THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CIVIL APPLICATION No. 0001 OF 2021

5 (Arising from Miscellaneous Cause No. 0001 of 2021).

AC YAFENG CONSTRUCTION LIMITED .... APPLICANT

VERSUS

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1. THE REGISTERED TRUSTEES OF }
   LIVING WORD ASSEMBLY CHURCH }
2. UNITED BANK OF AFRICA } .... RESPONDENTS

15 **Before: Hon Justice Stephen Mubiru.**

RULING

a. Background.

20 By an agreement dated 10th September, 2019 the 1st respondent contracted AC Yafeng Construction Company Limited for the construction of "The Living World Assembly Prayer City" comprising a Church building, a Sunday School, and guest block among other facilities at Kajjansi. The project was to commence on 25th October, 2019 and be completed by 24th October, 2022 at the contract price of US $ 11,372,367 (U shs. 41,679,725,055/=) In accordance with that 25 agreement, the applicant took out a performance guarantee with the 2nd respondent in the sum of shs. 4,169,772,511/= in the 1st respondent's favour. The 1st respondent then made an advance payment of shs. 5,569,772,512 (US $1,519,719.65) and construction works began. By December, 2020 differences had emerged between the applicant and the 1st respondent regarding the performance of the contract as a result of which the 1st respondent terminated the contract by a 30 letter dated 23rd December, 2020. On 28th December, 2020 the 1st respondent the 1st respondent notified the 2nd respondent of the applicant's default and demanded for payment of the sum secured by the performance bond. The 2nd respondent then on 29th December, 2020 demanded that the applicant pays damages in that amount. The applicant in turn wrote to the 1st respondent on 30th December, 2020 seeking the appointment of an arbitrator.

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b. <u>The application.</u>

This application is made pursuant to section 6 (1) of *The Arbitration and Conciliation Act*, section 98 of *The Civil procedure Act* and Order 36 rules 1, 2 and 9 of *The Civil procedure Rules*. The applicant seeks interim measures of protection pending the intended arbitration, by
5 way of restraining the 2nd respondent from paying any monies due under the performance guarantee agreement and the 2nd respondent from demanding and / or instituting recovery measures / proceedings against the applicant. This follows an interim order issued by this court on 5th January, 2021

10c. <u>Submissions of counsel for the applicant.</u>

M/s Haguma Law Chambers Advocates submitted that the applicant has a *prima facie* case that is likely to succeed, the applicant is likely to suffer irreparable damage if the injunction is not granted and the balance of convenience favours the grant of the injunction. This is because the applicant intends to contest the legality of the 1st respondent's termination of the contract and the
15 performance guarantee is a component of the underlying contract. The applicant will suffer irreparable damage in light of the time and resources it has invested in the project this far. Since the performance guarantee is yet to be honoured, the balance of convenience favours the grant of an injunction. As regards the 1st respondent's contention that the applicant does not exist in fact and law, this is based on a mere typing error in the applicant's name, an error of counsel which
20 can be corrected by amendment. They prayed that the application be allowed.

d. <u>Submissions of counsel for the 1st respondent.</u>

M/s Kasirye, Byaruhanga and Co. Advocates submitted that the applicant is non-existent in fact and law. The underlying contract was between the 1st respondent and AC Yafeng Construction
25 Company Limited, but not the applicant. Being a non-existent entity, the applicant has no capacity to sue and thus pleadings filed by it are fatally defective and cannot be cured by amendment. In the alternative, the applicant has not made out a *prima facie* case with a probability of success since the performance guarantee is autonomous and thus independent of the underlying contract, which is the subject of the dispute. The applicant is not likely to suffer
30 irreparable damage if the injunction is not granted and the balance of convenience does not favour the grant of the injunction.

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e. The decision.

It is common ground that the applicant by the name stated in its pleadings is a non-existent entity. Whereas counsel for the 1st respondent argued that this is a fatal error, it is contended though by counsel for the applicant that this was the result of a typing error by counsel, which should not be visited on the company and is curable by amendment.

On the one hand, it is trite that an unincorporated entity that does not exist in Uganda as a body corporate is incapable of maintaining a suit (see *The Fort Hall Bakery Supply Co. v. Fredrick Muigai Wangoe [1959] EA 474*), and that where a suit is filed by a non-existent party, such an error cannot be cured by an amendment (see *The trustees of Rubaga Miracle Centre v. Mulangira Ssimbwa, H.C. Misc Appl. No. 576 OF 2006*). On the other hand, amendment may be allowed in case of misnomer (see *J. B. Kohli and others v. Bachulal Popatlal [1964] E.A. 219* and J. *B. Kohli and others v. Bachulal Popatlal, [1964] EA 219*). While one involves a change of identity due to inability to identify the correct person, the other arises when the person is certain but he or she is given an incorrect name.

In short, whereas counsel for the respondent argued a case of misidentification, counsel for the applicant argued a case of misnomer. Misidentification occurs when an entirely wrong person is named, different from the one intended. This arises when two separate persons actually exist and an author mistakenly writes a name similar or identical to that of the correct person. In contrast, misnomer occurs when the identity of the person is certain but he or she is given an incorrect name. Cases of a misnomer are such that the person whose name is written is known and is the one whose name is intended to be written, only that it is written incorrectly or an entirely wrong name is written.

The misnomer principle is the process by which a court determines the attribution of a name. For the doctrine of misnomer to apply, it is required that: (1) the author intended to name the subject to whom the name is now being attributed; and (2) a reasonable person would attribute the name to the person to whom it is now intended to be attributed. Misnomer arises when the author merely misnames the correct person as opposed to not being unable to identify the correct person.

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> If any party to the action is improperly or imperfectly named on the writ and no change of identity is involved, the misnomer may be corrected in the statement or claim by inserting the right name with a statement that the party misnamed had been sued by the name or the writ e.g. "John William Smythe" suecl as "J.M. Smith." The Defendant cannot take advantage of such alteration (pleas in abatement of misnomer were abolished as long as 1834); but difficulty may arise in executing a judgment unless the Plaintiff amends the writ. The author also notes that where a Defendant has executed a deed by a wrong name, it is right to sue him by the name in which he executed it. (See W. Blake Odgers et al, *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, Eleventh edition, at pages 174 – 175).

Generally, expressions of names should be construed objectively to ascertain whether a reasonable person, with all of the background knowledge that would reasonably have been available to the author, would attribute the name to the individual to whom it is sought to be attributed. The relevant question is; to which individual would a reasonable person attribute the name? That attribution must generally be construed by reference to the known background facts. The test is whether or not a reasonable person reading the name, in all the circumstances of the case, and looking at it as a whole, may say to himself or herself, "of course it must mean so and so, but they have got his or her name wrong."

The misnomer doctrine applies to correct inconsequential deficiencies or technicalities in names. It has also been applied more broadly, for example, to complaints that what was named was a corporation instead of a partnership, a parent corporation instead of a subsidiary, a building instead of its corporate employer, and a corporation in liquidation instead of its successor (see *Datskow v. Teledyne, Inc., 899 F.2d 1298, 1301-02 (2d Cir.)* (parent-subsidiary), cert. denied, *498 U.S. 854 (1990)*; *Montalvo v. Tower Life Bldg, 426 F.2d1135, 1146-47 (5th Cir. 1970)* (building-corporate employer); *Travellers Indem. Co. v. United States ex rel. Construction Specialties Co., 382 F.2d 103 (10th Cir. 1967)* (parent-subsidiary); *Shoap v. Kiwi S.A., 149 F.R.D. 509 (M.D. Pa. 1993*) (successor corporation); *Dunham v. Innerst, 50 F.R.D. 372 (M.D. Pa. 1970)* (corporation-partnership); *Adams v. Beland Realty Corp., 187 F. Supp. 680 (E.D.N.Y. 1960)* (same).

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A classic misnomer is one in which the name contains a minor spelling error of the subject's name, or inclusion of a full middle name rather than merely a middle initial. If it is a case of misnomer, the name could be corrected by replacing the erroneous name for the correct name. In misnomer cases, the correct person is identified, even if under the incorrect name.

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> The test must be: how would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "of course it must mean me, but they have got my name wrong," then there is a case of mere misnomer. If, on the other hand, he would say: "I cannot tell
> 10 from the document itself whether they mean me or not and I shall have to make inquiries," then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer." (See *Davies v. Elsby Brothers Ltd [1960] 3 All*
> 15 *ER 672).*

In the instant case, considering that "AC Yafeng Construction Limited" does not exist in fact, this is not a case of misidentification, hence no change of identity is involved. The identity of the company that was contracted by the 2nd respondent is certain but was inadvertently given an
20 incorrect name by omission of the word "Company" from its true name. As a result, a reasonable person would attribute the applicant's name to "AC Yafeng Construction Company Limited," to whom it is now sought to be attributed. This is a situation of a mere misnomer. This is not a case in which the notice of motion was filed by a non-existent person, but one of mere misnomer for which the court ought to allow an amendment. I am therefore inclined to follow the decision in J. *B. Kohli and others v. Bachulal Popatlal, [1964] EA 219* to find so and order that the applicant's name be and is hereby deemed corrected by amendment, from "AC Yafeng Construction Limited" to "AC Yafeng Construction Company Limited," the party to the construction agreement from which the dispute has arisen.

30 That aside, according to section 6 (1) of *The Arbitration and Conciliation Act*, a party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure. Interim measures of protection provide temporary relief to a party, aimed at protecting rights of that party pending final resolution of a dispute. They prevent the adverse party from destroying or removing assets

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thereby rendering the final arbitral award meaningless. The measures envisaged therefore may require a party to either; (a) maintain or restore the *status quo* pending the determination of the dispute; or (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; or (c) provide a means of 5 preserving assets out of which a subsequent award may be satisfied; or (d) provide evidence that may be relevant and material to the resolution of the dispute. Courts have the discretion to direct the most suitable measures in the circumstances of each individual case though according to well established practice, such orders are issued only where there is an imminent risk of irreparable loss; when irreparable prejudice could be caused to rights which are the subject of arbitral 10 proceedings or when the alleged disregard of such rights may entail irreparable consequences.

When court is called upon to grant injunctive relief as an interim measure of protection pending arbitral proceedings, the court will generally have regard to the following: (a) the nature and strength of the applicant's case, i.e., whether there is a serious question to be arbitrated, in 15 respect of which the applicant demonstrates a sufficient likelihood of success; (b) whether there is an imminent risk of irreparable loss, by considering whether damages are an adequate remedy to the perceived risk of harm; and (c) the course of action favoured on a balance of convenience, i.e. the course of action that results in the lower risk of injustice if the decision to grant the injunction is incorrect.

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To justify issuance of an injunction as an interim measure of protection, the contractor must make out a case showing that; (i) the performance bond in issue is a conditional one; (iii) the employer is attempting to call on the performance guarantee beyond the circumstances in which a call is permitted under the underlying contract; or (iii) that the employer's call is founded on a 25 claim that is specious, fanciful or untenable. It will not be enough to stop the beneficiary calling on the bond that its case or claim against the other contractual party is a weak one. An injunction as an interim measure of protection is not to issue where the performance guarantee in question is an unconditional one since on-demand performance guarantees are autonomous or independent of the underlying construction agreement, and constitute primary independent 30 obligations placed on a guarantor to make payment of a guaranteed amount.

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f. <u>The nature and strength of the applicant's case, i.e., whether there is a serious question to be arbitrated, in respect of which the applicant demonstrates a sufficient likelihood of success.</u>

5 Injunctive relief is ordinarily aimed at preserving the *status quo*. The order issued should be one that requires a party to take, or refrain from taking, specified actions that that are either likely to cause, current or imminent harm or prejudice to the arbitral process, or preserve assets out of which a subsequent award may be satisfied. Where the contractor disputes the employer's ability to call on the performance guarantee pending arbitral proceedings, the contractor must be able to 10 establish that there is a serious question to be arbitrated as to the existence of the breach. Inversely, to justify the granting of an injunction, the applicant must demonstrate that the employer's call on the performance guarantee is founded on a claim that is specious, fanciful or untenable.

15 When considering whether or not to grant an injunction as an interim measure of protection, the court can only very rarely form a final view as to which of the parties is in breach of the contract (see *Kiyimba Kaggwa v. Katende Haji Abdu Nasser [1985] HCB 44*). The arbitrator will be able to determine the issue finally at the arbitration. However, given the importance of performance guarantees in the commercial world, it is necessary for the court at this early stage to be satisfied 20 that the applicant has a strong case to be presented for arbitration and that the order sought is necessary to prevent a current or imminent harm or prejudice to the arbitral process, or to preserve assets out of which a subsequent award may be satisfied.

The applicant seeks to have both respondents restrained from enforcing their respective rights 25 accruing under a performance guarantee, pending arbitration of disputes that have arisen between the applicant and the 1st respondent, under their construction contract. There have been many cases over the years relating to injunctions being sought often against the bank, surety or other organisation which has provided the bond or letters of credit as the case may be. In practice, there is little difference in the approach of the courts as between bonds and letters of credit.

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The Court of Appeal of England in *Edward Owen Engineering Ltd v. Barclays Bank International Ltd [1978] QB 159* which involved a performance guarantee said that the same principles apply as applied to letters of credit. At page 171 Lord Denning MR adopted what Mr Justice Kerr (as he then was) said in *RD Harbottle (Mercantile) Ltd v. National Westminster*
5 *Bank Ltd [1978] QB 146 at pages 155-6*:

> It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except
> 10 possibly in clear cases of fraud of which the banks have notice, the court will leave the merchants to settle their disputes under the contract by litigation or arbitration...The courts are not concerned with their difficulties to enforce claims these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks
> 15 are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.

The question in the instant application then is whether or not the order sought is necessary to
20 prevent a current or imminent harm or prejudice to the arbitral process, or to preserve assets out of which a subsequent award may be satisfied. The answer to this question largely depends on whether or not the performance guarantee in issue a conditional one or unconditional. This is because whereas a conditional performance guarantee depends on the obligations owed by the Contractor to the Employer under the contract, and the Contractor must be a party to it, the
25 unconditional bond or bank guarantee is autonomous.

A performance guarantee is a bond taken out by the contractor, usually with a bank or insurance company (in return for payment of a premium), for the benefit of and at the request of the employer, in a stipulated maximum sum of liability and enforceable by the employer in the event
30 of the contractor's default, repudiation or insolvency. The purpose of the performance guarantee in the construction industry is to perform the role of an effective safeguard against non-performance, inadequate performance or delayed performance and its production provides a security as readily available to be realised, when the prescribed event occurs.

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There are two types of performance guarantees: Conditional guarantees or default bonds, whereby the surety accepts "joint and several" responsibility for the performance of the contractor's obligations under the contract; and Unconditional guarantees or on-demand bonds, which is a covenant by the surety (usually a bank) to indemnify the employer following
5 contractor's default, subject to stated terms.

On-demand performance guarantees constitute primary independent obligations placed on a guarantor to make payment of a guaranteed amount. The obligations are independent from the main contract and are usually triggered by a written demand being made on the guarantor. When
10 a performance guarantee is unconditional, and intended to be cash equivalent, subject to the exceptions of fraud, unconscionability and express terms to the contrary, it can be called on by the beneficiary upon written demand to the issuing institution, without regard to the underlying construction contract. It is characterised by the absence of any conditions required to make a call on the guarantee other than the making of the call itself. This is what is known as the "autonomy
15 principle. A bank is not concerned in the least with the relations between the contractor and the employer nor with the question whether the contractor has performed his contractual obligation or not, nor with the question whether the contractor is in default or not, the only exception being where there is clear evidence both of fraud and of the bank's knowledge of that fraud (see *Edward Owen Engineering Ltd v. Barclays Bank International Ltd [1978] 1 QB 159*)
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With unconditional performance guarantees, the contractor is not a party to the arrangement. The guarantor will become liable merely when demand is made upon it by the beneficiary with no necessity for the beneficiary to prove any default by the principal in performance of the underlying construction contract. The maxim "pay first and argue later" best describes one of the
25 key principles underlying demand guarantees (see *Ward Petroleum Corp. v. Federal Deposit Inc. Corp (1990) 903 F. 2d 1299*). The beneficiary need only have a bona fide claim of a breach of contract; upon the beneficiary asserting the basis of the claim contending that there has been a breach of contract. A sample of an unconditional on demand performance guarantee can be found in the case of *Kirames Sdn Bhd v. Federal Land Development Authority [1991] 2 MLJ 198*
30 as follows:

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> The said sum of Ringgit 117,535 shall be paid by us forthwith to you irrespective of whether or not there is any dispute between the said contract and yourselves (the Authority) in respect of or relating to the said contract or in respect of any other matter and irrespective of whether or not such said dispute, if any, has been settled, resolved, litigated or adjudicated upon otherwise howsoever.

As between the bank and the employer beneficially such a bond is tantamount to cash in the hand of the employer. The best examples for words showing intent of an un-conditional performance guarantee are to be found in the cases of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 MLJ 149* and *IE Contractors Ltd v. Lloyd's Bank Plc and Rafidain Bank [1990] 2 Lloyd's Rep 296* which respectively provided as follows:

> We hereby unconditionally and irrevocably guarantee the payment to EPMI. We undertake to pay you, unconditionally, the said amount on demand, being your claim for damages brought about by the above named principal.

In contrast, conditional performance guarantees, are guarantees only payable on the happening of a specified condition linked mainly to performance of the contractor or sub-contractor. A conditional guarantee or a "see to it" guarantee is characterised by the requirement for the beneficiary, when making a call on the guarantee, to have a judgment or award evidencing both a proven breach of the underlying contract, together with a loss suffered by the employer as a consequence of this breach. It imposes an obligation on the guarantor subject to the beneficiary establishing default in the underlying contract. In this respect a conditional bond is generally seen as a suretyship, in that it imposes an obligation upon the guarantor, subject to the beneficiary establishing proven default in the underlying contract. It, however, differs from ordinary guarantees in that the beneficiary is not required to first seek recovery from the principal.

With conditional performance guarantees, the guarantor becomes liable upon proof of a breach of the terms of the underlying construction contract by the principal and the beneficiary sustaining loss as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default. The beneficiary is required to produce specific documents evidencing the grounds under which they believe the principal has breached the underlying contract or the

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loss that they have suffered. A sample of a conditional performance guarantee can be found in the case of *Teknik Cekap Sdn Bhd v. Public Bank Berhad [1995] 3 MLJ 449* as follows:

> If the sub-contractor (unless relieved from the performance of any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor shall pay to the contractor up to and not exceeding the sum of RM422,000 (Malaysian Ringgit four hundred twenty two thousand) only representing 10% of the contract value or such part thereof on the contractor's demand notwithstanding any contestation or protest by the sub-contractor or by the guarantor or by any other third party, provided always that the total of all partial demands so made shall not exceed the sum of RM422,000 (Malaysian Ringgit four hundred twenty two thousand) only and that the guarantor's liability to pay the contractor as aforesaid shall correspondingly be reduced proportionate to any partial demand having been made as aforesaid.

Another example of words used in conditional performance guarantees is to be found in the case of *Teknik Cekap Sdn Bhd v. Public Bank Bhd [1995] 2 Lloyd's Rep 296,* as follows;

> If the subcontractor ... shall in any respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor shall pay...

Similarly, The Association of British Insurers (ABI) produced a model form of guarantee bond (the ABI bond), which they recommend for use in the UK construction industry in preference to on-demand bonds, whose wording is as follows;

> The guarantor guarantees to the employer that in the event of a breach of the contract by the contractor, the guarantor shall subject to the provisions of this guarantee bond satisfy and discharge the damages sustained by the Employer as established and ascertained pursuant to and in accordance with the provisions of or by reference to the contract and taking into account all sums due or to become due to the contractor.

It is seen from the above samples that the main distinction between the two types of guarantees is that while a call on unconditional performance guarantees is premised upon documents stating a bona fide claim of a breach of contract, a call on conditional performance guarantees is conditioned upon proven facts establishing a breach. In conditional performance guarantees, the beneficiary must comply with conditions precedent for calling the guarantee. This has the effect of making the call on the guarantee dependant on proving both the contractual liability of the principal as well as loss suffered by the employer as a consequence of the principal's breach. In

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on-demand performance guarantees, on the other hand, the only condition precedent for calling the guarantee is a written notice to the guarantor. An on-demand bond clearly presents risks for contractors, especially if they are in dispute with their employer. There have been cases where the parties have been in dispute and the contactors have sought an injunction against the surety bank to prevent them paying out the bond. On numerous occasions such injunction applications have been denied by the courts.

This court then has to determine whether in the instant case the 1st respondent contracted to receive an on-demand guarantee as a primary obligation placed on the guarantor or rather whether the guarantee is akin to a suretyship, which is conditional on proof of breach of underlying performance obligations.

To resolve this question, the court must scrutinise the wording of the guarantee and rely on the recognised rules of interpretation, one of which is to ascertain the intention of the parties from the express wording of the document. Performance guarantees are to be construed independently of the underlying documents (see *Meritz Fire and Marine Insurance Co. Ltd v. Jan De Nul NV and another [2011] 2 Lloyd's Rep. 379*). A great deal depends on the wording of the guarantee itself to discover the intention of the parties. In the instant application, the relevant wording in the guarantee issued by the 2nd respondent on 29th November, 2019 (annexure "A" to the affidavit in support of the motion), states as follows;

> …and we undertake to pay you, upon your first written demand declaring the contractor to be in default under the contract, without cavil or argument any sum or sum within the limits of …. This guarantee is subject The Uniform Rules of Demand Guarantee; ICC Publication No. 758

The wording of the guarantee is clear and unambiguous. The terms of the guarantee do not require the guarantor to decide whether the employer and contractor have or have not fulfilled their obligations under the underlying transaction, with which the guarantor is not concerned. What is required is simply a declaration the contractor is in default under the contract. The language used reveals that the true intention of the parties was to have an unconditional guarantee in place. It only required a statement of default by the 1st respondent, without an indication of the nature of the default, or the presentation of a certificate by an engineer or

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surveyor, or presentation of a judgment or arbitral award. Had the parties expressly chosen to make payment depend on the resolution of any dispute, they could have agreed that a relevant document against which payment was to be made would be an arbitration award.

5 In other words, the 2nd respondent was assuming a primary and independent obligation to pay under the guarantee rather than to guarantee the due performance by the applicant of its contractual obligations. Hence the guarantee does not impose a conditional obligation to pay premised upon proof of facts of breach by the applicant, but rather is conditioned upon documents presented by the 1st respondent. The proper construction of the guarantee is that the

10 claim had to be based on an assertion by the 1st respondent that the sum was due and payable by the 2nd respondent for the applicant's breach of its obligations under the construction contract. There need not be any proof of breach of the underlying obligations under the contract.

For the avoidance of doubt, Article 5 (a) of *The Uniform Rules of Demand Guarantee* (URDG);

15 ICC Publication No. 758, expressly provides that the obligations of a guarantor are independent of any issues in the underlying contract. It states as follows;

> A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the
> 20 purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary

25 Article 12 of the URDG limits the liability of the guarantor to only the terms contained in the agreement, hence further alienating and protecting the guarantor bank from liabilities emanating from other agreements entered into by the other parties to the contract of which it may or may not even be aware. Under the URDG, demand guarantees are clearly completely independent of any underlying relationship between the applicant and the beneficiary, and subject to only the

30 terms contained in it, thereby limiting the liabilities and rights of the guarantor bank to only matters it voluntarily commits itself to.

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It was argued by counsel for the applicant that the 1st respondent is guilty of a number of breaches of the underlying contract including; failure to avail the applicant with the project drawings in a timely manner, failure to issue an unconditional bank payment guarantee, and wrongful termination of the contract. On the other hand, the 1st respondent claims that the applicant diverted funds advanced to it for the project, failed to make substantial progress in the construction works, failed to comply with site safety requirements, failed to adhere to the specifications and failed to account for the money advanced to it. According to both counsel, this constitutes the substance of the parties' dispute for consideration in the prospective arbitration. It is this that Counsel for the applicant's argues will be rendered nugatory if the injunction is not granted.

It has not been demonstrated though to this court in which way honouring the unconditional performance guarantee, which is in essence cash payable to the 1st respondent under an autonomous agreement, will prejudice the arbitral process whose substance is the pace and value of work done before the termination of the contract and the lawfulness of that termination. It has also not been shown that a subsequent award may be satisfied out of the funds secured by the performance guarantee.

The terms of underlying contracts will often impact on a performance guarantee call. In the instant case, Clause 31 of the underlying construction contract is devoid of any procedural limitations. In any event, these are usually considered as merely a set of contractual procedural rules designed to provide a safeguard against unfair calling by requiring the guarantor, on receipt of a compliant demand, to, without delay, transmit a copy of the demand to the principal. Words of similar import have been held before intended only to regulate the right to call on the guarantee and therefore purely a procedural matter. They do not render a guarantee conditional in the true sense (see *Fasda Heights Sdn Bhd v. Soon Ee Sing Construction Sdn Bhd & another [1999] 4 MLJ 199*).

In conclusion, the applicant has not proved this to be a conditional performance guarantee and that the 1st respondent's call is founded on a claim of breach that is specious or fanciful. Even if it were a conditional performance guarantee, the applicant has not shown that the 1st respondent

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is attempting to call on the performance guarantee beyond the circumstances in which a call is permitted under the underlying contract; or that the basis for the call is untenable. Furthermore, the applicant has not proved that the 1st respondent seeks payment in circumstances where the underlying contract clearly and expressly prevents it from doing so.

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It has not been demonstrated that the order sought is necessary to prevent a current or imminent harm or prejudice to the arbitral process, or to preserve assets out of which a subsequent award may be satisfied. In any event, questions whether the 1st respondent is liable under the underlying contract are irrelevant since this is an unconditional performance guarantee. In such cases, if the

10 documents are in order, the guarantor must pay.

g. Whether there is an imminent risk of irreparable loss, by considering whether damages are an adequate remedy to the perceived risk of harm.

15 The remedy is only available where compensatory damages would be inadequate. Irreparable damage, injury or loss has been defined as "loss that cannot be compensated for with money" (see *Kiyimba - Kagwa E.L.T. v. Haji Abdu Nasser Katende [1985] HCB 43*; *Mugenyi Yesero v. Wandera Philemon K. [1987] HCB 78* and *Uganda Moslem Supreme Council v. Kagimu Mulumba and Four others [1980] HCB 110*).

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I have formed the view that damages would be an adequate remedy since the applicant's claim in the prospective arbitration is one for breach of contract. Although the calling of the guarantee gives rise to a real risk of damage to the commercial reputation, standing and creditworthiness of the applicant, it would not be very difficult to quantify such damage in the prospective

25 arbitration. The performance guarantee in issue being an unconditional one, the relevant consideration revolves around the question whether there has been a relevant demand.

An injunction should not be granted lightly because it would put the beneficiary in precisely the position it sought to avoid; that it can be paid first and talk later. As to whether the 1st respondent

30 made a call beyond the circumstances in which a call is permitted under the underlying contract, the answer to this question depends in each case upon the wording of the particular guarantee

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(see *AES-3C Maritza East 1 EOOD v (1) Credit Agricole Corporate and Investment Bank and Alstom Power Systems GmbH [2011] EWHC 123*). Money recoverable under an unconditional performance guarantee is payable against an appropriately worded demand accompanied by such document as the demand requires and without proof of the existence of a liability under the underlying contract. The only documents which were required were a notice to or claim against the applicant relating to the alleged breach of obligations under the contract which was relied upon by the 1st respondent in their demand.

h. <u>The course of action favoured on a balance of convenience, i.e. the course of action that results in the lower risk of injustice if the decision to grant the injunction is incorrect.</u>

A performance guarantee is a form of financial security provided by a person to secure the performance of the contractual obligations of another. It usually provides for a monetary amount that may be called upon by the beneficiary of the guarantee in the event of a contractor's failure to perform its obligations under the contract. Whereas a conditional performance guarantee may only be called on actual proof of default and damage, such as an arbitration award or court judgment, and the payment will only cover the proven loss sustained by the beneficiary up to the amount stated in the performance guarantee, an unconditional performance guarantee does not require any proof of default. The beneficiary will generally receive payment of the full amount upon the presentation of a written statement to the issuer stating that the contractor has failed to perform.

Since unconditional and irrevocable performance guarantees, impose an obligation on the guarantor that is absolute or unconditional, which becomes fixed upon the principal's default, courts would only prevent a party from calling upon a performance guarantee where the party in whose favour the performance guarantee is given: (i) is acting fraudulently; (ii) is acting unconscionably; or (iii) has made a contract not to call upon the guarantee (see *Clough Engineering Limited v. Oil & Natural Gas Corporation Limited [2008] FCAFC 136; Sirius International Insurance Co v. FAI General Insurance Ltd [2003] 1 WLR 2214* and *Kawasaki Heavy Industries Ltd v. Laing O'Rourke Australia Construction Pty Ltd [2017] NSWCA 291*), for example where a beneficiary seeks payment in circumstances where the underlying contract

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clearly and expressly prevents it from doing so (see *Simon Carves Ltd v. Ensus UK Ltd [2011] EWHC 657; 135 Con LR 96, [2011] BLR 340*).

In the instant case, the second respond issued a guarantee stipulating a sum payable upon
5 "written demand declaring the contractor to be in default under the contract, without cavil or argument," which is demonstrative of the objective intention of the parties, i.e. there was no intention to fetter the beneficiary's capacity to call until after a binding determination is made in respect of whether there has been a breach of contract. When a performance guarantee is characterised as unconditional and irrevocable, clear words will be required to support a
10 construction which inhibits a beneficiary from calling on it where a breach is alleged in good faith, i.e. non-fraudulently. Just as and the guarantor who issues an unconditional and irrevocable performance guarantee is not entitled to require that the creditor first proceed or exhaust remedies against the principal debtor, save for cases of fraud or unconscionable conduct, the principal debtor cannot fetter the beneficiary's capacity to call until after a binding determination
15 has been made in respect of whether there had been a breach of contract.

The intended purpose of an unconditional and irrevocable performance guarantee is twofold: (i) to secure the contractor's performance of the contract / provide security against the contractor becoming insolvent; and (ii) to give the employer access to funds it claims notwithstanding the
20 fact that a dispute with the contractor is afoot. In the latter case, it serves as a risk allocation device as it is used to allocate the risk between the parties as to who will be out of pocket during a dispute arising under the contract. Therefore to allow an injunction, as an interim measure of protection, in order to restrain a call on a guarantee that is intended to act as a risk allocation device would defeat the purpose of that security: i.e. that the employer will have access to funds
25 during a dispute between the parties.

For all the foregoing reasons, the interim injunction order issued by court on 5th January, 2021 restraining the 2nd respondent from honouring the 1st respondent's demand under the performance guarantee is hereby vacated, and this application is accordingly dismissed. The
30 costs of this application and those of the application for the interim injunction are awarded to the 1st respondent.

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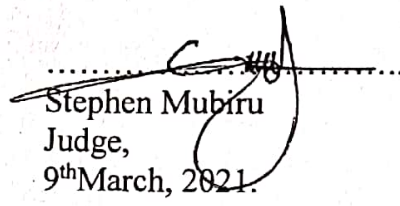
Dated this 9th day of March, 2021



Stephen Mubiru
Judge,
9thMarch, 2021.

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THE REPUBLIC OF UGANDA

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

MISC. CAUSE NO. 001 OF 2021

AC YAFENG CONSTRUCTION COMPANY LIMITED ::::::::::::::] APPLICANT

VERSUS

1. THE REGISTERED TRUSTEES OF LIVING WORD ASSEMBLY CHURCH ::]
2. UNITED BANK FOR AFRICA (UGANDA) LTD:::::::::::::] RESPONDENTS

ORDER

This matter coming up for final Disposal this 9th **March, 2021** by **His Lordship Hon. Justice Stephen Mubiru**, read out by the **Deputy Registrar, Her Worship Mary Kaitesi Kisakye** in the presence of **Mr. Dennis Sembuya Counsel for the 1st Respondent,** and **Mr. Kenneth Kipalu Counsel for the Applicant.** The parties' representatives Mr. Emeka Okoye- Chairman of the Applicant and Mr. Patrick Kimongo for the 1st Respondent also present in Court.

IT IS HEREBY ORDERED THAT:

1. The Interim Injunction order issued by the Court on 5th January, 2021 restraining the 2nd Respondent from honouring the 1st Respondent's demand under the performance guarantee is hereby Vacated.

2. High Court Miscellaneous Cause No. 001 of 2021 is accordingly dismissed.

3. The Costs of this application and those of the application for the Interim Injunction are awarded to the 1st Respondent.

GIVEN under my Hand and Seal of this Court this ...9th... day of ...March... **2021.**

REGISTRAR

Extracted by:
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