



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL SUIT NO. 209 OF 2010

KENYA RAILWAYS CORPORATION.....PLAINTIFF

-VERSUS-

DEVELOPMENT BANK OF KENYA.....DEFENDANT

AND

ERDEMANN PROPERTY LIMITED.....1ST INTERESTED PARTY

KENYA RAILWAYS STAFF RETIREMENT SCHEME.....2ND INTERESTED PARTY

RULING

PLEADINGS

By an Application dated 28th November 2011 and filed on 30th November 2011, the 1st Interested Party/Applicant sought from this Court for orders that:-

- 1. Erdemann Property Limited and Kenya Railways Staff Retirement Scheme be enjoined in this suit.***
- 2. The costs of this application be met by the Defendant.***

The Application is supported by the Affidavit of **Ze Yun Yang** dated 28th November 2011 and is based on the ground that the presence of the 1st and 2nd Interested parties is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions in this suit. Also, it is in the interest of justice on grounds to be adduced at the hearing of the application.

The Plaintiff filed grounds of opposition on 22nd December 2011 on grounds that the applicant lacked grounds to enjoin the 2nd Interested Party. The Plaintiff deponed that it had no cause of action against the intended interested parties. The Plaintiff confirmed its claim against the Defendant is one of bank guarantee which prohibits the instant application.

On 16th January 2012, the Plaintiff filed Replying affidavit and set out the chronology of events that culminated to the instant claim against the Defendant as follows;

The Plaintiff on its own behalf and on behalf of the 2nd Interested Party invited tenders under **Tender No. KRC/PLM/59/08** for the lease of three properties namely **L.R No. 209/11379** registered in the name of the Plaintiff and **L.R No. 209/11953** and **L.R No. 209/9760** both registered in the name of the 2nd Interested Party.

The tender document required a tenderer to submit alongside their documents, a tender security of **2%** of the stand premium and annual rent bid. Further, a banker's cheque or bank guarantee in favour of the Plaintiff for the equivalent of **10%** of the total amount of their bid which would act as a deposit in the event of the award. Intended 1st Interested Party; Erdemann Property Limited participated in the tender and submitted bank guarantees dated 8th July 2009 for **50 Million** and **250 Million** which were provided for by the Defendant. It was a further fundamental term that the bank shall unconditionally guarantee as a primary obligation and not merely as a surety, the sums due under each guarantee document and shall pay the sums due to the Appellant on first demand without raising any objection.

On 30th July 2009, the Plaintiff issued a letter of notification of award to the Applicant and in a response letter dated 3rd August 2009, the Applicant accepted the award with a caveat that the acceptance was subject to the conditions stipulated in its bid document. By a letter dated 10th August 2009, the Plaintiff through its Managing Director, acknowledged receipt of the letter dated 3rd August 2009, noted the content thereof and invited the Applicant to contract negotiations.

An introductory meeting was held on 26th August 2009 after which the **C.E.O of Kenya Railways Staff Retirement Benefit Scheme (hereinafter referred to as “KRSRBS”)** invited **Erdemann Property Limited** to a property sale negotiation meeting on 17th September 2009.

On 23rd October 2009, the Kenya Railways Corporation (**hereinafter referred to as “KRC”**) forwarded to Erdemann Property Limited a form of contract for execution. By a letter dated 26th October 2009, Erdemann Property Limited’s advocates returned the form of contract unexecuted and forwarded an executed form of agreement to **KRSRBS**.

The 1st Interested Party having refused to sign the contract, the Plaintiff by a letter dated 30th October 2009, notified the Defendant that the 1st Interested Party had refused to execute the contract and demanded for transfer for the funds held under the two guarantees to the Plaintiff’s bank account.

On 30th October 2009, Erdemann Property Limited received from its bankers a copy of a demand notice issued by **KRC** to Erdemann Property Limited’s bankers requiring payment of **Kshs. 300 Million**. By a letter dated 4th November 2009, Erdemann Property Limited wrote to its bankers seeking assurance that **KRC’s** demand would not be complied with.

By a letter dated 12th November 2009, Erdemann Property Limited’s advocates forwarded to **KRC** an executed amended contract after attempting to resolve the matter in a meeting held on 10th November 2009. **KRC** did not execute the amended contract and remained silent.

By a letter dated 16th November 2009, Erdemann Property Limited’s bankers responded to the demand notice issued by **KRC** stating that the negotiations had been finalized. However, on 24th November 2009, **KRC** issued another demand notice to Erdemann Property Limited calling up the bank guarantees.

Erdemann Property Limited disallowed its bankers from complying with the demand notice stating that the demands were issued with an intention to defraud them as **KRC** had not complied with the conditions that **KRC** accepted in its bid document.

Following the refusal to comply with the demand notices, **KRC** filed a Plaint dated 31st March 2010 seeking enforcement of the bank guarantees against Development Bank of Kenya Limited (**hereinafter referred to as “The Defendant”**) for the:-

- a) Sum owed under bank guarantee No. GDBK/2009/0666 dated 8th July 2009 for Kshs. 50 Million issued by the Defendant as tender security; and**
- b) Kshs. 265 Million due under bank guarantee No. GDBK/2009/067 dated 8th July 2009 issued by the Defendant as tender deposit.**

The bank guarantees issued by the Defendant were issued on behalf of the 1st Interested Party who is a customer of the Defendant. It is in view of this, that the 1st Interested Party filed this Application.

On 25th February 2019 parties through Counsel agreed to rely on filed written submissions with regard to the Application. The defendant waived right to file submissions but through Counsel supported the instant application.

APPLICANT/ 1ST INTERESTED PARTY’S CASE

The Applicant filed its Submissions dated 15th January 2019 and filed on 16th January 2019 in support of the said Application.

The Applicant submitted that it was necessary for the 1st and 2nd interested parties to be enjoined in the suit as there are questions before this court that cannot be properly and effectually determined in their absence. The Applicant relied on **Order 1 Rule 10 (2) of the Civil Procedure Rules** which provides for a party to be enjoined in a suit as a necessary party. It states:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

The above provision was reinforced in the case of **Lucas Kabobia Njuguna vs Consolata Bank of Kenya Ltd [2005] eKLR** where it was held:

“A plain reading of this sub rule shows that the only party who can be joined whether as Plaintiff or Defendant is one who

ought to have been joined it is also clear that a party can be joined if his presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit”

The Applicant further submitted that the Plaintiff’s cause of action is that the Applicant declined to sign the tender contract and such refusal amounted to an express breach of the terms of the tender documents, which therefore entitled the Plaintiff to the 2% tender security and 10% tender deposit. Whereas; the Plaintiff’s cause of action is premised on the Applicant’s refusal to sign tender contract; the Applicant contends that the tender bid submitted by the plaintiff through the letter dated 9th July 2009 contained conditions which deviated from the tender requirements contemplated in the tender document. The Plaintiff however, accepted the bid inclusive of those conditions therefore not compel the Applicant to sign a contract that did not address the said conditions.

The Applicant submitted that the crucial question for this court to determine is which party is liable for breach of contract in non-execution of the contract. This question cannot be determined in the absence of the Applicant and 2nd Interested Party as they were integral parties in the tender process proceedings which is the subject matter of the suit from which the bank guarantees emanated.

The Applicant relied on the case of **Benson Mwangi Wangai v Ibrahim Ndwiqa 7 Another [2005] eKLR** where the court held:

“From all the pleadings on record and in various documents produced by both the applicant and the respondent in this matter and other related matters and especially the leave in respect of the suit premises, it is apparent that Ibress Motor Agencies Ltd. was an integral party thereto.”

The Applicant asked the Court to consider that should the Plaintiff’s claim against the Defendant succeed, the ultimate liability arising from such a decision, would fall on the Applicant who would be condemned without an opportunity to be heard which would be contrary to **Article 50 COK 2010**; the right to fair hearing and the principles of natural justice.

The Applicant further submitted that the Plaintiff’s opposition to the Application is premised on the notion that the suit is based on bank guarantees to which the Defendant is irrevocably liable. The Applicant opposed this assertion because the contractual and legal nature of the bank guarantees is in contention and the same cannot be determined in the absence of the Applicant and the 2nd Interested Party.

It was the Applicant’s submissions that the Applicant and the 2nd Interested Party ought to have been joined to these proceedings at the time of the institution of the suit and they relied on the case of **Lucas Kabobia Njuguna vs Consolata Bank of Kenya Ltd [2005] eKLR** where it was held:

“The Applicant is alleged to be a purchaser of the suit premises. He alleges that he purchased the suit premises even before this suit was instituted. Any orders that may ultimately be made in this suit will obviously affect the Applicant. I have no doubt in my mind that the Applicant ought to have been joined to these proceedings at the time of institution of the suit. As a purchaser, his interest is directly in conflict with the Plaintiff’s interest”

RESPONDENT/ PLAINTIFF’S CASE

The Plaintiff filed its Submissions dated 5th February 2019 and filed on 6th February 2019, in response to the 1st Interested Party’s Application dated 28th November 2018.

The Plaintiff submitted that joinder of an interested party is governed by **Order 1 Rule 10 (2) of the Civil Procedure Rules** and relied on Black’s Law Dictionary 9th Edition which defines “interested party” as ***a party who has a recognizable stake (and therefore standing) in the matter.***

The Plaintiff also relied on the case of **Joseph Njau Kingori v Robert Maina Chege & 3 Others[2002] eKLR** which set out the guiding principles for a party to be enjoined as an interested party as:

- 1. The proposed interested party must be a necessary party and a proper party;***
- 2. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff;***
- 3. The ultimate order or decree cannot be enforced without his presence in the matter;***
- 4. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.***

The Plaintiff further relied on the case of **Werrot and Company Ltd and Others vs Andrew Douglas Gregory and Others, Nairobi (Milimani) High Court Civil Case No. 2363 of 1998 [1998] LLR 2848** which held:

“For determining the question whom is a necessary party there are two tests:

- (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question and***
- (ii) (ii) it should not be possible to pass an effective decree in the absence of such a party.”***

On whether the 1st Interested Party should be enjoined in this case, the Plaintiff submitted that in the case of *Pioneer Holdings (Africa) Ltd vs Intra Africa Assurance Co. Ltd [2016] eKLR*, the judge relied on the decision in *Transafrica Assurance Co. Ltd v Cimbria (EA) Ltd [2002] 2 EA 627 (CAU)* where it was held:

“A bank or institution giving a performance bond is therefore bound to honour it in accordance with the terms of the bond if it appears the papers are in order regardless of any dispute between the buyer and the seller arising from the contract in respect of which the bond was given.”

The Plaintiff further relied on the case of *Kenindia Assurance Company Limited vs First National Finance Bank Limited* which relied on the case of *Edward Owen Engineering Ltd v. Barclays Bank International Ltd (1978) 1 ALL ER. 976* where it was held that:

“All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the bank has notice.”

It was therefore the Plaintiff's submissions that the 1st Interested Party is not a necessary party in these proceedings because:

- a) *The Plaintiff has not raised any cause of action against the 1st Interested party;*
- b) *The issue for determination is whether the Defendant should pay to the Plaintiff the amounts guaranteed; and*
- c) *There is no relief sought against the 1st Interested Party and it is possible to pass an effective decree in the absence of the 1st Interested Party*

The 1st proposed interested party participated in the said tender and submitted bank guarantees; one for Ksh 50,000,000/- and the other was for Ksh 250,000,000/-.The guarantees were issued by the Defendant Bank

The 1st Proposed interested party was declared as the successful bidder but did not execute the contract and to date failed to pay the required tender deposit.

The refusal of 1st interested party signing the contract was deemed as breach of terms of tender documents, a breach that entailed the Plaintiff to forfeit the tender security and tender deposit.

The plaintiff wrote to the defendant bank to transfer funds held in 2 guarantees following breach of tender terms by 1st interested party by refusing to sign the contract. The defendant bank declined to transfer funds thereby breaching the bank guarantee. The 1st interested party ought not to be joined as the Plaintiff's claim is against the defendant bank for realization of the guarantee.

The Plaintiff submitted that the 2nd Interested Party is not a necessary party in the proceedings because:

- a) *KRC was acting on its own behalf and on behalf of its employees' retirement benefit scheme;*
- b) *There is no relief sought against the 2nd Interested Party and it is possible to pass an effective decree in the absence of the 2nd Interested Party;*
- c) *The 1st Interested Party has no authority to seek to enjoin the 2nd interested Party; and*
- d) *The 2nd Interested Party has not sought to be enjoined in this suit neither has there been any evidence adduced by the 1st Interested party indicating its intention to be enjoined.*

It was therefore, their submission that the 2nd Interested Party has no identifiable stake in the dispute because if the decree were to be passed against the Defendant, the benefits of the decree automatically fall on the Plaintiff and no input from any other party would satisfy the same.

DETERMINATION

Following the submissions by the parties, the issue to be determined by the Court is whether the 1st and 2nd Interested Parties may be enjoined in this suit.

Joinder of an interested party is governed by **Order 1 Rule 10 (2) of the Civil Procedure Rules** as highlighted above, but in joining a party to the suit there are conditions to be satisfied. **The guiding principles of enjoining an interested party were set out in the case of Joseph Njau Kingori v Robert Maina Chege & 3 Others[2002] eKLR** as stipulated above. Are the 1st and 2nd interested parties necessary and proper parties to the suit? Is their presence as parties to this suit crucial in enabling the Trial Court effectively and completely adjudicate upon and settle all questions involved in the suit. Can the ultimate order or decree be enforced without these parties presence in proceedings

that culminate to the said order/decreed? To answer these questions and determine the issue The Court shall consider specific circumstances of this case.

Principles of Commercial Law by K.I Laibuta on Guarantee and Indemnity Pg 228 defines and outlines types of guarantee and enforcement procedures as follows;

“A guarantee is a special promise or undertaking constituted by a collateral agreement in which the guarantor is held liable for the debt, default or miscarriage of the principal debtor, who is primarily liable for the subject debt. There are various types of guarantees; payment guarantee, advance payment guarantee, performance bond, tender guarantee, credit guarantee and customs guarantee. Each type has specific processes of enforcement apart from general enforcement of guarantees.”

A bank guarantee is a payment guarantee is generally issued by the bank on behalf of a client securing payment to a 3rd Party if/when the client fails to fulfill a contractual commitment. In this case, the Tender guarantee is an obligatory condition to participate in tender process.

The obligation of a guarantor arises upon default as was held in ***Ebony Development Co. Ltd v Standard Chartered Bank Ltd*** the court found that:

“...The security of charge was a guarantee. The obligation of a guarantor is clear. It becomes liable upon default by the principal debtor. The charge concerning this matter is the second charge updating the indebtedness of the borrower. It is not the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum...”

Admittedly, where a borrower defaults to service the debt due and owing, the guarantee in form of the charge maybe called in for sale to realize the debt upon requisite notice. A guarantor's contract is an independent one of his own; he cannot, therefore, be joined in the same suit with his principal. This is because different legal instruments with different legal obligations govern both the guarantor and principal debtor.

However, in the instant case, the tender guarantee was/is in form of an obligatory condition to participate in the tender offered by the Plaintiff to various bidders who included the 1st interested party; Erdemann Property Limited. The 1st interested party was the successful bidder. Both Plaintiff and 1st interested party concede that the contract was not signed but each party attributes different reasons for non-compliance. The Plaintiff claims that the refusal by 1st interested party to sign the contract amounted to breach of contract and necessitated enforcement of the guarantee by 1st interested party held by the defendant bank. The 1st interested party on the other hand claims that they refused to sign the contract as the terms in the said contract were varied from the tender terms. The Plaintiff's claim shall be determined at trial; at this stage is to determine whether in light of the outlined circumstances, the interested parties ought to be joined to the suit.

Plaintiff and 1st interested party are the contracting parties that gave rise to present circumstances. They have a looming dispute on whether, there was/is in place a valid contract; if so what were/are terms of the guarantee. The dispute for trial shall entail whether a contract capable of enforcement by parties and/or Court was concluded by contracting parties. The evidence the Court shall require to determine this question is within the possession of both contracting parties.

In a case of similar circumstances; ***Mehta Electricals Limited vs I& M Bank LTD & Anor eKLR*** the dispute was whether a guarantee could be enforced due to breach by the Plaintiff. The Court found;

“It is trite law that a guarantee can only be recalled on the basis of its terms, The default that triggers the recall must be such as prescribed under the guarantee.”

To confirm this position, the contracting parties shall tender evidence during trial to establish the basis/default for call up of the guarantee by Plaintiff against the Defendant bank. The situation then demands that the 1st interested party as a contracting party should be part of these proceedings for the Trial Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

In the case of ***KenIndia Assurance Company Limited vs First National Finance Bank Limited(2008) eKLR*** the Court observed;

“...in the nature of a covenant by the Appellant (the Insurance Company) to pay upon the happening of a particular event. It is a form of security guaranteeing payment by 3rd Party. In such cases the most important factor to consider before liability can attach is whether there has been default.”

The suit entails enforceability of the guarantee by plaintiff against the Defendant. To be enforceable, the guarantee must be the main object of the transaction of which it forms a part, as opposed to a mere incident in a larger transaction. In that case the object of the guarantee and of the transaction from which the primary liability guarantee arises must also be lawful.

The underlying contract ought to be established first, then the terms of guarantee; whether it was/is a conditional or general guarantee established and if there was default to necessitate enforcement of the guarantee by Plaintiff against the Defendant Bank. To prove the underlying contract the 1st interested party as one of the contracting parties must be party to these proceedings. The defendant deposed that upon receipt of Plaintiff's notice to enforce the guarantee, and notified their instructing client 1st interested party who expressly curtailed them from compliance. This act is /will be one of the issues at trial and hence reinforces the position that the 1st interested party ought to be joined to the proceedings.

With regard to the 2nd interested party; Kenya Railways Staff Retirement Benefits Scheme; it is deposed and not contested that the Plaintiff, Kenya Railways Corporation invited bidders to lease suit properties **L.R. No 209/11379; L.R 209/11853 & L.R.8760** all situated on Haile Selassie Avenue on its own behalf and on behalf of its employees, Kenya Railways Retirement Scheme. It was/is an express term of the tender document that the Plaintiff acted on the 2nd interested party's behalf too.

There is no demonstration that the 2nd interested party is a necessary and proper party to be joined to these proceedings, it is not established as a contracting party, no relief is sought by the 2nd interested party and no claim is established against the 2nd interested party. It was not a contracting party. Finally, the 2nd interested party has not /did not apply by itself to be joined to the proceedings and the 1st interested party had/has no locus to join the 2nd interested party. This Court finds that since the 2nd interested party is fully represented by Plaintiff, there is no legal basis nor evidence adduced at this stage to establish that the 2nd interested party being joined will enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

That being said, inspite of the conditions set out in ***Joseph Njau Kingori v Robert Maina Chege & 3 Others [2002] eKLR; supra*** this Court finds that from the facts considered above; the 1st interested party is joined to these proceedings as a necessary and proper party to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

The 2nd interested party is not a necessary and proper party as its represented by the Plaintiff Kenya Railways Corporation.

DISPOSITION

- 1. The application filed on 28th November 2011 is partly upheld and partly dismissed in the following terms;**
- 2. The 1st interested party Erdemann Property Limited is hereby joined as party to these proceedings;**
- 3. 2nd interested party Kenya Railways Staff Retirement Benefits Scheme is not to be joined to these proceedings as they are represented by the Plaintiff Kenya Railways Corporation;**
- 4. Each party to bear own costs;**
- 5. The matter shall be processed in the normal manner through DR Commercial Division of the High Court before setting the same for hearing.**

DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS 27th MAY 2019.

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. ARERI HOLDING BRIEF MUTURI FOR THE PLAINTIFF

MS NDUNGU HOLDING BRIEF KINGARA FOR DEFENDANT

MS AWOUR FOR GITAU FOR 1ST INTERESTED PARTY

COURT ASSISTANT- JASMINE