



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 160 OF 2003

EAST AFRICA DEVELOPMENT BANK LTD PLAINTIFF

VERSUS

APOLLO INSURANCE CO. LTD. 1ST DEFENDANT

CMC MOTOR GROUP LTD. 2ND DEFENDANT

JUDGEMENT

1. The Claimant is a development bank established under the Treaty Amending and Re-enacting the Charter of the East African Development Bank 1980. It initially filed its claim as against the 1st Defendant on 24th March, 2003. The claim arose out of a performance bond, entered into between the Plaintiff and Defendant on 2nd December, 1998 to ensure compliance of the contract by its client, CMC Motors Group Ltd for the supply of twenty four (24) buses valued at Kshs. 121,680,000/- to the former's client, Kenya Bus Services Ltd. (hereinafter referred to as "KBS"). It is the Plaintiffs claim that the 2nd Defendant failed to honour its obligations, and subsequently, under the provisions of the performance bond, the culpability of the surety, i.e. the 1st Defendant, arose therefrom. It is the Plaintiff's contention that since the 2nd Defendant failed to deliver seven (7) of the twenty four (24) buses to its client, the 1st Defendant under the performance bond was culpable and was thus indebted to the Plaintiff to a proportionate recompense of Kshs. 35,490,000/- plus interest at the rate of 18% from the date of demand, being 13th February, 2003. Following the Ruling by Emukule, J delivered on 29th July, 2004, the learned Judge allowed the application by the 1st Defendant to have the 2nd Defendant enjoined in the suit and allowed the Plaintiff to amend its Plaint accordingly.
2. In the Amended Plaint filed on 13th February, 2007, the Plaintiff claims against the Defendants, jointly and severally, for Kshs. 35,490,000/- plus interest at 18% from 13th February, 2002. However, it clearly reiterated that as it had no contract with the 2nd Defendant it had no claim to make against it.

The Plaintiff's Case

3. The Plaintiff had advanced a loan to KBS to the tune of Kshs. 131,738,824/- vide a loan agreement dated 1st October, 1998. The sums were for the purchase of twenty four (24) Sanayi buses, which were to be supplied by the 2nd Defendant herein. In a letter dated 1st December, 1998, KBS instructed the Plaintiff to disburse the amount of Kshs. 121,680,000/- to the 2nd

- Defendant for the acquisition of the twenty four (24) buses. It was a condition before the disbursement of the funds that the 2nd Defendant guaranteed the performance of its obligations under the contract. The Performance Bond was entered into between the Plaintiff and the 1st Defendant on 2nd December 1998. It was a strict provision of the Bond that the supplier was to conform to the agreement for the supply of twenty four (24) vehicles, evidence by delivery notes duly signed by the representatives of the Plaintiff and the 2nd Defendant.
4. In a letter dated 2nd December, 1998 addressed to the Plaintiff, the 2nd Defendant forwarded the said Performance bond for the delivery of twenty four (24) vehicles to KBS. By Sales **Invoice No. 1570**, the 2nd Defendant was to supply twenty four (24) buses chassis at the price of Kshs. 5,070,000/- for each unit, totaling to Kshs. 121,680,000/-. KBS in its letter dated 12th October, 1998 to the 2nd Defendant, confirmed its order for the twenty four (24) Sanayi buses chassis and further instructed them to deliver them to Associated Vehicle Assemblers in Mombasa (hereinafter referred to as “AVA”) to build the bus bodies according to the specifications of KBS. In a letter dated 30th November, 1998, AVA acknowledged the receipt of the order for twenty four (24) bus bodies upon delivery of the chassis therefor from the 2nd Defendant. On diverse dates between 9th November, 1998 and 6th May, 1999, AVA was in receipt of the chassis from the 2nd Defendant for building of the bodies as per KBS instructions. Thereafter, the complete buses were delivered back to the 2nd Defendant as evidenced in the delivery notes dated 22nd April, 1999 to 14th August, 1999. The cumulative number of complete buses delivered to KBS by the 2nd Defendant was seventeen (17), with another seven (7) unaccounted for.
 5. The Plaintiff contends that the seven (7) buses aforementioned have never been delivered to KBS, hence the institution of the present suit to seek compensation as per the Performance Bond. In a letter dated 13th February, 2002 addressed to the 1st Defendant, the Plaintiff informed the 1st Defendant of the deficit of seven (7) buses undelivered to KBS by the 2nd Defendant, and further demanded Kshs. 35,490,000/- as cost for the undelivered vehicles. In further letters dated 1st March, 2002 and 17th July, 2002, the Plaintiff reiterated that the delivery notes attached to the 1st Defendant’s letter dated 25th February, 2002 were in relation to the chassis delivered to AVA by the 2nd Defendant, and were by no means an indication that the 2nd Defendant had delivered twenty four (24) buses to KBS as per the contractual agreement. The Plaintiff, however, stated that only seventeen (17) buses had been delivered to KBS, and hence demanded the cost of the undelivered seven (7) as per its demand letter dated 6th September, 2002 and Amended Plaintiff filed on 13th February, 2007.

1st Defendant’s Case

6. The 1st Defendant denies any culpability in the demand and claim as issued by the Plaintiff. In its Amended Statement of Defence filed on 13th May, 2009, the 1st Defendant rebuts the Plaintiff’s claim for the supply of twenty four (24) buses by the 2nd Defendant, by stating that the Performance Bond stipulated the delivery of twenty four (24) vehicles and not complete buses as alleged. In a letter dated 20th September, 2002, the instructed advocates of the 1st Defendant made reference to an earlier letter by the 1st Defendant dated 2nd December, 1998 addressed to KBS seeking the release of the Bond with a view to cancelling the same. This was ostensibly carried out after the confirmed delivery of the twenty four (24) vehicles by the 2nd Defendant to KBS as contained in a letter dated 17th May, 1999 by the 2nd Defendant addressed to the 1st Defendant.
7. In a letter dated 1st July, 1999 without letter head and presumably from AVA, KBS was informed therein that the delivery of twenty four (24) buses to KBS was complete. Further, a certificate of completion should be issued to confirm the same. In the letter dated 25th February, 2002, the 1st Defendant attached thereto twenty four (24) delivery notes to AVA to confirm that the 2nd Defendant had complied with its obligations under the Performance Bond and thus concluded the commitment under the surety. The same position was reiterated in a letter dated 7th August, 2002 in reference to an earlier letter dated 5th August, 2002 by the Plaintiff, seeking amicable settlement

of the matter.

8. The 1st Defendant reiterated in its Amended Statement of Defence, that the contract, as far as it was concerned, was for the delivery of twenty four (24) vehicles, and not complete buses as alleged, with the delivery notes duly signed by 2nd Defendant and AVA following instructions by KBS in its letter dated 12th October, 1998. Despite demands being issued against it, (which it admits), the 1st Defendant contends that any liability placed upon it shall be recovered and reimbursed by the 2nd Defendant for its failure to perform the contract, which is the basis of the Plaintiff's claim.

2nd Defendant's Case

9. This Court delivered its ruling with regard to the 1st Defendant's application dated 16th December, 2011 on 19th September, 2011. In granting prayers 1 and 2 of the said application, the Court allowed for the 1st Defendant to hold the 2nd Defendant liable to the Plaintiff should the former be found culpable in the performance of the contract between the 2nd Defendant and KBS. Further, the counter indemnity entered into by the Defendant's be called upon or issues therein tried immediately after the hearing of the instant suit.
10. The 2nd Defendant has not filed any statement of Defence. However, in the 2nd Defendant's witness statement filed on 23rd November, 2012, **Titus Thome Mbiti**, the 2nd Defendant's Regional Manager, states that the Company received an order vide letter dated 12th October, 1998 from KBS for the supply of twenty four (24) Sanayi bus chassis. They were further instructed to deliver the same to AVA to fabricate and build bodies, at the cost of KBS. In the witness statement, it is contended that the instructions contained in the letters dated 12th October, 1998 and 30th November, 1998 were both instructive and an affirmation that AVA had received the twenty four (24) chassis for fabrication and body building. It was further reiterated that KBS had instructed two separate entities i.e. the 2nd Defendant and AVA for the delivery of complete buses, with the former delivering the chassis and the latter fabricating the bodies. The 2nd Defendant further states that by the delivery of the twenty four (24) buses to AVA as per the instructions of KBS, it fully complied with the obligations as per the Performance Bond of 2nd December, 1998. This, it states, is evidenced by the forwarding of the twenty four (24) signed delivery notes to the 1st Defendant in the letter dated 17th May, 1999 to which the 1st Defendant, in its letter dated 1st July, 1998, informed KBS of the completion of its obligations under the Performance Bond.

Analysis of Evidence and Facts

11. From the foregoing, it is not in dispute that the 1st and 2nd Defendant entered into a contract, a Performance Bond, on 2nd December, 1998 as evidenced by the letter dated 2nd December, 1998. It was a term of the Bond that the same would be vacated in any one of two circumstances: either by the Plaintiff releasing the Bond to the surety, or by the 1st Defendant (and the supplier, the 2nd Defendant), furnishing the 1st Defendant with delivery notes, signed by the representatives of the supplier and KBS. The Court notes at this juncture, that the twenty four (24) delivery notes furnished by the 2nd Defendant to the 1st Defendant on 17th May, 1999 were for the delivery of the bus chassis to AVA as per the instructions of KBS in the letter dated 12th October, 1998. To this, AVA responded by its letter dated 30th November, 1998.
12. This far, none of the aforementioned facts were in dispute, and the evidence presented before this Court has not been disputed either. The point of divergence is evidenced when the Plaintiff in its letter dated 6th September, 2002 demanded the reimbursement of the cost of seven (7) vehicles amounting to Kshs. 35,490,000/- from the 1st Defendant. The claim is jointly and severally presented in its Amended Plaint. The 1st Defendant reiterates that the Performance Bond as executed on 2nd December, 1998 was for the delivery of twenty four (24) vehicles by the 2nd Defendant, without stipulating the condition that the vehicles were to be in. The 2nd Defendant on

its part reiterates that it fulfilled its obligations under the contract by supplying twenty four (24) chassis to AVA as per the instructions of KBS vide its letter dated 12th October, 1998.

13. The 2nd Defendant made reference to two letters dated 12th October, 1998 and 30th November, 1998. It is the contention of the 2nd Defendant that this amounted to KBS issuing different instructions to two different entities to ensure full compliance with the delivery of the twenty four (24) buses. One set of instructions was to the 2nd Defendant, to deliver twenty four (24) bus chassis as per Sale Invoice No. 1570 dated 13th November, 1998. The second set of instructions was issued to AVA for the fabrication of the bodies of the buses as per the letter dated 30th November, 1998.
14. The issues for determination by the Court, are contained in the Agreed Statement of Issues dated 10th August, 2007 as follows:

- “1. Whether the Plaintiff had leave to amend the Plaintiff in the manner set out in the amended Plaintiff;*
- 2. Whether the 2nd Defendant is non-suited due to want of privity of contract;*
- 3. Whether the 24 units to be supplied were to be complete with body and seats;*
- 4. Whether the 2nd defendant delivered the 24 buses*
- 5. Whether the Plaintiff is entitled to claim from the Defendants jointly and severally the amount of Kshs. 35,490,000/- together with interest;*
- 6. Whether the demand letter and/or notice of intention to sue was served on the 2nd Defendant; and*
- 7. Who is to bear the costs of the suit”.*

The first two issues were conclusively dealt with in the Rulings by Waki, J, Waweru, J and Emukule, J delivered on 23rd May, 2003, 23rd November, 2006 and 24th July, 2004 respectively. Leave to amend and the enjoinder of the 2nd Defendant as party to the suit need not to be dealt with at this juncture as the said Judges jurisdiction have already dealt with them, with no appeal having been filed with reference to the same.

15. What is in contention is whether the vehicles as covered by the Performance Bond executed on 2nd December, 1998 comprised twenty four (24) complete buses with bodies and seats or twenty four (24) chassis only as alleged by the 1st Defendant. PW1 **Robert Mugambi Murithi** in submitting his witness statement dated 22nd October, 2012 as his evidence-in-chief at during the hearing of this matter, stated that there was no contract between Plaintiff and the 2nd Defendant. The contract that it had, was with the 1st Defendant as surety for the Plaintiff's then customer, KBS. He produced Plaintiffs **Exhibit No. 3** being the Performance Bond that had been executed as between the Plaintiff and the 1st Defendant. The non-delivery claim, he reiterated, was against the 1st Defendant, who as surety, had guaranteed the delivery of twenty four (24) complete vehicles to KBS, of which seven (7) were undelivered. During cross examination, PW1 confirmed that the 2nd Defendant was to supply the chassis while AVA was to build and fabricate the bodies and seats. He also admitted that there were twenty four (24) delivery notes that had been issued by the 2nd Defendant to AVA for the twenty four (24) chassis as provided in **Plaintiff's Bundle of Documents at pages 44-67**. This was as per the instructions issued by KBS to the 2nd Defendant in its letter dated 12th October, 1998. PW1 stated that the Plaintiff was neither aware of this letter, nor the letter dated 17th May, 1999 addressed to the 1st Defendant from the 2nd Defendant, acknowledging the delivery of the twenty four (24) bus chassis to KBS. He was also not aware as

to whether twenty three (23) buses were registered in the joint names of the Plaintiff and KBS as stipulated in the letter dated 12th October, 1998 addressed to the 2nd Defendant from KBS. He acknowledged that the purchase price as stipulated in **Sales Invoice No. 1570** was Kshs. 5,070,000/- per unit for the twenty four units, totaling to Kshs. 121,680,000/-.

16. On 17th February, 2014 DW1 Parul Shakant Khimasia testified during the Defence hearing on behalf of the 1st Defendant. He admitted that the 1st Defendant had agreed and executed a Performance Bond for Kshs. 121,680,000/- in order to guarantee the delivery of twenty four (24) buses by the 2nd Defendant to KBS. He referred the Court to a letter dated 12th October, 1998 by KBS to the 2nd Defendant, in which it stated that they were in receipt of the twenty four (24) bus chassis valued at Kshs. 2.5 Million each. The letter further, as stated above, detailed that the chassis were to be delivered to AVA for fabrication and body building. He stated that the 2nd Defendant had completed its obligations under the Performance Bond and had delivered the twenty four (24) bus chassis as per the 2nd Defendant's letter dated 1st July, 1999. In cross examination, he admitted and stated that there was no provision in either the Sales Invoice or the Performance Bond that there was to be a supply of chassis only and that they both detailed delivery of "vehicles". This was the position taken by DW2 Titus Thome Mbiti who reiterated that he was not sure whether the delivery was for a complete bus or chassis only. However, he reaffirmed DW1 statement as regards the Kshs. 2.5 Million being the unit price for each chassis. The total cost of approximately Kshs. 5,070,000/- per complete bus would have been inclusive of the cost of the body and seats that had been quoted to KBS.

17. In determining whether the delivery of the vehicles was for the complete bus with body and seats or just the chassis, the delivery notes, letters dated 12th October, 1998 and 30th November, 1998 and the Sale Invoice No. 1570 present a clear picture in my view, who was to deliver what. In the said Sales Invoice details it reads inter alia:

"24 (twenty four) BMC Buses chassis units comprising:- 6 cylinder (5880 cc) turbocharger diesel engine, 6-speed + 1 reverse synchronized gearbox complete on eleven (11) size 10.00 x 20 tubed tyres all round including sparewheel, R.H.D power steering, driver's manual, wheel changing tools and complete with 55" seater bus body with seats to be painted to your colour SPECIFICATION." (emphasis added).

Both DW1 and DW2 admit that the unit prices referred to in the letter dated 12th October, 1998 referred to the unit price per chassis of Kshs. 2.5 Million, but with the additional costs of the body and seats, the price would rise to Kshs. 5,070,000/- as quoted in the Sales Invoice. In the letter dated 30th November, 1998 addressed to KBS, AVA confirms the acceptance of the order for the building of twenty three (23) bodies to be installed on the chassis delivered by the 2nd Defendant. A further fax transmission dated 11th September, 1999 shows that the 2nd Defendant was still in possession of **"5 or 6 units"** which were awaiting a "mechanical finish". Later in the letter, it was stated that bus no. twenty four (24) had been delivered directly to KBS, although no delivery notice has been produced to evidence that fact.

18. From the foregoing, it may be inferred that KBS had engaged two different entities to facilitate the delivery of 24 complete buses. Firstly, there was the 2nd Defendant, who was to deliver the 24 chassis to AVA for body fabrication. After the fabrication, the bus, now complete with body, seats and colour as specified by KBS, were delivered to the 2nd Defendant for mechanical completion. The 2nd Defendant, as evidenced by the seventeen (17) delivery notes in the Plaintiff's Bundle of Documents at pages 27-44, was to deliver the vehicles to KBS in a complete and satisfactory mechanical condition. KBS by itself or its representatives, by appending their signature on the delivery notes, acknowledged receipt of the same. The 2nd Defendant has not produced before Court any other delivery notes acknowledging the delivery of the disputed seven (7) vehicles. In my understanding of the whole process, the 2nd Defendant was to deliver the 24 chassis to AVA who would then build on to the chassis the bodies, seats etc and then re-deliver to the 2nd Defendant's Mombasa workshop the US complete buses for the 2nd Defendant to mechanically

complete the same for final delivery to KBS.

19. According to the Transport Licensing Act, Cap 404 of the Laws of Kenya, 'motor vehicle' is defined as:

“a mechanically propelled vehicle intended or adapted for use on roads and includes a trailer but does not include a tractor”

This definition is replicated under the Traffic Act, Cap 403 which defines the term 'motor vehicle' as:

“any mechanically propelled vehicle, excluding any vehicle running on a specially prepared way such as a railway or tramway or any vehicle deriving its power from overhead electric power cables or such other vehicles as may from time to time by rules under this Act be declared not to be motor vehicles for the purposes of this Act;

Can a chassis therefore, in following the above descriptions, be construed to mean a vehicle in accordance with the Performance Bond? A chassis is, in every description of the term, a part of a vehicle, consisting of the engine, wheels and frame. It is analogous to the human skeleton i.e. the bones without the flesh and other organs. It is a part of a vehicle and in my view, cannot be construed to mean a complete vehicle. The Performance Bond executed on 2nd December, 1998 alongside the Sales Invoice dated 13th November, 1998, evidenced that the 2nd Defendant was to deliver to KBS twenty four (24) vehicles, which according to the Transport Licensing Act and the Traffic Act, means vehicles adapted for use on the road. The condition under the Performance Bond was for the delivery of twenty four (24) vehicles. It reads in part:

“NOW the condition of the bond is such that if the supplier shall conform to the above agreement then the above bond shall be void, otherwise it shall remain in force until it shall expire by either the bank releasing the original bond to the surety or the supplier furnishing the surety with delivery notes for the twenty four (24) vehicles duly signed by the representatives of the supplier and the bank's customer. (emphasis added).

20. The 2nd Defendant only supplied seventeen (17) complete vehicles to KBS, although twenty four (24) bus chassis had been confirmed as ordered in the letter dated 12th October, 1998. AVA also acknowledged receipt of the same number of chassis from the 2nd Defendant for fabrication as instructed by KBS. However, 2nd Defendant supplied and delivered only seventeen (17) complete vehicles to KBS. Why then did they not supply all twenty four (24) vehicles as per the contractual agreement? From the fax dated 11th September, 1999 it would seem that the 2nd Defendant was still in possession of “5 or 6 units” that they had not completed for onward delivery to KBS. The 2nd Defendant has not given any satisfactory answer as to why it did not deliver the remaining seven (7) vehicles to KBS. Instead it turned round to allege that it was contracted to deliver twenty four (24) bus chassis. The Sales Invoice, the letter dated 12th October, 1998 and the delivery notes in the Plaintiff's Bundle of Documents at pgs. 27-44 paint a different picture altogether as to whose responsibility and obligation it was for the delivery of the twenty four (24) complete buses. In my view, it was the responsibility of the 2nd Defendant to supply KBS with twenty four (24) vehicles, complete with body and seats as per the Sales Invoice No. 1570 dated 13th November, 1998 and as per the Performance Bond executed on 2nd December, 1998. The total price was inclusive of the body and seats, which fact is not disputed as evidenced by the letter dated 12th October, 1998, in which the unit price for the chassis was detailed as Kshs. 2.5 Million. The balance of Kshs. 2,570,000/- was the cost of fabrication, body building and seats of the twenty four (24) buses, which fact was attested to by DW2 in his testimony.

21. The 1st Defendant submitted that the Plaintiff was guilty of inordinate delay in filing the claim against it. It referred to **Universal Bank Ltd v Double Whiteline Stationary Printers & 2 Others H.C.C.C No. 561 of 1998** in which the Court made a determination *inter alia*:

“It is significant that the Plaintiff waited until 26th August, 1997 before making the demand it did through its advocates. The Plaintiff has not explained why this delay of nearly six months occurred. Perhaps had they taken steps earlier they could have obtained payment from Naker who did not leave Kenya until August 1997.”

This was the position adopted by the Court in Universal Bank Ltd v Guaca Stationers & Another H.C.C.C No. 29 of 1999 in which it was held:

“In consonance with Universal Bank Ltd v Double Whiteline Stationary Printers & 2 Others (supra) I am, like Commissioner of Assize Philip Ransley, of the view that the loss in this case was occasioned by the inactivity of the Plainiffs. Indeed it took them two years even to file this action after the 2nd Defendant was safely out of the way.”

The Rulings in the aforementioned cases can be distinguished from the instant one. Firstly, they dealt with promissory notes, which by their very essence have a time limitation period pegged to them. Secondly, they were short term facilities, issued and availed under set out terms and conditions. Unlike a Performance Bond, which is autonomous in nature i.e. that the party's obligations (in this instance the Plaintiff), are independent of the obligations of the 1st Defendant in the underlying transaction, which was for the guarantee of the 2nd Defendant to supply the vehicles to KBS, the Plaintiff's client. Promissory notes bestow a primary obligation as between the maker and the endorser. The obligations under the Performance Bond as here, were as stipulated, that the bond would only be vacated, upon the satisfactory performance and completion by the 2nd Defendant of its obligations. As long as the 2nd Defendant did not conform to the agreement, the terms and conditions of the Performance Bond subsisted. There would be no delay in executing the claim unless and until the obligations were satisfied.

22. In my opinion, the 1st Defendant having failed to satisfy its obligations under the Performance Bond, the Plaintiff was entitled to claim as against it for the cost of the undelivered seven (7) complete buses. The 1st Defendant also admits in its submissions that:

“...However, on evidence it does appear that in the final analysis CMC (the 2nd Defendant) was to supply 24 buses with body and seats and not simply 24 chassis.”

No evidence to contradict this statement has been adduced by either of the Defendants. In Kenindia Assurance Co. Ltd v First National Finance Bank Ltd (2008) eKLR, it was held inter alia:

“The very nature of a performance bond should surely be calling it in and being paid promptly on demand. There should be proof of conditions, the only exception is fraud. Only then will a Court interfere with the enforcement of a bond.”

The Court of Appeal, in the abovementioned determination, cited the authority of Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All E.R 976 where Lord Denning held:

“The bank's undertaking is therefore as absolute and autonomous as the one given under a letter of credit so that when the demand is made in conformity to the guarantee, payment must be made even if the seller objects that the beneficiary's request is manifestly unjustified.”

23. The 2nd Defendant, in a letter dated 2nd December, 1998 forwarding the Performance Bond, stated that the supply was for twenty four (24) vehicles to KBS. The 2nd Defendant did not complete its obligations as under the Performance Bond and the 1st Defendant as surety, is culpable for the failure by the 2nd Defendant in supplying the seven (7) complete vehicles. No fraud has been

alleged by the Defendants that would enable the Court, to follow the **Kenindia Assurance Co. Ltd v First National Finance Bank Ltd** and **Edward Owen Engineering Ltd v Barclays Bank International Ltd** cases (both supra), so as to set aside the enforcement of the Performance Bond. The Plaintiff has, on numerous occasions maintained, that it has no claim as against the 2nd Defendant as stated in paragraph 12 of its Amended Plaintiff. As a result, I enter Judgement for the Plaintiff as against the 1st Defendant for Kshs. 35,490,000/- together with interest at 18% as well as costs as prayed in the Amended Plaintiff.

DATED and delivered at Nairobi this 24th day of April, 2014.

J. B. HAVELOCK

JUDGE