Sichuan Huashi Enterprises Corporation East Africa Limited v Landbank Real Estate Investment Trust Limited (Civil Suit 381 of 2015) [2021] KEHC 89 (KLR) (Commercial and Tax) (5 October 2021) (Judgment)

Neutral citation number: [2021] KEHC 89 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 381 OF 2015

JM MATIVO, J

OCTOBER 5, 2021

BETWEEN

SICHUAN HUASHI ENTERPRISES CORPORATION EAST AFRICA LIMITED ..... PLAINTIFF

AND

LANDBANK REAL ESTATE INVESTMENT TRUST LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiff's case against the defendant as enumerated in its Amended Plaint dated 12th May 2021 is that on or about June 2015 the defendant invited bids for the construction of a boundary wall and a guard house on its property L.R. No. 8529/1. It avers that it submitted its Bid-on 29th June 2015 and Bid Bond Number 201020115846 issued by Standard Chartered Bank Limited (herein after referred to as the Bank) on 9th July 2015. Also, it avers that the Tender Award was conditional on the signing of a contract to be sent alongside the notification of the award.

2. It is common ground that vide a Notification Award dated 17th July 2015 the defendant notified the Plaintiff that its bid was responsive and the construction cost of Kshs.750,924,649.99 was accepted. There is no dispute that the Notification of the Award clearly provided that the award was "subject to contract" which was to be drafted. Additionally, it was subject to the Plaintiffs unequivocal acceptance of the offer.

3. The Plaintiff's disputation is that the notification of the award introduced new terms, namely that the contract would be provided in due course contrary to the tender terms which provided that the award would be in accordance with the terms of the contract

annexed to the Tender. Further, the Plaintiff states that it sought clarification on various items set out in the letter of 17th July 2015, among them, regarding payments, that the contract document that would govern the construction, the duration of the contract, the suitability and acceptance of a performance bond as opposed to a bank guarantee. The Plaintiff contends that the aforesaid request for clarification amounted to a counter offer as opposed to an unequivocal acceptance of the terms of the offer.

4. The Plaintiff also avers that the defendant failed to respond its letter of 21st July 2015, but on 27th July 2015 via an e-mail the defendant stated that the request for the issuance of a performance bond from an insurance company had been rejected. It avers that on 29th July 2015, the defendant annulled the award and called upon the on the Bank to honor the terms of the Bid Bond on account of the Plaintiff's forfeiture of its Bid Bond by failing to furnish a Performance Bond. The Plaintiff contends as at 17th July 2015 no contract had been entered into with the defendant and the defendant was in breach of the terms of its own tender and could not call upon the Bank to pay the sums secured by the bid bond or at all.

5. Alternatively and or on without prejudice to the foregoing, the Plaintiff states that the defendant is estopped from claiming forfeiture of the Bid Bond having itself failed to award the tender in compliance with its own tender documents. It states that it is apprehensive that the defendant will wrongfully, irregularly and/or illegally call upon and has already demanded that the sum of Kshs.15,018,493.00 guaranteed by Bid Bond to be paid to it and the Plaintiff will have no means of recovering the said sums from the defendant. Further, the Plaintiff states that the defendant has by its letter dated 29th July 2015 wrongfully demanded that Bank immediately transfer the said sum by RTGS to account number 0100xxxxxxxx in its name held at CFC Stanbic Bank Limited Upper Hill Medical Centre Branch. As a consequence of the foregoing, the Plaintiff prays for the following reliefs: -

    a. A declaration that the defendant is not entitled call upon and/ or receive the Kshs.15,018,493.00 secured by and/or guaranteed by Bid Bond Number 201020115846 issued by the Standard Chartered Bank Kenya Limited.

    b. A permanent injunction barring the Defendant and/or its agents and or representatives from calling upon and/or receiving from the Standard Chartered Bank Kenya Limited the sums Kshs. 15,018,493.00 secured by and/or guaranteed by Bid Bond Number 201020115846.

    c. Costs of this suit.

    d. Any other relief which this Court may deem just and/or expedient.

6. The defendant in its written statement of defense dated 24th September 2015 denied the Plaintiffs claim. It averred that the Plaintiffs bid constituted an offer which was accepted by the defendant on 17th July 2015 culminating in the award. It avers that the award

constituted a valid and independent contract contrary to the Plaintiffs assertions which heralded execution of the construction contract and the contract form was accordingly furnished to the Plaintiff alongside other tender documents whose terms and conditions the Plaintiff agreed to. Without prejudice to the foregoing, the defendant contends that pursuant of clause 28 of the Instructions to Tenderers, the Plaintiff was required to execute and return the contract form within 10 days of receipt thereof and furnish a performance bond, which it failed.

7. Further, the defendant avers that the award was subject to contract and the contract form supplied to the Plaintiff was to be returned duly executed within 10 days of receipt thereof. The defendant avers that the Plaintiff failed to furnish to the defendant with copies of its statutory licenses, proof of insurance against injury to persons and property and the performance bond/security which were to constitute the construction contract as defined by the General Conditions of Contract in the tender documents, thus hindering the preparation of the construction contract.

8. Also, the defendant avers that it accepted the Plaintiff's bid and notified the Plaintiff of the award which the Plaintiff confirmed, but the Plaintiff sought to fundamentally alter the terms of the contract which amounted to a counter offer. It states that a valid contract was entered into between the parties on 17th July 2015 secured by the Bid Bond from the Plaintiffs Bank but the Plaintiff renegaded on the terms and conditions and frustrated the formation of the contract necessitating the annulment of the award by the defendant and forfeiture of the bid bond. Also, the defendant states that it has a legitimate right under the guarantee by the Bank for unconditional payment of Kshs. 15,018,493/= upon demand and that the Plaintiff is not privy to the guarantee. Further, the defendant states that the Plaint does not demonstrate a reasonable cause of action against the defendant to merit a trial. Additionally, it states that the suit is speculative, misconceived, incompetent and a nonstarter.

9. At the hearing, the Plaintiff called 2 witnesses. PW1, Mr. Wang Jianzhong, its Managing Director. He adopted his Witness Statement dated 3rd August 2015. His evidence is essentially a replication of the averments in the Plaint; so, it will serve no utilitarian value to rehash the same here. Upon cross-examination, he maintained that the Plaintiff did not sign the contract nor did he sign the performance bond, hence, no contract was entered into. He however testified that he submitted the tender together with a tender security and his bid was accepted. Upon further cross-examination, he maintained that a contract must be signed before providing insurance against injury to persons and property. He also maintained that the contract was never signed despite being issued with the award.

10. Upon being referred to page 67 of the Plaintiff's documents, he admitted that the document appearing therein was a contract form and that it was among the tender documents. He stated that the Notification of the Award provided that the contract was being prepared. He also confirmed signing the award. He also stated that he did not provide the defendant with the statutory licenses. He admitted that the Plaintiff did no provide security documents to the defendant nor did the Plaintiff return a signed contract to the defendant. Further, he admitted that they agreed to abide by the tender and that the

document provided that until the agreement is signed, the document remains binding. He denied that the Plaintiff breached the terms.

11. On further cross-examination, he stated that the Plaintiff's proposal at page 308 of the defendant's documents was a counter offer which was declined. He also stated that he understood that any variations to tender documents was to be done in accordance with the tender documents. He admitted the existence of a clause granting the defendant discretion to change the contract. Upon being referred to pages 309 to 310 of the documents, he answered that he did not understand that the tender documents at paragraph 17 was to lead to a final contract. He however conceded that the tender documents is part of the contract and that the tender did not provide for variations. On re-examination he stated that the Notification letter was written subject to contract and that no contract accompanied the letter of offer.

12. PW2, Mr. Zheng Cao the Plaintiff's Managing Director since 2017 adopted his supplementary Witness Statement dated 1st September 2020. His evidence is that on 2nd October 2015 this court granted conditional injunctive relief wherein the Plaintiff was directed to furnish an undertaking as to damages and deposit the sum of Kshs. 15,018,493 in a Joint Interest Earning Account. He testified that the Plaintiffs Undertaking as to Damages appears on pages 143 to 144 the Plaintiffs Supplementary Bundle of Documents and the consent by the parties Advocates extending the timelines for opening a Joint Interest Earning Account appears on page 145 of the Plaintiffs Supplementary Bundle of Documents. Additionally, he testified that the Plaintiff incurred a sum of over Kshs.34 million as follows: - (a) Kshs.15,018,493/= which was deposited in a Joint Interest Earning Account in the names of both parties advocates currently standing at Kshs.19,966,536.35; (b) Kshs. 15,018,493/= still being held by Standard Chartered Bank Kenya Limited and is the subject of the orders of this Court of 2nd October 2015.

13. On cross-examination, he stated that the contract at page 69 was not signed and that since he was not the in charge then, he was unable to confirm whether the contract was provided for signing.

14. On its part, the defendant called Mr. Kenneth A. Amolo, a director/shareholder and the chairman of the defendant. He adopted his Sworn Witness Statement dated 18th August 2020 filed in court on 20th August 2020. His evidence was that sometimes in June 2015, the defendant invited sealed tenders from contractors registered under category D for the construction of a boundary wall and guard house on plot number L.R No. 8529/1, Kamulu, Nairobi, Machakos County, described as tender No. LBG/ MKAM/BW-05-2015. He stated that the tender document comprised of invitation for instruction to tenderers; general conditions of contract, special conditions of contract, appendix to conditions of contract, employer's requirements, technical specifications, bill of quantities, drawings, standard tender (form of tender), tender security form, contract form, performance security form, qualification information, and confidential business questionnaire. He stated that the aforesaid invitation was open to all tenderers eligible as described in the tender documents. Further, he stated that the invitation for

tenders provided that tenders must be accompanied by security as specified in the tender documents.

15. Also, he stated that though the tenders were to be submitted on or before July 2015, the defendant reserved the discretion to extend the deadline submission of tenders and subsequently, the defendant changed the date of submission to 14th July 2015 at the request of tenderers. He stated that the instructions to tenderers in the tender document preceded the forms, conditions, specifications and other requirements for apposite understanding by tenderers of their eligibility, obligations and risks involved. He testified that the tender provided that a prospective tenderer requiring any clarification of the tender document may notify the defendant of any requests for such clarification; and the defendant undertook to respond to such requests which it received, not later 5 days prior to the deadline for the submission of tenders. He stated that the tenderers were also required to complete the Form of Tender and the appropriate Bill of Quantities furnished in the tender documents, indicating the services to be performed.

16. He testified that it was compulsory for the tenderers to furnish a tender security equivalent to 2% of the bid amount, in form of a bank guarantee or a bank draft issued by a reputable bank in Kenya or abroad in the form provided in the tender documents or another form acceptable to the defendant, and an unsecured bid would be rejected by the defendant as non-responsive.

17. Mr. Omolo testified that the tender security would be discharged or returned as promptly as possible but not later than 30 days upon the expiration of the of tender validity prescribed by the defendant, if the tenderer was unsuccessful; or, upon the successful tenderer signing the contract and furnishing the performance security. Also, he testified that the tender security would be forfeited if a tenderer withdraws its tender during the period of tender validity specified by the defendant on the Tender Form; or in the case of a successful tenderer, if the tenderer fails: -to sign the contract in accordance with paragraph 28; or to furnish performance security in accordance with paragraph 29.

18. He testified that the tender was to remain valid for 90 days or as specified in the tender documents, and, the defendant reserved the discretion to extend the deadline for submission and opening of tenders. He also testified thatunder Clause 17.1 of the tender document, the tenderer had opportunity to modify or withdraw its tender after the tender submission, provided that written notice of the modification, including substitution or withdrawal of the tenders, is received by the defendant prior to the deadline prescribed for submission of tenders. He also stated that section B of the Instructions to Tenderers expressly prohibited modification of tenders after the deadline for submission of tenders. Further, he stated that the tender opening date and time was fixed on the date of submission of the bids and that the tenders were to be evaluated on the basis of their responsiveness to eligibility of mandatory requirements; and that the lowest evaluated responsive tender would be qualified to perform the contract.

19. Mr. Omolo testified that prior to the expiration of the period of tender validity, the defendant was to notify the successful tenderer in writing that its tender had been accepted; and the notification of award would constitute the formation of the contract

as provided in clause 27.1 and 27.2, and at the time of the Notification of the Award, as per clause 28.1, the defendant was to send to the successful tenderer the contract form provided in the tender documents incorporating all agreements between the parties. It was his testimony that pursuant to Clause 28.2 of the Tender Document, the successful tenderer was required to sign, date and return the contract form to the defendant within 10 days of receipt thereof. Further, he testified that under Clause 29.1 and Section C, clauses 6.1 and 6.3 of the Tender Document, the successful tenderer was to furnish performance security bond from a reputable bank located in Kenya or abroad, or in another form acceptable to the defendant within 10 days of receipt of notification of the award. In addition, he stated that the tender provided for a performance period of 9 months from the commencement date as defined and or prescribed in the letter of award.

20. Additionally, Mr. Omolo testified that the tender provided for a defect liability of 12 months and also it provided that the defendant reserved the right to extend the completion date and or performance period. He also stated that the Plaintiff completed the Bill of Quantities quoting a sum of Kshs. 750,924,649.99 and undertook to interalia abide by the tender until 2nd October 2015 and that the tender shall remain binding unless and until a formal agreement is prepared and executed. Further, he testified that on 13th July 2015, the Plaintiff submitted its bid in duplicate together with its profile and the Bid Bond to the defendant which complied with the specifications in the Tender document and the defendant accepted the Plaintiff's bid and notified the Plaintiff of the award who accepted it subject to contract.

21. He testified that the defendant extended the period for completion of works from the initial 9 months to 42 weeks in exercise of its discretion under the tender documents. In addition, he stated that a Principal term of the tender contract was the irrevocability of the bid and the corollary term was the obligation to both parties to enter into the construction contract upon the acceptance of the tender. Further, he stated at the time of the Notification of the Award, the defendant returned the duplicate tender documents containing the contract forms for the Plaintiff to sign the same.

22. Additionally, Mr. Omolo stated that upon notification of the award, the defendant required the Plaintiff to submit copies of its statutory licenses, detailed curriculum vitae, proof of insurance against injury to persons and property and the performance bond in accordance with section B of the Instructions to Bidders all of which was to constitute the construction contract. He testified that on 22nd July 2015, the Plaintiff returned unsigned and undated contract form together with requests for variations to the tender contract and also failed to furnish the defendant with proof of insurance against injury to persons and property as required under section D of the Bid Documents.

23. He stated that the said section obligated the Plaintiff to furnish the defendant with a performance security from a reputable bank located in Kenya or abroad within 10 days of receipt of notification of award which the Plaintiff refused to provide. As a consequence, the defendant called upon the defendant to enter into a construction contract in the manner provided in the tender document but the contract did not come into being owing to the Plaintiff failure to execute the contract forms submitted to it or provide proof of

insurance and failure to furnish the performance security as required. He also stated that the Plaintiff hindered the signing of the contract contrary to the tender document.

24. Further, the defendant stated that the Plaintiff irregularly and belatedly requested variations to the contract including alteration of payment of the balance of contract amounts, alteration of the defect liability period from 12 months to 6 months; alteration of the already extended agreed performance period of 42 weeks to 15 weeks and issuance of a performance bond by an insurance company instead of a reputable bank. He stated that through the said modifications, the Plaintiff sought to fundamentally vary the terms and conditions of its tender contract but the defendant rejected the said proposals. Additionally, he stated that in willful breach of the contract, the Plaintiff neither signed nor dated the contract form as required but instead returned it to the defendant on 22nd July 2015 unsigned and undated together with the aforesaid proposals on variations to the tender and also failed to furnish proof of insurance as required in breach of the terms. He stated that the Plaintiffs allegations that notification of award was not in accordance with the terms of the tender is untrue.

25. He testified that the Bid Bonddated 9th July 2015 furnished by the Plaintiff provides that it is subject to the Uniform Rules for Demand Guarantee, ICC Publication No. 758, which constitutes a valid contract between the defendant the bank to pay Kshs. 15,018,493/= which the Plaintiff is not privy to. He stated that the bid bond was designed to ensure the Plaintiff performs its obligations under the contract. As a consequence, the defendant invoked Section B, Instructions to Tenderers: Clause 29.2 of the tender document and annulled the award on 29th July 2015 leading to the Plaintiff's forfeiture of the tender security.

26. He testified that the defendant subsequently claimed security for the tender in the sum of Kshs. 15,018,493/= from the Bank by way of the demand dated 29th July 2015. Further, he stated that the Plaintiff also brought to the Plaintiffs attention the above defaults and consequential annulment of the tender and forfeiture of the bid bond by the Plaintiff to the attention of the Bank. He stated that the defendant returned the original bond to the bank for enforcement. He testified that the said sums have not been paid due to the temporary injunction issued on 2nd October 2015 injuncting the defendant from illegally and irregularly receiving any payment from the Bank in respect of the bond. He testified that the defendant has a legitimate right under the guarantee and that the bank signified willingness to honour the guarantee and that the Plaintiff should not be permitted to unjustly interfere with the banks irrevocable obligation to pay. He also testified that in absence of fraud in the formation of the tender contract, the court cannot intervene. Lastly, that the integrity of the bidding system must be protected.

Plaintiff's advocates submissions

27. The Plaintiff's counsel submitted that there was no contract in existence between the parties because the Notification of Award of Tender was done on a "Subject to Contract" basis contrary to Clauses 27.1,27.2 and 28.1 of the Contract. He submitted that because the defendant failed to furnish the contract contemporaneously with the Notification of Award, the defendant cannot not call upon the Bank honor the performance bond. He

argued that the defendants attempt to clarify the discrepancies amounts to re-writing the contract contrary to the rule in *National Bank v Pipeplastic Samkolit*[1] which held that the courts do not rewrite contracts.

28. Counsel submitted that the use of the term "Subject to Contract" means that no contract is in existence. He cited *East Africa Fine Spinner (In Receivership) & 3 Others v Bedi Investments* which held that "subject to contract" negatives the existence of any binding contract. He also cited Lord Westbury LC in *Chinnock v The Marchioness* which held that there is no agreement independent of the stipulation “Subject to Contract” which is dependent upon a formal contract being prepared. Also, counsel cited *Keppel v Wheeler & Another*[2] which held that where a person accepts an offer “subject to contract,” it is means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged.

29. Further, counsel cited *Chitty on Contract* and *Bennett Walden & co. v wood*[3] both of which held that no contract is in existence if the terms "Subject to Contract" are used. Additionally, counsel drew the courts attention to Lord Evershed’s statement in the said case that an offer “subject to contract” lacks that essential characteristic, for its acceptance does not create a contract. Fortified by these authorities, counsel submitted that no contract was in existence between the parties and therefore the defendant could not call upon the Bank to honor the Bond. He submitted that the defendant was in breach of its own conditions by failing to furnish the contract contemporaneously with the Award. Consequently, counsel argued that the defendant is estopped from invoking the Tender terms since it breached the same. Accordingly, he submitted that the defendant had not entered into any contract with the Plaintiff. He submitted that the defendant is bound by its own contract/ Tender as well as the terms set out in its letter of notification of the award of Tender which clearly established the non-existence of a binding legal contract. He submitted that the defendant cannot be allowed to resile from the clear position set out in its own Tender documents and/or its letter of Notification of Award of Tender.

30. Counsel singled out the defendant's letter of 17th July 2015 which refers to 14 days as opposed to the 10 days provided in Clause 28.2 of the Tender and argued that any ambiguity in the Tender Document ought to be construed in the Plaintiffs favour because the tender emanated from the defendant. Further, he submitted that the Plaintiffs letter of 21st July 2015 was a counter-offer and for that reason no contract was concluded between the parties. He cited *Butler Machine Tool Co. Ltd v Ex-cell-O corp (England) Ltd*[4] in which Lord Denning held that a letter by a purchaser of a machine rejecting the

1 {2001} KLR 112.

2 {1927} 1 KB 577.

3 {1950} 2 All ER 134.

4 {1979} 1 WLR 401 at p.405.

price escalation clause by the vendor was a counter-offer and that documents ought to be construed as whole. He submitted that there is no contract to be enforced in this case.

31. Counsel submitted that having established that there was no contract in existence between the parties, the defendant cannot be allowed to call the enforce the bid bond. He argued that the defendant has no legitimate right to the said sums having itself failed to comply with the terms of its own Tender and in particular Clauses 27.2 and 28.1, 2.

32. Without prejudice to the foregoing, counsel submitted that Clause 29.2 of the Tender gave the defendant the discretion to accept a Performance Bond from an entity other than a Bank. He argued that the defendants right to call on the Bid Bond had not crystallized as there was no contract in existence. He argued that the documents defined a contract as an agreement entered into between Landbank and the Tenderer as recorded in the "contract Form" signed by the Parties. As a consequence, he argued that it is fraudulent for the defendant to call upon the defendant to honor the bid bond. He argued that clause 29.2 which provides for forfeiture indicates that it was meant to unjustly enrich the defendant. He cited *Dunlop Pneumatic Tyre Company Limited v New Garage Motor Company Ltd*[5] which held inter alia that the court must find out whether the payment stipulated is in truth a penalty or liquidated damages.

33. Counsel also cited *Chase International Investment Corporation and Another v Laxman Keshra and Others*[6] which held that "… the principle of unjust enrichment presupposes three things: (1) that the defendant has been enriched by the receipt of a benefit; (2) that he has been so enriched at the expense of the Plaintiff; and (3) that it would be unjust to allow him to retain the benefit…. " He argued that in the circumstances of this case, the defendant's calling up of the bid bond would amount to unjust enrichment and urged the court to allow the Plaintiff's case.

The defendant's advocates submissions

34. The defendant's counsel submitted that by completing the tender form, the Plaintiff undertook to abide by the tender because the tender provided that it shall remain binding on the Plaintiff unless and until a formal agreement is prepared and executed. He argued that the Plaintiff undertook to commence and complete the works within the stipulated time. Counsel submitted that its bid together with its profile and the Bid Bond complied with specifications on the Tender Security Form and that a contract arose automatically upon the submission of the tender. He cited *Eldo City Limited v Corn Products Kenya Limited and Another*[7] and submitted that there was no error or mistake on the face of the tender; and the tender was neither withdrawn nor revoked.

35. Counsel argued that on 17th July 2015, the defendant accepted the Plaintiffs bid and notified the Plaintiff of the award and the Plaintiff acknowledged receipt and contract

5 {1915} AC 79.

6 {1978} KLR 143

7 {1981} 1 S.C.R. 111.

came into being. He argued that a call for tenders is an invitation to treat and the tender constitutes an offer. He argued that the Notification of the award was subject to contract and submitted that the parties intended to create legal relations and the parties agreed on all terms essential to form a contract. He submitted that the presence or absence of the phrase “subject to contract” will not of itself determine whether or not a contract exists. He cited *Eldo City Limited v Corn Products Kenya Limited and Another*[8] and submitted that the tender documents/contract provide that the notification of award will constitute the formation of the contract, thereby signifying the parties' intention.

36. He also argued that the Plaintiff has not provided plausible explanation for refusing to sign the contract within 10 days as required. He also submitted that the principal term of the tender contract was the irrevocability of the bid, and the corollary term was the obligation in both parties to enter into the construction contract upon the acceptance of the tender. (Citing *R. (Ont.) v. Ron Engineering*[9]).

37. Counsel submitted that the defendant has a legitimate right under the guarantee to claim and receive payment of Kshs.15,018,492/= as a result of the Plaintiffs defaults since it is a binding agreement/undertaking by the bank. Further, in the absence of fraud in the formation of the tender contract, clearly established and of which the bank had/ has notice, the court cannot intervene and/or interfere as sought; and the bank must be allowed to honor its absolute obligation under . the guarantee to pay the defendant upon demand.

Determination

38. Two key issues fall for determination in this case. One is the significance of the label “subject to contract” deployed by the defendant in its notification of award issued to the Plaintiff. The other issue is whether in the circumstances of this case, the defendant can call upon the Bank to honor the performance bid bond.

39. Regarding the first issue, the question whether two persons intend to enter into a legally binding contract is, of course, to be determined objectively. But the context is all-important.[10] In this case the most important feature of the context is the use of the phrase "subject to contract." It is fairly well established that to prevent the creation of legal relations parties use the term ‘subject to contract’ or a similar variation. The expression indicates that the parties are still negotiating and have not yet entered into a contract. The phrase "subject to contract" is a well-known phrase in ordinary legal parlance. Statements of its effect are legion. I give a few examples.

40. In *Evans v Trebuchet Design Ltd*, the facts were that Peter Evans created a free annual yacht guide alleged that Trebuchet had infringed his copyright when it re-coloured his artworks after taking responsibility for designing the guide following Mr Evans’

8 {2013} e KLR.

9 {1981} 1 S.C.R. 111.

10 *Edmonds v Lawson*{2000} QB 501.

retirement. Trebuchet sent Mr Evans a letter marked ‘Without Prejudice Save as to Costs’ in which it offered to pay him £3,000 in full and final settlement of his claim. Mr Evans emailed to accept the offer and sent an invoice for the £3,000. The following month Trebuchet sent Mr. Evans a standard form settlement agreement which included additional terms, notably a confidentiality clause that Mr Evans refused to sign. Mr Evans subsequently pursued his claim but lost when the court held that as Trebuchet’s initial offer was not marked ‘subject to contract’ it was an offer capable of acceptance it its own right which Mr Evans had accepted with his email and thereby concluded a binding settlement agreement.

41. In *Joanne Properties Ltd v Moneything Capital Ltd and another*, a month after the above decision the English Court of Appeal was asked to rule on the enforceability of another settlement agreement, this time one that had been negotiated with some correspondence marked ‘subject to contract.’ After it had fallen into arrears on a loan from Moneything, Joanne applied to set aside the loan agreement as well as a charge it had given over a property to secure the loan. Terms to settle that claim were agreed and provided for the property to be sold, but issues arose over whether the parties had reached a further agreement as to how the proceeds of sale would be distributed. The ‘subject to contract’ label was used during protracted negotiations, but the High Court found that a binding contract was nonetheless made. Joanne appealed and the Court of Appeal found that the High Court had “seriously undervalued’ the impact of the ‘subject to contract’ wording on the negotiations. Lord Justice Lewison (author of a leading textbook on interpreting contracts) gave the appeal court’s judgment and highlighted one of his previous decisions in which he held that ‘subject to contract’ meant that: -

    a. neither party intends to be bound either in law or in equity unless and until a formal contract is made; and

    b. that each party reserves the right to withdraw until such time as a binding contract is made.

42. The learned judge placed emphasis on two important points that the judge at first instance had not been referred to. First, once negotiations have begun on a ‘subject to contract’basis, that condition is “carried all the way through negotiations”, and secondly, that “the parties could get rid of the qualification of 'subject to contract' only if they both expressly agreed that it should be expunged or if such an agreement was to be necessarily implied”. As correspondence had been marked ‘subject to contract’ and there had been no agreement to ‘get rid’ of that basis for negotiations, the court allowed the appeal and held that no agreement about the distribution of the sale’s proceeds had been made and neither party was bound by the positions they had put forward in their negotiations.

43. In *Tiverton Estates Ltd v Wearwell*[11] Lord Denning MR said:

> “It is everyday practice for a solicitor, who is instructed in a sale of land, to start the correspondence with a letter "subject to contract" setting out the terms or enclosing

[11] {1975} Ch 146, 159.

a draft. He does it in the confidence that it protects his client. It means that the client is not bound by what [12]has taken place in conversation. The reason is that, for over a hundred years, the courts have held that the effect of the words "subject to contract" is that the matter remains in negotiation until a formal contract is executed."

44. In *Generator Developments Ltd v Lidl UK GmbH*[13] after considering a number of authorities, the court put it this way: -

45. As Lord Denning MR explained: "But there is this overwhelming point: Everything in the opening letter was "subject to contract." All the subsequent negotiations were subject to that overriding initial condition."[14] However, in the course of the judgments both Lord Denning MR and Templeman LJ approved the proposition formulated by Brightman J in Tevanan v Norman Brett (Builders) Ltd that: "parties could get rid of the qualification 'subject to contract' only if they both expressly agreed that it should be expunged or if such an agreement was to be necessarily implied." Templeman LJ also approved a further passage of Brightman J's judgment in which he said: -

46. Templeman LJ went on to say:

> "Accordingly, in my judgment, the judge, with great respect, fell into the error which was adumbrated by Brightman J, namely of thinking that because parties got near a contract or conveyance, because parties assumed that they would go happily on until matters had become binding, therefore the "subject to contract" qualification either ceased to have effect or was replaced by a new contract. That, in my judgment, is not the position. It is always the case that in "subject to contract" negotiations one side or both from time to time speak as though there was a contract or would be a contract, and that is because everybody looks on the bright side and thinks a sale is going to

[12] {1972} 223 EG 1945.

[13] {2018} EWCA Civ 396 {2018} 2 P & CR 7.

> "The meaning of that phrase is well-known. What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) that each party reserves the right to withdraw until such time as a binding contract is made."

[14] *Sherbrooke v Dipple* (1981) 41 P & CR 173.

> "… when parties started their negotiations under the umbrella of the "subject to contract" formula, or some similar expression of intention, it was really hopeless for one side or the other to say that a contract came into existence because the parties became of one mind notwithstanding that no formal contracts had been exchanged. Where formal contracts were exchanged, it was true that the parties were inevitably of one mind at the moment before the exchange was made. But they were only of one mind on the footing that all the terms and conditions of the sale and purchase had been settled between them, and even then, the original intention still remained intact that there should be no formal contract in existence until the written contracts had been exchanged."

take place. The fact of the matter is that for very good reasons the "subject to contract" formula enables one to see at once whether there is or is not a contract—either a contract exchanged or conveyance executed and delivered —or whether parties are in the negotiation stage. Once one gets away from principle, then all is difficulty, and reliance on odd conversations and letters produces uncertainty in law."

47. The court in the above case reaffirmed that approach in *Cohen v Nessdale Ltd*[15] which held that once negotiations are begun 'subject to contract,' that label governs all subsequent communications between the parties unless the label is expunged by express agreement or by necessary implication. The court cited Sherbrooke v Dipple[16] which held that parties can get rid of the qualification 'subject to contract' only if either they both expressly agree that it should be expunged or if such an agreement can be necessarily implied. In RTS Flexible Systems Ltd it was held that on the particular facts of that case the equivalent of a "subject to contract" clause had indeed been waived; not least because the putative contract had been partly performed. But in terms of the general approach, Lord Clarke said at [47]:

48. He added at [56]: Whether in such a case the parties agreed to enter into a binding contract, waiving reliance on the "subject to [written] contract" term or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold." In *Jirehouse Capital v Beller*[17] Peter Smith J held that the "subject to contract" formula had been lifted by necessary implication. In so holding he applied the principle in Cohen v Nessdale. This decision is simply an application of the principle to particular facts.

49. The "subject to contract" label should be used with caution, and parties should be careful to ensure that where it has been used, during any stage of negotiations, a formal contract is reached before the agreement is to be taken as binding. For this case, the most important feature of the context is the use of the phrase "subject to contract." The phrase "subject to contract" is a well-known one: The meaning of that phrase is well-known. What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) that each party reserves the right to withdraw until such time as a binding contract is made.

15 {1982} 2 All ER 97.

16 (1980) 41 P and CR 173.

> " We agree … that, in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances."

17 {2009} EWHC 2538 (Ch).

50. Usually, once negotiations have begun “subject to contract,” this condition is carried all the way through. This condition can be removed only if parties either expressly agree to “expunge” the condition or if such an agreement is to be “necessarily implied. Even if the parties had become of one mind on the terms of the contract, the “original intention still remains intact that there should be no formal contract in existence until the written contracts had been exchanged and this issue is quite separate from whether the agreement reached between the parties is an incomplete agreement. For the above propositions, see Joanne Properties v Moneything supra.

51. What is emerging from the above discussion is that the term ‘subject to contract,’ should not be overlooked in any contract negotiations or where it appears during the negotiations. The term is used to show that a party does not intend to enter into an agreement at that point but will do so in a separate, signed, document and protects a party from being bound by terms until its ready to do so when all of a deal’s terms have been agreed. The significance of these three words has been highlighted in the above cited decisions. Unfortunately, “Subject to Contract” is not a guarantee that a party will not find itself in a legally binding contract. In commercial contracts, it is a question of fact whether a contract has been created. If the evidence fulfils the requirements of a contract, regardless of whether the terms are contained in emails, heads of terms, memoranda of understanding etc, a party may find that you have a created a contract inadvertently.

52. Whilst the term “Subject to Contract” might help in showing the intent of the parties, any documents exchanged or signed which are not intended to be legally binding should explicitly state such. When subject to contract is added to a letter, email, or another form of communication it is stating that the communication isn't legally binding until it is agreed to by all parties. From the above cited jurisprudence, the key takeaways are that, when negotiating a settlement:

    a. Parties should ensure that any document which is not intended to be legally binding is clearly labelled or titled ‘subject to contract.’

    b. Conversely, if a document or parts of it are intended to be legally binding, then this should be made clear in the body of the document (and the ‘subject to contract’ label should not be used as a label or title). The parties should also state explicitly that the ‘subject to contract’ negotiations have come to an end, if that is their intention.

    c. This label is used where parties do not wish to become contractually bound until formal documentation is completed. The words “subject to contract” is used on documents exchanged by parties during contract negotiations. These words denote that the document is not an offer or acceptance and negotiations are still going on. The expression “without prejudice” is also used in place of “subject to contract.”

d. An agreement which is made "subject to contract" is generally unenforceable. The words normally negate any contractual intention, so that the parties are not bound until formal contracts are exchanged. However, the label 'subject to contract' isn't a complete magic bullet, but not using it may be asking for trouble. In *Global Asset Capital, Inc v Aabar Block S.A.R. L*[18] the reiterated the well-established principle that, when deciding whether a contract has been made during negotiations, the court will look at the whole course of those negotiations. Focusing on part of the communications in isolation could give the misleading impression that the parties had reached an agreement when in fact they had not.

53. I now apply the above authorities to the facts of this case. The Notification of Award was clearly labelled "Subject to Contract" clearly signifying that their intention was that the contract will only come into existence upon signing a formal contract. Also, its common ground that the Plaintiff sought clarification of several issues. However, the defendant took the view that the issues raised amounted to a counter-offer which was a rejection of the award. The defendants view cannot be taken lightly. It simply means that Plaintiff did not accept the award. The implication is that no contract came into being because the letter of award was clearly marked "subject to contract" which was never signed.

54. The other issue is whether the defendant can lawfully call upon the bank to honor the performance guarantee. For starters, issuance of a Bank guarantee amounts to an offer, which must be accepted by the beneficiary. It is common ground that the offer is generally accepted tacitly which acceptance is afterward evidenced by the call from the beneficiary. Thus, by virtue of the issuance of the guarantee by the bank and the tacit acceptance of the beneficiary (the beneficiary's acceptance can be deemed to exist when he does not object), the bank and the beneficiary are contractually bound and they can no longer change or amend the terms of the guarantee.

55. Now that defendant never rejected the guarantee does the absence of a signed contract between the parties herein affect the guarantee. Did a relationship lawfully come into existence between the defendant and the Bank such that it can be said that the Bank can be described as the principal debtor in the guarantee between the Bank and the defendant. A direct bank guarantee gives rise to three distinct contracts: The underlying contract between the debtor and the creditor; the counter-indemnity (or reimbursement contract) between the debtor and his bank; and finally, the contract established between the debtor's bank and the creditor. However, it should be noted that these three contracts although related are completely independent.

[18] {2017} EWCA Civ 37.

56. As was appreciated by the Supreme Court of India in *Mahatma Gandhi Sahakra Sakkare Karkhane v National Heavy Engg. Co-op. Ltd*.,[19] the language deployed in a guarantee becomes important if we consider that usually a plain reading of the provisions of a standard unconditional bank guarantee reflects that the guarantor undertakes to pay without demur which makes the demand conclusive and binding. Some bank guarantees make the beneficiary a sole judge in regard to invocation and enforcement of bank guarantee, which leaves the decision of invocation to the absolute discretion of that beneficiary.[20]

57. It is permissible for a court to determine, in context, whether compliance with the intention and purpose of the on-demand guarantee is sufficient. Accordingly, parties should seek to phrase mode of delivery clauses carefully in order to ensure that they are prescriptive in nature and that a failure to comply with the mode of delivery clause would result in an invalid demand. The Supreme Court of Appeal of South Africa in *Schoeman & Others (Schoemans) v Lombard Insurance Co Ltd* was tasked with considering the correct interpretation of the mode of delivery clause contained in an on-demand guarantee and whether delivery to the guarantor (albeit not in the manner prescribed) is sufficient and constitutes a valid demand. The court held that when interpreting a document, regard must be had to the context by reading the provisions in light of the document as a whole and the circumstances which surrounded the document coming into existence. The court further noted that a sensible (business-like) meaning should be preferred to one which is not sensible and which undermines the apparent purpose of the document.

58. Talking about the language used in the guarantee, guidance can be obtained from the Supreme Court of India decision in *U.P. Co-op. Federation Ltd. v Singh Consultants and Engineers (P) Ltd*.[21] Here, the obligation was undertaken by the Bank to repay the amount on "first demand" and "without contestation, demur or protest and without reference to such party and without questioning the legal relationship between the party in whose favour guarantee was given and the party on whose behalf guarantee was given." The Supreme Court held that the Bank was obligated to pay the moment a demand was made without protest and contestation, irrespective of any dispute between the parties.

59. Whereas the above decision(s) offer the accurate reading of the law, I am alive to the fact that in light of the stringent law governing Bank Guarantees, there are only two narrow exceptions where a guarantee can be challenged. One is in the event of fraud of an egregious nature as to vitiate the entire underlying transaction, of which the bank has notice. The only exception to the rule that the guarantor is bound to pay without demur, is where fraud on the part of the beneficiary has been established. The party alleging fraud

[19] (2007) 6 SCC 470.

[20] Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Co-op. Ltd**.,** (2007) 6 SCC 470.

[21] (2006) 13 SCC 599

has to establish it clearly on a balance of probabilities.[22] Lord Denning MR in *Edward Owen Engineering Ltd v Barclays Bank International Ltd*[23] where he said: -

60. The second exception relates to special equities in the form of averting irreversible wrong between the parties. This second exception relates to the cases where in allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. The harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature that it would override the terms of the guarantee and the adverse effect of declining to accept such a guarantee. A guarantee which was furnished as part of fulfilling requirements for a tender which was clearly labelled "subject to contract" must be read and construed in the peculiar context and circumstances in which it was procured. The guarantee cannot in the circumstances of this case stand unless and until the contemplated contract comes into existence. The guarantee having been furnished as security for due performance of the contract, it cannot be enforced unless the contract it sought to secure comes into existence followed by default by the person providing the security. Here is a case where the tender documents in clear terms deployed the nomenclature "subject to contract." The contract was never signed. The Plaintiff sought some clarifications before a formal agreement was signed. In the defendants' own words, the information sought amounted to a counter offer which is a rejection to the original offer. The circumstances of this case are such that if the guarantee was to be enforced, it would cause irretrievable harm to the Plaintiff because the Bank is being called upon to honor a guarantee yet the contract upon which the guarantee was provided as security had not come into existence. It would be an affront to justice if the court were to allow the encashment of the guarantee in such circumstances. The facts of this case fall within the second exception discussed above.

61. In conclusion, it is my finding that the Plaintiff has established its case to the required standard. Accordingly, I allow the Plaintiff's claim and issue the following orders: -

    a. A declaration be and is hereby issued that the defendant is not entitled call upon and/or receive the Kshs.15,018,493.00 secured by and/or guaranteed by Bid Bond Number 201020115846 issued by the Standard Chartered Bank Kenya Limited.

[22] *See* The Supreme Court of Appeal stated in *State Bank of India and another v Denel Soc Limited {*2015} 2 All SA 152 (SCA).

[23] [1978] QB 159 (CA) [19trievable harm or injustice78] 1 All ER 976; (1977 3 WLR 764) at 983 B-D.

> " A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice."

b. A permanent injunction be and is hereby issued barring the defendant and/or its agents and or representatives from calling upon and/or receiving from the Standard Chartered Bank Kenya Limited the sums Kshs. 15,018,493.00 secured by and/or guaranteed by Bid Bond Number 201020115846.

c. Each party shall bear its own costs.

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 5TH DAY OF OCTOBER 2021

JOHN M. MATIVO

JUDGE