

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA IN KAMPALA  
(COMMERCIAL DIVISION)**

**HCT - 00 -CC - MA - 24 - 2012**

**(Arising out of Miscellaneous Application No. 579 of 2011)**

**(From HCCS No. 344 of 2010)**

**LIBERTY CONSTRUCTION  
APPLICANT/PLAINTIFF**

.....

**VERSUS**

**ATTORNEY GENERAL  
RESPONDENT/DEFENDANT**

.....

**BEFORE: THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE**

**R U L I N G:**

This is an application by way of notice of motion brought under Order 52 rules 1, 2 and 3 CPR and Section 98 CPA. It seeks orders that:-

- 1) Execution of the orders of this honourable court in MA No. 579 of 2010 made on 13<sup>th</sup> December 2011, be stayed pending the hearing and determination of the Applicant's appeal/intended appeal against the said orders.
  
- 2) The costs of this application be provided for.

The main grounds as provided in the motion are that:-

- a) The Applicant being dissatisfied with the orders of this honourable court has already initiated an appeal process against the decision and orders of this honourable court made on 13<sup>th</sup> December 2011 in MA No. 344 of 2010.
- b) The Applicant has also applied for and waiting to receive the copy of the proceedings of the court to enable it file the appeal.
- c) The intended appeal has a high likelihood of success.
- d) In the meantime the Respondent has already taken steps to enforce the orders of court by demanding payment of the sum of (U) Shs. 1,059,511,240/=, which is payment in MA No. 579 of 2010.
- e) If the said sum is paid the applicant will suffer substantial or irreparable loss and the intended appeal will be rendered nugatory.
- f) In the interest of justice that the status quo be maintained pending the outcome of the intended appeal.

This application is supported by the affidavit of Mr. Edmund Mabiwo who is the Managing Director of the Company.

There is an affidavit in reply sworn by Mr. Elisha Bafirawala, Senior State Attorney, dated 27<sup>th</sup> February 2012. There is also an affidavit in rejoinder by Mr. Edmund Mabiwo sworn on 29<sup>th</sup> February 2012.

The case brought by the Applicant is that, the Respondent made a written demand to M/s Leads Insurance Company for a sum as stated in the bond, of (U) Shs. 1,059,511,240/=; and at the same time the Insurance Company has made a counterclaim on the counter guarantee made by the Applicant in favour of the Insurance Company. It is the case for the Applicant that, the Applicant in performing the suit works had done 99% of the works; and that it was the Respondent and not the Applicant who had breached the contract. There were various circumstances under which that breach was done, including the invading of the site and confiscation of the Applicants equipment. It is upon these circumstances that the Applicant filed the head suit and the subsequent applications seeking the orders stated there in, this suit is still pending in court and it is for that reason that the Applicant prays that this court restrains the Government from insisting to be paid the proceeds and the bond be recalled until the determination of the appeal.

The case for the Applicant is that if this stay is not granted by reason of the counter guarantee which the Applicant is supposed to pay to Leads Insurance Company, the proceeds therefore will wipe out his business and that will cause irreparable loss to the Applicant. It is also the case for the Applicant that the Respondent in the counterclaim in the head suit only admitted the amount of Shs. 700,000,000/= would still be payable, which though still existing, is still far less than the amount on the bond.

It is the prayer for the Applicant that this court restrain the Government from insisting to be paid from the proceeds of the bond until the determination of the appeal. Counsel for the Applicant submitted that for applications of this nature, court is enjoined to

exercise discretion as provided for in Section 98 of the Civil Procedure Act. The considerations are such that:

- i) The appeal has merit,
- ii) That if the appeal is successful and stay is granted, then he will suffer irreparable loss.

In this regard he referred me to several decisions which I have read and are familiar; the first is the case of **T.M.K. vs Busingye & Others [HCB] 1992 - 1993** decision by Mukanza J. He also referred me to **Francis Mansio vs Nuwa Walakira CA No. 09/1990.** Counsel also referred me to the decision of **Kengrow Industries vs C. C. Chandran CA No. 03/2001.**

It is the case for the Applicant that these tests required under the suit are; i) that the appeal has reasonable chances of success, and ii) the loss arising out of it if the bond is paid, the execution of this bond cannot be atoned for in damages, especially considering that the main suit is still pending in this court, down the road the business of the Applicant will not be existing. He also submitted that discretion such as this, in the interest of justice is such that, the status quo should be preserved pending the appeal. In this particular case he pointed out that the bond, which the subject of this application, though styled as an on demand bond must be read together with the general Articles of the main contract to the extent that it can only be imposed on non-completion which was not the case in this case; it is did not happen in this case and the extent to which the two conflict upon, can be regarded as wide and not over ride the contract. He submitted that in substance it is an on demand bond on paper but not in reality.

In reply counsel for the Attorney General contends that the bond is an on demand bond and has already been demanded, and therefore her submissions is that orders of this court have already been executed. She has also submitted that it is the Applicant and not the Respondent which breached the contract. She has further submitted that the wording of bond is such that it shall be made, paid, without hassle or arguments; and therefore the submissions made by counsel for the Applicant with regards to the reasons why it cannot be enforced cannot be consequential. The fact that the written demand has been made, makes the prayers by the counsel for the Applicant to be overtaken by events, as all that is awaited at this point in time is payment.

Counsel for the Respondent also a point that Leads Insurance Company is not part of these proceedings therefore this application is brought against a wrong party. She emphasized that the bond is an autonomous contract in the main suit and any loss that would arise out of this can be atoned in damages in separate proceeding in a separate suit. Counsel referred me to the case of **Prestone vs Yashoni** (Kenya Court of Appeal) 2002. In that case it was held that for there to be a stay court has to be satisfied that an intended appeal is arguable, it is not frivolous and also that unless it is granted and the appeal is successful; it be rendered nugatory.

I need also to point out that counsel for the Applicant is disagreeing with this interpretation; he said that the bond cannot be independent of the main contract and cannot be enforced before the completion of the contract, as was done in the instant case. It is also the case for the Applicant that the application is not frivolous. It is also the case that it would be unfair and unjust that the Respondent be allowed to benefit

from this bond for the full value of (U) Shs. 1,059,511,240/= when indeed it was the Respondent that was in breach, and that this will be proved in the head suit. He contends the bond was called in bad faith and therefore should not be enforced. Furthermore, he submitted that in making a right decision court should be cognizant of the effects of the counter guarantee on the business.

I have heard submissions of both counsel and I am grateful; I shall now address my mind to the authorities that have been presented to court. Again I am thankful because they are familiar.

The test for setting aside execution on orders of the court pending an appeal are fairly well established; indeed all the authorities all point to basically two points - (i) that there is a likelihood of success, and (ii) unless the stay is granted the Applicant will suffer irreparable loss and that will render the appeal nugatory.

The nature of stay that the Applicant seeks from this court as provided for in the motion is slightly at variance with what counsel for the Applicant has been submitting to court. In the motion it is prayed that the Applicant having been dissatisfied with the decision of this court prays that in the interest of justice the status quo be maintained pending the outcome of the intended appeal; there is no specific prayer for stay of execution. The reason being that, he has submitted that the Respondent has already taken steps to enforce the orders of this court by demanding from M/s Leads Insurance Company, payment of Shs. 1bn/=.

Counsel in his submissions clarified that it was the desire of the Applicant that the Respondent be restrained from insisting on

receiving the money to be paid out of the bond. It would appear to me that a call on the bond has already been made as of the 9<sup>th</sup> January 2012 and both parties agreed that all is being awaited is actually for the Insurance Company to pay the bond.

In my decision in MA No. 579 of 2010 I alluded to the nature of the demand bond. I pointed out that such a bond on the authorities be regarded as an autonomous contract from the underlining contract itself, and can only be paid according to its wording. In this particular case the wording of the bond says that, *it shall be paid without hassle or argument*; there is no doubt in my mind that that made that bond an on demand bond. It is also important to point out, as I did in my ruling then; that the head suit itself while challenging the bond did not make reference to any allegations of fraud, and did not provide any particulars of fraud neither did it raise the issue of bad faith that counsel now seeks to rely on in order to negate the effects of bond. It is also important to note that it is not this court which ordered that the Respondent should apply to enforce the bond; it simply refused to grant the temporary injunction, the rest was in the hands of the Respondent.

Counsel has argued that this bond cannot be interpreted separately from the main contract. In this regard, based on my ruling again in MA No. 579/2010, I must respectfully disagree; the authorities show such a bond is independent of the main contract that is the nature of such a bond. It is almost like a letter of credit, it can only be enforced according to the tenor of its wording. If the parties had wished for a different type of bond, they would be so free to enter into one. He has also argued and strongly so, that no execution has taken place at this time; because the law in hand demands it be paid by the Insurance

Company. The Insurance Company has not paid, and that execution can only be when the money has been received.

In my mind I would like to agree with the submissions of counsel for the Respondent that all that is required of the Respondent is to make a written demand in writing; that is all that is required. Whether or not the Insurance Company had made payment is a second issue. I also wish to agree that it would be impossible for this court to have an impact on that bond considering that it is between the Applicant and the Insurance Company who is not a party to these proceedings. If the party would want this to be done the Insurance Company would have to be sued separately. As it is I find the status quo with regard to the bond has already changed; all that is required is for payment to be made. It would be incredible for this court to issue an order against the Respondent saying, do not receive the money; that would be out of powers of this court! It is a separate contract between the parties; if the Insurance Company does issue the payment I do not see how this court can now say that the Respondent should not receive the money.

Counsel for the Applicant has also asked that this court take into account the effects the counter guarantee will have on the business of his client. His submission is that if payment was made then his client will be obligated, under the counter-guarantee, to pay the Insurance Company the same amount of money that it has paid to the Respondent; this sum being a large figure of over Shs. 1bn/= would wipe away his clients business.

Whereas I sympathize with the possible effects of the counter-guarantee on the Applicant's business, I want to agree with counsel



for the Respondent that such effects can be monetarised. In other words, that should the Applicant suffer any loss as a result of such payments then it can be atoned in damages, or further restoration of the suit.

All in all I find that court is unable to accept the prayers for maintaining the status quo on the strength of the submissions made that the bond has already been called. The Applicant still has access to remedies under the head suit; he would be best advised to do so.

Having said that, the motion is dismissed with costs to the Respondent.

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**Justice Geoffrey Kiryabwire**

**JUDGE**

**Date: 29/02/2012**