

**IN THE HIGH COURT OF SIERRA LEONE**  
**(COMMERCIAL AND ADMIRALTY DIVISION)**  
**FAST TRACK COMMERCIAL COURT**

BETWEEN:

ASSOCIATES BUILDERS CIVIL CONSTRUCTOR      - PLAINTIFF/RESPONDENT  
& DEVELOPERS

AND

KEC INTERNATIONAL LTD & ANOTHER      - DEFENDANTS

**RULING DELIVERED BY THE HON. JUSTICE M.P. MAMI J.A**  
**DATED THE 11<sup>TH</sup> DAY OF MAY, 2023.**

COUNSEL

A.S. Bah Esq.  
T. Kellie Esq.  
I.S. Mansaray Esq.

- for the Plaintiff/Respondent  
- for the 1<sup>st</sup> Defendant/Respondent  
- for the 2<sup>nd</sup> Defendant/Applicant

Before this court is an application by notice of motion dated 28<sup>th</sup> day of October, 2022 filed by Messrs. Yada Williams & Associates, solicitors for the 2<sup>nd</sup> Defendant praying for the following orders:

1. That the claim against the 2<sup>nd</sup> defendant in these actions be dismissed, and or struck out on the following grounds:
  - That the plaintiff's do not have a cause of action against the 2<sup>nd</sup> defendant there being no legal or factual basis upon which the 2<sup>nd</sup> defendant was made a party.
  - That the action against the 2<sup>nd</sup> defendant is frivolous, malicious and vexatious and an abuse of the process of the court.
2. That all further proceedings emanating from the action or connected thereto be stayed pending the hearing and determination of this application.
3. Any other or further orders that this Honourable court deems fit and just in the circumstances
4. At the cost of this application be borne by the plaintiff in these actions jointly and severally.

The application is supported by the affidavit of Druscilla Coker a banker of No.3 Charlotte street, Freetown in the Western Area of the Republic of Sierra Leone with the following exhibits:

Exhibit "A" – A copy of the writ of summons

Exhibit "B" – Copies of the memorandum & Notice of appearance]

Exhibit "C" – A Copy of the agreement

Exhibit "D" – A copy of the Board Resolution

Exhibit "E" – A copy of the letter to the 2<sup>nd</sup> defendant requesting from the 2<sup>nd</sup> defendant an advance payment guarantee

Exhibit "F" – A copy of the said commitment letter

Exhibits "G&H" – Copies of the letter of request for extension of the APG and the commitment letter approving same

Exhibit "J" – A copy of the said letter

Exhibit "K" – A copy of the letter of notification`

Exhibit "L" – A copy of a letter

Exhibit "M" – A copy of a letter

## Exhibit "N" – A copy of a letter

Mr. Mansaray counsel for the 2<sup>nd</sup> defendant/applicant referred to the affidavit of Mr. J. Jalloh sworn to the 7<sup>th</sup> day of November, 2022 to which there is only one (1) exhibit attached thereto "O" which is the Advance Payment Guarantee.

He relies on the content of both affidavits specifically paragraph 2 to 21 of the affidavit of Druscilla Coker sworn to on the 28<sup>th</sup> of October, 2022 and submit thus:

- That it is trite law that an "on demand guarantee" imposes an inescapable legal obligation on the guarantor to make payment when demand is made in accordance with the Terms and Conditions of the guarantee
- That it is immaterial whether there is an underlying principal or contract in, this case a contention between the plaintiff and the 1<sup>st</sup> defendant that the reason for this is that the "APG" is an autonomous independent and separate contract from the principal contract.
- That the position of the law is well settled in, that it is "unconditional"
- He refers to the case of *UTB V. Goal Sierra Leone & Sierra Wifi Ltd* (FTCC 034/15) judgement delivered on the 29<sup>th</sup> of May, 2015.
- He also refers to *Paget Law on Banking 10<sup>th</sup> Edn.* Under the Rubric "Performance Bond" page 653.
- He submit (replying on Law Geoffrey's dicta) that by exhibit "O" which is the APG, that it was agreed upon by the parties, that the guarantee is an "on demand guarantee" to be paid on first written demand; He refers to the 2<sup>nd</sup> paragraph of the said exhibit "O"
- He also refers the court to exhibit "J" which is a letter written by, the 1<sup>st</sup> defendant/beneficiary demanding payment of the said guarantee.
- He submit that by exhibit "J", the beneficiary is calling on the bond to be paid to them.
- That payment were made in accordance with the terms stated in the "APG" (Exhibit "F")
- He also referred to exhibit "F" which is a special condition for the utilisation of the "APG"
- He refers to what constitute "default" and submit that it does not matter whether there is a dispute between the plaintiff and the 1<sup>st</sup> defendant.
- That what is crucial is whether the 2<sup>nd</sup> defendant complied with the terms and conditions of the "APG"
- This he said is all the reason why in the reliefs they are requesting from this court, which is that, this action is frivolous, vexatious and that the plaintiff has

not established any case of action or traverse any facts, that have a factual or legal basis to bring in the 2<sup>nd</sup> defendant.

- He referred to exhibit "A" which is the Writ of Summons, that because there was a dispute, the 1<sup>st</sup> defendant ought not to have been paid
  - He submit that in exhibit "A" they have alleged fraud.
  - That the invoice submitted for payment was not prepared by them.
  - He refers to the entirety of the APG and its terms and that there is no portion where it is says payment to the defendant was dependents on the provision of invoice to pay the 1<sup>st</sup> defendant.
  - He submit that the terms of the APG are clear and therefore it states that payment is dependents on the provision of an invoice.
  - He also refers to exhibit "N" dated 25<sup>th</sup> August, 2021. That the 2<sup>nd</sup> defendant set out the terms and conditions of the APG.
  - He further submit that there is no cause of action against the 2<sup>nd</sup> defendant, and further refers to what constitute cause of action, and for this he refers to Supreme Court Decision in the matter intituled **S/C CIV.6&7 2018 SYLVIA BLYDEN V. CHIEF ELECTORAL COMMISSION & OTHERS - SAMURA KAMARA & OTHERS M.N. ALI CONTEH & OTHERS**
  - He refers to exhibit "A" and submit that the cumulative effect of the facts traversed therein point to one (1) direction, that 2<sup>nd</sup> defendant has no business in this proceedings.  
That they merely complied with the terms of the APG, and conclude that the action is frivolous, and vexatious and an abuse of the process of this court.
- That the application is made pursuant to Order 31 Rule 17(1) paragraph B (1)

In reply Mr. Bah counsel for the plaintiff refers to the affidavit in opposition filed dated 16<sup>th</sup> November, 2022 with the following exhibits attached thereto

Exhibit "ASB1" - A photostat copy of the said writ of summons

Exhibit "ASB2" - A photostat copy of the said memorandum & notice of appearance for and on behalf of the 2<sup>nd</sup> defendant

Exhibit "ASB3" - A photostat copy of the said notice of motion

Exhibit "ASB4" A photostat copy of the said order

Exhibit "ASB5" - A photostat copy of the said agreement

Exhibit "ASB6" - A copy of the letter of demand dated 13<sup>th</sup> October, 2020

Exhibit "ASB7" - A copy of the letter dated 10<sup>th</sup> September, 2020

Exhibit "ASB8" - A copy of the letter dated 13<sup>th</sup> October, 2020

Exhibit "ASB9" - A copy of the progress report prepared by the plaintiff and sent to the 1<sup>st</sup> defendant

Exhibit "ASB10" - A copy of the letter dated 3<sup>rd</sup> August 2021

Exhibit "ASB11" - A copy of the letter dated 3<sup>rd</sup> August, 2021

Exhibit "ASB12" - A copy of the letter dated 4<sup>th</sup> August, 2021

Exhibit "ASB13" - A copy of the letter dated 17<sup>th</sup> August, 2021

Exhibit "ASB14" - A copy of the letter dated 25<sup>th</sup> August, 2021

Exhibit "ASB15" - A copy of the bank statement of the plaintiff

Mr. Bah submit thus:

- That the court knows the principle of performance bond, that it is one that imposes an obligation on the bank to honour the said performance bond when demanded by the beneficiary.
- That however, this principle is subject to one exception i.e. "fraud"
- That such notice of fraud which is an exception to this principle must have been communicated to the bank before the payment was made.
- That this is the position held in the **EDWARD OWEN'S CASE**
- He refers to the dictum of Lord Denning in the case **of EZTEGN V.J HENY SCHODER Banking ..... 1941**, where he said:  
**"the bank ought not to pay under the credit, if it knows that the documents are forged."**
- He submit that this is exactly, the situation before the court, wherein the 1<sup>st</sup> defendant fraudulently requested for the performance bond of the 2<sup>nd</sup> defendant
- That they fraudulently prepared an invoice and sent same to the 2<sup>nd</sup> defendant, claiming that the said invoice was issued by the plaintiff
- That the plaintiff in a letter categorically denied, and this denial was communicated to the 2<sup>nd</sup> defendant company.
- He refers the court to exhibit ASP11, a letter dated the 3<sup>rd</sup> of August, 2021 written by the 2<sup>nd</sup> defendant company and addressed to the plaintiff herein in which they claim to have received an invoice on the 12<sup>th</sup> of July, 2021
- That they subsequently sent a letter that the 1<sup>st</sup> defendant company, had therefore accepted an invoice submitted by the plaintiff for the total sum of

Le139,451,677 as a result of this they will honour the demand of the 1<sup>st</sup> defendant company.

- He also refers to a quotation and submit that it was fraudulently prepared by the 1<sup>st</sup> defendant company, and same was however issued by the plaintiff
- He refers to the case of **United Trading Corporation Vs. Allied Arab Bank Ltd 1984** that with respect to the knowledge of fraud was communicated to the bank before the payment was issued, the bank ought not have made the payment.

With the leave of the court Mr. Kellie counsel for the 1<sup>st</sup> defendant submit thus:

- That the plaintiff in his amended writ of summons, gave particulars of fraud, but the fraud was never pleaded.
- That the mere giving of particulars without pleading same makes the particulars of no purpose at all, and therefore the amended writ ought to be dismissed and throw out.
- He also refers to the aspect of fraud i.e. Ecobank had indicated to them, that an invoice was presented.
- That there is no evidence before this court, that indeed there was such a letter
- That even if they were, it will not necessarily constitute a fraud.
- That the condition of the APG is that beneficiary should make a written demand
- That once the demand is made it triggers the obligation of the bank to pay, without any dispute
- That whether the beneficiary makes a written demand preceded by an invoice is of no moment. That the issue of invoice pertains to contractual dispute between the plaintiff and the 1<sup>st</sup> defendant
- That the English authority made it clear, that it is only fraud committed by the beneficiary or his agent of which the beneficiary possessed knowledge, will constitute an exception to the independence principle.
- He refers to **United Merchants (Investment) Ltd V. Glass Fidas & Equipment Ltd V. Royal Bank of Canada.**
- That to sum up the information communicated to the plaintiff by Ecobank cannot constitute fraud on the part of the 2<sup>nd</sup> defendant beneficiary for two (2) reasons:
  - Firstly, there is no evidence before this court, that the 1<sup>st</sup> defendant made such communication
  - Secondly, it will still not constitute fraud or dishonestly.

Because the beneficiary will simply have been exercising the right conferred upon it by the APG.

With leave of the court Mr. Mansaray counsel for the 2<sup>nd</sup> defendant, refers to the affidavit in reply dated 22<sup>nd</sup> day of November, 2022 and submit thus:

- That the commercial question to be asked by this court, was whether the production of an invoice was a condition precedent for the payment of the APG.
- He submit that the APG is clear as to the terms and conditions, and the obligations are very strict precedent for the payment of the APG.
- He submit that the APG is clear as to the terms and conditions and the obligations are very strict on the 2<sup>nd</sup> defendant.
- That whether the invoice was produced or not once the written demand was made they are bound to pay
- He refers the court to exhibit "ASB1" which is a letter dated 25<sup>th</sup> August, 2021 (which is a response to exhibit "ASB13)
- He further submit that it was not clear on the APG that the payment was for the production of invoice.

### **Analysis of the Issues Involved.**

A cursory glance at the application filed that is before this court by notice of motion is requesting that the initial cause of action ought not to have been brought against the 2<sup>nd</sup> defendant in the first place to extent of the action in matter intituled F.T.C.C 013/22 2022 A. No.1 be struck out to wit:

1. Recovery of the sum of Le235,125,000 (Two Hundred and Thirty-five Million One Hundred and Twenty-five Thousand Leones) due and owing to the plaintiff company by the 1<sup>st</sup> defendant
2. Recovery of the sum of Le80,548,322.00 (Eighty Million Five Hundred and Forty-eight Thousand Three Hundred and Twenty-two Leones) from the 2<sup>nd</sup> defendant company.
3. Interest on the said sums at the current banking lending rate
4. Damages for breach of contract from the 1<sup>st</sup> defendant company
5. Any further order or orders that this Honourable court may deem just and proper
6. Cost

The said request before this court as it pertains to the aforesaid claim is that: -

1. That the claim against the 2<sup>nd</sup> defendant in these actions be dismissed, and or /struck out on the following grounds:

- i. That the plaintiff do not have a cause or action against the 2<sup>nd</sup> defendant there being no legal or factual basis upon which the 2<sup>nd</sup> defendant was made a party to
- ii. That the action against the 2<sup>nd</sup> defendant is frivolous, malicious and vexatious and an abuse of the process of the court
2. That all further proceedings emanating from this action or connected thereto be stayed pending the hearing and determination of this application.
3. Any other or further orders that this Honourable court deems fit and just in the circumstances
4. That the costs of this application be borne by the plaintiffs in these actions jointly and severally.

The question this court will ask itself is whether the 2<sup>nd</sup> defendant has been improperly joined as a defendant in the aforesaid action to the extent of same been "vexatious, frivolous, malicious and an abuse of the process of the court.

This will necessitate that the facts of the matter be set out, as contained and claimed by the plaintiff in the writ of summons.

### **Facts**

That the plaintiff is at all material times to this action is a private company a registered business under the laws of Sierra Leone, whilst the 1<sup>st</sup> defendant a private company, with its place of business in Makeni, and the 2<sup>nd</sup> defendant a banking institution operating in Sierra Leone.

That the plaintiff company on the 7<sup>th</sup> April 2020 entered into an agreement with the 1<sup>st</sup> defendant company for the construction of an accommodation building and a guest house at Kamakwie in the Northern Province of the Republic of Sierra Leone. The estimated value of the contract was L2,151,035.471. that according to clause 13 of the said agreement, 10% of the contract price shall be paid as advance payment against submission of a bank guarantee and the submission of an invoice along with a performance security of 5% of the contract to be submitted in the form of a bank guarantee insurance bond.

That as a result of the above conditions, the 2<sup>nd</sup> defendant company, Ecobank (SL) Ltd served as a principal guarantor to the 1<sup>st</sup> defendant company herein for and on behalf of the plaintiff to effect the payment of Le220,000,000 which represents 10% of the contract price for the commencement of work. However, in the event that the plaintiff's work is not satisfactory or fails to do the work at all, the 1<sup>st</sup> defendant company can request for the payment of the performance bond from the 2<sup>nd</sup>



defendant company and the said request shall be honoured provided there is no dispute in respect of same

That the plaintiff company herein received the said amount of Le220,000,000.000 (Two Hundred and Twenty Million Leones) to start the work, which they did. They claimed that they judiciously utilized the said amount. An invoice on how this said amount was sent to the 1<sup>st</sup> defendant company.

The plaintiff company claimed out of good faith and for the interest of progress, personally used an additional Le 235,125,000.00 (Two Hundred and Thirty-five Million One Hundred and Twenty-five Thousand Leones) on the site. An invoice in respect of this was sent to the 1<sup>st</sup> defendant company having been notified of the above, argued that the work done on the site is far from satisfactory and that they do not believe that the plaintiff company have personally spent Le235,125,000.00 (Two Hundred and Thirty-five Million One Hundred and Twenty-five Thousand Leones) on the site. An invoice in respect of this was sent to the 1<sup>st</sup> defendant.

That the 1<sup>st</sup> defendant company having been notified of the above, argued that the work done on the site is far from satisfactory and that they do not believe that the plaintiff company have personally spent Le 235,125,000.00 (Two Hundred and Thirty-five Million One Hundred and Twenty-five Thousand Leones) that they therefore refused to pay what is due and owing them.

The plaintiff company claimed they suggested for both parties to appoint an independent evaluator to visit the site in Kamakwie and do an independent assessment of the work carried out on the site, and produce a comprehensive report as to the amount that may have been spent on the site. This the 1<sup>st</sup> defendant company never agreed to do.

That by letter dated 3<sup>rd</sup> August, 2022, the 2<sup>nd</sup> defendant company wrote a letter to the plaintiff company informing them, that the 1<sup>st</sup> defendant wrote a letter to the plaintiff company informing them that the said company have requested to be paid the 5% performance bond, and that they have accepted an invoice submitted by the plaintiff company to the 1<sup>st</sup> defendant for the total sum of Le139,451,677.67 (One Hundred and Thirty-nine Million Four Hundred and Fifty-one Thousand and Sixty-seven Cents)

Also that by letter dated 4<sup>th</sup> August 2021, the plaintiff company wrote to the 2<sup>nd</sup> defendant company denying that sent an invoice of Le139,451,677.67.

That by letter dated the 17<sup>th</sup> of August, 2021 solicitors for the plaintiff company wrote to the 2<sup>nd</sup> defendant company as the guarantor and requested that they withhold any payment request made by the 1<sup>st</sup> defendant company as there is a

disagreement between the two companies as to the work that has been done on the site and the amount they claimed spent so far.

That by letter of the 23<sup>rd</sup> August, 2021 and there was contention of works performed and the initial amount advanced the plaintiff, further contend that, notwithstanding, the 1<sup>st</sup> defendant went ahead and paid the 2<sup>nd</sup> defendant the sum of Le80,548,322.00.

An appearance was entered for the 2<sup>nd</sup> defendant and defence filed by Messrs. Garber & Co, the pith and substance of which is contained in paragraphs 2 ad 4 which I will specifically set out thereof to wit

Paragraph 2: -

**“Paragraph 8 of the plaintiff’s particulars of claim is denied in its entirety; The Terms and Conditions agreed by both the plaintiff are clearly set out in the contract agreement dated 7<sup>th</sup> April, 2020, the said terms and conditions denote the obligations assumed by wither party, under the said contract agreement as attested by their contract agreement does not contain any terms or condition enjoining either party to undertake any obligation, especially one involving the unconsented expenditure of money or monies, on any basis at all, and then seek to impose that obligation on the other party, accordingly the 1<sup>st</sup> defendant denies it is liable to the plaintiff for the amount claimed or that it breached the contract agreement in any respect. The signed contract agreement constitutes the entire agreement between the plaintiff and the 1<sup>st</sup> defendant and any term or condition extraneous to those set out therein and unilaterally assumed one party, is incapable of building the party that has not consented to such term or condition.”**

Paragraph 4: -

**“As to paragraph 11 of the plaintiff’s particulars of claim, it is trite law that a bank’s inevocable undertaking to pay money to a beneficiary under a documentary guarantee or a documentary credit arrangement is separate from, and independent of the underlying contract giving rise to the bank’s obligation to make payment, and is enforceable by the beneficiary against the bank, so long as the demand for payment complies with the terms and conditions of the guarantee or credit. Accordingly, the 1<sup>st</sup> defendant was within its right to make the demand and was entitled to be paid if the demand was compliant.”**

It is upon this that the 1<sup>st</sup> defendant has promised his objections and application.

On the 20<sup>th</sup> day of April, 2022, counsel for the plaintiff, came before this court through a notice of motion requesting for leave to be granted to wit:

1. That this Honourable court grants leave to the plaintiff/applicant herein to amend the statement of claim of the writ of summons dated the 2<sup>nd</sup> March, 2022 filed on his behalf.
2. That this Honourable court grants and further or other consequential orders relating to the filing or amended pleadings or otherwise as the Honourable court may deem fit.
3. That the costs of this application be cost in the cause.

This court on the 1<sup>st</sup> of June, 2022 ordered as follows:

1. That the application is granted for in this court pursuant to its inherent powers conferred on that behalf to wit; order 23 Rule 5(1) of the High Court Rules 2007 is so inclined to exercise same.
2. The plaintiff/applicant is further directed to serve the amended statement of claim on the defendants within (5) five working days effective from the date of this order, and the defendants have (5) working days upon receipt of the amended statement of claim to file amended defence if they are so desirous.
3. No order as to costs

### **Issues in Contention**

The crux of the plaintiff/applicant's claim is that the action brought by the plaintiff is frivolous and malicious as it does not have any legal or factual basis in Law.

- That the plaintiff by joining the 2<sup>nd</sup> defendant has wrongly and erroneously interpreted the nature and fundamental characteristics of an Advance Payment Guarantee or Performance Bond.
- That the 2<sup>nd</sup> defendant was legally obligated to honour the guarantee immediately at first written call was made on it subject to its strict terms and conditions due and owing the plaintiff company by the 1<sup>st</sup> defendant company.
- Recovery of the sum of Le80,548,322.00 from the 2<sup>nd</sup> defendant company; (the applicant herein)
- Interest on the aid sums at the current banking lending rate.
- Damages for breach of contract from the 1<sup>st</sup> defendant company.
- Any further order or orders that this Honourable court may deem just.
- Costs

The 2<sup>nd</sup> defendant/applicant has in his submissions raised 3 questions, that will form the thrust of this action analysis jointly, and severally against the backdrops of submission of all counsel and the applicable law.

**“Whether payment under an advance payment guarantee more particularly one that is to be paid on demand is predicated on there being a dispute.”**

There are various ways to pay for goods and services in international sales contract, the method chosen for any particular transaction will greatly depend on the seller's confidence in the integrity and solvency of the overseas buyer.

Although the terms 'Performance Bond' and 'Performance Guarantee' maybe used to denote a true contract of suretyship, they are now more often used to refer to instrument which are similar in form and function to standby credit (when they are sureties called 'on demand' performance bonds or demand guarantee- hereafter collectively referred to as demand guarantee).

The bank which issues a demand guarantee agrees to make payment or production of the written demand by the beneficiary or his written declaration that the principal has defaulted.

The beneficiary need only demand payment, he does not have to prove that the principal has defaulted in performance of the underlying contract (although sometimes the demand may have to be supported by specific documents, such as a certificate from an independent third party indicating the principal has defaulted or that payment is otherwise due.)

I will adopt the words of Lord Denning wholesale in the description of this instrument in the EDWARD OWEN case of **ENGINEERING LTD V. BARCLAYS BANK INTERNATIONAL LTD (1978) QB 159.** court of Appeal to wit:

**“A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit, that was clearly stated in Hamzeh Malas & Sons V. British Imex Industries Ltd (1958) 2 QB 127”**

“To this general principle there is an exception in the case of what is called established or obvious fraud to the knowledge of the bank. The most illuminating case is of *Sztejn V. J. Henry Schroder Banking Corp.* which was heard in the New York Court of Appeals.

**“It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issue bank agrees to pay upon presentation of documents not goods, this rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade.”**

However, this obligation on the part of the bank in this instance the 2<sup>nd</sup> defendant to pay, in the question this court will ask itself, is whether same is overwhelming?

Reference for this is made to an assessment and review of the undermentioned:

- The advance payment guarantee dated the 14<sup>th</sup> day of April, 2021.
- The letters of commitments dated the 13<sup>th</sup> October 2020 and April, 2021
- The light of documentary evidence and other underlying contractual relations.

It is without doubt from the documents before this court that the plaintiff on the 7<sup>th</sup> of April, 2020 entered in an agreement with the 1<sup>st</sup> defendant company, for the construction of an accommodation building and guest house at Kamakwei in the Northern Province of the Republic of Sierra Leone, the estimated value of the contract was Le2,151,035,471 (Two Billion One Hundred and Fifty-six Million Thirty-five Thousand Four Hundred and Seventy-one Leones)

That Clause 13 of the said contract provides for payment terms, specially (a) thereof to wit:

Consequently, the 2<sup>nd</sup> defendant company Ecobank Sierra Leone served as a principal guarantor to the 1<sup>st</sup> defendant company for and unbehalf of the plaintiff's company to effect of payment of Le220,000, which presumably represents 10% of the contract price for the commencement of work.

The said Clause 13 provides: -

- (a) 10% of the contract shall be paid as advance against submission of irrevocable bank guarantee valid up to 30 days beyond contract period (i.e.) 30.10.2020 and submission A invoice along with performance security as specified in Clause No.12. the bank guarantee shall be extended before the expiry date at the request of KEC in case of advance was not adjusted by then.

- (b) 85% progress payment for the work shall be paid on monthly interim payment based on the measurement certified by the site in charge of KEC and Transco CLSG and within 15 days of presentation of certified invoice.
- (c) 5% amount shall be payable on completion of identified scope of work and finalization of reconciliation statement for KEC supplied materials

Clause 12 provides:

**“the performance security is 5% of the contract price and to be submitted in the form of a bank guarantee/insurance bond valid up to 30 days beyond defect liability period (i.e. 30.03.2021)**

By letter dated 3<sup>rd</sup> August 2021 addressed to the directors of Associates Builders from Victor Williams, head of commercial banking of the 2<sup>nd</sup> defendant provides.

Call on Advance Payment Guarantee

**“We write in relation to the call of our Advance Payment Guarantee issued on your behalf to KEC International Limited for the sum of Le220 (Two Hundred Twenty Million Leones), further to our meeting held on the 5<sup>th</sup> of July, 2021 between KEC International Limited, Associates Builders and representatives from Ecobank (SL) Limited, we agreed that you issue payment invoice to KEC International for work completed. Copy of the said invoice was received on the 12<sup>th</sup> of July, 2021.**

**Consequently, KEC International has informed the bank that they have accepted an invoice submitted by your organisation for the total sum of Le139,451,677.67 (One Hundred and Thirty-nine Million Four Hundred and Fifty-one Thousand Six-seven Cents). As a result of this, kindly be informed that your will be debited with the unadjusted payment of Le80,548,322.00 (Eighty Million Five Hundred and Twenty-two Leones) for onward reimbursement to KEC International Limited. Please ensure you fund your account accordingly.”**

There is a reply from the plaintiff dated 4<sup>th</sup> August 2021 for Mr. Ibrahim Vandi, the managing director of the plaintiff company, raising serious stance contained in the said reply.

**“KEC are on the habit of downplaying us whereas matters sent to them for serious consideration, they would rather ignore our concerns and carry on with what they think is necessary for them, we can no longer tolerate such-ill treatment.**

**However, we want to make our stand that on no grounds the bank debit our account to KEC for any reason. Furthermore, if they continue in this manner, we shall arbitrate to evaluate work done on site."**

Was this sufficient to determine the 2<sup>nd</sup> defendant from discharging its obligations under the guarantee?

### **In *Bollvinter Oil S v. Chase Manhattan Bank***

This is an interlocutory appeal from strcuton J.

By a contract of Effreightment dated 8<sup>th</sup> June, 1982, the plaintiff, Bollvinter Oil SA agreed to transport a cargo of crude oil for the third defendant, the general company of Homs refinery, from Iran to Syria, the plaintiffs also agreed to furnish the 3<sup>rd</sup> defendant with a bank guarantee for US. \$1 Million, the plaintiffs' requested the first defendant, Chase Manhattan Bank NA, to arrange the guarantee. In consequence the 2<sup>nd</sup> defendant, the commercial bank of Syria, gave a guarantee of U.S \$1 Million to the third defendant and the first defendant opened an irrevocable letter of credit in favour of the 2<sup>nd</sup> defendant.

Disputes over the performance of the contract arose between the plaintiff and the 3<sup>rd</sup> defendant and subsequent to the issue of a writ the plaintiffs on 31<sup>st</sup> October, 1983 obtained exparte injunctions

- (i) Restraining the third defendant from claiming on the guarantee (2) restraining the second defendant from paying under that guarantee or claiming on the letter of credit and (3) restraining the first defendant from paying under the letter of credit.

On 30<sup>th</sup> November 1983, after an inter partes hearing, the judge discharged the injunction against the first and second defendants. By a notice of appeal dated 5 December, 1983, the plaintiffs appealed. On the 9<sup>th</sup> December, Sir John Donaldson MR handed down the judgement of the court, which stated the court's reasons for dismissing the appeal.

What came out dearly from this matter is the principle that a unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond, or guarantee, the customer is seeking to take advantage of this unique characteristics of same in the must exceptional case he is to be allowed to derogate from the bank's personal and

irrevocable undertaking, given be it again, noted at his request, by obtaining an injunction restraining the bank from honoring that undertaking, he will undermine what is the bank's greatest assets, however large and rich, it may be, namely the reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined.

This court will also have recourse to the argument in the Sierra Leone case of UTB and Goal Sierra Leone (FTCC) date 25<sup>th</sup> May, 2005, where distinction was drawn between "On demand bond" and on "default bond". Where the court reinstated the time tested principle in Edward Owen Engineering Ltd V. Barclays Bank Int'l Limited, as is applicable on "demand bond" - which a typical of what is before this court.

I am persuaded and convinced in my mind, that the tenets of international commercial dealings, which has been ideally kept sacrosanct throughout all these years should be, maintained particularly when it has to do with Advance Payment Guarantees or Performance Bond immediately a first written call is made on it subject to its terms and conditions. Circumstances have not arisen and in this scenario for me to tamper with it, more particularly so as counsel for the plaintiff/respondent has not in this instance convinced this court that it falls within the exception of "fraud"

on the three questions been formulated and posed to this court to wit:

- i. whether the 2<sup>nd</sup> defendant is under an obligation to pay the 1<sup>st</sup> defendant on Advance Payment Guarantee?
- ii. whether payment under Advance Payment Guarantee more particularly on that is to be paid on demand is predicated on there being dispute.
- iii. whether the plaintiff has a cause of action against the 2<sup>nd</sup> defendant.

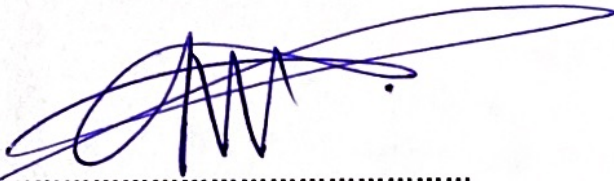
The answer on the first question is in the affirmative, and the 2<sup>nd</sup> and 3<sup>rd</sup> questions are in the negative for all the reasons highlighted hereinbefore.

Consequently, this court is of the considered view that the application is granted for as prayed to wit:

- **The claim against the 2<sup>nd</sup> defendant in this action is dismissed and struck out on the following grounds:**
  - i. **That the plaintiff do not have a cause of action against the 2<sup>nd</sup> defendant there being no legal or factual basis upon which the 2<sup>nd</sup> defendant was made party.**



- ii. That the action against the 2<sup>nd</sup> defendant is frivolous, malicious and vexatious and an abuse of the processes of the court.
- Solicitors costs of N1e3,000 (Three Thousand New Leones) to be paid by the plaintiff to counsel for the 2<sup>nd</sup> defendant/applicant.
  - Further directions to be given at the next adjourned date.



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**THE HON. JUSTICE M.P. MAMI JA.**