Posco International Corporation v Mayfair Insurance Co Ltd (Civil Suit 128 of 2019) [2024] KEHC 11136 (KLR) (Commercial and Tax) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11136 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 128 OF 2019

FG MUGAMBI, J

SEPTEMBER 20, 2024

BETWEEN

POSCO INTERNATIONAL CORPORATION ..... PLAINTIFF

AND

MAYFAIR INSURANCE CO LTD ..... DEFENDANT

JUDGMENT

Background

1. The plaintiff filed the present suit vide an amended plaint dated 30/6/2021. The dispute arises pursuant to a Payment Guarantee issued by the defendant to the plaintiff, at the instance of Afrikon Limited (herein the buyer). The Payment Guarantee was issued as a pre-condition to a Deed of Settlement dated 16/6/2017 between the plaintiff and the buyer in respect of trucks that the plaintiff was meant to supply to the buyer.

2. It was a pre-condition under the Deed of Settlement that to purchase goods from the plaintiff, the buyer had to provide an on-demand guarantee issued by a reputable insurance company in favour of the plaintiff for payment of USD 900,000 (the claim amount).

3. The plaintiff contends that it is pursuant to the Deed of Settlement that the defendant, an insurance underwriter, issued to the plaintiff a written instrument of guarantee dated 24/8/2017. That by the said guarantee the defendant unconditionally and irrevocably undertook and agreed to guarantee that in the event of a breach of the Deed of Settlement by the buyer, it would discharge the damages sustained by the plaintiff.

4. The plaintiff confirms that the payment guarantee was issued, prepared and duly executed by the defendant and acknowledges not having executed the guarantee. The plaintiff contends that following default on the part of the buyer to make payment of the claim amount, the plaintiff notified the

defendant and demanded payment of the claim amount due under the Settlement Agreement. The defendant's continued refusal to make good the claim is what led to the suit now before this court.

5. At the hearing the plaintiff called one witness, Julius Towett, its Manager, Business Development. The testimony of PW1 mirrors his witness statement dated 27/5/2019. Where need be, I will refer to the witness's testimony in my analysis and determination.

6. In response to the claim by the plaintiff, the defendant filed a further amended statement of defense dated 21/9/2021. The defendant takes issue with the change of name by the plaintiff from Posco Daewoo Corporation, insisting that no evidence has been produced to support the change of name. The defendant also denies the existence of any guarantee agreement entered into with the plaintiff.

7. The defendant avers that even if the guarantee agreement were valid, it was not liable to pay up since the plaintiff had not supplied any goods to the buyer. It is also the defendant's case that at the time when the guarantee was issued by the defendant, there had already been breach of the Deed of Settlement. This is in as far as the Settlement required the Guarantee to be provided by 30/7/2017 meaning that the goods in question reverted to the plaintiff who had the right to sell them and recover their loss.

8. The defendant's case is that the guarantee issued on 24/8/2017 was therefore a breach and as such the guarantee is not payable. The defendant further contends that the claim was in any case time barred. Finally, it is the defendant's case that the plaintiff's attempt to receive payment under the guarantee was fraudulent.

9. During the trial, Emma Mwangi, DW1, testified on behalf of the defendant, corroborating her witness statement dated 16/11/2021. Again, I will refer to her testimony as need be in the analysis and determination below.

Analysis and determination:

10. Upon considering the pleadings, submissions and evidence presented by the parties, it is my view that the following issues arise for determination:

    i. Whether this court is vested with jurisdiction to determine the dispute before it;

    ii. Whether the payment guarantee entered into on 24/8/2017 between the plaintiff and the defendant is valid and therefore enforceable;

    iii. Whether the demand for payment of the claim amount by the plaintiff to the defendant under the payment guarantee is valid; and

    iv. Whether the defendant is liable under the payment guarantee to pay the plaintiff the claim amount due under the settlement agreement.

Whether this court is vested with jurisdiction to determine the dispute before it:

11. The defendant argues that the dispute before this court is premised on the Deed of Settlement executed between the plaintiff and the buyer.

12. It is not in issue that the said agreement contains an arbitration clause requiring disputes to be resolved by arbitration under the International Arbitration Rules of the Korean Commercial Arbitration Board. The Agreement has been produced by both parties in their respective bundle of documents.

13. While it is true that the defendant is not a party to the settlement agreement, it is not accurate to state that the dispute before this court is premised on the said agreement. The plaint clearly sets out the claim and remedies that the plaintiff seeks. None of the remedies relates to the settlement agreement.

They are premised on the guarantee issued to the plaintiff by the defendant at the buyer's instance. The Payment Guarantee itself, at Clause 11, explicitly states that it is governed by the laws of Kenya and that the courts of Kenya have jurisdiction.

14. It provides as follows:

> " The Guarantee Bond shall be governed by and construed in accordance with the laws of Kenya and only the courts in Kenya shall have jurisdiction hereunder."

15. In my view, the Payment Guarantee is a separate and distinct secondary contract from the primary Settlement Agreement, despite their interrelation. Accordingly, this court is vested with the jurisdiction to adjudicate this dispute and I so find.

Whether the Payment Guarantee entered into on 24/8/2017 between the plaintiff and the defendant is valid and therefore enforceable? Execution of the Payment Guarantee:

16. The plaintiff takes issue with the submission by the defendant that the guarantee was not executed by the plaintiff. It is the plaintiff's case that the same was not pleaded and should therefore not be considered by this court. In any case, the plaintiff argues that it is the defendant that failed to provide room for the plaintiff to execute the said guarantee.

17. The defendant denies that the same was not pleaded and points this court to paragraphs 3, 5 and 7B of the statement of defense.

18. It is a well settled point of law that parties are bound by their pleadings particularly in an adversarial system such as ours. The import of this is that parties are confined to the issues, claims and defenses they have specifically raised in their pleadings.

19. The rationale for this rule is that it promotes fairness by ensuring that both parties are fully aware of the case they need to address and can prepare their evidence and arguments accordingly. It prevents one party from ambushing the other with new, unforeseen issues at trial. In buttressing this point the plaintiffs referred this court to the case of Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others, [2014] eKLR.

20. The Black's Law Dictionary defines an amended pleading as a pleading that replaces an earlier pleading. This means that once a pleading is amended and filed with the court, the amended pleading generally takes the place of the original pleading. The original pleading is effectively superseded and no longer has legal effect. I have looked through the further amended statement of defense filed by the defendant, which is the valid defense on record.

21. I align myself with the plaintiff's submissions that indeed, no such averment regarding want of execution by the plaintiff has been raised by the defendant in the statement of defense. The defendant instead chose to raise its issues in the submissions, arguing that proper execution is a condition precedent to enforcement of the Guarantee. The courts have consistently held that submissions cannot take the place of pleadings. (See for instance in Robert Ngande Kathathi V Francis Kivuva Kitonde, [2020] eKLR.

22. To make a finding on this basis would amount to this court entering into an enquiry not properly before the court and as such speculating on the dispute by attempting to consider peripheral aspects of the dispute.

23. That said, and even if, for arguments sake I was to consider the ground raised by the defendant, I note that it has not been denied that the Payment Guarantee originated from the defendant. It was their

document yet they have not addressed the question as to why no provision was made for the plaintiff to execute the document.

24. On this occasion I would invoke the contra preferentum rule which serves as a tool for ensuring that the drafting party bears the risk of any ambiguities or omissions.

25. Moreover, having made representations that it was in the process of dealing with the plaintiff's claims, the defendant is estopped from challenging the validity of the guarantee. I say so on the strength of the case of Serah Njeri Mwobi V John Kimani Njoroge, [2013] eKLR in which the court underscored the doctrine of estoppel in the following terms:

> " The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person."

26. Additionally, I take the view that the lack of execution by the plaintiff would not necessarily render the guarantee invalid, noting that the parties by their conduct intimated to each other at all times that they were in a contractual relationship. I say this on the strength of the decision in Reveille Independent LLC V Anotech International (UK) Ltd, [2016] EWCA Civ 443 where it was held that:

> " ... a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly.
>
> The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty."

27. Additionally, in Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] V Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan], [2017] eKLR this court stated as follows:

> " I may perhaps point out that an offer in a draft contract may be accepted even when not signed. It is all a matter of fact and the signing of a draft document only adds to show the fact of acceptance and establishment of legal obligations. Thus in Brodgen V Metropolitan Railway Company, [1876-77] L.R 2 App Cas 666, an English case which stands for the general proposition that a contract can be accepted by the conduct of parties, the claimant altered a draft coal supply agreement sent to him by the Defendant and returned it signed. The Defendant put it in a drawer and did not sign. The parties then had coal supplied and paid for. When a dispute arose the claimant argued that he was not bound by the agreement. The court held that there was a contract which came into existence after the coal was supplied and received but not earlier.
>
> I would state that the same position still obtains nearly 150 years later. The mere fact that the parties sign a draft agreement and actually accept that it is a draft agreement of itself does not mean an agreement exists. Neither does it also mean that an agreement does not exist. What matters and is crucial are the events succeeding such signatures and especially the conduct of the parties." (emphasis added)

28. Either way, this ground still fails.

The Plaintiff's locus:

29. The other ground raised by the defendant is that the plaintiff is a stranger to these proceedings since the Payment Guarantee was entered into with POsco Daewoo Corporation and not Posco International Corporation. The defendant observes that the contract was not assignable and that the plaintiff has not provided evidence of change of name.

30. In the amended plaint I note that the plaintiff describes itself as Posco International Corporation, formerly Posco Daewoo Corporation. The plaintiff further avers that it changed its name on 18/3/2019. It produced a Notification of Company Name Change which is to be found at page 1-3 of PExh 2, to prove this point.

31. Sections 107 and 108 of the *Evidence Act* lays out the rules for discharge of the legal burden of proof. Besides this, there is the evidential burden of proof whose distinction was well set out by the Supreme Court in Presidential Election Raila Amolo Odinga & Another V IEBC & 2 Others, (2017) eKLR. The Court held as follows:

> " Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."

32. The plaintiff in this case had the initial burden to produce prima facie evidence of the name change. The Notification of Company Name Change on the face of it reflects the name change by the plaintiff. Having discharged its evidential burden of proof and laid a probable basis for the change of name, the evidential burden moved to the defendant to disprove the evidence or attack the veracity of the evidence produced by the plaintiff by way of further evidence.

33. The defendant failed to do so and only alleged that the same was not a valid document. This was not sufficient without any proof either of non-compliance with the law or of forgery. It is therefore my finding that the plaintiff has proved that it was formerly Posco Daewoo Corporation. Having changed its name to Posco International Corporation, the plaintiff retains locus standi to institute or proceed with a suit in its different name.

34. The defendant further argues that the plaintiff, having been incorporated in Korea, means that the *Companies Act* 2015 would not apply in this regard.

35. It is not in issue that the forum of adjudication in this case is the court in Kenya. This is where the defendant is resident and where the Guarantee Payment contract was signed. By dint of section 975 and 982, the *Companies Act* applies to foreign companies registered or carrying on business in Kenya. In my view the existence of a Liaison Office in Kenya, which has been alluded to by both parties is evidence that the plaintiff carries on business in Kenya. This provides a basis for establishing jurisdiction in the Kenyan courts.

36. That being the case, Section 66(2) of the *Companies Act* 2015 provides that:

> " The change [of name] does not affect any rights or obligations of the company or invalidate any legal proceedings by or against it..."

37. Further, under section 66(3), that:

> " Any legal proceedings that might have been continued or commenced against it by its former name may be continued or started against it by its new name."

38. For these reasons I accordingly find that the plaintiff is not a stranger to this suit and that it has the necessary locus standi to bring the suit before this court.

Stamp duty:

39. Finally, the submission by the defendant that the Payment Guarantee cannot be admissible as evidence by dint of Section 19 (1) of the *Stamp Duty Act*, having not been stamped and registered has been countered to this court's satisfaction. Attached to the plaintiff's bundle of documents, PExh 1 at pg 11 is a copy of the Payment Guarantee bearing a stamp from the collector of stamp duties, dated 11/4/2019.

40. Accordingly, I do find that the Payment Guarantee herein is valid and enforceable.

> Whether the demand for payment of the claim amount by the plaintiff to the defendant under the payment guarantee is valid?

41. The plaintiff contends that it made a claim for payment of the claim amount under the Payment Guarantee, on 21/2/2018, subsequent to the breach by the buyer. As far as the plaintiff is concerned, the demand was therefore within the validity period of the Guarantee, which was scheduled to expire on 23/2/2018, 2 days after the demand had been made.

42. The defendant on the other hand denies that the claim was made within time, arguing instead that the validity of the Guarantee ran from 24/8/2017 to 24/2/2018. The demands having been made on 1/6/2018 and 29/1/2019 were issued outside the validity period. The defendant acknowledges that while the demand dated 21/2/2018 was within the duration of the Guarantee, it was issued by Posco Daewoo Corporation, Kenya Liaison Office, which is not a party to the Guarantee.

43. The defendant therefore avers that only the Head Office would have issued a valid demand. The evidence on record indicates that the email sent on 21/2/2018 was sent through the Kenya Liaison Office. The Oxford Advanced English Dictionary (online version) defines a liaison as a relationship between two organizations or different departments in an organization, involving the exchange of information or ideas. In other words, generally speaking, a liaison office would be an office established by a company in a foreign country primarily to facilitate coordination, and collaboration between the parent company and entities in the host country.

44. It is not clear what structure the Liaison Office in Kenya takes vis-à-vis the parent company in Korea. In the absence of any evidence to the contrary, it is my view that the two are separate and distinct legal entities. In the case of Paul Stuart Imison V Jodad Investments Ltd, [2019] eKLR the court dealt with an almost similar question concerning a parent and a subsidiary company in which it held that the 2 are separate and distinct legal entities, notwithstanding that the directors and shareholders were the same. The court stated as follows:

> " As regards the issue of privity of contract, it is true the appellant had contracted with Riva and not the respondent. In the circumstances, the respondent could not be held liable for the debts of its subsidiary Company, the two being distinct and separate legal entities. We are in agreement with the holding of the learned Judge. The authority that she cited, Re: Southard Limited [1979]3 All ER564 is quite apt:

> ...a parent Company may spawn a number of subsidiary companies, all directly or indirectly controlled by the Shareholders of the parent Company. If one of the subsidiary companies turns out to be the runt of the litter and declines into insolvency to the dismay of the creditors, the parent Company and the subsidiary companies may prosper to the joy of the Shareholders without any liability for the debts of the insolvent subsidiary."

45. Following this line of reasoning, and upon further examination of the Payment Guarantee, it is evident that the contracting parties were the plaintiff and the defendant. The Schedule to the Payment Guarantee identifies the exporter as Posco Daewoo Corporation, with the address listed as 165 Convensia-ro, Gu, Incheon 406-840, Korea. The same schedule confirms the guarantee expiry as 23/2/2018.

46. The Payment Guarantee did not confer any authority or role upon the agents of the contracting parties. In fact, PW1 admitted that the contract was between the defendant and their Head Office in Korea. It is undisputed that the first notification of breach was issued by the Posco Daewoo Corporation Kenya Liaison Office, which is a separate legal entity and not a party to the Payment Guarantee.

47. In the absence of any express provision within the guarantee, I agree with the defendant's position that only the parent company had the authority to initiate the claim. Besides being inconsequential and having no legal effect, the question is whether the said notification even complied with the contract of guarantee.

48. I am drawn to Clause 4 of the Payment Guarantee which provides that:

> " Whether or not this guarantee bond shall be returned to the Guarantor, the obligations of the Guarantor under this Guarantee Bond shall be released and discharged absolutely upon expiry as defined in the schedule, save in respect of any breach of the Agreement which has occurred and in respect of which a claim in writing containing particulars of such breach has been made upon the Guarantor upon expiry."

49. Upon reviewing the notification of the claim sent by the Kenya Liaison Office, I find that it does not qualify as a valid claim under Clause 4 of the guarantee, as it lacks the necessary particulars of the buyer's breach. In addition to the email, the plaintiff has confirmed that a claim form was indeed submitted to the defendant. This is corroborated by the evidence on record, which shows that the claim form was forwarded to the defendant via email on Friday, 23rd February 2018, at 14:58 hrs.

50. It is undisputed that the claim form was submitted from the plaintiff's Head Office. Given that this submission occurred on the last day of the validity of the Payment Guarantee, I would take the view that it constitutes a valid call under the terms of the guarantee.

51. The final item that I will deal with is the defendant's argument that the plaintiff's call was made on an alleged breach of a document alien to the Guarantee and as such not payable.

52. The Court of Appeal in Lalji Karsan Rabadia & 2 Others V Commercial Bank of Africa Limited, [2015] eKLR cited with approval from The Law of Guarantees by Geraldine Andrews & Richard Millet 2nd Edition, at page 156 to the effect that:

> " A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary

obligation which is dependent upon the default of the principal and which does not arise until that point."

53. Equally, the Court of Appeal in National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd, [2002] 2EA 503 stated as follows regarding express provisions contained in a contract:

> " A court of law cannot rewrite a contract, between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

54. The preamble and the schedule to the Payment Guarantee clearly identifies the primary contract upon which the guarantee is issued, as the settlement agreement between the plaintiff and the buyer, dated 13/3/2015 and amended on 16/9/2015.

55. The Deed of Settlement that has been produced before this court is dated 16/6/2017. PW1 in cross examination insisted that the Agreement referred to by the Payment Guarantee was not the one dated 13/3/2015 but the Settlement Agreement of 16/6/2017. PW1 further testified that there had been an amendment to the agreements, giving rise to the agreement of 16/6/2017, on which the demand was made.

56. He also averred that the previous document dated 16/9/2015 was not before the court and that it is not the one referred to in the Schedule to the Payment Guarantee.

57. Given the two decisions that I have referred to, this court cannot import its own findings to a contract entered into by parties. It therefore follows that the primary contract as expressly stated in the guarantee is the one dated 16/9/2015. It ought to have been produced before this court as it is crucial for determining the scope and extent of the guarantor's liability.

58. The guarantor's liability typically arises only if the principal debtor defaults on their obligations under the primary contract. There appears to be a lack of clarity on the primary contract and therefore the primary obligations by the buyer. The plaintiff has not proved their allegation that the agreement of 16/9/2015 was further amended by the agreement of 16/6/2017. This allegation cannot certainly stand against the express provisions of the Payment Guarantee.

59. In light of this and as a result of the uncertainty of the primary obligation, the enforceability of the guarantee is uncertain and cannot stand.

Disposition

60. Accordingly, the plaintiff's suit against the defendant fails and is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE