



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 55 OF 2017**

**MEHTA ELECTRICALS LIMITED.....PLAINTIFF**

**- VERSUS -**

**I & M BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**SYNOHYDRO CORPORATION LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before me was brought by the plaintiff, seeking a temporary prohibitive injunction to restrain the 1<sup>st</sup> Defendant from making payment to the 2<sup>nd</sup> Defendant, arising from a Demand issued on 31<sup>st</sup> January 2017.
2. The 2<sup>nd</sup> defendant, **SYNOHYDRO CORPORATION LIMITED** was awarded a contract by the **KENYA AIRPORTS AUTHORITY** for services which were to be provided at the Jomo Kenyatta International Airport, Nairobi. The said services included;
  - a) **Enhancement of the Runway Capacity;**
  - b) **Enhancement of Instrument Landing System;**
  - c) **Upgrade and Rehabilitation of Aircraft Pavements; and**
  - d) **Installation of Aeronautical Ground Lighting for runways and taxiways.**
3. It is common ground that 2<sup>nd</sup> defendant awarded a sub-contract to the plaintiff, (**MEHTA ELECTRICALS LIMITED**), for the Installation of Aeronautical Ground Lighting for runways and taxiways, and for installation of Metrological Equipment.
4. Pursuant to clause 7 of the contract, the plaintiff was entitled to an Advance Payment. However, the plaintiff could only receive any such advance payment after the plaintiff had provided a Guarantee in respect to such payment.
5. The Advance Payment Guarantee would be given by a reputable bank, who would give an undertaking to pay to the 2<sup>nd</sup> defendant, the sums which had been advanced to the plaintiff.

6. In this instance, the **INVESTMENTS & MORTGAGES BANK LIMITED** issued two Guarantees to **SYNOHYDRO CORPORATION**, for Kshs. 18,746,991/40, and U.S.D 892,089.41, respectively.

7. After receipt of the said guarantees, **SYNOHYDRO CORPORATION** granted to **MEHTA ELECTRICALS LIMITED**, the money whose value was cited on the face of the guarantees.

8. According to the 2<sup>nd</sup> defendant, the reason why it paid the advance payment to the plaintiff was so that the plaintiff would be ready to immediately carry out the work assigned to it.

9. In the Replying Affidavit sworn by **YIN FANGXIANG**, who is the Assistant Manager of the 2<sup>nd</sup> defendant it is stated as follows;

**“...if the plaintiff utilizes the advance payment for any other purpose other than carrying out the subcontract works, the 2<sup>nd</sup> Defendant was entitled to demand that the 1<sup>st</sup> Defendant liquidate the guarantee and pay the money secured to the 2<sup>nd</sup> Defendant”.**

10. At paragraph 11 of its written submissions, the 2<sup>nd</sup> defendant reiterated that position, in the following words;

**“The plaintiff obtained the guarantees and was given the advance payment. It was a term of the guarantee that should the plaintiff apply the said money to any use other than carrying out the subcontracted works, then the 2<sup>nd</sup> Defendant would issue a demand requiring the bank that issued the guarantee to pay the money and the 2<sup>nd</sup> Defendant would pay”.**

11. It is common ground that the Kenya Airports Authority had not yet given its instructions which could then trigger the commencement of the works which the plaintiff is supposed to undertake.

12. It would appear that the Employer was faced with financial constraints, and that therefore, it was not certain when the plaintiff may be called upon to perform its part of the subcontract.

13. In the circumstances, the 2<sup>nd</sup> defendant expressed the view that it was not prudent for the plaintiff to continue holding onto the advance payment, as the money would simply be lying idle.

14. As far as the 2<sup>nd</sup> defendant was concerned, it was ready and able to hand back to the plaintiff, the advance payment, as soon as the Employer gave instructions for the performance of the subcontract.

15. In any event, the 2<sup>nd</sup> defendant pointed out, the guarantees in issue did not have any arbitration clause.

16. Furthermore, the 2<sup>nd</sup> defendant holds the view that the guarantees were “*Demand Guarantees*”, as opposed to “*Conditional Guarantees*”.

17. Thirdly, the 2<sup>nd</sup> defendant emphasized that the Guarantees were separate and distinct contracts between the 2 defendants; whilst the subcontract was between the plaintiff and the 2<sup>nd</sup> defendant.

18. It is common ground that the guarantees were autonomous.

19. However, the parties are in complete disagreement on the question as to whether the guarantees were or were not conditional.

20. There are 2 broad-based categories of guarantees, being either “**On-Demand Guarantees**” or “**Conditional Guarantees**”.

21. The category into which any guarantee fits into is determinable depending on the terms contained within it.

22. For example, a guarantee can stipulate that it is payable “*on first demand*”. Such a guarantee would become payable immediately after the first demand has been made. A guarantee of that kind is called an “*On-Demand Guarantee*”.

23. In contract, a guarantee which becomes payable only when specified conditions have been met is called a “*Conditional Guarantee*”.

24. The plaintiff insists that the guarantees in issue herein were conditional, because;

**“The demand must be in writing accompanied by a written statement stating that the subcontractor is in breach of its obligation under the subcontract, because the subcontractor used the advance payment for purposes other than the costs of mobilization in respect of the works”.**

25. The plaintiff concedes that the demand was in writing. However, the said demand was not accompanied by any statement indicating or setting out the breach of the subcontract, which had been undertaken by the plaintiff.

26. In any event, the plaintiff insists that it was not in breach of the contract.

27. The plaintiff then proceeded to give particulars of the manner in which it went about doing the mobilization for the works it was supposed to perform.

28. On the one hand, the plaintiff submits that the guarantees cannot be recalled because it was not in breach of the subcontract; whilst on the other hand, the plaintiff makes the point that;

**“35. 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”.**

29. Therefore, if the guarantee specified that it could only be called up when the plaintiff had defaulted in the performance of the subcontract, it would have been incumbent upon the 2<sup>nd</sup> defendant to demonstrate such default.

30. In the case of **KENINDIA ASSURANCE COMPANY LIMITED Vs FIRST NATIONAL FINANCE BANK LIMITED (2008) eKLR** the Court of Appeal handled a case in which the Performance Bond was;

**“...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 a third party. In such cases the most important factor to consider before liability can attach is whether there has been default”.**

31. In the circumstances, it was held that the Demand Notice could only issue after default was established.

32. In the case of **LAGOON DEVELOPMENT LIMITED Vs BEIJING INDUSTRIAL DESIGNING & RESEARCH INSTITUTE, Hccc No. 486 of 2014**, Gikonyo J. said;

**“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”.**

33. In this case, the plaintiff has not shown that the guarantees in issue had stipulated that the said guarantees could only be called up if there was a default by the plaintiff.

34. Secondly, the guarantees did not specify that the 2<sup>nd</sup> defendant had to set out the particulars of the

alleged breach of the subcontract.

35. Therefore, I am unable to share the plaintiff's view that;

**“Without asserting whether the plaintiff is in breach of the Subcontract, the 2<sup>nd</sup> Defendant cannot validly and lawfully demand for the recall of the APGs”.**

36. That view is not supported by the express terms of the guarantees in issue.

37. If the parties to the guarantee had intended that the said guarantee could only be recalled when there had been a default on the part of the plaintiff, they should have said so expressly.

38. As the guarantee did not specify that there had to be a default or a breach, on the plaintiff's part, before the guarantee could be called up, the court cannot read such a requirement into the guarantee.

39. The plaintiff submitted that an Arbitration Agreement exists between the parties.

40. First, it is clear that there is no contract which had been signed by all the three parties herein. The subcontract is between the Plaintiff and Synohydro Corporation Limited; and the bank is not a party to it.

41. The guarantee is between the Bank and Synohydro Corporation Limited; and the plaintiff is not a party to it.

42. The plaintiff has failed to demonstrate that the guarantee contained an Arbitration Agreement.

43. Upon my perusal of the subcontract, I found an Arbitration Agreement, but the guarantee does not contain a similar agreement. Therefore, on a prima facie basis, I find that the plaintiff has not made out a case that would mandate the court to refer to arbitration, any dispute between the bank and the 2<sup>nd</sup> defendant.

44. Indeed, it does appear that between the 2 defendants there was no dispute.

45. Logically, it is arguable that the 2<sup>nd</sup> defendant ought not to be allowed to assert that the plaintiff was in breach of the subcontract, if there was no breach.

46. But as can be seen from the following words, which the plaintiff cited from the book, **“LAW of GUARANTEES”, by B.C. MITRA;**

**“As to the fulfillment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken at its face value unless the contractor can establish that the beneficiary's stand is motivated by fraud, misrepresentation, deliberate suppression of material facts or the like, of which would give rise to special equities in favour of the contractor. In absence of such elements the bank guarantee has to be honoured by the bank and the beneficiary cannot be restrained from enforcement”.**

47. On the strength of that pronouncement, this court reiterates that it cannot read into the guarantees, something which is not expressly stated within the said guarantees. I am enjoined to take the statement of the beneficiary, at its face value. Therefore, if the Demand Notice were to state that the subcontractor was in breach of its obligations under the subcontract, because the subcontractor had used the advance payment for purposes other than as provided for in the subcontract, the court would not be entitled to inquire into the propriety of such statement.

48. In this case, I have not found any fraud, misrepresentation, deliberate suppression of material facts or any other reason which could give rise to special equities in favour of the plaintiff.

49. I find that the subcontract is not being performed. In the circumstances, the plaintiff is simply retaining money which it had received from the 2<sup>nd</sup> defendant.

50. From the letter dated 20<sup>th</sup> January 2016, the plaintiff had informed the 2<sup>nd</sup> defendant thus;

**“We have employed as little resources as possible in the project in order to minimize any loss and costs incurred while waiting for the Employer’s decision on the scope of A G L works. With the effect of the losses minimized we will wait for the Employer’s decision of the A G L works before deciding on whether or not to terminate the subcontract, which at the moment can still be executed”.**

51. On a *prima facie* basis therefore, the plaintiff is deemed to have utilized minimal resources on the subject matter. That means that, by its own admission, the plaintiff is still holding the bulk of the Advance Payment.

52. I have found no reason, in law or in fact, that could justify the continued retention of the bulk of the Advance Payment, when the subcontract was not being performed.

53. I also find that the plaintiff has failed to satisfy me that if the bank paid to the 2<sup>nd</sup> defendant, the money which was the subject matter of the guarantees, that would cause the plaintiff to suffer severe or irreparable loss.

54. In the result, there is no basis upon which the court can grant an injunction to restrain the 2<sup>nd</sup> defendant from calling up the guarantees, until the dispute is resolved through arbitration; that is because the guarantees do not have any arbitration agreements.

55. Nonetheless, the 2<sup>nd</sup> defendant has to give an appropriate Demand Notice to the plaintiff, before it can thereafter call up the guarantees.

56. The application dated 6<sup>th</sup> February 2017 is dismissed. The plaintiff shall pay costs to the defendants.

**DATED, SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of October 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*Khaseke for the Plaintiff*

*Mbaluto for the 1<sup>st</sup> Defendant*

*Githumbi for the 2<sup>nd</sup> Defendant*

*Collins Odhiambo – Court clerk.*