



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 83 OF 2018

BETWEEN

GABRIEL TEO KIAN CHONG.....1ST APPELLANT

TANA RIVER LIFE FOUNDATION.....2ND APPELLANT

AND

SECURITY PRODUCTS LIMITED.....RESPONDENT

(Appeal from the ruling and order of the of the High Court of Kenya

at Malindi (Chitembwe, J.) delivered on 16th May 2018

in

Malindi H.C.C.C. No. 5 of 2014)

JUDGEMENT OF THE COURT

The appellants, Gabriel Teo Kian Chong and Tana River Life Foundation, are dissatisfied with the decision of the High Court which ordered the release to the respondent, Security Products Limited security bonds that were guaranteed by African Banking Corporation Limited (the ABC Bank) as security for the construction works the respondent was to carry out.

As a brief background to the dispute from what we can discern from the record (the main pleadings, that is, the plaint and the defence were not included), the 1st appellant entered into a contract with the respondent for the construction of a multi storied classroom building block for the 2nd appellant at Idsowe, Tana Delta, Tana River County (*the Contract*). It was a requirement of the contract that the respondent provide security bonds in favour of the 2nd appellant against an advance payment guarantee of Kshs. 8,276,843 and a performance bond of Kshs. 2,069,211 (*the security bonds*). ABC Bank issued the two security bonds in accordance with the parties' agreement.

In a sudden turn of events, the Contract between the respondent and the 2nd appellant was terminated on 11th June 2013 which gave rise to this suit between the respondent and the appellants. On 17th June 2014, that suit was withdrawn by consent between the parties on the following terms;

“1.THAT the suit herein be marked as withdrawn with costs to the Defendants, as will be taxed by the Deputy Registrar.

2.THAT works already done upto determination of the contract be assessed by an independent Quantity Surveyor and proper valuation to be done on Bill of Quantity rates and all amounts owing to the Plaintiff or the Defendant be settled accordingly”.

Soon thereafter, on 17th June 2013, the appellants wrote to ABC Bank demanding release of the security bonds for reasons that the suit had been withdrawn with costs. It would appear that no response was received from ABC Bank and on 2nd July 2013, both the appellants again demanded release of the security bonds, this time for reasons that the respondent had failed to repay the advance payment in accordance with the conditions of the Contract, and further that the guarantee was due to expire on 9th July 2013, and they had not been notified whether it

would be extended.

When no response from ABC Bank was forthcoming, the appellants filed an application in respect of the consent judgment seeking inter alia, orders for security bonds held by the ABC Bank in the sum of Kshs. 7,831,002 together with interest to be released to the 2nd appellant. The grounds of the application were that the suit was terminated on 17th June 2014; that the 2nd appellant had demanded payment of the security bonds but to no avail, and that there was no legitimate or lawful reason for refusal by ABC Bank to release the security bonds.

The respondent's reply in an affidavit and a further affidavit sworn by Mohamed Shahid Mougale on 29th October 2014 and 28th October 2015 respectively, was that the contract was terminated when the 2nd appellant blocked the road to the construction, and stopped it from carrying on with the work; that the 2nd appellant had since engaged another contractor without finalizing with the respondent. It was further deposed that the bonds were intended to provide security in the event either party defaulted in payment or failed to perform any part of the contract; that in this case the 2nd appellant was yet to settle the respondent's pending payments, render final accounts, and close the project; that furthermore, the appellants were only entitled to uplift the security bonds once it was proved that the respondent had performed all the works and paid all outstanding bills.

In a ruling delivered on 19th April 2016 the learned judge dismissed the application and opined that it would be imprudent to release the security bonds to the appellant. The court however ordered that in terms of the consent order withdrawing the suit, the parties appoint an independent surveyor to assess the works within 45 days, and in the event no agreement was reached, then each party would be at liberty to file separate valuation reports.

It would seem that the initial ruling of 19th September, 2016 did not settle the dispute, and by another ruling delivered on 16th May, 2018, the learned judge again dismissed the application but this time, ordered that the security bonds be released to the respondent. In so doing, the court concluded that it was only logical to release the security bonds to the respondent, as there was evidence to show that it had partly performed the contract by the time it was terminated, and that since the appellants were in possession of the construction site, they were adequately secured.

It is this decision that aggrieved the appellants and provoked this appeal which was premised on the grounds to wit, that the learned judge wrongly ordered the security bonds held by ABC Bank to be released to the respondent; that the learned judge was wrong in holding that the respondent had performed part of the contract, and directing that the respondent be paid yet it had not requested for any payment; and that in the totality of the decision the learned judge had misdirected himself.

Both **Ms. Okumu** learned counsel for the appellant and **Mr. Obaga** holding brief for Mr. Lughanje for the respondent filed written submissions.

The appellants' submitted that the security bonds were obtained to ensure that the respondent performed the works under the Contract, and that following the termination of the Contract, the respondent's obligations also came to an end, but that where a liability existed, this would continue until such time as the parties' obligations were performed or the guarantee was revoked. In this case, it was argued, the appellants had revoked the guarantee by their letter of 2nd July 2013, and with no contract to bind the parties to each other, what was left was for the security bonds to be released to the appellants.

In addition, the appellants argued, that the learned judge was wrong in finding that the respondent had performed part of the Contract, and further misdirected himself in ordering that the respondent be paid for that part of the Contract that had been performed, since this was not a matter that was before the court, and no demand for payment had been made. The appellants went on to fault the High Court for ordering the release of the security bonds held by ABC Bank to the respondent, despite the bond terms specifying that they ought to have been released to the appellants on demand, and also for holding that the issue concerning the release of the securities could be dealt with in the main suit, yet the suit in question was effectively determined when the parties entered into the consent on 17/6/2014 withdrawing the suit.

In response the respondent's submission was that it was a condition of the consent that upon withdrawal of the suit, the parties would assess the works done and settle payments due to the parties; that therefore, the release of the bonds was premature. With regard to the assertion that the learned judge misdirected himself in finding that the respondent had performed its part of the contract, the respondent referred to the Conditions of Contract to show that it was the appellants' obligation to value the work performed by the respondent; that in addition, since the consent order specified that the appellants value the works and pay the respondent for the works undertaken, having found that the respondent had carried out the works, the court was right in finding that the security bond should be released to the respondent.

We have considered the pleadings the submissions and the law, and the central question for our consideration is whether the learned judge properly exercised his discretion to order the release of the security bonds to the respondent. In determining the issue before us, we are guided by the principles succinctly explained by Newbold, (P) in the case of ***Mbogo & Another vs Shah [1968] EA 93***, when he rendered himself thus;

“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

Bearing the foregoing in mind, was the learned judge right in ordering the release of the security bonds to the respondent? In reaching that decision the learned judge had this to say;

“Given the dispute herein, and while appreciating that there is another suit pending in court, I do find that the securities held by

ABC Banking Corporation ought not to be released to the defendants. The parties agree that the plaintiff did some work. Photographs of all that was done are part of the record. The dispute herein only involves the release of the security and not how much is payable to either party. That aspect of the dispute will be determined in a full hearing in the other matter.”

After observing that the appellants owed the respondent various amounts under the contract, the learned judge went on to find;

“I do find that since the security bonds were placed in favour of the plaintiff and the project manager advised against the termination, it is only logical that the security bonds be released to the plaintiff.”

We will begin by observing that what was before the trial court was a post judgment application seeking release of security bonds. The application was brought after a consent was entered between the parties, and the suit withdrawn. Consequently, any orders sought thereafter would have required to be in accordance with the terms of the parties’ consent.

That said, the consent order directed *inter alia*, “*THAT works already done upto determination of the contract be assessed by an independent Quantity Surveyor and proper valuation to be done on Bill of Quantity rates and all amounts owing to the Plaintiff or the Defendant be settled accordingly*”. Pursuant to the consent order, in his first ruling, the learned judge ordered the parties to submit valuations of the works. Presumably, the valuations were submitted, though they were not included in the record before us. In the second ruling the learned judge found that the respondent had indeed undertaken the works, and on this basis, the court ordered the release of the security bonds to them.

Nevertheless, the consent order was clear. A valuation was to be undertaken by an independent Quantity Surveyor in accordance with the rates specified by the Bill of Quantity, and amounts owing to the parties if any, to be settled. It was not a term of the consent that the security bonds be released to either of the parties. The consent order limited the court’s jurisdiction to determining whether the order for valuation of the works was complied with and if not, the court would make such orders as would ensure compliance. Therefore, to the extent that the learned judge ordered the release of the security bonds, when this was not specified as a term of the consent, the learned judge went well beyond the Court’s stipulated mandate.

We would add that, it should not be overlooked that the terms of the security bonds, including the manner of release were spelt out in a separate arrangement between the appellant, the respondent and the ABC Bank. As to whether or not the terms of release were fulfilled was not a matter that was before the trial court, or indeed before this Court. This being the case, no basis was established by which the learned judge could order their release. By so doing, the learned judge misdirected himself, by taking into account matters that he ought not to have considered, and as a consequence, we find that we must interfere with that decision.

Accordingly, we allow the appeal, and set aside the ruling and orders made by the High Court on 16th July 2018. We order the respondent to bear the costs of the appeal.

It is so ordered.

Dated and delivered at Mombasa this 11th day of October, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR