



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

CIVIL SUIT NO 893 OF 2010

LEO INVESTMENTS LIMITED.....PLAINTIFF

-VERSUS-

TRIDENT INSURANCE COMPANY LIMITED.....DEFENDANT

JUDGEMENT

Pleadings

1. By its plaint dated 17th December 2010 filed in this Court on 21st December, 2010, the plaintiff herein seeks:
 - (i) **Kshs 8,681,576 together with interest at commercial rates.**
 - (ii) **Costs of this suit.**
 - (iii) **Any other or further relief that this Honourable Court may deem fit to grant.**
2. The cause of action according to the plaintiff, the registered owner of land parcel LR No. 209/1864/2 (hereinafter referred to as the suit property) arose from a contract between the plaintiff and **Vihar Construction Company Limited** (hereinafter referred to as the Contractor) for the construction of a hotel block comprising of 66 units of the suit property to be commenced on 2nd June, 2010 and to be completed on 5th May, 2011.
3. According to the plaint, the contractor was to provide one surety for the due performance of the contract till completion pursuant to which the contractor took out a Contractor's Performance Bond (hereinafter referred to as the Bond) on 23rd July 2010 with the Defendant in favour of the Plaintiff. According to the plaint. It was a term of the agreement that the bond would become void if the contractor conformed to the said agreement. However, in the event that the contractor did not conform thereto the bond was to remain in full force. However the bond was not to be discharged or impaired by breach of the said agreement but would remain in full force till 22nd July, 2011 or upon the issuance of the completion certificate whichever happened first.
4. It was pleaded that as a result of severely defective workmanship it was recommended that the work already done be demolished or redone and the plaintiff was forced to demolish the work already done after the architect and the project manager gave the contractor written instruction to rectify the defects but the later refused and or neglected to do so.
5. It was pleaded that at the time of the demolition the plaintiff had already paid the contractor a sum of Kshs 5,525,663.50 and that the plaintiff was forced to have the works redone by another

- contractor thus incurring a further loss of Kshs 7,016,762.62.
6. However despite demand that the Defendant honours the performance bond and pay the sum of Kshs 8,681,576.00 the Defendant refused to do so hence the suit herein.
 7. In response to the plaint the Defendant on 28th January, 2011 filed a statement of defence dated 28th January, 2011 in which the Defendant averred that the plaintiff's suit violated the provisions of the Civil Procedure Rules 2010 and that the plaint was not accompanied by a competent verifying affidavit; that the deponent of the verifying affidavit is neither a director or an agent of the plaintiff and had no authority to swear the said affidavit; that the law firm of **Mutembei, Gichuru & Company Advocates** had no instructions to draw and the present that suit; that the claim is misconceived, wholly unfounded and the Defendant not liable to the plaintiff.
 8. The Defendant, however denied the allegations of breach of contract against its insured **Vihar Construction Company Limited** and while denying liability to the plaintiff contended that it was in fact the plaintiff that owed its insured a sum of Kshs 4,336,445.12 on account of work done and services rendered pursuant to the said agreements between the parties on termination of the contract. According to the Defendant the sum claimed by the plaintiff lacks any factual foundation and that even if the Defendant's insured had defaulted on the contract between the plaintiff and the insured, the amount payable would have been commensurate to the actual loss sustained by the plaintiff and not the entire value of the Bond. It was however pleaded that no default was occasioned by the insured hence the plaintiff did not suffer any loss or damage so as to entitle the plaintiff to compensation under the Bond.
 9. On 11th February, 2011 the Plaintiff filed a reply to the defence dated 11th February, 2011.

Plaintiff's Case

10. In support of its case, the plaintiff called **Bernard Juma Opiyo**, a building contractor and the plaintiff's project manager as PW1. He adopted the contents of his statement filed on 3rd October, 2011 in which he confirmed the existence of the contract between the plaintiff and the said contractor. After the contractor commenced the work, he stated that it was his duty to make routine visits to the site on the Plaintiff's behalf to inspect the quality and execution of the works.
11. According to him it was noted during one visit that the contractor's workers were doing two different mixes, one for casting and the other for testing under the instructions of the contractor. In one of his said visits. He found that the workers had done some bases and were casting other bases. He however noticed several defects such as the fact that the retaining wall had honeycombs and the column bases were improperly aligned a fact which he informed the project engineer and architect after which it was decided that the contractor proceeds with the work at his own risks. Samples were thereafter taken from the already done bases. However, the contractor stopped working until the said tests were done whose results were that all the samples failed meaning that the mixing was poor and the concrete used was not the one specified. Further the material used in making the concrete was substandard. The contractor was then requested to demolish the work and redo the work but he declined to do so prompting the plaintiff to carry out the demolition itself.
12. According to him, the foam work was not properly done. In his view, when two mixings are done, it means that the one being taken for testing is not the one being used. According to him whereas part of the concreting was being done by machine, part of it was being done elsewhere and that the former was being used for testing.
13. In cross-examination by **Mr Omuga**, learned counsel for the Defendant, PW1 stated that since he was working on another site, he was on the Plaintiff's site full time. Although he was working with the project engineer **Khalifa Manza** of Metrix and the Architect **Mr Girr**, both of them were similarly not at the site full time since they were consultants. He admitted that he was not part of the team that was doing the testing and was only given the results which he was not party to. He conceded that he was not in the laboratory.
14. In re-examination by **Mr Marete**, PW1 reiterated that although he was present when the samples were taken, he was not there when the testing was being done although he was shown the report on the basis of which he testified.
15. The second witness for the plaintiff was **Daniel Kamanza Manza**, who testified as PW2. According to him, he was a civil and structural engineer at Metrix Integrated Consultancy and confirmed having recorded his statement in this case filed on 3rd October, 2010 whose contents he

- adopted as part of the examination in chief.
16. In the said statement he stated that their said company was instructed by the plaintiff to supervise construction work on the suit property which was being undertaken by the Contractor herein. After the excavation, he instructed the contractor to commence building and place the steel. Prior to the commencement of the said works, he specified to the contractor by means of structural drawings the kind of material that ought to be used and workmanship to be employed. According to him, he visited the construction site on several occasions and upon one such visit he observed that the retaining wall, base and columns had already been done and there were some honeycombs which according to him were unusual. He also observed that the bases and retaining wall already done could not support a building and as the work progressed it was discovered that the contractor did not conform to the specified standards. According to him, he was advised by the project manager and the architect that on 20th August, 2010 when a surprise site visit was made the contractor was found making two different concrete mixtures one of which did not conform to the specifications and this concern was raised by him and the Architect with the Construction Manager **Mr Hussein Chatur** and they advised the plaintiff that the concrete needed to be tested to confirm whether they conformed to the required standards. The plaintiff then instructed a private laboratory firm by the name of Britech Limited to carry out the said tests and consequently representatives of the said firm in the company of the Construction Manager went to the site with a concrete coring machine and obtained 24 concrete cores which were taken by Britech for the said purpose which in 17th September 2010 were crushed and tested in his presence and that of a contractor and the Construction Manager, **Mr Chatur**. After reading the report from Britech and on consultation with the Architect, the witness stated that they advised the plaintiff that the work which had reached basement level be demolished as the foundation could not support the contemplated structure. However, the contractor did not carry out the demolition as instructed thus prompting the plaintiff to carry out the same
 17. According to him the construction contract given to the Contractor was terminated and as at the time of the termination the Contractor had been paid for the substandard work done.
 18. In cross-examination by **Mr. Omuga**, PW2 stated that he had a Bachelor of Technology Degree in Civil and Structural Engineering from Moi University amongst other qualifications and was registered with the Engineering Regulatory Board in 2011. On 19th September, 2010 he admitted that he was not yet registered but working with Metrix Engineering Consultants which was registered under **Khalid Alkizim**. Although both of them were visiting the site, he was the one who was in principle doing so. According to him he was allowed to work under another registered engineer and was on site when the samples were taken for testing and attended the testing. According to him the samples did not meet the standard. According to him the samples were tested in the presence of the Contractor and that the foreman was involved though he could not tell his name despite having dealt with him since inception. He clarified that the foreman was present when the samples were taken but it was the Managing Director of the Contractor who was present at the testing. According to him, he was being paid by Metrix Engineering Consultants who in turn was being paid by the Plaintiff.
 19. In re-examination he reiterated that the foreman was present when the samples were taken while at the time of the testing the main Contractor by the name **Sandeep** was present.
 20. The next witness for the plaintiff was **Hussein Chatur**, a Civil Engineer and the plaintiff's project manager. He similarly adopted the contents of his statement filed herein on 3d October 2011.
 21. In the said statement he stated that on 2nd June, 2010 he signed a contract as a Director of the Plaintiff in which the Plaintiff agreed with the Contractor herein for a construction of a hotel block consisting of 66 units on the plaintiff's suit property to commence on 2nd June, 2010 to 2nd May 2011. According to him it was a fundamental term of the contract that the contractor would take out a performance bond with a reputable insurance company or Bank for the purposes of guaranteeing completion and performance of the said contract. He stated that the contract was executed on behalf of the plaintiff by the plaintiff's director, **Rahim Chatur** and the Defendant executed a performance bond with the Defendant on 23rd July, 2010.
 22. Later in the course of the construction it was discovered that the work did not conform to the specifications and it was found that there were two different kinds of concrete mix with one of the mixtures being of a low mix and not up to the standards required. Further the columns were

- erected at incorrect locations with some being vertically twisted while some aligned in the wrong directions making the work substandard. On consulting the project manager it was decided that the concrete be tested and instructions for the purpose were given to Britech Limited and in his presence, the Contractor, **Daniel Kamanza** the structural engineer and a representative of the said Britech, 24 concrete cores were obtained from the site for testing. After crushing and testing in his presence and in the presence of the contractor and a **Mr Daniel Kamanza**, it was concluded that all the 24 concrete cores tested failed to achieve a comprehensive strength of at least the minimum specified strength and had the construction proceeded the building would have collapsed.
23. Based on the report and on the advice of the Project Manager and Architect, it was concluded that the construction which had reached basement level be demolished but the contractor failed to do so forcing the Plaintiff to carry out the demolition at its own expense thereby incurring considerable losses and termination of the contract.
24. According to the witness attempts at compensation failed.
25. In cross examination PW3 conceded that he was also a director of the plaintiff which has 3 directors, **Madat Ali Chatur**, **Rahim Chatur** and himself. According to him he was the construction manager for the plaintiff which is a family run company. He said that they were unhappy with the Contractor. The construction according to him begun in June 2010 and they had a consulting supervising the work and the reasons for having many professional was to ensure safety. At the time of the termination he said that the excavation of the site, the foundation, 70% of the columns, the basement and 50% of the retaining wall were complete. According to him the columns were up to the ground level. He however, did not know how much was due. He however confirmed that he attended the site meeting of the 19th September, 2010 at which time the amount was just valued but not certified. However referred to the defendant's bundle of documents at page 71 he confirmed that the sum due was Kshs 4,336,445.10 as a preliminary valuation which amount according to him was to be certified by the project Architect who together with the Structural Engineer were not present at the meeting. To him the valuation is done by the Quantity Surveyor. Referred to page 70 of the said documents he said that the Hotel was Liton Plaza while **Chatur Hussein** was himself. He said that the figure of 4,336,445.10 must have been amended by the Quantity Surveyor employed by the Plaintiff though it was not certified. According to him, he was not aware of any documents indicating that they were not liable to pay the said sum.
26. The witness testified that the decision to file the case was out of the failure by the Defendant to pay the performance bond. He admitted that this was the second case though he could not remember which company was the first. Since 2008, he said that they were now working on the 5th site. To him, if the figure of Kshs 4.3 million stands he would still claim the money from the Contractor. He said that between the termination and the putting of a new contractor, **M C Building Ltd**, on site it took them a week. The demolition however, took them 6 weeks. While the laboratory testing cost them Kshs 300,000.00 he said that the cost of demolition was known by his accountant. Within 8 weeks, the construction according to him started.
27. The witness however denied that they had made any claim against **M C Builders**. He said that one of the directors, **Rahim**, his elder brother made the decision for this suit to be filed though he was involved in the decision after the issue was raised at a Board of Directors' meeting at which a verbal resolution was passed. He said that the firm of advocates on record is in their panel and it was **Rahim** who made the decision that they be given the work in their presence. He affirmed that the claim against the defendant is for the defendant to honour he performance bond. According to him, although they are not the ones who took out the bond, they were the beneficiaries thereof since they paid the money to the contractor. In his view, performance bond is on a call; as soon as the contractor defaults it is paid straightaway.
28. In re-examination, the witness in reference to the letter dated 19th September, 2010 said that was a preliminary valuation which was subject to costs and damages and that contractor has not claimed the said sum. According to him once the contract is terminated the new contractor completes the work and the amount due to him is calculated. He confirmed having seen the Bond which was in favour of the plaintiff. He said that there was no letter of cancellation of the Bond and that the Bond had no provision for cancellation. Referred to the letter dated 6th November 2010, the witness said that two cheques were issued amounting to Kshs 1,000,000 by the Contractor which were dishonoured and that this was in respect of the loan to purchase the materials. According to him there were several correspondences between him on behalf of the plaintiff and one **Suresh**

- Machita** on behalf of the Defendant highlighting the outstanding accounts and requesting the defendant to honour the Bond and that the Defendant never said that they were unwilling to honour the Bond.
29. The 4th witness for the plaintiff was **Peter Fraser Scott** who testified as PW4. According to him, he was a Consulting Engineer and he recorded his statement on 22nd August 2011 the contents of which he adopted as part of the examination in chief. He testified that he prepared a report in respect of the concrete compression strength on the suit property for the plaintiff giving the results of the forensic investigations by his engineering practice on the concrete used to construct the partially completed apartments. According to him none of the 24 concrete cores taken from the structure reached the specified compressive strength and consequently continuing with the construction of the building would have been serious as the building would have collapsed hence the defective structure needed to be demolished and re-cussed before proceeding with the construction.
30. According to him the people who were present during the testing were **Mr Hussein** for the client, **Mr Daniel Kamanza** for the Contractor and **Mr Julius Shikoli** the Engineer. Similarly the crushing took place in the presence of the said people save for **Mr Shikoli**.
31. In cross examination, PW4 stated that at the time of the testing, the same were on the walls and the columns which were on the ground level. He could however not say whether there was a basement. He did not however visit the site since the visit was by his staff. The Chief Technician was the one who was in charge of the consultancy and he did not do the work hands on and his testimony was based on what he gathered from the laboratory. He however overruled the possibility of the material not coming from the site. To him, he acted on faith and assurance of other people since he was not there personally.
32. In re-examination he said that the material was taken in the presence of all the parties and that the testing was in their presence.

Defendant's Case

33. On behalf of the Defendant, **Martin Cheruiyot Bett**, defendant's legal officer testified as DW1. He confirmed that he was aware of the statements filed in this suit. One statement was made by **Suresh Pachatta** who was the defendant's principal officer while the other was by **Handeep Rehal** who was one of the defendant's policy holders working with **Vihar Construction Limited** who was the insured. According to him **Suresh Pachatta** was no longer in the defendant's employment though he could confirm the contents of his statement filed on 28th January 2011. He similarly confirmed the contents of the statement by **Hardeep Singh**. There was a further statement made by him and filed on 2nd February 2012.
34. According to him he was aware of the plaintiff's claim against the defendant in which the net amount of the claim is Kshs 8,681,576.00. While adopting the contents of his statement he said that the defendant's position was that the performance bond was cancelled based on the client's letter dated 20th September 2010 formally instructing them to cancel the bond dated 20th July 2010 which letter was issued prior to the date of the filing of this suit on 21st December 2010 after the contract was terminated. According to him the amount due and payable to the contractor was Kshs 4,336,445.10 payable by the plaintiff in this case to the Contractor. In his view the defendant was not therefore liable. Since the bond was cancelled, the defendant had no contractual relationship with the plaintiff at the time of the suit hence the plaintiff case ought to be dismissed.
35. In his statement, DW1 stated that on termination of the contract a final certificate in the sum of Kshs 4,336,445.10 was issued payable by the plaintiff to the Contractor and that the terms of the agreement empowered the insured to cancel the Bond.
36. According to him, apart from this suit the plaintiff has lodged a complaint with the Insurance Regulatory Authority a sign that its actions are motivated by malice and not the desire for justice.
37. In cross-examination by **Mr Marete** for the plaintiff, DW1 confirmed that in the performance agreement the parties were **Leo Investments** and **Vihar Construction** and the Defendant. According to him, there was no mention of Liton Plaza. He confirmed that the Bond was given pursuant to clause 16 which required security from either a bank or insurance company in the value of 10% of the contract work until certification date. He confirmed that it was a form of

- guarantee. He confirmed that the performance Bond had all the terms and was hence a complete document and did not provide that the insured was to show loss before compensation. According to him, the bond was to come to an end on 22nd July 2011 or on issuance of a completion certificate whichever came first. He was however, unaware of the issuance of the completion certificate. He confirmed that the bond did not state that it would come to an end on a letter and that he was unaware of the circumstances of the termination of the contract save from the letter that it was due to poor workmanship. He was unaware whether the amount had been paid by the contractor and neither was it within his knowledge that a demand had been made by the contractor to the plaintiff.
38. In re-examination by **Mr Omuga**, DW1 stated that the principle of insurance is based on good faith and if no loss is established the insurance company is not obliged to settle the claim. According to him the insurance bond was cancelled based on instructions supported by other documents in which there was an amount owing to the contractor and none to the developer. In his view, the bond operated as a normal cover hence a loss had to be ascertained. According to him the letter of cancellation was written by Liton Plaza Ltd yet the security was in favour of the plaintiff.
39. According to him the defendant was not liable in any way and that the bond was cancelled and the contract terminated by consent.
40. The second defence witness who testified as DW2 was **Hardeep Singh Rehal**. According to him, he was a contractor under **Vihar Construction**. He adopted his statement dated 28th January, 2011 and filed the same day. According to him, on 2nd June 2010 the Contractor entered into construction contract with Liton Plaza which was the name of the project while the employer was Leo Investments both of whom were owned by the Chatur. Payment was however being made by the plaintiff though the building was to be called Liton Plaza. Referring to the letter dated 19th September 2010 he said the same was on the letterhead of Liton Plaza. On 19th September 2010 they met at the site when the contract was terminated in the presence of **Mr Hussein Chatur** for the developer, **Bernard Juma** the project in charge, the Quantity Surveyor and himself. According to him the Contractor was told to hand over the project as the contract had been terminated. The alteration according to him was done by **Mr Joseph Kungu**, the Quantity Surveyor who informed them to proceed to cancel the Bond. The same night he wrote to the insurance giving instructions which were to be effected the same day. According to him the amount owed was Kshs 4,436,445.10.
41. The other contractor then demolished the building which was on the ground floor but had a basement. According to him this was not their first contact and that all the contracts had performance Bond which is payable only if there is a loss. If there is no loss, according to him, the insurance does not pay and in this case there was no loss on the part of the employer since the Contractor was the loser since it has not been paid the retention. He stated that the amount due was confirmed by the Quantity Surveyor, **Mr Kungu** who told them to cancel the Bond. In his view, he does not think that the insurance is liable to pay regardless of the loss. In his view the Defendant was not liable hence the plaintiff's claim ought to be dismissed.
42. In cross-examination by **Mr Marete**, the witness stated that the Bond was a guarantee that the work would be done and was in favour of the plaintiff. He confirmed that the Bond did not state that the plaintiff must suffer loss to be paid. Similarly it did not provide for cancellation by a letter. He reiterated that the handwritten notes were made by **Mr Kungu** and signed by him though there was no signature against the alteration. According to him they were owed Kshs 4 million which was not paid since September, 2010. Although they had demanded the same, no court proceedings had been commenced. He confirmed that they were employed by the plaintiff from whom the payments were.
43. In re-examination, he stated that there was no dispute about the alteration and that there was no bad blood between them. To him they had amicable meeting and the termination was by mutual consent as well as the cancellation.

Plaintiff's Submissions

44. At the conclusion of the case, the plaintiff submitted that the Bond was not conditioned upon the plaintiff establishing the loss suffered as it was a complete document with terms and conditions

flowing therefrom and that this was admitted in the defence. In support of this submission the plaintiff relied on **Corporate Insurance Co. Ltd vs. Nyali Beach Hotel [1995-1998] 1 EA 7 at 16 and 17.**

45. It was submitted that it was not in doubt that the contract was not fully performed and nothing prevented the Defendant from commissioning an assessment of loss to establish that the plaintiff did not suffer any loss as a result of the contractor's poor workmanship.
46. It was submitted that since the Bond did not provide for its cancellation, the mode of discharging the Defendant from liability was under the Bond if the contract was fully performed by the Contractor. In any case the letter relied upon as terminating the contract which was handwritten and not countersigned was not from a party to the Bond. According to the plaintiff the issue of the cancellation of the bond was not even pleaded and only came out at the hearing.
47. It was submitted that it was not in contention that as a result of poor workmanship the contract was terminated and the site handed over to M C Builders and the work already done had to be demolished and redone. Relying on the said **Corporate Insurance Ltd Case** (supra) it was submitted that the burden is placed upon the surety to establish that the work has been performed since the very objective of a performance bond is to assure a developer that the contractor would perform the contract. Hence the surety ought to ascertain exactly the risk they were taking.
48. It was therefore submitted that the Court ought to find for the plaintiff and grant judgement as prayed in the plaint.

Plaintiff's Submissions

49. On behalf of the Defendant, it was submitted that the plaintiff was under an erroneous belief that the beneficiary of an indemnity insurance is under no obligation to prove any loss while making a claim against the insurer or the insured.
50. According to the Defendant the plaintiff did not lead any evidence to prove its insurable interest in the suit property, the project, or any form of loss it sustained and the special damages claimed in the plaint were never proved as required by the law. To this end the Defendant relied on **David Kinyanjui & 2 Others vs. Meshack Omari Monyoro Civil Appeal No. 121 of 1993.**
51. It was further submitted that since it was admitted that there was no Board resolution authorising the filing of this suit or appointment of the firm of advocates to act for the plaintiff in this suit, as the said decisions were made solely by **Rahim Chatur**, who never testified in this suit, the suit violated the provisions of the Civil Procedure Rules, 2010.
52. It was submitted that in the letter dated 19th September, 2010 it was determined that there was a sum owed to the contractor and the letter authorised the contractor to proceed and cancel the insurance and performance bond.
53. As the contract was between **Liton Plaza Limited** and was only witnessed by the plaintiff on one hand and the Contractor on the other, it was submitted that the plaintiff had no insurable interest in the contract hence it was unclear how the Bond could be taken in favour of the plaintiff. **Halsbury's Laws of England**, 4th Edn Vol. 25 was cited in support of this proposition. Without disclosing its interest in the Bond, it was submitted that the Bond was null and void.
54. It was further submitted that in contracts of insurance the insurer's liability is limited to the actual loss which ought to be proved. However, in this case none of the plaintiff's witnesses tendered any evidence in proof of the allegations of loss claimed in the plaint.
55. The Court was therefore urged to dismiss the plaintiff's suit with costs.

Issues for determination

56. Before setting out the issues, it is important to emphasise that the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination and therefore it is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. See **Galaxy Paints Co. Ltd vs. Falcon Guards Ltd [2000] 2 EA 385** and **Standard Chartered Bank Kenya Limited Vs. Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.**

57. However, in this jurisdiction, the position is that a court may allow evidence to be called, and may base its decision, on an un-pleaded issue if it appears from the course followed at the trial that the un-pleaded issue has in fact been left to the court for decision. See **Odd Jobs vs. Mubia [1970] EA 476** and **Great Lakes Transport Co (U) Ltd Vs. Kenya Revenue Authority Civil Appeal No. 106 of 2006 [2009] KLR 720.**

58. It has been held that a Court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for a decision. The failure to plead facts though an irregularity is not fatal to the judgement if cured by the course of events taken at the trial, which shifted from the pleaded cause of action to the un-pleaded cause of action, a shift which did not cause prejudice to the other party who was prepared to meet that un-pleaded cause of action. See **Dhanji Ramji vs. Rambhai & Company [1970] EA 515, Transworld Safaries (K) Limited vs. Robin Makori Ratemo Civil Appeal No. 78 of 2005 [2008] KLR 339.**

59. In the instant case although some issues were never pleaded, it is clear from the course adopted by the parties that there were issues which were left for determination of the court. Therefore having considered the pleadings herein, the evidence adduced and the submissions made, it is my view that the following are the issues which fall for determination:

1. **Whether the suit as drawn is fatally defective for failure to be accompanied by a competent verifying affidavit on the ground of lack of authority by the plaintiff to do so and whether the firm which filed the plaint was duly authorised by he plaintiff to do so.**
2. **Whether there was breach of contract by the Contractor.**
3. **Whether the performance bond was conditional upon the plaintiff establishing the loss suffered. Alternatively whether the plaintiff was under an obligation to prove the loss suffered.**
4. **If the answer to issue number 3 is in the affirmative whether the plaintiff proved the said loss.**
5. **Whether the performance bond was cancelled and whether that cancellation was valid.**
6. **Whether the Plaintiff was a party to the performance bond.**
7. **Whether the Defendant is liable to the Plaintiff under the said Bond.**
8. **Who should bear the costs of the suit**

60. On the issue whether or not the suit is defective, it was contended that there was no authority given by the plaintiff company authorising the institution of these proceedings contrary to the provisions of the Civil Procedure Act. Order 4 rule 1(4) of the Civil Procedure Rules provides:

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

61. Clearly from the foregoing provision, nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, in my view, may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of **Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as he suit. Its absence, is therefore, not fatal to the suit.

62. The next issue is that there was no company resolution to institute the instant suit and instruct the firm of **Mutembei, Gichuru & Company Advocates** to act for the plaintiff. It is trite that advocates can only act in a matter where they have been instructed either expressly or by implication. It is also trite that an incorporated person is but just a legal person in the eyes of the law. It is therefore axiomatic that an incorporated body has of necessity to act through agents who are usually its Board of Directors by way of resolutions passed thereby. Where for example it is proved to the satisfaction of the Court that legal proceedings were commenced by or on behalf of an incorporation by an advocate contrary to or in the absence of the instructions of an

incorporation it is trite in this jurisdiction that such proceedings are liable to be struck out with costs being borne by the advocate concerned. This was the position in **Tavuli Clearing & Forwarding Limited vs. Charles Kalujee Lwanga Nairobi (Milimani) HCCC No. 585 of 2004** where **Kasango, J** held that under section 27 of the *Civil Procedure Act* the Court has wide discretion to make orders in respect of costs and an advocate is liable to pay costs personally for filing a suit he is not authorised to so file and in the case of an incorporated company such authority can only be by resolution or resolutions passed either at a company or board of director's meeting, recorded in the minutes. It follows that if the firm of **Mutembei, Gichuru & Company Advocates** had no instructions either expressly or by implication in this matter all the pleadings filed by the said firm would be liable to be struck out with costs to be borne by the said firm. It is however to be noted that an action commenced without authority is capable of being ratified. As was held by **Hewett, J** in **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000:**

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

63. In this case, PW3 testified that though the decision to file the suit was made by one of the directors, **Rahim**, his elder brother, he was involved in the decision after the issue was raised at a Board of Directors' meeting at which a verbal resolution was passed. He said that the firm of advocates on record is in their panel and it was **Rahim** who made the decision that they be given the work in their presence. In my view, where there is a general retainer given to an advocate by a client, it does not fall in the mouth of the client to argue that there were no instructions given to the advocate in respect of a particular matter falling within the series in which there was a general retainer unless it is shown that there were express instructions given to the advocate not to act in that particular matter. In that event the onus of proving lack of instruction would be on the person alleging the same.
64. Accordingly, I am not prepared to hold that this suit was commenced without authority of the plaintiff as to do so would amount to turning this Court into an academy of law rather than a court of justice. See **Anthony Edward Cumming vs. Queen's Hotel Civil Appeal No. 28 of 1934 [1935] 2 EACA 25.**
65. On the issue of the verifying affidavit, the issue was dealt with by **Ringera, J** (as he then was) in **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460** where the learned Judge expressed himself as follows:

“According to the provisions of Order 3 Rule 2 an affidavit by a corporation can only be made by an officer thereof who is duly authorised by the corporation and this is a matter of substance and not form as it is incompetent for any other person howsoever conversant with the averments in the plaint he may be to make an affidavit on behalf of the corporation.....A person employed by a corporation with broad responsibilities is obviously an officer of the corporation as neither the Companies Act nor Civil Procedure Act and the Rules have assigned the term “officer” any special meaning.....The failure by the deponent to state that she makes the affidavit with the authority of the corporation is a substantial defect which renders the said affidavit incompetent and courts its being struck out.....A country manager is an officer of a Corporation on proper interpretation of Section 2 of the Companies Act, Cap 486 and by extension Order 3 Rule 2[c] of the Civil Procedure Act.....Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly

and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue.....The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”

66. The above decision was made on 2nd November, 2001 before the advent of the overriding objective. Dealing with the said objective which is stipulated in sections 1A and 1B of the *Civil Procedure Act* and sections 3A and 3B of the *Appellate Jurisdiction Act* respectively, the Court of Appeal in Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009 expressed itself as follows:

“The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives.”

67. *In this case the court declined to strike out the appeal on the ground that if the record of appeal was struck out, it was certain that the appellant would return to the court with an application for extension of time, which would result in further delay of the final disposal of the case and inevitably result in further increase in costs hence was not be right for the Court to strike out the appeal.*

68. *In this case the verifying affidavit was sworn by a director of the plaintiff who deposed that he had the requisite authority to swear the affidavit on behalf of the co-director. I therefore do not see any defect in the said affidavit. Even if there was one I would have dismiss the suit merely on that round since that defect does not in my view go to the jurisdiction and it is an omission which is capable of being cured.*

69. The third issue is whether the performance bond was conditional upon the plaintiff establishing the loss suffered. Before dealing with the issue it is important to briefly deal with the law relating to performance bonds. In Kenindia Assurance Company Limited vs. First National Finance Bank Limited Civil Appeal No. 328 of 2002 the Court of Appeal expressed itself as follows:

“The Court’s view of the matter is that upon giving notice of default, the respondent had discharged its obligations under the guarantee and the burden then shifted to the appellant to rebut the rebuttable presumption raised by the notice that liability had attached unless payment is made before a formal demand is made. Notice is to enable the guarantor to approach the principle debtor to ascertain the truth and to urge it to pay. The position would have been different had no fixed period been fixed within which liability would attach in which case the respondent would then have been placed in the unenviable position of exhausting even the avenue of litigation and appointment of a receiver. But as the matter stands, the performance bond had a life of only 12 months and it was executed in 1997. It cannot have been contemplated that the respondent would first sue or appoint a receiver, and when those failed then make a formal demand. It would be faced with the answer that the demand had been made too late....All these 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 contractual 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.....As to the fulfilment 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..... The performance bond in the instant case is in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security guaranteeing payment by a third party and in such cases the most important factor to consider before liability can attach is whether there has been default. Once default is established and that there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security.....Performance bonds fulfil a most important role in international trade. If the seller defaults in making delivery, the buyer can operate the bond. He does not have to go to far away countries for damages, or go through a long arbitration. He can get damages at once, which are due to him for breach of contract. The bond is given so that, on notice of default being given, the buyer can have his money in hand to meet his claim for damages for the seller's non-performance of the contract. The courts must see that these performance bonds are honoured. The courts always recognise that the bonds affected the 'tempo' of the parties' obligations but not their substantive rights.....In the instant case the appellant's obligation was to pay upon demand which the obligation was established when it was served with a notice of default and upon a demand of payment being made. Liability to pay in the circumstances is not and cannot be an issue. There is no question outstanding to go for trial or which will require the examination of witnesses.....On the question of interest it was within the respondent's right to demand it provided the overall liability did not exceed what was covenanted. Besides it was a matter in the discretion of the court."

69. Similarly in Transafrika Assurance Co. Ltd vs. Cimbria (EA) Ltd [2002] 2 EA 627 (CAU), it was held:

"A performance bond has many similarities to a letter of credit and it has long been established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of credit are satisfied. Any dispute between a buyer and seller must be settled between themselves and the bank must honour the credit.....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. It is only excused where there is fraud of which it has notice."

70. Again In Kamro Agroviet Limited vs. Ceva Sante Animale & Others Kisumu HCCC NO. 45 of 2008, the Court held:

"A performance guarantee was similar to a confirmed letter of credit. Where, therefore a bank had given performance guarantee it was required to honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. 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. As to the fulfilment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken on its face value unless the contractor can establish 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."

70. Therefore the general rule is that a surety that has issued a performance bond for a construction contract may become liable under the bond when the principal fails to fully and correctly perform the underlying contract between the principal and the obligee/owner ("owner"). Typically, a surety's obligations under a performance bond are triggered when the owner declares the principal to be in default or terminates the principal's contract for default. After receiving notice of its

principal's default, the surety generally is entitled to a reasonable period in which to investigate the circumstances surrounding the propriety of the default and to choose a course of action in performing its bond obligations. Of course, if the surety believes that the obligee has acted improperly, it may elect to deny liability and not perform under the performance bond or else it may choose to perform under a reservation of rights.

71. From the above discourse, a performance the rules relating to a performance bond must be distinguished from the general rules of contract or insurance. In issuing a Bond, the insurance company's obligations are to the owner and not the contractor though it is the contractor who would be liable to pay the insurance company the consideration for the issuance of the Bond. The owner however, has nothing to do with the validity of the agreement between the contractor and the owner. Accordingly, it is my view that the issue of insurable interest is inapplicable. Based on the same reasoning whereas in normal insurance contracts the claimant is obliged to prove loss, it is my considered view that in purely performance bond contracts, as long as a default is proved, the insurance surety is obliged to pay the sum for which the bond was issued unless the surety proves that it is entitled to pay less. In other words the onus of proving that the surety is not liable to the full amount of the Bond rests on the surety. This was the position in **Corporate Insurance Co. Ltd vs. Nyali Beach Hotel** (supra) where **Pall, JA** expressed himself as follows:

“The risk taken is generally known to the surety and the circumstances generally point to the view that as between the creditor and surety it was contemplated and intended that the surety should take upon himself to ascertain exactly what risk he was taking upon himself. Ordinary contracts of guarantee are not amongst those requiring *uberima fides* on the part of the creditor towards the surety by the creditor of the facts known to him affecting the risk undertaken by the surety will not vitiate the contract.”

72. In my view, this determination disposes of issues numbers 4 and 6

73. However, in ***Practice and Law of Banking*** by **H P Sheldon**, 8th Edn. at page 359, it is stated:

“Unconditional release of the principal debtor involves release of the surety; for since the principal debtor is released, it follows that the person liable only on his default is also released. But any release of the principal debtor which contains a proviso reserving his rights against the surety, even though such a release may be unconditional in form, so far as regards the principal debtor, is after all only a partial discharge, for by reserving his rights against the surety, the banker is entitled to sue him, and he, in his turn, is entitled to sue the principal debtor for the money he has paid to the banker on his behalf. If, however, he agreement is in the form of merely a covenant not to sue the principal debtor, containing no proviso reserving the rights against the surety, then I effect it is an absolute release of both principal debtor and surety, and both are discharged.”

74. This therefore brings me to the 5th issue whether the performance bond was cancelled and whether that cancellation was valid. The Defendants have relied on the letter dated 19th September, 2010 in support of their case that the Bond was validly cancelled. As already indicated above, notwithstanding the contents of the Bond, since the liability of the Defendant depended on the liability of the Contractor, if the contractor was unconditionally released from liability by the Plaintiff, the Defendant's liability would similarly come to an end.

75. The letter dated 19th September, 2010 although is on the letterhead of Liton Plaza Ltd, was clearly signed by **Hussein Chatur**, PW3 herein who confirmed that he was a director of the plaintiff. PW3 did not deny signing the said letter. In his evidence the alterations made by hand on the said letter were made by **Mr Kungu** who was the Plaintiff's Quantity Surveyor. In PW3's evidence, the valuation was done by the Quantity Surveyor and referred to the letter dated 19th September, 2010 appearing at page 70 of the Defendant's documents he said that the figure of 4,336,445.10 must have been amended by the Quantity Surveyor employed by the Plaintiff. In the said letter it was indicated that the Contractor “may proceed with cancellation of the insurance and performance Bond”.

76. It was however contended that the alterations were not countersigned. However as stated

hereinabove PW3 admitted that the alterations were made by the said Quantity Surveyor in his presence. Apart from that alteration, there were other alterations such as the substitution of the figure of Kshs 4,280,870.13 with Kshs. 4,336,445.10. which sum was confirmed by PW3 as preliminary valuation. It is therefore clear that some of the alterations in the said letter were admitted as correct. In my view, the right person who would have shed light on the circumstances under which that additions or alterations were made was the said Quantity Surveyor, **Mr Kungu**, who was admittedly an agent of the Plaintiff. No explanation was proffered why he was not called as a witness in this case. In the case of **Green Palms Investments Ltd vs. Kenya Pipeline Co. Ltd Mombasa HCCC No. 90 of 2003**, it was held that the failure by a party to call as a witness any person whom he might reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination.

77. In the absence of an explanation as to how and why the said alterations the Court has no option but to find that the said alterations were made with the authority and consent of the Plaintiff. That would mean that the Plaintiff unconditionally released the Contractor from liability and having been released, the Defendant was similarly released from its liability as a surety in respect of the subject performance Bond since the Defendant's liability on the performance bound was conditional on the Contractor's liability. Therefore the answer to issue no. 5 is that the performance bond was validly cancelled.
78. That leads me to the 7th issue which is whether the Defendant is liable to the Plaintiff under the said Bond. Based on the foregoing determination it must follow that the Defendant is not liable to the Plaintiff under the performance Bond.
79. Consequently, it follows that this suit ought to be and is hereby dismissed with costs to the Defendant.

Dated at Nairobi this 24th day of March 2014

G V ODUNGA

JUDGE

Delivered the presence of: