as the Build, Own Operate and Transfer Agreement (BOOT). This was on 1st October, 2007. On 15th August, 2008 the parties executed a written contract which elaborates each party's rights and obligations that included remuneration of the Plaintiff by a gross fee of 2% of the total approved project cost value. It is alleged that the Plaintiff fully performed its obligations under the contract and on 4th of October, 2008 and on 11th October, 2008 presented two invoices for payment of Uganda shillings 106,200,000/= and 417,368,454/= respectively which was not honoured with payment by the Defendant hence the suit. The Plaintiff claims general damages which he asserts is a direct consequence of the breach of contract because of great strain to its business operations and cash flow as a result of the failure to pay.

In the written statement of defence, the Defendant averred that the suit was premature and not properly before the court for failure to comply with clause 8 of the agreement and ought to be struck out with costs. In paragraph 5 of the written statement of defence, the Defendant admits paragraph 4 (a) of the plaint. Paragraph 8 is to the effect that sometime in 2007, the Defendant contracted and engaged the Plaintiff for the provision of consultancy services in the form of a feasibility study for a proposed construction of a multi-storey building. What is denied is that the feasibility study was a prerequisite to the sourcing of financing for the building project or that the Defendant acted on the feasibility study and obtained financing. In paragraph 8 of the written statement of defence the Defendant acknowledged receipt of Annexure "A", a letter from the National Social Security fund dated 7th of April 2008 on the subject of: "FUNDING FOR THE CONSTRUCTION OF THE FARMERS CENTRE ON PLOT 27 NAKASERO ROAD". In the letter it is written that NSSF Board approved the application for the funding of the Farmers Centre under the BOOT arrangement and the funding was to be up to a maximum of Uganda shillings 25,300,000,000/=. NSSF would then recover the principal & interests from the monthly

rental income and from the completed building within a period of 25 years. Thereafter NSSF would transfer the property back to the Defendant after recovering the principal amount and interest thereon. Expected interest was expected at 14% per annum. NSSF required the Defendant to confirm the offer so that they would prepare other necessary documentations attached to the BOOT agreement. In paragraph 8 of the written statement of defence the Defendant avers that annexure "A" quoted above was revoked by the offeror. Lastly, the Defendant averred that annexure "B" to the Plaintiff's amended plaint which is an agreement dated 15th of August, 2008 and in paragraphs 4 (c) and (d) of the plaint which is the basis of the claim, is founded on a contingent contract whose material part failed to accrue rendering the agreement void. For purposes of clarity this paragraph of the plaint stipulates that the Defendant acting on the strength of the feasibility study carried out by the Plaintiff was granted funding for the building project by NSSF under what came to be known as the BOOT agreement between NSSF and the Defendant. Secondly, that the parties executed a written contract which elaborately set out each party's rights and obligations on 15th of August 2008 and that it was agreed in clause 2 thereof that the Defendant would remunerate the Plaintiff with a gross fee of 2% of the total approved project costs.

In the joint scheduling memorandum executed by both the Plaintiff's Counsel and the Defendant's Counsel on 18th March 2015 and filed on court record on the same day relevant facts are agreed to on the basis of the pleadings of both parties namely:

1. The Plaintiff is a company limited by shares and duly incorporated and carries on business in Uganda.
2. The Defendant is a non-governmental organisation duly registered and operating under the laws of Uganda.
3. In July 2007, the Defendant contracted the Plaintiff for the provision of consultancy services in the form of the feasibility study for its proposed construction of a multi-storey building to be known as Uganda National Farmers Centre at plot 27 Nakasero Road Kampala.
4. It was agreed between the parties that the other terms and conditions of the contract would be agreed upon at a later date.
5. In August 2007, the Plaintiffs completed the feasibility study and presented it to the Defendant's National Executive Committee which unanimously approved it.
6. Acting on the strength of the aforesaid feasibility study, the Defendant by letter dated 1st October, 2007 (with the reference), applied to the National Social Security Fund (NSSF) for the funding of the building project.
7. While the Defendant's aforesaid application for funding was still under consideration, the parties executed a written contract on 15th August, 2008 in which it was inter alia agreed that the Plaintiff would be remunerated by the Defendant to the tune of 2% of the total

approved project cost of value and also that full payment will be effected by the Defendant upon approval of the feasibility study by the project financiers (NSSF).

8. The project financier (NSSF) wrote to the Defendant by letter dated 7th of April 2008 wherein it communicated its board's acceptance and approval of the Defendant's aforesaid project financing application together with the requisite ministerial consent thereto.
9. On 10th September, 2008, the Defendant and the project financier (NSSF) entered into a project financing agreement referred to as the Build, Own Operate & Transfer Agreement (BOOT).
10. It is further admitted that on 4th October, 2008 and on 11th October, 2008, the Plaintiff presented two invoices as averred in the plaint for payment and the Defendant failed or refused to settle the payments.
11. Additional facts were agreed to and including the date that it entered into a written contract on 15th August, 2008.
12. The project financier (NSSF) attempted to terminate the BOOT agreement and communicated it to the Defendant. NSSF however agreed to meet "reasonable" costs incurred in the process of formulating the agreement.
13. The Defendant wrote to the Plaintiff by letter dated 19th of July, 2013 informing it of the position in the preceding paragraph above and requested that the Plaintiff to submit a claim for its reasonable costs for transmission to NSSF for settlement.
14. The Plaintiff responded to the letter on 24th July, 2013 further pressing its claim for payment of the full amount under the contract.
15. The Defendant wrote to the Plaintiff again on 18th February, 2014 stating that it had transmitted the Plaintiff's claim to NSSF but the latter had deviated on its earlier undertaking to pay "reasonable costs".
16. The Inspectorate of government concluded a report on 20th April, 2013 in which findings on matters pertaining to the Boot agreement were cited most notable of them being (i) NSSF had taken the decision to dissolve the BOOT agreement which led to protracted negotiations about the costs incurred on dissolution of the agreement. (ii) there was no indication that the Defendant intended to sue NSSF for claims arising from the BOOT agreement.
17. The IGG report also recommended among other things that the claims by the Defendant to NSSF as costs incidental to or as a result of the preparation of the BOOT agreement be determined in accordance with the terms of the agreement and the matter should be settled amicably between the two parties.

These admitted facts go to be very core of the issues agreed between the parties for resolution by the court. It is therefore strange that another issue emerged as to whether there was a contract between the parties. That notwithstanding and in the joint scheduling memorandum, the following are the agreed issues for resolution of the dispute namely:

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1. Whether there was a contract between the parties?
2. Depending on the answer to issue (1) above, whether the contract was rendered void on account of failure of accrual of a material part thereof?
3. Depending on the answer to issue (1) and (2) above, whether the Defendant breached the contract?
4. What remedies are available to the parties?

In view of the pleadings and agreed facts there is generally no need to determine whether there was a contract between the parties as a matter of fact as required by the agreed issue 1. This is because the Plaintiff was engaged by the Defendant and there is a host of correspondence which confirms this. What can be framed for resolution is whether the contract is enforceable. The question of fact of the existence or execution of a written contract is agreed. The Defendant on the other hand has raised an issue as to whether the Plaintiff can depart from its pleadings by asserting that the contract was partially written and partly oral in its written submissions. This submission was partially based on the pleading and the evidence led by the Defendant that the Chief Executive Secretary did not have authority to execute the contract exhibit P3. Without going into the details of the written submissions, the Plaintiff's Counsel submitted that the contract was governed by section 33 of the Companies Act Cap 110 (repealed) and the contention was that whether a contract was wholly or partly oral and partly in writing would be binding on the company so long as it was made on behalf of the company by persons acting under the express or implied authority of the company. The Plaintiff submitted that the initial contract was an oral contract where the Plaintiff accepted the terms of the contract and proceeded to perform on the basis of the oral contract. Thereafter this contract was reduced into writing. Obviously it is apparent from the written agreement giving the facts that are agreed that the feasibility study was conducted before execution of the written contract exhibit P3. The fact that there was an oral agreement is not pleaded and I agree that without amendment of the pleadings, no evidence and submissions can be based on an oral agreement. In any case the Plaintiff relies on the written agreement and the work done prior to that on instructions of the Defendant. Specifically the Plaintiff relies in paragraph 4 of the plaint on a written agreement executed between the parties. Most importantly the fact that there existed a contract between the parties whether implied or not for the Plaintiffs to carry out a feasibility study is an admitted fact and need not be proved. The question inter alia should be whether the Plaintiff and the Defendant are bound by the terms of the contract executed after the event.

I have carefully considered the submissions of both parties on this question including the submissions of the Plaintiff's Counsel in rejoinder that the Plaintiff is not obliged to establish the internal workings of the Defendant on the question of authority of the persons who executed the contract. I find submissions of the Defendants Counsel as to whether there was a contract on the first issue unnecessary to determine on the premises on which he based this argument because the Plaintiff could still recover on the basis of quantum meruit. Secondly, the Defendant would

be barred by the doctrine of estoppels from denying the contract or undertaking in which it actively requested the Plaintiff to submit reasonable costs to the financier following the services rendered by the Plaintiff which are admitted.

The services rendered were confirmed by correspondence of the Defendant mostly written by the Chief Executive Secretary of the Defendant. In exhibit P 11 the Defendant's Chief Executive Secretary wrote to the managing director of NSSF in a letter dated 25th of June, 2008 that there were prequalified companies who were service providers in preparation for the commencement of the project for construction of the farmers centre. The project design and feasibility study consultant was the Plaintiff. In exhibit P12 being a letter addressed to the managing director NSSF dated 15th of October 2008 the Chief Executive Secretary forwarded invoices of consultants on the BOOT project and included the Plaintiff as one of the consultants with a claim of Uganda shillings 106,200,000/=. In exhibit P13 the Defendant again wrote to NSSF for advance payment which will inter alia be paid to the Plaintiff. In exhibit P 14 the chief executive secretary of the Defendant wrote to the managing director NSSF in a letter dated 27th of January 2010 on the concerns of the Defendant about communication to terminate the Boot agreement between the Defendant and NSSF. These documents were exhibited by consent in the proceedings of 8th December, 2015.

On the first point it is clearly stipulated in Halsbury's Laws of England Volume 9 (1) Fourth Edition Reissue in paragraph 1156 that claims for a quantum meruit in respect of work voluntarily done under the contract terminated for breach or under and unenforceable, void or illegal contract are properly regarded as restitutionary. Specifically in paragraph 1158 the learned authors consider work done under an unenforceable, void or illegal contract and write that in some instances, the Plaintiff may recover on quantum meruit in respect of work done under a contract which is unenforceable, void or illegal. They write as follows:

"Where a contract is unenforceable, as a general rule the Defendant is not precluded by the fact of performance by the Plaintiff from pleading the unenforceability. If, however, the contract has been performed by the Plaintiff, and the work has been done by the Plaintiff at the request of the Defendant and of which he has had the benefit, the Plaintiff can recover on quantum meruit notwithstanding the unenforceability of the contract.

Where a contract is void as being made without authority, the Plaintiff who has rendered services and it may be entitled to recover on a quantum meruit..."

In **Craven-Ellis v Canons Ltd [1936] 2 All ER 1066** the Court of Appeal of England per Greer LJ held that the obligation to pay is imposed by a rule of law and not by inference of fact from the acceptance of the goods or services: He said at 1073:

"The decisions in *Clarke v Cuckfield Union Guardians* and *Lawford v Billericay Rural District Council*, are also authorities to the effect that the implied obligation to pay is an

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obligation imposed by law, and not an inference of fact, arising from the performance and acceptance of services. In the last mentioned case the work in respect of which the Plaintiff sued was done in pursuance of express instructions given by the Defendant council, but was not binding on the Defendants because no agreement had been executed under their seal. It was impossible to say as a matter of logical inference from the facts that by accepting the advantage of the Plaintiff's work they had promised to pay him a reasonable sum therefore. Both parties assumed that there was a contract between them, and the acceptance of the work by the Defendants could not in fact give rise to the inference of a promise to pay the reasonable value. For these reasons this case seems to me to show that the obligation is one which is imposed by law in all cases where the acts are purported to be done on the faith of an agreement which is supposed to be but is not a binding contract between the parties."

The evidence presented clearly demonstrates that the Defendant not only accepted the services of the Plaintiff but engaged the services and indeed forwarded the Plaintiffs "reasonable costs" to NSSF for payment. Secondly, the Defendant on the basis of that would be barred by the doctrine of estoppels from asserting that there was no contract or use of the Plaintiffs services in which payment would be made to the Plaintiff whether by the financier or through the Defendant by the financier. The evidence of PW1 and PW2 demonstrates that the Defendant was involved and knew about the engagement of the Plaintiffs for the services rendered and the correspondence only crystallises the issue into a reality well-known to the Defendant.

In the premises, the question of whether there was a contract between the parties would lead to no possible good and I will therefore start with issue number 2 of whether the contract was rendered void on account of failure of accrual of a material part thereof? The basis of this issue is whether the arrangement between the parties was contingent upon the financier funding the building project.

The Plaintiff's Counsel submitted that the issue of whether the contract was rendered void on account of failure of accrual of a material part thereof was a defence raised by the Defendant in paragraph 10 of the amended written statement of defence. He submitted that no evidence was led to establish the existence of the material part of the contract or how it failed to accrue. On that basis he submitted that the issue should be answered in the negative. On the other hand the Defendants Counsel submitted that if exhibit P3 were to have any connection to the Defendant, the contract would be null and void in so far as it stands, it deal with the contingency which never materialised. It stipulates in clause 2 thereof that full payment shall be made by the Defendant upon completion, submission and approval of the project feasibility report by the project financiers. He submitted that there is no evidence that a feasibility study was carried out by the Plaintiff under the contract. Secondly, no evidence was adduced by the Plaintiff to show that the project financiers ever proved a feasibility study carried out by the Plaintiff under the contract. The burden was on the Plaintiff to adduce evidence from the project financiers that they

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had approved a feasibility report produced after 15th of August 2008 as stipulated in the contract. Counsel relied on the case of Morgan versus Bennie (supra) and Game Concepts vs. Mweru Rogers HCCS No. 71 of 2012 for the proposition that non-performance of a condition precedent rendered the contract null and void.

In rejoinder the Plaintiff's Counsel submitted that the contingency actually materialised. This is on the basis that the Defendant produced a feasibility study report exhibit P1 and applied for funding from NSSF which accepted it and communicated the acceptance in exhibit P2. This was followed by the signing of the BOOT agreement exhibit P5.

I have carefully considered the evidence and issue number two is founded on the existence of a written contract as pleaded in the plaint. The said contract was admitted as exhibit P3 and is dated 15th of August 2008. In clause 2 thereof it is provided that the Defendant agreed to pay the consultant a gross fee of 2% of the total approved project cost value. Secondly, it is further agreed that the consultant agreed to perform the task without prior payment. Thirdly, it is provided that full payment shall be made by the Federation/Defendant upon completion; submission and approval of the project feasibility report by the project financiers. Lastly, it is also provided that upon failure to perform the task, the consultant shall forfeit the payment according to the agreement.

I have carefully considered the agreement which is the foundation of the Plaintiff's suit. While the agreement seems to consider a future performance, after 15th August ,2008, the feasibility study had been undertaken and completed. In fact the Plaintiff pleads that the feasibility study was a prerequisite to the sourcing of the building project financier and was completed in August 2007 and presented to the Defendants National Executive Committee which unanimously approved it (see paragraph 4 (b) of the plaint). Secondly, in paragraph 4 (c) the Plaintiff averred that the Defendant acting on the strength of feasibility study applied for and was granted funding for the building project by the National Social Security Fund. In paragraph 4 (d) it is evident that the parties executed a written contract which set out each party's rights and obligations and it was agreed in clause 2 thereof that the Defendant would pay the plaintiff a gross fee of 2% of the total approved project cost value.

There is no doubt in my mind that the Plaintiffs claim is based on clause 2 of exhibit P3 and which reflects the terms on which the plaintiff provided consultancy services. Without having to conclusively resolve the question of whether this written contract is binding on both parties, proceeding from the assumption that it is, the question can still be answered as to whether the suit is premature.

I have accordingly considered the evidence of the Plaintiff as well as that of the Defendant. Starting with the testimony of Deo Bigirwa the company director/financial analyst and shareholder of the Plaintiff, his evidence confirms that the work or the feasibility study and

payment thereof would be contingent upon the Defendant securing financial arrangement from a suitable financier. In paragraph 5 he testified that the feasibility study was required by the Defendant for presentation to suitable financiers for purposes of soliciting for a funding arrangement for the proposed construction project. Secondly, it was also agreed that payment for the consultancy services rendered in the production of the feasibility study would be contingent upon the Defendant securing the financing arrangements from a suitable person and the sum would be 2% of what would ultimately be agreed upon as the approved total project cost between the Defendant and the prospective financier. In paragraph 6 he confirmed that a written contract was executed between the parties exhibit P3. Thirdly, that the project cost was fixed by the project financier under a BOOT agreement exhibit P5. He testified in paragraph 7 of the written witness statement that NSSF approved the Defendant's project and executed the above agreement. Secondly, he testified that additional services were rendered on the request of NSSF in terms of adjustments to the feasibility study. Subsequently he presented two invoices for payment on the basis that the project approved for financing had a value of US\$12,603,816.

I have carefully considered clause 2 of the written contract exhibit P3 and it clearly stipulates that the consultant agrees to perform the task without prior payment. What is prior payment? Secondly it is clearly provided therein that payment shall be made by the Defendant upon completion, submission and approval of the project feasibility report by the project financiers. It is further provided that the Defendant agreed to promptly inform the consultant of any development which may affect the obligation of the Federation and to indemnify the consultant for any loss that would be occasioned. My understanding of the issue is whether payment of the consultant was contingent upon the funding of the project or whether it was contingent upon approval of the project. I have carefully considered the issue and the key phrase that should bear on the interpretation is the use of the word "financier". Did the Defendant obtain a financier for the project? It is an agreed fact that NSSF took a decision to dissolve the BOOT agreement. This agreement is in paragraph 3 (f) of the agreed facts.

I have indeed considered the Defendants evidence particularly exhibit D2 in which the issue of the manner of hiring of the consultants was raised in the minutes of the Defendants National Executive Committee. In minute 48/NEC/08 on matters arising, the meeting was requested to discuss the feasibility study report. The question was whether the agreement between the Plaintiff and the Defendant ought to have been approved by members of the National Executive Committee. The committee also wanted to know how the figure of US\$12 million which was said to be payable to the Plaintiff was arrived at. Another member from Eastern region noted that the project had been introduced to the National Executive Committee and was overwhelmingly supported.

Last but not least NSSF terminated the Boot agreement thereby rendering any arrangement between the Plaintiff and the Defendant without financial support from the financier. I have further considered the testimony of Charles Ogang, the president of the Defendant Federation.

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Aside from raising the question of the authority of the persons who executed the agreement between the Plaintiffs and the Defendant, he testified in writing that they informed the then president during a National Executive Committee meeting that the people providing services related to the project were doing so on goodwill and would be paid by the contractor when the money was released.

The crux of the issue is that NSSF terminated the boot agreement and therefore there was no project financier envisaged between the parties. It was conceded by PW2 during cross examination that NSSF agreed to pay reasonable costs by letter dated 19th of July 2013 from the Chief Executive Secretary of the Defendant exhibit P8. In the letter addressed to the Plaintiffs the Defendant wrote that the agreement between the Defendant and NSSF was unworkable and that NSSF agreed to meet reasonable costs incurred in formulating the agreement. He requested the Plaintiffs to submit reasonable costs backed by supporting documents for transmission to NSSF. On 18th of February 2014 in exhibit P10 the Chief Executive Secretary of the Defendant informed the Plaintiff by letter that they forwarded information supplied by the Plaintiff to NSSF. However there was a change of decision by NSSF deviating from the agreement they initially had.

Subsequently DW1 Mr Charles Ogang testified and was cross examined. He emphasised that his understanding was that the Plaintiffs were providing services voluntarily and in goodwill. They were not working for payment. He conceded that the Defendant surrendered a certificate of title to NSSF under the BOOT agreement but the agreement became unworkable. The question was whether the Defendant had taken NSSF to court and he testified that they were in the process of engaging NSSF about the termination of the agreement. He conceded that the Chief Executive Secretary had authority to write the letters. This is because the executive secretary communicates decisions which had been taken. In the correspondence it was accepted that the Plaintiff was a service provider. NSSF had taken responsibility to meet reasonable costs.

It became apparent that NSSF could have been engaged as a necessary party because payments were expected from the financier and the Defendant was not in a position to meet the Plaintiff's demands. In fact the Defendant dutifully forwarded the Plaintiffs invoices to the financier which as agreed was NSSF. Pursuant to NSSF pulling out of the project, there was no funding for the Plaintiffs services. My understanding of exhibit P3 is that it was agreed that full payment would be made upon the completion, submission and approval of the project feasibility report by the project financiers. It was envisaged that this money would come to the Defendant who would then pay. In the circumstances there is no financier and the issue is whether the initial engagement with NSSF fulfils the terms of the contract. In my opinion, it does not because the phrase used by the parties was 'approval' of the project by 'the financier'. The financier has not approved the project because it pulled out on the ground that it was not workable. However, NSSF agreed to pay reasonable costs. I note that the Defendant was not limited to one financier

and could try to source financing from another source. At this stage of the proceedings, I cannot conclude that the service agreement between the Plaintiff and the Defendant has been frustrated.

The Defendant is under obligation to pay for the services of the Plaintiff upon approval of the project by the financier. In the circumstances, because NSSF pulled out, my conclusion is that the suit is premature to the extent of making the defendant immediately liable to pay since the parties had reached the stage where they were engaging NSSF on the question of reasonable costs and there is correspondence in evidence to this effect. The process of engaging NSSF on the question of reasonable costs was still ongoing according to the President of the Defendant. In the premises, my conclusion is that the Defendant was willing to pay provided NSSF fulfilled its obligations, if any (a matter that is not the subject matter of adjudication in this suit).

The only just order in the circumstances is to make a declaration that the Plaintiff is entitled to reasonable costs payable by the Defendant who was required to source the finance from the project financier. The Plaintiff is not privy to the agreement between the Defendant and any Financier who approves the project for financing. NSSF had initially approved the project pursuant to which the Defendant and NSSF signed the BOOT agreement. In exhibit P2 NSSF by letter informed the Defendant that it had approved the project. However it subsequently pulled out leaving both the Defendant and the Plaintiff in the lurch. It is Defendant's own undertaking to the Plaintiff to pay reasonable costs from money sourced from its partner NSSF in the circumstances. NSSF is not a party and no issue can be determined between it and the Defendant and therefore no order can be made against it.

No order shall be made to determine what reasonable costs the Plaintiff is entitled to. The suit only succeeds with a declaratory order issued under Order 2 rule 9 of the Civil Procedure Rules that the Plaintiff is entitled to reasonable costs upon the Defendant obtaining the necessary financing from the financier as envisaged by the parties in their written agreement and various correspondences admitted in evidence. The Defendant has not taken any concrete steps in this regard. There shall be no consequential order against the Defendant who is for the moment under obligation to source the reasonable costs of the plaintiff. However, the Plaintiff's suit in the limited way held above, succeeds with costs.

Judgment delivered on the 10th of February 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Arthur Murangira Counsel for the Plaintiff

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Kenneth Katungisa Deputy CEO of Defendant in court

Julian T. Nabaasa: Research Officer Legal

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

10/02/2017