



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO. 545 OF 2015

EPCO BUILDERS LIMITED.....PLAINTIFF

VERSUS

MIDDLE EAST BANK KENYA LIMITED.....DEFENDANT

AND

NAIROBI GLASS AND MOTOR HOUSE LIMITED.....INTENDED 3rdPARTY

RULING

1. The Application before the Court is brought by the Defendant in this matter. The Plaintiff was issued on 2nd November 2015. It is brought by EpcO Builders Ltd. The Defendant is Middle East Bank Kenya Limited. The Defendant is being sued pursuant to an indemnity alternatively a guarantee.
2. The Defendant has brought the Application to join a Third Party. The Defendant's case is that the guarantee was given to the intended Third Party and not the Plaintiff. In addition, the Defendant's case is that the Intended Third Party owes it a cross-undertaking.
3. The background to the Suit is that on 20th June 2013, the Plaintiff entered into a Building of Works Agreement with Nairobi Glass and Motor House (the Intended Third Party). The Intended Third Party was engaged by the Plaintiff to carry out sub-contract works. It was a term of the agreement that the sub-contractor would provide a surety who was an established bank or insurance company. The defendant was such a bank. It is the Plaintiff's pleaded case that the surety would be bound to the Plaintiff for the due performance of the liabilities and obligations placed upon the sub-contractor in the agreement until the certified date of completion. It is alleged by the Plaintiff that the sub-contractor was paid on 26th August 2012, in advance, the sum of KShs 18,565,166.40 (Eighteen million five hundred and sixty five thousand one hundred and sixty six shillings and forty cents only). That is the sum demanded by the Plaintiff. The sub-contractor is alleged to have defaulted in its obligations under the alleged agreement.
4. However, Paragraph 9 of the Plaintiff states, "*The Plaintiff claims from the Defendant Kenya Shillings as pursuant to a Guarantee dated 23rd July 2013*". Earlier at paragraph 4 it says, the relevant agreement had been entered into on 20th June 2013. A copy of the "Advance Payment Guarantee" dated 23rd July 2013 is included in the Bundle of Documents (which is not paginated) as document No 4. Document No 5 of that List is described as "*Copy of EpcO's Cheque No 019304 dated 23rd August 2013*". That cheque is dated as pleaded on 23rd August 2013. It is made payable to "yourselves". It is made out in the sum of

KShs 18,085,032/=. Photocopied on the same page is an annotation signed by persons who are not named or given any designation asking them to pay the same sum to the alleged account of the Intended Third Party. That page also stamped with a stamp from that Diamond Trust Bank which says "TRANSFER" and is dated 26th August 2013. Over the page is a document that is described as "swift message confirming payment by RTGS". The amount alleged to have been paid is less than the amount contained in the guarantee letter.

5. The Defendant has filed a Defence. It admits the Guarantee but states that Guarantee was revocable by the Bank and/or the Sub-Contractor. It describes the Guarantee as an "advance payment guarantee" and not an all obligations guarantee. The Defence is dated 10th December 2015 and filed on 11th December 2015.

6. A month later, on 19th January 2016 the Defendant filed Chambers Summons seeking the joinder of the sub-contractor to the Building Contract as a third party. On its face of it appears that the Chambers Summons is brought under **Order 1 Rule 15(1)(a)** of the **Civil Procedure Rules 2010**. It is entitled "**EX PARTE**". In the Application, the Defendant seeks "for Orders that the Defendant be given leave to issue Third Party Notice against Nairobi Glass and Motor House AND the costs of this application be provided for. The Application is made on the "ground that the proposed Third Party has agreed to indemnify the Defendant in respect of any liability arising from the guarantee sued upon in this action.". The Application is Supported by the Affidavit of Dhiren Rana. The Deponent is the Managing Director of the Defendant. At paragraph 3 of the Affidavit, he says "The Guarantee referred to in paragraph 5 of the Plaint was issued by the Defendant at the request of Nairobi Glass & Motor House ("the Third Party") and the Third Party confirmed its undertaking to indemnify the Defendant in the event the Defendant became liable under the said Guarantee. Exhibit A to the Affidavit Exhibits a copy of said "Counter Indemnity" on the Letterhead of the Intended Third Party.

7. The Issues that therefore seem to arise for determination in the suit are broadly:

- (a) Whether there was a valid and subsisting guarantee and/or warranty and/or performance bond
- (b) The amount of that guarantee
- (c) Whether there was an advance payment to the Intended Third Party, and if so the quantum of that payment;
- (d) Whether there was a valid and subsisting counter indemnity
- (e) Whether the guarantee was conditional, and if so whether those conditions were in existence at the relevant times.

The question to be answered now is whether or not the Intended Third Party needs to be added to ensure a fair trial. The Application is opposed by the Plaintiff/Respondent on two grounds. Firstly, that the guarantee is payable on demand and secondly that the joinder of a Third Party will delay the proceedings and the Defendant is deliberately attempting to delay the proceedings.

8. Order 1, rule 15. Relates to the procedure for Notice to third and subsequent parties . It provides:

15. (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially

the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.

(3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.

(4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions “third party notice” and “third party” shall respectively apply to and include every notice so issued and every person served with such notice.

(5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.

9. While it is correct that **CPR Order 1 Rule 15** provides for an ex parte procedure for an application for joinder. It is also true that if a Court is not satisfied as to the merits of an application, on the face of it, the Courts has various options available to it. One such option is to dismiss the application summarily. However, the Overriding Objective enunciated in Sections **1A and 1B of the Civil Procedure Act Cap 21**, Laws of Kenya provides for a more purposeful and holistic approach to proceedings. With that in mind the Court ordered the Application to be served upon the Respondent and the Intended Third party, who has not participated. The Respondent, who is also the Plaintiff, opposes the Application. In summary, the opposition is based on two main reasons. The first is delay and secondly it relies upon the grounds set out in ***Dunholm Rahisi Stores –v- Barclays Bank of Kenya Ltd & Another [2005] eKLR pp 8 and 9.*** The merits of that argument is based on the specific facts of that case. It relates to Banking Services provided. It is distinguishable with this case in that the existing Parties here are not in a Bank Customer relationship. In that case there was a multiplicity of services provided and the Court decided the guarantee which had been admitted in pleadings could stand alone. That is not the case here.

10. In the case now before the Court, the transaction entered into between the Defendant Bank and the Intended Third Party has two parts. There is the guarantee given by the Bank to the Plaintiff and the counter-guarantee given by the Intended Third Party to the Bank. It is akin to a performance bond. The Plaintiff goes into great depth as to the merits of the suit. Those arguments are premature and are better placed for the trial. Whether or not the guarantee is irrevocable or not, is a question for the trial. The question before the court now is whether the Defendant’s argument that the guarantee and counter guarantee are in fact two parts of the same transaction is sound. The Plaintiff has no first-hand knowledge of the Banker Client relationship.

11. The Intended Third Party was served with the Application and thereby has been afforded an opportunity to respond and “set the record straight. It has failed to participate despite the adjournment granted to ensure service was effected.

12. Given the character of the transaction between the Defendant and the Bank it is clear from the

evidence that the guarantee would not exist without the counter-guarantee. Therefore, there is a presumption that the two form part of the same transaction. The only other party to the agreement has not rebutted that presumption nor answered the evidence put before the Court by the Defendant. It is therefore unchallenged. The proximity between the the alleged payment and the alleged default is also an essential issue to be addressed in finding liability.

13. As to delay, it is inevitable that both the Application and its outcome will cause delay. However, weighing up the relative ills, the Defendant's right to a fair hearing in the most cost effective way, that is, without a multiplicity of proceedings is to have all the issues resolved together.

14. In the circumstances and for the reasons set out above, the Defendants Application is allowed with costs.

15. This Ruling was intended to be delivered on 16th June 2016 but the Judge was on leave. The delay in delivering it is regretted.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Dated 15th June 2016

SIGNED AND DELIVERED AT NAIROBI ON THIS 20th DAY OF JUNE 2016.

In the Presence of :

Isaiah Otieno - Court Clerk

Mr Osiemo - Plaintiff/Respondent

Mr Ochahu HB Mr Nyambu - Defendant/Applicant

No Appearance – Intended Third Party