

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO. 40 OF 2014**

5 **KYADOK HARDWARE LIMITED ----- PLAINTIFF**

**VS**

**KWIK BUILD CONTRACTORS LTD ----- DEFENDANT**

**BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

10 **JUDGMENT**

**BIEF FACTS:**

The Plaintiff entered into an oral contract with the Defendant, to supply the Defendant with building materials to carry out construction works at the UN site at Entebbe Airport. The materials were supplied by the Plaintiff to the Defendant between the months of November, 15 2012 and November, 2013.

The Plaintiff claims to have supplied materials worth Shs. 858,653,300/-. But the Defendant has since paid only Shs. 668,497,400/-, leaving an outstanding balance of Shs. 190,165,900/- which the Plaintiff seeks to recover, together with interest thereon, general damages and costs of the suit.

20 The Defendant denies t he Plaintiff's claim contending that the materials supplied by the Plaintiff were worth Shs. 375,000,000/-, yet the Defendant made an excess payment of Shs. 28,497,400/-. By the counter claim, the Defendant seeks the alleged excess payment to be refunded by the Plaintiff.

The Defendant urged court to dismiss the Plaintiff's suit with costs and enter judgment in its 25 favor on the counter claim, together with interest, general damages and costs of the counter claim.

The parties fixed a joint scheduling memorandum and the following three issues were framed:-

- 1) **Whether the Defendant is indebted to the Plaintiff in the sum claimed in the plaint.**
- 2) **Whether the Plaintiff was paid in excess of Shs. 28,497,400/- as claimed in the counter claim.**
- 3) **What remedies are available to the parties.**

The Plaintiff called two witnesses PW<sub>1</sub> the Managing Director of the Plaintiff Company. And PW<sub>2</sub>, whose responsibility was to keep track of the incoming goods and income.

The Defendant called one witness, the Managing Director of the Defendant Company.

The evidence of the witnesses will be referred to when dealing with the issues, in the order that they were set out.

- 1) **Whether the Defendant is indebted to the Plaintiff in the sum claimed in the plaint and whether the Plaintiff was paid in excess of Shs. 28,497,400/- as claimed in the counter claim.** The two issues will be dealt with together.

Both parties agree that they had an oral agreement for sale and purchase of building materials to be delivered to the Defendant's construction site at Entebbe. The goods would be received by the Defendant's designated officials, who would acknowledge receipt by signing on the delivery notes and then issue the goods received notes to the Plaintiff.

That the goods supplied by the Plaintiff would be delivered to UN Base at Entebbe with the delivery notes. The Store Keeper would sign for the goods on the delivery note and would issue and give to the person delivering the goods and then issue, the **"Goods received delivery note"**.

The delivery notes from the Plaintiff to the Defendant for 2012 were exhibited, together with Exhibits P5<sub>1</sub>-P5<sub>6</sub> for 2013, and there were acknowledged with goods received notes.

After the first LPO was issued, the Defendant would make phone calls to PW<sub>1</sub>, placing the orders and deliveries would be made. The goods would be received by Arthur

Musiime the Store Manager, while the Site Engineer would verify the materials, sign the delivery notes and thereafter issue goods received notes.

PW<sub>2</sub> confirmed that Exhibits P5<sub>(1)</sub> – P5<sub>(61)</sub> are delivery notes issued to the Defendant whenever goods were supplied to the Defendant. The delivery notes would be prepared by PW<sub>2</sub> while PW<sub>1</sub> delivered the goods – See Exhibits P5<sub>(1)</sub>, P5<sub>(7)</sub>, P5<sub>(8)</sub>, P5<sub>(25)</sub> and P5<sub>(26)</sub>. However that, sometimes DW1 would send a driver to the shop to pick the goods and would sign as a recipient, while PW<sub>2</sub> signed as the deliverer.

DW<sub>1</sub> contended that it was agreed that the payments for the steel would be made later following the Company procedures of issuing LPOs. Payments would be made within 30 days.

He also agreed with PW<sub>1</sub> that the agreed arrangement was that the Plaintiff would continue to supply the Defendant with steel on credit basis, but that Company procedures would be followed. That is, the Defendants employees on site would request for steel required by Defendant from the Defendant's headquarters. Upon receipt of the request, DW<sub>1</sub> would call PW<sub>1</sub> and ask him to supply the steel to the site together with delivery notes. Upon receipt of the steel at the site, the Store Keeper together with the Site Engineer would verify the delivery, sign acknowledging receipt of the steel and issue the goods received note. The goods received note had to be signed by three people: that is the person who delivered the steel, the Store Keeper and the Site Engineer. A copy of the goods received note would be given to the supplier. The goods in this case would be received by Arthur Musiime who was in charge of the stores.

It is apparent from the evidence of the parties that it was for the Plaintiff (Seller) to send to the buyer (Defendant) the goods in question. That was the express contract between the parties – under S.29 of the Sale of Goods Act.

Decided cases have established that *“where under a contract, the seller of goods is required to deliver them at the buyer's premises; he fulfills his obligation if he delivers them there to a person who apparent has authority to receive them”*. – **Galbraith & Grant Ltd vs. Block [1922] 2 KB 155.**

DW<sub>1</sub> asserts in this case that the terms of the contract were complied with, until such time as when the Defendant's project was coming to an end, when he noticed foul play between the Defendants, Store Keeper and the Director of the Plaintiff. He denies ever having sent the driver to receive the goods as all deliveries had to be made to the site.

5 He points out that, the Store Keeper was arrested and taken to Entebbe Police, but upon his release, he returned to the Defendant's offices and stole all the documents. The Store Keeper was arrested with money delivered to him by the Plaintiff's driver to induce him to receive less steel compared to what was indicated on the delivery note.

10 DW<sub>1</sub> insisted that on going through the delivery notes not accepted by the Defendant, for example delivery note 34, the signatures were not made by one person. Delivery note 35, delivery notes 11-15 and 19 -20, 11-34 have signatures the Defendant does not accept.

15 The witness further testified that, it is not true as claimed by the Plaintiff's witnesses that **"goods received notes"** could not be obtained at the site. That the Store Keeper and Site Engineer would be there at anytime and whenever they were not there, there would be someone to receive the goods and issue the goods received notes.

20 He confirmed that the deliveries went on from November, 2012 to November, 2013, but that no goods received notes were prepared for November, 2013. However that, the deliveries of November, 2013, were doubtful and that is why they were never paid for. Most of the Defendants documents were lost or stolen by the Store keeper who was arrested by Police. Thereafter, there was an acting Store Keeper Twinomujuni Moses and the Plaintiff did not make any more deliveries after 27.09.13.

The claim of the Plaintiff is for the balance on the goods sold and delivered to the Defendant. The Defendant denies delivery of the goods to the designated place as agreed or delivery according to the subsequent directions.

25 However, the evidence of the Defendant in this regard is hard to believe. When the first purchase order was made, the goods were delivered. The subsequent orders were made by phone calls and they were also delivered save that the payment was to be made a month after delivery making it a sale on credit; although court was not informed of the number of times the items were ordered by phone and the amount that was to be paid.

The delivery notes identified the goods, the date delivery was requested for or made, the quantity, description of the materials, the person to whom the materials were to be delivered, there was also space for the name and signature of the person delivering and receiving the materials.

5 The “**goods received notes**” also indicate the site where the goods were delivered, the person from whom they were received, the vehicle number, name of driver, date, LPO serial number, quantity, particulars, rate, amount, then the name and signature of the person dispatching, receiving/Store Keeper and Site In charge.

10 The evidence available shows that acting on the phone directions of DW<sub>1</sub>, the Plaintiff dispatched goods through PW<sub>1</sub> or their driver to the Defendant’s construction site at the UN Base at Entebbe. The goods were received at the site by either the Store Keeper Arthur Musiime, or Julius the foreman, or Okello Henry or Sam Olok Site In charge, or by someone on behalf of Boaz the Site In Charge. All these people were employed by the Defendant.

15 In each case, at least two of the above named persons signed the Plaintiff’s delivery slip or sheet to indicate that the goods had been received, and the person receiving the materials entered them in record of goods received note, identifying the site, where the goods were from, the vehicle number, the name of the driver and the date the goods were received, the quantity, particulars and indicating name and signature of the person who  
20 dispatched, received and the Site In charge.

Except for the evidence of DW<sub>1</sub>, who admitted that he was not at the site most of the time, none of the other people who were at the site were called to testify on the Defendant’s behalf.

25 From the delivery notes Exhibits P5<sub>(1)</sub> – P5<sub>(61)</sub>, the goods received notes Exhibits DEXT<sub>(XIV)</sub> – DEXT<sub>(xxiv)</sub> and the goods received notes Exhibits PEXT 12<sub>(1)</sub> – 12<sub>(XIII)</sub>, it can be discerned that the goods were delivered and received by Musiime Arthur- Store Keeper, Okello Henry or Julius for the Foreman, Sam Olok the Site In charge or Site In charge for Boaz.

30 The Store Keeper, the Foreman and Site In charge were employees of the Defendants and therefore agents of the Defendant at the site where the construction materials were

delivered. It was part of their duties to receive goods delivered to the construction site of the Defendant as directed by DW<sub>1</sub>.

The Store Keeper and Site In charge/ Foreman had a system for their filing and recording goods received for use on the site and the system was operated in the anomaly. Though  
5 DW<sub>1</sub> claims for the Defendant that the Store Keeper Musiime Arthur was compromised to receive less deliveries than ordered, this allegation was not proved as the information DW<sub>1</sub> relied on was received from third parties that is, Site Administrator who it is claimed was notified by someone.

Since the complaint to Entebbe Police Station about the Store Keeper was abandoned, the  
10 Defendant did not avail any other evidence to verify the truth of his contention.

From the evidence availed to court by either of the parties, it is apparent that the terms and conditions upon which the goods were supplied by the Plaintiff to the Defendant are the terms and conditions agreed upon by the parties. According to the agreement payment was to be made at the end of the month following delivery, unless otherwise  
15 specifically agreed.

Delivery of the materials in accordance with the agreed terms meant delivery to the construction site or to the Defendant's authorized agent.

The Defendant being a Corporate body could only accept delivery through an agent of the Defendants who is an individual. Such agent may have had express authority to receive  
20 goods on behalf of the Defendant Company, or may have had implied authority by virtue of the job the individual was employed to do; or may have been held out by the Defendant as having authority to receive goods on its behalf; that is to say, had ostensible or apparent authority – Refer to **Galbraith & Grant Ltd vs. Block (Supra)**.

In the present case, the Store Keeper Arthur Musiime, Julius the Foreman, or Okello  
25 Henry, Sam Olok Site In charge or Boaz all had authority, implied or ostensible/ apparent authority to receive materials on behalf of the Defendant.

They were the employees of the Defendant and could also hold out to anyone on site as having authority to receive goods and approve them on behalf of the Defendant.

The Defendants claim that no one was ever sent to the Plaintiff's shop to pick goods  
30 could not be sustained for the simple reason that according to the agreement "the

direction was to deliver to the Store Keeper at the UN Base, and the delivery was to be approved by the Site In charge if found on duty, which the Plaintiff in fact did. That all materials were delivered is confirmed from the “delivery notes” and the “goods received notes”.

5 The goods were delivered to the site to the persons indicated on the delivery notes and goods received notes held out by the Defendant as having authority to accept goods on behalf of the Defendant.

10 Under S.32 of the Sale of Goods Act (1) – *where in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.*

Court is satisfied that the evidence available confirms that there was delivery of the construction materials to the Defendant in accordance with the oral agreement.

15 The next issue to determine is **whether the Defendant is indebted to the Plaintiff in the sum claimed in the plaint.**

The evidence of the Plaintiff in this respect is that the materials supplied to the Defendant were worth Shs. 858,880,000/-, out of which Shs. 660,000,000/- was paid and Shs. 190,000,000/- and some remained unpaid.

20 The goods would be supplied and the invoice issued later since the money was not paid instantly.

Exhibits P<sub>1</sub>, P<sub>2</sub> and P<sub>3</sub> are delivery notes and invoices used to supply materials to the Defendant. For invoice No. 118 of 10.11.12, the first payment is said to have been made on 07.02.13 and the balance of Shs. 60,548,900/- is indicated on the document.

25 The next payment of Shs. 15,000,000/- cash is said to have been made on 22.02.13, as per Exhibit P<sub>2</sub>. The third payment of Shs. 358,000,000/- was paid in the DFCU Bank main branch.

The bank statement Exhibit P<sub>7</sub> and D<sub>2</sub> on which the money was paid indicates that Shs. 203,497,400/- on 02.07.13, Shs. 100,000,000/- was paid at DFCU – Exhibit P<sub>11</sub> and D<sub>6</sub>.

On 16.09.13, another Shs. 100,000,000/- was paid and no other payment was received after that. – Exhibit P<sub>1</sub> and D<sub>5</sub>.

Exhibit P<sub>9</sub> and D<sub>4</sub> is the cash sale receipt No. 4491 for Shs. 15,000,000/- which was paid to PW<sub>1</sub> in cash. A receipt was issued to the Defendant.

5 Exhibit P and D<sub>3</sub> is the bank statement of Tembo Steel (U) Ltd dated 19.04.13 which shows that the Defendant paid Shs. 353,000,000/- out of which Shs. 150,000,000/- was paid to Tembo Steel (U) Ltd (as per P.9 of the statement.)

The Plaintiff asserts that, if the Defendant claims they do not owe them Shs. 190,000,000/- claimed, they should bring evidence to that effect.

10 The Defendant acknowledged the invoices on two occasions; after which DW<sub>1</sub> told that Plaintiff that it was not necessary to raise invoices as the amount to be paid was known and would be deposited in the Plaintiff's bank.

Invoice No. 118 of 10.11.12, was acknowledged by the Defendant while invoices Nos. 172 of 12.01.13, invoice 221, and invoice 215 of 22.02.13 are not signed.

15 The invoices were prepared by PW<sub>2</sub> Eva Kasule who kept track of the deliveries made so that payments could be made.

That the payments made do not reflect payments after every month as agreed. Invoice No. 348 of 26.11.13 was for Shs. 374,566,400/- but the Defendant paid only Shs. 200,000,000/-. The corresponding invoices for delivery notes No. 366 of 28.11.13, No. 20 367 of 29.11.13, No. 368 of 30.11.12 could be asked from Eva Kasule who made deliveries. While the signature of the person who delivered an invoice No. 14 of 16.12.12 is not seen.

PW<sub>2</sub> Eva Kasule acknowledged her responsibility of keeping track of incoming goods and income. She contends that while the Defendant made payments before, when the 25 stage that required iron bars was completed, the Plaintiff was never paid again and hence the balance of Shs. 190,000,000/- claimed by the Plaintiff.

The witness also confirmed that the Plaintiff used to give the Defendant delivery notes which they would sign, and invoices and receipts for cash paid. The Defendant would then issue to the Plaintiff the **“goods received notes”**.



Exhibit P<sub>1</sub> and P<sub>2</sub> were identified as invoices written by PW<sub>2</sub> for the Defendant for iron bars and binding wires totaling Shs. 160,548,900/-. But that the Defendant only paid Shs.100,000,000/- the equivalent of US Dollars 37,700, leaving a balance of Shs. 60,548,900/-.

5 More iron bars for Shs. 36,400,000/- were supplied to the Defendant by the Plaintiff bringing the sum of unpaid to Shs. 96,948,900/-. Out of this sum, the Defendant paid Shs. 15,000,000/- on 22.02.13 and the balance remained Shs.81,948,900/-.

Whenever the Defendant made payments, a signed receipt would be issued by the Plaintiff. After 22.02.13, more iron bars and binding wires were supplied to the  
10 Defendant; but the invoice was not signed as it extended to page 6- and that is where the witness signed as indicated in Exhibit P<sub>4</sub>.

The total of materials supplied was Shs. 117,864,500/- less Shs. 260,000/- leaving a balance of Shs. 117,604,500/-.

The invoice No. 215 was signed by Patrick Isagara for the Defendant. It was tendered as  
15 Exhibit P<sub>13</sub> with no objection.

Exhibit P<sub>3</sub> is invoice No. 221 and invoice No. 200 is for cement worth Shs. 29,400,000/-. The invoice was prepared by the witness and the original was not signed as Isagara instructed her to deliver the goods saying he would add up the total prices from the delivery and deposit the money in the bank. That is what he did.

20 Also that invoice Nos. 302,303,304,348 issued by PW<sub>2</sub> were not signed for the same reason, but all the goods indicated therein were delivered to the Defendant. – Exhibit P<sub>14</sub>–  
18 were admitted without any objection from the Defendant.

Payment vouchers No. 484- Exhibit P<sub>6</sub> was issued by the Defendant in payment of US Dollars 37,700. While Exhibits P<sub>10</sub> and P<sub>11</sub> are receipts from DFCU Bank in which the  
25 Defendant deposited money on PW<sub>1</sub>'s account.

Exhibit P<sub>13</sub> invoice No 215 is not signed as it ends at Exhibit P<sub>4</sub>- Invoice 220. The invoices are dated 22.02.13 and 10.04.13 respectively.

The invoices have different dates because the goods were taken on different dates. The invoices would be made after delivery of the goods, while payments would be made 30 days from the date of delivery.

5 Exhibit P<sub>1</sub> invoice No.118 indicates the respective dates of delivery. The invoices and delivery notes tally. The invoices add up to a total of Shs. 858,000,000/- and some while the delivery notes add up to Shs. 858,650,000/- and some. Out of that, the Defendant paid Shs. 668,497,400/-.

Invoice No. 348 of 26.11.13 – Exhibit P<sub>18</sub> indicates a total of Shs. 374,506,400/-.

10 Exhibit P<sub>7(D<sub>2</sub>)</sub> shows that the Defendant paid a total of Shs. 200,000,000/-. Two dates of payment are indicated, That is 02.07.13 and 16.09.13. While invoice No.348, Exhibit P<sub>15</sub> relates to supplies made between 26 and 30.11.13.

That the original invoice of 348 is with the witness and it was one of the last supplies made after which the Defendant never communicated again.

15 Of invoice No.304 of 07.08.13 and invoice No.305 of 07.08.13- Exhibit P<sub>17</sub>, invoice No.304 is the correct invoice while invoice No.305 was included in error.

Invoice No.348 of 26.11.13 Exhibit P<sub>18</sub> and invoice No.360 of 26.11.13 have the same dates and indicate the same items, but invoice No348 is the correct one.

20 It was pointed out that the documents were redone before the case was filed. Whenever some goods were missing from the invoice, they would be added to the new invoice and the earlier invoice cancelled. Invoice No.304 Exhibit P<sub>17</sub> was written first and invoice No.350 written later.

Invoice No. 304 included all the goods and cash which the Plaintiff used to give to the Defendant whenever they had no transport. When invoice 350 was rewritten, some cash was left out.

25 As for Exhibit P<sub>18</sub> of invoice No.348 and invoice 340, invoice 348 was written first and a certain amount of money given to the Defendant when transport was left out. At times the Defendant would request for cash assistance, claiming that it had ran out of money.

Exhibit P<sub>15</sub> invoice No.302 of 24.05.13, indicates different dates. The invoice would be issued after the goods had been delivered. But since the Defendant had delivery notes,

they knew that the goods were due for payment. The invoices would be made to show the Defendant that it owed money to the Plaintiff. The Defendant refused the invoices promising that all delivery notes would be totaled to know what was owed to the Plaintiff.

5 Exhibit P<sub>1</sub>, invoice No.302 has various dates. Invoice 303 and 304 followed each other. But not everyone took goods on credit. Those paying cash would be issued with a receipt.

The Defendant contended that, while dealing with the Plaintiff, payments were on cash basis. The Plaintiff would send an invoice to the Defendant and DW<sub>1</sub> would sign the invoice to confirm supply.

10 Before signing the invoice, the people at the site would deliver to DW<sub>1</sub> the “**goods received notes**” and delivery notes and he would compare with the invoice. Even where money was not available to pay the Plaintiff, DW<sub>1</sub> would sign the invoice after verification. The money would then be entered into the Defendant’s books to show the amount owed to who.

15 The Defendant denies owing the Plaintiff any money, contending that all money was paid apart from the fraudulent invoices issued to the Defendant. All invoices signed by the Director were paid through the Bank and there is evidence of payment.

The following invoices are said to have been personally signed by DW<sub>1</sub> and paid by the Defendant.

- 20
- 1) Invoice No.118 of 10.11.12 for Shs. 60,548,900/-
  - 2) Invoice No. 172 of 12.01.13 for Shs. 81,848,900/-
  - 3) Invoice No.221 of 8\_.13 for Shs. Shs. 133,594,000/-
  - 4) Invoice No. 200 of 23.03.13 for Shs. 29,400,000/-
  - 5) Invoice No.220 of 10.04.13 for Shs. 117,864,500/-

25 That this was the last invoice that bore DW<sub>1</sub>’s signature as Director of the Defendant.

**Total Shs. 423,256,300/-**

The figure claimed by the Plaintiff was disputed on the ground that the figure known to the Defendants is Shs.400,037,000/-. While PW<sub>2</sub> claims that invoice No.220 was a continuation of the invoice dated 22.02.13. This would not be a continuation as the invoice was transferred with the figure acknowledged against the figure mentioned earlier  
5 Shs. 3,080,000/- plus Shs.957,000/- = Shs. 4,037,000/-. And the figure of Shs. 117,864,500/- has no connection with invoice 220. The figure is being claimed based on an invoice made two months earlier that is in February 2013.

Although the documents of the Defendant got lost, it was argued, the Defendant has an invoice of Shs.80,471,200/- which was the Defendant's last invoice and final payment to  
10 the Plaintiffs. It does not appear anywhere in the Plaintiff's records. That there are no more invoices that DW<sub>1</sub> personally signed and paid.

The witness pointed out that:-

- 1) On 19.04.13 the Defendant transferred to the Plaintiff Shs. 203,497,000/-.
- 2) On 02.07.13, the Defendant transferred to the Plaintiff Shs.100,000,000/-.
- 15 3) On 16.07.13, the Defendant transferred to the Plaintiff Shs. 100,000,000/-.
- 4) On 22.03.13, the Defendant to the Plaintiff Shs. 15,000,000 in cash on receipt No. 4491- Exhibit D<sub>4</sub>.
- 5) Cash payment of US Dollars 37,700, equivalent to Shs. 100,000,000/- was made on 07.02.13.

20 The total payment made to the Plaintiff through bank transfers was Shs. 418,497,000/-. This was against goods valued at Shs. 309,528,800/- plus Shs. 80, 471,200/- which brings it to a total of Shs. 390,000,000/-, plus 80,471,200 = **390,000,000/-**.

When cash payments were added, the total payment came to Shs. 490,000,000/-. The Defendant also paid Tembo Steel Milling Shs. 150,000,000/- through the Plaintiff's account  
25 on 19.04.13.

Upon comparing the invoices bearing DW<sub>1</sub>'s signature as Managing Director and money transferred to the Plaintiff, all money owed to the Plaintiff was paid. That the invoices that bear his signature are not known to the Defendant and some were received by people not at the Defendant construction site, and therefore the Defendant cannot be party to them. For

example invoice No.215 of 22.02.13, does not bear any signature yet it is linked to invoice 220 of 10.04.13.

DW<sub>1</sub> identified one of the invoices of 10.11.12, which indicates supply on credit but was later paid. He asserts that, if goods were supplied on credit, he would pay the Plaintiff each  
5 time the Defendant was paid by the UN, as this was the understanding.

However that, there was no payment to the Plaintiff in the month of November, 2013, as the last payment was on 16.09.13 for the goods supplied on credit. The Defendant paid Shs. 100,000,000/- and no balance remained on the goods supplied on credit.

The witness added that, he needed to check to confirm if any goods were supplied in  
10 November, 2013, as the deliveries of November were doubtful and were therefore never paid for.

That in total, the Defendant paid Shs.418,497,000/- for the goods received on credit and the Defendant issued the goods received notes on all those payments.

He added that, the invoice dated 10.11.12 was paid in 2012, and the balance was carried  
15 forward. Exhibit P<sub>4</sub>, invoice No.220 was signed against the amount on the invoice. As for Exhibit P<sub>13</sub>, invoice 215, the materials were not supplied to the Defendant. And for the goods received note No. 575 and 450, the items supplied are both dated 21.03.13.

The goods indicated in Exhibit P<sub>13</sub> are the same as in Exhibit P<sub>3</sub>. While the goods received notes 637-450 were abandoned.

As for Exhibit P<sub>14</sub> serial No.200, he could not confirm if the cement was received as there is  
20 nothing to show it was received. It is one of the invoices upon which the Defendant paid the Plaintiff for cement delivered.

Apart from the invoice, he personally signed, the witness contended that there are no other documents he issued or signed in this case. The documents were signed by the other people  
25 as the staff on site would not sign invoices.

The invoices would be signed by him in person.

The money claimed by the Plaintiff and the alleged over paid amount by the Defendant is in the form of special damages.

*“Special damages is that damage in fact caused by the wrong. And it is trite law that this form of damages cannot be recovered unless it has been specifically claimed or proved. Or unless the best available particulars or duties have before trial been communicated to the party against whom claimed”.* – See **Uganda Telecom Ltd vs. Tanzanite Corporation Ltd** SCCA 17/2004 and **Haji Aumani Mutenkanga vs. Equator Growers (U) Ltd** SCCA 07/95.

The Plaintiff in the present case seeks to recover Shs. 190,165,900/- as unpaid balance due from the Defendant for materials supplied. The Plaintiff’s claim is based on invoices alleged to be unpaid by the Defendant – Exhibits P<sub>1</sub>, P<sub>2</sub>, P<sub>13</sub>, P<sub>3</sub>, P<sub>14</sub>, P<sub>4</sub>, P<sub>5</sub>, P<sub>16</sub>, P<sub>17</sub> and P<sub>18</sub>.

- 10 To determine the amount due and owing to the Plaintiff from the Defendant, court takes into account the amounts indicated on the invoices and the amounts indicated as paid.
- a) Exhibit P<sub>1</sub> – invoice 118 of 10.11.12 if for Shs. 160,548,900/- less Shs. 100,000,000/- paid on 07.02.13 = Shs. 60,548,900/-.
  - b) Exhibit P<sub>2</sub> invoice 172 of 12.01.13 Shs. 36,400,900/-, plus the balance brought over of Shs. 60,548,900/- = 96,948,900/- less Shs. 15,000,000 paid on 22.02.13 = Shs. 81,948,900/-.
  - c) Exhibit P<sub>13</sub> invoice 215 of 22.0.13 Shs. 113,827,500/-.
  - d) Exhibit P<sub>3</sub> invoice 221 of 08.02.13, Shs. 148,954,000/- less Shs. 15,000,000/- (date paid not indicated) = Shs. 133,954,000/-.
  - 20 e) Exhibit P<sub>14</sub> invoice 200 of 23.03.13 total Shs. 29,400,000/-.
  - f) Exhibit P<sub>4</sub> invoice 220 of 10.04.13 total Shs.117,864,500/- (includes amount carried forward) less Shs. 260,000/- (no indication when it was paid) Total Shs. 117,604,500/-.
  - g) Exhibit P<sub>15</sub> invoice 302 of 24.05.1 Total Shs. 148,778,800/-.
  - h) Exhibit P<sub>16</sub> invoice 303 of 11.06.13 Total Shs. 59,099,700/-.
  - 25 i) Exhibit P<sub>17</sub> invoice 04 of 07.08.1 Total Shs. 134,845,900/-.
  - j) Exhibit P<sub>18</sub> invoice 348 of 26.11.13 Total Shs. 27,219,000/- with indication that overall total is Shs. 374,506,400/- less Shs. 200,000,000/- (no indication when paid) = 174,806,400/0.

From all the above invoices, it can be discerned that the total costs of materials supplied to the Defendant on credit was Shs. 862,748,800/-.

The payments made by the Defendant are established as follows:-

- 5 a) Exhibit P<sub>1</sub> invoice 118 of 10.11.12 it's indicated that Shs. 100,000,000/- was paid on 07.02.12 upon conversion of US Dollars 37,700: The US dollars 37,700 is reflected on Exhibit P6/D1 the payment voucher No. 484 from the Defendant dated 07.08.13.
- b) Exhibit P<sub>2</sub> invoice 172 of 12.01.13 indicates that Shs. 15,000,000/- was paid- receipt No. 4118 of 22.02.13.

10 Although Exhibit P<sub>9</sub>/D<sub>4</sub> indicates that the Shs. 15,000,000/- was received by the Plaintiff from the Defendant on 27.02.13.

- c) Exhibit P<sub>3</sub> invoice 221 of 08.02.13 indicates that Shs. 15,000,000/- was to be deducted from the amount of Shs. 148,954,000/- on the invoice. However, the sum cannot be traced from any of the documentary evidence on record. For that reason, it cannot be considered as paid.
- 15 d) Exhibit P<sub>4</sub> invoice 220 of 10.04.13, indicates that Shs. 260,000/- was deducted from the sum of Shs. 117,864,500/- on the invoice. But it cannot also be traced from the documentary evidence presented by the Defendant and therefore cannot be considered as paid.
- e) Exhibit P<sub>18</sub> invoice 348 of 26.11.13 indicates that Shs. 200,000,000/- was paid by the Defendant. This is confirmed by Exhibit P<sub>7</sub>/D<sub>2</sub> that shows that Shs. 100,000,000/- was deposited 02.07.13, and another Shs. 100,000,000/- was deposited on the same account on 16.09.13 by Patrick Isagara. The same amounts are reflected on Exhibit P<sub>11</sub>/D<sub>6</sub> the cash deposit slip of 02.07.13; and Exhibit P<sub>10</sub>/D<sub>5</sub> cash deposit slip of 16.09.13. The slips indicated that invoices were availed.
- 20 f) Exhibit P<sub>7</sub>/D<sub>2</sub> indicates that on 19.04.13 a cash deposit of Shs.203,497,400 was made on PW<sub>1</sub>'s DFCU Bank account by DW<sub>1</sub> Patrick Isagara.
- 25 g) While Exhibit P<sub>8</sub>/D<sub>3</sub> the bank statement of 0.02.15, in the name of Tembo Steels (U) Ltd from DFCU Bank indicates that on 19.04.13, DW<sub>1</sub> deposited Shs. 150,000,000/- on the

account. This confirms his testimony that on 19.04.13, he paid the said sum to PW<sub>1</sub>'s account.

The evidence is also supported by PW<sub>1</sub>, who told court that the Defendant paid him Shs. 353,000,000/- out of which Shs. 150,000,000/- was paid to Tembo Steel.

5 From all the above evidence, it is clear that a total of 668,497,400/- was paid by the Defendant to the Plaintiff towards settling the amount due for the construction materials supplied to the Defendant.

The burden of proof that the Defendant owes the Plaintiff Shs. 190,165,900/- is accordingly on the Plaintiff. And the Defendant also has the burden to prove that it over paid the Plaintiff  
10 by Shs. 28,497,400/-.

This is because *“the burden of proof rests upon the party who substantially asserts the affirmative of the issue”*. – Refer to **Joseph Constantine Steamship Line vs. Imperial Smelting Corporation Ltd [1942] AC 154 at 174.**

And *“the standard of proof required in civil cases is generally expressed as proof on the  
15 balance of probabilities. If the evidence is such that the tribunal can say, we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not”*. – **Miller vs. Minister of Pensions [1947] 2 ALL ER 372 - Lord Denning.**

In the present case, the court has found from the evidence of both parties that the goods supplied by the Plaintiff to the Defendant were worth Shs. 862,748,800/-. Out of that sum,  
20 Shs. 668,479,400/- has been established to have been paid by the Defendant leaving a balance of Shs. 194,251,400 unpaid.

Court has noted that, there is a variance of Shs. 4,085,500/- between the amount of Shs. 190,165,900/- pleaded in the plaint as due and owing and the amount of Shs. 194,251,400/- proved in evidence.

25 However, the Defendant cannot claim to have been taken by surprise. The Plaintiff pleaded full particulars to show the nature and extent of the damage claimed. That is the amount it claimed to be recoverable. The Defendant was accordingly sufficiently informed of the nature of the case it was to meet. – **Refer to the case of Shah vs. Mohammed Haji Abdallah [1962] EA 769.**



The variance in the amount claimed in the present case was as a result of an error in addition. But considering the evidence on both sides, it is clear that the Exhibits contained the whole amount proved as due and owing.

5 Considering the Defendant's claim that it paid more than the value of the goods supplied to it and therefore Shs. 28,497,400/- should be refunded, I have already pointed out that the burden of proving the over payment was on the Defendant.

10 I am fortified in my holding by the case of **JK Patel vs. Spear Motors Ltd SCCA 04/91, [1993] VI KALR 85** where it was held that *“the law is that, where one party alleges that it paid another and the other denies receipt of the payment, the onus is on the party who alleges payment to prove the payment”*.

As already pointed out in this judgment, the evidence indicates that the Plaintiff supplied to the Defendant goods worth 862,748,800/- and not Shs. 375,000,000/- as claimed by the Defendant. The evidence also shows that out of Shs. 862,748,800/- only Shs. 668,497,400/- was paid thereby remaining a balance of Shs. 194,251,400/-.

15 There is no evidence adduced by the Defendant to show that the Plaintiff was paid in excess of Shs. 28,497,400/-. The Defendant failed to discharge the burden placed on it by law. This court therefore finds that there was no over payment made by the Defendant to the Plaintiff.

For those reasons already stated herein, the Plaintiff has proved that the Defendant owes it a balance of **Shs. 194,251,400**. It is accordingly granted to the Plaintiff as special damages.

20 **Remedies available to the parties:**

The Plaintiff prayed court to award the balance of the sums of money due and owing, damages, interest and costs.

The Defendant on the other hand asserted that the Plaintiff was fully paid and in fact paid in excess and that court should order refund of the overpaid sum, plus costs of the suit.

25 As already set out herein, the Plaintiff proved that Shs. 194,251,400 is due and owing and it has been awarded as special damages.

**General Damages:**

The principle of law is that *“general damages are such damages as the law presumes to be the natural or probable consequence of the Defendant’s act and need not be specifically pleaded. It arises by inference of law, and need not, therefore, be proved by evidence, and may be averred generally”*.

5 According to the case of **Haji Asumani Mutekanga vs. Equator Growers Ltd (Supra)** – *“general damages in breach of contract are what a court may award if it cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man”*.

10 The contract between the parties in this case was for delivery of construction materials to the Defendant. It must have been envisaged that payment for the materials was to be made promptly upon supply of the materials. The Defendant’s failure to pay the balance due on the materials amounted to breach of contract for which the Plaintiff is entitled to general damages.

15 The Plaintiff did not propose any sum deemed to be reasonable award as damages. Therefore court will exercise its discretion taking into account the time the balance has remained unpaid and the fact that the Plaintiff’s entitled to interest on the sum, to award Shs. 10,000,000/- as general damages.

**Interest:**

20 The Plaintiff prayed court to award interest at the rate of 30% per annum on both the special and general damages from the date of supply of the materials and judgment respectively.

Under S.26 (2) of the Civil Procedure Act, court has discretionary powers to award interest on the decretal sum where it was not agreed upon.

25 That position of the law has been confirmed by decided cases, where it has been held that *“where no rate of interest is provided, the rate is fixed at the discretion of court. However, it is recognized that in commercial transactions, the award of interest should reflect the current commercial value of the money”*. – Refer to **Crescent Transportation Co. Ltd vs. B.M Technical Services Ltd CACA 25/200** and **Harbutts Plasticine Ltd vs. Wyne Tank & Pump Co. Ltd [1970] IQB 447**.

It is apparent from the evidence that interest on delayed payments was not agreed on between the parties. However, the Plaintiff's claim of interest at the rate of 30% per annum on special and general damages is excessive in nature.

The court will therefore exercise its discretion and award interest at the rate of 21%.

- 5 The interest on the special damages will run from the date of filing the suit till payment in full. This is line with the principle established by the Supreme Court in the case of **Siet Co vs. Noble Builders (U) Ltd SCCA 1/95**, that *“where a person is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit. Where,*
- 10 *however, damages are to be assessed by the court, the right to those damages does not arise until they are assessed. In such event, interest is only given from the date of judgment”*.

Interest on the general damages will therefore be given from the date of judgment until payment in full and at the court rate of 6% per annum.

**Counter Claim of the Defendant:**

- 15 The Defendant having failed to prove the alleged over payment to the Plaintiff, the order for refund is not available. The counter claim is accordingly dismissed.

20

**Costs:**

Both parties prayed for costs of the suit.

The Plaintiff being the successful party in the suit is entitled to costs. Under S.27 (2) of the Civil Procedure Act, costs follow the evident unless for good cause, court orders otherwise.

- 25 Judgment is in the result entered for the Plaintiff against the Defendant in the following terms:-

- l) The Defendant to pay the Plaintiff special damages of **Shs. 194,251,400/-**.

- II) The Defendant to pay the Plaintiff general damages of Shs. 10,000,000/-.
- III) Interest to be paid on the special damages at the rate of 21% per annum from the date of filing the suit until payment in full.
- IV) Interest to be paid on the general damages at the rate of 6% per annum from the date of judgment until payment in full.
- V) Taxed costs of the suit to be paid by the Defendant.

**FLAVIA SENOGA ANGLIN**

**JUDGE**

10 **20.02.18**