

UGANDA / JUDGMENT

M and B Engineers Limited v Uganda National Roads Authority and Another (Civil Appeal No. 316 of 2021) [2023] UGCA 118 (20 March 2023)

[2023] UGCA 118

COURT

Court of Appeal of Uganda

BEFORE

Kibeedi Mutangula, JA, Gashirabake, JA, Musoke, JA

CASE / FILE NUMBER

Civil Appeal No. 316 of 2021

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA CIVIL APPEAL NO. 0316 OF 2021

M & B ENGINEERS LTD:..... :.....APPELLANT**VERSUS****I. UGANDA NATIONAL ROADS AUTHORITY 2. ATTORNEY
GENERAL :..... :..... RESPONDENTS**

(Appeal from the decision of the High Court at Kampala (Commercial Division) dated 19 July, 2021 before Wamala, J. in Civil Suit No. 012 of 2016)

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA HON. MR. JUSTICE
MUZAMIRU MUTANGULA KIBEEDI, JA HON. MR. JUSTICE CHRISTOPHER
GASHIRABAKE, JA****JUDGMENT OF ELIZABETH MUSOKE, JA****Introduction**

This appeal arises from the decision dated 19th July, 2021 of the High Court (Wamala, J.) in Civil Suit No. 012 of 2016.

Background

By an agreement dated 10.03.2009, the Government of Uganda represented by the Ministry of Works and Transport (MOWT) contracted the Appellant to construct the Birara Bridge. The initial contract price was Ugx. 1, 290,205,000/= which was later revised upwards to Ugx. 1,765,894,500/=. The initial completion date was 30.11.2009 which was extended to 30.7.2010. The Appellant did not complete the works by the said 30.7.2010 and was penalized in liquidated damages by the 2nd Respondent for the delay.

Despite the penalty, the Appellant failed to complete the works and by letters dated 29.11.2011, 13.08.2012 and 21.08.2012, MOWT notified the Appellant of its intention to terminate the contract. By a letter dated 30.10.2012, MOWT terminated the contract citing failure to complete works within the completion timeframe and abandonment of the site for 28 days without permission. By the same termination notice MOWT retained possession of all the Appellant's materials, plants and equipment at the site.

The Appellant being aggrieved filed a suit against the Respondents in the High Court founded on breach of contract, unjust enrichment and quantum meruit. In the alternative, the Appellant made a claim for wrongful/unlawful seizure and detention of the Appellants goods, conversion, trespass and negligence and sought declarations that the 2nd Respondent's failure to pay for extra works amounted to breach of contract, the Appellant was entitled to be paid for extra works on the basis of unjust enrichment and quantum meruit; the seizure of the Appellant's equipment and other goods was wrongful/unlawful, payment for extra works, lost earnings, general and punitive damages, interest and costs.

The Respondents in their defence denied all acts of breach of contract, unjust enrichment and unlawful seizure/ detention of the Appellants materials. At the trial, the Appellant's suit was dismissed on 19th July 2021 and a counterclaim by the 2nd Respondent succeeded against the Appellant.

The Appellant being dissatisfied with the Judgment and decision of the High Court filed this Appeal.

Grounds of Appeal

The grounds of appeal are set out in the Memorandum of Appeal filed on 20 October 2021 as follows;

- 1. The trial court erred in law and in fact in holding that the waiver of agreed completion of 30.07.2010 by the Ministry of Works is conditional and temporary.
- 2. The trial court erred in law and fact in holding that the waiver of agreed completion date lapsed.
- 3. The trial court erred in law and fact in holding that the Works Ministry did not acquiesce in the works done by the appellant after the agreed completion date.

- 4. In the alternative to 1-3 above, having held that clause 49 of GCC remedies failure to complete works within the agreed time by paying the employer liquidated damages, the trial court erred in law and fact

in holding that the appellant's failure to complete the works within the agreed time is a fundamental breach whereas not.

- 5. The trial court erred in law and fact in failing to find and hold that the purported termination of the appellant's subsisting contract was induced and instigated by the 1st respondent who demanded the Works Ministra to handover the project to it.
- 6. The trial court erred in law and fact in failing to find and hold that the fundamental breaches alleged in the 13.8.2012 and 3.10.2010 letters were mere afterthoughts and concoctions to facilitate and justify the 1st respondent's takeover of the project.
- 7. The trial court erred in law and fact in holding that the appellant stopped works and abandoned the site for more than 28 days without the project manager's permission.
- 8. The trial court erred in law and fact in holding that the appellant's materials and equipment on site were rightly seized under clause 61 of GCC yet the alleged stoppage of works and abandonment of site for more than 28 days without project manager's stated in the seizure letter was not proved.
- 9. The trial court erred in law and fact in dismissing the appellant's claims related to the seized properties.
- 10. The trial court erred in law and fact in relying on an extrinsic matter (alleged substandard work) not stated in the letters of 13.8.2012 and 3.10.2012 to make a finding of a fundamental breach.

11. The trial court erred in law and fact in failing to determine the quantum of damages due to the appellant.

The 2nd Respondent filed a cross appeal. During the trial, a counterclaim had been filed against the Appellant for a declaration that the Counter-Defendant (now Appellant) had defaulted in its performance of its obligations under the contract and that MOWT rightfully terminated the contract, the plant, machinery, equipment and temporary works became the property of MOWT and the payment of Ugx. L,090,447,750 being over payment for works not completed and liquidated damages under the contract. The counterclaim succeeded partially only in respect of the declarations.

The grounds of the cross appeal are that;

- 1. The learned trial Judge erred in law and fact when he failed to award the \$2nd Respondent's the total sum of Ugx. 1,090,447,750/= representing the overpayment for the works not executed by the Appellant, liquidated damages under the contract and 10% value of the uncompleted work under the Contract.
- 2. The trial court erred in law and fact when he failed to award costs of the suit to the Respondents.

Representation

The Appellant was represented by Mr. Alex Candia, learned Counsel while Mr. Titus Kamya, learned Counsel appeared for the 1st Respondent, and Mr. Richard Adrole and Ms. Claire Kukunda, learned State Attorneys appeared for the 2nd Respondent.

The Submissions

Counsel for the Appellant argued grounds 7, 8 and 9 together, grounds 1-3 together, ground 4, 11 and 10 separately and grounds 5-6 together. Counsel for the 2nd Respondent replied to grounds 1-3 first, ground 4 alone, grounds 5-6 together, ground 7 alone, grounds 8 and 9 together, and grounds 10 and 11 separately. Counsel for the 2nd Respondent only responded to grounds 8 and 9.

Grounds 7, 8 and 9

Counsel for the Appellant submitted that the learned trial Judge erred when he found that the Appellant had failed to comply with the instruction to demolish and rebuild piers and abutment, stopped the works and abandoned the site for 28 days without the permission of the project manager. According to Counsel the evidence of the 2nd Respondent as to time of the alleged stoppage was contradictory whereby, she stated in her WSD that the stoppage occurred in July 2011 and in her counterclaim that it happened in August 2011.

Counsel argued that from the evidence on record, the works which the Appellant was alleged to have abandoned were to demolish and rebuild some bridge members and the court erred when it found that the works

were assessed and found to be of sub-standard quality, condemned and the Appellant ordered to demolish and reconstruct which was never pleaded by the 2nd Respondent and contravened Order 6 Rules 1 and 7 of the Civil Procedure Rules S. I 71-1. Counsel referred court to *Intedreight Forunarders vs EADB SCCA No.033 of L992* for the proposition that parties are bound by their pleadings and cannot succeed on a case borne out of their defence and counterclaim.

Counsel contended that the 2nd Respondent never proved the fact of stoppage of works and abandonment at the trial and the evidence of the two witnesses which was adduced did not prefer any testimony as to the same. The said witnesses were not the Project Managers and were not involved in the contract by July or August when the works were allegedly stopped. More over the Project Manager was not called as a witness. Counsel referred court to Nazmudin Gulam

Hussein Viram vs Nicholas Roussos SCCA No. 001 of 2006 and J K Patel vs Spear Motors SCCA No. 004 of 1991 for the proposition that where a party does not call a material witness to testify, the Court ought to draw an adverse inference that the evidence of that witness would have tended to be averse to that party's case. He invited court to draw an adverse inference against the 2nd Respondent.

Counsel further contended that Exhibit P50, the letter dated 3.10.2012 by which the 2nd Respondent allegedly terminated the contract under clause 59.1 of the GCC on the ground that the Appellant had committed ^a fundamental breach by abandoning the site for 28 days was an afterthought since the contract had already been terminated by Exhibit P49, a letter dated 13.8.2012 whereby the Appellant was requested to hand over the site for failing to complete the works by the completion date under Clause L7. L of the GCC. According to Counsel, these letters were authored by the same person and if there had been any stoppage, the author would have said so under P49.

Regarding the issue as to whether the trial court erred in upholding the seizure of materials and equipment on site, Counsel argued that clause 61.1. of the GCC authorised such seizure only upon fundamental breach which in this case was stoppage of works and abandonment for 20 days which was never proved. According, Counsel contended that should this court find that abandonment and stoppage weren't proved, it should hold

the 2nd Respondent vicariously liable for wrongful seizure and appropriation of the materials and equipment.

Counsel referred court to Depafted Asian Custody Board vs rssa Bukenya SCCA No. 026 ol lrg92 for the proposition that trespass to goods consists of any unlawful disturbance of possession of goods and seizure or removal.

In reply to the arguments under grounds 8 and 9, it was submitted for the 1st Respondent that the stoppage and seizure of material was an action done by the 2nd Respondent for which the 1st Respondent is not answerable.

Counsel argued that the learned triai Judge correctly considered the evidence of the letters dated 3/L0120L2 and 29ILL/2011 which showed that the Appellant had stopped works and abandoned the site for more than 28 days without the project manager's permission. As such the contract was rightly terminated entitling the 1st Respondent to retain the materials and equipment on site under the GCC.

Counsel referred court to the evidence of TPW1 Engineer Lawrence pario and TPW2 Mr. Christian Balaba to the effect that the equipment which were handed over to the 1s Respondent were not serviceable, already vandalized of no valuable use to the Respondent.

Counsel contended that the 1st Respondent was instructed by the Ministry of Works and Transport to hand over some of the equipment including two excavator numbers UAH 705V and UAH 014X to the owners and this was done. Upon completion of the bridge the vehicles which had remained on site including UAE 873D Isuzu Elf Tipper; Excavator digger 140 Chassis No. 80H 100G and the concrete mixer of 20-liter capacity were handed over to the Ministry of workers under Tp5, a letter handing over nonservice equipment to the Ministry.

Counsel urged this court to find that grounds B and t have no merit and to dismiss the same with costs.

Regarding ground 7, Counsel for the 2nd Respondent submitted that even though the Project Manager was not presented in court as a witness, pEX 50 was exhibited and admitted in court and the said letter evidenced that the ground for termination of the contract was stoppage and abandonment of the site for 28 days without permission from the Project Manager. Counsel also referred court to PEX47 where MOWT also informed the Appellant of its intention to terminate the contract based on failure to complete works and frequent stoppage of works without authorization from the Project Manager.

Counsel referred court to Uganda Revenue Authority vs Stephen Mabosi SCCA No. 026 of 1995 for the proposition that an omission to challenge the evidence in chief on a material essential point by cross examination would lead to the inference that the evidence is accepted as credible and true. Counsel submitted that the Appellant having exhibited the letters itself never adduced any supplementary evidence to challenge the contents and the trial court correctly reviewed the said letters and admitted their evidence that the contract was terminated for abandonment and stoppage of works.

With respect to grounds 8 and 9, it was submitted for the 2nd Respondent that the stoppage and abandonment of works was not the only ground for termination of the contract. The Respondent adduced evidence to the effect that the Appellant failed to complete the works as contracted, performed sub-standard work and abandoned the site. According to counsel, PEX47 and PEX50 remained uncontested confirmed that the Appellant had indeed defaulted in execution of its obligations under the contract.

According to Counsel, the conduct of the Appellant amounted to ^a fundamental breach which precipitated MOWT to invoke clause 61.1 of the GCC and to retain the materials and equipment s its property. Counsel prayed to court to uphold the decision of the lower court on this issue and to dismiss grounds 8 and 9 of appeal.

In rejoinder, Counsel for the Appellant reiterated his earlier submissions and added that the 2nd respondent failed to prove stoppage and abandonment and since she had pleaded it the WSD and counterclaim, she had the onus to do so. The 2nd Respondent failed to produce the Project Manager as a material witness and neither did the author of Exhibits P49 and P50 testify in court which left the allegations of abandonment and stoppage un proved.

Grounds 1, 2 and 3

Counsel for the Appellant jointly argued grounds 1, 2 and 3, concerning waiver and acquiescence together and submitted that the MOWT had by implied conduct waived the agreed completion date of 30.7.2010 when it continued to instruct the Appellant to continue working and continued supervising the site after that date.

He referred court to *General Pafts (u) Limited vs NPART SCCA No. 009 of 2005* where waiver was described as a release or waive of a right of action or interest in property, legal or equitable which requires an express or implied agreement and that an implied agreement, if acted upon by the other party would operate on the principle of estoppel.

counsel also referred court to *Richards vs oppenheim [1950] 1 ER 420* where Lord Denning held that by pressing for delivery many months beyond the stipulated delivery date, the defendant waived the initial time stipulated for the delivery.

Counsel argued that the 2nd Respondent did not plead either express or conditional waiver in his WSD and Counterclaim and there was no evidence to show that the waiver was express and conditional and the finding to that effect was erroneous. According to Counsel, the holding that the waiver was given on condition that the Appellant completes the work according to the work program is unsupported by Exhibits D10, p31, P34, P42 and P47, letters deducting liquidated damages and denying extension of the contract, letter requesting for response in 14 days and threatening to terminate, invitation to review the work progress and map a way forward and letters requesting for demolition and reconstruction of 2 piers and abutment.

Counsel argued that by instructing the Appellant to continue working with its supervision despite expressly refusing to extend the completion date, MOWT by implied conduct waived the 30.7.2010 completion date and acquiesced by permitting the Appellant to continue to work after the completion date.

Counsel for the 2nd Respondent disagreed and replied that the doctrines of waiver and acquiescence were pleaded as a defence by the Appellants following failure to perform the contract on time and the burden to prove their existence was indeed on the Appellant and not the 2nd Respondent.

Counsel referred court to the provisions of Section 101 of the Evidence Act Cap 6 on the burden and standard of proof and argued that it was wrong for the Appellant to shift the burden of proving the waiver and acquiescence on the Respondent. According to Counsel, the MOWT neither expressly nor impliedly waived its right to claim breach and it did not acquiesce to the Appellant's works.

Counsel referred court to the evidence of DW2 and submitted that following failure to complete works on time, MOWT subjected the Appellant to liquidated damages for 100 days and notified them of its intention to terminate the contract. According to PEX 47, the Appellant having received steel beams late in January 2011 promised to resume work and complete by 30 July 2011 based on the revised work program and still failed to deliver. As such the waiver if at all any was temporary and conditional.

Counsel prayed that this court upholds the findings of the trial court on this issue and dismisses grounds 1, 2 and 3 of the Appeal since the trial court correctly found that the waiver was express and conditional and that it was temporary for reasonable cause and on condition that the Appellant completes the work according to the adjusted program and since the Appellant did not satisfy the conditions MOWT correctly terminated under PEX50.

In rejoinder, Counsel for the Appellant reiterated his earlier submissions and added that the Respondent's arguments on this issue were contradictory when he argued that MOWT did not expressly or impliedly waive their right to claim and that the waiver given was temporary and conditional. He invited court to reject the Respondent's submissions on this issue and find that the 2nd Respondent waived the completion date.

Ground 4

Counsel for the Appellant argued ground 4 as an alternative to grounds 1, 2 and 3 and submitted that the intention of the parties under clause 49 of GCC was to treat time breaches as a warranty to be remedied by liquidated damages and not a condition and that the court erred when it treated the same as a condition whereas not. Counsel referred court to Halsbury's Laws of England 3rd Ed. Vol. 8 Para 328 at pages 194-195, and submitted that a contract can only be terminated for breach of

condition which is a fundamental breach and any breach which can be remedied by damages is a warranty.

In reply, Counsel for the 2nd Respondent submitted that pursuant to Clause 59 of the GCC, the Appellant fundamentally breached the contract by failing to complete the works, abandoning the site on several occasions and carrying out substandard works. Counsel referred court to PEX 30, ^a letter by MOWT when it pointed out that the Appellant had fundamentally breached the contract and it evoked clause 49. L of the GCC which was a condition of the contract. According to Counsel the reference to payment of damages did not reduce the condition as to time to a mere warranty as alleged and this was never the intention of the parties.

Counsel submitted that the contract provided for consequences for noncompliance with the completion date including payment of liquidated damages and termination of the contract. Counsel referred court to *National Bank of Kenya Limited vs Pipe plastic Sakowitz (K) Limited and Another* (2002) 2EA 503, for the proposition that a court of law cannot re-write the contract between the parties and that the parties are bound by the terms of their contract unless coercion, fraud or undue influence are proved or pleaded.

Counsel also referred Court to *Thrift Homes Ltd vs Kays Investment Limited* [2015] eKLR, where the court while relying on Chitty on Contracts 27th Edition Vol 1, General Principles Sweet & Maxwell L994 at 1029 where it was stated that at law, time is always of essence in a contract when time is fixed for the completion of it and a party could treat the contract as repudiated if the other party's performance was not completed on the date stipulated by the contract.

Counsel submitted that time became of essence when the parties agreed to complete the works by 30.7.2010 and this was a major condition of the contract that cannot be reduced to a mere warranty. Further that having evoked clause 49 of the GCC on the liquidated damages, MOWT proceeded to set 100 days as the period for payment of the said damages and completion of the works and when the Appellant again failed to complete the works in the stipulated time, MOWT was entitled to terminate this contract.

Counsel prayed that this Court should find that failure to finish the works amounts to a fundamental breach which entitled the 2nd Respondent to terminate the contract.

Ground 11

Counsel for the Appellant faulted the learned trial court for failing to assess damages and dismissing the suit without assessing the damages. Counsel referred court to *Lutaya vs Attorney General* SCCA No. 010 of 2002 and submitted that the duty of the trial court to assess damages arises even though the trial court has decided to dismiss the suit.

In reply, Counsel for the 2nd Respondent submitted that the learned trial Judge having found that the claims by the Appellant had failed was rightfully under no obligation to assess the damages it would have awarded to the Appellant.

Ground 10

Counsel for the Appellant faulted the trial court for attempting to formulate the 2nd Respondent's defence without jurisdiction when it found that even though substandard work was not stated as a ground for termination under the contract, the employer would still be entitled to terminate the contract. Counsel argued that the trial court had no power to extend the express grounds of termination because if substandard work existed MOWT had elected not to treat it as a fundamental breach for termination purposes when it issued P49, the termination letter based on failure to complete works on time.

In reply, it was contended by Counsel for the 2nd Respondent that although the quality of work was not included in the letters dated 13.8.2012 and 3. L0.20L2 as a ground for termination of the contract, the 2nd Respondent in its WSD at page 23 contended that the work done by the Appellant was substandard and adduced evidence to that effect including test results showing that most of the bridge elements fell below the concrete strength required as a minimum for the bridge. Counsel referred court to PEX34 and PEX42, letters to the Appellant by MOWT requesting her to demolish the 2 piers and abutment and to rebuild them.

Counsel argued that the contents of PEX34 and PEX42 were never rebutted by the Appellant. Further that, it is settled and always an implied

term of contract that goods or services must be of quality especially where the contractor is aware of the purpose they will serve and since the Appellant did not challenge this evidence, it showed that they had admitted that the works were substandard.

Counsel prayed to court to uphold the finding of the trial court on this issue and to dismiss this ground with costs.

Grounds 5 and 6

Counsel for the Appellant submitted that the reason for termination was not proved at all and MOWT terminated the contract merely to handover the project to UNRA.

According to Counsel MOWT would have terminated the contract immediately after expiry of the completion date on 30.7.2010 and the alleged fundamental breaches as espoused in the 2nd Respondent's letters dated 13.8.2012 and 3.10.2012 were mere afterthoughts, maneuvers and ploys to cover up the illegal hand over to UNRA.

In reply, Counsel for the 2nd Respondent submitted that the reason for termination was proved and that the Appellant was aware at all material times that the contract was supposed to be completed on 30.7.2010 and the MOWT had communicated its displeasure and notified the Appellant of its intention to terminate the contract. Counsel referred court to the evidence of DW2, who testified that a meeting was convened to discuss the contractor's work progress on 18.8.2009 and it was found to be below the expected level. Further that, the contract was terminated because the contractor failed to complete works on time and even after the liquidated damage period which left the employer with no other choice but to terminate the contract.

Counsel further submitted that the condition as to time was a fundamental term of the contract under clause 59 of the GCC and that its breach was communicated to the appellant severally through PEX 30, PEX47 and PEX49 and the termination of the contract for failure to complete the works by 30. L0.2012 cannot be considered as an afterthought.

Counsel prayed that this honourable court upholds the finding of the trial court on this issue and dismisses grounds 5 and 6 of the Appeal.

Remedies

Counsel for the Appellant invited court to invoke its powers under Section 11 of the Judicature Act Cap 13 and to grant the remedies sought under the plaint rather than remitting the matter back to High Court. Counsel abandoned reliefs sought under (a), (b) (f) and prayed for declarations under (c), (d), (e) to be granted since the seizure was wrongful. $\frac{1}{2}$

Counsel for the Appellant also prayed for payment of Ugx. 1, 222,009,000/= as value for goods which was assessed under Exhibit P57, $\frac{1}{2}$ the loss assessment report which was never discredited by the Respondents in cross examination.

Counsel also prayed for lost earnings as itemized in paragraphs 10 (xi) (xvi) and reliefs (h) -(l) under the Plaint as well as general and exemplary damages of Ugx 1,000,000,000 and Ugx 300,000,000 respectively as sufficient recompense and costs in this court and the lower court.

In reply, it was submitted for the 2nd Respondent that the Appellant was not entitled to any of the remedies sought since as seen under DEX18, the project was handed over to the 1st Respondent with the equipment and materials found on site which were non-serviceable. Moreover, the equipment was handed over to a Kalule J B and Charles Sentamu as registered owners according to information from URA. As such the Appellant is not entitled to the declarations and the sum of Ugx. 1, 222,009,000/= since no evidence was led to arrive at the said figure.

Counsel argued that the Appellant is not entitled to lost earnings, general and exemplary damages since the seizure was lawful and there was no evidence before the trial court to support the said lost earnings. He prayed to have the appeal dismissed with costs.

Counsel for the 1st Respondent asked Court to dismiss this Appeal with costs.

In rejoinder, it was submitted that the argument that the equipment was non serviceable was misconceived since this fact was never brought to the attention of the Appellant in 2012 when the 1st Respondent took over the site and it only arose at the end of the project. Moreover, the alleged third parties were never called to testify as to their ownership of the equipment yet the Appellant pleaded that he had purchased the said equipment. At the time MOWT took over the site on 23.8.2012, the equipment was not vandalized nor non-serviceable and it is liable for their safety.

Resolution of the appeal

I have carefully studied the record, the parties' submissions and the law and authorities relied on therein. I have also had regard to the law and authorities not cited by the parties but relevant to the determination of the present appeal.

This is a first Appeal. It is well established that in a first appeal from a decision of the High Court, this Court has a duty to reappraise the evidence and draw inferences of fact. See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions 5.113-10.

While discussing the duty of the first appellate court in the case of Uganda vs. George Wilson Simbwa, Criminal Appeal No. 37 of 2005, the Supreme Court stated as follows:

"This being the first appellate court in this case, it is our duty to give the evidence on record as a whole that fresh and exhaustive scrutiny which the appellant is entitled to expect, and draw our own conclusions of fact. However, as we never saw or heard the witnesses give evidence, we must make due allowance in that respect."

This Court therefore has a duty to appreciate the evidence adduced in the trial Court, subject it to exhaustive scrutiny and re-evaluate evidence, avoid a miscarriage of justice and be mindful in order to reach its own conclusion.

With the above principles in mind, I will proceed to resolve the grounds of appeal in the order set out under the Memorandum of Appeal.

Grounds 1, 2 and 3

The gist of the Appellant's claim in grounds 1, 2 and 3 is that the 2nd Respondent by implied conduct waived the agreed completion date of 30.7.2010 and could not rely on the same to terminate the contract yet it had permitted the Appellant to continue working on the site and supervised him post the said completion date. Further that the Respondent did not plead express, conditional or temporary waiver and

the trial Judge erred when he found that there was a temporary and conditional waiver.

The law on waivers is settled. According to Chitty on Contracts, 28th Edition, Vol. 1, 1999 page 1158 paragraph 23-039 where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its tenor. Further at page 1161 paragraph 23-045 thereof on waiver of breach, it is stated that one party may waive his right to terminate a contract consequent upon a repudiation of the contract by the other party. Where the waiver is by estoppel, the innocent party waives not only his right to terminate performance of the contract but also his claim for damages for the breach.

Words and Phrases Legally Defined 4th Volume at P.404 defines waiver as the abandonment of a right in such a way that the other is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted and is either express or implied from conduct.

According to the Black's Law Dictionary 9th ed at page 7677, an implied waiver may arise where a person has pursued a course of conduct as to evidence an intention to waive a right or where his conduct was inconsistent with any other intention than to waive it.

While evaluating the evidence on waiver and acquiescence the learned trial Judge at page 748 paragraph 15 of the Record of Appeal found that

"... although counsel for the plaintiff did not expressly state so in their submission, it is clear that the plaintiff intends to rely on the doctrine of acquiescence and waiver as the basis for the argument that the plaintiff was not in breach of the contract on account of time within which the contract was supposed to be completed. Indeed, in paragraph 4 (c) and (o), of the Plaintiff, the plaintiff sought to rely on these doctrines.

At page 751, the learned trial Judge stated thus:

It is claimed by the Plaintiff that the Defendant waived the condition as to time of completion and in due course acquiesced to the continued performance of the contract after the period agreed to in the contract.

At page 754 para 20 and 25 of the Record of Appeal, he stated;

... by its nature, the contract PEX1 anticipated the giving of time, opportunity and preparation before termination of the contract. This can be seen from the provisions of clause 49 of the GCC which envisage that in case the contractor was unable to complete the works within the agreed time, the contractor would be obliged to pay liquidated damages to the employer at a specified rate... By a letter PEX30 dated 20.09.2010, the employer invoked the above provision and subjected the contractor to payment of the damages. The plaintiff was warned that if after 100 days the works were not completed, the contract could be terminated."

The learned trial Judge at page 755 of the Record of Proceedings in his Judgment had this to say;

... the waiver given was express and conditional, that is, it was temporary, for reasonable cause and on condition that the plaintiff completes the works according to the work program they had submitted. When those conditions were not satisfied by the plaintiff, the waiver lapsed and could not be relied on by the very plaintiff that was in breach of the same.

The Appellant has argued that the waiver is implied since there was no program submitted to occasion the conditional waiver as found by the trial Judge and that by allowing the Appellant to continue works past the completion date, the 2nd Respondent waived its right to terminate the contract for non-completion on that specific date. I disagree.

My view is that making a waiver requires an outward representation or some conduct that unequivocally indicates, when interpreted objectively, that the electing party has made a knowing, irrevocable election to waive a right. See: Insurance Corporation of the Channel Islands vs. The Royal Hotel Ltd [1998] Lloyd's Rep IR 151 at paragraphs 162-163).

According to Halsbury's Laws of England, 3rd Edn Vol 14 paragraph 1174 and 1176 at pages 636 – 7. It is provided that;

1175, Waiver:

"A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent and the fact that the other

party has acted up on it is sufficient consideration. Where the waiver is not express, it may be implied from conduct in general, where one party has by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his words acted on it, the party who gave the promise or assurance can not afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has introduced, even though it is not supported in point of law by any consideration.

Where the right is a right of action, or an interest in property, and express waiver depends upon the same considerations as a release. If it is a mere statement of an intention not to insist upon the right, it is not effectual, unless made with consideration; but where there is consideration, the statement amounts to a promise and operates as a release. Although there is no express waiver, the person entitled to the right may so conduct himself that it becomes in equitable to enforce it and this is sometimes called an implied waiver; but in such cases, the right is lost either on ground of estoppel or of acquiescence, whether by itself or accompanied by delay."

1176: Knowledge of Rights Essential:

"For a release or waiver to be effectual, it is essential that the person granting it should be fully informed as to his rights; and similarly, confirmation of an invalid transaction is inoperative, unless the person confirming knows of its invalidity."

It seems clear to me from the above passage, that to release or waive a right of action or interest in property, legal or equitable, requires an express or implied agreement of the person entitled to that right. Where the agreement is express, it has to be under seal or supported by valuable consideration. An implied agreement, if acted upon by the other party, would operate on the principle of estoppel.

In the instant case, there is no evidence showing either an express or implied agreement by the Respondent to release or waive its right of action to claim for termination. There is also no evidence of any consideration for any such an express agreement, if any, nor evidence of an agreement by conduct of the nd Respondent. Mere permitting the Appellant to continue work on the site and subjecting him to payment of liquidated damages did not extinguish the nd Respondent's equitable right of action.

I have reviewed PEX29, a reply to the request by the Appellant for extension of the completion date dated 3 February 2010 and PEX30, letter of intention to deduct liquidated damages dated 20 September 2010. According to PEX 30, it clearly stated that the completion date has never been revised from 30 July 2010 since the Appellant's request to extend was rejected under PEX 29. The said letter also stipulated that after 100 days the contract could be terminated.

I accordingly find that the learned trial Judge whilst being alive to law exhaustively dealt with the issue on waiver and acquiescence when he found that the waiver given if at all any could be construed as express, conditional, and temporary, for reasonable cause and on condition that the plaintiff completes the works according to the work program which was submitted by the Appellant under PEX 33 where they undertook to complete the unexecuted work by May 2012.

Grounds 1, 2 and 3 are accordingly answered in the negative.

Ground 4

This ground was argued as an alternative to 1, 2 and 3 above. The gist of the Appellant's argument herein is that the intention of the parties under clause 49 of GCC was to treat time breaches as a mere warranty to be remedied by liquidated damages and not a condition which would amount to a fundamental breach.

Clause 49 of the GCC stated:

49. Liquidated damages

49.1. If so, stated in the SCC, the contractor shall pay liquidated damages to the employer at the rate per day stated in the SCC for each day that the Completion Date is later than the intended completion date... payment of liquidated damages shall not affect the contractor's liabilities.

The learned trial Judge while evaluating this evidence at Page 754 para 20 of the Record of Proceedings observed that;

"... it is clear that by its nature, the contract anticipated the giving of time, opportunity and preparation before the termination of the contract. This can be seen from the provisions under clause 49 of GCC which envisaged that in case the contractor was unable to complete the works within the agreed time, the contractor would be obliged to pay the employer liquidated damages at the rate specified in the contract for each day the completion date was exceeded."

In a contract, some terms are more important than others. The law thus divides terms into 'conditions' and 'warranties'. A condition is the major term and is so important that, if broken, the injured party, may refuse to go on with the contract. A warranty is a less vital term; if broken, the injured party will still have to go on with the contract but he may be compensated for the breach by an award of damages.

The Appellant in this case is asking the court to consider that since the 2nd Respondent subjected the failure to complete works on time to payment of liquidated damages, this must mean that the said term was a warranty and not a condition, breach of which would be categorized as fundamental. I disagree.

In construing contractual provisions, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties, the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the party's relationship and all the relevant facts surrounding the

transaction so far as known to the parties. See Agri-Industrial Management Agency Ltd vs. Kayonza Growers Tea Factory Ltd & Anor H. C. C. S No. 819 of 2004, cited with approval in the dictum of Bingham of Cornhill in Bank of Credit & Commercial Lord International S. A. (in liquidation) vs. Ali (2001) 1 All ER 961.

From the reading of clauses 49.1 49.2 of the GCC, it appears to me that PEX 1 indeed anticipated the giving of time to the contractor to rectify and perform the contract. According to PEX 30, when the payment of the liquidated damages was invoked, the Appellant was warned to complete the works in 100 days or the employer would terminate the contract. The employer kept extending the timelines for completion to enable the appellant to finalise the works which did not happen and as such the employer was obligated to treat the issue as to time as a condition. If the parties had wanted it to be a warranty, they would have expressly stated SO.

Depending on the nature of the agreement and the relationship between the parties, a warranty in one contract may be treated as a condition in another. In this particular case from my review of PEX 29, it was clear that the parties intended the time clause as a condition and not a mere warranty and the stipulated liquidated damages for delay were intended to typically specify a date by which milestones must be met and set forth requirements for determining when they have been achieved, hence the 100 days' failure of which would entitle the Respondent to other remedies.

Ground 4 of this Appeal is accordingly answered in the negative.

Grounds 5 and 6:

The gist of the Appellant's contention in grounds 5 and 6 is that the trial Judge erred when he found that the reason for termination in PEX49 was proved by the Respondent whereas not since according to the Appellant, the contract was terminated by MOWT to enable the illegal hand over of the project to the Respondent.

The learned trial Judge whilst considering the evidence at page 756 para 2 of the Record of Appeal had this to say;

"... although it was not stated as a ground for termination, the plaintiff further committed a breach in regard to the quality of the expected works. The plaintiff was alerted by the employer about the sub-standard work and actually ordered to demolish and rectify the works but the plaintiff did not oblige. The attempts by the plaintiff to employ private assessment of the impugned works and a strengthening/improvement plan were unilateral on the part of the plaintiff and were neither agreed to nor acquiesce by the Defendant. The attempts were actually not part or within the terms of the contract. They could not therefore bind the Defendant.

In my view the plaintiff's failure to comply with the performance requirements of the contract both in terms of time and quality cannot be justified by extended execution of the works by the plaintiff or by the termination of the contract by the employer."

I have reviewed PEX49, a letter by the Permanent Secretary of MOWT addressed to the Appellant dated 13 August 2012 which stated that the Appellant's continued stay on the site was illegal since he had fundamentally breached the contract when he failed to complete the works by the intended completion date under clause 17.1 of the GCC and further following expiration of the extra 100 days where the contract was administered under liquidated damages and still the Appellant had not completed the works.

The contention that the ground for termination under PEX49 was not proved and that the purported fundamental breach was intended to facilitate the handover of the project to the \$1\$st Respondent is, in my view, absurd.

PEX 49 cannot be looked at in isolation of the circumstances of this case. I have reviewed PEX 48, a letter by MOWT dated 24 February 2012, before the termination under PEX 49 which was referenced as poor performance of the contract wherein auditors had been appointed and upon investigations on the site found that the bridge did not comply with specifications and as such the Appellant was ordered to rectify the defects, six months later the contract was terminated.

It is clear in my view and from PEX48 that the quality of the works even though not specifically referred to under PEX49 also contributed to the termination of the contract by the employer as correctly found by the learned trial court.

By way of comparison, under section 15 of the Sale of Goods Act, Cap. 82, where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, whether the seller is the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for the purpose. It would defeat logic that the employer would contract the Appellant to construct the bridge and the said contractor remains employed even though they have failed to comply with the specifications needed before the bridge could function.

I find no merit in grounds 5 and 6 of the Appeal and dismiss the same accordingly.

Grounds 7, 8 and 9

Counsel for the Appellant complained about the seizure of the appellant's materials and equipment on the site under clause 61 of GCC by MOWT represented by the 2nd Respondent. According to Counsel since the abandonment/stoppage alleged in the letter dated 3/10/2012 was not proved, the 2nd Respondent should be held vicariously liable for the unlawful seizure and appropriation of the materials and equipment.

I note that **Clause 61 of the GCC** provided that all materials on the site, plant, equipment temporary works and works shall be deemed to be the property of the employer if this contract is terminated due to the contractor's default.

According to counsel for the Appellant since the alleged stoppage and abandonment of the site, being the basis of the termination was not pleaded or proved, the seizure of the materials and equipment at the site by MOWT cannot be said to have been lawful.

While determining this issue at page 755 para 20 and 25 of the Record of Appeal, the learned trial Judge found that;

... it was further shown by the defendant that when the plaintiff was served with a notice of intention to terminate the contract, the plaintiff undertook to complete the works under the revised program. However, when the works were assessed, they were found to be of substandard quality, they were condemned and the plaintiff was ordered to demolish and reconstruct. The plaintiff however did not comply with this instruction and later abandoned the work for more than 28 days without the permission of the Project Manager, leading to the eventual termination of the contract."

I have reviewed PEX50, a letter from MOWT to the Appellants dated 3 October 2012. The said letter states that on 14 December 2011, the Appellant was notified of the intention to terminate if they did not complete the works. Counsel for the Appellant submits that there was no stoppage and abandonment of the site. I have also reviewed PEX 47, a letter by MOWT dated 29 November 2011, in this letter, the employer indicated an intention to terminate and stated that since resumption of work in May 2011, the Appellant had frequent stoppages of work and had further failed to complete the works on time.

On 24th February 2012, the Appellant was informed of his poor performance under PEX48 and requested to rectify the defaults by reconstructing pier 2 and the abutment. By the time of PEX50, the said defaults had not yet been rectified. I find that whereas stoppage of works and abandonment was not specifically pleaded in the WSD or counterclaim, the same was borne out of the evidence of the respondent and proved by PEX 47. Having been served with a notice to terminate the Appellant came up with a work plan which he did not follow which occasioned the termination since the Appellant failed to comply with the performance requirements of the contract.

Moreover, besides stoppage and abandonment, the Respondent led and adduced evidence to show that the Appellant had fundamentally breached the contract when they failed to complete works on time and when they submitted substandard works.

Having found that the contract was breached by the Appellant, the trial court was right to conclude and find that the Respondent was entitled to the seizure and possession of all materials on the site, plant, equipment temporary works and works following the contract being terminated due to the contractor's default as provided for under Clause 61 of the GCC.

Grounds 7, 8 and 9 are accordingly answered in the negative.

Ground 10

Counsel for the Appellant criticized the trial court for finding that there was termination based on an extraneous ground of sub-standard work which was out of the scope of the grounds preferred in PEX 49 and PEX50.

The learned trial Judge considered this evidence at Page 757, Para 12-18 of the Record of Proceedings when he stated that;

"In my view, even if a waiver of the condition as to time of completion had been established by the plaintiff, which it has not, there is evidence that the employer would still have been entitled to terminate the contract on account of sub-standard work under clause 59.2(e) of the GCC."

I have already found under grounds 7, 8 and 9 in this Appeal that the conclusion by the learned trial Judge that the Appellant breached the contract and that the employer was entitled to terminate the same was arrived at after exhaustive scrutiny of the evidence on record which revealed that the Appellant had not completed the works on time, had stopped and abandoned works during the course of the execution of the contract without consent from the project manager and also performed substandard works.

The finding on sub-standard work is not alien to this matter as Counsel for the Appellant alleges. According to PEX47, the employer complained to the Appellant that the works were below specifications and requested him to rectify the abutment and pier 2 which was not done. The only plausible conclusion that can be made was that the works presented were substandard as rightfully found by the trial court.

Ground 10 of this Appeal must accordingly fail.

Ground 11

Counsel for the Appellant faulted the trial Court for failing to assess damages it would have awarded if the appellant's suit had not been dismissed.

I note that it has been commended by certain authorities that a trial Court, although it has dismissed a suit claiming for damages, ought to nonetheless assess the damages it would have awarded if the suit had succeeded. See: *Mute v Elikana and another* [1975] 1 EA 201 quoted with approval in *Mpungu & Sons Transporters Ltd vs. Attorney General and Another*, Court of Appeal Civil Appeal No. 63 of 1999 (unreported) The rationale of that recommended practice is to save time and costs, in that, should an appellate Court reverse the decision of the trial Court and find that the suit ought to have succeeded, the appellate Court would award the damages as assessed by the trial Court without referring the matter back to the trial Court for a further hearing on the question of damages.

However, I must quickly add, that recommended practice on assessing damages is not an academic adventure, and therefore on appeal the Court must consider whether failure to follow the practice caused a miscarriage

of justice. In the present case, no miscarriage of justice was occasioned by a failure of the trial Court to assess damages considering that I have found on this appeal that the appellant was not entitled to an award of damages anyway.

Ground 11 of the appeal must also fail.

In conclusion, for the reasons given above, I would find no merit in the appeal and dismiss it in its entirety.

I will now proceed to consider and determine the cross appeal on its merits.

The submissions on the cross appeal

Ground 1:

It was argued for the Cross Appellant that the learned trial Judge erred in law and fact when he dismissed the Cross Appellant's counterclaim for the recovery of Ugx. 1,090,447,750/= representing overpayment of works not completed by the Appellant and liquidated damages. Counsel argued that the trial court ignored evidence of DEX23, the dispatch notice which clearly indicated that the entire batch of documents including DEX21 and DEX22 were dispatched on 27 March 2013 by email following approval of the final Payment Certificate on 7 February 2013.

Counsel submitted that the documents exhibited were not contested by the Cross Respondent in cross examination and the same were admitted.

Counsel faulted the trial Judge for finding that DW2 who prepared the DEX 22 Final Certificate was not the Project Manager which raised authenticity issues. He submitted that DW2 was an Assistant Commissioner for the $\$1^{\wedge}\{\rm st\}$ Respondent and he play a vital role at the termination of the contract when he accompanied the Commissioner to take over the site and that after MOWT had taken over the Cross Respondent was tasked and requested to submit a final account which they failed to do as confirmed in PEX51 and so DW2 proceeded to do it since the actual Project Manager had been interdicted for over payments.

Counsel referred court to Kaggwa Michael vs Olal Mark and 6 Others HCCA No. 010 of 2017 for the proposition that documentary evidence must be properly authenticated before it can be admitted and its due execution must be proved by anyone who saw the document executed or written or by the genuine signature of the executor. According to Counsel DEX 22 was properly authenticated and its foundation laid and signature proved by its author.

Counsel also submitted that the trial court erred when it found that DEX 24, the Final Account was not authenticated and yet this document showed how DW2 had come up with the figure of Ugx. 1,090,447,750/= and was signed by DW2.

In reply, Counsel for the Cross Respondent argued that Clause 60.1 of the GCC clearly stipulated that the Project Manager was mandated to prepare a final certificate after termination certifying what was due to the employer and contractor.

Counsel for the Cross Respondent replied that Exhibit D24, the basis for the counterclaim was a final account as testified by DW2 and not a final certificate as envisaged under clause 60.1 of GCC and moreover DW2 who prepared D24 was not the Project Manager and the same was prepared without valuation of works. Counsel referred Court to D20, a letter by Ministry of Works notifying the Cross Respondent of the intended valuation and discussion of the final account but the said works were not valued and as such without a final account and measuring the works, there was no basis for a final certificate.

Counsel further contended that the claim was inconsistent in as far as it was estimated at Ugx. \$661,000,000/= in D16 dated 30.8.2012, and another claim of Ugx. 991,316,138 under D24 was claimed and now the Cross Appellant seeks 1,090,447,750 which is grossly contradictory. According to Counsel the trial Court rightly rejected this Claim by the Cross Appellant and this Court should uphold that decision and dismiss this ground

Ground 2:

Counsel for the Cross Appellant complained about the failure by the learned trial Judge to award costs. According to counsel the award of costs is a matter of discretion under Section 27 of the Civil Procedure Act Cap 71 and the trial Judge erred when he refused to award costs because the counterclaim had substantially failed save for declarations and yet he had found that Plaintiff had failed with no reliefs sought being granted.

Counsel invited this Court to consider *Candiru Alice vs Amandua Fenisto and Another* HCCS No. 019 of 2014 for the proposition that as a general rule, a successful party is entitled to an award of costs and to find that the Judge erred in this issue and yet the Cross Appellant had successfully defended against the suit. Counsel prayed that the cross appeal be granted with the prayers sought.

In reply, it was submitted for the Cross Respondent that the Court gave sufficient reasons why costs weren't granted that is to say since the Counterclaim had substantially failed, the Cross Appellant was not entitled to costs. Counsel prayed that this court should find no merit in this ground and dismiss it.

Resolution of the cross appeal

I have considered the submissions of counsel on this cross appeal, the law and authorities cited and I will now proceed to address the grounds of cross appeal as argued by both counsel.

Ground 1

Counsel for the cross Appellant faulted the learned trial Judge when he dismissed their counterclaim for the recovery of Ugx. 1,090,447,750/= representing overpayment of works not completed by the Appellant and liquidated damages. According to the Cross Respondent, the trial court rightfully evaluated this evidence when it found that a final account as testified by DW2 was prepared and not a Final Certificate as envisaged under clause 60.1 of GCC and moreover DW2

who prepared D24 was not the Project Manager and the same was prepared without valuation of works.

Clause 60.1 of the GCC provides that the Project Manager was mandated to prepare a final certificate after termination certifying what was due to the employer and contractor. The Project Manager did not testify. According to DW2 who made the Final Account, the said Project Manager had been interdicted at that time. No evidence in support of this was adduced.

The learned trial Judge while evaluating this evidence at page 760 para 20 of the Record of Appeal stated:

"... by letter dated 29th April 2013 DEX20, the employer expressed intention to value the works executed prior to the termination of the contract so as to be able to issue a payment certificate... There is evidence by DEX21 dated 14 January 2013 that the employer was forwarding to the plaintiff the final payment certificate and measurement sheets for the plaintiff's signature.

In that letter the employer communicated that the plaintiff owed the Government of Uganda Ugx. 991,316,138/- resulting from certified payments of un executed work. The document said to be forwarded under cover of the said letter is DEX22 titled Final Payment Certificate.

This letter is indicated to have been executed on 25th January 2013 and 7th February 2013 by officers of the employer. It therefore raises a question as to how such a document would have been forwarded by letter dated 14th January 2013 way before it was executed. It also raises a question as to how Final Payment Certificate would have been made before valuation of existing works by the time of termination of the contract. DW2 stated in his cross examination that the Final Payment Certificate was supposed to be made after valuation of the executed works."

I have reviewed DEX20 a letter from MOWT to the Cross Respondent dated 29 April 2013, inviting them for valuation of works executed in order to issue a Payment Certificate; DEX21- a forwarding letter to the Cross Respondent dated 14 January 2012 for the Final Payment Certificate, DEX 22, informing the Cross Respondent that they owed the Government of Uganda a sum of Ugx. 991,316,138/.

I have also reviewed DEX 23, the dispatch noted dated 27 March 2013 and DEX24 a summary of the Final Account, un dated and un signed which shows that the total amount due and owed by the Contractor is Ugx 1,090,447,759/=. According to Counsel for the Cross Appellant, DEX 23 allegedly forwarded DEX21 and DEX22. From my review, of the said document it does not show how it dispatched the later documents at a later stage.

I have also reviewed DEX 14 which states that the value of works was Ugx. 1,747,894,500/= and as such when you deduct the sum of Ugx \$712,881,000/\$ = the balance owed for extra works done by the Appellant would be Ugx. 1, 035,013,500/ \$=\$

I agree with the learned trial Judge that the evidence of DEX21 raises a question as to how such a document would have been forwarded by letter dated 14th January 2013 way before it was executed. It also raises a question as to how Final Payment Certificate would have been made before valuation of existing works by the time of termination of the contract. I find that the Cross Appellant has failed to discharge his burden in proving the actual sums allegedly owed by the Appellant. DEX 14 was indeed not authenticated and it fails to show how the figure of Ugx. 1, 035,013,500/= was arrived at.

I also find that there was no Final Certificate adduced before the Court in proof of this claim. Considering the amounts of money involved, I would have expected the Cross Appellant to adduce cogent and conclusive evidence as to the Final Account and Final Certificate and additional evidence in proof of why the Account was created by a third party and not the Project Manager as intended under the GCC which burden was not met.

Accordingly, I agree with the findings of the lower court on this issue and this ground 1 of the cross appeal must fail.

Ground 2.

The Cross Appellant faulted the trial Judge for failing to grant costs.

It is trite law that costs follow the event and the successful party is entitled to costs. Section 27 of the Civil Procedure Act Cap 71 states;

"Provided that the costs of any action, cause or other matter shall follow the event unless the court or the judge shall for good reason otherwise order".

From my review of the record of appeal, the learned trial Judge whilst denying costs to the Cross Appellant at page 762 Para 3 found that:

"... since both the main suit and the counterclaim have substantially failed, the counterclaim having only succeed on declarations, I will order that each party including the third party shall bear their own costs of the suit and counterclaim."

I would like to borrow the words of Ojwang J of the High Court of Kenya in the case of Republic versus The Minister of Agriculture ex parte W'njuguna & Others [2006] 1 EA 359 (HCK), where he said;

"Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for. The complex elements in the proceedings that guide the exercise of the taxing officer's discretion must be specified cogently and with conviction. The nature of forensic responsibility placed upon counsel when they prosecute the substantive proceedings must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of

a considerable amount of industry and was inordinately time consuming the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated apart, of course, from the need to show if such works have not already been provided under a different head of costs."

I find that the learned trial Judge exercised his discretion judiciously and denied costs in the lower case when he found that since the suit and the counterclaim had substantially failed each party should bear its own costs. I will not disturb that finding. Ground 2 of the cross appeal accordingly fails.

In conclusion, I would find no merit in the cross appeal and would dismiss it.

As to costs, I would order that each party bears its own costs both of the appeal and cross appeal.

As Kibeedi and Gashirabake, JJA both agree, the Court unanimously dismisses both the appeal and cross appeal, with each party to bear its own costs throughout.

It is so ordered.

Dated at Kampala this.....

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Elizabeth Musoke Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Elizabeth Musoke, Muzamiru M. Kibeedi & Christopher Gashirabake, JJA]

CIVIL APPEAL NO. 0316 OF 2021

..... M & B ENGINEERING LTD :::::::::::

VERSUS

1. UGANDA NATIONAL ROADS AUTHORITY

::::::::::::: **RESPONDENTS 2. THE ATTORNEY GENERAL** :::::::::::

[Appeal from the Judgment and Orders of the High Court at Kampala (Commercial Division) dated 19th July 2021 before Wamala, J. in Civil Suit No. 012 of 2016)

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by my Learned Sister, Hon. Justice Elizabeth Musoke, JA. I agree that the appeal should be resolved in the terms proposed based on the reasons which have been comprehensively set out in the judgment.

Dated at Kampala this 20th day of 03

Muzamiru Mutangula Kibeedi JUSTICE OF APPEAL

**THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(CORAM: ELIZABETH MUSOKE, MUZAMIRU-KIBEEDI, GASHIRABAKE, JJA)**

CIVIL APPEAL NO. 0316 OF 2021

M & B ENGINEERING LTD.:..... VERSUS

UGANDA NATIONAL ROADS AUTHORITY &

THE ATTORNEY GENERAL:.....

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA.

I have read in draft the judgment of Hon. Lady Justice Elizabeth Musoke, JA.

I concur with the judgment and the orders proposed and I have nothing useful to add.

Dated at Kampala the

Christopher Gashirabake JUSTICE OF APPEAL.

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Prepared on 14 October 2026 · Esheria