THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 1089 OF 2017

(Arising from Civil Suit No. 719 of 2017)

SUMMIT PROJECT LTD ::::::: APPLICANT

VERSUS

10 BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

This ruling arises from an application brought underOrder 41 rule 2 and Section 98 Civil Procedure Act. The applicant is seeking for orders that;

- 1) A temporary injunction doth issue against the defendant/ respondent, her agents, servants, workmen or any other persons authorised by her restraining them from causing liquidation of the applicants performance guarantee held by its bankers; Standard Chartered Bank until hearing and determination of the main suit.
 - 2) Costs of the application be provided for.
- The gist of the grounds of this application are contained in the affidavit of Mishereko David the applicant's Managing Director and they include;
 - a) That the applicant on the 28.11.2014 entered an agreement with the respondent for maintenance of its roads for a period of three years at a total considerations of UGX 10,640,467,200/= (Ten Billion Six Hundred Forty Million Four Hundred Sixty Seven Thousand Two Hundred Shillings).
 - b) That as the execution of the works progressed, the respondent wrote to the applicant falsely accusing her of abandoning the project falsely insinuating that the applicant had not done/ covered the earlier four cycles, falsely insinuating that it was not in position to

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execute works in cycle six and falsely accused of committing fundamental breaches of the contract and thus issued to the applicant a notice of intended termination of the contract.

- c) The respondent has not terminated the contract for non- performance of the contract but is proceeding to liquidate the applicant's performance guarantee.
- d) It is in the interests of justice that the order doth issue pending the hearing and determination of the main suit upon its merits.

Applicant's submission.

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Counsel for the applicants submitted by praying that the application be allowed with costs.

- 10 He submitted basing on the conditions for grant of a temporary injunction as re-instated by court in *Kiyimba Kaggwa Vs Abdul Nasser Katende [1985] HCB 43* that the applicant satisfies court that;
 - a) there is a prima facie case with a probability of success.
 - b) he or she might otherwise suffer irreparable damage which would not be adequately compensated in damages; and
 - c) the balance of convenience is in his or her favour if court is in doubt.

He further submitted that performance securities are governed by the autonomy of performance guarantee though it has an exception which is fraud, irretrievable injustice and existence of special equities in a contract while relying on *V.K Constructions Works Ltd Vs The Bank of Rajasthen Ltd* and *Another II (1992) BC 344*, *48 (1992)DLT 468,1992(23) DRJ 371*.

Respondent's submissions.

Counsel for the respondents submitted on the application by praying that the application should be dismissed with costs to the respondent as the application is incomplete.

He submitted that the ordinary principles of temporary injunctions do not apply to "on demand 25 guarantees" but rather principles of an autonomous contract which is entitled to freedom from interference by court unless in instances of fraud where the bank has notice.

He also submitted that the order for the grant of an injunction can not be issued against the bank as the bank is not a party to the case and no notice has been issued to (see *Lamba Enterprises Ltd V Attorney General M/A No. 386 of 2013*).

He further submitted that even if the court was to find that the traditional conditions for grant of injunctions as laid down in *E.L.T Kiyimba Kagwa Vs Haji Nasser Katende [1985] HCB 43* were applicable, the applicants would not have satisfied court within the conditions that govern the grant of injunctions.

10 **Decision of the Court**

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I have carefully considered the pleadings and submissions by both Counsel for the applicant and the respondent.

In my view, both principles, that is the autonomy principle and the one governing grant of temporary injunctions both apply to the instant application.

Performance guarantees are essentially unconditional undertakings to pay a specified amount of money to a named beneficiary, usually on demand and sometimes on the presentation of certain specified documents.

It is an undertaking to pay a specified sum to the beneficiary in the event of breach of contract. Where the beneficiaryseeks payment in accordance with the terms of the guarantee, the bank must pay regardless of how unfair that might be to the account party. (see *Lamba Enterprises Ltd Vs Attorney General M/A No.386 of 2013* where court relied on *Edward Owen Engineering Ltd Vs Barclays Bank International Limited [1978] QB 159*.

The bank in this instance can not be forced to pay if it is not a party to the suit unless it is added as an opposite party.

25 **Orders 41 r 3 CPR provides**;

"that court in all cases, before granting an injunction, direct notice of the application for an injunction to be given to the opposite party." For this injunction to be issued against the bank it must have been served with the notice under the above order.

Since it was not added as an opposite party and yet the injunction if granted would have the effect of restraining the bank from paying the respondent, this in my view renders the application incompetent.

Since the holding above in effect disposes of the application I won't consider other facets of the application.

In the result this application is dismissed with costs.

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B. Kainamura Judge 10.08.2018