THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0234 OF 2021

UGANDA NATIONAL ROADS AUTHORITY::::::::::::::::APPELLANT

VERSUS

1. DOTT SERVICES LIMITED
2. PROFESSIONAL ENGINEERING CONSULTANTS LTD::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Adonyo, J. dated 1st July, 2021 in Civil Suit No. 65 of 2016)

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

JUDGMENT OF ELIZABETH MUSOKE, JA

This appeal is against the decision of the High Court (Adonyo, J.) dismissing, with costs, a suit filed by the appellant against the two respondents.

Background

The appellant, Uganda National Roads Authority ("UNRA"), is a body established under the National Roads Authority Act, 2006, and one of its functions is to "enter into agreements or other arrangements with any person for the provision of road services, subject to such charges as may be agreed upon". In 2010, UNRA entered two such road services agreements with the 1st respondent, Dott Services Ltd ("Dott"), for the development and maintenance of two roads, namely: 1) Tororo-Mbale Road (49 km) and; 2) Mbale-Soroti Road (103 km). The signing of both contracts took place on 22nd October, 2010 and the agreed commencement date for their execution was 21st November, 2010. The road works were expected to be concluded within 18 months, i.e by 21st May, 2012. UNRA was required under the relevant contracts to take certain steps to ensure that the road works commenced as soon as possible, either on the agreed commencement date, or shortly thereafter by, for example, promptly ensuring that Dott obtained

possession of the road construction sites; providing the strip maps for the road works; promptly issuing construction drawings, among other things.

Dott felt that UNRA delayed to do some of the above-mentioned things. On 1st November, 2013, Dott made a claim for compensation to the tune of Ug. Shs. 17,766,930,850/= for delay occasioned by UNRA to the commencement of the road works on Tororo-Mbale Road and for compensation to the tune of Ug. Shs. 27,789,880,200, for delay caused by UNRA to the commencement of road works on Mbale-Soroti Road. The combined amount under both claims was Ug. Shs. 45,556,811,050/=. Dott claimed that the each of the road works had been delayed by 509 days.

UNRA subsequently contracted the 2nd respondent Professional Engineering Consultants Ltd (PEC), to evaluate Dott's claims. PEC substantially agreed with Dott's delay claims but recommended that lower amounts be paid, namely, Ug. Shs. 12,865,025,357/= for the Tororo-Mbale Road and Ug. Shs. 20,339,809,243/= for the Mbale-Soroti Road, for a combined amount of Ug. Shs. 33,204,834,600/=.

There were subsequent discussions involving UNRA and Dott regarding the amount of the compensation money owing, in which UNRA proposed to pay Dott as follows, Ug. Shs. 11,526,323,154/= for Tororo-Mbale Road and Ug. Shs. 18,332,208,914/= for Mbale-Soroti Road, for a combined amount of Ug. Shs. 29,858,532,068/=. Dott accepted this new evaluation and the monies were paid to it.

In 2016, UNRA initiated an internal audit into the amount of compensation money paid to Dott. The findings, embodied in the report by Mr. Moses Kasakya, UNRA's Director Internal Audit, were that Dott was over paid and was entitled to a lesser compensation amount of Ug. Shs. 8,833,252,755.67/=.

UNRA, basing on the Audit Report, instituted proceedings against the Dott and PEC. UNRA's first claim against Dott was for recovery of money had and received. UNRA also made an alternative claim that Dott had wrongly and/or fraudulently obtained Ug. Shs. 21,025,279,315/= being the unjustified compensation monies paid to Dott. Against PEC, UNRA claimed indemnity

for PEC's professional negligence, and for breach of contract which had resulted in PEC wrongly advising UNRA to pay the compensation monies to Dott.

Both Dott and PEC filed separated defences denying any wrong doing and claiming that the compensation monies paid to Dott were justified, and properly assessed.

The learned trial Judge, in his judgment, found that Dott was rightly paid Ug. Shs. 29,858,532,068/= as compensation money. He found that Dott was, under the relevant road construction agreements, entitled to claim for compensation in case acts by UNRA caused delay in commencement of the relevant road works. The learned trial Judge found that there was such delay in the present case, in that; UNRA had delayed to issue to Dott, strip maps, construction drawings and construction guidelines. UNRA had also delayed to put Dott in possession of the respective road sites. The learned trial Judge further found that the compensation money was, after Dott lodged claims for the same, properly assessed by PEC, acting as an agent of UNRA, and that in evaluating the claims, PEC had acted with all the necessary skill and care and had relied on documentation supplied by UNRA. The learned trial Judge disbelieved UNRA's claims that either Dott or PEC acted wrongly, fraudulently or with corrupt motives in causing UNRA to pay the compensation monies. He stated that UNRA had been involved in the verification of the compensation claims made by Dott and had willfully authorized the quantum paid as compensation money. The learned trial Judge found that UNRA had, by instituting the suit, acted dishonestly so as to deny responsibility for its role in approving the compensation monies. The learned trial Judge, therefore, found no merit in UNRA's claims and dismissed its suit with costs.

UNRA, being dissatisfied with the decision of the learned trial Judge now appeals to this Court on the following grounds:

"1. **The learned trial Judge erred in law and fact when he misconstrued the evidence on progress of works and made a finding that the 1st respondent suffered delay and was entitled to prolongation costs of UGX 29,858,532,069/= for 509 delay days.**

2. **The learned trial Judge erred in law and fact when he misconstrued the meaning and application of the construction principles of variation, price adjustment, acceleration and prolongation and thus reached a wrong conclusion.**

3. **The learned trial Judge erred in law and fact when he failed to make a finding that addenda No. 2 between the appellant and the 1st respondent provided for acceleration of works.**

4. **The learned trial Judge erred in law and fact when he failed to make a finding that the appellant having paid the 1st respondent for accelerating works, could not pay the 1st respondent prolongation costs for the same period of acceleration.**

5. **The learned trial Judge erred in law and fact when he failed to make a finding that the appellant is entitled to UGX 29,858,532,069/= as money had and received.**

6. **The learned trial Judge erred in law and fact when he failed to make a finding that the respondent committed of fraud in causing payment of the suit funds.**

7. **The learned trial Jude erred in law and fact when he failed to make a finding that the 2nd respondent was professionally negligent in certifying and recommending payment of the suit funds to the 1st respondent.**

8. **The learned trial Judge erred in law and fact when he made a finding that the appellant was not entitled to an award of damages and interests."**

The appellant prayed this Court to: 1) allow the appeal; 2) set aside the judgment and decree of the learned trial Judge; and 3) grant to the appellant both the costs of the appeal and in the Court below.

The respondents opposed the appeal.

Representation

At the hearing, Ms. Mary Kutesa, Mr. Titus Kamya and Mr. Henry Muhangi, all learned counsel, jointly appeared for the appellant. Mr. Enos Tumusiime, learned counsel, appeared for the 1st respondent. Mr. Byrd Ssebuliba and Ms. Rebecca Nakiranda, both learned counsel, jointly appeared for the 2nd respondent.

The Court gave to the parties, a schedule for filing written submissions in support of their respective cases, which was duly complied with. The written submissions have been considered in this judgment.

Appellant's submissions

Counsel for the appellant, in their written submissions, argued the grounds in the following manner: ground 1 independently; grounds 2 and 3 jointly; grounds 4 and 5 jointly; and thereafter each of grounds 6, 7 and 8 independently.

Ground 1

Counsel submitted that the learned trial Judge erred when he found that Dott was entitled to prolongation costs. According to counsel, there was no prolongation to the relevant road projects at all. Counsel submitted that, in its ordinary meaning, prolongation is the extension of the duration of something. Further, that according to the **Society of Construction Law Delay and Disruption Protocol 2002 (SCL Protocol)**, it is a well-established principle of construction law that where the contract performance is delayed on account of an employer's breach, and the contractor applies for extension of time for completion, an award of extension of time establishes a new completion date. The number of days awarded as extension of time for completion will correspond with the number of days the employer's acts or omissions delayed performance. Counsel submitted that **Clause 28.1** of the **General Conditions of Contract for the Procurement of Works (GCC)**, was relevant to the present case, provides as follows:

> **"28.1 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 would cause the Contractor to incur additional cost."**

Counsel pointed out that the project manager has never granted an extension on account of delay caused by UNRA, and therefore, there was no prolongation.

It was further submitted that the learned trial Judge stated in his judgment that there had been a delay of 169 and 139 days to the relevant contracts, and this assessment was obtained from the findings of the project manager. Counsel then contended that the learned trial Judge erred when he held that the delay to the relevant projects was 509 days yet there was no evidence showing that the project manager extended the projects by 509 days. Further still, there was no evidence proving that Dott stayed on the project for 509 days longer than agreed, and in the absence of that evidence, the learned trial Judge ought to have found that there was no justification for the compensation monies paid to Dott.

Counsel further submitted that the learned trial Judge overlooked evidence showing that during the alleged delay period, Dott was on the site working and being paid from the date of issue of the first set of construction drawings. Counsel referred to the documentary evidence covered in Exhibits P.22, P.25, P.26, P.27, P.28 P.54-57 proving this point, and contended that it was dishonest that Dott relied on delays, yet it had been working during the relevant delay period.

Counsel also submitted that the relevant contract that was concluded between the parties was for staged reconstruction of two road projects for a duration of 18 months, and the parties agreed, under clause 28.1 of the GCC, that where a compensation event occurs affecting the intended completion date, the project manager could extend time for the intended completion. Counsel referred to the textbook by **Andy Hewitt, Construction Claims and Responses, 2nd Ed.** for the proposition that for a claim of extension of time to succeed, the contractor must demonstrate that an event of delay occurred and that it had the effect of delaying completion. Counsel contended that Dott did not, at the trial, prove that such extension had either been sought or obtained, neither did PEC prove that it ever obtained an application for extension of time.

Furthermore, counsel submitted that Dott did not seek an extension because all the parties were aware that any delays to the project were fully compensated under a subsequent contract, contained in Addendum No. 2, which established a new time frame for the completion of the relevant

projects and also provided for increase in scope, time and price. Counsel contended that any question regarding delays that had earlier been suffered were rendered academic on the signing of Addendum No. 2.

Counsel also submitted that, even assuming that there had been a 509-day delay to the project as claimed by Dott, the amount of compensation Dott was entitled to could only be determined by reference to the provisions of the relevant contracts and proved in a manner required to prove special damages. Dott would be required to adduce evidence of site records showing actual costs incurred due to the delay, but had failed to do so.

Counsel concluded the submissions on ground 1 by urging this Court to re-evaluate the evidence and find that it was wrong for Dott to claim for prolongation costs owing to a 509-day delay without evidence that there had been an extension for a corresponding number of days to allow for completion of the project.

Grounds 2 and 3

Counsel submitted that the learned trial Judge misconstrued key principles in construction law such as variation, price adjustment, acceleration and prolongation and their application to the present case. Counsel referred to the SCL protocol for the definition of variation as **"any difference between the circumstances and/or content of the contract works as carried out, compared with the circumstances and/or content under which the works are described in the contract documents as required to be or intended to have been carried out. A change or variation may or may not carry with it a right to an extension of time and/or additional payment**"; and acceleration as "the execution of the planned scope of work in a shorter time than anticipated or the execution of an increased scope of work within the originally planned duration". Counsel also referred to the **Black's Law Dictionary** for further definition of acceleration, as well as to a publication by the learned authors **Pater Davidson and John Mullen titled Evaluating Contract Claims**. Further still, counsel referred to the definition of prolongation in the SCL Protocol, as

the extended duration of works during which costs are incurred as a result of a delay.

Counsel contended that UNRA adduced documentary evidence showing that the parties agreed to compensate Dott for any delay by signing Addendum No. 2 which provided for acceleration of the relevant project works. Counsel alluded to Exhibits P73, P74 and P75, the documentary evidence of the negotiations leading to the execution of the addendum, and contended that the gist of the negotiations was that the addendum was intended to provide for completion of the works in a shorter period to cover for any earlier delays, to provide for compensation for loss suffered by earlier delays by providing for increased cost rates, and to rule out prolongation of the road projects. Counsel also referred to the evidence of PW3 Rebecca Natukunda who testified that as per Addendum No. 2, Dott was not entitled to payment of prolongation costs claimed because any loss occasioned by that delay was negotiated under that addendum and compensated through increase of rates. Counsel further referred to the evidence of PW2 Eng. Karekezi who testified that he was the project manager for the relevant project and had found that Dott merited an extension of 169 days and 139 days owing to delay occasioned by UNRA to the two road projects. PW2 further testified that he had prepared a draft variation of the contract to revise the original contract rates so as to compensate Dott for any loss occasioned by the delay. Counsel also referred to the testimony of PW4 to similar effect, and submitted that the evidence was supported by that of DW1 Prassad Reddy and DW2 Michael Mabonga Wetala.

Counsel submitted that the learned trial Judge had erred when, against the weight of all the highlighted documentary and oral evidence, he concluded that the addendum did not provide for acceleration basing solely on the oral evidence of DW2. Counsel contended that relying on oral evidence in preference to documentary evidence was erroneous. For this submission, counsel referred to **Bamugye vs. Tropical African Bank Ltd, Court of Appeal Civil Appeal No. 48 of 2007 (unreported).**

Grounds 4 and 5

Counsel submitted that Dott was paid compensation as prolongation costs, by mistake. Counsel conceded that there were delays at the early stages of the execution of the relevant contracts, but maintained that UNRA had taken steps, through execution of Addendum No. 2, to compensate Dott for those delays, through application of acceleration measures like increasing the contract prices. Counsel referred to the **SCL Protocol** for the proposition that where acceleration is instructed and/agreed, the contractor is not entitled to claim prolongation compensation for the period of employer delay avoided by the acceleration measures.

It was further submitted that the compensation monies paid to Dott and Addendum No. 2, as rightly acknowledged by the learned trial Judge, both covered the same period, and therefore, UNRA had been laboring under the weight of mistaken belief when it considered that payment of the compensation monies to Dott was due. Counsel contended that the monies paid out by mistake to Dott were recoverable under the doctrine of money had and received. Counsel referred to the textbook **Chitty on Contracts, 21st Ed.** for the statement that the action for money had and received by the respondent for the use of the appellant was called by Lord Mansfield "a kind of equitable action' and lies when the respondent has received money which in justice and equity belongs to the appellant under circumstances which render the receipt a receipt by the respondent to the use of the appellant. Counsel also referred to the comments of **Martin B** in **Freeman vs. Jeffries (1869) L.R 4 Ex. 189** that **"for a long time, implied contracts have been admitted into the law where a transaction having taken place between the parties, a state of things has arisen in reference to it which was not contemplated by them, but which is such that one party ought in justice and fair dealing to pay a sum of money to the other"**. Counsel urged this Court to sustain UNRA's argument that the payment of compensation monies amounting to Ug. Shs. 29,858,532,069/= to Dott was a double payment and to direct a refund of the said monies applying the doctrine of money had and received.

Ground 6

Counsel submitted that the learned trial Judge failed to properly address his mind to the evidence adduced by UNRA in support of the allegations of fraud against Dott and PEC. Counsel relied on **Zaabwe vs. Orient Bank, Supreme Court Civil Appeal No. 4 of 2006 (unreported)** and **Kampala Bottlers Ltd vs. Damanico Ltd, Supreme Court Civil Appeal No. 22 of 2002 (unreported)** for the principles on proof of fraud, and contended that fraud was established by evidence that Dott made claims for prolongation costs, well knowing that there was no basis for such claims and PEC approved those claims fully aware that they had no legal basis. Counsel further contended that Dott and PEC were aware that two weeks prior to the submission of Dott's compensation claim, UNRA and Dott executed an addendum that precluded the making of that compensation claim. Counsel contended that Dott's claim for compensation was a willful and intentional perversion of facts to induce UNRA to pay the relevant compensation monies.

Furthermore, counsel submitted that it was also evidence of fraud that Dott, from the time of evaluation of the claim to date, have severally and jointly withheld information relating to their claim such as contemporary records relating to the project like site diaries and equipment registers, that would demonstrate the level of equipment mobilization during the period of the alleged delay and the nature of the project's daily activities. Similarly, it was indicative of fraud that PEC also deliberately refused to consider/request for this information, which was a ploy to cause fraudulent payments. In addition, witnesses on behalf of PEC told lies while on oath which was further evidence of fraud. Counsel urged this Court to reverse the learned trial Judge's findings and find that Dott and PEC acted fraudulently.

Ground 7

Counsel referred to the principles on negligence as developed at the common law and articulated in cases such as **Donoghue vs. Stevenson [1932] AC 362; and Blyth vs, Birmingham Water Works Co. 11 Ex. 784** cited with approval in the Uganda High Court case of **Baali Jackson vs. Mansons (U) Ltd Civil Suit No. 37 of 2012.** Counsel submitted that for

a claimant to succeed on a claim for negligence, he or she must prove: 1) That there existed a duty of care owed to the claimant by the respondent; 2) that the defendant breached that duty; 3) that the claimant suffered injury or damage as a result of the breach of duty. Counsel submitted that UNRA contracted PEC to offer consultancy services for evaluation of Dott's compensation claim, and the contract was made following PEC's representations that it possessed special skill and qualities to supervise the contract works on behalf of UNRA. Counsel further submitted that under the contract, PEC was had a duty to review and monitor the road projects and to advise UNRA on any problems arising during execution of the road projects. PEC was expected to perform its duties under the contract with due care, efficiency and diligence, in accordance with best professional practices. Counsel contended that PEC breached this duty when it; a) relied on an erroneous opinion of UNRA's counsel regarding the evaluation of prolongation costs owing to Dott, yet PEC was expected to make its own individual assessment; b) failed to maintain a detailed daily site diary for the project; c) purported to vary an earlier decision by a project manager following an inapplicable procedure; d) evaluated Dott's compensation claim without reference to any contemporary records; e) determined that Dott was entitled to prolongation costs yet there had been no prolongation period; and f) awarded to Dott compensation as prolongation costs yet Dott had already been compensated through payment of an acceleration rate under Addendum No. 2. Further still, counsel submitted that as a result of PEC's negligence, UNRA paid out the impugned compensation monies to Dott. In view of the above submissions, counsel contended that PEC was liable to pay damages for negligence to UNRA. Counsel prayed this Court to find that the learned trial Judge had erred when he found otherwise.

Ground 8

Counsel submitted that the learned trial Judge erred when he found that the appellant was not entitled to damages and interest. Counsel reiterated that an award of damages is a discretionary remedy and further that in assessing the quantum of damages, court will mainly be guided, interalia, by the value of the subject matter, the economic inconvenience suffered by the innocent

party and the nature and extent of the breach. In the present case, UNRA was deprived of the suit compensation monies due to the fraudulent acts of the respondents and the negligence of PEC, and it would be appropriate that this Court awards Ug. Shs. 1,000,000,000/= to UNRA as general damages with interest at court rate from the date of judgment till payment in full, in accordance with **Section 26** of the **Civil Procedure Act, Cap. 71**.

1st respondent's submissions

In reply, counsel for the 1st respondent argued the grounds in the following manner; grounds 1 and 5 jointly; grounds 2, 3 and 4 jointly; then each of grounds 6, 7 and 8 separately.

Grounds 1 and 5

Counsel submitted that two issues arose for determination under grounds 1 and 5 – firstly, whether Dott suffered delays of 509 days; and secondly, whether Dott was entitled to prolongation costs of Ug. Shs. 29,858,532,069/=. He contended that UNRA and Dott entered into two similar road works contracts in respect of Tororo-Mbale Road and Mbale-Soroti Road. The contracts incorporated Special Conditions of Contract which, under **Clause 21.1**, stipulated that **"the site possession date shall be the commencement date which shall be communicated in writing and with a strip map. The detailed construction drawings will be provided to the contractor within two months of the commencement date"**. Counsel further submitted that the road works contracts also incorporated General Conditions of Contract, which under **Clause 21**, 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 (Special Conditions of contract), the employer will be deemed to have delayed the start of the relevant activities and this will be a compensation event".** Counsel further referred to Clause 44.1 of the GCC which provided that the following were compensation events: a) the employer does not give access to a part of the site by the site possession date stated in the SCC; c) the project manager does not issue drawings, specifications, or instructions required for

execution of the works on time; 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) or the employer does not work within the dates...stated in the contract and they cause delay or extra cost to the contractor; i) other compensation events described in the SCC or determined by the project manager shall apply.

Counsel further submitted that pursuant to the above contractual provisions, Dott, on 1st November, 2013, submitted claims for compensation citing the following grounds: a) delayed possession of site; b) delayed provision of strip maps; c) delayed provision of construction drawings; d) delayed clarification on the design way forward; e) introduction of new scope of works; f) intermittent design changes; g) delayed resolution of variation orders; and h) distortion of the contractor's programme. He further submitted that UNRA submitted Dott's claim to PEC for evaluation and the latter accepted grounds "a-e" and rejected grounds "f-h". UNRA rejected PEC's evaluation, and engaged an independent legal expert who advised UNRA to pay compensation of Ug. Shs. 29,858,532,069/= and it did so.

It was further submitted that after paying the compensation monies, UNRA turned around and filed the suit in the trial Court to recover the monies. In determining the suit, the learned trial Judge considered that the evidence proved that there were delays by UNRA in issuing of strip maps, drawings, and also delay in issuing of clarification/guidelines to address the earlier delay. The learned trial Judge considered that the delay was for 509 days. Counsel contended that the delay occasioned by UNRA amounted to breach of contract for which UNRA was liable to pay compensation. He referred to Section 61 (1) of the Contracts Act, 2010 for the position that where there is breach of contract, the party who suffers a breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage as caused to him or her, and submitted that when the provision is taken together with Clauses 44.1. 44.2 and 44.3of the GCC, Dott was entitled to be paid compensation as was done.

Counsel further submitted that the assessment of the compensation paid to Dott was done by UNRA with the aid of agents like PEC and other consultants

like the Chief Mechanical Engineer, Ministry of Works and Transport, and approved by the UNRA's top management. Counsel contended that the learned trial Judge rightly considered that the method of computing the compensation was carried out by UNRA itself.

Furthermore, counsel submitted that Dott constructed the two relevant roads to completion, where after, UNRA issued it with completion certificates and final accounts. Counsel contended that if there were any bonafide claims against Dott, UNRA ought to have sought for liquidated damages under clause 49.1 of the GCC but it did not do so. Counsel contended that UNRA was estopped from claiming money from Dott under the relevant contract when the contract has long been completed.

Counsel further submitted that UNRA, in parts of its submissions on ground 1, is raising new matters not raised in the trial Court. He cited the case of **Interfreight Forwarders (U) Ltd vs. East Africa Development Bank, Supreme Court Civil Appeal No. 33 of 1992 (unreported)** for the proposition that a party was bound by its pleadings and could not establish a new case. In this regard, counsel pointed to UNRA's reliance on Clause 28.1 of the GCC on the role of the project manager to allow for extension of the completion date, and submitted that UNRA's case in the lower court was founded on Clauses 21 and 44 of the CC. Further, counsel pointed to UNRA's reliance on SCL Protocol, 2002, and argued that the document was neither pleaded, mentioned in evidence, nor was it referred to in UNRA's submissions in the trial Court. Further still, counsel submitted that similarly, UNRA based its case in the lower Court on the SCL Protocol of 2017, but this was rejected by the learned trial Judge on grounds that the cause of action arose before the protocol was made. Counsel contended that UNRA was trying to smuggle the protocol of 2002 onto the court record yet no evidence was led on the same in the trial Court.

Counsel further submitted that, in any case, the SCL Protocol was not a contract document and did not take precedence over any contract document. Counsel referred to Clause 2.5 of the GCC and SCC for the list of contract documents and the order of their priority. He further contended that if UNRA

had intended to incorporate the SCL Protocol as a contract document, it would have expressly done so.

It was further submitted that the appellant's submission that the learned trial Judge did not indicate how the 509 delay days were arrived at were misplaced. PW1 had acknowledged that the amount of delay was for that number of days, and moreover, the learned trial Judge had in his judgment given a detailed analysis as to how the delay days were arrived at.

On UNRA's submission that the project manager ought to have acknowledged the 509 delay days and extended the completion date by a corresponding number of days, counsel argued that the number of delay days entitled Dott to compensation under Clause 44 of the GCC with or without the project manager's acknowledgement. Further, counsel contended that the project manager extended the contracts for the relevant road projects to 38 months and 40.5 months respectively, periods longer than the 509 delay days.

Counsel concluded on this issue, by submitting that UNRA was estopped from claiming any refund considering that it issued Completion and Final Accounts Certificates for the two roads, and thereby closed the issue of claims against Dott. In counsel's view, UNRA was estopped from demanding money on account of the relevant road projects, including the suit moneys. Counsel prayed that this Court disallows grounds 1 and 5.

Grounds 2, 3 and 4

Counsel began by raising an objection to the competency of grounds 2, 3 and 4. He submitted that the grounds relate to the construction concepts of variation, price adjustment, acceleration and prolongation, all new matters that were never pleaded or indeed mentioned in UNRA's pleadings. Counsel submitted that **Order 6 Rule 7** of the **Civil Procedure Rules, S.I 71-1** prohibited the raising of new matters not referred to in a party's pleadings. He also referred to the cases of Captain Gandy vs. **Caspair Air Charter Ltd (1956) EACA 139**; **Interfreight Forwarders (supra); Fangmin vs. Belex Tours and Travel Ltd, Supreme Court Civil Appeal No. 6 of 2013 (unreported) and Electoral Commission and Another vs.**

Tumwesigye, Court of Appeal Election Petition Appeals Nos. 73 and 74 of 2021 (unreported), in which the import of the said provision was discussed and the Court held that a person is not allowed to succeed on a case not set up in their pleadings. Counsel urged this Court to strike out the three grounds for having been filed in a manner that contravened Order 6 Rule 7.

On the merits, counsel submitted that the learned trial Judge was right when he found that Addendum No. 2 did not provide for acceleration of works neither was there acceleration to the project. He submitted that the two road works contracts were for a duration of 18 months, with effect from 21st November, 2010 to June, 2012, and during that period, there was no acceleration to provide for completion of works by June, 2012.

Counsel also disagreed with UNRA's submission that Addendum No. 2 provided compensation to Dott. He contended that Addendum No. 2 was intended to make provision for the change in circumstances, owing to delay occasioned by UNRA to the commencement of the road construction projects, that had led to an inevitable increase in the costs of the relevant construction projects. Counsel pointed out that whereas the relevant construction projects were intended to commence on 21st November, 2010, UNRA provided the relevant strip maps on 1st August, 2011 and did not have the construction drawings ready until 12th April, 2012, only two months to the end of the original 18-month contract period. Counsel submitted that at that point, 3 months had lapsed since Dott's bids for the relevant projects were prepared in 2009, and there had been a change in the circumstances; the traffic on the roads had increased leading to a deterioration in the state of the roads, meaning that the costs of the construction of the relevant roads had increased. To counsel, this was the basis for the signing of Addendum No. 2 so to cater for the increased costs due to the highlighted change in circumstances, by increasing the contract prices for the relevant road projects.

Furthermore, counsel submitted that UNRA's arguments about acceleration, increase of rates overlooks the decision of its own contract committee of 13th July, 2013 which recommended payment of compensation to Dott.

Counsel also submitted that Addendum No. 2 did not preclude Dott from getting compensation for UNRA's earlier delays as it was entitled to the same under Clause 44 of the Contract. He submitted that the learned trial Judge was right when he found that Dott was entitled to be paid compensation for the following reasons. First, the relevant contracts were admeasurement contracts which entitled Dott to compensation under Clause 44 of the GCC. Secondly, the payment of compensation applied to past delay events while Addendum No. 2 covered future costs of the relevant road projects. Thirdly, Addendum No. 2 did not provide for acceleration as the contractor did not claim for acceleration. Fourthly, there was no evidence that Dott was paid twice for the same amount of work. On the contrary, the relevant compensation certificates were not revised after the making of the addendum.

Counsel further submitted that UNRA's submissions are based on a misconception of the provisions of Clause 44 of the GCC, but the learned trial Judge was alive to the import of that provision, which was that as long as there were delays by UNRA in issuing of strip maps, construction drawings, etc, Dott would be entitled to compensation.

Counsel submitted that grounds 2, 3 and 4 ought to fail.

Ground 6

Counsel submitted that the learned trial Judge correctly found that Dott and PEC did not commit any acts of fraud as alleged by UNRA. He contended that Dott's claim for payment of compensation was based on the contracts signed with UNRA. Further that the claim was properly lodged and approved by UNRA, acting on independent professional advice and after obtaining clearance from the Solicitor General. Counsel submitted that there was no merit in UNRA's submissions that Dott had intentionally perverted the truth so as to obtain the payment as it did. He contended that, on the contrary, Dott's claims were truthful. He pointed out that there was evidence that Dott suffered delays of 509 days. Secondly, Dott was entitled to compensation under Clause 44 of the GCC. Thirdly, the delay was occasioned by UNRA's acts. Moreover, Dott had submitted all relevant documentation while making

its claim, and UNRA had not asked for additional documentation. Further still, the decision to pay the compensation monies was taken by UNRA's top management without any influence from Dott.

Counsel, while making reference to the Zaabwe case (supra), contended that in view of the above highlighted circumstances, Dott never made any false representation so as to intentionally pervert the truth and lead UNRA to surrender its legal right. Counsel further pointed out that UNRA had failed, without giving any reasons, to summon as witnesses, any of the persons who sat in the top management meeting that approved payment of compensation to Dott. He urged this Court to uphold the learned trial Judge's findings on fraud and to disallow ground 6.

Ground 7

Counsel submitted that PEC was not liable to pay damages for negligence arising out of alleged breach of duty of care to UNRA regarding evaluation of Dott's compensation claim. He gave the following reasons for this submission: First, PEC correctly assessed that Dott was entitled to compensation pursuant to the relevant contracts, and therefore the payment was justified. As such, UNRA's claims that PEC was liable in negligence for approving wrongful payments were misconceived. Secondly, because the payment to Dott was justified, UNRA did not suffer any loss so as to attract liability in negligence. Thirdly, the advice to pay Dott for 509 delay days was approved by UNRA itself. Fourthly, PEC could not be liable for giving false advice to UNRA because its advice was not taken, anyway. PEC had assessed the compensation payable to Dott at Ug. Shs. 33,204,834,600/= whereas UNRA had on its own volition opted to pay a lesser amount of Ug. Shs. 29,858,532,069/=. Counsel submitted that the above submissions demonstrate that PEC had not been negligent and prayed this Court to disallow ground 7.

Ground 8

Counsel submitted that the learned trial Judge was right when he refused to award damages to UNRA with interest at Court rate. He submitted that there was no justification for awarding damages in the present case because

compensation had rightfully been paid to Dott arising out of delays occasioned by UNRA. He submitted that ground 8, should also fail.

2nd respondent's submissions

Counsel for the 2nd respondent began by challenging the competence of some grounds of the appeal. It was submitted that grounds 1, 2 and 6 were incompetent for offending **Rule 86 (1)** of the Rules of this Court, which provides:

> **"86. Contents of memorandum of appeal.**
>
> **(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make."**

Counsel contended that grounds 1, 2 and 6 were general grounds. Ground 1 did not specify the evidence that the learned trial Judge misconstrued; ground 2 did not concisely show how the learned trial Judge had misconstrued the evidence; and ground 6 did not specify which acts of fraud the learned trial Judge should have found against the respondents. Counsel submitted that the practice adopted by appellate courts has been to strike out such improper grounds as was done in the case of **Attorney General vs. Baliraine, Court of Appeal Civil Appeal No. 79 of 2003 (unreported)** and **Byaruhanga vs. Musoke, Court of Appeal Civil Appeal No. 2 of 1998 [1999] KALR 62**. Counsel urged this Court to strike out grounds 1, 2 and 6.

Counsel, like his colleague for Dott, also submitted that grounds 2, 3 and 4 were incompetent and ought to be struck out because they introduced new matters, contrary to the rule that a party cannot raise a cause of action different from his original case. The submissions on this point were similar to those made by counsel for Dott and it is unnecessary to repeat them here.

On the merits, counsel argued the grounds of appeal in the following manner: ground 1 independently; grounds 2, 3 and 4 jointly; grounds 5 and 8 jointly; ground 6 independently and lastly ground 7 independently.

Ground 1

Counsel submitted that ground one raises an issue of whether the learned trial Judge rightly found that the 1st respondent suffered delays and was entitled to compensation of Ug. Shs. 29,858,532,069/= for 509 delay days pursuant to the contract for the road works. Counsel emphasized that breach of contract by one party emphasized the other party to compensation. For this submission, counsel relied on the case of **MTN Uganda Ltd vs. GQ Saatchi and Another, Court of Appeal Civil Appeal No. 0098 of 2017 (unreported) (counsel for the appellant relying on Kasibante vs. Shell (U) Ltd, High Court Civil Suit No. 542 of 2016 (unreported)**. Counsel emphasized that there was evidence proving that UNRA acknowledged that Dott had suffered delays for 509 days. Further, that there was evidence that Dott had mobilized equipment and was ready to commence the construction project by October, 2010 whereas UNRA failed to provide design drawings until September, 2012. To counsel, all the aforementioned pointed to breach by UNRA of the relevant contracts, which entitled Dott to compensation. Counsel also contended that the learned trial Judge properly considered the evidence and gave elaborate reasons as to how the computation of the 509 delay days was arrived at.

On UNRA's submission that Dott's failure to adduce evidence of contemporary records affected its compensation claim, counsel submitted that reference to such records was not a contractual pre-condition to the assessment of the claim. Counsel further submitted that, in any case, PW2 the Project Manager, testified that there were no such contemporary records. Further still, that in any case, UNRA failed to adduce evidence proving that Dott demobilized during the relevant period.

Counsel submitted that ground 1 must fail.

Grounds 2, 3 and 4

Counsel submitted that one issue arises from grounds 2, 3 and 4, namely: whether the learned trial Judge rightly considered and properly construed the construction principles of variation, price adjustments, acceleration, prolongation and addenda. Counsel noted that whereas counsel for UNRA,

in their submissions, put much focus on explaining the highlighted construction principles, they did not point out any clause in the relevant road works contracts where the terms were mentioned, incorporated or considered. Counsel, citing the case of **Byakika vs. National Social Security Fund, Court of Appeal Civil Appeal No. 0193 of 2017 (unreported)**, submitted that literal interpretations must be given to the words used in a contract in order to ascertain their meaning. Counsel submitted that a detailed reading of the relevant contracts and Addendum No. 2 reveals that there was no mention of acceleration or prolongation as forming part of the agreed terms of the contract between the parties. Counsel also submitted that acceleration was inapplicable to the Addendum No. 2 because at the time of signing that document, the duration for the original contracts had expired on 21st May, 2012.

It was submitted that the learned trial Judge therefore rightly evaluated the evidence and found that Dott was entitled to compensation for the 509-day delay; and that the principle of acceleration was inapplicable in the present case. Counsel prayed that grounds 2, 3 and 4 be disallowed.

Grounds 5 and 8

Counsel submitted that the issue that arises from grounds 5 and 8 is whether the learned trial Judge rightly rejected and dismissed the appellant's claims for money had and received and for damages and interest. On the issue of money had and received, counsel supported the decision of the learned trial Judge, contending that UNRA failed to demonstrate that Dott received money from it for no consideration. Counsel referred to the case of **Nsubuga vs. Rwomushoro**, **Court of Appeal Civil Appeal No. 102 of 2012 (unreported)** for the principles on the doctrine of money had and received. The Court in that case stated:

> **"...a failure of consideration was held to occur if sufficient consideration was contemplated by the parties at the time the contract was entered into, but either on account of some innate defect in the thing to be given, or non-performance in the whole or in part of that which the promisee agreed to do, nothing of value can be or is received by the promisee."**

Counsel contended that the doctrine as articulated in the above case was inapplicable to the present case, because the compensation to Dott was paid pursuant to a contract providing for it.

As for the appellant's claim for damages, counsel submitted that the learned trial Judge rightly found that the appellant was not entitled to damages having failed to prove its claim for money had and received. Counsel, citing the case of **Masaka Municipal Council vs. Takaya, Court of Appeal Civil Appeal No. 1073 of 2015** (unreported), submitted that the decision to award or deny damages is made in the discretion of the trial Court, and an appellate Court may only interfere if there exist reasons justifying it to do so. Counsel also submitted that UNRA proved no wrong suffered and since damages are intended to remedy wrongs, UNRA was not entitled to damages.

It was also submitted that as the learned trial Judge disallowed UNRA's claim, it logically followed that he had to also deny the appellant damages and interest.

Counsel prayed that grounds 5 and 8 be disallowed.

Ground 6

According to counsel, the issue arising from ground 6 is whether the learned trial Judge rightly dismissed the UNRA's action of fraud against Dott and PEC. Counsel submitted that UNRA failed its claim of fraud as set out in its pleadings. Counsel pointed out that UNRA claimed that Dott had fraudulently made a claim for 509 delay days although no such delay was experience, but submitted that this claim had to fail because there was evidence, even from UNRA's witnesses PW1, PW2 and PW3 confirming that Dott suffered the 509 delay days.

As for UNRA's submission based on alleged purported payment of acceleration rates, counsel submitted that this allegation was neither pleaded nor proved during the trial.

Further, regarding UNRA's contention that Dott and PEC acted fraudulently by withholding contemporary records, counsel submitted that this allegation was also neither pleaded nor proven. Moreover, according to counsel, PEC

had not been retained by UNRA during the period when the delays occurred, and it must have been taken that the documentation was in UNRA's custody. Counsel further submitted that UNRA's submissions alleging that Dott and PEC withheld documentation were an indicative of UNRA's hypocrisy. UNRA knew that PEC had not been hired when the delays occurred but expected PEC to be in possession of contract documents. Further, UNRA knew that the decision to pay compensation to Dott was recommended by its own legal counsel, but counsel for UNRA in their submissions attempted to impugn the legal advice. In addition, UNRA knew that PEC had requested for documents during the evaluation of the claim.

Counsel submitted that the learned trial Judge properly considered the evidence and rightly found that Dott and PEC were not guilty of fraud. Counsel prayed that this Court dismisses ground 6.

Ground 7

Counsel submitted that the learned trial Judge was right when he dismissed UNRA's professional negligence claims against PEC because the same were neither pleaded nor proved. Counsel submitted that the test for professional negligence was articulated in the case of **Hedley Byrne and Co. Ltd vs. Heller and Partners Ltd [1964] AC 465** as follows:

> **"Where a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, and a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to another person who, as he knows or should know, will place a reliance upon it, then a duty of care will arise."**

Counsel also referred to the case of **Caparo Industries PLC vs. Dickman [1990] 1 ALLER 568** where it was stated that liability for professional negligence only arises where advice is acted on without any further independent inquiry. **Counsel contended that the decision to pay Ug. Shs. 29,858,532,069/=** did not originate from PEC but from an independent party that UNRA consulted.

Furthermore, counsel submitted that UNRA neither pleaded nor proved the particulars of fraud it was canvassing in its submissions. Counsel advanced

a proposition that allowing UNRA to succeed on a case that it did not plead and to which the respondent never responded would occasion grave injustice and defeat the purpose of pleadings. For this submission, counsel referred to the case of **Luyimbazi vs. Stanbic Bank Uganda Ltd, Supreme Court Civil Appeal No. 2 of 2019 (unreported)**.

Counsel also submitted that in any case, the evidence on record proves that PEC exercised due care and skill in evaluation and assessment of Dott's claim. PEC demonstrated that its computations were based on the fact that Dott incurred losses arising from wear and tear of idle machinery, indirect costs, lost time on insurance and securities, head office and site overheads. Counsel also pointed out that in carrying out the evaluations, PEC exercised prudence by obtaining clarification from various stake holders.

Counsel further submitted that PEC made the evaluation relying on documents forwarded to it by UNRA and in deference to instructions from UNRA to evaluate the said claim. Counsel contended that in those circumstances, UNRA was estopped from denying Dott's entitlement to compensation. For the principles on estoppel, counsel relied on the case of **Mwesigwa vs. Petrol Uganda Ltd, Court of Appeal Criminal Appeal No. 97 of 2009 (unreported)**.

Furthermore, counsel submitted that UNRA's attempted denial of the truth and accuracy of the legal opinion relied on to evaluate Dott's compensation claim amounted to an immoral act on which this Court cannot rely to make findings against PEC. Counsel relied on the authority of **Masaka Municipal Council (supra)** where it was held that Court cannot found its decision on an immoral act of one of the parties.

Counsel concluded by submitting that UNRA failed to prove the case of professional negligence against PEC and urged this Court to uphold the findings of the learned trial Judge, and disallow ground 7.

Appellant's submissions in rejoinder

Counsel for UNRA made submissions rejoining to some of the arguments made for Dott and PEC. Counsel also commented on counsel for Dott's reference to Exhibit D97, an alleged diagnostic report made by UNRA.

Counsel submitted that the said document was never admitted in evidence and should not be relied on by this Court.

Counsel further submitted that the Supplementary Record of Appeal filed by Dott was irregular in that it contained the same information contained in UNRA's record of appeal, and should not have been issued by Registrar of the High Court. Counsel submitted that there cannot be two records of proceedings issued in the same matter, and urged this Court to strike out Dott's Supplementary Record.

On the preliminary objection that grounds 1, 2 and 6 are incompetent for offending **Rule 86 (1)** of the Rules of this Court, and that grounds 2, 3 and 4 introduce a new case in departure from UNRA's pleadings, counsel submitted that the objections should not be sustained because they were raised late. Counsel referred to the case of **Electoral Commission and Another vs. Tumwesigye, Consolidated Election Petition Appeals Nos. 73 and 74 of 2021 (unreported)** where this Court guided that preliminary points of law on the manner of framing of the grounds of appeal ought to be raised at the earliest opportunity. Counsel submitted that the preliminary objections should have been raised at the hearing and not during the submissions.

With regard to the merits of the preliminary objections, counsel submitted that grounds 1, 2 and 6 were compliant with **Rule 86 (1)** of the **Rules of this Court** and the guidance in the **Florence Baliraine case (unreported)** as they specified the points that were wrongly decided by the trial Court. On the contention that grounds 2, 3 and 4 contravened **Order 6 Rule 7** of the **Civil Procedure Rules, S.I 71-1,** which prohibits the raising of new matters, counsel submitted that the said provision permits for raising of new matters that are not inconsistent with the original pleadings. Counsel contended that the matters raised in grounds 2, 3 and 4 were consistent with the pleadings and the evidence, and urged this Court not to strike them out.

In all other respects, counsel merely reiterated the submissions made in support of the appeal.

Resolution of the Appeal

We have carefully studied the record, and also considered the submissions of counsel and the law and authorities cited. We have also considered other applicable law and authorities not cited.

This is a first appeal from a decision rendered by the High Court in exercise of its original jurisdiction, and on such appeals, this Court is enjoined by **Rule 30 (1) (a)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10** to reappraise the evidence and draw inferences of fact. Furthermore, in the case of **Uganda vs. Ssimbwa, Criminal Appeal No. 37 of 1993 (unreported)**, the Supreme Court stated as follows on the duty of a first appellate Court:

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

I will bear the above principles in mind as I proceed to determine the present appeal. In my view, the following 5 issues arise from the 8 grounds set out in the appellant's memorandum of appeal, and points raised in the respondent's preliminary objections:

"1. **Whether the preliminary objections raised by Dott and PEC against UNRA's appeal should be sustained.**

2. **Whether there was no proper basis for the payment of Ug. Shs. 29,858,532,068/= to Dott.**

3. **If not, whether the money ought to have been ordered to be refunded as money had and received.**

4. **Whether PEC and UNRA committed acts of fraud that tainted the payment made to Dott**

5. **Whether PEC was liable to UNRA for professional negligence.**

6. **Whether UNRA was entitled to the remedies claimed."**

Issue 1 – Whether the preliminary objections raised by Dott and PEC against UNRA's appeal should be sustained

The respondents, in their respective submissions, raised two main objections to the appeal. First, it was submitted by counsel for the 2nd respondent that grounds 1, 2 and 6 were drafted in a manner that contravened **Rule 86 (1)** of the **Rules of this Court**, in that these grounds were general and did not specify the points they were challenging, and were therefore incompetent. **Rule 86 (1)** of the Rules of this Court provides:

> **"86. Contents of memorandum of appeal.**
>
> **(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make."**

It is now well-established that grounds of appeal should explicitly set out the points in the decision appealed from that were allegedly wrongly decided. Grounds 1, 2 and 6 do not set out the precise points that were wrongly decided by the learned trial Judge – ground 1 alleges that the learned trial Judge "misconstrued the evidence on progress of works"; ground 2 alleges that the learned trial Judge "misconstrued certain construction principles" and ground 6 states that the learned trial Judge failed to make findings of fraud against the respondent. Therefore, there is merit in the submissions of counsel for the 2nd respondent that the highlighted grounds are general and do not concisely set out the issues in the present case. However, as will become apparent in the course of this judgment, the other issues raised for determination will involve a re-evaluation of all the evidence on record and therefore these grounds will also be answered.

The second objection to the appeal, which was raised by counsel for the 1st respondent and his counterparts for the 2nd respondent related to the competency of grounds 2, 3 and 4. It was submitted that these grounds raise new issues on the construction concepts of variation, price adjustment, acceleration and prolongation, that were never pleaded or indeed mentioned in UNRA's pleadings in the trial Court. Counsel contended that raising new issues contravenes **Order 6 Rule 7** of the **Civil Procedure Rules, S.I 71-1** as well as well-established principles laid down in cases such as **Captain**

Gandy vs. Caspair Air Charter Ltd (1956) EACA 139; Interfreight Forwarders (supra); **Fangmin vs. Belex Tours and Travel Ltd, Supreme Court Civil Appeal No. 6 of 2013 (unreported)** and **Electoral Commission and Another vs. Tumwesigye, Court of Appeal Election Petition Appeals Nos. 73 and 74 of 2021 (unreported)**, which hold that a litigant is not allowed to succeed on a case not set up in his/her pleadings.

I have considered grounds 2, 3 and 4. My view is that underlying all these grounds, which is the central issue on this appeal, is UNRA's claim that the payment made to Dott was not justified. This claim, invariably requires re-appraisal of the evidence and interrogation of all the circumstances as I shall do while resolving the other issues. Thus, while I must state that UNRA ought to have done a better job in framing their grounds of appeal, the justice of the case requires me to consider all the grounds and issues arising in this appeal.

I would therefore overrule the preliminary objections raised for the respondents.

Issue 2 – Whether there was no proper basis for the payment of Ug. Shs. 29,858,532,068/= to Dott

This issue covers grounds 1, 2, 3 and 4. In each ground, UNRA gives a different reason for objecting to the payment of Ug. Shs. 29,858,532,068/= ("the payment") it made to Dott. In my view, in determining this issue, one has to examine the relevant road works contract and/or the nature of the dealings between the parties, because the basis for the payment will most likely lie therein.

In 2010, UNRA executed two contracts for Dott to carry out road works on two roads, namely Tororo-Mbale Road (49 KM) and Mbale-Soroti Road (103KM). The relevant contracts, with similar content, were signed on 22nd October, 2010 and were for a duration of 18 months with effect from 21st November, 2010. Mr. Peter W Sebanakitta, then Executive Director signed the respective contracts on behalf of UNRA; Mr. S. Ravi, signed on behalf of Dott. By the respective contracts, Dott agreed to:

"execute and complete the works and remedy any defects therein in conformity in all respects with the provisions of the contract."

UNRA on the other hand undertook to:

"pay the contractor in consideration of the execution and completion of the works and then remedying of defects therein, the contract price...or such other sum as may become payable under the provision of the contract, at the times and in the manner prescribed by the contract."

The parties also agreed to incorporate other documents to form part of the contracts documents and these were: a) Letter of Bid Acceptance; b) Contractor's Bid; c) Special Conditions of Contract; d) General Conditions of contract; e) Technical Specifications; f) drawings; g) bills of quantities; and h) any other documents listed in the condition of particular applications as forming part of the contracts. The nature of the road works, as set out in the respective Special Conditions of Contract, were as follows:

"Scarification of existing surface and base; improvement of existing base with crushed rock; double surface dressing; single surface dressing/reseal; drainage works; raising of low-laying areas; and road safety interventions including installation of road furniture."

I pause here to note that the relationship between UNRA and Dott was contractual. Therefore, determination of the rights and liabilities of the parties was governed by principles of contract law. **Section 10 (1)** of the **Contracts Act, 2010** provides the following definition of a contract:

"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."

I also wish to reiterate the following principles of contractual interpretation. In **Wood vs. Capita Insurance Services Limited [2017] UKSC 24**, it was stated that when conducting contractual interpretation, the Court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement.

I note that the successful execution of the contracted road works required UNRA to promptly provide to Dott, in accordance with timelines set out in the relevant contracts, certain materials for each road, including; a strip map,

a detailed construction drawing, design drawings etc, and for UNRA to promptly do certain things, including handing over of the relevant road sites to Dott. From the outset of the relevant road projects, Dott felt that UNRA delayed to provide the materials and/or do some of the acts alluded to earlier, and that those delays entitled it to obtain compensation from UNRA. Dott, consequently, filed a claim for payment of Ug. Shs. 45,556,811,050/=. UNRA acknowledged that Dott was entitled to compensation but set and paid a lower amount of Ug. Shs. 29,858,532,068/=. As stated earlier, UNRA then turned around and filed a suit claiming that the highlighted payment was not justified.

My view is that UNRA's claims could only have succeeded upon proof that the payment was contrary to the contract signed by the parties. In its plaint, UNRA alleged as follows:

> "8. **...that Dott's claim of UGX 29,858,532,069/= as prolongation costs as compensation for a period of 509 days was unlawful, unjustified and or illegal. The said amounts were claimed without any justification on how the same accrued and no consideration whatsoever was provided for the same by the 1st defendant. The payment was therefore erroneously made and is invalid."**

In response, Dott stated in its Written Statement of Defence (WSD) that the impugned payment was made under the terms of the relevant road works contracts. Further, that the amount paid arose from UNRA's own proposal and that it arose following breach of contract by UNRA. The incidents of breach of contract as listed in Dott's WSD were as follows: a) failure to handover the road sites on 21st November, 2010 and instead doing so on 17th December, 2010; b) failure to provide strip maps until 1st August, 2011; c) failure to provide designs and construction drawings for the two road projects until 11th April, 2012; d) failure to sanction the fundamental changes to the scope of works until 5th May, 2012; e) delay in responding to crucial contractually relevant communication sought by Dott; and f) making substantial changes to the design and method of execution of the relevant road works, remitting additional intermittent design changes which all affected Dott's plans.

I have studied the relevant contracts and observe that they both envisaged that certain monies would become payable in certain circumstances, and relevant to the present case, this raises a question of whether the parties agreed that Dott would be paid for the highlighted delays. The answer to this question, which is at the heart of the dispute, requires examination of the relevant contractual provisions. The respective counsel for Dott and PEC submitted that the Dott's right to the impugned payment arose pursuant to **Clause 44** of the **General Conditions of Contract** for the two road projects. Clause 44 is reproduced below:

> **"44. Compensation Events**
>
> **44.1 The following shall be Compensation Events:**
>
> **(a) The Employer does not give access to a part of the Site by the Site Possession Date stated in the SCC.**
>
> **(b) The Employer modifies the Schedule of Other Contractors in a way that affects the work of the Contractor under the Contract.**
>
> **(c) The Project Manager orders a delay or does not issue Drawings, Specifications, or instructions required for execution of the Works on time.**
>
> **(d) The Project Manager instructs the Contractor to uncover or to carry out additional tests upon work, which is then found to have no Defects.**
>
> **(e) The Project Manager unreasonably does not approve a subcontract to be let.**
>
> **(f) Ground conditions are substantially more adverse than could reasonably have been assumed before signing of the Agreement from the information issued to bidders (including the Site Investigation Reports), from information available publicly and from a 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) Other contractors, public authorities, utilities, or the Employer does not work within the dates and other constraints stated in the Contract, and they cause delay or extra cost to the Contractor.**
>
> **(i) The advance payment is delayed.**

Time

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

(k) The Project Manager unreasonably delays issuing a Certificate of Completion.

(l) Other Compensation Events described in the SCC or determined by the Project Manager shall apply.

44.2 If a Compensation Event would cause additional cost or would prevent the work being completed before the Intended Completion Date, the Contract Price shall be increased and/or the Intended Completion Date shall be extended. The Project Manager shall decide whether and by how much the Contract Price shall be increased and whether and by how much the Intended Completion Date shall be extended.

44.3 As soon as information demonstrating the effect of each Compensation Event upon the Contractor's forecast cost has been provided by the Contractor, it shall be assessed by the Project Manager, and the Contract Price shall be adjusted accordingly. If the Contractor's forecast is deemed unreasonable, the Project Manager shall adjust the Contract Price based on the Project Manager's own forecast. The Project Manager will assume that the Contractor will react competently and promptly to the event.

44.4 The Contractor shall not be entitled to compensation to the extent that the Employer's interests are adversely affected by the Contractor's not having given early warning or not having cooperated with the Project Manager.

I have reviewed all the relevant contractual documents and, save for the two provisions highlighted above, I did not find any other provisions concerning payment of compensation.

As stated earlier, the Court's task when interpreting a contract is to ascertain the meaning of the words employed in it. In the present case, this Court has to determine, whether a proper construction of the relevant contractual provisions supports UNRA's claim that Dott was not entitled to compensation. Clause 44 (1), paras (a) – (k) of the GCC, set out the circumstances where a contractor could invoke a compensation event. The events invoked by Dott in the present case, which I set out earlier in the judgment would appear to fall within the definition of compensation events set out in the said clauses.

It will further be noted that Clauses 44 (2) and (3) of the GCC provide that:

> **"44.2 If a Compensation Event would cause additional cost or would prevent the work being completed before the Intended Completion Date, the Contract Price shall be increased and/or the Intended Completion Date shall be extended. The Project Manager shall decide whether and by how much the Contract Price shall be increased and whether and by how much the Intended Completion Date shall be extended.**
>
> **44.3 As soon as information demonstrating the effect of each Compensation Event upon the Contractor's forecast cost has been provided by the Contractor, it shall be assessed by the Project Manager, and the Contract Price shall be adjusted accordingly. If the Contractor's forecast is deemed unreasonable, the Project Manager shall adjust the Contract Price based on the Project Manager's own forecast. The Project Manager will assume that the Contractor will react competently and promptly to the event."**

Clause 44.2 covers situations where the contractor claims that the compensation events justify an extension of the intended completion date. On the other hand, Clause 44.3 covers situations where the contractor claims, upon invoking the compensation events, that the price the contractor estimated at the beginning of the project has appreciated owing to the occurrence of the compensation events. However, a third scenario could emerge where the contractor claims for a specific sum of money to cover for losses incurred owing to the occurrence of the compensation events. This third scenario is what seems to have happened in the present case, and the question becomes whether or not the relevant contracts precluded such a claim. For reasons that I will give later in this judgment, I would find that UNRA accepted the propriety of this third scenario and settled this contention. Therefore, it is unnecessary to decide it.

Nevertheless, I have considered an additional objection by UNRA to the payment made to Dott. Counsel for UNRA submitted that this Court ought to employ, what they deem as technical construction principles so as to arrive at a conclusion that the payment was improper, as certain requirements rendered necessary by **Clause 29** of the **GCC**, before payment of the compensation, including the necessity of the Project Manager having

acknowledged the delay period, were not satisfied. **Clause 29** of the GCC stipulates that:

> **"29. 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 priced proposals for an acceleration are accepted by the Employer, they are incorporated in the Contract Price and treated as a Variation."**

I do not think that Clause 29 is applicable in determining whether compensation was payable to Dott. My interpretation is that Clause 29 applies to circumstances when the employer requires the contractor to finish the project before the intended project completion date. To take the example of the present case, the relevant contracts were expected to run for a duration of 18 months, from 21st November, 2010 until May, 2012. Assuming, UNRA had, by March 2011, availed all relevant materials on time, but wanted Dott to complete the project in December, 2011 and not May, 2012, UNRA could apply Clause 29 to accelerate the project to do so. If my illustration is accepted as true, it becomes clear that Clause 29 has nothing to do with determining delays or whether compensation is payable for such delays.

Counsel for UNRA also submitted that the meaning and application of several principles of construction law, namely acceleration, variation, price adjustment and addenda had a bearing on whether the payment to Dott was proper. Counsel laboured to explain the meaning of these terms, but unfortunately I must say that counsel for UNRA's endeavor in this regard was for purely academic purposes. Those principles have to be construed in the context of the contracts for the relevant road projects and as I mentioned earlier, the issue is whether the contracts permitted the payment made to Dott.

The question of whether the contracts for the relevant projects permitted the payment made to Dott was, in my view, resolved, when, prior to institution of the suit in the lower Court, UNRA accepted that it was liable to pay some money owing to the delays Dott complained of. UNRA's conduct in accepting that Dott was entitled to be paid money for the delays in issue renders the doctrine of estoppel applicable to settle the dispute. **Section 114** of the **Evidence Act, Cap. 6** on the doctrine of estoppel provides, as follows:

> **"114. Estoppel.**
>
> **When one person has, by his or her 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 nor 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."**

I also refer to the Australia High Court case of **Commonwealth v Verwayen ("Voyager case") [1990] HCA 39; (1990) 170 CLR 394**, which expounded the doctrine of estoppel. Mason, J. stated:

> **"That brings me to estoppel, a label which covers a complex array of rules spanning various categories. There are the divisions between common law and equitable estoppel, between estoppel by conduct and estoppel by representation, and the distinction between present and future fact. There are titles such as promissory estoppel, proprietary estoppel and estoppel by acquiescence. Yet all of these categories and distinctions are intended to serve the same fundamental purpose, namely "protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted": Waltons Stores, per Brennan J. at p 419. See also per Mason C.J. and Wilson J. at p 404; Grundt, at pp 674-675.**
>
> **At common law the principle of estoppel by conduct or representation ("estoppel in pais") provided that protection by preventing the party estopped from unjustly departing from an assumption of fact which his conduct had caused another party to adopt or accept for the purpose of their legal relations: Grundt, at pp 657, 674; Thompson v. Palmer [1933] HCA 61; (1933) 49CLR 507at p547; Waltons Stores, at pp 397-399, 413-415, 443, 458.**

But it was well established that, in order to support an estoppel by conduct, the representation (or assumption) must be a representation of an existing fact, a promise or representation of intention to do something being insufficient for that purpose: Yorkshire Insurance Co. v. Craine (1922) 2 AC 541 at p 553."

Brennan, J. stated as follows:

"Estoppel by representation of a fact (estoppel in pais) precludes a party who, by his representation, has induced another party to adopt or accept the fact and thereby to act to the other party's detriment from asserting a right inconsistent with the fact on which the other party acted: Thompson v. Palmer [1933] HCA 61; (1933) 49CLR 507; Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59CLR641. Equitable estoppel or, as I prefer to call it, an equity arising by estoppel precludes a person who, by a promise, has induced another party to rely on the promise and thereby to act to his detriment from resiling from the promise without avoiding the detriment: Waltons Stores (Interstate) Ltd. v. Maher [1988] HCA 7; (1988) 164 CLR 387 at p 427. An equity of this kind, by imposing a liability either to avoid detriment to the other party or to honour the promise, trenches upon the liberties or immunities of the person who is bound. An estoppel, whether in pais or arising in equity, is binding so soon as it is acted onto the detriment of the other party.

I noted that in the present case, after Dott made a claim for compensation on 1st November, 2013, discussions commenced between UNRA and Dott for purposes of evaluating the claim. The focus of those discussions was to determine whether Dott's claim was proper, or in otherwords, whether the third scenario I mentioned earlier was permissible in light of the parties' contract. It will be noted that eventually, UNRA, through its Executive Director Ms. Allen Kagina, by letter (Exhibit D30) dated 5th May, 2015 addressed to the Solicitor General, stated that it had conducted an assessment and agreed to pay compensation to Dott. Ms. Kagina's letter, in part, read as follows:

"STAGED RECONSTRUCTION OF TORORO-MBALE & MBALE-SOROTI ROADS CONTRACTNO. UNRA/WORKS/2009-2010/0001/20/04 &05

Contractor's Claim No. 1 for compensation due to delayed commencement of permanent works and delays of performance in the project works by relevant events

...

The employer's independent financial assessment of the claim is given in Table 1 and Table 2 for Tororo-Mbale and Mbale-Soroti road respectively.

Table 1: Summary of calculated compensation costs for Tororo-Mbale road

No.	Description	Amount in Ushs as computed by	
		Contractor	Employer
1.	Direct cost (Insurance and Securities)	725,359,120	416,388,502
2.	Equipment idle time cost	5,865,108,576	5,189,217,453
3.	Indirect fees	2,023,819,274	1,910,638,034
4.	Head office and site overheads	6,124,092,815	4,010,079,168
5.	Cost of putting contractor to disrepute	3,028,550,810	0
	Total	17,788,930,850	11,526,323,155

Table 2: Summary of calculated compensation costs for Mbale-Soroti road

No.	Description	Amount in Ushs as computed by	
		Contractor	Employer
1.	Direct cost (Insurance and Securities)	1,097,884,480	628,395,265
2.	Equipment idle time cost	9,497,170,205	8,577,701,815
3.	Indirect fees	3,277,815,730	3,054,077,198
4.	Head office and site overheads	9,358,682,095	6,072,034,637
5.	Cost of putting contractor to disrepute	4,607,327,775	0
	Total	27,789,880,200	18,332,208,915

The Employer's position (financial assessment) of the Claim was communicated to the Contractor seeking their concurrence.

The Contractor in their letter of 21st April, 2015 agreed to the Employer's determination and award against financial claim No. 1 for an amount of UGX 11,526,323,155/= for Tororo-Mbale road contract (see copy attached as Annex 2) and UGX 18,332,208,915/= for Mbale-Soroti road contract (see copy attached as Annex 3) both without preconditions.

The purpose of this communication is to bring the above to your attention and inform you that we are processing payment to the contractor for Claim No. 1"

Therefore, when UNRA accepted to pay Dott for the relevant delays, as the above correspondence shows, UNRA represented by conduct that it accepted that Dott was entitled to the payments it made and it was thereafter precluded from arguing as it attempted to do in the suit in the lower Court that Dott was not entitled to those payments.

I would answer issue 2 – whether there was no proper basis for the payment of Ug. Shs. 29,858,532,068/= to Dott in the negative. I would find that the payment to Dott was based on the relevant road works contract and was determined and accepted by UNRA in 2015. Thereafter, UNRA was estopped from asserting that Dott was not entitled to the payment. Grounds 1, 2, 3 and 4, must, consistent with the above reasoning, fail.

Issue 3 – If not, whether the money paid to Dott should have been refunded as money had and received

It is, for the determination of this issue, unnecessary to survey the principles of the doctrine of money had and received. The findings on issue 2 are sufficient to dispose of Issue 3. Since I found that the payment made to Dott was accepted by UNRA, it follows that Dott cannot be made to refund the said money. Issue 3 would be answered in the negative, and ground 5 from which issue 3 arises must fail.

Issue 4 – Whether PEC and Dott committed acts of fraud that tainted the payment made to Dott

By its plaint, UNRA claimed that the payment made to Dott was tainted by the fraud committed by PEC and Dott. UNRA listed the following particulars of Dott and PEC's fraud:

> **"Particulars of fraud of the 1st Defendant (Dott)**
>
> **(a) The 1st defendant falsely making a claim that it suffered and/or incurred prolongation costs equivalent to 509 days for the Tororo-Mbale for the period 10th November, 2010 till 12th March, 2012 and 509 days for the Mbale-Soroti roads for the period 10th November, 2010 till 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 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 (PEC)

(a) **The 2nd defendant approving, advising, certifying, submitting of the IPC No. 15 and 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 invoices dated ... and 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."**

Dott and PEC denied these allegations of fraud. I must observe that fraudulent conduct may lead to negation of rights and advantages a party derives from the fraud. Fraud, was defined by **Katureebe, JSC (as he then was)** in **Zaabwe vs. Orient Bank Ltd and 5 Others, Supreme Court Civil Appeal No. 04 of 2006 (unreported)** 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. In legal proceedings, a person relying on fraud must adduce evidence to prove the allegations.

I have reviewed the particulars of fraud set out in UNRA's pleadings. In some part, the allegations are simply untrue or misconceived. The allegation that Dott gave no consideration for the payment made to it has to be examined in the context of the relevant road works contracts which envisaged that UNRA could, in certain circumstances, pay such monies as Dott was entitled to. As I said earlier, the relevant contracts could, in one view, be interpreted as permitting payments to Dott for delays occasioned by UNRA. On that view, the payments were provided for under the relevant contract and the consideration for it was that Dott was expected to execute the relevant works in the agreed time frame. Therefore, UNRA's allegation that Dott furnished no consideration is untrue.

The allegation that the monies paid to Dott were not payable cannot be sustained. I earlier stated that UNRA, upon its own voluntary evaluation, deemed that Dott was entitled to the payment of Ug. Shs. 29,858,532,069/= for the relevant delays. It could not thereafter assert otherwise.

I would also dismiss the allegation that PEC acted fraudulently when it approved the payment made to UNRA. My assessment of the evidence revealed that UNRA acted independently from PEC when it approved the payment to Dott. Whereas PEC recommended the payment of Ug. Shs. 33,204,834,600/=, UNRA paid a lesser amount of Ug. Shs. 29,858,532,069/=. This means that the final computation of the money paid to Dott was done by UNRA and cannot have been due to the fraudulent acts of PEC whose evaluation was overlooked. Ground 6 from which issue 4 arises must also fail.

Issue 5 – Whether PEC was liable to UNRA for professional negligence

This issue can also be answered shortly without reviewing the authorities on professional negligence. Contrary to the submissions of counsel for UNRA, the final evaluation that UNRA based on to pay Dott was done by UNRA and not PEC. Therefore, UNRA cannot allege that PEC acted negligently yet the latter's advice regarding Dott's claim was ignored.

Issue 5 must also be answered in the negative, and ground 7 which relates to this issue must also fail.

Ground 8 of the appeal must fail. UNRA was neither entitled to an award of damages nor an award of interest.

In conclusion, I would disallow all grounds and dismiss the appeal with costs to the respondents.

As Kibeedi and Gashirabake, JJA also agree, the Court unanimously dismisses the appeal with costs to the respondents.

Dated at Kampala this 28th day of Sept 2022.

.....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

CIVIL APPEAL NO. 0234 OF 2021

UGANDA NATIONAL ROADS AUTHORITY::::::::::::::APPELLANT

VERSUS

1. **DOTT SERVICES LIMITED]**
2. **PROFESSIONAL ENGINEERING]**
   CONSULTANTS LTD]::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Adonyo, J. dated 1st July 2021 in Civil Suit No. 65 of 2016)

JUDGEMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by my sister, Hon. Justice Elizabeth Musoke, JA. I agree with the reasoning, conclusion and orders proposed.

Dated at Kampala this 28th day of Sept 2022

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0234 OF 2021

UGANDA NATIONAL ROADS AUTHORITY::::::::::::::APPELLANT

VERSUS

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(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Adonyo, J. dated 1st July, 2021 in Civil Suit No. 65 of 2016)

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

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

I have had the benefit of reading in draft, the judgment prepared by learned sister Musoke, JA and I am in agreement with the analysis and conclusions contained therein. I have nothing useful to add.

Dated at Kampala this 28th day of Sept 2022.

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Christopher Gashirabake

Justice of Appeal