



**Zhejiang Chengjian Construction Africa Limited v Eighty Eight Nairobi Limited & another; Standard Chartered Bank (Kenya) Limited (Interested Party) (Commercial Suit E547 of 2024) [2025] KEHC 1195 (KLR) (Commercial and Tax) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1195 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E547 OF 2024  
BM MUSYOKI, J  
FEBRUARY 28, 2025**

**BETWEEN**

**ZHEJIANG CHENGJIAN CONSTRUCTION AFRICA LIMITED ..... PLAINTIFF**

**AND**

**EIGHTY EIGHT NAIROBI LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**WHITE STEID CONSTRUCTION LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**STANDARD CHARTERED BANK (KENYA) LIMITED INTERESTED PARTY**

**RULING**

1. The plaintiff in its application dated 10-09-2024 prays that this court grants the following orders;
  1. Spent.
  2. The Honourable court be pleased to issue an order for temporary injunction barring the respondent and the interested party, whether by themselves, their agents, servants or assigns from encashing, calling and/or receiving any payments from Standard Chartered Bank (Kenya) Limited in respect of performance guarantee No. 201020235547 issued on 1<sup>st</sup> December 2023 and amended on 28<sup>th</sup> May 2024, pending hearing and determination of this application.
  3. The Honourable court be pleased to issue an order for temporary injunction barring the respondent and the interested party, whether by themselves, their agents, servants or assigns from encashing, calling and/or receiving any payments from Standard Chartered Bank (Kenya) Limited in respect of performance guarantee No. 201020235547 issued on 1<sup>st</sup> December 2023



and amended on 28<sup>th</sup> May 2024, pending hearing and determination of arbitration proceedings and/or this suit.

4. Costs of this application be provided for.
2. The genesis of the matter is that a contract was entered between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants in which the plaintiff was engaged as a sub-contractor to carry out framework construction on L.R number 209/3006 situated along Ngong road in Nairobi belonging to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant was the main contractor in the development. As a condition for award of the construction tender, the plaintiff was required to secure and provide a performance guarantee of Kshs 20,000,000.00 in favour of the 2<sup>nd</sup> defendant from a reputable financial institution which it succeeded in securing from the interested party. The 1<sup>st</sup> defendant on 9-09-2024 called for settlement of the performance guarantee which precipitated this suit.
3. The plaintiff avers that it was issued with a letter of acceptance for the tender dated 26-02-2020. It was to carry out the works at a contract price of Kshs 1,430,000,000.00 and before it commenced the works, it secured a performance guarantee as required in the contract from the interested party vide performance guarantee number 201020235547 dated 1-12-2023 which was to lapse on 30-05-2024 but was later extended to 30-05-2025 after some dispute between the parties was settled. The plaintiff adds that the agreements between it and the defendants contained arbitration clauses.
4. The plaintiff further depones that due to unavoidable circumstances, it fell short of its completion obligations and sought extension of time for ninety days which was ignored by the 2<sup>nd</sup> defendant leading it to issue a suspension of works notice. It later retracted the suspension through email dated 24-07-2024. According to the plaintiff, the reasons for the delay were factors beyond its control. The plaintiff adds that despite there being dispute resolution mechanism clauses in their contract documents, the 2<sup>nd</sup> defendant recalled the performance bond and demanded that the sum of Kshs 20,000,000.00 be paid into its account which if acted upon will cause it (the plaintiff) to suffer damages in that;
  1. Its reputation will be damaged because it will be perceived as a contractor that does not complete projects;
  2. The encashment will affect other performance guarantees that the interested party has issued on behalf of the applicant and there is a risk that the guarantees will be recalled.
  3. It will be blacklisted by the interested party and will experience challenges in securing performance bonds from other service providers.
  4. It will be exposed to debt recovery proceedings that will be initiated by the interested party to recover the sums remitted to the 2<sup>nd</sup> respondent.
5. It is the applicant's position that it did not breach the contract and the unilateral termination by the 1<sup>st</sup> defendant is unfair, unreasonable and contrary to the agreements between the parties. According to the plaintiff, there exists a dispute and this court should issue an injunction pending the arbitration.
6. The respondents have opposed the application through two affidavits sworn by Jonathan Jackson, a director of the 1<sup>st</sup> defendant and Edward Ochigo a director of the 2<sup>nd</sup> respondent on 20<sup>th</sup> September 2024. The interested party has sworn an affidavit through its relationship manager one Tu Chia-Hsuan dated 23<sup>rd</sup> September 2024 in which it stated that the interested party does not take side in the application and that it will abide by the orders of the court but asks for the costs of the application.



7. The replying affidavits of Jonathan Jackson and Edward Ochigo are substantially similar in content. They depone that the 1<sup>st</sup> defendant is the employer of the 2<sup>nd</sup> defendant while the plaintiff is a sub-contractor of the 2<sup>nd</sup> defendant. The three parties have been in close financial and working relationship such that the 1<sup>st</sup> defendant even paid the plaintiff directly on behalf of the 2<sup>nd</sup> defendant and that the flow of information between the three has been unrestricted. They add that the 1<sup>st</sup> defendant is not a party to the performance guarantee which was between the 2<sup>nd</sup> defendant and the interested party. It is also stated that the 1<sup>st</sup> defendant was not a party to the subcontract between the plaintiff and the 2<sup>nd</sup> defendant.
8. The defendants have confirmed existence of the contract as narrated by the plaintiff and that the plaintiff was required to submit a work schedule showing how it would carry out the works which it did and revised several times. They add that there was a delay in starting the works which was occasioned by change of design but the same was compensated although the plaintiff was responsible for part of the delay. Subsequent to the delay, the parties entered into a claim settlement and amended agreement dated 15<sup>th</sup> November 2023.
9. In the claim settlement and amended agreement, the parties agreed on mandatory terms where the internal works were to be completed by 31-05-2024 and external works by 30-06-2024 and an ex-gratia extension of time was to be allowed for completion of external paint works up to 31-07-2024. The plaintiff did not adhere to these timelines and on 13-06-2024, it gave notice to make a claim for extension of time despite which no claim was given. Instead, the plaintiff gave a revised program on 20-06-2024 which had new completion date of 30-09-2024. The plaintiff again failed to follow the revised 2<sup>nd</sup> program and issued a revised program with completion date of end of December 2024. Again, the plaintiff failed to adhere to the 3<sup>rd</sup> revised program and said that it did not have finances and asked for release of retention money to enable it perform.
10. The 1<sup>st</sup> defendant avers further that it had during the life of the contract given the plaintiff notices of delay and failure to rectify defects on 12-01-2024, 12-06-2024 and 13-08-2024. It is also stated that the plaintiff failed to pay some suppliers and labour forcing the 1<sup>st</sup> defendant to pay the same although the plaintiff delayed the payments by giving wrong, questionable and suspect invoices.
11. The defendants add that the plaintiff abandoned the project on 23-07-2024 and subsequently on 24-07-2024 issued a notice to suspend the works without any contractual basis and never returned to the site. On 25-07-2024, the plaintiff informed the 2<sup>nd</sup> defendant that it was unable to pay salaries for its workers and by a letter dated 26-07-2024 the 2<sup>nd</sup> defendant took up the obligation of paying the workers. The amount paid for the salaries was to be deducted from the plaintiff's subsequent payment certificates. The defendants add that despite this help, the plaintiff went on to remove scaffolding on site and disabled cranes and hoist exposing the site to safety risks.
12. The defendants aver further that following the above successive breaches, the 2<sup>nd</sup> defendant issued a default notice to the plaintiff on 6-08-2024 but the plaintiff did not rectify the default which prompted the 2<sup>nd</sup> defendant to recall the performance guarantee from the interested party by a letter dated 9-09-2024. It is this recall which culminated to filing of this suit and application.
13. According to the defendants, the dispute resolution clause was between the defendants and the plaintiff but was not applicable to the performance guarantee between the 2<sup>nd</sup> respondent and the interested party. They deny that the plaintiff ever made an application for extension of time and argue that the matter was not mature for arbitration.



14. The application was disposed of by way of written submissions. The plaintiff and the defendants filed submissions both dated 11-11-2024 while the interested party opted not to file any submissions but relied on its replying affidavit aforesaid. Upon reading through the application, the supporting affidavit, the replying affidavits together with annexures thereto and the parties' submissions, I have formed the opinion that the issues calling for determination are;
1. Whether the performance guarantee dated 1-12-2023 issued by the interested party is subject to arbitration clause in the agreements between the plaintiff and the defendants.
  2. Whether the plaintiff has made out a case warranting the grant of the orders sought.
15. The plaintiff has submitted that the performance guarantee is intertwined with the contracts between it and the defendants and the two are not separable. If I were to buy that argument, it would mean that the terms in the agreement dated 15-11-2023 and letter of acceptance dated 26-02-2020 are applicable to the performance guarantee and vice versa. It is true that the agreement dated 15-11-2023 between the plaintiff and the 1<sup>st</sup> defendant had arbitration clause (clause 4). The agreement at clause 2.5 provided that the plaintiff would provide performance bond of Kshs 20,000,000.00 in favour of the 2<sup>nd</sup> defendant by 17<sup>th</sup> November 2023.
16. The interested party and the 2<sup>nd</sup> defendant were not parties to the agreement dated 15-11-2023 and they cannot be expected to be bound by the terms therein. The performance guarantee was just one of the requirements for the agreement and had nothing to do with the relationship between the plaintiff and the defendants. Once the same was issued, clause 2.5 of the agreement was spent. It was just a guarantee for the performance of the works where the interested party undertook to pay the 2<sup>nd</sup> defendant the amount indicated in the guarantee. The interested party was not bound to interrogate or supervise and actually should not be concerned with the relationship between the plaintiff and the defendants. A performance guarantee is a contract between the person issuing it and the person in whose favour it is issued. In this case, it was a contract between the interested party and the 2<sup>nd</sup> defendant and the interested party was not bound to consult or make reference to the plaintiff once the 2<sup>nd</sup> defendant decided to recall the guarantee.
17. In view of the above and noting the doctrine of privity of contract, I hold that the performance guarantee was not subject to the arbitration clause or the terms of the agreement between the plaintiff and the defendants. The interested party had no part to play in the performance of the contract and did not subject itself or parties to arbitration. The 2<sup>nd</sup> defendant also having not executed the agreement dated 15-11-2023 could not be subjected to arbitration proceedings based on the said agreement. A party who has not subjected itself to arbitration cannot be bound by a clause in third parties' agreement. I have also noted that the interested party had in the guarantee subjected itself to non-exclusive jurisdiction of the court meaning that it had not agreed to be subjected to arbitration which is a voluntary exercise.
18. The second issue is whether the plaintiff has made a case for grant of injunction pending arbitration. Section 7(1) of the [Arbitration Act](#) provides that;
- ‘It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.’
19. The plaintiff has not initiated the arbitration process and in the circumstances, for the court grant an order of interim injunction, it is my opinion that the applicant must in addition to satisfying the established conditions for grant of a temporary injunction, show the court that there exists a dispute



capable of being referred to arbitration. It is an established principle that not every disagreement in performance of a contract translates to an arbitral dispute.

20. The plaintiff has deponed and submitted that there is a clear dispute between the parties which should be referred to arbitration. However, other than that general statement, the plaintiff has not pinpointed to this court specific details of the dispute. The plaintiff is clearly the one who abandoned the project. Letter by the 1<sup>st</sup> defendant dated 12-01-2024 which is produced as exhibit 'JJ-2a' of the replying affidavit by Jonathan Jackson complains of delay in construction listing down the areas which were considered to be of concern. There is also annexure 'JJ-2b' which makes reference to the earlier letter and points out the delays the plaintiff was causing and further areas of concern. This letter also called for details of the plaintiff's action plans, manpower loading schedule and materials delivery schedule. The defendants also exhibited a letter dated 13-08-2024 which is marked as 'JJ-2c' which complains that the works had been abandoned since 23-07-2023.
21. The plaintiff has not shown this court the efforts it made in rectifying these breaches or explaining the failure to rectify. It has not told the court the breaches the defendants committed. I have also not seen any correspondences between the parties declaring a dispute. It has been shown by the defendants and not denied that the plaintiff was unable to adhere to its programs of works. The plaintiff did not give reasons for suspension and subsequent abandonment of the project safe to state that it was due to unavoidable circumstances which it has not disclosed. Even when the plaintiff was in distress in form of lack of finances to pay its employees, the 1<sup>st</sup> defendant came in and paid the salaries despite which the plaintiff did not resume work. This is evident in emails produced by the 1<sup>st</sup> defendant as annexures 'JJ3' to 'JJ-5'.
22. Before the 2<sup>nd</sup> defendant recalled the bond, the plaintiff had breached the contract not once but thrice. I do not in the circumstances see any dispute which should be subjected to arbitration. Section 6(1)(b) of the *Arbitration Act* postulates that the court must satisfy itself that there is a real dispute between the parties on matters agreed to be referred to arbitration before it grants an application for stay of proceedings pending arbitration. The Section provides that;

'A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.'

24. As I have stated earlier, the plaintiff herein has not specified the nature of dispute in the matter and without that, there is no justification for granting the orders. I am inclined to follow the reasoning of my elder sister Honourable Lady Justice Lucy Gitari in *County Government of Kirinyaga v African Banking Corporation Ltd* (2020) KEHC 5213 (KLR), where she held as follows;

'In this case the applicant in the supporting affidavit has not stated the nature of the dispute which has arisen between the parties. The grounds in support of the application do not disclose the dispute if any. It only refers to letters marked BM-2-. In one of the letters the applicant has stated that it was demanding an outstanding amount. The amount has not been stated. It is not sufficient for the applicant to state that under clause 26 of the agreement it is stipulated that any and all disputes arising out of or in connection with the agreement including and not limited to a dispute over its validity shall be referred to arbitration. The applicant must specify the dispute and the nature of the dispute.'



25. Even if there was a dispute which can be referred to arbitration, the same cannot in my view affect the interested party's obligation to abide by the 2<sup>nd</sup> defendant's recall of the guarantee. The guarantee which is exhibited by the plaintiff as annexure 'LZJ-4a' is clear that the interested party undertook to pay the guaranteed sum notwithstanding that there could be a dispute between the plaintiff and the 2<sup>nd</sup> defendant. I agree with the judicial pronouncements that the party issuing a performance bond is under obligation to pay once the bond is recalled regardless of the relationship between the parties to the contract unless there is proof of fraud for which the party issuing the guarantee had notice. In *Kenindia Assurance Company Limited v First National Finance Bank Limited* (2008) KECA 91 (KLR) the Court of Appeal was faced with similar position as in this suit and it held that;

'For these reasons, we adopt the words of Lord Denning M.R. in the case of *Edward Owen Engineering Ltd V. Barclays Bank International LTD* (1978) 1 ALL ER. 976, in which he rendered himself as follows:

All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the bank has notice."

26. I see nothing in the application which would fit into the exemption stated in the above holding. The plaintiff has not given any particulars of fraud or established what fraud the defendants and the interested party committed or to which the interested party had a notice. A general statement that the defendants are involved in or committed fraud is not sufficient.
27. In conclusion I find the application dated 10-09-2024 wanting in merits and I dismiss it with costs to the defendants and the interested party.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Miss Khizi for the defendant and absence of the respondent.

