IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), SICHALE & ODEK JJA)

CIVIL APPEAL NO. 339 of 2012

BETWEEN

KARURI CIVIL ENGINEERING (K) LIMITED.....APPELLANT

AND

EQUITY BANK LIMITED .....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Havelock J.) dated 16th October 2012

in

Nairobi HCCC No. 694 of 2008)

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JUDGMENT OF THE COURT

1. The appellant, ***Karuri Civil Engineering (K) Limited***, is a construction company. At all material times, Contract No. 0741PP dated 20th March 2002 was signed between the appellant and the Office of the President for execution of a sewerage system rehabilitation works at ***Kenya Navy Mtongwe*** for the Department of Defence.

2. On 22nd May 2002, the respondent Bank, ***Equity Bank Limited***, executed a performance bond in the sum of Ksh. 5,735,647.70 (Five Million Seven Hundred Thirty-Five Thousand Six Hundred Forty-Seven and Seventy Cents) in favour of the Department of Defence. In the Bond, the Bank was guarantor to the appellant for completion and performance of the sewerage rehabilitation contract. In the event the appellant failed to perform the contract, the Bank would pay the Department of Defence the Bond amount upon demand.

3. By a Plaint dated 25th November 2008 as amended on 20th June 2011, the appellant filed suit against the respondent Bank for breach of the Performance Bond. The appellant asserts that works on the sewerage rehabilitation started upon execution of the performance bond; the appellant mobilized its plant, machinery and other equipment to perform the contract; the equipment mobilized included a case poclain excavator, one-ton roller, one concrete mixer, a vibrator machine as well as motor vehicles.

4. The appellant claims it performed a substantial part of the sewerage works until 13th July 2004 when the ***Office of the President*** (OP) terminated the contract and demanded from the respondent Bank payment of the guaranteed Bond amount.

5. Upon termination of the contract, the appellant required the respondent to immediately pay the Bond sum to the Department of Defence to enable it remove its plant, machinery, motor vehicles and equipment from site. It is asserted despite persistent demands, the respondent failed, neglected and or refused to honour the terms of the Bond leading to detention of the appellant's machinery and equipment by the Department of Defence.

6. The respondent Bank subsequently paid the Department of Defence the Bond sum of Ksh. 5,735,647.70 on 23rd September 2008 by cheque No. 42169. In the meantime, the appellant's machinery and equipment were detained and withheld for four years from 13th July 2004.

7. The appellant contends the respondent Bank committed breach of the Performance Bond in the following manner:

"(a) Failure to honour the terms of the Bond within a reasonable time.

(b) Failure to pay the sum secured within a reasonable time thereby occasioning the detention of the appellant's equipment, machinery and motor vehicles.

(c)Misrepresenting to the appellant that the Bond sum secured had been paid prior to 23rd September 2008."

8. The appellant allege that by reason of delay in payment of the Bond amount, it suffered direct loss, damage and loss of user of the detained equipment for 1195 days being the total number of days in which its machinery and equipment were detained. The loss allegedly suffered by the appellant was itemized cumulatively as Ksh. 75,285,000/=. Consequently, the appellant claims against the respondent special damages for loss of user and hiring charges in the sum of Ksh. 75,285,000/= and interest thereon.

9. The respondent Bank filed a statement of defence and counterclaim. The Bank denied executing a performance bond. It averred it was not party to Contract No. 0741PP dated 20th March 2002 for execution of sewerage system rehabilitation works for the Department of Defence. The Bank denied that detention or removal of the appellant's equipment from site was premised or conditioned on payment of the performance bond; the respondent asserted the performance bond was an independent contract in which the appellant was not party; the Bond did not have a clause for retention or detention of the appellant's goods on site pending payment. It was urged the respondent Bank had nothing to do with retention of the appellant's equipment on site. In totality, the respondent denied liability to the appellant in the sum of Ksh. 75,285,000/= or any part thereof; it was avowed the appellant had no cause of action and *locus standi* to sue the respondent.

10. By way of counterclaim, the respondent claimed against the appellant the sum of Ksh 5,735,647.70 together with interest thereon at the rate of 18% per annum which sum was paid on behalf of the appellant for breach of Contract No. 0741PP between the appellant and the Office of the President.

11. In defence to the counterclaim, the appellant averred the respondent recovered sums secured under the performance bond by disposing properties charged in its favour. The appellant's properties charged were LR No. 2250/31; LR No. 37/288, LR No. 9042/146; LR No. 170/30 and LR No. Nyandarua/Kirima/6 Ol Kalau and log books for various motor vehicles. In denying liability for the counterclaim, the appellant urged it was not required to provide any security for the performance bond as the respondent held adequate security in form of legal charge over the properties aforementioned.

12. Upon hearing the parties, the trial judge dismissed both the claim and counterclaim. In dismissing the claim for Ksh. 75,285,000/= the judge expressed as follows:

"Further, the Plaintiff's witnesses never gave any reason as to why, if the contract was terminated and the Plaintiff moved off-site in July 2004, it took over four years for the Plaintiff to chase up the Defendant as regards payment of the Bond. In my view, it is the Plaintiff herein that is guilty of laches just as much as the Defendant. Thus in answer to the issue whether the Plaintiff suffered direct loss as a consequence of the Defendant's failure to pay the Bond sum on first written demand, the answer must necessarily be "no" ….…. I find that the release of the Plaintiff's plant, machinery, vehicles and equipment was not dependent upon the payment of the Bond. If anything, it was dependent upon the payment of the Advance Payment Guarantee which both PW2 and PW4 mentioned in their evidence with the latter saying that the Advance Payment Guarantee had no reference to the matter before the court."

13. In dismissing the counterclaim, the judge expressed himself thus:

"…. The Defendant has been guilty of laches in not pursuing its claim against the Plaintiff for reimbursement of the monies it had paid out to the Department of Defence under the Performance Bond. In fact, I believe the prosecution of the Defendant's counterclaim would never have happened had the Plaintiff not filed this case against the Defendant. When I questioned DW1 as regards whether the Defendant had charged the Plaintiff a premium or commission to provide the Performance Bond, I was told that a 2% commission had been charged and debited to the Plaintiff's account with the Defendant. To my mind, the Defendant has received consideration for its putting up the Performance Bond. Consequently, I am unable to see how it now requires more, in fact, the total amount of the Bond....The Plaintiff in its submissions maintained that the Defendant can recover the sum secured by the Bond by disposing of several properties charged in its favour. It maintained that the various advances made by the Defendant to the Plaintiff included in the Bond amount and the same had now been recovered. I found no evidence in that regard but I am persuaded that in view of the Defendant's reluctance to provide statements of account to the Plaintiff in terms of the monies recovered upon sale of the secured properties, that the Plaintiff's submissions in this regard are well founded…… Accordingly, I find that the

Defendant's counterclaim unproved and strike out the same."

14. Aggrieved by the dismissal of the suit, the appellant has lodged the instant appeal citing the following abridged grounds in its memorandum of appeal.

(i) The judge erred and contradicted himself on one hand in finding the respondent cannot escape liability by pleading privity of contract and on the other finding the respondent not liable for breach of the Performance Bond.

(ii) The judge erred in finding that although the respondent paid the monies demanded under the Performance Bond (albeit extremely late) the lateness was not a breach of contract.

(iii) The judge erred in finding that although the respondent knew the appellant's equipment had been held on site, the equipment

was not necessarily held due to non-payment of the Performance Bond.

(iv) The judge erred in failing to find that the respondent's purported claim to lien over the appellant's plant and machinery was a clear demonstration of the respondent's effort to frustrate the release of the appellant's plant and equipment.

(v) The judge erred in finding the appellant guilty of laches.

(vi) The judge erred in finding that release of the plant and equipment was not dependent on payment of the Performance Bond without appreciating that the Performance Bond and the Advance Performance Bond were intertwined and relate to the same contract.

(vii) The judge erred in delivering a contradictory judgment.

15. At the hearing of this appeal, learned counsel ***Mr. C. M. Ngugi*** appeared for the appellant while learned counsel ***Mr. R. N. Munyalo*** appeared for the respondent. Both parties filed written submissions and lists of authorities.

16. The appellant in rehashing background facts submitted the gist of its claim is failure by the respondent to timeously pay and honour the Performance Bond. Counsel urged the appellant as the third party beneficiary to the Bond is entitled to sue the respondent Bank; that whereas the appellant was not obliged to provide security for the Bond, the respondent was also holding log books for motor vehicles and several title documents for loans advanced to the appellant; that on 13th March 2008, the respondent released some of the log books motor vehicles as it had adequate security for any monies due and owing.

17. The appellant submitted the trial judge failed to appreciate that as a direct consequence of the respondent's delayed payment of the Bond, the appellant was denied use of its plant, equipment and machinery; the judge further erred in failing to award special damages of Ksh. 75,285,000/= for loss of user of the detained plant, machinery and equipment. In support of this submission, counsel cited the case of **Dirphys vs. Soya (1956) CA 714** where in a claim for special damages for delay and detention of a ship due to collision, the court held there was nothing wrong in giving the appellant compensation for each of the 20 days the ship was detained. Counsel also cited the case of **Koufos vs. Czarnikow Limited (1969) AC 350**.

18. Counsel invoked the mitigation rule submitting the appellant company is medium sized and would not be able to raise and settle the sum secured under the performance bond. Being medium sized, there was nothing the appellant could do to mitigate loss of use of the detained equipment.

19. In opposing the appeal, the respondent urged the appellant was misleading this Court by failing to disclose there were two Bonds issued in favour of the Department of Defence: first, was a Performance Bond for Ksh. 5,735,647/= and second, an Advance Payment Bond of Ksh. 11,471,200/=. Counsel submitted the respondent Bank paid Ksh. 5 million towards the Advance Payment Bond leaving a balance of Ksh. 6,191,808/=. It was urged the appellant did not clarify that the suit before the trial court related to the performance bond and that the appellant's plant, equipment and machinery were held as a result of non-payment of the balance of the Advance Payment Bond of Ksh. 6,191,808/= and not on account of the performance bond.

20. Submitting on *locus standi*, the respondent Bank urged there was no privity of contract between it and the appellant as regards the performance bond. The Bond had nothing to do with the appellant's plant, equipment and machinery; the Bank's responsibility under the Bond was to the Department of Defence and any delay in settling monies due cannot give rise to cause of action by the appellant; if any loss or damage was suffered by the appellant due to detention of its equipment, such loss and damage cannot be attributed to the respondent. Counsel cited the case of **Edward Owen Engineering Limited vs. Barclays Bank International Limited [1978] 1 All ER 976** where it was held that a Bank which gives a performance guarantee must honour that guarantee and is neither concerned with the relations between the supplier and the customer nor with the question whether the supplier has performed his contracted obligation or not.

21. In further opposition to this appeal, the respondent raised the issue of remoteness of damage; that even if the respondent knew the appellant's machinery and equipment were detained, any loss suffered was remote and could not be attributed to the respondent; that the appellant's misery was not occasioned by delay in payment of the Bond. The respondent made reference to the appellant's own witness testimony to the effect that despite payment of the performance bond, the appellant's plant, machinery and equipment continued to be held due to non-payment of the Advance Payment Bond. In urging us to dismiss the appeal, the respondent submitted there was no evidence on record showing missed opportunities, agreements or enquiries by third parties who were interested in using or hiring any of the machinery and equipment detained by the Department of Defence.

22. We have considered the grounds of appeal, submissions by counsel and case law cited by the parties. This is a first appeal and the duty of this Court is to revisit the evidence on record, evaluate the same and arrive at its own conclusions. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). We appreciate that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. (See **Mwanasokoni vs. Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga vs. Kiruga & Another (1988) KLR 348).**

23. The contestations in the instant appeal relate to Performance Bond, Advance Payment Guarantee and delay in honoring the Bonds. Also in issue is whether there is a direct and causal link between delay by the respondent Bank in honouring the performance bond and the detention of the appellant's machinery and equipment. Who is liable for the loss of user suffered by the appellant as a result of detention of the equipment? The answer to this question depends on whether the detention of the machinery and equipment was unlawful. This question was not canvassed before the trial court and there is no determination on the lawfulness or otherwise of detention of the appellant's equipment by the Department of Defence.

24. At the risk of over-simplification, guarantees fall into two broad categories. The traditional guarantee or surety on one hand, and "on demand" guarantee on the other. "On demand" guarantees are also known as performance guarantees, performance bonds or demand bonds. (See **Vossloh AG v Alpha Trains (UK) Limited [2011] 2 All ER (Comm) 307 at [24]– [28])**. "On demand" guarantee is distinguishable from the traditional guarantee as liability is primary not secondary and payment by the guarantor is to be made in response to demand and is not dependent whether there has been a default under the principal contract. In the instant appeal, the performance bond in issue is a demand guarantee bond in which the respondent Bank's liability is primary and independent of any liability for non-performance of the contract by the appellant.

25. At the outset, the respondent Bank contend the appellant has no *locus standi* to file suit against it as it is not a party to the performance bond; that a performance bond is an independent contract and no third party can derive a right or benefit therefrom. This is the doctrine of privity of contract. The appellant countered asserting it has a right to sue the respondent Bank as the third party beneficiary to the bond. The trial judge in dismissing the defence of privity of contract cited the case of **Gakombe vs. Automobile Association of Kenya & another (2006) eKLR** where in finding that privity of contract did not prevent a beneficiary of the contract from filing suit this Court expressed:

> **"The agreement dated 20th August 1997 between Savings & Loan (S&L) and Automobile Association (AA) provided for financing the purchase or construction of homes for members of AA. The prospective buyers were required to save 20% of the purchase price over 36 months by equal monthly instalments. Dr. Gakombe's claim is founded on refinancing of existing loans, which prima facie appears to be based on different terms from those set out in the agreement between S&L and AA. The terms of the refinancing, unlike those set out in the agreement between S&L and AA involved saving 20% of the outstanding loan over a period of 24 months.**
>
> **In these circumstances, can Dr. Gakombe's suit be described as one, which discloses no reasonable cause of action because of the doctrine of privity of contract, or a suit which is scandalous, frivolous and vexatious? In our view, the learned judge was justified in concluding that Dr. Gakombe's contention that there was a collateral agreement between him and S&L on refinancing was not idle and that his suit did raise triable issues, which deserved to be interrogated and determined only after a full hearing of the suit."**

26. We are minded that the general rule on privity of contract is well captured in **Dunlop Pneumatic Tyre Co Ltd vs. Selfridge & Co Ltd [1915] AC 847**, where ***Lord Haldane, LC*** rendered the principle thus:

> ***"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."***

27. Adopting the same line of reasoning Hancox, JA, in **Agricultural Finance vs. Lengetia Ltd *[1985] KLR* 765** stated:

> ***"As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."***

28. In **Shanklin Pier Ltd vs. Detel Products Ltd [1951] 2 KB 854**, the United Kingdom Bench Division used the principle of collateral contracts as an exception to the rule of privity of contract. McNair J expressed:

> ***"If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A."***

29. The trial court in its judgment appreciated the foregoing exception to privity of contract as enunciated in ***Shanklin Pier Ltd*** (supra) and affirmed by this Court in **Gakombe vs. Automobile Association of Kenya & another (2006) eKLR**. We re-affirm this exception.

30. In the instant matter, the respondent Bank entered into a performance bond with the Department of Defence on application by the appellant; the Bank received a 2% premium as consideration for issuance of the Bond; the trigger for enforcement of the Bond was non-performance of the main contract between the appellant and the Department of Defence. In our considered view, the respondent Bank owed a duty to the appellant company to honour the performance bond which was executed upon request by the appellant.

31. In **Aineah Likuyani Njirah vs. Aga Khan Health Services [2013] eKLR**, this Court expressed that there are now many exceptions to the privity rule, both at common law and in the statute books. One of the exceptions is the need to grant third parties the right to enforce a contract made for their benefit. In our considered view, the doctrine of privity of contract cannot be used to oust responsibility to a third party beneficiary of a performance bond. We find no fault in the trial judge's determination that the respondent cannot escape liability on the basis of privity of contract.

32. In this matter, the appellant does not fault the trial court's finding and determination on privity of contract; the appellant faults the court for having made a finding that the respondent Bank cannot escape liability based on privity of contract and thereafter failing to find the respondent liable on account of delayed payment of the bond. It is in this context the appellant contend the trial judge issued a contradictory judgment.

33. It is not disputed there was delay on the part of the respondent in payment of the sum of Ksh. 5,735,647.70 due under the bond. The bond amount was paid on 23rd September 2008 after a four-year delay.

34. As stated above, the appellant contends the judgment of the trial court was contradictory. Our reading of the judgment shows the judge analyzed the issue of privity of contract in two parts: in the first part, the judge in considering the issue of appellant's *locus standi* articulated the general principle on privity of contract and the exception thereto; on the second part, the judge analyzed the evidence and applied the exception to privity to the facts of this case.

35. It is in the context of considering the issue of *locus standi* that the trial court evaluated the evidence on record and applied the principle in ***Shanklin Pier Ltd*** (supra) as an exception to privity and expressed as follows:

> ***"The Plaintiff alluded to the argument that the contract in respect of the Bond was collateral to the Plaintiff's works contract with the Department of Defence and thus an implied trust had been created in order to circumvent the privity rule….It was the Plaintiff's clear submission that in view of the implied trust created, in the circumstances the Plaintiff could enforce the Bond and claim damages arising from and directly resulting from the defendant's breach in failing to honour the Bond."***

36. On the contestation that the impugned judgment is contradictory, it is our view the appellant has failed to appreciate that liability under performance bond is both a question of fact and law. The trial court in determining the law made a finding conferring *locus standi* to the appellant. The next logical issue was for the appellant to prove that indeed, the respondent was liable for special damages for loss of user of the detained machinery and equipment as claimed in the plaint. The trial court in its evaluation of the evidence determined that liability had not been proved. The alleged contradiction is a misapprehension by the appellant of the two pronged approach the trial court adopted in determining if the appellant had *locus standi* and then determining if from the proved facts, the respondent was liable to the appellant for loss of user and or detention of the plant, machinery and equipment.

37. The respondent continued to focus on the issue of privity of contract asserting the detention of the appellant's plant, machinery and equipment by the Department of Defence was not due to delayed payment under the performance bond but non-payment of the balance of the Advance Payment Guarantee.

38. In the instant matter, an advance payment was made by the Department of Defence to the appellant in the sum of Ksh. 11,471,200/=. To secure the advance, an Advance Payment Bond was issued by the respondent Bank in favour of Department of Defence.

39. To appreciate how an advance payment bond operates, the facts in **Caterpillar Motoren GmbH & Co KG vs. Mutual Benefits Assurance Co** (**Caterpillar**) **[2015] EWHC 2304**, are relevant.

40. In this matter, the trial court held that the retention or detention of the appellant's equipment by the Department of Defence was not due to delay in payment of the performance bond but due to non-payment of the balance of the Advance Payment Guarantee. The appellants fault the trial court in finding that the performance bond and advance payment bond were separate and distinct. The nature of performance bond and advance payment guarantee as revealed in the ***Caterpillar case (supra)*** aptly demonstrate the two are interlinked and founded on the same contract. The bonds are contractually separate; however, it is the purpose of the bonds that are distinct; the trigger for demand for payment is the same namely non-performance of the contracted works. In this regard, we find the trial court erred in holding the performance bond to be separate and distinct from the advance payment bond.

41. The next issue for our consideration is whether the trial court correctly evaluated the evidence to arrive at the conclusion that the respondent Bank was not liable to the appellant for loss of user despite delay of four years in paying the performance bond. The court made a determination that the detention of the appellant's equipment and machinery was not dependent on the payment of the performance bond. The appellant contends this finding is erroneous. This raises the issue of causation and remoteness of damages.

42. In **Hadley vs. Baxendale, 156 Eng. Rep. 145 (1854)** , it was held that damages for breach of contract are limited to damages arising directly from the breach, plus those arising from special circumstances known to the parties at the time of contracting, which they should have reasonably contemplated.

43. In this matter, the appellant's case is not premised on delay damages in a construction contract. It is a claim for special damages for loss of user and detention of plant, machinery and equipment occasioned by the respondents delayed payment of the bond amount of Ksh. 5,735,647.70 to the Department of Defence. On this issue, we have analyzed the evidence on record, PW2 ***Daniel Omondi*** testified as follows:

> *"Two matters of importance in relation to the contract was the Performance Bond and the Advance Payment Guarantee. When demand was made to the Bank, it did not immediately make payment. Only the Performance Bond was retrieved by the Bank on 20th September 2008. The Advance Payment Guarantee was partially redeemed by the work done by the Plaintiff – the balance was Ksh. 6,191,808/=. We have demanded from the Bank but it has not been paid to date…. The Performance Bond was to secure the ultimate performance of the Plaintiff under the contract. It made no mention of any equipment. The Department of Defence gave ultimatum that the construction equipment and material was not to be released. It was an internal correspondence. It did not indicate that the equipment and materials could be released upon payment of the performance bond. The bond had no contract on the equipment and material inside the premises of the Department of Defence."*

44. PW4 ***Ndenga Anthony Guyali*** testified as follows:

> *"We had another Performance Bond of Ksh. 2.8 million. Equity Bank confirmed payment of Ksh. 5 million. They paid on 20th September 2008…. No other payment was made by Equity Bank. Despite this, the Department of Defence has not released the vehicles because of the advance payment not paid by Equity Bank of Ksh. 6,196,808/=."*

45. We have considered the contention that the appellant's equipment and machinery was detained by the Department of Defence on account

of delayed payment of Ksh. 5,735,647/70 payable under the performance bond. We have weighed this contention against the testimony of PW2 and PW4 as narrated above. The evidence reveal a scenario in which there were several performance bonds issued by the respondent Bank to the Department of Defence to guarantee various contractual performances by the appellant.

46. The evidence shows the Department of Defence terminated the sewerage rehabilitation contract for failure by the appellant to diligently proceed with the works and to comply with the default notice. It is evident non-performance by the appellant was the cause of termination of the contract and ensuing detention of machinery and equipment. Had the appellant performed the contract, no liability on either party would have arisen. The appellant cannot reap from its non-performance and seek compensation from the respondent Bank on account of delayed payment of the performance bond.

47. In this matter, the appellant urged there can be no wrong without a remedy and forgot the dictum which states a person cannot benefit from his own wrong. The retention or detention of the appellant's plant, machinery, equipment and motor vehicles was occasioned by failure of the appellant to execute and perform the sewerage rehabilitation works. Detention was a direct consequence of non-performance; neither delayed payment of the bond nor the advance payment guarantee were causes of retention or detention of the appellant's equipment. It was the appellant's non-performance that set in motion detention of its equipment. In our view, the loss lies where it falls. Any delay in payment of the performance bond would entitle the Department of Defence to interest on the bond amount. In this context, we are persuaded by the reasoning in **Sinohydro Corporation Limited vs. GC Retail Limited & another [2016] eKLR** where it was expressed the principle that underlies demand guarantee is each contract is autonomous and the obligations of the guarantor is not affected by disputes in the underlying contract between the beneficiary and the principal.

48. We are further convinced the respondent is not liable to the appellant under the performance bond because the bond neither mentions nor refers to any plant, machinery and equipment. The bond only guaranteed payment to the Department of Defence – the bond was not an insurance cover for the appellant.

49. Further, even if the respondent had knowledge that the appellant's equipment had been detained, the decision to detain the machinery and equipment was made by the Department of Defence and if the appellant is aggrieved, it should lodge claim against the Department of Defence under its contract for sewerage rehabilitation. The evidence shows the respondent was not party to making the decision to detain any of the appellant's machinery, equipment or motor vehicle. Accordingly, we find the trial judge did not err in finding the respondent not liable to the appellant for loss of user of the detained equipment on account of delay in payment of the performance bond.

50. For the various reasons stated above, we find this appeal has no merit and is hereby dismissed. There is no cross-appeal on dismissal of the counterclaim and we affirm the decision of the trial court in dismissing the counterclaim. Each party is to bear its own costs in this appeal.

Dated and delivered at Nairobi this 8th day of March, 2019

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR