REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 354 OF 2009

COTTINGHAM PROPERTIES LIMITED ....PLAINTIFF

VERSUS

TAUSI ASSURANCE COMPANY LIMITED ....1ST DEFENDANT

TIRTH CONSTRUCTION LTD ....2ND DEFENDANT

CHANDRESHKUMAR MADHUBHAI BABARIYA

RAMJI J. VARSANI

TIRTH CONSTRUCTION LTD ....THIRD PARTY

JUDGMENT

1. The plaintiff filed this suit vide a plaint dated 11th May, 2009 and amended on 26th July 2012, seeking for judgment against the 1st and 2nd defendants as follows:-

(a) A declaration that the 2nd Defendant is in breach of the Building Contract dated 8th November 2005,

(b) The sum of Kshs. 7,700,000 due and payable by the 1st Defendant under the terms of the Performance Bond,

(c) The sum of Kshs. 3,403,645.71 due and payable by the 2nd Defendant;

(d) Interest on (b) and (c) above at court rates

(e) Costs of the suit.

2. The plaintiff case is that, on or about the 8th November 2005, it entered into a building contract (herein "the contract") with the 2nd defendant, whereby the 2nd defendant was contracted to construct 20 apartments together with the usual amenities and conveniences on property known as L.R. No. 2/258, Muringa Road, Nairobi. The agreed consideration for the works was;Kenya shillings seven million seven hundred thousand (Kshs. 7,700,000).

3. The contact stipulated that, construction works would commence on 22nd November 2005 and be completed within a period of forty eight (48) weeks being on or before 23rd October 2006. Further clause 4 of the contract provided that the 2nd defendant would secure a performance bond in favour of the plaintiff for the performance of the contractor's obligations.

4. As a result, the 1st defendant issued a policy number; POL/0766/127/2005, to stand as surety for the performance of the 2nd defendant's obligations under the contract, and be liable to the plaintiff for damages incurred as a result of that default up to a maximum amount of Kenya shillings seven million seven hundred thousand (Kshs. 7,700,000). That on the basis of the performance bond, the plaintiff granted the 2nd defendant possession of its premises and the 2nd defendant commenced the works.

5. By a letter dated 13th June 2006 and subsequent requests, the 2nd defendant sought for an extension of eight (8) weeks for completion of the works. The parties agreed on 15th January 2007as the date of completion of the works. The plaintiff avers that despite the aforesaid

requests, the 2nd defendant failed to complete the project at the agreed extended contractual date of 15th January 2007 and abandoned the project and the premises in the month of April 2007 in breach of the contract, thereby necessitating the plaintiff to complete the works on its own.

6. That due to the 2nd breach of the building contract, the completion of works was delayed by a total of 31 weeks from 15th January 2007 to 15th August 2008. That under the terms of the contract, the plaintiff is entitled to claim damages in the amount of; Kenya shillings ten thousand (Kshs. 10,000) per flat, per week for the entire period of delay and additional expenditures incurred as a result of the 2nd defendant's default.

7. The plaintiff claims damages as computed below:-

a) Excess/additional expenditure ------Kshs. 4,903,645.71

b) Delay (@ Kshs. 10,000 per flat x 20 flats

X 31 weeks) ---------------------- -Kshs. 6, 200,000.

Total----------------------------------Kshs.11,103,645.71

8. The plaintiff further avers that the 1st defendant has failed to settle the amount under the performance bond to a maximum of; Kenya shillings seven million seven hundred thousand (Kshs. 7,700,000), despite demand and notification of intention to sue, hence the suit herein.

9. However, the 1st defendant filed a statement of defence dated 10th July 2009, and amended on 10th August 2012, denying liability for the plaintiff's claim, in particular being liable to pay the maximum sum of; Kenya shillings seven million seven hundred thousand (Kshs. 7,700,000) or any part thereof on demand or otherwise. It was averred that, the alleged performance bond issued on 9th November 2005, was not properly executed and/or executed under seal, therefore it is invalid and unenforceable. And even then, it does not disclose or stipulate any consideration consequently it is. Therefore, it does not constitute a valid contract capable of attributing any liability to the 1stdefendant as a surety or otherwise.

10. The 1st defendant pleaded in the alternative and without prejudice to the aforesaid that, even if the alleged document is valid (which is denied), then it is not a performance bond but a contract of surety-ship and should be strictly construed as such and the terms thereof strictly complied with by the plaintiff.

11. The 1st defendant specifically denied being liable to pay sum of; Kenya shillings seven million seven hundred thousand (Kshs. 7,700,000) or any part thereof on demand or otherwise. It also denied the alleged loss in the sum of; Kenya shillings eleven million one hundred and three thousand six hundred and forty five and seventy one cents (Kshs. 11,103,645.71) as pleaded and quantified. It was argued that, in any event, the plaintiff failed to effectively terminate the contract before incurring the alleged excess or additional expenditure.

12. Further the plaintiff filed the suit herein without exhausting the remedies available to it under the contract entered into between it and the contractor. That a dispute exists between these parties and should have been resolved by means of arbitration, as provided for in the contract, before filing the suit herein.

13. Similarly, subsequent to entering into the contract, the plaintiff on diverse occasions varied or amended and/or parted from the terms and conditions of the contract, without the knowledge, consent or authority of the 1st defendant, to its prejudice, thereby discharging the 1st defendant from all liability under the alleged performance bond. The variations or amendments included inter alia; extending time for completion of works.

14. The 1st defendant prayed that, the suit against it be dismissed with costs however, in the event it is held liable to the plaintiff, declaration be made that, it is entitled to indemnity and/or contribution by the third parties including the 2nd Defendant on the basis of the guarantees and indemnity and judgment be entered accordingly with costs.

15. The2nd defendant cum a third party was joined in these proceed9ng vide a chamber summons application dated 4th August 2009 filed by the 1st defendant. The 1st defendant filed a statement of claim against the 2nd defendant claiming indemnity on the basis of counter guarantee dated 9th November 2009. The plaintiff also applied and was allowed to join the 2nd defendant as a defendant.

16. Subsequently upon joinder, the 2nd defendant and third party filed an amended defence dated 13th January, 2016 and a counter claim and denied the plaintiff's claim. It was averred that the parties to the building contract verbally agreed on two additional extensions such that, the completion date for the works was agreed to be on 31st August 2007. They denied leaving incomplete works and argued that they completed the works and were issued with a completion certificate dated 3rd September 2007 showing that practical completion of works was achieved on 31st August 2007.

17. That even then, the plaintiff delayed in settling the certificates of payment and save for certificates numbers 1 and 8, payment in respect of all the other certificates numbers 2, 3, 4, 5, 6 and 7, were delayed, or settled in part payment, which in turn delayed the completion of works. That a cheque for a sum of, Kenya shillings seven million (Kshs. 7,000,000), issued by the plaintiff was dishonored, which caused the 2nd defendant to close down works, for three (3) months. Further the Plaintiff interfered with one of the 2nddefendant's sub-contractors and threw the plumber out of the site, which contributed to further delay in the completion of the project works.

18. However the 2nd Defendant concede that contract provides for a claim for damages in the amount of; Kenya shilling ten thousand (Kshs. 10,000) per week in case of default but denied that the Plaintiff is entitled to the payment, and/or the sum of; Kenya shilling seven million seven hundred thousand (Kshs. 7,700,000), under the performance bond. That to the contrary the plaintiff owes the 2nd defendant, Kenya shilling five million (Kshs. 5,000,000), for extra works after completion of the project.

19. The 2nd Defendant averred that, the disagreement between the parties arose when they were not able to carry out a valuation of the final and extra works done, thus the court should order the valuation and production of the final accounts. The 2nd Defendant conceded that, in the unlikely event that, the 1st Defendant is found to be liable to the Plaintiff in the sum of; Kenya shilling seven million seven hundred thousand (Kshs. 7,700,000) or any part thereof, the Third parties will indemnify the 1st Defendant.

20. However the plaintiff filed a reply to defence dated 21st July, 2009, reiterating the averments in the plaint, in particular the performance bond was duly authored, issued and executed by the 1st defendant in its favour, therefore the 1st defendant is estopped from belatedly alleging that it is invalid or otherwise. That the e subject document is clearly entitled "contractor's performance bond" indicating the intention of the document and its intended purpose and that the requisite consideration for the same was made in the form of premium payments.

21. It was argued that, the performance bond and the building contract are separate and distinct contracts each affording their own separate and individual remedies in the event of default. Further, there is no limitation or requirement necessitating the plaintiff to exhaust and/or explore its remedies under the contract whether vide arbitration or otherwise prior to seeking its available remedies under the performance bond.

22. The case proceeded to full hearing, whereupon the plaintiff called three witnesses; (Pw1) Anthony Thimangu; the Architect, (Pw1) Christopher Nderitu, the Quantity surveyor (pw2), and (Pw3), Professor Simeon Imbamba the plaintiff's managing director, The witnesses generally reiterated the averments in the pleadings, adopting and relying on their statements filed in court together with the supporting the documents.

23. The 1st defendant called Rita Thathi to testify on its behalf. She relied on a witness statement dated 1st November, 2016 and filed on 11th November, 2016, and a bundle of documents filed alongside the statement, while the 2nd Defendant cum the Third party's evidence was led by its director, Chandresh Kumar. He too relied on his statement dated 13th January 2016 and the documents filed alongside.

24. At the conclusion of the hearing of the suit, the parties filed their respective submissions and identified issues for the determination as between the 1st defendant and the third party as follows:-

a) whether the third party was aware of the contents of the pleadings herein having been served with the same;

b) whether the third parties are aware of the defendant's claim of indemnity against them as pleaded in the defendant's statement of claim against the third party dated 23rd November 2009 and filed on 24th November 2009;

c) whether the third party issued and gave to the defendant a counter guarantee form dated 9th November 2005 indemnifying the defendant against all liability resulting from the plaintiff's claim;

d) whether the third party has admitted liability to indemnify the defendant against the said liability;

e) whether the defendant is entitled to claim against the third party on he indemnity or any part thereof including all costs and interest as pleaded in the statement of claim and the amended defence herein

25. The statement of issues between the plaintiff and the 2nd defendant were identified as follows:-

a) was there a valid building contract entered into between the plaintiff and the 2nd defendant?

b) what was the scope of works envisaged under the building contract?

c) was the stipulated date of completion achieved and if not, why was it not achieved?

d) was an extension granted and did the 2nd defendant complete the works within the extended period?

e) if not, did the plaintiff take any steps as envisaged under the contract before it went ahead to complete the work itself?

f) was a certificate of practical completion issued? If so, to whom was it issued?

g) if the 2nd defendant had abandoned the works as alleged, then why was the certificate or practical completion issued to it and not the party who completed the works?

h) if the practical certificate was achieved on 15th August 2007, who will be responsible for expenses incurred after the date?

i) why were the directors of the 2nd defendant present on the site even at the time of testing of lights?

j) is the plaintiff entitled to claim Kshs. 3,403,645.71, from the 2nd defendant? How was this sum incurred by the plaintiff? Is the sum recoverable by the plaintiff or should it be borne by the plaintiff as per clause 41.4 of the agreement?

k) is there any sum payable by the plaintiff to the 2nd defendant?

l) who should bear the cost of this suit?

26. In my considered opinion most of the issues identified are not in dispute but from the arguments of the parties the following issues stand out as being sticky and/or in dispute:-

a) whether the document produced by the plaintiff dated 9th November 2005,is "a performance bond" or a contract of guarantee or surety-ship;

b) what is the mode of dispute resolution mechanism provided for in the building contract between the plaintiff and the 2nd defendant; and whether the dispute between them should have been referred to arbitration;

c) whether any of the respective parties herein breached their obligation under the building contract; and

d) whether the defendant is entitled to be indemnified by 2nd defendants and/or Third parties?.

27. There is no dispute that the plaintiff and the 2nd defendant entered into a building contract dated 7th November 2005. Clause 16 thereof, required the 2nd defendant/third party to provide a performance bond in the sum of Kshs. 7,700,000equivalent to 10% of the contract price, issued by a surety, an established bank or insurance company and approved by the plaintiff/employer. The purpose was for due performance of the contract until the certified date of practical completion.

28. I have already analyzed the arguments advanced by the respective parties on the subject document described as a "performance bond" and in a nutshell the following issues arise:-

(a) whether the subject performance bond dated 9th November 2005 was issued in favour of the plaintiff and if so, how much money did it secure?;

(b) whether the performance bond is valid and enforceable against the 1st defendant?;

(c) is that document is a performance bond or contract of surety-ship?;

(d) is the 1st defendant liable to pay the plaintiff the sum of Kenya shillings seven million seven hundred thousand (Kshs. 7,700,000) claimed?;

(e) is it necessary to prove default on the part of the 2nd defendant as a precondition of the enforcement of the performance bond, and if so, has the plaintiff proved such default?

29. In resolving this issue, I have taken cognizance of the document produced at page 59 of the plaintiff's bundle of documents, referenced: PLO/0766/127/2005 and titled "contractors performance bond". The content thereof; states that, it is an "agreement between the 1st defendant as surety, wherein the 1st defendant binds itself to the plaintiff in the sum of; Kenya shillings seven million seven hundred thousand (Kshs. 7,700,000), in relation to the contract dated 7th November 2005, between the 2nd defendant and the plaintiff, under which the 2nd defendant is to carry out and complete works therein stated in the manner and by the time therein specified all in accordance with the provisions of the said contract".

30. The document further provides that, if the contractor defaults on his obligation under the contract, the surety shall satisfy and discharge the damages sustained by the employer to the amount of the bond and the bond shall be void, otherwise it shall remain in full force and effect. Further, upon default by the contractor and without prejudice to any rights or remedies the employer may have under the contract, the employer shall be entitled to demand for forfeiture of the bond and the 1st defendant shall honour the demand in the amount stated in the bond.

31. Finally, the document provides 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 liability under the above written bond.

32. However before I make my findings on the subject issue, it suffices to note the parties submitted heavily on the same. The 1st defendant who raised the issue submitted that, despite the fact that the Plaintiff pleads the document is a "performance bond", under paragraph 7 of the amended plaint states that "the 1st Defendant agreed to stand as surety" and paragraph 20, states that the "cause of action against the 1st defendant is for payment of; Kenya shillings seven million seven hundred thousand (Kshs.7, 700,000), as guaranteed".

33. The 1st defendant further submitted that, clause 16 (i) provided that, the contractor shall provide one "surety" and the first line of the

document names “Tausi Assurance Company limited” as the surety. That indeed, the word “surety” appears in at least at three places in the document. Therefore those clear expressions and stipulation are of the essence that, the document alleged to be performance bond, is a contract of surety, and the 1st defendant signed the document as a surety. Further the plaintiff’s witnesses were constrained to accept that it was in fact a contract of guarantee.

34. However, the plaintiff in response submissions reiterated that the subject document is clearly described as “contractor’s performance bond” due to the following reasons:-

> *(a) The document clearly states in its heading it is a “contractor’s performance bond” and sets the preamble, description, purpose and intention of the document;*
>
> *(b) It is the business practice and norm in the construction industry for a performance bond of this nature to be provided securing the performance of the building contract by the nominated contractor;*
>
> *(c) The use of the words “bond” and “performance bond” in the document necessarily implies that the document is and is intended to be a performance bond;*
>
> *(d) It is also clear that throughout the document itsel it is referred to as a “bond”. There is no single phrase referring to the document as a “contract of surety-ship” as alleged by the 1st defendant and to construe the document as such would be to import a meaning into the document or entail re-writing the document to accord it a meaning that it simply does not have; and*
>
> *(e) The phrase “surety” was simply used in the document to describe the 1st defendant as the plaintiff is described as the employer, as much as the building contract is not a contract of employment in the strict sense of the word.*

35. The Plaintiff further submitted that, paragraph 1 of the letter dated 19th November 2008, addressed by the 1st defendant’s Insurance and Loss assessors, McLarens Young International; refers to the document as a “performance bond”. Similarly paragraph 2 of the letters dated 13th December 2008, and 24th June 2009, refers to the document as; a “bond” and a “performance bond”.

36. The plaintiff urged the court to construe the document in its ordinary meaning or if it is apparent the words used therein are technical in nature, the court should consider how the words are normally used by persons within that business or profession and interpret the words in that sense. That in the absence of ambiguity, it is unnecessary for the court to consider extrinsic evidence or custom usage of the phrase by the parties. The case of; *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited (2017) eKLR* was relied on.

37. As can be deduced from the arguments and submissions of the parties, the key issues is the meaning and/or understanding of the phrases “bond”, “performance bond”, “surety”, “surety-ship” and “guarantee” as used generally and/or herein.

38. In that regard the plaintiff referred the court to the definition of the term “bond” under Black Law Dictionary which is defined as “a contract by specialty to pay a certain sum of money which the maker or obligor promises and thereto binds himself, his heirs, executors, and administrators, to pay a designated sum of money to another”. The same dictionary defines, a “performance bond” as a “bond given by a surety to ensure the timely performance of a contract” It is “a third party’s agreement to guarantee the completion of a construction contract upon the default of the general contractor”, and is also termed as a “completion bond; surety bond; contract bond”.

39. The plaintiff further referred to the definition of the terms under the Wikipedia Encyclopedia”, where the term “performance bond” is defined as; “a surety bond issued by an insurance company or a bank to guarantee satisfactory completion of a project by a contractor”.

40. The 1st defendant referred the court to the text on; Guarantee (2nd edition) where the author states that; “the term “performance guarantee” is sometimes used to denote a genuine contract of guarantee or indemnity. That to make matters worse and even more confusing, such guarantees or indemnities may be given in circumstances in which one might expect to be true performance bonds. The nature of the contract is ultimately a question of its construction.

41. The 1st defendant further relied on the case of;*Trafagar House Construction (Regions) Ltd-Vs- General Surety and Guarantee Co. Ltd(1995)* where the court observed that, the subject bond itself contained indications that it was intended to be a guarantee and the appellants were described as “the surety”. The case of; *Laxmanbhai Construction Ltd-Vs- Kenya Orient Insurance Co. Limited HCC No. 746 of 200*was also cited.

42. In my considered opinion a “performance bond” can be described and/or defined as “a written guaranty from a third party/guarantor (usually a bank or an insurance company) submitted to a principal (client/customer) by a contractor on wining the bid. A performance bond ensures payment of a sum (not exceeding a stated maximum) of money in case the contractor fails in the full performance of the contract”.

43. Thus a performance bond is used to protect the Developer’s investment in a venture. If the contractor fails to complete the project based on the contract between him and the employer, then the project owner can file a claim on the performance bond. If the claim is found to be valid the surety company that issued that performance bond will make sure the contractor compensates the harmed party.

44. It binds three entities together in a legal contract.

> *(a) The principal; the contractor purchasing the bond to guaranty performance quality;*
>
> *(b) The oblige; the agent/project owner requiring the bond; and*

(c) The surety; the underwriter issuing the bond, thus guarantying the owner the successful performance of the contract

45. In deed performance bonds are also commonly referred to as "surety bonds" and "performance security bonds", and are basically a guaranty made by a surety company that jobs will be completed, per contract, guidelines and regulations.

46. It is also noteworthy that the Black Law's Dictionary defines the word surety as; "a person who is primarily liable for paying another's debt or performing another's obligation; specifically, a person who becomes a joint obligor, the terms of the undertaking being identical with the other obligor's and the circumstances under which the joint obligation is assumed being such that, if the joint obligor becomes required to pay anything, he or she will be entitled to complete reimbursement". The dictionary then defines surety-ship as, "the legal relation that arises when one party assumes liability for a debt, default, or other failing of a secondary party".

47. To revert back to matter herein, I find that the subject document clearly reads in bold and capital letter that; it is a "performance bond" There is no reference therein to a "contract of guarantee". The use of the words "surety" does not make it contract of guarantee or surety – ship per se, it simply recognizes the fact that, a bond is usually given by a surety. That does not change the nature of the document herein. I therefore hold that the subject document is a performance bond in the strict legal and trade usage sense and/or transaction.

48. The other issue raised is whether the performance bond was properly executed and/or executed under seal. The 1st defendant argued that the document was not validly executed but the plaintiff argued the 1st defendant received consideration from the 2nd defendant, in lieu of the performance bond and in addition, it is clear from the third party's proceedings that, the 2nd defendant also provided further consideration in the form of cross guarantees.

49. Furthermore, detrimental reliance by the plaintiff on the document also provided consideration. Thus the 1st defendant is estopped both in law and equity from alleging the fraud after the Plaintiff has relied on the document. In my considered opinion, the subject document was properly executed on behalf of the 1st defendant by its officer under authority of; the Power of Attorney No. 37050/1, therefore, any allegations casting doubt on the validity of the document and/or alleging fraud cannot stand.

50. Having held the document issued by the 1st defendant is indeed a contractor's performance bond as envisaged under clause 16.1 of the contract, the question that arises is whether, the 1st defendant is liable under it. The 1st defendant argues that it was discharged from liability when the contract between the plaintiff and the 2nd defendant/third party, was varied without its knowledge.

51. It was submitted that in view of extension of contract completion, variations in contract in clause 34 in regard to payments; clause 38 in relation to termination of contract and preparation of accounts; taking over works by plaintiff without complying with clause 38 of contract; all without consent or knowledge of the 1st defendant as guarantor, discharged the 1st defendant. In addition, the accounts at Pages 147 to 187 of the plaintiff's documents are far out of time and inaccurate.

52. In that regard reference was made the text in; Halsburys Laws of England,3rd edition vol.18 pages 253-257 and Bullen and Leake, on Guarantees 10th edition, page 603, where it is stated that, "if after giving a guarantee, the creditor, without the authority or consent of the surety, alters the contract made with the principal debtor, the surety is thereby discharged on the ground that he cannot be made liable for non-performance of a contract he has not guaranteed".

53. Further reference was made to the case of; *Holme-vs- Brunskil (1878)3QBD*; where it was stated that " if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial, or that it cannot otherwise be beneficial to the surety, the surety may not be discharged; yet that, if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will hold that in such case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged. Accordingly, whenever a creditor seeks a variation in terms of his contract with the principal without the knowledge or consent of the surety, he does so at his own risk, and unless the benefit or lack of prejudice to the surety is obvious, or there is obviously no possibility of prejudice, the surety will be entitled to be discharged."

54. That similarly the case of; *Holme –vs- Brunskill (1878) QBD P.495 quoting Rees-vs- Berrington: 28 April 1975* held that, the extension of time to the principal without the knowledge of the surety will discharge the surety. That, "it is the clearest and most evident equity not to carry on any transaction without the knowledge of him (the Surety), who must necessarily, have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him." Finally, the court observed in the case of; *Reid-Vs- National Bank of Commerce (1971) E.A.525,* stated that, "the law has always been jealous to protect a guarantor who, especially in a continuing and fluctuating liability, is very much at the mercy of the creditor".

55. However the plaintiff submitted that, the 1st defendant was not privy to the building contract and cannot therefore derive any rights under it. That the performance bond is autonomous to the building contract and separate and distinct contract enforceable on its own terms. There was no provision either in the performance bond, itself or in the building contract that required the plaintiff to inform the 1st defendant of any variations.

56. Further the building contract itself envisages variations, as clause 36 provides for extension of time and the 3rd paragraph of the performance bond itself clearly states as follows; "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."

57. The plaintiff relied on the cases of; *Synohydro Corporation Limited vs GC Retail Limited & No. 487 of 2015;* and *Gatare Limited vs Standard Assurance Kenya Limited HCCC No. 245 of 2008,* where the courts held that; "a performance bond is a separate and distinct

contract between the principal and beneficiary. It is an on-demand bank security that is autonomous from the underlying contract." and "is therefore unconditional."

58. The 1st defendant as surety ought not to be overly concerned about the performance or otherwise of the parties under the building contract. That upon a claim of default and demand for payment, it was incumbent on the 1st defendant to pay the amount secured in the bond without undue delay and without extensively inquiring into the validity or otherwise of the claim. The only exception to this rule is where there is a clear case of fraud, which is not the case herein.

59. Further reference was made to the cases of; *Transafrica Assurance Co. Ltd vs. Cimbria (EA) Ltd [2002] 2 EA 627 (CAU)*, and *Kenindia Assurance Company Limited vs. First National Finance Bank Limited Civil Appeal No. 328 of 2002,* where it was held 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 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. The only exception is when there is clear fraud of which the bank has notice.

60. Similarly, the court held in the case of; *Kamro Agrovet Limited vs. Ceva Sante Animale& others Kisumu HCCC NO. 45 of 2008*, that typically, a surety's obligations under a performance bond are triggered when the owner declares the principal to be in default or terminate the principal's contract for default.

61. In my considered opinion, the issue of whether the 1st defendant is liable on the performance bond or not depends on, inter alia; whether there was default on the part of the principal debtor/2nd defendant/third party and demand made upon the 1st defendant for payment. The first issue goes to the contract between the plaintiff and the 2nd defendant/third party.

62. However it is clear from a letter dated 22nd October 2008, that the plaintiff wrote the 1st defendant, over 2nd defendant's breach of the contract, requiring payment of the sum of Kshs. 7,700,000, being the sum secured under the terms of the performance bond. The 1st defendant responded vide a letter dated 7th November 2008, notifying the plaintiff that the matter had been referred to their Legal and Insurance Consultants for advice. Subsequently the payment was not made, and the plaintiff issued a formal demand for the payment of the sum. Even then the 1st defendant also argued that upon the 2nd defendant's default, it was it was necessary for the plaintiff to terminate the contract in the manner envisaged in the building contract, in order to forfeit the performance bond.

63. That clause 38.4; was completely breached and not complied with, in that no joint inspection was organized in terms of clause 38.4.2 for the purpose of work done, the final accounts were not prepared until; October,2008, a year and a half later and not within reasonable time. That it is only after the above has been done that the employer can take possession of works and employ alternative means of completing work if indeed it needed to be so completed.

64. However the plaintiff argued that, there was no such requirement that termination of the contract was necessary prior to the lodging of any claim under the performance bond. The performance bond itself or the building contract did not contain any clause or provide any such limitation requiring termination of the building contract as a condition precedent to a claim under the performance bond. It is not every act of default by a contractor that requires or necessitates the employer to terminate the contract. For example, the contractor may default by failing to complete the contract within the time provided but this in itself whilst exposing the contractor to a claim of damages and the insurance company to claim under the performance bond does not necessarily have to lead to a termination of the contract.

65. That termination of the contract is an election or right of the employer. It is not a mandatory requirement. Clause 38.2 of the building contract provides that "...the architect may give to the contract notice..." Further termination of the contract is a remedy or right of the plaintiff against the 2nd defendant under the building contract. Forfeiture of the performance bond is a remedy or right of the plaintiff against the 1st defendant under the performance bond. That the stipulated remedies and rights under the building contract on the one hand and the stipulated remedies and rights under the performance bond are separate and distinct, unrelated and do not flow from one contract to another in the manner argued by the 1st defendant. Clause 38.1 provides; "without prejudice to any other rights or remedies which the employer may possess...." The clause clearly recognizes that termination of the contract by the employer is not an exhaustive or exclusive remedy and the employer is entitled to other rights and remedies

66. It was submitted that the 2nd defendant, was always accorded the opportunity to complete the works in accordance with the terms of the contract and subsequently, the 2nd defendant abandoned the works without notice and without terminating the contract in the manner provided, which led to the conclusion that, the 2nd defendant had abdicated its obligations under the building contract.

67. The issue of termination of the contact goes to the substance of the building contract. I shall therefore deal with the respective claims between the plaintiff and the 2nd defendant/third party. In that regard, I find that, there is no dispute that, the parties to the building contract experienced challenges during the execution of the contract and in particular meeting the timelines. This is evidenced by the fact that the period of works was extended from 23rd October 2006 to 15th January 2007 and then April 2007. It is also not in dispute, there were delays in the payments of the certificate of completion issued by the architect in favour of the 2nd defendant/contractor. It is averred that, payments were delayed and/or, made in piece meals and at the whims of the plaintiff as evidenced by certificate No. 3-6 and the period thereof unilaterally extended. Hence the rival blame as to who between the parties breached the contract.

68. The plaintiff further pleads that the 2nd defendant/third party abandoned the project and premises before completion of the project and premises before the agreed contractual date of 15th January 2007, or at all, whereas the 2nd defendants denies abandoning the site and strongly argues that, the works were completed and the architect issued it with a certificate of practical completion showing that, the contractor had practically completed the works. That clause 1.3 of the contract defines a certificate of completion as; "a certificate issued by

the architect to the contractor to signify a state of completion where, in the opinion of the architect the works are substantially complete and can effectively and conveniently be used for the intended purposes". The certificate consequently releases the contractor/principal debtor from liability and of necessity release the 1st defendant as the guarantor from liability.

69. Apparently the 1st defendant argued the 2nd defendant's case extensively. It submitted that, according to the architect, the contractor had completed 85% of the contract works. The final accounts the contractor/the 2nd Defendant was paid was Kshs.47, 998,069.30 out of the total contract amount of Kshs. 78,285,197.00. This calculates to 61% as opposed to 85% which calculated to K.Shs.66, 542,417.00. This shows that the plaintiff on its own admission short paid the 2nd defendant by K.Shs.18, 754,408.00, more than plaintiff's claim which the 2nd defendant has counterclaimed against the Plaintiff.

70. Further, in view of the dispute about payment to the contractor, it was essential for the plaintiff to invoke clause 45 of the Contract and establish through the arbitrator the actual amount and liability before launching the suit in breach of the contract.

71. However, the plaintiff submitted that the issuance of the certificate of practical completion in essence means that the works envisaged under the contract are practically complete. However, this does not necessarily imply that there are no liabilities or default by the contractor in performing his obligations under the contract.

72. That clause 48 provides for damages if the contractor fails to complete the works by the date provided in the appendix to the contract or within any extended time accorded by project architect. In this instance, the date of practical completion was stipulated as 23rd October, 2006. Subsequently it was extended to 15th January. No further periods of extension were applied for or provided to the contractor. The certificate of practical completion provides that the works were completed on 31st August, 2007, being a delay of over 7 months from the extended completion date.

73. Accordingly, even if the 2nd defendant had completed the works (which is vehemently denied), the 2nd defendant was still in default of the terms of the building contract by failing to complete the works within the time frame provided or extended under the terms of the contract. This act of default alone entitled the plaintiff to; (a) seek forfeiture of the bond and (b) damages against the 2nd defendant as quantified in the appendix to the building contract. Therefore whilst the certificate of practical completion is evidence of completion of the works by the plaintiff, it was irrelevant for the purposes of the building contract.

74. That clause 41.5 of the building contract provides that, "should the employer take over the whole of any part of the works before the issue of a certificate of practical completion, practical completion shall be deemed to have taken place on the date of taking over of the whole or any part of the works." Accordingly, this clause proves that the occurrence of practical completion does not in itself mean that the building contractor has completed the works or performed its obligations under the building contract.

75. Further, it is also noteworthy from the building contract that the contractor remains liable under the contract to attend and make good latent defects, repairs and other incomplete works after the issuance of the certificate of practical completion and during the defects liability period, which if it performs leads to the issuance of certificate of final completion. That it is only upon issuance of the latter document that a contractor can claim or be deemed to have fully performed the terms of the building contract.

76. The plaintiff argued that, in the alternative and without prejudice to the above, the certificate of practical completion was issued in favour of the plaintiff as evidenced by a letter dated 2ndoctober 2008 produced by the project architects which explained the issuance of the certificate of practical completion to the plaintiff, on the basis that it is the plaintiff who completed the works once the same were abandoned by the 2nd defendant to this effect. The plaintiff however conceded that the original certificate of practical completion was with the 2nd defendant.

77. The plaintiff submitted further that there is numerous correspondences from the architect, at (pages 125, 133, 134, 135, 136, 137, 138, 140, 141, 144) and addressed to the 2nd defendant evidencing that the 2nd defendant had failed to complete the works within the extended period 15th January, 2007. This evidence is corroborated by pw2 (the project quantity surveyor) and pw3 (a director of the plaintiff) who all affirmed the 2nd defendant's failure to complete the works either within the time frame stipulated or at all, despite the 2nddefendant's being advanced funds by way of a Rapid Results Initiative (RRR) agreement aimed at achieving completion of the works by the extended completion date of 15th January, 2007.

78. Further the contractor did not give notice under clause 41.1 of completion of works, nor submitted request as per clause 34.1, requesting for payment after payment of certificate No. 10. Similarly under clause 34.16.2 and 34.16.3 of the building contract, the contractor is entitled to (a) payment of one-half of the retention amount within 14 days of the issuance of practical completion and (b) payment of the balance of one-half of the retention amount on the expiry of the defects liability period yet there was no such payments were applied for or processed in favour of the 2nd defendant.

79. In addition there was no application or issuance to the 2nd defendant of a certificate of making good the defects or certificate of final completion as required under the terms of the building contract. Further, the 2nd defendant's witness did not provide the date of such inspection by its agent and the project architect. Neither are there any minutes available to establish that such a joint inspection took place.

80. Finally, the 2nd defendant has not provided any evidence such as invoices or receipts for procurement of building materials, payroll evidencing payment of workers, invoices or receipts for payment to sub-contractors, attendance to any of the works, the site meetings or proof of any other activity that would be considered normal and necessary to show that a building contractor is carrying out the works. All it has is photographs of a complete building at night, which photos can be taken even now.

81. I have considered the respective submissions by the parties and I find that, the certificate of completion of works was issued on 3rd September 2007, indicating the practical completion of works was achieved on 31st August 2007 and defects period ended on 28th February 2008. The architect conceded in cross examination that the original certificate of practical completion of works produced by the 2nd defendant/contractor was genuine, valid and authentic he but did not know it was issued to the 2nd defendant. In re-examination, he reiterated the contractor was not issued with a certificate of completion of works. It is clear from the evidence of the architect that he could not explain how the original certificate of completion reached the 2nd defendant/contractor, although I note that, it indicates it was copied to the contractor, in which case the contractor should have the copy of the certificate. Even then whatever explanation, the architect may have, the key question remains how the architect issued a certificate of completion to the plaintiff when the works by the contractor were incomplete and then "cc" the contractor.

82. Whatever the case may be, clause 38 of the building contract provides that, if the contractor suspends works for a period exceeding fourteen days or fails to proceed regularly and diligently with works or to follow architectural instructions, the contract shall be terminated. If indeed the contractor abandoned the site why didn't the plaintiff invoke the provision of this clause?

83. In my considered opinion and based on the correspondence herein it ic clear that the contractor did not finish the project works within the stipulated time and it is clear there was no handing over the works to the plaintiff. However the certificate of completion of works speaks otherwise.

84. Be that as it were, it is noteworthy that after the issuance of the certificate of completion of works, the 2nd defendant wrote a letter dated 25th September 2007, to the 1st defendant advising them that the policy had lapsed. The letter reads as follows: -

> "*We refer you to the above policy.*
>
> *With effect from the expiry date i.e. 8th November 2006, please lapse the policy.*
>
> *The copy of the Completion Certificate is enclosed herewith for your records.*
>
> *We await your NIL endorsement in due course."*

85. As a result therefore, the 2nd defendant discharged the 1stdefendant from liability and requested for cancellation of the bond. Although, I uphold the plaintiffs submissions that, the performance bond contract was independent of the building contract, I find that the architect; Mr. Antony Thimangu having admitted he issued the certificate of practical completion naturally, the consequences thereof is to discharge the 2nd defendant and by extension, the 1st defendant from liability and consequently, the plaintiff is estopped from making any claim against the 1st defendant.

86. I shall now consider the respective specific claims between the parties to the building contract.

87. The plaintiff claims for a sum of; Kenya shillings three million four hundred and three thousand six hundred and forty five and seventy one cents (Kshs. 3,403,645.71) being the balance of; Kenya shillings seven million seven hundred thousand (Kshs. 7,700,000) due and payable by the 1st defendant under the terms of the performance contract. Further practical completion of the works was achieved on 31st August 2007, thereby occasioning a delay of 31 weeks and that the 2nd Defendant readily admits that the works were completed on 15th August 2007, which in itself is a delay of 29 weeks. Therefore on this ground alone judgment ought to be entered in favour of the plaintiff for the liquidated damages for this delay.

88. That damages for delay are provided for under the Appendix to the building contract and computed as Kshs. 10,000 per flat per week and for 20 flats, this amounts to Kshs. 200,000 per week totaling Kshs. 6,200,000, for 31 weeks. In addition, the plaintiff also claims for the sum of Kshs. 4,903,645.71 represented by cost overruns of the fixed sum building contract occasioned by the 2nd defendant's failure to complete the works.

89. The plaintiff relied on the case of; *Hadley v. Baxendale (1854) 9 exch. 341,* where it was stated that, "…where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it…"

90. However the 2nd defendant averred that the plaintiff is not entitled to any damages because the 2nd defendant did not breach the contract. The delays of payment cannot be termed as "some payments". These were major delays including the rapid results initiative (RRI) which was paid in installments and the last portion thereof of kshs.700, 000.00 was never paid. Further, the delays impacted negatively on the performance of the 2nd defendant. That the document provided by the plaintiff show clearly that there were delays beginning with certificate No. 1. It was submitted that (RRI) was to assist recover lost time yet the (RRI) itself was paid in installments, meaning that time continued to be lost.

91. To the contrary he 2nd defendant seeks for a sum of; Kenya shillings seventeen million five hundred and one thousand nine hundred and twenty eight (Kshs. 17,501,928) and interest and costs and any other relief that the court deems fit.

92. However, it is noteworthy that the particular of these claims by the respective were not given in the pleadings, the plaintiff simply states, "in addition, the plaintiff also claims for the sum of Kshs. 4,903,645.71, represented by cost overruns of the fixed sum building contract

occasioned by the 2nd defendant's failure to complete the works." It is also noteworthy that the plaintiff initially instituted the suit against the 1st defendant only; the 2nd defendant was not a party to the suit. The claim only came into issue when the 1st defendant joined the 2nd defendant as a party

93. In the same vein the 2nd defendant states at paragraph 12of the counter claim that "the 2nd defendant avers that the plaintiff owes it; Kenya shillings twelve million three hundred and thirty six thousand two hundred and seventy nine, (Kshs 12, 366 279.00) and the same is tabulated under that paragraph. However, though stated as a liquidated claim, no documentary evidence was led to support it. All the documents produced by the 2nd defendant did not specifically prove this sum of money.

94. I have gone through the statement of Chandresh Kumar dated 13th January 2016, and he simply states as follows: "I have personally gone through the final accounts and picked various items whose costs cannot be attributed to the 2nd defendant. In this regard, the 2nd defendant has deducted the cost of the said items from any amounts claimed from the 2nd defendant and claims Kshs. 12,336,279 as per a statement of defence. This figure will depend on the evidence the plaintiff will provide for expenditure incurred before the 15th August 2007, together with documentary evidence which will include receipts of the materials by the director of the 2nd defendant. Therefore this figure may go up". Therefore the 2nd defendant relied on final accounts prepared; he faults as having been prepared without his input. Similarly like the plaintiff, the 2nd defendant did not raise its claim until it was brought in the suit by the 1st defendant and the plaintiff. So were the claims by these two parties filing their claims as an afterthought?

95. In that regard, I associate with the holding in the case of; *Bid Insurance Brokers Limited-Vs- British United Provident Fund Mombasa H.C.C.C.No. 4 of 2015,* that, "it is the duty of the plaintiff to prove its claim for damages as pleaded. It is not enough simply to put before the court a great deal of material and expect the court to make a finding in his favour. It was said by Lord Goddard, CJ in Bonham Carters Hyde Park Hotel Limited [1948]64TR177; the Plaintiff must understand that if they bring action for damages it is for them to prove damage. It is not enough to write down particulars and, so to speak, throw them at the head of the court, saying, "this is what I have lost, I ask you to give me these damages." They have to prove it."

96. Even then, the provisions of; clause 45.0 of the building contract provides that, both parties thereto agreed to submit their dispute to arbitration. However the 2nd defendant submitted to the jurisdiction of the court and responding to the pleadings. It is indicated it filed a defence dated 13th January, 2016. The issue jurisdiction cannot arise at this stage.

97. In conclusion, I find and hold that the plaintiff and the 2nd defendant entered into the building contract. It is evident the plaintiff did not make payments on time and the 2nd defendant delayed with completion of the works. Therefore if there was a breach, both parties contributed to it. It is also clear that the 1st defendant issued a performance bond in favour of the plaintiff. However following the issuance of the certificate of completion of works the 1st defendant was discharged, leaving primary liability to the 2nd defendant.

98. The upshot of all this is that I find that none of the parties have proved their respective claims and I dismiss the plaintiff's and 2nd defendant suit in respect of both the parties with costs to the 1st defendant.

99. It is so ordered.

Dated, delivered and signed in an open court this 4th day of July 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Mwangi for Mr. Gachanja for the plaintiffs

Mr. Sehmi for the 1st defendant

Mr. Sehmi holding brief for the 2nd defendant and third parties

Dennis ....court assistant