

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 335 OF 2012**

**AMBITIOUS CONSTRUCTION COMPANY LTD}.....PLAINTIFF**

**VERSUS**

**UGANDA BROADCASTING CORPORATION}.....DEFENDANT**

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

**JUDGMENT**

The Plaintiff's action against the Defendant was for recovery of Uganda shillings 749,884,386/= being the total sum outstanding under the contract for construction of a television complex, interest thereon at the commercial rate of 30% per annum, general damages for breach of contract and costs of the suit.

The facts disclosed in the plaint are that by a contract made between the Plaintiff and the Defendant on the 31<sup>st</sup> March, 2009 the Defendant contracted the Plaintiff to construct a television complex at the Defendant's premises at Plot No. 17-a9 Nile Avenue, Kampala (works) at the cost of Uganda Shillings 2,541,809,819/=. By virtue of the deed of variation made between the parties in December 2010, the Defendant requested the Plaintiff to carry out additional works worth Uganda Shillings 350,031,602/=. By clause 1.2 of the said deed the contract price of the whole works was varied to Uganda Shillings 2,891,841,421/=. The Plaintiff commenced construction of the works in accordance with the contract and periodically the value of the work executed have been certified by the Project Manager, Creations Consults Africa Ltd in accordance with clause No. 41 of the contract and an interim certificate issued in respect thereof. The Defendant paid on all the interim certificates issued by the Project Manager, Creations Consults Africa Ltd save the interim certificate No. 8R issued on 30<sup>th</sup> May, 2011 for the sum of Uganda Shillings 354,430,881/=. When the Plaintiff completed the additional works under the variation deed, they were inspected by the Project Manager and UDC team and found satisfactory. A final certificate for the said works of the value of Uganda Shillings 349,997,760/= was issued to the Plaintiff on 20<sup>th</sup> December, 2011. Under clause No. 42 of the contract the Defendant was under an obligation to pay the Plaintiff for the works done by the Plaintiff and certified by the Project Manager but to date the Defendant has refused and/ failed and ignored to pay the Plaintiff despite numerous demands and reminders made by the Plaintiff. Clause 45 of the contract required a proportion of 5% of the payment due to the Contractor to be retained by

the Employer and repaid to the Contractor when the defects liability period expires. Although the defects liability period expired on 20<sup>th</sup> February, 2012 to date the Defendant has not remitted to the Plaintiff the sum of Uganda Shillings 45,455,745/= retained by it. By reason of the continued failure /refusal of the Defendant to pay the Plaintiff, the said unpaid funds have lost value owing to the very high inflation rates that the country is experiencing and currently standing at not less than 30% per annum. The Plaintiff has further been denied use of the said funds all of which call for compensation by way of general damages.

The Defendant denied the Plaintiff's claim and counterclaimed for general and liquidated damages for breach of contract and costs of the counterclaim. In the written statement of defence the Defendant proposed to raise a preliminary objection on the point of law on the ground that the deed of variation the subject matter of this suit is an illegality that cannot be enforced by the court. As far as the counterclaim is concerned, it is alleged that the Plaintiff/counter Defendant failed to complete the contract within 10 months in accordance with clause 21.1. The Defendant to the counterclaim was expected to complete the contract and handover by 28<sup>th</sup> February, 2010 but only completed on 17<sup>th</sup> of February 2011. The project was delayed by 355 days without specific approval. The Defendant/counterclaimant was entitled under the contract to liquidated damages at the rate of 400,000/= per day for the delays. The liquidated damages being a total of Uganda shillings 142,000,000/=. Secondly the Defendant to the counterclaim failed to complete the studio complex in accordance with the contract and it had many defects making it unfit for human occupation and cannot be used as a studio at all. As a consequence the counterclaimant has suffered loss and damages for the counter Defendant's breach of contract. The Defendant to the counterclaim is solely to blame for the breaches. Where for the counterclaimant sought for declaration that the deed of variation of the contract is illegal and unenforceable. Thirdly, for a declaration that all claims arising from the purported deed of variation are illegal and cannot be enforced by the court. The Defendant sought dismissal of the suit with costs on those grounds. As far as the counterclaim is concerned, the counterclaimant prays for the award of liquidated damages for breach of contract, award of general damages for breach of contract and interest from the date of the award until payment in full.

In rejoinder the Plaintiff denied the Defendant's counterclaim and contended that it never breached the terms of the contract as to completion time and that if there was a delay, it was either with the approval or due to the failure of the Defendant to fulfil the conditions precedent to the timely discharge of the Plaintiff's obligation.

The Plaintiff was represented by Counsel Muzamil Kibedi while the Defendant was represented by Counsel Thomas Ochaya and Counsel Maxim Mutabingwa.

The Plaintiff filed witness statements of two witnesses PW1 Arch. Matoya Maroria the Defendant's Project Manager and PW2 Mr. Parsant Patel one of the directors of the

Plaintiff who were cross examined. The Defendant presented one witness DW1 Eng. Sam Batanda.

Both parties addressed the court in written submissions. Four issues were agreed upon by the parties in the amended joint scheduling memorandum filed in court on 17<sup>th</sup> June, 2016 as follows;

1. Whether the deed of variation is void for illegality?
2. Whether or not the Plaintiff breached the contract?
3. Whether the Plaintiff is entitled to the remedies sought under the main suit?
4. Whether the Defendant is entitled to the remedies sought under the counterclaim?

## **RESOLUTION OF ISSUES**

### **ISSUE 1: Whether the deed of variation is void for illegality?**

**The Plaintiff's Counsel** submitted that this issue was raised by the Defendant who in paragraph 13 of the amended WSD averred that the particulars of the illegality include the following;

- a) Purporting to enter a deed of variation without approval of the solicitor general.
- b) Purporting to enter into a deed of variation contrary to the constitution.
- c) Purporting to enter into a deed of variation in total disregard of the procurement laws and procedures and contrary to the Uganda Broadcasting Corporation Act 2005 and the Public Procurement and Disposal of Public Assets Act 2003 as amended.

The Plaintiff's Counsel submitted that the Defendant had the burden to prove all the above three aspects of the alleged illegality. Counsel further submitted that the Defendant's complaints under this issue were reduced to the deed of variation having not gone through the contracts committee prior to being signed and not getting the approval from the Solicitor General. This leads to the assumption that the other particulars of illegality were either abandoned or not proved. Counsel submitted that in the Plaintiff's reply to the WSD and defence to the counterclaim, the Plaintiff averred in paragraph 3 that the deed of variation was simply part and parcel of the principal contract and the additional works weren't illegal/ unconstitutional or contrary to public policy. As regards the contention that the variation deed was entered into without the approval of the solicitor general, the Plaintiff stated in paragraph 3(c) of its reply to the WSD that the variations and additional works were made in accordance with the provisions of the principal contract; whose approval by the solicitor general and compliance with the PPDA has not been contested.

Counsel opted to discuss this issue under 2 sub-issues namely;

1. Failure to obtain the Solicitor General's approval and breach of the constitution.
2. Breach of the public procurement and Disposal of public Assets Act 2003 as amended.

In regard to failure to obtain the solicitor general's approval and breach of the constitution, the Plaintiff's Counsel submitted that **Article 119 (5) of the Constitution** bars conclusion of agreements and contracts to which the government is a party or in respect of which the Government has an interest without legal advice and approval of the Attorney General. Counsel disagreed with the Defendant's pleadings and evidence that the above provisions were breached while concluding the deed of variation thus rendering the deed of variation illegal and unenforceable.

Consequently the Plaintiff's Counsel submitted that clause 38.2 of the principal contract permitted variation of the contract price by the Project Manager by not more than 15% with the approval of the Defendant. The deed of variation was for the sum of Uganda Shillings 350,031,602/=. The summary of Annexure 1 of the variation deed indicates that in monetary terms the deed of variation constituted a percentage increase over the contract sum of 13.8%. It is the Plaintiff's contention that the increment of 13.8% was well within the permitted range of variation permissible under clause 38.2 of the principal contract of 15% which PW1 confirmed in his evidence in cross examination. Counsel prayed that court find that there was no need to obtain a separate approval of the variation deed from the solicitor general or attorney general as such the constitution was not breached.

In regard to Breach of the public procurement and Disposal of public Assets Act 2003 as amended, the Plaintiff's Counsel made reference to paragraph 14 of the witness statement of DW1 in which he stated that upon review of contracts by the Defendant, it was found that the deed of variation had not gone through the contracts committee prior to being signed as was required by the PPDA. DW1 stated that the information about the alleged review was given in the management meeting by the procurement officer. He stated that he was not involved in the review exercise of the contracts nor was he a member of the contracts committee of UBC as such DW1's evidence is hearsay and inadmissible under **S. 59 of the Evidence Act Cap. 6**.

Counsel cited the case of **Central Purchasing Corporation Limited versus Hon. Maj. Gen. (Rtd) Kahinda Otafiire HCCS No. 627 of 2003**, where Justice Yorokamu Bamwine held that;

'It is trite law that evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made.'

Counsel submitted that the evidence of DW1 as regards the fact that the variation had not gone through the contracts committee is hearsay and not sufficient to prove the claim of the non-compliance with the PPDA as such the fact of non-compliance with the PPDA Act was not proved by the Defendant.

Consequently Counsel contended that even if the Defendant were to prove non-compliance with the PPDA Act that of itself would not be sufficient to render the contract illegal. He invited court to adopt the decision of this court in **Finishing Touches Limited versus Attorney General HCCS No. 144 of 2010** where this court held that;

‘...the provisions which had been breached by the authority placed duties on the authority namely the contracts committee and the procuring and disposal authority/permanent secretary Ministry of foreign affairs and not the Plaintiffs...moreover the issue of legality of procurement is being raised after the procuring and disposal entity enjoyed the services of the Plaintiff and there was satisfaction. It would be unjust for the Plaintiff not to be remunerated when the alleged acts of non-compliance were the acts of the Defendant’s servants.’

On the question of non-compliance with the PPDA Act, the Plaintiff’s Counsel also cited the case of **Setramaco International Limited versus Board of Directors/Head Teacher Lubiri Secondary School and Another, HCCS No. 478 of 2005** where Hon. Justice Geoffrey Kiryabwire found that the PPDA Act has no express provision that states that non-compliance with the Act makes a contract illegal and indeed unenforceable. Court found that there was a valid contract between the Plaintiff and the Defendant.

The Plaintiff’s Counsel prayed that court find that the variation deed is not illegal for alleged breach of the PPDA Act and this issue be answered in favour of the Plaintiff.

**In reply to this issue, the Defendant’s Counsel** considered the agreement as executed by the parties and also made reference to the three illegalities as stated by the Plaintiff and **Article 119 (5) of the Constitution** as cited by the Plaintiff. The Defendant’s Counsel also cited **Article 119 (6)** which grants the Attorney General authority by statutory instrument to exempt particular contracts from such approval. Counsel cited **Regulation 2 (1) of the Constitutional (Exemption of Particular Contracts from Attorney General’s Advice) Instrument S. I No. 12 of 1999** which exempts an agreement or contract whose value is Uganda Shillings 50,000,000/= or less from the constitutional requirements of **Article 119(5)**.

Counsel also cited **Regulation (2) f) of the PPDA Regulations 2003** which reechoes that Article and states that;

‘A contract document, purchase order, letter of bid acceptance or other communication in any form conveying acceptance of a bid that binds a procuring and disposing entity to a contract with the provider, shall not be issued prior to...approval by all relevant agencies, including, the Attorney General.’

On amendments in contracts, the Defendant’s Counsel cited **Regulation 262 (3) c)** which prohibits the same except with the prior approval of the Attorney General and provides that;

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

- '1. An amendment to a contract refers to a change in the terms and conditions of an awarded contract.
- (2) Where a contract is amended in order to change the original terms and conditions, the amendment to the contract shall be prepared by the procurement and disposal unit.
- (3) A contract amendment shall not be issued to a provider prior to-
- (c) Obtaining approval from other concerned bodies including the Attorney General, after obtaining the approval of a contracts committee.
- (5) No individual contract amendment shall increase the total contract price by more than fifteen percent of the original contract price.'

The Defendant's Counsel submitted that the importance and finality of the Solicitor General's opinion and its binding nature on government entities has been emphasised by the Supreme Court in **Bank of Uganda versus Banco Arabe Espanol SCCA No. 1 of 2001**. Counsel contended that the effect of the failure to seek the solicitor General's approval or clearance prior to signature of an agreement or contract and amendment of a contract was resolved by the Constitutional Court in **Nsimbe Holdings Limited Vs. Attorney General & IGG, Constitutional Petition No. 2 of 2006** where the constitutional court held that;

'the failure to comply with Article **119 (5), Regulation 225 (2) f), regulation 262 (3) c) of the PPDA rules 2003** renders the agreement or contract or any such procurement document unconstitutional, null and void with no legal effect and binds neither party.'

Counsel went ahead to submit that whereas the first contract dated 31<sup>st</sup> March, 2009 was prior to its signature approved by the solicitor general, the variation deed dated December 2010 which also sought to amend the principal contract was not which renders the amendment illegal, null, void abinitio and unconstitutional. He contended that the additional liability of Uganda Shillings 350,031,602/= as consideration for additional works reflected and created in the variation deed is an illegal and unconstitutional claim which cannot be sustained by the Plaintiff against the Defendant. Counsel further submitted that the Plaintiff's contention that there was no need to seek the approval of the solicitor general because the agreement allowed for a variation of not exceeding 15% and the deed of variation in this case 'percentage increase over the contract sum was only 13.8% is misconceived and erroneous. It still grossly exceeds the amount stipulated under **Article 119 (6)** the Attorney General was granted the authority by statutory instrument to exempt particular contracts from such approval.

The Defendant's Counsel cited **Regulation 2 (1) of the Constitutional (Exemption of Particular Contracts from Attorney Generals Advice) Instrument S.I No. 12 of 1999** which exempts an agreement or contract whose value is Uganda Shillings 50,000,000/=. Counsel submitted that the amount of Uganda Shillings 350,031,602/= is not a contested value of the variation as such falls outside the constitutional provision requiring the solicitor General's *Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$# xtra+ *maximum735securityx 2017 style*

approval which was not obtained. Counsel further cited the case of **Makula International Limited vs. Cardinal Nsubuga, Civil Appeal No. 4 of 1981 and Kisugu Quarries Limited vs. Administrator General (1999) 1 EA 163 (SC)** which provides that a court of law cannot sanction that which is illegal. Illegality once brought to the attention of the court overrides all questions of pleadings, including any admissions made thereon. No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court. Counsel also cited the Supreme Court case of **Active Automobile Spares Ltd vs. Crane Bank Limited and Rajesh Pakesh, Civil Appeal No. 21 of 2001 at page 27** where he held that it is trite law that courts of law will not enforce an illegality and quoted the case of **Scott vs. Brown Doering (1892) 2 QBD 724 at page 728** where it was held that;

‘Exturpi causa non oritur action. The old and well known maxim is founded in good sense and expresses a clear and well recognised legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence by the Plaintiff proves illegality the court ought not to assist him.’

Counsel disagreed with the Plaintiff’s contention that the evidence of DW1 is hearsay. The Defendant’s Counsel submitted that DW1 testified that he was present in the meeting when the PDU made the report on the findings in IDI which were discussed in the management meeting of the Defendant company which was the basis of the review.

The Defendant’s Counsel submitted that the authority of **Setramaco International Limited versus Board of Directors/Head Teacher Lubiri Secondary School and Another, HCCS No. 478 of 2005** is inapplicable to this matter. The solicitor general’s approval was required in respect of the variation being in excess of Uganda Shillings 50,000,000/- which is a point of law and the contract was far in excess of this amount. He submitted that the deed of variation in this matter was void for illegality and prayed that court finds as such.

**In rejoinder to this issue the Plaintiff’s Counsel** reiterated their earlier submissions that **Article 119 (5) of the Constitution** was not breached when the Plaintiff and Defendant increased the contract sum by Uganda Shillings 350,031,602/= as detailed in the deed of variation because of the following reasons;

1. Clauses 38, 39 and 40 of the principal Contract which was approved by the Attorney General approved in advance variations to the principal contract which do not exceed

15% of the principal Contract sum without a condition that even the variations had to be specifically approved by the Attorney General.

2. The contested deed of variation's overriding objective was to vary the already approved Bills of quantities by 13.8% of the original contract sum and thus within the approved mandate of the Defendant.
3. The deed of variation expressly stated it was part and parcel of the principal contract.

The Plaintiff's Counsel disagreed with the Defendant's contention that the contested deed of variation should have been specifically submitted to the Attorney General for approval. He submitted that the foundation of the requirement of the Attorney General's approval of contracts is **Article 119 (5) of the Constitution** which does not specify how the Attorney General should exercise the mandate to approve any given contract. It is left to the discretion of the Attorney General to determine as he deems fit. Counsel submitted that in the current case the Attorney General while approving the principal contract also permitted the Defendant to vary the contract by more than 15% of the contract sum; without attaching the condition of coming back to the Attorney General for a specific approval before exercising the mandate. Counsel further submitted that after the Attorney General's approval of the contract in the manner above, the contract process moved from the realm of contracting to contract management or contract execution. He submitted that it's in the realm of contract execution that the management of the Defendant deemed it prudent to document the variation of the Bills of Quantities in the form of the document appearing on page 44 - 52 of the Joint Trial Bundle. He submitted that the Defendant's management having been unconditionally authorized by the principal contract approved by the Attorney General at the stage of contracting, they were not duty bound to go back to the Attorney General for the Constitutional approval prescribed by **Article 119 (5) of the Constitution**. The Attorney General's approval for the variation had been given in advance and the parameters for its exercise clearly defined in the principal contract which was clearly within the mandate of the Attorney General as prescribed by **Article 119 (5) of the Constitution**. Counsel submitted that **Regulation 262 (3) (c) of the PPDA Regulations, 2003** cannot be a valid basis for requiring the Defendant to go back to the Attorney General for the specific approval of the Variation because of the reasons below:-

1. Only parliament was mandated under **Article 119 (5) of the Constitution** to prescribe conditions under **Article 119 (5) of the Constitution**.
2. The Rule would be dictating to the Attorney General as to how to exercise his mandate under **Article 119 (5) of the Constitution** and would thereby be contravening the Constitution for fettering or restricting the discretion of the Attorney General under **Article 119 (5) of the Constitution**.
3. The Rules were not made under **Article 119 of the Constitution** they were made under the



PPDA.

In all, the Variation Deed did not breach **Article 119(5) of the Constitution**.

The Plaintiff's Counsel submitted that on the other hand, if the Variation Deed indeed breached **Regulation 262 (3) (c) of the PPDA Regulations, 2003** as submitted by the defence Counsel, or the PPDA Act itself, the effect of such breach is not to render the Deed illegal and void abinitio. The Defendant has already enjoyed the services of the Plaintiff. The Defendant's Desk Officer, Eng. Batanda had expressed during the handover that he had been impressed with the work; and the outstanding sums for the works done were duly certified by the Project Manager contracted by the Defendant for the purpose. As such, the Defendant has no valid reason not to pay for the price of its benefit. Counsel relied on the decision of this court in **H.C.C.S. No. 763/2007 & 278/2010 Equator Touring Services Ltd vs. KCC** where court clearly distinguished between the consequences of a constitutional breach as compared to the consequences of a breach of the provisions of the PPDA and Regulations:- In case of a breach of any provisions of the Constitution, the contract is illegal, null and void abinitio whereas a breach of the provisions of the PPDA and the regulations under it does not automatically render the contract illegal. The Plaintiff reiterated their earlier submissions on this issue and prayed that Court be pleased to answer it in their favour.

## **ISSUE No. 2**

### **Whether or not the Plaintiff breached the contract?**

**The Plaintiff's Counsel submitted** that this issue was raised by the Defendant and the following breaches were raised;

- a) That the Plaintiff failed to complete the studio within the time set out in the contract.
- b) That the subject building had too many defects, was not fit for human occupation and cannot be occupied and used as a studio at all.
- c) Failure to officially or formally hand over the building and the keys to the Defendant.
- d) Refusal by the Plaintiff to remedy the defects and complete the building.

The Plaintiff's Counsel submitted that the Defendant had the legal burden to prove each of the alleged breaches which he failed to do as discussed below;

In regard to failure to complete the studio within the time set out in the contract, the Defendants failed to prove it. The Plaintiff's Counsel disagreed with the Defendant's evidence as stated by Eng. Sam Batanda in paragraphs 7, 16 and 17 of his witness statement that the contract was entered into on 31<sup>st</sup> March, 2009 and construction works commenced in May 2009. That the works should have been completed within 10 months but the certificate of completion indicates that the completion of the works was achieved in February 2011 well beyond the prescribed time which based solely on the principal contract. However, the reality that arose during execution was that there were numerous additions and variations that the Project Manager and the Defendant instructed the Plaintiff to carry out which necessitated extension of time. Counsel

submitted that the Project Manager gave fresh instructions to vary the works by the letter dated 20<sup>th</sup> October, 2010. Eventually the formal deed of variation was signed in December 2010 which actions made the original timeframes irrelevant.

The Plaintiff's Counsel submitted that PW1 stated that the original planned timeframes became unrealistic and the parties continued to mutually change the period. The Project Manager further stated during the cross examination that some of the extensions were made during the project meetings. The reasons for this turn of events are changes in the Defendant's tastes, variations in the design, bureaucracy, importation of materials from overseas and delays by the Defendant to pay the Plaintiff. He submitted that the continuous variations released the Plaintiff from any liability under the original time frame of 10 months. He made reference to **Chitty on Contracts, 29<sup>th</sup> Edition, Volume 2 at page 688** where it is written that;

‘Construction contracts almost invariably stipulate a period or date of commencement and completion. The Contractor must be afforded the opportunity to carry out the work within the stipulated period. Any act of prevention, such as the ordering of variations or late access to working areas, will release the Contractor from the fixed period unless the contract provides working machinery for adjustment of the time period.’

Counsel submitted that the Defendant pleaded defective work as such they had the obligation to prove the defects. He proved this in the witness statement of Eng. Sam Batanda who stated that at the time of handover of the works there were still a few things that needed to be completed which include the air ducting/conditions for the complex modifications proposed by Sony, Automatic Voltage Regulator and UPS for the lift. In cross examination, he stated that the things which needed to be done were not part of the contract between the Plaintiff and the Defendant as such the Defendant failed to prove this claim. He submitted that on the contrary, the Defendant's only witness confirmed during cross-examination that at the handover meeting held on 08<sup>th</sup> December 2011, he had expressed that he was generally satisfied with the work as stated in par. 1 of Exhibit PE 17 (at page 65 of the Trial Bundle). Counsel submitted that without prejudice to the aforesaid, what amounts to "defects" in the construction sector is a highly technical matter. The only persons competent to testify about it are technical people. In the instant case, control of the quality of the works was part of the Project Manager's mandate as per clause No. 33 - 36 of the Building Contract (Exh. PE1). The Project Manager issued the Certificate of Practical Completion on 15<sup>th</sup> December, 2011. Then the Project Manager (PW1 Matoya) on 04.12.2012 went ahead to issue a Final Account Statement and Final Certificate which he forwarded to the Defendant's Managing Director. These certifications have never been challenged by the Defendant; as such the Defendant had no technical basis for alleging that the Plaintiff's work was defective. He prayed that Court find that the Defendant failed to prove the alleged defective work.

With regard to handover, Counsel submitted that the alleged failure of the Plaintiff to formally

handover the building and the keys to the Defendant was raised by the Defendant in paragraph 16 of their Amended WSD. But there was no evidence that they adduced to support their allegation. On the contrary, the documentary evidence proves that there was a formal handover. This evidence includes: -

- Exh. PE 15 (a) (Appearing on Page 62 of the Joint Trial Bundle - Letter formally handing over the keys). During his cross examination, DWI Batanda confirmed signing for them.
- Exh. PE 17(b) - (Appearing on page 66 of the Joint Trial Bundle - Attendance list of people present at the site during the handover.) During cross examination, DWI Batanda confirmed that he signed on the attendance list as No. 13.
- Exh. PE 18(a) - (Appearing on page 65 of the Joint Trial Bundle - Letter of the Project Manager confirming the site handover having been held on 08<sup>th</sup> December 2011).

Counsel submitted that even the only witness of the defence (DWI Eng. Batanda) confirmed during the cross-examination that he had attended the handover and that he is the one who had received the keys to the building. Refusal by the Plaintiff to remedy the defects and complete the building. Counsel submitted that since there is no evidence of defective work on the part of the Plaintiff, then it automatically follows that the Plaintiff did not have a legal obligation to remedy the alleged defects. He submitted that from the above submissions, it is clear that the Defendant's alleged breaches of contract by the Plaintiff are not supported by evidence and should be dismissed.

**In reply, the Defendant's Counsel** submitted that in regards to failure to complete the works in time, the Defendant's Counsel submitted that the Plaintiff argues that the Defendant's contention is very simplistic. It should be noted that whereas the practical completion occurred on 17<sup>th</sup> February 2011, clause GCC 17.1 of the special conditions provided that the completion date for all the works shall be within ten (10) months. But clause GCC 21.1 of the special conditions provided that the site possession date was to be 30 days from the execution date which was 31<sup>st</sup> March, 2009. Counsel submitted that the extension in time could only be done subject to the specific prior approval of the Employer (UBC) as evidenced in clause GCC 4.2 of the special conditions which provided that;

"...Before carrying out any duties which would cause the amount due to exceed the contract price or give entitlement to extend time, the Project Manager shall obtain specific approval from the Employer. .. “

Counsel submitted that notwithstanding, whatever the parties might have agreed upon in the general clauses of the contract, Clause 57.2 of the contract provided that in case of conflict, the special conditions of the contract shall prevail over the general terms. The delay in practical completion by the Plaintiff amounted to a breach of a special term of the contract on their part,

and the Project Manager's validation of the extension in time could not occur unless with the prior specific approval of the Employer (UBC) which according to the facts was not obtained. The contention by the Plaintiff that the Project Manager gave the necessary extensions was contradicted in cross examination when he stated that he had minutes of meetings; where the agreed positions were made yet no such minute was adduced in evidence as such it remained a mere allegation.

**In rejoinder the Plaintiff's Counsel submitted** that from the submissions of the defence Counsel, it appears that the complaint of the Defendant under Issue No.2 has now been reduced to failure to complete the works in time. The Plaintiff's Counsel submitted that all the evidence on the Court record indicates that the completion of the works beyond the original ten months was caused by the Defendant as detailed by the Project Architect in paragraph 26 of the Witness Statement of PW1 Matoya Maroria. There is no document or any other evidence from the Defendant complaining that the Plaintiff delayed to complete the works. This confirms the evidence of PW1 Matoya that the Defendant approved the extension of time. The Contract did not provide the form in which the Employer's approval was to take. In this case, the site meetings, among others, were used for that purpose. He submitted that the defence Counsel has no basis to doubt PW1 on that aspect.

The Plaintiff's Counsel reiterated their earlier submissions on this issue and prayed that Court be pleased to resolve it in their favour.

### ISSUE 3

#### **Whether the Plaintiff is entitled to the remedies sought under the main suit?**

**The Plaintiff's Counsel submitted** that in the Plaintiff, the Plaintiff seeks the following remedies:

- a) UGX 749,884,386/=.
- b) Interest on (a) above at the commercial rate of 30% per annum from date of certification of the works till payment in full.
- c) General damages as pleaded in Paragraph 5.
- d) Costs of the suit.
- e) Interest on (c) and (d) above at the commercial rate of 30% per annum from date of judgment till payment in full.

With regard to the remedy of UGANDA SHILLINGS 749,884,386/= the Plaintiff's Counsel submitted that the evidence in respect of this prayer is contained in paragraphs 23 to 25 of the Witness Statement of PW2 Parsant Patel. He submitted that this is the total sum of three payments which were duly certified by the Project Manager, namely:

- Interim Certificate No. 8R for the sum of Uganda Shillings 354,430,881/= which Certificate was admitted in evidence as PE10b and appears on Page 55-56 of the Joint Trial Bundle;

- Final Certificate for the sum of Uganda Shillings 349, 997, 760/= which Certificate was admitted in evidence as PE18 (b) and appears on Page 68 of the Joint Trial Bundle;
- Retention Money amounting to Uganda Shillings 45,455,7451= as per Exhibit PE21(a) and PE21(b) and appearing on Pages 80 and 81 of the Joint Trial Bundle;

The Plaintiff's Counsel submitted that in cross examination of DW1, he confirmed that the money owed to the Plaintiff by virtue of the Interim Certificate No. 8R, the Final Certificate admitted in evidence as PE18(b) and the retention money has all never been paid by the Defendant to the Plaintiff. He prayed that court orders the Defendant to pay the total sum of Uganda Shillings 749,884,386/= as claimed by the Plaintiff.

With regard to interest on (a) above at the commercial rate, the Plaintiff's Counsel submitted that there is no question that the transaction between the Plaintiff and the Defendant was commercial in nature and it is only reasonable that the sum claimed by the Plaintiff does attract interest at a commercial rate. According to Paragraphs 27 and 28 of the witness statement of PW2, he stated that the money used to execute works under the project was bank money for which the bank charges the Plaintiff an average interest rate of 24% per annum. Counsel submitted that PW2 was never cross examined on that evidence and prayed that court grant interest on the total sum claimed of Uganda Shillings 749,884,386/= at the rate of 24 % per annum from date of certification of the payments till payment in full by the Defendant.

With regard to General Damages, the Plaintiff's Counsel submitted that the claim for general damages was pled by the Plaintiff in paragraph 5 of the Plaint to the effect that by reason of the failure/refusal of the Defendant to pay the Plaintiff, the Plaintiff had been denied use of the funds. The said unpaid funds were continuously losing value due to the high inflation rates in the country. Counsel also stated that in paragraph 29 of his Witness Statement, PW2 Parsant Patel stated that the money continues to lose value against the dollar yet many of the materials used in the project were imported. He submitted that the witness was not cross examined on this aspect of his evidence and he prayed that court finds it just to award general damages to the Plaintiff in the sum of Ugx 150M.

With regard to Costs of the suit, the Plaintiff's Counsel submitted that it is settled law that costs are discretionary and that they should follow the outcome of the case unless special circumstances are proved to show that the suit would have been avoided if it were not for the actions of the Plaintiff. Counsel submitted that no such special circumstances have been shown and prayed that costs of the suit be granted to the Plaintiff.

With regard to Interest on general damages and costs, Counsel submitted that these are consequential orders and prayed that court be pleased to grant them.

**In reply the Defendant's Counsel** submitted that in respect of the claim of UGX 749,884,386/= in light of the finding on issue 1 as regards the illegality of the Deed of variation the Latin maxim "Exturpi causa non oritur action" be given its full effect. The amount of the variation

deed is not claimable in this action or any event payable and if any amount was paid this amount be offset as well. PW2 testified in cross examination that they received UGX 85,000,000/= (Uganda Shillings Eighty Five million only) as an advance payment. Counsel stated that this amount be transferred to payments effected on the main contract and if court finds any amount due under it, it should be offset from that amount.

In reply to the issue of interest on a) above, Counsel submitted that court does consider what the actual rate of interest is. That the Plaintiff save stating that the money used to execute the projects was obtained from banks contradicts himself when he admits receiving advance payment for the works and at another time contends delays were due to delayed payments. He invited court to consider this evidence for what it was worth and make a finding that that claim is not backed by evidence and is contradicted by the Plaintiffs own evidence. This evidence was inconsistent and as such his evidence cannot be relied on. He cited the case of **Uganda vs. Abdallah Nasur 1982 HCB 1** where Masika CJ as he then was held that;

"In assessing evidence of a witness and reliance to be placed on consistency is a relevant consideration. Where grave inconsistencies occur the evidence may be rejected unless satisfactorily explained while minor inconsistencies may have no adverse effect unless it points to deliberate untruthfulness"

Counsel submitted that if court be pleased to make an award, it be at court rate in light of the contradictions.

As far as general damages are concerned, the Defendant's Counsel replied that this case doesn't warrant a claim for general damages in the sum of UGX 150,000,000/- (Uganda Shillings One Hundred Fifty Million) or at all and reiterated their submissions in (b) above.

With regard to costs of the suit, the Defendant's Counsel invited court to exercise its discretion in establishing whether having found as it did on issue 1 it was necessary to have filed this claim in the first place.

In regard to Interest on general damages and costs Counsel reiterated their submissions in (d) above.

**In rejoinder** with regard to the Uganda Shillings 749, 884,386/= claim, the Plaintiff's Counsel disagreed with the Defendant's submission that should the Court find that the Deed of Variation was illegal, then it should order that the sum of Uganda Shillings 85M received by the Plaintiff under the said deed be offset from the above sum. He submitted that it is settled law that loss in case of an illegal contract falls where it lies.

As far as interest on (a) above is concerned, the Plaintiff's Counsel disagreed with the Defendant's submission that any interest on the sums awarded by Court should be at the Court rate. He submitted that the dispute is before the Commercial Court because it is a commercial dispute as such court rate cannot make commercial sense in a transaction  
*Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$\$# xtra+  
*maximum735securityx 2017 style*

where all parties concede it to be a commercial transact. Counsel prayed that Court sticks to granting interest at commercial rate from the date when the sums were certified as being due to the Plaintiff up to the time of full payment.

With regard to General damages, the Plaintiff's Counsel submitted that in case the Court holds Issue No.1 in favour of the Plaintiff, then the sum of Uganda Shillings 150M would suffice as general damages. But should Court hold Issue No.1 against the Plaintiff, then the Court has discretion to award the Plaintiff under the head of "general damages" the loss suffered as a result of nullification of the Variation Deed amounting to Uganda Shillings 350M. In view of the fact that obtaining the Attorney General's approval was an obligation of the Defendant; the Defendant has enjoyed the fruits of the Plaintiff's works after giving the Plaintiff the impression that it had done its part in discharging its obligation to get all the prescribed approvals.

#### **ISSUE 4**

#### **Whether the Defendant is entitled to the remedies sought under the counterclaim?**

**The Plaintiff's Counsel submitted** that under the counter claim, the Defendant claimed the following remedies against the Plaintiff:-

- a) A declaration that the purported deed of variation of contract is illegal and unenforceable.
- b) A declaration that all the claims arising from the purported deed of variation are illegal and cannot be enforced by the court.
- c) Dismissing the Plaintiff's suit with costs to the Defendant.
- d) Allowing the counterclaim with costs to the Defendants.
- e) Awarding liquidated damages for breach of contract.
- f) Awarding general damages for breach of contract.
- g) Awarding interest on such sums as may be found to be due, from the date of award until payment in full.

The Plaintiff's Counsel submitted that the Defendant is not entitled to any of the remedies sought under the Counterclaim and prayed that court be pleased to dismiss the counterclaim with costs to the Defendant.

**In reply the Defendant's Counsel** submitted that in light of the findings on the preceding issues court be pleased to grant all the declarations and prayers sought and prayed that the suit be dismissed with costs to the Defendant.

**In rejoinder, the Plaintiff's Counsel** reiterated earlier submissions and prayed that Judgment be entered for the Plaintiff.

#### **Judgment**

*Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$#\$ xtra+  
*maximum735securityx 2017 style*

I have duly considered the pleadings of the parties, the agreed facts, the evidence, the submissions of Counsel and authorities cited.

By a joint scheduling memorandum filed on 19<sup>th</sup> June, 2015 executed by both Counsels, some relevant facts of the suit are agreed to as follows: It is agreed that by contract dated 31<sup>st</sup> March, 2009, the Defendant contracted the Plaintiff for the construction of a television complex at the Defendant's premises at plot number 17 – 19 Nile Avenue, Kampala at the cost of Uganda shillings 2,541,809,819/=. By virtue of a deed of variation made between the parties in December 2010, the Defendant requested the Plaintiff to carry out additional works worth Uganda shillings 350,031,602/= and the contract price of all the works was varied to Uganda shillings 2,891,841,421/=. The Plaintiff actually constructed the television complex at the Defendant's premises at plot 17 – 19 Nile Avenue. Under clause number 42 of the contract, the Defendant was under an obligation to pay the Plaintiff for the works done by the Plaintiff and certified by the Project Manager. Clause 45 of the contract required a proportion of 5% of the payment due to the Contractor to be retained by the Employer and repaid to the Contractor when the defects liability period expires. The Plaintiffs served the Defendant with notice of intention to sue on 10th of October, 2011.

The Plaintiff asserted that it duly performed its contractual obligations and the prescribed certificate of completion was duly issued to her on 15<sup>th</sup> December, 2011 for the main contract and another certificate of completion dated 6<sup>th</sup> March, 2012 was issued to the Plaintiff for additional works. The Plaintiff further asserts that it formally handed over the keys to the building constructed by her at the Defendant's premises with an official letter dated 10th of December 2011.

On the other hand the Defendant maintains that the Plaintiff's claim is based on a deed of variation which is an illegality that cannot be enforced by the court. The sums purportedly certified in the Plaintiff's certificate number 8R were not due for reason of the Plaintiffs breach of the contract. The sums purportedly certified in the Plaintiff certificate of 20th of December 2011 as consideration for additional works reflected and created in the valuation deed was an illegal and unconstitutional claim which cannot be sustained by the Plaintiff against the Defendant. The deed of variation is bad in law, contrary to public policy, unconstitutional and cannot be enforced by the court as it was tainted with illegalities. The deed of variation was entered into without the approval of the Solicitor General/Attorney General. The Plaintiff in breach of the contract failed to complete the studio complex in accordance with the contract. The Plaintiff failed to complete the building within the specified time lines and failed to hand over the building the Defendant, brought keys and abandoned them at the Defendant's offices without formally handing over the building to the Defendant. The Plaintiff was requested by the Defendant to remedy the defects and complete the building but has refused or failed to do so. It followed that the conduct of the Plaintiff amounted to breach of contract in so far as the project completion was delayed by about 355 days without the specific approval of the Defendant as *Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$# xtra+ *maximum735securityx 2017 style*



agreed upon. The Defendant claims liquidated damages for delay of Uganda shillings 142,000,000/= under a counterclaim.

On the other hand the Plaintiff asserted that the alleged inspection and discovery of alleged defects was not only done long after the defects liability period but was done by strangers to the contract contrary to established procedure of inspection and as such the defects if any were outside the purview of the contract between the parties. Secondly the building is fit for human habitation and it was inspected before the expiry of the liability period and the modalities for correction of the few defects were agreed upon between the parties. The Plaintiff duly rectified whatever defects she was obliged to rectify. Most of the defects that the Defendant was complaining about were brought about by the negligence of the Defendant's agents and it was agreed that the Defendant would bear the cost of remedying those defects. That notwithstanding the Plaintiff has on numerous occasions informed the Defendant that she was ready and willing to rectify the defects at the Defendant's costs but no agreement to that effect has been reached. The Plaintiff denied breach of contract as claimed by the Defendant. As for the time within which to complete the construction, it was not of essence and so the Defendant is barred by the doctrine of estoppel from claiming any damages in respect thereof.

Most of the documents were admitted by consent of the parties. The Plaintiff's documents exhibit P1 to exhibit P 22. Three exhibits were admitted for the Defendant and two Defendant's documents were contested.

Agreed issues:

1. Whether the deed of variation is void for illegality?
2. Whether or not the Plaintiff breached the contract?
3. Whether the Plaintiff is entitled to the remedies sought under the main suit?
4. Whether the Defendant is entitled to the remedies sought under the counterclaim?

### **Whether the deed of variation is void for illegality?**

The issue of whether the deed of variation is void for illegality turns on the question of fact as to whether the amount involved in the variation in terms of payment or costs of the variation required a fresh bidding process to be undertaken prior to execution of the variation deed or consent of the Defendant. The Plaintiff's Counsel addressed the question of whether failure to obtain the Solicitor General's approval leading to alleged breach of article 119 of the Constitution had been committed by the parties to make the variation void for illegality. Secondly, whether there was breach of the Public Procurement and Disposal of Public Assets Act 2003 by the deed of variation.

As a matter of fact the Plaintiff's contention is that the variation constituted a percentage increase in the costs of 13.8% and under clause 38.2 of the principal contract, the permitted variation of

the contract price by the Project Manager may go up to 15% without the approval of the Employer/Defendant. This was within the permitted range of variation and confirmed by the testimony of PW1.

On the other hand the Defendants Counsel maintained that the agreement was executed contrary to article 119 (5) of the Constitution. Secondly under Regulation 2 (1) of the Constitutional (Exemption of Particular Contracts from Attorney Generals Advise) Instrument S I Number 12 of 1999 an agreement or contract whose value is Uganda shillings 50,000,000/= or less is exempted from the constitutional requirements of article 119 (5) of the Constitution. However the deed of variation was worth over Uganda shillings 350,000,000/= and was therefore not exempted from the requirement to obtain the Attorney General's consent.

I have carefully considered the detailed submissions of Counsel on the above issue. I note from the beginning that the main contract exhibit P1 executed between the Plaintiff and the Defendant on 31<sup>st</sup> March, 2009 is not in dispute in terms of whether it had the consent of the Attorney General or whether the provisions of the Public Procurement and Disposal of Public Assets Act, 2003 in terms of the procedure for execution of contracts was followed. The conclusion is that exhibit P1 complied with the law in all respects.

The Plaintiff relied on the clause on changes in the bills of quantities. This is article 38 of the contract exhibit P1. I have duly considered clauses 38 – 41 of the contract as set below:

“38. Changes in the Bill of Quantities

38.1 If the final quantity of the work done differs from the quantity in the Bills of Quantities for the particular item by more than 25%, provided the change exceeds one percent (1%) of the Initial Contract Price, the Project Manager shall adjust the rate to allow for the change.

38.2 The Project Manager shall not adjust rates from changes in quantities if thereby the Initial Contract Price is exceeded by more than 15%, except with the prior approval of the Employer.

38.3 If requested by the Project Manager, the Contractor shall provide the Project Manager with a detailed cost breakdown of any rate in the Bill of Quantities.”

39. Variations

39.1 All variations shall be included in updated Programs produced by the Contractor.

40. Payments for Variations

40.1 The Contractor shall provide the Project Manager with a quotation for carrying out the variation when requested to do so by the Project Manager. The Project Manager shall assess the quotation, which shall be given within seven days of the request or within any longer period stated by the Project Manager and before the variation is ordered.

40.2 If the work in the variation corresponds with an item description in the Bill of Quantities and if, in the opinion of the Project Manager, the quantity of work above the limits stated in sub clause 38.1 or the timing of its execution do not cause the cost per unit or quantity to change, the rate in the Bill of Quantities shall be used to calculate the value of the Variation. If the cost per unit of quantity changes, or if the nature or timing of the work in the variation does not correspond with items in the Bill of Quantities, the quotation by the Contractor shall be in the form of new rates for the relevant items of work.

I have carefully considered the above provisions of the main contract exhibit P1. Clause 38 of the contract deals with adjustment of costs by the Project Manager. Specifically clause 38.2 provides that the Project Manager shall not adjust rates from changes in quantities if thereby the initial contract price is exceeded by more than 15% except with the prior approval of the Employer. The Plaintiff's Counsel relied on this clause for the submission that the main contract gave authority to the Project Manager to make a variation in the contract whose costs implications do not exceed 15% of the main contract price or the Initial Contract Price. The wording of clause 82 however provides for changes in the cost of particular items in the Bill of Quantities. Changes in the Bill of quantities for instance can be generated by changes in the market price of goods. That notwithstanding, the specific matter under consideration is a variation in the contract. Paragraph 2 of the agreed facts in the joint scheduling memorandum specifically gives the fact that by the deed of variation made between the parties in December 2010, the Defendant requested the Plaintiff to carry out additional works worth Uganda shillings 350,021,602/= and that the contract price for all the works was varied to Uganda shillings 2,891,841,421/=. The initial contract price according to paragraph 1 of the agreed facts is Uganda shillings 2,541,809,819/=. The Plaintiff used these variation in figures to calculate the cost implications of the deed of variation and came to the conclusion that it was about 13.8% of the initial contract price and therefore consistent with clause 38.2.

Clause 38 is to be read in conjunction with clause 39 which deals with variations. Clause 39.1 provides that all variations shall be included in updated programs produced by the contract. The Contractor is obliged to provide the Project Manager with the quotation for carrying out the variation when requested to do so by the Project Manager. It does not expressly provide for the cost implications in terms of what percentages permissible. This conclusion can only be reached upon reading clause 38 and 40 in relation to the powers of the Project Manager to accept any change in the price of the contract up to 15% of the initial contract price depending on the circumstances of the contract.

*Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$# xtra+  
*maximum735securityx 2017 style*

I have accordingly considered the Defendant's submissions relating to the need to obtain the consent of the Attorney General for any new agreement. He considered the deed of variation as a new contract which required consent of the Attorney General. The Plaintiff's Counsel on the other hand relies on the main contract which permits variations within the main contract without the consent or approval of the Solicitor General/Attorney General. I have accordingly considered the Public Procurement and Disposal of Public Assets Regulations 2003, Statutory Instrument 2003 Number 70. Specifically variations are permissible under Regulation 261 which provides as follows:

“261. Variations or change orders to contracts

(1) A contract variation or change order is a change to the price, completion date or statement of requirements of a contract, which is provided for in the contract to facilitate adaptations to unanticipated events or changes in requirements.

(2) A contract variation or change order may be issued with the approval of the contracts committee.

(3) Notwithstanding sub regulation (2), any additional funding required for a variation or change order shall first be committed.

(4) A contract may be varied in accordance with a compensation event or the issue of a variation, change order or similar document, as provided in the contract.

(5) A variation or change order shall be in accordance with the terms and conditions of a contract and shall be authorised by a competent officer.

(6) A contract which provides for a variation or change order shall include a limit on a variation or change order which shall not be exceeded without a contract amendment.

(7) A competent officer, for purposes of this regulation, shall be defined in the contract.”

The regulation defines variation as a change to the price, completion date or statement of requirements of a contract, which is provided for in the contract to facilitate adaptations to unanticipated events or changes in requirements. Secondly, Regulation 261 (2) uses permissive language and provides that a contract variation may be issued with the approval of the contracts committee. Thirdly any additional funding required for a variation or change order shall first be committed. Fourthly, regulation 261 (5), (6) and (7) caters for contractual authority to issue a variation.

A variation order shall be in accordance with the terms and conditions of a contract and shall be authorised by a competent officer. It follows that the wording of the contract is important as to whether it is a competent officer or authority to make a variation order. The regulations also

provide that a variation or change order show include a limit which shall not be exceeded without contract amendment. Last but not least the competent officer is to be defined in the contract. It follows that if the contract allows for variation or change order to be made within certain limits, the competent officer has authority within the contract to make the variation. Variation is a useful tool to respond to the different circumstances that may require variations to be made from time to time. It should be noted that clause 39 and 40 of the contract exhibit P1 envisage situations where variation may lead to a deduction in the price. Similarly it envisages situations where variation may lead to an increase in the contract price. Where variation is permissible within the terms of the contract, there is no need to seek permission of the Attorney General/Solicitor General. This is because the Attorney General approved the terms of the main contract which includes clauses that allows variations within certain limits. This is further supported by regulation 261 of the PPDA Regulations 2003. Last but not least it is up to the competent authority or competent person defined in the contract to ensure that the variation has the requisite funds before committing the public procurement and disposal entity to a variation in contract performance. The deed of variation was admitted in evidence as exhibit PE 8.

The deed of variation was executed by the Managing Director of the Defendant in the presence of the Corporation Secretary as well as the Managing Director of the Plaintiff company. Some issues were raised in relation to the date of the variation. The document indicates that it was made in December 2010 but the particular date of variation is not given. Failure to write the date of the execution of the variation is not fatal since it was executed by the parties and makes reference to the main contract dated 31<sup>st</sup> March, 2009. In the preamble it is provided that the Employer was desirous of carrying out additional works and varying some bills of quantities in the construction of the television studio complex at a money consideration of Uganda shillings 350,021,602/=. Secondly, it is provided that the parties are mutually agreeable to a variation of the principal agreement to accommodate the variations proposed by the Employer. The deed of variation was supposed to be construed and to form part and parcel of the principal agreement. The Employer undertook to pay the Contractor advance payment of Uganda shillings 87,507,901/= against the submission of an advance payment guarantee from a reputable bank acceptable to the Employer.

Before taking leave of the matter, the Defendants Counsel submitted that the contract could not be amended without consent and relied on Regulation 262 of the PPDA Regulations 2003. He submitted that regulation 262 (3) (c) forbids amendment to contracts without the prior approval of the Attorney General. First of all it should be noted that the PPDA Regulations 2003 make a clear distinction between variations of contract and amendments to a contract. Regulation 261 further defines what a variation is.

Regulation 262 deals with a different matter from variation of contracts and defines what an amendment to a contract is. It provides that:

“262. Contract amendment

- (1) An amendment to a contract refers to a change in the terms and conditions of an awarded contract.
- (2) Where a contract is amended in order to change the original terms and conditions, the amendment to the contract shall be prepared by the procurement and disposal unit.
- (3) A contract amendment shall not be issued to a provider prior to—
  - (a) obtaining approval from a contracts committee;
  - (b) commitment of the full amount of funding of the amended contract price over the required period of the revised contract; and
  - (c) obtaining approval from other concerned bodies including the Attorney General, after obtaining the approval of a contracts committee.
- (4) A contract amendment for additional quantities of the same items shall use the same or lower unit prices as the original contract.
- (5) No individual contract amendment shall increase the total contract price by more than fifteen percent of the original contract price.
- (6) Where a contract is amended more than once, the cumulative value of all contract amendments shall not increase the total contract price by more than 25 percent of the original contract price.”

It is clear from regulation 262 that an amendment deals with a change in the terms and conditions of an awarded contract. The Defendant's submissions in relation to breaches of the PPDA Act and Regulations arise from the premises that there was an amendment to the contract which had been awarded to the Plaintiff. If this is a false premise, then the issue is easily answered. By a reading of regulation 261, a variation is a different creature from an amendment to the contract. Regulation 261 (1) of the PPDA Regulations 2003 defines variations to mean a contract variation or change order affecting change to the price, completion date or statement of requirements of a contract, which is provided for in the contract to facilitate adaptations to unanticipated events or changes in requirements. It deals with adaptations due to unforeseen events or changes in requirements.

PW1 Mr Maroria Matoya testified in paragraph 16 of his written statement that in the course of construction, the client required certain variations to be made to the initial design. He wrote exhibits P4 and P6 in pursuit of the client's interest. Exhibit P4 is a letter dated 20th of October 2010 addressed to the managing director of the Plaintiff on the subject of variations. The Plaintiff

was required to make certain variations which included double glazing partitions in the studios, newsrooms, master control room and VIP room. Secondly, to carry out demolition and alterations in the power room. Thirdly, to supply certain specifications of cables. Fourthly, to provide quotation for additional cost on the main distributor board and finally revised fire fighting installations which include among other things hose reels and water pump. Exhibits P5 and P6 concerns a request for advance payment and the reply of the Defendant for the Plaintiff to obtain a bank guarantee for the advance payment needed for commencement of the variation works.

In the premises the evidence is quite clear that there was no amendment to the contract. The Employer through the Project Manager ordered variations in the contract with cost implications. Those cost implications did not exceed 15% of the initial contract price and were catered for within the main contract. Specifically the additional cost implication was that 13.8% being less than 15% permissible under the contract. The terms of the contract under which the variation was done had been approved by the Attorney General. By calling it a deed of variation, it did not change the nature of the instructions given to the Plaintiff and the variations that were required. The substance of the deed of variation was a variation of the contract within the terms of the main contract by the person designated to communicate the variation which the Plaintiff was obliged to comply with under the contract. According to clause 1.1 (ee) of the Main Contract, a variation is defined as instruction given by the Project Manager which varies the works. Furthermore clause 28 of the contract provides that the Project Manager shall extend the intended completion date if a declaration is issued which makes it impossible for completion to be achieved by the intended completion date without the Contractor taking steps to accelerate the remaining work, which would cause the Contractor to incur additional costs. The Contractor was under obligation to provide the Project Manager with a quotation for carrying out the variation when requested to do so. The cost of the variation is to be assessed by the Project Manager under clause 40.1. Clause 40.3 allows the Project Manager to order variation and make a change to the contract price based on the Project Managers own forecasts of the effects of the variation on the Contractor's costs. Clause 41.5 provides that the value of work executed shall include the valuation of variations and compensation events.

It follows that the variation was done within the main contract exhibit PE 1 which had been approved by the Attorney General and which complied with the Public Procurement and Disposal of Public Assets Act. All the authorities relied upon proceed from the premises that there was another contract. A variation is an order made within the main contract. For emphasis the fact that the parties executed a variation deed does not stop it from being an order given by the Project Manager as was clearly done in this case within the terms of the initial contract. The variation deed is superfluous and does not change the nature of the variation which is an order changing the way the contract is performed. In the premises the preliminary objection on the ground that the variation deed was an illegality for failure to obtain consent of the Attorney

General under article 119 of the constitution or failure to seek approval of the contracts committee for amendment of contract under regulation 262 (3) (c) of the Public Procurement and Disposal of Public Assets Regulations 2003 has no merit. It also follows that the authorities relied on by the Defendants Counsel in support of the contention that the variation deed is an illegality are clearly distinguishable on the ground that the variation proceeded from the contract which was approved by the Attorney General as it was provided for as clearly envisaged by the PPDA Regulations 2003 and Regulation 261 thereof. In the premises therefore, the objection has no merit as it proceeded from false premises and is overruled with costs.

**Issue 2: Whether or not the Plaintiff breached the contract?**

I have carefully considered the written submissions which have been set up above. I have also considered the evidence and the contractual provisions with regard to whether the Plaintiff failed to complete the studio within the time set out in the contract and whether the subject building had any defects and was not fit for human habitation. Whether failure to finish or formally hand over the building and the keys to the Defendant was another breach of contract and finally refusal of the Plaintiff to remedy defects and complete the building.

Under exhibit P1 clause 17 of the contract provides that the Contractor shall commence execution of the works on the start date and shall carry out the works in accordance with the program submitted by the Contractor and as updated with the approval of the Project Manager and complete them by the intended completion date specified in the Special Conditions of Contract. According to GCC 17.1 the intended completion date for the whole works was to be within 10 months. Under GCC 35.1 the defects liability period is 365 days. It is an admitted fact that the contract was not completed within 10 months as envisaged by clause 17 and GCC 17.1. Extension of time of the intended completion date is catered for under clause 28 of the contract. It is provided under clause 28.1 that the Project Manager shall extend the intended completion date if a variation is issued which makes it impossible for completion to be achieved by the intended completion date without the Contractor taking steps to accelerate the remaining work, which would cause the Contractor to incur additional costs. Clause 13.1 allows the Project Manager to instruct the Contractor to delay the start of progress of any activity within the works.

According to the Project Manager who testified as PW1 and in paragraph 15 of his written testimony the construction was initially agreed to last for 10 months with effect from the date on which the contract was signed between the Contractor and the Employer on 31<sup>st</sup> March, 2009. In paragraph 16 he testified that in the course of the construction, the client required certain variations to be made to the initial design and he relied on exhibits P4 and P6 which are some of the documents he wrote in pursuance of the client's interest. The client is the Employer or the Defendant. As a result of the variations, the initial planned timeframe became unrealistic and he kept on extending the completion date with the consent of the Employer. Furthermore he relied on exhibit P3 which confirm to some of the extensions of time. The completion of the project



was achieved on 17<sup>th</sup> February, 2011 and he duly issued a certificate of completion. The defects liability period was 12 months and expired on 17<sup>th</sup> February, 2012. The studio complex was handed over to the Employer on 8<sup>th</sup> December, 2011. He attributed the delays to the changes in the clients interests what he called tastes. When the Defendant's officials returned from one of the foreign trips, they instructed him to change the design of the studio so that it could resemble what they had seen overseas. There were variations in the design and delays in decision-making process of the Employer out of bureaucracy. There were also delay generated by importation of materials required for the variation.

He was extensively cross examined about his testimony and this testimony stood out. I have also reviewed the various correspondences relating to the execution of the contract. In exhibit P2 dated 25<sup>th</sup> June, 2010 there is a request for extension. The reason given by the Plaintiff in the letter was that the completion date which was scheduled for 12<sup>th</sup> April, 2010 had lapsed due to some delays in decision-making from the client and the consultant. Extension was granted by a letter dated 8<sup>th</sup> July, 2010. Extension of time was granted up to 31<sup>st</sup> of August 2010. Subsequently on 20<sup>th</sup> of October 2010 the Plaintiff was instructed to supply materials for a studio complex in accordance with the variation ordered by the Project Manager (see exhibit P4). In exhibit P5 the Plaintiff wrote to the Project Manager on the issue of double glazing partitioning which required materials to be imported. Materials were to be imported after payment of an advance payment upon the Plaintiff obtaining an advance payment guarantee from an acceptable bank. Documents with regard to the advance payment and advance payment guarantee are exhibit P7 (a) exhibit P7 (B) exhibit P8 which is the deed of variation.

I have also considered the testimony of DW1 Eng Sam Batanda who testified that he got involved in June 2011. His role was to ensure that the complex was ready for installation of the equipment under a separate contract. In cross examination he admitted that he was present at the handing over ceremony presided over by the managing director. He also signed the attendance sheet at the handing over ceremony. He agreed that the complex had been formally handed over to the Defendant. He signed on his own behalf and that of the Defendant. He further admitted that there were things which needed to be completed which were not part of the Plaintiff's contract.

In the main testimony which is in writing DW1 engineer Sam Batanda testified that he was Head of Engineering at Uganda Broadcasting Corporation. In paragraph 11 he testified that on 8<sup>th</sup> December, 2011 the Plaintiff handed over the site to the Defendant and it was noted that there were still a few things that needed to be completed which included air conditioning of the complex, modifications proposed by Sony, automatic voltage regulation and UPS for the lift. However in cross examination he admitted that these were not part of the Plaintiff's contract. The issue arose when the management changed and there was a review of the contract and it was whether the variations executed between the parties went through the proper procedure. It was established that it had not gone through the approval of the solicitor general. In paragraph 16 he

*Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$# xtra+  
*maximum735securityx 2017 style*

testified that the completion date of the contract was calculated from 31<sup>st</sup> March, 2009. This would give about January 2010 as the date of completion. He contended that instead the Plaintiff handed over the site on 17<sup>th</sup> February, 2011 according to the certificate of completion.

Having reviewed all the evidence and considered the submissions of Counsels of the parties, the conclusion is that extensions of the time were permitted by the contract and the Defendant's representative who is the Project Manager PW1 granted the requisite extensions of time to the Plaintiff under the terms of the contract. He consulted with management before granting extensions of time. The reasons for extension of time were given and were not rebutted by DW1.

I have carefully considered the submission that the Project Manager required specific approval of the Employer and GCC 4.2 of the special conditions of contract. The fact that the Project Manager extended the contract is not in dispute and I do not see how the Plaintiff can be faulted for failure of the Project Manager, if any, to obtain specific approval. Under the contract, it is the Project Manager who makes the order for extension of time. The Plaintiff is under no obligation to inquire as to whether the Project Manager had obtained the requisite specific approval of the Employer. Clause 28.1 clearly provides as follows:

"The Project Manager shall extend the intended completion date if a variation is issued which makes it impossible for completion to be achieved by the intended completion date without the Contractor taking steps to accelerate the remaining work, which would cause the Contractor to incur additional cost."

Clause 28.2 clearly provides that the Project Manager shall decide whether and by how much to extend the intended completion date within 21 days of the Contractor asking for a decision upon the effect of the variation and submitting full supporting information. The duty of the Plaintiff was to submit complete information in support of an application for extension of time. The Plaintiff would then await the decision of the Project Manager but not inquire as to whether the Employer had given full consent to the extension of time. Clause 13.1 also permits the Project Manager to instruct the Contractor to delay the start of progress of any activity within the works.

The full import of the contractual clauses is that the Project Manager had authority to communicate an extension of time to the Plaintiff which was done according to the correspondence reviewed above. Some of the extensions were necessary to allow for importation of glazing material which was based on the request of the Defendant in the variation of works. It follows that the allegation that the Plaintiff did not complete the works within the stipulated period has no merit and that is no breach of contract on that account.

On the question of the defects liability period, I agree with the Plaintiff's evidence that the question of defects liability was raised after the defects liability period had passed and was outside the contractual requirements. Secondly, there were third-parties involved in parallel contracts which required their own specifications but affected the plaintiff's work. The Project

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

Manager testified that that some of the defects were caused by the negligence of the Defendants officials. In cross examination PW1 testified that the defects were all cleared during the defects liability period. Thereafter by the time further defects were brought to his attention, the defects liability period had expired. For instance there was a leakage due to people stepping on iron sheets that buckled due to the Defendants officials trying to put razor wire to keep birds away. Secondly there was a complaint that some glasses were burst. This is because there was no ventilation and air conditioning and a window shattered. It was the responsibility of the officials of the Defendant to open the windows.

The overall conclusion is that the Plaintiff is not liable for breach of contract for defects in the works. The works were certified and inspected by engineers of the Defendant and the site handed over. Work was done to the satisfaction of both parties. Issue number two is resolved in favour of the Plaintiff. The Plaintiff did not breach the contract with the Defendant.

**Whether the Plaintiff is entitled to the remedies sought in the plaint and whether the Defendant is entitled to the counterclaim?**

I have carefully considered the submissions on issues number three and four. I will start with the question of whether the Defendant is entitled to the counterclaim. Upon the resolution of issue number two, it is clear that the delays were catered for within the contract and therefore the claim for liquidated damages for delay has no merit.

As far as the claim for breach of contract is concerned, the issue has been resolved by the conclusion that there was no breach of contract and therefore the claim for damages in the counterclaim has no merit.

In the premises, the counterclaimants counterclaim as against the counter Defendant stands dismissed with costs.

Issue number three as to whether the Plaintiff is entitled to the remedies sought in the main suit. The claim of the Plaintiff is based on the certificates of completion of works which are catered for in the contract and duly issued by the Project Manager. In cross examination of DW1, the fact that certain monies were not paid to the Plaintiff was admitted.

The Defendant's main defence is that the deed of variation was an illegality. It follows that the submission was that the sum of Uganda shillings 85 million received by the Plaintiff under the variation should be offset. Those submissions are untenable in light of the finding of the court that the variation deed was catered for under the main contract and was therefore not an illegality but enforceable. The Plaintiffs claim is based on the testimony of PW2, a director of the Plaintiff to the effect that there was interim certificate number 8R for Uganda shillings 354,430,881/= exhibit P10. Secondly, final certificate for the sum of Uganda shillings 349,907,760/= exhibit PE 18 (b). Thirdly the retention money amounting to Uganda shillings 45,455,745/=; Exhibit P 21

(b). I have duly examined exhibits which were duly certified by the Project Manager and are inclusive of VAT of 18%. The total amount of the above categories is Uganda shillings 749,884,386/=. These amounts are not in dispute and the Defendants defence was on a point of law which was overruled. In the premises, the Plaintiff is awarded Uganda shillings 749,884,386/= being money due and owing to the Plaintiff and retained by the Defendant.

The final certificate is dated 4<sup>th</sup> April, 2012.

I have carefully considered the submissions on whether the Plaintiff should be awarded general damages and interest on the liquidated sum. Clause 42.1 provides that the Employer shall pay the Contractor the amount certified by the Project Manager. No specific provision has been made in the contract for the period within which payments are to be made. However payment is to be made within a reasonable period of time. Where there is delay in payments, the Contractor is entitled to interest for the period of delay.

The question is whether general damages should be awarded in the circumstances of the suit. The principle for award of damages is *restitutio in integrum* as held by the East African Court of Appeal in **Dharamshi vs. Karsan [1974] 1 EA 41**. Restitutio in integrum can also be achieved by an award of interest on money withheld. In **Tate & Lyle Food and Distribution Ltd vs. Greater London Council and another [1981] 3 All ER 716** Forbes J held at page 722 that award of interest is not a punitive measure for having kept the Plaintiff out of his money but part of the attempt to achieve restitutio in integrum. And in commercial cases the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld. The prayer to award general damages together with interest concurrently as specific heads of compensation was rejected in **Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472** Lord Wright held:

“... the contention is that money awarded as damages for the detention of money is not interest and has not the quality of interest. Evershed J, in his admirable judgment, rejected that distinction. The appellant’s contention is, in any case, artificial and is, in my opinion, erroneous because the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation”

Interest can represent the profit that the Plaintiff would have made if it had the use of the money in time.

In the premises, the claim for general damages is superfluous. The Plaintiff is entitled to interest on the money withheld from the date the suit was filed to the date of judgment. Interest is  
*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

awarded at the rate of 19% per annum from the date the suit was filed to the date of judgment. Further interest is awarded from the date of judgment at the rate of 19% per annum till payment in full.

Under section 27 of the Civil Procedure Act, costs follow the event and the Plaintiff's suit succeeds with costs awarded to the Plaintiff.

Judgment delivered in open court on 19<sup>th</sup> May, 2017

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

Counsel Thomas Ochaya for the Defendant

Atukunda Faith holding brief for Musamil Kibedi for the Plaintiff

Beatrice Kulume Legal Officer of the Defendant in court

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

**Christopher Madrama Izama**

**Judge**

**19<sup>th</sup> May, 2017**