



**MFI Technology Solutions Limited v Consolidated Bank of Kenya Limited & another;
Intellect Design Arena Limited (Interested Party) (Commercial Case E255 of 2023)
[2023] KEHC 22025 (KLR) (Commercial and Tax) (5 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E255 OF 2023
DAS MAJANJA, J
SEPTEMBER 5, 2023**

BETWEEN

MFI TECHNOLOGY SOLUTIONS LIMITED PLAINTIFF

AND

CONSOLIDATED BANK OF KENYA LIMITED 1ST DEFENDANT

STANBIC BANK OF KENYA LIMITED 2ND DEFENDANT

AND

INTELLECT DESIGN ARENA LIMITED INTERESTED PARTY

RULING

Introduction and Background

1. What is before the court for determination is the plaintiff's notice of motion dated June 7, 2023 made under the provisions of sections 1A, 1B, 3A and 3B of the *Civil Procedure Act* and order 51, rule 1 of the *Civil Procedure Rules, 2010* seeking a permanent injunction restraining the 2nd defendant ("Stanbic Bank") from paying the 1st defendant ("Consolidated Bank") USD \$243,600 in fulfilment of Stanbic Bank's performance guarantee No MD2216000004 ("the Performance Guarantee").
2. The application is supported by the grounds set out on its face and the supporting and supplementary affidavits of Sachin Mittal, the plaintiff's Finance Director, sworn on June 7, 2023 and July 13, 2023 respectively. It is opposed by Consolidated Bank through the replying affidavit of its legal manager, Albert Anjichi, sworn on June 26, 2023. Stanbic Bank has filed its response through the replying affidavit of its legal advisor, Ferina Okemwa, sworn on June 21, 2023.



3. The facts giving rise to this application are largely common ground and can be gleaned from the plaintiff's pleadings and the parties' depositions. On May 4, 2022, Consolidated Bank awarded the plaintiff a tender for the upgrade and maintenance of Consolidated Bank's Core Banking System that is licensed by the interested party. Consequently, the plaintiff, Consolidated Bank and the interested party entered into variation agreements on June 3, 2023 that varied agreements they had entered into in 2012 ("the agreement"). Upon execution of the agreement, the plaintiff was required to provide a performance security equivalent to 10% of the value of the contract, that is, USD 243,600.00 and thus, by the letter dated June 9, 2022, Stanbic Bank, at the request of the plaintiff gave the performance guarantee wherein it irrevocably guaranteed to pay Consolidated Bank any sum or sums not exceeding USD 243,600.00, upon demand by Consolidated Bank.
4. Under the agreement, Consolidated Bank would pay 50% of the license fees along with the sign-off of the contract and 50% balance after 60 days from the date of the agreement sign-off. However, Consolidated Bank requested for a review of the payment terms and proposed to pay the licence fee of USD 1,334,000.00 in four equal instalments of USD 333,500.00 each, which request the plaintiff accepted in its letter of July 23, 2022. On June 6, 2023, Consolidated Bank called up the performance guarantee claiming that the plaintiff was in breach of the agreement and thus demanded the guaranteed sum of USD 243,600.00. It is this action that prompted the plaintiff to file this suit together with the instant application to which I now turn.

The Application

5. The plaintiff contends that despite adhering to Consolidated Bank's terms and even being gracious enough to adjust to its new payment schedule, Consolidated Bank breached the agreement by failing to pay it in accordance with the agreement. That as a result of the aforesaid breach, it had to halt the project due to insufficient funds despite constant reminders to Consolidated Bank to pay the outstanding amount through letters and emails.
6. The plaintiff avers that Consolidated Bank cannot issue any demand for payment under the performance bond as it has not breached any terms of the agreement and Consolidated Bank has misrepresented the position to Stanbic Bank. It contends that Consolidated Bank has suppressed material facts that favor the plaintiff by failing to disclose that it was the one in breach as it has failed to pay the amount due under the agreement hence the plaintiff could no longer sustain the project without such payments.
7. The plaintiff states and reiterates that Consolidated Bank's actions amount to fraud as it failed to disclose and or suppressed material facts namely that it has failed to make payments under the agreement and that it seeks to recover money from the plaintiff knowing fully that it has not paid the plaintiff for services rendered. The plaintiff contends that if the injunction is not granted, it shall suffer irreparable loss and damage.

Consolidated Bank's Reply

8. Consolidated Bank opposes the application and urges that it be dismissed on the ground that plaintiff and interested party failed to deliver the contracted services in accordance with the agreement. It states that from the onset, the plaintiff and the interested party did not deliver the Core Banking System in accordance with the Request for Proposal (RFP) and the bid document as disclosed in the initial product walk through conducted in October 2022. Following clarifications from the Interested Party on critical items of the Core Banking System, a second product walk through session took place between 18 and May 23, 2023 and on the request of the interested party a further one was held on June 2, 2023.



9. By the letter dated June 6, 2023, Consolidated Bank gave the plaintiff and the interested party feedback on the product walk through session which disclosed that the interested party lacked the capacity and ability to deliver a core banking system upgrade to Consolidated Bank as contracted. In sum, Consolidated Bank stated that the plaintiff and the interested party were unable to meet basic user requirements hence the final upgraded solution would not give Consolidated Bank the desired capabilities supporting the current customer needs and Bank requirements. That they were not able to deliver most of the system requirements that they had initially committed to provide as per the tender documents, the basis of the tender award and that out of 74 items considered very critical to Consolidated Bank's operations, only 5 items were successfully showcased during the product walk through. As a result, it evinced its intention to proceed and exercise its rights and remedies available under the agreement including the right to call up the performance guarantee in the event the agreement is not fully or well executed.
10. Consolidated Bank states that it called up the performance guarantee from Stanbic Bank on June 6, 2023. It states that it followed due process in terminating the agreement and calling up the performance guarantee and that the reasons for termination were attributed to the plaintiff and the interested party and at no point was it at fault.
11. As regards payment, Consolidated Bank states the claim for full payment of the contract price is unwarranted and that it had already paid USD 213,375.00; two installments of USD 100,000.00 on September 5, 2022 and USD 113,375 on October 5, 2022. That due to the fact that the agreement was voidable at the option of Consolidated Bank, it is entitled to restitution to the position it was in before the agreement was entered into by the parties.
12. Consolidated Bank urges the court to dismiss the application on the ground that it called up the performance guarantee in line with the law and Stanbic Bank is mandated to honour it despite any disputes that may exist between the plaintiff and Consolidated Bank. That in any event, the performance guarantee is a liquidated sum that is adequately compensable by an award of damages, which the plaintiff has in fact prayed for in its plaint.

Stanbic Bank's Reply

13. Stanbic confirms that the plaintiff took out the performance guarantee and that the same is yet to be paid to Consolidated Bank. However, it contends that it is willing and ready to comply with any order that the court deems just and fit to grant.

Analysis and Determination

14. The question the court is being called to determine is whether a permanent injunction ought to be granted in favour of the plaintiff to restrain Stanbic Bank from paying or honoring the demand issued to it by Consolidated Bank in respect of the performance guarantee.
15. As a preliminary issue, I agree with Consolidating Bank's submission that a permanent injunction should not be granted at an interlocutory stage especially where the facts in issue are still disputed and subject to determination at the trial. The plaintiff ought to have applied for a temporary injunction pending the hearing and determination of the application and a second prayer for a temporary injunction pending the hearing and determination of the suit. An injunction is applied for at an interlocutory stage to restrain a party pending the happening of a future event and principally to protect the status quo or the subject matter pending the determination of the application or suit. By granting the application as sought, court would leave nothing for determination at trial (see [*Daniel Kariuki Kamau v Hannah Wanjiru Kamau & 8 others* KRGYA HCCA No 30 of 2016 \[2018\]](#))



eKLR). I will however proceed as if the plaintiff has sought an interlocutory injunction as Consolidated Bank will not suffer any prejudice as the parties have had the opportunity to ventilate their positions to the fullest extent.

16. For the plaintiff to succeed, it must fulfill the conditions for the grant of an injunction settled in *Giella v Cassman Brown* [1973] EA 385. It must demonstrate that it has a prima facie case with a probability of success, that it will suffer irreparable loss which cannot be compensated by an award of damages if the injunction is not granted and if the court is in doubt regarding the nature of injury, determine the matter on a balance of convenience. In *Nguruman Limited v Jane Bonde Nielsen and 2 others* Nrb CA civil appeal No 77 of 2012 [2014] eKLR, the Court of Appeal held that the three conditions are to be considered as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003] eKLR explained that a prima facie case is, “a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.” It also observed in the *Nguruman Case* (supra) that:

We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.

17. A prima facie case is grounded on what is pleaded in the plaint. The plaintiff pleads that Consolidated Bank has failed to pay it USD 1,334,000.00 due under the agreement despite demand. That Consolidated Bank demanded immediate payment of the performance guarantee contrary to the terms and provisions of the agreement and one of the prayers it seeks is, “recovery of USD 243,600/= in the event the 2nd defendant remits the performance guarantee No MDxxxxxx4 to the 1st defendant.”
18. From a cursory look at the plaint, the plaintiff does not state how and what terms and provisions of the agreement Consolidated Bank has breached by calling up the performance guarantee. In any case, whether the Consolidated Bank is in breach of the agreement or not is immaterial as the performance guarantee is an independent contract from the primary contract, that is the agreement. The independence of performance guarantees and like agreements is explained in *Halsbury’s Laws of England*, 4th Ed, Volume 41 at page 819 on performance guarantees and bonds 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.
19. Lord Denning, MR in *Edward Owen Engineering Limited v Barclays Bank International Limited* [1978] 1 All ER 976 which has been 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 held as follows;

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.

20. I agree with the above holding that any dispute between the protagonists of the primary contract does not vitiate the performance guarantee or bond and that the issuer has no option but to honour the same. The Court of Appeal, in *Karuri Civil Engineering (K) Limited v Equity Bank Limited* Nrb CA civil appeal No 339 of 2012 [2019] eKLR restated this position by stating that

Guarantees fall into two broad categories. The traditional guarantee or surety on one hand, and “on demand” guarantee on the other. “On demand” guarantees are also known as performance guarantees, performance bonds or demand bonds. (See *Vossloh AG v Alpha Trains (UK) Limited* [2011] 2 All ER (Comm) 307 at [24]– [28]). “On demand” guarantee is distinguishable from the traditional guarantee as liability is primary not secondary and payment by the guarantor is to be made in response to demand and is not dependent whether there has been a default under the principal contract. [emphasis mine]

21. Under the performance guarantee, Stanbic Bank is obligated, “.....to pay the beneficiary any sum or sums not exceeding in total an amount of USD 243,600.00 (United States Dollars two hundred and forty three thousand and six hundred only) (the “guaranteed amount”), upon receipt by us of this guarantee and the beneficiary’s complying demand in writing supported by the beneficiary’s written statement whether in the demand itself or in a separate signed document accompanying or identifying the demand, stating that the applicant is in breach of its obligation(s) under the contract, without the beneficiary needing to prove or to show grounds for your demand or the sum specified therein.” In its demand, consolidated bank states that the plaintiff is in breach of its obligation under the agreement, it has attached the performance guarantee and demanded payment under it. This is sufficient from Consolidated Bank and for Stanbic Bank to honour the demand without any further explanation from Consolidated Bank or any question from Stanbic Bank. Whether or not Consolidated Bank has honoured its obligations under the agreement is immaterial to Stanbic Bank and it has no option but to honour the demand. in short, the plaintiff lacks any privity of contract with Stanbic Bank.
22. In conclusion I find and hold that the plaintiff has not made out a *prima facie* case with a probability of success in order to entitle it to an injunction restraining Stanbic Bank from honouring its contractual obligation to Consolidated Bank under the performance guarantee.
23. Assuming the court came to the conclusion that the plaintiff has made out a *prima facie* case with a probability of success, it would still have to consider whether damages are an adequate remedy in the circumstances. In this case, the remedy for breach as the plaintiff states is payment of the balance of the amount under the agreement. The plaintiff has not shown that Consolidated Bank or Stanbic Bank would be unable pay the amount of the performance guarantee in the event its suit succeeds.



Disposition

24. For the above reasons, the plaintiff's application dated June 7, 2023 is dismissed with costs to the defendants.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Musangi instructed by J. M. Musangi and Company Advocates for the Plaintiff

Mr R. G. Mwangi instructed by G & A Advocates LLP for the 1st Defendant.

Mr A. Mwangi instructed by Igeria and Ngugi Advocates for the 2nd Defendant.

Instructed by CM Advocates LLP for the Interested Party.

