THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 0307 OF 2012

POWER CITY CONTRACTORS LIMITED}.....PLAINTIFF

VS

ECOBANK UGANDA LIMITED}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this action against the Defendant for a declaration that the Plaintiff is not indebted to the Defendant at all in respect of all guarantees issued in favour of LTL projects (PVT) Ltd for the benefit of the Plaintiff; an order for the release and return of all securities given to the Defendant by the Plaintiff in respect of the said guarantees; general damages; and costs of the suit.

The Plaintiff holds an account in the Defendant bank and in the year 2010 applied for credit facilities from the Defendant for the Defendant to avail Advance Payment Guarantees and Performance Guarantees for the Plaintiff. This was to enable the Plaintiff perform a contract. The guarantees were issued in favour of LTL (Pvt) Ltd, the Plaintiffs Employer. The Plaintiff contends that the guarantees were rejected by the Employer. The Defendant was promptly informed about the rejection of the guarantees and the Plaintiff obtained alternative guarantees from Leads Insurance Ltd. By letter dated 20th of September 2011 the securities of the Defendant were returned to it. For purposes of obtaining the facilities from the Defendant bank the Plaintiff had committed certain securities in favour of the Defendant. Upon request for the Defendant to return or release the securities, the Defendant refused and instead demanded Uganda shillings 72,627,832 from the Plaintiff. The Plaintiff's case is that the original basis upon which the Defendant claims the said sum of money was the guarantees issued by the Defendant which were not utilised by the Plaintiff and had been rejected by the Employer of the Plaintiff. Consequently the Plaintiff avers that the act of holding onto the Plaintiffs securities by the Defendants is wrongful and has led to a lot of inconvenience for which the Plaintiff claims general damages and a permanent injunction against the Defendant. The Plaintiff seeks orders for the release of all securities given to the Defendant by the Plaintiff in respect of the guarantees, a permanent injunction, general damages and costs of the suit.

On the other hand the Defendant's case is that the Plaintiff is indebted to it for a sum of Uganda shillings 72,627,823.43/=. The Defendant contends that the rejection of the guarantees was only brought to its attention one year after the guarantees had been issued. Secondly the indebtedness of the Plaintiff arose out of its negligence to immediately inform the Defendant of the rejection of the guarantee thereby incurring quarterly fees on the Advance Payment Guarantee and debit interest expenses as a result of unauthorised debit balance on the Plaintiffs account. The Plaintiff did not mitigate its liability by immediately informing the Defendant of the Employer's decision to reject the Advance Payment Guarantee. The Plaintiff accepted the consideration contained in the facility letter dated first of September 2010 and is indebted to the Defendant. The Plaintiff had written to the Defendant to settle his indebtedness by paying Uganda shillings 18,496,557.20/=. In the premises the Plaintiff is not entitled to the remedies claimed in the plaint. The Defendant further counterclaimed against the Plaintiff for the sum of Uganda shillings 72,627,823.43/=, general damages for inconvenience caused to the Defendant by the Plaintiff and costs of the suit. The facts in support of the counterclaim and the application for the credit facility which was granted and the fact that the Plaintiff was required to pay in addition the processing fees an arrangement fee, the quarterly fee of 1% of the Advance Payment Guarantee which was never paid. Furthermore the counterclaimant alleges that the Plaintiff carried out unauthorised debits on its account attracting debit interest expenses. The Plaintiff never paid the quarterly fees or debit interests. Additionally the counterclaim and claims interest at 20% per annum from the debit from the date of default until payment in full, general damages for inconvenience and costs of the counterclaim.

In defence to the counterclaim the Defendant denies the claim and contends that there was no consideration which moved from the Defendant/counterclaimant so as to entitle the counterclaimant the claims. Secondly the Advance Payment Guarantee was invalid while the Performance Guarantees were never issued. In the premises the Plaintiff claims that the counter claimants claim is dismissed with costs.

The Plaintiff is represented by Innocent Nyote of Messieurs Nyote and Company Advocates while the Defendant is represented by Munanura Andrew of Messieurs Sebalu and Lule Advocates. Counsels filed a joint scheduling memorandum in compliance with Order 12 of the Civil Procedure Rules in which certain facts are agreed. The agreed facts are as follows:

1. The Plaintiff holds an account with the Defendant bank.
2. On 1 September 2010 the Plaintiff applied for an Advance Payment Guarantee and Performance Guarantee to enable it perform the contract reference number REA/Wrks/09=10/00334/3/4.
3. The guarantees were to be issued to LTL Projects (Pvt) Ltd.
4. The guarantees were to attract in 2% processing fee, 2% arrangement fees and 1% quarterly fees.

5. The Advance Payment Guarantee was returned to the Defendant on 20th of September 2011.

The factual controversies are whether the Plaintiff informed the Defendant that the guarantee had been rejected? Secondly, whether the Defendant never furnished any consideration to the Plaintiff? Whether the Defendant does not have the basis of claim Uganda shillings 72,627,832.43/=? Whether the Plaintiff was in possession of the guarantees for over a year but never paid the fees agreed to the Defendant leading to an overdrawn position on its account?

Inasmuch as both parties presented witnesses, there were few factual controversies and Counsel addressed the court in written submissions. The facts of this dispute are sufficiently stated in the written submissions.

The agreed issues are:

1. Whether all the guarantees or bonds were issued, collected from the Defendant and used by the Plaintiff?
2. Whether the Plaintiff received any consideration for the Defendant for the sum of Uganda shillings 72,627,832.43/=?
3. Whether the Defendant is entitled to fees under the facility letter dated 1 September 2010 for the Advance Payment Guarantees?
4. Remedies

Written submissions

1. **Whether all the guarantees or bonds were issued, collected from the Defendant and used by the Plaintiff?**

The Plaintiff's Counsel submitted that the document headed "Application for Additional Credit Facilities" dated September 1, 2010 constituted the contract upon which either party's claim is based. The purpose of the contract was to enable the Plaintiff perform the contract as set out in paragraph 5 of the document. The performance was only possible if the Defendant issued the Plaintiff with two Advance Payment Guarantees and two Performance Guarantees as detailed in paragraph 3 thereof. Relying on the testimony of PW1 and DW1 in cross examination, the two Performance Guarantees were never issued by the Defendant. Consequently the Defendant did not fulfil its part of the bargain under the contract when the Plaintiff had provided the Defendant with all the securities requested for. The intention of the guarantees was to enable the Plaintiff perform the contract with LTL Project (Pvt) Ltd. The Defendant did not enable the Plaintiff perform the contract because of its default. The Defendant breached the contract with the Plaintiff and the court should find that the guarantee or bonds were not issued by the Defendant and ipso facto the Defendant breached its contract with the Plaintiff.

In reply the Defendant's Counsel submitted that it is an agreed fact that only the APG's were issued. Therefore not all guarantees were issued. From the evidence the Defendants Counsel submits that only to APG's were issued, collected from the Defendant and used in the implementation of the contract between the Plaintiff and the Employer. In cross examination PW1 confirmed that the APG's were issued in September 2010. Secondly the Plaintiff commenced work in October 2010 and by that time the APG's were in possession of the Employer. Thirdly the Plaintiff was paid for work done and the only time the Employer inquired of the APG was March 2011 and only returned with the Defendant in September 2011. PW1 confirmed that the Plaintiff provided the employer would both APG's and PG's.

Counsel submitted that the court finds that failure to issue the Performance Guarantees amounted to breach of contract, the breach was not fundamental to relieve the Plaintiff of its obligations to pay the fees for the APG's. The fact that the Defendant did not issue the Performance Guarantees did not stop the Plaintiff from performing the contract. No evidence was adduced that the contract with the Employer was cancelled because the Defendant did not issue the Performance Guarantees. The contrary evidence is that the Plaintiff provided both guarantees to the Employer and proceeded to perform the contract. The employer returned the guarantees on the ground that they were invalid yet the employer is the one that refused to pay the advance payment receipts in an account held in the Defendant bank.

The evidence of PW1 shows that the advance payment proceeds were never paid the Plaintiffs account is in the Defendant bank. These denied the Defendant cash collateral security and therefore not all securities were provided. The Plaintiff admitted during cross-examination that the fees and costs of the APG were never paid. No evidence was adduced to show that because the Performance Guarantees were never issued by the Defendant, they were unable to commence performance of the contract between the Plaintiff and the Employer.

Finally evidence adduced shows that both parties were in breach of contract. The Defendants Counsel submitted that both parties did not fulfil all their obligations but to the extent that they did, the benefits that accrue under the contract should be enforced.

In rejoinder on the first issue the Plaintiff's Counsel submitted that it is true that the Plaintiff did not adduce evidence that its contract with the Employer was cancelled because the Defendant did not issue the Performance Guarantees. This was not necessary. The uncontroverted evidence of the Plaintiff in paragraph 15 of the witness statement of PW1 is that the Plaintiff got alternative valid Advance Payment Guarantee is from leads insurance Ltd which was the basis for getting the advance payment from the Employer. The APG issued by the Defendant was not used at all in as much as they would become valid only when money was deposited on the account of the Plaintiff in the Defendant bank. It was not the duty of the Plaintiff to deposit the money on his own account. And there is no evidence to imply that this duty was on the part of the Plaintiff. Furthermore it is not true that the Plaintiff also breached its obligations under the contract in issue. The duty of the Plaintiff was to provide security for the issuance of the Advance Payment

Guarantees and the Performance Guarantees which it did. There was no duty on the part of the Plaintiff to pay fees for any invalid Advance Payment Guarantee. The submission that the Defendant breached its part of the bargain this is the Plaintiff from its obligations under the contract.

Issues No's 2 and 3 where argued together by the Defendant's Counsel and will be considered as presented.

Whether the Plaintiff received any consideration from the Defendant for the sum of Uganda shillings 72,627,832.43/= claimed by the Defendant and whether the Defendant is entitled to the fees under the facility letter dated 1 September 2010 for the Advance Payment Guarantee?

On the second issue on whether the Plaintiff received any consideration for the Defendant for the sum of Uganda shillings 72,627,832.43/= the Plaintiff's Counsel relied on the case of Curie v. Misa (1875) LR 10 Exch. 153 cited by Furmston MP (1986) Cheshire, Fifoot and Furmston's Law of Contract, London, Butterworth at page 69. In the definition: "a valuable consideration in the sense of law may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." The Plaintiff's Counsel submitted that according to PW1 the Plaintiff did not take any benefit, profit or gain or interest on the Defendant's that the Defendant may have recourse its securities and the subject contract. There is no basis for the Plaintiff to be liable to pay the Defendant the sum claimed. Firstly the two pairs of the two types of guarantees which were necessary for the Plaintiff to perform its contract were not issued at all. Only one set was issued namely the Advance Payment Guarantees and which were of no benefit to the Plaintiff. From the evidence of both PW1 and DW1, the APG's were returned to the Defendant. In conclusion there was no consideration received by the Plaintiff from the Defendant so as to bind the Plaintiff to pay the sum claimed.

On the third issue the Plaintiff's Counsel submitted firstly that the Defendant breached the facility agreement by not issuing the Performance Guarantees. On that basis the Plaintiff was discharged of its obligations under the facility. According to McKendrick, Ewan (1990), Contract Law, London, Macmillan at page 232, and innocent party may be discharged from its contractual obligations when the other breaches the contract. On that basis the Plaintiff was discharged by the Defendant's breach. The Plaintiff did not benefit from its contract with the Defendant because of the Defendants default. If the Plaintiff pays the sum of money claimed in the counterclaim, it would amount to unjust enrichment of the Defendant. On the principle that the court should not facilitate unjust enrichment Counsel relied on the speech of Lord Wright of the House of Lords in Fibrosa Spolka vs. Alcyjna Lawson Combe Bocbov Ltd [1943] AC 32 at page 61. He further submitted that if the court orders that the Defendant keeps the Plaintiffs securities for purposes of recovering the counterclaim sum of money, the Defendant would be unjustly enriched by the court. Counsel further submitted that the principal was applied in the

case of Godfrey Katabi versus Total Uganda Ltd HCCS number 687 of 2000 (Commercial Court) by Honourable Justice James Ogoola.

The Plaintiff's Counsel submitted without prejudice that from the evidence of DW1, it was a condition precedent in the contract between the parties that various fees were to be paid in advance before the Advance Payment Guarantees (APG S) and the Performance Guarantees (PGS) were to be issued according to paragraph 7 of the contract exhibit P1. There was no basis for issuance of the same before any demand for payment. The agreement was never amended by any addendum of the APG before payment upfront. The claim for payment on the basis of the APG's is misplaced. The APG S would be valid only when LTL Project (Pvt) Ltd deposited money and the account of the Plaintiff in the Defendant bank. The APG's never became valid on account of failure to deposit money on the Plaintiffs account. Counsel contended that the Plaintiff cannot be for what is invalid. He relied on the case of **Lee Parker vs. Izzet (No.2) [1972] 2 All ER 800** and that of **Aberfoyle Plantations Ltd versus Cheng [1959] 3 All ER 910** that where a contract is subject to an uncertain conditions, such agreement is void. The Plaintiff's Counsel submitted that there was no agreement between the Plaintiff and the Defendant in as much as there was an uncertain condition that the APG's were to be valid upon money been deposited on the account of the Plaintiff by the Employer in the Defendant bank. In those circumstances the court should find that the Defendant is not entitled to any fees under the facility letter dated 1 September 2010 for the APG's. Secondly the Defendant did not furnish court with evidence on how Uganda shillings 72,627,832.43/= arose. The calculation according to the agreement for the period testified to by DW1 does not amount to that sum of money.

On issues number two and three the Defendants Counsel relies on Black's Law Dictionary at page 324 for definition of consideration. It is something (such as an act, forbearance, or a written promise) bargained for and received by a promisor from a promisee; that which motivates the person to do something, especially to engage in a legal act. "A consideration in its widest sense is the reason, the motive or inducement, by which a man is moved to bind himself by an agreement. It is not for nothing that he consents to impose an obligation upon himself, or abandoned or transfers a right. It is in consideration of such and such a fact that he agrees to bear new burdens or to forego the benefits which the law allows him."

Section 2 of the Contracts Act 7 of 2010 defines consideration to mean a right, interest, profit or benefit accruing to one party or forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party. Furthermore under section 70 of the Contracts Act 2010, anything done or any promise made, for the benefit of the principal debtor, may be sufficient to a guarantor to give a guarantee. The question therefore is whether the document constituted the contract between the Plaintiff and the Defendant? And secondly what was the consideration? Thirdly was it Uganda shillings 72,627,823.43/=?

It is the Defendant's case that the contract between the Plaintiff and the Defendant is contained in exhibit P1 which is the facility letter dated 1 September 2010 and which defines the rights and obligations of each of the parties thereto.

The consideration includes responsibility undertaken by the other party. The Defendant undertook to pay on demand Uganda shillings 368,951,988/= in the Advance Payment Guarantee issued. The responsibility undertaken constituted consideration. The submission that the Plaintiff got no benefit, profit, penal interest from the Advance Payment Guarantee is misconceived and not supported by any evidence. The Plaintiff commenced works after submitting the Advance Payment Guarantee and Performance Guarantees. The Plaintiff was paid for work done. The wording in the Advance Payment Guarantee did not stop him from getting paid or performing the contract. Clearly, being able to commence work in October 2010 and getting paid is a benefit, profit, penal interest that the Plaintiff was able to obtain after providing the Advance Payment Guarantee. PW1 agreed during cross-examination that the Plaintiff was required to provide Advance Payment Guarantees and Performance Guarantees by the Employer and it provided both.

Uganda shillings 72,627,832.43/= is the fees, costs, legal fees, disbursements, monthly fees and expenses associated with the facility. The basis of charging is contained in the facility letter exhibit P1. The Plaintiff did not pay any of the fees of costs and the Defendant had a right to charge it. Furthermore the Plaintiff was obliged to pay fees for the APG's and the PG's separately. Paragraph 7 of exhibit P1 caters for the fees for the Advance Payment Guarantees. It is not disputed that the guarantees were returned in September 2011. The Plaintiff not only admitted not been fees but also admitted that it commenced work and was paid. The Plaintiff accepted payment well aware that the advance payment proceeds have been paid. Consequently the Plaintiff is not an innocent party so as to be released from its obligations.

On the argument that the securities were invalid the evidence of DW1 shows that the clause as to validity is to guarantee receipt of the security agreed to by the parties and to avoid unnecessary risks. PW1 agreed that the contract with the Employer was a risky venture. As far as the testimony that the project refused to pay the proceeds into an account of the Plaintiff held in the Defendant bank, the Plaintiff and the employer were aware of the obligation to pay the proceeds of the Defendant's bank. The executed the contract and made no effort to ensure that this was done. The Defendant had a right to protect itself in the venture that the Plaintiff considered risky. The clause in the APG as to validity of the guarantee should not be held to be illegal because it would be a miscarriage of justice.

PW1 admitted that it was obligated to pay the fees and had picked the guarantees and commenced work. The conditions precedent is contained in clause 9 of exhibit P1. Clause 11 of exhibit P1 shows that none payment of fees gives the bank right to call in the facility. It did not cancel the guarantees. Clause 15 of exhibit P1 provided that all legal fees, stamp duties and other expenses associated with the documentation, perfection, administration and recovery of the

facility shall be debited from the account. The fees were supposed to be deducted from the account. Annexure I marked as number 8 in the trial bundle exhibit D1 shows that on 15 September 2010 the Defendant debited the Plaintiffs account with the necessary fees.

On how the claim in the counterclaim was arrived at, the testimony of DW1 in paragraph 17 of his witness statement and exhibit P5 partners 15 and 16 shows that because of no money on the Plaintiffs account, the account was overdrawn. The evidence is that the fees accumulated to Uganda shillings 72,627,832.43/= due to non-payment of fees, interest on the said amount and penalty interest on account of the account being overdrawn. This evidence was not challenged by the Plaintiff in cross examination of DW1. Counsel relied on the case of JK Patel versus Spear Motors Ltd Civil Appeal number 4 of 1991. Failure to challenge the evidence was an implicit admission of the correctness of the evidence. The bank statement shows that on 15 September 2010 fees, interest and charges were applied on the Plaintiffs account.

In rejoinder the Plaintiff's Counsel submitted that he agrees with the definition of the term "consideration" but submitted that no consideration was furnished to the Plaintiff under the agreement exhibit P1 on the following grounds:

Firstly an invalid Advance Payment Guarantee does not amount to consideration because it does not have any value. Consideration must be sufficient and for it to be sufficient, must have economic value. An invalid APG does not have any economic value in law so as to constitute sufficient consideration. Secondly it is true that the Plaintiff commenced work after submitting the Advance Payment Guarantees and Performance Guarantees but these guarantees were not from the Defendant bank but from Leads Insurance Ltd. The evidence of both parties is that no Performance Guarantees were ever issued by the Defendant. Consequently the Plaintiff's commencement of work had nothing to do with the Defendants Advance Payment Guarantee of Performance Guarantee or any payment by the Employer to the Plaintiff. Thirdly performance of the Plaintiff's contract with the employer was not related to the guarantees issued by the Defendant. An Advance Payment Guarantee only serves the purpose of getting money in advance to enable the Plaintiff perform its contract. No money was ever advanced to the Plaintiff by virtue of the Defendant's Advance Payment Guarantee according to the evidence on court record.

Whether the parties are entitled to the remedies sought?

On the basis of the Plaintiff's submissions on issues number 1, 2 and 3 the Plaintiff's Counsel submitted that the Plaintiff is entitled to the prayers in the plaint. He contended that the Defendant is wrongly holding onto the Plaintiffs securities which action has inconvenienced the Plaintiff who has suffered some losses since it cannot use its security. On the basis of the general proposition Counsel prayed for general damages at Uganda shillings 20,000,000/= which would compensate the Plaintiff for the Defendants wrongs. Counsel further relied on article 126 (C) of

the Constitution of the Republic of Uganda which requires courts to ensure that adequate compensation is awarded to victims of wrongs.

On the question of remedies the Defendants Counsel concedes that the Plaintiff cannot be held liable for all the guarantees because not all were issued. However the Plaintiff should be held to be liable for the services received. There is evidence that the APG's were issued, received and used by the Plaintiff only to be returned in September 2011. In those circumstances fees on the APG's were due and owing. As far as securities are concerned, they were properly and legally obtained.

The Plaintiff received services and has not paid for the same. The Defendant was not responsible for non-payment of the proceeds. The Plaintiff received payment from the Employer. It was a term of the contract exhibit P1 paragraph 8 (C) and 10 (viii) that payment proceeds were to be assigned to the Defendant bank. Exhibit D1 and annexure I thereto demonstrates that no proceeds were ever paid to the account when the Plaintiff was receiving payment for work done. A permanent injunction would enable customers to obtain services and not pay for them and resort to the courts to protect the prompt payment.

As far as general damages and interests are concerned, the Plaintiff has not shown any proof of loss or inconvenience caused entitling it to general damages.

As far as the counterclaim of the Defendant is concerned, the account statement clearly demonstrates how monies accumulated. This evidence was not subjected to cross examination and should be taken as proved. In those circumstances the court should find for the Defendant in the counterclaim.

In rejoinder the Plaintiff Counsel submitted that the Plaintiff did not allege that the Advance Payment Guarantee issued by the Defendant is not authentic or illegal rather the Plaintiff states that they are not valid. They were to become valid only after money was deposited on the account of the Plaintiff in the Defendant bank. In those circumstances not consideration moved from the Defendant to the Plaintiff for Uganda shillings 72,627,832.43/= as counterclaimed for.

Judgment

I have carefully considered the pleadings of the parties, the agreed facts and documents, the testimonies and the submissions of Counsel together with the authorities cited for consideration by the court. I will deal with the issues as framed by the parties.

1. **Whether all the guarantees or bonds were issued, collected from the Defendant and used by the Plaintiff?**

The first issue deals with the question of fact but also leads to a consideration of matters of law with regard to whether if the guarantees or **bonds** were issued the same was used by the Plaintiff.

I have duly considered the submissions of Counsel and it is conceded by both Counsels that the Defendant issued two Advance Payment Guarantees. These were exhibited as exhibits P2 and exhibit P3. Exhibit P2 is issued by the Defendant granting an Advance Payment Guarantee not exceeding **Uganda shillings 232,609,700/=.** It is dated 14th of September 2010 and is issued in favour of LTL Projects (PVT) Ltd. The guarantee towards the end reads as follows after the recitals:

> "WE, THE UNDERSIGNED Ecobank Uganda Limited (HEREINAFTER CALLED "THE GUARANTOR") legally domiciled at Plot No. 4 Parliament Avenue, P.O. Box 7368 Kampala, as instructed by Power & City Contractors Ltd, agree unconditionally and irrevocably to guarantee payment to the Authorised Representative of the Consortium on its first demand and without its first claim to Power & City Contractors Ltd, in the amount not exceeding Uganda shillings 232,609,700/= (…).
>
> This security shall remain valid and in full effect from the date of the advance payment into Power & City Contractors Ltd account with the Guarantor under the Contract until the Employer receives full repayment of the same amount from the Contractor."

The second guarantee is exhibit P3 and was issued on 13 September 2010 by the Defendant. It is also an Advance Payment Guarantee with similar terms with that in exhibit P2. The wording is essentially the same and is as follows:

> ""We, the undersigned Ecobank Uganda Limited (hereinafter Called "The Guarantor") legally domiciled at Plot No. 4 Parliament Avenue, P.O. Box 7368 Kampala, as instructed by Power & City Contractors Ltd, agree unconditionally and irrevocably to guarantee payment to the Authorised Representative of the Consortium on its first demand and without its first claim to Power & City Contractors Ltd, in the amount not exceeding Uganda shillings 136,342,500/= (…)
>
> This security shall remain valid and in full effect from the date of the advance payment into Power & City Contractors Ltd account with the Guarantor under the Contract until the Employer receives full repayment of the same amount from the Contractor."

By document exhibit P4 it is apparent that the Advance Payment Guarantees had been issued by the Defendant and received by the Employer of the Plaintiff. Exhibit P4 is a letter dated 4 March 2011 written by the Defendant to the Employer of the Plaintiff explaining that the Defendant had not received monies on the clients account at Ecobank and thus inactivation of the Advance Payment Guarantee. Also received in evidence is an Advance Payment Guarantees issued by Leads Insurance Ltd for the period 14th of March 2011 to 31st of December 2011 exhibit P6. The advance payment issued by the Defendant is dated several months earlier in September 2010. Subsequently by letter dated 20th of September 2011 the Plaintiff wrote to the Defendant bank returning the advance payment securities.

It is therefore established as a question of fact that two controversial Advance Payment Guarantees were issued by the Defendant and submitted by the Plaintiff to the Employer. The Defendant's Counsel submitted that the Advance Payment Guarantee was utilised because the Plaintiff was paid. On the other hand it is contended for the Plaintiff that the Advance Payment Guarantee was invalid because no money was received on the Plaintiffs account with the Defendant bank. The issue as framed would tend to answer whether the Advance Payment Guarantee was a valid guarantee.

I have duly read through the Advance Payment Guarantee instrument itself. With due regard to the submissions of Counsel, the Advance Payment Guarantee makes it plain that it would become effective from the date of advance payment into the account of the Plaintiff with the Defendant bank. It has been established that no advance payment was paid by the Employer into the Defendant bank on account of the Plaintiff. I would particularly quote paragraph 2 of exhibit P4 which was written by the Defendant bank to the Employer of the Plaintiff. It is written as follows:

> "We have not received the said monies on the clients account at ECOBANK and thus inactivation of the Advance Payment Guarantee."

The term "inactivation" is not ordinary English. Possibly it comes from the word "inactive". According to Chambers 21st Century Dictionary Revised Edition, the word "inactive" means among other things "no longer operating or functioning". By using the word "inactivation" the suggestion is that somebody made it no longer operating or functional. However in the context of the instrument the meaning I get is that the Advance Payment Guarantee was inactive because no money was received on the clients account with the Defendant bank. As noted earlier the letter of the Defendant is dated 4th of March 2011. Subsequently on 20th of September 2011 the Plaintiff wrote to the Defendant bank returning the Advance Payment Guarantees on the ground that the Employer had rejected them claiming that they are invalid. The evidence is consistent with the procurement of another guarantee issued by Leads Insurance Ltd for the period 14th of March 2011 to 31st of December 2011. The date of the Advance Payment Guarantee is not however written in that document. Nevertheless because it covers the period 14th of March 2011 up to 31 December 2011, it comes on the heels of the letter of the Defendant bank dated 4th of March 2011 indicating that there was "inactivation" of the Advance Payment Guarantee issued by the Defendant bank in 2010.

Without considerations of the submissions as to whether the APG itself was invalid, it can be safely concluded that the APG could not be enforced until and unless the Employer makes an advance payment to the Plaintiff and deposits it on the Plaintiffs account.

Certain factual controversies were agreed to for trial of the dispute in the joint scheduling memorandum endorsed by Counsel. The first factual controversy which is relevant to the first issue is whether the Plaintiff informed the Defendant that the guarantee had been rejected. The

second factual controversy is whether the Defendant never furnished any consideration to the Plaintiff? In other words the Advance Payment Guarantee had purportedly been rejected according to the evidence adduced at the trial. The evidence on record is that it had been issued and subsequently a letter was written indicating that it had been rejected as invalid. Additionally the Defendant's own document shows that no advance payment was ever made to the Plaintiff by depositing it on the Plaintiffs account with the Defendant. The Advance Payment Guarantee was conditional upon the deposit of the advance payment on the Plaintiffs account with the Defendant bank.

I have duly considered the evidence of PW1 Mr Mugume Samuel, a director of the Plaintiff Company. He confirmed in his witness statement that the Advance Payment Guarantees exhibit P2 and P3 were issued by the Defendant bank. Secondly they were handed over to the Employer LTL Projects (Pvt) Ltd, a company registered under the laws of the Republic of Sri Lanka. He testified that on 4 March 2011 the Defendant advised the Employer upon their request that the documents they were holding as Advance Payment Guarantees were invalid. His case is that the Plaintiff never got any valid loan facility to warrant the Defendant to charge the Plaintiffs account with exorbitant monthly interest and penalties. During his cross-examination certain salient points emerged. These include the fact that the Advance Payment Guarantees were issued in September 2010 and were delivered to the Employer. Secondly the evidence adduced by PW1 is that the project commenced around October 2010. It was raised in an agreement between the government of Uganda and a Consortium involving the Employer. By the time they commenced the project, the Employer was in possession of the Advance Payment Guarantees issued by the Defendant. He further confirms that the APG was considered an initial document for commencement of the project. On the basis of the above evidence the Defendants Counsel submitted that there was value in the Advance Payment Guarantee because it enabled the Plaintiff to commence a contract which was its primary purpose. However PW1 testified that no advance payment was ever made to the Plaintiff though the contract commenced. There is no satisfactory evidence of the contractual obligations of the Employer with regard to the deposit of an advance payment to the Plaintiffs account. The evidence that advance payment would be made on the Plaintiffs account is the Advance Payment Guarantee instrument itself namely exhibits P2 and P3.

Representations were made on the activation of the Advance Payment Guarantee by the Defendant in March 2011. The Defendant bank because of non-receipt of money wrote that it was "inactivated".

DW1 Mr Johnson Galabuzi confirmed the issuance of the Advance Payment Guarantees. He confirmed that advance payment was never paid into the Plaintiffs account with the Defendant bank. As far as the counterclaim of the Defendant is concerned it relates to two facilities issued on 1 September 2010. The obligations of Ecobank were to provide two Advance Payment Guarantees to the Employer of the Plaintiff.

The foundation of the Advance Payment Guarantee is the offer letter exhibit P1. Paragraph 3 thereof provides that the facility is an Advance Payment Guarantee and Performance Guarantee. Facility 1 is the Advance Payment Guarantee while facility 2 is the Performance Guarantee. The consideration for the facility is provided for in paragraph 7 of exhibit P1. The security for the facility is provided for in paragraph 8 and involves Personal Guarantee and Indemnity from the Managing Director of the Plaintiff. The facility was also to be covered by a security of 50% as collateral of the APG funds and 30% cash collateral of the Performance Guarantee funds. The facility or project funds were supposed to be banked with the Defendant bank. The Performance Guarantee was not issued. PW1 admitted that the fees of the Defendant bank were not paid. The fees included 2% processing fees of the total Advance Payment Guarantee amount which was to be paid up front. Secondly 2% of the Advance Payment Guarantee amount proceeding two months of the quarter is payable. 1% quarterly fee of total Advance Payment Guarantee amount to be paid quarterly at the beginning of quarters is also payable.

As far as the first issue is concerned, it is resolved by considering the validity of the Advance Payment Guarantee. The validity or effectiveness of the Advance Payment Guarantee can be considered by perusal of the Advance Payment Guarantee instrument only. No extraneous evidence may be necessary to interpret the document itself except the unchallenged evidence that the Employer never paid any advance payment on the Plaintiffs account with the Defendant bank. In other words the second last paragraph of the Advance Payment Guarantee document demonstrates that the Advance Payment Guarantee never came into effect due to the non-payment. Without payment into the account of the Plaintiff with the Defendant bank, the Advance Payment Guarantee was not enforceable. For emphasis I will quote the second last paragraph again and it provides as follows:

> "This security shall remain valid and in full effect from the date of the advance payment into Power & City Contractors Ltd account with the Guarantor under the Contract until the Employer receives full repayment of the same amount from the Contractor."

By using the phrase that this "Security shall remain valid and in full effect from the date of the advance payment into Power & City Contractors Ltd account with the guarantors under the contract…", The Advance Payment Guarantee never became operational because no payment was received into the account of the Plaintiff with the Defendant bank. The Defendant bank is described as the Guarantor in the Advance Payment Guarantee instrument. Because the guarantee was not operational, it was only issued but never came into force until it was withdrawn or rejected. In the premises there is no need to consider exhibit P1 which is the offer letter giving the obligation to issue an Advance Payment Guarantee. Strangely the Defendants Counsel conceded that both parties were in default. As far as the Plaintiff is concerned, the Plaintiff never paid the requisite fees prescribed in the facility offer letter exhibit P1. On the other hand the Advance Payment Guarantee was not enforceable because of the wording. It was carefully drafted to ensure that it was not effective until payment of the advance payment on the

Plaintiffs account with the Defendant bank. Even though the Advance Payment Guarantee is an autonomous document of undertaking, it did not fulfil the requirements of the facility granted in exhibit P1 which is the facility offer letter. The nature of a guarantee is that it is issued and is effective for purposes of securing payment to the Plaintiffs account. By providing that payment should be received on the Plaintiffs account before the guarantee is effective, the Defendant changed the rules and the name of the game. The Defendant ensured that payment would be made by the Employer of the Plaintiff without any guarantee and which Advance Payment Guarantee would only become operational if money is received first. In other words though the Defendant executed the document, a close scrutiny of the document by the Employer may not meet the requirements of the guarantee before release of the advance payment.

I have duly considered the nature of an Advance Payment Guarantee or performance bonds. According to the textbook "Law of Guarantees" by Geraldine Mary Andrews and Richard Millet at page 11 paragraph 1.16:

> "Bonds are simple covenants by one person to pay another, either conditionally or unconditionally. A performance bond, also commonly called a Performance Guarantee, is a binding contractual undertaking given by a person, usually a bank, to pay a specified amount of money to a named beneficiary on the occurrence of certain event, which is usually that non-fulfilment of a contractual obligation undertaken by the principal to the beneficiary.
>
> Performance bonds are not guarantees in the true sense, but are a particularly stringent form of contract of indemnity. They are often drafted in such a way that the liability to pay will arise on a mere demand by the beneficiary, even if there is reason to doubt that the primary obligation has been broken. The rights and duties of the parties to a performance bond will depend on the terms of the contract which has been agreed between them and are not subject to the usual equities which apply to ordinary contracts of guarantee or indemnity."

The question therefore would be what the obligation of the principal or in this case the Plaintiff is to the beneficiary who is being guaranteed by the Defendant bank? An advance payment is secured by the principal for performance of the contract. It could only be secured if there is an Advance Payment Guarantee. Liability of the bank to pay is supposed to arise where the primary obligation has been breached. In this case there is no indication of breach of the primary obligation of the principal/the Plaintiff. However the beneficiary did not make any advance payment to the bank or the Guarantor. No obligation to pay would arise if the beneficiary made a demand on the Guarantor/Bank. At page 444 in the Law of Guarantees, Geraldine Mary Andrews and Richard Millet write that the essential character of the performance bond is more akin to a promissory note than to a true guarantee. It is an undertaking to pay a specified sum to the beneficiary in the event of a breach of contract, rather than a promise to see to it that the contract would be performed. The obligation to pay in accordance with the terms of the

agreement is entirely independent of the underlying contract between the account party and the beneficiary. Considering the contractual obligations of the parties I have had due regard to exhibit P1 which according to the submissions of both Counsel governs the relationship between the Plaintiff and the Defendant bank. The Defendant bank was supposed to provide credit facilities and is described as a lender while the Plaintiff is described as the borrower/obligor. The facility includes Advance Payment Guarantee and Performance Guarantee. The purpose of the facility was to enable the company perform on a contract for the construction of high-voltage lines and low voltage networks of government priority rural electrification projects. It would expire within 27 months from the date of issuance of the performance bond and Advance Payment Guarantee. The evidence adduced shows that no performance bond was ever issued by the Defendant bank. Secondly the Advance Payment Guarantee never commenced though it was issued between the 13th and 14th of September 2010. The wording of the guarantee instrument itself shows that it would only commence upon deposit of the advance payment on the Plaintiffs account by the Employer. Lastly the evidence is that the Advance Payment Guarantee instruments were eventually returned before their activation. I.e. it could only be activated by deposit of advance payment on the Plaintiffs account by the Employer.

In the premises there is no need for me to consider whether there was consideration by the Defendant. The document that the Defendant issued was not operational or effective because it depended on the actions of a third-party which never took place. Because the third-party action of deposit of money never took place, the contract was not effective and subsequently the documents were withdrawn before it became effective. The fact that the Employer could have accepted the documents does not render the Advance Payment Guarantee an effective guarantee without the action of the Employer. No evidence has been used of any contractual relationship between the Defendant bank and the Employer of the Plaintiff. The Advance Payment Guarantee is expressly clear about the fact that the Employer was required to make the advance payment on the Plaintiffs account for the guarantee to become effective. In the premises the Advance Payment Guarantees issued by the Defendant and collected and handed over to the Employer of the Plaintiff, was not utilised in the sense that it was not yet an effective document at the time of issuance. It was not enforceable during the period it remained in the custody of the Employer until when it was returned due to failure by the Employer to make an advance payment to the Plaintiff on the Plaintiffs account with the Defendant bank.

Issues number two and three shall be considered together because they are intertwined.

2. Whether the Plaintiff received any consideration from the Defendant for the sum of Uganda shillings 72,627,832.43/=?
3. Whether the Defendant is entitled to fees under the facility letter dated 1 September 2010 for the Advance Payment Guarantees?

As far as issue number two is concerned, both Counsels agreed with the definition of the term "consideration". I will additionally quote the definition in Osborn's Concise Law Dictionary 11th Edition at page 107 which defines it as follows:

> "To constitute a simple contract (q.v) an agreement must amount to a bargain, each of the parties paying a price for that which he receives from the other. This price is referred to as consideration. In Curie v. Misa (1875) L.R. 1O Ex 162, consideration was defined as:
>
> > "Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other"
>
> If, therefore, one party e.g. gives a right or benefit, he gives consideration. Equally, if a party incurs or undertakes responsibility, he gives consideration."

According to Stroud's Judicial Dictionary of Words and Phrases Sweet & Maxwell 2000 Edition Consideration means:

> "The definition of 'consideration' given in Selwyn N.P. 8th ed., 47, which is cited and adopted by Tindal C.J. in Laythoarp v. Bryant, 5 L.J.C.P. 220), is: 'Any act of the Plaintiff from which the Defendant derives a benefit or advantage, or any labour, detriment, or inconvenience, sustained by the Plaintiff, provided such act is performed, or such inconvenience suffered, by the Plaintiff with the consent, either express or implied, of the Defendant'" (per Bowen L.J., Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q.B. 271). In the 12th ed. of Selwyn, at p. 43, the definition is: "Any act of the Plaintiff from which the Defendant derives (or expects to derive, Haigh v. Brooks, 10 A. & E. 309) a benefit or advantage, or any labour, detriment, or inconvenience, sustained by the Plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered, by the Plaintiff at the request, or with the consent, either express or implied, of the Defendant".
>
> "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other..."

From the above definitions, the Plaintiff was supposed to receive something of value from the Defendant in return for depositing security with the Defendant bank and also paying the price of the facility stipulated in paragraph 7 of exhibit P1. In this particular case the benefit was not supposed to be something of an inconvenience such as a detriment, inconvenience and loss or responsibility. It was supposed to be securing advance payment on the Plaintiffs account. My conclusion is that the consideration given by the Defendant bank in light of resolution of issue number one was not effective or operational until and unless the Employer deposited money on the Plaintiffs account. The consideration was dependent on the occurrence of a future event which never occurred and therefore was conditional. In the absence of deposit by the Employer

on the Plaintiffs account, the Advance Payment Guarantee was not enforceable and therefore worthless. Because the consideration was conditional, it was not effective or of value from the facts of the case. Issue number two is resolved in line with the resolution of issue number one. The Plaintiff received an Advance Payment Guarantee which was not enforceable and therefore did not have any value and did not amount to a consideration agreed to in exhibit P1 because of impossibility of performance due to the actions of the third-party was made part and parcel of the validity of the Advance Payment Guarantee.

As far as issue number three is concerned on whether the Defendant is entitled to the fees mentioned in the facility letter. The short answer is that payment of the fees is contractual. Even if the fees had been paid by the Plaintiff and it is admitted that they were not, it ought to be refunded for failure of consideration.

The submission that fees were not paid is however academic. It amounts to saying that the Plaintiff never deposited the fees. However the Plaintiff was loaned money by the Defendant bank for payment of the fees which loan carried interest. It is quite acceptable that the fees were deducted from the Plaintiffs account and therefore continued to attract interest as rightly calculated by the Defendant bank. However it is apparent that because the Advance Payment Guarantee did not become effective due to non-deposit of funds on the Plaintiffs account, and because of the dependence of the Advance Payment Guarantee on the actions of a third-party who is not a party to this suit, it was not possible to implement the contract exhibit P1. To use the words of the Defendant in exhibit P4, because of "inactivation" of the Advance Payment Guarantee due to non-receipt of the requisite funds, the contract could not be implemented. In other words it was impossible to perform the contract by having an effective Advance Payment Guarantee. In my judgment the Defendant by carefully drafting the Advance Payment Guarantee in such a way as to make it conditional on the deposited by a third party is not a party to exhibit P1 which is the offer of the facility, it contributed to the impossibility of its performance or its operationalisation. Secondly the Employer who is not a party to the contract never paid any money on the Plaintiff’s account. There is no evidence that this was the fault of the Plaintiff. In any case the wording of the guarantee itself negates such a conclusion. The Advance Payment Guarantee is explicitly clear that it shall remain valid and in full effect from the date of the advance payment into the account of the Plaintiff with the Guarantor. In other words for the Employer to be able to call on the Advance Payment Guarantee, it was incumbent upon them to pay money by way of an advance payment into the account of the Plaintiff with the Defendant bank. This was never done rendering the whole arrangement without an enforceable Advance Payment Guarantee, the subject matter of the facility issued by the Plaintiff. No fees could be deducted to meet the charges stipulated in paragraph 7 of the facility letter because the entire purpose of the facility was frustrated. I must emphasise that it is the Defendant bank which contributed to the impossibility of enforcement of the offer letter by failure to issue an operational Advance Payment Guarantee which would be unenforceable without the input of a third-party. In any case the third-party Employer is not a party to this suit. No evidence of the

contractual obligations of the Plaintiff as far as the payment of the advance into its account, if any, has been adduced in evidence.

In the case of **Krell vs. Henry [1903] 2 K.B pages 740** there was an appeal to the Court of Appeal from the decision of Darling J who had dismissed the Plaintiff's action for enforcement of a contract to rent a room. The court held that the foundation of the contract was the desire of the Defendant to watch the Coronation procession which had been fixed for a certain day. The Coronation even was postponed and the Defendant refused to pay for the room though he had paid a deposit and later did not take up the room. The judge held that the Plaintiff was not entitled to recover the balance of the rent contracted. He relied on the case of *Taylor versus Caldwell* (1863) 3 B. & S 826. On appeal to the Court of Appeal Vaughan Williams L.J. discussed the principle in Taylor versus Caldwell at page 748:

> "where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time of the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

At page 751 he held that the room was chosen because of its peculiar suitability for viewing the Coronation procession:

> "Surely the view of the Coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab – namely, to see the race – being held to be the foundation of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract."

The above rule was considered by the House of Lords in **Fibrosa Spolka Akeyjna vs. Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122** per Lord Russell who described the effect of the rule in **Chandler versus Webster [1904] 1 KB 493** that:

> "that in cases of frustration loss lies where it falls, or that where a contract is discharged by reason of some supervening impossibility of performance, payments previously made

and legal rights previously accrued according to the terms of the contract, will not be disturbed, but the parties would be excused from further liability to perform the contract."

The rule that the loss falls where it falls is distinguished by Lord Wright at page 141:

> "But I think it is clear both in English and Scots law that the failure of consideration which justifies repayment is a failure in the contract performance. What is meant is not consideration in the sense in which the word is used when it is said that in executory contracts the promise of one party is consideration for the promise of the other. No doubt in some cases the recipient of the payment may be exposed to hardship if he has to return the money though before the frustration he has incurred the bulk of the expense and is then left with things on his hands which became valueless to him when the contract fails, so that he gets nothing and has to return the repayment. These and many other difficulties show that the English rule of recovering payment the consideration for which has failed works a rough justice. It was adopted in more primitive times and was based on the simple theory that a man who has paid in advance for something which he has never got ought to have his money back.…"

In this case what was bargained for were an Advance Payment Guarantee and a Performance Guarantee. The Performance Guarantee was never issued. The Advance Payment Guarantee was issued but never became operational. In other words the Plaintiff never got what it bargained for. What was bargained for was an operational Advance Payment Guarantee. The Defendant loaned money to the Plaintiffs account to cater for the fees. In actual fact the money expected never came. In the premises, the charges are no longer enforceable against the Plaintiff and both parties are relieved of their obligations under exhibit P1 on account of impossibility of performance due to the actions of the third-party Employer.

4. Remedies

As far as remedies are concerned, because my conclusion is that both parties are relieved of their obligations, the Plaintiff is entitled to receive its securities back from the Defendant bank. The Plaintiffs claim is for declaration that it is not indebted to the Defendant in all respects of all guarantees issued in favour of the Employer. Secondly for an order of release and return of all securities given to the Defendant by the Plaintiff in respect of the guarantees, general damages and costs of the suit.

In view of the resolutions of issues number 1 up to 3 the Plaintiff is only entitled to the declaration and a return of its securities. In the premises a declaration issues that the Plaintiff is not indebted to the Defendant in respect of the Advance Payment Guarantee issued in favour of LTL Projects (Pvt) Ltd for the benefit of the Plaintiff.

An order issues for the Defendant to release to the Plaintiff all securities the subject matter of the facility offer exhibit P1 deposited for purposes of exhibit P1.

As far as the claim for general damages is concerned, in view of the resolution of issue number three, general damages cannot be awarded. In the premises each party shall bear its own loss. The Plaintiff's suit succeeds in part with each party to bear its own costs.

As far as the counterclaim is concerned exhibit D1 which is a letter dated 17th of July 2012 wherein PW1 on behalf of the Plaintiff offered to settle outstanding balances on its account to the tune of shillings 18,596,558.20/=. He testified that the offer was no longer on the table. There is no evidence that the offer was accepted neither did it amount to an acknowledgement of indebtedness. Evidence return on exhibited D1 is to the effect that the Defendant rejected the proposal would in writing indicate that the Defendant wanted to be fully paid for the services of issuing the Advance Payment Guarantee. In view of the findings on issues number one and two, the counterclaim of the Defendant cannot be granted.

The counterclaim of the Defendant is dismissed with each party to bear its own costs.

Judgment delivered in open court this 13th day of June 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Andrew Munanura Kamuteera for the Defendant

Counsel for the Plaintiff not in court

Plaintiffs MD Mr Mugume Samuel in court

Defendant’s officials not in attendance

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

13 June 2014