



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE NO. 284 OF 2010

HANDS OF HOPE

INTERNATIONAL.....PLAINTIFF

VERSUS

**MAYFAIR INSURANCE COMPANY
LIMITED.....DEFEMDANT**

RULING

1. According to the plaint, the plaintiff's claim is in respect of a performance bond issued by the defendant on behalf of **Shivcon Construction Company Limited**, (hereinafter referred to as the contractor). It was agreed by a contract dated 14th May, 2008 that the contractors would complete the building works of an orphanage within 52 weeks. Under the terms of the performance bond, the defendant agreed to pay to the plaintiff on demand a sum of Ksh. 4,771,178/=. According to the plaintiff a demand letter dated 14th August 2009, was issued to the defendant requesting them to honor the terms and conditions of the performance bond, but the defendant failed or refused to honor the bond which precipitated the plaintiff to file this suit against the defendant.
2. The defendant entered appearance and filed a chamber summons which was subsequently amended on 27th May, 2010. The defendant sought for orders that all proceedings in this suit be stayed and the dispute between the plaintiff and **contractor be** referred to arbitration. This application is premised on the grounds that the dispute by plaintiff is in respect of the performance bond regarding an agreement and conditions of contract for building works dated 14th May, 2008 between the plaintiff and the contractor should be determined first. Under clause 45.0 of that agreement and conditions of contract for building works, it provides that any dispute should be resolved by way of arbitration.
3. In this regard the plaintiff declared a dispute, and the performance bond cannot be invoked before the dispute is resolved. Counsel for the defendant relied on the supporting affidavit of **Tusha Shah** sworn on 19th May, 2010. In that affidavit, the deponent attached a copy of the agreement and conditions of contract for building works entered into between the plaintiff and the contractor. In that agreement, the plaintiff is described as the employer and **Shivcon Construction Company Limited** is described as the contractor.

4. This application was opposed; Counsel for the defendant relied on the grounds of opposition on points of law. It was argued that the application is bad in law since the agreement and conditions of contract for building works did not involve the defendant. The performance bond did not have an arbitration clause. The defendant had nothing to do with the arbitration clause No. 45.0 which was a contract between the plaintiff as the employer and **Shivcon Construction Company Limited** as the contractor. Thus the construction agreement dated 14th May, 2008 and contractor's performance bond dated 19th May, 2008 are two distinct and separate agreements. Counsel for the plaintiff also relied on several authorities which explain what constitutes a performance bond and the correct interpretation that is given to a written instrument such as the performance bond.

5. The plaintiff has sued the defendant who executed a performance bond dated 19th May, 2008 seeking for its due performance. The defendant is alledging that the issue of the performance bond should await the arbitration of the agreement and conditions of contract for building works between the plaintiff and contractor. To my mind, the contract for building works is between the plaintiff and the contractor. The contractor's performance bond was issued separately on 19th May, 2008 by the defendant to the plaintiff. I have read the performance bond; there is no clause that makes provision for the performance bond to await the determination of the arbitration of the building contract.

6. The performance bond is a separate contract between the plaintiff and the defendant. The contractor is not a party to this that bond, and is also not a party to this suit, therefore there is no privity of contract with the plaintiff in regard to the performance bond. A similar opinion which I find of persuasive nature is expressed in **HALSBURY'S LAWS OF ENGLAND FOURTH EDITION PARA 748** where the learned authors have described what constitutes the doctrine of privity as followings:-

“The general rule: The destine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose on strangers to it. That is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuation”.

7. I find no privity of contract in regard to the performance bond with the plaintiff and the contractor. It is also not clear under whose authority the defendant is seeking these orders as the authority of the contractor was not revealed. It is evident that the performance bond constitutes a separate contract. For the aforesaid reasons, I have no difficulty in finding the application amended on 18th May, 2010 lacking in merit; it is hereby dismissed with costs to the plaintiff.

Ruling signed and submitted for delivery on 1st November, 2010

MARTHA KOOME

JUDGE

Delivered and countersigned on 8th day of December, 2010.

MURUGI MUGO

JUDGE