

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 644 OF 2011

INTRA AFRICA ASSURANCE LIMITED.....APPELLANT

VERSUS

MOLYN CREDIT LIMITEDRESPONDENT

(An appeal from the Ruling of the Chief Magistrate's at Milimani, Hon. B. Olao (Mr.) dated 29th November, 2011 in the Chief Magistrate's Court Milimani civil suit No. 3814 of 2011)

JUDGMENT

The appellant was the defendant in the lower court where the respondent had instituted a suit to recover a sum of Ksh. 2,610,428/= being the performance bond executed by the appellant in favour of the plaintiff in the event a company known as Henrays Construction Limited did not perform its contractual obligations to the satisfaction of the respondent.

After the appellant was served with the pleadings it filed a defence in which it denied the respondent's claim, and in particular that the performance bond was unconditional. On the contrary, the respondent was blamed for breach of contract in that the contractor had substantially performed its obligations, was not in default, had not been given notices to rectify whatever defects, was prevented from performing its mandate due to defective specifications, and in any case the declaration of default was in bad faith.

The defence was followed by an application by the respondent by way of Notice of Motion for summary judgment against the appellant in the sum of Kshs. 2,610,428/= as claimed in the plaint. The said application was brought under Sections 1A, 1B, 3,3A of the Civil Procedure Act, Order 36 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules.

The application was opposed by the appellant but in a ruling delivered on 29th November, 2011 the court allowed the application against the appellant and entered judgment in favour of the respondent. That is the genesis of this appeal.

The lower court is faulted for failing to hold that the performance bond was unconditional and that under Order 36 of the Civil Procedure Rules, the defendant had shown it was entitled to defend the suit. The lower court was also faulted for holding that there was no evidence in writing of changes in architectural drawings, yet the appellant's replying affidavit highlighted the same and further that it failed in not holding that the appellant was not notified of any changes to drawings, which was a condition precedent for the respondents liability under to the bond to take effect.

For the court to enter summary judgment based on pleadings and affidavit evidence, it must be satisfied that the claim is unequivocal and that no amount of denial can justify the suit to remain any longer, pending trial. The entry of summary judgment has the effect of locking out a party without a hearing, and it is therefore the duty of the court to be satisfied that it is a clear case of indebtedness before such an order can be granted. It bears repeating that, such an order should be granted cautiously and only in the clearest of cases.

There is also the consideration that, however weak a party's pleading may be, they should not be denied an opportunity to have their day in court. Where a bona fide triable issue exists such an order should not be granted. – See **Margaret Njeri Mbugua vs. Kirk Mweya Nyaga (2016) e KLR, Shah vs. Padamshi (1984) KLR 531, Sunderji vs. Clide House Co. Limited (1984) KLR 499, CONCORD Insurance Co. Limited vs Kewal Contractors Co. Limitd & 2 Others (2009) e KLR.**

The performance bond is not strictly a liquidated sum. It is a conditional undertaking by the party posting the bond that in the event of the secured obligation not being performed to the satisfaction of the client, then liability may attach. Looking at the defence filed by the appellant, several triable issues emerge. It cannot be said by any standard that, that defence was a sham or incapable of proceeding to trial.

With respect, the respondent was not entitled to summary judgment and the appellant ought to have been given an opportunity to have its day in court. This appeal succeeds and therefore the ruling of the lower court is hereby set aside in its entirety. The lower court file shall be returned for trial before another magistrate of competent jurisdiction.

Considering the age of this matter, priority should be accorded. The appellant is entitled to the costs of this appeal.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE