AAR Insurance Kenya Ltd v Thika Water & Sewerage Company Ltd; KCB Bank Kenya Ltd (Interested Party) (Civil Appeal E412 of 2021) [2023] KEHC 1953 (KLR) (Civ) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1953 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E412 OF 2021

AN ONGERI, J

MARCH 17, 2023

BETWEEN

AAR INSURANCE KENYA LTD ..... APPELLANT

AND

THIKA WATER & SEWERAGE COMPANY LTD ..... RESPONDENT

AND

KCB BANK KENYA LTD ..... INTERESTED PARTY

(Being an appeal from the Ruling of Hon. E. K. Kagori (PM) in Nairobi CMCC no. E2688 of 2021 delivered on 29/6/2021)

JUDGMENT

1. The Appellant was the Plaintiff in CMCC no. 2688 of 2021 in which the Appellant was seeking an injunction to restrain the Interested Party, its agents, servants and or employees from honouring the demand by the Respondent remitting and or making any payment or settling any monies or financial obligations arising from the performance guarantee ref. no. MD2100600002C for kshs.1,591,402.70 between the Appellant and the Respondent dated 6/1/2021.

2. The Appellant and the Respondent entered into a medical insurance contract dated 14/1/2021 via tender no. Thiwasco/048/2020-2021 for a contract sum of 15,914,027 00 for 12 months.

3. The said premium payments were to be remitted in three equal installments.

4. The Appellant remitted a performance security from the Interested Party which is the subject of this appeal.

5. This cause of action arose when the Respondent attempted to obtain the cash from the Interested Party.

6. The Appellant filed CMCC no. 2688 of 2021 seeking an injunction to restrain the Respondent from realising the bond deposited with the Interested Party.

7. The trial court dismissed the suit and the Appellant filed this appeal on the following grounds:

    a. That the learned magistrate erred in law and in fact in holding that the appellant had not established a *prima facie* case to warrant grant of injunctive orders on the enforcement of the performance guarantee in spite of overwhelming evidence on the record.

    b. That the learned magistrate erred in law and in fact in failing to grant an injunction pending hearing and determination of the suit while at the same time acknowledging that it was not possible to determine who breached the contract at the interlocutory stage and without laying a foundation on any of the pleadings filed by the plaintiff.

    c. The learned magistrate failed to issue conservatory orders inform of an injunction against all documentary evidence presented before it and thereby conclusively determining the propriety of the suit at an interlocutory stage.

    d. The learned magistrate erred in law and in fact in dismissing the appellants application with costs to the respondent when the circumstances demanded conservatory orders.

    e. That the learned magistrate failed to consider the evidence in its totality hence reaching a wrong conclusion of both facts and law.

8. The parties were directed to file written submissions in the appeal which are as follows:

9. The appellant submitted that clause 6 of the contract provides for the furnishing of a performance security as a condition precedent. Thus the performance bond was issued pursuant to clause 6 of the medical contract therefore it was not an independent contract. The agreement was canceled by mutual consent of both parties and rendered the performance bond otiose and therefore the respondent cannot seek to enforce it.

10. The appellants submitted that the respondent on 24th February 2021 issued a notice to terminate the contract alleging breach of terms and demanded for a full refund of the premium paid. The performance security was essentially supposed to cover losses incurred as a result of nonperformance of the contract and the nonperformance was occasioned by a disagreement on the list of medical providers. That since the respondent initiated the nullification of the contract, it suffered no loss and its demand was fraudulent and dishonest.

11. It was the appellant's contention that it satisfied the triple test for the grant of an injunction. it indicated that the trial court admitted that the issues on who breached the contract or whether there was any breach would have to be determined at the full trial and thus the proper remedy was to retain the status quo.

12. The appellant added that it created the performance security for the benefit of the respondent but this was subject to certain conditions which were not fulfilled.

13. The appellants indicated that they would suffer irreparable loss as it would not be able to recover from the respondent as the amount would be in the form of a performance guarantee from a third party and not directly from itself.

14. On the final ingredient of a balance of convenience the appellant argued that the respondent has in its custody a refund of its premium and yet seeks to claim the amount on the performance security which is pegged on a nullified contract. The appellants added that it deserved an interim relief in order to secure the substratum of the suit as failure would make the main hearing nugatory.

15. The respondent conversely submitted that the appellant did not satisfy the conditions for grant of interlocutory injunction. It argued that the appellants did not prove *prima facie* case as they admitted that they were to blame for the circumstances that led to the breach of contract and that they even paid back the amount of money that they had been paid by the respondent. In their admission they pointed out that the essence of the performance bond was to act as a buffer zone in the eventual loss the respondent would incur as a consequence of breach.

16. The respondent contended that the appellant did not prove how he would suffer irreparable harm. The respondent argued that it is a company with good financial repute and the appellant has not made any allegation that should the amount specified in the performance bond be paid, they would not be able to pay back should the suit succeed.

17. As to the balance of convenience tilting toward it the respondents argued that it has suffered loss amounting to Kshs. 2,033,749.90 and it would be convenient that they are paid the amount in the performance bond in order to enable them mitigate the losses they have suffered.

18. The interested party in its submission indicated that vide a letter dated 6th January 2021 the interested party furnished the respondent with a performance guarantee MD2100600002C for Kshs 1,591,402.70 an amount that was to be paid upon the first demand by the respondent without any argument, in respect to the provision of medical insurance cover tender No. Thiwasco/048/2020-2021.

19. In a letter dated 14th April, 2021 the respondent demanded for payment from the interested party in which they indicated that the appellant was in breach of its obligation in pursuance with the medical cover. It was the interested party's argument that they are not privy to the contract between the appellant and the respondent and hence cannot attest to the happenings of what eventually led to the nullification of the contract. Their involvement relates to the performance guarantee and hence can only restrict itself to it.

20. That the dispute between the appellant and respondent is independent of the guarantee contract between the bank and the respondent unless fraud is established and in support the interested party cited that case of *Eli Holdings Ltd v. Kenya Commercial Bank* [2020] eKLR where it was held;

> " A bank guarantee is an autonomous contract that required strict compliance to its terms. The Bank has no obligation to question the performance or otherwise of the obligation of the parties in the underlying contract"

21. It was therefore the interested party's argument that, in light of the confirmation from the bank that the amount is available and restricted awaiting the outcome of the court case, the appeal herein is frivolous and largely serves to delay the primary dispute pending before the lower court.

22. This being a first appeal, the duty of the 1st appellate court is to re-evaluate the evidence and to arrive at its own conclusion whether or not to support the findings of the trial court.

23. The issues for determination in this appeal are as follows:

    i. Whether the Appellant was in breach of it's part of the contract with the Respondent.

    ii. Whether the Respondent was entitled to encash the performance security deposited with the Interested Party.

    iii. Whether the Appellant was entitled to the injunctive orders it was seeking against the Interested Party and the Respondent.

24. On the issue as to whether the Appellant was in breach of the contract it entered into with the Respondent, there is evidence that the Respondent issued a notice to terminate the contract on 24/2/2021 and demanded refund of the instalment of kshs.5,213,216.05 which was refunded by the Appellant.

25. There is evidence that the Appellant entered into a contract with the Interested Party that the Interested Party should pay the Respondent kshs.1,591,402.70 should the Appellant breach it's part of the contract.

26. Although the Trial court said it is not possible at this stage to find out who breached the contract, the fact that the Appellant refunded the 1st instalment of kshs. 5,213,216.05 and agreed to nullify the contract ab-initio on 3/3/2021 clearly indicates that there was breach of the contract.

27. If the Appellant alleges that it was not in breach, it should have sought specific performance.

28. I find that the Interested Party was not privy to the terms of the contract between the Appellant and the Respondent and its duty was to pay the Respondent if the contract was not performed.

29. On the issue as to whether the Respondent was entitled to encash the performance security deposited with the Interested Party I find that the answer is in the affirmative since the Appellant by refunding the 1st instalment admitted being in breach.

30. The Interested party was supposed to pay upon demand if the contract was not performed.

31. On the issue as to whether the Appellant was entitled to the injunctive order, I find that the answer is in the negative.

32. The three conditions for grant of an injunction were laid out in the case of *Giella Vs Cassman Brown Co. Ltd* 1973 EA |page 358 as follows:

    i. That the applicant must show that he has a *prima facie* case with a probability of success.

    ii. That the applicant might suffer irreparable loss which cannot be compensated by an award of damages if the injunction is not granted.

    iii. That the balance of convenience tilts in favor of the applicant.

33. In the current case, I find that the Appellant cannot say that he has established that he has a *prima facie* case with probability of success when he rushed to nullifying the contract instead of seeking an order of specific performance if he maintains that he was not at fault.

34. Secondly the guarantee is a monetary sum which can be compensated by a money award should it be found that the Appellant did not breach the contract between itself and the Respondent.

35. Finally, I find that the balance of convenience in this case tilts in favor of the Respondent and I find that the Appellant was not entitled to an injunction against both the Interested Party and the Appellant.

36. I find that the trial court was right in declining to grant the injunction.

37. This appeal lacks merit and the same is dismissed with costs to both the Interested Party and the Respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

A. ONGERI

JUDGE