



**China Gansu International Corporation for Economic & Technical Cooperation
Kenya Company Limited v Golden Gulf International Limited (Commercial Civil Case
E679 of 2021) [2021] KEHC 227 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E679 OF 2021**

**DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

**CHINA GANSU INTERNATIONAL CORPORATION FOR ECONOMIC &
TECHNICAL COOPERATION KENYA COMPANY LIMITED PLAINTIFF**

AND

GOLDEN GULF INTERNATIONAL LIMITED DEFENDANT

RULING

1. The Plaintiff has moved the court by the Notice of Motion dated 12th July 2021 made, inter alia, under Order 40 rule 1 of the *Civil Procedure Rules* and sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) seeking the following orders:
 - 1) Spent
 - 2) Spent
 - 3) Spent
 - 4) THAT there be a declaratory order that the Defendant is not entitled to call in the Bid Bond Tender Security dated 21st May 2021 or otherwise make any demands for payment under the same pending the hearing and determination of the intended suit between the Plaintiff and the Defendant.
 - 5) THAT there be an order for an interim injunction or order for an interim protective measure restraining Equity Bank (Kenya) Limited from paying or otherwise complying with the Defendant's demand dated 9th July 2021 or any demands by the Defendant for payment of any



sums under the Bid Bond Tender Security dated 21st May 2021 issued by Equity Bank (Kenya) Ltd pending the hearing and determination the suit between the plaintiff and the Defendant.

- 6) THAT costs of this application be provided for.
2. The application is supported by the affidavit and supplementary affidavit of its General Manager, Zou Qili, sworn on 12th July 2021 and 29th July 2021 respectively. It is opposed by the Defendant through the replying affidavit of its General Manager, David Obare, sworn on 19th July 2021. The application was canvassed by written submissions.
3. The facts leading to the suit and application are fairly straightforward and can be gleaned from the Plaintiff and depositions. The Defendant invited the Plaintiff to submit its bid for an intended project for the construction of 522 Housing Units on its parcel of land in Mombasa; Sub-division No. 817/II/MN. On 3rd May 2021, the Plaintiff was duly notified that it had been awarded the tender to undertake construction of the Units at a cost of KES. 3,090,280,201.00 inclusive of 16% VAT. As a condition for the award, the Plaintiff was required to send its acceptance letter and provide a Bid Bond Tender Security equivalent to 2.5% of the contract value from a reputable bank within 7 days of the award. On 21st May 2021, the Plaintiff's bankers, Equity Bank (Kenya) Limited ("Equity Bank"), issued to the Defendant the Bid Bond Tender Security for KES. 77,257,005.02 being 2.5% of the contract value tenable upto 19th July 2021.
4. The Plaintiff's case is that the Defendant neglected to execute the formal contract but instead wrote to Equity Bank a letter dated 9th July 2021 calling in the Bid Bond on the ground that the Plaintiff had failed to execute the contract and failed to provide a Performance Guarantee as stipulated in the contract. The Plaintiff disputed the Defendant's action on several grounds including the fact that it is the Defendant who occasioned failure to execute the contract. Further that the contract did not have a time frame for execution and that it is yet to be notified of the Defendant's intention to call in the Bid Bond.
5. The Plaintiff states that Equity Bank has indicated its intention to honour the Bid Bond unless stopped by this court and if Equity Bank makes payment, it will suffer irreparable loss and damage. The Plaintiff therefore seeks the following reliefs:
 - 1) A declaration do issue in the Plaintiff's favour to the effect that the Defendant is not entitled to make any demand for payment under the Tender Security No. JV/GGI-BSL/2021-001A issued by Equity Bank Kenya Limited as security for the construction of Housing Units on the parcel of Land known as Sub-division No 817/II/MN County Council of Mombasa.
 - 2) That there be an order of Permanent Injunction requiring Equity Bank Kenya Limited to withhold the making of any payment under the Tender Security dated 21st May 2021 issued by Equity bank Kenya Ltd to the Defendant.
6. The Plaintiff's case is along the lines I have outlined above. It states the Defendant is not entitled to call in the Bid Bond from Equity Bank as the parties were engaged in negotiations over the terms of the contract and that there was no period for execution of the contract hence there was no contract requiring the Plaintiff to furnish a Performance Guarantee. The Plaintiff cites the case of *Sichuan Enterprises Corporation East Africa Limited v Landbank Real Estate Investment Trust ML HCCOMM No. 381 of 2015 [2015] eKLR* where the court granted an injunction to restrain the defendant from calling up the Bid Bond on the ground that the defendant had failed to meet the terms of the contract by failing to execute the contract.



7. In response to the Plaintiff's case, the Defendant states that the Plaintiff has not provided any evidence that the parties were negotiating yet the Defendant had approved the final contract and forwarded it to the Plaintiff. The Defendant has called in aid the case of *Kenindia Assurance Company Limited v First National Bank Limited NRB CA Civil Appeal No. 328 of 2002 [2008]eKLR* where the Court of Appeal cited, with the approval, the words of Lord Denning M.R. in the case of *Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 ALL ER. 976*, where he stated as follows:

All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. 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 contracted 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. The only exception is when there is clear fraud of which the bank has notice.

8. In the application under consideration, the Plaintiff seeks a declaratory order in prayer 4 against the Defendant and an injunction against Equity Bank in prayer 5. Also important is the fact that the Plaintiff seeks the same reliefs in the main suit. In *Johana Nyokwoyo Buti v Walter Rasugu Omariba & 2 Others KSM CA Civil Appeal No. 182 of 2006 [2011] eKLR*, the Court of Appeal explained the nature of a declaration as follows:

A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force - that is, it does not require anyone to do anything. It is available both in private and public law save in Judicial Review jurisdiction at the moment. The rule gives general power to the courts to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter.

9. Since a declaration settles the parties' rights, it is difficult to see how the court can issue an interim declaration without hearing the suit. In other words, the court cannot grant an interim declaration as sought by the Plaintiff as sought in prayer 4.
10. Turning to the prayer for injunction, there is no dispute about the applicable principles in resolving this Plaintiff's application. Has the Plaintiff have met all the conditions for the grant of an injunction as set out in *Giella v Cassman Brown [1973] EA 385*? In order to succeed in obtaining an interlocutory injunction, the Plaintiff 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 reiterated those conditions and added that they are to be considered as separate, distinct and logical hurdles which a plaintiff is expected to surmount sequentially. In *Mrao Ltd v First American Bank of Kenya Limited and 2 Others MSA CA Civil Appeal No. 39 of 2002 [2003] eKLR*, the Court of Appeal 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."
11. The substance of the Plaintiff's application is that it seeks an, "interim injunction or order for an interim protective measure restraining Equity Bank (Kenya) Limited from paying or otherwise complying with the Defendant's demand dated 9th July 2021...." The injunction and indeed, the final



relief in the Plaintiff is directed not at the Defendant but at Equity Bank. This begs the question whether the Plaintiff can make out a *prima facie* case for an injunction against a person who is not party to the suit.

12. The Court of Appeal in *Pashito Holdings Limited & Another vs Paul Ndungu & 2 Others NRB CA Civil Appeal No. 138 of 1997 [1997] eKLR* dealt with a situation where the Commissioner of Lands had not been joined in the case where it was accused of illegally allocating land. On the necessity of joining the affected party, the court observed as follows:

The respondents could not have established a *prima facie* case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to *Jowitts Dictionary of English Law* (2nd Edition)

"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said: "However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings". With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents' case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief".

13. It is common ground that the matter in issue is the Bid Bond issued by Equity Bank to the Defendant. As explained by the Court of Appeal in the *Kenindia Case (Supra)*, the Bid Bond being in the nature of a documentary credit must be honoured according to its terms. Its efficacy lies in the fact that it is an independent contract from the primary contract. This means that the Plaintiff is not party to the Bid Bond and cannot question the legal obligations of Equity Bank or cause the court to adjudicate on the legal incidents of the Bid Bond without its participation in this suit.
14. On the other hand, I accept that the court granted an injunction in *Sichuan Huashi Enterprises Corporation East Africa Ltd v Landbankk Real Estate Investment Trust Ltd (Supra)* but the circumstances in that case are different as the injunction was not directed at the bank issuing the guarantee. The injunction in that case was directed at the defendant restraining it from calling in the guarantee and or receiving the proceeds thereof. The court directed that the sum under the Bid Bond be secured in a joint account pending determination of the application. In this case, the order is directed at Equity Bank which, according to the Plaintiff, has indicated that it will comply with the demand.
15. I am constrained to come to the conclusion that in the absence of Equity Bank, the court cannot issue an injunction restraining it from performing any of its obligation under the Bid Bond. I therefore find and hold that the Plaintiff has not established a *prima facie* case with the probability of success. Following the decision in *Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)*, once the Plaintiff fails to surmount the first hurdle, then the application must fail.
16. The Notice of Motion dated 12th July 2021 is dismissed with costs to the Defendant.



DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Mburu instructed by Kimondo, Gachoka and Company Advocates for the Plaintiff

Mr Omondi instructed by J. P. Ngoya and Austine Advocates for the Defendants.

