**THE REPUBLIC OF UGANDA,**

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

**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO 832 OF 2007**

**OBED AHIMBISIBWE VS AKRIGHT PROJECTS LTD**

**OBED AHIMBISIBWE}...........................................................................PLAINTIFF**

**VS**

**AKRIGHT PROJECTS LTD}................................................................RESPONDENT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiff commenced this action on 7 November 2007 to recover inter alia balance of a contract sum of **Uganda shillings 50,629,779/=** from the Defendant alleged to be outstanding. The Plaintiff also seeks interest on the claimed sum, costs of the suit and any other relief that the court may deem fit and just to grant.

The Plaint discloses that at all material times the Plaintiff was assigned by the Defendant to carry out some construction works at the Defendant's building sites around Kampala. The Plaintiff claimed that the total cost of the contract was **Uganda shillings 81,177,778/=** but the Defendant only paid **Uganda shillings 30,547,999/=** leaving a balance of **Uganda shillings 50,629,779/=.**

The Defendant denied the Plaintiff’s claims disclosed in the plaint and counterclaimed against the Plaintiff for **Uganda shillings 8,417,045/=** being a claim for failure to pay for materials picked from the Defendant's store and for failure to complete some of the works leaving the Defendant to complete them. The Defendant contended that the costs of the incomplete work should be offset from the contract sum.

In the course of preliminary pre-trial conference and on the 22nd of February 2012 it was agreed by consent of both Counsel and parties that a Quantity Surveyor is appointed to verify the claims of both parties and come up with a report. The Quantity Surveyor was required to assess the evidence and any other materials to arrive at his conclusions. Subsequently the matter was delayed for over two years and eventually the parties engaged Mr Giles O. Odongo, Principal Quantity Surveyor, Ministry of Works and Transport, Public Structures Department. The matters for determination by the Quantity Surveyor according to the report filed on court record are as follows:

1. Whether 40 contracts were entered into between the Plaintiff and the Defendant?
2. Whether the contracts were performed and to what extent?
3. Whether the Plaintiff is entitled to payment of the contract balance of Uganda shillings 50,629,779/=?
4. Whether the Defendant, Messieurs Akright Projects Ltd, is entitled to a refund of Uganda shillings 8,419,045/= as claimed?

The final report of the Quantity Surveyor was issued on 12 January 2015. The Plaintiff is represented by Counsel Gabriel Byamugisha of Byamugisha Gabriel and Company Advocates while the Defendant is represented by Counsel Geoffrey Kavuma of Messieurs Okello - Oryem and Company Advocates. Both Counsels addressed the court in written submissions after the report of the appointed Quantity Surveyor was filed on court record and served on the Counsels.

In the Plaintiffs written submissions, the Plaintiff relies on the facts as agreed in a joint scheduling memorandum dated 1st October 2009.

The facts are that the Plaintiff was a construction contractor of the Defendant from the year 2000 – 2006. During the subsistence of the contractual relationship, the Plaintiff and the Defendant executed several construction contracts for construction of buildings at various sites belonging to the Defendant. Sometime in 2006 a dispute arose between the Plaintiff and the Defendant for non-payment of the contract price. The total contract price was Uganda shillings 82,430,489/= only. The Plaintiff's Counsel reproduced the issues agreed to for determination by the Quantity Surveyor and only added the last issue agreed to in the scheduling memorandum as to what remedies are available to either of the parties.

In the written submissions, the Plaintiff’s case is that both parties agreed to the Quantity Surveyor and that most of the issues were resolved by the report and parties were bound by the findings in the report. The Plaintiff's Counsel further addressed the court on the findings of the Quantity Surveyor. Out of the 40 jobs the Plaintiff claimed, two of them were not construction jobs but items of payment claim. Secondly one of the jobs had no supporting documents giving a total of 37 jobs presented by the Plaintiff qualifying for assessment by the Quantity Surveyor. There is no need to reproduce submissions of Counsel to the extent that they echo the report of the Quantity Surveyor. Suffice it to say that the final value of the work determined was that the work contracted in 38 contracts was **Uganda shillings 78,256,724/=**. The gross value of the contracted work executed on-site in 37 contracts was **Uganda shillings 77,612,212/=.** The value of disputed work in 37 contracts was **Uganda shillings 14,365,296/=.** While the gross value of the undisputed work was **Uganda shillings 63,246,916/=**. The amount of an encumbered entitlement payable to the Plaintiff by 31 December 2007 at the time of the plaint was **Uganda shillings 33,098,316/=** which was awarded to the Plaintiff with interest at commercial rate effective January 2008.

The Plaintiff however disputed part of the report and made an additional statement in which he attached documents to prove that the disputed work was actually carried out and deserves to be paid. On the basis of that evidence the Plaintiff claims additionally a total of **Uganda shillings 14,364,296/=**. Counsel prayed that this amount is also awarded and therefore a total of **Uganda shillings 47,463,612/=** should be awarded with interest at commercial rate from January 2008 to the Plaintiff.

On the question of whether the Defendant is entitled to a refund of **Uganda shillings 8,419,045/=**, the Plaintiff's Counsel contended that the Defendant had not proven entitlement according to the report of the Quantity Surveyor.

As far as remedies are concerned Counsel submitted that there was breach of contract and secondly there was dilatory and diversionary conduct of the Defendant which led to the protracted trial. He prayed for general damages for breach of contract and inconvenience and proposed an amount of **Uganda shillings 50,000,000/=** as general damages. Secondly he prayed that the costs of the suit are awarded to the Plaintiff.

In the Defendant's written submissions in reply, Counsel Geoffrey Kavuma agreed with the issues as framed. He submitted that upon the advice of the court, the parties engaged the services of a Quantity Surveyor mentioned above. He agreed that clause 17 of the revised report of the Quantity Surveyor on the issue of whether the Plaintiff is entitled to payment of the contract balance of Uganda **shillings 50,629,000 779/=** concludes that the Plaintiff is only entitled to **Uganda shillings 33,098,316/=** at December 2007 prices. He proposed to deal with the question of interest.

The Defendant took issue with clause 18 of the report that the Defendant has not proven entitlement to **Uganda shillings 8,490,045/=.** The money was claimed in the counterclaim of the Defendant. He noted that the Plaintiff never filed a rejoinder and response to the counterclaim within the stipulated time in accordance with the Civil Procedure Rules. The Plaintiff was therefore deemed to admit the Defendant’s pecuniary claim. He submitted that the Quantity Surveyor did not have the benefit of looking at the pleadings to determine if the Plaintiff had filed a rejoinder to the Defendant’s counterclaim or not.

On the question of submission on the interest payable with effect from January 2008 at bank of Uganda commercial lending rate, compounded monthly after the date of payment of the entitlement, he contended that the Quantity Surveyor did not determine the issue of interest. He emphasised that in the absence of an agreement, the court should exercise its discretion in awarding interest. Counsel relied on the cases of **Attorney General versus Semanda [2007] HCB 32**, a decision of the Supreme Court and **Begumisa Financial Services Ltd versus General Mouldings Limited [2007] 1 HCB 72**, a decision of the Court of Appeal. Furthermore he relied on the case of **Kanobolic Group of Companies (U) Ltd versus SCOUL Court of Appeal Civil Appeal Number 34 of 1997** that compound interest has to be agreed to expressly by the parties.

Counsel for the Defendant maintains that the Quantity Surveyor never determined from the documents whether the parties expressly agreed to any commercial interest.

Furthermore the Plaintiff took issue with one of the findings of the Quantity Surveyor and made an additional statement. During cross-examination he admitted that he fully participated in the exercise which led to the report of the Quantity Surveyor and provided all the documentation in his possession and that he had no objection whatsoever with the findings of the Quantity Surveyor. In the premises the Quantity Surveyors report settles the matter.

As far as remedies are concerned the Quantity Surveyors dealt with the remedies save for the issue of interest on the amount.

On the question of the claim for general damages the Defendant’s Counsel relies on the case of **Stroms versus Hutchinson [1905] AC 515** that general damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of. The Plaintiff's Counsel did not demonstrate how he arrived at the proposed **Uganda shillings 50,000,000/=** as compensation. Moreover the Defendant's conduct was wholly participatory in making sure that the expert was able to arrive at his determination/opinion. There was therefore no basis for the proposed award of **Uganda shillings 50,000,000/=** as general damages.

**Judgment**

I have carefully considered the Plaintiffs suit and the counterclaim as well as the defences to the plaint and to the counterclaim. I have also considered the written submissions of Counsel as well as the report of the Quantity Surveyor appointed by the parties.

The first question to be considered relates to the counterclaim of the Defendant for payment of **Uganda shillings 8,417,045/=**. In his submissions the Defendants Counsel contended that the Defendant was entitled to default judgment because the Plaintiff had filed a reply to the counterclaim out of time. Consequently he was of the opinion that the Quantity Surveyor had no mandate to include this item in his determination of the dispute. The fact of the matter is that the Quantity Surveyor was appointed by the parties and he did not find the Plaintiff liable in the counterclaim.

That notwithstanding I have duly considered the pleadings. The Plaintiff filed the original plaint on 7 November 2007. Subsequently an amended plaint was filed on 21 December 2007. Thereafter the Defendant filed his written statement of defence and counterclaim on 28 December 2007. However the endorsement of the registrar shows that the written statement of defence and counterclaim was endorsed on 7 January 2008. On 21 January 2008, the Plaintiff filed a reply to the defence and counterclaim.

I have carefully considered the issue. First of all there is no evidence of when the Plaintiff was served with a written statement of defence. That notwithstanding the period between 24 of December and 7th of January is not reckoned in the computation of time allowed by the rules according to order 51 rule 4 of the Civil Procedure Rules. Furthermore the Plaintiff is entitled to reply to the counterclaim within 15 days after service upon him or her of the counterclaim. This is stipulated by Order 8 rule 11 (1) of the Civil Procedure Rules. Supposing that the Plaintiff was served on the same day the defence was endorsed by the officer (7th of January 2008), the Plaintiff would still be entitled to file a reply to the counterclaim by 28 January 2008. However the reply to the defence and counterclaim was filed on 21 January 2008 within time and therefore there is no merit to the Defendant's submissions that the Quantity Surveyor had no mandate to consider whether the Plaintiff was liable to the counterclaim.

The facts of this dispute are agreed in the joint scheduling memorandum endorsed by both Counsels for the parties on 1 October 2009 and also filed on court record on 1 October 2009. In the agreed facts the Plaintiff was a construction contractor of the Defendant from the year 2002 to late 2006. During the subsistence of the contractual relationship, the Plaintiff and the Defendant executed several construction contracts for construction at the various sites belonging to the Defendant. Sometime in 2006 a dispute arose between the Plaintiff and the Defendant regarding an alleged breach of contract by the Defendant for non-payment of the contract price. It is agreed that the total contract price was Uganda shillings 82,413,589/=.

During the conferencing inter parties, both parties agreed to the appointment of a Quantity Surveyor to visit the site and ascertain the value of the work done by the Plaintiff as well as to determine whether the Plaintiff was entitled to the claim in the plaint and whether the counterclaimant was entitled to the claim in the counterclaim. The parties appointed Mr Giles O. Odongo, a registered surveyor of Uganda/Quantity Surveyor. He is also the Principal Quantity Surveyor employed by the government in the Ministry of Works and Transport in the Public Structures Department. According to the report forwarded by the Quantity Surveyor, the following were the matters determined by him namely:

1. Whether 40 contracts were entered into between the Plaintiff and the Defendant?
2. Whether the contracts were performed and to what extent?
3. Whether the Plaintiff is entitled to payment of the contract balance of Uganda shillings 50,629,779/=? And
4. Whether the Defendant Messrs Akright Projects Ltd, is entitled to a refund of Uganda shillings 8,419,045/= claimed?

The report writes that selected issues in the dispute were referred by the court for expert determination and by an independent expert appointed by the parties.

On the first issue as to whether there were 40 jobs, he came to the conclusion after detailed examination of the documents and conduct of the parties that 37 jobs constituted valid contracts between the parties.

The second issue was whether the contracts were performed and to what extent? This issue seemed to be subsumed with the question of entitlement of the Plaintiff. The question was whether the Plaintiff was entitled to payment of the contract balance of **Uganda shillings 50,629,779/=**. He came to the conclusion that the value of work contracted in the 38 contracts was worth **Uganda shillings 78,256,744/=** with 18% VAT inclusive. Secondly the gross value of the contracted work executed on site in 37 contracts was **Uganda shillings 77,612,212/=** with VAT of 18% inclusive. The value of disputed work in the 37 contracts was **Uganda shillings 14,365,296/=**. The gross value of undisputed work executed was of **Uganda shillings 63,246,916/=** with 18% VAT inclusive. The gross amount of payments made to the Plaintiff by the Defendant was **Uganda shillings 30,148,600/=** with VAT of 18% inclusive. The amount of an encumbered entitlement payable to the Plaintiff by 31 December 2007 was **Uganda shillings 33,098,316/=** with VAT of 18% inclusive. He also concluded that the practice would be to calculate interest from January 2008 at Bank of Uganda commercial lending rate, compounded monthly up to the date of payment of the entitlement. He concluded that the Plaintiff is entitled to payment of **Uganda shillings 33,098,316/=** with VAT inclusive at December 2007 prices with interest calculated from January 2008.

On the question of whether the Defendant Messieurs Akright Projects Ltd is entitled to a refund of **Uganda shillings 8,419,045/=**? The Quantity Surveyor came to the conclusion that the Defendant has not proven entitlement.

In the matter before me entitlement of the Plaintiff to **Uganda shillings 33,098,316/=** by 31st of December 2007 with 18% VAT inclusive has not been contested. The Plaintiff's Counsel endorsed this finding as the Defendant’s Counsel did as well. The Defendant’s Counsel only contested the interest payable on that amount. On the other hand the Plaintiff's Counsel submitted that the sum of **Uganda shillings 14,365,296/=** was unfairly omitted by the Quantity Surveyor from his determination on the ground that it was disputed and no evidence supported it.

The dispute was referred to a Quantity Surveyor who considered all the issues referred from the evidence availed by the parties. Therefore can the question of **Uganda shillings 14,365,296/=** which constitutes a disputed amount be revisited by this court?

The Plaintiff's case presented a long list of alleged contracts together with several bills of quantities for the construction of houses of the Defendant. In light of the kind of evidence required and the prolonged examination of bills of quantities as well as the task of ascertaining the market rate of those quantities, it was agreed that the dispute be referred to a Quantity Surveyor. A Quantity Surveyor was duly appointed by the parties and presented with several issues which included the entitlement of the Plaintiff under the contracts to be ascertained. Section 27 of the Judicature Act cap 13 laws of Uganda provides for trial by a referee or arbitrator. The relevant part in section 27 (b) provides:

"27.Trial by referee or arbitrator.

Where in any cause or matter, other than a criminal proceeding –

1. all the parties interested who are not under disability consent;
2. the cause or matter requires any prolonged examination of documents or any scientific or legal investigation which cannot, in the opinion of the High Court, conveniently be conducted by the High Court through its ordinary officers; or… (c)…

The High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court."

In this case the issues referred to the arbitrator/referee were specifically handled and the parties were given an opportunity to present all the evidence and submission in that regard and opportunity was given to their own professionals to be heard on any clarifications. Particularly the relevant question with regard to the **Uganda shillings 14,365,296/=** arose in the determination of issue (c) which is whether the Plaintiff is entitled to payment of the contract balance of Uganda shillings 50,629,779/=? I agree with the Defendant’s Counsel that the matter cannot be reopened in the circumstances of this case.

Section 27 of the Judicature Act is also enforced by Order 47 of the Civil Procedure Rules which deals with references by consent of the parties to arbitrators. References are made in situations where there is no contract submitting the dispute envisaged therein to an arbitrator or arbitrators. Furthermore during the court conducted scheduling conference under Order 12 rule 1 of the Civil Procedure Rules the court explores the possibility of mediation, arbitration and any other form of settlement. In this case the court explored the possibility of the matter being tried by a Quantity Surveyor. Where a matter has been referred by consent of the parties to an independent expert, the court cannot revisit the matter except in particular instances which are prescribed. The court can only deal with the matters which have remained pending and which were not referred for determination under section 27 of the Judicature Act.

Order 47 rule 3 (2) of the Civil Procedure Rules provides that the court:

“shall not, except in the manner and to the extent provided in this Order, deal with the matter in the suit.”

Order 47 rules 15 give the grounds for setting aside an award of a referee or arbitrator. The grounds include misconduct or corruption, fraudulent concealment of any matter by one of the parties and the award is made after proceeding with the suit by the court. The Plaintiff cannot purport to call evidence on the same issue he had an opportunity to present to the Quantity Surveyor for a period of about two years when the matter remained pending. The Quantity Surveyor is the chosen expert of the parties. Consequently the question of whether the Plaintiff is entitled to **Uganda shillings 14,365,296/=** cannot be revisited.

**Remedies**

I have already dealt with the question of the counterclaim. The Quantity Surveyor found that the Defendant did not have any evidence of entitlement to that amount.

In the premises the Plaintiff is awarded **Uganda shillings 33,098,316/=** as contained in the award of the Quantity Surveyor. This amount is inclusive of VAT of 18%.

On the question whether interest should be awarded in the manner suggested by the Quantity Surveyor on the principal award. The issue of interest was not referred for trial to the Quantity Surveyor and therefore I agree with the Defendant’s Counsel that interest can only be dealt with or awarded at the discretion of this court.

Before determining the rate of interest I will deal with the claim for general damages of **Uganda shillings 50,000,000/=** advanced by the Plaintiff's Counsel. He justified the claim on the ground that the Defendant delayed the proceedings leading to protracted proceedings since the suit was filed. I do not agree with the submission on the ground that delays in suits which have been filed are compensated by costs as far as several appearances are concerned. Secondly it is up to the Plaintiff to move the court to proceed with the suit. On the other hand being kept out of money is compensated by the appropriate award under the principle of *restitutio in integrum*.

The Plaintiff’s action was for payment of the balance of the contractual price. The balance of the contractual price was established by the court referee/Quantity Surveyor. According to **Halsbury's laws of England fourth edition reissue volume 12** (1) Para 1063 at 484, upon breach of a contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interests from the time when it became payable under the contract or as the court may allow. Such an award fulfils the principle of *restitutio in integrum* in that the Plaintiff has to be put in a position he would have been had the injury complained of not occurred. The award of interest is compensatory.

Interest is awarded for the deprivation of the Plaintiff of the amount in due time and under the doctrine of *restitutio* *in integrum*. In the case of **Tate & Lyle Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716** Forbes J at page 722 held that the award of interest is an attempt to achieve *restitutio in integrum*:

“I think the principle now recognised is that it is all part of the attempt to achieve restitutio in integrum.”

The principle is further captured in the judgement of the House of Lords, per Lord Wright in the case of **Riches v Westminster Bank Ltd [1947] 1 All ER 469** at page 472 that interest:

“... May be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation....”

Finally Lord Denning MR held in the case of **Jefford and another v Gee [1970] 1 All ER 1202**, Court of Appeal, Civil Division at page 1206 and quoting an earlier judgment in **Harbutt’s Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 All ER 225, CA at page 236** that:

‘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.”

The award of interest fulfils the fundamental rationale for award of general damages as articulated by the East African Court of Appeal in **Dharamshi vs. Karsan [1974] 1 EA 41** that general damages are awarded to fulfil the common law remedy of *restitutio in integrum* which means that the Plaintiff has to be restored as nearly as possible to a position he would have been had the injury complained of not occurred. The conclusion is that where interest is awarded as compensation for deprivation of the Plaintiff by keeping him out of his money, ordinarily general damages will not be awarded.

In the premises the Plaintiff is awarded interest on the sum of Uganda shillings 33,098,316/= awarded as the Plaintiffs balance under the contract at 20% per annum from January 2008 up to the date of judgement. The interest awarded includes VAT at 18%.

Additional interest is awarded on the aggregate sum at the date of judgement at the rate of 20% per annum from the date of judgement till payment in full. The additional interest further includes VAT at 18%.

As far as costs are concerned, the general rule is that costs follow the event and the Plaintiff is awarded the costs of this suit.

The counterclaim of the Defendant stands dismissed with costs.

Judgment delivered in open court on 12 June 2015

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

Gabriel Byamugisha Counsel for the Plaintiff

Plaintiff present

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**12 June 2015**