



**Magnate Ventures Limited v Credit Bank PLC (Commercial Case E059 of 2022)
[2023] KEHC 2234 (KLR) (Commercial and Tax) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E059 OF 2022**

A MABEYA, J

MARCH 24, 2023

BETWEEN

MAGNATE VENTURES LIMITED PLAINTIFF

AND

CREDIT BANK PLC DEFENDANT

RULING

1. Before court is the plaintiff's Notice of Motion dated 12/4/2022. The Motion was brought under Order 36 Rule 9, Order 40 Rules 1(a), 2(1) and (2), 10 and 11 of the Civil Procedure Rules 2010, sections 1A,1B, 2, 3 and 3A of the Civil Procedure Act.
2. The Motion sought final judgment against the defendant for the liquidated claim of Kshs. 62,263,936 and USD 474,634.00 together with interest thereon at court rates from 7/10/2021 until payment in full. It further sought for interlocutory judgment for general damages for fraud, breach of contract, breach of trust/fiduciary obligations and that the suit be fixed for assessment of damages.
3. The application was supported by the affidavit of Stanely Kinyanjui sworn on 12/4/2022. The grounds thereof were that; there was no defence to the suit since the defendant was truly indebted to the plaintiff and therefore the suit was proper for summary judgment for the liquidated amounts claimed.
4. That the defendant ought to be restrained for the breach of the contract between itself and the plaintiff with respect to the 'on demand' performance bond. That there was a probability that the defendant had committed fraud and breach of contract therefore it was necessary for the court to ascertain damages.
5. The defendant opposed the application through grounds of opposition dated 25/4/2022. It contended that the plaintiff had failed to provide legal grounds to justify the orders sought. That



- the application was misconceived, frivolous and an abuse of the court process as it failed to meet the requirements of the Civil Procedure Rules.
6. Parties canvassed the application by way of written submissions which I have considered. The plaintiff submitted that the issue for determination was whether the bank was entitled to withhold the payments upon demand by the plaintiff. The case of *Shapoorji Pallonji and Company Private Limited v Yumin Limited* [2021] EWHC 862 was cited in support of the grounds to be considered in an application for summary judgment in instances where a bank had refused to make payments on bonds upon demand.
 7. It was further submitted that the performance bond gave rise to an autonomous contract and the Principal Company with which the plaintiff had entered into a contract was not part of it. That the defendant's refusal to make payment on demand amounted to a fraudulent conspiracy. That no explanation had been given by the defendant as to why it failed to make the payment upon demand.
 8. On its part, the defendant submitted that it had a good defence which raised triable issues and it ought not be deprived of its right to have the same tried by a proper trial. That the defendant had been served with a court order barring it from calling up the performance bond. That due to the complexity of the matter the matter ought to proceed to full trial. The cases of *Delphis Bank K Ltd v Caneland Ltd* [2014] eKLR and *Sammy Ndegwa Muriithi v Richard Gachagwa Thairu & anor* [2021] eKLR were cited in support of the principles applicable to applications for summary judgment.
 9. I have considered the parties' averments and the submissions on record. The main issue for determination is whether the applicant has made out a case for summary judgment.
 10. A brief background to the case is that the plaintiff entered into a contract with a company known as Hebei Tuofa Telecommunication & Electric Manufacturing Ltd (Hebei) for the supply and installation of lines and transformers. The parties agreed that Hebei would take out on demand performance bonds by a recognized bank which were issued by the defendant.
 11. The subject performance bonds were 'on demand bonds' dated 15/5/2019 for USD 474,634 and 16/5/2019 for Kshs.62,263,936/- ("the 'on demand bonds'") respectively. The same were valid until 18/5/2022.
 12. A dispute ensued between the plaintiff and Hebei and on 6/10/2021, the plaintiff made a demand on the said 'on demand' bonds. It was the plaintiff's contention that the defendant failed to pay the amount on demand which necessitated the suit.
 13. The defendant filed a defence denying the plaintiff's claim. It denied the existence of any contract between the plaintiff and Hebei. It denied issuing the 'on demand bonds' and the terms set out therein. It admitted having received the demand from the plaintiff but stated that it could not pay in respect thereof because there was a legal impediment, that it had been served with a court order restraining the calling up of the said 'on demand' bonds. Further, the defendant alleged that there was fraud in calling up for the 'on demand' bonds.
 14. The applicant filed the present application therefore seeking summary judgment on the grounds that the defendant was indebted to the plaintiff and since performance bonds were payable on demand, there were no triable issues that needed to proceed to trial.
 15. On its part the defendant termed the application as misconceived and an abuse of the courts process. The defendant's position was that its defence raised triable issues as failure to pay out the bonds was occasioned by a court order barring the defendant from transferring the money to the plaintiff.



16. In *Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR, the Court of Appeal held: -

“Before the grant of summary judgment the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as “subject to liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”

17. This was the same position taken by the courts in *Delphis Bank Ltd v Caneland Ltd* [2014] eKLR and *Sammy Ndegwa Muriithi v Richard Gachagwa Thairu & another* [2021] eKLR. The principles that come out of case law is that; summary judgment is in the discretion of the court, the same should be granted sparingly and only in clear cases where there is clearly no arguable issue and that the court should lean towards hearing the parties on merit.

18. In view of the foregoing, a triable issue is any matter that would require further interrogation by the Court. Before entering judgment summarily without hearing the parties, the court should satisfy itself that there is no issue that has been raised either in the defence or replying affidavit that need further examination by way of a trial. I will therefore examine the defence and see the issues raised.

19. I have considered the defence dated 1/4/2022. In that defence, the defendant denied the contract between the plaintiff and Hebei as well as issuing the ‘on demand’ bonds. As an answer the plaintiff did produce in its supporting affidavit documents to show that there really was a contract between it and Hebei which was the basis of the ‘on demand’ bonds. The ‘on demand’ bonds themselves were produced as Exhibit ‘A’ to the supporting affidavit. Although the defendant had denied the terms of the said ‘on demand’ bonds, the terms set out therein turned to be as pleaded by the plaintiff in the plaint. Therefore, the denial of existence of the contract and the “on demand” bonds were a non issue.

20. The only reason advanced by the defendant for not honoring the ‘on demand’ bonds was that it had been served with an order restraining the calling up of the ‘on demand’ bonds. That suit was HCCC COMM No. E866 of 2021 Hebei Tuofa Telecommunication and Electric Equipment Manufacturing Company Ltd vs. Magnate Ventures Ltd.

21. The subject order and pleadings in the said suit were produced by the plaintiff in the supporting affidavit. The order was issued on 18/10/2021. It restrained the plaintiff from calling up the ‘on demand’ bonds pending the inter-partes hearing of the application. A subsequent order made on 7/12/2021 extended that order for a period of 45 days only and the court indicated that after the expiry of that period, the said order would automatically lapse.

22. In view of the foregoing, two issues arise. Firstly, by the time the order of 18/10/2021 was being made, the plaintiff had already called on the ‘on demand’ bonds on 7/10/2021 and the order did not act retrospectively. Secondly, that order expired 45 days after 7/12/2021, that is, by 22/1/2022. The present suit was filed on 25/2/2022 way after the subject order had expired. In this regard, the existence of that order cannot be an issue either for trial or a defence to the demand on the performance bonds.

23. The other issue that the defendant raised was alleged fraud. There were no particulars of facts that were pleaded for the alleged fraud that were pleaded. That of course is contrary to the provisions of Order 2 Rule 10(1)(a) and (b) of the *Civil Procedure Rules*. Particulars of the alleged fraud failing, the



allegation does not lie. It was upon the defendant to clearly set out the facts relied on to show that there was existence of fraud.

24. Having considered what the defendant raised as issues, it is imperative to now consider the nature of the claim before court. The plaintiff's claim is two-fold, a liquidated claim based on the 'on demand' bonds and a claim for general damages for fraud, breach of contract, trust/fiduciary duty and exemplary damages. Of course, the claims for damages must be proved through trial and not summarily.
25. As to the claim for 'on demand' bonds, the law has been restated variously. I have seen the bonds. The defendant bound itself 'unconditionally and irrevocably to guarantee as primary obligor and not as surety merely, the payment to you on your first written demand without whatsoever right of objection on our part ...'. The demand was served upon the defendant on 7/10/2021.
26. In the cases relied on by the plaintiff of *Globe Developers Ltd v Mayfair Insurance Co. Ltd* [2020] eKLR and *Kenindia Assurance Co Ltd v First National Bank Ltd* [2008] eKLR, it was clear that the obligation to pay arises upon demand. On demand performance bonds are instruments which have been developed in the banking industry for ease of Commercial transactions. The banks are required to settle immediately the amount they have bound themselves in such an instrument on demand.
27. In this regard, a bank which issues a performance bond has to honour that guarantee in accordance to its terms. The obligation arises immediately upon demand. The only exception is where there is a clear fraud which the bank has notice. The fraud must, in my view, be shown to exist by irrefutable evidence.
28. In the present case, there is nothing to show that there was any fraud. The allegation of fraud alleged in the plaint was neither particularized nor any evidence produced to establish the semblance of the same. It must be recalled that the plaintiffs evidence was neither rebutted nor challenged as the bank did not file any replying affidavit to the Motion.
29. In view of the foregoing, I find that the defence in this case raises no triable issue as regards the liquidated claim. Accordingly, I allow the application in terms of prayer nos 4 and 5 of the Motion dated 12/4/2023.
30. As regards the other claims, they are to be proved at the trial. The plaintiff will have the costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2023.

A. MABEYA, FCI Arb

JUDGE

