



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 270 OF 2015

BETWEEN

**LANDBANK REAL ESTATE INVESTMENT TRUST
LIMITED.....APPELLANT**

AND

**SICHUAN HUASHI ENTERPRISES CORPORATION EAST AFRICA
LIMITED.....RESPONDENT**

(Being an appeal from the ruling' decision of the High Court at Nairobi

(O. A. Sewe, J.) delivered on 2nd October 2015

in

HCCC NO. 381 OF 2015)

JUDGMENT OF THE COURT

On 3rd August 2015 the respondent, ***Sichuan Huashi Enterprises Corporation East Africa Limited***, filed a Notice of Motion in the High Court against the appellant, ***Landbank Real Estate Investment Trust Limited***, seeking a temporary injunction to restrain the appellant from illegally and irregularly calling in and/or receiving payments from Standard Chartered Bank (Kenya) Limited, (*the Bank*) in respect of Bid Bond No. 20102115846 issued on 9th July 2015 (*the Bid Bond*), pending the hearing and determination of this application; and a temporary injunction restraining the appellant from illegally and irregularly calling in and/or receiving payments from the Bank in respect of the Bid Bond pending the hearing and determination of the suit in the High Court.

The motion was premised on the grounds that in June 2015, the appellant invited bids for the construction of a boundary wall and a guard house on its property Land Title. No. 8529/1 in Kamulu. In response, the respondent submitted its Tender Bid on 29th June, 2015, together with the Bid Bond issued by the Bank. According to the respondent, Clause 28.1 of the appellant's Instructions to Tenderers Document expressly provided firstly, that the Notification of the Award was to be contemporaneously accompanied by the Contract Documents and secondly, that a Performance Bond would be furnished in accordance with the Conditions of Contract, in the Performance Security Form in the Tender documents or in another form

acceptable to the appellant.

In a letter of 17th July 2015 marked “**SUBJECT TO CONTRACT**” the appellant’s Chairman, Mr. Kenneth Omolo, informed the respondent that it had been awarded the tender. The letter of notification also expressly stated that the contract terms would be embodied in a contract that was in the process of being drafted, and would be provided in due course. It was also stated that it would be conditional upon the respondent’s unequivocal acceptance of the offer.

In a letter dated 21st July, 2015, the respondent raised its concerns, regarding the nature of the contract document governing the construction; the duration of the contract; the damages for delay which it found to be high and onerous on the contractor; the suitability and acceptance of a performance bond from an insurance company, as opposed to a bank. No response was received from the appellant.

On 29th July, 2015, the appellant annulled the tender award, and on the same day, called upon the Bank to honour the terms of the Bid Bond following the respondent’s failure to furnish it with a Performance Bond.

In the respondent’s view, this was unwarranted, as contrary to Clause 28.1, no contract had been made available to the respondent as required, and without such contract, the respondent had no ability to secure the requisite Performance Bond. The respondent contended that it was apprehensive that the appellant would irregularly and illegally call in and/or receive the Bid Bond sum; that a demand had already been made, to which the Bank intended to comply on or before the close of business on 4th August, 2015. The respondent further contended that it would have no means of recovering the sums from the appellant.

The motion was supported by an affidavit sworn by **Mr. Wang Jianzhong** on 3rd August 2015 who largely reiterated the grounds of the application.

In a replying affidavit sworn on 17th July 2015, on behalf of the appellant, **Mr. Kenneth Omolo** deponed that after the respondent was notified of the tender award, it became the respondent’s responsibility to complete and sign the Contract Form, and return it to the appellant in accordance with Clauses 28.1 and 28.2 of the Instruction to Tenderers, and that the respondent failed to execute and return the Contract Form. It was further deponed that the respondent was required to provide the appellant with a Performance Bond from a reputable bank within 10 days in accordance with Clause 29.1 of the Instructions to Tenderers, but failed to do so, thereby triggering the realization of the Bid Bond. It was averred that the appellant was entitled to claim immediate payment of the Bid sum of Kshs. 15, 018,493, and on account of this, the Bank was duly notified.

After hearing the application, the High Court, granted the injunctive relief sought on the basis that, it was satisfied that a prima facie case with a probability of success was made out, that the respondent stood to suffer irreparable damage if the Bid sum was paid to the appellant as it would have no means by which to recover the sum of Kshs. 15,018,493/, and that the balance of convenience tilted in favour of granting an injunction to restrain the appellant from receiving the Bid sum pending the hearing and determination of the substantive suit.

The appellant was aggrieved by the decision of the High Court and has filed this appeal on the grounds that the learned judge failed to consider the law on demand guarantees; failed to correctly interpret and apply the principles of injunctions, and failed to consider the general principles on injunctions.

Both the appellant and respondent filed written submissions, which their respective counsels highlighted before us. On behalf of the appellant, learned counsel **Mr. Miyare** submitted that, the learned judge failed to appreciate that the Bid Bond was a guarantee of payment, which was payable on demand; that the guarantee bond was autonomous from any underlying contract between a principle and a beneficiary; that the obligations of the Bank were not affected by the underlying contractual disputes between the parties, so that a guarantor must honor the beneficiary’s demand, irrespective of the disputes pertaining to the underlying contract. Counsel cited the case of ***Sinohydro Corporation Limited vs GC Retail Limited &***

another [2016] eKLR in support of the outlined arguments. Counsel contended that the order of injunction granted by the court violated the requirement of guarantee bonds and was unlawful.

Counsel also argued that the court orders sought were against a third party, namely, the Bank, who was not privy to the contract between the appellant and the respondent, and therefore no prima facie case had been made out. It was further stated that, in the event the respondent succeeded in the suit, the appellant had sufficient financial capability to enable it to refund the sums paid.

In reply ***Ms. Barasa***, learned counsel appearing for the respondent, submitted that, despite the Tender Documentation specifying that the construction contract document was to accompany the tender award, it was not forwarded to the respondent together with the award notification as required. As no binding contract existed between the parties, the appellant was estopped from calling on the Bank to pay out the Bid sum. On this basis, counsel submitted, a prima facie case had been made out.

Counsel further submitted that the learned judge rightly concluded that the respondent would suffer irreparable damage, if the Bid sums were paid to the appellant, since no assurance was provided or financial capability demonstrated to show that the sums would be refunded. Finally, counsel submitted, that the High Court rightly held that, the circumstances of the case tilted the balance of convenience in favour of the respondent.

We have considered the parties' submissions, the record, and the law. In deciding the application, the learned judge was exercising discretionary powers. That being the case, we can only interfere with the exercise of such discretionary powers under certain well defined principles succinctly spelt out in the case of ***Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] KLR 125***, where this Court held inter alia as follows:-

“2. The Court of Appeal may only interfere with the exercise of a court’s judicial discretion if satisfied:

(a) The Judge misdirected himself on law; or

(b) That he misapprehended the facts; or

(c) That he took account of considerations of which he should not have taken account; or

(d) That he failed to take account of consideration of which he should have taken account; or

(e) That his decision, albeit a discretionary one, was plainly wrong.”

Setting out the principles for the grant of an injunction, the learned judge stated thus;

“This being an application for an Interlocutory Injunction, the starting point is for the court to satisfy itself that the principles laid down in the case of *Giella v Cassman Brown (Supra)* have been satisfied namely:-

1. That an applicant must show a prima facie case with a probability of success.

2. That an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages”.

These being the applicable principles, we turn to whether a *prima facie* case was made out. Central to the dispute is the issue of whether a binding contract existed as between the parties which was breached by the respondent, thereby entitling the appellant to obtain payment of the Bid sums held by the Bank.

In rendering its decision, the court weighed out the appellant’s case, that is, whether the Bid Bond sum

was payable on demand, irrespective of whether a binding contract existed or not, against the respondent's, which was that, since no contract existed between the parties, there was no basis upon which the Bid Bond sums could be paid and concluded, that a prima facie case had been made out.

There is no dispute that the appellant invited tenders for its construction project and requested interested tenderers to submit their Bids together with a Bid Bond. There is also no dispute that the respondent submitted a bid together with a Bid Bond. What is in dispute, amongst other issues, is who between the appellant and the respondent breached the terms of the tender. As this is a matter of fact that must be left for the determination of the trial court, we are satisfied that the learned judge rightly concluded that a prima facie case was properly made out.

On whether the respondent would suffer irreparable damage if the Bond sums were paid to the appellant, the learned judge surmised that since no assurance was provided, or financial capability demonstrated, there was the real possibility that the appellant would be incapable of refunding the sums in question. The Bid sums in question, are by no means inconsequential, and without any evidence to support their financial ability to refund such sums, we are satisfied that the learned judge reached the right conclusion that the respondent had "...established that the risk of its suffering irreparable harm is real." We would also agree, given the circumstances of the case that, the balance of convenience tilted in the respondent's favour.

In view of the foregoing, we can find nothing to show that the learned judge exercised her discretion injudiciously or misdirected herself on law or misapprehended the facts or took account of considerations of which she ought not to have taken into account or failed to take account consideration of which ought to have been taken into account.

As such, we see no reason to interfere with the decision of the High Court. We find that the appeal lacks merit, and is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 9th day of June, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR