

**Alpa Gama Engineering Enterprises Ltd
v Attorney General (Civil Appeal No. 54
of 2014) [2020] UGCA 69 (2 July 2020)**
[2020] UGCA 69

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- [2] As Barishaki Cheborion, JA., agrees with it too, this appeal is partly allowed in the terms and with the orders proposed by Muzamiru Kibeedi, JA.

Signed, dated and delivered at Kampala this $\frac{1}{2}$ day of $\frac{1}{2}$ $\frac{1}{2}$

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 054 OF 2014

(Coram: Egonda-Ntende, Cheborion Barishaki & Muzamiru. M. Kibeedi, JJA)

ALPHA GAMA ENGINEERING ENTERPRISES LTD:::::::::::::APPELLANT

\$10\$

VERSUS

ATTORNEY GENERAL:::::::::::::

(Appeal from the judgment of the High Court of Uganda delivered on 19th December, 2013 in Civil Suit No. 438 of 2010 by David K. Wangutusi, J)

JUDGMENT OF BARISHAKI CHEBORION, JA

I have had the benefit of reading in draft the judgment of my learned brother \$15\$ Muzamiru. M. Kibeedi, JA and I agree with him that this appeal should partially succeed.

I also agree with the orders he has proposed.

2nd day of JULY \$2020\$. Dated at Kampala this

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Barishaki Cheborion

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[CORAM: Egonda Ntende, Barishaki Cheborion and Muzamiru Kibeedi, JJA]

CIVIL APPEAL NO.54 OF 2014

BETWEEN

ALPHA GAMA ENGINEERING ENTERPRISES LTD ::::::::::: APPELLANT

VERSUS

ATTORNEY GENERAL :::::::::::

\$10\$ (Appeal from the Judgment of the High Court of Uganda at Kampala. Commercial Division [Hon. Mr. Justice David Wangutusi] dated the 19th December 2013 in HCT-00 - CC - CS - 438 - 2010)

JUDGMENT OF MUZAMIRU KIBEEDI. JA

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INTRODUCTION:

The Appellant in this appeal was the original Plaintiff in the suit filed in the High Court of Uganda at Kampala, Commercial Division, namely: HCT-00 - CC - CS -438 – 2010. Judgment was entered in its favour on the 19th of December 2013 by Hon. Mr. Justice David Wangutusi. This appeal is against part of the decision and Orders of the High Court of Uganda.

The background to the dispute is as follows:

On 15th August 2008 the Appellant and the government of Uganda, represented by the solicitor General, entered into a contract for the construction of the Regional Offices of the Ministry of Justice and Constitutional Affairs at Arua at the agreed consideration of Ug.shs. 984,618,278 (inclusive of Value Added Tax of 18%). Payments for the construction work done was agreed to be made

Page 1 of 15
Page 1 of 15
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against Certificates of Payment issued by the Project Manager. Ms Plantek Consultants, Architects, Planners, Engineers and Project Managers.

Execution of the construction works by the Appellant commenced on 1st September 2008. Along the way the Appellant, by the letter dated 24th February 2009 addressed to the Project Manager, requested for the contract price to be S increased by 15% to cater for the unforeseen increase in the cost of building materials and fuel/transport. By the letter of the Ag. Solicitor General to the Appellant Ref. No. ADM/35/01 dated 20th

April 2009, he informed the Appellant that the Ministry's Contracts Committee had met on 16th April 2009 and approved his request for an upward adjustment of the Contract sum by 15% \$10\$ (18% VAT inclusive) from the original contract sum of Ug.shs.984,618,278/= to Ug.shs.1,132,311,019/= (VAT of 18% inclusive). In the same letter the Ag. Solicitor General requested the Appellant to go to the Ministry to sign an Addendum to the original contract agreements. The record of Appeal does not have a copy of the signed Addendum and neither is there evidence of the Addendum having been signed at all.

Be as it may, construction of the works progressed to completion and, on 5th September 2009, the Appellant formally handed over the completed offices to government. On 5th October 2009 the Appellant wrote a letter to the Project Manager, with a copy to the Solicitor General, whose subject was titled "Our Submission for Final Project Account for construction of Arua MOJCA Regional Offices". However there is no evidence in the Record of Appeal to confirm that the Project Manager and Solicitor General received the said letter.

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The aforesaid notwithstanding, by the said letter the Appellant **inter alia** acknowledged receipt of a total of \$Ug.shs\$. 797,422,358/= (inclusive of withholding Tax) from government by way of advance payment and pursuant to the 5 Certificates of Payments issued by the Project Manager on diverse dates.

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The Appellant indicated that it was still owed the sum of Ug.shs.296,719,415/= (inclusive of 18% VAT) which it requested the Respondent to clear.

The Appellant was subsequently paid the sum of Ug.shs.110,050,414/= towards unpaid VAT for the construction works pursuant to the payment voucher signed on 27th May 2010 by the Passing Officer, Ministry of Justice and Constitutional Affairs (Exhibit D3).

In December 2010 the Appellant instituted Civil Suit No.438 of 2010 against the Respondent claiming Ug.shs. 268,234,880/= as the unpaid balance due on the contract (inclusive of VAT wrongfully retained by the Appellant and retention fees). The Appellant also sought to recover Ug.shs.72,213,230/= which it claims to have paid to the Uganda Revenue Authority (URA) as a penalty for nonpayment of VAT due to the Respondent's retention of the 18% VAT on the balance due to the Appellant. The Appellant also sought general damages, interest and costs of the suit.

In its Amended Written Statement of Defence (WSD) the Respondent denied \$15\$ the Appellant's claims and stated that the Appellant had been paid the full value of the work done and all the VAT that accrued from the contract.

In the Joint Case scheduling Conference Memorandum signed by the counsel for the Appellant and Respondent on 30th November 2012 and filed in the trial

- Court the following facts were agreed upon: \$20\$
- a) "That the [appellant] was on the 15th August 2008 contracted by the Government of Uganda represented by Ministry of Justice and Constitutional Affairs to construct regional offices for the said Ministry in Arua District at a contract price of Ug.shs.984,618,278/= (shillings Nine Hundred Eighty Four million Six Hundred Eighteen Thousand Two Hundred Seventy Eight only) VAT inclusive.
- b) That the above contract price was revised on 16th April 2009 by the Ministry's contracts Committee from the original contract price of Ug.shs.984, 618,278/= to Ug.shs.1, 132,311,019/= VAT inclusive due

Page 3 of 15

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to the rise in the prices of construction materials and fuel costs vide a letter dated 20th April 2009 basing on the actual value executed.

- c) That the [appellant] duly executed the entire contract works and handed over the premises to the said Ministry of Justice and Constitutional Affairs sometime in September 2009 and the same is being occupied and used today".

At the scheduling, two issues were agreed upon namely:

- a) Whether the Plaintiff was entitled to the sum claimed
- b) What were the remedies available to the parties?
- On the day set for the commencement of the hearing of the oral testimony of \$10\$ the Appellant's witnesses, the Respondent's counsel did not show up in court. With leave of court, the Appellant presented the evidence of its only witness, the Appellant's Managing Director, closed its case and made oral final submissions. Judgment was reserved for delivery on 19.12.2013.
- On 19th December 2013, the Learned Trial Judge entered judgment in favor of \$15\$ the Appellant against the Respondent for:
 - a) Ug.shs.5,605,617/= towards unpaid VAT;
 - b) Special damages of Ug.shs.17,674,628/= in respect of the unpaid balances on the contract sum due to the Appellant;

- c) General damages of Ug.shs.10,000,000/ \$=\$ to cover deprivation of the use of \$20\$ the above unpaid balance on the contract sum for a period close to 4 years w.e.f \$5\$ th September 2009 due to delayed payment thereof;
- d) Interest on the above special damages at the rate of 10% per annum from the 5th September till payment in full;
- e) Interest on the above general damages at court rate from judgment till \$25\$ payment in full; ucilee
- f) Costs of the suit.

Page 4 of 15

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The Appellant was dissatisfied with part of the judgment of the Trial Judge and it appealed to this Court.

GROUND OF APPEAL

In the Memorandum of Appeal filed by the Appellant in this Court on 02nd May 2014, the Appellant set out 5 grounds of appeal which were couched as follows:

- 1. "The learned Trial Judge erred in law and fact in failing to award Ug.shs.72,213,230/= being penalty on VAT paid by the appellant to Uganda Revenue Authority.
- 2. The learned Trial Judge erred in law and in fact when he failed to award the appellant Ug.shs.147, 629,741/= being the value of the variations *under the revised contract.*
- 3. The learned Trial Judge erred in law and fact in awarding the appellant a paltry sum of Ug.shs.17,674,628/= as special damages instead of unpaid contract sum of Ug.shs.340,448,110/= VAT inclusive plus the value of variations executed under the revised contract.
- 4. The learned Trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record as a whole or at all and thus came to a wrong conclusion.
- 5. The learned Trial Judge erred In law and fact when he awarded the appellant interest of 10% per annum on special damages instead of commercial rate of 25% per annum claimed in the plaint."

REPRESENTATIONS:

When the Appeal came up for hearing, the Appellant was represented by Mr. Alex Kyandia and Mr. Allan Tumwesigye while the Respondent was represented by Mr. Richard Adrole, Principal state Attorney, assisted by Mr. Wizera Franklin, State Attorney.

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SUBMISSIONS BY COUNSEL:

Counsel adopted their respective Conferencing Notes but were allowed by court to orally make some additional clarifications on their written arguments. The

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arguments of each party will be subsequently set out when analyzing each particular ground of appeal to which they relate.

ANALYSIS BY COURT:

As a First Appellate Court, the duty of this Court in an appeal of this nature is to re-evaluate the evidence before the Trial Court and draw its own inferences of \$\overline{5}\$ fact while making allowance for the fact that it did not have the opportunity enjoyed by the Trial Court of seeing or hearing the witnesses. See Rule 30(1) of the Judicature (Court of Appeal) Rules S. I 13-10, Pandya Vs R [1957] EA 336, The Executive Director of National Environmental Management Authority (NEMA) Vs Solid State Limited, Supreme Court Civil Appeal \$10\$ No.15 of 2015(unreported).

It is with the above principles in mind that I now proceed to discuss the grounds of appeal as presented by the parties.

GROUND NO. 1: CLAIM FOR PENALTY ON VAT OF UGX 72,213,230/=

The first ground of appeal was framed as follows: The learned Trial Judge erred \$15\$ in law and fact in failing to award Ug.shs.72,213,230/= being penalty on VAT paid by the appellant to Uganda Revenue Authority.

The above ground appears to arise from the Learned Trial Judge's findings and decision which he set out on page 4 of his judgment as follows:

"In the plaintiff's claim, he said he was owed retained VAT and the \$20\$ Penalties that accrued from delayed payments. During the hearing however, the plaintiff conceded that VAT was indeed paid by the defendant to the tune of Ug.shs.176,569,455/=. He said the defendant now only owed him Ug.shs.5,605,617/=. Since the defendant did not dispute the VAT owed, the plaintiff is awarded *Ug.shs.5,605,617/= as VAT unpaid."*

Page 6 of 15

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In their submissions, the Appellant's counsel criticized the Learned Trial Judge for failing to take into account the time when the VAT payments were made by the respondent to the appellant. They submitted that the respondent made the VAT payments late with the consequence that the appellant could not remit the same to the Uganda Revenue Authority (URA) within the time prescribed by the Value Added Tax Act, Cap 349.

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As a result, on 30th July 2009 URA imposed a penalty of Ug.shs.72,213,230/= as per exhibit PE8 which the Appellant paid in order to avoid the risk of closure and possible freezing of its accounts by URA and also to continue with the performance of the contract. They concluded by stating that the Learned Trial Judge had erred in not ordering the respondent to refund the VAT penalty of \$Ug.shs.72,213,230\$ = suffered by the Appellant.

The Respondent's counsel supported the findings of the Trial Judge. They submitted that after the Appellant's Managing Director had conceded that the VAT had been paid by the Respondent leaving a balance of only 15 Ug.shs.5,605,617/=, it was simply logical for the Learned Trial Judge to award the Appellant the sum of Ug.shs.5,605,617/= and not the colossal sum of Ug.shs.72,712,230/ \$=\$.

Analysis of the Record of Appeal reveals that in paragraph 7 of its Complaint, the Appellant claimed, by way of special damages, the VAT penalty of \$20\$ Ug.shs.72,213,230/= allegedly imposed by URA on the Appellant for defaulting to pay VAT, which default was stated to have been caused by the Respondent's retention of VAT at source instead of paying it to the Appellant for on ward remission to URA.

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Page 7 of 15 The alleged penalty was communicated to the appellant by the URA letter dated 30th July 2009 which was tendered into the evidence before the Trial Court as exhibit P8. For ease of reference I will reproduce its contents below:

> UGANDA REVENUE AUTHORITY. Domestic Taxes Department, Kampala South. P. O BOX 7286. KAMPALA. 30th July 2009

Our ref: B91-1007-7229-V \$10\$

> The managing Director, Alpha Gamma Engineering **Enterprise Limited** P. O BOX 29605. Kampala

Dear Sir,

Re: TAX AUDIT FOR MAY 2007 - FEBRUARY 2009

The above audit conducted on your business between May 2009 and July 2009 has been finalized.

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Please find below a summary of our audit findings:

TAX	TAX	PRINCIPAL	PENALTY	TOTAL	PERIOD
2009	HEAD	VAT	71,392,387	72,213,230	143,605,617

It is important to note that we have made several efforts to meet you for a reconciliation of the findings but you have never bothered to respond.

Please, if we don't hear from you by Monday 3rd August 2009, this assessment will be confirmed without any further warnings.

Note that interest will accrue at the rate of 2% per month from the date the tax should have been paid and will continue to accrue through to the date the liability is settled.

Yours faithfully,

Bashabe Beliah

MANAGER, KAMPALA SOUTH

CC: Supervisor, Payment and Service Delivery

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In my opinion, the above letter was not sufficient evidence to entitle the Appellant to the refund of the VAT penalty claimed on the following grounds:

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- a) The tax audit was not specific to the appellant's VAT obligations under the suit contract. The audit appears to have been a more general VAT Tax Audit whose scope went beyond the suit contract.
- b) The period covered by the audit was from May 2007 February 2009 which. by necessary implication, included the period before the Appellant entered into the suit contract with the Respondent on 15.08.2008.

- c) The letter did not apportion how much of the penalty tax was attributable to the suit contract and how much was attributable to the other contracts which the Appellant had executed during the period under audit of May 2007-February 2009. This is especially so in light of the Respondent's letter dated 27.08.2009 to the Solicitor General (Exhibit P6) by which the Respondent indicated that at the time it had two projects under the Solicitor General's docket for which the VAT component had not been settled namely: Construction of Arua Regional Office and Construction of New Moroto Prison.

In the premises aforesaid, whereas in his judgment the Learned Trial Judge bundled the claim for the unpaid VAT together with the claim for the refund of the VAT penalty of Ug. Shs.72,213,230/= with the result that he never made a \$20\$ specific evaluation of all the relevant evidence on the record relating to the Appellant's claim for the VAT penalty of Ug. Shs.72,213,230/=. Nonetheless on re-evaluation of the evidence it has been revealed that the Appellant did not furnish the Trial Court with sufficient evidence to prove his entitlement to the VAT Penalty refund of Ug. Shs.72,213,230/= to the required standard. I would \$25\$

therefore find that the Appellant's ground no. 1 has no merit.

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GROUND NO. 2, 3 & 4: ASSESSMENT OF THE UNPAID BALANCE DUE TO THE APPELLANT UNDER THE CONTRACT

Counsel for the Appellant argued grounds 2 & 3 together. But I can add that even ground 4 could properly be joined with grounds 2 & 3.

All the above three grounds relate to the assessment by the Trial Judge of the $\overline{5}$ \$ outstanding sums due to the Appellant from the Respondent under the suit contract.

The complaint of the Appellant appears to be that the Learned Trial Judge based his assessment on the wrong contract sum of Ug. Shs.930,753,017/= instead of the revised contract sum of Ug. Shs.1,132,311,019/= and improperly \$10\$ evaluated the evidence relating to the payments made viz-a-viz the contract sum as adjusted and wrongly reached the conclusion that the Appellant was entitled to only Ug. Shs.17,674,628/= as special damages which was a very low sum instead of Ug. Sh.340,418,110/= (inclusive of VAT of 18% and variations value of Ug. Shs. \$147,629,741/= \$).

The Respondent disagreed. Counsel for the Respondent contended that the Respondent was liable for payment of only the amounts certified by the Project Manager. That the certified amount contained in the Final Certificate was Ug. Shs.930,753,017/=. That the Learned Trial Judge rightly considered the certified figure and properly evaluated the evidence and came to a correct conclusion that the appellant was only entitled to special damages of Ug. Shs.17,674,628/ \$=\$.

It is settled law that for this Court, as the first Appellate Court, to interfere with the award of damages by a Trial Court, the Appellant has to show that the Trial Judge proceeded on a wrong principle of law or that he misapprehended the evidence in some material respect and thereby arrived at a figure which was

Page 10 of 15

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inordinately high or low – See Byabalema & 2 Others Vs UTC (1975) Ltd, Supreme Court Civil Appeal No. 10 of 1993 (unreported), Administrator General Vs Bwanika James & 9 others, Supreme Court Civil Appeal No. 7 of 2003 (unreported), and Crown Beverages Ltd Vs Sendu Edward, Supreme Court Civil Appeal No.01 of 2005 (Unreported).

The Learned Trial Judge dealt with the question of how much money was owed to the Appellant by the Respondent on pages \$4 - 8\$ of his judgment thus:

"... during the trial, [the appellant] told court that the total amount paid to him so far was Ug. Shs. 907,472,772/=. It is therefore the difference between this figure and the contract sum as varied to Ug. Shs. 1,132,311,019/= which must be resolved ...

To decide whether the [appellant] is entitled to further payment, it is important to look at the terms of the contract.

The method of payment was by presentation of payment certificates ...

... from the record, it is clear that the defendant effected payment on 15 presentation of payment certificates duly checked and certified by the Project Manager.

In a contract where payment is based on certificates, the contract price simply remains an estimate. I can say further, that it remains an estimate after variation. The contract price in this case was varied by 15% of the figure to Ug. Shs. brought the contract price. *This* original 1,132,311,019/=. While this meant he could claim payment up to that figure, he could only do so by presenting certificates duly endorsed by the Project Manager.

The Plaintiff's final certificate issued by the Project Manager was dated \$25\$ \$3rd\$ September 2009...

> The certified amount was given to this court in Exh. D.2 as Ug. Shs.930,753,017/=. This document which formed the commissioning report and which was authored by the plaintiff on \$5^{\text{th}}\$ September 2009 days after the final certificate had issued is the most reliable evidence as this amount, less therefore \$It\$ is amount. the certified to Ug. Shs.907,472,772/= already recovered, that forms the money owed to the plaintiff by the Defendant.

The result is Ug. Shs.23,280,245/=. But this amount includes the unpaid VAT of Ug. Shs.5,605,617/= which if subtracted from the sum owed,

Page 11 of 15

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leaves, Ug. Shs.17,674,628/= and it is the sum of money awarded as special damages."

From the above, it is clear that the Learned Trial Judge heavily relied upon the certification by the Project Manager, especially the Final Certificate, to determine the unpaid balance due to the Appellant. The said Final Certificate had inter alia based its certification on the contract price stated to be Ug. Shs.984,653,973/=. A copy of the Certificate appears on page 209 of the Record of Appeal. In my opinion, the heavy reliance on the said Certificate was unjustified in the circumstances of this case for the following reasons:

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First, the Final Certificate was never tendered in court as an exhibit at all. Much \$10\$ as it was indicated under item 9 (b) (v) of the Joint Case Scheduling and Conference Memorandum (which I will subsequently refer to as the "Joint Scheduling Memo") as one of the documents that the Defendant/Respondent intended to rely upon, it is one of the Defendant's documents which were expressly stated under item 10(c) of the Joint Scheduling Memo not to have \$15\$ been agreed upon by the parties. So the Respondent could only tender it into Court during the oral testimony of their witnesses which did not happen in the instant case.

Secondly, the parties had agreed on three key facts in the Joint Scheduling Memo signed by Counsel for each of the parties on 30th November 2012 \$20\$ namely: \$\div\$

- a) That the original contract price was Ug. Shs.984,618,278/= (VAT inclusive);
- b) That the said contract price had been revised on 16th April 2009 from Ug. Shs.984,618,278/= to Ug. Shs.1,132,311,019/= (VAT inclusive); and
- c) That the Appellant had duly executed the entire contract works and handed \$25\$ over the premises to the Ministry of Justice and Constitutional Affairs \$\mathcal{L}\$

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sometime in September 2009 and that as of the date of signing the Joint Scheduling Memo on 30.11.2012 the Regional offices were being occupied and used by the Ministry.

The Joint Scheduling Memo appears on page 63-77 of the Record and it was signed slightly after three years of the handover of the regional offices to the \$\mathsf{S}\$ respondent in September 2009.

In the above circumstances, it was erroneous to the Trial Court to interpret the contents of the Final Certificate in isolation of the other non-contested evidence on the Court record, especially the agreed facts.

Further, the moment the parties agreed on the existence of a valid contract, the \$10\$ revised contract price of Ug. Shs.1,132,311,019/= (VAT inclusive) and complete execution of the contract by the Appellant, then the burden of proof shifted to the Respondent to prove that he had fully paid the full contract price of Ug. Shs.1,132,311,019/= (VAT inclusive) save for the sums admitted by the Appellant as received.

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In the instant case, the Appellant's Managing Director told the Trial Court that at the time of his testimony he had so far received a total sum of Ug. Shs.907, 472,772/=. As such, the Respondent had the burden to prove settlement of the balance which a simple calculation indicates to be Ug. Shs.224, 838,247/= (VAT inclusive). Without such evidence being adduced by the Respondent, that is the sum the Learned Trial Judge ought to have awarded the Appellant as the unpaid balance on the contract price had he to have addressed himself properly to the law and evidence in the matter.

As such grounds 2, 3 & 4 have merit. I would allow them.

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Page 13 of 15

GROUND NO. 5: INTEREST RATE AWARDED

The complaint of the Appellant under this issue is that the Learned Trial Judge wrongly exercised his discretion when he awarded the Appellant interest at the rate of 10% per annum instead of the commercial rate of 25% as claimed by the

Appellant. $\overline{5}$

> The respondent did not agree. Counsel for the respondent submitted that the trial judge critically analyzed all the relevant factors, including the fact that he had already awarded the appellant general damages. As such, they invited this court to reject this ground.

- For this court, as an Appellate court, to interfere with an award of interest by a \$10\$ trial court it must be shown that the trial judge has taken or failed to take into account a factor or factors he or she ought to have taken into account or that the award is so high or so low that it amounts to an erroneous estimate. - See Crane Bank Ltd v. Nipun Narottam Bhatia SCCA No. 02 of 2014.

- I have looked closely at the record of the lower court. The dispute before the 15 trial court having been of a commercial nature ought to have attracted interest at a commercial rate – See Ecta (U) Ltd Vs Geraldine Namirimu & Another, Supreme Court Civil Appeal No. 29 of 1994.

In my opinion, the rate of 10% per annum appears to have been rather on the lower side. I would raise it to 18% per annum from date of filing this suit till \$20\$ payment in full. Ground 5 accordingly has merit.

CONCLUSION

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In the final result, this appeal would partially succeed, and I would set aside the judgment and orders of the High Court and substitute them with the following *mannincipae* orders:

Page 14 of 15

- a) An award of special damages of Ug. Shs.224, 838,247/= (Uganda Shillings) Two Hundred Twenty Four Million Eight Hundred Thirty Eight Thousand Two Hundred Forty Seven Only (VAT inclusive) to the Appellant as the unpaid balance due on the revised contract price;
- b) An award of interest on the above sum at the rate of 18% per annum from $\$ \text{mathsf{S}} \text{\$}$ date of filing the suit in the High Court till payment in full.
- c) An award of $\$2/3\text{\$}$ of the costs in this Court to the Appellant in view of its partial SUCCESS.
- d) The award of general damages of $\$ \text{Ugx} \$ 10,000,000/=$ in favour of the appellant made by the High Court and not appealed against.
- e) Interest on the above general damages at the court rate from date of judgment of the High Court (19.12.2013) till payment in full.
- f) The award of costs of the suit in the High Court as made in favour of the appellant by the High Court and likewise not appealed against.
- 2 day of $\$ \text{JULY} \$ 2020$. Dated at Kampala this 15

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MUZAMIRU KIBEEDI Justice of Appeal

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Prepared on 14 October 2026 · Esheria