REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1810 OF 1999

VICTORIA COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

INTRA AFRICA ASSURANCE CO. LTD.....DEFENDANT

RULING

This is an application for summary judgment under order 35 rules 1 and 8, order 50 rule 7 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act.

The circumstances which give rise to the application are that by a letter dated 26/3/1997 the plaintiff at the request of a company known as Universal Apparels Limited (EPX) (hereinafter called the company) agreed to make available to the company the following facilities:-

(a) Overdraft facility for working capital - US Dollar 400,000

(b) Import Letters of Credit - US Dollar 600,000

Total _____

US Dollars - 1,000,00

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Interest on the said sum of US Dollars 1 million was agreed at the rate of 12% per annum compounded on a monthly basis with the plaintiff reserving the right to alter the rate on its own discretion or as may be directed by the Central Bank of Kenya. It was further agreed that as security for the facilities, the directors of the company a certain Mrs Rubina Ahmed and Eric Oloo would execute personal guarantees in favour of the plaintiff/ applicant. In addition to the personal guarantees, the company was required to provide performance bonds issued by a reputable insurance company for US Dollars 1 million.

Pursuant to these agreements on 26/3/1997 the directors for the company executed joint and several personal guarantee/indemnity in favour of the plaintiff for the principal sum of US Dollars 1 million while at the same time the defendant duly issued to the plaintiff the following performance bonds in favour of the plaintiff –

Policy Number of

Performance Bond	Date	Amount (Kshs)
86PBO2215	29.05.97	27,500,000.00
86PBO2218	05.06.97	13,475,000.00
86PBO2229	28.07.97	11,977,000.00
86PBO2229	15.08.97	24,500,000.00
Total		77,452,000.00

Under the terms of the performance bonds, the defendant binds itself to pay to the plaintiff on demand the various accounts stipulated in the bonds in the event that the company defaults in repaying to the plaintiff such sums of money as would from time to time be due and owing from the company to the plaintiff.

According to the plaintiff, in pursuance of the agreement and obligations, the plaintiff duly advanced moneys and otherwise provided banking facilities and other financial accommodation to the company.

The plaintiff claims that the defendant breached its obligations made to it by the defendant under the terms and conditions of the credit facilities extended to it in that it refused to make scheduled repayments and that on account of the company's failure to make the repayments, the plaintiff made demand on the defendant by a letter dated 2/4/1998 requiring the defendant to honour the terms and conditions of the performance bonds and to pay to the plaintiff the various sums then due under the performance bonds which were:-

Account No	Balance Outstanding as at 28/2/98	Interest Rate
CA1793 (Kenya Shillings)	2,722,977.50	36% per annum
EE134 (US Dollars)	981,521.80	12% per annum

The plaintiff claims that in breach of its obligations under the performance bonds the defendant has refused to settle the amounts due and owing from it to the plaintiff which as at 29/5/1998 stood at:

(a)Kshs 3,204,590.20 together with interest thereon at 36% per annum from 30th, May 1998 until payment in full.

(b) US 4.1,035,449.05 together with interest thereon at 12% per annum from 30th, May 1998 until payment in full.

That is the amount together with interest which the plaintiff claims from the defendant.

In a defence filed on 31/7/1998 the defendant admits that it issued the performance bonds the subject of the suit but then avers that it was further agreed between the plaintiff and the defendant that –

(i) the letter of credit (secured by the bonds) would be redeemed upon receipt of the goods in which event the performance of the bonds would be discharged;

(ii) the performance bonds would only be payable in the event that the goods (to purchase through the credit facilities secured by the bonds) were not received and re-exported; and

(iii) it was a further term of the issuance of the performance bond that the plaintiff would fully secure itself by an instrument of security offered by the company and would only call upon the defendant for payment of the bonds in the event that it was unable to recover the amounts payable under the bonds from the company.

By reason of the above conditions and/or agreements the defendants contends that no event upon which the performance bonds would be payable has occurred and consequently the sums claimed are not payable to the plaintiff.

The relevant performance bonds are annexed as pages 5 to 8 of exhibit 'YPI' to the affidavit in support of the application sworn on 15/12/1998 by Joseph Pattni, who is the plaintiff's General Manager. The material parts of the bonds read:-

"Know all men by these presents:-

That we Universal Apparels (EPZ) Limited of Box 30429, Nairobi as Principal, and Intra Africa Ass Co Ltd of Box 43241, Nairobi as surety, are held and firmly bound to Victoria Commercial Bank Ltd as obligee in the sum of Kshs ... to the payment of which, well and truly to be made, the principal and surety bind themselves, their heirs, executors and successors, jointly and severally, firmly by these presents. Whereas the principal has entered into a contract based on import letters of credit dated 26.3.97 with the obligee for Kshs ..... and whereas the contract between the principal and obligee provides that the obligee shall make a payment to the principal in the amount of Kshs ... Now, therefore, the condition of the above obligations is such that, if the above bound principal shall well and truly perform his obligation as set forth in the said contract or in the event of non-fulfillment to this obligations under the said contract, the above bound principal shall repay the sum of Kshs ... or such part thereof as will be outstanding or in the event of default by the above bound principal, the surety shall satisfy and discharge the obligee upto the sum of Kshs ... or such part thereof as will be outstanding, then obligation shall be void, otherwise it will remain in full force and effect"

They are signed on behalf of both the principle (the company) and the defendant.

It will be obvious from a careful reading of the performance bonds that the conditions referred to by the defendant in its defence are not contained in the bonds. If however the said conditions are in a separate document it must be observed that the defendant has not alluded to any such document. Given that the fact the only reference one can draw from the situation is that the alleged conditions and/or terms do not in fact exist and consequently the defendant's liability under the performance bonds is unconditional.

Mr Chacha Odera who represented the defendant in this matter sought to show that the performance bonds were not admissible by reason of not having been stamped. However as contended by Mr Regeru for the applicant, section 19 of the Stamp Duty Act permits the production in evidence of an unstamped instrument provided that duty thereon is paid. The position in this matter, as revealed in Mr Pattni's supplementary affidavit is that the performance bonds have been stamped and consequently they are properly before the Court.

Mr Odera also submitted that the letter annexed to Mr Pattni's further affidavit and marked as "YP 1" was inadmissible as the author of the letter Mrs Rubina Ahmed had not sworn any affidavit. In my view that objection lacks merit. I say so because the letter is written by the company on the subject of the performance bonds. It is to be recalled that the applicant had requested the company to provide the performance bonds as part of the securities for the loan facility to the company. In his supplementary affidavit Mr Pattni states that the letter objected to was written in the ordinary course of business, in good faith and in connection with real and genuine issues that were pending between the company and the applicant.

In my view contents of the letter are relevant to the issues at hand and accordingly there is nothing in the rules of procedure which would bar its production. It is clearly not hearsay.

It was also argued on behalf of the respondent that the documents relied on to support the application were inadequate by reason of the fact that in the letter of offer the sums to be advanced were stated as 1 million US Dollars while the performance bonds are in Kenya Shillings.

In response the applicant has sought to explain the anomaly by stating that two accounts were opened in respect of the transaction, one in Dollars and the other one in Kenya Shillings and that the amounts claimed in the plaint represent the balance outstanding on those two accounts.

In my view the respondent's objection on the above point is well founded. Given that its obligations to the applicant arise only from its undertakings as contained in the performance bonds, it is clear that the respondent cannot be held liable to the applicant in respect of commitments arising from arrangements of whatever nature that might have been made between the applicant and the company outside the performance bonds. It must also be observed that the respondent's liability under the performance bonds is expressly limited to the aggregate sum comprised in the 4 performance bond which according to the applicant's own calculations total Kshs 77,452,000 only. Indeed the performance bonds do not contain any provision for payment of interest and non can be allowed pursuant to the bonds in this suit.

Mr Odera also contended that the right to call upon the maker of the performance bonds to honour them arises only after certain other conditions had been met. He said that the conditions included such matters as proof that letters of credit had been offered; that the person in whose favour the letter of credit were offered, had called upon the applicant to honour such letter and that the applicant had made payment. Those alleged conditions are however not mentioned any where in the performance bonds and it would seem that by attempting to introduce them into this matter, the applicants are clearly ignoring the requirements of the law on the subject.

In *Chitty on Contracts* 24th Edition Vol I page 338, the learned author states:

"Where the parties have embodied the terms of their contract in a written document, the general rule is that "verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract".

This rule is often known as the " parol evidence" rule. Its operation is not confined to oral evidence, but extends to extrinsic matter in writing, such as drafts, preliminary agreements and letters of negotiation. Evidence is not admissible of negotiations between the parties; nor is it permissible to adduce evidence to show that their subjective intentions were not in accord with the particular expressions used in the written instrument. "Evidence of negotiations" ... "or of the parties intentions ..... ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction."

And in the case of *Edward Owen Engineering Ltd v Barclays Bank International Ltd* in [1978] 1 All ER it was held:-

"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. Accordingly, as the defendants' guarantee provided for payment on demand without proof or conditions, and was in the nature of a promissory note payable on demand, and the plaintiffs had not established fraud on the part of the buyers, the defendants were required to honour their guarantee on the demand made."

The evidence available in this case shows that the applicant has done even more than what the law requires it to do in order to establish its case. It has shown that the respondent bound itself to pay the various sums stated in the performance bonds. On the strength of these bonds the applicant advanced an overdraft facility of US Dollars 400,000 and import letters of credit for US Dollars 600,000 to the company. As at 30/6/2000 the sum of Kshs 6,384,773.35 and US Dollars 1,329,237.65 were outstanding

on the transaction. The total of these two sums is evidently in excess of the total sum payable under the 4 performance bonds. The excess is no doubt due to accrued interest on the sums advanced to the company. As aforesaid, there is no provision in the performance bonds for payment of any money over and above those stated in the instrument which means that the excess cannot be recovered.The applicant is nevertheless entitled to interest at commercial rates (to be agreed or argued) from the date of demand (which is 2/4/1998) because that is the date on which the sum payable under the bonds became due and owing. No fraud has been established in connection with the transaction and in my judgment, the amounts stated in the bonds are clearly payable.

In view of what is stated above, I find that the defence filed herein is a sham and does not disclose any triable issues. It is accordingly struck out and judgment entered in favour of the plaintiff against the defendant for the said sum of Kshs 77,452,000 plus interest thereon at commercial rates from 2/4/1998 till payment in full. The respondent will bear the applicant's costs of the suit and of this application plus interest thereon at court rates.

Dated and Delivered at Nairobi this 11th day of October 2000.

T.MBALUTO

JUDGE