



**REPUBLIC OF KEEYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL SUIT NO. 134 OF 2014**  
**(FAST TRACK)**

KIKENNI PROPERTIES LIMITED .....PLAINTIFF/APPLICANT

VERSUS

APA INSURANCE LIMITED .....DEFENDANT

AND

MOMBASA SPACE CONTRACTORS LIMITED .....THIRD PARTY

**RULING**

1. The application coming up for consideration is a Notice of Motion dated 9<sup>th</sup> February, 2015 that seeks the following orders:

- (i) That the defendant's defence be struck out;
- (ii) Judgment be entered in favour of the plaintiff as prayed in the plaint; and
- (iii) The defendant do pay the costs of the application and the suit.

2. It is anchored on the grounds on the body of the application and the supporting affidavit of Njeri Chege, a Director of the plaintiff company, who was duly authorized to swear the affidavit on its behalf.

3. The respondent filed its grounds of opposition on 9<sup>th</sup> April, 2015 in which it raised the following grounds:-

- (i) The application is fatally defective for abusing the express and mandatory provisions of Order 15 rules 1 and 2 of the Civil Procedure rules;
- (ii) The defence raised herein raises a myriad of triable issues;
- (iii) The defence raises the issue of fraud which at law is a tenable and triable issue;
- (iv) The existence of third party proceedings herein preclude the plaintiff from making the instant application;
- (v) The plaintiff's application is in the circumstances of this case premature; and

(iv) The application as conceived and formulated is bad in law, untenable and the same ought to be struck out.

4. The 3<sup>rd</sup> party filed no response to the application.

#### **APPLICANT'S SUBMISSIONS**

5. Mr. Khagram, Learned Counsel, held brief for the applicant's Advocates on record. He highlighted the applicant's written submissions filed on 19<sup>th</sup> October, 2015. He submitted that the issue the subject matter of the application arises out of a performance bond issued by the respondent to the applicant for construction of a development project. Counsel referred the Court to the affidavit of the deponent, Njeri Chege and annexures thereto, namely, copies of the performance bond, a letter from the Architect to the Contractor as well as other letters, a document acknowledging breach of contract by the contractor and a letter informing the contractor of the intention to terminate the contract. Mr. Khagram cited the case of **Edward Owen Engineering Limited vs Barclays Bank International Limited** 1978 QB 159, which established that if the beneficiary seeks payment in accordance with terms of the bond, the bank must pay regardless of how unfair that might be to the account party. He also relied on the decision in **Kenindia Insurance Company Limited vs First National Finance Bank Limited**, Civil Appeal No. 328 of 2002, where the Court cited with approval the case of **Cargil International SA and Another vs Bangladesh Sugar and Food Industries Corp** [1966] ALL ER 563. He submitted that the gist of the said authorities is that performance bonds play an important role in commerce and that the guarantor upon notice of default being given must pay what is due in the performance bond as that is a separate contract between the plaintiff and the defendant.

6. The Court's attention was drawn to the case of **Hands of Hope International vs Mayfair Insurance Company Limited** [2010] eKLR which held that the performance bond is a separate contract between the plaintiff and the defendant. The contractor is not a party to this that bond and is also not a party to this suit, therefore there is no privity of contract with the plaintiff in regard to the performance bond.

7. Mr. Khagram also referred to the decisions in **Transafrica Assurance Co. Ltd vs Cimbria (EA) Ltd, [2002] 2 EA 627 and Kamro Agrovet Limited vs Ceva Sante Animale and Others**, Kisumu HCCC No. 45 of 2008 where the Courts equated performance bonds/guarantees to letters of credit, which are enforceable. The **Kamro Agrovet case** (supra) held that the only exception to that rule was where fraud by one of the parties to the underlying contract had been established and the banks had notice of the fraud.

8. It was submitted that no rebuttal has been made of the fact that there has been a breach of contract and that the defence in this case contains a bare allegation of fraud, with no supporting evidence. Counsel further submitted that the defence was a sham and the matter should not go to full trial as the case will consume a lot of judicial time and parties will incur costs for no good reasons. The Court was urged to allow the application.

#### **RESPONDENT'S SUBMISSIONS**

9. Mr. Busieka, Learned Counsel for the respondent relied on his written submissions, dated 9<sup>th</sup> November, 2015, list of authorities and grounds of opposition filed on 9<sup>th</sup> April, 2015. He submitted that the application is premature. He urged the Court to look at the defence which contains triable issues which they have replicated in their written submissions. It was submitted that a performance bond is a contract of suretyship which is intertwined with the principle of extensiveness. In support of the said assertion, he cited the case of **Moschi vs Lep Air Services Limited** [1973] AC 331. Counsel also referred to the case of **Cargill International Limited vs Bangladesh Sugar and Food Industries Corporation** (1998) 1 WLR 461, where it was held that a Plaintiff has an obligation to account to a defendant or the creditor stands to benefit unlawfully.

10. In reference to the list of documents filed by the 3<sup>rd</sup> party, Mr. Busieka submitted that in the final

project report, the said 3<sup>rd</sup> party states that it performed its contractual obligations and the plaintiff owes it Kshs. 3,328,491.00. He submitted that the liability of the respondent is coextensive to the 3<sup>rd</sup> party and that the respondent owes nothing to the applicant.

11. It was submitted that the contract of the performance bond involves the 3<sup>rd</sup> party and it behoves the applicant to prove that it suffered substantial loss. Counsel relied on the case of **Mercy Karimi Njeru & Another vs Kisima Real Estate Ltd**, HCC 402 of 2014, where the Court observed as follows:-

*“In the instant case the admission by the defendant is not plain obvious and clear to warrant summary judgment being entered against the defendant. This Court enjoys the principle that the right to be heard is a fundamental right that must not be denied to enable the defendant ventilate its position. In my humble view, the defendant should be given an opportunity to defend the suit and claim by the plaintiffs against it. Entering summary judgment against it when the defence is filed and therefore ousting the defendant from the judgement seat contrary to Constitutional imperatives on the right to access to justice as contemplated under article 50 (1) of the Constitution and which right cannot be limited by dint of article 25 of the Constitution, particularly when it is clearly established that the dispute herein can be determined by the application of the law----”*

## **ANALYSIS AND DETERMINATION**

12. The issues that call for determination are:-

- (i) If the applicant’s supporting affidavit complies with the requirements of rule 9 of the Oaths and Statutory Declarations Rules;
- (ii) If the applicant’s/plaintiff’s affidavit and application should be struck out;
- (iii) If the answer to (ii) is no, if the the defence should be struck out; and
- (iv) If the performance bond is enforceable.

13. On issue No. 1, when perusing the annexures to the supporting affidavit sworn by Njeri Chege on 9<sup>th</sup> February, 2015, I noted that the deponent in paragraph 3 of the said affidavit states that *“there is now produced and shown to me the bundle of documents exhibited at pages 1 - 24 forming the exhibit marked as NC1.”*

14. Looking at the annexures, the document bearing the exhibit mark is a copy of the performance bond. The exhibit mark reads as follows:-

*“This is the exhibit marked NC1 referred to the annexed affidavit of **Nick Allen**.” (emphasis mine).*

15. Firstly, it follows that the affidavit of Njeri Chege is not supported by any annexures through which this Court could have obtained crucial evidence. The annexures attached to her affidavit are not hers but Nick Allen’s who has not filed an affidavit in support of the present application. Secondly, even if the exhibit marked NCI bore the correct name of the deponent, this Court notes that only the first document in a series of documents bears the exhibit mark from a Commissioner for Oaths. All the other documents paginated as 2 - 24 are so to say, joy riding on the 1<sup>st</sup> document, as they bear no exhibit marks.

16. Rule 9 of the Oaths and Statutory Declaration Rules requires that annexures to affidavits **should** be sealed and stamped. The rule reads:-

***“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.”(emphasis mine).***

17. In the case of **Fredrick Mwangi Nyaga vs Garam Investments & Another** [2013] eKLR, Havelock J, (as he then was) considered the application of Rule 9 of the Oaths and Statutory Declarations Rules. The Judge in holding that an exhibit annexed to an affidavit which is not marked is for rejection cited with approval a ruling by Hayanga J, (as he then was) in the case of **Abraham Mwangi vs S. O Omboo & Others**, HCCC No. 1511 of 2002 where the Judge held thus:-

*“Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibit marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That marks the affidavit incomplete and hence also rejected...”*

18. Another decision addressing the matter of annexures to affidavits was made by Judge Mutungi in the case of **Solomon Omwega Omache & another vs Zachary O Ayieko & 2 others** [2016] eKLR, where he stated as follows:-

*"Although the point was not taken up by the plaintiffs the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annexures which are neither marked nor sealed with commissioner's stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistants lack of attention and due diligence."*

19. This court in the case of **Juja Coffee Exporters Limited and 3 Others vs Bank of Africa Ltd. & Another**, Mombasa HCC case No. 57 of 2016, struck out an affidavit whose annexures did not comply with the provisions of Rule 9 of the Oaths and Statutory Declarations Rules which are in mandatory terms.

20. Taking into consideration the foregoing legal precedents and the error on the face of annexures filed by the applicant, the only order that commends itself to me is that of striking out all the annexures to the affidavit of Njeri Chege. The said affidavit relies on the said annexures, without them, it is an empty shell which is bereft of life. I therefore strike out the said affidavit as well.

21. The end result of the foregoing is that the application dated 9<sup>th</sup> February, 2015, cannot stand without support and is hereby struck out as well. Costs to the respondent.

**DELIVERED, DATED and SIGNED** in open court at **MOMBASA** on this 18th day of August, 2016.

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Anjarwalla h/b for Walker Kontos Advocates for the applicant

Mr. Ambwere holding brief for Mr. Oloo for the respondent

Rose Echor Court Assistant