



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 32 of 2005**

**NATIONAL CEREALS & PRODUCE BOARD.....PLAINTIFF**

**VERSUS**

**DUBAI BANK KENYA LIMITED.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff is a statutory body dealing in grains and other cereals and with its head offices at Nairobi in the Republic of Kenya. The Defendant is a limited liability company incorporated in the Republic of Kenya and a banking institution having its offices at Nairobi.
2. The Plaintiff's suit is based on the Further-Amended Plaint dated **10<sup>th</sup> May, 2006** and filed on **11<sup>th</sup> May 2006**. In the suit, the Plaintiff prays for judgment against the defendant for the sum of US\$ 687,000 together with interest thereon at court rates from the date of filing the suit till full payment. The Plaintiff also prays for the costs of the suit.
3. The background of the suit is that vide a written contract executed by the plaintiff, on one part, and M/S Freba Investments (herein referred to as "the firm") on the other part, the plaintiff contracted to buy from the firm some thirty (30) thousand metric tons of white maize at the price and subject to other conditions contained in the said contract. One such condition of the contract was that the firm was to procure and deliver to the Plaintiff a Performance bond irrevocably guaranteeing the Plaintiff that the firm would honour its obligations under the contract and that in default, the plaintiff would be entitled to recover the value of the performance bond.
4. On 20<sup>th</sup> August 2004 the firm, through the Defendant procured the performance bond dated 19<sup>th</sup> August 2004, in which the Defendant guaranteed to the Plaintiff the execution by the firm of the contract to the extent of US \$ 687,000. However at the hearing of the suit, the Plaintiff corrected the date of issuance of the bond from 20<sup>th</sup> August 2004 to 24<sup>th</sup> August 2004 which was not disputed by the defendant. in the circumstances the court allowed the said amendment.
5. It is the Plaintiff's claim that the firm failed and/or refused to deliver the maize within the contracted time or at all despite the fact that the Plaintiff fulfilled its obligations. Due to the Firm's breach, the plaintiff demanded the payment of the said sum of US \$ 687,000 from the Defendant but it is their claim that the defendant has failed and/or refused to pay the said amount, which is now the subject of this suit. It is the plaintiff's case that the performance bond imposed upon the defendant strict liability and the defendant is accordingly obliged to honor the plaintiff's claim.
6. The Plaintiff's claim is controverted by the Defendant through a Further Amended Statement of Defence dated 18<sup>th</sup> May 2006 and filed on the same day.

7. The defendant avers that the plaintiff made various prejudicial material variations to the written contract dated 17<sup>th</sup> August 2004, without authority, consent and/or knowledge of the defendant. The particulars of the variations are as follows:-

**a) The plaintiff entered into a written addendum with Freba Investments dated 24<sup>th</sup> August 2004, which agreement made substantial variations to the written contract referred to in the plaint.**

**b) The plaintiff granted freba investments a further extension of the shipment date from 30<sup>th</sup> August 2004 to 23<sup>rd</sup> September 2004.**

**c) The plaintiff granted freba investments a further extension of the shipment date from 23<sup>rd</sup> September 2004 to 25<sup>th</sup> October 2004.**

**d) The plaintiff granted freba investments a further extension of the shipment date from 25<sup>th</sup> October 2004 to 16<sup>th</sup> November 2004.**

8. The defendant admits issuing a performance bond dated 19<sup>th</sup> August 2004 and avers that the same took effect from that date and not 20<sup>th</sup> August 2004. It is further averred by the defendant that the said performance bond was only valid for 90 days from the date of issue and contends that the said guarantee expired on 16<sup>th</sup> November 2004.

9. It is the defendant's case that the guarantee was discharged by virtue of the various material variations to the written contract. The defendant disputes the plaintiff's claim that it fulfilled its contractual obligations and asserts that the plaintiff has been sued by Freba investments for breach of contract in HCCC NO. 28 of 2005.

10. The defendant admits receiving a demand for payment vide a letter dated 16<sup>th</sup> November 2004 but avers that the same was received on 18<sup>th</sup> November 2004 when the guarantee had lapsed and therefore the defendant is not liable to pay the sum claimed. Further, the said demand dated 16<sup>th</sup> November 2004 did not comply with the requirements of the performance bond issued by the defendant and as such the same was invalid.

11. It is the defendant's contention that it was not liable to pay the plaintiff the sum claimed as it had notice that the claim was a fraud. The following are the particulars of fraud as alleged by the defendant:-

**a) The plaintiff made the demand well knowing that it had breached the contract with Freba Investments.**

**b) The plaintiff made the demand well knowing that it had defaulted in its part of the contract with Freba investments in respect to issuance of a workable letter of credit.**

**c) The plaintiff made the demand well knowing that it was not entitled to any payment from Freba Investments.**

**d) The plaintiff made the demand well knowing that Freba investments had not breached its contractual obligations and conditions.**

12. It is also the defendant's contention that they are under no obligation to pay the purported claim as the engagement to pay was made to Freba Investments and not to the Plaintiff herein.

13. The plaintiff called four (4) witnesses. Mr. Patrick Karanja, PW 1, relied entirely on his witness statement filed in court and dated 22<sup>nd</sup> November 2011.

14. On cross examination, PW 1 confirmed that Freba Investments was to furnish the Plaintiff with a

performance bond whose validity period was 90 days from date of issue. He also confirmed that the demand for payment as made by the plaintiff under the performance bond was received by the defendant on 18<sup>th</sup> November 2004. PW 1 maintained that the performance bond dated 19<sup>th</sup> August 2004 was issued to the Plaintiff on 24<sup>th</sup> August 2004.

15. On re-examination, PW 1 testified that under clause 9.1 of the contract between Freba investments and the Plaintiff, there was a provision for the issuance of a performance bond but that the said clause did not indicate how the 90-day period would run. He also testified that the performance bond was for the sum of USD 687,000 which is 10% of the Contract sum.

16. Mr. Stanley Kiprotich, PW2, a clerk with the Plaintiff testified that on 16<sup>th</sup> November 2004 he could not deliver the letter for demand of payment to the defendant since the officer in charge of receiving the said letter was not in. He went back to the defendant's offices on 17<sup>th</sup> November 2004 and this time round he found the officer in charge, one Mr. Rajab Karume, but the said officer did not receive the letter. However, it is PW 2's testimony that on 18<sup>th</sup> November 2004 he went back to the defendant's offices and the said Mr. Rajab Karume received the letter.

17. Mr. Jason Ayuka, PW 3, a driver at the plaintiff company and Mr. James Keya, PW 4, relied entirely on their witness statements filed in court and dated 22<sup>nd</sup> November 2011. They essentially gave testimony to buttress the position of PW 2 as regards the delivery of the letter dated 16<sup>th</sup> November 2004.

18. The defendant called one witness, Mr. Rajab Karume, DW 1. He is currently the manager debt recovery but was the manager credit department in 2004. He relied entirely on his witness statement dated 17<sup>th</sup> February 2012. He confirmed that Freba investments formally requested the defendant to issue them with a Performance Bond. The requisition form did not form part of the bundle of documents produced by the defendant. He testified that the performance bond was issued on 19<sup>th</sup> August 2004 and he is not aware whether the said bond reached the plaintiff on 24<sup>th</sup> August 2004.

19. It was also DW 1's testimony that the performance bond was to expire on 16<sup>th</sup> November 2004 and that if a demand was made to them within the period of validity the defendant would have paid. DW 1 denied ever meeting Mr. Kiprotich on 17<sup>th</sup> November 2004 and testified that he acknowledged the letter on 18<sup>th</sup> November 2004.

20. It was averred by DW1 that the validity period of the performance bond was 90 days from the date of issue. He further averred that the validity of a performance bond is pegged on the date of issue when the bank signs it and not when it is received by the beneficiary.

21. After the hearing the parties herein filed written submissions as directed by the Court and relied on various English authorities which I have considered.

22. There are a number of issues not contested in this matter. The parties are in agreement that the demand for payment dated 16<sup>th</sup> November 2004 by the Plaintiff was served upon the defendant on 18<sup>th</sup> November 2004. The defendant has admitted having executed the performance bond herein in favor of the Plaintiff. Therefore, the defendant's argument that the demand given by the plaintiff was null and void by virtue of the plaintiff including the word "limited" to Freba investments does not go to the substance of this matter. In addition, it is apparent from the proceedings that the defendant abandoned the allegations in its further amended defence that the performance bond was discharged by virtue of material variations to the contract and that the plaintiff's claim was a fraud. In essence, the parties did not contest the authenticity of the performance bond on its substance. The issue arose on the construction of the said performance bond.

23. It's the defendant's case that it was a requirement under the bond that the plaintiff would make demand for payment if Freba investments did not fulfill a condition of the contract dated 17<sup>th</sup> August 2004 and not when the firm breached an obligation of the contract. On this argument, I am of the view

that there is no real departure between a breach of contract and not fulfilling a condition of the contract. Under contract law it is trite that non fulfillment of a term of the contract which is a condition amounts to breach of the contract. From the court records, it is clear that Freba Investments breached the contract between the plaintiff and itself as evidenced in the judgment delivered by my sister Honourable Joyce Khaminwa on 22<sup>nd</sup> October 2009 in HCCC No. 28 of 2005.

24. It is further the defendant's case that the validity of the bond was for 90 days and time started running from the date of issue which was on 19<sup>th</sup> August 2004. On the other hand it is the plaintiff's case that the date of issue was 24<sup>th</sup> August 2004 when it received the performance bond. In its submissions the defendant referred the court to the definition of *date of issue* in **Black's law dictionary** as follows:-

**“the date that a stock or bond bears on its face, not the date on which it is actually signed, delivered or put into circulation.”**

The above definition is clear that the date of issue is the date on the face of the document. In that case the date of issue of the Performance bond herein was 19<sup>th</sup> August 2004 being the date on the face of the document.

25. The plaintiff's interpretation of the date of issue is not substantive and seems to be an interpretation made for convenience. I would go with the definition given in the black's law dictionary that the date on the face of the bond is the date of issue. In any case, it was the duty of Freba Investments to furnish the plaintiff with the duly executed performance bond in time. If the practice was in accordance with the plaintiff's interpretation, then it would be difficult to enforce any breach occasioned by time since the party in default would plead having received a document on a date convenient to his or its circumstances.

26. Furthermore, I am of the opinion that due diligence would have required the Plaintiff to scrutinize the performance bond and raise any queries it had over the same document then. On the contrary, the plaintiff was supplied with the performance bond and they accepted it. On the face of the document it is clear that the same was valid for 90 days and it's only reasonable that the 90 days was to run from the date on the face of the document. Therefore, the plaintiff cannot now turn back and challenge the performance bond whether on the issue of the date or otherwise.

27. In light of the foregoing, this court remains with the following main issues for determination:-

- a) **When was the defendant served with the demand for payment dated 16<sup>th</sup> November 2004;**
- b) **Whether the performance bond was valid as at the date of demand;**

28. The first issue is when the first defendant was served with the letter dated 16<sup>th</sup> November 2004. It is worthy to note that PW 2 admitted that the defendant received the said letter on 18<sup>th</sup> November 2004. His testimony was that when he went to serve the letter upon the defendant on 16<sup>th</sup> November 2004, the officer in charge was not around and that on 17<sup>th</sup> November 2004 when he went back to the defendant's offices to serve the same letter the officer in charge did not receive the letter. The officer in charge, DW 1 denied having received any letter from the Plaintiff on 17<sup>th</sup> November 2004.

29. While I may give the benefit of doubt to the Plaintiff that indeed they attempted to serve the defendant on 16<sup>th</sup> November 2004, I cannot be oblivious to the fact that there was no evidence of service that day. In fact, even PW 2 himself admitted that they were not able to serve the letter on 16<sup>th</sup> November 2004. Therefore the Plain fact is that the said letter was not served on 16<sup>th</sup> November 2004. The evidence in Court is that the same was received by the defendant on 18<sup>th</sup> November 2004 and this court can only find that demand for payment by the plaintiff was served upon the defendant on 18<sup>th</sup> November 2004. There is no evidence documentary or otherwise to prove that the defendant was notified of its liability before the last date of the life of the performance bond which was 16<sup>th</sup> November 2004.

30. However, the evidence of Stanley Kiprotich PW2, alluded to attempts by the Defendant to evade service of the demand letter. Nevertheless, I am not willing to accept the attempt to avoid service as a fact since DW1 Mr. Rajab Karume vehemently denied the same. It is also my view that if the alleged attempt to evade service were factual and proven then the date of service would be the 17<sup>th</sup> November 2004 when the allegation of evasion was made. It is worth noting that on 16<sup>th</sup> November 2004, when Mr. PW2 first went to the defendant's premises to serve he was not able to do that because there was nobody to receive the document. He willingly returned back with the document.

31. This leads us to the second issue of whether the performance bond was valid as at the date of demand. The date of issue of the performance bond was 19<sup>th</sup> August 2004 and the same was valid for 90 days. Therefore the bond was to expire on 16<sup>th</sup> November 2004. The evidence that has been led in Court is to the effect that the demand for payment dated 16<sup>th</sup> November 2004 was served upon the defendant on 18<sup>th</sup> November 2004. It is not in doubt that on this date the performance bond had already expired and was no longer in existence. Therefore, in essence, the Plaintiff's right to crystallize the performance bond had been overtaken by events the performance bond having expired. It is not in dispute that the plaintiff was entitled to payment under the performance bond from the defendant since Freba Investments had breached the contract. However, it seems, and unfortunately so, that the plaintiff's demand for the said payment came too late in the day. Even if the service was effected on 17<sup>th</sup> November 2004 when the alleged evasion to accept service was made, it would still have been a day too late.

32. In the event my finding is that the performance bond dated 19<sup>th</sup> August 2004 with a validity period of 90 days expired on 16<sup>th</sup> August 2004. Therefore the said performance bond was not in existence when the plaintiff served the defendant with a demand for payment on 18<sup>th</sup> November 2004. The result is that the same was not valid on 18<sup>th</sup> November 2004 and this Court can therefore not enforce the same.

33. In the upshot, the Plaintiff's case is hereby dismissed with costs to the defendant.

That is the judgment of the Court.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 6<sup>TH</sup> DAY OF FEBRUARY 2013**

**E.K.O OGOLA**  
**JUDGE**

**PRESENT**

M/s Malesi for plaintiff  
Kipng'eno for Defendant  
Teresia- court clerk