

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**

**HCCS NO. 581 OF 2014**

**COIL LIMITED** ..... **APPLICANT**  
**VERSUS**  
**ATTORNEY GENERAL** ..... **RESPONDENT**

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

**JUDGMENT**

Coil Limited the Plaintiff in these proceedings filed this suit against the Attorney General herein referred to as the Defendant for a declaration that the Defendant breached the contract between the parties, special and general damages, interest and costs of the suit.

The background to this claim is that the Plaintiff was contracted by the Ministry of Tourism, Trade and Industry to construct a National Artisan premises “*Jua Kali*” at Makindye at a contract sum of UGX. 13,024,981,048/= **ExhD3**.

In order to comply with the performance of the Contract the Plaintiff submitted a Performance Security dated 6<sup>th</sup> June 2009, Bond No. LIL/01-B51/00789/2009 **ExhP2** which stated that Leads Insurance Limited as guarantors for the Plaintiff would pay a total up to UGX. 3,907,494,314/= payable upon written demand if the Contractor/ Plaintiff was to be in default under the Contract. This guarantee was valid till 6<sup>th</sup> June 2011 plus twenty eight days from the date of issue of the certificate of completion.

She also submitted an advance payment bond No. LIL/01-B522/00623/2009 dated 6<sup>th</sup> June **ExhP3** for UGX. 200,000,000/= valid from date of advance payment till the Employer/Defendant receives full repayment of the same from the Contractor not later than 6<sup>th</sup> June 2011.

The Plaintiff further submitted a Contractor's All Risk Insurance Policy Bond No. P-KAM-09-103-CAR-000027 **ExhP3** for a sum of UGX.39, 559,959/= dated 2<sup>nd</sup> September 2009 valid from 15<sup>th</sup> June 2009 to 15<sup>th</sup> June 2011.

The Plaintiff contended that the contract provided for advance payment, 20% of the contract price.

It is the Plaintiff's claim that despite submitting the advance payment bonds, the Defendant only made payment of UGX. 200,000,000/= as advance sum. That she on several occasions and in various meetings asked for the balance of advance payment totalling UGX. 2,404,996,209.6/= but the Defendant refused to pay it which grossly affected the construction speed.

Be that as it may, she went ahead and started work as instructed commencing with the preliminary works which included; hoarding and fencing, water and electricity supply to the site, site office construction, mobilization of plant and equipment. The Plaintiff contended that she with the bulk earthworks which included; site clearance and bulk excavation to reduce levels.

That before she could commence construction of the buildings she was notified by the Project Manager in a letter dated 16<sup>th</sup> July 2009, **ExhP4** that the Defendant having acquired additional plots around the site intended to integrate the proposed developments with those for which the contract had been signed. He wrote;

*"You may well be aware that the employer has acquired additional plots of land around the site and it is their desire that these should also be planned and designs carried out to integrate the proposed developments with those for which a contract has been signed with your company.*

*We have had site meetings with the employer to consider on the site implications of trying to integrate the two and it is generally agreed that some minor modifications to the current documents will be necessary at this stage to achieve the objective."*

By **ExhP4** the Defendant also asked the Plaintiff to forward originals/copies if the originals had been forwarded to them of; Advance Payment Guarantee, Performance/Security and Insurance Policies. The Defendant also stipulated that having carried out site visits the items shown in the Plaintiff's Interim Statement No.1 for payment were not reflected at the site therefore the Plaintiff was advised to re-submit the claim after the site meeting and discussions.

The Plaintiff contends that she sent reminders to the Defendant awaiting receipt of the integrated designs and informed the Project Manager of the resources that lay idle which affected her cash flow. That she proceeded to submit an Interim Claim No. 1 dated 23<sup>rd</sup> June 2009 for UGX. 205,486,400/= . Upon the request of the Project Manager the Plaintiff subsequently revised and re-submitted the interim claim No. 1 which altered the sum to UGX. 223,497,000/=, **ExhD7**.

It is the Plaintiff's contention that despite the submissions and revisions made; a certificate was never issued by the Project Manager contrary to Clause 42.1 of the General Conditions of the Contract.

The Plaintiff then proceeded to request for Arbitration from the Uganda Society of Architects but no action was taken. Instead in a letter dated 21<sup>st</sup> December 2011, **ExhD15** the contract was terminated by the Permanent Secretary to the Ministry of Tourism, Trade and Industry in these words;

*“The Ministry is disappointed to note that since the contract was signed and payment of UGX. 200,000,000/ (Two hundred million) advanced to you; there has never been any activity on the site to warrant the Ministry to continue with the project. This letter serves as a notification of termination of the contract and the Ministry will not be able to honour any of your claims nor expect your company to lodge in any claims since no work was ever done on site.”*

Aggrieved by the actions of the Ministry of Tourism, Trade and Industry and the financial losses incurred, she filed this suit.

In response to these claims, the Defendant acknowledges that an advance payment of UGX. 200,000,000/= was made to the Plaintiff against the advance guarantee obtained by her from Leads Insurance Limited however she did not obtain and present any other advance payment guarantee from any financial institution against which a claim for the balance of the advance sum could be paid.

Denying liability, the Defendant contended that on various dates when the Plaintiff presented interim certificates showing how the money advanced to it had been spent, they were found not genuine and failed to correspond with the work done on site. That because of the Plaintiff's non performance of the contract, the Ministry of Tourism, Trade Industry and Cooperatives proceeded to terminate the contract.

By way of Counterclaim, the Defendant/ Counterclaimant alleges that alterations in the work were communicated to the Plaintiff and both parties agreed that the contract price would be revised downwards. By these changes the Plaintiff/Counter-Defendant was advised to commence with one block where no changes had been made however no work had been carried out by the time the contract was terminated.

The Defendant also alleged that the Plaintiff kept on submitting false claims where work had not been done.

The Counterclaimant contends that as a result of the Counter-Defendant's failure to perform the contract, failure to mobilize resources to carry out the work as agreed, and abandonment of the site, false claims the contract was terminated.

The Counterclaimant further contends that the Counter-Defendant only carried out a small portion of excavation and partial hoarding of the site. As a result of the Counter-Defendant's actions the works carried out against the Advance payment was less than the value of the monies advanced therefore she suffered loss for which she claims special damages of UGX. 150,000,000/=, general damages, interest and costs.

The issues for trial as agreed by the parties are;

1. Whether the contract between Coil Ltd and Attorney General was breached?
2. What remedies are available to the parties

As to whether the contract between the parties was breached one of the reasons given by Plaintiff leading to the delays is that they were given only UGX 200,000,000/= as advance payment. That in spite of demanding for increase in the advance payment so as to expedite work on site, the Defendant failed to do so. The Defendant contended that the Plaintiff did not qualify for advance payment above UGX 200,000,000/= because that is what they had guaranteed.

Counsel for the Plaintiff argued that the advance payment guarantee was provided for in clause 51.1 in the Special Conditions of the Contract to the tune of 20% of the contract price payable within 60 days of signing without any other conditions. He submitted that the advance payment guarantee was mentioned in the General Conditions of Contract subject to the Special Conditions of Contract. That since the Special Conditions of Contract did not provide for an advance payment guarantee, the 20% was automatic and that the Defendant's failure to pay beyond the UGX 200,000,000/= was therefore a breach of contract.

In her reply counsel for the Defendant contended that advance payment would only be paid against of advance payment security. That the contract was clear as to under what circumstances the advance payment should be made. Clause 51 of the General Conditions of Contract provides for advance payment.

It states in 51.1 as follows;

*“If so stated in the SCC, the Employer shall make advance payment to the Contractor of the amount state in the SCC within the period stated in the SCC, against provisions by the contractor of an on- demand Bank security in a form and by a bank acceptable to the Employer in amounts and currencies equal to the advance payment.”*

This advance money was to be used specifically for payment for equipment, plant, materials, mobilization and expenses required specifically for the execution of the contract. The proof of which the contractor would demonstrate that the advance payment had been used in the manner and for purposes aforementioned by supplying copies of invoices or other documents to the Project Manager.

Clause 51.1 of section 8 of the Special Conditions of Contract provides as follows;

*“The advance payment will be equivalent to maximum 20% of the contract price and will be paid in the sum of currencies and proportions as the contract price. It will be paid to the contractor within 60 days of signing the contract.”*

This clause under Section 8 of the Special Conditions of Contract does not mention the need of an advance guarantee. Counsel for the Plaintiff must have relied on the opening words of Clause 51.1 of the General Conditions of Contract which read;

*“If so stated in the SCC the Employer shall make advance payment to the contractor.”*

He submitted that clause 51.1 of the Special Conditions of Contract took precedence over the General Conditions of Contract and that therefore since it did not mention the advance guarantee, the guarantee could not be used as a condition for releasing advance payment.

I must say with due respect that that is not how the General Conditions of Contract and the Special Conditions of Contract relate to each other. Both of them form part of the contract and where they do not conflict both of them operate to regulate the conduct of the contract.

In the instant case, the General Conditions provide for the need for advance security. This requirement is not expressly stated anywhere in the Special conditions of contract that it should not apply. Furthermore, the words “if so stated” in the General Conditions of the Contract only apply to the provision of advance payment. The rest of the clause states the prerequisites to be fulfilled before that sum of money is released.

The Advance Security is in place to ensure that in event of failure of the contractor executing the work the Employer has a fallback position. This security plays a big role in safeguarding public funds in constructions such as this one.

Furthermore, the issue of advance security was an agreed position and indeed that is why the Plaintiff obtained an advance security at the signing of the contract.

PW.1 in his testimony during cross examination states,

*“For advance payment to be made they had to submit an advance guarantee.”*

He also stated that they submitted an advance security payment for UGX 200,000,000/= and that that sum was paid. Last of all he said the Plaintiff did not submit any further security.

It is my finding that advance payment guarantee was a requirement before advance payment could be released. The Plaintiff’s argument therefore that their work stalled because of non-payment of advance was a self inflicted situation.

The Defendant did not therefore breach any of the provisions by failure to release advance payment.

The other issues to be considered under the head of breach of contract are; whether the Plaintiff failed to fulfil the terms of the contract and thereby breached the contract and whether the Defendant breached the contract when she terminated it.

The Plaintiff contended that their failure to do the construction was because the Defendant told them to wait for modified plans.

The Defendant conceded that the plans were to change in some places but they had agreed that construction of Block B would continue albeit minor modifications because the Plaintiff knew what they were supposed to do. Looking at **ExhD14**, there was modification of Block B and because new plots had been obtained a review of the site was necessary. This is clearly seen in **Exhibit D.14** Minute 2.2.3 when they observed;

*“The position of the original site in relation to the additional plots acquired and its civil works designs and the requirement of integration of the design for the original and expanded sites, necessitated review of the sequency of construction of the contract works and decision was taken to phase the works to take into account of the designs for adjacent plots.”*

While the Architect stated that Block B was to constitute Phase 1, he also said it required modifications. So even where the Plaintiff would otherwise start from, could only be done after the modifications.

Furthermore under Minute 6.2, the construction drawings were not readily available and the Architect promised that he would avail them after the meeting. It is noted that the commencement date was changed and as stated in **Exhibit D.14** (i) in a meeting held a month later on 8<sup>th</sup> September 2009 the Contractor's report showed that he had mobilized to 30%, preliminaries to 30%, site clearance 50% and Temporary fencing to 10%.

She was expected by the next meeting to have completed site offices, hoarding, site clearance, setting out levels and progress on retaining walls and ground slabs.

The Plaintiff through PW1 complained that their interim certificates were rejected and payment not effected without any reasons and that this rejection left them with no money to proceed with the contract.

The Defendant contended that they rejected the Plaintiff's certificate because they were exaggerated and loaded with false claims and they asked the Plaintiffs to take into account the falsehoods in the claim and resubmit. In one of the letters **ExhD.9** Plan Systems which was one of the Consultant Engineers explained the reasons for rejection for approval of certificates. He wrote under the subheading delays ordered by the Project Manager;

*“Having agreed on the phasing of the works and the packaging of work into Phase 1 formal approvals were required before the Project Manager's instructions to proceed.*

*However prior to the instructions for phasing there was a claim lodged by the Contractor on the 23<sup>rd</sup> June 2009 for work purportedly done when no work had been executed on claim. That claim was rejected outright.”*

The Project Manager further wrote,

*“The Project Manager under clause GCC 42.1 has no legal responsibility over false claims that are deliberate for work not done or items/sections of*

*work not executed. He can only check authentic claims and make corrections for genuine errors and issue a certificate.*

*Even your revised (present) claim still has false items not removed.”*

The allegation of false claims seems to have appeared in several communication between the Architect and the Plaintiff. **Exhibit D.8** (II) was such communication the interim statement No.1 was sent back to the Plaintiff with these comments;

*“As discussed with your representatives before the site meeting the statement had been executed before the works activities and was therefore not acceptable and it was to be withdrawn and represented on execution of the activities.”*

This letter was written to the Plaintiff on the 29<sup>th</sup> October 2009. On the 29<sup>th</sup> September 2011 the Defendant’s Architect wrote to the Plaintiff Exhibit D.8 (V) in reference to interim statement No.2,

*“As you are aware the above claim could not be ascertained until the site meeting of 23<sup>rd</sup> June 2011 when work which had been executed could be identified and recorded. The Quantity Surveyor has since asked for clarification when you visited their offices but the clarifications are yet to be provided.*

*The works were recorded as follows;*

- 1. Site office of G.1 Sheets - submit sketch and construction details and dimensions.*
- 2. Excavation- submit details including typographical levels before levelling and after.*
- 3. Party hoarding - give details and dimensions.*
- 4. A number of items of work done were indicated in your valuation claim which were not recorded on site as work done during the site hand over, such as excavations to form basement and foundation trenches.*

*Please note that these items do not qualify to be valued unless they were executed.”*

The foregoing is a clear allegation of false claims. These allegations were not dislodged by cross-examination and full clarification was given during re-examination of DW1. As long as the Plaintiff remained silent when challenged to prove work it had done or when it had filed claims that were allegedly false the Project Manager was under no obligation to certify these claims.

For those reasons the non payment and the resultant lack of finances to proceed with the execution of the contract can only be blamed on the Plaintiff herself.

The Plaintiff also alleged that the Defendant's official told them that there would be modifications of building plans because new land had been acquired. While this is true and while it would have led to delays the Plaintiff's allegations could only hold water if she had done all the other work to completion namely; mobilization, preliminaries, site clearance and temporary fencing. These were not affected by the intended changes and yet even in these by the 8<sup>th</sup> September 2009 only 30% had been done on mobilization, 30% on preliminaries, 50% on site clearance and 10% on temporary fencing.

These figures were listed in **Exhibit D14** a meeting in which the Plaintiff participated. It is the evidence of DW1 that by November 2009 the site was still just partially cleared and excavations were incomplete with the Plaintiff still submitting interim statements that were rejected for non compliance. By February 2010 when the Plaintiff is alleged to have abandoned the site, the position was still the same.

DW1 stated that the Plaintiff used to make false claims. He stated that when interim statement No.1 dated 23<sup>rd</sup> June, 2009 was submitted for UGX 205,486,400/= the Plaintiff had executed no work at all. That a revised interim statement dated 25<sup>th</sup> November 2009 with the amount UGX 223,492,000/=, it was discovered that only minor works of site clearance and a few works of preliminaries had been done but it still carried all false claims which were in interim statement No.1.

Then came the Interim Statement and Compensation claim dated 26<sup>th</sup> February 2010 for 675,394,967/= **ExhD7(1V)** which included a claim for idle equipment and personnel. But

what brings out these claims as false is the claim for advance security and demand for interest on it.

As I have already found above advance was only payable upon executing a bond of advance security. In the interim statement and compensation claim **Exhibit D.7 (IV)** under item 5, the Plaintiff claimed for interest charged on securities/bonds for advance payment and that pursuant to clause 44.1(c) and 44.1 (1) a claim for 262,273,616/= was justified.

The Plaintiff also attached a copy of letter from their bankers showing the borrowing interest rate and claiming interest of unpaid advance at 23%. During cross-examination PW.1 told court that they never processed or went for a second advance security.

For these reasons, the claim in **Exhibit D.7 (IV)** for advance security bond and interest thereof submitted as part of the Interim Statement and Compensation claim are false.

This proof of false claims explains why the Defendant's Project Manager kept on sending back the Interim Statements and the resultant delays can only be construed against the Plaintiff.

They are also corroborative of the Defendant's evidence and allegations that while they were indeed going to be modifications in other quarters the preliminaries, the mobilization, site clearing were things that could be done even before the modification on Block B and others were availed. Interestingly, if no work was going on due to the stay pending receipt of instructions, why was the Plaintiff insisting on further payment.

Furthermore, they depict the Plaintiff as deceitful and a false claimant. Her action created whatever delays the Plaintiff complains of and I cannot visit these delays upon the Defendant. There is no doubt that by the time the termination was issued there was no work going on. This position is supported by the claim for idle equipment and personnel.

The Plaintiff has claimed for compensation in **D.7 (VI)** but it is this very claim that she falsely claims for the second advance security and interest attendant thereto which already makes this claim suspect. More so the Plaintiff did not produce any evidence of personnel or equipment.

Furthermore, none was found on site at handover. Lastly, even if they were there, the delay and the resultant redundancy was a creation of the Plaintiff who kept on submitting false claims. Since this delay was caused by the Plaintiff herself, she cannot benefit from it.

The sum total is that it is the Plaintiff who actually committed the breach and not the Defendant.

It is the Court's finding that the termination **ExhD15** was therefore justified.

By way of Counterclaim the Counterclaimant alleged that the Plaintiff had been given advance payment of UGX. 200,000,000/= obtained on 6<sup>th</sup> June 2009. That they would have given her more but she failed to present any other advance payment guarantee. According to Clause 51.1 of the General Conditions of the Contract and of the Special Conditions of the Contract the advance payment was supposed to be repaid by the Plaintiff. This would be progressively reduced from the amount repaid by the Defendant as he presented certificates for payments.

As I stated before her certificates were rejected because they were full of falsehood.

The Counterclaimant therefore claimed loss of UGX. 150,000,000/=, general damages, interest on (a) above at the rate of 25% per annum from date of breach till payment in full.

Although the Counterclaimant claimed UGX. 150,000,000/= evidence indicated otherwise. A surveyor sent to value works done came out with a report which showed that the work that had been done on site by the Plaintiff was worth UGX. 135,966,680/=.

The same report showed that the Plaintiff had incurred an expense of UGX. 5, 770,000/= on wages for watchmen with 25% as overhead.

He found preliminaries to have been UGX. 98,433,000/=, Construction works UGX. 16,793,000/=, which totalled UGX 115,226,000/= subjected to 18% VAT added UGX 20, 740,680/= which all totalled UGX 135,966,680/=. It was the value of work done after the contract had been terminated.

PW1 objected saying they were against the whole figure but the said PW1 did not give Court how he came up to his alternative claim. It would have been easier for her if her interim

statements had been approved but this I have said before was not possible because of the falsity in her claims.

The Report remained undisturbed and I find no reasons to disbelieve it.

For those reasons the total value of the works is set off leaving UGX. 55,808, 720/= as the amount owed to the Counterclaimant by the Contractor.

The Counterclaimant has also claimed general damages. As for these damages, a Plaintiff is awarded these damages, if he or she has suffered loss or inconvenience, ***Musisi Edward vs Bebihuga Hilda [2007] HCB 1, 84.*** To do justice that party must be put in the position he or she would have been in had she or he not suffered the wrong; ***Kibimba Rice Ltd bvs Umar Salim SCCA No. 17 of 1992.***

These damages are not however awarded without justification. Justification will be given by evidence to show the inconvenience and loss suffered by the Claimant. There is no evidence whatsoever in the Defendant's witness statement that they suffered damages other than the special damages.

For those reasons I find no reason for awarding general damages. It is so denied.

As for interest the award is in the discretion of the court. It is on the basis that the Defendant has kept the Plaintiff out of his money and the Defendant has had use of it himself; ***Harbutt's Plasticine Ltd vs Wayne Tank and Pump Co. Ltd [ 1970] QB 447*** wherein Lord Denning observed;

*“An award of interest is discretionary. It seems to me that the basis of an award of interest is that the Defendant has kept the Plaintiff out of his money, and the Defendant has had the use of it himself. So he ought to compensate the Plaintiff accordingly.”*

When awarding interest, consideration must be given to the type of business the Plaintiff does, and the length of period he has been deprived of the use of his money. The money claimed was given to the Plaintiff by the Counterclaimant in June 2009 when they presented a guarantee for the advance payment. They used some of it to do the Counterclaimant's work. The balance that remained cannot surely attract interest at 25% per annum which I consider excessive.

After considering the circumstances of the whole case, I find an award of interest of 15% per annum on the head of special damages appropriate which I so award.

This interest shall accrue from date of termination of contract namely December 21<sup>st</sup> 2010.

In conclusion the Plaintiff's suit is dismissed with costs.

Judgment is entered in favour of the Counterclaimant against the Plaintiff in the following terms;

- a) The Counterclaimant is awarded UGX. 55,808,720/=
- b) Interest on the decretal sum at 15% per annum from December 21<sup>st</sup> 2010 when the contract was terminated till payment in full
- c) The Plaintiff will also pay costs of the suits.

**Dated at Kampala this 24th day of May 2019**

**HON. JUSTICE DAVID WANGUTUSI.**  
**JUDGE**