



THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL COURT DIVISION)  
Miscellaneous Cause No. 15 of 2022

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**ROKO CONSTRUCTION LTD:.....:APPLICANT**

**VERSUS**

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- 1. THE AGA KHAN UNIVERSITY**
- 2. ABSA BANK (U) LTD:.....:RESPONDENTS**

**BEFORE HON. JUSTICE RICHARD WEJULI WABWIRE**

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**RULING**

**INTRODUCTION**

The Applicant brought this Application by Chamber Summons under Section 6 of the Arbitration and Conciliation Act and Rule 13 of the Arbitration Rules, First Schedule to the Arbitration and Conciliation Act, Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act for orders that an interim measure of protection issues by way of a temporary injunction, restraining the 2<sup>nd</sup> Respondent from effecting payment to the 1<sup>st</sup> Respondent,

its agents, servants, assignees, employees or anyone deriving authority from  
25 it, from receiving payment or enforcing demands or encashment of the  
Performance Security No. 400/19 worth USD 88,637.90 issued by the  
2<sup>nd</sup> Respondent for the benefit of the 1<sup>st</sup> Respondent in relation to a Contract  
for the construction of a mockup building at Nakawa, pending final  
determination of the Arbitration proceedings commenced by the Applicant  
30 against the 1<sup>st</sup> Respondent under the Arbitration Contract and for costs of  
the Application to be provided for by the Respondents. The Application was  
supported by the Affidavit of Mark Koehler, the Applicant's director. The 1<sup>st</sup>  
Respondent filed an Affidavit in reply deposed by Anosh Elavia, the 1<sup>st</sup>  
Respondent's Project Manager.

#### 35 **REPRESENTATION**

At the hearing, the Applicant was represented by M/s Newmark Advocates  
while the 1<sup>st</sup> Respondent was represented by M/s ENSafrica Advocates.  
Both parties filed their written submissions.

#### 40 **SUBMISSIONS AND DETERMINATION.**

This Application is primarily made under **Section 6 of the Arbitration and  
Conciliation Act cap. 4** which provides that:

45 *"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".*

The conditions that have to be fulfilled in order for a court to grant an interim  
measure of protection were outlined in the case of **Pan-Afric Impex (U) Ltd  
vs Barclays Bank PLC and Absa Bank Ltd, MA No. 804/2007**, where  
Justice FMS Egonda-Ntende held that;



50 *“Firstly there must be an arbitration agreement between the parties. A*  
*party to such an agreement may then apply for such an interim*  
*measure before or after the commencement of arbitral proceedings. If*  
*the arbitral proceedings have commenced, the Applicant would have*  
*to be a party to these proceedings, and a party to the agreement giving*  
55 *rise to the arbitration proceedings.”*

In the case of **AC Yafeng Construction Limited v Registered Trustees of Living Word Assembly Church, MA No. 01/2021**, Justice Stephen Mubiru held that;

60 *“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 respect of which the Applicant demonstrates a sufficient likelihood of success;*
- 65 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 favored on a balance of convenience, i.e. the course of action that results in the lower risk of injustice if the*  
70 *decision to grant the injunction is incorrect...*
- d) *An injunction as an interim measure of protection is not to issue where the performance guarantee in question is an unconditional one...”*



75 Clause 20.6 of the Contract dated 28<sup>th</sup> May 2019, marked as Annexure A to  
the Affidavit in support provides that;

80 *'If a dispute arises between the parties in connection with or arising out  
of this Contract or breach thereof and upon which a written notice is  
issued by one party to the other, the Parties shall attempt to settle such  
dispute by discussions among their senior management. All disputes  
occurring during the course of the project and on which a mutually  
acceptable resolution was not reached shall not, demonstrably, be  
allowed by the Contractor to impede or hamper the progress of works  
which shall continue as per schedule and can only be referred to  
85 arbitration after the issue of the Taking Over Certificate by the  
Employer.*

90 *However, if the dispute is not settled amicably, within forty-two (42)  
Days of such written notice, (or such further period as the parties may  
agree) the same shall be settled by international arbitration without  
resorting to courts. The following points should be noted about the  
arbitration process;*

- a) *The dispute shall be finally settled under the Rules of Arbitration of  
the International Chamber of Commerce (Rules) and under its  
auspices,*
- 95 b) *The dispute shall be settled by three arbitrators appointed in  
accordance with the Rules...'*



According to the Applicant the dispute that arose between the parties stems from the 1<sup>st</sup> Respondent's act of applying to cash the performance guarantee.

100 The Applicant's Counsel submitted that pursuant to Clause 20.6 of the Contract dated 28<sup>th</sup> May 2019, after realizing that the acts of the 1<sup>st</sup> Respondent in applying to cash the guarantee were illegal, arbitrary, and fraudulent they decided to apply for arbitration.

Counsel submitted that the law is that a demand made according to the terms  
105 of the performance bond must be paid except in cases of fraud. (See; *National Housing & Construction Co. Ltd V Lion Assurance Co. Ltd, CS No. 239/2013*). Counsel contended that the 1<sup>st</sup> Respondent committed acts of fraud because according to the performance guarantee, the 1<sup>st</sup> Respondent's claim must bear the confirmation of the Beneficiary's bankers that the  
110 signatures thereon are authentic yet the claim herein does not bear such confirmation. That the Project Manager had connived with the 1<sup>st</sup> Respondent to deny the Applicant a certificate of completion of takeover yet the Applicant had completed the performance of the contract. That by addendums dated the 16<sup>th</sup> day of September 2020 and 8<sup>th</sup> December, 2021,  
115 the 1<sup>st</sup> Respondent took over payment of the suppliers & sub-contractors directly, which meant that the Applicant had no direct control over them regarding performance because timely performance was dependent on prompt payments by the 1<sup>st</sup> Respondent.

That in breach of the said addendums, the 1<sup>st</sup> Respondent failed to pay the  
120 suppliers and sub-contractors in time thereby delaying completion of the contract within time agreed and yet fraudulently shifted the blame to the



Applicant. That the 1<sup>st</sup> Respondent also refused to pay the Applicant for the work done under certificate 4 which delayed performance of the contract and yet shifted the blame on to the Applicant with an ulterior motive to cash the performance guarantee.

In reply, the 1<sup>st</sup> Respondent's Counsel submitted that the 2<sup>nd</sup> Respondent is duty bound to honor a call made on the Performance Security notwithstanding any dispute raised by the Applicant in any court or tribunal.

Counsel contented that 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 of the contractor's default, repudiation or insolvency.

The purpose of performance guarantees 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 realized when the prescribed event occurs.

There are two types of performance guarantees, namely, 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 contractor's default and subject to stated terms.

Paragraphs 2 and 3 of Annexure B to the Affidavit in support, which is the performance guarantee dated 7<sup>th</sup> June 2019 states that;



150 *'We Barclays Bank of Uganda Limited hereby undertake to pay the amounts payable under this guarantee unconditionally and irrevocably without any demur, merely on the first written demand from the employer. Any such demand made on the bank shall be conclusive as regards the amount payable by the bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding USD 88,637.90*

155 *We undertake to pay the employer the amount that is due under this guarantee not withstanding any dispute or disputes raised by the contractor in any suit or proceeding pending before any court or tribunal relating thereto...'*

160 Premised on the foregoing, the Performance Security in the instant case is characterized as an on-demand/unconditional guarantee. This indemnity structure allows the beneficiary to claim directly against the financial institution without first having to pursue the contractor or prove the contract's breach. 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

165 concerned. It only required a statement of default by the 1<sup>st</sup> Respondent without an indication of the nature of the default. Unconditional or On-demand performance guarantees constitute primary independent obligations placed on a guarantor to make payment of a guaranteed amount.

170 In this performance guarantee, the 2<sup>nd</sup> Respondent agreed to provide a performance guarantee of USD 88,637.90 payable to the 1<sup>st</sup> Respondent on demand.





In paragraph 8 of the guarantee it was agreed that the guarantee is valid up to February 2021 or the issuance of the certificate of final completion unless expressly extended in writing by the 2<sup>nd</sup> Respondent. Paragraph 9 states that  
175 any claim must bear the confirmation of the beneficiary's bankers that the signatures thereon are authentic.

Fraud is the only exception where a demand made according to the terms of the performance bond may not be paid. Indeed Annexure B to the supplementary Affidavit in support which is the 1<sup>st</sup> Respondent's claim does  
180 not bear the confirmation of the Beneficiary's bankers that the signatures thereon are authentic as stipulated under Paragraph 9 of the performance guarantee.

The Supreme Court, in the case of **Fredrick Zaabwe vs. Orient Bank & O'rs SCCA No. 04 of 2006**, relying on Black's Law Dictionary 6<sup>th</sup> Edition at  
185 page 660, defined fraud to mean the intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right. That it is a false representation of a matter or fact whether by words or by conduct, by false or misleading allegations or concealment of that which  
190 deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury.

In **Kampala Bottlers Ltd v Damanico (U) Ltd, Civil Appeal No. 22/1992**, Court stated that the general principle of law is that fraud must be proved strictly and the burden of proof is more than on a balance of probabilities  
195 generally applied in civil matters. Based on the established parameters for categorization of an act as a fraud, I do not find lack of confirmation by the Beneficiary's bankers that the signatures on the 1<sup>st</sup> Respondent's claim are





authentic, to meet the parameters that would categorize that omission as a fraud. It could only possibly amount to a breach of contract, which in any case can be dealt with in the arbitral proceedings but would not hamper encashment of unconditional guarantees.

The allegations of fraud to be the basis upon which the application to have the guarantee cashed and as a underpinning the omission by the 2<sup>nd</sup> Respondent to pronounce themselves on the authenticity of the signatures raised as the subject of the dispute are not sufficiently proved to raise a serious question to be arbitrated.

On whether there is an imminent risk of irreparable loss that cannot be compensated by an award of damages, the Applicant's Counsel submitted that if the 2<sup>nd</sup> Respondent cashes the Performance Security to the 1<sup>st</sup> Respondent, the Applicant's account will be depleted thereby exposing it to countless suits by the service providers, employees, sub-contractors and that its reputation will be destroyed beyond repair and that they will have been condemned unheard. He further submitted that if the 2<sup>nd</sup> Respondent cashes the Performance Security to the 1<sup>st</sup> Respondent, Court will be allowing illegal enrichment yet the Applicant has fully completed the work. That if court denies the Applicant the temporary injunction, the damage caused shall be unbearable and cannot be atoned for in damages. That once the said sum is cashed, it shall be hard for the Applicant to recover from the 1<sup>st</sup> Respondent because it is not resident in Uganda and has no known assets in Uganda where the Applicant can recover the money if paid.

In reply, the Respondent' Counsel submitted that the Applicant is a reputable entity undertaking the development of a hospital with capacity to pay damages awarded against it and whatever alleged breach that may arise is based on breach of contract that can be compensated in damages if at all



225 the arbitrator finds the Applicant in breach of the contract.

In the case of **E.L.T Kiyimba-Kaggwa v Hajji Katende Abdu Nasser [1985] HCB 43**, court defined irreparable injury to mean that the injury must be a substantial or material one, that is, one that cannot adequately be compensated for in damages.

230 In AC Yafeng construction (supra), which was rightly cited by the Respondent, Justice Mubiru stated that the only condition precedent for calling on a demand guarantee is a written notice to the guarantor and that an interim measure of protection will be issued if the Applicant shows that the performance bond in issue is a conditional one, the employer is  
235 attempting to call on the performance guarantee beyond the circumstances in which a call is permitted or the employer's call is founded on a claim that is specious, fanciful or untenable. That an injunction should not be granted lightly because it would put the beneficiary in precisely the same position it sought to avoid, that it can be paid first and talk later. He held that damages  
240 are an adequate remedy since the Applicant's claim in the prospective arbitration was for breach of contract.

Paragraph 8 of the guarantee stipulates that the guarantee is valid up to February 2021 or the issuance of the certificate of final completion unless expressly extended in writing by the 2<sup>nd</sup> Respondent. According to Annexure  
245 C to the Affidavit in support, on 19<sup>th</sup> February 2021 and 28<sup>th</sup> May 2021, the performance guarantee was extended from 10<sup>th</sup> February 2021 to 30<sup>th</sup> July 2022 respectively.

This being an unconditional performance guarantee, the guarantor's obligation herein is to make payment of the guaranteed amount once the  
250 beneficiary makes a demand with a bona fide claim of a breach of contract.





According to paragraph 3 of Annexure H to the Affidavit in support, the 1<sup>st</sup> Respondent made the demand to the 2<sup>nd</sup> Respondent stating as follows;

255 *'We, the employer hereby notify the bank by declaring in writing that the contractor has failed in performing its obligations under the contract by not completing the works by the completion date as stipulated under the contract despite various extensions granted by the employer from time to time.'*

260 Upon issuance of this letter to the 2<sup>nd</sup> Respondent, the Applicant applied to this court for an interim order which was granted for three days and later extended until hearing and completion of the main cause which is the instant one. According to the above case, the only condition precedent for calling on a demand guarantee is a written notice to the guarantor which was done on 25<sup>th</sup> April 2022 as highlighted above. In my view, if the Applicant was 265 determined to fulfil the contract, an extension of the guarantee by more than a year was sufficient time for them to do so.

270 There is no plausible reason proffered why the 1<sup>st</sup> Respondent should be barred, any further, from accessing their guarantee. The 1<sup>st</sup> Respondent cannot be denied their entitlement simply because the Applicant will allegedly face a risk of countless suits and its reputation will be destroyed. This is speculative. None the less, in the event of a breach of contract, the successful party would be entitled to damages and additionally, there are well established procedures for recovering from non-residents. It is my finding therefore that the Applicant can be compensated in damages if 275 breach by the 1<sup>st</sup> Respondent is established.

According to the case of E.L.T Kiyimba-Kaggwa v Hajji Katende Abdu Nasser (supra) the balance of convenience is considered where the court is



in doubt. However, in the instant case, the Applicant has not been able to prove that it will suffer irreparable injury. The fact that the Applicant was given many opportunities to complete the contract but did not do so serves to discount any facet of a prima facie case with a probability of success.

An unconditional performance guarantee does not require any proof of default. The beneficiary will generally receive payment of the full amount upon presentation of a written statement to the issuer stating that the contractor has failed to perform. The only condition precedent for calling on a demand guarantee is a written notice to the guarantor which was done as indicated in Annexure H to the Affidavit in support, on 25<sup>th</sup> April 2022 when the 1<sup>st</sup> Respondent made a written demand to the 2<sup>nd</sup> Respondent citing breach of contract by the Applicant who has, to date not completed, way past the time stipulated in the contract.

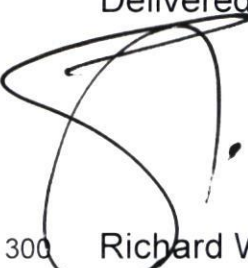
This tilts the balance of convenience in the 1<sup>st</sup> Respondent's favor.

The Respondent is at liberty to make a call on the security, which the 2<sup>nd</sup> Respondent is duty bound honor.

The Application is accordingly dismissed with costs and the Interim measure of protection issued on 13<sup>th</sup> May 2022 is hereby set aside.

I so order.

Delivered at Kampala this 28<sup>th</sup> day of July 2022.



Richard Wejuli Wabwire

**JUDGE**



