

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**HCCS NO. 712 OF 2013**

**CAPITAL VENTURES INTERNATIONAL LIMITED:..... PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL**

**1<sup>ST</sup> DEFENDANT**

**AFRICA DEVELOPMENT BANK :..... 2<sup>ND</sup> DEFENDANT**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**J U D G M E N T:**

The Plaintiff Capital Ventures International Limited sued the Attorney General and Africa Development Bank referred to herein as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively for the recovery of US\$ 457,343 and UGX 38,230,000/=, general damages, interest and costs of the suit.

The facts as discerned from the pleadings are simple and straight forward.

The 1<sup>st</sup> Defendant having received a loan from the 2<sup>nd</sup> Defendant for dairy development decided to install milk coolers in 14 districts in Uganda. The 1<sup>st</sup> Defendant through the Ministry of Local Government which was its executing agency invited bids for the supply, installation, commissioning, training in operational and maintenance of 37 milk coolers in 14 districts as clearly spelt out in **ExhP3** as follows;

1. Rakai 3 in number.
2. Bududa 5 in number.
3. Sironko 1 in number.
4. Kapchorwa 3 in number.

5. Lyantonde 6 in number.
6. Sembabule 6 in number.
7. Kibale 1 in number.
8. Mubende 4 in number.
9. Kamuli 1 in number.
10. Kamuli 1 in number.
11. Namutumba 1 in number.
12. Pallisa 1 in number.
13. Budaka 1 in number.
14. Bukwo 1 in number.

Of these the first four were to be supplied with both UMEME grid and standby generator power supply. The rest were to be supplied with only generator power.

The Plaintiff was approved to supply the items. On the 8<sup>th</sup> of July 2010 the Permanent Secretary, Local Government wrote to the Plaintiff **ExhP1** as follows;

*“This is to inform you that the Ministry has approved your bid document to supply the above items at a contract sum of US Dollars \$ 984,800 (United States Dollars Nine hundred eighty four thousand only exclusive of taxes).*

*Please note that your quotation and this Notification of Award shall form a binding commitment.”*

On the 3<sup>rd</sup> August 2010, the Plaintiff responded, **ExhP2**, accepting the “offer to supply and install the above mentioned 37 milk coolers.”

The Plaintiff and the 1<sup>st</sup> Defendant then entered into a formal agreement on 13<sup>th</sup> August 2010 **ExhP3** for the provision of the said 37 milk coolers and 37 generator sets under the Community Agricultural Infrastructure Improvement Program (CAIIP) funded by the second Defendant.

The Plaintiff then begun the importation of the coolers and on 31<sup>st</sup> October 2011 she declared that the goods had arrived in the country, **ExhP6**. In the same submission, the Plaintiff requested for payment of USD 492,400 which was 50% of the contract price.

The submission comprised the shipping documents. On the strength of the said documents the 1<sup>st</sup> Defendant disbursed the USD 492,400 and later another USD 170,458 which altogether amounted to US 662,858. The contract price was USD 984,800 so it left USD 322,012 as a balance to the whole contract.

The Plaintiff contended that she installed 34 milk coolers. Three of them were not installed because the houses in which they were to be installed had not been built.

On 3<sup>rd</sup> January 2012 the Plaintiff wrote to the 1<sup>st</sup> Defendant **ExhP11** and informed her that all the 37 coolers had arrived in the country and that eight of them had already been delivered to their final destination. They requested to hand them over.

On the 12<sup>th</sup> February 2012, the Plaintiff again wrote to the Permanent Secretary a letter **ExhP12** which in part reads;

*“To- date we have supplied and installed thirty four (34) milk coolers across the country. Three (03) milk coolers have not been installed because the houses are not ready. They are currently housed at our ware house in Tororo.”*

As to payment in the same **ExhP12** the Plaintiff wrote;

*“Despite several requests for us to be paid and promises by you to pay us, no payment has been forthcoming.”*

A similar letter updating status of the installation and demand for payment **ExhP15** was written on 10<sup>th</sup> May 2012 still demanding for payment. Acknowledging the work done by the Plaintiff the Permanent Secretary wrote to the Chief Administrative Officers of Namutumba, **ExhP16(a)**, Kaliro, **ExhP16(c)**, Lyantonde **ExhP16(F)** and Rakai **ExhP16(H)**. To all of them he wrote in part;

*“In line with the conditions of contract, the supplier was supposed to supply, install, test and commission the agro-*

*processing facilities. Accordingly the supplier has now completed the installation of the following facilities in the indicated sub-counties.”*

The other piece of evidence which indicates that the Plaintiff had delivered and installed the equipment is found in **ExhP20** written by the Permanent Secretary to the Managing Director Tropical Bank Limited. He wrote;

*“We refer to the contract between the above Company and the Ministry for the supply, installation, testing and commissioning of thirty seven (37) milk coolers in the east and western Uganda under Community Agriculture Infrastructure Improvement Programme (CAIIP) funded by the African Development Bank.*

*The supplier has delivered the equipments and has completed the installation. The Ministry is now in the process of testing and commissioning most of the milk coolers and their respective diesel generator sets. The second part of payments to the Capital Ventures International Limited (CVI) shall be made after this exercise, in the month of September, 2012.”*

This payment was not made, so on the 25<sup>th</sup> October 2012 the Plaintiff again wrote to the Permanent Secretary reminding him of non-payment.

On 2<sup>nd</sup> November 2012, the Permanent Secretary wrote to the Plaintiff and suggested that an inspection pursuant to clause 7 of the agreement would be carried out. On 21<sup>st</sup> February 2013 appreciating the work done by the Plaintiffs, the Permanent Secretary directed that the three milk coolers that had not been installed, be handed over to the respective districts.

On 20<sup>th</sup> March 2013 the Permanent Secretary wrote to the Plaintiff **ExhP28** expressing dissatisfaction with the generators. He wrote;

*“So far of the ten machines tested, constant failures of the generators have been noted. This has mainly been due to the fact that the generators supplied do not much the power requirement of the milk coolers.”*

*In view of the above we are unable to process payment for both the generators and milk coolers as claimed. However, with your consent, we will process payment for the milk coolers less cost of the generator sets as elaborated below;*

He further wrote;

*“The purpose of this letter, therefore, is to inform you of the findings from the preliminary testing of the milk coolers together with the generators and to request you to inform us whether you accept the payment of USD 170,528 for the milk coolers supplied and installed to date. In line with clause 27 of the General Conditions of Contract, the functionality and performance of the 37 generator sets is yet to be verified by a team of technical personnel from both the Ministry and your Company.”*

By **ExhP29** dated 21<sup>st</sup> March 2013, the Plaintiff agreed to those terms as part payment pending verification of the others.

She added;

*“As indicated in your above reference letter our technical team shall be ready at the earliest opportunity to join your Ministry’s technical team to verify the specifications and functionality of these generator sets.”*

The Plaintiff then awaited for a date to be communicated to her. By July 2013 the joint verification had not been done. So on 11<sup>th</sup> July 2013 the Plaintiff by **ExhP30** terminated the contract. She wrote;

*“We submitted our invoice for payment and was received on 14<sup>th</sup> May 2012. Since then we have not been paid as per the contract. Under clause 15.3 of the said contract of supply, payment was supposed to be effected within 60 days from the date of receipt thereof.*

*This presupposes that any commissioning and testing of the machines was to be done within the stipulated period.*

*By copy of this letter we hereby issue a termination notice under clause 32.1 (b) of the Contract.”*

In response the Permanent Secretary in what would be called a counter termination notice **ExhP31** dated 20<sup>th</sup> August 2013 wrote to the Plaintiff explaining why the demand for payment of 12<sup>th</sup>May 2012 was not honoured. He wrote;

*“Your payment was not honoured in time because you failed to fulfill your contractual obligations highlighted hereunder;*

- (a) Failure to install 4 milk coolers,*
- (b) Failure to test and commission 27 milk cooler,*
- (c) Failure to furnish detailed operations and maintenance manual for each appropriate unit of the supplied goods,*
- (d) Failure to maintain maintenance and repair services for the goods supplied over the warranty period,*
- (e) Failure to replace 37 defective generator sets as per GCC Clause 14.2,*
- (f) Failure to complete the civil works on all the 37 milk cooler sites,*
- (g) Failure to provide training to the operators for the 37 milk coolers.*

*Given that you have failed to perform your contractual obligations as per the agreed delivery schedule and you have failed to honour our advice, we do agree with your termination notice. You are therefore requested to hand over the 37 sites together with all the accessories paid for, to the Ministry by 30<sup>th</sup> August 2013.”*

On receipt of this communication the Plaintiff filed this suit seeking special damages of USD 405,448 and UGX 38,085,000/=, general and aggravated damages, interest at 12% per annum on special damages from date of cause of action until payment in full and costs.

The Defendant denied liability. The 1<sup>st</sup> Defendant while admitting that it entered into the contract with the Plaintiff, it was not liable because the Plaintiff failed to fulfill his contractual obligation by failing to install 4 milk coolers, test and commission 27 milk coolers. That the Plaintiff failed to furnish detailed operation and maintenance manuals for each unit supplied.

The 1<sup>st</sup> Defendant also contended that the 37 generators the Plaintiff supplied were defective and did not replace them as provided for under clause 14.2 of the contract.

Furthermore that the Plaintiff failed to complete the civil works on all the 37 milk cooler sites and did not train the operators.

That by paying USD 702,227 was equivalent to 71.3% of the contract price which was sufficient to cover the cost less the 37 defective generators and accessories and associated services for commissioning of the facilities.

Further that since all the milk plants were taken directly by their respective District Local Governments specified in the Schedule of requirements, the Plaintiff's claim that she incurred exorbitant expenses to warehouse them, provide security and insure them is untenable.

By way of Counterclaim, the 1<sup>st</sup> Defendant/Counterclaimant contended that the Plaintiff had breached the contract and therefore sought special and general damages, interest and costs.

She alleged that the Plaintiff's obligations included the "supply, install, commission, test, train in operation and maintenance." That the Plaintiff supplied, installed but on commissioning and

testing the 37 generators none of them worked. That the maintenance was of poor quality contrary to GCC. 7.3 of the contract.

That because of the Plaintiff's failure, the 1<sup>st</sup> Defendant was forced to replace the generators 37 in number, commission the milk coolers all amounting to USD 984,800 which she counter claimed.

The Defendant also prayed for general damages and costs.

In reply to the Counterclaim the Plaintiff contended that they investigated the complaint of defective generators, and found that it is due to poor maintenance and manned by unqualified personnel, **ExhP27**. That the Defendants themselves refused to nominate people to go with the Plaintiff for verification.

In her Written Statement of Defence the 2<sup>nd</sup> Defendant pleaded Diplomatic Immunity. When the matter came up for hearing, the Plaintiff dropped its claim against the 2<sup>nd</sup> Defendant.

The issues that now arise for resolution are;

- 1) Whether there was a breach of contract, if so by whom?
- 2) Remedies.

It is not in dispute that the Plaintiff was awarded the contract to supply, install and commission 37 sets of milk coolers at a contract sum of USD 984,800. It is also not in dispute that the Defendant had paid a total of USD 662,858 by the time the Plaintiff terminated the contract.

By the terms of the Agreement the Defendant would make an advance payment of 10% of the contract within 60 days of signing the contract against a bank guarantee for equivalent amount. 40% of the total sum would be paid on submission of shipping documents. 45% on completion of installation and commissioning and 5% upon issuance of Final Acceptance Certificate.

The Plaintiff's role in the contract is provided for in Clause 2.00 of the General Specifications of the Contract document.

Clause 2.1 provides;

*“The contract works under this section comprise of plant, equipment and related electrical installations for milk*

*coolers. The works shall include the supply, installation, connection, testing, commissioning, guarantee and maintenance during defects liability period of all new fixtures.”*

As for civil works, the Plaintiff was responsible for all Builders’ work and civil works incidental to the contract. These included cutting of holes in walls and floors, provision of foundations for plant and machinery. Together with the foregoing was fixing of brackets, cable and ductwork ducts, trenching and making good thereafter.

Having outlined the obligations of the Plaintiff I proceed to deal with each of them.

### **Supplying;**

The answer on whether the Plaintiff supplied the coolers and generators lies in the various correspondences and pleadings of the Defendant.

On the 3<sup>rd</sup> January 2012 by **ExhP11** the Plaintiff wrote to the Permanent secretary Ministry of Local Government informing them that all the milk coolers had arrived in the country and that the milk coolers in Buyende, Nawaikoke, Namwiwa, Bumanya(the last three being in Kaliro) Namutumba, Agule, Budaka, Butenza were under installation. That fifteen coolers for Masaka, six for Mubende and eight for Tororo were ready for delivery and installation. In the same letter Peter Emusugat Director of the Plaintiff also sought permission to hand over sites that had finished installation and testing of the equipment.

On May 10<sup>th</sup> 2012 by **ExhP15** the Plaintiff’s Director again wrote;

*“We are happy to report that we have supplied, installed, tested and ready to commission the said 3,000 liter coolers at the following sites.”*

And the Plaintiff’s Director then listed the sites in Rakai, Lyantonde, Kibaale, Mubende, Kamuli, Namutumba, Pallisa, Budaka, Sironko, Kaliro all totaling to twenty. In the same communication the Director listed those that had not been installed and gave reasons as follows;

*“The following sites have not been installed because the building structures are not ready. The 3,000 liter milk*

*coolers and there corresponding diesel generator sets are in the country ready for installation.”*

They listed them as Sembabule, Mubende, Bududa, Kapchorwa and Bukwo totaling to seventeen (17) of them. Furthermore, the Director of the Plaintiff then requesting that those that had been installed should be commissioned. He wrote;

*“ The purpose of this letter therefore is to ask the Ministry to;*

*(a) Take delivery and commission all the twenty (20) sites that we have supplied, installed and tested the 3,000 liter milk coolers and their corresponding generator sets;*

*(b) Take delivery of all the remaining seventeen (17) 3,000 liter milk coolers and their corresponding diesel generator sets until such time that their buildings are ready for us to install and test them.*

*(c) Pay to us the claim here attached for all the 3,000 liter milk coolers supplied less the 5% retention fee.”*

Indeed these installations must have taken place because on the 7<sup>th</sup> June 2012 by **ExhP16(a)** the Permanent Secretary of the Defendant wrote to the Chief Administrative Officer Namutumba district. He in part said the following;

*“ In line with the conditions of contract the supplier was supposed to supply, install, test and commission the agro-processing facilities. Accordingly the supplier has now completed the installation of the following facilities in the indicated sub-counties.”*

The Permanent Secretary seems to have been satisfied that these installations had been run because he wrote;

*“ The facilities have been subjected to several test runs to ensure their compliance to the technical specifications.”*

A similar letter was written the Chief Administrative Officer of Kaliro, Lyantonde, Rakai all stating that the facilities had been subjected to several technical test runs. Still on 20<sup>th</sup> June 2012 by **ExhP18** the Plaintiff wrote to the Permanent Secretary and stated that the facilities which had not been installed were because there were no structures in which to put them but that those in Rakai, Lyantonde, Kaliro, Namutumba had been commissioned and handed over to the Ministry of Local Government who in turn handed them over to the respective districts namely; Rakai, Lyantonde, Kaliro and Namutumba.

The others that had been supplied, installed, tested and were ready for commissioning were in Kibale, Mubende, Kamuli, Paliisa, Budaka, Sironko and Kaliro. That the facilities had been supplied and installed was further buttressed by **ExhP20** dated 20<sup>th</sup> August 2012 in which Dr John Mbadhwe wrote as follows;

*“We refer to the contract between the above Company and the Ministry for the supply, installation, testing and commissioning of thirty seven(37) milk coolers in the east and western Uganda under the Community Agricultural Infrastructure Improvement Programme (CAIIP) funded by the African Development Bank.*

*The supplier has delivered the equipment and has completed the installation. The Ministry is now in the process of testing and commissioning most of the milk coolers and their respective diesel generator sets.”*

By **ExhP12** of 12<sup>th</sup> February 2013 the Plaintiff again communicated the position. Although this letter is dated 12<sup>th</sup> February 2012 the year must have been a typing error because all the stamps on it by the Ministry of Local Government and by African Development Bank clearly indicate that it was a 2013 letter. In this letter the Plaintiff wrote in part;

*“On October 25<sup>th</sup>2012, we wrote to you confirming that we had now installed thirty three(33) milk coolers. We also requested you to take delivery of the remaining three (03) milk coolers till the houses are ready and pay the invoice dated 10<sup>th</sup> May 2012.*

*On November 2<sup>nd</sup> 2012 we received a check list of the things you wanted to see at each site. We acted accordingly and your officers went and confirmed as per the mail and schedule here attached.*

*In all these activities, your officers have been visiting and promising to formally take delivery of the milk coolers and effect payments to us. To our disappointment, no payment has been realized and no formal delivery has been done and yet the milk coolers continue to be used by the communities.”*

By the foregoing it becomes clear that the milk coolers and the corresponding generator sets were delivered, installed, tested and were being used by the communities.

The Defendant alleged that the generators that were delivered were defective. DW1 Joseph Kawombe testified that the Plaintiff supplied thirty seven defective generators and failed to replace them. He further stated that the generators when installed and tested were not working since they were of poor quality. That the Plaintiff was informed in a meeting between the parties of the defects but did nothing to rectify the situation. Further, that the Plaintiff failed to complete the commission of all the thirty seven cooler sets and did not provide training to the operators of the thirty seven milk coolers.

On the 20<sup>th</sup> August 2013 the Permanent Secretary wrote to the Plaintiff **ExhP31** stating that the contract indeed had to be terminated because the Plaintiff had failed to install four milk coolers, had failed to test and commission 27 milk coolers, had not furnished detailed operations and maintenance manual for each appropriate unit, had failed to provide maintenance and repair services for goods supplied over the warranty period, had failed to replace all thirty seven defective generator sets, had not completed the works over the thirty seven milk cooler sites and had failed to train operators on sites for the thirty seven milk coolers.

That the four milk plants were not installed was not disputed by the Plaintiff. The Plaintiff in fact in all their correspondences had at first mentioned that as many as seventeen (17) had not been

installed because the building structures were not ready. From evidence it is clear that the building structures were eventually built less four of them.

The duty to build the building structure lay upon the Defendant. The civil works that were expected of the Plaintiff under civil works including cutting of holes in walls and floors, the erection and provision of foundations for plant and machinery and fixing of brackets, cable, ducts, trenching and making good thereafter the structures that had been put in place by the Defendant.

In fact by **ExhP26** the Permanent Secretary acknowledged the absence of the shelters to house the facilities. He wrote to the Managing Director of the Plaintiff in these words;

*“Reference is made to your letter dated 12<sup>th</sup> February 2013 in which you indicated that three (3) milk coolers in the districts of Bukwo and Kapchorwa could not be installed due to delayed completion of civil works on the shelters to house them.*

*The Ministry appreciates the level of patience expressed in trying to hold onto these machines until when the construction of the shelters has been completed. However with the accumulating storage and insurance costs, that you have continued to incur, we are now instructing all the affected districts to take custody of the machines until such a time when the shelters will be ready for installation.”*

This communication by the Permanent Secretary reveals two things. Firstly, that it was the Defendant’s duty to provide the shelters. Secondly, that failure to provide the shelters had occasioned costs and expenses upon the Plaintiff in respect of storage and insurance costs.

It follows therefore that since the duty to provide shelter fell upon the Defendant and they had gone ahead and directed the Plaintiff where to deliver which directive they complied with the Defendant cannot turn round and claim non- installation.

As for failure to commission, the Plaintiff on several occasions asked the Defendant's representatives to go together and not only do the commissioning but also take stock of what the Defendant complained were defective generators.

From **ExhP27** it is clear that some of the facilities had already been commissioned. For example the facilities in the district of Lyantonde were commissioned in June 2012 and apparently it is from this Lyantonde district where the complaints arose.

In other instances the Plaintiff wrote several times to the Defendant to go and commission the facilities. On 20<sup>th</sup> June 2012, **ExhP18** the Plaintiff requested the Defendant's representatives to go and take delivery and commission the eight (8) that had not been commissioned. Again on October 25<sup>th</sup> 2012 by **ExhP21** the Plaintiff wrote to the Permanent Secretary of Ministry of Local Government informing him of what had been supplied, installed, tested and handed over to the communities totaling thirty three(33) milk facilities.

The Plaintiff wrote;

*“The purpose of this letter is therefore to ask you to;*

*a) Take delivery and commission all the thirty three (33) 3000 liter milk coolers and generator sets supplied, installed, tested and are now in use by the communities.*

*b) Take delivery of the remaining four (4) 3000 liter milk coolers and their corresponding generator sets until such time those structures shall be constructed and made ready for us to install and test and install them.”*

This letter was received by the Permanent Secretary on 26<sup>th</sup> October 2012. It is not disputed that the milk coolers had been supplied, installed, tested and handed over to the communities. Indeed on 21<sup>st</sup> February 2013 the Permanent Secretary wrote to the Plaintiff **ExhP26** and asked the Plaintiff to deliver the coolers due to the various district administrative officers since they could not be installed due to delayed completion of civil works.

From the evidence it is clear that the Plaintiff did ask the Defendant to send representatives to commission. Where the Defendant sent people they were commissioned. Where the Defendant

did not send the Plaintiff could not be faulted for non-commissioning. The Defendant also complained that the generators that were supplied by the Plaintiff were defective and that the Plaintiff did not do the repairs as was required of him by the warranty in the twelve months from hand over.

That the facilities got spoilt here and there is not in doubt. Evidence however shows that the Plaintiff played a role in the repair. They even entered into an understanding with the various districts with the knowledge of the district administrations. Such understanding for purposes of repairs can be seen in **ExhP23** where Maumbe Fred who was the chairman of the board of directors of Eastern Dairies wrote to the sub-county chief Buteza sub-county Sironko District and notified the Assistant Secretary who approved.

I find it necessary to reproduce this letter;

**“RE;GENERATOR MALFUNCTION AT BUTEZA  
MCC**

*I refer to the MOU signed between the sub-county authority and Eastern Dairies for the management and smooth functioning of the milk cooling facilities. There in as spelt out we obliged to inform and seek your express permission to have the generator repaired for its efficient functioning.*

*I quote the telephone conversation with Geoffrey and Mr. Mugabe who are the technical suppliers of the equipment at the MCC. They advised that we go ahead and do necessary repairs, forward a payment request through your office to the Ministry of Local Government for onward submission to the concerned contractor who in turn shall refund the accrued expenses thereon.*

*Therefore this is to submit the details concerning the defects of the generator at Buteza MCC and to allow repairs and servicing to take place subject to reimbursement by the contractor as advised in first paragraph above.”*

The foregoing shows that the procedures adopted for repair had been officially accepted and the payments were being made by the Plaintiff. The comments written by the AEO to the Senior Assistant Secretary indicated that those repairs were indeed done and done satisfactorily. This position is buttressed by **ExhP25** which again says that the MOU was signed by the Senior Assistant Secretary of Buteza sub-county on behalf of the Ministry of Local Government and Eastern Dairies for the management and smooth functioning of the milk cooling facilities.

It also shows that whatever repairs were being done were known to the Plaintiff's representatives. It in part reads;

*“I have been in contact with Geoffrey, Mr. Mugabe and Mr Joseph Kaumbe who are the technical persons under CAIIP equipment. The necessary repairs have been finalized and therefore this is to forward a payment request through the relevant offices of the Ministry of Local Government for onward submission to the concerned contractor for a refund thereof.”*

In my view the repairs that were brought to their attention save the Lyantonde ones were being done. The Defendant specifically contended that the facilities in Lyantonde more specifically the generators were defective. The Defendant in accepting the termination notice of the Plaintiff wrote **ExhP31** stating that one of the reasons why they had not paid was because the Plaintiff had supplied defective generators and that whatever payments were being made they would be less the cost of the thirty seven defective generators as well as the related accessories and associated services for the commission of the facilities.

On the 2<sup>nd</sup> November 2012, **ExhP24** the Permanent Secretary had written to the Plaintiff stating that they would carry out a joint inspection of the ear-marked sites to ensure that everything was in order. This inspection seems to have taken off but in the absence of the Plaintiff because on 20<sup>th</sup> March 2013, **ExhP28** the Permanent Secretary wrote to the Plaintiff's director saying;

*“Of the ten (10) machines tested, constant failures of the generators have been noted. This has mainly been due to*

*the fact that the generators supplied do not match the power requirement of the milk coolers.”*

Interestingly at the conclusion of the letter the Permanent Secretary wrote as follows;

*“In line with clause 27 of the General Conditions of the Contract the functionality and performance of the thirty seven (37) generator sets is yet to be verified by a team of technical personnel from both the Ministry and your company.”*

This last statement by the Permanent Secretary points to two things; not being a technical person he was not sure of the cause of the defects. Secondly, that an actual position would be reached after going there jointly to verify the problem.

In reply to the Permanent Secretary’s letter the Plaintiff denied ever supplying defective generators stating that the generators supplied were within specifications in the bid document and therefore matched the power requirements for the 3000 liter milk coolers. They further wrote in **ExhP29**;

*“As indicated in your above reference letter our team shall be ready at the earliest opportunity to join your Ministry’s technical team to verify the specifications and functionality of these generator sets.”*

It seems to me that the solution lay in a joint inspection which comprised the two parties and their technical staff. The Defendant did not constitute the team that was to go with the Plaintiff to verify the functionality. It is worth noting here that the Defendant had referred to only ten and DW1 said the ten was representative of the thirty seven. Asked whether he established that the ten were not 15KVA he said they never established that. He was a mechanical engineer and the issues in question here were electrical. No formal minutes were generated in respect of any meetings concerning the defects of the generators. It seems that having waited for the team to be constituted and none was forthcoming the Plaintiff decided to do his own check.

The check by the Plaintiff was done on the 21<sup>st</sup> February 2013 in Lyantonde district on facilities that had been commissioned in June 2012. Their findings are as follows;

- I. *That the generator sets that had been handed over to the Ministry in June 2012 in immaculate running condition had been run down.*
- II. *That the sets were being run by unqualified persons instead of the people they had trained.*
- III. *That the technician in Lyantonde had vandalized the generator causing short circuit and therefore blowing off many components of the generator sets.*
- IV. *That they were poorly maintained and serviced.*
- V. *They were kept in appalling conditions.*

*And in Kasagama the fuel pump had collapsed and so they fuelled the generator by gravity by placing a jerry can of diesel on top of the generator. In Mpumudde the oil levels were very low. They concluded that the poor performance was due to poor maintenance.*

From the evidence on record these generators had been working since they were commissioned in June 2012 and there had been no complaints until 2013. The other reason why I say they were working is found in the comments of the representatives of the Ministry of Local Government which stated that the facilities had been repaired to satisfactory standards. **ExhP24** which indicated the defects for repair in Buteza did not at all suggest that the generators were below 15KVA and yet the same generators were found satisfactory by the representatives of the Ministry of Local Government.

As it stands now the Defendant's failure to constitute a technical team to go and verify the strength of the generators deprived the Defendant of the evidence it required to prove deficiency of the generators. Such evidence was necessary to rebut if not to vary the Defendant's own evidence in which they said that the facilities had been subjected to several technical test runs to ensure their compliance to the technical specifications.

These were letters written to the Chief Administrative Officers **ExhP16(a)** and **ExhP16(c)**. From the wording of those letters it seems clear that the facilities had been test run and found to be compliant with the technical specifications and ready for certification

The last paragraph of **ExhP16** reads;

*“The purpose of this letter therefore is to request you and your technical team together with the officials of the beneficiaries sub-counties, to attend the demonstration and certification exercise of the installed facility on the 14<sup>th</sup> June 2012 to enable the other processes of its operationalisation to begin.”*

The fact that these machines were handed over and operated for eight (8) months is on its own indicative that they had passed the test for provisional acceptance and that thereafter if they were faulty the Plaintiff would be expected to do repairs. And indeed when for example the generator in Buteza sub-county Sironko needed repairs Eastern Dairies which had entered into MOU with the Defendant sought permission to repair it and stated that they had discussed the matter with the suppliers of the equipment who advised repairs and they would foot the cost **ExhP23**.

That the equipment was repaired to the satisfaction of the users is supported by **ExhP25** a letter written to the Ministry of local Government on 4<sup>th</sup> January 2013. It in part reads;

*“ I have been in contact with Geoffrey, Mr Mugabe and Mr Joseph Kawombe who are the technical persons under CAIIP Equipment . The necessary repairs have been finalized and therefore this is to forward a payment request through the relevant offices of the ministry of local government for onward submission to the concerned contractor for a refund thereon.”*

That being the case the Defendant cannot claim that the generators were of deficient capacity. The Defendant’s claim in the Counterclaim that they bought generators because those supplied by the Plaintiff were deficient can therefore not stand and it is therefore dismissed.

The sum total is that the Plaintiff did supply all the milk coolers and generator sets as specified in the contract.

The Plaintiff claimed for US\$ 457,343 as money the Defendant did not pay. Having found that the Plaintiff supplied all the plant as contracted, and that she committed no breach, She is entitled to the balance unpaid. The contract sum was US\$ 984,800. PW1 stated and it is clear from paragraph 10 of the scheduling memorandum that the Defendant had paid US\$ 492,400 in the beginning and latter US\$ 170,458. This totaled to US\$ 662,858. This subtracted from the contract sum leaves a balance of US\$ 321,942 which is awarded.

The Plaintiff also claimed for extra costs incurred because of keeping four sets of milk plant when the Defendant's agents failed to avail the infrastructure within which to install them. That because of that, they paid unnecessary and exorbitant costs of warehousing, providing security and insurance.

In its reply the Defendant stated that the Plaintiff had the duty to supply and install that therefore the cost of warehousing, security and insurance did not arise. The Defendant further contended that when the equipment arrived the Plaintiff took it directly to the local administrations where they were to be installed and that therefore the claim that she incurred exorbitant expenses could not stand.

The answer to this question is found in the various correspondences between the parties. While it is true that the Plaintiff was expected to import, transport and install without further costs there was nothing in the agreement that obliged him to import and be stranded with the equipment. Such a situation would certainly now put on the Plaintiff the unnecessary cost of storage and security which he would be doing on behalf of the Defendant.

In such a situation the liability to pay for storage fell upon the Defendant. The proof that the Plaintiff kept the equipment and as a result incurred expenses was alluded to by the Permanent Secretary of the Ministry of Local Government on the 21<sup>st</sup> of February 2013 **ExhP26**. It in part reads;

*“The Ministry appreciates the level of patience expressed in trying to hold onto these machines until when the construction of the shelters have been completed. However*

*with the accumulating storage and insurance costs, that you have continued to incur, we are now instructing all the affected districts to take custody of the machines until such a time when the shelters will be ready for installation.”*

By the foregoing paragraph there is no doubt that the Plaintiff incurred costs occasioned by the failure of the Defendant when it failed to put in place the infrastructure in which the Plaintiff would have installed the milk plant.

PW1 however did not give much by way of evidence but relied more on the payment vouchers which were Appendix A. Scrutiny of these vouchers however cover all the activities and much more than storage and security. Even with the storage some of it was in places that had nothing to do with the equipment for Tororo and Sebei.

I however found vouchers for warehousing and security here in Kampala which amounted to UGX. 1,300,000/= and since this is the only sum that was strictly proven the Plaintiff is awarded UGX. 1,300,000/= for warehousing and security of the milk plant which he could not deliver and install because there was no infrastructure a provision that was an obligation of the Defendant.

The other claims like rent, transportation, allowances to staff, loading and offloading, fuel and meals, provision of electrical works at the site cannot be maintained because they fell directly within the contract price as provided for in the contract document.

The Plaintiff also claimed interest on bank charges of USD 87,331 on the loan borrowed. The Plaintiff contended that because of the delay in payment, they incurred unnecessary interest of USD 87,331.

From communication between the parties and others, there is no doubt that the Defendant's agents were aware of the loan. The position is buttressed by **ExhP4** in which the Permanent Secretary Local Government wrote to the Tropical Bank assuring them of remitting all payments due to the Plaintiffs.

By this commitment the Permanent Secretary committed the Defendant to make prompt payments in the form of Advance Payment 10% contract price, on submission of shipping

documents 40%, on completion of installation and commissioning 45% and upon issuance of Final Acceptance Certificate 5%.

Some of these payments were not made due to the breach of the Defendant as stated earlier in this Judgment. Non-payment by the Defendant exposed the Plaintiff to loan interest that would otherwise not have accrued. The interest is clearly shown in the statement of account of the Plaintiff with Tropical Bank as exhibited.

It is however noted that while the Plaintiff claimed USD 87,331, the totals in the statement show only USD 75,733.98. Since the Plaintiff must strictly prove a special damage; **Hajji Asuman Mutekanga vs Equator Growers Ltd SCCA No. 7 of 1996**, the Plaintiff is awarded USD 75,733.98 as interest accrued from bank loan which was proved.

The Plaintiff also claimed general damages resulting from the Defendant's breach of contract.

The settled position is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural and probable consequence of the Defendant's act or omission; **James Fredrick Nsubuga vs Attorney General HCCS No, 13 of 1993**.

A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in a position he or she would have been in had she or he not suffered the wrong and when assessing the quantum of damages, courts are namely guided by the value of the subject matter, the economic inconveniences that a party may have been put through and the nature and extent of the breach; **Kibimba Rice Ltd vs Umar Salim SCCA No. 17 of 1992; Uganda Commercial Bank vs Kigozi[2002] 1EA305**.

Considering the fact that the Defendant breached the contract and deprived the Plaintiff of his earnings well aware that the capital injected into the project was a loan, that the Plaintiffs were subjected to hardships as the loan attracted interest, that it created a business embarrassment, I find an award of UGX. 50,000,000/= as general damages appropriate. It is so awarded.

The Plaintiff also prayed for aggravated damages. These are awarded under circumstances where the Defendant has acted in a high-handed manner, insulting, malicious or oppressive; **Esso Standard (U) Limited vs Semu Amanu Opio SCCA No. 3 of 1993**. The court under such

circumstances may increase the compensation to the Plaintiff which would be referred to as aggravated damages.

In the present case the Defendant did not act in such a manner but simply failed to do its obligations when it did not constitute the joint verification team to go and verify the defects alleged as a result it retained the payment. This cannot be basis of awarding aggravated damages. Aggravated damages are therefore denied.

Turning to interest, the Plaintiff prayed for interest on special damages at a rate of 12% per annum from date of cause of action till payment in full. As herein the basis for the award of interest is that the Defendant has kept the Plaintiff out of his money; and has had use of it himself, so he ought to compensate the Plaintiff. **Harbutt's Plasticine Ltd vs Wynne Tank & Co. Ltd [1970] 1 Ch 447**. The interest awarded at the discretion of court but this discretion must be exercised judiciously; **Uganda Revenue Authority vs Stephen Mabosi SCCA No. 16 of 2005**

No reasons were given by the Plaintiff to justify such a high rate of interest however this being a business entity losses must be considered with a commercial lense. Taking the circumstances into consideration and the fact that the dollar currency is not so vulnerable to inflation I find an award of interest at 6% per annum on the special damages from date of filing till payment in full appropriate. It is so awarded. The Plaintiff is also entitled to costs of the suits.

In conclusion judgment is entered in favour of the Plaintiff against the Defendant/Counter-claimant in the following terms;

- a) The Defendant pays special damages of UGX 1,300,000/=
- b) US\$ 321,942 as balance on the contract sum.
- c) USD 75,733.98 as interest accrued on the bank loan
- d) The Defendant pays general damages of UGX. 50,000,000/=
- e) Interest on a, b and c at 6% pa and from date of filing till payment in full. On (d) at 6% pa from date of judgment till payment in full,
- f) Costs of the suit.

**Dated at Kampala this 27<sup>th</sup> day of August 2018**

**HON JUSTICE DAVID WANGUTUSI**

**JUDGE**