



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 279 OF 2006

PIONEER HOLDINGS (AFRICA) LTD.....PLAINTIFF

VERSUS

INTRA AFRICA ASSURANCE CO LTD.....DEFENDANT

JUDGEMENT

1. The Plaintiff instituted its claim against the Defendant through its Complaint dated 5th May 2006. The Defendant denied the allegations as averred therein through its statement of Defence dated 22nd June 2006. The brief facts leading up to the claim are as follows; the Plaintiff entered into a construction agreement with a construction company, Megdev Construction Ltd (hereinafter referred to as the “contractor”) on 24th June 1996.
2. As a condition for the performance of the contract, the contractor executed a performance bond with the Defendant on 28th June 1996, which performance bond was issued in favour of the Plaintiff. The performance bond was for the sum of Kshs 3,200,000/-. Under the construction agreement, the contractor was obligated to complete the works by 24th June 1997, although this period was extended by consent until 31st July 1997.
3. The contractor failed to complete the works by the stipulated and agreed upon time, and only completed the work on 3rd December 1997. In a letter dated 30th June 2005, the Plaintiff wrote to the Defendant demanding the payment of Kshs 1,339,500/- which the Plaintiff claimed it was entitled to in respect of the delay in completion of the works by the Defendant.
4. In its Defence dated 22nd June 2006, the Defendant denied liability, and further contended that the Plaintiff was in breach of the contractual obligations by failing to pay the contractor its dues upon presentation of certificates issued by the project architect, which was in contravention of Clause 30(1)-(7) of the agreement, and was therefore liable to pay the contractor a sum of Kshs 600,000/-.
5. It was stated that any breach was attributable to the Plaintiff, and that therefore, the Defendant is not liable under the performance bond, which in any event, as it now stands, is a dead letter the contractor having handed over possession of the project on 3rd December 1997. Further, it was contended that the Plaintiff was guilty of laches, and that the instant suit is time barred.

6. The Plaintiff argued its case through the written statement of Zool Nimji dated 7th September 2012. Therein, it was urged that the contractor had breached its obligations under the construction agreement to complete the works on the completion date, and had only managed to do the same on 3rd December 1997, which was seventeen weeks and six days after the completion date.

7. Further, it was stated that by the contractor's breach in failing to complete the works within the agreed time, the Defendant was liable to the Plaintiff under the performance bond, and that the quantum payable as set out under para. 8 of the Plaint was Kshs 1,339,500/-, as well as interest on the sum. It was further contended that the Plaintiff invoked the performance bond after it failed to reach an amicable settlement with the contractor, and that therefore, the Defendant was liable to the Plaintiff as claimed.

8. On its part the Defendant relied on the witness statement of Ramesh Chandulal Patel dated 20th September 2012. It was contended that the Plaintiff did not inform the Defendant of its alleged claim against it until 30th June 2005, by which time the claim was time barred by virtue of Section 4 of the Limitation of Actions Act. Further, it was reiterated that at paras. 7(i)-(v) of the statement of Defence referring to various correspondences between the defendant's predecessor (sic), that it (the Plaintiff in this instance) was in breach of the contract with the contractor.

9. It was adduced that the contract having been completed on 3rd December 1997 or by 31st August 1998 when all faulty works were repaired and made good, the claim against the Defendant was time barred, with reference being made to Clause 31(1) of the Building Contract.

10. On 27th March, both parties filed an agreed list of issues to be determined by the Court. These issues numbered nineteen (19) but after a consideration of the facts, they have been reduced to three(3) namely;

1. Was the Plaintiff guilty of laches.

2. Was the Defendant liable to the Plaintiff under the performance bond and

3. Is the Plaintiff entitled to interest on the sum claimed if it is found that the Defendant was indeed liable under the performance bond?

The issue of costs is incidental to the outcome of the instant suit and will be determined after the rendering of the Court.

11. With regards to the issue as to whether the Defendant was liable to the Plaintiff under the performance contract, the Court considered and looked at the Form of Bond dated 28th June 2008. The same was entered between the contractor on the one part and the Defendant on the other, and the same was executed in favour of the Plaintiff.

12. The Defendant was to provide insurance or a bond to ensure that the contractor effectively and effectually completed the works within the stipulated and agreed upon period. According to Black's Law Dictionary Tenth Edition by Bryan A. Garner at pg. 1319, the term Performance Bond is defined as follows;

“ A bond given by a surety to ensure the timely performance of a contract”

The contractor was obligated under Clause 31(1) of the contract to provide a surety. The said clause reads;

The contractor shall provide one surety who must be an established bank, insurance company or financial institution to the approval of the employer and who will be bound to the employer in the sum equivalent to ten per cent (10%) of the contract sum for the due performance of the contract until the certified date of practical completion.

In this regards, the Court of Appeal in the case of **Kenindia Assurance Company Limited v First National Finance Bank Limited Civil Appeal No. 328 of 2002** held 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. The 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. In absence of such elements the bank guarantee has to be honoured by the bank and the beneficiary cannot be restrained from enforcement..... The performance bond in the instant case is in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security guaranteeing payment by a third party and in such cases the most important factor to consider before liability can attach is whether there has been default. Once default is established and that there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security...The courts must see that these performance bonds are honoured. The courts always recognize that the bonds affected the ‘tempo’ of the parties’ obligations but not their substantive rights...In the instant case the appellant’s obligation was to pay upon demand which the obligation was established when it was served with a notice of default and upon a demand of payment being made. Liability to pay in the circumstances is not and cannot be an issue.”

Further, in **Transafrica Assurance Co. Ltd v Cimbria (EA) Ltd [2002] 2 EA 627 (CAU)**, it was held;

“A bank or institution giving a performance bond is therefore bound to honour it in accordance with the terms of the bond if it appears the papers are in order regardless of any dispute between the buyer and the seller arising from the contract in respect of which the bond was given.”

13. In consideration of the foregoing therefore, short of fraud, the Defendant was liable to pay, upon presentation of the demand to it by the Plaintiff, of the sums claimed against the performance bond. The issue as to whether there was a dispute between the Plaintiff and the contractor would not, and therefore could not, offer any recusal of the Defendant of its obligations under the performance bond.

14. However, in the instant, and in a further reading of the ruling in **Kenindia Assurance Company Limited v First National Finance Bank Limited**(supra), the Court would be inclined to look and delve further into the issues as to whether there was deliberate suppression of material facts or misrepresentation on the part of the beneficiary, in this instance, the Plaintiff.

15. In this regard, the contractor was obligated to have completed the works by 24th June 1997. However, and by consent, the same was extended to 31st July 1997. They still did not complete the works as stated, and the Plaintiff did not call upon the performance bond.

16. According to the Plaintiff, the bond was to remain in force, until and unless the contractor had completed practical completion of the works. By its own admission, the Plaintiff stated that the contractor completed the works on 3rd December 1997, and on 31st August 1998, had issued to the contractor with a certificate of making good defects.

17. It would therefore be deemed that the contractor had fulfilled its obligations under the contract, and that therefore, and in accordance with Clause 31(1) thereof, the security for performance was deemed to have lapsed once there was practical completion of the project on 3rd December 1997, and further enunciated by the issuance of the certificate of making good defects issues by the project architect on 31st August 1998.

18. The provisions of the performance bond entered on 28th June 1996 should not be looked at in isolation; they should be read together with the terms of the construction agreement entered between the Plaintiff and the contractor, *moreso* at Clause 31(1) of the same.
19. In so far as the performance bond guaranteed performance under the contract by the contractor, the same was not to be in perpetuity, as alleged by the Plaintiff in its submissions. Further, under Clause 22, it was for the Plaintiff to claim against any incomplete works by the contractor and the same to be claimed as liquidated and ascertained damages for the period in which the works remained incomplete.
20. Failure by the Plaintiff to make claim under this Clause, and further under the Form of Bond issued on 28th June 1996 at the time as and of when the work remained incomplete, meant that it had forfeited its rights accruing out of the said failure, and by taking over possession of the completed project and further issuing a certificate of making good defects, the Plaintiff had acquiesced to the completion of the contractors obligation, and cannot therefore claim for any breach of the same.
21. The instant in the present suit are distinguished from those reiterated to by the Plaintiff in the cases submitted of **Edward Owen Engineering Ltd v Barclays Bank International Ltd (1978) QB 159**, as well as **Bradford Old Bank Ltd v Sutcliffe (1918) 2 KB 833**. The circumstances for raising the issue of demand are quite dissimilar. As of 31st July 1997, the Plaintiff claimed that the contractor was already in breach of its contractual obligations, and that therefore, its right to claim under the performance bond emanated at that time.
22. There was therefore no need, as stated in **Bradford Old Bank Ltd v Sutcliffe** (*supra*) for the Plaintiff to prove its demand from the Defendant for breach. The Plaintiff did not demand from the Defendant at the time that the alleged breach occurred, but instead, waited for a period of over eight (8) years before making a demand against the Defendant.
23. In so far as the period for the demand was not expressly stated in the performance bond, the same could be inferred from Clause 31(1) of the construction contract, as well as Clause 22 thereof. Under Clause 31(1) it read in part that “...*who will be bound to the employer in the sum equivalent to ten per cent (10%) of the contract sum for the due performance of the contract until the certified date of practical completion.*”
24. The surety was bound by the agreement for guaranteeing performance **UNTIL** the certified date of practical completion, which in this instance was 31st August 1998. Thereafter, they were not bound by the terms of the bond as the performance of the contract had been deemed to have been completed.
25. For the Plaintiff’s notion that the said performance would be called upon demand is unreasonable, in that, they could still call upon the performance bond even after there was completion of the project by the contractor. Accordingly, the time period in which the performance bond would be called upon was until there was a certified date of practical completion, and after which thereafter no demand or call up could be made on the performance bond.
26. The statement that the Plaintiff had been engaging the contractor in reaching an amicable solution thereby obviating the need to issue a demand against the Defendant is quite unfortunate. It can clearly be seen that it was due to this failure to reach an amicable resolution of its dispute with the contractor that the Plaintiff sought to then make unfounded demands under the performance bond against the Defendant in order to alleviate the claim made against it by the contractor in Civil Suit No 291 of 2001.
27. In that regard therefore, the Plaintiff is not only guilty of laches, but also of deliberate suppression of material facts that would act in favour of the contractor. They had failed to disclose that they had failed to pay the contractor on the certificate issued on 31st August 1998, and that their claim therefore, against the Defendant was propagated by the claim against them in Civil Suit No 291 of 2001.
28. As was reiterated in the case of **Fenton v Emblers 97 ER 831**, that time is calculated from the time

the right accrues, in this instance from 4th December 1997, and not from the time of making a promise or demand, as alleged by the Plaintiff.

29. The claim by the Plaintiff against the Defendant, as has been established pursuant to the foregoing, was not only time barred, but was also made after the completion of the works, which after the Defendant was not bound under the performance bond, the performance of the project having been completed.

30. There was unreasonable delay in enforcing a right that may have accrued by the Plaintiff, and that an equitable right, as a legal right, is subject to a period of limitation in bringing actions to enforce it. (See Osborn's Concise Law Dictionary 7th Edition at pg. 195).

31. The court therefore finds no merit in the Plaintiff's claim against the Defendant for enforcement of the performance bond, and hereby dismisses the suit, with costs awarded to the Defendant.

Dated, Signed and Delivered in Court at Nairobi this 8th day of April, 2016.

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C. KARIUKI

JUDGE