

The Republic Of Uganda

In The High Court Uganda At Kampala

Commercial Division

Civil Suit No. 650 Of 2016

Uganda National Roads Authority ::::::::::::::::::::::::::::::::::::::::::::::::::::::: Plaintiff

Versus

1. Dott Services Limited
2. Professional Engineering Consultants ::::::::::::::::::::::::::::::::::::::::::::::: Defendants

Before: Hon. Justice Dr. Henry Peter Adonyo

Judgment

1. Background:

Uganda National Roads Authority a body corporate established under the Uganda National Roads Authority Act of 2006, (hereinafter referred to “UNRA”) sued Dott Services Limited (hereinafter referred to as “Dott Services”) jointly with Professional Engineering Consultants (hereinafter referred to as “PEC”) both of which are companies limited by liability under the Companies Act for the recovery and refund of Uganda Shillings Twenty One Billion Twenty Five Million Two Hundred Seventy Nine Thousand Three Hundred Fifteen (UGX 21,025,279,315/=) with interest and costs which allegedly was wrongly paid to Dott Services as prolongation costs after PEC in breach of its engineering consultancy services to UNRA for road works undertaken on Tororo-Mbale and Mbale–Soroti roads fraudulently and negligently recommended to UNRA through a false assessment and verification that Dott Services be paid the said amount of money for no justifiable reason at all.

Both Dott Services and PEC denied UNRA's claim that the money was paid as compensation for delay days for no work at all and put UNRA to task to justify its allegation.

2. Brief Facts:

On 22nd October 2010 UNRA signed a contract with Dott Services for the staged reconstruction of Tororo-Mbale road, 49 kilometers in distance, to be completed within 18 months (about 1 and a half years) at Uganda Shillings Thirty Billion Two Hundred Eighty Five Million Five Hundred Eight Thousand One Hundred Only (UGX 30,285,508,100/= and for Mbale-Soroti, 103 kilometers in distance similarly to be completed within a period of 18 months (about 1 and a half years) but at fixed cost of Uganda Shillings Forty Six Billion Eighty Three Million Two Hundred Seventy Seven Thousand Seven Hundred Fifty Only (UGX. 46,083,277,750).

Following a design review UNRA changed the scope of works which resulted in the varying of the original contract through an Addendum 2 dated 16th October 2013 which resulted in the increasing of the original contract price and period for construction of the two roads with Mbale-Soroti costs increasing to UGX 108,124,833,428/= to be executed in 40.5 months while Tororo-Mbale cost increased to UGX 63,804,103,546/= to be executed in 38 months.

On 1st of November 2013 Dott Services wrote two letters to UNRA referenced DOTT / TOR-MBE / CLM / 011- 013 / 001 and DOTT / MBE-SORT / CLM / 001-012 / 001 titled Claim No.1 as compensation for 509 days for delayed commencement of permanent works amounting to a total of UGX 45,556, 811,050/=. UNRA on 5th November 2013 referred Claim No.1 to PEC its project consultants which had by then replaced a previous one called Gibb Africa Limited to for review and advise.

PEC assessed and evaluated Dott Services claim and recommended to UNRA to pay Dott Services UGX 33, 204, 834, 600/= instead of the claimed UGX 45,556, 811,050/=.

UNRA on receipt of PEC recommendations made after some consultations with its external legal experts and 17th April 2015 wrote to Dott Services proposing to pay it UGX 29,858,532,069/= instead of UGX 33, 204, 834, 600/= as a final payable amount. Dott Services agreed with UNRA after getting clearance from both PPDA

and the Solicitor General subsequently paying Dott Services total of UGX 29,858,532,069/=.

In July 2016, UNRA's new management instituted an internal audit into payments made to Dott Services in respect of Tororo-Mbale and Mbale-Soroti roads. The internal audit examined documents including the road execution contract, progress reports and site meeting minutes and concluded that Dott Services was never entitled to payments for delay compensation beyond 169 and 139 days earlier approved by UNRA's own contracts committee as prolongation costs in the amount of UGX 8,883,252,755.67/=, instead of the UGX 29,858,532,069/= which had been paid under Claim No. 1 arising from the recommendation of PEC.

On 29th July 2016 and 8th August 2016 UNRA then wrote two letters to the PEC demanding that excess amount of UGX 21,025,279, 315/= it had paid to Dott Services as delayed days compensation. Dott Services declined to refund the said amount claiming it had been properly paid.

UNRA proceeded to institute this suit against both Dott Services and PEC in which it is seeking for the following:

- a. An order for recovery of money had and received for no consideration.
- b. An order for the repayment of UGX 21,025,279,315/=.
- c. An order for payment of interest at commercial rate on i. above from the date of receipt of the money till payment in full.
- d. An order for payment of general and punitive damages against both defendants.
- e. An order for payment of interest at court rate on (iv) above against both defendants from the date of judgment until payment in full.
- f. Costs of the suit against both defendants jointly and severally.

Dott Services denies UNRA's claim stating that by virtue of the contracts it signed with UNRA in 2010 it was entitled to all that was paid under Claim No.1 t as prolongation delay costs arising from delays occasioned by a breach of the contract by UNRA as it had changed the scope of the contract, failed to handover the two road

sites in time to Dott Services, failed to provide road drawings, and engineering information and instructions in time in addition to subsequently redesigning the scope of the two roads projects changing their scope which resulted the claimed for prolongation days costs for which it was entitled under Clause 44 of the General Conditions of Contracts (GCC).

PEC also denied UNRA's claims against it stating that it carried out its duties professionally with all the required engineering skills and due diligence subsequently making recommendations to UNRA which was ignored with UNRA opting to eventually pay the amount of UGX 29,858,532,069/= as a final settlement which it had in the first place not recommended.¹

3. Procedure:

Mr. Titus Kamyia and Mr. Henry Muhangi of the Directorate of Legal Services of Uganda National Roads Authority appeared for the plaintiff. Dott Services was represented by Mr. Enos Tumusiime of Tumusiime, Kabega & Co. Advocates while Ms. Rebecca Nakiranda of Nakiranda & Co. Advocates together with Mr. Byrd Sebuliba of M/s Shonubi, Musoke & Co. Advocates, appeared for PEC. A total of six (6) witnesses testified in court with some testifying to audio–video link. UNRA's witnesses were Mr. Moses Kasakya-PW1, Mr. Paul Karekezi-PW2, M/s Rebecca Natukunda-PW3 and Mr. Mike Hughes-PW4. Dott Services presented Mr. Prasad Reddy-DW1 as its witness while PEC had Mr. Michael Mabonga Wetala-DW2.

Voluminous documentary exhibits were filed in court as Joint Trial Bundle Volumes I to IV in addition to those attached to the affidavit of Mr. Prasad Reddy (DW1) and

¹ *“Staged road reconstruction” being defined in road construction industry as the construction of roads pavement by applying successive layers of asphalt concrete according to design and to a predetermined time schedule. The design of planned stage construction should not be confused with the design of major maintenance or the rehabilitation of existing pavements. This process adopted in highway projects where the road is constructed in layers, or “stages”, and each layer is only placed when the underlying peat is strong to support without failure growth of traffic is uncertain or future traffic volumes are expected to increase substantially due to future developments.*

See: <https://www.sciencedirect.com>

to the sworn written witness statements. In addition, parties filed final written statements.

The pleadings, the documentary exhibits, the witness statements and the final written statements are on record and have been considered accordingly in this judgment.

4. Legal principles:

In all civil matters, the onus rests on the plaintiff to adduce evidence to prove his or her case against the defendant on a balance of probabilities if he or she is to obtain the relief sought for according to **Section 101 (1) of the Evidence Act Cap. 6 of the Laws of Uganda** it is provided that “*whoever so desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.*”.

While the burden of proof is on a balance of probabilities that in criminal cases is one beyond reasonable doubt with the degree of exponentiality in the level of proof in criminal and civil matters having been well discussed by Lord Denning, MR in the case of *Miller Vs Minister of Pensions [1947] 2 All ER 372* at 373 wherein the learned judge stated;

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice”.

In the instant case, therefore, the burden of proof lies on UNRA which is the plaintiff to prove its case on a balance of probabilities as against Dott Services and PEC based on a contract entered into on 22nd day of October 2010. That contract was staged road reconstruction and as with all contracts is enforceable under the Contracts Act, 2010 whose section 2 defines a contract as “*an agreement enforceable by law made with free consent of the parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound*”.

Section 2 of the Contracts Act, 2010 must be read synch with Section 10(1) of the same Act which states that “*a contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound*”.

A contract entered into by parties must be valid and the prerequisites of a valid contract was ably discussed by Lady Justice C. K. Byamugisha (as she then was) in ***William Kasozi versus DFCU Bank Ltd High Court Civil Suit No.1326 of 2000*** wherein the learned stated that “*once a contact is valid; it creates reciprocal rights and obligations between the parties to it. I think it is the law that when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation the party signing it is bound by its terms*”

Furthermore, the essence of section 10 (1) and (2) of the Contracts Act was explained in the case of ***Greenboat Entertainment Ltd Vs City Council of Kampala H-C-C-S No. 0580 of 2003*** as “*in law, when we talk of a contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable, there must be capacity to contract; intention to contract; consensus and idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract*”.

Further where a party to an agreement claims that the other party to a valid contract had failed to perform his or her obligations or performs them in a way that does not correspond with the agreement, then the guilty party is said to be in breach of that agreement and the innocent party would be entitled to a remedy as was pointed out in the case of ***Ronald Kasibante vs. Shell Uganda Ltd HCCS No.542 of 2006***.

The Online Dictionary Wikipedia defines a breach of contract as “*a legal cause of action and a type of civil wrong in which a binding agreement or bargained-for exchange is not honoured by one or more of the parties to the contract by non-performance or interference with the other party's performance. A breach occurs when a party to a contract fails to fulfill its obligation(s), whether partially or wholly, as described in the contract, or communicates an intent to fail the obligation or otherwise appears not to be able to perform its obligation under the contract. Where there*

is breach of contract, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party. See: [https://en.wikipedia.org/wiki/Breach of Contract](https://en.wikipedia.org/wiki/Breach_of_Contract)

The courts in Uganda in several decided cases have considered what a breach of contract entails. In ***William Kasozi vs. DFCU Bank Ltd High Court Civil Suit No.1326 of 2000***, Lady Justice C. K. Byamugisha (as she then was) had this to say in relations to a breach of contract:

“Once a contract is valid; it creates reciprocal rights and obligations between the parties to it. I think it is the law that when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation the party signing it is bound by its terms, hence, when one party to a contract fails to perform his or her obligations or performs them in a way that does not correspond with the agreement, the guilty party is said to be in breach of the contract and the innocent party is entitled to a remedy.”

The High Court in ***Ronald Kasibante vs. Shell Uganda Ltd HCCS No.542 of 2006***, similarly defined breach of contract as *“the breaking of the obligation which a contract imposes, which confers a right of action for damages on the injured party.”*

Lastly, in ***Nakana Trading Centre Co. Ltd vs Coffee Marketing Board Civil Suit No. 137 of 1991*** which was cited with approval in ***Emmanuel Kyoyeta vs Emmanuel Mutebi Civil Suit No. 781 of 0214***, the court went on to state that the act of breaching of a contract was said to occur where one or both parties fail to fulfill the obligations imposed by the terms of a contract.

Arising from the exposition of the legal principles above, it can be safely concluded that where parties derive rights and obligations based on a contract, then such parties must not only show to that they did enter into a valid contract which is legally binding between them but that the contract defined the rights and duties which governs them for such a contract to be legally enforceable in a court of law. From the pleadings of the parties here, the contract entered into by the parties is not in dispute.

In the instant matter, UNRA’s case is grounded Claim No.1 which it states was falsely and negligently recommended by PEC which enabled Dott Services to be paid

which was not due to it falsely paid monies which was not due to it and that this was in breach of contract.

5. Issues:

During the joint scheduling conference parties framed issues for the determination of this suit. which I have adopted them accordingly as below.

- a) Whether the 1st defendant suffered prolongation costs of 509 days.
- b) Whether the plaintiff is entitled to recovery of the suit funds as money had and received against the 1st defendant.
- c) Whether the defendants committed acts of fraud and caused loss to the plaintiff.
- d) Whether the 2nd defendant was professionally negligent and in breach of the consultancy contract in evaluating the claim and advising the plaintiff to pay the suit funds.
- e) The remedies are available to the parties.

6. (Issue. No. 1): Whether the 1st defendant suffered prolongation costs of 509 days:

This issue constitutes the central element in the claim of UNRA against the defendants. The background of this claim is that on 22nd October 2010 UNRA signed a contract with Dott Services for the staged reconstruction of Tororo-Mbale and Mbale-Soroti. The facts leading to the signing to that contract appears questionable for from the way it was executed UNRA in the first place asked Dott Services in September 2010 to mobilise for the implementation of the road works, yet it had not signed any contract with it. This apparent hurried action resulted into the signing of a contract and the non-provision of certain critical information in time such as the requisite road strip maps and road design drawings.

The untenable situation led to several delays which made it difficult to implement the contract as is even highlighted by delays in handing over the road sites and the eventual redesigning of the two roads by Gibb Africa Limited, which was contracted by UNRA as the project consultant when such critical documents were not in place. The redesigning of the two roads entailed Dott Services providing to UNRA fresh costings which culminated in Addendum No.2.

Later, however, in 2013 Dott Services made a claim for prolongation costs as compensation for delayed in Claim No.1. These claims were stated to already have formed part of Addendum No. 2 previously approved as delay days by Gibb Africa Limited which had awarded to Dott Services extension time of 169 days and 139 days respectively.

The coming up of Claim No. 1 created new situations and indeed frictions between UNRA and Dott Services subsequently leading to this suit for while Dott Services was claiming under Claim No/ 1 that it was entitled to delay days prolongation costs, UNRA claimed that those days had already been properly assessed and awarded by Gibb Africa Limited and incorporated in Addendum No.2 to the contract.

While substantial amount was paid under Claim No.1 by UNRA in 2015, in 2016 UNRA sought to have refunded that amount of money on the basis that it paid that money out of false misrepresentations and connivance to fleece it after an approval by it engineering consultant PEC which it says had disregarded earlier consideration of the same items recommended by Gibb Africa Limited.

This is the gist of the testimonies of Moses Kasakya (PW1), Paul Karekezi (PW2) and Rebecca Natukunda (PW3).

In response to UNRA's claim, Dott Services argued that its claim in Claim No.1 claimed arose from UNRA's own failure in following the provisions of Clause 21.1 of the Standard Contract Condition (SCC) which in part required UNRA to hand over to it the two road work sites by 21st November 2010 together with all relevant strip maps which UNRA failed to provide on due date of 17th December 2010 and only did so on 1st August 2011 and thus since this was so then it was entitled under General Conditions of the Contract GCC) to claim those items as compensatable delay days which was in addition to UNRA's failure to provide 100 meters strip map sections as agreed but instead provided 10 kilometers contrary to the contractual provisions thus creating delays claimable as compensation events as was testified to by PW2 and PW3 and even confirmed by DW1.

UNRA through PW1 and PW2 denied that such delay alone could prevent Dott Services from executing the road works as there was sufficient work for it carry out which did not even require the strip maps in addition to the fact that at no time did Dott Service stop work on the roads arising from lack of strip maps.

Dott Services further pointed out that the other events claimed arose from UNRA's failure to provide information as to road width and pavement structures until 12th

April 2012 which culminated to a compensation delay days period of 8 months as provided for under Clause 44.1 (a) and (c) of the General Conditions Contract (GCC).

This was in addition to failure to provide detailed construction drawings within two months of the commencement date of 21st November 2010 for the road works which only were issued to it on 12th March 2012 and on 19th March 2012, respectively rendering permanent road works to only commence on 4th May 2012 thus becoming additional compensation days claimed.

negating UNRA's claim that it was not entitled to delay days compensation.

On the claim by UNRA that it was inefficient in execution of the road works given the fact that it lacked staff and that its road construction equipment constantly broke down thus delaying the road works, Dott Services argued that this submission by UNRA was an afterthought for under the Standard Condition of the Contract (SCC) it had the contractual right to claim for liquidated damages if this indeed was but it did meaning that it was estopped from raising such a claim at this stage when the prolongation delays costs had already been even confirmed by the issuance of a final accounts for the two road projects demonstrating completion of project and payments thus leaving UNRA's claim that Dott Services did not suffer the prolongation delay costs to have no basis and should be dismissed accordingly.

As for PEC, its case was that Dott Services was entitled to the claimed prolongation days claimed as compensation events for which it was paid arising squarely from UNRA's inability to comply with its contractual obligations when it failed to implement several provisions of the contract it had signed with Dott Services including the provision of road strip maps on contract commencement date of 21st November 2010 but doing so on 1st August 2011 as proved by Exhs. D7 and D8.

Additionally, PEC pointed out that by UNRA failing to review, approve and avail road design drawings in time to Dott Services, respectively and only doing so in August 2011 for road design review (Dex.8), September 2011 for road design approval (Dex.9 and 9 (a)), 12 March, 2012 and 19th March, 2012 receipt by Dott Services of approved road designs (Dex. 10 and 10 (a)) and 11th April 2012 receipt of detailed designs drawings with the technical consultant's guidelines (Dex11, Dex.12 and Pex.14), then it was liable for a cumulative delays dates stretching from 21st

November 2010 to 12th April 2012 as corroborated by Michael Mabonga Wetala (DW2) thus resulting into prolongation days which were even awarded and approved by the UNRA itself through its contract committee in a meeting held on 17th April 2015 with the full knowledge of the earlier approved delay days of 139 and 169.

Furthermore, PEC pointed out that even though the evidence of Paul Karekezi (PW2) confirmed that the delays in issuing strip maps amounted to 253 days, the actual delays in commencing construction works amounted to 605 days which days well outside the contractual obligations of the parties as per the contract signed on 22nd October 2010 which legal thus negated UNRA's argument that the delay in supplying the documents were not important for the commencement of the construction works and therefore any claim arising from their non-supply should not have been considered for payments yet it was clear from the contract that the provisions of those documents in a timely manner were *sine qua non* for the implementation of the road contracts.

As to the argument that the calculation of the claimed prolongation days delay included Sundays and public holidays which should not be paid, PEC asked the court to find that this allegation was not proved by UNRA for the very reason that its alleged expert testimony presented by one Mike Hughes (PW4) was clearly inconclusive, limited in terms of being relevant and obviously unreliable as it was not grounded on any clause of either the SCC or the GCC which could vouch his statements.

On the lack of contemporary records to justify losses and expenses, PEC submitted that it applied the calculation formula and methodology recommended by UNRA itself in evaluating the Dott Services Claim No.1 which it never doubted even after the claim was sent to it because it subsequently approved the methodology and went on to make final payments based the same methodology which means that UNRA could not opt out from the same claiming that the said formula was inaccurate, yet it relied on it to pay Dott Services and thus was estopped from doing for as provided so under **Section 114 of the Evidence Act** where it is provided that "*when one person has, by his or her own declaration, act or omission, intentionally, caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she or his or her representative shall be allowed in any suit or proceeding between himself or herself and that person or his or her representative, to*

deny the truth of that thing". This is position was re-emphasized by Hellen Obura, J (as she then was) in **Arch Joel Kateregga & Anor Vs Uganda Post Limited H.C.C.S No. 10 of 2010** while citing with approval the case of **Pan African Insurance Company (U) Ltd vs International Air Transport Association HCCS No. 667 of 2003** in which Justice Lameck Mukasa held that "*the doctrine of estoppel by conduct prevents a party against whom it is set up from denying the truth of the matter. The principle is that where a party has by his declaration, act or omission intentionally caused the other to believe a thing to be true and to act upon such a belief he cannot be allowed to deny the truthfulness of that thing*".

As regard Addendum No. 2, PEC urged court to find that the said document did not refer to compensation for delay days losses suffered by Dott Services but was a price adjustment scheme as pointed out in its clauses 6, 7 and 8 which was entered into to enable the contractor to implement the revised scope of works. According to PEC, therefore, if this is the case, then the expert's witness opinion of PW4 would remain inadequate and uninformed given that it was never anchored on the logic behind the issuing of Addendum 2 and as such should be found untruthful.

I do agree that such expert evidence can only be of value and conclusive if its evidential worth is placed under scrutiny by court as was pointed out in **Namatovu Margaret versus Tom Kaaya & Stanley Ndyabahika, H.C.C.S No. 432 of 2005** with the court in that case citing with approval **Sarkar's Law of Evidence, 17th Edition, 2010 at page 1258** which reads as follows; "*The infirmity of expert evidence consisted in this is that it is mostly matters of opinion and is based on facts detailed by others or assumed facts and opinions against opinion; and experts are selected by parties by ascertaining previously that they will give an opinion favourable to the party calling them. Expert evidence is, however, of value in cases where courts have to deal with matters beyond the range of common knowledge and they could get along without it, eg matters of scientific knowledge or when the facts have come within the personal observation of the experts*" Sarkar then concludes; "*The evidence of an expert is not conclusive. It is for the courts to assess the weight of the evidence and come to its own conclusion. An expert is fallible like all other witnesses and the real value of his evidence lies in the logical inferences which he draws from what he himself observed, not from what he merely surmises or has been told by others. Therefore, in cross examining him it is advisable to get at the grounds on*

which he bases his opinion. There is great difficulty in dealing with evidence of expert witnesses. Such evidence must always be received with caution; they are too often too partisans- they are reluctant to speak quite the whole truth, if the whole truth will tell against the party who had paid them to give evidence... Their duty is merely to assist court by calling attention to, and explaining, matters the true significance of which would not be clear to persons who have received no scientific training, or have had no special experience in such matters.” (Emphasis mine)

In conclusion on this point, PEC then urged court to find that its recommendation to UNRA which enabled Dott Services be paid under Claim No.1 as prolongation days delay costs should be found to be legally justified since it was grounded on contractual provisions found in the SCC which UNRA failed to implement which are compensatable events under the GCC with any claim otherwise being outside the scope of the contract signed on 22nd October 2010 and therefore should be dismissed accordingly.

I now turn to discuss and determine the merits and demerits of issue number 1 of whether Dott Services (the 1st defendant) suffered prolongation costs of 509 days. On the 22nd of October 2010 a contract was signed between UNRA and Dott Services for the staged reconstruction of the Tororo-Mbale road, (49 kilometers) to be executed in 18 months at a fixed cost of UGX 30,285,508,100= and for Mbale-Soroti road, (103 kilometers) to be executed similarly in 18 months at fixed cost of UGX. 46,083,277,750/=. These contracts were admeasured governed under the General Conditions of Contract for Procurement of Works (GCC) issued by the Public Procurement and Disposal Authority for such works in 2005.

Claim No.1 is the source of UNRA’s complaint in that it states that the said claim is said to have mistakenly enabled Dott Services, after a recommendation to UNRA by PEC, to be paid a huge amount of money as prolongation costs which was excess funds paid for no consideration at all entitling UNRA to its recovery as per its summarised following facts:

- a) There were indeed delays days suffered by Dott Services which arose from the delay issuing of construction drawings that lasted from 21st November 2010 which was the contract commencements date up to 9th April 2011 for the contract it signed with Dott Services on 22nd October 2010 for Lot D and 9th May 2011 for Lot E.

- b) There was never any delay totaling 509 days was suffered by Dott Services on the two road projects as prolongation days period as claimed by Dott Services and approved by PEC.
- c) An extension of delay time of 169 days for Lot D and an extension of time of 139 days for Lot E was granted to Dott Services for period stretching from 21st November 2010 to 9th April 2011 and 9th May 2011 for Lot D and Lot E, respectively.
- d) UNRA paid Dott Services for prolongation days costs of UGX 29,858,532,069, /= as a result of connivance and fraud by Dott Services and PEC for no consideration at all.
- e) Both Dott Services and PEC were liable for the fraudulent claim which this court must direct them refund the excess funds paid.

In proving its case against the two defendants, UNRA called in the testimonies of four witnesses and tendered in several documents whose details are summarised as follows;

a. Moses Kasakya (PW1):

He is a Director Internal Audit at UNRA. He reviewed and evaluated the Dott Services claim of UGX 29,858,532,071 for its validity and found that it was for prolongation costs which was stated to have arisen from a delayed commencement of works, direct costs incurred by Dott Services such as insurance and securities costs, equipment idle time costs, indirect fees, head office costs and site overheads which all amounted to 509 days, but these claims were not legally valid as per contract signed on 22nd October 2010 for the following reasons;

- i. The commencement date of the contract signed on 22nd October 2010 was 21st November 2010.
- ii. The 509 days claimed by Dott Services in addition included resource mobilization period which ran from 21st November 2010 to 20th January 2011 for a period of 60 days which UNRA could not be held liable contractually.
- iii. Dott Services Claim No.1 included weekends and public holidays which were non-working days for which UNRA was not contractually liable and this is seen from the fact that the period from 21st November 2010 to 12th April 2012 included 86 Sundays and public holidays combined which should have been deducted from the claimed 509 days.
- iv. Dott Services' claim that its mobilized resources were idle was not true since they were being used during the progressive issuance of drawings and designs

from 9th April 2011 and 9th May 2011 up to 11th April 2012 when complete designs were issued to it with the Interim Payment Certificates 1, 2 and 3 demonstrating this fact that road works was ongoing during that period.

- v. There was no information availed to show the days claimed were arrived at given that no source of that information was availed.

b. Rebecca Natukunda (PW2):

She is the Head of Technical Audit with UNRA who assignment by UNRA's Director of Internal Audit was to carry out a detailed review and evaluation of Dott Services Claim No.1. She reviewed several documents including the two road works contracts, correspondences relating to the two road projects, minutes of site meetings, status reports, interim payments certificates and Claim No.1 and established the following.

- The contracts between UNRA and Dott Services were varied in scope, time and money via Addendum No. 2 on 16th October 2013 with the cost in respect of Mbale-Soroti road project increasing from UGX 46,083,277,750 to UGX 108, 124,833,428 and its execution duration increasing from 18 (eighteen) months to 40.5 months while the cost of execution of Tororo-Mbale road increased from UGX 30,285,508,100/=to UGX 63,804,103,546 with its execution period increasing from 18 months to 38 months.
- The contract supervision was initially carried out by Gibb Africa Limited on behalf of UNRA as its engineering consultant and upon expiration of that consultancy contract, Professional Engineering Consultants Limited (PEC) was appointed in June 2013 as replacement contracts implementation supervising consultant.
- Dott Services Claim No.1 was challengeable on grounds that it informed a site meeting held in January 2011 that it had not yet mobilised all the required equipment on site and promised to do the needful by the end of the mobilization period of 22nd February 2011. But this was not to be, for in another site meeting held 16th March 2011, the Dott Services again informed the meeting that not all equipment were on site. Therefore, from its own admission, Dott Services claim for prolongation costs during the mobilization period was not valid and therefore, UNRA could not be charged for idle resources that were not on site.

- From the time the consultant issued the drawings for both Lots on 9th April 2011 and 9th May 2011, Dott Services continued to work despite alleged lack of design drawings as proved by minutes of site meetings No. 6 to No. 15 held on 12th April 2012 as well as interim payment certificates No.1 to No. 3.
- Dott Services made reports on progress of works which stated that it was yet to mobilise some equipment in addition to reporting that some of its equipment on site regularly broke down and needed repair. In respect of these reports Dott Services was always tasked to improve equipment mobilization as well as their repairs but at no time did Dott Services report idle equipment or any resources.
- The delay caused by late issuing of design drawings led to the project consultant recommending an extension of time of 169 days and 139 days for Lots D and E, respectively.
- The claimed prolongation of 509 days for period of 21st November 2010 to 12th April 2012 had no contractual basis with only contract compensable days only arising from delays of the 169 and 139 days for Lot D and Lot E, respectively which was determined by an Audit Report and amounting to UGX 8,883,252,755.67/= only.
- Further information which she came across subsequently revealed that Dott Services was never from the beginning entitled to prolongation delay costs.
- A design review by Gibbs Africa Limited informed changes in the scope of work necessitating the variation of the original contract for which Gibbs Africa Limited advised Dott Services to submit a priced variation order which would capture such variation.
- Dott Services submitted a priced variation order in which it indicated that the two road contracts could not be completed with the already approved resources and within the contracted time without acceleration.
- No conclusion on this was made before Gibb Africa contract ended.
- Later in 2013 PEC was appointed to replace Gibb Africa Limited. It advised UNRA that the original contract be subjected to acceleration rates for the road works to be completed in the contracted time.
- Following PEC advice, the Regional Manager and Director of Operations of UNRA recommended to the Acting Director PDU / Head PDU of UNRA that Dott Services contract be amended to include the completion of the increased

scope of work within a reduced implementation period using additional resources at accelerated factor of 1.39 and 1.5 for Tororo-Mbale and Mbale-Soroti, respectively.

- Accordingly, UNRA’s contracts committee approved the proposal and revised the scope of works for the two projects to a revised contract price using the proposed acceleration factors of 1.5 and 1.39 from UGX 30,285,518,100/= to UGX 63,804,103,546/= (110 percent increase) for Tororo-Mbale road and UGX 46,083,277,750 to UGX 107,646,033,428 (135 percent increase) for Mbale-Soroti execution duration extended from 18 months to 38 months and to 40.5 months, respectively.
- An Addendum No. 2 to the original contract was then prepared, submitted to the Public Procurement and the Disposal of Public Authority (PPDA) and the Solicitor General for clearance and approval, respectively, and subsequently it was signed on 13th October 2013.
- On 1st November 2013 Dott Services submitted to UNRA Claim No.1 seeking compensation for delayed commencement of permanent road works for the Tororo-Mbale and Mbale-Soroti roads which UNRA referred to PEC review and advise.
- PEC reviewed the claim and determined that UNRA was obliged to pay UGX 33,204,8834,600 compensation for delayed commencement of the two-road works. This amount was subsequently reduced to UGX 29,858,532,069 in a meeting between UNRA, Dott Services and PEC on 17th April 2015.
- In a letter dated 29th April 2015 PEC advised UNRA to pay to Dott Services UGX 29,858,532,069/= as compensation for the delayed commencement of works. UNRA accordingly paid this amount on 22nd May 2015.
- The acceleration factor applied was retrospective in that it covered past period including commencement date of 21st November 2010 to 16th October 2013 when full drawings and instructions were issued to Dott Services.
- Dott Services received double payment for the same compensation event since the period of acceleration under Addendum No. 2 overlapped the prolongation days claim period.
- According to the Society of Construction-Delay and Disruption Protocol, it is provided that where acceleration has been agreed upon, the contractor is not

entitled to claim prolongation costs for a period covered by acceleration, therefore Dott Services was not entitled to the excess funds paid to it.

c. Paul Karekezi(PW3):

He is a Project consultant with Gibb Africa Limited and testified that;

- Gibb Africa Limited was employed by UNRA as its project consultant for design review and contract supervision for road works Lots D and E.
- Gibb Africa Limited found no design to review and agreed with UNRA to prepare detailed designs for the two road projects.
- Gibb Africa Limited informed Dott Services by letter that the commencement date for the two-road works was 21st November 2010 as per sub-clause 1.1 (ee) of the Special Conditions of Contract.
- Design execution was changed 10 km sections as provided under the clause 7303 of the General Specifications for Road and Bridge Works since the permanent works could not start without complete design drawings.
- The design drawings for the first 12 kilometers on Lot D was issued on 9th May 2011 while that for Lot E was issued on 4th April 2011 and covered 10 kilometers.
- From 4th April 2011 and 9th May 2011 onwards, Dott Services never stopped any road work due to any lack of design information with this fact demonstrated by minutes of site meetings, reports and interim payment certificates for the work already done.
- Dott Services during this time notified UNRA of its intention to claim for extension of time arising from delayed designs and delayed possession of the site in accordance with the provisions of the contract.
- Gibb Africa Limited advised Dott Services to prepare a draft variation order after the new design had been issued and it did so.
- After an assessment of the Draft variation order Gibb Africa Limited recommended to UNRA's contracts committee grant to Dott Services extension of time of 169 days for Lot D and 139 days for Lot E based on approved designs issued it.
- The contracts committee did not immediately approve Gibb Africa Limited's recommendation for increase in price of UGX 40,942,123,361 for Lot D and UGX 64,199,385,689 for Lot E but sought further clarifications.

- In the meantime, Gibb Africa Limited's supervision contract expired before the recommended cost could be finalized.
- In his view the idling days costs claim by Dott Services of UGX 29,858,532,069 in Claim No.1 had no basis for it was fully engaged throughout and never reported any idling of resources and therefore it was not entitled to any amount in excess of the valuation made by Gibb Africa Limited in its assessment which considered escalated rates as well as increased quantities.

d. Mike Hughes (PW4):

He was an expert witness called by UNRA. He testified that;

- He prepared the report marked Pex. 87.
- That his conclusions in the report were that there was no clear basis as to how the claim under Claim No.1 were calculated and awarded given that they differed significantly with those which were recommended by Gibb Africa Limited.
- He testified that according to his findings that though Dott Services was entitled to prolongation costs as damages it was unlikely that UNRA was entirely liable for all the claimed 509 days given that there was no proof of these days were arrived at by Dott Services in the absence of records.
- He found that Dott Services method of calculating the claimed compensation was not based on any legal principle and did not follow the best practices for addressing delays and disruptions in construction practice.
- He concluded that given dearth of information to demonstrate the claimed losses then there could not be any actual losses.

Dott Services agreed with UNRA that indeed on 22nd October 2010, it signed a contract with UNRA after UNRA had earlier on 7th September 2010 instructed it to mobilize equipment, materials and personnel for execution of road works on Tororo-Mbale and Mbale-Soroti roads. That it fully complied with UNRA's request and was ready to execute the road works by November 2010 as per the program of works premised on the original scope of works but unfortunately could not do so for the

reasons which subsequently forced it to claim for UNRA compensation arising from the following;

- Failure by UNRA, through its agent, in handing over the the road site works on the 21st November 2010 as per the contract signed on 22nd October 2010 which it instead did so on 17th December 2010.
- Failure by UNRA to provide strip maps on time to enable road works to begin which it only did so on the 1st August 2011, which was nine (9) later than the road project commencement dates.
- That it challenged an interim extension of time of 169 days and 139 days for both Lots D and E granted by Gibb Africa Limited for lost time as it was not based on any technical basis for consequent extensions of time were only granted after the conclusion of the Final Design much later which eventually enabled the issuance of a program for completion.
- UNRA failed to provide road designs and construction drawings for the contract roads until 12th March and 19th March 2012, respectively.
- UNRA failed to provide implementable detailed designs and construction drawings until 11th April 2012.
- UNRA failed to approve detailed fundamental changes to the scope of works until 5th May 2012.
- UNRA failed to respond in time to all relevant communication from Dott Services and delayed the valuation of Variation Orders until October 2013.
- UNRA frequently made substantial changes to the road design and method of executing the road works in addition to intermittently remitting several design changes which led not only to distortions of Dott Services' planning, but its road implementation program, sequencing and works activities which were all compensable events under the SCC and GCC.
- As a result of the ineptitude of UNRA, Dott Services made a claim for compensation for prolongation days costs as follows;

- i. loss of anticipated revenue generation and disruption of cash flow as per the signed contract.
 - ii. depreciation of the contractor's plant, machinery and equipment.
 - iii. costs for maintaining quarry and camp sites and management of traffic details; and keeping personnel in site due to prolongation of the contract.
 - iv. opportunity cost due to lost business,
 - v. financial costs.
 - vi. delayed retention of money.
 - vii. excess liability costs for road sections which should have been handed over.
 - viii. putting the contractor to disrepute.
- Dott Services submitted Claim No.1 for compensation days arising from the fact that UNRA had breached the terms of the contract which was signed on 22nd October 2010 with the details in the claim each being a compensable event under the GCC.
 - That the prolongation days costs were raised and paid in accordance with the terms of both SCC and GCC.

In support of its case Dott Services called one witness in support of its case.

a. Prasad Reddy (DW1):

He is the Director of the 1st Defendant entity and testified that;

- UNRA failed to hand over the sites by 21st November 2010 to the 1st Defendant but instead did so on 17th December 2010, in contravention of Clause 21.1 of the General Conditions of Contract.
- The contract for the road works required that commencement date be communicated in writing together with strip maps and that detailed construction drawings be provided within 2 months of the commencement date which UNRA failed to do.

- UNRA provided strip maps to Dott Services in August 2011 which was a period of nine (9) months late and was halfway through the project implementation period of 18 months.
- The road project detailed drawings were only provided in March 2012 which was one (1) year and four (4) months late and was just two (2) months to the road contract completion date.
- The design review and pavement structure were provided in September and November 2011 which were many months away from the commencement date of 21st November 2010.
- The two road contracts required that detailed construction drawings together with the top widths to be provided within two (2) months of the commencement date of 21st November 2010, but this was done only on 8th February 2012 with the plans and profiles only provided on 12th March 2012, which was one and a half years late while the road design was provided on 16th October 2013!
- After providing the design review for the two Lots, UNRA again changed the scope of works on pavement layers and unit rates and unilaterally varied the original contract on 16th October 2013 through an Addendum 2 which increased contract price for Lot E to UGX 108,124,833,428/= with execution moving from 18 to 40.5 month for Mbale- Soroti and for Lot D to UGX 63,804,103,546/= for Tororo-Mbale to be executed over a period of 38 months from 18 months.
- UNRA's engineering consultants carried out several reviews, revised drawings / designs and gave numerous variations instructions many a time in piecemeal relating to such items such as the size of aggregate, road profile and size leading to distortions in work schedule with the several inquiries made Dott Services in respect to these changes never answered on time or at all.
- The changes brought about by the design review, piecemeal instructions, delayed possession of the site, delay to provide strip maps, delays to issue construction drawings, delayed clarification of designs and introduction of new scope of works all caused distortion to Dott Services' work program resulting in the claimed and subsequently paid delay days suffered totaling to 509 on

each road project with these claimed delay days being the direct result of UNRA's incompetence in fulfilling its part of the contract signed on 22nd October 2010 and were compensable under Clause 44 of the General Condition of Contract.

- Dott Services suffered financial losses arising from cost of paying personnel at site, cost of maintaining quarries, camp sites and materials, costs of managing traffic details, its head office and site expenses, advance payment guarantees, performance guarantees and insurance policies over plants, materials, equipment and personnel injury or death with Clause 11 of the contract providing that all these events were at the employer/ UNRA's risk.
- The net loss of revenue by Dott Services for Mbale-Soroti Road was UGX 45, 564, 964, 198/= while that for Tororo-Mbale Road was UGX 26, 783, 456, 562/=.
- Dott Services disagreed with Gibb Africa Limited's recommendation of 169 and 139 days for Mbale–Soroti and Tororo-Mbale Roads as it was not based on any clear reasons and so subsequently Dott Services made a claim for compensation for delays for 16 months for each road to UNRA which claim was subsequently sent to PEC to evaluate and recommend.
- PEC approved Dott Services' claim following its assessment and evaluation of all compensation events which included delayed issuance of strip maps, delayed site possession, delayed issuance of construction drawings and delayed issuance instructions on construction of works.
- PEC rejected Dott Services' claim for undue introduction of new scope of works which required change of method of works, intermittent and substantial design testing / revisions, delayed resolution of variation orders and distortion of Dott Services' program of works stating that such claims had already been addressed in Addendum No.2 which dealt with increased scope of works.
- PEC recommended for Dott Services 253 days arising from delayed issuance of the strip map, 255 days for failure to provide drawings and instructions, the cost of insurance and bond guarantees but not the cost of putting Dott Services into disrepute.

- Following some advice from a legal expert, UNRA offered to pay, and Dott Services agreed and accepted the amount of UGX 29,858, 532,069/= as compensation costs in June and August 2015 for both Tororo-Mbale and Mbale-Soroti Road.
- The High Court in the case of *Dott Services Ltd and Another vs Attorney General Misc. Cause No. 137 of 2016 found* that UNRA caused delays and the situations which led to the claimed and paid losses.
- UNRA has no further lawful claim as against Dott Service and as such its claim in this court should be dismissed with costs.

PEC's case was that it evaluated Dott Services' claim based on the documents availed to it by UNRA and found that compensation events had indeed occurred and made its findings in detailed evaluation reports, which showed that UNRA delayed to issuance of strip maps, construction drawings and guidelines to Dott Services which resulted in an extension of compensable time totaling to 509 days as delay days with the claims evaluated with due care after which recommendations to UNRA to pay to Dott Services UGX 33,204,834,600/=with UNRA after reviewing the recommendation subsequently approved a payment amounting to UGX 29,858,632,070/=after conceding that it had delayed the implementation of the contract it signed with Dott Services as was anchored in Clause 21.2 of the SCC and thereafter wrote to Dott Services approving its claim with PEC, in line with the engineering consultancy contract , going onto prepare and submit an interim payment certificate in terms of what had been approved by UNRA for payment to Dott Services and as such PEC cannot be held liable for its recommendation to UNRA which itself approved the same in addition to its eventual renegotiation downwards of the recommended figure with Dott Services which it eventually paid arising from its own free will and volition.

PEC called one witness in support of its case.

a. Michael Mabonga Wetala, (DW2)

He is director at PEC and testified in court as follows;

- On the 3rd July 2013, UNRA and PEC executed a contract for an engineering consultancy services.

- Variation Order No.1 provided for extension of time for 169 and 139 days which arose from delays in issuing drawings which were subsequently done in April 2011 and May 2011.
- The designs prepared by the Gibb Africa Limited resulted from a significant change in the scope of works on the two (2) projects which then necessitated the drafting of Addendum No. 2 for the purposes of addressing the change in unit rates, the variation of the contract and extension of time for execution and completion of works.
- Gibb Africa Limited, thereafter, worked on a Variation Order to accommodate the changes in design which subsequently became Addendum No. 2.
- PEC later assessed and evaluated the revised rates considering the revised scope of work, tender rates and the required project completion time and recommended additional mobilization of resource for higher production rates.
- The contracts committee of UNRA approved Addendum No. 2 on 13th June 2013.
- On 19th August 2013, the Public Procurement and Disposal of Public Assets Authority (PPDA) allowed the variation and wrote to UNRA to amend the original contract with Addendum No. 2 which document was approved by the Solicitor General after consultation by UNRA.
- UNRA and Dott Services upon approval by UNRA's Contracts Committee executed Addendum No. 2 on 16th October 2013.
- On 5th November 2013, UNRA wrote to PEC officially notifying it of Dott Services' Claim No.1 which included compensation events of between 21st November 2010 and 12th April 2012.
- PEC after evaluated Dott Services Claim No. 1 using documents supplied to it by UNRA and after seeking further clarification from Dott Services made recommendation that UNRA approve for payments only items relating to delayed issuance of a strip map (254 days), delayed issuance of site possession, delayed issuance of construction drawings (417 days) and delayed issuance

for clarification / guidelines on construction works (256 days) as compensable events which all totaled to 509 days.

- PEC also inform UNRA that it had rejected Dott Services' claims for new scope of works, change of method of works, delayed resolution of variation orders and delay due to distortion of contractor's program of works since these had already been addressed in Addendum No. 2 in relation to the increased scope of works and increase contract price for both road works.
- PEC recommended to UNRA to pay to Dott Services UGX 33,204,834,600/= as compensation for the delays as assessed out of a total claim of UGX 45,556,811,050/= made by Dott Services.
- UNRA subsequently negotiated with Dott Services and a paid a reduced amount of UGX 29,858,632,070/ as final amount on Claim No.1.

The above summarizes the evidence in regarding to the instant issue of whether Dott Services suffered prolongation costs of 509 days on Lots Of D and E and whether each of the events claimed was compensable under the General Conditions of the Contract.

Given that the contract signed on 22nd October 2010 between UNRA, and Dott Services was an admeasurement contract governed under the GCC and was for the staged reconstruction of Tororo-Mbale road and Mbale Soroti road, I will examine the said contract relevant provisions in order to make appropriate findings and conclusions.

The major and relevant provisions of the contract signed between UNRA and Dott Services on 22nd October 2010 are reproduced hereinafter below for clarity and reference.

a. Clause 1.1 (c) Admeasurement Contract:

This clause provides that *“an admeasurement contract is one under which works are executed based on agreed rates and prices in a bill of quantities and payment is made for the quantity of work executed.”*

b. Clause 2 sub-clause 5 Interpretation:

This clause provides that *“the documents forming the contract shall be interpreted in the following order of priority.*

1. *Agreement*
 2. *Any letter of acceptance*
 3. *Contractor’s Bid*
 4. *Special Conditions of Contract*
 5. *General Conditions of Contract*
 6. *Specifications*
 7. *Drawings*
 8. *Bill of Quantities of Activity Schedule, as appropriate, and*
 9. *Any other document listed in the SCC as forming part of the Contract.”*
- c. Clause 4 Project Manager’s Decisions:

This clause provides as follows;

4.1 Except where otherwise specifically stated, the Project Manager will decide contractual matters between the Employer and the Contractor in the role representing the Employer.

4.2 The Project Manager will obtain the Employer’s approval for any of the decisions specified in the SCC.

- d. Clause 11 Employer’s Risks:

This clause provided that *“from the start date until the Defects Correction Certificate has been issued, the following are the Employer’s risks:*

- a. *The risk of damage to the works, plant, materials and equipment to the extent that it is due to a fault of the employer or in the employer’s design, or due to war or radioactive contamination directly affecting the country where the works are to be executed*
- e. Clause 14.1 Site Investigation Reports:

This clause provided that *“The contractor, in preparing the bid, shall rely on any site investigations reports referred to in the SCC, supplemented by any information available to the bidder.”*

f. Clause 15 Queries about the Special Conditions of Contract:

This clause at Clause 15.1 provided that *the Project Manager will clarify queries on the SCC.*

g. Clause 21.1 Possession of the Site:

This clause provided that *“the employer shall give possession of all parts of the site to the contractor. If possession of a part is not given by the date stated in the SCC, the Employer will be deemed to have delayed the start of the relevant activities, and this will be a Compensation Event”*

h. Clause 22 Access to the Site:

This clause was to the effect that *“the contractor shall allow the project manager and any person authorized by the Project Manager access to the site and to any place where work in connection with the contract is being carried out or is intended to be carried out.”*

i. Clause 28.1 Extension of the Intended Completion Date:

This clause provided that *“The Project Manager shall extend the Intended Completion Date if a Compensation Event occurs or a Variation is issued which makes it impossible for completion to be achieved by the Intended Completion Date without the Contractor taking steps to accelerate the remaining work, which could cause the contractor to incur additional cost.”*

j. Clause 29 Acceleration:

This clause had two relevant parts as follows;

29.1 was to the effect that *“when the Employer wants the Contractor to finish before the Intended Completion Date, the Project Manager, will obtain priced proposals for achieving the necessary acceleration from the Contractor. If the Employer accepts these proposals, the Intended Completion date will be adjusted accordingly and confirmed by both the Employer and the Contractor.”*

29.2 which stated that *“if the Contractor’s prices proposals for an acceleration are accepted by the Employer, they are incorporated in the Contract Price and treated as a variation.”* Underlining mine.

k. Clause 32.1 Early Warning:

Under this clause it was provided that *“the contractor shall warn the Project Manager at the earliest opportunity of specific likely future events or circumstances that may adversely affect the quality of the work, increase the contract price or delay the execution of the works. The Project Manager may require the contractor to provide an estimate of the expected effect of the future event or circumstances on the contract price and completion date. The estimate shall be provided by the contractor as soon as reasonably possible.”*

l. Clause 37: Bill of Quantities or Activity Schedule:

For admeasured contracts, the following clauses were applicable.

Option 1: Admeasurement Contracts- Bill of Quantities:

Clause 37.1 provided that *“the Bill of quantities shall contain items for the construction, installation, testing and commissioning work to be done by the contractor”*

Clause 37.2 provided that *“the Bill of quantities is used to calculate the contract price. The contractor is paid for the quantity of the work done at the rate in the bill of quantities for each item”*

m. Clause 39 Variations:

Clause 39.1 Option 1 provided relating to admeasured contracts provided that *“ all variations shall be included in updated programs produced by the contractor”*

n. Clause 40: Payment for Variations:

Option 1: Admeasurement Contracts-Payment for Variations:

“40.1 The Contractor shall provide the project manager with a quotation for carrying out the variation when requested to do so by the project manager. The project manager shall assess the quotation, which shall be given within seven days of the

request or within any longer period stated by the Project Manager and before Variation is ordered.

40.2 If the work in the variation corresponds with an item description in the bill of quantities and if, in the opinion of the project manager, the quantity of work above the limit stated in sub-clause 38.1 or the timing of its execution do not cause the cost per unit of quantity to change, the rate in the bill of quantities shall be used to calculate the value of the variation. If the cost per unit of quantity changes, or if the nature of timing of the work in the variation does not correspond with items in the bill of quantities, the quotation by the contractor shall be in the form of new rates for the relevant items of work.

40.4 If the Project Manager decides the urgency of varying the work would prevent a quotation being given and considered without delaying the work, no quotation shall be given and considered without delaying the work, no quotation shall be given, and the variation shall be treated as a compensation event.”

o. Clause 44.1 Compensation Events:

Under this clause the following were listed compensation events:

- a) The Employer does not give access to a part of the site by the site possession dated stated in the SCC*
- b)*
- c) The Project Manager orders a delay or does not issue drawings, specifications, or instructions required for execution of the works on time*
- d)*
- e)*
- f) Ground conditions are substantially more adverse than could reasonably have been assumed before issuance of the Letter of Acceptance or Agreement from the information issued to bidders (Including the Site Investigation Reports) from information available publicly and from visual inspection of the site.*

g) *The Project Manager gives an instruction for dealing with an unforeseen condition, caused by the Employer, or additional work required for safety or other reasons.*

h)

i)

j) *The effects on the Contractor of any of the Employer's Risks*

k) ”

p. Clause 44.2 of the GCC: Definition of Compensation Events:

This clause defines “compensation events as those that would cause additional costs or those that would prevent the work from being completed before the Intended Completion date in which case the contract may be increased and or the intended completion date may be extended depending on the information submitted by the contractor.”

Determination of Issue No.1:

I now turn to discussing and concluding the first issue as follows.

a. Dott Services' Claim No. 1 for Prolongation costs:

It is an undisputed fact that Dott Services submitted Claim No.1 to UNRA on 1st November 2013 through PEC seeking compensation for the delayed commencement of permanent works on the road projects tendered as Lot D and Lot E amounting to UGX 45,556,811,050/=. That claim listed delay events with delay days compensation sought as delayed possession of site, delayed provision of strip maps, delayed issuance of construction drawings, delayed clarification of design way forward, undue introduction of new scope of works that required change of method of works contrary to what was contemplated during tendering and signing of the contract, delay due to intermittent and substantial design testing and revisions, delay due to delayed resolution of the variation orders and delay due to distortion of the road contractor's program of work.

It also not disputed that PEC upon receipt of Dott Services' claim considered only the the first four claimed events as compensation events for settlement under Clause 44.1

of the GCC amounting to UGX 33,204,834,600/= as against a total claim of UGX 45,556,811,050/= which had been made by Dott Services (See: Pex.82.).

It also true that after PEC's recommendation to UNRA that it pays an amount of UGX 33,204,834,600/= , UNRA held additional discussions and negotiations with Dott Services and after it had secured approval from both PPDA and the Solicitor General, UNRA went on to pay Dott Services UGX 29,858,532,069/= on the basis that this amount arose from incurred financial losses such as the depreciation of plant, machinery, equipment and tools, the cost of managing idle personnel at road sites, the loss of anticipated revenue, excess liability costs for roads sections and opportunity cost due to lost business, the costs of maintaining advance payment guarantees, performance guarantees and insurance policies over a long period of work, plant, materials and equipment among others. All these facts are not disputed. I will not examine it further.

b. Method of computing Dott Services' Claim No.1:

What is disputed is the method of computing Dott Services' Claim No.1 for during cross-examination, Moses Kasakya (PW1) informed court that arising from the details of the claims submitted by Dott Services to UNRA , UNRA was concerned with some of the claims made and sought further explanations and information to enable it vouch whether those claims were true or not such as those relating to plant and equipment which could were neither indicated as being new or old given the fact that no record of assets had been availed so to provide relevant information as to when and what equipment was mobilized. This concern extended to the claimed number of staff as well as their cost since neither their appointment letter nor pay as you earn records were availed thus given the fact that there were no prior correspondences in these items, it was difficult for UNRA to treat these items as compensation events since even no site diary was availed by Dott Services as was its obligation thus making these claims doubtful as compensation. This doubt was also pointed out and questioned by Mike Hughes (PW4) who raised doubts as to how Dott Services eventually arrived at such a claim.

In response, to this sub issue, Michael Wetala (DW2) informed court that Dott Services made its claim in respect of these items relying on UNRA's own established weighting system in addition to a guidance from the Chief Mechanical Engineer

Ministry of Works and Transport in addition to pointing out that Ex.D26 showed that UNRA was indeed already in possession of these very questioned and doubted information for as proved by site meetings minutes and progress reports which referred to items such as equipment, personnel and materials and so forth.

In the absence of any rebuttal of these facts by UNRA that PEC in calculating the compensation events days claimed by Dott Services used a methodology which was supplied by it and given the fact that indeed UNRA had verifiable information as regards the items which were claimed, I would agree with the defense case that the method of computing Dott Services' Claim No.1 was supplied by UNRA itself which also additionally to the relevant records such site diaries and records to be able to sufficiently verify both staff information and assets which were claimed as compensation events.

c. The claimed Prolongation days of 509 by Dott Services:

Dott Services claimed that it suffered prolongation days cost totaling to 509 arising from several delay events and these are.

i. Delays in issuing the strip maps:

Clause 21.1 of the Special Conditions of the Contract provided that UNRA through its project engineering consultant was required to issue strip maps at the commencement of the works project upon handing over of the sites with the requirement under this was clause being that the commencement date was to be communicated in writing with strip maps.

However, according to the evidence on record and which is not disputed, Gibb Africa Limited, representing UNRA only provided the strip maps on 1st August 2011 which was a period nine (9) months later than the project commencement date of 21st November 2010 as is reflected by Ex. D7 and Ex. D8 which the documents submitting strip maps to Dott Services by Gibb Africa Limited transmitting with Gibb Africa Limited in a letter dated 5th April 2012 (Pex. 4) addressed to UNRA referenced '**Lot D; Staged Reconstruction of Tororo-Mbale Road-Contract No. UNRA/Works/2009-2010/00001/02/04** explaining the delay in transmitting the strip maps in the following terms:

".... the delay in issuing the strip maps for the project is a compensation event and to establish the Contractor's entitlement to an extension of time, we consider that the following should be taken into account.

a. The strip maps for the project should have been issued on the start date, i.e., 21 November 2010"

In my considered opinion, this was a clear acceptance of responsibility by UNRA through its agent that it failed to provide the strip maps to Dott Services in accordance with the SCC and, therefore, proving that this was a compensation event of 253 days which should be calculated from 21st November, 2010 as was provided under Clause 44 of the General Conditions of the Contract (SCC) given that indeed there was a breach of a contractual by UNRA and therefore Dott Services was properly entitled to the delay compensation days of the 253 days on this item.

ii. Delayed issuance of construction drawings:

In respect of the issuance of construction drawings, it was a requirement under Clause 21 (1) of the SCC provided that *"...the detailed construction drawings will be provided to the contractor within 2 months of the commencement date."* The use of the word *"shall"* within the contract document connotes as according to Merriam–Webster Dictionary *directives that express what is mandatory (emphasis mine)*. This, therefore, would mean would the issuing of the construction drawings to Dott Services would mandatorily be not later than 20th January 2011 given that the commencement date for the contract signed on the 22nd October 2010. The fact that this was not done by that date as proved by Ex.D9 and Ex.D10 in which UNRA's Resident Engineer submit to Dott Services, the detailed construction drawings for the two roads on dates of 12th March 2012 and 19th March 2012, respectively which dates are clearly outside the two month's mandatory period as provided by Clause 21.(1) of the SCC makes that delay a compensation event in line with Clause 44.1 (c) of the GCC earlier reproduced above making the assessment of PEC in this respect as a prolongation days testified to by Michael Wetala (DW2) in paragraph 5.6.4 of his witness statement to be a claimable event thus was correctly claimed and paid for.

iii. Delayed issuance of clarification/ guidelines on construction of the works:

The perusal of Dex.11 and Dex.12 which are two documents referring to the two road work projects written by the project engineering consultant to Dott Services dated 12th April 2012 and referenced *Construction of Road Pavement-Clarification* show that the project consultant issuing clarification instructions on pavement construction on the existing carriageway, widening sections, subgrade, subbase and base.

According to DW2 that the initial scope of works required the contractor to scarify the existing road base and modify it with crushed rock to form a new base but with clarification instructions on pavement construction on the existing carriageway, widening sections, subgrade, subbase and base of 12th April 2012 it is clear to me that the an earlier carried out design review brought in new changes which required new guidelines to be issued to the contractor thus given the fact that UNRA did not make a timely decision in regard to the road top width yet this was the basis for the overall construction works, then the delayed issuance of clarification on construction works was clearly a compensation event under Clause 44.1 (c) which lists this as *a delay by the project manager in issuing drawings, specifications and or instructions required for execution of the works* thus a compensation event. Therefore, arising from the fact indeed the delay in issuing construction guidelines which led to an assessment of delay of 256 days for both Lots by PEC, I would find that this claim was correctly claimed in terms of Clause 44.1(c) of the GCC.

iv. Delayed site possession:

Clause 21.1 of the SCC provided that UNRA was to give possession of all parts of the contracted sites to Dott Services on contract commencement date, which was communicated as 21st November 2010, the failure of which the effect of Clause 44.1 (a) of the GCC would kick start and make such failure a compensation event.

The perusal of documents Dex. 5 and Dex. 6 both dated 17th December 2010 and which were issued by UNRA's Executive Director placed the road contract sites at the disposal of Dott Services. Clause 1.1 (ee) of the SCC 1.1 provided that the *site possession date shall be the commencement date which shall be communicated in writing and forwarded together with strip maps as start date and shall be 30 days after signing of the contract.*

Given that documents Dex. 5 and Dex. 6 both of which are dated 17th December 2010 and issued by UNRA's Executive Director, and which were placing the road contract sites at the disposal of Dott Services, then my conclusion that since the contract between the plaintiff and Dott Services was signed on the 22nd October, 2010 then by UNRA through its Executive Director handing over site possession to Dott Services on 17th December 2010 less any strip map was contractually a in breach of the clear terms of Clause 1.1 (ee) of the SCC and was thus properly assessed by PEC as a compensation event under Clause 44 of the GCC.

Arising from al the events discussed above, I would conclude that UNRA by failing to implement the above listed events within the terms of the contract signed it signed on 22nd October 2010 with Dott Services breached its clear provisions with the result that breaches became compensation events which were claimable under Clause 44 of the General Conditions of Contract as compensable events meaning that they were properly assessed and recommended by PEC for payment and not fraudulent as claimed by UNRA for according to the decisions in *Nakana Trading Centre Co. Ltd vs Coffee Marketing Board* and *Emmanuel Kyoyeta vs Emmanuel Mutebi Civil Suit No. 781 of 0214* earlier, a breach of contract arises where ONE or both parties fail to fulfill the obligations imposed by the terms of a contract.

In this case, UNRA failed to fulfill several of its obligations as stipulated under the admeasurement contracts for the staged reconstructions of Lot D and E as discussed above with all these events individually amounting to a breach of contract for which Dott Services was entitled to compensation as delayed days' events which in combination totaled to the number of the days claimed and paid under Claim No. 1.

The conclusion above is despite UNRA's spirited argument that those days should not have been determined as actual compensatory days given that Dott Services had wrongly calculated those days to include public holidays and weekends which were non-working days, and which should have been deducted for I find that UNRA failed to demonstrate that the contract it had signed with Dott Services excluded those days which it wished to be deducted given the clear provisions of Clause 44 of the SCC which provided that these were compensatory events in case of delay caused by the employer which delay has been clearly demonstrated by the 1st defendant as delays suffered for which it was entitled to compensation.

vi. Extension of Time for Lot D and Lot E of 169 days and 139 days respectively:

It was submitted on behalf of UNRA days that the period of delay only stretched from 21st November 2010 to the dates when the first set of drawings was issued to the contractor which were 9th April 2011 and 9th May 2011 for the two road works thus translating to delay days of 169 days and 139 days respectively which claim according to the testimony of PW3 was settled with no contest by Dott Services after an assessment by Gibb Africa Limited making any subsequent delays solely caused by Dott Services which arose from its slow implementation of the two road projects arising from its snail paced process of implementation of the projects.

However, from the evidence of Paul Karekezi (PW2) in his written statement paragraphs 37, 38, 39 it is confirmed that after the preparation of a detailed design drawings for each the the two road projects, UNRA itself instructed GIBB Africa to direct Dott Services to prepare for each of the two road projects for which it had now received detailed drawings a quotation which would be considered by UNRA. To that effect Dott Services did so and submitted priced quotations within which it claimed for an extension of time of 541 days for each of the Lots on the basis that there was delayed detailed design drawings, delayed issuance of strip maps and changed scope of works in addition to seeking an increase in the total cost of both Lot D and Lot E to UGX 102,518,183,018/=.

However, after an assessment, the project manager, GIBB Africa, recommended an increase to UGX 28,772,723,200/= for both Lot D and Lot E and an extension of time of 169 days for Lot D and 139 days for Lot E and submitted to UNRA whose Contracts Committee revised the completion date from 21st May 2012 to 6th October 2012 for Mbale to Soroti, and for Tororo to Mbale from 21st May 2012 to 6th October 2012. The Contracts Committee, however, requested for more details on the claimed costs.

What is important here is that, at this point, although UNRA argues that this extension of time took care of all delays suffered by Dott Services, there was no consideration for the delays suffered by Dott Services after May 2011.

In fact, the number of days of 169 days and 139 days only considered the period until the first sectional drawings were issued on 9 May 2011 for Lot D and 4th April for Lot E. (See PEXH 17). Although UNRA through its witnesses PW1, PW2 and PW3 asserted that from the time sectional drawings were issued to Dot Services such that it never ran out of work, this assertion, however, is not legally tenable given the

fact that right from the very beginning of the commencement date of the contract, Dott Services met a clear set back given that strip maps which would have enable it start implementation of the contract were never issued until August 2011 in addition to the fact UNRA delayed giving it access to the road works sites contrary to clause 21.1 of the SCC and even delayed giving clarification guidelines.

All these were on top of the fact that although the project consultant had recommended an increase in costs, the contracts committee of still insisted that it needed clarification as to costs which issue was never brought into consideration again until the signing of Addendum No. 2 later which subsequently included the increase in scope of works meaning that from the time when the question of clarification of costs arose as per the decision of the Contracts Committee of UNRA, Dott Services was in the blind as to what it ought to or ought not to do thus such indecision by UNRA clearly not only caused delay which the purported extension was stated to have covered but what was clear was that the the delay and prolongation suffered by Dott Services continued to persist even after the signing and approval of Addendum No. 2 was approved meaning that UNRA was legally responsible for its own several indecisions which caused Dott Services not to be able to fulfill its lawful contractual obligations thus ending up rightly claiming through PEC what was due to it as prolongation days by virtue of the the SCC signed on 22nd October 2010 and the GCC.

On whether Addendum No. 2 covered prolongation costs, it was the assertion of UNRA that the prolongation costs were catered for under Addendum No.2 and therefore there was no justification for Dott Services in filing Claim No.1. My assessment of Addendum No.2. is that from an earlier proposal by Gibb Africa Limited and after the provision of the change in scope of works, to Dott Services was asked to prepare and submit a price variation order arising from the design review. This request was complied with by Dott Services when it submitted a proposal in which it indicated that if the variation order was to be implemented within the same resources and production rates then it would take about 8 years to complete the two project works yet UNRA was insisting that the project works be completed no sooner than December 2013 and so Dott Services proposed further that in order to meet the expectation of UNRA, the project works could be completed with the application of an acceleration rate factor of 1.39 and 1.5 for Tororo-Mbale and Mbale-Soroti, respectively to the original contracts rates necessitating the use of additional resources which position was confirmed by PEC in its letters of 12th March 2013 and 2nd May 2013 in which it

recommended the acceleration rates with those factors in addition to further extensions of time and costs for both Lot D and Lot E based on claims from the contractor specifically extension of time of 509 days for each Lot with additional costs totaling to UGX 29,858,532,069 for both Lots to which UNRA responded to PEC according to both Karekezi (PW3) and Michael Wetala (DW2).

This variation order would later become Addendum No.2 and would relate to the change of scope, unit rates and extension of time as per Memos written by UNRA's Head of Procurement to UNRA's Contracts Committee in which he was seeking approval of Addendum No. 2 given that the design review had culminated into a significant increase in scope and therefore required additional time and resources to complete the road construction works (Ref: Memos dated 4th June 2013, 10th June 2013, Exhs P74 and 75). The same was approved according to PW3 and DW2 on 23 June 2013 with a revised contract price from UGX 30, 285,518,100 to UGX 63,804,103,546 reflecting an increase of 110% for Tororo-Mbale, and for Mbale-Soroti, the contract price was increased from UGX46,083,277,750/= UGX 107,646,033,428 reflecting an increase of 135 %. Also, the duration of the contract was revised from 18 months to 38 months for Tororo- Mbale and to 40.5 months for Mbale-Soroti effective 10 November 2010, with completion dates extended to 31st December 2013 and 31st March 2014 respectively.

Due this revised scope of the project duration, the supervision consultant recommended this extension of 537 days to allow completion of works within the acceptable time frame. This formed part of Addendum No. 2 which was then cleared by the Public Procurement and Disposal of Assets Authority as well as the Solicitor General whose justifications are contained in a letter dated 3rd July 2013 and addressed to the Executive Director by the Public Procurement and Disposal of Public Assets Authority (PEXH 76). They include the following;

- a. Traffic composition and loading of vehicles along the project road significantly arising from increased opportunities in South Sudan, and opening of Soroti- Dokolo- Lira, which worsened the state of the road
- b. The Design review conducted detailed pavement investigations and revealed a severe deterioration in the pavement layers of the project road, which

showed the need for significant changes in the road design in order to optimize the project benefit.

- c. It was difficult to implement the revised scope using the rates in the contract of 2010, whose rates prevailed in the market in the year 2009 and yet the market conditions had significantly changed from those that prevailed during bidding time.
- d. The need to improve pavement strength in order to cater to increased traffic due to the opening of Soroti-Dokolo-Lira Road.
- e. The original scope of the works at the time of tender comprised simple maintenance, which included scarifying the existing pavement and mixing it with crushed rock to form the road base and provision of a new double bitumen surface dressing. Due to deterioration that had taken place between the time of bidding and contract commencement a design review had to be carried out to establish the level of deterioration and the nature and scope of works needed.
- f. The design review was completed in August 2011 and approved by the plaintiff in September 2011, yet the contractor had fully mobilized at the site all contractual equipment, as well as key staff by the end of December 2010.
- g. Due to the increased scope of works, in terms of quantity, an analysis by the plaintiff showed that contractually it would take 8 years.

In short while Addendum No. 2 concerned itself with the revision of the scope of works and quantities, nowhere in the correspondences show that the addendum discussed costs incurred by Dott Services arising and this was despite the fact the contractor had fully mobilized at the site equipment as well as key staff by the end of December 2010.

In my considered view, therefore, I would find that the Addendum No. 2 mainly addressed the change in the scope of works arising from the design review with and not what was claimed in Claim No.1 though it also true that some of the claimed events such as delay due to undue introduction of a new scope of works and required methods of execution of the works, delays due to new design trials and testing, intermittent substantial design revisions, delays due to distortion of the program of

works and delayed resolution of variation orders as testified to by DW2 who testified that these events were covered under addendum no.2, which addressed the increased scope of works arising from the design review.

Arising from the above, I am inclined to agree with Dott Services in relation to compensation, Addendum No. 1 did not refer to compensation for the delays and losses suffered by the contractor as even its clauses 6, 7 and 8 indicate that the purpose was to provide for a price adjustment to enable the contractor to implement the revised scope of works. I would accordingly find so.

The other point of interest was the argument raised by UNRA that there were indeed some delays attributable to Dott Services which should not have been claimed for payment such as demonstrable slow progress of the works, lack of equipment, frequent breakdown of the equipment, repeat of work due to poor level control and poor sharing of equipment by the contractor's different teams. This position of UNRA found in the testimony PW2 and PW3 who all referred to the minutes of site minutes and progress reports and thus confirming that such delays could not have been claimed as attributable to UNRA, yet those inactions arose from Dott Services own folly and as such were non-compensable delays could only be attributed to the 1st defendant.

In respect to this point, I have had the occasion to peruse the several minutes of site meetings contained in the trial bundle of UNRA and I have confirmed that while it is true that several complaints against Dott Services are reported for slow progress of the works as in the site meeting held on 23rd June 2011, the participants of the meeting who included officials of UNRA, Dott Services and Gibb Africa Dott Services attributed the slow progress to large increase of the earthworks which was never envisaged at tender stage and the frequent rains with the participants only recommending that the contractor could do better without penalizing it. This position was echoed yet again in the site meeting No. 11 held on 4th November 2011 where it was observed by its attendees that *“the rate of progress on the works was still extremely slow and at the current rate, of progress, there was no way the contractor could hope to complete the project within the contract period, or even estimate whether or when he could complete the works”* with no further sanction on the contractor.

Of note though was the fact that in both site meetings Dott Services tabled in a progress report on each of those site meetings which showed commencement and progress on permanent works though with slow progress was being made with no additional sanction as against it.

Therefore, given this position and as earlier demonstrated, it is apparently clear to me that the delays suffered by Dot Services were separate events arising from breach of the contract for the staged reconstruction for Lot D and E with the delays referred to by UNRA shown by the site meetings arising from poor performance or implementation of the works for which UNRA only always cautioned Dott Services but took no further action. As such, UNRA's arguments that the delays suffered by Dott Services arose from slow progress of the works, and frequent breakdown of the equipment would in my considered opinion fall on the way as not proved making me to conclude on this issue that arising from my thorough examination of the contractual relations which existed between UNRA and Dott Services, no proof has been shown on a balance of probabilities that Dott Services did not suffer prolongation days costs of 509 which it claimed through PEC and was paid. I would thus answer this issue is therefore answered in the affirmative.

7. Issue 2: Whether the Plaintiff is entitled to recovery of the suit funds as money had and received against the 1st Defendant:

It was the submission of counsel for UNRA that double compensation was made to Dott Services which had adequately been compensated under Addendum 2 in which parties agreed to apply an acceleration factor to the bills of quantities presented by Dott Services in order to have the works completed in less time as demanded by UNRA and at an increased cost. The testimony of Paul Karekezi (PW3) as well as PEXH62 was cited as proving this point for reflecting recommendations for the payment of UGX. 12,865,025,357= for Lot D and UGX 20,339,809,243 for Lot E in relation to delays.

Furthermore it, was pointed by counsel for UNRA that according to the testimony of Rebecca Natukunda (PW2) the delays claimed by Dott Services in Claim had been compensated under Addendum 2 with Exhibits P.68, Exhibit P.71, Exhibit P.73, Exhibit P.74, Exhibit P.75, Exhibit P.76 and Exhibit P.77 showing the rationale for Addendum No.2 and indicating the parties' agreement to subject the original contract rates to acceleration such that the contract costed price for Lot D increased by

110 percent from UGX 30,285,518,100= to UGX 63,804,103,546= while the price for Lot E increased by 135 percent from UGX 46,083,277,750= to UGX 107,646,033,428= using an acceleration factor of 1.5 and 1.3 applied to Lot D and E respectively.as confirmed by both Rebecca Natukunda (PW2) and Prasad Reddy (DW2) during cross examination in addition to parties also agreed to increase the duration of the contract for Lot D from 18 months to 38 months with an intended completion date of 31st December 2013 and for Lot E from 18 months to 40.5 months with an intended completion date of 31st March 2014 such that by parties signing Addendum No. 2 on the 13th of June 2013 and back dating it to cover the earlier period of Claim No. 1 then all claims by Dott Services had therefore duly compensated therefore making Dott Services claim for prolongation costs already covered by acceleration under the addenda and for a liability avoided by the employer through payment of acceleration costs should therefore have never arisen and thus was erroneous given that acceleration period under Addendum No.2 overlapped the period of prolongation claimed and paid meaning that any subsequent payment for the claim of prolongation costs, after payment of acceleration costs amounting to a double payment which should be refunded as money had and received in line with the holding in *Jamba Soita V David Salaam HCCS 40 of 2005* where it was held that where it is proved that money was received without correlating consideration then it was obligatory that the person who received it refunds it.

Counsel for Dott Services rebutted UNRA's claim in this respect and went on to submit that Dott Services was entitled to compensation under clauses 44 (1) and 44 (2) of the General Conditions of Contract with proof of these costs being confirmed by PW2, DW1 and DW2. Given the fact that all these witnesses agreed that UNRA made Dott Services to incurred delayed days costs when it not only delayed giving site possession to Dott Services but provided late strip maps and road construction drawings which acts led to staff and machinery idle times in addition to the incurring of office overheads, depreciation of working equipment and other tools, financial costs of the bank guarantee among others which delayed days costs claim covered the period between 21st November 2010 to 12th April 201 and not the period after the signing of the Addendum No. 2. which are all provided for under the provisions of Clause 44 of the GCC which provides for compensation events and Clause 28 of the SCC which refers to the extension of time which clauses should not be confused with the other given that under Claim No.1, Dott Services sought for compensation under Clause 44 of the the GCC for costs suffered between 21st November 2010 to

12th April 2012 meaning that it never sought for double payments as compensation but rather only received one payment under the Interim Payment Certificate No. 15 amounting to UGX 29,858,532,069 /= for compensation events under Clause 44 of the GCC.

On top of this it was argued for Dott Services that contrary to the submissions of UNRA, the purported acceleration factor indicated was never used for Addendum No. 2 for given the fact that UNRA chose Option 2 which did not include an acceleration factor as testified to by DW2, the plaintiff chose option No. 2 meaning that both the variation order and the addendum 2 did not provide for any acceleration. Additionally, counsel for Dott Services submitted that court should additionally consider the fact that UNRA in its pleadings did not plead any acceleration factor and therefore its submissions on acceleration should be disregarded as not supported by any pleadings given the legal position which provides that parties are bound by own pleadings as was held in the case of *Interfreight Forwarders (U) Ltd VS East African Development Bank SCC NO. 33 of 1992*.

Counsel also argued that contrary to UNRA's submissions the extension of time under Clause 28 of the contract did not invalidate the contractor's right for compensation under the GCC with the Claim No.1 submitted by Dott Services catering for changes in the scope of works and not to compensating it for the time lost as sufficient consideration with the plaintiff's claim for money had and received should not be entertained by as it was not entitled to the recovery of the suit funds paid.

As for PEC, it was submitted by its counsel that the elements for money had and received had not been proved by the plaintiff given that the consideration for the payment under Claim No. 1 was the delay and the costs incurred by Dott Services arising from delays occasioned by UNRA itself which even carried out the all the necessary checks and took precautions before approving the paid monies given the clear evidence that the cause of all the delays and project failures as showed in DEXH21, PEXH74 and PEXH75 arose from the actions of UNRA and Gibb Africa Limited which did not have construction drawings to be used by the contractor by the time the contract implementation but started that process only during the period of execution of the contract with several constant changes which all caused all the claimed delay days which this court should find as such and dismiss UNRA's claim that there was double payment yet the two payments were different as they related to different things as provided for by the contract.

In its submissions in rejoinder, counsel for UNRA submitted that court should find that the cited correspondences and negotiations were evidence of acceleration given that Pex.73, Pex.68, Pex.74, Pex.71, Pex.75 and the testimonies of PW3, DW1 and DW2 all demonstrated that each of the items under Addendum No. 2 applied an acceleration factor which confirmed the fact that it would not have been possible to achieve work required to be carried out in 38 and 40.5 months in a period of 6 months without applying an acceleration factor rate hence given that this was not so, this court should find that that Dott Services was paid twice through acceleration.

Determination of Issue Two:

The plaintiff seeks to recover the sum of UGX 29,858,532,069/= which it states was paid out as compensation and prolongation costs to the 1st defendant, as money had and received.

The concept of money had and received is a well-established principle that has been discussed in various cases. In the case of ***Kensheka vs Uganda Development Bank Civil Suit No. 469 of 2011***, the court referring to ***Dr. James Kashugyera Tumwine, & Another vs Willie Magara & Another***, explained the principle of money had and received as follows;

“Money which is paid to one person which rightfully belongs to another, as where money paid by A to B on a consideration which has wholly failed, is said to be money had and received by B to the use of A. It is recoverable by action by A. The paying of A to B according to the Learned Author of A Concise Law Dictionary by P.G Osborn 5th Edn 9th P.212 becomes a quasi-contract an obligation not created by but similar to that created by contract and is independent of the consent of the person bound.....the other view is that in an action for money had and received liability is based on unjust enrichment i.e., the action is applicable whenever the defendant has received money which in justice and equity belongs to the Plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the Plaintiff.”

As was pointed out in the above case, a plaintiff aggrieved can bring an action to recover sums of money where there was an agreement for payment of monies from one party to another but where due to non-performance or defect in whole or part of

the agreement, there has been failure of consideration and nothing of value can performed, as a result of which parties are entitled to be restituted.

In relations to the instant matter, counsel for UNRA submissions was that there should be a refund for the money paid under Claim No. 1 given the fact that Addendum No.2 provided for acceleration rates which overlapped the period of prolongation claimed separately by Dott Services and paid UNRA making that the subsequent payment for prolongation costs after payment of acceleration costs to amount to a double payment. In making this submission counsel UNRA relied strongly on the testimony of Rebecca Natukunda (PW3) and Reddy Prasad (DW1) which he argued showed that the parties agreed to acceleration rates for the original contract.

I now turn to examine the details of this claim in relations to the contract signed on 22nd October 2010 and the GCC.

Clause 29 of the General Conditions of Contract which is reproduced below provides for acceleration;

29.1 When the Employer wants the Contractor to finish before the Intended Completion Date, the Project Manager, will obtain priced proposals for achieving the necessary acceleration from the Contractor. If the Employer accepts these proposals, the Intended Completion date will be adjusted accordingly and confirmed by both the Employer and the Contractor.

29.2 If the Contractor's prices proposals for an acceleration are accepted by the Employer, they are incorporated in the Contract Price and treated as a variation.

Briefly, the testimony of Rebecca Natukunda (PW3) was that the Dott Services advised UNRA that if it wanted the variation order to be implemented with the same resources then it would not be completed within the ideal time without acceleration. She also told the court that the PEC also additionally recommended to UNRA that the original contract rates be subject to acceleration for the contract works to be completed within the desired time. It was also her testimony that the contracts committee UNRA on being advised approved the proposal of revising the scope of works for the two projects and revised the contract price using acceleration factors of 1.5 and 1.39 to the original contract rates from UGX 30,285,518,100/= to UGX 63,804,103,546/= (110 percent increase) for Tororo- Mbale road, and UGX 46,083,277,750 to UGX 107,646,033,428 (135 percent increase) for Mbale-Soroti

road. The said contract committee also extended duration for completion of the contract from 18 months to 38 months for Lot D and to 40.5 months for Lot E. This approval was reduced into Addendum No.2 which was duly cleared by the PPDA and approved by the Solicitor General and was signed on 13th October 2013.

Exhibits Pex.68, P Pex.71, P Pex. 73, P Pex.74, P Pex.75, P Pex.76 and Pex.77 referred to by counsel for UNRA show the rationale for Addendum No. 2 and showed that the parties agreed to subject the original contract rates to acceleration. Pex.73, for example, which was a letter addressed to the Executive Director of UNRA dated 17th May 2013 and referenced “STAGED RECONSTRUCTION OF MBALE-SO-ROTI ROAD (103 KM) CONTRACT NO: UNRA / WORKS/ 2009 - 10/00001/02/04 DRAFT ADDENDUM NO. 3 in its third paragraph it was written as follows;

“However despite our earlier common position in your recent meeting held in 7th May 2013, the earlier submission based on a common understanding was reconsidered and you (UNRA) advised that we buildup new rates from first principles taking into account the change of scope of works, methods and scheduling of the contractor, or to calculate the additional cost of contractor due to acceleration by mobilizing and demobilizing additional equipment, manpower, overhead costs required to complete the project in the recommended contract duration. In addition, you requested us to carry out reasonableness tests on the revised rates.

We have accordingly prepared a revised version of addendum no.3 with four new options that were prepared on the basis of your guidance as above-mentioned.”

In Pex.72 also addressed to the Executive Director of UNRA and dated 2nd May 2013 and written by one Remegie Girukwishaka who is stated as PEC’s Project Manager’s Team Leader, in it, it was as stated as follows;

“Reference is made to our submission of the draft VO No. 1 dated 12th March 2013 on the captioned subject and the joint meetings held in UNRA Office between UNRA Officials, Project Manager (PEC) and the contractor (Dott Services) on 26th April 2013 and 30th April 2013.

.....

*It should be noted that **due to the exclusion of depreciation of additional equipment in the calculated factor, the contractor under clause 29 is entitled to claim for acceleration.** This could be an area for negotiation.” (Emphasis mine).*

Pex.74 which is a memo written by the Acting Director of the Procurement / Head PDU to the Secretary of the Contracts Committees of UNRA and is dated 10th June 2013 sought “**Request for approval of Addendum No.3 (Revision of scope of works and quantities)** and provided as follows;

“

The subject contract was secured through a bidding process based on preliminary designs made in the year 2009, and was subject to a design review by the supervision consultant that would update the designs before commencement of permanent works and advise on the appropriate interventions at the time.

Arising out of the unacceptable rate proposed by the contractor the Supervision Consultant analysed the revised scope using the resources committed under the on-going contract and the approved work program and concluded that it would require 5.2 years to complete the revised scope of works as compared to the original 18 months. The consultant consulted with the employer who advised that the acceptable completion deadline should not exceed March 2014, hence all necessary resources should be determined and acceleration allowed ensuring completion of the revised works by 31 March 2014. The consultant was further advised that the applicable rates should be fixed over the contract duration as the contract did not have any price adjustment provisions and the employer was not desirous to introduce such clauses at this time. Consequently, the consultant derived fixed unit rates that would be acceptable for executing the revised scope. The 314th Contracts Committee held on 10 May 2012 approved a time extension of 139 days due to delayed completion of design reviews, however, due to the effect of the revised scope on the project duration the supervision consultant in close consultation with the user department recommends further extension of 536 days (17.9 months) to allow completion of works within the acceptable time frame. This extension revises the completion duration 18 months to 40.5 months which revises the completion deadline from 7 October 2012 to 31 March 2014.

Based on the consultant's determination of revised rates, in a letter dated 12th March 2012, he recommended amendment of the contract price from UGX 46,083,277,750/= to UGX 110,205,025,814/= to be executed within 40.5 months from the commencement date and within the recommended fixed unit rates.

The user department reviewed the consultant's recommended unit rate against the Contractor's proposed unit rate and noted that in some instances, the consultant's unit rates were cheaper than the contractor's rate while in some instances those of the contractor were cheaper. The user department recommended use of a hybrid of rates from the consultant and the contractor by adopting whichever is cheaper for a given pay item. Consequently, the User department recommended amendment of the contract price from UGX 46,083,277,750/= to UGX 107, 646,033,428 to be executed within a period of 40.5 months (from the commencement date; 10 November 2010) at the recommended fixed unit rates.

The User Department in a memo date 25th March 2013, received in PDU on 26th March 2013, requested for approval of the variation order No.1 seeking to revise the contract price from UGX 46, 083,277,750 to UGX 107, 646,033,428.

PDU reviewed the UD submission and established that the factor that had been used to revise the unit rates was not adequately justified. In memos dated 30 April 2013 and 7 May 2013 (enclosed herewith as part of Annex 7-Correspondences during the review process), PDU sought clarifications/ additional information from the user department and Supervision Consultant on basis of factor used to revise the unit rates. From the clarification given in memos dated 3rd May 2013 and 23rd May 2013 respectively (enclosed herewith as part of Annex 7-Correspondences during the review process) it was evident that all the attempts to justify a more reasonable cost would not yield better results than the earlier recommended hybrid of rates from the Consultant and the Contractor recommended by the user department with the effect of revising the contract price from UGX 46, 083,277,750 to UGX 107, 646,033,428. (Emphasis mine)

A similar letter was written in respect of Lot D (See especially Ex. P75).

On its part, counsel for Dott Services argued that contrary to the submissions of the counsel for UNRA, no acceleration factor was provided for under the addendum and that as per the testimony of DW2 with UNRA chose Option No. 2 which did not

include an acceleration factor and as such the variation order and addendum did not provide for acceleration. The testimony of DW2 was to the effect that on 4th June 2013 and 10th June 2013, UNRA's Head of Procurement wrote memos to the Secretary of UNRA's Contracts Committee in relation to the revised scope of work and quantities for each of the respective road projects and requested for approval of Addendum No. 2 given that the design review had culminated into a substantial increase of scope with additional time and resources required to complete the road construction works as seen from the provisions of Pex.74 and Pex.75 reproduced above.

The reading Pex.74 and Pex.75 above do not show that there was an acceleration rate was applied to arrive at for the new rate. Although acceleration factor was one of the options discussed in Pex.73 reproduced above, it was **NEVER** taken into consideration in arriving at the final rates as Pex.74 and Pex.75 show the process used to arrive at the final rates indicating a hybrid of rates was considered.

Therefore, I would find as a matter of fact there is no proof adduced on record that acceleration of works was approved and was considered by UNRA in determining the final project monies for the project to be completed within the time envisaged by UNRA itself with this finding dismissing the claim made by PW3 Rebecca Natukunda (PW3) that the contracts committee of UNRA approved the proposal revising the scope of works for the two projects and revised the contract price, using acceleration factors of 1.5 and 1.39 to the original contract rates, from UGX 30,285,518,100/= to UGX 63,804,103,546/= (110 percent increase) for Tororo - Mbale, and UGX 46,083,277,750 to UGX 107,646,033,428 (135 percent increase) for Mbale- Soroti) then remaining a lie hence confirming the defendants argument that no acceleration rates were used in Addendum No. 2.

Another argued pandered by counsels for UNRA was that that by the signing of Addendum 2 on the 13th of June 2013 which was back dated to cover the earlier period of in Claim No. 1, Dott Services claims in Claim No. 1 was covered meaning that the delay days were duly compensated meaning that Dott Services' claim for prolongation costs covered by the addendum was a liability avoided by UNRA through payment of acceleration costs and therefore should not have been made with any claim thereto being erroneous.

The examination Claim No.1 shows that it covered the period 21st November 2010 to 11th April 2012 while Addendum No.2 was backdated to cover the same period until the end of the revised contract. However, even though the two documents appear to overlap, Dott Services' claim in Claim No.1 was purposed on prolongation costs arising from delays such as delayed possession of contract sites, late provision of strip maps and construction drawings leading to several idle personnel, office overheads, depreciation of the working equipment and other tools, financial cost of the bank guarantee, among others which I agree covered the period between 21st November 2010 to 12th April 2012 and not the period after the signing of the Addendum No. 2.

Addendum No.2 on the other hand, took into consideration costs relating to the change of scope of works, arising from the design review and delays due to undue introduction of a new scope of works and required methods of execution of the works which were contrary to what was provided for in the contract, delays due to new design trials and tastings, intermittent substantial design revisions, and delays due to distortion of the program of works and delayed resolution of variation orders

It is also clear from the evidence on record, that Dott Services was entitled to compensation for delayed days costs under clauses 44 (1) and 44 (2) of the General Conditions of Contract which is extension of time arising from prolongation costs as compensation events while Clause 28 refers to the extension of time. Therefore, UNRA's submission that Dott Services claim for prolongation costs after signing the addendum for a period covered by acceleration under the Addendum 2 where the employer avoided liability through payment of acceleration costs would, in my considered opinion, not amount to a double payment for which there was no consideration as the two instances are completely different.

Therefore, I would find that the elements required to establish a claim for money had and received as having not been fulfilled with this falling according.

This issue is answered in the negative.

8. Issue 3: Whether the Defendants committed acts of fraud and caused loss to the Plaintiff:

According to counsel for UNRA, the defendants committed acts of fraud and caused loss to the Plaintiff in support of this allegation, counsel relied on the definition of

fraud as was held by the Supreme Court in the case of *Fredrick J. K. Zaabwe vs Orient Bank Ltd. Civil Appeal No. 4 of 2006* which was cited by Lady Justice Helen Obura (as she then was in) in the case of Muse AF Enterprises Co. Ltd vs. Billen General Trading Limited and 3 Others HCCS No 102 and 271 of 2013 in which fraud was defined as *"an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture..."* arguing that in the instant case both defendants jointly and severally acted fraudulently and knowingly causing the payment of the funds, yet they understood there was no consideration when Dott Services made a claim for prolongation costs for 509 days while aware that no such delay had been suffered by it with PEC evaluating and recommending that claim, yet it was aware that no such delay had been suffered by Dott Services given that an earlier determination by Gibb Africa Limited had been made unchallenged thus the resultant fraud. The other acts of fraud mentioned by counsel for UNRA included the fact that both defendants were aware that an Addendum No. 2, which took care of of Dott Services' Claim No. 1 for prolongation costs using an acceleration cost, had been executed and paid by UNRA to Dott Services which still had the audacity to submit a claim for payment of prolongation costs. Counsel's other submission was that the two defendants fraudulently withheld information and refused to provide documents to UNRA relating to the period of the claim was made such as site diaries and equipment register which acts were indication of dishonesty, willful perversion of the truth and total false misrepresentation of the true facts leading to the hatching of a fraudulent scheme to induce UNRA to part with the suit funds which had no consideration at all. Arising from these facts, counsel for UNRA urged court to find that both defendants acted fraudulently.

In response to the submission of counsel for UNRA, counsel for Dott Services urged court to find that UNRA through it witnesses had failed to prove allegations of fraud levelled against both defendants but that PW1 had conceded to Dott Services claim on costs of insurance and bank guarantees as accruing in addition to pointing to no

clause in the contract which prohibited Dott Services from claiming the total 509 days including the 86 public holidays which PW1 claimed ought to have been deducted given that they were non days.

In relation to the testimony of Paul Karekezi (PW2) counsel for Dott Services urged court to find his testimony unreliable since he was the one who was responsible for the claimed delay days of 509 days given that he failed his duties in issuing required road drawings and strip maps at the contract commencement date and generally personally mismanaged the contract by not knowing the contract start date, the date of mobilization and arrival to site by Dott Services in addition to failing to explaining he recommended fewer days yet he issued the final drawings as late as 19th March 2012.

In relation to PW3's testimony, counsel for Dott Services submitted that her evidence was hearsay and should not be relied upon since she joined UNRA after the suit claims had already been presented and failed to interview relevant staff of UNRA especially the executive directors, project engineers and heads of the contracts committee who were involved in the transactions. Furthermore, her from her evidence in chief, she mentions an amount of money which was inconsistent with what was claimed by UNRA through its plaint differed making her statement unreliable and not able to prove the allegation of fraud against the 1st and 2nd defendants.

As regard the testimony of Robert Hughes (PW4) counsel for Dott Services urged court to disregard given the limited documentation availed to him rendering to not be able to properly determine whether the contractor was entitled to prolongation costs or not with even his challenging of the Global Claims Formula having no basis under the law since even he failed to substantiate his opinion that the payments were made unlawfully or irregular.

Arising from the failure by UNRA to prove Claim No. 1 was fraudulently orchestrated through its witnesses and documents, counsel for Dott Services urged court to find that the said claim made in accordance with the contract and was duly authorized by UNRA's management itself and so UNRA cannot turn around to claim that it was defrauded into making the payments.

Counsel for PEC on this issue concurred with the submissions of counsel for Dott Services but went on to further add that according to law, every specific element of

fraud pleaded must be proved on balance of probabilities which in this case UNRA had failed to do so with any fraud pleaded to be specifically attributed to the transferee as was held in *Kampala Bottlers Ltd v Damanico (U) Ltd SCCA No.22 of 1992*. In making this submission counsel for PEC referred to the evidence of PW3 who he said had testified that she did not come across any document that was forged by the defendants.

Furthermore, counsel for PEC pointed out that UNRA's witnesses, that is, PW1, PW2 and PW3, all confirmed the total number of prolongation days as being 509 during their cross-examination and that under the contract, signed on 22nd October 2010 there was no exception for public holidays and weekends with PW1 specifically pointing out that the terms of insurance and project execution bonds securities not excluding public holidays and Sundays!

Further, it was the submission of counsel for PEC that the submission of Claim No.1 after Addendum No.1 had been signed could not amount to forgery for each of the document served a different purpose given Addendum No. 2 provided for price adjustment while Claim No. 1 covered compensation for delays under the contract.

On the plaintiff's submission that the defendants withheld information and records, counsel for PEC submitted that this was a white lie given the fact the documents used to evaluate the claim were availed to the UNRA on 5th November 2013.

In the submissions in rejoinder, counsel for UNRA reiterated his submissions and urged court to agree with them that that the retrospective application of Addendum No.2 meant that all costs such as insurances, securities, salaries and rents for that period were paid for under the extension and covered even Dott Services Claim No.1 from day one since acceleration formulas was used. And therefore, by it seeking for additional payments it committed fraudulent acts which the court should find accordingly.

Determination of Issue No. 3:

I have taken careful consideration of the submissions of both parties in respect of this issue. From its submissions, UNRA claims that the two committed several acts of fraud including the causing payment of funds for which there was no consideration for while Dott Services made a claim for prolongation costs, PEC evaluated and

approved the claim as prolongation costs aware that no delay had occurred and was also aware that such costs had been taken care of under the Addendum No. 2.

In the case of *Fredrick Zaabwe VS Orient Bank SCCA No.04/2006*, fraud was defined by the Supreme Court as the “*intentional perversion of truth for purpose of inducing another in reliance upon it to part with some valuable thing belonging him or to surrender a legal right.*” Further in the case of *Kampala Bottlers Ltd vs Damanico (U) Ltd SCCA No.22/1992*, the the Supreme Court held that an allegation of fraud must be directly or by necessary implication, attributed to the party against whom it is alleged, and that fraud must be proved strictly with the burden of proving so being heavier than a balance of probabilities generally applied in civil matters as was also well explained in the case of *FAM International vs Mohamed Hamid El Faith Civil Appeal No. 16 of 1993* that the standard of proof for fraud is more than a mere balance of probabilities though less than proof beyond reasonable doubt with the holding in *Nanteza Nabeta VS Konde Civil Suit No. 391 of 2010*, pointing additionally, that fraud must be attributed to the party accused of committing the party alleging it prove attributing to fraud on the transferee either directly or by necessary implication, that is, the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.

Arising from the authorities cited above it is my considered opinion that acts of fraud must be shown to have been committed intentionally and must be attributed to the party accused of committing it, directly or by necessary implication.

In this suit, the particulars of fraud were set in the amended plaint as follows;

Particulars of fraud against the 1st defendant:

- a. The 1st defendant falsely making a claim that it suffered and /or incurred prolongation costs equivalent to 509 days for the Tororo-Mbale road for the period from 10th November 2010 until 12th March 2012, 509 days (for Mbale-Soroti roads for the period 10th November 2010 until 12th March 2012), when in fact no delay or prolongation equivalent to 509 days for either road occurred as alleged or at all
- b. The 1st defendant making a claim for recovery of UGX 29,858,532,069/= as prolongation costs, with knowledge that such costs were not due at all
- c. The 1st defendant making a claim and receiving the sum of UGX 29,858,532,069 when it was aware that it had not provided consideration to the plaintiff for the said sums at all

Particulars of fraud of the 2nd defendant:

- a. The 2nd defendant approving, advising, certifying, submitting of the IPC No. 15 and or recommending to the plaintiff to make payments in the sum of UGX 29, 858, 532,069 to the 1st defendant as prolongation costs, with knowledge that such costs were not due to the 1st defendant
- b. The 2nd defendant recommending payments of a claim for compensation for loss that was never suffered.

Particulars of fraud of the 1st and 2nd defendant:

- a. The defendants colluding and conniving to make a false claim for prolongation costs in the sum of UGX 29,858,532,069 well aware that such loss was never suffered as claimed or at all
- b. Colluding to raise fictitious invoiced and receiving payments upon them
- c. Receiving, retaining and continuing to retain money wrongfully obtained from the plaintiff
- d. Acting in concert with each other in a dishonest manner with a view to unjust enrichment at the expense of the plaintiff.

From the record and evidence adduced in court I do take note of the fact that in June 2013, UNRA's Contracts Committee approved Addendum No. 2 in relation to the revision of the scope of works for Lot D and Lot E from UGX 30,285,518,100 to UGX 63,804,103,546 (110%) increase for Tororo-Mbale and UGX 46,083,2777,750 to UGX 107,646,033,428 (135% increase) for Soroti. Later on, 1st November 2013, Dott Services filed a financial claim titled Claim No.1 with UNRA seeking recompensed for delayed commencement of works under the contract signed on 22nd October 2010. two projects. PEC verified Dott Services final claim and advised UNRA to pay Dott Services UGX 29,858,532,069 as financial losses incurred arising from delayed commencement of works. UNRA obliged after seeking clearance from both PPDA and the Solicitor General.

UNRA, however, by this suit argument that Dott Services in concert with PEC fraudulently made Claim No.1 and was paid on for no consideration at all. With due respect, I hardly find any sufficient evidence on record to support this very serious for the following reasons.

From the evidence on record, UNRA had itself, albeit partially admits that Dott Services was entitled to compensation arising from the period of prolongation but that 509 days were not justified. This conclusion is supported by paragraph 18 of the

witness statement Rebecca Natukunda (PW3) in which she states that she rendered advice to UNRA's management of for prolongation costs though not amounting to the 509 days claimed by Dott Services.

Furthermore, a report on the Inquiry into Prolongation Costs of 29.8 billion for Staged Reconstruction of Tororo-Mbale and Mbale-Soroti roads dated 1st July 2016 noted that whereas Dott Services was entitled to compensation for prolongation costs, its claim for 509 days was not justified with the inquiry finding that UGX 8,833,252,755.67 was justified with an amount of UGX 21,025,279,315 being an overpayment.

Also, Michael Hughes (PW4) in his testimony refers to the fact that given lack of information and records which he confirmed he did not receive from any source especially UNRA itself, it was unlikely UNRA solely was responsible for all the claimed 509 days costs.

It would thus appear from the testimonies of UNRA's witnesses that the payment for prolongation costs did arise not as an act of fraud but rather as an issue whose source was not clear due to lack of documentations with the evidence on record pointing an accusing finger UNRA's officials and its management including its first consultant Gibb Africa Limited who all bear partial responsibility in approving payment of the suit monies then turning around that it was fraudulent. This conclusion is supported by documents such as a memo from UNRA own Legal Counsel which is dated 15th October 2012 which recommended payments for prolongation costs, and which formed subsequent process of approval of the same.

Arising from such clear evidence, I find it strange that UNRA would turn around blame PEC that it evaluated and approved Claim No.1 in 2013 for prolongation costs yet aware that no such delay had been suffered yet UNRA had by earlier determination by both Gibb Africa Limited and its legal counsel had found otherwise, and these findings were unchallenged by UNRA itself on top of the fact that its internal systems rapidly went into high gear to approve a claim which it hen later turns around and claims was fraudulent. In my view this kind of behaviour is one of the the highest level of dishonesty I have ever met in my judicial life of over thirty years life given the fact that after UNRA's internal systems had approved Dott Services

claim further advise was sought from PPDA and the Solicitor General which all advised payment. Unless there was collusion which has not been proved, I am forced to conclude that UNRA's turn around behavior was very strange and uncommon one as on the one hand it approved the existence of those claimed facts and then on another hand goes on to shout fraud. What a messy situation. One cannot have his or her cake and eat it!

Given the inadequate and impotent evidence adduced by UNRA in its attempt to prove that the defendants committed acts of fraud and caused loss to UNRA which is well below the required standard of proof which is more than a mere balance of probabilities though less than proof beyond reasonable doubt as was held in *Kampala Bottlers Ltd vs Damanico* and *FAM International vs Mohamed Hamid El Faith (cited above)*, I am inclined to conclude the required standard of proof for establishing fraud has not been established and I would answer this issue in the negative.

9. Issue 4: Whether the 2nd defendant was professionally negligent and in breach of the consultancy contract in advising the plaintiff to pay the suit funds:

It was the submission of counsel for UNRA that the PEC owed it a duty of care to as a faithful adviser in perform key consultancy obligations under the contract went on to breached that duty of care when it approved a claim by Dott Services which had negligently and recklessly failed to maintain a detailed daily site dairy for the project in addition to its differing a decision which had been made by Gibb Africa Limited which was its predecessor project manager contrary to contractual provisions in addition to relying on erroneous opinion of UNRA's own thus ending up evaluating a claim without a reference to any contemporary records to support the the claim which erroneous judgment led UNRA to pay out the claimed suit suit amount as a result of negligent acts amounting to a breach of contract which this court to find accordingly.

In response to this submission, counsel for Dott Services argued that indeed if UNRA was not amenable to the advice which given to it by PEC regarding Claim No.1 then its legal course of action would be ought to claim under a professional indemnity insurance policy and not from PEC given that PEC itself was never the engineering consultant for the road projects and was on site during the period in question with the duty to review and monitor claims arising from that particular period falling

squarely on Gibb Africa Limited which ought to have ensured that proper site records were kept showing deployed equipment and personnel and not PEC. Furthermore, from the evidence on record UNRA relied on its own appointed legal expert which reduced Claim No. 1 to UGX 29,858,532,069/=and as such could not be seen to lay blame on PEC which merely gave it an advice which it could chose to accept or reject.

In addition to the above submission of counsel for Dott Services, counsel for PEC insisted that PEC executed its contractual obligation with skill and due care and without any negligence and that for UNRA to succeed in its action based on professional negligence as against PEC it must plead and prove causation of loss and show that it relied wholly PEC's professional advice resulting in the wrong decision. However, counsel for PEC submitted that this was not so given the fact that whereas PEC had recommended a figure of UGX 33,204,834,600/=, this recommendation was ignored by UNRA which sought and received own independent legal expert advice and subsequently had reduced the recommended amount to UGX 29,858,532,069/= which UNRA went on to pay, actions which would invalidate and negate any claim against PEC as professionally negligent.

PEC's counsel also contended that additionally arising from the testimonies of PW1 and PW3, it was clear that the documents used to evaluate Claim No.1 were availed to PEC by UNRA itself in addition to the fact that PEC itself sought from Dott Services the justifications for its claim by letters exhibited as Ex.D24 and Ex. D25, copied to UNRA which were never questioned, with final approval of the claim made by UNRA and so UNRA would be precluded from accusing PEC of professional negligence, yet PEC relied on documents and information supplied by UNRA which UNRA subsequently used to determine what it can pay and paid and thus as was pointed out in *Candiru Asina Binnia vs Centenary Rural Development Bank Ltd, H.C.C.S No. 0022 of 2016* UNRA would not be entitled to reap any financial benefit from his or her own wrong which was the case here.

Lastly on the claim that UNRA relied on PEC's recommendation to make the decision it made, it was submitted by counsel for PEC that the court was required also to decide whether a plaintiff relied on the professional advice of a defendant in paying out the claim with the case of *Caparo Industries PLC v Dickmann [1990] ALLER Vol.1 567* relied upon as providing the criteria in determining whether or not the duty of care existed which was not the case here for even additionally PW1 and

PW3 during cross examination clearly testified that UNRA did not rely on PEC's recommendations to pay the suit sums for it not only hired an independent legal expert but conducted an independent financial assessment of the claim in addition to carrying out negotiations with Dott Services which resulted in the reduction to the amount recommended by PEC which it then went onto pay for which PEC could not be held professionally liable.

In rejoinder, counsel for UNRA argued that the court should find that indeed PEC had admitted that it carried its evaluation and recommendation to UNRA in the absence of contemporary records which was proof of recklessness, negligence and breach of trust.

Determination of Issue 4:

I have taken into consideration the submissions of both parties. The court in *Stanbic Bank (U) Ltd vs Tuka Investments Ltd and Four Others (Civil Suit No. 468 of 2013) [2017] UG COMM 119 (2 October 2017)* cited *Blyth vs Birmingham Water Works (1856) Exch, 784, 156 ER 1047* defined negligence as “*the omission to do something which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The standard demanded is not perfection but of reasonableness.*”

Therefore, for a court of law to arrive at a determination that negligence does exist in a claim, it must give consider the the presence of the ingredients in the cause of action for negligence.

In the instant matter, therefore, tin order for UNRA to prove the allegations of negligence against the PEC, it must prove the following ingredients as were laid out in the case of *Donoghue vs Stevenson [1932] AC 502*, and they include that;

- a) The defendant owed a duty of care to the plaintiff.
- b) There was a breach of that duty by the defendant.
- c) The plaintiff suffered injury as a result of the breach.

In addition to the above, the court also must also consider the relationship between the parties as well as the principle established by decided cases in determining

whether a duty of care existed. See: *Stanbic Bank (U) Ltd vs Tuka Investments Ltd and Four Others*. Lastly as was held in *Stanbic Bank (U) Ltd vs Tuka Investments Ltd and Four Others* cited *Capara Industries PLC vs Dickman [1990] IAUER 568*, a court must consider whether a duty of care exists, taking into account the foreseeability of harm caused, the proximity of relationship of parties as well as the reasonableness of imposing such a duty.

In the plaint, negligence of the 2nd defendant was pleaded as follows;

- (a) The 2nd defendant in recommending payment of UGX 29,858,532, 069/= failed to exercise a degree of care that a consultant of reasonable prudence should have exercised, which led to wrongful payment and loss suffered by the plaintiff
- (b) The 2nd defendant advising, certifying, submitting of the IPC and or recommending to the plaintiff to make payments in the excess sum of UGX 21,025,279, 315/= as prolongation costs, whereas such costs were not due to the 1st defendant
- (c) The 2nd defendant advising and recommending to the plaintiff to make payments in the excess sum of UGX 21, 025, 279, 315 as prolongation costs, on account of 509 days for Tororo-Mbale and 509 days for Mbale-Soroti roads yet only 169 and 139 days' extension was approved by the contracts committee for Mbale-Soroti and Tororo-Mbale projects respectively.
- (d) The 2nd defendant recommending payments for a claim for compensation for loss that was never suffered.

According to Rebecca Natukunda (PW3) in her evidence in chief, PEC took over the supervision of the two road projects by letters dated 3rd January 2013, 16th January 2013, 24th March 2013, 12th April 2013 and 23rd April 2013. From these documents, which are not disputed, PEC assumed professional responsibility towards UNRA thus owing a duty of care to it arising from the employer –contractor relationship. The duties given to PEC in the consultancy contract included review and analysis of the contractor's compensation claims, advice on contract variations and extensions of time, supervision of the road works, certification of amounts to be paid under the

contract as well as the evaluation and giving opinion on claims, accounts, questions, disputes and differences as required under the terms of contract.

The question then which would arise is whether PEC acted in accordance with its duty of care for this court to determine any breach when it recommended for the payment of prolongation costs.

In her witness statement, paragraph 12 (O, P, Q, R, S, T), PW3 testified that the UNRA referred PEC, Dott Services Claim No. 1 on 5th November 2013 with specific request for it to review the same in accordance with the contract signed on 22nd October 2010. According to PW3, PEC reviewed the claim and advised UNRA to pay a sum of UGX 33,204,834,600/= for a total of 509 days as compensation for the loss suffered by the contractor on the two projects but that in a subsequent meeting where negotiations were held with Dott Services in the presence of PEC, UNRA had that sum reduced to UGX 29,858,532,069/= with UNRA subsequently requesting PEC as per its consultancy contract requested to officially write to UNRA the negotiated and agreed amount. So, in a letter dated 29th April 2015, PEC wrote to UNRA, the employer to pay to Dott Services, contractor a total sum of UGX 29, 858,532, 069/= as financial compensation which sum was then paid UNRA after getting further advice from PPDA and Solicitor General and an independent legal expert to Dott Services on 22nd May 2015.

UNRA's grievance as against PEC is that PEC having taken part in preparation of Addendum No. 2, in which issues raised in Claim No.1 had already been addressed by the parties through an acceleration factor, should have known better that the claim was invalid and should not have recommended it for payment and therefore by its failure to advise UNRA as stipulated under the Consultancy Contract, it was thus liable for the excess payment. The other alleged acts of negligence raised by UNRA against PEC included its failure to maintain a detailed daily site diary for the two projects, the varying of the decision of Gibb Africa Limited - the previous project manager contrary to contractual provisions, relying on the erroneous opinion of UNRA's legal counsel and evaluating the contractor's claim without a reference to any contemporary records in support of Claim No.1.

The fact relating to this issue are that UNRA received Claim No. 1 for compensation for delayed commencement of permanent works from Dott Services forwarded

through PEC which evaluated the claim but according to UNRA without referring to contemporary documents. However, the reading of documents Exh.20 and Dex.19, show that it was UNRA itself which forwarded the supporting documents to PEC which PEC used for evaluating Dott Services claim. Therefore, I find it incongruous and strange for UNRA for UNRA to turn around and impute act of negligence on PEC when UNRA itself provided the requisite documents.

Furthermore, the allegation against PEC that PEC varied the recommendation of Gibb Africa Limited which was the the previous project consulting manager, cannot be solely placed on PEC solely and is even not supported by evidence on record for evidence of PW3 and DW2 show that UNRA in a letter dated 5th November 2013, sought the opinion of PEC in relation to Dott Services Claim No.1 which arose, not from PEC recommendations to UNRA but from a subsequent decision taken by UNRA itself. Furthermore, I also find as a matter of that UNRA was complicit as regard Variation Order No.1 of GIBB Africa Limited which eventually led to Addendum No. 2 given that Paul Karekezi (PW2) to the effect that he had submitted to UNRA's Contracts Committee a draft variation order which then approved an extension of time of 169 days for Lot D and 139 days for Lot E but that the said contracts committee required additional details and clarification on the issue of costs which matter then never concluded but was left in abeyance until the appointment PEC with PW3 stating that subsequently UNRA contracts committee approved the further extension of time and costs for Lot D and E with extension of time further approved to 509 days for each lot and additional costs totaling to UGX 171,928,936,974/= in comparison to UGX 105,141,509,050/= previously recommended by GIBB Africa. These payments were later reduced into Addendum No. 2 which was recommended by PEC and approved by UNRA and has not been questioned by UNRA at all with what I see here is UNRA's allegation that PEC was negligent for revising the draft variation order, which was the work of an adjudicator, yet UNRA does not show any damage it suffered arising from the revision of the variation order.

UNRA also alleges that PEC relied on the erroneous decision of its (UNRA's) counsel. Here, I hasten to note that it is not in dispute that UNRA sought an independent financial assessment from the Solicitor General by letter dated 5th May 2015 (Ex.30) and had also sought the advice of a legal expert which o recommended that the contractor's claim to be reduced the final sum of UGX 29,858,532,069/=. Furthermore,

in response to queries by the Auditor General, UNRA clearly informed the Auditor General that stated that it had relied on the advice of a legal expert for the recommended reduced amount meaning that UNRA did not entirely rely on PEC's recommendation for payment of sums under Claim No.1, rather, it additionally sought external legal and financial advice, in arriving at a decision to pay out the said sums. This is more so given the fact that Ex. D31 which are minutes of a meeting that was held in UNRA Boardroom on 17th April 2015 with the purpose of discussing the basis and quantum of the Claim No.1 and which was attended by officials UNRA, Dott Services and PEC resolved in one of its resolutions as per testimony of PW1 in cross-examination that PEC forward to UNRA the agreed final computation of Dott Services Claim No. 1 officially to UNRA for payment with the further agreeing that the delay caused amounted to 509 days.

Secondly, in paragraph 4 of those minutes under Item 4 it was agreed that the the period utilised by the contractor after the contract but when strip maps and design drawings had not yet been issued be considered the carrying out emergency work.

In another resolution under Item 6.2 PEC was directed by the meeting to compute actual cost incurred on Insurance and Security of 509 days.

Given all these I am satisfied that the assessment of Claim No. I was never PEC single decision but a collective decision of the officials of UNRA, Dott Services and PEC. In the circumstances, I would find that UNRA has no moral authority to impute negligence on the part PEC, yet it was a consistent participant to the whole process of coming up with the final Claim No.1 which it subsequently paid. Therefore, I would find that there is no sufficient prove that PEC acted negligently rather, the evidence on record seems to point to the fact that PEC exercised the required standard of care and skill, considering the knowledge, which was current in its profession at the time in question and in consideration of the information availed to it by both Dott Services and UNRA with Gibb Africa Limited's merely differing in opinion with that of PEC with no evidence of negligence leaving the recommendations of PEC not to fall outside the possible margins of error and was therefore not negligent. Therefore, I would answer this issue in the negative.

10. Issue 5: Remedies available to the parties:

The Plaintiff sought the following remedies.

- a. A declaration that the Defendants committed acts of fraud against the Plaintiff.
- b. The 1st Defendant be ordered to refund Uganda Shillings Twenty One Billion Twenty Five Million Two Hundred Seventy Nine Thousand Three Hundred Fifteen (UGX 21,025,279,315/=).
- c. as money had and received for no consideration having been paid to it under a mistake of fact.
- d. A declaration that the 2nd Defendant was professionally negligent and in breach of its duty of care and should be ordered in addition to indemnifying the Plaintiff for the sum wrongly paid to the 1st Defendant, to pay damages to the Plaintiff in the sum of UGX 1,000,000,000= with interest at court rate till payment in full.
- e. The Defendants jointly and severally be ordered to pay general damages of UGX 1,000,000,000 and punitive damages of UGX 2,000,000,000.
- f. The Defendants jointly and severally be ordered to pay interest at a commercial rate from 22nd May 2015 the date payments of Uganda Shillings Twenty One Billion Twenty Five Million Two Hundred Seventy Nine Thousand Three Hundred Fifteen (UGX 21,025,279,315/=) were made to the Dott Services till payment in full
- g. The Defendants jointly and severally be ordered to pay the costs incurred in prosecuting the suit

Dott Services sought the following declarations and findings:

- a. The 1st defendant suffered prolongation costs of 509 days
- b. The plaintiff is not entitled to the recovery of the suit funds
- c. The defendants did not commit any acts of fraud or cause any loss whatsoever to the plaintiff
- d. The 2nd defendant was not professionally negligent or in breach of the terms of the consultancy contract

PEC sought the following remedies;

- a. Dismissal of the Plaintiff's suit with costs to the 2nd defendant

- b. A certificate of two counsel having been represented by two advocates; that is to say; M/s Shonubi, Musoke & Co. Advocates and M/s Nakiranda & Co. Advocates.
- c. A certificate of complexity given the voluminous and complex documents that have been involved in the prosecution of the suit.

Determination of Issue No. 5:

Arising from my conclusions in Issues 1 to 4 above, this honorable court would proceed to make declaration regarding the orders sought by each of the parties as below:

- 1. Declaration regarding to orders sought by UNRA:
 - a. This honourable court declines to issue a declaration that the Dott Services and PEC committed acts of fraud against UNRA.
 - b. This honourable court declines to issue an order that Dott Services refund Shillings Twenty One Billion Twenty Five Million Two Hundred Seventy Ninety Thousand Three Hundred Fifteen (UGX 21,025,279,315/=).
 - c. to UNRA as money had and received for no consideration its having been paid to it under a mistake of fact.
 - d. This honourable court declines to issue a declaration that PEC was professionally negligent and in breach of its duty of care and should be ordered in addition to indemnifying UNRA for the sum wrongly paid to the Dott Services, pay damages to UNRA in the sum of UGX 1,000,000,000= with interest at court rate till payment in full.
 - e. This honourable court declines to order that Dott Services and PEC jointly and severally pay to UNRA general damages of UGX 1,000,000,000 and punitive damages of UGX 2,000,000,000 as the same has not been proved.
 - f. This honourable court declines to order Dott Services and PEC jointly and severally to pay back to UNRA Shillings Twenty One Billion Twenty Five Million Two Hundred Seventy Ninety Thousand Three Hundred Fifteen (UGX 21,025,279,315/=) with interest at commercial rate from 22nd May 2015 the date payments of were made to the Dott Services till payment in full.
 - g. This honourable court declines to order that Dott Services and PEC jointly and severally be ordered to pay the costs incurred in prosecuting the suit as this suit against them by UNRA has been unsuccessful.

2. Declaration regarding to orders sought by Dott Services:

- a. This Honourable declares that Dott Services suffered prolongation costs of 509 days.
- b. This Honourable court declares that UNRA is not entitled to the recovery of the suit funds amounting to Shillings Twenty One Billion Twenty Five Million Two Hundred Seventy Ninety Thousand Three Hundred Fifteen (UGX 21,025,279,315/=) from Dott Services.
- c. This Honourable court declares that Dott Services and PEC did not commit any acts of fraud or cause any loss whatsoever to UNRA.
- d. This Honourable court declares that PEC was not professionally negligent or in breach of the terms of the consultancy contract.

3. Declaration regarding to orders sought by PEC:

- a. This Honourable court dismisses UNRA's suit against PEC with costs.
- b. This Honourable court grants to PEC a certificate of two counsel its having been represented by two advocates namely; M/s Nakiranda & Co. Advocates and M/s Shonubi, Musoke & Co. Advocates in accordance with Regulation 41 (1) of the Advocates (Remuneration and Taxation of Costs) Regulation S.1 No. 267-4 given that this was a complex and lengthy case which required sufficient dedication, adequate time for research and putting together evidence and subsequent presentation of the case in court including the preparation of final submissions in addition to the fact that the amount of sum sought for recovery was very significant requiring due care and diligence and the avoiding of disruptive tendencies such as corruption which could easily pervert the cause of justice.

c. Costs:

Pursuant to Section 27 of the Civil Procedure Act, costs follow the event and the award of costs is in the court's discretion. In this case, I have found no reason as to why the two defendants herein should not be granted costs since they are the successful parties here. Therefore, the cost of this is awarded to Dott Services and PEC as against UNRA.

11. Orders:

These are the final orders of this Honourable court;

- a. This suit brought by UNRA as against Dott Services and PEC is dismissed with costs.
- b. A certificate of two counsel is issued to PEC given that it was represented by M/s Nakiranda & Co. Advocates and M/s Shonubi, Musoke & Co. Advocates
- c. Dott Services and PEC are awarded the cost of this suit as against UNRA.

I so order accordingly at Kampala this 1st day of July 2021.

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Hon. Justice Dr. Henry Peter Adonyo

Judge

1st July 2021