THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISC. APPLICATION NO. 217 OF 2022
(ARISING FROM MIS. APPLICATION NO.095 OF 2022)
(ARISING FROM MISC. APPLICATION NO.094 OF 2022)
(ARISING FROM MISC. CAUSE NO.003 OF 2022)

DFCU BANK LIMITED :: APPLICANT

VERSUS

1. **POLAT YOL YAPI SAN VSTIE A.S**
2. **UGANDA NATIONAL ROADS AUTHORITY :::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING ON AN INTERPLEADER APPLICATION

Introduction

The Applicant brought this interpleader application by way of Notice of Motion under order 34 rules 1, 2, 4, and 6 of the Civil Procedure Rules S.I. 71-1 and Sections 59 and 98 of the Civil Procedure Act Cap 71 seeking orders that;

1. It be determined whether the Applicant should effect payment of **USD 12,413,382** and **UGX 14,259,362,014** on the Advance Payment Guarantees **No.ABG022019120657** and **ABG01201912019120658**, the subject of the 2nd Respondent's demand dated 18th January 2022 as contended by the 2nd Respondent or whether the Applicant is restrained from paying the said Advance Payment Guarantees by the Interim Order of this Court dated the **28th January 2022** as contended by the 1st Respondent.
2. Costs of this Application be provided for.

Background

This application arises out of a dispute between the 1st and 2nd Respondents vide *Misc. Cause No.003 of 2022 POLAT YOL YAPI SAN VS TIC A.S v UGANDA NATIONAL ROADS AUTHORITY.* Since the bringing of the miscellaneous cause, the 1st Respondent has also filed Miscellaneous Applications Nos. 94 and 95 of 2022, applications for interim and temporary injunctions respectively against

Received by
Robert Anomiyaka c/o

the 2nd Respondent preventing the 2nd Respondent from terminating the 1st Respondent's Contract for Civil Works For the Upgrading of Muyembe-Nakapiripirit Road (the underlying contract) and restraining the 2nd Respondent from collecting on the advance payment guarantees pending the determination of the dispute between the parties.

The background to the dispute is that on 7th November 2019, the 2nd Respondent entered into a contract for civil works with the 1st Respondent for the upgrading of Muyembe-Nakapiripirit Road (92 km) and secondary link roads (25 km) to be paved (bituminous) standard. In accordance with the conditions of the contract, advance payments in the sums of **USD 12,413,382 (United States Dollars Twelve Million Four Hundred and Thirteen Thousand Three Hundred and Eighty Two)** and **UGX 14,259,362,014 (Fourteen Billion Two Hundred and Fifty Nine Million Three Hundred Sixty Two Thousand and Fourteen Uganda Shillings)** were required to be made by the 2nd Respondent to the 1st Respondent as Contractor and these payments were made against Advance Payment Guarantees issued by the Applicant bank (Nos. ABG022019120657 and ABG012019120658 respectively). At some point in 2020 the 2nd Respondent terminated the contract with the 1st Respondent on grounds of non-performance, the 1st Respondent is challenging the 2nd Respondent's actions on grounds that the delays in construction works were as a result of supply shortages occasioned by the COVID-19 pandemic amounting to a force majeure event. The parties are currently undergoing arbitration proceedings to resolve this dispute but in the interim the 1st Respondent instituted Misc. Cause 003 of 2022 seeking an injunction preventing the 2nd Respondent from terminating the underlying contract pending the hearing and determination of the arbitration.

On 12th December 2019, at the request of the 1st Respondent, the Applicant issued to the 2nd Respondent two (2) On-Demand Advanced Payment Guarantees, to wit; Advance Payment Guarantee **No. ABG012019120658** securing the sum of **UGX 14,259,362,014** and Advance Payment Guarantee **No. ABG022019120657** securing the sum of **USD 12,413,382** (the "secured sums"). The pertinent terms of the Guarantees for the purposes of this application were that:

A) The Applicant irrevocably undertook to pay the 2nd Respondent a sum not exceeding the Secured Sums upon receipt of the 2nd Respondent's complying demand stating that either the 1st Respondent utilized the advance payment for purposes other than mobilization in relation to the

works or that the 1st Respondent had failed to repay to the 2nd Respondent the advance payment in accordance with the terms of the contract.

B) The Guarantees were to expire on 6th December 2022.

C) The Guarantees were subject to the **Uniform Rules for Demand Guarantees, 2010 Revision, International Chamber of Commerce (ICC) Publication No.758 2010 Revision, International Chamber of Commerce (ICC) Publication No. 758** excluding sub-article 15 (a) (Hereafter "URDG 758").

In a letter dated 18th January 2022 which was received by the Applicant on 19th January 2022 the 2nd Respondent made a demand on the Applicant for payment of the whole of the Secured Sums. The Applicant had five (5) business days within which to examine the 2nd Respondent's demand and determine whether it was a complying demand which should be paid or a non-complying demand which should be rejected, pursuant to **Article 20** of URDG 758. The Applicant conducted the examination within the stipulated time and found the demand to a complying demand which should be paid.

There is a dispute of facts between the Applicant and 2nd Respondent as to when the Applicant should have effected payment having found the demand to be complying, the 2nd Respondent argues that the Applicant had until 27th January 2022 (5 days after 19th January 2022) to effect payment. The Applicant on the other hand argues that it complied with the requirements under Article 20 of URDG 758 and completed its assessment within the 5 days, which it says ended on 27th January 2022 and that whilst it was still processing the payment on the 28th of January 2022, which sums (it claims) were to be effected on that same day, it was served with an Ex-parte Interim Court Order from this Court issued by Honorable Lady Justice Suzan Abinyo dated 28th January 2022 in *Misc. Application No.095 of 2022, Polat Yol Yapi San Vstie A.S v Uganda National Roads Authority* ("the Ex parte Interim Order").

The 1st Respondent's position is that the Interim Order restrains payment by the Applicant of the Secured Sums and the Applicant claims that in furtherance of this contention the 1st Respondent has threatened to pursue contempt of court proceedings against the Applicant directly if it effects payment of the secured sums to the 2nd Respondent.

On the other hand, the 2nd Respondent's contention is that the Interim Order does not restrain payment of the secured sums by the Applicant, and to this

effect, the Applicant claims that the 2nd Respondent has threatened the Applicant with both regulatory censure and a suit if it does not complete payment of the secured sums.

The Applicant's claim herein is that the two Respondents' claims are adverse to each other with respect to the same money which the Applicant holds, thus making this a proper case for an interpleader application for which this Court should determine which of the two competing contentions stands. The Applicant, therefore, instituted this application seeking direction from this Court on whether or not it should release the funds demanded by the 2nd Respondent or whether it is prevented from doing so by the Interim Court Order. The Applicant avers that it does not wish to breach its contractual obligations to the 2nd Respondent nor act in contempt of an Order of this Court, as a result of this it has held out on paying the demand on the Guarantees and in collecting on Counter Guarantees until this Court has pronounced itself on this application.

The Applicant's application is supported by the Affidavit of **Ms. Angelina Namakula-Ofwono**, the Applicant's Chief Legal Officer/ Company Secretary where much of the above information is reproduced and supported by **Annexures "A1" – "D"** attached to the Affidavit.

Following the Applicant's filing of this application, on the 28th of February 2022, this Court issued an Interim Order vide Misc. Application 217 of 2022 extending the Ex Parte Interim Order temporarily restraining the 2nd Respondent from enforcing, collecting, or calling on the Advance Payment Guarantees and Performance Guarantees issued to the Applicant (DFCU Bank Limited) and KCB Bank (U) Ltd until the disposal of this application. On the same day, both the 1st and 2nd Respondents filed their Affidavits in Reply.

The 1st Respondent's Affidavit in Reply was deponed by **Mr. Edip Bahim Yenen**, the 1st Respondent's project manager. In **paragraph 3** of his Affidavit, the 1st Respondent's deponent states that he is informed by the 1st Respondent's lawyers that the application is not tenable in law. Mention is made under **paragraph 5** of his Affidavit that the 1st Respondent filed Miscellaneous Cause No.03 of 2022 against the 2nd Respondent which is still pending before this Court for hearing and determination of the dispute.

In **paragraph 12** of his Affidavit, the 1st Respondent's deponent averred that (on legal counsel's advice) any person who has knowledge of an Order of Court whether null or valid or irregular cannot be permitted to disobey it and that any party must comply with the Order of the Court until it is appealed or set aside

by a Court of competent jurisdiction. Hence, he argued in **paragraphs 13** and **14** of his Affidavit, since the Court Order that was issued by this Court on 28th January 2022 is still valid and has never been set aside or appealed against, he further argued that the said Court Order supersedes any demands and threats of regulatory censure and suits made by the 2nd Respondent or any other person. He further averred in **paragraph 15** of the Affidavit that thus, the 2nd Respondent's threats are not above and cannot be equated to an Order of this Court. On this basis, he argued that this application is not tenable in law and prayed that this application be dismissed with costs to the 1st Respondent.

The 2nd Respondent's Affidavit was deponed by **Ms. Esther Kusiima**, the Head of the Contracts & Claims department in the 2nd Respondent. In **paragraph 3** of her Affidavit, the 2nd Respondent's deponent avers that this application is incompetent and does not satisfy the conditions for grant of an application for interpleader relief.

In **paragraph 9** of her Affidavit, the 2nd Respondent's deponent avers that on 11th March 2020 and 16th March 2020, the 2nd Respondent paid to the 1st Respondent USD 12,413,382 and UGX 14,259,362,014 as an Advance Payment and on the strength of the Guarantees and the Applicant's undertaking. She further avers in paragraph 10 that the sums were credited to the 1st Respondent's account with KCB Bank Uganda Limited on 12th March and 16th March 2020 and attached a proof of payment for the Advance Payment marked **Annexure "C2"**.

In **paragraph 12** of her Affidavit, the 2nd Respondent's deponent avers that as per URDG 758, the Applicant had five (5) business days following the Demand to either issue a notice rejecting the Demand or pay the sums secured by the Guarantees, and this meant that the Applicant had no later than close of business (COB) on 26th January 2022 to issue its notice. In **paragraph 14**, the 2nd Respondent's deponent argues that following the lapse of the above stated 5 business days, the Applicant had an obligation to immediately pay the secured sums.

In **paragraph 16** of her Affidavit, the 2nd Respondent's deponent argues that the Applicant's undertaking to the 2nd Respondent to pay under the Guarantee is independent from and not subject to claims or defences arising from any relationship (especially the underlying contract between the 1st and 2nd Respondent) other than a relationship between the Guarantor (Applicant) and the beneficiary (2nd Respondent). In **paragraph 17** she further argued **that HCMA No.95 of 2022**, the substantive application and the Cause out of which it arises are presumably claims/ actions arising out of the underlying

Contractor-Employer relationship between the 1st Respondent and the 2nd Respondent, to which, she argues, the Guarantees and/ or the Applicant's obligation to immediately pay the secured sums on or by the end of 26th January 2022 cannot be subjected. She thus argues in paragraph 18 of her Affidavit that the 1st Respondent is distinct and not privy to a separate and distinct undertaking or guarantor-beneficiary relationship between the Applicant and 2nd Respondent arising from the Guarantees and can't legally and validly obtain an Order barring enforcement of the terms of that undertaking.

The 2nd Respondent's deponent argues that in any event, having received the Ex Parte Interim Order in **HCMA No.95 of 2022** on 28th January 2022, the Applicant was already in breach of its obligation to immediately pay the secured sums to the 2nd Respondent, which time she argued had already lapsed by COB on 26th January 2022 (2 days earlier).

She thus argues in **paragraphs 20** and **21** of her Affidavit that the Interim Order seeks to stop the 2nd Respondent from performing acts which had already happened by the date of its issue and that by the date of the issuance of the Interim Order, all actions necessary for the enforcement of the Guarantee had already occurred i.e. a complying demand had been issued to the Applicant, the 5 days within which to examine the demand had lapsed, the secured sums were already due and owing and the Applicant already had an obligation to immediately pay the secured sums, which (she claims) it adamantly ignored.

She argues that since the Applicant is not a party to **HCMA No.95 of 2022**, it is not bound by the Order and further that the Ex Parte Interim Order did not expressly state that it barred the Applicant from effecting payment of the secured sums to the 2nd Respondent. She further states in **paragraphs 23** and **24** of her Affidavit that the Ex Parte Interim Order which was issued on 27th January 2022 has since lapsed and or expired on the basis that the **Civil Procedure (Amendment) Rules, 2019** ("the 2019 Rules") expressly restrict the validity of Ex Parte Interim Orders to a period not exceeding 3 days from the date of issue. She further averred that the 1st Respondent has never served the 2nd Respondent with a copy of the Ex Parte Interim Order, the Substantive Application of the Main Cause contrary to what is provided under the 2019 Rules. On this basis, she argues in paragraph 27, the Ex Parte Interim Order lapsed on 31st January 2022.

In **paragraph 29** she averred again that there is no adverse claim to the secured sums by the 1st Respondent because, she argues, the Guarantees issued by the Applicant are contracts between the Applicant and the 2nd Respondent only

which she argues the 1st Respondent cannot lay claim to. That the 1st Respondent cannot lay claim to sums secured under the Guarantees to which it is not a party. She stated further in paragraph 32 that no proof has been furnished by the Applicant to show that the 1st Respondent has claimed entitlement to the secured sums, and as such, she argued that this is not a case where two persons are adversely claiming the same sums/ debt as required by law.

She further argued under **paragraph 33** that no proof has been furnished by the Applicant to show that the subject matter in the Main Cause (HCMC No.003 of 2022) out of which the instant Application arises is or includes the secured sums or that the Main Cause relates to the secured sums that are the subject of this Application, in any way.

Finally, in **paragraphs 34** and **35**, the 2nd Respondent's deponent raises some allegations, alleging firstly that the Applicant was reluctant to pay even before receiving the Ex Parte Interim Order, that this application is made by the Applicant in bad faith as an outright abuse of Court process only intended to frustrate the 2nd Respondent's enforcement of its benefits under the Guarantees, and that the Applicant's intentions are nefarious and illegal in light of the fact that, she argues, the debt is uncontested and the Applicant admits it is already due and owing.

Representation

At the hearing on 28th February 2022, the Applicant was represented by Masembe Kanyerezi and Eriya Mikka, the 1st Respondent was represented by Ellison Karuhanga and Patience Akampurira, and the 2nd Respondent was represented by Kenneth Mwebembezi.

At the hearing, Counsel for the Applicant prayed for an interim measure of protection and for directions on filing submissions. The Court ruled that the status quo be maintained until the final disposal of this application and thereby ordered that an Interim Order be issued restraining the Respondent from enforcing, collecting, or calling on the Advance Payment Guarantee and Performance Guarantees issued to the Applicant and KCB Bank (U) Ltd pending the determination of this application.

The 1st Respondent did not file submissions but the Applicant and the 2nd Respondent filed submissions per the Court's directions, which submissions I have taken into consideration in giving this Ruling.

Issues for Determination

The parties did not agree on or present distinct issues in their Submissions but, in line with this Court's inherent powers to frame issues, the following issues have been framed for determination in this application;

1. Whether or not this application has been properly brought before this Court as an interpleader application?

2. Given the factual context of this application and taking into account a true and proper interpretation of the law, what is the lawful course of action for the Applicant to take in these circumstances?

3. What are the remedies available to the parties?

Resolution

Issue One: ***Whether or not this application has been properly brought before this Court as an interpleader application?***

Section 59 of the **Civil Procedure Act** Cap 71 (CPA) provides for circumstances where an interpleader application may be instituted;

> *59. Where interpleader suit may be instituted.*
>
> *Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest in it other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, that other person may institute a suit of interpleader against all the claimants or, where a suit dealing with the same subject matter is pending, may intervene by motion on notice in such suit, for the purpose of obtaining a decision as to the person to whom payment or delivery shall be made, and of obtaining indemnity for himself or herself; except that where any suit is pending in which the rights of all parties can be properly decided, no such suit of interpleader shall be instituted.*

Order 34 rules 1 and **2** of the **Civil Procedure Rules SI 71-1** ("CPR") provide;

> ***1. Practice under this Order.***

Interpleader proceedings may be instituted—

(a) in a case where no suit is pending, by an originating summons;

or

(b) in a case where a suit is pending, by motion on notice in that action.

2. Averments to be proved by applicant.

In every suit of or application by way of interpleader the applicant shall satisfy the court by way of affidavit or otherwise—

a) that the applicant claims no interest in the subject matter in dispute other than for charges or costs;
b) that there is no collusion between the applicant and any of the claimants;
c) that the applicant is willing to pay or transfer the subject matter into court or to dispose of it as the court may direct.

In the Applicant's submissions counsel for the Applicant argued that in light of the background and facts pertaining to this matter as laid out in the Applicant's Affidavit in Support and as highlighted earlier in this Ruling, the Applicant has demonstrated that;

a) it claims no interest in the subject matter in dispute being the Secured Sums.
b) that there is no collusion between the Applicant and any of the Respondents.
c) that the Applicant is willing to pay the Secured Sums as the Court may direct.

The Applicant's counsel argued that the above criteria having been met as is required under **Order 34 rule 2**, the basis for the grant of the interpleader application has been made out.

The 2nd Respondent's counsel raised two contentions on this issue in the 2nd Respondent's Submissions in Reply. Firstly, it argued that applying for interpleader relief, the Applicant must, in addition to satisfying Court of the requirements under **Order 34** also satisfy that the requirements under **section 59** of the **CPA** have been met and principally prove that two or more persons are adversely claiming against one another, the same debt or money. Counsel for the 2nd Respondent argued that, given the independent nature of guarantees, the only beneficiary to the secured sums under the guarantees, in this case, is the

2nd Respondent, and under no circumstances can the 1st Respondent lay a claim or entitlement to the secured sums as the Applicant's undertaking under the Guarantees was not made to it but to the 2nd Respondent.

To this end, the 2nd Respondent argued that the 1st Respondent is not laying claim to the secured sums and further that the 1st Respondent does not dispute the fact that in March 2020 the 1st Respondent was paid the sums secured by the Guarantees as advance payment in the underlying contract and that it (the 1st Respondent) has had the benefit of the same sums for over 2 years. Thus, the 2nd Respondent argued, in these circumstances, there is no adverse claim to the secured sums by the 1st Respondent, and therefore no basis on which the Applicant brings the interpleader application.

As a second contention, the 2nd Respondent argued that the secured sums in this application are separate and independent from the claims being brought by the 1st Respondent in the main cause. To this end the 2nd Respondent relied on ***Standard Chartered Bank Uganda Limited v Gapco Uganda Limited and Anor HCMA No.0049 of 2007*** where the Court, in that case, held as follows;

> *"Section 59 of the Civil Procedure Act, requires an existing suit to be dealing with the same subject matter as the subject matter in the intended interpleader proceeding, so as to allow an applicant, to commence interpleader proceedings by way of notice of motion in the existing suit. Clearly, in my view, the subject of the head suit, and the subject matter of the interpleader proceeding sought to be initiated are clearly different subject matter, arising from different transactions between, the claimants herein and Gapco Tanzania Ltd.*
>
> *[...]*
>
> *As the subject matter of the interpleader proceeding is not the same as the subject matter of the existing head suit, interpleader proceedings cannot be commenced as the applicant has done. On this ground alone this application should fail. I dismiss the same with costs to claimant No.1."*

To this effect, the 2nd Respondent's counsel argued that HCMA No.95 of 2022 and Miscellaneous Cause No.03 of 2022 (out of which the Application for the Impugned Order arises) pertain to disputes between the 1st and 2nd Respondents, and all arise out of the underlying suit construction contract. And that since the subject matter of the instant proceedings is the sums secured under the guarantees i.e. **UGX 14,259,362,014** and **USD 12,413,382** which the 1st Respondent is not claiming in the HCMA No.095 of 2022 or Miscellaneous Cause No. 003 of 2022, there are no adverse claims to the money.

I shall start by addressing the 2nd Respondent's second contention before addressing the first.

I have perused through the pleadings in both HCMA No.094 of 2022 (the miscellaneous application) and Miscellaneous Cause No.003 of 2022 (the miscellaneous cause). As a starting point, in the miscellaneous application the 1st Respondent sought the following reliefs;

1. *A temporary injunction doth issue restraining the Respondent from terminating the Applicant's contract for Civil Works for the upgrading of Muyembe-Nakapiripirit Road (92 km) to Paved (Bituminous) Standard and Secondary link roads pending the hearing and determination of MC No.03 of 2022.*
2. *An interim order doth issue restraining the Respondent from enforcing, collecting or calling on the Advance Payment Guarantees and Performance Guarantees issued by DFCU Bank Limited and KCB Bank (U) Limited pending the hearing and determination of MC No.03 of 2022.*
3. *Costs of the Application be provided for.*

One of the grounds on which the 1st Respondent made its application in HCMA No.094 of 2022 was that *"2. The Applicant has been informed by its bankers DFCU Bank Limited that the Respondent has made a call on the Advance Payment Guarantee totalling UGX 14,259,362,014 and USD 12,413,382".*

From the foregoing, it is clear that the subject matter of the present application is the same as that claimed under HCMA No.094 of 2022 and HCMA No.95 of 2022 (which sought the interim remedy on primarily the same facts).

In the miscellaneous cause the Applicant (1st Respondent) is seeking the following remedies;

1. *An interim measure of protection doth issue restraining the Respondent from terminating the Applicant's Contract for Civil Works For the Upgrading of Muyembe-Nakapiripirit Road (92 km) to Paved (Bituminous) Standard and Secondary link roads pending the hearing and determination of the arbitration.*
2. *An interim measure of protection doth issue restraining the Payment Guarantees and Performance Guarantees issued by DFCU Bank Limited and KCB Bank (U) Limited pending the hearing and determination of the arbitration.*
3. *Costs of the application be provided for.*

One of the grounds on which the 1st Respondent instituted Miscellaneous Cause No.003 of 2022 is that *"3. The Applicant has been informed by its bankers DFCU Bank Limited that the Respondent has made a call on the Advance Payment Guarantee totalling UGX 14,259,362,014 and USD 12,413,382."* Which is precisely the subject matter of the present application.

Therefore, both the Miscellaneous Cause and the Miscellaneous Applications from which the present application emerges, make reference to the secured sum which are currently held by the Applicant. The Applicant brought the present interpleader application as a consequence of being served with the Court order in *HCMA No.095 of 2022* (the impugned order/ the ex parte interim order), which order itself also clearly refers to the secured sums making reference to the Advance Payment Guarantees and the Performance Guarantees that were issued by the Applicant and KCB Bank (U) Ltd. I, therefore, find that the 2nd Respondent's second contention is misconceived in so far as the amounts claimed in this application are clearly the subject matter of the earlier suits which are pending. Therefore the requirement under **section 59** of the CPA is fulfilled.

The 2nd Respondent's 1st contention is that the 1st Respondent has no adverse claim to the secured sums because it essentially has no legal basis to claim the secured sums and hence, it argues, this entire application is not properly brought as an interpleader proceeding.

In order to understand the basis of this contention, we need to consider the nature of guarantees and the rules that apply to them. As a starting point, the guarantees which are the subject matter of this application, are described as Advance Payment Guarantees. They are attached to the Applicant's Affidavit in Support at **annexures "A1"** and **"A2"** respectively.

An advance payment guarantee, also called an "advance payment bond" is a contract under which the issuer (Bank) undertakes to be responsible for the fulfillment of a contractual obligation owed by one person to another if the first person defaults on their contractual obligations. An advance payment guarantee may be on-demand (known as a demand guarantee) and subject to the performance of the person on whose behalf the guarantee is taken out (known as performance guarantees). In this case, we are dealing with advance payment guarantees where the issuer's obligation to pay arose out of the Beneficiary's complying demand. Both Guarantee Documents (**Annexures "A1"** and **"A2"**) express and state as follows;

"At the request of the Applicant, we as Guarantor, dfcu BANK LIMITED of P.O. Box 70, Kampala, Uganda having our registered office at Plot 26 Kyadondo Road, Nakasero hereby irrevocably undertake to pay the Benefidicary any sum or sums not exceeding in total an amount of [USD 12,413,382 (United States Dollars Twelve Million Four Hundred Thirteen Thousand Three Hundred Eighty Two Only)/ UGX 14,259,362,014 (Uganda Shillings Fourteen Billion Two Hundred Fifty Nine Million Three Hundred Sixty Two Thousand Fourteen Only)] upon receipt by us of the Beneficiary's complying demand stating either that the Applicant:

a) Has used the advance payment for purposes other than the costs of mobilization in respect of the works; or
b) Has failed to repay the advance payment in accordance with the Contract conditions specifying the amount which the Applicant has failed to repay.

A demand under this Guarantee may be presented as from the presentation to the Guarantor of a swift message from the Beneficiary's Bank stating that the advance payment referred to above has been credited to the Applicant on its account number 2291441280 at KCB Uganda Limited (Swift Code: KCBLUGKA)."

The implication of the foregoing is that the nature of these guarantees is that they are not only advance payment guarantees, they are also performance guarantees and on-demand guarantees. A "demand guarantee" is defined under **article 2** in URDG 758 to mean **"any signed undertaking, however named or described, providing for payment on presentation of a complying demand."** Demand guarantees are a kind of performance guarantee and a performance guarantee is a bond taken out by the contractor as the principal, usually with a bank or insurance company (in return for premium payment) as the guarantor, for the benefit of and at the request of the employer as the beneficiary. In our facts, the 1st Respondent is the principal who took out the demand guarantee from the Applicant (the guarantor) in favor of the 2nd Respondent as the beneficiary. Because the performance guarantee, in this case, is "on demand" it means that the beneficiary has the power to make a demand on the sums in the event of the contractor's (1st Respondent's) default, repudiation, or insolvency. The purpose of performance guarantees in the construction industry is to be an effective safeguard against non-performance, inadequate performance, or delayed performance and its production provides a security as readily available to be realized when the prescribed event occurs.

Patent's Law of Banking Twelfth Edition, at page 730 para 34.2 explains demand guarantees as follows;

> *"... The principle which underlines demand guarantees is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by the disputes under the underlying contract between the beneficiary and the principal. If the beneficiary makes an honest demand, it matters not whether as between himself and the principal he is entitled to payment. The guarantor must honor the demand, the principal must reimburse the guarantor (or counter-guarantor), and any disputes between the principal and the beneficiary, including any claim by the principal that the drawing was a breach of the contract between them, must be resolved in separate proceedings to which the bank will not be a party."*

The above extract makes reference to ***Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] QB 159*** where at page 171 Lord Denning MR adopted what Mr Justice Kerr (As he then was) said in ***RD Harbottle (Mercantile) Ltd v National Westminister Bank Ltd [1978] QB 146*** at pages 155 – 6 stating;

> *"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 possibly in clear cases of fraud of which 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 unconditional wording of the guarantees. The machinery and commitments of banks 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.*

This principle was followed by Hon. Justice Stephen Mubiru in ***AC Yafeng Construction Limited v The Registered Trustees of Living Word Assembly Church and United Bank of Africa Misc. Application No.0001 of 2021*** that;

> *"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 a*

performance guarantee is unconditional, and intended to be a 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 characterized 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 principle". A bank is not concerned in the least with the relations between the contractor and the employer nor with the question of 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 or fraud and of the bank's knowledge of that fraud (see Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 QB 159).

[...]

The maxim "pay first and argue later" best describes one of the key principles underlying demand guarantees (See Ward Petroleum Corp. v Federal Desposit Inc. Corp (1990) 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.

In light of the above authorities, two things are clear and apparent to me, the first is that the agreements concerning the Advance Payment Guarantee which the Applicant undertook to pay exist independent from the underlying contract between the 1st and 2nd Respondents. Therefore, any disputes that arise therefrom have no bearing on the guarantee agreements and the obligations undertaken by the Applicant thereunder. The second thing that is apparent to me is at the point at which a demand was made and was found to be a complying demand, the Applicant was under an obligation to pay up the secured sums as per the undertakings it made in the Advance Payment Guarantees. In normal circumstances, the 2nd Respondent's interests are more or less protected and secured from any competing demands, including those that may arise from the principal (in this case the 1st Respondent) under the underlying contract. This is of course provided that there has been no fraud or unconscionable conduct on the part of the 2nd Respondent which the Applicant has been made aware of.

Having said that, this case was unique in the sense that just before paying out the secured sums, the Applicant was served with a sealed Ex Parte Interim Court Order expressly preventing it from acting on the demands of the 2nd Respondent. The Order and its implications on the Applicant's conduct is clear and unambiguous because it states that it is *"restraining the Respondent from*

enforcing, collecting or calling on the Advance Payment Guarantees and Performance Guarantees issued to DFCU Bank Limited and KCB Bank (U) Limited pending the hearing and determination of MA No.094 of 2022". I, therefore, agree with the Applicant and 1st Respondent that, despite not being a party to the proceedings, the Applicant would have still been held liable for contempt of court for acting contrary to what is clearly provided in the Order. ***Semakula Haruna v Stanbic Bank (U) Ltd HCCS No.431 of 2009*** and ***Attorney General v Times Newspapers Ltd and another [1992] 2 All ER 398*** are two of several authorities on the point that a third party can be held liable for acts committed by itself in contravention of a court order/ direction despite not being a party to the proceedings from which that court order/ direction emerges.

I, therefore, find that the Applicant was correct in filing these pleadings, it was really the best recourse left to the Applicant to ensure, despite the 2nd Respondent having a valid claim to the secured sums, that it was not acting in contempt of a valid Court Order.

In my view whether or not the 2nd Respondent has a valid claim to the money does not necessarily alter the fact that the Applicant was justified in bringing this application. The "competing claims" in this case were not necessarily the claims to the secured money, but the fact that the 2nd Respondent had demanded the secured sums on the one hand and then the 1st Respondent had obtained a valid court Order intercepting the payment on the other hand. This clearly amounted to two competing interests which left the Applicant stuck between a rock and a hard place; having its contractual obligations to the 2nd Respondent on one side and its broader legal obligations to abide by a duly executed Court Order on the other. The Court Order was taken out by the 1st Respondent with the clear aim of temporarily preserving the status quo in the 1st Respondent's interests. So these facts, in my view, suffice to indicate two competing/ adverse claims which fulfill the necessary requirements for interpleader applications of this nature.

I shall address the validity of the 2nd Respondent's claim in the preceding issue as I resolve what course of action the Applicant ought to take in these circumstances, but as a preliminary point, I resolve this issue with a finding that this Application was properly brought before this court as an interpleader application given the circumstances in which the Applicant found itself.

Issue Two: ***Given the factual context of this application and taking into account a true and proper interpretation of the law, what is the lawful course of action for the Applicant to take in these circumstances?***

In addressing the Applicant's next course of action a preliminary issue I want to first address concerns the propriety of the timelines within which the Applicant operated upon receiving the demand letter on 19th January 2022. The 2nd Respondent sought to argue that the Applicant operated outside of the prescribed timeline of 5 days given under **Article 20** of the URDG 758, in her Affidavit in Reply, the 2nd Respondent's deponent contended that from 19th January 2022, when the Applicant received the 2nd Respondent's demand, the Applicant had five (5) business days following the demand to comply and that this meant that it had no later than close of business (COB) on 26th January 2022 to pay up the sums secured by the guarantee. The contention raised by the 2nd Respondent was that the Applicant had an obligation to **immediately** pay these sums without delay (paragraphs 11, 12, and 14 of the 2nd Respondent's Affidavit in Reply).

The Applicant's counsel responded to this contention arguing that the five (5) business days ended on 27th January 2022 within which the time to examine the demand lapsed, following its assessment and finding the demand to be a complying one, it was argued that the Applicant then had the 28th January 2022 to process and make the payment. Incidentally, the bank was then served with the Interim Order before it could complete processing and effecting this payment. Thus the Applicant's counsel argued, it is not the case that the Interim Order was issued after the obligation to pay crystalized because, he argues, both the obligation to pay and the Interim Order coincided.

Article 20 of URDG 758 provides;

> *"a. If a presentation of a demand does not indicate that it is to be completed later, the guarantor shall, within* ***five business days following the day of presentation****, examine that demand and determine if it is a complying demand. This period is not shortened or otherwise affected by the expiry of the guarantee on or after the date of presentation. However, if the presentation indicates that it is to be completed later, it need not be examined until it is completed.*
>
> *b. When the guarantor determines that a demand is complying it shall pay."*

As a starting point, the 5 day period is reserved for making an assessment on whether or not the demand is complying. It is not (necessarily) expressed as a

time period within which payment must be effected, only that upon the lapse of the 5 days, a decision should be made by the Bank on whether or not the demand is complying or alternatively, notice should be issued rejecting the Demand. In this case, the Applicant confirmed in **paragraph 5** of the Affidavit in Support that the Applicant conducted the examination within the stipulated time of five days and found the demand to be complying, thereafter the Applicant averred that, whilst it was still processing the payment it was served with the ex-parte interim order vide *Misc. Application No. 095 of 2022.*

In my view, the Applicant still acted within its obligations under **article 20** of URDG 758 to the extent that the examination/ assessment to determine the compliance of the 2nd Respondent's demand was completed by/ before 27th January 2022. In other words, by COB on the 26th January 2022, as I understand it, the assessment was completed and a determination had been made by the Applicant that the demand made by the 2nd Respondent was a complying demand. Thereafter URDG is not specific in exactly when payment is to be effected only that it shall be made. Under Article 20(b) it says that when the guarantor determines that a demand is complying **it shall pay**. The provision doesn't expressly state that this payment shall be immediate, that it shall occur on the same day following the completion of the assessment or provide, in distinct terms, a specific number of days within which this payment should be effected. Having said that, however, the implication of the provision read in the wider context of the article is that this payment is mandatory and should be directly effected. Oftentimes banking transactions may take one or two days to be processed before entering the account of the recipient. I, therefore, do not agree with the 2nd Respondent that the Applicant was in breach of its obligations as guarantor by not immediately paying out the money on/or by 27th January 2022. The practical realities are that it may have taken a couple of days for the payment to be processed and effected resulting in the interception by the Court Order on 28th January 2022 having the effect that it did, before the payment was completed.

Having addressed that preliminary point, I will now turn to the proper actions the Applicant ought to take in light of the facts and the law and various authorities I have already discussed concerning guarantees of this nature. I have already highlighted the nature of advance payment guarantees, performance guarantees, and demand guarantees under the first issue. Whilst the guarantees, in this case, are described as Advance Payment Guarantees, the guarantees also fall under the sub-categories of performance and demand guarantees in that, looking at the wording of the documents, they grant the 2nd Respondent the right to receive payment on making a demand following a

performance breach on the part of the 1st Respondent where the 1st Respondent either;

> *"a) has used the advance payment for purposes other than the costs of mobilization in respect of the Works; or*
>
> *b) has failed to repay the advance payment in accordance with the Contract conditions specifying the amount which the Applicant has failed to pay."*

From the foregoing, it is clear to me that the 2nd Respondent would be entitled to the secured sums which are currently held by the Applicant were either of the above conditions to be breached by the 1st Respondent. Looking at the law on advance payment guarantees, performance, and on-demand guarantees, we see that once a beneficiary establishes a valid claim to the secured sums, they are entitled to the same, save for situations of fraud, unconscionable conduct, or where they make an undertaking/ contract not to call upon the guarantee (see ***AC Yafeng Construction Ltd v The Registered Trustees of Living Word Assembly Church and United Bank of Africa (Supra)*** and ***Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] QB 159 (Supra)***).

Thus, what was necessary in this case, was for the 2nd Respondent to express a bona fide claim under either of the mentioned two conditions). Once the beneficiary asserted/ stated the basis of its claim, the Applicant was bound to pay up the sums demanded. The wording of the Guarantees is that the 2nd Respondent was only required to state that the 1st Respondent had breached either of the two conditions, there is no additional requirement of proof of the same provided, the actual wording in the Guarantees is that the Applicant may act *"upon receipt by us (the Applicant) of the Beneficiary's (the 2nd Respondent's) complying demand stating either that the Applicant [...]".*

The court in ***AC Yafeng Construction Ltd v The Registered Trustees of Living Word Assembly Church and United Bank of Africa (Supra)*** reached a similar conclusion and it was held, in that case, that the wording of the guarantee was clear and unambiguous and that the terms of the guarantee did 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. I am inclined to reach the same conclusion here. The 2nd Respondent had no obligation to prove the basis of its claim, only to state that a breach of either of the two conditions by the 1st Respondent had occurred. It was not the Bank's job/ obligation to then determine the basis or validity of the breach. Those are issues to be resolved by the 1st Respondent and 2nd Respondent independent of the Applicant through the Miscellaneous Cause.

In this case, the 2nd Respondent made its demands to the Applicant in a letter dated 18th January 2022 (**Annexure "B"** to the Affidavit in Support). In the said letter the 2nd Respondent's Executive Director, the Beneficiary's Statement stated the following;

> ***"Beneficiary's Statement***
>
> *The said guarantees are due to expire on 6th December 2022. The Contractor has used the Advance Payment for purposes other than the costs of mobilization in respect to the works. According to sub-clause 14.2 of the General Conditions of Contract, the Contractor is supposed to use the Advance Payment for mobilization and cash flow support.*
>
> *The Contractor has only mobilized 81 out of the required 143 units of equipment as per the Contract, whereas effective utilization of the equipment stands at 47%. Among the key equipment, not mobilized includes the concrete and asphalt batching plants. It should be noted that several equipments so far mobilized belong to the sub-contractors who usually demobilize the equipment without the Engineer's approval. Similarly, the Contractor failed to fully mobilize and equip the Engineer's laboratory.*
>
> *In addition, 20 months after commencement, the Contractor has still failed to mobilize a fully operational quarry. The Contractor has failed to mobilize key personnel such as the Structural Engineer, the Social Manager and the Health and Safety Officer.*
>
> *The inadequate mobilization and poor cash flows by the Contractor are an indicator that the Contractor has used the Advance Payment for purposes other than what it was meant for.*
>
> *Please find attached proof that the Contractor was paid advance payment by the funder, Islamic Development Bank.*
>
> *Please note that the Authority has not recovered any advance payment from the Contractor's payment certificates. This is therefore to demand that you immediately cash the unrecovered amounts of UGX 14,259,362,014 and USD 12,413,382 to the Islamic Development Fund account as detailed below [...]"*

From the foregoing letter, we see that the basis on which the demands were claimed by the 2nd Respondent under the terms of the Guarantee documents are made out in the letter; that being that the 1st Respondent had used the advance payment for purposes other than the costs of mobilization in respect of the works. This is one of the two conditions under which a demand can be made

under the Advance Payment Guarantees the 2nd Respondent entered into with the Applicant (see **Annexures "A1"** and **"A2"** to the Affidavit in Support).

On this basis, in light of the law and various authorities, which in my view are unambiguous, I am inclined to find that the Applicant is bound to pay the 2nd Respondent the amounts it is claiming under the Advance Payment Guarantees. That is the only legally valid course of action for the Applicant to take in my view in these circumstances.

Issue Three: What are the remedies available to the parties in these circumstances?

The court in ***AC Yafeng Construction Ltd v The Registered Trustees of Living Word Assembly Church and United Bank of Africa (Supra)*** vacated an interim injunctive order that had earlier been issued with Hon. Justice Stephen Mubiru holding at page 17;

> *"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 the funds it claims notwithstanding the 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 during a dispute between the parties."*

This Court is also within its inherent powers as granted under section 33 of the Judicature Act to vacate any earlier orders which were granted in this matter provided it is found, as has been done from the foregoing analysis, that it is just and equitable for those interim orders to be vacated in light of the facts and evidence presented in this matter.

Conclusion:

Thus, having resolved issues 1 and 2 as I have, I am inclined to follow the same line of reasoning and hereby order;

1. That the interim orders issued by this Court on 27th January 2022 and extended on 28th February 2022 restraining the 2nd Respondent from enforcing, collecting or calling on the Advance Payment Guarantees and Performance Guarantees issued to the Applicant and KCB Bank (U) Ltd are hereby set aside and vacated.
2. Consequently, I direct the Applicant to immediately execute the payments to the 2nd Respondent as earlier directed and pursuant to the demand letter dated 18th January 2022.
3. Each party shall bear its own costs.

I so order.

Jeanne Rwakakooko
JUDGE
12/04/2022

This Ruling was delivered on the 14th day of April, 2022 (via Email).