IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Kwach & Omolo JJ A)

CIVIL APPEAL NO 100 OF 1988

Between

JAGJIVAN SINGH TRADING T/A SPANCRETE.....APPELLANT

AND

MENENGAI INVESTMENTS LTD.....RESPONDENT

(Appeal from the order of the High Court at Nairobi (Justice Apaloo) dated 16th September, 1987

IN

HCCC No 2485 of 1985)

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JUDGMENT OF THE COURT

On or about 16th November, 1977, Jagjivan Singh, trading as Spancrete, the appellant herein, entered into a construction contract with Menengai Investments Ltd, the respondent herein, and by that agreement the appellant was to construct for the respondent a total of 98 houses on a plot of land in Nairobi. As a consideration for constructing the houses, the appellant was to be paid a total of Kshs 7,627,480/= and that payment was to be made at various stages as the construction proceeded. As is the usual practice in building contracts, the terms were spelt out in great details and at the end of it all (clause 36) the parties stipulated that: -

> "Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation in clause 30 (5) (a) of these conditions or the rights and liabilities of the parties under clauses 25, 26, 33 or 34 of these conditions) then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be appointed on the request of either party....."

Clause 25 of the agreement set out the circumstances under which the respondent would be entitled to terminate the agreement while clause 26 dealt with the circumstances under which the appellant would be entitled to do the same. Clause 30 dealt with the issue of certificates by the architect and payments at the

various stages of the construction were to be made by the respondent to the appellant only upon the issuance of such certificates. At some date which is not clear from the record, the respondent terminated the agreement in terms of clause 25 and various disputed matters followed. Those disputed matters were, in accordance with clause 36 referred to the arbitration of a gentleman called DA Glover.

He started to receive evidence on the dispute and as he proceeded to do so, various questions which were said to be on points of law arose and he apparently thought he would not be able to resolve them himself. So under section 22 (1) of the Arbitration Act, he set out "a case stated" and asked the assistance of the High Court in the resolution of the points of law contained in the "case stated". It was that "case stated" which came before Apaloo J, as he then was, on various dates and after full arguments from counsel for the parties, the learned judge gave his ruling on the case stated on 16th September, 1987. The learned judge, at the end of it all, gave the parties leave to appeal against his ruling and the appellant promptly availed himself of that right. The memorandum of appeal contained a total of six grounds of appeal, with each ground being divided into various sub-grounds. When the hearing of the appeal opened before us, Mr Nagpal, learned counsel for the appellant, did not argue grounds 1 and 2 and we need not concern ourselves with those two grounds. But he fully argued the two remaining grounds and Mr Oraro, learned counsel for the respondent, also made a full reply to Mr Nagpal's submissions. We accordingly have had the benefit of full arguments on the issues raised before us and on top of it all, numerous authorities were cited to us to assist us in resolving the issues put before us. We are grateful to both counsel and if we do not deal with each and every point raised and authorities cited by them, we do not do so because we lack courtesy; it is simply impossible to deal with each and every one of them.

Ground 3 with its various sub-heads concerns the finding of the judge on question number 5 in the case stated and that question was framed in the following terms: -

> "5. If the contractor (appellant) can be shown to have been entitled to the additional payments referred to in question 4 whether under the aforementioned written contract agreement the continuing failure of the employer's (respondent's) architect to include such payments in interim certificates would constitute a breach of contract by the employer which would preclude the employer from determining the contractor's employment under clause 25 of the said agreement whether or not such payments were specifically claimed by the contractor in written certificate applications."

The basis of that question, as the judge correctly pointed out was this. Payments to the appellant were to be made at various stages of the construction and as we have already pointed out such payments were to be made only upon certificates issued by the architect. There was some dispute before the learned judge as to whose agent the architect was and the judge found and held that the architect was the agent of the respondent. There is no appeal against that conclusion but even if there had been, we doubt if it would have had any chance of success. By clause 30 (2) of the agreement, among the items to be included by the architect in an interim certificate: -

> "shall.....be the total value of the work properly executed and the value of the materials and goods which have been delivered or adjacent to the works....."

The judge found that if the materials and goods were delivered or adjacent to the works and if they were brought to the attention of the architect who then failed to include them in an interim certificate, that would constitute a breach of contract by the respondent whose agent the architect was. We need not say that if such goods and materials were included in an interim certificate and the respondent failed to pay for them, that would also constitute a breach of the contract by the respondent. Those were the findings of the judge on these points but he went on to hold that even if such breaches had been proved, the respondent was still nevertheless entitled to terminate the agreement under clause 25. Mr Nagpal attacked this finding principally on the ground that the respondent having failed to make payments to the appellant and thus starving the appellant of funds, the respondent was not entitled to terminate the contract as the respondent would be, in effect, using a situation created by its own wrong. In this connection, Mr Nagpal quoted to us various texts, such as *Chitty on Contracts*, 25th Ed page 702 paragraph 1491 under the heading "Prevention of Performance." In that paragraph the learned author states: -

> "The Court will readily imply a term in any contract that the parties shall co-operate to ensure the performance of their bargain. The degree of the co-operation required, however, is to be determined not by what is reasonable, but by the obligations imposed – whether expressly or impliedly – upon each party by the agreement itself. But if one party is in breach of his duty to co-operate, so that performance of the contract cannot be effected, the other party will be entitled to treat himself as discharged..".
>
> "1492 By the same token, if an agreement is entered into which can only take place effectively by the continuance of a certain existing state of circumstances, each party is under an implied obligation to do nothing of his own motion to that state of circumstances, under which alone the agreement can be operative. Also where a binding contract is made subject to a condition precedent, the contract will generally be construed as imposing an obligation on each party to do nothing to prevent the fulfillment of the condition precedent. It has been said to be a general principle of law that, where performance of a condition precedent is prevented by the act or default of one party, the contract is taken to have been duly performed by the other, even though the condition has not been satisfied....."

Mr Nagpal also quoted to us various passages from "Building Contracts" 5th Ed By Keating page 158 under the heading "Party Cannot Rely On Own Wrong" and there it is stated: -

> "Where one party has failed to perform a condition of the contract, the other party cannot rely on its non-performance if it was caused by his own wrongful acts. .....To attract the principle that a party to a contract is not permitted to take advantage of his own breach of duty, the duty must be one that is owed to the other party under the contract....."

At page 231 of the same book the author has this to say under the title "Employer Causing Delay": -

> "If the employer prevents the completion of the works in any way, as for example, by failing to give possession of the site or to provide plans at a proper time or by interfering improperly through his agent in the carrying out of the works.....etc, the general rule is that he loses the right to claim liquidated damages for non completion to time for he "cannot insist on a condition if it is his own fault that the condition has not been fulfilled..."

The only other passage we need to quote is that from *Hudsons Building & Engeneerng Contracts*, 10th Ed at page 700 where under the heading "Forfeiture and Determination" the author says: -

> "The power of forfeiture cannot be exercised where the employer has caused the default upon which it is agreed that the power shall arise. In such a case the rule of law applies which exonerates one of the two contracting parties from the performance of a contract, where the performance of it is prevented or rendered impossible by the wrongful act of the other contracting party."

Mr Nagpal argued that the respondent having failed to make payments to the appellant, it was wrong to allow it (respondent) to terminate the contract on the ground that the appellant had failed to proceed diligently with the work, and that in finding that the respondent was entitled to terminate the contract, the learned judge was allowing the respondent to rely on its own wrong. We think we should say Mr Oraro did not agree with Mr Nagpal on this contention.

What do we make of it ourselves? It must never be forgotten that the questions put before the learned judge by way of a case stated were based on facts which were said to have been either admitted or proved before the arbitrator. We think that the fundamental flaw in Mr Nagpal's submissions on this point, lies in his misconception that the learned judge found as a fact that the respondent had refused to make any payments to the appellant. There was no factual basis upon which the learned judge could have made such a finding and with respect to Mr Nagpal, he never did so. The facts which were agreed or proved before the arbitrator were listed as numbers 1-24. They are to be found from page 9 to page 14 of the record of appeal. In none of those facts was it even stated that the architect had issued a certificate or

certificates upon which the respondent was obliged to pay and that the respondent had failed to pay. What the judge was asked to answer was whether the contractor was entitled to payment on interim certificates for materials and goods required for use in the works and delivered or adjacent to the works in addition to the payments in the completion schedule for payment (question 4) and whether under the contract, the continuing failure to include certain payments in interim certificates constituted a breach of contract which would preclude the respondent from terminating the contract. In the event the learned judge answered question 4 by saying that the appellant would be entitled to payment on interim certificates for materials and goods required to be used in the works and delivered to or adjacent to the works; he also held that if such materials and goods were brought to the notice of the architect and the latter refused to include them in an interim certificate, that would constitute a breach of contract for which the employer would be liable. We do not understand these conclusions by the judge to mean, and we fail to understand how anyone can construe them to mean, that the judge found that certificates were issued and the respondent had failed to pay the amount or amounts stated in the said certificates, or that despite notice to the architect that materials and goods had been brought to or adjacent to the site, that the architect refused to include them in certificates and therefore that the respondent was in breach of his obligations under the contract and was not entitled to terminate it. As we have said, there was no factual basis upon which the learned judge could have found as a fact that the respondent had failed to pay for the certificates issued by the architect. In ground 3 (iv) of the grounds of appeal, for example, the complaint is that: -

> "The learned judge erred in failing to make a specific finding that the respondent would not have good cause for exercising his rights under clause 25 (a) and/or (b) of the contract if he failed to include payment in respect of materials and goods referred to in the question posed in interim certificates as this would prevent the appellant from proceeding regularly and diligently with the works and that such failure would constitute reasonable cause for wholly suspending the carrying out of the works before completion thereof."

In our view, that complaint is a classic illustration of the misconception pervading the appellant's view of the issues involved. As we have repeatedly stated, there was absolutely no factual basis upon which the learned judge could have made a specific finding that the respondent had no good cause for terminating the contract. Apart from anything else, that must be a matter for the arbitrator whose duty it shall be to determine as a question of fact whether certificates were issued and were not paid for and whether materials and goods delivered to or adjacent to the works were brought to the notice of the architect and he failed to include them in certificates. Had the parties wanted the judge to conclusively determine these points, they would have given more facts than they did in the case stated. We can find no substance in the complaints raised in ground 3 of the grounds of appeal and that ground must entirely fail.

That now brings us to ground number 4 which itself divided into eight sub grounds. These grounds are based on question number 6 in the case stated and that question was framed as follows: -

> "6. Whether the employer [respondent] has the right in law to recover from the contractor [appellant] the monies paid by the employer to KCFC in the reimbursement of the monies paid by KCFC to KCB in liquidation of the contractor's overdraft with KCB plus the accrued interest thereon."

The factual basis upon which the learned judge was asked this question are to be found in agreed or proved facts numbers 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 up to 24. Briefly stated, those facts were as follows. To enable the appellant to perform the contract between the parties, the appellant needed to have an overdraft facility with a bank and on 28th January, 1978, it was mutually agreed that the respondent "would support an overdraft application" by the applicant. Pursuant to that mutual agreement, the appellant signed a letter to the Kenya Commercial Bank (KCB) applying for an overdraft facility in the sum of Kshs 1,500,000/= for a period of six months and the overdraft facility was to be guaranteed by the Kenya Commercial Finance Company Limited (KCFC). On or about 4th February, 1978, the said overdraft facility was granted to the appellant by KCB against a guarantee from KCFC and the contractor was aware of this. The guarantee by KCFC to KCB was requested by the respondent who in turn agreed to guarantee KCFC against loss arising therefrom although there was no evidence that a written agreement to this effect was ever executed.

The appellant was aware that there was an agreement between KCFC and the respondent under which the respondent would be held responsible for any loss suffered by KCFC in giving the guarantee in respect of the overdraft facility but the appellant was not acquainted with the details of this arrangement. A special account was then opened at the KCB by the appellant and cheques on the account required the joint signatures of the appellant and a named director of the respondent. It was also agreed by both parties (that is, the appellant and the respondent) that the overdraft facility was to be utilized solely for the execution of the building contract and that all payment certificates issued under the building contract after the opening of the overdraft account would be paid into the said account in order to repay the overdraft. By about 4th March, 1978, the overdraft facility was exhausted and all further drawings on the overdraft account were stopped. Only one certificate in the sum of Kshs 324,220/= was ever paid into the account and around 15th July, 1978, the appellant received a letter from KCB's lawyers demanding the repayment of Kshs 1,570,860.90 which sum was inclusive of interest. The appellant did not repay the overdraft except to the tune of the one certificate already mentioned. KCB then called upon KCFC to make good their guarantee and on 2nd October, 1978, KCFC paid to KCB a total of Kshs 1, 635,507.20 and on the same day, KCFC debited the account of the respondent with that sum. The respondent did not start to repay KCFC until 19th December, 1980 and the respondent did not complete the repayment to KCFC until 1st April, 1981. By then the respondent had paid to KCFC a total of Kshs 2,147,472.85, that sum obviously including interest. The respondent then filed a suit in the High Court claiming the refund of the sum so paid to KCFC from the appellant but that suit was withdrawn and the claim for that sum was included among the matters referred to Mr Glover for determination. The parties agreed before Mr Glover that the claim involved matters of law and referred it to the High Court for determination. The learned judge ruled that the appellant was bound to pay back the money to the respondent and hence the complaints in ground 4 of the appellant's grounds of appeal.

Why does the appellant say that he is not bound to pay the money? As far as we were able to understand Mr Nagpal, his first contention on this point was that the respondent was under no legal obligation to pay the money to KCFC. According to the appellant, the transaction in which KCB, KCFC and the respondent were involved amounted to a guarantee and because of that it should have been in writing so as to satisfy the provisions of section 3 (1) of the Law of Contract Act. That section provides:-

> "No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereto by him lawfully authorized."

There was no written agreement between the respondent and KCFC, says the appellant, so that if the respondent chose to pay any money to KCFC then the respondent can truly be called a volunteer and the appellant cannot be asked to reimburse him. In *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyds R 289 one of the questions which the Court was asked to answer was:-

> "Is the defendant entitled to succeed on the basis that the payment of 84,000 to Laytons on June 1, 1972 was a voluntary payment?"

Dealing with that question the Court had this to say:-

> "In our judgment, the answer to this question must be negative on the authority of *in re Chetwynd's Estate*, which is binding on this Court and involves that if A, whether expressly or by implication, requests B to guarantee A's debt to C there arises, in the absence of any special circumstances, an amplication of law that A also requests B to pay the debt if A does not, and not an implication that such request is to pay only if A himself is legally compellable to pay. In other words, the request by A is "pay if I do not" and "pay if I do not and if I am legally compellable to pay". We therefore agree with Mr Justice Mocatta that the defendant must fail on this issue, but would add that, in our view, it is clear from the judgments' *in re Chetwynd* that, the implication "pay if I do not" is capable of being rebutted by evidence that the request to be inferred was in truth "pay if I do not and if I am legally compellable to pay"; and we think that it could also be rebutted by evidence that A had countermanded his request before B had committed himself to the

transaction since in such a case it could truly be said that B had made a voluntary payment....”

As we have said the appellant’s first contention is that the respondent was under no duty to pay any money to KCFC because there was no written guarantee in the whole transaction, contrary to section 3 (1) of the Law of Contract Act which we have already set out. What are the facts which were given to the learned judge? They were that on 31st January, 1978, the appellant signed a letter to KCB applying for an overdraft facility in the sum of Kshs 1,500,000/= for a period of six months and that the facility was to be guaranteed by KCFC (No 9 of agreed or proved facts). On or about 4th February, 1978, the overdraft facility was granted to the appellant by KCB against a guarantee from KCFC and of which the appellant was aware (emphasis added) (No 11 of the agreed or proved facts). Pausing there for a moment, there is nothing to show that the guarantee given by KCFC to KCB was not a written one. It is to be noted that the principal debtor, that is, the one who was bound to pay back the money to KCB was the appellant. KCFC undertook to ensure that the appellant would repay the money to KCB and if the appellant failed to repay KCFC would itself pay. That was a true case of a guarantee and it does not matter to us that in order to give the guarantee to KCB, KCFC was requested to do so by the respondent. There could not, accordingly be any question of a guarantee between KCFC and the respondent. The respondent was not being given any loan or overdraft facility by KCFC. All that the respondent did was that it would be held responsible for any loss suffered by KCFC in guaranteeing the overdraft facility (emphasis added) (No 13 of the agreed or proved facts). There really could not have been any question of a guarantee between the respondent and KCFC. The 24th Ed of *Chitty on Contracts* paragraph 4419 under the heading “*Guarantees and Indemnities Distinguished*” states as follows:-

> “It has been established from a very early date that the words “debt, default or miscarriage of another person” mean that the section only applies where there is some person other than the surety who is primarily liable. The section therefore applies when the surety assumes a secondary liability and agrees to be answerable if the principal debtor fails to meet his liability, but it does not apply where the surety assumes a primary liability. This is the origin of the distinction between contracts of guarantee and contracts of indemnity, the former falling within the section and the latter outside it.....”

The principal debtor in this case has always been the appellant and KCFC was a guarantor within the true meaning and intendment of that word. The respondent could not, in the circumstances be a guarantor irrespective of what the parties said in paragraph 12 of the agreed or proved facts wherein it was stated that the respondent had agreed to guarantee KCFC against loss arising from KCFC’s agreement to guarantee the overdraft facility. The true legal position must be that the respondent agreed to indemnify KCFC against any loss which the latter might incur in connection with the guarantee given to KCB. We accept the statement in *Chitty on Contracts* that section 3 (1) of the Law of Contract does not apply where the surety assumes a primary liability represents the correct legal position in Kenya.

Where does that leave the appellant? There cannot be any doubt on the agreed or proved facts that the appellant who was the principal debtor and whose primary duty it was to repay the overdraft facility failed to do so. KCB called upon KCFC to pay and without any quibbling KCFC made good their guarantee to KCB. KCFC then called upon the respondent to deliver on its promise to make good any loss which KCFC might suffer in connection with the guarantee to KCB. The respondent had no doubt that it was obliged to pay; it (respondent) did not allege that there was no written guarantee between it and KCFC. It could not have made any such allegation because as we have said it merely undertook to indemnify KCFC against any loss it might suffer. In the end the respondent paid to KCFC the amount in dispute which, it must not be forgotten, was the primary responsibility of the appellant to pay to KCB. The appellant was aware that KCFC had given a guarantee to KCB; he was also aware that there was an arrangement under which the respondent would be held responsible for any loss suffered by KCFC in guaranteeing the overdraft facility availed to him. How can the appellant now be allowed to say that the respondent was under no obligation to pay the money to KCFC? It would clearly be unjust to allow the appellant to take that position and with respect, the learned judge was entirely right in holding him liable. Accordingly, ground 4 with its sub-divisions must equally fail.

Ground 5 has four sub-divisions but all deal with the issue of interest paid on the Kshs 1,500,000/= which

the learned judge found to have been approximately Kshs 511,855/=. By 2nd October, 1978 when KCB called upon KCFC to pay the amount due and the amount which KCFC actually paid was Kshs 1,635,507.20/=, but the respondent had to pay a total of Kshs 2,147,342.85/=, to KCFC and as we pointed out earlier the last payment was not made until 1st April, 1981, some three or so years later. The appellant appears to think he was not liable to pay the extra interest.

Like the learned judge, we think there is no substance in that complaint. The duty to repay the money to KCB primarily lay with the appellant. He was unable to discharge that duty. He cannot now be heard to complain that if the respondent was called upon to discharge his (appellant's) obligations, the respondent should have done so promptly. He himself was unable to do it at all and he cannot complain that the respondent should have been able to do it much earlier. With respect, there is no substance in this complaint and it must equally fail.

Nor can we find any substance in ground 6 with its two sub-divisions. The arbitrator will have to determine whether the respondent owes the appellant any money and if the arbitrator were to find in favour of the appellant on that score, we cannot find anything wrong in principle in the arbitrator off-setting what is owed against what the appellant might owe to the respondent. Like the other grounds, the last one must also fail. These being our views on all the grounds which were argued before us, the final order of the court shall be that the appeal wholly fails and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 21st day of September 1995

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL

I certify that this is a true copy of theoriginal.

DEPUTY REGISTRAR