



Rupra Construction Company Limited v Longonot Place Limited (Miscellaneous Application 155 of 2017) [2022] KEHC 275 (KLR) (Commercial and Tax) (31 March 2022) (Ruling)

Neutral citation: [2022] KEHC 275 (KLR)

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

MISCELLANEOUS APPLICATION 155 OF 2017

WA OKWANY, J

MARCH 31, 2022

BETWEEN

RUPRA CONSTRUCTION COMPANY LIMITED PLAINTIFF

AND

LONGONOT PLACE LIMITED DEFENDANT

RULING

1. Through a Joint Building Council (JBC) Contract dated 7th December 2015, the Defendant/Applicant herein contracted the Plaintiff/Respondent to undertake renovations at its premises situate at Suswa and Lenana Blocks of the Longonot Place.
2. Pursuant to Clause 16.1 of the JBC, the Plaintiff was required to provide a Performance Bond "who must be an established bank to the approval of the Employer who will be bound to the Employer in the sum equivalent to ten percent (10%) of the contract price for the due performance of the contract until the certified date of practical completion".
3. The plaintiff procured a performance bond with Equatorial Commercial Bank Limited for a sum of Kshs 49,999,999, however, the defendant terminated the agreement before the plaintiff completed the construction works after which it wrote to the bank demanding payment of Kshs 49,999,999.
4. In order to enforce the Bond, a demand had to be made to the Bank by 30th June 2017. On 20th March 2017, a demand was issued to the Bank but before its enforcement, an order was on 31st March 2017, issued by this court, differently constituted, for the maintenance of the *Status Quo* as follows: -

“In the meantime status quo with regard to the Performance Bond is to be maintained and if no payment has been made on account of the Performance Bond, none is to be made.”



5. Parties referred the matter to arbitration and an award was published on 10th December 2020 in which the Arbitrator declined jurisdiction with respect to the Performance Bond but found that the Plaintiff was in very substantial breach of its obligations to the Defendant.

Application

6. Following the publication of the Award, the applicant/defendant filed the application dated 2nd July 2021 under Section 7 and 18 of the Arbitration Act and Order 25 rule 5 and Order 40 rule 7 of the Civil Procedure Rules seeking orders that: -
 1. Spent
 2. That this Honourable Court be pleased to set aside, discharge and or vacate the Status Quo orders made herein on 31st March 2017 and extended from time to time preventing the defendant from enforcing and or receiving payment pursuant to the recalled performance bond from Spire Bank Limited on 20th March 2017.
 3. That the Defendants be at liberty to pursue its rights pursuant to the demand made on 20th March 2017 pursuant to the performance bond
 4. That subject to the above orders, the suit herein be marked as adjusted and/or concluded.
 5. That costs of this application be provided for.
7. The application is supported by the affidavit sworn by the Plaintiff's General Manager Ms. Judy Wanjiku and is based on the following grounds;
 - a. That pursuant to a constructive Agreement dated 7th December 2015 the plaintiff procured Spire Bank Limited to issue a Performance Bond in favour of the defendant as security for the good performance of the construction agreement.
 - b. That the Performance guarantee dated 5th January 2017 in favour of the defendant for Kshs 49,999,999/= remained valid even on 20th March 2017 when the defendant issued a demand for payment of the secured sum following default by the plaintiff in its performance of the construction agreement
 - c. That subsequently, the plaintiff sought and obtained Status Quo orders on 31st March 2017 from the court restraining the payment being done pursuant to the demand issued by the defendant against Spire Bank Limited.
 - d. That by an award dated 10th December 2020 and published on 1st April 2021, the arbitrator determined, *inter alia*, as follows:
 - . "72. I find that the claimant did not proceed regularly and diligently with the work..."
 - "83 I find that an employer operating under the agreement and conditions of contract for building works JBS 1999 edition ...is entitled to determine the contractor's employment under clause 38.1.2 and fails to proceed regularly and diligently with the works.
 - "88 I determine that the claimant did not proceed regularly and diligently with works and the respondent was entitled to terminate the contract the way it did



“112 My decision on the issue is that the respondent was entitled to terminate the contract with the claimant and followed the termination procedure in clause 38 of the JBC contract.

- e. That the above Arbitrators findings entitle the defendant to receive payment of the sum of Kshs 9,999,999/= from Spire bank Limited
 - f. That unless the Status quo orders made on 31st march 2017 and extended pending determination of the arbitration proceedings are set aside, discharged and/or vacated, The defendant shall be denied its contractual and property rights
 - g. That the defendant is aggrieved by the continued subsistence of the status quo orders despite the determination that the plaintiff was at fault and the construction contract was unlawfully terminated.
 - h. That upon lifting of the orders herein and in view of the award issued herein, the suit herein shall be fully determined and or adjusted.
 - i. That the demand dated 20th March 2017 was made during the pendency and subsistence of the performance bond and therefore the defendant is entitled to receive payment for the said sum of Kshs 49,999,999/= secured by the performance bond.
 - j. That the orders sought herein are merited.
8. The respondent opposed the application through the replying affidavit of its Director Mr. Joginder Singh Rupra who concedes that the parties entered into the JBC for the agreed renovations of the defendant’s apartments by the plaintiff and that the plaintiff secured the performance bond. He states that the defendant terminated the contract and that the realization of the performance bond as sought by the defendant in the application is premature since the award has neither been adopted nor set aside.
 9. Parties canvassed the application by way of written submissions. The defendant argued that the Arbitrator’s findings entitle it to enforce the Performance Bond. The defendant observed that the status quo orders have been in place since 31st march 2017 and were issued in order to protect the subject matter of a suit pending arbitration. It was the defendant’s case that there was no plausible basis for maintaining the status quo orders yet the dispute between the parties had been determined by the Arbitrator.
 10. The defendant further argued that courts should not interfere with the enforcement of the performance bond of guarantee unless fraud was established. The defendant maintained that no further proof was required since the arbitrator had established the plaintiff’s breach. The defendant added that the setting aside and enforcement of the arbitral award were separate proceedings through which parties could pursue their rights and obligations.
 11. On its part, the plaintiff submitted that the application is premature and should await determination of the Defendant’s application for the setting aside of the Award. The plaintiff contends that its position will be prejudiced if the status quo orders are set aside. It was the plaintiff’s case that the arbitrator’s award of Kshs 88.9 Million is sufficient to cover the amount for claimed by the defendant and compensation for the termination which the performance bond intended to redress. The plaintiff observed that allowing this application would amount to granting the defendant double compensation.
 12. I have considered the pleadings and the rival arguments made by the parties. The main issue for determination is whether this court should lift the status quo order issued on 31st March 2017 that had



the effect of preventing the defendant from enforcing the payments with respect to the Performance bond. According to the applicant/defendant, the arbitrator found the respondent to be at fault thus entitling it to receive payment of the Sum of Kshs 49,999,999 from Spire bank Limited. The applicant is also apprehensive that it would be denied its' contractual and property rights if the status quo orders are not lifted.

13. As I have already stated in this ruling, the plaintiff's position is that the application for realization of the performance bond is premature as the arbitration award has not been adopted or set aside.
14. *Black's Law Dictionary Tenth Edition*, defines Performance Bond as follows :-

“ A bond given by a surety to ensure the timely performance of a contract”
15. In *Paget's Law of Banking (12th edition 2003) at page 730* the authors states as follows :-

“The principal that underlies demand guarantee is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by the disputes under the underlying contract between the beneficiary and the principal. If the beneficiary makes an honest demand, it matters not that between himself and the principal he is entitled to payment. The guarantor must honour the demand...”
16. In *Lagoon Development Limited vs Beijing Industrial Designing & Research Institute*, HCCC No. 486 of 2014, Gikonyo J. held that: -

“I should also state here that a performance guarantee or bond is to be honoured in accordance with the terms of the bond. Default which renders the performance guarantee or bond payable should therefore be prescribed in the bond”.
17. In the present case, it was not disputed that the respondent issued a performance guarantee in favour of the applicant for the sum of Kshs 49,999,999. Through an order issued on 31st March 2017, the court ordered for the maintenance of the status quo to enable the parties refer their dispute to arbitration. The arbitral award was published and the plaintiff found to have been in breach of the terms of their contract. The question that arises is whether the status quo orders should be lifted as sought by the applicant.
18. My understanding of the wording of the status quo order is that it was a temporary measure to last until the dispute was determined by the arbitrator. I find that in view of the uncontested position that the arbitral Award was published, the status quo orders should automatically lapse as the reason for which they were issued is spent. My further finding is that the mere fact that the award has not been set aside or enforced does not justify the continued existence of the status quo order.
19. It is trite that parties are bound by the terms of their contracts and that courts cannot rewrite a contract between the parties. Similarly, parties are bound by the Arbitrator's findings as long as such findings have not been set aside.
20. It is also settled law in Kenya that a court of law ought to permit the enforcement of a Performance Bond or guarantee. This is the position that was taken in *Concord Insurance Co. Ltd vs Kewal Contractors Co. Ltd & 2 Others* [2009] eKLR.
21. The principle that emerges from case law is that a court of law will invariably enforce a performance guarantee, unless fraud is established. In the present case, it was not disputed that the plaintiff secured a performance bond with the bank for the due performance of the contract to its completion. The



contract was not completed as agreed and the plaintiff was called upon to honour the performance guarantee in respect of the construction agreement. The plaintiff has not stated that there was fraud on the part of the defendant.

22. In the circumstances of this case, I find that nothing stands in the way of the defendant in enforcing the performance bond. I therefore find that the applicant has made out a case for the granting of the orders to set aside, discharge or vacate the status quo orders issued on 31st March 2017.
23. Consequently, I allow the application dated 2nd July 2021 with costs to the applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MARCH 2022.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Mwangi for Defendant/Applicant.

Mr. Nganga for Plaintiff.

Court Assistant – Abdi

