



**GATARE LIMITED.....PLAINTIFF**

**VERSUS**

**STANDARD ASSURANCE KENYA  
LTD.....DEFENDANT**

### **RULING**

Application dated 22/7/08 was filed in court on 28/7/2008. The applicant seeks summary judgment against the defendant as prayed in the plaint dated the 13<sup>th</sup> May 2008 together with interest and costs. The amount claimed in the plaint amounts to Kshs.5,400,000/= with interest at court rates.

The application is supported by grounds and affidavit of James Mwai Kamotho sworn on 22/7/2008. It is sworn that the plaintiff entered into a contract with Pekaki Construction and Works Services (*hereinafter called Pekaki*). Pekaki was required to obtain a performance bond which was issued by the defendant. The said Pekaki failed in the performance of his contract and bond became payable to the plaintiff due to non performance of the contract by Pekaki. The performance bond issued by the defendant is exhibited and marked “JMK 2”.

The defendant has filed a replying affidavit sworn by Simon Musembi Mbau described as the Underwriting Manager of the defendant. The defendant has opted to deny liability under the said bond and raises triable issues arising from the statement of defence and requests for leave to defend the suit.

In reply to the defendant’s affidavit the plaintiff caused a reply to be sworn by James Mwai Kamotho showing that plaintiff did not negotiate the bond with the defendant and it is not the source of any errors that may be spotted on the document. And that the bond was not a draft but a final document which was issued by the defendant in connection with the contract of building works.

Parties have filed their authorities. This application is brought under **Order 35 Rule 1, Civil Procedure Rules** which provides for a summary procedure by which the court may enter judgment against a defendant for a liquidated demand with or without interest or recovery of land. Where the defendant has appeared on an application by the plaintiff, the defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend.

In this case the plaintiff’s evidence is sworn by affidavit of a Director of the plaintiff company who swears that he is fully aware of the issues in dispute. And the defendant has opted to file an affidavit in opposition. The parties have filed lists of authorities. The plaintiff relies on:

**1. Magunga General Stores vs. Pepco Distributors Ltd.**

Where the Court of Appeal held that a mere denial is not sufficient defence and a defendant has to show that there is a good defence.

**2. Zola vs. Ralli Bros [1969] EA 691**

**3. Kobil Petroleum Ltd. vs. Kisisi Petroleum Products Ltd. – HCC No. 123/02**

Where Judge Ringera (as he then was) observed that:-

***“It appears to be common ground and indeed it is the correct position in law that once the plaintiff’s motion for summary judgment, satisfied the provisions of Order 35 Rule 1, the onus shifts to the defendant to show pursuant to the provisions of Rule 2 that he should be given leave to defend.”***

**4. German Development Co-operation (GTZ) vs. Euro Bank Ltd. [2002] UR 166**

In this case the facts were in connection with payment of Bond. The performance bond provided for payment on demand without the need to prove or show reasons for demand. The defendant is not therefore justified in introducing extraneous grounds which plainly were not part of the bond. In the present case the defendant was bound to:-

***“To Gatare Ltd. (employer) in the sum of Kshs.5.4 million to be paid by us to the said Gatare Ltd. (employer)”***

Now the condition of the above written bond is such that:-

***“if the said Pekaki Construction & Works Services (contractor), his/her executors, administrators, successors or assigns shall conform to the said agreement, the above-written bond to be void otherwise to remain in full force provided always and it is hereby agreed and acknowledged that the liability of the said Standard Assurance (K) Ltd. (surety) under the above written bond shall not in any way be discharged or impaired by reason of any breach or breaches, willful or otherwise of the said agreement committed with or without the knowledge or consent of the said Pekaki Construction & Works Services (contractor) by or on behalf or with the knowledge or consent of the said Gatare Ltd. (employer).”***

Therefore, it is clear the bond above stated is unconditional.

Regarding the defences in the case of **Laxmanbhai Construction Ltd. vs. Kenya Oriental Insurance Co. Ltd.** Hon. Onyango Otieno, J.A. (as he now is) observed that:-

***“The complicated nature of a case is no excuse for refusing an application under Order 35 so long as it is clear that the defendant has no real defence.”***

In the case of **First National Finance Bank Ltd. vs. Kenindia Assurance Co. Ltd. [2002] KLR 2100 CCK.**

***“The very nature of 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 in the enforcement of a bond.”***

The plaintiff also relies on Halsbury Laws of England, Vol. 3 (1) at page 213 (Banking). Paragraph 256 Performance Bonds:-

***“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 supplier and the customer, nor with the question whether the supplier has performed his contractual obligation or not, nor whether the supplier is in default or not.”***

And finally Pagets Law of Banking, Chapter 34:-

***“Performance bonds tend to be used where the underlying obligation is not payment of money but the performance of other obligations such as arising under a building contract. The duty of the guarantor under a guarantee is to pay the sum or sums therein stated on presentation of a written demand for payment.”***

The defendant has submitted authorities also:-

1. **Five Continents Ltd. vs. Mpata Investments Ltd. [2003] 1 65**

Which concerned the striking out a statement of defence on the ground of triable issues.

2. **Provincial Insurance Co. & East Africa Ltd. vs. Kivuti**

Where it was held that:-

***“In an application for summary judgment even one triable issue if bona fide would entitle the defendant to unconditional leave to defend.”***

3. **Order 14 Rule 4** Supreme Court rules:-

***“The power to give summary judgment under Order 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend.”***

4. **Text and Materials in Commercial Law by Sealy & Hooley at 682**

Where the case of **Edward Owen Engineering Ltd. vs. Barclays Bank International Ltd. [1978] QB 159 C.A.** is referred to Lord Denning M.R. said:-

***“A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course, we are very familiar. It has 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 the credit are satisfied. Any dispute between buyer must be settled between themselves. The bank must honour the credit ... there is an exception in the case of established or obvious fraud to the knowledge of the bank ... such is the law as to a confined letter of credit. How does it stand with regard to a performance bond or a performance guarantee?”***

***So as one takes instances after instances these performance guarantees are virtually promissory notes payable on demand.”***

Considering the above authorities cited by both sides and considering the document annexed by the plaintiff as “JMK 2”, I find no triable issues arising between the plaintiff and the defendant. The bond is a separate contract from the contract between the plaintiff and the contractor. The bond is therefore unconditional. In fact it is stated thereon that the bond:-

***“shall not in any way be discharged or impaired ...”***

The denial of issuing the performance bond, in the alternative pleadings and the threatened third party proceedings are all extraneous matters. The defendant’s letter of 23/4/2008 refers Performance Bond, also under the letter dated 23/1/2008 the defendant “this bond” was mentioned by the defendant.

It is quite clear the document of Performance Bond was issued by defendant. No allegations of fraud are made. I am convinced that the plaintiff is entitled to judgment. I therefore allow the application and enter judgment for plaintiff against the defendant as prayed in the plaint with interest at the rate of 14% p.a. and costs of suit.

The plaintiff also has costs of this application.

Orders accordingly.

**DATED, SIGNED and DELIVERED** at Nairobi this 30<sup>th</sup> day of October, 2009.

**JOYCE N. KHAMINWA**

**JUDGE**