Oxbridge Limited v Guaranty Trust Bank (Kenya) Limited (Civil Case E059 of 2020) [2022] KEHC 14540 (KLR) (Commercial and Tax) (31 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14540 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E059 OF 2020

DAS MAJANJA, J

OCTOBER 31, 2022

BETWEEN

OXBRIDGE LIMITED ..... PLAINTIFF

AND

GUARANTY TRUST BANK (KENYA) LIMITED ..... DEFENDANT

JUDGMENT

Plaintiff's Case

1. The plaintiff's case is set out in the plaint dated February 28, 2020. By a letter of offer dated March 31, 2016 ("original letter of offer"), the defendant ("the bank") agreed to extend to the plaintiff certain banking facilities comprising an overdraft in the sum of Kshs 40,000,000.00, a term loan of Kshs 400,000,000.00 intended to take over the plaintiff's facility at Bank of Baroda Kenya Limited ("Bank of Baroda"), letters of credit/asset finance facilities of GBP 870,000.00, letters of credit/asset finance of USD 735,000.00 and a credit card line of Kshs 2,000,000.00. The facilities were amended by the letter of offer dated June 15, 2016 ("the amended letter of offer").

2. The plaintiff states that the letters of offer were executed by both parties and formed a contract. The plaintiff states that it met the bank's requirements and paid a facilitation fee of Kshs 7,387,750.00 but the bank, by a letter dated November 8, 2016, unilaterally cancelled the facilities on grounds of the Plaintiff's failure to abide by the terms.

3. As a result of breach of the letters of offer, the plaintiff states that it suffered loss and damage including the sale of its guarantor's assets to recover monies due to Bank of Baroda which has only been halted by an injunction issued by the court. The plaintiff therefore seeks a declaration that the cancellation of facilities issued by the bank was not occasioned by default on its part and that cancellation of the facilities by the letter dated November 8, 2016 is unlawful, null and void and an order of specific

performance compelling the bank to disburse the entire facilities sanctioned under the letters of offer. In the alternative, the plaintiff seeks an order compelling the defendant to refund 1% facilitation fee of Kshs 7,387,750.00 with interest at commercial rates from the date of payment to the bank.

4. The plaintiff also accused the bank of fraud and misrepresentation. It states that the bank fraudulently misrepresented to it that it would disburse the facility upon execution of the letters of offer and payment of the facilitation fee. That the bank unilaterally cancelled the contract despite the plaintiff having met all the obligations and purporting to retain the facilitation fee without meeting its obligations. It therefore seeks general and punitive damages against the bank for fraud, misrepresentation and breach of fiduciary duty to the plaintiff.

Defendant's Case

5. In its statement of defence dated May 5, 2020, the bank admits that it issued the original letter of offer and the amended letter of offer which were accepted by the plaintiff, its directors and guarantors. The bank states that in an effort to fulfil its contractual obligation under the letters of offer, it appointed advocates who prepared the security documents and forwarded them to the plaintiff's advocates for execution by the plaintiff and its guarantors, prepared and issued financial undertakings to Bank of Baroda and its advocates in order to facilitate the takeover of the amounts owed by the plaintiff. It also called for and received the necessary title documents, prepared and caused to be executed necessary discharges of charge over various securities from Bank of Baroda.

6. The bank further states that despite reasonable indulgence with the plaintiff and its own efforts to complete perfection of the securities, the plaintiff breached the conditions under the letters of offer by failing to avail all the required security documents and in particular it failed to avail duly executed charge documents over title No Mombasa/Block 1/256 which was to be created by Mantel Limited ("the Mantel Property"), a guarantor of the plaintiff. The bank avers that by failing to avail the missing securities, the plaintiff failed to meet the timelines stipulated in the letters of offer. Consequently, the delays caused the period required for completion of the payment and registration of securities under the professional and financial undertakings set by the advocates for the Bank and Bank of Baroda to lapse. The entire transaction was therefore cancelled with the result that the plaintiff could not draw down facilities under the letters of offer. The bank had no option but to cancel the offer of facilities as it would have been exposed to possible legal obligations to the Bank of Baroda and legal fees to its advocates.

7. The bank contends that following the plaintiff's fundamental breach of the letters of offer, it was released from any obligation under the letters of offer and was no longer obligated to proceed with the offer of facilities. Further, the plaintiff having failed to honour the terms of the letters of offer, is estopped from alleging breach of contract. The bank also denies that the plaintiff is entitled to the remedies sought in the plaint and prays that the suit be dismissed.

Agreed Facts And Issues

8. At the pre-trial stage, the parties prepared a statement of agreed issues dated June 21, 2021 and statement of agreed facts dated July 30, 2021. The agreed facts are as follows:

    1. The plaintiff and the defendant enjoyed a customer - bank relationship.

    2. By a letter dated January 18, 2016, the plaintiff requested the defendant to avail to it a loan, overdraft, letters of credit/assets finance and other facilities to the tune of Kes 738,775,000.00

3. A letter of offer dated March 31, 2016 and an addendum dated June 15, 2016 were issued and accepted by the plaintiff and its directors/ guarantors.

4. The purpose of the facilities granted was to take over the plaintiff's liabilities from Bank of Baroda (K) Ltd.

5. The disbursement of the facilities was conditional upon provision of all requisite security documents listed under the letter of offer dated March 31, 2016 and the addendum dated June 15, 2016 as follows:

    i. First legal charge for Kes 738,775,000.00 (Kenya shillings seven hundred thirty eight million seven hundred seventy five thousand only) over IR No Mombasa / Block 1/256 in the name of Mantel Limited and LR No MN/V/541 in the name of Karnak Limited.

    ii. Assets finance documentation for GBP 870,000.00 (Great Britain Pounds eight hundred and seventy thousand only) over the prime mover truck to be purchased.

    iii. Assets Finance documentation for USD 735,000.00 (United States dollars seven hundred and thirty-five thousand only) over the trailers to be purchased.

    iv. Corporate guarantee for Kes 738,775,000.00 (Kenya shillings seven hundred thirty-eight million seven hundred seventy-five thousand only) by Mantel Limited supported by a Board Resolution.

    v. Corporate guarantee for Kes 738,775,000.00 (Kenya shillings seven hundred thirty-eight million seven hundred seventy-five thousand only) by Karnak Limited supported by a Board Resolution.

    vi. Corporate guarantee for Kes 738,775,000.00 (Kenya shillings seven hundred thirty-eight million seven hundred seventy-five thousand only) by Premier Flour Mills Limited supported by a board resolution.

    vii. Corporate guarantee for Kes 738,775,000.00 (Kenya shillings seven hundred thirty-eight million seven hundred seventy-five thousand only) by Trident Insurance Co Limited supported by a board resolution.

    viii. Personal guarantees for Kes 738,775,000.00 (Kenya shillings seven hundred thirty-eight million seven hundred seventy-five thousand only) by directors and shareholders of the company viz: Diamond Hasham Lalji Nurani & Shahid Diamond Lalji Nurani.

    ix. Comprehensive insurance cover over the collaterals and developments thereon with the defendant's interest noted therein as "loss payees" and including [n] non cancellation" clause.

    x. Comprehensive insurance cover over the trucks and trailers with the defendant's interest noted therein as "loss payees" and including "non cancellation" clause.

    xi. Fresh valuation reports by one of the defendants' approved valuers over IR No Mombasa / Block 1/256 and LR No MN/V/541.

    xii. Board resolution authorizing the borrowing of up to Kes 738,775,000/= (Kenya shillings seven hundred thirty eight million seven hundred seventy five thousand only and issuance of securities therein.

6. The defendant had appointed lawyers, Messrs Coulson Harney Advocates, to undertake perfection of the securities required under the letters of offer.

7. The defendant's said advocates issued a professional undertaking to the lawyers representing Bank of Baroda (Kenya) Limited, Messrs Gathaiya & Associates Advocates.

8. The plaintiff did not avail an executed charge and the consent over title No Mombasa/ Block 1/256 which was one of the securities required for lending.

9. The securities were therefore not perfected.

10. Consequently, defendant's requirements for perfection of securities were not met. The defendant's advocates, Coulson Harney Advocates, returned the security documents to Gathaiya & Associates Advocates, on October 13, 2016, which was after the period of compliance expired.

11. The takeover process of the plaintiff's credit facilities from the defendant of Baroda (K) Ltd was unsuccessful.

12. The management fees of Kes 7,387,750.00 payable under clause 8.2 of the letter of offer dated March 31, 2016 was collected by the defendant from the plaintiff.

9. The court has to make a determination on whether there was breach, who is liable and the reliefs to be granted based on the parties agreed issues which are as follows:

1. What are the terms of the letters of offer entered into by the parties herein.

2. Which party was to blame for the failure to complete registration of the securities set out in the letters of offer.

3. Was the plaintiff in breach of the requirements of the letters of offer.

4. Was the management fee paid by the plaintiff a condition precedent to grant of the credit facilities.

5. Was there breach by the defendant

6. Whether the plaintiff is entitled to the reliefs sought.

7. Which party is liable to pay costs of the suit.

10. At the hearing the parties each called one witness. the plaintiff called its director, Diamond Lalji (PW 1) while Bank's legal officer, Josephine Wanja Gachuru (DW 1), testified on its behalf. The parties thereafter filed written submissions.

11. Having considered the testimony and written submissions, it is abundantly clear that resolution of the suit depends on the interpretation of documents hence I shall not recite the parties' testimony particularly in view of the agreed facts which leave a narrow window for factual dispute. I shall therefore refer to testimony if it sheds light on resolving the issues agreed for determination.

What were the terms of the Letters of Offer entered into by the parties herein?

12. It is not in dispute that the bank issued the letters of offer to the plaintiff. It listed the guarantors, the facilities sanctioned and the limits, the purpose of the diverse credit facilities among other terms and conditions all which are not disputed. The important clauses are clause 4 which deals with drawdown of the term loan facility to be paid directly to the Bank of Baroda to clear the outstanding liabilities;

clause 5 on conditions of sanction; clause 6 on the term and repayment of the facilities, the interest charged, commission charges and fees, security, and most importantly clause 19 on acceptance.

13. The letters of offer contain clauses that bind the parties and it is the duty of the court give effect to those terms. It cannot rewrite the agreement unless it is unconscionable, unfair or oppressive as was held by the Court of Appeal in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* Nrb CA civil appeal No 282 of 2004 [2014] eKLR as follows:

    (35) ..... It is not for the court to rewrite a contract for the parties. As this court held in *National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd* civil appeal No 95 of 1999 "a court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.

    (36) Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.

14. In this case the letters of offer are valid and nothing has been raised by either party to the contrary.

Which party was to blame for failure to complete registration of the securities.

15. The parties blame each other for the non-registration of the securities. Clause 9 of the original letter of offer outlines all the securities that the plaintiff was required to furnish. It was the plaintiff's obligation to ensure all these documents are given to the bank including those listed under clause 9.2. Once the bank received the documents, it would proceed to register them in order to secure its interest.

16. The plaintiff had a fundamental duty to provide registrable security documents. Since it did not provide an executed charge instrument as was required, it was entirely to blame as the bank could not complete the registration process. The bank further contends, and I agree with it, that without being furnished with all the required documents by the plaintiff it could not proceed to disburse the facilities as it would have been in breach of section 33(4) of the *Banking Act* (chapter 488 of the Laws of Kenya) and the Central Bank of Kenya Prudential Guidelines and in particular guideline No CBK/PG/04 which states, "that where securities are obtained they should be perfected in all respects ensuring that charge and debentures are duly registered and should be perfected in all the respects as specified in the letter of offer."

17. It emerged at the hearing that the delay was as a result of the legal requirement to obtain consent from Kenya Railways Corporation (''KRC") as the lessor of title number Mombasa Block 1/256. According to PW 1, the plaintiff was following up on the consent physically at the KRC offices but did not have any documentary evidence to confirm this position. It however contends that it was the duty of the bank's advocates to follow up the consent while the bank states that the plaintiff's had a duty to provide all the necessary documents.

18. It is evident that the consent from KRC was mandatory for registration of the title to be effected. This consent was one among many other documents that the plaintiff was required to provide and was essential for perfection of the security. Having failed to provide the consent from KRC or the executed charge instrument from March 2016 to November 2016, the plaintiff can only shoulder the blame for failing to comply with letters of offer.

19. As regards the charge instrument, the plaintiff submits that at the hearing the bank confirmed that there is no evidence of the letter forwarding charge instrument to the plaintiff. The bank admitted that the two forwarding letters were sent to two different companies; the letter dated June 20, 2016 addressed to Karnak Limited and the letter dated June 21, 2016 to Mantel Limited but both were in respect to the same property being land reference No MN/V/541. DW 1's position was that this was an error on the part of the bank's advocates. The bank, however, did not furnish their own copy of the unexecuted charge instrument or any letter forwarding the said charge instrument to the plaintiff. The plaintiff's position is that based on this evidence, it did not execute the charge instrument since the bank did not forward it in the first place.

20. I take the position that although a copy of the charge instrument, whether executed or not, was not produced, there is correspondence from the bank requesting for the duly executed charge instrument from the plaintiff. If the charge instrument was never sent, the natural reaction from the plaintiff would have been to respond to the bank either to clarify the error in the two letters or inform it that it did not have the requested charge instrument since it was the one to benefit from the banking facilities. Instead the plaintiff failed to respond to the bank's requests while time continued to run whereupon the bank invoked clause 19 of the original letter of offer withdrawing the offer.

21. In conclusion therefore, I find and hold that the plaintiff's obligation under the letters of offer was to ensure that all the documents required to perfect the securities were provided in good order. By failing to provide registrable documents to the bank, it cannot run away from its own failure.

Was the Plaintiff in breach of the requirements of the Letters of Offer?

22. This issue is resolved by the finding on the preceding issue. I would only emphasize what the court stated in *William Kazungu Karisa v Cosmas Angore Chanzera* MLD HCCC No 85 of 2001 [2006] eKLR the court expressed the position that, "The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them". In this case, the letters of offer had express terms and conditions which bound the plaintiff upon its acceptance. It was an express condition that the plaintiff would furnish the security documents within the prescribed timelines which it failed to thereby breaching the terms of the letters of offer.

Where payment of management fee by the Plaintiff a condition precedent

23. The plaintiff seeks refund of the 1% management fee it paid to the bank. This is governed by clause 8.2.2 of the original letter of officer which states:

    The Management fees indicated in clause 8.2.1 above shall be payable upon acceptance of the offer letter and at every annual review, being fee charged for expertise and intellectual capital used by the bank in facilitating steps required towards granting the facilities and carrying out annual review. The same shall be debited to your account. [emphasis mine]

24. In this context, the word 'shall' denotes a mandatory command which shows that the amount had to be paid for the credit facilities to be granted. This therefore answers the question that the payment of the management fee or facility fee was a condition precedent to the grant of the credit facilities and is paid upon acceptance of the offer letter. This position was confirmed by both witnesses during hearing.

Did the Defendant breach the agreement?

25. Clause 5 of the original letter of offer under the heading, "conditions of sanction" provides that the bank is only required to disburse facilities as and when it has received the documents, items and evidence in the prescribed form and manner; payment in cleared fund of all fees and expenses

prescribed, and upon compliance at the relevant time with the terms and conditions of all the bank documents which include but not limited to the offer letters, security documents and the conditions.

26. The bank undertook all measures to request for the charge instruments in order to initiate perfection of securities procedure. Clause 19.3 states as follows:

    Guaranty Trust Bank (Kenya) Limited reserves the right to withdraw the offer should the security documents indicated in clause 9 herein not be executed within 60 days from the date hereof, and in any event if drawdown is not commenced within 90 days from the date of this letter of offer.

27. The bank produced all the correspondences including emails issued on diverse dates to the plaintiff, Bank of Baroda, the guarantors being Mantel Ltd, Karnak Limited, professional undertakings of its advocates which shows the steps and efforts it took in this transaction. The bank wrote an email dated July 13, 2016 to one Sheila Rashid which stated, "We have gone through the executed documents and realised the charge instrument in respect to title number Mombasa Block 1/256 in the name of Mantel Company is not among the documents delivered to us. Please confirm whether you have it in your possession and let us have it in order for us to send the documents to the bank for execution." During hearing PW1 testified that he did not know who the said Sheila Rashid was.

28. The Bank of Baroda through its advocates Gathaiya & Associates forwarded several documents to the bank through a letter dated August 17, 2016 such as the original certificate of lease for title number Mombasa Block 1/256, original provisional certificate of title number CR 17481/7, duly executed discharge of charge for title number Mombasa Block 1/256 and duly executed discharge of charge for LR MN/V/541. In response, the bank's advocates wrote an email dated September 1, 2016 to Gathaiya & Associates informing it that the charge instrument was yet to be forwarded to them as the borrower was still following up on the consent to charge. The bank's advocates and the bank exchanged several emails dated August 12, 2016 and September 14, 2016 in respect to the missing charge instruments that had not been forwarded. As a result, the bank's advocates wrote an email to the plaintiff dated October 4, 2016 notifying it that the undertaking issued to the Bank of Baroda would expire in 12 days and requested it to provide a way forward. On November 8, 2016, the bank issued a cancellation of facilities letter following the expiration of the undertaking issued to the Bank of Baroda before perfection of securities and failure to comply with the conditions set out in the letters of offer.

29. The email of October 4, 2016 from the bank' employee, Ferzan Chaudhri, addressed to Prakash Sanas and copied to PW 1 among other recipients negates the plaintiff's position that it did not receive any communication of cancellation of the facilities prior to the cancellation letter of November 8, 2016. Although I have not seen any email sent directly to the plaintiff requesting for the charge instrument, the plaintiff was under an obligation to ensure all documents were furnished to the bank. It ought to have responded to the email of October 4, 2016 from the bank which informed it of the lapse of the undertaking given to the advocates for the Bank of Baroda after 12 days by either providing the charge instrument or giving a way forward.

30. I find that the bank undertook all measures to protect its interest by ensuring all the required security documents were available in order to initiate the perfection of security process from the date of issuance of the original letter of offer in March 2016 until its cancellation in November 2016. The bank was therefore entitled to withdraw the letters of offer. I therefore hold that the plaintiff has not proved that the bank has breached any agreements as alleged or at all.

Whether the Plaintiff is entitled to the reliefs sought?

31. Having held that the plaintiff breached the terms of the letters of offers, it is not entitled to any of the reliefs sought. The plaintiff did not discharge its burden of proving illegality, fraud or

misrepresentation on the part of the bank. Further, the bank acted in accordance to the provisions of clause 19.2 of the original letter of offer to withdraw the facilities as 60-day timeframe prescribed therein had already lapsed. This finding therefore disposes of the prayer seeking a declaration that the purported cancellation of facilities is unlawful, null and void.

32. The plaintiff seeks an order of specific performance to compel the bank to disburse the entire sum under the facilities. As the facilities were lawfully withdrawn the court does not have power to make such an order. Further, the plaintiff has not provided and neither is there an executed charge instrument for Mombasa Block 1/256 which is the reason the bank withdrew the facilities.

33. I agree with the decision in *Reliable Electricals Engineering Ltd v Mantrac Kenya Limited* Msa HCCC No 190 of 2005 [2006] eKLR cited by the bank where the court stated that orders for specific performance are discretionary but cannot be issued if the contract suffers from some defect such as failure to comply with the formal requirements or where there is an adequate alternative remedy. The plaintiff must also show that it is ready and willing to perform all the terms of the agreement (see *Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti* Nrb CA Civil Appeal No 165 of 1996 [1997] eKLR). Even if the court were to order the bank to disburse the facilities, the plaintiff has not provided any steps taken towards obtaining the consent from KRC or the charge instrument which are vital in the perfection of securities hence the order of specific performance even if it was to be granted, it will be futile.

34. Turning to the prayer for refund of the facilitation fees as an alternative, clause 8.2.3 of the original letter of offer states that, 'above management fees are non-refundable under all circumstances even when the facilities are cancelled and/or unutilised." This aspect was confirmed by PW 1 and DW 1. Since the contract is definitive on the issue of refund, the court cannot grant this relief either as a principal or alternative relief.

35. The plea for general and punitive damages cannot succeed as the claims of fraud, misrepresentation and breach of the fiduciary duty have failed. The claim for damages is in relation to the amount the plaintiff owes to the Bank of Baroda. It was the duty of the plaintiff to service this loan and it cannot attribute the loss and damage on the withdrawal of the facilities yet it failed to comply with the terms of the letters of offer.

36. The plaintiff submits that this case is an exception to the general rule that banks do not owe borrower's fiduciary duty of care. The plaintiff contends that it had legitimate expectation that the bank would prepare and present all documents for execution and that by further paying the facilitation fee, the bank would exercise due diligence and protect the it's interest. As I have held, the parties' obligation under the clear terms of the letters of offer cannot be overridden by the notion of the exception of duty of care as suggested by the plaintiff. At the end of the day, the transaction could not proceed without the plaintiff furnishing complete security documents.

37. Before I conclude, the plaintiff in its written submissions, proposed issues for the determination which differed from the statement of agreed issues signed by both parties on June 21, 2021. Since the parties had agreed on issues, the court was bound to consider and give answer to each issue as required by order 21 rule 5 of the *Civil Procedure Rules*. However, I have addressed the issues raised by the plaintiff in so far as they are ancillary to the issues agreed by the parties.

Who is liable to pay costs of the suit.

38. The general rule is that costs follow the event. Since the plaintiff has failed to prove its case, it must now shoulder the costs of the suit as it has not shown any reason for the court to depart from the general principle.

Disposition

39. This suit is dismissed. The plaintiff shall bear the defendant's costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Terer instructed by Mutai and Company Advocates for the Plaintiff.

Mr Mwangi instructed by Macharia-Mwangi and Njeru Advocates for the Defendant.