

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 780 OF 2015

OMEGA CONSTRUCTION COMPANY LTD}.....PLAINTIFF

VERSUS

KAMPALA CAPITAL CITY AUTHORITY}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff brought this action for recovery of the amount certified in a final certificate issued by the Project Manager under a contract for upgrading of the Drainage Black spots in Kampala Phase 1 Contract Number KCCA/WRKS/2011 – 2012/002664) between the Defendant (the Kampala Capital City Authority) as Employer and the Plaintiff as Contractor, and also for interest on the debt under the provisions of the contract, and general damages.

The main contention in this suit relates to certificates of completion issued by the Defendant. Two rival certificates of completion were issued and the main controversy is which of the certificates reflects the Plaintiffs entitlement if any. The claim arising from the certificate relied on by the Plaintiff amounts to Uganda shillings 4,187,692,874/= as the unpaid balance of the certified sum plus interest accrued thereon by 6th November, 2015. The Plaintiff also claims damages for financial losses, loss of opportunities, inconvenience, and for late payment of the debt. The Plaintiff claims interest and reimbursement of financial charges at the rate of 45.5% for commercial borrowing. The Plaintiff further claims interest on the decretal amount at the rate of 30% per annum from the date of judgment till payment in full. Finally the suit is for costs of the suit to be provided for as well.

In the written statement of defence the Defendant denies the Plaintiff's claims and inter alia avers that the Plaintiff is not entitled to any payments as averred in the plaint for various reasons

written in the WSD. Inter alia the sum of Uganda shillings 1,721,040,000/= in the final payment certificate claim for extension of time number 1 is not due to the Contractor because the extension of time granted was without costs whatsoever. Secondly, Uganda shillings 236,100,000/= claimed in a purported final certificate for extension of time number two is an irregular claim since the second extension of time was a similar result, evaluated and granted without costs. Thirdly Uganda shillings 418,107,352/= being liquidated damages for failure to complete the works within the time ought to have been deducted in any certificates due to the Plaintiff which was not done in the final certificate. Furthermore the Defendant averred that defective works were erroneously valued and certified for payment. Uganda shillings 82,080,000/= for culprits which the Plaintiff had procured under the original scope of works was paid for by the Defendant in IPC number 4. 10% value of uncompleted works representing the Defendant's additional cost of completing the works was not deducted in the final certificate. The Defendant denied the claims in the plaint the facts of which are contained in the submissions of Counsel.

Consideration of the facts adduced in evidence led me to the conclusion that the material facts of the dispute are not in controversy. What is controversial relates to interpretation of facts and law. The Plaintiff called one witness and the Defendant called one witness whereupon the court was addressed in written submissions.

In this judgment SCC means Special Conditions of Contract.

GCC means General Conditions of Contract.

Written submissions of Counsel for the Parties

The Plaintiff submitted on the facts and wrote that on 30th December, 2011, the Defendant as Employer and the Plaintiff as Contractor entered into a Contract for Upgrading of Drainage Black spots in Kampala - Phase 1 Contract No. KCCA/WRKS/2011-2012/002664 and the contract is not in dispute. The contract sum was an amount of Uganda Shillings 4,181,073,515/= and the contract period was a duration of 8 months from the start date. The Project Manager named in the Contract is the Director Engineering and Technical Services in the Defendant KCCA. On 25th April, 2012 KCCA delegated all the authority, duties and functions under the contract to Messrs Architect Consults (U) Ltd in Association with Wanjohi Consulting Engineers

("Architect"); without any other reservations (save with regard to Traffic Flow Plans which required the Employer's approval). As such, where the reference to 'Project Manager' appears in the Contract, this is a reference to the Consultant, Architect. The notification of the Appointment of Architect is Annexure I (b) to the Witness Statement of Eng. Mugalaasi. The structure of the contract documents and the relationship between the Special Conditions of Contract ("SCC"), and the General Conditions ("GCC") is set out in paragraph 4.5 of the Complaint. The Plaintiff's Case is an action in debt for recovery of amounts owed to it as certified payments under Interim Payment Certificates (hereinafter "IPCs") to wit IPC No. 1, IPC No.2 and IPC No. 3 only partly paid and IPC No. 4 which has never been paid at all and the Payment upon Termination reflected in a final certificate. The Plaintiff's alleged that the Defendant/Employer committed a fundamental breach of contract by non-payment of IPC No. 4, and by refusal to pay the outstanding balances on IPC No. 1, IPC No. 2 and IPC No. 3 which had been partially paid. On the 25th of July 2014, and on the 5th and 25th September, 2014 the Plaintiff/Contractor issued notices to the Defendant that the Defendant was in fundamental breach of the contract due to delays in payment and the notices were not heeded. Under GCC 59.1 and 59.2 either party, was entitled to terminate the Contract if the other party caused a fundamental breach of the Contract. Such breach includes failure to make payment certified by the Project Manager within 84 days of the date of the Project Manager's certificate.

On 27thOctober, 2014 after the notices of fundamental breach of contract were not heeded; the Plaintiff terminated the Contract pursuant to GCC 59.1 and GCC 59.2 (d). Under GCC 60.2, if the Contract is terminated by the Contractor by reason of the fundamental breach of Contract by the Employer, the Project Manager shall issue a certificate for the value of the work done, materials ordered, the reasonable cost of removal of Equipment, repatriation of the Contractor's personnel employed solely on the works and the Contractor's costs of protecting and securing the works and less advance payments received up to the date of the certificate.

Following the termination of the contract by the Plaintiff, the Project Manager made a determination in accordance with GCC 60.2 and issued a payment upon termination (Final Certificate) on 23rd January, 2015 [although the covering letter was apparently inadvertently written as 23rd January, 2014. That certificate (hereinafter referred to as the "Genuine Final Certificate") was received by both parties on the same day. It is Annexure XV to the Complaint.

The closing sum payable to the Plaintiff/Contractor under the "Genuine Final Certificate" was a Sum of Shillings 3,670,455,850/= which sum also incorporated the unpaid balances on IPC No. 1, IPC No. 2 and IPC No. 3 and the unpaid sum on IPC No. 4. On 29th January, 2015 after the acceptance and processing of the Plaintiff's termination by the Project Manager under GCC 60.2, and after the issuance of the "Genuine Final Certificate" by the Project Manager, the Defendant purported to effect its own termination via a letter ref ED/KCCA/1303/01 (Annexure XVI to the Plaintiff). Despite the determination in accordance with GCC 60.2 and issue of the "Genuine Final Certificate" by the Project Manager, the Defendant refused and or deliberately neglected to pay the Plaintiff's entitlement as set forth in the "Genuine Final Certificate". The Plaintiff demanded for the certified amounts but the Defendant refused to pay. When a Notice of Intention to sue was served on the Defendant by the Plaintiff's Counsel, the Defendant paid a sum of Shillings 970,158,313/= into the Plaintiff's account on 24th June, 2015. But the Defendant did not indicate what this payment was supposed to settle. Under GCC 43, the Employer shall pay the Contractor the amounts certified by the Project Manager within 30 days of the date of each certificate. If an Employer delays or defaults in payment, the Contractor is entitled to interest on the delayed payment which shall be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing.

After deduction of the payment of Uganda Shillings 970, 158, 313/= made by the Defendant on the 24th day of June 2015, the principal amount owing was reduced to Uganda Shillings 3,549,910,493.60/=, but with the addition thereto of interest for the period 24th June, 2015 to 6th November, 2015 at the prevailing rate of interest for commercial borrowing, the total amount due as of 6th November, 2015 rose to a sum of Uganda shillings 187,692,874/=. The Plaintiff's evidence in the written witness statement of Eng. Pius Mugalaasi, shows that the rate of interest for commercial borrowing and the totality of the finance charges incurred by the Plaintiff was 41.8% which was subsequently increased to 43.5% for the delayed payment period from 24th June, 2015 to 16th August, 2015 and further increased to 45.5% for the delayed interest period from 17th August, 2015 to 6th November, 2015 according to documents showing interest rates charged on the Plaintiff by Barclays Bank Uganda Ltd. Additional interest continued to accrue on the outstanding sum. The Plaintiff also claimed damages for detention of its certified payment

as the delay in payment has put the Plaintiff to great financial embarrassment and inconveniences, loss of business, loss of opportunities and loss of use of its resources.

At the scheduling conference it was established that the parties relied on different certificates of payment with different outstanding amount in the final certificate arrived at. The Plaintiff relied on what it termed the "Genuine Final Certificate" but the Defendant contended that it had fully paid the Plaintiff and had documents to prove it. The court directed the parties to each produce the documentary basis of their respective positions.

Thereafter it was agreed that the central issue in the case revolved around which final certificate should be relied upon to determine the payment due to the Contractor.

As far as the background in the written submissions of the Defendant is concerned, the Defendant agreed that the Plaintiff and the Defendant on 30th December, 2011 entered into a contract for upgrading of Drainage Black spots in Kampala-Phase 1 an ad measurement Contract No. KCCA/WRKS/2011-2012/002664 at a contract sum of ugx.4, 181,073,515/= for a duration of 8 months. The scope of works comprised of excavations, construction of lined drains, installation of culverts and manholes and catch pits and reinstatement of trenches traversing across roads and these were to be executed at Jinja road Black spot C7 (Dewinton road, Yusuf Lule Road, and Electoral Commission- Access road), Entebbe road Black spot C17 (Sikh street; Dastur street, Snay Bin Amir Road, Market square Nakasero), and Ben Kiwanuka street Black spot C14 (Nakivubo mews, Nakivubo place, Channel street). At the beginning of the project, the Project Manager on behalf of the Defendant was the Director of Engineering and Technical Services, (DETS), as provided in GCC 1.1 (y) of the Contract from the period of contract signing of 30th December, 2011 up to the date of appointing a supervising consultant on 26th April, 2012 namely Messrs Architect Consults in Association with Wanjohi Consulting Engineers. The Plaintiff from the onset of the contract did not have the requisite qualified personnel to perform its contractual obligations and thus executed the works with poor workmanship and not in accordance with the quality, design and specifications stipulated in the contract and the same was communicated to the Plaintiff and ignored. The Auditor General Report of 11th November, 2014 concerning the contract raised issues related to poor workmanship on the re-scoped works sections especially Bugolobi, Mbogo-Tula in

Kawempe division and the same were always brought to the attention of the Contractor. The Plaintiff's performance of the contract was largely below expectation throughout the entire period of the contract up to when it was terminated and despite extensions of time at no cost as evidenced by a Deed of Variation signed by both parties, the Plaintiff failed and/or neglected to proceed regularly with the works so as to achieve completion within the contract period. The Plaintiff failed to maintain valid securities as required, despite numerous reminders which were a fundamental breach of contract under clause 59.2 (f) of the GCC.

Contract 59.2 (e) stipulates that failure by the Contractor to maintain a valid security is a ground for termination of the contract. The advance payment guarantee issued from Eco Bank ref No. EUG/PP/018/12 on 18th January, 2012 amounting to Uganda Shillings 836,214,703/= was valid up to 30th June, 2012. By the time of payment certificate No. 1 was forwarded for payment on 18th March, 2013 the advance guarantee had expired. Despite several reminders, the advance guarantee was not renewed which did not allow the Defendant to progressively recover the advance amount as per provisions of GCC clause 51.1, but instead, it was forced to recover all the advance of Uganda shillings 836,214,703/= from the payment certificate No. 1. The first performance guarantee issued from Eco Bank ref No. EUG/PP/005/12 received 12th January, 2012 amounting to Uganda shillings 418, 107,352/= was valid up to 9th March, 2013.

The first payment claim was submitted on 18th March, 2013 when the Performance Guarantee had expired. The Contractor renewed the Performance Guarantee on 15th April, 2013 which also expired on 23rd December, 2013 and was never extended even after several notifications. Non-renewal of the performance guarantee affected processing of payment of Certificates No.1, 3 & 4. The refusal of the Contractor to extend performance securities was considered a serious issue as it exposed the Defendant to various risks and would put it in a vulnerable position in the execution of the contract. For the period when the securities had expired, in case of any loss resulting from the Contractor's failure to complete its obligations under the contract, remedies available to the client to recover the loss are taken away as provided for in GCC clause 52 in the contract. The Contractor's attendance to site works was irregular and unsatisfactory.

The Contractor's staff used to start work almost at mid-day whenever they worked and there were days when there was no activity on site, sometimes months. This was communicated to the Contractor who failed to take remedial measures. The Plaintiff would mobilize and demobilize at will intermittently which disrupted business in the city resulting into relocation of works outside the Central Business District.

Even with the relocation of works, the Plaintiff abandoned the site of Mbogo-Tula Kawempe from March 2014 up to the time of terminating the contract. This inconvenienced the Defendant as the site conditions would get worse.

The Contractor would frequently carry out excavations and delay in covering and reinstating the sites. The location of the works at first being in the Central Business District meant that delays resulted in serious disruption of businesses and traffic. The disruptions sometimes resulted in public unrest that required police intervention. The Contractor failed to adhere to GCC clause 27 requiring him to provide updated work programmes within specified periods. The revised programme expected 5 days after letter of acceptance (18th January, 2012) was submitted late to the client on 16th March, 2012, yet commencement should have been 12th January, 2012. The programme submitted did not have specific dates. While other work programmes would be provided late after several reminders by the Project Manager. As a result, the works would continually lag behind. These consequently contributed to the Contractor's failure to complete the project on time as there was completely non-adherence to the work programme. The Contractor continually failed to meet performance targets as set out in his numerous work programmes. The Consultant reminded the Contractor several times to propose methods of correcting the defects and ensuring that the defects are corrected pursuant to clause 59.2 (e) of the contract, but the Contractor never made any meaningful proposal for rectifying the defects nor did he correct the defects. The Contractor continually and willfully refused to implement the Project Manager's instructions. For instance, on the rescope works, the Contractor received instructions to commence works on 28th October, 2013 but actual works on ground started in January 2014. Pursuant to **clause 23.1 of the GCC**, the Contractor was supposed to carry out all instructions of the Project Manager which complied with the applicable laws where the site is located and failure to adhere

forms grounds for termination. There are instances where the Contractor refused to follow the Project Manager's instructions on addressing defects within stipulated time, providing updated work programmes, maintaining guarantees, attending to joint assessment, providing traffic flow plans, and abandoning works among others. Despite the above anomalies in the performance of the contract, the Plaintiff purported to terminate the contract alleging fundamental breaches of the contract by the Defendant by non-payment of the interim payment certificates IPC No. 4 and by partial and delayed payment for IPC No.1 ,IPC No.2 and IPC No.3 hence the Plaintiff's suit.

PW1 Eng. Pius Mugalaasi Mugerwa testified on behalf of the Plaintiff and filed a written statement of his evidence. DW1 Eng. Justus Akankwansa testified on behalf of the Defendant and also filed a witness statement. The critical issue recorded by court was:

"Whether payment should be made in accordance with the Original Certificates as issued by the Project Manager/Consultant which the Plaintiff presented or whether the payments should be made in accordance with the Defendant's Certificates issued out and amended by the Defendant?"

PLAINTIFF'S WRITTEN ADDRESS

The Plaintiff's Counsel pointed out that with agreement on the above sole issue, the Defendant effectively abandoned its defences purported to be based on defective works. In any case any issues to do with Contract performance and any Employer's dissatisfaction therewith would under the Contract GCC 24 and 25 be resolved by adjudication and arbitration, and if they were brought to Court, it would stay the action and send the matter to arbitration or adjudication as the case may be. Indeed the Plaintiff's suit is an action for recovery of certified sums and not to litigate performance or contractual machinery breakdown disputes. And indeed the parties accordingly and wisely narrowed down the issue to which of the payment certificates are to be relied on to determine the Plaintiff/Contractor's payment.

The Plaintiff's Counsel submitted that the "In-House" versions of payment certificates 1, 2, 3, and 4 submitted to court by the Defendant are unusable in determining the amounts payable to the Plaintiff. By a letter ref. DLAIKCCAI001/05, filed on 30thSeptember, 2016, the

Defendant submitted to court a set of Certificates prepared by the Defendant and not by the contractually appointed Project Manager/ Architect and purported to have paid and settled the Plaintiff's claim on that basis. These certificates are collectively referred to as the "Impugned In-House IPCs".

Counsel submitted that paragraph 34 of the Plaintiff's Witness Statement is to the effect that the Impugned in- House IPCs are unknown to the Plaintiff. The Plaintiff also questioned the rationality of the Defendant's action in deciding to ignore, defy and disregard the Certificates issued by the construction supervision consultant (Architect) appointed by the Defendant to supervise the construction and to certify the works, and seeking to create its own parallel contradictory certificates. Moreover, when the in- house Project Manager, (and indeed the Defendant), had fully delegated without any reservation, all functions of the Project Manager to the Architect, including the function to determine the value of work executed and to certify payment under GCC 42.2, 42.3.

He further submitted that when the genuine certificates IPCs 1, 2, 3 and 4 were not paid on the due dates stipulated in the Contract, they started accruing interest as provided by GCC 43.1. In construction contract law, where a contract nominates a contract administrator to administer the performance of a contract, it is not possible for the Employer to take over or encroach on the functions of the contract administrator, unless there are express words in the contract permitting this to occur. The encroachment on or arrogation of contract administration duties by the Employer is referred to as 'interference' and has serious consequences for the Employer as summarized in **Halsbury's Laws of England, Building Contracts (Vol. 6 (2011/3 at Para 338** which cites the **Case of Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd [2006] BLR 113** where the matter was considered. The suit involved trial of certain preliminary issues which included whether the Employer was entitled under the contracts to appoint itself as the construction manager. Jackson J decided that the Employer had no power to appoint itself as construction manager for several reasons including: "(1) It is such an unusual state of affairs for the Employer himself to be the certifier and decision-maker that this can only be achieved by an express term. In the present case there is no express term authorizing this."

The Plaintiff's Counsel submitted that in the contract between the Plaintiff and the Defendant,

there is no longer an express term authorizing the Employer himself to be the certifier and decision-maker, since under GCC/SCC 4.2 all powers of the certifier and decision maker were delegated to Architect as Project Manager (save for Traffic Flow Plans). This renders the Impugned In-House IPCs useless and inapplicable for computing the Plaintiff's entitlement and court has to honor only the genuine IPCs 1, 2, 3 and 4 issued by the Project Manager i.e. Annexure V, VI, VII, VIII and XV above. Counsel further submitted that the Impugned In-House IPCs are also invalid and ineffective as they were not delivered or issued to the Contractor (Plaintiff) as required by law. When the Contractor terminated the Contract pursuant to GCC 59.1 and 59.2 (d) owing to fundamental breach of the Contract by the Defendant, the Project Manager proceeded under GCC 60.2 of the Contract to make a determination of the sums due to the Contractor (Plaintiff) and issued a Payment upon Termination (Final Certificate) on 23rd January, 2015 The Final Payment Certificate was also accompanied by a "STATEMENT FOR FINAL CERTIFICATE".

Counsel submitted that firstly, final payment instruments under Construction Contracts have been described in various contracts inter alia as the "Final Certificate of Payment", 'Final Certificate', 'Final Payment Certificate', or 'Final Statement'. Among the well-known construction contract forms, where the terminology of 'Final Payment Certificate' is employed is the FIDIC Conditions of Contract' where it means the certificate of payment issued by the Engineer pursuant to Sub-Clause 60.8 of those conditions of Contract and which states the amount which, in the opinion of the Engineer, is finally due under the Contract or otherwise. The Building Contract Dictionary defines a Final Certificate as the last certificate issued in connection with a contract. In amongst other things, a final certificate may certify the amount which is finally due from the Employer to the Contractor arising out of the contract. Murdoch and Hughes in their authoritative Book titled '**Construction Contracts: Law and Management**', state that "the final certificate can signify the contract administrator's satisfaction with the work, or the amount that is finally due to the Contractor, or both of these things". With reference to a seminal treatise Hudson defined a certificate as: "the expression in a definite form of the exercise of the judgment, opinion or skill of the engineer, architect or surveyor in relation to some matter provided for by the terms of the contract". Furthermore, he wrote that a certificate will usually relate to an existing state of affairs, either directly or as an expression of the opinion or judgment of the certifier.

In the Contract between the Plaintiff and the Defendant, the existing state of affairs was that the Plaintiff had terminated the Contract under GCC 59 and upon such termination by the Contractor for fundamental breach the Project Manager was duty-bound to proceed under GCC 60.2 of the Contract, to issue a certificate of payment upon termination. The Project Manager did so and issued a 'final certificate'. In the case of **Merton London Borough Council v Lowe (1981) 18 BLR 130, CA**, it was held that a document was a final certificate, with reference to the accompanying letter which stated that it was enclosing the final certificate. In that case the issue was whether or not the certificate was a final certificate. There was nothing on the face of the certificate itself to say that it was a final certificate.

The Plaintiff's Counsel also relied on **Alpha Gama Engineering Enterprises Ltd v Attorney General (HCT - 00 - CC - CS - 438 - 2010)**, where Wangutusi, J, held with reference to whether a document was a 'final certificate' with reference to the words of the Project Manager in part that: "I/We certify that final payment as shown is due from the Employer to the Contractor." ... "Value of the work executed as per final statement attached (including variations and price adjustment)" that the words under this contract are given their natural meaning and meant that the certificate was the last certificate carrying the final payment in respect of construction of the office block and in satisfaction of the contract between the Plaintiff and the Defendant.

On the basis of the above authorities, the Plaintiffs Counsel submitted that when the Project Manager issued the payment upon termination final certificate on 23rd January, 2015 the Project Manager thereby issued a 'final certificate' as understood in Construction Contract Law.

The certificate created a debt due and rendered the Project Manager legally incapable of issuing another or further parallel or contradictory certificate. Payment upon termination dated 23rd January, 2015, created a debt due. In construction contract Law, a 'final certificate' creates a 'debt due'. The issuance of the certificate creates a debt that is due for payment immediately. In fact, even an interim certificate creates a debt in favour of the Contractor which the Employer must pay at once subject to any right to set-off and an interim certificate may be regarded as akin to "cash in hand". If an interim certificate creates a debt due, then how about a 'final certificate'? Counsel relied on the Australian case of **Tan Hung Nguyen & Another**

vs. Luxury Design Homes Pty Limited & 2 Ors [2004J NSWCA 178 and where the statement of the Law in Halsbury's Laws of England, Volume 3, 458-459 was quoted with approval that: "...*Each certificate* for an installment creates a debt due, and the Contractor is entitled to immediate payment thereof subject to the terms of the contract and any right of the Employer to any set-off or counterclaim damages." The right of the Contractor to payment is enforceable as a debt. In the case of **Job Job Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture [2009] ZASCA 23**, the Supreme Court of Appeal of South Africa also held that: "... a *final payment certificate* is "treated as a liquid document since it is issued by the Employer's agent, with the consequence that the Employer is in the same position it would have been in if it had itself signed an acknowledgment of debt in favour of the Contractor... The certificate thus embodies an obligation on the part of the Employer to pay the amount contained therein and gives rise to a new cause of action subject to the terms of the contract. It is regarded as the equivalent of cash."

In conclusion to this point, the Plaintiff's Counsel submitted that the Project Manager issued a final certificate, which created a debt due and payable to the Plaintiff.

Counsel further submitted that after the Project Manager issued the "Genuine Final Certificate" on 23rd January, 2015 the Defendant KCCA interfered and issued a subsequent parallel and contradictory 'certificate' under GCC 60.1, as if it is KCCA that had terminated. In any case these certificates had never been delivered to or served upon the Defendant, until October 2016, when it was served on the Plaintiff's Counsel in this suit. These impugned certificates purport to state different sums as being the amounts finally payable to the Plaintiff under the terminated contract.

He observed that the genuine final certificate has the stamps of both the Plaintiff and the Defendant acknowledging receipt thereof while the impugned certificate has only the stamps of the Defendant acknowledging receipt of the same. The proper final certificate was signed by both the Project Manager (Architect) and the Contractor, while the impugned final certificate was not signed by the Contractor. It meant that the impugned certificate was not duly issued or served and this was admitted by the Defendant's witness in cross-examination.

Counsel submitted that the burden to prove the impugned final certificate lay on the Defendant

under Sections 101 - 103 of the Evidence Act but the Defendant did not even produce the author of its final certificate on the other hand the proper certificate was acknowledged unequivocally by the Defendant's witness.

He submitted that according to precedents even in the absence of any express requirement that a certificate be delivered, it will usually be implied that the certificate, to be effective, must be delivered to the affected persons (See: *Token Construction Co Ltd v Charlton Estates Ltd* (1976) 1 BLR 48; and *Penwith DC v VP Developments Ltd* [1999] EWHC Tech 231, *London Borough of Camden v Thomas McInerney & Sons Ltd* (1986) 9 Con LR 99).

In conclusion the impugned certificates also fall foul of the law because they were never issued or delivered and are of no effect. The payment upon termination cannot be revised and was intended to determine the amount of the final payment for the Contractor. The Project Manager clearly stated and treated that certificate as 'final'. It was entitled "Payment upon Termination (Final Certificate)". There is a long list of cases which establishes that where the contract administrator (Project Manager) issues a final payment certificate, this concludes the contract administrator's (Project Manager's) powers to correct or modify previous payment certificates, and he or she becomes *functus officio*. Counsel submitted that under such circumstances the contract administrator (Project Manager) has no power to correct or modify the final payment certificate on its own motion; any correction or modification can only occur if either party raises a dispute under an arbitration clause which gives it the appropriate jurisdiction or commences litigation. Counsel cited the case of **H. Fair-Weather Ltd v. Asden Securities Ltd (1979) 12 BLR 40**, where Judge William Stabb QC held (at p.53) that once the contract administrator (certifier) had issued the Final Certificate under the Contract Conditions then, if no notice of arbitration had been given by either party within the permitted time, in accordance with the Contract Conditions, the contract administrator (certifier) was thereupon *functus officio* and was thereby precluded thereafter from issuing any further valid certificate under the Contract Conditions (See **Alpha Gama Engineering Enterprises Ltd v Attorney General**, a party dissatisfied by a certificate goes to adjudication or as the case may be, arbitration).

The Plaintiff's Counsel submitted that a final certificate issued under GCC 60.2 cannot be the subject of review and revision or amended by a later certificate. That review or supplementary

revision is only allowed with interim certificates. Once a contract administrator (Project Manager or engineer) has signed an interim certificate for a payment to a Contractor, he cannot withdraw it later. But an interim certificate can be adjusted either in subsequent interim certificates or in the final certificate. The practice in most construction contracts is therefore for errors in interim certificates to be corrected in the next interim certificate or in the final certificate. This is the essence and purpose of GCC 42.6 which provides that the Project Manager may exclude any item certified in a previous certificate or reduce the proportion of any item previously certified in any certificate in the light of later information. But such revision or correction is not possible with final certificates. The final certificate is the last. There is no other certificate after it. In fact, construction law experts are emphatic the certifier is entitled to exercise the function of certifier only once per certificate and thereafter is *functus officio* and have no further duty as to that certificate (See the Law of Construction Disputes by Cyril Chern, CRC Press, 2016, at p. 200). In the South African case of **Ocean Diners (Pty) Ltd v Golden Hill Construction CC [1993] 2 All SA 260 (A) 22**, a final certificate had been issued by the appellant's agent (the architect) acting within the scope of his authority. Thereafter the representative of the appellant questioned the correctness of certain amounts included in the final valuation. Thereupon, the architect, without any prior referral to the respondent, purported to cancel unilaterally the certificate and subsequently issued what was described as an interim certificate. The Supreme Court of South Africa (Appellate Division) held that a certificate of payment is not open to attack because it was based on erroneous reports of the agent of an Employer or the negligence of the engineer and such negligence on the part of the engineer cannot provide a basis for cancellation or withdrawal of the certificate by the Employer. The Plaintiff's Counsel concluded that the contract administrator (Project Manager) having certified the last and final payment under GCC 60.2 in effect the contract ended and it concluded the contract administrator's (Project Manager's) powers to correct or modify this last certificate.

It is a well known principle or doctrine of privities of contract that the alleged the appointment or contract between the Project Manager and the Employer cannot impose a contractual burden on a third party (Contractor) without his consent. To be effective restrictions placed by the Employer on the Contract Administrator (Project Manager) must be notified to the Contractor. Secondly, in Construction and Engineering Contract Law and Practice, the duties

and powers of a contract administrator and any restrictions or limitations on those powers, are determined by the contract between the Employer and the Contractor i.e., in the Construction Contract. As such, although, the appointment agreement between the Employer and the contract administrator may itself impose limits on the powers of the contract administrator, any such limitations will have no effect as between the owner and the Contractor unless they are drawn to the Contractor's attention, and the Contractor has agreed to them applying (See, Construction Law by Julian Bailey, CRC Press, 2014, at page 352 and that “as between the Contractor and the Employer the authority of the engineer cannot be limited without the Contractor being made aware of the fact). As such there is no requirement for the Project Manager (Architect) to first consult the Employer before certifying the works done for payment. There are no valid or enforceable restrictions placed by the Employer on the Project Manager with regard to certification.

Rate of interest for Commercial Borrowing:

The Plaintiff's Counsel submitted that IPCs 1, 2, 3 and 4 plus the final certificate issued by the Project Manager on 23rd January, 2015 should have been paid in full by the Employer within the period stipulated in the Contract. Under GCC 43 of the Contract, the Employer shall pay the Contractor the amounts certified by the Project Manager within 30 days of the date of each certificate. If an Employer delays or defaults in payment, the Contractor is entitled to interest on the delayed payment which shall be calculated from the date by which the payment should have been made up to the date when the late payment is made, at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made.

The evidence of the Plaintiff's Witness Statement is that the rate of interest for commercial borrowing and the totality of the finance charges incurred by the Plaintiff was 41.8% which was subsequently increased to 43.5% for the delayed payment period from 24th June, 2015 to 16th August, 2015 and further increased to 45.5% for the delayed interest period from 17th August, 2015 to 6th November, 2015.

Counsel submitted that although Courts both here in Uganda and in overseas Common Law jurisdictions had previously struggled with awarding compound interest and late payment

charges in construction disputes, that situation has recently changed. In the High Court case of **Sarah Kayaga Farm Limited vs. the Attorney General Civil Suit No. 351 of 1991** the Hon. Ag. Judge Remmy K. Kasule (as he then was) awarded compound interest in a construction dispute arising on what he described as "World Bank Standard Construction agreement format which addresses delays in payment". In **Sempra Metals Ltd v Inland Revenue Commissioners and another [2007] 4 All ER 657**, a seminal decision on interest on late payments, the UK House of Lords/Supreme Court finally recognized that the loss flowing from the late payment of money will include the cost of borrowing money and that this cost may include an element of compound interest. Lord Nicholls held that the legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again. The unsound rule returning once more for consideration by their Lordships concerned the negative attitude of English law to awards of compound interest on claims for debts paid late. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdrafts or credit cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss it must recognize and give effect to this reality. In *Sempra Metals (supra)* it was also recognized that the loss flowing from the late payment of money may be loss of an opportunity to invest the unpaid money and that the investment loss may need to include a compound element if it is to be a fair measure of what the Plaintiff lost by the late payment. Counsel also cited **Sarah Kayaga Farm Ltd v. Attorney General** and **Kampala Capital City Authority v Omega Construction Limited Misc. Application No.1 81 0/2015** where compound interest and the default interest for late payment were allowed.

He submitted that it is the duty of the Court to enforce the contract of the parties. The amounts outstanding as at 19th October, 2016 are Uganda Shillings 6, 460, 379, 176/=. Since contractual interest continues to accrue under GCC 43, this is a living table i.e. figures continue to change upwards on account of accrual of interest. The interest as obtained from Barclay's Bank, which is the Plaintiff's financing Bank under together with charges is 45.5% which ought to be awarded by the court.

In regard to remedies sought and prayers of the Plaintiff, the Plaintiff's Counsel prayed for Judgment against the Defendant for Uganda Shillings 6,460,379,176/= being the amount due

plus the interest accrued thereon as at 19th October, 2016 , damages for financial losses, loss of opportunities, inconvenience, and for late payment of the debt. Interest and reimbursement of finance charges at current rate of 45.5% for commercial borrowing and totality of finance charges charged to the Plaintiff from the 6th November, 2015 until date of Judgment. The Plaintiff claimed interest on the decretal amount at the rate of 30% per annum from the date of Judgment until payment in full and costs of the suit.

Submissions of the Defendant’s Counsel in reply:

The Defendant Counsel submitted that three issues should be considered namely:

1. Whether there was breach of the contract in issue and if so?
2. Who is liable in the circumstances of this case?
3. What remedies are available in the circumstances of this case?

In resolution of issue one on whether there was breach of the contract in issue, the Defendant’s Counsel submitted that there were breaches of the contract and these were committed by the Plaintiff as a result of which the Plaintiff is not entitled to the prayers in its pleadings.

The Defendant’s Counsel further submitted that with court's guidance, when the parties appeared before court to conference the matter, it was agreed that the central issue in the case revolved around which set of certificates applied to determine the payment due to the Plaintiff upon which court recorded the sole issue framed for determination as follows;-

'Whether payment should have been made in accordance with the Original Certificates issued by the Project Manager/Consultant presented to court by the Plaintiff or whether the payments should be in accordance with the reviewed Payment Certificates presented to Court by the Defendant'

In reply the Defendant’s Counsel submitted that at the beginning of the project, the Project Manager on-behalf of the Defendant was the Director of Engineering and Technical Services (DETS), as provided in GCC 1.1 (y) of the contract from period of contract

signing of 30th December, 2011 up to the date of appointing a supervising consultant on 26th April, 2012, Messrs Architect Consults in Association with Wanjohi Consulting Engineers. The Consultant was appointed by the Defendant to perform the duties and obligations of the Project Manager for the works and to be fully responsible for the Engineering Designs and Construction supervision of the works.

The Defendant's Counsel submitted that all payment certificates issued by the Consultant were subject to verification and due diligence by the Employer in consultation with the Consultant to ensure value for money and conformity to contractual terms and conditions before payment and in certain instances amounts payable were either confirmed or varied by the Defendant in consultation with the Consultant as evidenced by details of the certificates on court record. All adjusted payment certificates had accompanying reports indicating the reasons for deductions or increases and communications were made to the Plaintiff with regard to the changes on the certificates according to correspondence adduced in evidence.

Counsel submitted that the Defendant exercised due diligence when on receipt of the payment certificates forwarded for payment, discovered on their face discrepancies which were not in conformity with the contractual terms and conditions pursuant to GCC clauses 2.3, 37, 43, 52 & Part 3: Section 6 of the contract. These discrepancies were:

- a) Inclusion of sections of defective works or incomplete works in the payment.
- b) The claims lacked Quality tests to support payment claims.
- c) Lack of or incorrect measurement sheets for some items.
- d) Some items included for payment had not satisfied the provisions of the contract Part 3: Technical Specifications: Section 6: Statement of Requirements guiding measurement and payment of those items such as day works, traffic flows, overhaul.
- e) Lack of valid advance and performance securities exposing client to risks.

The Defendant's Counsel submitted that the evidence of the Defendant was unchallenged. In respect to payment certificate No. 4, the Defendant exercised due diligence by refusing

to clear the same due to the following anomalies:

- i. Poor workmanship on rescoped works for which payments in certificate No.4 were being sought. Thus payment being sought in the said certificate was for defective works.
- ii. The reported site concrete cubes tests for Bugolobi had failed tests exhibiting poor workmanship.
- iii. Measurements on overhaul payments without location of distances.
- iv. Non maintenance of securities and recommended penalization while preparing a final certification.

It is also the unchallenged evidence of the Defendant that the Office of the Auditor General agreed with the Defendant's position and wondered how in payment certificate No A, the Project Manager's distance of overhaul from Salaama road, Bugolobi Tula to Namanve could be the same. Further during one of the on-site inspection by the Office of the Auditor General of 11th November, 2014 in respect of both initial and rescoped works, the representatives of the Office of the Auditor General on measurements had the same values as certified by the Defendant's Directorate of Engineering and Technical Services but which varied from what the Project Manager had initially recommended for some items. The same anomalies raised by the Defendant in respect to not clearing the payment certificate No A were the same raised by Office of the Auditor General which evidence remains unchallenged by the Plaintiff. Hence the Project Manager's and Defendant's determined final value of works done was the same in the sum of Uganda shillings 3,593,821,079/= out of which Ug.shs. 2,879,513,494/= was paid to the Plaintiff and Uganda shillings 714,307,585/= retained by the Defendant as penalties for liquidated damages, defective works and uncompleted works.

The Defendant's Counsel submitted that this being an admeasurements contract, where the Bill of Quantities is used to calculate the contract price and the Contractor is paid for the verifiable quantity of the work done; the Plaintiff was paid in time for all works that he executed in conformity with the contract terms, conditions and specifications. The details

of payment certificates were given by the Counsel. On advance payment, a request for Uganda shillings 836, 214,703 = was received on 12th January, 2012 from Contractor and paid on 21st February, 2012. In payment Certificate No. 1 this request was received on 18th March, 2013 from the Consultant recommending payment of Uganda shillings 540, 787,676/= out of the cumulative value of works of Uganda Shillings 1,520,342,644/=. On Defendant's due diligence, the cumulative value of works was ascertained at Uganda Shillings, 358,770,400/= which was approved payment of Uganda shillings 386,678,657/= and paid on 7th May, 2013.

Counsel submitted that discrepancies in the Consultant's submission were corrected or revised in respect of the payment certificate No. 1 by the Defendant resulting into less payment and the purported delayed payment were as follows:

- Wrong advance payment amount Uganda shillings 827,520,703 stated instead of ug.shs.836, 214,703/=.
- Miscalculations on measurement sheets on items B 17.01 (b), item22.02, B16.02, B22 (a), 22.17(ii).
- Quality assurance reports lacked Employer's approval and the Consultant included the rejected sections for payment and defective works in item 22.07(a) Class A bedding encasing pipes claimed by Project Manager reduced from 1099 .43m³ to 912.00m³), Contractor was requested by the Project Manager to submit quality assurance reports of 29th January 2013 ref: 2012/KCCA/DBS/OC/024. Consultant's review &approval of the asphalt tests was done 2ndApril 2013 ref: 2012/KCCA/DBS/041.
- Item B 16.02, Overhaul lacked Consultant's approval and it was not paid.
- On re-measurement, item 17.04 (b) concrete paving blocks reduced from 130m³to 32.50m³and Item 17.04(d) Asphalt from 1160m³ to 1127.5m³.
- Item 22.17(d) (ii) from 2.0m to 1.6m. While day works lacked consultant's approval as required Part 3: Section 6 of contract.
- The advance guarantee had expired 30th June, 2012. While performance expired 9th March, 2013 while certificate was in process. This forced the Defendant to recover all advance and was considering termination when the

performance guarantee was renewed 15th April, 2013. After which is when the Defendant cleared the payment.

- A communication ref: DE/20 13/CS/MK/In/0040 dated 13th Sept 2013 was given to the Contractor explaining discrepancy and there was response signifying that the Contractor had no objection.

The above evidence was not challenged by the Plaintiff during cross examination of Engineer Justus Akankwasa.

Payment Certificate No. 2 was received on 1st July, 2013 from consultant recommending payment of Uganda shillings 561,924,067 out of the cumulative value of works of Uganda shillings 1,947,691,898=. On the Defendant's verification, the cumulative value of works was established to be Uganda shillings 1,803,292,797/= with approved payment of Uganda shillings 400,070,157= (after deductions) which was paid on 27th August, 2013.

Counsel further submitted that discrepancies were corrected or revised by the Defendant in respect of the payment certificate No. 2 resulting into less payment. Discrepancies on BOQ item 22.07 (d) although a quantity of 316.22m² was approved by the PM per measurement sheets attached, the rate of the item of Uganda shillings 4,7343,900/= was not included in the certificate. There was no instruction by the Project Manager as required to support documentation as provided for Part 3: Section 6 statement of Requirement: Sub clause 7 clause 14(k) of the contract.

The aforementioned anomalies were brought to the attention of the Consultant and the consultant addressed the said concerns by revising the earlier payment certificates initially issued and this was done after joint site visit for example, measurement sheets or quality tests for asphalt tests on Dastur Street revealed defects which both the Consultant and Contractor were notified of, in the communication dated 13th September, 2013 ref: DE/2013/CS/MK/In/0040.

Certificate No. 3 Counsel submitted that this was received on 18th November, 2013 from the Consultant recommending payment of Uganda shillings 288,229,967/= out of the

cumulative value of works of Uganda shillings 2,123,548,316/=. On the Defendant's verification, the cumulative value of works was established as Uganda shillings 2,121,505,757/= with approved payment of Uganda shillings 286,391,664/= and this was paid on 27th December, 2013.

The Consultant was given comments on 27th November, 2013 by letter ref: KCCA/DE/2013/AK/AJ/jm/00236 and on 9th December, 2013 about discrepancies in the forwarded certificate. The Consultant made clarifications and attached additional support documentation on 26th November, 2013 ref: 2012/KCCA/DBS/065 and 10th December, 2013 ref: 2012/KCCA/DBS/067. The anomalies were corrected accordingly by the Consultant after a joint site visit.

1.6. Certificate No. 4, Counsel submitted that this was received on 3rd July, 2014 from the Consultant/ Project Manager. The certificate was for works carried out at Salaama road, Bugolobi & Kawempe Tula (mainly rescoped areas after 2nd extension of time approval of 140 days) for the period 28th October, 2013 to May 2014. Following a joint site assessment on 24th July, 2014 the certificate was returned to the Consultant citing the following concerns:

- a. lack of quality assurance reports as works were marred by poor workmanship
- b. lack of a valid performance guarantee which was fundamental breach by the Contractor to enable processing of payment as per communications 3rd July, 2014 ref: DETS/KCCA/1307/08-AK/ AJ/jm 14- 368, DETS/KCCA/1307 /08-AK/ AJ/MK/jm 14-010 dated 10th February, 2015. The performance guarantee acceptable to the Employer was an Unconditional bank guarantee as per GCC 52.3 which was never resubmitted by the Contractor.

Payment claims after Contract termination GCC 60.2 of the contract by the Defendant's Employer could not be based on incomplete and unclear documents of the Project Manager. Payments recommended were not in conformity to contract terms and conditions. This was thus not considered for payment since the consultant stated that there are costs for time extensions No. 1 & 2 which were still under analysis. The Project Manager confirmed to

the Plaintiff that the cost claims analysis was still ongoing vide letter ref: 2012/KCCA/DBS/OC/110 dated 27th October, 2014 and the document was unclear on which amount was recommended by the Consultant for payment to the Plaintiff as they were three recommendations due for payment to the Contractor in the sum of Uganda shillings 1,713,315,850/=, Uganda shillings 3,670,455,850/= and Uganda shillings 1,604,145,516.20/= respectively. This evidence was not challenged during the cross examination of Engineer Justus Akankwasa. The Contractor therefore committed a fundamental breach of contract and allegedly terminated the contract citing GCC 60.2 of the contract due to failure of payment by the Employer. However, the failure to make the alleged payment was due to the Contractor's failure to fulfill its obligations such as by failure to maintain a valid Performance Guarantee. In light of the above undisputed fact, the defendant's Counsel wondered how the Plaintiff/Contractor expected the Defendant/Employer to effect payment without a valid Performance Guarantee. The consultant had not included assessment of original works on Black spot C17 & C7 in the final certification and this was also not paid and comments raised to the Consultant to resubmit vide letter ref: DETS/KCCA/1307/08-AK/AJ/jm 14-390 dated 7th November, 2014.

Final Payment Certificate: The Defendant's Counsel submitted that on joint assessment by the client's representative and the Consultant, the value of works for original and rescope works was established as Uganda shillings 3,593,821,079/= according to the final submission from the Consultant dated 26th March, 2015. Measurements of certificate No. 4 that had discrepancies were replaced by those endorsed by the Consultant and the said evidence was not challenged by the Plaintiff.

Therefore, following the concerns raised by the Auditor General which were considered by the Defendant, the final payment resulted into deductions as provided for **under GCC 60.1 of the contract as shown below:**

Final Cumulative value of works	Uganda shillings 3,593,821,079/=
DEDUCTIONS	
Liquidated damages as per GCC 49.1 for the period	Uganda shillings 418,107,352/=
Cost of defective works as was measured	Ug.shs.222,717,081/=

by PM	
10% for the uncompleted works 734,831,516 (based on rescoped BoQ)	Ug.shs.73,483,152/=
Previous payments made (Advance, Certificates Nos.1 ,2,3)	Ug.shs.1 ,909,355,181/=
Final payment made to the Contractor 23rd June 2015	Uganda shillings 970,158,313=

In light of the above, the question is whether the Employer could make any payment on the basis of an uncompleted, unclear and erroneous payment certificate recommended by the Consultant Engineer and which were not in conformity to contract terms and conditions.

Counsel submitted that since such a payment certificate is not conclusive as to the sufficiency of the actual work done and as such, the Employer is not liable to make payment. Since the payment certificates in issue were still under analysis, the Defendant had no basis/justification to make a payment since the certificates in issue were inconclusive.

The Plaintiff's Counsel submitted that **The Public Procurement and Disposal of Assets Regulations** Part V- Contract Management-Regulation 50 (1) on Delays in payment stipulates that: "where a payment request contains errors or discrepancies or is supported by incorrect or incomplete documentation, or is not in accordance with the terms of a contract, the payment request shall not be certified and shall be returned to the provider specifying the reasons for the rejection".

He further submitted that the aforesaid Regulations, Part V on Contract Management - Regulation 50 (2) provide that: "A provider whose payment request is rejected shall be entitled to present a new or amended payment request, which shall be treated as the original payment request". The PPDA Regulations Part V on Contract Management and regulation 50 (2) provides that: "Notwithstanding sub regulation (1), where a procuring and disposing entity queries any part of a payment invoice from a provider, the procuring and disposing entity shall pay the unchallenged portion of the invoice to the provider".

In light of the above, the Defendant followed the cited provisions of the law to ensure that payment was made for work done so that there is value for money. Accountability of the public funds spent on the project remained a duty of the Defendant and not the Consultant/Project Manager. Counsel cited the case of **Robins vs. Goddard [1905] 1 K.B. 294**, where it was held that no certificate of payment should be considered as conclusive evidence as to the sufficiency of the work and that the Employer was free to defend and prove that the work was not in accordance with the contract.

Counsel further submitted that the Consultant and certifier departed from the instructions of the Employer/Defendant and therefore acted outside contractual terms. The Defendant in agreement with the Plaintiff's submissions that a payment certificate issued by the Certifier and /or Project Manager creates a debt due but only as long as there is compliance with contractual terms. In the instant case, it is an admitted fact that the Consultant issued a payment certificate with clear gross errors on the face of it. The Employer was faced with an erroneous final payment certificate and had the option of bringing the said errors to the Certifier (its agent) who if satisfied can decide to make necessary remedial action as it was done in the instant case. The Contractor has no legal basis to claim for payment based on such an inconclusive and erroneous final payment certificate.

Counsel further submitted that the Plaintiff does not dispute that the final payment certificate was issued in error but argues that once such payment certificate is issued by the Project Manager whether erroneously or not, the Employer is liable to pay and further that the Employer cannot question or seek the certifier to remedy the error.

He also submitted that the case of *Kampala Capital City Authority v Omega Construction Co. Ltd* Misc. Application No. 181 of 2015 is differentiated from the instant case because unlike the instant case, the case in issue concerned the Arbitrator's Award directing the Project Manager to work out the Claimant's final Payment in accordance with GCC Clause 58.2, 39.3, 39.4 (a) and 39.6 of the contract. In the instant case, the Project Manager issued payment certificates which among others lacked quality assurance reports as works were

marred with poor workmanship and included sections of defective works or incomplete works in the payment, the claims lacked quality tests to support payment claims, lack of or incorrect measurement sheets for some items, some items included for payment had not satisfied the provisions of the contract Part Technical Specifications: Section 6: Statement of Requirements guiding measurement and payment of those items such as day works, traffic flows, overhaul. The payment certificates had obvious errors which were brought to the attention of the Project Manager/Certifier. A Project Manager may exclude any payment in any certificate in light of later information disclosing obvious errors therein. The Project Manager acts on behalf of the Employer. Indeed, GCC Clause 4.1 of the contract is to the effect that the Project Manager represents the Employer. GCC Clause 1.1 (y) of the contract is to the effect that the Project Manager is appointed by the Employer and is responsible for administering the contract. The Project Manager as such implements the instructions of the Employer pertaining to the contract.

Counsel submitted that in light of the above therefore, since the original payment certificates had errors which were brought to the attention of the consultant, the agent of the Defendant who issued them and the fact that the said payment certificates were reviewed by the Consultant and payment made accordingly to the Plaintiff who never objected to the same until the filing of the instant suit and the fact that the said payment certificates never had supporting documents and were not conclusive. The Defendant owes no monies to the Plaintiff as alleged. The original payment certificates issued by the Consultant were overtaken by events following their revision and issuance of reviewed payment certificates by the Consultant upon which the Defendant based to make payments to the Plaintiff. Both the original and the reviewed payment certificates were issued by the same person, the Consultant.

Counsel also submitted that the principle of *functus officio* does not apply to the Project Manager. He maintained that there is no law in Uganda that bars the certifier of a payment certificate from correcting obvious errors in the certificate. In the final certificate in question there were figures where the Project Manager indicated that they were under analysis and it would not be prudent for the Employer to pay such amounts. He further submitted that any payment in the circumstances would amount to unjust enrichment and

not value for money in the circumstances of this case.

He submitted that much as the consultant was the certifier in this case, certificate was to be done in compliance with the contract and the instructions of the Employer in line with the provisions of the contract. The certifier issued the original certificates in error and reviewed the same and payment was made basing on the reviewed certificates. In light of the above therefore, payment to' the Plaintiff should be based on the reviewed payment certificates. He prayed that the court as a custodian of justice should hold that the Plaintiff is not entitled to any payments as none validly accrued to it for the following reasons:

- (i) Shillings 1,721,040,000/= in the final payment certificate claimed for extension of time (EOT) number 1 is not due to the Contractor because the EOT granted was without cast whatsoever.
- (ii) Shillings 236,100,000/= claimed in the purported final certificate for EOT No 2 is an irregular claim since the 2nd EOT was similarly sought. Evaluated and granted without cost.
- (iii) Shillings 418,107,352/= being liquidated damages for failure to' complete the works within time ought to have been deducted in any certificates due to the Plaintiff but was not done in final certificate.
- (iv) Defective works were erroneously valued and certified far payment. Uganda shillings 82,080,000/= for culverts which the Plaintiff had procured under the original scope of works was paid for by the Defendant in IPC No. 4.
- (v) There was no delay in payment as alleged by the Plaintiff and the only valid certificate due to it was IPC No. 4 for which after a joint measurement, the sum of Shillings 970,158,313/= was assessed for payment and was paid by the Defendant.

Counsel further submitted that since there are no outstanding payments due to the Plaintiff under the contract in the sums alleged, the Plaintiff is not entitled to either simple or compound interest accruing on the alleged sum. He cited the case of **Attorney General vs. Virchand Mithalal & Sons Ltd Supreme Court Civil Appeal No. 20 of 2007**, where court

observed that a simple interest arises invariably when a party which is liable or owes money fails to pay what is due before or on the date agreed, stipulated, or implied. If the matter comes to court, the court exercises its discretion as to the rate and date when interest shall be paid. The award of compound interest however depends on other different criteria beside the discretion of Court. Compound interest is not founded simply on the mere fact of indebtedness nor on the date the principal debt became due or on the duration it has taken to pay since accruing. It is based on one or more of a multiplicity of reasons such as the law applicable to the transaction, the nature of the business transacted or agreed between the parties, the construction of the contract made between the parties among others.

No evidence was adduced or authorities cited to suggest that in this case, compound interest was intended, implied or anticipated by the parties or implied by law. In this case, the Plaintiff has not in the first place proved that it is entitled to any payment from the Defendant since all certified payments as revised by the Consultant actually due and owed to the Plaintiff were paid by the Defendant. In the premises, the Defendant's Counsel submitted that the payment to the Plaintiff in the circumstances of this case should be based on the reviewed payment certificate issued by the Consultant. Review of the said payment certificates by the Consultant followed exercise of due diligence and in good faith to protect and save public resources and to ensure that there is value for money. He submitted that the Plaintiff having failed to prove its case, Court be pleased to dismiss the same with costs.

Plaintiffs Submissions in Rejoinder:

In rejoinder the Plaintiff reiterated its earlier submissions and maintained that the Defendant's submissions deviate from the sole issue agreed for determination by the Court which is a grievous transgression on the part of the Plaintiff as this tries to direct the trial of this Case round and round in circles. The Courts of Judicature in Uganda, right up to the Supreme Court have pronounced themselves strongly on this matter and have refused deviations from agreed issues (See **Stanbic Bank Uganda Ltd v Uganda Crocs Ltd** (Supreme Court Civil Application No. 4 of 2004) Tsekooko. JSC held that the scheduling conference is the stage when proper issues would emerge and parties and the court would settle the real issues to be tried and determined.

Counsel pointed out that at the scheduling conference the central issue was agreed and it gravitated around which set of certificates applied, to determine the payment due to the Contractor. The purpose of a scheduling conference were also considered in various other cases namely: In **Jamil Ssenyonjo vs. Jonathan Bunjo Civil Suit No. 180 of 2012** Hon Mr. Justice Bashaija following Supreme Court **Tororo Cement Co. Ltd vs. Frokina International Ltd SCCA No. 21 of 2001** and **Stanbic Bank (U) Ltd vs. Uganda Crocs Ltd SCCA No. 41 2004** held that the purpose of Scheduling Conference is, inter alia, to sort out issues over which parties are agreed so that there is no litigation over them thereafter (See also Mudiima & 5 Ors vs. Kayanja & 2 Ors HCCS No. 0232 of 2009 (Land Division). In **Angella Katatumba vs. the Anti-Corruption Coalition of Uganda** High Court (Commercial Division) Civil Suit No 307 of 2011, this court held that agreements entered into during the scheduling conference have immediate ramifications. They may influence the mode of trial and even how to deal with facts that may be in controversy and facts that do not have to be proved in the trial. A fact which is not in controversy need not be tried. The Court of Appeal in **Comet (U) Limited and Another v DFCU Bank and 2 Others, Civil Appeal No. 82 of 2002** held that the parties should confine their written submissions to one issue agreed to at the scheduling conference: "At the conferencing stage, Mr. Mulira must have had knowledge of the information on the 1st respondent involving the alleged fraud. However, Counsel opted to leave it out and instead agreed to submit on the sole issue agreed upon by the parties. The blame for the omission is squarely at his door" The Plaintiffs Counsel invited court to reject the Defendant's submissions as deviate from or goes beyond, the sole agreed issue. He also pointed out that any other form of dispute had to be referred to arbitration under GCC 24 and 25.

In relation to alleged unchallenged evidence of the Defendant, the Plaintiff's Counsel asserted that the Defendant kept on repeatedly making a false submission that the Defendants evidence was unchallenged when DW1 was cross examined after the parties had initially consented to the facts and that there would be no cross examination.

As far as the evidence is concerned IPC No. I for an amount of Uganda shillings 540,787,676/= was certified on 18th March, 2013 but only an amount of UGX Shillings 363,477,938 was paid on 13th May, 2013. A sum of Shillings 177,309,738/= remained outstanding and unpaid on that Certificate. The outstanding balance attracted interest under GCC 43.1 of the Contract from 18th

April 2013 to date or to the time of payment Interest amounts to Uganda shillings 20,173,862/= for IPC I and IPC No. 2 was for an amount of Uganda shillings 561,924,067/= and was certified on 27th June, 2013 but only an amount of Uganda shillings 400,070,157/= and was paid on 28th August, 2013. A sum of shillings 161,853,910/= therefore remained outstanding and unpaid on that certificate. The outstanding balance attracted interest under GCC 43.1 of the Contract. Interest is from 27th July, 2013, up to date or to the time of payment and amounts to Uganda shillings 24,978,979/= for IPC 2, IPC No. 3 for an amount of Uganda shillings 288,229,976/= which was certified on 15th November, 2013 but only an amount of Uganda shillings 286,391,664 was paid 30th December 2013. A sum of shillings 1,838,312/= therefore remained outstanding and unpaid on that Certificate. The outstanding balance attracted interest under GCC 43.1 of the Contract. Interest is from 15th December 2013 up to date or to the time of payment interest amounts to Uganda shillings 7,011,694/= for IPC 3, IPC No. 4 for an amount of Uganda shillings 1,074,859,703/- was certified on 27th June, 2014 but the certified amount was not paid, at all.

Counsel submitted that the Defendant is trying to assert that IPC No. 4 was returned to the consultant. The IPC was issued by the Project Manager. The Plaintiff's Counsel submitted that no evidence whatsoever was tendered to show that this certificate was ever returned' to the Plaintiff Contractor. It has never been returned to the Plaintiff Contractor. After it was issued, even the Project Manager no longer had authority to recall it. The settled view in construction contract law is that an interim certificate can only be adjusted in subsequent interim certificates or in the final certificate. The practice in most construction contracts is therefore for errors in interim certificates to be corrected in the next following interim certificate or in the final certificate. This is the import of GCC 42.6 which states that the Project Manager may exclude any item certified in a previous certificate or reduce the proportion of any item previously certified in any certificate in the light of later information.

The Plaintiff's Counsel submitted that indeed, there is no provision whatsoever in the contract, for returning a certificate to the Contractor. Unless, the Defendant wants to say that it unilaterally rewrote the contract. Under the Contract, an IPC is not returned. If a certificate is erroneous, the error is corrected in the next IPC and if there is no next interim certificate then in the final account and final certificate. In the case of termination as happened in this contract, the

correction of the error would be done in the final certificate upon termination issued under GCC 60.2.

In conclusion, Counsel submitted that the claim to have returned the IPC No. 4 is not only false, but also unknown and untenable under the Contract. Therefore the IPC No. 4 remained outstanding and attracting interest and there is no proof of payment. Interest on IPC No. 4 is from 27th July, 2014 to date, or to the time of payment.

With regard to indeterminate claims alleged by the Defendants Counsel, the Plaintiff's Counsel submitted that it is clear from documents already submitted in evidence that the Plaintiff's claims were evaluated, certified and passed for payment by the Project Manager who had the mandate to do so. In the final certificate of payment the Project Manager appears to have inadvertently indicated the claims as being "under analysis" according to item 12 of the final payment certificate.

ITEM	DESCRIPTION	AMOUNT	REMARKS
3	Claim for costs arising out of time Extension 1	1,721,040,000	An analysis was carried out by the Consultant. (Documents from Client for the period in question were not considered as they were not
6	Claim for costs arising out of time Extension 2	236,100,000/=	An analysis presented to Client
12	Amount due to the Contractor	1,713,315,8501=	This amount is less items (3) and (6) as the final analysis is yet to be made
13	Amount due to the Contractor	3,670,455,8501=	This amount includes final claims under items 3 and 6.

At page 4 of Annex IX the Project Manager approved a sum of Uganda shillings 1,721,040,000/= for claim No.1 and at page No. 5 of Annex X the Project Manager approved a sum of Uganda shillings 236,100,000/= for claim No. 2. Claims were therefore concluded and determined by the Project Manager conclusively. These are the same amounts in the final certificate of payment statement. The remarks on item 12 of the above Table were an inadvertent

slip by the Project Manager. During cross examination of DW1 he answered that the items had been approved and the Project Manager had the authority to approve them.

In the cross- examination of DW1 it was established that there is no evidence whatsoever that the interim certificates were ever re-evaluated. In any case the Plaintiff's suit is based on entitlement according to construction contract law and practice.

Furthermore, the contract has provisions for disputing the decisions of the Project Manager. In GCC 24 and 25, that procedure is by adjudication and arbitration. If the Defendant wanted to dispute the approval of these claims, it should have invoked the procedure for disputing the decisions of the Project Manager. The Defendant in its Written Submissions actually admits that the certificates issued by the Project Manager are valid and correct, but only that the Defendant made their own 'internal or parallel certificates.

In the Defendant's certificates the Defendant removed the following:

- a. Claim No. 1 - this was removed with the intention of reducing the money due to the Contractor. Yet the proper procedure was for the Defendant to invoke the procedure for disputing the decisions of the Project Manager in GCC 24 and 25.
- b. The situation is the same with Claim No. 2.
- c. In the Defendants final certificate the Defendant purported to deduct liquidated damages yet on a termination under GCC 60.1 and 60.2 no liquidated damages are chargeable.
- d. The questioned final certificate of the Defendant purported to deduct money on account of work not done under GCC 60.1. But under GCC 60.2, in which termination was by the Plaintiff, no such deductions are permitted.
- e. The Project Manager did not include any defective works in the certificate that he made on 23rd January 2015. Yet the Defendant purports to make deductions for "defective works" in its revised final certificate.

The effect of the Defendants actions is to deprive the Contractor of the moneys due and

accruing to it together with due interest on the money.

With regard to the invocation of Regulation 50 (1) of the Public Procurement and Disposal of Public Assets (Contracts) Regulations No. 14 of 2014 which provides inter alia that:

“50. Delays in payment.

(1) Where a payment request contains errors or discrepancies or is supported by incorrect or incomplete documentation or is not in accordance with the terms of a contract, the payment request shall not be certified and shall be returned to the provider, specifying the reasons for the rejection.

(2) A provider whose payment request is rejected shall be entitled to present a new or amended payment request, which shall be treated as the original payment request.

(3) Notwithstanding sub regulation (1), where a procuring and disposing entity queries any part of a payment invoice from a provider, the procuring and disposing entity shall pay the unchallenged portion of the invoice to the provider.”

Counsel submitted that the Contract between the Defendant and the Plaintiff was procured on a Standard Bidding Document (Works) for the Procurement of Works made under the PPDA Act and the Regulations. The Preface to the SBD states that:

“This Standard Bidding Document (SBD) has been prepared by the Public Procurement and Disposal of Public Assets Authority (PPDA) for use by Local Government Procuring and Disposing Entities (PDEs) for the procurement of Works. The procedures and practices presented in this SBD have been developed to reflect the requirements of the Public Procurement and Disposal of Assets Act No. 11 of 2003...”

The Act has designated the SBD to regulate the relationships between the entity procuring the Works [i.e. Procuring Entity (Employer)] and the provider of the Works or Contractor (the Plaintiff herein). The User Guide to the Standard Bidding Document for the Procurement of Works states that: "The purpose of the SBD is to provide Procuring and Disposing Entities with one common standard containing basic contractual provision and safeguards which are required by the Government of Uganda in the execution of public procurement and the use of public funds."

The applicable framework governing the payments due to the Contractor is that in the Contract. The applicable Provisions are in GCC 42 of the Contract which states that the Contractor shall submit to the Project Manager statements of the estimated value of the work executed less the cumulative amount certified previously. Unless otherwise specified in the SCC, such statements shall be submitted monthly. The Project Manager shall check the Contractor's statement and certify the amount to be paid to the Contractor. The value of work executed shall be determined by the Project Manager.

The equivalent of the "payment request" mentioned in Reg. 50 (1) is to be found under GCC 42.1 i.e. the Contractor's "statements of the estimated value of the work executed less the cumulative amount certified previously" which the Contractor submits to the Project Manager. No evidence whatsoever was tendered by the Defendant to show that any of the Contractor's requests for payment was returned to the Contractor on account of errors or discrepancies. Reg. 50 (1) refers and relates only to payment requests. On the contrary IPCs No's 1, 2, 3, and 4 were issued by the Project Manager. A certificate is not the same thing as a payment request. A payment request is a precursor or antecedent to the issue of a certificate. On that basis, the Defendant's attempt to mislead the court, so as to justify its non-contractual interference with the professional contract administrator's Certification, must miserably fail.

The Plaintiff's Counsel further expounded on the contractual provisions and the practice in the construction industry on request for payment, verification and certification and I need not refer to the extremely lengthy submissions in rejoinder written contrary to court directions to keep submissions short.

The Plaintiff's Counsel reiterated earlier submissions on the discretionary powers of the court to award compound interest and prayers in the main submissions and prayed that the Defendant's submissions be rejected and Judgment be entered for the Plaintiff.

Judgment

I have carefully considered the written submissions of Counsel for the Plaintiff and for the Defendant. I have also considered the relevant law and evidence and arrived at my decision as to the critical issue in this suit which will be the main focus of my judgment. At the scheduling conference the main issue recorded by the court that would address the most critical matter in controversy between the parties is:

"Whether payment should be made in accordance with the original certificates issued by the Project Manager/Consultant which the Plaintiff presented or whether the payments should be made in accordance with the Defendant's certificates issued out and amended by the Defendant?"

The Plaintiff's Counsel argued that the Defendant had abandoned its defences based on defective works and other breach of contract as alleged against the Plaintiff for which the Defendant purported to terminate the contract when the Plaintiff had done so in writing. The reason for the central issue obviously is that the Defendant as the Employer issues certificates of payment after inspection and evaluation and the question of what went on before the certificate was issued may not be material for payment since what is certified as due for payment is based on a system of evaluation in place between the parties. Specifically this is a suit based on a final certificate of payment and what is in dispute is whether the money mentioned in the final certificate is owed to the Plaintiff. It could have been a suit brought by way of summary procedure but for the Defendants defence that all monies due to the Plaintiff was paid. In any case the Defendant relies on other certificates issued by its servants and which rivals that presented by the Plaintiff for payment. Other contentions relate to who the proper person to issue certificates of payment to the Contractor/Plaintiff under the relevant contract is.

The main controversy in a nutshell is therefore which final certificate of payment is the binding certificate of payment between the parties.

The Plaintiff's contention is that the Defendant's payment certificates were not prepared by the contractually agreed Project Manager/architect. The Plaintiff therefore contests the payment certificates numbers 1, 2, 3 and 4 presented by the Defendant. Instead the Plaintiff relies on the payment certificates issued by the Project Manager and the role of the Project Manager to certify payment under GCC 42.2, 42.3. The contention being that the certificates became a debt due and

payable under the contract. Furthermore the contention is whether the said certificates can be revised or replaced by the questioned in house certificate of payment issued by the Defendant and not in accordance with the contract.

On the other hand the Defendant's Counsel submitted that there was breach of the contract between the parties and the Plaintiff as a result is not entitled to the prayers in the pleadings. The Defendant's case is that it fully paid all the monies it owed and was due to the Plaintiff and owed no monies to the Plaintiff as alleged. The Defendant achieved this position through a circuitous route of deductions for alleged breaches and some for the alleged faults or defaults of the Project Manager who issued the certificate/s relied upon by the Plaintiff. I must add that both parties have final payment certificates they variously rely on and which are at variance with each other's certificate. A final certificate presents the final position after reconciliation of all accounts between the parties and ought to have made the requisite deductions or subtractions from earlier matters concerning the earlier interim certificates. That is why the main issue for trial is narrowed to which certificate the court ought to take. For the Defendant the deductions made are even made subsequent to the issuance of a final certificate to the Plaintiff by the Project Manager. The corollary issue relates to whether the Defendant can revise the certificate issued and under what circumstances. Evidence was also present and considered on this question.

The court had directed the parties to produce their respective certificates and other documents to be relied upon. The Defendant admitted that the consultant who acted as the Project Manager was appointed to perform the duties and obligations of the Project Manager for the works and to be fully responsible for the engineering design and construction supervision of the works. All payment certificates issued by the consultant were subject to verification and due diligence by the Employer in consultation with the consultant to ensure value for money and in conformity to contractual terms and conditions before payment. In certain instances amount payable were either confirmed or varied by the Defendant in consultation with the consultant as evidenced by details of the certificates on court record. All adjusted payment certificates had accompanying report indicating the reasons for deductions or increases and communications were made to the Plaintiff with regard to the changes in the certificates. The changes were not challenged by the Plaintiff during cross-examination of the Defendants witness Eng Justus Akankwasa.

The Defendant exercised due diligence when on receipt of the payment certificates forwarded for payment, discovered on its face discrepancies which were not in conformity with the contractual terms and conditions pursuant to GCC clauses 2.3, 37, 43, 52 and Part 3 section 6 of the contract. The Defendant relied on various issues and came to the conclusion that it exercised due diligence in refusing to clear the payment certificates issued to the Plaintiff by the Project Manager. Furthermore the office of the Auditor General agreed with the Defendant's position on the basis of certain anomalies in the valuation of the works.

For the moment my role is not to determine what those anomalies and discrepancies are but to first consider the contractual terms and the legal framework of the contract as to whether it was permissible to make evaluation of payment certificates issued by the Project Manager in the manner suggested by the Defendant's Counsel.

The final result was that discrepancies in the consultant's submissions were corrected or revised resulting into deductions and less payment to the Plaintiff.

The details are contained in the submissions of Counsel and are not material for purposes of interpretation of the contract and the law as to which certificate or certificates are the contractual certificates which should form the basis for payment of the Plaintiff. The factual matter dealt with is that following several concerns, including those raised by the Auditor General, the final payment resulted into deductions and therefore less payment to the Plaintiff.

The Defendant's Counsel submitted that the payment certificate is not conclusive as to the sufficiency of the actual work done and as such the Employer is not liable to make payment using the amount certified. The payment certificates in issue were still under analysis and the Defendant had no basis/justification to make the payment since the certificates in issue were inconclusive. The Defendant's Counsel cited the **Public Procurement and Disposal of Assets Regulations Part V – Contract Management Regulation 50 (1)** on delays in payment. It provides that: "where a payment request contains errors or discrepancies that is supported by incorrect or incomplete documentation, or is not in accordance with the terms of the contract, the payment requests cannot be certified and shall be returned to the provider specifying the reasons for the rejection."

The provider's payment request was rejected and is entitled to present a new or amended payment request which will be treated as the original payment request. It further deals with queries to any part of the payment invoice from the provider, whereupon the procuring and disposing entity shall pay the unchallenged portion of the invoice to the provider. It follows that the Defendant followed the provisions of the law to ensure that payment was made for works done so that there is value for money. Finally relying on the case of **Robbins vs. Goddard [1905] 1 KB 294**, it was held that no certificate of payment should be considered conclusive evidence as to the sufficiency of the work and that the Employer was free to defend and prove that the work was not in accordance with the contract.

The Plaintiff's Counsel submitted in rejoinder that the Defendant departed from the sole issue agreed upon during the scheduling conference. He invited the court to reject the Defendant's submission which deviates from the agreed issue. In further support of the main submissions, the Plaintiff's Counsel submitted that there was no provision in the contract for return of the certificates to the Contractor. If a certificate is erroneous, the errors are corrected in the next interim payment certificate. If there is no next interim payment certificate, it is corrected in the final outcome and final certificate. In the case of termination as in this case, the correction of the error would have been done in the payment upon termination under GCC 60.2. He reiterated submissions that the certificate issued upon contract termination is a final certificate. The relevant Plaintiff certificates were evaluated, certified and passed for payment by the Project Manager who was mandated to do so.

The first issue to resolve is not necessarily based on the certificates issued which contained the material amounts in question but whether the payment certificates issued by the Project Manager is the payment certificate to be relied upon by the court or whether that issued by the Defendant which contains deductions and reductions should be the payment certificate duly issued by the Employer. The resolution of the issue preliminarily requires an interpretation of the contractual provisions and the statutory law before considering any certificates.

The agreed facts are that the Plaintiff is a limited liability company incorporated and carrying on construction and engineering work while the Defendant is a body corporate established by the Kampala Capital City Authority Act, Number 1 of 2010 with capacity to sue and be sued in its corporate name. Secondly on 30th of December 2011, the Defendant, Kampala Capital City

Authority (KCCA) by a written contract engaged the Plaintiff for upgrading of drainage black spots in Kampala Phase 1 Contract No. KCCA/WRKS/2011 – 2012/002664. The contract sum was agreed to at Uganda shillings 4,181,073,515/= and the contract period was the duration of eight months from the start date. The contract documents consisted of, among others, the agreement, the Special Conditions of Contract (SCC) and the General Conditions of Contract (GCC). The contract documents are supplemented by a deed of variation. The works under the contract comprised of excavations, construction of drains, installations of culverts and manholes and catch pits and reinstatement of trenches traversing across roads. The Plaintiff's execution of its obligations under the contract was affected by delays associated with the site handover and submission of designs and because of these delays, the Defendant agreed to grant extensions of time to the Plaintiff within which to perform its obligations. The initial grant of an extension of time was for 202 days. A further extension of time of 140 days was also granted.

The relevant facts in dispute concerning the interpretative issue is that the closing sum payable to the Plaintiff who is the Contractor under the contract and that the final payment certificate issued by the Project Manager on 23rd January, 2015 was a sum of Uganda shillings 3,670,455,850/= which sum included the unpaid balances on IPC (Interim Payment Certificate) No. 1, IPC No. 2, and IPC No. 3. That despite the determination in accordance with the GCC 60.2 and issue of the final payment certificate by the Project Manager, the Defendant refused or deliberately neglected to pay the Plaintiff's entitlement. The matter in contention concerns the issuance of the final certificate by the Project Manager. This is because the Defendant has counter certificates to that of the Project Manager. Other contentions relate to any consequential claims arising from the central issue.

The contract/agreement for the works is attached to the witness statement of PW1 Mr Pius Mugalaasi Mugerwa, a civil engineer and managing director of the Plaintiff. It is dated 30th of December 2011 and it incorporates the Special Conditions of Contract and the General Conditions of Contract.

Section 1.1 (y) defines a Project Manager as: "the person named in the Special Conditions of Contract (or any other competent person appointed by the Employer and notified to the Contractor, to act in the replacement of the Project Manager) who is responsible for supervising the execution of the works and administering the contract.

Clause 4 of the General Conditions of Contract particularly 4.1 provides as follows:

"Except where otherwise specifically stated, the Project Manager will decide contractual matters between the Employer and the Contractor in the role representing the Employer."

Under clause 4.2 it is provided as follows:

"The Project Manager will obtain the Employer's approval for any of the decisions specified in the SCC."

Payment certificates and payments are provided for under clauses 42 and 43 of the General Conditions of Contract respectively. These provisions are reproduced herein below for ease of reference:

"42. Payment Certificates

42.1 The Contractor shall submit to the Project Manager statements of the estimated value of the work executed less than the cumulative amount certified previously. Unless otherwise specified in the SCC, such statements shall be submitted monthly.

42.2 The Project Manager shall check the Contractor's statement and certify the amount to be paid to the Contractor.

42.3 The value of work executed shall be determined by the Project Manager.

42.4 The value of work executed shall comprise the value of:

- (a) the quantities of the items in the Bill of quantities completed for admeasurement contracts; or
- (b) completed (fully or partially) activities in the activity schedule for lump-sum contract activities.

42.5 The value of work executed shall include the valuation of variations and compensation events.

42.6 The Project Manager may exclude in the previous certificate or reduce the proportion of any item previously certified in any certificates in the light of later information any item certified.

43. Payments

43.1 Payments shall be adjusted for deductions for advance payments and retention. The Employer shall pay the Contractor the amount certified by the Project Manager within 30 days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on delayed payment in the next payment. Interest shall be calculated from the date by which the payment should have been made up to the date when delayed payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made.

43.2 If an amount certified is increased in a later certificate or as a result of an award by the Adjudicator or an Arbitrator, the Contractor shall be paid interest upon the delayed payment as set out in this clause. Interest shall be calculated from the date upon which the increased amount would have been certified in the absence of dispute.

43.3 Unless otherwise stated, all payments and deductions will be paid or charged in the proportions of currencies comprising the Contract Price.

43.4 Items of the Works for which no rate or price has been entered in will not be paid for by the Employer and shall be deemed covered by other rates and prices in the Contract.”

I have carefully considered the above General Conditions of Contract and the General Conditions of Contract can only be modified or amended by the Special Conditions of Contract in relation to the particular contract executed by the Employer and the Contractor. I have accordingly perused the Special Conditions of Contract to establish whether any of the above provisions of the General Conditions of Contract have been modified in any way. The Special Conditions of Contract section 8 clearly provide that the Special Conditions of Contract shall supplement the General Conditions of Contract. Whenever there is a conflict, the provisions of the Special Conditions of Contract shall prevail over those in the General Conditions of Contract. In other words the Special Conditions of Contract are to be read in harmony with the General

Conditions of Contract and where there is any conflict between the two the Special Conditions of Contract override that of the General Conditions of Contract to the extent of the inconsistency. The first condition is the General Conditions of Contract 4.2 where it is provided that the Employer's specific approval is required for traffic flow plans. Apart from traffic flow plans, clause 4.2 of the General Conditions of Contract is clear that the Project Manager would obtain the Employer's approval for any of the decisions specified in the Special Conditions of Contract. Therefore those decisions are in respect of traffic flow plans. The rest of the other decisions do not require the Project Manager obtaining the Employer's Approval.

The second amendment which is material to the provisions of the General Conditions of Contract quoted above is clause 43. Specifically clause 43 was modified by adding to clause 43.4 the following words:

"... All work to be paid for is to be recorded by the Contractor on forms approved by the Project Manager. Each completed form is to be verified and signed by the Project Manager or his representative within two calendar days of the work being done. The Contractor will be paid for work only when he has obtained signed work forms. The value of the work executed shall comprise the value of the quantities of the items verified by the Project Manager as completed on daily work forms".

Generally speaking the above conditions of the Special Conditions of Contract do not significantly vary the General Conditions of Contract quoted above. Starting with payment certificates, it is preceded by the Contractor submitting to the Project Manager statements of the estimated value of the work executed less than the cumulative amount certified previously. The statements are supposed to be submitted monthly and it is upon the Project Manager to check the Contractors statement and certify the amount to be paid to the Contractor. Particularly clause 42.3 provides that the value of the work executed shall be determined by the Project Manager. Clause 42 therefore generally gives the formula for the calculation of the value of the work to be included in each certificate. Secondly, it provides that it is the Project Manager to determine the value of the work. Last but not least, the Project Manager may exclude or reduce the proportion of any item previously certified in any certificates in light of later information on any item certified.

The Defendant's Counsel cited the Public Procurement and Disposal of Assets Regulations Part V – Contract Management Regulation 50 (1) on delays in payment. He wrote that it provides that:

“Where a payment request contains errors or discrepancies which is supported by incorrect or incomplete documentation, or is not in accordance with the terms of the contract, the payment requests cannot be certified and shall be returned to the provider specifying the reasons for the rejection.”

The submissions of the Defendant's Counsel are contained at page 14 of the written submissions. I have done my best to establish where these regulations can be found and was unable to establish their source because no citation was made. However on perusal of the submissions of the Plaintiffs Counsel in rejoinder it was cited as a regulation of 2014. The contract was made before the regulations were ever passed and in any case the provisions replicate the earlier statutory law. I have managed to peruse similarly worded Regulations that apply to local government. The Defendant's Counsel relied on what he cited as the **Public Procurement and Disposal of Assets Regulations Part V and Regulations 50 (1) on delays in payments**. Instead **The Public Procurement and Disposal of Public Assets Regulations, 2003, Statutory Instruments 2003 No. 70** provides as follows:

“255. Payment period

The period for payment shall be thirty days from certification of invoices, except where this is varied in the Special Conditions of Contract.

Regulation 255 provides for payment within 30 days from certification of invoices except where this is varied by the Special Conditions of Contract. This is consistent with the clause 42.2 of the General Conditions of Contract which allows the consultant or Project Manager to certify the amount to be paid to the Contractor. It is also consistent with clause 43.1 of the General Conditions of Contract which provides that the Employer shall pay the Contractor the amount certified by the Project Manager within 30 days of the date of each certificate. It is also consistent with the regulations relied on by the Defendants Counsel when read together with other regulations. The Plaintiff's Counsel submitted that the contract was governed by the Public Procurement Law of 2003. I do not see any conflict in the procurement law whether under the

local government law or the central government law and no prejudice has been occasioned to either party by citing any of these laws.

Payments and delays are provided for under regulation 256 of the Public Procurement and Disposal of Public Assets Regulations 2003 which is reproduced for ease of reference and it provides as follows:

256. Payment and payment delay

(1) A procuring and disposing entity shall ensure that all payment requests are processed promptly within the payment period specified in a contract.

(2) A provider shall make a request for payment to a procuring and disposing entity in accordance with the terms of a contract placed by the procuring and disposing entity.

(3) A procuring and disposing entity shall, within five working days of receipt of a payment request from a provider, examine and ascertain that the request is correct, accurate and in accordance with the terms of a contract.

(4) Where a payment request is accurate and in accordance with the terms of a contract, a procuring and disposing entity shall certify it for payment and make payment in accordance with the terms of the contract.

(5) Where a payment request contains errors or discrepancies or is supported by incorrect or incomplete documentation or is not in accordance with the terms of a contract the payment request shall not be certified but it shall be returned to a provider, specifying the reasons for the rejection.

(6) A provider whose payment request is rejected shall be entitled to present a new or amended payment request, which shall be treated as the original payment request.

(7) Notwithstanding sub regulation (5), where a procuring and disposing entity queries any part of a payment invoice from a provider, that query shall not delay payment of the unchallenged portion of the invoice to the provider.

The above regulation and particularly 256 (4) provides that where payment request is accurate the procuring and disposing entity shall certify it for payment and make payment in accordance with the terms of the contract. Particularly regulation 256 (5) provides for situations where there are errors or discrepancies or incorrect or incomplete documentation and therefore provides that the request for payment shall be returned to a provider specifying the reasons for the rejection. Furthermore in sub regulation 6 it is provided that a provider whose payment request is rejected shall be entitled to present a new or amended payment request, which shall be treated as the original payment request. Lastly sub regulation 7 provides that the unchallenged portion of the invoice shall not be delayed for payment.

The Regulations envisaged a return of the request for payment to the service provider or provider of goods or services before certification. What is envisaged is that the Project Manager who acts on behalf of the Employer would scrutinise the request for payment and check it for inaccuracies whereupon he or she would return the same to the service provider if it is not in accord with the contract. The Project Manager would not certify the works, the subject matter of the request for payment, for payment. The submissions of the Defendants Counsel are therefore contrary to the procedure provided for in the regulations.

I have further considered similar provisions which deal with local governments under the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006. The Defendant is a body corporate and manager of a local government schedule of duties as its mandate. It can be governed by the local government Regulations namely the Local Governments (Public Procurement and Disposal of Public Assets) Regulations quoted above. Regulation 118 provides as follows:

“118. (1) Where a payment request contains errors or discrepancies or is supported by incorrect or incomplete documentation or is not in accordance with the terms of a contract the payment request shall not be certified but it shall be returned to a provider, specifying the reasons for the rejection.

(2) A provider whose payment request is rejected shall be entitled to present a new or amended payment request, which shall be treated as the original payment request.

(3) Where a procuring and disposing entity queries any part of a payment invoice from a provider, that query shall not delay payment of the unchallenged portion of the invoice to the provider.”

The two elements which come out of the regulations are that a request for payment can be returned to the provider of the goods and services and in which case it shall not be certified. Secondly, the provider is entitled to provide a new payment request amended accordingly. Last but not least, the Employer shall pay the provider for the unchallenged portion of the invoice of the provider. In either case, a certificate of payment shall be paid within 30 days of the certificate. This is clearly provided for under regulation 117 (6) and (7) of the above Regulations and which provides as follows:

“117

(6) The period for payment shall be within thirty days from certification of invoices, except where this is varied in the Special Conditions of Contract.

(7) Where a payment request is accurate and in accordance with the terms of a contract, a procuring and disposing entity shall certify it for payment and make payment in accordance with the terms and conditions of the contract.”

Both Regulations namely that under the local government system and the general law of procurement provide for payment to be made within 30 days from the date of certification except where it is varied in the Special Conditions of Contract. The Regulations use mandatory language. Regulation 255 of the Public Procurement and Disposal of Public Assets Regulations, 2003 provides that the period of payment shall be 30 days from certification of invoices except where it is varied in the Special Conditions of Contract. Secondly regulation 117 (6) of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006 provides that the period for payment shall be within thirty days from certification of invoices, except where this is varied in the Special Conditions of Contract.

The inevitable conclusion is that the court has to look at the contract which contract was executed in April 2011 before other regulations of 2014 ever came into force. The contract legal framework is the law before 2014. The contract was terminated at the end of 2014.

Certification of the works is provided separately from payment. Clause 42 of the General Conditions of Contract provides for certification or payment certificates. Like I have noted before, the Contractor is required to submit to the Project Manager statements of the estimated value of the work executed less than the cumulative amount certified previously. The statements are supposed to be submitted monthly under clause 42.1 of the General Conditions of Contract. Thereafter it is the Project Manager under clause 42.2 to check the statement and certify the amount to be paid to the Contractor. Furthermore, clause 42.3 provides that the value of work executed shall be determined by the Project Manager. Finally clause 43 deals with payment and just like the statutory provisions clause 43.1 provide that payment shall be adjusted by deductions for advance payments and retention. The Employer shall then pay the Contractor the amount certified by the Project Manager within 30 days from the date of each certificate. Clause 43.1 of the General Conditions of Contract also uses the mandatory language when it prescribed that payment shall be made within 30 days from the date of each certificate. The prescribed period has cost implications. Where there is a delay in payment, a penalty/remedy for delay is prescribed. Before going into the penalty/remedy for delay, the statutory provisions make it clear, as analysed above, that certification is not done before checking for any errors or discrepancies or inaccuracies. Furthermore, the contract and regulations make it clear that subsequent adjustments can be made on the basis of new information in the subsequent certificates of payment. The only question for determination is therefore who the contractual authority to determine what should be included in the certificate is.

I have carefully considered the issue and set out the statutory provisions as well as the contractual provisions which are relevant. The submissions of the Defendants Counsel are premised on the authority of the Employer to revise certificates of payment issued by the Project Manager. Whatever happened before certification is not material in light of the mandatory provisions requiring payment to be made within 30 days of each certificate. In theory the question of which certificates should be considered should never arise in a contractual relationship because this is taken care of in the contract itself. In the contract in question, it is the

Project Manager who has the authority to issue certificates of payment. If the Employer so wished, it simply needed to liaise with the Project Manager to verify the certificates and ensure that they are issued in accordance with the contract and the bills of quantities agreed upon. There cannot be a conflicting certificate for any period of payment. In any case the statutory provisions I have quoted above require verification to be done before the issuance of a certificate of payment and it is the duty of the Project Manager to certify whatever the Contractor has submitted for payment. That is his professional duty to ensure that whatever is paid does not have inaccuracies. In the Public Procurement and Disposal of Public Assets Regulations 2003, regulation 256 (4) provides that where a payment request is accurate and in accordance with the terms of the contract, a procuring and disposal entity shall certify for payment and make payment in accordance with the terms of the contract. This is preceded by regulation 256 (3) which require the verification of the payment request from the provider to be made within five working days of receipt of the request. Furthermore the Local Governments (Public Procurement and Disposal of Public Assets) Regulations and regulation 118 (1) specifically requires a payment request to be verified before certification in mandatory language. It provides that:

“Where a payment request contains errors or discrepancies or is supported by incorrect or incomplete documentation or is not in accordance with the terms of a contract *the payment request shall not be certified but it shall be returned to a provider, specifying the reasons for the rejection*”. (Emphasis added)

The strong point to be made is that the verification of the payment request is made before certification. The certification under the contract is made by the Project Manager. The duty is therefore on the Project Manager to ensure that it is professionally done and where necessary in consultation with other stakeholders. There ought not to be two or more conflicting certificates in respect of the same work under the same contract. If information is subsequently received which require deductions, the amounts to be paid in the next certificate shall be adjusted accordingly either by an increase or decrease in the amount to be paid in the next certificate.

The contractual terms of the general conditions of service are enforceable as between the Plaintiff and the Defendant. The Plaintiff is not concerned with any errant conduct of the Project Manager which prejudices the Employer because the Project Manager is an official or a servant of the procuring and disposal entity namely the Defendant. The Contractor forwards the

proposed payment document giving the basis for the payment and this is cross checked for execution of the work and the quality thereof.

The Project Manager is appointed by and paid by the Defendant. The Project Manager makes the Defendant liable for whatever he does such as certification which attracts liability. Such liability arises from a certificate of payment specifying the amount to be paid by the Employer. Certification is done after the work has been completed or section of the works has been completed and then verified by the Project Manager. In theory a dispute as to whether work has been done or not can be established by the production of a certificate of payment and a request for payment specifying the work that has been done. Clause 43.2 of the General Conditions of Contract even envisages an increase in the next certificate as a result of an award by the adjudicator or an arbitrator and the Contractor is entitled to be paid interest upon the delayed payment. This further envisages dispute as to the amount payable that ought to be made the subject of the process of what money should be payable in case of rejection of the request for payment. Clause 43.1 of the General Conditions of Contract provides that if the Employer makes a late payment, the Contractor shall be paid interest on the delayed payment in the next payment. Interest will be calculated from the date by which the payment should have been made up to the date when delayed payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made.

The above conclusions takes care of the submissions of the Defendant's Counsel that the Project Managers certificate of payment would create a debt provided there is compliance with the contractual terms. He submitted that there were gross errors on the face of the certificate. As far as the statutory provisions and contractual provisions are concerned, the debt arises from the certificate of payment. Inaccuracies and gross errors are supposed to be checked before the issuance of the certificate. It is not in the circumstances where there is no counterclaim or cross action, the duty of the court to check a certificate of payment to ensure that it is properly issued. As we shall note the process of verification and challenge to the award of the Project Manager is a contractual process. It is primarily the work of the Project Manager to determine the amount due upon request for payment being made by the Contractor. The Plaintiff is not vicariously liable for the work of the Project Manager though the Defendant is. The Plaintiff does not certify any work for himself.

As far as issue number 1 is concerned, because the Employer who is the Defendant did not pay the sums certified by the contractual manager, and particularly because the payment was not made within 30 days as envisaged in the contract, then prima facie that would amount to a fundamental breach of the contract and issue number 1 of whether there was breach of the contract in issue ought to be answered in the affirmative if all evidence is consistent with the conclusions based on interpretation of the contract and law. This would be in the absence of a counterclaim, set-off or cross action. The Employer/Defendant breached the terms of clause 43 of the General Conditions of Contract by failure to make payment within 30 days of certification by the Project Manager. I agree with the submissions of the Plaintiff's Counsel and the authorities that a certificate of payment can be the basis of a summary suit because the contract itself is couched in mandatory language and provides that payment shall be made within 30 days of the issuance of the certificate of payment. This is without considering whether the Project Manager had mismanaged the contract by issuing certificates of payment not in accord with the contract in an appropriate case. It was the duty of the Project Manager to ensure that the certificates were in accord with the contract. It was the duty of the Project Manager to ensure that no certificate is issued without verification. The material element in the certificate is the amount certified as being due and owing under the contract. Thereafter the Employer shall pay within 30 days or incur interest at commercial rate for each payment from the due date until payment. Finally can the prima facie position be overturned by allegations and evidence if proved that there were errors in the certificates?

Coming to the facts of the dispute, the Plaintiff's case is that the Defendant/Employer committed fundamental breaches of contract by non-payment of the whole amount of Interim Payment Certificate (IPC) No. 4, and by its refusal to pay the outstanding balances on IPC No. 1, IPC No. 2 and IPC No. 3 which were partially settled. On the 25th of July 2014, and on the 5th and 25th September, 2014 the Plaintiff/Contractor issued notices to the Defendant that the Defendant was in fundamental breach of the contract due to delays in payment. The Plaintiff pursuant to non payment terminated the Contract as stipulated by GCC 59.1 and GCC 59.2 (d). The Project Manager then in accordance with GCC 60.2 made a determination and issued a payment upon termination final certificate on 23rd January, 2015. Under that certificate the closing sum payable to the Plaintiff/Contractor is written as Uganda shillings 3,670,455,850/= and it included unpaid balances on IPC No. 1, IPC No. 2, IPC No. 3 and IPC No. 4. The dispute arose when

on 29th January, 2015 the Defendant wrote a counter termination letter and did not pay the Plaintiff the amount in the final certificate pursuant to the Plaintiff's termination. The Defendant paid a sum of Uganda shillings 970,158,313/= to the Plaintiff on 24th June, 2015 and after deduction of the payment the Plaintiff's claim is Uganda shillings 3,549,910,493.60/=. The Plaintiff claims interest from the period 24th June, 2015 up to 6th November, 2015 at the prevailing rate of interest for commercial borrowing which by 6th November 2015 is Uganda shillings 187,692,874/= (at a rate of 41.8% per annum). The Plaintiff claims that the rate was increased to 43.5% for the delayed payment period from 24th June, 2015 to 16th August, 2015 and further increased to 45.5% for the delayed interest period from 17th August, 2015 to 6th November, 2015 by Barclays Bank of Uganda. Additional interest continues to accrue on the outstanding sum until the date of Judgment. Plaintiff claimed damages for retention of its certified payment leading to great financial embarrassment and inconveniences, loss of business, loss of opportunities and loss of use of its resources.

When the crux of the dispute was established by the court as to which certificate of payment was the valid certificate, the Defendant claimed it had fully paid the Plaintiff and had documents to prove it. Thereafter the Defendant produced by filing in court on 30th September 2016 a set of Certificates and advancing the position that they paid and settled the Plaintiff's claim on the basis of the submitted certificates. This in a nutshell is the bone of contention because both parties are using certificates of payment which are at variance with that of the opposite party.

The crux of the dispute is also contained in the testimony of Engineer Justus Akankwasa in his written testimony. In paragraph 2.1.1 he testified that the Plaintiff neglected/refused to maintain a valid performance security under the contract and failed to submit quality tests results to support its payment applications. He contended that this constituted a fundamental breach of contract and therefore, the Plaintiff would not have purported to terminate the contract as alleged based on the provisions of GCC clause 60.2 of the contract. This essentially supports the Plaintiff's submission that the Plaintiff had issued a notice of termination pursuant to which a final certificate was issued by the Project Manager. DW1 testified that all payment certificate issued by the consultant were subject to verification and due diligence by the Employer in consultation with the consultant to ensure value for money and conformity to contractual terms and conditions. He contended that the Defendant exercised due diligence when on receipt of the

payment certificates, for the ordered for payment, discovered on the face of it discrepancies which were not in conformity with the contractual terms and conditions pursuant to GCC clauses 2, 3, 37, 43, 52 and Part 3: section 6 of the contract.

Engineer Akankwasa listed some of the discrepancies. The gist of his testimony is that the discrepancies resulted into reduction of the amounts due to the Plaintiff. I will not set out the said discrepancies with reference to certificates numbers 1, 2, 3 and 4. However, I will make reference to the final payment certificate. He testified in paragraph 3.2.9 of his written testimony that on joint assessment by the client representative and the Project Manager, the value of the works for original and re-scoped works was Uganda shillings 3,593,821,079/= according to the final submission from the Project Manager dated 26th of March 2015. The value of the defective works increased from Uganda shillings 25,000,000/= previously recommended by the Project Manager to Uganda shillings 222,717,081/=. Measurements of certificate number 4 which had discrepancy were replaced by those endorsed by the Project Manager and a valuation of defects for original and re-scoped works was done. Following the concerns raised by the Auditor General which were considered by the Defendant, the final payment resulted into deductions as provided for under GCC 60.1 of the contract namely:

- Final cumulative value of works was Uganda shillings 3,593,821,079/=.
- Liquidated damages according to GCC 49.1 for the period amounted to Uganda shillings 418,107,352/=.
- Cost of defective works as measured by the Project Manager was Uganda shillings 222,717,081/=.
- 10% of the completed works 734,831,516/= based on the re-scoped bills of quantities.
- Previous payments made in advance under certificates 1, 2 and 3 amounting to Uganda shillings 1,909,355,181/=.
- Final payment made to the Contractor and dated 23rd of June 2015 amounting to Uganda shillings 970,158,313/=.

Comparing the two figures, the Plaintiff's case is that the Project Manager in accordance with GCC 60.2 made a determination and issued a final payment certificate on 23rd January, 2015. Under that certificate the closing sum payable to the Plaintiff/Contractor is written as Uganda shillings 3,670,455,850/= that included unpaid balances on IPC No. 1, IPC No. 2, IPC

No. 3 and IPC No. 4. I must point out that the difference between the Plaintiff's figure based on the final certificate and that of the Defendant's subsequent final certificate is Uganda shillings 76,634,771/=. The Plaintiff's figure is based on a letter dated 23rd of January 2015 (with an error in the year written as 2014) written on the letter head of Arch Tech Consultants (U) Ltd in Association with Wanjohi Consulting Engineers and addressed to the Director of Engineering & Technical Services Kampala Capital City Authority. It is copied to the Plaintiff. Attached to the letter is the final payment certificate statement giving the amount due to the Contractor in item 13 thereof as Uganda shillings 3,670,455,850/=.

For the moment what is material are the adjustments made to the above lump sum after this letter was written. Starting with the explanations of Engineer Akankwasa DW1, the final payment included the final cumulative value of works which according to him is valued at Uganda shillings 3,593,821,079/= less liquidated damages according to GCC 49.1 etc as detailed above. After the deductions the final payment of Uganda shillings 970,158,313/= was paid to the Plaintiff on 23rd of June 2015.

The basis of the Defendant's deductions is contained in correspondences which predate the final certificate. However subsequent to the final certificate, there are internal memos auditing the contract. One is dated 5th of June 2015 after the final certificate was issued giving the basis of the deductions from the sum of Uganda shillings 3,593,821,078/=. According to the deductions what is due to the Contractor is Uganda shillings 984,916,241/=. After further adjustments the auditors made a recommendation for payment of Uganda shillings 970,158,313/= which according to DW1 was paid on 23rd of June 2015. Pursuant to the audit exercise, the Defendant issued a final certificate for the said amount. The grounds of the deductions are clearly set out above and for ease of reference are repeated here in below namely:

- 1) Final cumulative value of works was Uganda shillings 3,593,821,079/=.
- 2) Liquidated damages according to GCC 49.1 for the period amounted to Uganda shillings 418,107,352/=.
- 3) Cost of defective works as measured by the Project Manager was Uganda shillings 222,717,081/=.

- 4) 10% of the uncompleted works was Uganda shillings 734,831,516/= based on the re-scoped bills of quantities.
- 5) Previous payments made (advance on Certificates 1, 2, and 3) amounting to Uganda shillings 1,909,355,181/=.
- 6) Final payment made to the Contractor dated 23rd of June 2015 amounting to Uganda shillings 970,158,313/=.

Pursuant to the above deductions, the Plaintiff was paid and there is no balance owed according to the Defendant.

I have carefully considered the evidence and the crux of the issue is whether the Defendant is entitled to issue another certificate after an audit exercise when a final certificate had been issued by the Project Manager. This issue also encompasses the question of whether subsequent deductions can be made.

In paragraph 12 of the written testimony of PW1, the Project Manager named in the contract is the Director Engineering and Technical Services in the Defendant. He also testified that the Defendant delegated all the authorities, duties and obligations under the contract without reservation to Messieurs Architect Consultant (U) Ltd in Association with Wanjohi Consulting Engineers (architect) on 25th of April 2012. The Special Conditions of Contract which amends GCC 1.1 (y) provides that the Project Manager is the Director of Engineering & Technical Services, Kampala Capital City Authority. The contract between the parties was signed on 30th December, 2011. By letter dated 25th April, 2012 addressed to the managing director of the Plaintiff, the Defendant wrote appointing a Construction Supervision Consultant Messrs Architect Consults (U) Ltd in Association with Wanjohi Consulting Engineers. It is written that the consultant will perform the duties and obligations of the Project Manager for the works and to be fully responsible for the engineering designs, and the construction supervision of the works. Under the circumstances, the Defendant is barred by the doctrine of estoppels from presenting the Director of Engineering & Technical Services of Kampala Capital City Authority as the Project Manager for the works. The original Project Manager could have been the Director of Engineering & Technical Services of Kampala Capital City Authority. It is curious that it is the Director of Engineering & Technical Services of Kampala Capital City Authority

which gave the grounds for the revised certificate of payment which is in dispute. The project had been given for management to a private firm namely Messrs Architect Consults (U) Ltd in Association with Wanjohi Consulting Engineers.

Additional facts indicate that by letter dated 27th October, 2014 addressed to the Executive Director of the Defendant, the Plaintiff wrote terminating the contract. The letter was written on 27th of October 2014 and received by the Defendant on the same day according to the stamp of the Defendant. The Plaintiff relied on the GCC 59.1 and GCC 59.2 (d). The basis of the letter was that the Employer had not paid the payment certified by the Project Manager within 84 days of the date of the Project Manager's certificate. They advised the Project Manager to proceed in accordance with the GCC 60.2 and issue a completion certificate and proceed to make due payments within the dates provided for under the contract.

By letter dated 19th January, 2015, the Defendant wrote on the same subject over termination of contract exercising its right under clause 59.1 of the contract and terminated it giving grounds of termination. The letter was apparently received by the Plaintiff on 29th January, 2015.

I have accordingly considered clause 59.1 of the General Conditions of Contract. It provides that the Employer or the Contractor may terminate the contract if the other party causes a fundamental breach of the contract. Under clause 59.2 (d) fundamental breaches of contract is defined to include where a payment certified by the Project Manager is not paid by the Employer to the Contractor within 84 days of the date of the Project Manager's certificate. Clause 59.5 provides that if the contract is terminated, the Contractor shall stop work immediately, make the site safe and secure and vacate the site as soon as reasonably possible.

For all intents and purposes, the Plaintiff had terminated the contract for fundamental breach for failure of the Defendant/Employer to pay a certified payment (certified by the Project Manager) for more than 84 days. This was termination on the ground of a fundamental breach by the Employer as defined.

The Project Manager in accordance with the Plaintiff's termination letter in a letter dated 23rd January, 2015 (year erroneously written as 2014) certified final payment due to the Plaintiff under clause 60.2 of the General Conditions of Contract. The conclusion is that the Plaintiff terminated the contract before the Defendant's purported termination of the contract on other grounds. Following the termination, it is pertinent to consider the wording of the provision dealing with the payment upon termination to establish whether the subsequent deductions were lawfully done. Clause 60.1 and 60.2 of the GCC provides as follows:

"60.1 If the contract is terminated because of the fundamental breach of contract by the Contractor, the Project Manager shall issue a certificate for the value of the work done and materials ordered less advance payments received up to the date of the issue of the certificate and less the percentage to apply to the value of the work not completed, as indicated in the SCC. Additional liquidated damages shall not apply. If the total amount due to the Employer exceeds any payment due to the Contractor, the difference shall be a debt payable to the Employer.

60.2 If the contract is terminated for the Employers convenience or because of a fundamental breach of contract by the Employer, the Project Manager shall issue a certificate for the value of the work done, materials ordered, the reasonable costs of removal of equipment, repatriation of the Contractor's personnel employed solely on the works, and the Contractor's costs of protecting and securing the works, and less advance payments received up to the date of the certificate."

The relevant provision is clause 60.2 which deals with termination by the Contractor on the ground fundamental breach by the Employer. Under this provision the Project Manager is obliged to issue a certificate for the value of the work done, materials or, the reasonable costs of removal of equipment, repatriation of the contract as personnel employed solely on the works, and the Contractor's costs of protecting and securing the works. It is less advance payments received at the date of the certificate.

Going back to the contractual terms of payment, any adjustments are supposed to be made before the issuance of the certificate. That notwithstanding I have considered the deductions contained

in the written testimony of DW1 Engineer Akankwasa because deductions go beyond on the issuance of a parallel final certificate by the Defendant's servants. The court can consider whether lawful deductions can be made from the final certificate which the Plaintiff has dubbed as the "Genuine Certificate". This is because the rival certificate purports to make contractual deductions from the original certificate. The approach preserves the final certificate relied on by the Plaintiff and considers whether deductions are permitted from it. For that reason I do not have to consider the numerous authorities cited by the Plaintiff's Counsel on the conclusiveness of the final certificate issued by the Project Manager but will deal with any deductions made subsequently as to whether lawfully made.

The Defendant applied liquidated damages according to GCC 49.1 for the period amounting to Uganda shillings 418,170,352/=. The GCC 49.1 provides that if so stated in the Special Conditions of Contract, the Contractor shall pay liquidated damages to the Employer at the rate per day stated in the Special Conditions of Contract for each day that the completion date is later than the intended completion date. The total amount is not to exceed the amount defined in the Special Conditions of Contract. Clause 49.1 as modified by the Special Conditions of Contract provides that liquidated damages for the whole of the works are 0.05% of the contract price per day. Secondly, it provides that the maximum amount of liquidated damages for the whole of the works is 10% of the final contract price. The Employer may deduct liquidated damages from amounts due to the Contractor. Payment of liquidated damages shall not affect the Contractor's liabilities. Clause 49.2 envisages the liquidated damages being taken into account in the certificates of payment.

Clause 43 which deals with payments provides that payment shall be adjusted for deductions for advance payments and retention. The Employer shall pay the Contractor the amount certified by the Project Manager within 30 days of the date of each certificate. Deductions are made for advance payments and retention.

I have carefully considered the claim for liquidated damages and the same was raised in paragraph 6 (iii) of the written statement of defence. However, the wording of the paragraph leaves a lot to be desired. The Defendant wrote that shillings 418,107,352/= being liquidated damages for failure to complete the works within the time ought to have been deducted in any certificates due to the Plaintiff which was not done in the purported final certificate. In other

words the Defendant faults its own Project Manager for not having deducted liquidated damages for delays.

Time control is provided for under clause 27 of the general terms of contract and extension of time is permissible. The burden is on the Defendant to prove that the delays were the delays attracting liquidated damages which ought to have been reflected in the final certificate. The final certificate is the certificate of the Defendant and not that of the Plaintiff. The Project Manager has powers to extend the completion date under clause 28. Under clause 30 the Project Manager can order a delay to start all progress of any activity within the works. The amount ought to have been pleaded as a set-off or counterclaim and proved to the required standard.

The Defendant also claimed the cost of defective works as measured by the Project Manager being Uganda shillings 222,717,081/=. In paragraph 6 (IV) of the written statement of defence, it is pleaded as an amount arising out of defective works erroneously valued and certified for payment. Whereas the Defendant purportedly objected to the claims and in the final certificate, it is the Defendant's certificate and the objection can only be raised against the Plaintiff who is not responsible for issuing the certificate. The Defendant attached annexure "J" being the objection to the inclusion of the items in the certificate of payment. I have considered the objection referred to in the written statement of defence showing that the Defendant's case is premised on a letter dated 3rd July, 2014. In paragraph 2 they wrote that they returned the certificate to the Project Manager for review and for incorporation of any necessary changes. What is material is that the inspection report pleaded in the written statement of defence concerns the submission of an interim certificate IV for Uganda shillings 1,074,859,703/=. Any adjustments, if the pleadings are presumed to be true, ought to have been included in subsequent certificates. If they are not included in subsequent certificates, the Plaintiff is not to blame. For that reason, I do not have to get into the account in deciding the Plaintiffs suit.

The Plaintiff was also charged for uncompleted works valued at Uganda shillings 734,831,516/=. Accordingly it is averred that 10% of the value of those works representing the Defendant's additional costs for completing the works was not deducted in the final certificate. The pleading amounted to a counterclaim or set off against the Defendants own assessment and final certificate.

Last but not least the Defendant deducted Uganda shillings 1,909,355,181/= being advance payment on certificates, 1, 2 and 3. Clause 51.3 of the General Conditions of Contract as modified by the Special Conditions of Contract provides that advance payment will be repaid by deducting equal amounts from payments due to the Contractor in each payment certificate. It envisages that payments are progressively deducted and phased-in all of the certificates issued for payment of the Contractor. If there are four payments envisaged, they would be deducted in four equal instalments.

In paragraph 7 of the WSD, the Defendant does not deny the delay in the payment of the Plaintiff but averred that it was not deliberate.

From the ruling on the relevant provisions of the contract, the Defendant was entitled to deduct advance payments before issuing the final certificate or reflect it in the final certificate as a deduction leading to the total amount due to the Plaintiff. We have a situation where the Defendant is challenging its own certificate of completion of work issued to the Plaintiff. The Defendant admits that necessary deductions ought to have been made prior to the issuance of the certificate. That is the law because deductions are made before the certificate is issued. A request for payment is supposed to be rejected and returned to the service provider to submit new ones.

Furthermore having terminated the contract, 10% of the uncompleted works cannot be paid because the Project Manager is supposed to assess the costs of the Contractor under clause 60.2. The termination was for fundamental breach by the Employer. What is to be included in the certificate is the value of the work done, materials ordered, the reasonable costs of removal of equipment, repatriation of the Contractor's personnel employed solely on the works, and the Contractor's costs of protecting and securing the works. This is reduced by the deduction of any advance payments received before the date of the certificate.

In the premises, I have carefully considered the final certificate issued to the Plaintiff on 23rd January, 2015. It comprises of 13 items. It is also calculated in accordance with clause 60.2. The Project Manager valued the work done by the Contractor. On the second item the value of culverts procured but not used were valued. On the third item the claim for costs arising out of time extension was included. In item 4 the costs of removal of the equipment was factored in. In item 5 the repatriation of staff was valued. In item 6 the claim for costs arising out of time

extension was included. In item 8 advance payment, finished works with defects in item 9 and the previous payments in item 10 were included.

The Plaintiffs Counsel submitted with very many authorities that a final payment certificate cannot be revised or varied by the Employer. With reference to Building Contract Dictionary a final certificate is the last certificate issued in respect of the contract. In the book “**Construction Contracts**” by **Murdoch and Hughes** it means the Contractors satisfaction with the work, or the amount that is finally due to the Contractor or both. The fact that the final certificate was the last certificate was recognised by Justice Wangutusi in **Alpha Gama Engineering vs. Attorney General HCCS No. 438 of 2010**). The Plaintiff’s Counsel submitted that it is the certificate that creates the debt due and subject to the right of set off is as good as cash at hand (See **Tan Hung and Another vs. Luxury Design Homes Pty Ltd and 2 Others [2004] NSW 178** and **Halsbury’s Laws of England Vo. 3 paragraphs 458 – 459**). The right to payment is enforceable as a debt once it has accrued (See Supreme Court of Appeal of South Africa in **Job Job Investments (Pty) Ltd vs. Mavundla Zek Joint Venture [2009] ZASCA 23**)

The Defendant’s revised final certificates were never issued in that they were not delivered or acknowledged in writing by the Contractor. They were not in accord with the General Conditions of Contract.

The Plaintiff inter alia also submitted that payment upon termination by the final certificate cannot be revised. The certificate was intended to determine the final amount due to the Contractor. The act of issuing the certificate concludes the power of the Project Manager to correct or modify the amounts in it. He is *functus officio*. A party dissatisfied with the final certificate goes to arbitration or adjudication of the grievance (See **Alpha Gama Engineering Enterprises Ltd vs. Attorney General**). In **Ocean Diners (Pty) Ltd vs. Golden Hill Construction CC [1993] 2 All SA 260** it was held by the Supreme Court of South African (Appellate Div) that a certificate is not open to attack on the ground that it contains errors of the Employers agent and it cannot in the absence of a contractual provision enabling it or an agreement or waiver by the parties be withdrawn or cancelled by the architect to correct mistakes. Some other points and issues were raised by the Plaintiff’s Counsel and are contained in the written submissions however they all point to the contention that the final certificate cannot be revised or altered.

The Defendants Counsel submitted on the other hand that no certificate is conclusive evidence as to the sufficiency of work and the Employer is free to defend and prove that the work done was not in accord with the contract (See Robins vs. Goddard [1905] 1 K.B. 294.

Sufficiency of work is not the issue here. This is because the contract was terminated for fundamental breach before completion and what was to be valued under GCC 60.2 is the work done thus far in accordance with the clause.

I have accordingly considered the written submissions and case law. Where a contract is clear and unambiguous, the written terms of the contract can be interpreted as they are, without any need to refer to case law. Similarly, the terms of the statutory provisions applying to such contracts, where they are clear and unambiguous, do not require reference to the case law. Section 14 (2) of the Judicature Act Cap 13 laws of Uganda explicitly provides that the jurisdiction of the High Court shall be exercised in conformity with the written law. Where the written law does not extend or apply, then in conformity among others to the common law. It provides as follows:

“14. Jurisdiction of the High Court.

(2) Subject to the Constitution and this Act, the jurisdiction of the High Court shall be exercised—

(a) in conformity with the written law, including any law in force immediately before the commencement of this Act;

(b) subject to any written law and insofar as the written law does not extend or apply, in conformity with—

(i) the common law and the doctrines of equity;

(ii) any established and current custom or usage; and

(iii) the powers vested in, and the procedure and practice observed by, the High Court immediately before the commencement of this Act insofar as any such jurisdiction is consistent with the provisions of this Act; and

(c) where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice, equity and good conscience.

(3) The applied law, the common law and the doctrines of equity shall be in force only insofar as the circumstances of Uganda and of its peoples permit, and subject to such qualifications as circumstances may render necessary.”

In the written contract namely the General Conditions of Contract and the Special Conditions of Contract which are set out at the beginning of this judgment are explicitly clear and do not require any exposition of the common law or doctrines of equity. Specifically the statutory law clearly provides that payment shall be made within 30 days of certification. I considered the two provisions relating to procurement and management of services by local governments as well as procurement and management of services by government entities generally. I will start with the general law namely the Public Procurement and Disposal of Public Assets Regulations, 2003, Statutory Instrument 2003 Number 70 which provisions I have earlier on set out. I specifically considered regulation 255 and 256 thereof. That notwithstanding, I will also consider regulations 246 which provide as follows:

“246. Payment terms

Solicitation documents and the resulting contracts shall specify the payment terms that shall apply to a contract and these shall include—

- (a) payment method;
- (b) payment structure;
- (c) payment documents;
- (d) payment period; and
- (e) payment currency.”

Mandatory language is used that the solicitation documents and resulting contracts shall specify the payment terms which shall apply to a contract and this includes the payment documents and a payment method among others. In this case, payment was supposed to be made upon the

issuance of a certificate of payment. Specifically the payment in this matter arises from clause 60.2 of the general terms of contract upon termination on the ground of fundamental breach. I agree with the submissions of the Plaintiffs Counsel that a final certification for payment pursuant to termination under clause 60.2 concludes the contract. The Plaintiff brought the contract to an end by terminating it for fundamental breach. Thereafter the Plaintiff was entitled to payment under Clause 60.2 after final closing certificate of payment if issued by the Defendant's appointed and professional Project Manager.

Regulation 255 provides that payment shall be made 30 days from certification of invoices, except where this is varied in the Special Conditions of Contract. We have already considered the said provision and established that the Special Conditions of Contract do not vary the statutory provisions. We also considered regulation 118 of The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006 which is to the same effect.

Finally I agree with the Plaintiff's submission that where the contract has been brought to an end, clause 60. 2 of the General Conditions of Contract require a final certificate to be made bringing the contract to an end. Moreover, the time for verification of the claim of the contract is before the issuance of the final certificate. Last but not least, clause 60.2 permits the Project Manager to exclude advance payments by way of the deductions from the final certificate. Errors made in the certificate, and the errors of the Employer and not the Contractor. I further agree that the Defendant is entitled to set up a set off or counterclaim in the suit between the parties. It cannot do so unilaterally by amending its own certificates issued by the agreed consultant or Project Manager. Setoffs and counterclaims are provided for by Order 8 rule 2 of the Civil Procedure Rules which provides:

“2. Setoff and counterclaim.

(1) A Defendant in an action may set off, or set up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether the setoff or counterclaim sounds in damages or not, and the setoff or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court may on the application of the Plaintiff before trial, if in the opinion of the court the setoff or counterclaim cannot be

conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the Defendant to avail himself or herself of it.

(2) Where a Defendant includes a counterclaim in the defence; the Defendant shall accompany it with a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on.”

Order 8 rule 16

“16. Defence or setoff founded on separate grounds.

Where the Defendant relies upon several distinct grounds of defence or setoff founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.”

The rules provide that the setoff is pleaded and facts averred in the written statement of defence.

Mulla on the Code of Civil Procedure 16th edition page 1975 writes that in its original and strict sense, a setoff is a plea in defence pure and simple, which by adjustment would wipe off or reduce the Plaintiffs claim. At page 1978: the expression ascertained sum is used in contradistinction to un liquidated damages. There can also be an equitable setoff in respect of an ascertained sum of money the essence of such a claim is that there must be some connection between the Plaintiffs claim for a debt and the Defendant’s claim to set-off which would make it inequitable to drive the Defendant to a separate suit. Under the common law a set off has to be of an ascertainable amount. However the rule interpreted provides that the set-off has to be of an “ascertained sum”. On the other hand courts of equity used damages or unascertained sums as a defence to a claim in the plaint. An equitable set-off must arise from the same transaction. The general rule is that a legal set-off has to be of an ascertainable sum. The strict application of this rule on legal set-off has been criticised. In the case of **Axel Johnson Petroleum AB v MG Mineral Group AG The Jo Lind [1992] 2 All ER 163** STAUGHTON LJ notes at 169 that the development of the law of set-off was less than satisfactory and this led to the use of the equitable setoff:

Its historical development has led to results which appear to lack logic and sense. Legal set-off is available if both claims are for liquidated sums. Thus if a Plaintiff has a claim

for unliquidated damages, the Defendant cannot at law seek to set off a liquidated claim. I can see no sense in that today. This rule was mitigated by the Court of Chancery through the doctrine of equitable set-off which is available in broad terms if there is a sufficient degree of connection between the two transactions, whether or not either or both claims are unliquidated. But, as Leggatt LJ has pointed out, it is questionable whether the remedy is wholly effective as a cure for the disease.

Thirdly there are cases, such as *Mondel v Steel* (1841) 8 M & W 858, [1835–42] All ER Rep 511, where a claim for unliquidated damages can be used to diminish the price agreed to be paid.

In addition to those three rules there are particular cases where special rules have evolved, such as a claim for freight under a contract for the carriage of goods by sea and a claim by the holder of a bill of exchange.

It can be said that there is a case for reform of the law, which has to be discovered in a number of diverse rules based on no coherent line of reasoning. But in practice masters and judges, for whom the problem is of almost daily occurrence, manage to solve it without any great difficulty. Since the landmark case of *Hanak v Green* [1958] 2 All ER 141, [1958] 2 QB 9 a broad interpretation of the doctrine of equitable estoppels, or the grant of a stay of execution pending the trial of a counterclaim, has generally been sufficient to safeguard the Defendant's cash flow when justice required that result, and not if the Defendant did not deserve indulgence. It is rare indeed in my experience that legal set-off is mentioned, and even rarer for there to be such an elaborate and skilful argument as we have had in this case. So perhaps we can continue to tolerate the law as it stands.

According to Denning MR in the case of **Federal Commerce and Navigation Ltd v Molena Alpha Inc and others The Nanfri, The Benfri, The Lorfri** [1978] 3 All ER 1066 between pages 1077 – 1078 equity should be applied on a case by case basis:

During that time the streams of common law and equity have flown together and combined so as to be indistinguishable the one from the other. We have no longer to ask ourselves: what would the courts of common law or the courts of equity have done before

the Supreme Court of Judicature Act 1873? We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? (See *United Scientific Holdings Ltd v Burnley Borough Council* ([1977] 2 All ER 62 at 68, [1977] 2 WLR 806 at 811–812) per Lord Diplock). This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the Plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim. ...”

From the above authorities, the cross action should arise from the same transaction. The Defendant is confronted with pleading that its own Project Manager for whom it is vicariously liable did not properly evaluate the request for payment. Because the Defendant represented to the Plaintiff a final certificate of payment, the Defendant is caught by the doctrine of estoppels from asserting that its Project Manager did not do the right thing. The Defendant proceeded to unilaterally ignore the contractual terms and to revise its own certificate which ought to have been done before it is issued. In the premises there is no valid counterclaim or set off because the doctrine of estoppels applies. Section 114 of the Evidence Act provides as follows:

“114. Estoppel.

When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing.

The Defendant represented that it appointed a Project Manager to whom payment requests should be made. The Project Manager is not the Director Engineering and Technical Services in the Defendant who issued the rival certificate. By letter dated 25th April, 2012 addressed to the managing director of the Plaintiff, the Defendant wrote appointing a Construction Supervision Consultant Messrs Architect Consults (U) Ltd in Association with Wanjohi

Consulting Engineers. This is the only Project Manager under the contract and another cannot be presented let alone issue a final certificate. I noted that the Special Conditions of Contract amended GCC 1.1 (y) and provides that the Project Manager is the Director of Engineering & Technical Services, Kampala Capital City Authority. The contract was executed by the parties on 30th December, 2011. Subsequently the Defendant unequivocally appointed Messrs Architect Consults (U) Ltd in Association with Wanjohi Consulting Engineers who issued a final certificate.

I also agree that the burden is on the Defendant to prove the counterclaim or setoff. The Plaintiff is entitled to avail itself the shield of estoppels under section 114 of the Civil Procedure Rules having commenced an action on the basis of a certificate issued by the Defendant's appointed Project Manager and agent. Last but not least, the final certificate issued by Messrs Architect Consults (U) Ltd in Association with Wanjohi Consulting Engineers does exclude advance payment of Uganda shillings 836,214,703/=. The Defendant should not be permitted to question the Project Manager and issue another certificate giving a deduction of advance payment twice that amount.

The Plaintiff was entitled to payment within 30 days of the issuance of the final certificate dated 23rd January, 2015 under the statutory provisions reviewed above. After the issuance of the final certificate by the Project Manager, the Plaintiff was paid Uganda shillings 970,158,313/= which was paid after the deductions had been made by the Defendant through its department of engineering who had no mandate under the contract. It follows that the said amount of Uganda shillings 970,158,313/= paid subsequent to the final certificate can be deducted from the certified amount. Out of the certified amount of Uganda shillings 3,670,455,850/=: the Plaintiff is entitled to Uganda shillings 2,700,297,537/=

Remedies

I have carefully considered the written submissions on the issue of remedies which have been set up above. The Defendant relied on deductions on the amount claimed. Having concluded which deductions could be made lawfully, the Plaintiff is entitled to Uganda shillings 2,700,297,537/= out of the final certificate.

Damages and interest

In **Halsbury's laws of England fourth edition reissue volume 12** (1) and paragraph 1063 thereof page 484, upon breach of the contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interests from the time when it became payable under the contract or as the court may allow. Where the contract as in this case has a genuine pre-estimate of damage, interest will be paid at the agreed rate. In other words the agreed rate of interest agreed is the measure of agreed damages and the Plaintiff may not claim more in the absence of special circumstances where the Plaintiff can prove other damages. In the case of **Trans Trust S P R L v Danubian Trading Co Ltd [1952] 1 All ER 970** Denning LJ said at Page 977 that where special loss is foreseeable as a consequence of non-payment, that loss is recoverable. He held as follows:

“It was said that the breach here was a failure to pay money and that the law has never allowed any damages on that account. I do not think that the law has ever taken up such a rigid standpoint. ... That is, I think, the only real ground on which damages can be refused for non-payment of money is because the consequences are as a rule too remote. But when the circumstances are such that there is a special loss foreseeable at the time of the contract as the consequence of non-payment, then I think such loss may well be recoverable.”

According to **Halsbury's laws of England fourth edition reissue volume 12 (1) paragraph 1065** at page 486:

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

In the case of **Suisse Atlantique Société D'armement Maritime S A vs. N V Rotterdamsche Kolen Centrale [1966] 2 All ER 61** (House of Lords), Viscount Dilhorne held at page 69 that:

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

they suffered in consequence. In my view, the appellants cannot avoid the operation of these provisions and cannot recover more than the agreed damages for the detention of their vessel...”

The contractual clause is enforceable irrespective of the adequacy of the amounts stipulated in the contract and the Plaintiff cannot claim for more than is catered for in the contract. Lord Reid on the issue held at page 77 of the judgment that:

“The appellants chose to agree to what they now say was an inadequate sum for demurrage, but that does not appear to me to affect the construction of this clause. Even if one assumes that the \$1,000 per day was inadequate and was known to both parties to be inadequate when the contract was made, I do not think that it can be said that giving to the clause its natural meaning could lead to an absurdity or could defeat the main object of the contract or could for any other reason justify cutting down its scope. If there was a fundamental breach, the appellants elected that the contract should continue, and they did so in the knowledge that this clause would continue.”

Following the clear principle in the above precedents that damages recoverable for delay in payment under a contract which provides for the consequence of delay is the specified amount stipulated in the contract. In this case the Plaintiff was part of the amount certified in June 2015 and the Defendant had unilaterally deducted some amounts from the final certificate and refused to pay more. Clause 43.1 of the General Conditions of Contract required the Project Manager to include interest in the final certificate. The certificate was issued on 23rd January, 2015 and payment was supposed to follow within 30 days. It follows that the Plaintiff is entitled to interest for delay in payment from 23rd February, 2015 under clause 43.1 of the GCC which is to be calculated from the date by which the payment should have been made after the date when delayed payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payment is made.

The rate of interest for commercial banking in this awarded in this court has ranged from 18% - 24% over the years. In the circumstances I award the Plaintiff interest at a rate of 21% per annum from 23rd February 2015 till the date of judgment.

Further interest is awarded at the rate of 19% on the decreed amount at the date of judgment till payment in full.

The Plaintiff's suit succeeds with costs and the said costs shall be taxed and the certified amount paid to the Plaintiff by the Defendant.

Judgment delivered in open court on the 28th of August 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Christopher Bwanika for the Plaintiff appearing with Counsel Robert Ssawa

No one for KCCA

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

28th August 2017