



**Mennonite Board In Eastern Africa v Mayfair Insurance  
Company Limited & another (Commercial Case E452 of 2022)  
[2023] KEHC 17838 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17838 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E452 OF 2022**

**DAS MAJANJA, J**

**MAY 19, 2023**

**BETWEEN**

**MENNONITE BOARD IN EASTERN AFRICA ..... PLAINTIFF**

**AND**

**MAYFAIR INSURANCE COMPANY LIMITED ..... DEFENDANT**

**AND**

**THOMAS & PRION GRAND LACS LIMITED ..... PROPOSED DEFENDANT**

**RULING**

1. The Defendant (“Mayfair”), through its Chamber Summons dated 18<sup>th</sup> January 2023 made, *inter alia*, under Order 1 Rule 10 (2) and Rule 25 of the [Civil Procedure Rules](#) (“the Rules”) seeks an order that the Proposed Defendant (“Thomas & Piron”) be joined to this suit as a defendant. The application is supported by the affidavit sworn on 18<sup>th</sup> January 2023 by the advocate seized of this matter on Mayfair’s behalf, Nyagah Kithinji. It is opposed by the Plaintiff (“Mennonite”) through the replying affidavit sworn on 13<sup>th</sup> March 2023 by Robert Darby, a Project Manager and Director of Cherwell Limited (“Cherwell”) which is engaged by Mennonite.
2. Mennonite has also filed a Notice of Motion dated 8<sup>th</sup> February 2023 made, *inter alia*, under Order 2 Rule 15, Order 36 Rules 1 and 8 of [the Rules](#) seeking an order of summary judgment against Mayfair for Kshs. 36,062,255.00 as prayed for in the Plaint and/or an order striking out of Mayfair’s Statement of Defence dated 12<sup>th</sup> December 2022. Mayfair has opposed this application through the replying affidavit sworn on 9<sup>th</sup> March 2023 by its Legal Manager, Emma Mwangi. The parties have also supplemented their pleadings by filing written submissions.



3. So as to contextualize the present applications, a brief background is apt. The facts can be gleaned from Mennonite's Complaint dated 1<sup>st</sup> November 2022. By a Joint Building Council (JBC) Contract dated 3<sup>rd</sup> November 2014 ("the Contract"), Mennonite contracted Thomas & Piron to construct residential apartments and support facilities on ten levels and basement together with ancillary buildings and associated site works for the sum of Kshs. 360,622,553.00 on its property; Land Reference No. 1870/V/69 and 70 situated at Westlands, Church Road, Nairobi ("the Project").
4. Under the Contract the date for practical completion was 25<sup>th</sup> March 2016. It further provided that before commencing the works, Thomas & Piron would provide a surety, an established bank or insurance company, approved by Mennonite and who would be bound to it for a sum equivalent to 10% of the contract price for the due performance of the Contract until the certified date of practical completion. Accordingly, Thomas & Piron provided Mennonite with a Performance Bond issued by Mayfair and in favour of Mennonite for Kshs. 36,062,255.00 executed on 25<sup>th</sup> June 2015 ("the Performance Bond").
5. The Performance Bond was for the due performance by Thomas & Piron of the Contract, for the execution of the Project by their completion date and the same was valid up to 24<sup>th</sup> June 2016. Through an endorsement advise dated 23<sup>rd</sup> October 2015, the Performance Bond was extended for a further period so as to expire on 30<sup>th</sup> June 2017. In a further endorsement advise, the interests of Skyview Gardens and KCB Bank Limited were incorporated into the Performance Bond on 7<sup>th</sup> December 2016 and the same was again extended with effect from 1<sup>st</sup> January 2018 and was to expire on 31<sup>st</sup> March 2018.
6. By a letter of demand dated 21<sup>st</sup> June 2018, Mennonite wrote to Mayfair demanding forfeiture of the Performance Bond. Further, by a letter dated 14<sup>th</sup> October 2021, Mennonite's Advocates on record wrote to Mayfair reiterating the contents of the aforesaid letter. In this suit, Mennonite now claims that Mayfair has failed to honor the "first demand in writing" and accordingly, it seeks judgment for the amount in the Performance Bond. Mennonite claims that the demand for forfeiture of the Performance Bond was precipitated by the failure by Thomas & Piron to perform its contractual obligations in the manner expected, which led to the Contract being terminated in a letter dated 22<sup>nd</sup> May 2018.
7. In its Statement of Defence dated 12<sup>th</sup> December 2022, the Defendant admits that there was a contract between Mennonite and Thomas & Piron but that it was not privy to it nor involved in its administration. It admits that it issued the Performance Bond and states that it was not valid throughout the period of 25<sup>th</sup> June 2015 to 30<sup>th</sup> June 2018 but was subject to validity periods when it was extended from time to time until it expired on 30<sup>th</sup> June 2018 and during the last period of extension being 31<sup>st</sup> March 2018 to 30<sup>th</sup> June 2018, the interests of KCB Bank Kenya Limited and Skyview Gardens were duly noted.
8. Mayfair states that Thomas & Piron notified it of the pending arbitration proceedings between it and Mennonite in relation to several issues among them whether the Mennonite validly terminated the Contract and whether it should pay the certified outstanding amounts with interest. It therefore contends that in light of the arbitration proceedings there is a possibility that Mennonite prevented performance of the Contract and that act of termination was fraudulent. It adds that Mennonite employed another contractor and committed a crime by fraudulently presenting a forged contract to NCA for a permit upon which it employed casual labourers to work on the site and that the notice of default and the termination were calculated to avoid paying the certified amount and to criminally raise money from the Performance Bond.



9. While Mayfair admits that the Performance Bond is payable on demand, it contends that Mennonite presented an invalid demand and it is justified to hold it until the issues of invalidity are resolved by the court. Mayfair has raised several circumstances that give rise to fraudulent activities, misrepresentation of facts, and deliberate suppression of material facts by Mennonite.
10. First, that the project Architect, who is Mennonite's agent, wrote to the Director of City Planning Nairobi City County by a letter dated 16<sup>th</sup> February 2018, informing him that the Project had been designed, drawn, detailed and supervised by the Architect from the start to the end, and further confirming that the Project had been fully executed as per the drawings and specifications, and further confirming that the Project was practically completed, and that the handing over to the Client was underway. Second, that the said was copied to Mennonite and Thomas & Piron, and was to enable the County Government of Nairobi to facilitate Mennonite's issuance of an occupation certificate which occupation certificate dated 25<sup>th</sup> May 2018 was issued to Mennonite. Third, that Mennonite demanded forfeiture of the Performance Bond months after declaration of the Practical Completion of the Project, citing breach of contract by the Contractor by way of non-completion. Fourth, that Mennonite deliberately suppressed material facts and deceived the Court by informing it that it paid all the amounts certified and due to Thomas & Piron while in fact, it was in breach of its primary obligation under clause 34 of the Contract for failing to pay Thomas & Piron the amounts due and owing to it, upon presentation of certificates issued by the project architect. Fifth, that the Performance Bond was extended severally, by the Plaintiff and did not at any point call upon the Performance Bond until after completion and during the handover process. Sixth, that the Performance Bond was to remain in force until, and when Thomas & Piron performed its obligations under the Contract, or completed the works and that this completion is admitted by Mennonite in the letter dated 16<sup>th</sup> February 2018.
11. Mayfair therefore states that it is not bound by the Performance Bond as Thomas & Piron had fulfilled its obligations under the Contract. It avers that Mennonite committed fraud by obtaining an occupation certificate from the Director of City Planning, which certificate is only issued upon Practical Completion of contract works.
12. In its Reply to Defence dated 17<sup>th</sup> January 2023, Mennonite states that Thomas & Piron took possession of the site on 29<sup>th</sup> June 2015 and the Project commenced on 25<sup>th</sup> July 2015 with a contract period of 72 weeks and the completion date scheduled for 18<sup>th</sup> November 2016. That during that period, Thomas & Piron made three requests for extensions which the Project Architect granted but he denied requests dated 16<sup>th</sup> June 2017 and 12<sup>th</sup> July 2017. Further, Thomas & Piron shared a program of works on 31<sup>st</sup> July 2017 and 8<sup>th</sup> January 2018 committing to complete the works on 30<sup>th</sup> November 2017 and 28<sup>th</sup> March 2018 respectively. Mennonite contends that Mayfair was aware of the delay as Cherwell addressed to it an email dated 11<sup>th</sup> January 2018 informing it of the delay and that Thomas & Piron was working outside the Contract period and Mayfair duly extended the Performance Bond upto 30<sup>th</sup> June 2018.
13. Mennonite avers that the request of extension by Thomas & Piron dated 22<sup>nd</sup> January 2018 was rejected on 19<sup>th</sup> February 2018 with the Architect noting that the completion date remained 14<sup>th</sup> July 2017. That Thomas & Piron failed to complete the works on time causing Mennonite to terminate the Contract on 22<sup>nd</sup> May 2018. Mennonite contends that Mayfair was kept abreast of all the facts during this period. That upon termination, it appointed Nidcon Builders Limited to complete the Project in accordance with Clauses 38.4.1 and 38.5 of the Contract.



14. Mennonite denies the allegations of fraud. It states that although the Nairobi City County issued a certificate of completion, this is not a basis for claiming that the subject works were completed as there was evidence Thomas & Piron had not completed as demonstrated by the report by the Clerk of Works which shows that as at 11<sup>th</sup> May 2018 there were outstanding items to be completed. Further, that there was sufficient evidence to show that Thomas & Piron had failed in its obligations and Mayfair was aware of this fact and the reasons why it terminated the Contract.

### The Applications

15. Both applications are intertwined and are based on the facts and contentions I have outlined above. I propose to consider the application to strike out the suit first since it disposes of the suit. In the event the application is not successful, then I will consider the second application for joinder.
16. Mayfair attacks the application to strike out its defence on the ground that it offends Order 2 Rule 15(2) of *the Rules* as no evidence is admissible on such an application. It contends that it is inappropriate to combine the prayers under Order 36 and Order 2 Rule 15(1)(a) as one prayer requires evidence before a decision is made and the other one does not and thus, the second prayer sought by Mennonite in its application contravenes the provisions of Order 2 Rule 15 (2) and should be struck out.
17. Turning to the substance of the application, Mennonite has cast its application in the alternative. It seeks summary judgment on one hand and striking out of defence on the other and whereas the processes are summary in character, it is improper for a party to make such an omnibus application (see *Ashana Rikundalia and 2 Others v Arun C. Sharma* NRB CA Civil Appeal No. 128 “A” of 2014 [2017] eKLR). This however is not fatal particularly where there is no discernable prejudice and the parties are able to answer to and address all the arguments. I will however proceed on the basis that the application is one to strike out the defence under Order 2 rule 15 of *the Rules*.
18. I shall therefore consider that application as one to strike out the statement of defence which has been brought under Order 2 Rule 15 of *the Rules* which provide as follows:
15. Striking out pleadings [Order 2, rule 15.]
- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
    - (a) it discloses no reasonable cause of action or defence in law; or
    - (b) it is scandalous, frivolous or vexatious; or
    - (c) it may prejudice, embarrass or delay the fair trial of the action; or
    - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
  - (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
  - (3) So far as applicable this rule shall apply to an originating summons and a petition. [Emphasis mine]
19. I agree with Mayfair that no evidence is admissible or permitted in such an application and that Mennonite did not need any supporting affidavit and that the grounds on its face were enough and in compliance with the Rules. As to whether the application is incompetent, I would only reiterate what



the Court of Appeal stated in Njeri Mbugua v Kirk Mweya Nyaga NRB CA Civil Appeal No. 110 of 2012 [2016] eKLR, where it dismissed a similar argument as follows:

(31) From the above it is clear that an applicant can bring an application to strike out a pleading relying on any of the grounds listed in Order VI Rule 13 (1). The appellant brought his application in the court under ground (a) and (b) of Order VI Rule 13(1) of the *Civil Procedure Rules*. Under Order VI rule 13 (2) of the *Civil Procedure Rules* an application under ground (a) cannot be supported by evidence. However, the appellant also brought his application under ground (b) and under that ground he could adduce evidence. There is nothing to prevent an applicant from combining his application under grounds (a) and (b) as the appellant did. We would thus overrule the contention that the application was defective because it was supported by evidence.

20. It is not in dispute that the court has discretion to strike out a pleading on the grounds set out in Order 2 Rule 15 of *the Rules*. The general and accepted principle guiding the court was expressed by Madan JA., in D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1 as follows:

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

21. From the facts pleaded and which I have outlined, the dispute revolves around the enforcement of a performance bond. The fact that Mayfair issued the Performance Bond and that it is valid is not disputed. That being the case, the law on performance bonds and like contracts is now settled. In *Edward Owen Engineering Limited v Barclays Bank International Limited* [1978] 1 All ER 976, cited with approval by the Court of Appeal in Kenindia Assurance Company Limited v First National Finance Bank Limited NRB CA Civil Appeal No. 328 of 2002 [2008] eKLR, Lord Denning MR held as follows in respect of a performance bond:

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 long 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 and seller must be settled between themselves. The bank must honor the credit.

It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade.

22. From the aforesaid dicta, the key characteristics of a performance bond are two-fold. First, the bank or issuer of the bond must honour the demand. Second, the bond is an independent contract from the primary contract hence any dispute between the parties to the primary contract do not affect the obligation of the issuer to honour the bond. This is explained in Halsbury's Laws of England (4<sup>th</sup> Ed, Vol. 41) at Page 819 para. 960 as follows:

960. Nature and effect. Some commercial contracts include provision for one party, often the seller, to procure a so-called performance guarantee or bond from a bank or an insurance or other company in favour of the other contracting party. A performance guarantee or bond commonly provides for payments to be made on the demand of the beneficiary.



The contractual obligations arising under such guarantees or bonds are separate from and not dependent upon those existing under the sale contract between the seller and the buyer.” (Emphasis mine)

23. In addition to the above, the wording of the Performance Bond issued by Mayfair supports the general principle that it is an independent contract under which Mayfair undertakes to honour the demand. It states, at the material part, that:

Upon default, and without prejudice to his other rights under the contract, the Employer shall be entitled to demand forfeiture of the bond and we undertake to honour the demand in the amount above provided always and it is hereby agreed and declared that no alteration in the terms of the said contract or in the extent or nature of the works to be carried out and no extension of time by the Architect under the contract shall in any way release the surety from any liability under the above written bond.

24. The courts have resisted any attempt to interfere with the parties’ obligations under performance bond. For example, the court will not normally issue an injunction to restrain a bank from complying with a demand to encash a bond or restrain the party in whose favour the bond is issued from making the demand for payment (see for example *Sinohydro Corporation Limited v GC Retail Limited & another* ML HCCC No. 487 of 2015 [2016] eKLR, *Donholm Rahisi Stores v Barclays Bank of Kenya Ltd and Another* ML HCCC No. 156 of 2004 [2005] eKLR and *SAJ Ceramics Limited v HMS Bergbau AG and Another* ML HC COMM No. 253 of 2018 [2018]eKLR).

25. Unlike in the cases I have cited where it is the third party who seeks to restrain the issuer of the guarantee or bond from completing its obligations, this is a case where the Plaintiff, as the insurer who issued the bond, seeks to avoid its obligations. In light of the nature of the performance bond buttressed by the authorities cited, a performance bond is prima facie enforceable unless the issuer of the bond, in this case the Mayfair, shows or demonstrates that it has a reason to avoid the demand. The accepted generally accepted reason the issuer of the bond can rely on is fraud. In *R. H. Devani Limited v Transfuel Enterprises Ltd and Another* ML HC COMM No. 144 of 2012 [2015] eKLR, the court observed that, “[D]isputes between the parties to the contract should not concern the guarantee who has issued a performance security bond unless there is fraud by one of the parties of which the 2<sup>nd</sup> defendant [the insurance company] had notice.” The Court of Appeal explained this further in *Kenindia Assurance Company Limited v First National Finance Bank Limited* (*Supra*) as follows:

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 the supplier and the customer, nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions ..... only exception is when there is clear fraud of which the bank has notice..... As to the fulfilment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken at its face value unless the contractor can establish that the beneficiary’s stand is motivated by fraud, misrepresentation, deliberate suppression of material facts or the like of which would give rise to special equities in favour of the contractor. [Emphasis mine]

26. I have elsewhere outlined the grounds upon which Mayfair contends that Mennonite has committed acts of fraud, misrepresentation and deliberate suppression of material facts which would have entitled it to avoid liability under the Performance Bond. At this point I must point out that the parties agree that there is already a dispute before an arbitral tribunal following termination of the Contract. In fact,



the letter by Thomas & Piron's advocates declaring a dispute dated 25<sup>th</sup> February 2016 was written by the same advocates representing Mayfair in this case. In that regard, this court must exercise great circumspection in making any comments or findings that would prejudice or prejudge the outcome of those proceedings. In addition, mere allegations or assertions of fraud will not do. In *United Trading Corporation SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep. 554, Ackner LJ., held that:

The evidence of fraud must be clear, both as to the fact of fraud and as to the bank's knowledge. The mere assertion or allegation of fraud would not be sufficient ..... We would expect the court to require strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer. In general, for the evidence of fraud to be clear, we would also expect the buyer to have been given an opportunity to answer the allegation and to have failed to provide any, or any adequate answer in circumstances where one could properly be expected. If the court considers that on the material before it the only realistic inference to draw is that of fraud, then the seller would have made out a sufficient case of fraud.

27. In considering the issue of fraud, it must be recalled that the existence of a dispute between the employer and contract is not, of itself, evidence of fraud. In fact, the reason the performance bond is necessary is to shield the issuer from concerns regarding the underlying dispute. Thus, the issues whether Mennonite breached the Contract by failing to pay Thomas & Piron amongst other complaints levied against Mennonite do not undermine the validity of the bond. The parties in fact contemplate that despite any dispute between the employer and contractor may have, the bond would not be affected.
28. Moreover, the wording of the Performance Bond, as I have set out in para. 22 is clear that as long as there is default by Thomas & Piron, Mennonite is entitled to call it up. The Performance Bond does not impose any limitations or conditions on Mennonite as long as it is valid. Mayfair suggests that the Mennonite could not call up the Bond after Practical Completion and handing over property and also upon issuance of the Occupation Certificate. I hold that this does not mean or displace the fact that Thomas & Piron was already in default by its own admission in seeking extensions ultimately resulting in termination of the Contract. Completion, handing over and occupation does not mean that a contractor has not committed any breaches.
29. I hold that from the totality of evidence, the facts alleged by Mayfair amount to no more than incidents of an ordinary dispute between a contractor and its employer. They do not amount to or rise to the level of fraud as Thomas & Piron was already in breach which entitled Mennonite to call up the Performance Bond. Mayfair has not established that it is entitled to resist the encashment of the bond on the ground of fraud. In the circumstances, I enter judgment in favour of the Plaintiff on that account.
30. In reaching this decision, I am aware that at this stage the court is not called upon to examine the allegations made in acute detail but it nevertheless must satisfy itself that a case has been made out to intervene in what is an important instrument in commerce. The sentiments of the Kerr J., in *RD Harbottle (Mercantile) Ltd v National Westminster Bank Limited* [1977] 2 All ER 862 are true today as they were when he made them:

It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The



courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case, the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.

31. In view of the conclusion I have reached on the application by Mennonite, it would be unnecessary to deal with Mayfair's application for joinder of Thomas & Piron as a defendant to the suit. However, I will consider it for the sake of completeness.
32. Mayfair contends that Thomas & Piron is a party reasonably affected by the pending litigation whose addition to the suit will ensure that it is determined completely without the inconvenience of a multiplicity of proceedings and that Mennonite will not suffer any prejudice if the order is granted.
33. Mayfair states that the Performance Bond is an instrument of a conditional nature giving rise to a secondary liability on the part of Mayfair for Thomas & Piron's liability to Mennonite. That such secondary liability clearly depends upon the terms of the underlying Contract between Mennonite and Thomas & Piron and that in establishing the right of the Plaintiff to call on the Performance Bond, it is therefore imperative to consider the fulfilment of the terms of the Contract.
34. Mayfair states that after Thomas & Piron informed it of Mennonite's unfounded allegations of breach, it conducted its own investigations into the conduct of the Mennonite's obligations under the Contract and concluded that Mennonite perpetrated fraud on Thomas & Piron in addition to breaching its obligations under the Contract as set out in its Statement of Defence. Mayfair avers that Thomas & Piron engaged in actual construction work which it can readily adduce evidence touching on the fraud perpetrated by the Mennonite in relation to the Contract together with the Plaintiff's breach of contract.
35. Mayfair adds that in addition to the fraud perpetrated by Mennonite, Thomas & Piron has commenced arbitration proceedings raising various matters for determination including whether Mennonite has paid Thomas & Piron monies under the Contract despite presentation of certificates issued by the Project architect, whether Mennonite's termination of the works under the Contract, after completion and acquisition of an Occupation Certificate issued by Nairobi City County, was done in accordance with the terms of the contract. Mayfair states that it has raised these matters in its Statement of Defence thus making it imperative for Thomas & Piron to be added as a co-defendant to enable Mayfair to effectively set up its desired defence against Mennonite and bring to the court information that will be crucial for the fair determination of the case.
36. Mennonite opposes the application for joinder and contends that that Mayfair has not satisfied the conditions for joinder. It contends that a performance bond is a separate and distinct agreement from the underlying agreement and therefore the participation of the contractor, Thomas & Piron, is not necessary for the complete adjudication of the issues in this suit. It states that the demand letter calling up the Bond was sent to Mayfair before the expiration of the bond validity period and that it filed this suit once Mayfair to honour it.
37. Mennonite avers that the Performance Bond as drafted is an 'on demand' security which became payable the once Mennonite informed Mayfair of the contractor's default. Further, Mennonite states that there is no requirement in the Performance Bond for the interrogation of the relationship between Mennonite and Thomas & Piron to warrant its participation in this suit.



38. As stated, Mayfair seeks to join Thomas & Piron as a defendant in this suit. Order 1 Rule 10(2) of *the Rules* grants the court power to grant an order for enjoinder of a party as a defendant as follows:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

39. In *Pravin Bowry v John Ward & Another* NRB CA Civil Appeal No. 70 of 2009 [2015] eKLR the Court of Appeal adopted with approval the decision in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A 55 (SCU) where the Supreme Court of Uganda observed that:

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.

40. Mayfair contended that Thomas & Piron's presence is necessary to enable it effectually set up the defence it desires particularly in relation to the alleged fraud that has been perpetrated by Mennonite to enable this court to effectively and completely adjudicate upon and settle all questions involved in the suit.
41. As I have already stated, the subject of the dispute herein is the Performance Bond issued by Mayfair and in favour of Mennonite. It is an on-demand security that is autonomous from the underlying contract and is a separate undertaking from the underlying contract. This means that Thomas & Piron is not party to the Performance Bond which is applicable and enforceable as between Mennonite and Mayfair. Since Thomas & Piron is not privy to the Performance Bond, I do not see how its joinder as a Defendant is necessary to assist the court effectually determine the dispute between grounded on the Performance Bond, Mennonite and Mayfair. In any case, Mayfair remains at liberty to call Thomas & Piron as its witness in the proceedings or join it as a third party to indemnify it.
42. Apart from the aforesaid reason, I would also refuse to join Thomas & Piron in the ground that the issues raised by Mayfair are subject of arbitration proceedings between Mennonite and Thomas & Piron. Joining it as a Defendant would mean that the court would have to adjudicate the dispute that is already ongoing before an arbitral tribunal.

## Disposition

43. For the reasons I have set out above, I make the following dispositive orders:
- a. The Defendant's Chamber Summons dated 18<sup>th</sup> January 2023 is dismissed with costs to the Plaintiff.
  - b. The Plaintiff's Notice of Motion dated 8<sup>th</sup> February 2023 is allowed on terms that the Defendant's Statement of Defence dated 12<sup>th</sup> December 2022 be and is hereby struck out and



judgment is entered for the Plaintiff against the Defendant for the sum of Kshs. 36,062,255.00 with interest thereon at court rates from the date of filing suit until payment in full.

- c. The Plaintiff is awarded costs of the application and the suit.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Karani instructed by Wandabwa Advocates for the Plaintiff.

Ms Khizi instructed by Nyagah Kithinji and Company Advocates for the Defendant.

