REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 270 of 1996

CORPORATE INSURANCE CO. LTD…….....…….APPELLANT

AND

NYALI BEACH HOTEL LTD…….....……RESPONDENT

(Appeal from the Ruling of the Honourable Mr. Justice Githinji delivered on 6th April, 1993

IN

H.C.C.C. NO. 5123 OF 1990)

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JUDGMENT OF PALL JA

The facts giving rise to this appeal are that by a contract dated 10th April, 1986, (the contract) Nyali Beach hotel Limited (the Hotel) employed Actaf Construction Limited (the contractor) to construct a new wing adding 54 bedrooms to their hotel at Mombasa and to carry out some associated siteworks as shown on the contract drawings at an agreed cost of Kshs.19,459,246.50 subject to the conditions attached to the contract. Condition 31 of the said conditions reads as follows:-

"The contractor shall provide one surety who must be an established bank insurance company or fidelity guarantee

> **corporation to the approval of the architect who will be bound to the employer in the sum equivalent to 10% of the contract sum for the due performance of the contract until the certified date of practical completion."**

According the contractor commenced the construction work and as its request Corporate Insurance Company Limited (the appellant) provided a bond (the bond) which in pertinent parts reads as follows:

> **"Know All Men by these presents that we Corporate Insurance Co. Limited of P.O. Box 34172, Nairobi are bound to Nyali Beach Hotel Limited of P.O Box 90581, Mombasa in the sum of Kenya Shillings One Million nine hundred and forty six thousand (Kshs.1,946,000/=) to be paid by us to the said Nyali Beach Hotel Limited.**

Whereas by an agreement in writing dated 10th April, 1986 Actaf Construction Limited of P.O Box 67472, Nairobi contracted with the said Nyali Beach Hotel Limited to (description of work) construction of new wing containing 54 bedrooms in the said agreement particularly described and conformable thereto.

Now the condition of the above written bond is such that if the said Actaf Construction Ltd. his/their executors administrators successors or assigns shall conform to the said agreement then the above written bond to be void otherwise to remain in full force. Provided always and it is hereby agreed and declared that the liability of the said Corporate Insurance Company Limited under the above written bond shall not in any way be discharged or impaired by reason of any breach or breachers (wilful or otherwise) of the said agreement committed with or without knowledge or consent of the said Actaf Construction Limited (sic or) by or on behalf of (sic or)with the knowledge or consent of the said Nyali Beach Hotel Limited."

The contractor allegedly, did not duly perform the said contract or execute and complete the building works as required by the contract. The Hotel consequently determined the contract and in pursuance of the contract M/s. Dagliesh Marshall & Johnson, the architects under the contract, (the architects) certified by their certificate dated 9th December, 1988, a sum of Kshs.3,040,255.90, as the total amount due from the contractor to the Hotel because of the contractor's said alleged failure to duly perform the contractor. The contractor disputed the architect's certificate and in accordance with the terms of the contract the dispute was referred to Mr. Brian Barton, a quantity surveyor of Nairobi, for arbitration who by his award dated 3rd September, 1990 directed the contractor to pay the said sum of shs.3,040,255.90 to the Hotel. It is to be noted that the contractor had already then gone into liquidation and the liquidator on behalf of the contractor accepted the correctness of the architect's certificate in the arbitration proceedings. Hence the award was made with the consent of the liquidator of the contractor. As the appellant had executed the bond in the limited sum of Shs.1,946,000/= conditioned for the due performance of the contract, the Hotel sued the Appellant for the said sum of Shs.1,946,000/=.

By paragraph 3 of its defence, the appellant averred that the liquidator of the contractor unjustifiably and arbitrarily withdrew the dispute and consented to the award being made in terms of the certificate issued by the architects. By paragraph 4 of the defence, it denied that it was indebted to the Hotel in the said sum or at all. By paragraph 5 of the defence, the appellant alleged that the Hotel was entitled in law to avoid the bond because the Hotel although under a duty, failed to make full disclosure to the appellant of the facts material to its continued retention of the bond.

In the particulars of the Hotel's alleged non disclosure of facts the appellant alleged as follows:-

(a) That the Hotel failed to warn the appellant within reasonable time or at all that the contractor had failed to

perform the important parts of the contract an had disregarded the architects instructions and had displayed signs of inability to perform the contract.

(b) That the Hotel had failed to inform the appellant within reasonable time or at all that the period for completion of

the contract works had been extended and had failed to give to the appellant any or any adequate reasons for such extension.

(c) That the Hotel failed to inform the appellant within reasonable time or at all that the provisions of the contract

in relation to a retention clause in the contract were not being complied with and failed to give to the appellant any reasons for that non compliance.

Notwithstanding the defence, the Hotel applied for summary judgment against the appellant. By her affidavit sworn on 28th May, 1991, Juliet W. Kamande, senior legal officer of the appellant, deponed inter alia that at the hearing of the suit, the appellant would present evidence of non-disclosure of the aforesaid material facts and that it also intended to bring expert evidence to show that a substantial part of the Hotel's claim against the contractor would not have been maintainable had the said liquidator allowed the arbitration to proceed in order to call or have the benefit of the said expert evidence.

By his ruling, dated 6th April, 1993 which is the subject matter of this appeal, Githinji J. allowed the application for summary judgment and entered judgment for the Hotel against the appellant for the said sum of Shs.1,946,000/= with costs and interest. He held that the appellant had not shown that there was any genuine defence to the Hotel's claim.

The grounds set out in the appellants memorandum of appeal may be summed up as follows: namely, the learned trial Judge erred: (1) by holding that the appellant's defence did not show triable issues;(2) by not holding that the Hotel had concealed material facts from the appellant, disclosure of which would have enabled the appellant to re-assess its position as a surety which was compromised by that non disclosure, and ; (3) by failing to hold that the liquidator of the contractor and the Hotel had apparently colluded to compromise the contractor's position in the arbitration proceedings.

Mr. Muthoga for the appellant has forcefully argued that it was for the Hotel to prove that the contract had not been performed so as to be entitled to summary judgment and yet the Hotel did not produce any evidence of non performance of the contract. He went on to argue that the evidence of non performance was essential as the appellant's liability was only in the case of non performance of the contract. This obviously is an attractive argument. However the tenor of the bond is that the bond is conditioned to be void only if the contractor has fully conformed to the contract. In any other event it remains in full force and effect. Thus unless there is evidence that the contract had been fully performed by the contractor, the appellant continues to be bound by the bond.

In other words the appellant may void liability under the bond only if it can produce evidence that the contract had been fully performed. The onus of that proof is obviously on the appellant. It is not for the Hotel to prove that the contract. had not been performed. Still, by paragraph 4 of the affidavit, in support of the application Robin Troup a director of the Hotel, has deponed that the appellant did not duly perform the contract or execute or complete the building works as required by the contract. Annexed to his affidavit at page 52 of the record, is a copy of architects' certificate of expenses properly incurred by the Hotel and the amount of direct loss and or damage caused to the Hotel as a result of determination of the contract. The certificate runs into 22 pages (pp.52 to 73). It contains full details of the said sum of Shs.3,040,255.90 being the total amount certified to be due from the contractor to the Hotel. The appellant has not made any attempt to show that the architects' said certificate is faulty. At p.4 of his typewritten judgment the learned trial Judge said:

> **"It is at this stage of the hearing of the application for summary judgment that the defendant should show that there is a genuine dispute regarding the quantum entitling the defendant leave to defend. The mere assertion that expert evidence would be called at the trial that a substantial part of the claim would not have been maintainable without showing the basis in (on) which the quantum is disputed is not a ground for granting unconditional leave to defend. The defendant had opportunity to specify the basis of the dispute in its replying affidavit or even to file the affidavit of the expert."**

Mr. Muthoga has further argued that the Hotel owed a duty of to the appellant to inform it in good time that the contractor had failed to perform the contract which the Hotel had failed to do. However the very object of the bond was to assure the Hotel that the contractor would duly perform the contract. Generally, the duty to disclose material information on the part of the knowledgeable contracting party to the guarantor which would adversely affect his bargaining

position is at the time of formation of the contract of guarantee. The extent of that duty in any case would depend on how far the innocent party was misled into assuming an obligation which he would not have assumed if he was aware of the full facts. At the same time there is always a duty of enquiry on the part of the innocent party. Here, it is not the appellant's case that it was misled in any way by the Hotel as a result of which misleading information it agreed to be bound to the Hotel by the performance bond. In other words here the alleged non-disclosure does not relate to the formation of the contract of guarantee. Romer L.J said in SEATON VS HEATH (1899) 1Q B. 782 at 793:

"The risk taken is generally known to the surety and the circumstances generally point to the view that as

> **between the creditor and surety it was contemplated and intended that the surety should take upon himself to ascertain exactly what risk he was taking upon himself".**

In the instant case the appellant had undertaken to pay 10% of contract price to

the Hotel unless the contractor would duly perform the contract. There was no condition imposed under the bond upon the Hotel to notify the appellant in case the contractor would fail to perform the contract. In Kiby vs. Duke of Marlborough 105 E.R. 289 it was held:

"In most cased there is no obligation on the creditor to disclose all material facts relating to the transaction. The surety must inquire rather than presume."

In Seaton vs. Heath (supra) Romer L.J. at P. 792 again said:

"Ordinary contracts of guarantee are not amongst those requiring uberima fides on the part of the creditor towards

> **the surety and mere non communication to the surety by the creditor of the facts known to him affecting the risk undertaken by the surety will not vitiate the contract."**

Again, Keating on building Contracts 4th Edition at P.131 has this to say:

"The surety is undoubtedly, and not unjustly the object of some favour both at law and in equity, and…… is not to be

> **prejudiced by any dealings without his consent between the secured creditor and the principal debtor. Conduct which prejudices the surety's position may discharge the surety's obligation. But mere omission on the part of the employer mere passive acquiescence in acts which are improper on the part of the employer will no release the surety."**

In O'HARA V ALLIED IRISH BANKS LTD and another (1985) BCLC.52 it was held:

> **"A stranger who signed a guarantee with respect to a matter in which he had a commercial interest was not owed a duty of care by the person (for example a bank) in whose favour the guarantee is executed"**

The Hotel did not approach the appellant for that bond. It did not make any representation or explain to the appellant the risk to be undertaken. In fact there was no direct bargaining between the Hotel and the appellant. The risk undertaken must have been known to the appellant. In Trade Indemnity Co.Ltd v Workington harbour & Dock Board [1937] AC 1 (H.L.), Lord Atkin at P.18 said:

> **"For myself I doubt on the course of business alone whether a guarantor looks further than the skill and experience of the contractor to guard against risks of unknown difficulties in the**

performance of such a contract."

The above mentioned case also arose from an insurance company's bond for due performance of a building contract. By the same reasoning and in the circumstances of this case, it cannot be said that the Hotel owed a duty to the appellant to inform it that the contractor had failed to duly perform the contract.Mr. Muthoga also argued that as the Hotel extended the time for completion of the contract without the appellant's consent and without any adequate reasons for such extension, the appellant's obligation under the bond had been discharged. The bond was obviously procured by the contractor to comply with clause 31 of the contract. Under Clause 23 of the contract, if the architects upon receipt of a written request by the contractor are satisfied with the cause of the delay and are also satisfied that the completion of the works is likely to be or has been delayed due to one or more than one of the eventualities therein enumerated, they are empowered to grant a fair and reasonable extension of time for completion of the works. So, the extension of time in the instant case was granted by the architects as they were empowered to do so under the terms of contract which contract was the very basis of the bond provided by the appellant. In any event, there is no evidence to say that it was the Hotel which granted the extension of time.

Mr. Muthoga cited <u>HUDSON'S BUILDING & ENGINEERING CONTRACTS</u> 18th Edition which at P.471 say:

"A binding agreement to extend the builders time for completion without the consent of the surety will, it seems,

> **release the latter unless the provision to the contrary is made in <u>the contract of guarantee</u> or unless the extension is made under the provision of the principal contract guaranteed (which in building contracts will usually be the case). (emphasis provided)**

Here, in the instant case, the bond does provide; as hereinabove set out, that:

"The liability of the Corporate Insurance Company Ltd. (surety) under the above written bond shall not in any way be

> **discharged or impaired by reason of any breach or breached (wilful or otherwise) of the said agreement committed with or without the knowledge or consent of the said Actaf Construction Limited"**

Thus, this defence is also negatived by the express provisions in the bond itself and in the contract. Moreover, I agree with the trial Judge that "the extension of time can only work to the benefit of the surety" (the appellant) as the extension of time was to enable the contractor to complete the works in accordance with the contract which works if completed could have released the appellant from liability under the bond.

Another prima facie defence presented is that the Hotel did not comply with the provisions of the contract in relation to retention of money from the interim certificates of payment. This alleged breach of the contractor, even if it was a breach, could not discharge the appellants liability as the bond expressly states that the only condition which would release the appellant from liability under the bond is if the contractor conforms to the contract. In every other case the bond is to remain in full force and effect.

So far as the arbitrator's award is concerned, it is alleged that the position of the appellant was compromised because of an apparent collusion between the liquidator and the Hotel. However it is a bland allegation. There is not an iota of prima facie evidence offered in support thereof. The appellant cannot successfully say that it should be given leave to defend so that he could produce the evidence on this issue at the trial. The liquidator is the agent of the contractor and there is no evidence that he acted Mala fide.

I accept that a judgment in an action against the principal debtor or an award in an arbitration against the debtor is not binding on the debtor's surety and his liability must be proved in the same way as it would have to be proved against the principal debtor. But on an application for summary judgment it is incumbent upon the defendant to show that it has a bona fide and genuine defence to the plaintiff's claim. Otherwise he will not be allowed leave to defend. In the instant case the appellant has failed to adduce any prima facie evidence to show what is wrong with the architect's certificate or the arbitrator's award.

Mr. Muthoga rightly argued that under 0.353 r2 of the Civil Procedure Rules the defendant may show either by affidavit or by oral evidence or otherwise that he should lave leave to defend the suit. He said that he has to satisfy the court only that he should be given and opportunity to be heard as he might have something to say which might turn out to be a defence. But the purpose of 0.35 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. (See supreme Court Practice 1982 Edition Paragraph 14/3-4/2). The defendant is bound to show that he has some reasonable or fairly arguable ground of defence to the action. The defendants affidavit must condescend upon particulars and must clearly and concisely state what the defence is and what facts are relied on supporting it per Supreme Court Practice (supra) Para 14/3-4/4. In all cases sufficient facts and particulars must be given to show that there is a bonafide defence and of course once a bona fide defence has been identified, the court should refrain from resolving it on affidavit evidence. So far as a point of law is concerned, leave should be given where a difficult point of law is raised (See Electric Corporation vs Thomson Houston Co. 10 T.L.R 103). Nevertheless if the point is clear and the court is satisfied that it is really unarguable leave to defend will be refused (per Lord Greene M.R. in Cow vs Casey(1949) 1KB 481).

Leave to defend will not be given merely because there are several allegations of fact or of law made in the defendants affidavit. The allegations are investigated in order to decide

wheather leave should be given. As a result of the investigation even if a single defence is identified or found to be bonafide, unconditional leave should be granted to the defendant. Madan J.A. in Gupta vs Continental Builders (1978) K.L.R. 83 at P.87 said:

"The merits of the issues are investigated to decide whether leave to defend should be given. Sometimes the prima

> **facie issues which are preferred are rejected as unfit to go to trial being by their very nature as disclosed to the court incapable of resisting the claim. The court does not thereby shut out any genuine defences. What happens is that the court does not accept prima facie issues as genuine. This is exactly the task which the court is required to perform on an application for summary judgment."**

Moreover, the learned judge had a discretion whether or not to enter summary judgment under 0.35 of the Civil Procedure Rules. Platt J.A. in MUGUNGA GENERAL STORES VS PEPCO DISTRIBUTORS LTD (1982-88) 2 KAR. 89 at P.91 said:

"The Judge had, as he said, a discretion whether or not to enter summary judgment under order 35 of the Civil

> **Procedure Code. As laid down in MBOGO VS SHAH [1968] E.A. 93 the duty of this court (i.e. the court of Appeal) in an appeal against the exercise of that discretion is not to interfere unless the Judge has exercised his discretion wrongly in principle or perversely on the facts of the case."**

There is no fault of principle exhibited by the learned Judge and there is nothing to show that the exercise of discretion was perverse. Consequently, there is no ground on which the court can interfere with the discretion. I would dismiss the appeal with costs.

Dated and delivered at Nairobi this 9th day of January 1998.

G. S. PALL

…….……

JUDGE OF APPEAL.

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR