

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.

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

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 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
5 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**

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.

15 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 beneficiary seeks payment in accordance with the terms of the guarantee, the bank
20 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