



**China Gansu International Corporation For Economic & Technical Cooperation Kenya Company Limited v Golden Gulf International Limited & another (Commercial Case E679 of 2021) [2022] KEHC 3165 (KLR) (Commercial and Tax) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3165 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL CASE E679 OF 2021**  
**DAS MAJANJA, J**  
**JUNE 30, 2022**

**BETWEEN**

**CHINA GANSU INTERNATIONAL CORPORATION FOR ECONOMIC & TECHNICAL COOPERATION KENYA COMPANY LIMITED ..... PLAINTIFF**

**AND**

**GOLDEN GULF INTERNATIONAL LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EQUITY BANK (KENYA) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The court is called upon to determine the Plaintiff's Notice of Motion dated 11<sup>th</sup> November 2021 made, inter alia, under the Order 40 rule 1 of the Civil Procedure Rules principally seeking an interim injunction restraining the 2<sup>nd</sup> Defendant ("the Bank") from paying or otherwise complying with 1<sup>st</sup> Defendant's demand dated 9<sup>th</sup> July 2021 or any demands by the 1<sup>st</sup> Defendant for the payment of any sums under the Bid Bond Tender Security dated 21<sup>st</sup> May 2021 ("the Bid Bond") issued by the Bank pending the hearing and determination of this suit.
2. The application is supported by the affidavit of Zou Qili, the Plaintiff's General Manager, sworn on 11<sup>th</sup> November 2021. It is opposed by the 1<sup>st</sup> Defendant through the replying affidavit of its Managing Director, David A. Obare, sworn on 9<sup>th</sup> February 2022. There was no response from the Bank. The Plaintiff and the 1<sup>st</sup> Defendant have also filed written submissions in support of their respective positions.
3. The facts giving rise to this application are largely common ground and were highlighted in the court's ruling of 11<sup>th</sup> November 2021 but for context, I will rehash the same. The 1<sup>st</sup> Defendant invited the Plaintiff to submit its bid for an intended project for the construction of 522 Housing Units on a



parcel of land in Mombasa; Sub-division No. 817/II/MN. On 3<sup>rd</sup> May 2021, the Plaintiff was duly notified that it had been awarded the tender to undertake construction of the Units at a cost of KES. 3,090,280,201.00 inclusive of 16% VAT. As a condition for the award, the Plaintiff was required to send its acceptance letter and provide a Bid Bond Tender Security equivalent to 2.5% of the contract value from a reputable bank within 7 days of the award. On 21<sup>st</sup> May 2021, the Bank issued to the 1<sup>st</sup> Defendant the Bid Bond in the sum of KES. 77,257,005.02 being 2.5% of the contract value tenable upto 19<sup>th</sup> July 2021.

4. On 12<sup>th</sup> July 2021, the Plaintiff filed this suit accusing the 1<sup>st</sup> Defendant of neglecting to execute the formal contract and instead writing to the Bank in a letter dated 9<sup>th</sup> July 2021 calling in the Bid Bond on the ground that the Plaintiff had failed to execute the contract and failed to provide a Performance Guarantee as stipulated in the contract. The Plaintiff disputed the 1<sup>st</sup> Defendant's action on several grounds including the fact that it is the 1<sup>st</sup> Defendant which failed to execute the contract. Further, that the contract did not have a time frame for execution and that it was yet to be notified of the 1<sup>st</sup> Defendant's intention to call in the Bid Bond.
5. The Plaintiff stated that the Bank had indicated its intention to honour the Bid Bond unless stopped by this court and that if the Bank was to make payment, the Plaintiff would suffer irreparable loss and damage. Thus, the Plaintiff filed an application seeking, inter alia, a declaratory order that the 1<sup>st</sup> Defendant was not entitled to call in the Bid Bond or otherwise make any demands for payment under the same and that there be an order for an interim injunction or order for an interim protective measure restraining the Bank from paying or otherwise complying with the 1<sup>st</sup> Defendant's demand dated July 9, 2021 or any demands by the 1<sup>st</sup> Defendant for payment of any sums under the Bid Bond pending the hearing and determination of the suit between the Plaintiff and the 1<sup>st</sup> Defendant.
6. In the ruling dated November 11, 2021, I declined to grant the declaratory prayer on the ground that such an order could only be issued after hearing the main suit. I also dismissed the application on the ground that the Plaintiff, not being a party to the Bid Bond, could not question the Bank's legal obligations or cause the court to adjudicate on the legal incidents of the Bid Bond without the Bank's participation in this suit.
7. As is evident, the Plaintiff has now joined the Bank to the suit as the 2<sup>nd</sup> Defendant and seeks the same order of injunction sought in the previous application.

### **The Application**

8. The Plaintiff restates the same grounds in support of this application as it did in its earlier application. It contends that they were engaged in negotiations on the terms of the draft contract forwarded by the 1<sup>st</sup> Defendant to the Plaintiff when the 1<sup>st</sup> Defendant, without any notice whatsoever to the Plaintiff issued the demand letter dated July 9, 2021 to the Bank demanding payment of the sums secured under the Bid Bond alleging that the Plaintiff had failed to execute the contract between the parties and provide a Performance Guarantee as stipulated under the Contract.
9. The Plaintiff avers that the 1<sup>st</sup> Defendant's action is fraudulent, premature and invalid and that there was no time frame for execution of the contract between the Plaintiff and the 1<sup>st</sup> Defendant that was specified under the 1<sup>st</sup> Defendant's Letter of Award of contract dated May 3, 2021. It states that the 1<sup>st</sup> Defendant is the one who refused, failed and or neglected to execute the Contract and that the 1<sup>st</sup> Defendant's Letter of Award did not require the Plaintiff to furnish the Defendant with a Performance Guarantee. It further states that the Plaintiff and the 1<sup>st</sup> Defendant did not execute a contract requiring the Plaintiff to provide a Performance Guarantee as alleged by the 1<sup>st</sup> Defendant in its letter dated July 9,



2021 calling up the Bid Bond or at all. It explains that a Bid bond is replaced by a Performance bond or Performance Guarantee when the bid is accepted and the Contractor proceeds to work on the project. The Plaintiff avers that no construction works have been commenced by the Plaintiff entitling the 1<sup>st</sup> Defendant to a Performance Guarantee and that the 1<sup>st</sup> Defendant is yet to notify it of its intention to call up the Bid Bond or to revoke the Letter of Award as a result of the Plaintiff's failure to execute the Contract.

10. The Plaintiff contends that it has since established that the 1<sup>st</sup> Defendant does not have the capacity to enter into an agreement with the Plaintiff for the construction of the units and that the Project was a fraudulent scheme orchestrated by the 1<sup>st</sup> Defendant for purposes of duping genuine investors and ultimately designed to encash the Bid Bond provided by the Plaintiff. The Plaintiff claims that it has established that the 1<sup>st</sup> Defendant is not the registered owner of the subject parcel of land and as such, has no capacity to enter into a contract for construction of houses, that the 1<sup>st</sup> Defendant did not have cash flow or financing to undertake the project and that it failed, refused or neglected to provide evidence of funds or a financing agreement despite repeated requests by the Plaintiff, that no approval had been granted by the County Government of Mombasa to the 1<sup>st</sup> Defendant to undertake construction of the houses and the approval relied on by the 1<sup>st</sup> Defendant for the Project was granted to a Company known as Bandari Investments Company Limited on 23<sup>rd</sup> December 2016 and was limited to construction of a Boundary Wall, that the 1<sup>st</sup> Defendant also purported to have entered into a Joint Venture Agreement with Bandari SACCO who were the alleged registered owners of the subject parcel of land to undertake construction of houses on the SACCO's land but failed and/or refused to disclose to the Plaintiff the details of the said Joint Venture Agreement, that a certificate of postal search provided by the 1<sup>st</sup> Defendant to the Plaintiff purported that Bandari Investment Company Ltd was the registered owner of the subject parcel of Land and that Bandari Investment Company Ltd and Bandari SACCO are separate and distinct Corporate Entities and no nexus was established by the 1<sup>st</sup> Defendant between Bandari SACCO with whom the 1<sup>st</sup> Defendant purported to have entered into a Joint Venture with and Bandari Investment Company Ltd, the disclosed registered owner on the certificate of postal search provided to the Plaintiff by the 1<sup>st</sup> Defendant and that the title document provided to the Plaintiff by the 1<sup>st</sup> Defendant had varying Plot Numbers and disclosed the different registered owners.
11. The Plaintiff avers that if the Bank pays the sums demanded, it will in turn demand the same from the Plaintiff. The Plaintiff states that it will be unable to pay the same as the Plaintiff is yet to commence the construction works envisaged under the Letter of Award or receive a single payment from the 1<sup>st</sup> Defendant. In the circumstances, the Bank is likely to sell the Plaintiff's securities held by it and which constitute the Plaintiff's tools of trade and the Plaintiff will then be unable to service its other contracts elsewhere which will lead to termination of other contracts, its total collapse and ruin of its business and reputation which has taken many years to build.
12. The Plaintiff claims that it has established that the 1<sup>st</sup> Defendant is a briefcase and/or shell company without a known physical address, cash at bank or assets and as such cannot be able to refund to the Plaintiff the sum of KES. 77,257,005.02 once paid out to it. That it is therefore imperative that the Court does grant the Plaintiff the injunction. The Plaintiff adds that the Defendants will not suffer any prejudice if the orders sought are granted as the status quo ante will be maintained and that the balance of convenience lies in its favour.



## **The 1<sup>st</sup> Defendant's Reply**

13. The 1<sup>st</sup> Defendant contends that the Plaintiff has not made out a case for the grant of an injunction. The 1<sup>st</sup> Defendant states that the Bid Bond was furnished in its favour as a tool utilized as protection against the Plaintiff withdrawing its bid prior to the end of the bid validity period, or for refusing to sign the ensuing contract. That the Bid Bond operates as an assurance to the 1<sup>st</sup> Defendant that the Plaintiff will sign the Contract or otherwise forfeit the Bid Bond and at the same time it secures the compliance with the Plaintiff's obligations under the Contract.
14. The 1<sup>st</sup> Defendant states that apart from the Bid Bond, the Plaintiff was to provide a separate Performance Bond at the rate of 10% of the contract value being KES. 309,028,020.102. It reiterates that under the Tender documents, the Plaintiff was to enter into an Agreement with the 1<sup>st</sup> Defendant within 28 days from the date of acceptance by the Plaintiff and provide a Performance Bond of KES. 309,028,020.102 which it failed to do. The 1<sup>st</sup> Defendant avers that it forwarded the Contract document for execution but the Plaintiff has failed to execute the Contract and provide the Performance Bond aforesaid as required without any justifiable cause. The 1<sup>st</sup> Defendant avers that the only explanation given by the Plaintiff for the failure to execute is that the Contract had been forwarded to its Head Office in China for execution. The 1<sup>st</sup> Defendant denies that it has failed to execute the Contract as alleged by the Plaintiff. The 1<sup>st</sup> Defendant maintains that by dint of the Plaintiff's breach, the 1<sup>st</sup> Defendant exercised its undoubted right to recall the Bid Bond by demanding payment from the Bank.
15. The 1<sup>st</sup> Defendant states that the Bid validity period of 60 days is the period within which the offer by the Plaintiff remains valid and that this period expired on July 19, 2021 at 4:00pm, and if the Plaintiff decides to withdraw its bid or to not sign the contract then the Bid Bond will be forfeited. In the circumstances, the question as to whether a time frame for execution of the Contract has been specified in the Letter of Notification of Award does not arise and that despite the foregoing, the Plaintiff has failed to execute the Contract within the Bid validity period of 60 days which lapsed on 19<sup>th</sup> July 2021 without any request for extension by the Plaintiff.
16. The 1<sup>st</sup> Defendant further denies the allegation that it induced the Plaintiff to procure the Bid Bond purportedly knowing full well that it had no intention to enter into the Contract. It faults the Plaintiff for failing to execute the Contract and provide the Performance Bond in the 1<sup>st</sup> Defendant's favour as required. It adds that on the day of recalling the Bid Bond, the Plaintiff and the 1<sup>st</sup> Defendant held a meeting at the Bank's Headquarters in the presence of one of the Plaintiff's Lawyers, the Bank's Chinese Desk Representative and one of his Staff member where it was mutually agreed that the Plaintiff was to write to the Bank to extend the Bid Bond for a reasonable period, to enable the Plaintiff prepare the Performance Bond and forward the same with a signed contract and in return the 1<sup>st</sup> Defendant was to withdraw the demand thereof and that both parties agreed to have the same latest by Tuesday, July 13, 2021 but instead the Plaintiff chose to go to court for reasons best known to themselves. That to date the Plaintiff has never contacted the 1<sup>st</sup> Defendant to seek alternative ways to resolve this issue. The 1<sup>st</sup> Defendant urges the court to dismiss the application.

## **Analysis and Determination**

17. From the respective arguments I have set out above, the court is being called to determine whether an injunction ought to be granted in favour of the Plaintiff to restrain the Bank from paying or honoring the demand in respect of the Bid Bond.



18. As stated in the ruling of the 11<sup>th</sup> November 2021, I expressed the view that a Bid Bond is in the nature of a documentary credit that must be honoured according to its terms and that its efficacy lies in the fact that it is an independent contract from the primary contract meaning that the Plaintiff is not party to the Bid Bond which is applicable and enforceable as between the 1<sup>st</sup> Defendant and the Bank.
19. The independence of a Bid Bond from the primary contract was explained clearly by Lord Denning MR in *Edward Owen Engineering Limited v Barclays Bank International Limited* [1978] 1 All ER 976 where he held as follows;
- A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honor the credit.
- It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade.
20. I agree with the above holding that any dispute between the protagonists of the primary contract does not vitiate a documentary credit such as the Bid Bond and that a bank has no option but to honour the same. The Court of Appeal, in *Karuri Civil Engineering (K) Limited v Equity Bank Limited* NRB CA Civil Appeal No. 339 of 2012 [2019] eKLR restated this position by stating that ‘..... guarantees fall into two broad categories. The traditional guarantee or surety on one hand, and “on demand” guarantee on the other. “On demand” guarantees are also known as performance guarantees, performance bonds or demand bonds. (See *Vosloh AG v Alpha Trains (UK) Limited* [2011] 2 All ER (Comm) 307 at [24]– [28]). “On demand” guarantee is distinguishable from the traditional guarantee as liability is primary not secondary and payment by the guarantor is to be made in response to demand and is not dependent whether there has been a default under the principal contract.’”
21. Under the Bid Bond, the Bank was obligated to pay, on demand, the bonded sum of KES. 77,257,005.02, “(1) If the tenderer withdraws its tender during the period of bid validity specified by the tenderer on the tender form or (2) If the tenderer, having been notified of the acceptance of its tender by the employer during the period of bid validity: (A) Fails or refuses to execute the contract form if required, OR (B) Fails or refuses to furnish the bank guarantee, in accordance with the instructions to tenderers.” In its demand, the 1<sup>st</sup> Defendant stated that the Plaintiff had failed to execute the contract within the stipulated period and failed to provide the Performance Bank Guarantee as stipulated in the terms and condition of the contract.
22. The Plaintiff has not disputed the position given to the Bank by the 1<sup>st</sup> Defendant. All the Plaintiff has done is to give reasons for its failure to comply with the conditions precedent to making a demand. These reasons do not stop the Bank from honoring the Bid Bond. As has been stated, regardless of the parties’ dispute or reservations in the primary contract, the surety, in this case, the Bank is still bound to pay the bonded sums once the demand has been served upon it and the terms of the Bid Bond satisfied.
23. The issues raised and allegations made by the Plaintiff regarding the 1<sup>st</sup> Defendant’s capacity to enter into or complete the project do not implicate the Bank in any way. The suit between the Plaintiff and the 1<sup>st</sup> Defendant is still pending and no doubt, the Plaintiff will have the opportunity to ventilate its grievances. The Plaintiff cannot stop the Bank from paying up the demand sum under the Bid Bond because of its dispute with the 1<sup>st</sup> Defendant as the Bank is not even privy to the agreement between



the Plaintiff and the 1<sup>st</sup> Defendant. The call up of the Bid Bond was unqualified and categorical as it stipulated that the Bank was to pay upon receipt of a first written demand and without the need for the 1<sup>st</sup> Defendant to substantiate its demand provided that in its demand the 1<sup>st</sup> Defendant will note that the amount claimed by it is due to it, owing to the occurrence of one or both of the two conditions and specifying the occurred condition or conditions. This meant that the Bank was obliged to pay the amount demanded, in the terms dictated, and it mattered not that a dispute existed between the parties (see *Estate of Terence Peter O'Donovan & 3 others v National Bank of Kenya Limited* NRB CA Civil Appeal No. 168 of 2014 [2020] eKLR). The 1<sup>st</sup> Defendant has done exactly that and the Bank has no choice but to honour the demand.

### **Conclusion and Disposition**

24. For the above reasons, it is now clear that the Plaintiff has once again not established a prima facie case with the probability of success. Its application dated 11<sup>th</sup> November 2021 follows the same fate as its previous one, which is dismissal with costs to the 1<sup>st</sup> Defendant.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2022.**

**A. MSHILA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Ms Mburu instructed by Kimondo, Gachoka and Company Advocates for the Plaintiff

Mr Omondi instructed by J. P. Ngoya and Austine Advocates for the Defendants.

