



Monaco Engineering Company Limited v Standard Chartered Bank Kenya Limited (Civil Case 3 of 2016) [2022] KEHC 16881 (KLR) (Commercial and Tax) (22 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 3 OF 2016
DAS MAJANJA, J
DECEMBER 22, 2022**

BETWEEN

MONACO ENGINEERING COMPANY LIMITED PLAINTIFF

AND

STANDARD CHARTERED BANK KENYA LIMITED DEFENDANT

RULING

1. This is the final ruling in this matter following the judgment rendered by Tuiyott J., dated July 20, 2020 as follows:
 - (85) For that reason, the order sought by the Plaintiff, and which is deserving is that there be a review and audit of the Plaintiff's terms loan with the Defendant from the time of its inception to date so as to reveal the true status of the account. In this regard the parties are hereby directed to agree on and appoint an Independent Accountant to take those accounts and file a report within 45 days of the date of that appointment. In default of such agreement each party to appoint an accountant and the two accountants to appoint an umpire and the three to prepare a report of the accounts within 45 days of the appointment of the umpire. Where parties agree on one accountant, his costs will be shared equally by the parties. However, where three accountants are appointed each party will bear the costs of its accountant while the cost of the umpire will be shared equally by the parties.
 - (86) The final decision of this Court, including the aspect of costs, shall await the filing of the said report.
2. The parties were unable to agree on an independent auditor as directed by the learned judge. When the parties appointed independent auditors, they were unable to agree on an umpire hence the matter was referred back to court. The court directed that the Chairman of Institute of Certified Public



Accountants of Kenya appoint a single auditor to carry out the audit or review. When the accountant was appointed, counsel for the Plaintiff indicated that the Plaintiff did not wish to proceed with said auditor. When the matter came before me on application by the Defendant (“the Bank”), I directed as follows on October 19, 2022:

- a. The Review and Audit in accordance with the Judgment dated July 20, 2020 shall be conducted jointly by Benson Njiru Mati and Michael Mumassaba who shall prepare a joint report within 30 days from the date hereof.
 - b. The Auditors shall set out any points of disagreement in their report.
 - c. Each party shall bear the costs of its appointed auditor.
 - d. The matter is down for further directions/orders on a date fixed.
3. The Auditors nominated by the parties carried out the audit and prepared an Audit Report dated December 1, 2022 and titled, “Special Review and Audit of Monaco Engineering Ltd Term Loan with Standard Chartered Bank Kenya Ltd from the time of its inception to the date of judgment July 20, 2020.” Notably and as directed by the court, the Auditors did not set out any points of disagreement in their report.
4. I directed the parties to comment on the report before making the final orders. Counsel for Bank pointed out that according to the Report, there was an overcharge at the start of the loan and an undercharge subsequently with an overall net undercharge of Kshs. 47,470.00. According to the Bank, the only issue left by Tuiyott J., for determination was the issue of the overcharge which has now been resolved by the Auditors. It urges the court to dismiss the suit.
5. The Plaintiff’s director, Stanley Karari, in his deposition dated December 14, 2022 disputes the Report. He states that in the Plaintiff’s understanding, the Auditors were to make a report on how the loan was acquired, the interest payable, whether the Plaintiff was correctly listed in CRB, when its loan was listed as non-performing, why the loan amount was unpaid, whether the Bank was aware of any errors on the loan account and if so, whether the Plaintiff was ready, able and willing to settle the accrued amount.
6. The Plaintiff states that the Report fails to address the overcharge and why the Plaintiff was listed in the CRB during the second month after the loan was disbursed. That it fails to point out that the Plaintiff requested for its loan statements several times in an attempt to pay the outstanding amounts, but the same were denied. That the Report only concentrated on interest payable to the Bank and not the actual matter in dispute between the parties and why the Bank continued to charge interest when it was clear that the Plaintiff was willing to repay the entire loan. That the Auditors ignored the fact that the bank charges of 900 + 10% excise duty were charged at 999 instead of 990 and they also failed to address why several correspondences addressed to the Bank regarding the loaned amount with the correct figures were not responded to. The Plaintiff concludes that while the Report confirms different interest rates charged on the loaned amount and that this was never communicated to the Plaintiff, it fails to bring out the consequences of such different rates and what remedies, if any, available to it.
7. I have considered the arguments by the parties and I hold that the jurisdiction of this court at this stage is circumscribed by the Judgment and the direction granted by the court. For purposes of clarity, the Plaintiff sought the following reliefs in the Plaintiff:
- a) Declaration that the Defendant breached the contract between it and the Plaintiff in respect of the operation of the Plaintiff’s account, overdraft facilities and term loan facilities;
 - b) An order directing the review and audit of all debits and credits made by the Defendant to the Plaintiff’s account with the Defendant with respect to the Defendant’s operation of the



Plaintiff's account, overdraft facilities and term loan facilities for the period running from 2009 to 2005;

- c) General damages for breach of contract, negligence and wrongful forwarding of information to a credit reference bureau leading to the listing of the Plaintiff with the said bureau;
 - d) Interest if any at Court rates;
 - e) Any other or further relief that the Court may deem just, fit and expedient to grant.
8. After hearing the suit, the court dismissed prayers (a) and (c) aforesaid and directed the manner in which prayer (b) would be resolved at paragraph 85 of the judgment, which I have set out above which was after the court found that, "In the end, this Court has to find that a very substantial portion of the Plaintiff's claim has not been proved. The only aspect that has been proved is that there is a possibility of an overcharge on the loan account."
 9. The directions issued by the court on October 19, 2022 were to give effect to the judgment. A review and audit of the account has now been done by the Auditors. I am inclined to agree with the Bank that the issues raised by the Plaintiff call upon the court to re-open the hearing. For example, the court rejected the Plaintiff's claim for negligence and wrongful listing at the CRB. It also found that the Plaintiff had not proved that it had requested statements and that the Bank failed to furnish them.
 10. Although Tuiyott J., held that there was a possibility that the Plaintiff was overcharged by the Bank, the Auditors, appointed by the parties have reached the opposite conclusion. The Report is within the parameters set out in the Judgment and is hereby adopted by the court.
 11. In line with the Judgment, I find and hold that the Defendant did not overcharge the Plaintiff and since prayer (c) of the Plaintiff has been granted with the attendant result, the court must now formally dismiss the suit. The Plaintiff partially succeeded to the extent that it secured an order directing an audit of its account, it failed to prove its case. Save for that aspect of the case, there is no reason for the court to depart from the general rule that costs follow the event.
 12. For the reasons I have set out, I now dismiss this suit. The Plaintiff shall bear two thirds of the Defendant's costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Wachira instructed Kounah and Company for the Plaintiff.

Mr Fraser, SC instructed by Hamilton, Harrison and Mathews Advocates for the Defendant.

