THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 47 OF 2016

(Coram: Hellen Obura, Stephen Musota & Christopher Madrama, JJA)

A 2 Z INFRA ENGINEERING LIMITED:: APPELLANT

VERSUS

FOREST CITY ENGINEERING TECHNICAL SERVICES LIMITED::::::::: RESPONDENT

(Arising from the decision of the High Court at Kampala (Commercial Division) in High Court Civil Suit No. 232 of 2012 before His Lordship David K. Wangutusi, J delivered on 13th November, 2014)

JUDGMENT OF HELLEN OBURA, JA

Introduction

The appellant filed this appeal in this Court against the respondent seeking for orders that the appeal be allowed, the judgment and decree of the trial court be set aside, the award of the trial court of Ushs. 341,267,762/= with interest at 10% p.a be set aside, the award of costs to the respondent by the trial court as taxed by the Registrar be set aside, the appellant be awarded Ushs. 327,387,491/= being monies for materials supplied to the respondent, the execution proceedings and garnishee order absolute be set aside, the respondent pays back to the appellant Ushs. 6,023,065/= plus USD 4,880.76 it obtained vide garnishee order absolute and the costs of the appeal and those of the trial court be awarded to the appellant.

According to the appellant's case, these prayers are premised on breach of contract of the construction of a High Voltage Line and Associated Voltage Lines from Katakwi to Moroto (hereafter called "the contract") entered into between the appellant company and the respondent company on 14th September, 2010.

At the scheduling conference, the agreed facts were that there was a written sub-contract with a specified scope of work, fully described under clause 1.0 of the subcontract, the works performed were as specified in the bills of quantities and part payment was made in that respect. The appellant terminated the sub-contract and in the High Court, judgment was entered in favour of the respondent for the sum of Ushs. 341,267,762 with interest at 10% p.a running from termination until payment in full. The rest of the facts were disagreed.

Background to the appeal

The brief background to this appeal are that the Government of Uganda through the Rural Electrification Agency (REA) contracted the appellant, a company incorporated in India, to construct a 33kv High Voltage Line and Associated Voltage Lines from Katakwi to Moroto. The appellant sub-contracted the respondent for execution of the works vide a memorandum of agreement dated 14th September, 2010. The works comprised of survey, pole erection, stringing and dressing, installation of major equipment, finishing, testing and handover. It was estimated and agreed by the parties that the scope of works at Unit Rates, VAT inclusive, costed UShs. 1,320,280,170/=. In the course of performing the sub-contract, the respondents separately hired a lorry (crane) to the appellant. The appellant equally took hardware-material supplies from the respondent to fulfil commitments on their contract. The works progressed until the appellant terminated the sub-contract, citing the respondent's fundamental breach of the terms of the contract. Being aggrieved by the appellant's decision, the respondent brought an action against the appellant for unlawful termination of the contract and refusal to pay for the works fully performed.

The suit was heard and determined by the trial court which found in favour of the respondent and ordered that the appellant pays the respondent a sum of Ushs. 341,267,762/= with interest at 10 % p.a from the date of termination till payment in full plus

costs of the suit. Being aggrieved with the trial court's decision, the appellant filed this appeal on the following grounds:

1. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence hence arriving at a wrong conclusion that the respondent had hired out its motor vehicle to the appellant for 29 days and wrongfully awarding of Ushs. 14,000,000/= to the respondent.*
2. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record as regards the actual mileage/distance that was to be surveyed by the respondent according to the contractual works, thereby finding that the respondent surveyed a distance of 236.6km, whereas not.*
3. *The learned trial Judge erred in law and fact whereby he erroneously relied on the inconsistent testimonies and evidence of the respondent and hence arrived at a wrong conclusion that the respondents supplied 247 stubs and thus entitled to a balance of Ushs. 8,000,000/= whereas not.*
4. *The learned trial Judge erred in law and fact when he solely relied on the respondent's evidence, ignoring the appellant's evidence, thereby erroneously finding that the respondent had supplied line hardware material worth Ushs. 108,044,500/= whereas no evidence had been adduced to that effect.*
5. *The learned trial Judge misguided himself when he used wrong formula to compute the extent of the contract works that the respondent had performed hence wrongfully awarding an excessive amount of Ushs. 341,267,762/=.*
6. *The learned trial Judge erred in law and fact and contradicted himself whereby whereas he made a finding that the respondent's contract had lawfully been terminated for fundamental breaches, he later found that the respondent had performed 60 % of the contract entitling it to the sum of Ushs. 341,267,762/=.*
7. *The learned trial Judge erred in law and fact when he failed to evaluate the evidence on record when he found that lack of demand for materials meant the appellant was satisfied with materials that had been recovered and hence coming to a wrong*

conclusion that the appellant was not entitled to the sum of Ushs. 327,387,491/= for materials supplied to the respondent and not used in the contract works.

8. *The learned trial Judge erred in law and fact when he awarded Ushs. 171,532,946/= as retention monies, which sum was neither pleaded nor proved.*

Representations

At the hearing of this appeal, Ms. Sarah Kisubi appeared with Ms. Diana Leah Mugenyi for the appellant while Kabagenyi Madinah and Mr. Byekwaso Godfrey appeared for the respondent.

With leave of court, the memorandum of appeal, was amended such that the name of the appellant company which appeared on the memorandum of appeal as *"A2Z MAINTENANCE & ENGINEERING SERVICES LTD"* was corrected to read *"A2Z INFRA ENGINEERING LIMITED"*. This Court also allowed addition of grounds 9 and 10 as contained in the memorandum of appeal attached to the affidavit in support of the application. The 2 additional grounds are as follows:

9. *The learned trial Judge erred in law and fact when he failed to award damages as had been prayed for by the appellant in its counterclaim having found that the contract had been rightfully terminated by the appellant.*
10. *The learned trial Judge erred in law and fact when he failed to award costs on the counter claim as had been prayed for by the appellant.*

Both counsel adopted their conferencing notes and were allowed to file written submissions in respect of the 2 new grounds.

Appellant's Arguments

On ground 1, the appellant faulted the learned trial Judge for failing to properly evaluate the evidence hence arriving at a wrong conclusion. This is in regard to the motor vehicle which

the respondent hired out to the appellant in respect of which the learned trial Judge awarded Ushs. 14,000,000/= to the respondent. Counsel for the appellant submitted that the trial Judge merely accepted the respondent's claim and failed to follow the well-established legal principle as laid down in ***Siree vs Lake Turkana El Molo Lodges Ltd. (2000) 2 EA 520*** that special damages must be strictly pleaded and proved. Alternatively, counsel submitted that if the learned trial Judge was compelled to believe the respondent's evidence, he would only have considered the period between 25th February 2012 and 6th March, 2012 which is 10 days hence the sum of Ushs. 5,000,000/= which had been paid hence leaving a balance of Ushs. 4,500,000/=.

On ground 2, counsel submitted that whereas all the evidence was on record, the trial Judge erroneously evaluated the same as regards the actual mileage/distance that was surveyed by the respondent. He added that the contract provided for survey of 151 km of the 33kv High Voltage powerline and Associated Low Voltage networks at Katakwi-Moroto with tee off to Matany and Lorrengedwat. Counsel argued that the learned trial Judge principally based his finding on PW1's evidence wherein he fraudulently claimed to have surveyed additional areas at Nadiket Seminary and Nawatanwo Primary School which areas are within Katakwi-Moroto and the tee offs to Matany and Lorrengedwat and are part of the original scope as per the drawings on record. He prayed that the learned trial Judge's finding be quashed and this Court finds that the respondent was fully paid for the survey work.

Regarding ground 3, counsel submitted that had the learned trial Judge taken the contradictory claims of the respondents into consideration, he would have had no basis to find that the respondent supplied 247 stubs, was paid a total of Ushs. 1,500,000/= leaving a balance of Ushs. 8,000,000/= due to him. He pointed out that the respondent in PW2's written statement claimed to have supplied 247 stubs for which Ushs. 500,000/= was paid

leaving a balance of Ushs. 9,500,000/=. In addition, a purchase order adduced by the respondent which was relied upon by the learned trial Judge to find that the plaintiff had received Ushs. 1,000,000/= out of 9,500,000/= revealed a supply of 247 stubs at Ushs. 8,743,800/=. Similarly, a summary of the monies due to the respondent which is part of the respondent's written statement (item "C") shows that the respondent received Ushs. 1,257,000/= leaving a balance of 8,743,000/= due to him. The respondent also claimed in his last invoice forwarded to the appellant after 3 months of termination of the contract, that there was a balance of Ushs. 8,850,000/= for supply of 250 stubs. Counsel submitted that since the respondent failed to clearly specify with certainty the amount of his various claims for the supply of the stubs and to strictly prove the same, he was not entitled to recover any of the monies.

On ground 4, counsel submitted that the purported claim for supply of material was an afterthought in a bid to extort money out of the appellant. He added that the respondent never supplied any such materials and that is why he never raised any invoice demanding for any such payment prior to the fabricated claims in the plaint.

Counsel submitted on grounds 5 and 6 that evidence was adduced in court to prove that the respondent's workers had started to abandon the site for non-payment of wages. He argued that this implies that the respondent was unable to perform 100% of the 90km scope he was left with and instead performed only 54km which is 60% of the 90km. He added that the respondent was therefore entitled to only Ushs. 472,132,188/= and since the learned trial Judge found in his judgment that the respondent was paid Ushs. 478,050,442/=, it means that he was overpaid by a sum of Ushs. 5,918,253/=. Counsel contended that this is the correct position, the learned trial Judge should have considered. He prayed that this Court quashes the learned trial Judge's decision and finds in favour of the appellant. Counsel also

submitted that the learned trial Judge erroneously awarded the respondent retention without any ground or basis and prayed that this award be set aside.

On ground 7, counsel submitted that the appellant led evidence to show and prove to court that it supplied materials to the respondent worth Ushs. 372,266,812/=. Further, that by the date of termination of the contract, the appellant had only recovered Ushs. 44,897,321/= leaving a balance of materials not returned worth Ushs. 327,387,491/=, which evidence PW2 admitted to in his witness statement. Counsel thus prayed that this Court quashes the finding of the learned trial Judge regarding this ground.

Ground 8 was abandoned by the appellant.

Regarding ground 9, counsel submitted that it is trite law that the action for general damages is always available as of right when a contract has been breached. He argued that general damages flow automatically from the wrong inflicted on a claimant by a defendant to the end that whenever an injury is done to a right, the law will presume damages. Counsel submitted further that the learned trial Judge erred in omitting to consider the appellant's prayer for general damages yet it rightfully deserved an award and assessment of damages to be made by the trial court. He prayed that this Court makes an award and assessment of damages to the appellant, with interest and costs, to put it back in the same position it would have been if the respondent had not committed the breach. He also prayed that the award of damages made, should be commensurate to the value of the contract which was Ushs. 1,320,280,170/=.

On ground 10, counsel submitted that it is trite law that costs of any action, cause or matter follow the event unless the court for good cause orders otherwise. He argued that it is a natural and probable consequence that the costs incurred by the appellant on its

counterclaim should have been ordered to be paid by the respondent, the trial court having found that the respondent had breached the contract. He prayed that this Court orders the respondent to pay costs in the lower court and in this Court.

Respondent's Arguments

On grounds 1 and 2, counsel submitted that the learned trial Judge ably handled the appellant's claim regarding the motor vehicle which the respondent hired out to the appellant and he awarded Ushs. 14,000,000/= to the respondent. He prayed that this Court maintains this award. He further submitted that the learned trial Judge was right in finding that the respondent surveyed a distance of 236.6km, and upholding the initial quantity actually reflected in the legends. He prayed that this Court disregards the appellant's manifest attempt to misdirect it as it did in the lower court, by insisting that the extra distance was not invoiced by the respondent.

On grounds 3 and 4, counsel submitted that the learned trial Judge observed that the appellant did not contest the respondent's evidence of supply of line hardware materials and thus correctly awarded Ushs. 108,044,500/= for the same as well as the balance due. However, counsel argued that the additional correct balance that the learned trial Judge should have recorded in his conclusion is Ushs. 8,500,000/= and not Ushs. 8,000,000/=. He concluded that therefore the sums due under the items are Ushs. 116,544,500/=.

Regarding grounds 5 and 6, counsel submitted that the appellant's arguments are out rightly fallacious and misleading. He contended that the learned trial Judge reasonably evaluated the evidence before court and his conclusions were, on the whole, correct. He added that subsequent to termination of the sub-contract, the court's principal post-construction contract termination obligation was to determine the reasonable and discernible claims between the parties based on the evidence available. Counsel illustrated by computation

that resultantly, the average performance ratio was approximately, 62%. He invited this Court to either maintain the 60% performance ratio which is Ushs. 792,168,102/= as a reasonably applied approximation, or enhance the same to a more accurate average of 62% which is Ushs. 818,573,705/= of the contract value (Ushs. 1,320,280,170/=) derived from the financial records and other evidence of the parties which makes a difference of Ushs. 26,404,603/=. He prayed that this Court agrees with the above computation.

On ground 7, regarding the materials supplied to the respondent, counsel submitted that the respondent having exhibited hardly-challenged promissory written proof, the learned trial Judge considered it sufficient to justify the award of costs for materials had and received by the appellant. He prayed that this Court upholds the learned trial Judge's decision.

In response to ground 9, counsel submitted that the appellant was awarded Ushs. 112,050,298/= by the learned trial Judge as damages being money ostensibly spent on the contractors, which sum however, was set off from the overall award by the trial court. He added that the appellant is not entitled to any damages and prayed that this Court answers this ground in the negative and re-instates the assessed sum to the respondent.

On ground 10, counsel contended that the appellant is not entitled to any of the claims in the counterclaim and he invited court to so find. He further prayed that this Court orders that the appellant pays costs to the respondent for defending the counterclaim in the lower court and in this Court.

In rejoinder, counsel for the appellant submitted that the respondent's arguments and prayers for this Court to recompute, re-assess, vary and enhance the awards made in the lower court and also find that the court was wrong in finding that the termination was lawful, amounted to the respondent cross-appealing without following the required procedure. He

argued that the respondent's arguments ought to be limited to responding only to the grounds and arguments by the appellant. He prayed that all submissions made outside the appellant's appeal be disregarded and struck out.

Regarding grounds 9 and 10, counsel submitted in rejoinder that the learned trial Judge awarded Ushs. 112,050,298/= to the appellant as special damages, which he specifically pleaded and proved during trial as money spent by him to pay to the sub-contractors to complete the works that the respondent had not done. He argued that what the appellant seeks this Court to consider, assess and award are general damages which were occasioned resulting from gross financial loss, inconvenience and embarrassment caused by the respondent's gross breach of contract when it failed to complete the work assigned to it and on several occasions abused timelines accorded to it. He prayed that this Court finds in favour of the appellant and strikes out the respondent's legal arguments for being offensive to the law and procedure and also awards costs to the appellant.

Analysis and Findings

Before I discuss my findings and decision on this appeal, I wish to point out that when this appeal was argued before us and adjourned for judgment on notice, a letter from counsel for the respondent dated 22/6/2018 was brought to our attention on 25/6/2018. By that letter, counsel for the respondent requested the Deputy Registrar of this Court, to place before us for directions on the disposal of an application for an order to validate the respondent's notice of appeal filed out of time and that the said cross-appeal be duly considered by us during the course of making the final decision on the appeal.

We discussed this matter as a panel and found the approach adopted by counsel for the respondent rather strange and contrary to the principle of natural justice which is entrenched under Article 28 of the Constitution. The respondent's counsel wants this Court

to give direction on disposal of an application seeking an order to validate the notice of a cross-appeal that would be considered together with the main appeal which has already been argued before us. First of all, in our view, it would amount to this Court facilitating a back door entrance into the system after the main appeal is heard. Secondly, accepting that kind of arrangement would in effect amount to condemning the appellant unheard on those grounds of cross-appeal, which were not argued inter parties before us. For those reasons, we rejected counsel for the respondent's request.

I now turn to consider the grounds of appeal argued before us. As I do so, I am alive to the fact that this Court has a duty as the first appellate court under rule 30(1) (a) of the *Judicature (Court of Appeal Rules) Directions SI 13-10* to re-appraise the evidence and come up with its own conclusion. Having duly perused the court record and considered the written submissions of both counsel, I will now proceed to determine the grounds raised in this appeal.

On ground 1, the appellant faults the learned trial Judge for failing to properly evaluate the evidence regarding the hired motor vehicles which led to an award of Ushs. 14,000,000/= to the respondent.

PW1, Raphael Bwatota Sulia, the Project Manager of the respondent in his witness statement at page 491 of the court record, stated that the appellant hired the respondent's vehicle, a crane carrier, at a rate of Ushs. 500,000/= from 25/02/2012 to 24/03/2012 but the appellant only paid for one day of hire. Conversely, DW1 Gourav Baweja the acting Project Manager of the appellant company stated in his witness statement that the appellant used the respondent's truck for only 1 day at Ushs. 500,000/= which was duly paid.

The letter which was written by the respondent's Managing Director, Yahaya Kasoma Kabalega to the appellant's Project Manager indicated that the truck had spent more days

than anticipated in the appellant's custody and its hire amount had reached Ushs. 15,000,000/= as per the agreed rate. On that very letter, DW1 on behalf of the appellant put an endorsement with the words *"Received and Noted for action."*

In his judgment at page 40 of the court record, the learned trial Judge observed as follows:

> *"By the conduct of DW1 in telling court that he had used the vehicle for only one day yet by the reaction of the demand note it was all clear that it had been for several days. I am inclined to disbelieve DW1 and believe the evidence of PW1.*
>
> *It is my finding therefore that the motor vehicle which came into possession of the defendant on 25th February, 2012 was returned on 25th March, 2012-29 days later.*
>
> *Going by the cash voucher attached to Annexure 'C' the rate of hire was Ushs. 500,000/= per day; 29 days therefore amounted to Ushs. 14,500,000/= from which one would subtract the Ushs. 500,000/= already paid leaving Ushs. 14,000,000/= as unpaid money due and owing to the plaintiff by the defendant."*

Upon my own review of the evidence highlighted above, I note that the appellant through its Project Manager (DW1) does not completely deny the fact that it used the truck but he only contends that it was just for 1 day. DW1 in his witness statement pointed out that between 25/02/2012 when the respondent allegedly hired the vehicle to the appellant and 24/03/2012 when it was allegedly returned there were only 28 days and not the 40 days claimed in the plaint and in the evidence of PW1. He then challenged the respondent for failing to tell its driver to return the vehicle at the time it sent a demand letter to the appellant. DW1 however did not tell court when it took possession of the vehicle and when it returned it to the respondent to support his claim that it was hired just for 1 day.

I am not inclined to believe the account of DW1 because had it been that the vehicle was hired for 1 day, the cash voucher would have clearly stated so instead of calling it advance.

In addition, DW1 does not deny that the respondent wrote a demand note on 6/03/2012 for the return of the vehicle. If indeed the vehicle was used for 1 day and returned, what would again cause the respondent to send that written demand to the appellant and why would the appellant not protest it?

In the absence of any evidence to the contrary, I cannot fault the learned trial Judge for his finding that the motor vehicle which came into possession of the defendant on 25/02/2012 was returned on 25/03/2012 which was 29 days later. The only small error I would correct is the fact that the vehicle was returned on 24/03/2012 according to the evidence of PW1 and not on the 25/03/2012 as stated by the learned trial Judge.

As regards the rate of hire of the vehicle, it was pleaded by the respondent and PW1 also testified that it was Ushs. 500,000/= per day. The learned trial Judge evaluated the evidence and agreed with the respondent that the rate of hire was Ushs. 500,000 per day according to the agreement. He relied on the cash voucher dated 23/02/2012 which indicated that advance of Ushs. 500,000/= was paid to Mr. Yahaya for Crane Hire (Store at Katakwi). To my mind, this voucher does not state the rate of hire of the motor vehicle per day but rather advance payment for the vehicle hire. It therefore cannot be used to prove the rate of hire.

Be that as it may, DW1 did not contest the hire rate. His only problem was the number of days the appellant hired the vehicle which according to him was only for 1 day at a cost of Shs. 500,000/= which was paid. For the reason that the appellant accepted the hire rate to be Ushs. 500,000/= per day, I would accept that it was the agreed rate then just as the learned trial Judge rightfully did, I would multiply that sum by the 29 days the appellant had possession of the respondent's motor vehicle, which would be Ushs.14,500,000/= less the advance payment of Ushs. 500,000/=. The outstanding balance of Ushs. 14,000,000/=

would then be due and owing to the respondent. In the premises, save for the minor errors pointed out above and corrected, ground 1 would fail.

On ground 2 the appellant faults the learned trial Judge for failing to properly evaluate the evidence on record as regards the actual mileage/distance that was to be surveyed by the respondent according to the contractual works, and thus wrongly found that the respondent surveyed a distance of 236.6km.

The respondent had pleaded that it provided survey services to the appellant company at a cost of Ushs. 41,860,500/= for which it was only paid Ushs. 28,320,000/= leaving a balance of Ushs. 13,540,500/= due and owing. A summary of the distance surveyed and the amount paid as well as the outstanding balance was attached as annexure "B" to the plaint together with a map showing the area surveyed. It is indicated in the summary that the distance surveyed was 180.0 km of HV + 20.5 Km 3 phase LV + 36.6 KM 1 phase LV=180+56.5=236.5. Details of the area surveyed was provided in the map.

The appellant stated in its written statement of defence that the contractual work covered was not more than 155 km and an allowance of 5 km was added making the actual line 160 km as shown on page 2 of annexure 1 to the contract. Further that the appellant was to survey 160 km and when it presented an invoice dated 16/11/2010 with escalated survey line kilometres the appellant rectified this to the actual line being 160 km for which the appellant was fully paid.

PW1, stated in his witness statement that originally in their written instructions, they were to survey 151km which were later changed to 181km and afterwards they received verbal instructions to add an extra distance at Nawatanawo Primary School and Nadiket Seminary thus bringing the total distance surveyed to 236.5km. PW2, Yahaya Kasoma Kabalega

confirmed at page 99 of the court record that they surveyed 236.5 km. He added that the agreement stated that they survey 151km but they received verbal instructions to increase the distance to 181km and later to 236.5km.

On the other hand, DW1 stated that the respondent presented an invoice for payment claiming that it surveyed 211 km but after verification by the defendant engineers on the ground it was established that the survey covered not more than 160 km. He then contradicted himself by saying the appellant's site engineers carried out an independent survey exercise and the survey drawings showed that the distance was 151 km plus 12 km for LV networks which means the survey covered a distance of 163km and not 160. During cross examination DW1 at page 138 of the court record conceded that calculation of the figures provided by the respondent gave 236.5km as the total distance surveyed. Asked what would be the reason for the variation between what was actually received and what was paid for, DW1 gave no answer.

The learned trial Judge relied on the legend tendered in evidence by the respondent which had also been received by the appellant on 8th December, 2010. He then found as follows;

> *"The diagram showed that a distance of 236km were surveyed. DW1 stated that the initial survey was of 151 km but the defendant had approved 160km when the plaintiffs presented their claim for payment. The diagram however, clearly indicated a total of 236.5km were surveyed. The defendants received this document which was presented in court during cross-examination and DW1 did not fault the document. It follows therefore that while the original contract was to survey 151 km, additional work was given to the plaintiffs to survey. Approving 160km instead of 151 km initially agreed is in itself indicative that the defendant had subsequently increased the distance to be surveyed by the plaintiff which distance DW1 during cross examination admitted when he looked at the legend. Since the legend gives a total distance of 236.5km, this court is convinced and finds that the distance surveyed by the plaintiff was 236.5km..."*

I note from the court record that the contract between the parties was initially a written agreement marked Annexure "AZ1" in which the appellant sub-contracted the respondent to construct 33kv power lines and Associated Low Voltage networks at Katakwi-Moroto with tee off to Matany and Lorrengedwat which distance according to both parties was 151km. I further note that the respondent submitted an invoice to the appellant on 16/11/2010 with a description; Surveying Katakwi-Moroto Line, Quality 211 km which were cancelled out and reduced to 160km for an amount of Ushs. 28,320,000/= which was verified for payment.

The evidence on record as summarised above imply that there were verbal variations of the distance to be surveyed. While the respondent consistently stated that they surveyed a total distance of 236.5 km and provided a breakdown and maps as proof of that, the appellant kept giving contradictory figures relating to the distance surveyed. I am more inclined to accept the respondent's case as it is supported by the evidence on record. In the premises, I agree with the finding of the learned trial Judge that the distance surveyed by the respondent was 236.5km. For that reason, ground 2 fails.

On ground 3, the appellant faults the learned trial Judge for relying on the inconsistent testimonies and evidence of the respondent and hence arriving at a wrong conclusion that the respondents supplied 247 stubs entitling it to a balance of Ushs. 8,000,000/= whereas not.

I must point out that the respondent annexed some documents to its plaint (Annexure "D") being a purchase order from the appellant dated 06.02.2012 for 247 stay stubs at a total value of Ushs. 8,743,800/=. Clause 15 of the purchase order which the learned trial Judge referred to in his judgment states that One Million Uganda shillings was paid to M/s. Forest City Engineering & Technical Services Ltd for arranging the fuel for the transportation of first lot of stay stubs.

That purchase order quoted **Job Ref; No. REA/ERT/108-9/3 (Lot-2 33Kv line from Bobi Kamdini**). It should be noted that the suit contract is **Job Ref; REA/WRKS/09-10/00334/2 (Lot 2 Katakwi-Moroto with tee offs to Matany and Lorengedwat).** Attached to the purchase order are some documents which include a cash voucher from the appellant company dated 27/02/12 showing that Shs. 500,000/= cash advance was paid to Mr. Yahaya for transport of stay stubs to Kamdini and some handwritten acknowledgments of receipt of stubs.

The appellant in its amended written statement of defence contended that the respondent's annexure "D" (a purchase order dated 06/02/2012) was in respect of stubs for the Kamdini site whereas the acknowledgments of the receipt of stubs annexed thereto were in respect of Ibanda and Katakwi. Furthermore, that the purchase order was made in February 2012 and the acknowledgments of receipt were dated in 2011.

PW1 stated in his witness statement that the 247 stubs were supplied by the respondent at a time when the appellant company was erecting another line in Kamdini at a cost of Ushs. 35,400/= each inclusive of value added tax of 18%. Further, that the respondent charged Ushs. 1,257,000/= for transport out of which ushs. 500,000/= was paid to the respondent leaving an outstanding balance of Ushs. 9,500,800/= for both the stubs and transport. He also stated that the stubs were delivered to Kamdini by the respondent's company driver and they were received by their store officials on 08/02/2012.

DW1 in his witness statement stated that the annexures attached in proof of supplies of the stubs were dated in 2011 and the annexures for receipt of 247 stubs claims a signature of the appellant's site manager who was based at Katakwi-Moroto and not the Kamdini site where the respondent claimed it had delivered the stubs. He stated further that clause 15 of the said purchase order indicated that one million advance was paid to the respondent and

yet in its witness statement the summary of the respondent's transactions with the appellant, item C thereof showed that the respondent received Ushs. 1,257,000/= leaving an outstanding balance of Ushs. 8,743,800/=. In effect, DW1 contended that the respondent's supporting documents for this claim had contradictions.

The learned trial Judge while resolving this issue stated as follows;

> *"Counsel for the defendant submitted that there were contradictions in the plaintiff's claim and the evidence of PW1 in respect of money due on the stubs. While it is true that there are contradictions, it is also true that there were purchases of stubs by the defendant from the plaintiff.*
> *By clause 15 in the purchase order, it is clear that the plaintiff received Shs. 1,000,000/= on signing for the delivery of the stubs. It is also clear from the cash voucher dated 17th February 2012 that the plaintiff was paid Shs. 500,000/= also towards transport which he acknowledged.*
> *Having received Shs.1,500,000/= the remaining claim of money due and owing on the stubs supplied is Shs. 8,000,000/=."*

I have subjected the evidence adduced to support this claim to a fresh scrutiny and my finding is that there are some irreconcilable contradictions in them. First of all, the dates on the purchase order (Annexure "D") which is 06/02/2012 is later than the dates on some of the alleged acknowledgment of receipts of the stay stubs. One of the acknowledgments indicates that on 20/11/2011 "kicking broke stubs 183" were received by a person who only appended his or her signature without indicating the name. Another page indicated that on 02/10/2011 a total of 248 "king starbs" were received but there was no signature or name of the recipient. It is not explained whether the stubs were delivered before the purchase order was signed. Secondly, even if it were to be taken that there were advance deliveries, the number of stay stabs delivered would still be way higher than what was ordered, that is 183 plus 248 which totals 431 stubs.

Thirdly, there is a page indicating that on 08/02/2012 a total of 247 stay stubs were received by a person who signed and indicated his name, although the letters are not very clear to me, it appears to be Vinay Ranjan. But when this evidence is considered together with the evidence of a cash voucher from the appellant company dated 27/02/12 showing that Shs. 500,000/= cash advance was paid to Mr. Yahaya for transport of stay stubs to Kamdini it presents another aspect of contradictions or should I call it confusion. My general understanding of the word 'advance payment' is that it is money paid ahead of something or upfront as it were. Collins English Dictionary states that;

> *"Advance payment is payment that is made before goods or services are provided.....The advance payment is the good-faith money your client pays when you both sign a contract or letter of agreement."*

So if the advance payment of Shs. 500,000/= was made on 27/02/12 before the stay stubs were transported how possible was it that those same stay stubs would be delivered and received on 08/02/2012 which would be 19 days before the advance payment. Besides, it is not even explained in the evidence where the acknowledgment was done, that is, whether in a delivery book or on a sheet of paper. All that was tendered in evidence were photocopies of those handwritten notes whose original source was not disclosed. Even if there were no contradictions on the date of delivery, I would still doubt the authenticity of the alleged proof of delivery of the stubs.

Lastly, clause 15 of the purchase order which the learned trial Judge referred to in his judgment indicates that an advance of Ushs. 1,000,000/= was paid to the respondent for arranging the fuel for the transportation of first lot of stay stubs. The learned trial Judge having agreed that there were contradictions in the respondent's claim, nonetheless considered this payment and added it to the advance payment of Shs. 500,000/= for transport and found that a total of Shs. 1,500,000/= was paid which left Shs. 8,000,000/= remaining and owing on the stabs supplied.

With the greatest respect to the learned trial Judge, I do not agree with this finding and conclusion. To my mind, the unexplained sharp contradictions pointed to deliberate attempts to patch up otherwise weak evidence in support of the claim for supply of stubs. It is noteworthy that these stubs were allegedly supplied on credit at a time when the respondent was under great pressure from the appellant to complete work under the contract and its workers, according to the evidence on record, were rioting due to none payment of their wages. In fact according to the letter from the Resident District Commissioner, Katakwi dated 8th November 2011, the relevant part of which the learned trial Judge quoted in his judgment, the respondent had caused a crisis to service providers by failing to pay them. One therefore wonders why the respondent would in those circumstances supply those stubs to the appellant on credit and not make any demand for payment but only wait for the contract to be terminated and claim it in court.

In the premises, I find that the contradictory evidence adduced by the respondent did not prove on a balance of probabilities that it indeed supplied 247 stubs to the appellant on credit which were not paid for. The claim for Shs. 9,500,800/= would therefore fail. Consequently ground 3 succeeds.

Ground 4 is in regard to the supply of line hardware material worth Ushs. 108,044,500/=. The appellant contended that this was an afterthought in a bid to extort money from the appellant since no evidence had been adduced to that effect. DW1 in his evidence denied this claim on the basis that no purchase order or an invoice certified by the appellant was attached to support it. I note that the respondent adduced in evidence a list of things that were supplied to the appellant with an endorsement of Mr. Ashwani Khosla, the site engineer of the appellant who signed the same and wrote the words *"money to be paid off later"*. In my considered view, this evidence showed that the respondent indeed supplied

the hardware materials to the appellant in 2011, which materials were to be paid for later. I therefore reject the appellant's contention that this was an afterthought by the respondent and as such I agree with the learned trial Judge that the respondent supplied materials worth Ushs. 108,044,500/= to the appellant. This ground therefore fails.

On grounds 5 and 6, the appellant faults the learned trial Judge for using a wrong formula to find that the respondent had performed 60% of the contract entitling it to the sum of Ushs. 314,267,762/=. In his evaluation of the evidence relating to these grounds, the learned trial Judge found that the respondent had only performed 3 stages (that is pole erection, dressing and stringing) out of the 6 stages of the scope of work that was to be performed. As a result, he found that the 80% claimed by the respondent would be too high and in the premises, he considered 60% to be the appropriate percentage of the work done by the respondent. Therefore he computed the amounts due as follows:

> *"60% of the total contract sum (1,320,280,170/=) equals to 792,168,102/=. Thus, 792,168,102 - 478,050,442 (amount already paid) =314,117,660/=".*

In conclusion, the learned trial Judge found that the total outstanding amount due to the plaintiff for services rendered to the defendant was 314,117,660/=.

I must point out that a joint expert assessment of the work done by the respondent as at the time of termination of the contract should have been done and this would have eased the work of the learned trial Judge but this was not done. In the absence of an expert assessment, I agree with the learned trial Judge's conclusion that the estimate of the work performed by the respondent would be 60%. This is based on the evidence on record which shows that the respondent had only performed 3 out of 6 stages of the work contracted, one of which (pole erection) seemed more strenuous and hazardous than the rest as observed by the learned trial Judge.

I must however, point out that there is a disparity between the sum considered by the learned trial Judge as the amount paid to the respondent and what was actually pleaded in the respondent's plaint at page 210 of the court record. It is on record that by the time the appellant terminated the memorandum of agreement, it had paid the respondent a sum of Ushs. 439,124,342/=. This was rightfully captured by the learned trial Judge at page 20 of his judgement (page 45 of the court record). However, during the computation of the amount due, the learned trial Judge instead of deducting the amount paid of Ushs. 439,124,342 from the 60% value of the completed work which was Ushs. 792,168,102/=, he erroneously deducted a different sum of Ushs. 478,050,442/=. I have corrected this error by deducting the Ushs. 439,124,342/= which is the right figure from Ushs. 792,168,102/= thus leaving a sum of Ushs. 353,043,760 as the total amount due to the respondent for the services rendered to the appellant.

Having done the computations above, the learned trial Judge proceeded to consider the appellant's claims which included unused material, advance payments, additional costs for completing work. He found that; the respondent did not owe the appellant any money for materials that allegedly remained at the time of termination of the contract. He found that the unpaid advances was Ushs. 181,019,896.28/=; and the additional costs for completion of work amounted to Ushs. 112,050,298/=. Having so found, the learned trial Judge computed the respondent's claim and set off the appellant's claim from that of the respondent thereby arriving at a sum of Ushs. 341,267,762/= as the amount the respondent was entitled to recover from the appellant. I must point out that much as the learned trial Judge found the unpaid advances to be Ushs. 181,019,896.28/=, during his final computation he erroneously used a different figure of Ushs. 175,917,046/= as the advance payments and found the amount due to the appellant to be Ushs. 287,967,344/= which he offset from what was due to the respondent.

I have corrected the error by doing a fresh computation and I now find as follows;

Respondent

Motor vehicle use by defendant	14,000,000/=
Survey works	13,540,500/=
Line hardware material	108,044,500/=
60% contract performance	353,043,760/=
Retention	171,532,946/=
Total	**660,161,706/=**

Appellant

Advance payment	181,019,896.28/=
Additional costs	112,050,298/=
Total	**293,070,194.28/=**

To set off the appellant's claim I have deducted 293,070,194.28 from 660,161,706/= which gives a sum of 367,091,511.7/=. I therefore find that the respondent is entitled to recover **Ushs. 367,091,511.72/=** from the appellant as opposed to the **Ushs. 341,267,762/=** arrived at by the learned trial Judge. The trial court's finding on this ground is accordingly adjusted by correcting the amount due and owing to the respondent as above. In the premises, save for the correction of arithmetical errors, grounds 5 and 6 also fail.

Ground 7 relates to the finding of the learned trial Judge that lack of demand for materials meant that the appellant was satisfied with materials that had been recovered and as such it was not entitled to the sum of Ushs. 327,387,491/= being the value of the materials supplied to the respondent and not used in the contract works. The learned trial Judge considered the evidence of DW1, DW3 and PW3 together with annex "M" regarding this issue and he found that silence on the part of the appellant showed satisfaction with the items recovered

since annex "M" received no resistance and it indicated that all the remaining materials had been collected.

I have looked at annex "M" and I note that it indicates the materials that were recovered by the appellant on 19/4/2012 from Matany- Lorengedwat and those items that were in the store. I observe that there is a side note with the word *"all materials held by forestry engineering have been taken."* I have also observed that the recipient appended his signature after receiving the materials. There is no evidence on record to show that the appellant's agents demanded for any missing items. The recipients of the materials were never called to testify in court regarding what items went missing, if at all there were any. To my mind, the claim by the appellant of a sum of Ushs. 327,387,491/= for materials supplied is an afterthought. I also do not find any basis upon which the trial court could have awarded the sum claimed since no evidence was adduced to prove the same.

In the premises, I cannot fault the learned trial Judge for finding that the respondent did not owe the appellant any material that remained at the time of termination of the contract. This ground also fails.

In regard to ground 9, the appellant submitted that the learned trial Judge erred when he failed to award damages as had been prayed for by the appellant in its counterclaim having found that the contract had been rightfully terminated by the appellant.

General damages are the direct probable consequences which may be loss of use, loss of project, physical inconvenience, mental distress, pain and suffering. ***See: Kyagulanyi Coffee Ltd vs Steven Tumusange, CACA No. 9 of 2001.*** They are awarded at the discretion of court and they should be compensatory in nature in that they should restore

some satisfaction, as far as money can do it, to the injured plaintiff. ***See: Takiya Kashwahiri & anor vs Kajungu Denis, CACA No. 85 of 2011***.

In the instant appeal, the learned trial Judge found that the appellant rightfully terminated the respondent's contract. The appellant had filed a counterclaim in which he claimed recovery of Ushs. 112,050,298/= as money spent to rectify the faulty and poor work done by the plaintiff in some areas and to complete the work the respondent had left pending at the time of termination of the contract. In his evaluation of the remedies available, the learned trial Judge computed the appellant's expenses for completion of the work left by the respondent and rectification of the shoddy work based on the evidence on record and found that it totaled Ushs. 144,473,627/= which was over and above the amount claimed by Ushs. 32,423,329/=. He then found that the appellant was only entitled to the Ushs. 112,050,298/= which it claimed under that head and he fully awarded it.

As regards the claim for general damages for breach of contract in the counterclaim, the learned trail Judge did not at all consider or even allude to it. He only considered the respondent's claim for general damages for unlawful termination of the contract which he said the respondent was not entitled to in view of his finding that the contract was lawfully terminated.

I have reviewed the appellant's evidence in support of its claim for general damages. DW1 stated in paragraph 43 of his witness statement that the appellant had grossly suffered financial loss, inconveniences and embarrassment for the respondent's fundamental breaches of the contract for which the appellant held the respondent squarely liable in special damages, exemplary and general damages and costs. He had earlier given a chronology of events from the time the contract was signed and when work commenced and the respondent's failure to perform the contract to their satisfaction and within time. He also demonstrated the interventions they kept making and the final decision to terminate the

contract and engage other companies to complete the work as others rectified the shoddy works. Indeed the learned trial Judge upon evaluating the evidence found these breaches to have been proved and declared that the contract was lawfully terminated. There is therefore no doubt in my mind that the appellant suffered financial losses, inconveniences and embarrassment due to the respondent's breaches of the contract. While the financial losses was atoned for by the award of the Ushs. 112,050,298/= which the appellant claimed as special damages, there was no award for the inconveniences and embarrassment suffered by the appellant.

Be that as it may, I must observe that the learned trial Judge also found that the appellant had withheld some of the payments that were due to the respondent which, in my view, could have assisted the respondent to perform the contract better and avoid some of the breaches which led to termination of the contract. In the circumstances, I would be reluctant to award any general damages to the appellant as its claim under this head is not brought with clean hands.

For that reason, this ground also fails.

The last ground is about costs and the appellant faults the learned trial Judge for failing to award it costs on the counterclaim as had been prayed for. The appellant's counterclaim in the instant appeal, largely succeeded in the trial court as the learned trial Judge found; firstly that there were breaches of the contract by the respondent which made termination of the respondent's contract lawful; secondly that the appellant was entitled to a refund of the money it had advanced to the respondent and thirdly that the appellant was entitled to recover the money it had spent to complete work under the contract and to rectify the faults in the works done by the respondent. The appellant's claim for value of unused materials that were supplied to the respondent and not returned and the claim for aggravated damages, general damages, costs of the suit and interests were not successful.

On the other hand, the respondent's claim succeeded as a whole and the learned trial Judge awarded it full costs of the suit. ***Section 27(2) of the Civil Procedure Act (Cap.71)*** provides that costs are awarded in the discretion of court and shall follow the event unless for good reasons the court directs otherwise. Also see: ***Jennifer Rwanyindo Aurelia & anor vs School Outfitters (U) Ltd, CACA No.53 of 1999.***

It is my considered view that since the appellant's counterclaim largely succeeded the respondent should not have been awarded 100% of the taxed costs. Had the learned trial Judge addressed his mind to that fact, he would have given 50% of the costs to the appellant especially in view of the finding by the trial court that the respondent's breach of the contract led to its termination by the appellant. I therefore find that the learned trial Judge did not properly exercise his discretion in awarding costs. In the premises, ground 10 succeeds.

On the whole, grounds 3 and 10 of this appeal succeed while grounds 1, 2, 4, 5, 6, 7, and 9 fail for lack of merit and they are accordingly dismissed. The appellant is awarded 50% of the costs in this appeal and in the lower court.

I so order.

Dated at **Kampala** this ....20th....day of ....December....2019

.....

Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPEAL NO. 47 OF 2016

A2Z INFRA ENGINEERING LTD :: APPELLANT

VERSUS

FOREST CITY ENGINEERING TECHNICAL SERVICES LTD ::RESPONDENT

CORAM:

HON. MR. JUSTICE HELLEN OBURA, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

I have had the opportunity to read in draft the judgment of my learned sister Hon. Lady Justice Hellen Obura, JA.

I agree with her reasons and conclusions as well as the orders she has proposed. This appeal should succeed in grounds 3 and 10 and fail in grounds 1, 2, 4,5,6,7 and 9 for lack of merit. The appellant is awarded 50% of the costs in the appeal and in the lower court.

Dated at Kampala this.....20th.....day of .....Dec.....2019

.....

Stephen Musota
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 47 OF 2016

(Coram: Hellen Obura, Stephen Musota & Christopher Madrama, JJA)

A 2 Z INFRA ENGINEERING LTD} .....APPELLANT

VERSUS

FOREST CITY ENGINEERING TECHNICAL SERVICES LTD} .RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Hellen Obura, JA.

I agree with her that the appeal lacks merit and should be dismissed. I agree with the analysis of facts and the resolution of the grounds of appeal. I have nothing useful to add.

Dated at Kampala the 20th day of ~~November~~ Dec 2019

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 47 OF 2016

(Coram: Hellen Obura, Stephen Musota & Christopher Madrama, JJA)

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I agree with her that the appeal lacks merit and should be dismissed. I agree with the analysis of facts and the resolution of the grounds of appeal. I have nothing useful to add.

Dated at Kampala the 20 day of ~~November~~ Dec 2019

Christopher Madrama

Justice of Appeal