REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO 486 OF 2014

LAGOON DEVELOPMENT LIMITED…….PLAINTIFF

VERSUS

BEIJING INDUSTRIAL DESIGNING &

RESEARCH INSTITUTE……..….DEFENDANT

RULING

Introduction

[1] There are two applications dated 30th October 2014 and 12th November 2014, filed by the Plaintiff and Defendant, respectively. On 20th November 2014, this Court gave directions that both applications shall be heard together on 28th November 2014. The reason was that the two applications are the two sides of the same coin. For ease of reference, I will deal with the two applications under the title ‘’The Plaintiff’s Application’’ and The Defendant’s Application’’ and accordingly set out the arguments made in each application.

The Plaintiff’s Application; Prohibitory Injunction

[2] The Plaintiff’s application is the one dated 30th October 2014 which has been expressed to be brought pursuant to Order 40 Rules 1, 2, 3, 4, 10 & 11 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act and all other enabling provisions of the law. The application seeks for *inter alia*;

1. A temporary injunction do issue prohibiting the Defendant whether by its employees, servants or agent or any of them or otherwise howsoever from filing any proceedings in Kenya seeking to stop the payment of the performance guarantee GC0223812005057 issued by the Bank of China, Beijing Branch and seeking any injunctive relief whatsoever under the Agreement and Conditions of Contract for Building and Civil Engineering Works dated 5th March 2012 pending the hearing and determination of the suit; and

2. An order for costs of the application in favour of the Plaintiff.

[3] The application was predicated upon the grounds set forth in the Motion and more specifically:-

a) That the Defendant could not interfere with the performance of the guarantee issued to guarantee for the performance of the contract entered into by the parties, and that the same was governed by the Uniform Rules for Demand Guarantees, ICC Publication No 458. Any such interference with the performance of the guarantee would be against the tenets of international commerce and trade. Estoppel would nonetheless still arise against Defendant for it did not challenge the Final Certificate issued on 17th September 2014.

[4] The application was further supported by the affidavit of Fraso Abbing sworn on 30th October 2014. The affidavit sets out a brief and succinct background of this matter, that, the Bank of China, in compliance with the Agreement and Condition of Contract for Building & Civil Works entered by the parties dated 5th March 2012 (hereinafter referred to as the "contract"), issued an unconditional and irrevocable Advance Payment Guarantee & Performance Guarantee GC0223812005075 on 4th December 2012 that bound it to pay up to a total of USD 422,297.00. This performance guarantee was to act as security for any failure by the Defendant in performing its obligations under the contract. In circumstances leading to the calling up of the performance of the guarantee, the deponent averred that letters had been issued by the Quantity Surveyor on 27th May 2014 and 6th June 2014 in which they issued the Final Account and Valuation, after which the Architect issued the Final Certificate on 17th September 2014 certifying that the Defendant was liable to pay the Plaintiff Kshs 23,658,357.84. The Plaintiff on 3rd October 2014 decided to call up on the performance of the guarantee after the Defendant failed to pay to them the amount stated in the Final Certificate, and after the Architect had in a letter dated 23rd September 2014 informed both parties of the Defendant's outstanding obligations to the Plaintiff.

[5] The Plaintiff deposed further that it was apprehensive that the Defendant would interfere with the performance of the guarantee, as it had previously done by filing **Malindi HCCC No 2 of 2014 Lagoon Development Ltd v Beijing Industrial Designing & Research Institute**, although the suit was discontinued. It was deposed to that since the Final Certificate had neither been challenged, nor the Defendant fulfilled its obligations under the contract, the Bank of China was under an obligation to perform the guarantee irrespective of any dispute between the Plaintiff and the Defendant. Further, they averred that the Defendant could not interfere with the performance of the guarantee by the Bank of China, as there was no basis for the challenge and that any such interference would go against the principles of international trade and commerce. It was also averred that the Defendant had no assets in Kenya that could be attached in satisfaction of the outstanding debt save for the performance guarantee.

[6] In its submissions dated 5th March 2015, the Plaintiff argued that the Defendant having failed to perform its obligations under the contract, or challenge the Final Certificate dated 17th September 2014 within the stipulated time frame, the Defendant was estopped from interfering with the performance of the guarantee. They cited the case of ***NAIROBI GOLF HOTELS (K) LTD vs. LALJI BHIMJI SANGHANI BUILDERS & CONTRACTORS [1997]eKLR*** in which the Court of Appeal stated that the effect of a final certificate in contracts for works of construction was final and payable unless fraud or collusion is established. Therefore, it was the Plaintiff's contention that the Defendant cannot resist payment but to pay the outstanding debt.

The application was opposed

[7] The application was opposed by the Defendant through the affidavit sworn by the Zhao Ping. They urged that the application lacked merit, was an abuse of the process of the Court and did not warrant the granting of an injunction. The Defendant urged two grounds, namely; 1) that the Plaintiff had filed a substantially similar application in **Malindi HCCC No 2 of 2014;**and 2) that the circumstances in which the Plaintiff had approached the Court for equitable relief were less than honest. The Plaintiff failed to disclose to the Court that the termination of the contract was through the machinations of the Plaintiff and its continued inability to meet its obligations under the contract. Further, it was deposed to, that the right of the Plaintiff to enforce the performance guarantee was yet to accrue, as the substantive breach as alleged had not been proved, and that therefore, the calling up of the performance guarantee was premature and unenforceable in the circumstances. Thus, the Plaintiff came to court with unclean hands.

[8] In its submissions dated 27th November 2014, the Defendant beseeched the court to allow the matter to go to trial in line with the case of ***D T DOBIE & CO (K) LTD vs. MUCHINA (1982) KLR 1.*** They also relied on the case of ***R vs. JOKTAN MAYENDE & 3 OTHERS (2012) eKLR***on the Court's mandate of interpretation of Sections 1A and 1B of the Civil Procedure Act vis-à-vis the conduct of the Plaintiff and the circumstances of the instant application, with reference to the ruling delivered by both this Court and the Court of Appeal in **Malindi HCCC No 2 of 2014** and **Civil Appeal No 12 of 2014**.

THE DEFENDANT'S APPLICATION

The Defendant's gravamen

[9] The application by the Defendant is dated 12th November 2014 and is expressed to be brought pursuant to Order 40 Rules 2, 4(1) & 8 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act and Article 159(2) of the Constitution. The specific orders sought are *inter alia*;

1. An order of injunction restraining the Plaintiff, its agents, servants or whomsoever from in any manner calling up for payment and or enforcing the advance payment guarantee number GC0223812005075 and the performance guarantee number GC022381200574 issued to the Plaintiff by the Bank of China, Beijing branch Pending the hearing and determination of this suit.

2. An order directing the Plaintiff to furnish security in the sum of USD 681,009.86 or such portion thereof that may be sufficient to satisfy the decree or order that may be ultimately binding on the Plaintiff in this suit and in the counter claim.

3.Costs of this application to be borne by the Plaintiff.

[10] The application is premised upon the following major ground:-

a) That the purported call-up of the performance of the guarantee by the Plaintiff before proving its claim for breach of contract was premature as the right thereto had not yet accrued. Further, the substantive dispute between the parties on whether either of them had failed in their contractual obligations to the other is yet to be resolved.

[11] Ping Zhao in the affidavit sworn on 11th November 2014 averred that, the exercise of the right to enforce the performance both performance guarantees was subject to breach of contract of which no evidence of breach had been adduced. Further, it was deposed to that the Plaintiff initiated the process of realizing the performance of the guarantee with the Bank of China, before issuing the breach of contract which forms the substratum of the claim. The breach has to be resolved either by way of arbitration or by a Court of competent jurisdiction. The breach has not been so declared and so the calling up of the performance of the guarantee by the Plaintiff was premature and irregular.

[12] In its submissions dated 26th November 2014, the Defendant submitted that the question as to whether either of the parties had defaulted on their contractual obligations was a fact for the trial, and that it would therefore be fair for the Plaintiff to restrained from calling up on the performance of the guarantee until this case is determined. In its further submissions dated 9th February 2015, it was submitted that, before the Defendant could prosecute its application dated 12th November 2012, the Plaintiff obtained partial performance of the performance bond herein by Bank of China, although no evidence had been submitted in support of this allegation. Again, the Plaintiff, on 29.10.2014, had withdrawn the initial Malindi case in order to circumvent the contempt proceedings which had commenced in the said file as well as frustrate the interim order the Defendant had obtained in the initial Malindi case. Then immediately after the discontinuance, the Plaintiff on 30.10.2014 filed another case, i.e. Malindi HCCC NO 2 OF 2014. All these are sheer maneuvers which are indicative of abuse of court process by the Plaintiff.

[13] The Defendant submitted further that, they had satisfied the requirements for attachment before

judgement, since the Plaintiff was in the process of disposing of houses built and being built on LR NO 12889/265 within Kilifi County and the Plaintiff does not have any other known assets in Kenya. The financial status of the Plaintiff is also unclear. In the absence of evidence to the contrary, these activities by the Plaintiff will render execution of any decree against the Plaintiff impossible. Therefore, it has been established that there is no any other assets of the Plaintiff that could be attached in satisfaction of the decree which may be issued against them. Accordingly, it would be imperative of the Court to issue an order for security for costs, or that the monies disbursed to the Plaintiff be deposited in a joint interest earning account. See **International Air Transport Association & Another v Akrim Agencies Ltd & 2 Others**. It was submitted that an injunction should issue against the Plaintiff from calling up for the performance of the reminder and/or balance of the guarantee.

Application was opposed

[14] The application was opposed by the Plaintiff through its Replying affidavit sworn on 25th November 2014. The deponent challenged the authority of the deponent of the affidavit in support of the Defendant's application, and further reiterated that no power of attorney had been issued by the Defendant authoring the deponent to act on its behalf. The Plaintiff repeated the grounds it made in support of its application specifically that the Final Certificate as issued on 17th September 2014 had not been challenged by the Defendant within the time frame stipulated in the contract, and therefore the Defendant could not purport to challenge the performance of the guarantee. Secondly, the Plaintiff submitted that the Defendant could not interfere with the performance of the guarantee as it had breached its duty under the contract, and that furthermore, it had not challenged the Final Certificate issued on 17th September 2014. Further, it was submitted that the Plaintiff's right to seek the performance of the guarantees had accrued and that therefore the Defendant was estopped from making an application in the nature of an injunction. They relied in the cases of **Transafrica Assurance Co Ltd v Cimbria (EA) Ltd [2002] 2 EA 627** and **Kenindia Assurance Co Ltd v First National Bank Ltd [2008] eKLR** to buttress its dispositions.

[15 The Plaintiff further submitted that the Defendant had not particularized or proved its claim for special damages as the claim for USD 681,009.86 was unsupported, fictitious and illusionary. Thus, the Defendant's call for deposit of security for costs lacked legal basis. See **Ernest Mwai v Abdul Hashid & Another [1995] eKLR**), that no grounds had been adduced for attachment before judgment nor was there evidence that the Plaintiff was about to dispose of its property. see **Freight Forwarders Ltd v Aya Investment Uganda Ltd [2013] eKLR** and **Uganda Electricity Board Royal Van Zanten (U) Ltd [2012] 1 EA. The** and that the Defendant had not satisfied the test for attachment before judgment as enunciated under Order 39 Rule 5 of the Civil Procedure Rules. See its submissions dated 5h March 2015.

DETERMINATION

[16] On 20th January 2014, the Plaintiff had filed an application in HCCC No 2 of 2014 in Malindi, in which it sought orders similar to the ones in the instant application dated 30th October 2014. In the ruling delivered by Angote, J on 30th May 2014, the Plaintiff's application was dismissed. The said learned judge also allowed the Defendant's application, which was also similar to their application dated 12th November 2014. The Plaintiff was aggrieved by the decision of Angote J and filed an appeal in Civil Appeal No 12 of 2014. The Plaintiff filed an application for stay of execution of the order by the superior Court pending appeal. The said application was dismissed by the Court of Appeal in its ruling delivered on 10th October 2014. The matter was set down for hearing on 17th November 2014, before which the Plaintiff filed a Notice of Discontinuance pursuant to Order 25 Rule 1 of the Civil Procedure Act. The Notice dated 28th October 2014 was challenged by the Defendant, and the hearing and determination thereof is pending before the Court of Appeal in Civil Appeal No 1 of 2015.

[17] The issue in contention is with regards to the enforcement of the performance guarantees herein. The Plaintiff argued that the calling-up of the performance guarantee is ripe, as its rights had accrued by breach of the Defendant's obligations under the contract, and further, because the Defendant had not challenged the Final Certificate issued dated 17th September 2014. Further, as such, the Plaintiff averred

that the Defendant should be estopped from interfering with the enforcement of the performance guarantees.

[18] The Defendant is of a contrary opinion. The Defendant argued that the Plaintiff should be prevented from executing the performance guarantee, as the alleged breach of contract constitute the dispute between the parties and is yet to be resolved either as provided under the contract, or a Court of competent jurisdiction. And for that reason, the Defendant are convinced that the right to redress under the performance guarantee had not accrued.

[19] Whereas the Plaintiff contended that the Final Certificate issued on 17th September had not been challenged, the Defendant countermanded that the same was not conclusive evidence that they had breached the contract, and that in any event, they had rigorously challenged it. Further, it contended that the question of contractual obligations is an issue that could better be determined with the benefit of full evidence by the parties in a trial. It was averred that since there was no determination on this issue either by resolution or by a decision of a competent Court, the right to enforce the performance by the Plaintiff had not accrued. Even though the Plaintiff contends that the Defendant did not challenge the Final Certificate issued on 17th September 2014, once will see that in the letter dated 1st October 2014 by the Defendant that indeed they had challenged the Final Certificate, in response to the letter dated 17th September 2014 by the Plaintiff. The letter stated *inter alia*;

"That our client vehemently disputes the final certificate prepared by your client and has categorically stated as such through its quantity surveyor. In the final certificate, your client is claiming Kshs 25,617,408.84 for alleged rectification of defects. As you are fully aware, our client has denied the alleged defects and that is an issue that should be resolved in the manner proposed in Clause 45 of the contract by way of arbitration.

Since the matter is in Court and effectively *sub-judice,* neither party should continue making any comments or claims against the other. Such action should await the outcome of the Court ruling on scheduled for October 10, 2014 after which parties may ventilate their respective claims before an arbitrator."

[20] It is clear that, during the pendency of the ruling and determination of the Court of Appeal in Civil Appeal No 12 of 2014, the Plaintiff in total disregard of the orders of the superior Court on 30th May 2014, issued a Notice and Statement under the Performance Guarantee to the Defendant's bankers. See pages 37-40 of the Defendant's Replying Affidavit. This was a claim on the works completed by the Plaintiff after employing other contractors to complete the work that it had alleged had been unsatisfactorily completed by the Defendants. This was in breach of the ruling of the Court, and more in particular to paragraph 38(a) of the said ruling by the superior Court. By further alleging that the Final Certificate was not challenged by the Defendant, the Plaintiff was being dishonest and its contentions thereto tinctured.

[21] The previous acts by the Plaintiff in handling the entire issue of the performance guarantees and realization thereof was quite unpleasant and paints a picture of a Plaintiff who insists on default just to give it a ground to call-up for the performance guarantee. Such ''tyrannical posture'' or high-handed conduct of a plaintiff is force and fraud on the other party, and it will be a ground to estop such plaintiff from calling-up for a performance guarantee given upon the contract. Such conduct will never excite approval of equity for any purpose. Thus, as it has been said before, and I repeat it again, any such party coming to court for equitable relief will be denied remedy. I should state that in common parlance, a true description of the conduct of the Plaintiff in this case may require strong language to be used. But, as a court of law, I have used appropriate and measured language that to demonstrate that the Plaintiff does not deserve any equitable relief sought. One other thing; in its application dated 20th January 2014, the Plaintiff did not rely on the reason it is now relying upon, i.e. the Final Certificate had not been challenged; instead, they were willing to engage the Defendant in addressing the dispute through arbitration. and what I see is the Plaintiff going against the orders issued by the Court which had restrained them from stopping the Defendant from continuing any works at the site pending the hearing of

the dispute between the parties. Further, the Plaintiff engaged a third party contractor to complete the works, which was in disregard of the Court orders of 30th May 2014, and then sought to claim from the Defendant through the performance guarantee for alleged breach of contract.

[22] Other offensive actions by the Plaintiff consist in the manner they dealt with the initial Malindi case and the contempt proceedings which had been commenced therein. All these things will not allow a court of law in its true mind to lend its process or hand in aid of the Plaintiff. The Plaintiff was also aware that the Final Certificate was challenged which put to doubt its conclusiveness as proof of breach of contractual obligations herein. Therefore, an inescapable conclusion is that the Plaintiff has come before this Court with unclean hands, and would therefore not be eligible for an equitable relief. Accordingly, I dismiss the plaintiff's application with costs to the Defendant.

[23] I now turn to the Defendant's application dated 12th November 2014. It sought orders of estoppel against the Plaintiff from enforcing the performance guarantees pending the hearing and determination of the dispute before an arbitrator as provided for under Clause 45.2 of the contract, or as ordered by the Court in its rendering on 30th May 2014. The best argument in support of the said application is that the Final Certificate as issued was not a final certificate within the meaning of Clause 1.4 of the contract, and that therefore the effect of a final certificate as enunciated in the cases of **Transafrica Assurance Co Ltd v Cimbria (EA) Ltd** (supra) and **Nairobi Golf Hotels (Kenya) Ltd v Lalji Bhimji Sanghani Builders & Contractors** (supra) were distinguishable from the circumstances of the instant suit. They also urged that breach was in dispute and was yet to be resolved.

[24] My view is that the final certificate in a contract for works will depend on the terms of each contract. It is not conclusive just because a party has so stated especially where it has been challenged. See the case of **Nairobi Golf Hotels (**supra). 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 as prescribed in the bond. However, fraud or collusion by or with notice of the party claiming under the performance guarantee or bond will unravel and blow away any or all rights for such party to claim the performance bond. See **Trans Africa case** (supra). See also the purpose of performance bonds in international trade as was clearly stated by Denning M.R in ***STATE TRADING CORP. OF INDIA VS ED OF MAN (SUGAR) LTD (1981)*** Times 22nd July that;

''…performance bonds fulfil a most useful role in international trade. If the seller defaults in making delivery, the buyer can operate the bond. He does not have to go to [sic] far away countries to get damages or go through a long arbitration. ...on a notice of default being given, the buyer can have his money in hand to meet his claim for damages…''

See also what Morrison J said that such bonds affect the ''tempo of the parties'' obligations but not their substantive rights.

Now therefore, any forced or coerced or induced default will be classified under fraud or duress and will be considered under the ''tempo of the parties'' obligations to act bona fides. The facts of this case reveal force and maneuvers by the Plaintiff which were aimed at coercing the performance guarantees herein. The court will not countenance such conduct; instead, the duty of the court is to suppress such coercion and force when it is manifested or exhibited before court by a party. It is worth of note that Courts made pronouncements on the matter which were explicit and the Plaintiff should have submitted itself to voluntary restraint of not insisting on enforcement of the guarantees in question given the circumstances of the case. It would only be reasonable for the Courts to allow matters arising should be resolved as provided under Clause 45.2 of the contract.

Orders

[25] The Plaintiff has not established a *prima facie* or shown that it will suffer irreparable loss as to warrant an injunction. When all factors are taken into account, the balance of convenience tilts in favour of refusing to the injunction sought. I decline to issue any prohibitory injunction as prayed. The upshot is that I dismiss the application dated 30/6/2014.

[26] On the material before the court, the Defendant has shown that it challenged the Final Certificate issued on 17th September 2014 vide its letter dated 1st October 2014. Whether the challenge was within the time frame provided for lodging a challenge to the Final Certificate is a matter for trial where all parties will argue their cases fully. I also find and hold that the Plaintiff should be estopped from calling for the performance of the performance guarantee herein until this matter is heard and determined. If, it had already called for the performance guarantee, this is a clear case where the Plaintiff stole a match from the Defendant using the court process. It is a case where mandatory injunction is deserved. However, there is doubt whether the guarantees have been realized fully or partially. Therefore, the court will only be able to determine that issue on receipt of evidence on the true position of the guarantees. Meanwhile, it is ascertained that there were pending orders issued on 30th May 2014 in favour of the Defendant ordering the parties to refer the dispute to arbitration as provided for under the contract. Let the disputes follow the path of dispute resolution provided for in the contract.

[27] On deposit of security, the Defendant did not establish that the Plaintiff is disposing or about to dispose its properties with the intention of obstructing or delaying the execution of any decree which may be passed against it. See the case of **Freight Forwarders (Kenya) Ltd v Aya Investment (U) Ltd** (supra) which cited with approval the Court of Appeal case of **Kuria Kanyoko T/A Amigos Bar & Restaurant v Francis Kinuthia Nderu & Others (1988) 2 KAR 126**where it was thus;

"The power to attach before judgment must not be exercised lightly and only upon clear proof of mischief aimed at by Order 38 Rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be issued against him."

Accordingly, I decline to order deposit of security.

[28] In consideration therefore of the foregoing, the application by the Plaintiff dated 30th October 2014 is unmeritorious and is dismissed with costs to the Defendant. The Defendant's application dated 12th November 2014 is allowed to the extent expressly stated above. It is so ordered.

Dated, signed and delivered in court at Nairobi this 22nd day of June 2015.

F. GIKONYO

JUDGE