THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0665 OF 2017

STONE CRUSHING (U) LIMITED …… PLAINTIFF

VERSUS

ROKO CONSTRUCTION LIMITED …… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. The plaintiff's claim;

The Plaintiffs' claim against the defendant is for recovery of shs. 130,667,517/= The plaintiff claims that on 30th July, 2015 it was sub-contracted by the defendant to fabricate, supply and install steel structures during the re-development of the Catholic Uganda Martyrs Shrine at Namugongo, in preparation for the papal visit that was due to take place later that year, on 28th November, 2015. Under that contract, the defendant was to pay the plaintiff a total of shs. 1,626,778,500/= The plaintiff duly executed its part of the bargain but the defendant refused to pay the amount claimed as outstanding on the contract, hence the suit.

b. The defence to the claim;

In its written statement of defence, the defendant denied the plaintiff's claim. It contended that the plaintiff was fully paid for all work done to the satisfaction of the project consultant. However, the plaintiff was unable to complete works on the bridge and altar satisfactorily. Despite multiple meetings held for that purpose, the plaintiff failed to rectify defects in those works as identified by the project consultant. In order to meet the timelines set under the main contract, the defendant had to incur shs. 83,427,753/= as expenses for executing the works left unfinished by the plaintiff. The defendant therefore counterclaimed that sum from the plaintiff.

c. The issues to be decided;

By the parties' joint memorandum of scheduling, the following were agreed upon as the issues to be decided by court.

1. Whether the sub-contract was completed within the required time and to the required standard.
2. Whether the defendant breached the sub-contract for the works on the altar and the bridge.
3. Whether the plaintiffs is entitled to the sum of shs. 130,667,517/= as claimed.
4. Whether the plaintiff is liable to the defendant in the sum of shs. 83,427,753/= as counterclaimed.
5. What remedies are available to the parties?

d. The submissions of counsel for the plaintiff;

Counsel for the plaintiff, M/s Bagyenda and Co. Advocates, submitted that the plaintiff's witnesses adduced evidence to show that works on the three pavilions A, B and C was done and paid for in full. Works on the altar had been completed by 24th November, 2015 but the defendant refused to pay. The defendant issued two interim certificates; on 30th October, 2015 and 14th November, 2015 respectively, indicating 80% completion of the altar (exhibit P. Ex.3). It was ready for use by 23rd November, 2015 (exhibit P. Ex.5). Indeed on 28th November, 2015 the church congregation was hosted in the completed pavilions and mass was celebrated using the completed altar. The defence witness testified that later the stage of completion was revised to 50% by the project consultant. The justifications for that revision were not given. Instead the defendant insisted that the extra-support columns which had been fixed to avert the effect of deflection at the altar, should be removed. Expert evaluation by P.W.2 indicates that removal of the columns would result in the collapse of the altar (exhibit P. Ex.8). The defendant did not adduce evidence of costs allegedly incurred to rectify the defects. Without informing the plaintiff, the defendant changed the design of the bridge from steel to concrete but this was after the plaintiff had incurred shs. 69,492,890.40/= in the costs of purchase of material required for the bridge (exhibit P. Ex.9). Fixing the leaks in the roof was not part of the plaintiff's duties under the contract. The works were officially handed over on 24th May, 2016. The plaintiff thus is entitled to the sum claimed.

e. The submissions of counsel for the defendant;

Counsel for the defendant, Kaggwa and Kaggwa Advocates, submitted that the contract was signed on 30th July, 2015 (exhibit D. Ex.1) and works were to commence on 31st July, 2015 running for a period of three months, hence by 31st October, 2015. Certificate No. 5 was issued on 30th October, 2015 (exhibit D. Ex.6), while certificate No. 6 was issued on 16th November, 2015 (exhibit D. Ex.7) outside the contractual period. The plaintiff's witnesses attested to the fact that works were completed on or around 24th November, 2015. Completion was not achieved until June, 2016. The plaintiffs installed two support columns for the altar, which was not part of the original design. They were instructed to remove them but they did not. The plaintiff was paid 50% of the works done on the altar leaving a balance of shs. 57,870,627/= The plaintiff cannot be paid the full amount without a certificate of completion. There is no proof that a sum of 69,492,890.40 was paid to Roofings Limited since the invoice (exhibit P. Ex.10 dated 1st April, 2016), indicates they obtained the material on credit. Fabrication required prior approval of shop drawings (exhibit P. Ex.5) by the defendant. None were presented in respect of this purchase. Materials had to be bought after approval of the shop drawings. The plaintiff is responsible for its loss when it purchased the material for the bridge without prior approval. Shs. 3,304,000/= labour for fixing the cross was as a result of a personal donation by Mr. Lalani to the Church. The defendant was not involved at all. The defendant incurred cots in rectifying what the plaintiff failed to rectify.

f. The decision;

In resolving the issues raised, the court finds it convenient to address issues one and four concurrently, then the second issue, thereafter issues three and five concurrently and finally the fifth issue.

1st issue; whether the sub-contract was completed within the required time and to the required standard.

4th issue; whether the plaintiff is liable to the defendant in the sum of shs. 83,427,753/= as counterclaimed.

Perusal of the index to the sub-contract (exhibit P. Ex.1) indicates that the plaintiff was obliged to commence the works on 31st July, 2015 and the date of practical completion was specified as 14th November, 2015. Counsel for the defendant argued that the plaintiff's witnesses attested to the fact that works were completed on or around 24th November, 2015. Certificate No. 5 was issued on 30th October, 2015 (exhibit D. Ex.6), while certificate No. 6 was issued on 16th November, 2015 (exhibit D. Ex.7) outside the contractual period. Completion was not achieved until June, 2016.

P.W.1 Mr. Patel Krupenshkumar Chandubhai testified that by 24th November, 2015 not all work had been completed but all components, i.e. pavilions A, B and C, the bridge and altar were ready to use and were indeed used on 28th November, 2015 by the church congregation, which was hosted in the completed pavilions and mass was celebrated using the completed altar. Thereafter, the plaintiff undertook rectification works on the site including altar alignment and supporting the sagging roof with support members, which rectification was completed in May, 2016. It is thus evident that the plaintiff exceeded the three months contractually agreed for completion of the works. However, it was never specified that time was of the essence in its performance.

The effect of time being of the essence in a construction context is generally to render a sub-contractor's unexcused delay in completing the project a material breach of the agreement permitting the contractor to terminate the contract and seek damages for the delay. However, under certain circumstances, a contractor may waive its right to require adherence to the sub-contract schedule. When the contractor allows the practical completion date to pass without setting a new deadline and continues issuing construction change directives requiring the sub-contractor to perform additional work, that constitutes waiver of the "time is of the essence" provision of the contract. When the contractor fails to set a new practical completion date, it fails to preserve its right to enforce the liquidated damages provision for any date after the sub-contract's substantial completion date.

A sub-contractor will not normally be liable to pay damages for delay if completion time is validly extended or where the contractor continues to go on with the sub-contract unconditionally after knowledge of the breach, then such breach cannot be an excuse for its non-performance or rely on the term waived for purposes of enforcing its remedy for the breach (see *Shipping Services (Group)*

Ltd v. China Chongaing International Construction Corporation H.C. Civil Suit No. 538 of 2005 and *Pioneer Construction Co. Ltd v. British American Tobacco H.C. Civil Suit No.* 209 of 2008).

It was the testimony of D.W.1 Mr. Mark Koehler, that the rectifications were done in the course of the year 2016 which was during the defects liability period starting 27th November, 2015. The implication is that the defendant permitted the plaintiff to undertake works past the specified deadline without setting a new deadline. The principle is general that whenever a contract not already fully performed on either side is continued in spite of a known excuse, the defence thereupon is lost and the injured party is himself liable of he subsequently fails to perform, unless the right to retain the excuse is not only asserted but assented to. By virtue of the acquiescence, the defendant waived or lost its right to enforce the 0.5% per day liquidated damages clause capped at a maximum of 10% of the contract value. Consequently, the defendant's counterclaim for Shs. 9,808,581/= as damages for delay at 0.5% of the contract up to a maximum of 10% fails for waiver.

The defendant further counterclaimed shs. 11,850,000/= as labour charges and shs. 12,726,267/= as the Value Added Tax component thereof. This being a claim for special damages, the law is that not only must they be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219*). Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach, Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995* and *Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004*).

It was the testimony of D.W.1 Mr. Mark Koehler that the defendant incurred costs since they did the rectifications to the roof themselves. They must have bought materials to do the rectification but had no proof of material purchased nor for the labour costs. He did not know though if some of the rectification works were done by the defendant or the plaintiff. He testified further that

flushing with the altar could have been done by the defendant or the plaintiff. The only works he could with certainty say were done by the defendant involved fixing leaks in the roof, which though was not part of the sub-contract. I find this evidence to be most unsatisfactory as proof of special damages. Not only was the witness uncertain as to which of the parties undertook that component of the works, but also it is devoid of documentary evidence in circumstances where such evidence would reasonably be expected.

On the other hand, it was the testimony of the three witness for the plaintiff that rectification of defects was done by the plaintiff. Their testimony was corroborated by exhibit P. Ex.6, a delivery not dated 4th May, 2016 at page 56 of the plaintiff's trial bundle, for equipment received by the defendant at the site. That equipment included welding and grinding machines, a welding mask, power and grinder cables, scaffolding, etc. all being equipment that would ordinarily be associated with alignment and levelling of the altar. It is more probable that not, based on the evidence before court, that the rectification was done by the plaintiff rather than the defendant. The question of the quality of work done by the plaintiff id deferred to be considered when resolving the fourth issue. Consequently the defendant's counterclaim fails.

2nd issue; <u>whether the defendant breached the sub-contract for the works on the altar and the bridge</u>.

By clause 1.8 of the contract, the defendant was to pay 30% as advance payment. 50% when materials are ready for delivery and the balance 15% when the structures are erected and ready. 5% was to be retained until the end of 6 months' retention period after which it would be paid with a final certificate. It is the plaintiffs' claim that the defendant breached the agreement when it failed to pay shs. 57,870,627/= being the outstanding balance on the works done on the altar, shs. 69,492,890.40 for materials purchased and not used due to the defendant's change in design of the bridge from steel to concrete and Shs. 3,304,000/= labour for fixing the cross.

The defendant refutes this and contends that the plaintiff failed to perform in accordance with the contract documents when it installed two support columns for the altar, which was not part of the original design. The plaintiff was instructed to remove them but they did not. The plaintiff cannot

be paid the full amount without a certificate of completion. Materials had to be bought after approval of the shop drawings. The plaintiff is responsible for its loss when it purchased the material for the bridge without prior approval. Labour costs incurred for fixing the cross were the result of a personal donation by Mr. Lalani to the Church, for which the defendant is not contractually responsible.

There are three things that have to be completed before a sub-contractor can collect final retention payment: (i) the work must have been fully completed in accordance with the Contract Documents; (ii) the contractor must have submitted a payment application to the Architect that covers the completed work; and (iii) the architect must have approved a Certificate for Payment that includes the work. If failure of the architect to approve a Certificate for Payment that includes the work is not due to the contractor's fault, the sub-contractor has the right to demand payment.

If a sub-contractor does not receive payment after substantial or practical completion, the sub-contractor can cease work and file an action to recover the contract price from the contractor for a material breach of the sub-contract by the contractor. In the sub-contract, exhibit P. Ex.1, it was stated that the plaintiff would be entitled to 50% when materials are ready for delivery and the balance 15% "when the structures are erected and ready." The appendix thereto then fixed the date of "practical completion" as 14th November, 2015. The payments were thus pegged to two eventualities; "when the structures are erected and ready" for the 15% balance on the one hand and the date of "practical completion" for the 5% amount retained, on the other. While the former may be construed as the date of "substantial completion" the latter is clearly specified as the date of "practical completion."

Substantial completion is the stage in the progress of the work when the work or designated portion is sufficiently complete in accordance with the contract documents so that the owner can occupy or use the work for its intended purpose (see *Westminster Corp v. J Jarvis & Sons Ltd [1970] 1 W.L.R. 637* and *University of Warwick v. Balfour Beatty Group Ltd [2018] EWHC 3230*). The plaintiff attained substantial completion on 24th November, 2015 when thereafter the church congregation was hosted in the completed pavilions and mass was celebrated using the completed altar on 28th November, 2015. It is then that it became entitled to the balance of 15% "when the

structures are erected and ready." The consultant was therefore unjustified in revising the interim certificate from 80% completion to 50% although the defendant cannot be blamed for this revision.

However, substantial completion and practical completion are separate and distinct concepts. Practical completion was defined in *Mears Ltd v. Costplan Services (South East) Ltd and others [2019] 4 WLR 55* as follows;

a) Practical completion is easier to recognise than define … There are no hard and fast rules …
b) The existence of latent defects cannot prevent practical completion (Jarvis). In many ways that is self-evident: if the defect is latent, nobody knows about it and it cannot therefore prevent the certifier from concluding that practical completion has been achieved.
c) In relation to patent defects, the cases show that there is no difference between an item of work that has yet to be completed (i.e. an outstanding item) and an item of defective work which requires to be remedied. Snagging lists can and will usually identify both types of item without distinction.
d) … the practical approach developed by Judge Newey in *William Press and Emson* has been adopted … As noted in *Mariner*, that can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling.
e) Whether or not an item is trifling is a matter of fact and degree, to be measured against 'the purpose of allowing the employers to take possession of the works and to use them as intended' (see Salmon LJ in Jarvis). However, this should not be elevated into the proposition that if, say, a house is capable of being inhabited, or a hotel opened for business, the works must be regarded as practically complete, regardless of the nature and extent of the items of work which remain to be completed/remedied…
f) Other than *Ruxley*, there is no authority which addresses the interplay between the concept of completion and the irremediable nature of any outstanding item of work … But on any view, *Ruxley* does not support the proposition that the mere fact that the defect was irremediable meant that the works were not practically complete.

In *Ruxley Electronics & Construction Limited v. Forsyth [1996] 1 AC 344* a swimming pool as built had a diving area that was only six feet deep, although the contract specified it should be seven feet six inches deep. The owner said that, because it was an entire contract, the swimming pool had never been completed and he owed nothing by way of payment. He also claimed the cost

of rebuilding the pool even though he did not intend to carry out the work. The House of Lords concluded that, where the expenditure was out of all proportion to the benefit to be obtained, the appropriate measurement of loss was not the cost of reinstatement but rather the diminution in value. The issue addressed there was not related to substantial or practical completion.

Practical completion means a state of affairs in which the works have been completed free from patent defects other than ones to be ignored as trifling. It follows from the decision in *Mears Ltd* that if there is a patent defect which is properly regarded as trifling then it cannot prevent the certification of practical completion, whether the defect is capable of economic remedy or not. On the other hand, is the defect is properly considered to be more than trifling, then it will prevent practical completion, again regardless of whether or not it is capable of remedy. Significant defects cannot be discounted on the basis that they do not prevent the works from being used for their intended purpose. The mere fact though that a defect is irremediable does not in itself prevent practical completion. The issue as to whether or not it is capable of economic repair is a matter that goes to the proper measure of loss, not to practical completion.

In the instant case, the reason advanced by the defendant for refusal to pay is the plaintiff's failure to secure a certificate of completion due to its failure to remove two support columns for the altar, which was not part of the original design, but were necessitated by rectify a deflection in works at the altar. Deflection is the degree to which an element of structure changes shape when a load is applied. The change may be a distance or an angle and can be either visible or invisible, depending on the load intensity, the shape of the component and the material from which it is made. Components and structures that suffer deflection include, beams, columns, floors, walls, and so on. When a load produces a deflection that is too great, the component may fail. Given the possibility of structural failure, building codes usually determine what the maximum allowable deflection should be to ensure the safety of a building's users and overall structural integrity.

Construction defects can be grouped into the following four major categories: (i) design deficiencies; (ii) material deficiencies; (iii) specification problems; and (iv) workmanship deficiencies. There is no evidence in the instant case explaining the cause of the deflection. Its occurrence therefore cannot be attributed to any fault of the plaintiff. To rectify the defect, the

plaintiff installed two support columns. It was the testimony of P.W.2 Mr. Khanbadd Badru that the two columns are now indispensable. Their removal would cause a collapse of the structure. This is corroborated by the testimony of D.W.1 Mr. Mark Koehler that the defendant too never removed them and they remain in place to-date. The question then is whether or not their not having been part of the original design may be considered a trifling defect in the circumstances of this case.

Whether or not an item is "trifling" is a matter of fact and degree. It is to be measured against the purpose of allowing the owner to take possession of the works and to use the items as intended. The intended purpose of the works is of relevance only in determining whether such defects are trifling. In the instant case, the two columns were necessitated by a deflection whose occurrence cannot be attributed to any fault of the parties. It would be commercially unworkable if every departure from the contract drawings, regardless of the reason for, and the nature and extent of, the non-compliance, had to be regarded as a breach of contract. While a "material variation" may be a breach, it does not necessarily constitute a "material breach." To permit such an interpretation would lead to the commercially absurd result that practical completion could not be certified, as the breach could no longer be remedied.

The issue of whether a patent defect is capable of economic repair is a matter that goes to the proper measure of loss, not to practical completion. A patent defect that is properly regarded as trifling cannot prevent the certification of practical completion, whether the defect is capable of economic remedy or not. I find in the instant case that in light of its intended purpose the two columns, that they are a departure from the original drawings is a trifling in the circumstances of this case. Consequently, the plaintiff had attained practical completion by 27th June, 2016 when the works were finally handed over officially.

At substantial completion, the Contractor is under an obligation to make payment to the sub-contractor, deducting any portion of the funds for the sub-contractor's work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the sub-contractor. Substantial completion triggers the contractor's right to payment of the full contract amount minus retention. At practical completion, this will include the owner's obligation to release

any retention that may have been withheld as part of the payment process. In the final result, I find that the defendant has since the date of practical completion by the plaintiff, been in breach of its obligations under the contract when it failed to pay the contract price in full.

3rd issue; whether the plaintiffs is entitled to the sum of shs. 130,667,517/= as claimed.
5th issue; what remedies are available to the parties.

It is the plaintiffs' claim that the defendant breached the agreement when it failed to pay shs. 57,870,627/= being the outstanding balance on the works done on the altar, shs. 69,492,890.40 for materials purchased and not used due to the defendant's change in design of the bridge from steel to concrete and Shs. 3,304,000/= labour for fixing the cross. The plaintiff claims general damages for breach of contract, interest and costs as well.

i. The claim for shs. 57,870,627/= as the outstanding balance on the contract price.

The plaintiff claims shs. 57,870,627/= outstanding balance on the works done on the altar. When the work or designated portion is sufficiently complete in accordance with the contract documents so that the owner can occupy or use the work for its intended purpose, then substantial completion has been achieved. "substantial performance is so nearly equivalent to what was bargained for that it would be unreasonable to deny" the contractor the full contract price, however it must take into account the client's right to recover any damages from the contractor's failure to render full performance (see *J.M. Beeson Co. v. Sartori, 553 So. 2d 180, 182 (Fla. Dist. Ct. App. 1989*).

When substantial completion is achieved, only minor corrective work and punch list items will remain. Substantial completion entitles contractors to the remaining balance of the contract price, minus any retention withheld. Substantial completion triggers the contractor's right to payment of the full contract amount minus offsets. This will include the owner's obligation to release any retention that may have been withheld as part of the payment process.

ii. The claim for shs. 69,492,890.40 for materials purchased and not used.

iii. The claim for general damages.

The plaintiff claims shs. 69,492,890.40 for the materials purchased and not used, and general damages for breach of contract. In certain circumstances, an employer is requested to make an advance payment for materials before they are delivered to the site. Alternatively, an amount may be included in an interim application for payment for materials that are off site. Advance payment is usually sought where a contractor or supplier is outlaying significant expenditure on larger items of plant or equipment and requires some payment, notwithstanding the fact that it is not yet entitled to be paid under the contractual certification procedure.

Generally, the law considers that, unless the contract states otherwise, title (ownership) of materials passes from the contractor to the client at the time of delivery, irrespective of whether payment has been made. It is common though for sub-contractors to include in their terms of supply a clause stating that they retain ownership of the materials and/or goods until the materials and/or goods have been paid for. However, once materials and goods have been built into the works (i.e. they cannot be removed without damage to the structure, fabric, finishes or services installations to the building), ownership passes to the employer.

It follows that a subcontractor who is storing the goods off site, retains ownership of the goods until they are delivered on site. The contractor is responsible for storage costs while off-site; for loss or damage while off-site; and for handling costs at the storage premises and getting them to the works; and for insurance. Such materials must have been reasonably, properly and not prematurely brought to or adjacent to the works. The word 'prematurely' is probably best interpreted by reference to any programme or progress schedule in existence or to the (optional) master programme.

Sometimes an employer may pay for items even though they remain "off-site," for example, where a contractor has made a large payment for plant or materials that have yet to be delivered to site, or if the client wishes to "reserve" key items in order to protect the programme. Materials, goods and / or items pre-fabricated off-site for inclusion in the works. After the off-site materials and /

or goods have been paid for by the employer they become his or her property and cannot be removed from the premises where they are stored at the date of payment; except for use in the works.

Scheduling construction activities involves chronologically distributing tasks over the available timeframe, determining the resources, durations and procedures necessary to ensure the works are completed in a way that optimises cost, timeframe and quality. Ordinarily, the sub-contractor prepares a construction program showing the order and method in which he proposes to execute the works and the dates upon which the various elements, trades and sections of the works will be started and completed, including dates for submittal and approval of shop drawings and samples, for procurement and delivery of materials and equipment; for construction, installation, inspection, testing and commissioning. In the instant case it was subject to Shop Drawing approval.

"Shop Drawings" are drawings, diagrams, illustrations, charts, brochures, and other data that are prepared by Contractor or any Subcontractor, manufacturer, supplier or distributor, for some portion of the Work, which demonstrate the manner in which the Work is proposed to be furnished in conformance with the Contract Documents. Shop drawing submittal is the accepted method of approving a specific element of the work while allowing flexibility in the Contractor's means and methods. In absence of evidence to show that the stocking of the U-beams long before shop drawing that incorporated their use were presented and approved was imperative by reason of scarcity, special order processes or similar reason, the plaintiff cannot claim for the value of the U-beams. They were not incorporated in any certificate and were never delivered to the site. For all intents and purposes, they are the property of the plaintiff.

It was contended that the said U-beams cannot be used for any other purpose. This averment was not corroborated most especially since there is no evidence to show that they were specially ordered from Roofings Limited and specifically fabricated for the steel bridge. In any event, the U-beams must have salvage value, at least with smelters, evidence of which was never adduced by the plaintiff, yet it is under the legal obligation to mitigate its loss. Nevertheless, I find that the sub-contract was derived from the main contract. By this, the plaintiff was contracted to fabricate,

supply and install the steel bridge and when this was unilaterally re-designed as a concrete bridge by the defendant mid-contract, that act constituted a breach of the sub-contract.

The primary remedy for breach of contract is damages. Damages for breach are assessed according to the principle that the innocent party is, as far as possible, put in the position in which it would have been if the contract had been properly performed, subject to the usual rules on causation, foreseeability and mitigation (see *British Westinghouse Electric Co. Ltd v. Underground Electric Railways [1912] AC 673*). A party cannot recover damages for any part of a loss which could reasonably have been avoided. The duty to mitigate requires a party to act reasonably, which will depend on the individual circumstances of each situation. However, the claimant need only take steps which are in the ordinary course of business and is not required to engage in commercially risky conduct. Expenses, costs or further loss incurred in taking steps to mitigate the loss can be recovered.

The plaintiff suffered loss in that it applied some of the financial resources available to it, to procure material that has been unutilised for the last five years or so. Doing the best I can, I estimated the income lost had the money been invested otherwise to be in the region of approximately 15% of the value of items purchased. I accordingly award the plaintiff shs. 10,500,000/= as general damages for breach of contract.

iv. The claim for shs. 3,304,000/= as labour costs incurred for fixing the cross.

P.W.3 Mr. Lalani Salim testified that he donated the steel cross to the Catholic Church based on relationship between contractor and sub-contractor. We hired three cranes on the mutual understanding the defendant would pay the labour charges. It cost him shs. 3,304,000/= in labour and hiring a crane for fixing the cross.

There is no evidence to show that the defendant directed the plaintiff to fabricate, supply, and install that cross. The plaintiff did not adduce any evidence of shop drawings presented to and approved by the defendant in respect of that cross. It seems to me that it was entirely and ex-gratia

personal donation of P.W.3 whose costs cannot be claimed under the contract. This part of the plaintiff's claim therefore fails for being an ex-gratia donation offered for no consideration.

v. The claim for interest and costs.

Interest is awarded at the discretion of court, but like all discretions it must be exercised judiciously taking into account all circumstances of the case (see *Uganda Revenue Authority v. Stephen Mabosi S.C. Civil Appeal No.1 of1996).* The basis of such an award is that the defendant has kept the Plaintiff out of its money and the defendant has had use of it so the plaintiff ought to be compensated accordingly (see *Harbutt's Plasticine Ltd v. Wyne Tank & Pump Co. Ltd [1970] 1 Ch 447*).

Considering that the plaintiff would have used this money to re-invest in its business had it been paid on time in accordance with the contract, the plaintiff would be entitled to such a rate that would not neglect the prevailing economic value of money but at the same time insulate it against any economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai v. Warid Telecom Uganda HCCS No.224 of 2011*). The late payment of commercial debts can have a detrimental impact on any size of business, but perhaps more so for a smaller business where cash flow is more likely to be reliant on the timeous payment of invoices.

I consider the rate of 20% per annum as adequate in the circumstances. The principal sum of shs. 57,870,627/= awarded as the outstanding balance on the works done on the altar therefore shall carry that rate of interest from 27th June, 2016 until payment in full. The sum of 10,500,000/= awarded as general damages for breach of contract shall in turn carry interest at the rate of 8% per annum from the date of this judgment until payment in full.

Under section 27 (2) of The Civil Procedure Act, the cost of the suit follow the event unless the court for good reason otherwise orders. I have not found any good reason do order otherwise. Accordingly the costs of the suit and the counterclaim are awarded to the plaintiff.

In conclusion, judgment is entered for the plaintiff against the defendant, as follows;

a) Shs. 57,870,627/= outstanding balance.

b) Shs. 10,500,000/= as general damages.

c) Interest on (a) above at the rate of 20% per annum from 27th June, 2016 until payment in full.

d) Interest on (b) above at the rate of 8% per annum from the date of judgment until payment in full

e) The costs of the suit and of the counterclaim.

Dated at Kampala this 8st day of April, 2021 ……...

Stephen Mubiru
Judge,
8th April, 2021.