

TANZANIA / JUDGMENT

syscon builders ltd vs the psn of agriculture fs 2 others 2004 tzhccomd 35 1 october 2004

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO. 84 OF 2003 SYSCON BUILDERS LTD..... PLAINTIFFS
VERSUS THE PERMANENT SECRETARY MINISTRY OF AGRICULTURE AND FOOD
SECURITY..... 1st DEFENDANTS GIBB (EASTERN AFRICA)
LTD.....2nd DEFENDANTS THE HON. ATTORNEY GENERAL..... 3rd
DEFENDANTS

JUDGMENT

KALEGEYA, J: The Plaintiffs represented by C. Tenga, Advocate, claim against the Defendants, praying for judgment and decree for: - “(a) A declaration that the Plaintiff is entitled to Tshs. 126,439,409.40.....

- (b) The 2nd Defendant be barred from denying that the Plaintiff is entitled to a total of Tshs. 88,393,217.10 as principal amount plus interest as (a) above payable to the Plaintiff under Certificates Nos. 1, 2, 3, 4, previously rejected by the 2nd Defendant,
- (c) The 1st Defendant be ordered to pay to the Plaintiff Tshs. 126,439,409.40
- (d) General damages 2
- (e) Interest at 31% per annum from the date of filing this suit until

judgment.

- (f) Interest at court's rate from the date of judgment till payment in full.
- (g) Costs of this suit be borne by the Defendants.
- (h) Any other and further relief(s) and orders as this Honourable Court shall see just. ” The 1st and 3rd Defendants are represented by Mr. Chidowu, State Attorney while the 2nd Defendants are represented by Mr. Bakilana, Advocate. In support of their case, the

Plaintiffs called one witness, Mbilima Mnyaga (PW1), their Director, and tendered 7 documentary Exhibits (Exh.Pl - 7). In defence, the 1st and 3rd Defendants called one witness, Boniface Nkuba (DW1), an Engineer working with 1st Defendant and a project supervisor, while the 2nd Defendants called two witnesses, David Kimingi (DW2) and Paulo Karekezi (DW3), both working with the 2nd Defendants as a Senior Engineer and Managing Director respectively. On Exhibits, while 1st and 3rd Defendants tendered two (Exh.DI - D2), the 2nd Defendants tendered one (Exh.D3). The following stand undisputed. On 15th July 2000, the Plaintiffs and 1st Defendants executed an agreement (Exh.Pl) by which, the former undertook to effect construction 3 works on a project known as "Luganga Irrigation Scheme Construction Works Contract No. 511P/CN/03" in Iringa. This work was awarded to the Plaintiffs in their capacity as the 2nd highest bidders, the first, Godes Ltd, having failed to perform mid - way. The Construction site was handed over to the Plaintiffs on 1/8/2000. Construction was supposed to be completed within 200 days, up to 17/2/2001. However, it took an additional 420 days and attracted over 70 variations. The Project Engineer was Gibb (Eastern Africa) Ltd whose Director was based in Nairobi, Kenya, its Resident Engineer at Arusha and Assistant Resident Engineer at the site. The Engineer's duty was to administer and supervise execution of the construction works including approval of certificates for payments to Plaintiffs for work done. Among the Interim Payment Certificates (IPCs) lodged by the Plaintiffs with the 2nd Defendants for payment are IPC 1-4 (Exhibits DI, P2, P3 and P4). Some items in the four IPCs, though effected by the Plaintiffs and approved by the site Engineer and the Resident Engineer were not approved by the Engineer hence were not paid for. In terms of clauses 24 and 25 of Exh.Pl, for the works not paid for, the dispute was referred to the Adjudicator, who after hearing the parties made his finding dated 6th July, 2001 (Exh.P7) and recommended, 4 "It is the opinion of the Adjudicator that both the Engineer and the Contractor are contractually obliged to save the project by exercising fairness to both the client and the contractor, within the contractual limits. Therefore the Adjudicator recommends to the client to direct the Engineer to:

- (i) Identify canal chainages that qualify to be accepted as fitting the site clearance definition and then make joint measurements and determine the involved scales of variation and reasonable extension of time. Alignment changes, if any, claimed by the contractor should be carefully examined. (ii) Obtain supportive data to verify and conclude magnitude of extension of time as previously demanded by the Engineer for the variation order issued for Cross Drainage Structures. (Hi) Prove that hard material encountered on temporary canal actually fits into the rock definition (in BOQ preamble) and arrive at a reasonable determination of an extension of time. This recommendation (Hi) assumes that the original Site Investigation Report did not advise tenders about existence of rock in the sections under dispute. " Subsequently however, the 1st Defendants supplied further information to the Adjudicator who revised the first findings. In this 2nd finding (Exh.D2 dated 28/9/2001) the opening paragraph runs: "The Adjudicator's report of July 2001 had been reconsidered after the RESPONDENT submitted clarifications on particular items in DEFENCE. Therefore the Report of July 2001 becomes FIRST 5 EDITION and these new considerations will form

SECOND EDITION”, while in part C thereof the Adjudicator recommends:- “As stated in the first edition it is the opinion of the Adjudicator that both the Engineer and the Contractor are contractually obliged to save the project by exercising fairness to both the Client and the contractor, within contractual limits. Therefore the Adjudicator recommends to the client to direct the Engineer to:

- (i) Examine all canal alignment changes (shifting), if any, claimed by the contractor to determine if execution of Works in the shifted sections demanded additional construction efforts, beyond soil stripping to qualify for site clearance considerations. (ii) Obtain support data to verify and conclude magnitude of extension of time as previously demanded by the Engineer for the variation order issued for Gross Drainage Structures. (ii) Confirm rock hardness by laboratory tests for project records, for rocks encountered along temporary canal (s). Given under my hand this 28th day of September 2001 Sgd: Adjudicator” The Adjudicators’ efforts did not put the dispute at rest hence the present suit. I should pose here and state that notwithstanding quoting the prayers’ paragraph at the beginning of this judgment, regard being had to the nature of the controversy, for better appreciation, particulars of the claim as reflected in para. 10 of the plaint should be reproduced. The said paragraph provides: “The details of Plaintiff’s particulars of claim for amount denied and herein claimed, are as follows:
- (a) IPC No. 1 Site clearance for main canal ch. 6040 - 11310 which ought to have been paid at the rate of Tshs.1000.00 per square meter, but the second defendant approved and the first defendant paid Tshs.300.00 per square meter for stripping top soil only leaving the balance of Tshs.36,890,000.00 which is now claimed as a rightful entitlement denied to the Plaintiff
- (b) IPC No. 2: Claim for completed works which included site clearing of 7990 sq. meters for Tertiary drain No. 12 ch. 0 - 799 which ought to have been paid at the rate of Tshs.1000.00 but paid at Tshs.300.00 only for stripping top soil leaving the balance of Tshs.5,593,000.00 stand to date unpaid and is herein claimed.
- (c) IPC No. 3: For claim of completed works which included 7
 - (1) Site clearing for sections of main canal, two tertiary canals and one tertiary drain all totaling to 30,963 sq. meters. The 2nd Defendant approved and 1st Defendant paid Tshs.300.00 for top soil stripping only instead of Tshs.1000.00 per sq. meter leaving the deference of Tshs.21,674,100.00 outstanding and due to the Plaintiff.
 - (2) . Further, the Plaintiff claim for completed work, for cutting, stumping and disposal of 408 trees with firth greater than 500 mm, which ought to have been paid at the contractual rate of Tshs.10000.00 per tree, a total amount of Tshs.4,080,000.00 to date unpaid and lawfully due to the Plaintiff. The total amount claimed under this certificate is Tshs.25,754,100.00
- (d) IPC No. 4: Under this certificate the Plaintiff claim for:

- (1) Site clearing of tertiary canals and cattle trough with 23,782.529 sq. meters in total. In this, payment was made for top soil stripping only for Tshs.300.00 per square meter leaving the balance of Tshs.16,825,145.30 unlawfully withheld.
- (2) Further to above claim, the Plaintiff claim for cutting, stumping and disposal of 328 trees with 8 girth greater than 500 mm, to which the Plaintiff was entitled to a payment of Tshs.10,000.00 per tree, in total being Tsh.3,280,000.00. The same has been denied and stand unpaid to date.
- (3) That under the same certificate, the Plaintiff claim for site clearing for cattle trough inlet and outlet drains of 231.69 sq. meters amounting to Tshs.231,690.00 which was not approved until a year later that was 14th August 2002 under certificate No. 7. The Plaintiff claim interest from the date the amount became due until payment which amounts to Tshs.50,971.80.” The Defendants dispute the claims in total. The 1st and 3rd Defendant urge that site clearance was included in the general terms of the main contract under the item “top soil stripping” which was paid for - Mr. Chidowu makes reference to *Damudar Jinabhai & Co. Ltd v Eustace Sisal Estate Ltd* [1966] a.l.r Comm. 514 urging that Courts do not make contracts for parties but would tread on the express provisions of the contract and not otherwise; that that is what Plaintiffs contracted for (top soil stripping) after site inspection; that if the Plaintiffs did something else outside the main contract and without an order for variation that was at their own risk; that there is no question of delayed approval of IPC 3 (Exh.P4) as they (Plaintiffs) had undertaken works which had to get the employer’s approval first and that when approval was secured, payment was effected within the 28 prescribed days, negating the claim for interest, and finally, that the Adjudicator’s last finding reviewed the former hence there are no claims against them. The 2nd Defendant, on the other hand, urge that the staff at the site did not step into the shoes of the Engineer hence their approval of anything could not validate any claim if the Engineer found it unfit for approval as was the case here as per Exh.P6. On the meaning and interpretation of site clearance, the 2nd Defendants are on all fours with the other Defendants. On Adjudicator’s findings, the 2nd Defendants insist that they have no responsibility in dispute settlement under the contract and that under the said contract (Exh.Pl) there is no breach of duty they have committed, entitling Plaintiffs to claims made let alone a right of suing them. The Plaintiffs claim that they are entitled to payment for site clearance as it is different from soil stripping and that this should be treated under the contract, as variation as the site Engineer approved the same treading on what was authorized by the Engineer at the site meeting of 1.8.2000 and, in the alternative, that they deserve to be paid under the principle of “Quantum Meruit”. On trees, they insist that Exh.Pl provides for individual tree counting as a separate item and so are the prices adding also that the site Engineer gave his approval. On Adjudication, they impress that an Adjudicator is not mandated to revise his decision and that therefore the 2nd edition is no decision at all. On 2nd Defendants, the Plaintiffs urge that these are necessary parties. 10 Issues framed during the final pretrial and scheduling conference are as follows: “1. Whether under the contract, site clearance works were provided for as separate items which deserved to be paid for under Interim Payment Certificates Nos. 1, 2, 3 and 4 or were

deemed to be included in the Estimates of the main contract?

2. What was the approved rate for site clearance per square metre under IPC Nos. 1, 2, 3 and 4?
3. Whether cutting, stumping and disposal of 408 trees with girth greater than 500 mm was provided for as a separate item deserving to be paid for under IPC No. 3 or was included in the estimates of the main contract?
4. Under the terms of contract, what was the approved rate per tree under IPC No. 3?
5. Whether the 1st Defendant delayed approval of IPC No. 3 in respect of site clearing for cattle trough inlet and outlet drains of 231.69 sq. metres amounting to shs. 231,690.00.
6. If the answer to No. 5 above is in the affirmative, whether the Plaintiffs are entitled to interest thereof amounting to shs. 50,971.80?
7. What are the legal implications to the adjudicator's findings of 6th July, 2001 and 28th September 2001?
8. To what reliefs are parties entitled? However during the composition of this judgment, on 2nd reflection, and in terms of O. XIV, Rule 5 CPC, which provides: 11 "5.- (1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed" I have found it necessary to rephrase issue 1 and 3, re - arrange them; collapse issues 2 and 4 to form a single issue and add two more issues. Now issues 1 - 5 read: - "7. Whether under the contract, site clearance works were provided for as separate items or were deemed to be included in the Estimates of the main Contract?
2. Whether under the Contract, cutting, stumping and disposal of trees with girth greater than 500 mm was provided for as a separate item or was included in the estimates of the main contract?
3. Whether the construction works carried out by Plaintiffs and whose payment was claimed under IPC Nos. 1, 2, 3 and 4 were site clearance or top soil stripping?
4. Whether the Plaintiffs are entitled to payments for construction works forming part of claims under IPC 1, 2, 3 and 4, and, cutting, stumping and disposal of 736 trees with girth greater than 500 mm under IPC No. 3?
5. If the answer to issue 4 is in the affirmative, what were the approved rate for site clearance per square metre and approved rate per removed tree? Under this arrangement, the current issue 5 becomes issue 6 and those following are adjusted accordingly. Total issues are now 9 instead of 8. 12 Now, for the merits. Starting with issue 1 the evidence clearly shows that the site clearance works whose payment is being claimed, under Exh.Pl, were not provided for as separate items. PW1 is very categorical on this:- "The claim under para. 10 (a) concerns site clearance. This was not in the contract. This involves removal of topsoil, stumps and all

trees not exceeding girth of 500 mm. We did not present these claims under the certificate No. One. We presented them and they were rejected. We did carry out the site clearance from kms 6.04 up to 11.039 kms. The site clearance was not indicated in the bill of quantities but what was indicated was stripping topsoil. There is a difference between the latter and site clearance. Stripping topsoil is removal of soil which supports vegetation. ” Though not so provided, as to why the Plaintiffs are insisting that site clearance should be treated as a separate item now, PW1 goes on: “We lodged the claim following the initial meetings we held on 1/8/2000 when the site was handed over to us. This was between the Resident Engineer from Nairobi, the Assistant Resident Engineer from the Ministry, myself from the contractor and a Land Surveyor from the Ministry and attached to the Project. In the meeting, the site clearing issue cropped up. We told the Resident Engineer that the situation on the ground was different. He took me through the route where the project was to pass. This was done physically. He was called 13 Samwel. I noted that the canal was passing through a forest while when it was first shown to us it was passing along the road. I asked him about this. He said that wherever it will be noted that site clearing is required it should be recorded and measurements taken with his assistant. ” And, although submissions by parties/Counsel is not evidence (and obviously it is not easy for such party/Counsel to submit negatively against his case) it is no wonder that the Plaintiffs’ Counsel submitted, “...the Plaintiffs’ Counsel submits that it is entitled to payment for site clearance under contract as a variation and also under the principle of Quantum Meruit”. That said however, it is not correct to say that Exh.Pl is totally silent about “site clearance”. It mentions the same on three different instances while in the 4th instance the wording is simply “clear site ”. First, it is mentioned under “TECHNICAL SPECIFICATIONS FOR CONTRACTOR WORKS” part 2 (EARTHWORKS), item 201 entitled “site clearance ” (at page 22 of that part) with the following explanation. “1. The Contractor shall prepare the Site, or other areas where indicated on the Drawings or ordered by the Engineer by carrying out a general clearance of the ground and by removing trees and other vegetation to permit the proper execution of the Works. 14

2. Stumps and major roots shall be grubbed out and all combustible material arising shall be stockpiled at sites designated by the Engineer. Non combustible material shall be removed by the Contractor to approved tips. The Engineer may order certain trees to be left standing. ” Secondly, it is mentioned under s. 10 of the “Bills of Quantities” (at page 25 thereof), under a sub - title, “Site clearance ”, whose explanatory notes have the following: “The unit of measurement for site clearance shall be square metres. Site clearance shall be measured according to the design lines shown on the drawings or as indicated by the Engineer. The cutting, stumping and disposal of individual trees with girth greater than 500 mm shall be measured as unit items (No). Individual trees shall be counted by the Engineer and shall be measured independently of site clearance. The item description for cutting, stumping and disposal of trees shall classify the trees according to girth, measured 1m above the ground, as follows:

- a. less than 1m
- b. greater or equal to 1m. ” (emphasis mine) The side notes thereof have the following: - 15 “Site clearance shall include the stripping, removal and disposal of all grasses, shrubs and trees with a girth not exceeding 500mm. The item for removal of trees shall include for cutting, removal and disposal of all wood and branches, uprooting and disposal of stumps and roots and provision of suitable material and backfilling root holes including wetting to optimum moisture content and compaction. ” (emphasis mine) Thirdly, (and this is the most relevant) it is mentioned under the “Bills of Quantities General Summary”, Bill No. 6, item 6.1.1 and 4.14.1 where reference is made to 2500 and 250 sq. metres respectively, at the rate of shs,1000/= . Item 4.14.1 is only stated as “clear site”. The first and second instances are on generality while the third and 4th, though specific as they prescribe the sizes covered, are unrelated to the claims lodged. The answer to issue one therefore is that under the contract, site clearance works was provided for as a separate item only under Bill No. 6 of the Bills of Quantities, item 6.1.1 just for 2500 sq. m and item 4.14.1 for 245 sq. m. What about issue two (2) - cutting, stumping and disposal of trees with girth greater than 500 mm? 16 This issue should not waste much of our time. An answer has already been provided above. Under a paragraph subtitled “Site clearance”, under
- s. 10 of the Bills of Quantities quoted above, it is clearly provided that trees with girth greater than 500mm should be counted as separate items. Next we turn to issue three (3). Having carefully evaluated the evidence, I am satisfied that the construction works carried out by the Plaintiffs were indeed site clearance. Why? First, part of unchallenged PW1’s testimony as to why they claim for site clearance is already quoted. He insists that at the site meeting of 1.8.2000, the Engineer gave a green light to performance of such works under that separate item, having been impressed by Plaintiffs that the canals were not passing along the road as pointed out during the 1st visit but through a bushy area. The witness deposed that what was required was that measurements of such works be verified by the site Engineer. DW1 and 3 simply front a challenge to this but their evidence has no velocity to sway that of PW1 on this because they were not the Site Engineers nor Resident Engineer. They don’t allege to have attended the meeting. DW1 is categorical that he was at the 1st Defendants’ head office while DW2 confessed that whatever he came to know about the project was through general discussions on the 13 sister projects including the Luganga project. 17 “/ had information about Luganga as well because correspondences to Luganga Project were being copied to other projects. We used to have various meetings with Engineer at Nairobi hence I could also know something on the project. We had an occasion to discuss on Luganga informations and this was during the discussions with the Engineer in Company of other Engineers. We still discuss Luganga Project with other Engineers. ” DW3, though now the 2nd Defendants’ Managing Director, also stated that he became conversant with the project’s particulars mainly through reports. He deposed, “I started working with Luganga Project in February, 2002, as a Senior Engineer. I was the incharge of day to day running of the project and feeding back to the Engineer. There was no Engineer under me. The Senior Engineer is in Nairobi that is where I was. The Resident Engineer was at the site. He was Joseph

Gichuru. I was reporting to the Engineer, Dr. Avery". Clearly, this witness came into close contact with the project when it was almost coming to the end as he himself stated that it was handed over on 15/4/2002. And it would seem by them Gichuru had taken over from Gitoho. Thus, none of the three witnesses (DW1 - 3) can be a witness to what transpired at the site meeting. The Resident Engineer was Gitoho. This would have been a proper witness to defend their plight! They never bothered to bring him and they assigned no reason for that. A party who fails to front a relevant witness or adduced prompts the Court to draw a negative inference that if fronted or adduced it would be against the said party. Thus, PW1's testimony of this remains unscratched. Secondly, IPCs 1 - 4 (Exh.P2, 3, 4 and D2) clearly show that the various worksheets for site clearance are signed by both the Plaintiffs' and 2nd Defendants' representatives and each of these IPCs has a forwarding letter authored by the Resident Engineer whose wording of the main body is similar. One of such letters (in Exh.P2 which is also reflected in Exh.D1) runs as under: - "23 December 2000 Assistant Director, Crop Development, Irrigation RBM - SIIP Smallholder Irrigation Improvement Component Ministry of Agriculture and Co - operatives P.O. Box 9192 Dar es Salaam. Dear Eng. G.M. Kalinga, River Basin Management and Smallholder Irrigation Improvement Project Smallholder Irrigation Improvement Component Contract No. SIIP/CW/03 Luganga Irrigation Scheme Interim Payment Certificate No 1 We herewith enclose the original of the interim payment certificate No. 1 for the above project. Payment should be made within 28 days of the date of the certificate. Certain measured quantities exceed the quantities given in the bill of quantities. We confirm that these works have been constructed according to the Contract. 19 Yours faithfully for GIBB (Eastern Africa) Ltd. Sgd: Eng. Samuel Gitoho Resident Engineer" Two more correspondences also confirm that the site and Resident Engineers verified the construction works on site clearance and trees removal. One is dated 23 December, 2000, with the following contents: "23 December 2000 The Project Co-ordinator RBM-SIIP P.O. Box 9192 Dar es Salaam. Dear Mr. Masija, River Basin Management and Smallholder Irrigation Improvement Project Smallholder Irrigation Improvement Component Contract No. SIIP/CW/03 Luganga Irrigation Scheme Interim Payment Certificate No 1 - Variation Order No. 1 The above variation order arose as follows: The General Provisions of the Bill of Quantities states that individual trees shall be counted by the Engineer and shall be measured independently of site clearance. The corresponding bill item for trees is not provided in the Bill of Quantities. Yours faithfully For GIBB (Eastern Africa) Ltd. 20 Sgd: Samuel Gitoho Resident Engineer", while the other, dated 9th March, 2001 runs: "09 March 2001 The Project Co - ordinator RBM - SIIP Smallholder Irrigation Improvement Component Ministry of Agriculture and Co - operatives P.O. Box 9192 Dar es Salaam. Dear Mr. Masija, River Basin Management and Smallholder Irrigation Improvement Project Smallholder Irrigation Improvement Component Contract No. SIIP/CW/03 Luganga Irrigation Scheme Interim Payment Certificate No 2 The Interim payment Certificate No. 5 includes variations (Clause 40), which arose as follows: Tree cutting, stumping and disposal As Explained in IPC No. 2 Fill in Main canal This is to raise the existing ground to the required bed level in certain sections. Yours faithfully for GIBB (Eastern Africa) Ltd. Sgd: Samuel Gitoho Resident Engineer " 21 Although the Defendants argue (seemingly disowning

the substance of the above correspondences) that neither the site Engineer nor the Resident Engineer could exceed his delegated authority by certifying such works without the approval of the Engineer in Nairobi, DW1 - 3 are very clear in their testimonies that works were being supervised and approved by the Site Engineer who would certify them to the Resident Engineer, who in turn would send them to the Engineer in Nairobi for final approval and onward transmission to the Employer (1st Defendant) for payment. They concede that the project have had, one Gitoho as Resident Engineer -and Chemka as an Assistant Resident Engineer. They concede that these were exercising powers delegated to them. That being the case, if they wished to disown some of their acts, legally, under the rules of evidence, they had to prove that these Engineers exceeded their authority. Once the Plaintiffs established that these were Engineers put in those positions by the 2nd Defendants; that they (Plaintiffs) acted in consonance with their blessings; that the said Engineers certified in writing the works done, the burden swings to the Defendants to prove that all that was done was outside their (the site and Resident Engineers) delegated powers. And, they could only do this by establishing the ambit of delegated powers. They did not do this. It would defy common sense to buy a proposition that these Engineers were simply there, being paid by the 2nd Defendants, for doing nothing! Or, even to imagine that Gitoho could have guts of authoring such correspondences as already quoted without due authority. The Plaintiffs' position therefore remains unshaken. 22 Thirdly, the Defendants are netted by their own actions. While they alleged that the Engineers lacked authority, they admit, as also portrayed by evidence, that they effected some payments on site clearance and tree cutting with girth greater than 500mm in IPCs 1-2. If the said Engineers lacked authority, how come that payments were thus effected. It is irrelevant that later the Engineer decided to deduct the amounts earlier on paid. The above takes us to issue four (4). Flowing from the above, I am satisfied that the Plaintiffs are entitled to payments for site clearance and cutting, stumping and disposal of 736 trees. This is because the works were perfected by the Plaintiffs, measured and approved by the Engineer's agents as amply demonstrated above. It should be taken that the construction works and tree cutting formed part of the series of variations that characterized this project (76 variations!). The argument that variation works could not be carried out without securing the Engineer's approval or that of the employer, is defeated by the fact that, as for the Engineer, the site Engineer and the Resident Engineer's approval sufficed as they acted as his agents while the argument on lack of employer's approval is watered down by the fact that they were in the habit of effecting some payments without first giving that approval. DW1's testimony supports this view in entirety. He deposed, 23 "Under the contract there were variation works which the contractor did and were paid for. Variations would start at the site between Contractor and Engineers at the site: passed over to consultant and they would in turn be brought to us for approval. " Again, under cross examination by Mr. Bakilana, he conceded that at times the contractor would carry out works under variation without approval. He stated, "The canal for inlet and outlet were variations. The contractor worked on this without authority from the Consultant or ourselves. The contractor gave us problems and after due difficulties we finally approved as the work had already been done. " He does not end there. When answering questions by Mr.

Tenga he said, “The contractor is the one who prepares statements for payment. The site has a supervisor. Gibb had the Representative at the site. According to this the Representative of Gibb was Gitoho. Statements prepared by the contractor are seen by Representatives. When works are done the supervisor of Gibb would sign.” And yet still, we have one of the correspondences by the site Engineer (Chemka) to the Resident Engineer, Gitoho as another pointer to what was happening. This runs, 24 “Luganga Irrigation Scheme P.O. Box 389 Iringa 13/4/2001 Mr. S.K. Gitoho P.O. Box 8144 ARUSHA. RE: SITE CLEARING CHG 6040 - 0 (MAIN CANAL AND TCNO. 445 Please be informed that the under listed activities have been executed by the Contractor - SYSCON BUILDERS LTD. The quantities and vouchers for the activities will be submitted to you by the contractor for your approval. The applicable Items are as follow:

- Item 3.1.1: site clearing, m2 2400 (hg 0 - 300).
- Item 3.2.1: Site clearing, 4200 m (chg 300 - 1136 and chg 1536 - 4900) (8 x 4200m + 33600 m2)
- Item 3.3.1 site clearing, 8120 m2 (chg 6040 - 5325 & chg 5200 - 4900)
- Item 3.3.1: Site clearing, 8120 m2 (chg. 6040 - 5325 & chg 5200 - 4900)
- Item 3.8: Tertiary canal no. 4 for cutting trees & 500mm = 15 Nos Item 3.9: Tertiary canal no. 5 for cutting trees & 500mm =11 nos. These are variation works for which I kindly ask you to certify.. Sgd: D.N. Chemka - ARE” On the running of the Engineers functions, DW2 had this to say, 25 “The function of the Assistant Resident Engineer is to assist the Engineer and is appointed by the Resident Engineer. The latter appoints the Assistant from among his staff In this case, the Assistant Resident Engineer was appointed from the staff provided by the employer..... The Assistant Resident Engineer was employed by the Resident Engineer.” His testimony goes further, “The Director gets factual information from his staff..... The Engineer at the site was to record actual situation at the site. What the Engineer signs at the site signify what is actually at the site..... Indeed there was a delegation of powers to the Resident and Assistant Resident Engineer. The Engineer delegated the powers to the Resident Engineer in writing. The letter was addressed to Samwel Gitoho copied to the Contractor and Project Coordinator ...The same mode of delegation was employed to the Assistant Resident Engineer’s in writing.” With all the above can the Defendants still maintain that the Resident staff was acting without authority? 26 The above aside the Plaintiffs’ argument in the alternative (on Quantum Meruit) is not without substance. Section 70 of The Law of Contract Ordinance provides: “70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof the later is bound to make compensation to the former in respect of or to restore, the thing done or delivered; Provided that no compensation shall be made in any case in which the person sought to be charged had no opportunity of accepting or rejecting the benefit I have amply demonstrated above that the Plaintiffs executed the said works with the 2nd Defendants’ approval hence the proviso to the said provision of The

Law does not apply. Thus, the Plaintiffs would still be entitled to the payments under the said provision. We turn to issue five (5) As already indicated, under item 6.1.1 and 4.14.1 of the “Bills of Quantities General Summary” the rate provided for site clearance is shs.1000/= per square metre. The Plaintiffs are entitled to this rate. As regards the rate payable per tree, again having held that the site and Resident Engineers had the requisite authority, and invoking s. 10 of The Bills of Quantities already quoted which, among others, provide, 27 “Individual trees shall be counted by the Engineer and shall be measured independently of site clearance”, and the said Engineers having verified the said stumping and cutting and fixed the rate as per the work sheets contained in Exh.P2, 3, 4 and Exh.DI and all this cemented by Gitoho’s letters forwarding the IPCs, examples being the two letters of even dated (23/12/2000) and the third, dated 9/3/2001 and the 4th dated 13/4/2001, all fully quoted above, I have no doubt in my mind that the rate of shs. 10,000/= per tree is the proper rate. The answer to issue 5 therefore is that the rates at which the Plaintiffs are entitled payment are shs. 1000/= per square metre for site clearance and shs. 10,000/= per tree with a girth greater than 500 mm. Turning to issue 6, it is not disputed that Exh.P5 (IPC No. 4) containing, among others, site clearing works for cattle trough inlet and outlet drains measuring 231.69 sq. metres valued at shs.231,690/= was first submitted for payment on 7/7/2000 but was paid on 12/7/2001. The Plaintiffs rely on item 43.1 of the conditions of contract urging that the 28- day’s period had long lapsed. The Defendants argue that there was no delay as it was work done as a variation before the Employer approved, adding however that payments were effectively made within the prescribed period when the approval was made. The said item reads 28 “Payments shall be adjusted for deductions of advance payments and retention. The Employer shall pay the Contractor the amounts certified by the Engineer within 28 days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing rate of interest commercial borrowing.” In terms of the said provision and on facts presented, I see no ground which would entitle the Plaintiffs to the prayer for interest. They have not challenged by evidence the Defendants testimony that when the works were included in IPC 4 the variation had not been approved. They were accordingly deleted from that IPC. It would seem the Plaintiffs resubmitted the claim again in IPC 7 and this time it was paid. The Plaintiffs did not tell us the changed circumstances which made them resubmit the same in IPC 7. We cannot assume the cause. The 28 days referred to in Item 43.1 therefore would commence upon the submission of IPC 7 and not IPC 4. The Plaintiffs have not alleged any delay relating to IPC 7. Issue 6 is answered in the negative and consequently so is issue 7. Issue 8 should not waste much of our time. Once parties have crossed the thresholds of Adjudicator’s door and present their dispute before the Court as is the case here, whatever decision that may have been reached by the said Adjudicator do not bind the Court in reaching its verdict but may be taken as part of evidence of what transpired leading to the filing of the suit. 29 We now turn to reliefs. Reading the prayers’ paragraph as reproduced at the beginning of this judgment in relation to paragraphs 9 and 10 of the Plaint one gets

mixed up as to where the Plaintiffs sourced the figure of shs. 126,439,409.40. Para. 10 has already been quoted. Paragraph 9 states: "The Plaintiff claims against the First Defendant is for unpaid sum of money amounting to shs.126,439,409.40 (One Twenty Six Million Four Thirty Nine Thousand Four Hundred and Nine Forty Cents Only) being principle sum plus interest due to the Plaintiff arose out of execution of the contract and whose approval has been denied by the Second Defendant through Interim Payment Certificates... " The principal sum claimed under para.10 totals to shs.88,393, 217.10. The claim under para.10 (d) (3) having been disallowed the principal sum would now be shs.88,343,245.30. The Plaintiffs also claimed general damages but failed to provide a back up thereof. However, I do appreciate that the Plaintiffs are entitled to interest on the principal sum from the date when it fell due till the filing of the suit. They also claimed interest of 31% p.a. from date of filing the suit till judgment but did not provide the basis of the rate quoted although they are entitled to some interest. 30 In conclusion, judgment is hereby entered in favour of the Plaintiffs in terms of paragraph 10 of the plaint save para. 10 (d) (3). The claim of shs.50,971.80 thereunder is dismissed. They are entitled to payment of shs.88,343,245.30. Awarded also is interest on the principal sum at the rate of 15% p.a. from June 2002 to date of judgment I have deemed it necessary to have a uniform cut off point as the claims under the different IPCs were made on different dates. And I have picked on June 2002 because by then the project had already been handed over (15/4/2002). Plaintiffs are also awarded interest of 7% p.a. on the decretal sum from date of judgment till payment in full. Defendants are also condemned in costs. L.B. KALEGEYA JUDGE Delivered L.B. KALEGEYA JUDGE 1/10/2004 6,292 words o. .3 true and correct r° the = r judg?m ent Rolling ■>ign /W' D • ~ "r~ ■ - i- _ / p 1 registrar Comm»t4jJ CoU?c "6sm. Da"----- _

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