



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 380 of 2006

COASTAL KENYA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

CONCORD INSURANCE COMPANY LIMITED.....DEFENDANT

KEWAL CONTRACTORS LIMITED.....1ST THIRD PARTY

PARMINDER SINGH MANKU.....2ND THIRD PARTY

HARJEET SINGH MANKU.....3RD THIRD PARTY

R U L I N G

By a Chamber Summons filed on the 16th May 2007 the Plaintiff/Applicant seeks to have the defence filed by the Defendant herein, struck out under Order VI Rules 13 (1), (b), (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, and judgment entered for the Plaintiff as prayed in the plaint. It is contended that the defence put up by the Defendant is scandalous, frivolous and vexatious, and is meant to prejudice embarrass or delay the fair trial of this suit, and is an abuse of the process of the court.

The application is supported by a detailed affidavit sworn by Satvinder Singh Bhogal (the Managing Director of the Plaintiff), to which is attached a number of documents. It is the Plaintiff's contention that the Defendant executed a performance guarantee in favour of the Plaintiff for Kshs.15,000,000/=, and that the Plaintiff called upon the Defendant to honour the guarantee which was payable on demand, but that the Defendant failed to do so. The Plaintiff maintains that the Defendant has no defence to the Plaintiff's claim, and that the defence filed is scandalous and frivolous as the Performance Guarantee was issued unconditionally. The Plaintiff contends that issues regarding the contract between the Plaintiff and the 1st Third Party were not relevant to Defendant and provided no defence to him. Counsel for the Plaintiff also cited various authorities which He relied upon.

Although duly served with the application, the Defendant did not file any replying affidavit or grounds of opposition. When the application came up for hearing on 7th June 2007, it was adjourned at the instance of the defence counsel. The matter came up for hearing again on 18th September 2007, when another unsuccessful attempt was made on behalf of the Defendant to have the matter adjourned. The court ordered the application to proceed to hearing at 11.00 a.m.

There was however no appearance for the Defence at 11.00 a.m. By 11.40 a.m. the court decided to proceed with the matter in their absence. A detailed replying affidavit was sworn by Parminder Singh

Manku, the 2nd Third Party. He conceded that the Defendant did issue a Performance Guarantee in favour of the Plaintiff but denied that the Performance Bond was only payable on condition that there was a demand. He contended that the Performance Bond was payable only upon the default to perform or complete the sub-contracted works. He maintained that the 1st Third Party did not default in the performance and or completion of its obligation under the sub-contract, and that it was the Plaintiff who breached the fundamental terms of the sub-contract. At the hearing of the application Mr. Odhiambo who appeared for the 3rd Party “left the matter to the court.”

I have carefully considered the application, the affidavit in support and in reply as well as the submissions made by the Plaintiff’s counsel, it is evident from the defence which was filed by the Defendant that it does not deny issuing the Performance Guarantee but appears to be relying on the fact that the Plaintiff allegedly failed to meet its contractual obligation to the third party, and was also guilty of fraudulent misrepresentations and concealment of material facts in respect of the contract with the 1st Third Party. This is indeed consistent with the replying affidavit which was filed by the 2nd Third Party.

Nevertheless, it is evident that the Performance Guarantee which was signed by the Defendant in favour of the Plaintiff provided that the guarantee was payable upon demand and without any need to prove or show grounds or reasons for the demand. The Defendant cannot therefore seek to avoid liability by pleadings matters which goes towards liability as between the Plaintiff and the 3rd Party.

In the case of **R. D. Harbottle (Mercantile) Limited & Another vs Westminster Bank Limited & Others [1977] 2 ALL ER 862**, it was held as follows: -

“In the case of a confirmed performance guarantee, just as in the case of a confirmed letter of credit, the Bank was only concerned to ensure that the terms of its mandate and confirmation had been complied with and was in no way concerned with any contractual disputes which might have arisen between the Buyers and Sellers.”

Similarly in the case of **Edward Owen Engineering Limited v Barclays Bank International Limited [1978] ALL ER 976**, it was held that:-

“A performance guarantee was similar to a confirmed letter of credit. Where therefore a bank had given a 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 bank had notice of the fraud.”

The above cases clearly set out the principles governing the enforcement of Performance Guarantee.

In this case although the Defendant has alleged fraud, concealment and misrepresentation, the particulars of the alleged fraud and misrepresentation given in paragraph 13 (a) to (b) of the defence, clearly show that the allegations are nothing more than an attempt to rely on the dispute between the Plaintiff and the 1st Third Party. That cannot however provide any defence to the Defendant, as the dispute cannot be used to absolve it from its liability on the Performance Guarantee.

Accordingly, I find that the defence filed is frivolous and vexatious and is only intended to delay the fair trial of the suit. The defence is accordingly struck out and judgment entered in favour of the Plaintiff as prayed in the plaint.

Dated, signed and delivered this 24th day of October 2007.

H. M. OKWENGU

JUDGE