REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 180 OF 2012

KENYA HAULAGE AGENCY LIMITED.....PLAINTIFF

VERSUS

STANBIC BANK (K) LIMITED.....DEFENDANT

JUDGMENT

Outline of the pleadings by parties.

1. It is pleaded in the plaint dated and filed in court on the 20.9.2012 that at all material times, the plaintiff enjoyed a customer/bank relationship with the defendant so that when in mid-2011 there was a tender No. KPA/207-2010-11/AHM, with a requirement for provisions of a bid bond for Kshs. 250,000 to last for 120 days, it approached the defendant for that banking product with specific and express instructions on the critical attributes of the bond by its letter of 12.7.2011.

2. It was further pleaded that the defendant indeed agreed to provide the bid bond and issued the documents on 26.7.2011 being the day the tender was closing, but gave it a life of up to the 21.11.2011. There was a further term in the bond that if no demand would have been made against the defendant by that expiry date, the guarantee thereby given would stand null and void whether or not the original guarantee would have been returned.

3. The said bid bond, which had a validity period of less than 120 days, was used by the plaintiff for the intended purpose of tender and the plaintiff contends that having been assured of its propriety, it submitted its tender document and waited till the 28.9.2011 when it received a letter from the procuring entity to the effect that it had lost the tender due to the fact that the tender security was deficient on the requirement for 120 days' life.

4. The plaintiff blames the loss on what he calls negligence and lack of care on the part of the defendant and as a consequence, it claims to have lost the benefit it would have derived had it succeeded, being the margin between the procurement cost of USD 342,100 and the tender price of USD 592,960 which it calculates and claims in the sum of USD 250,860.

5. On the pleaded facts the plaintiff seeks the recovery of the lost sum, a declaration of the negligence, general damages as well as costs and interests. To accompany the plaint, the plaintiff filed a witness statement by one PATRICK MUNYAO as well as a list of documents containing some 6 documents with copies thereof.

6. For the defendant, a statement of defense dated 18.10.2012 was filed on 19.10.2012 in which only the descriptive paragraphs of the plaint were admitted while no knowledge was pleaded about the relationship between the parties and the fact that the company met and passed a resolution to sue. That the plaintiffs submitted a tender as pleaded at paragraph 5 and that it did make a request to the defendant by a letter dated 12.7.2011 were all denied and strict proof invited. It was however admitted that a request was received from the plaintiff's director, one PAUL MUNYAO, for a bid bond in favour of the Kenya Ports Authority with a validity of up to 21.11.2011 which request it honoured and issued the requested bond. Only to that extent did the defendant admit the pleadings by the plaintiff that it did issue the bid bond and that it had a validity period of up to 21.11.2011 but denied giving any assurance to the plaintiff and therefore denied any negligence or lack of care on its part. It was stressed and asserted that the loss of the tender was never on account of the defendant's negligence or lack of care. Any loss by the plaintiff in the sum claim and at all were all denied it being pleaded that there had never been any guarantee that the plaintiff would win the tender hence any pleaded loss is speculative and remote and was never and could not have been within the contemplation of the defendant.

7. The jurisdiction of the court and making of demand were admitted but all the claims by the plaintiff were denied with a prayer that the suit be dismissed with costs. In support of the statement of defense, the defendant filed a witness statement by one ERIC OTONGLO, a Senior Legal of the defendant as well as a list of some 4 documents with copies thereof. That witness statement by ERIC OTONGLO was subsequently substituted by a statement of one WILLIAM MWASHUMBE after the court leave was sought and obtained.

Evidence led at trial

8. Each party called one witness and as agreed with parties, such witnesses relied upon and adopted the witness statements as evidence in chief and were subjected to cross-examination. From that approach the evidence in chief remains in the witness statements which must be read with the notes taken during cross examination and re-examination.

9. PW 1, PAUL MUNYAO, in his witness statement asserted, in line with the plaint, that as a customer of the defendant, he did on behalf of the plaintiff request for the bid bond by a letter of 12.7.2011 and gave specific terms to be included but the defendant ended up giving a bid bond whose validity would terminate on the 21.11.2011 which the plaintiff contended was short of the requirement for 120 days. The said bond further limited the liability to only claims made by close of day on the expiry date would be considered. According to the witness, that was the sole reason for failure to win the tender as a result he suffered the loss pleaded and is thus entitled to the remedies sought in the plaint. The witness then produced the documents filed as P exhibit 1 – 6.

10. On cross-examination he admitted being a seasoned businessman and knowledgeable in tender supplies having only lost once due to a mistake. On that basis, he admitted that there is never a guarantee in winning a tender by any tenderer. When shown the tender documents, subject of the suit, in his list of documents, he admitted that the same was not complete but had quoted sum of USD 592,960.

11. On the bid bond he collected from the defendant on the tender closing date, he said that he did so himself and one hour to the opening of the tender hence he did not have time to study the document. On his letter requesting for the bid bonds, he said it was received by an acknowledgement at the back on the 14.7.2011. He said that his account was debited with the costs of the guarantee on 25.7.2011 and denied having bought the tender so as to bring this claim. He said that the product quotation from Pacific Maritime Industrial was just but a quotation not an invoice. He said the sum claimed was the mark up and the anticipated profit.

12. On re-examination by his advocate, the witness denied seeking to get a windfall and stated that his claim is the mark up or expected profit had the tender been awarded to him. He said that the letter from KPA dated 28.9.2011 was affirmative that he lost the tender owing to the validity of the bid bond being for 119 days and not 120 days yet the request was explicit in that regard. He said that his calculation of the loss was based on the cost at which the supplier would avail the goods, CIF Mombasa, when compared to the price at which the procuring entity would buy the same from the plaintiff.

Evidence by the defendant

13. MR WILLIAM MWASHUMBE, DW1, gave evidence by adopting the witness statement as evidence in chief. He also produced the documents filed as exhibits and the same were marked **D Exhibit 1 – 3.**

i. The gist of the evidence in chief was that sometimes on 14th July 2011, or thereabouts, the plaintiff informed the defendant that it was in the process of submitting some tender documents as pleaded and request for a bid bond in the sum of Kshs. 250,000 in the form of a bank guarantee and with a validity period of 120 days from the date of tender closure. He confirmed that the security was indeed issued on 26.7.2011 to last till 21.11.211 and that the document was collected by the plaintiff having been satisfied as to its correctness was used as intended for the submissions before it was returned to the defendant for cancellation. The witness took the position that the plaintiff had himself to blame for failure to ensure that the security issued met the requirement of the tender. Lastly, it was asserted that the claimed loss was too remote and not capable of contemplation by the defendant at the time the bid bond was issued. He prayed that the suit be dismissed with costs.

14. On cross-examination by the plaintiff advocate, the witness clarified that the defendant's correct name was STANBIC BANK formerly known as CFC Stanbic Bank Ltd. On that evidence, the plaintiff sought to amend the plaint and properly name the defendant and with consent of the defense the amendment was allowed for the name of the defendant to read STANBIC BANK (K) LTD.

15. The witness admitted that the plaintiff was at all material times a customer of the bank and that the letter of 12.7.2011 was indeed received by the bank on the 14.7.20211 and that in issuing the bank guarantee the bank charged fees. He confirmed that the request was specifically that the guarantee have a validity of at least 120 days from the date of tender closing being 26.7.2011. When shown the plaintiffs demand letter stating that computation showed the guarantee issued was for only 119 days, the witness confirmed such computation to be accurate and that the bid bond issued did not meet the request by the plaintiff and that the bank did not give what the plaintiff had asked for. He accepted that the bid bond given for a period less than that demanded by the procuring entity was the reason the bid was not accepted. He said he had no reason to doubt the veracity, authenticity and integrity of the letter from the procuring entity (KPA) and declined to take any position whether or not the plaintiff had suffered any losses. He admitted receipt of the demand letter on a date he could not remember and could not confirm or deny if there had been a response thereto while agreeing that the bank was not expected to ignore such correspondence. He equally was unable to say why the security was issued and signed on the very last day and minute but could not admit or confirm if that was the basis of the mistake. He then declined take a position in owning up to the mistake.

16. On re-examination, the witness noted that the letter from KPA dated 28.9.2001 and notifying of the failure of the bid was never copied to the bank and that the plaintiff never complained about the delay in issuing the bid bond.

Submissions offered.

17. After the close of production of evidence parties took time to file and exchange written submissions. The plaintiff's submissions were dated 23.11.2018 but filed on the 28.11.2018 while those by the defendant were dated 17.01.2020 and filed on 21.01.2020.

18. The records bear it out that the order and direction by the court given on the 10.11.2015 and regarding settlement and filing of agreed issues was never complied with hence when the parties attended court on 16.5.2016 both agreed that the issues crafted and filed by the defendant on the 15.4.2016 be adopted as the agreed issues. The said issues read:-

i) Did the plaintiff request the defendant to issue it with a Bid Bond for Kshs 250,000 valid for 120 days from the date of closing of the tender which was 26th July 2011?

ii) Was a Bid Bond issued by the defendant as requested and did the plaintiff accept this and include it as part of his tender document?

iii) Was the plaintiff guaranteed the order for supply of the goods it had bid for?

iv) What loss if any have the plaintiff by its bid being rejected?

v) Is the plaintiff entitled to the sum of US$ 250,860.00 as claimed?

vi) Costs of the suit?

19. I have had the benefit of reading and comprehending the evidence together with the submissions filed. I consider the issues as adopted for determination to be sequential and exhaustive of the entire dispute hence I will purpose to handle the same seriatim. However, before that task, a summation of the submissions offered should surface.

Plaintiff's submissions.

20. The plaintiff takes the position that the evidence led by both sides is clear that there was an agreement between the parties and that the terms thereof were clear and not in doubt. The decision in **RTS flexible systems Ltd Vs Molkerei Albis Maller GMBH & co. KG (uk production) 2010 UKSC 14 (45)** cited with approval in **Marita Peeush Mahajan Vs Yashwant Kumari Mahajan (2017) Ekr** was cited for the proposition of the law that the terms of a contract between two parties depends not on the individual subjective state of mind but on what was communicated between the parties by word or conduct based on objective appraisal of the said words and conduct to determine what was agreed.

21. That proposition of the law was relied on it being submitted that the letter of 12.7.2011 when followed with the defendants issue of the bid bond in favour of the plaintiff, show unequivocally that the parties operated on the terms of the request in the said letter. It was stressed and emphasized that the duration of the validity of the bond was all important.

22. It was pointed out that the evidence on record by both sides is that the bid bond given was for a period of less than that requested and did not meet the agreement between the parties. The plaintiff thus submits that the defendant was in clear breach of the contract and thus entitled the plaintiff to damages for breach of that contract in terms of the decision in **Bell Pacific Insurance Ltd vs Ecobank Ltd (2017) eKLR.**

23. Further submissions were offered to the effect that as a result of the deficient or noncompliant bid bond the bid was unsuccessful a matter the defendant had never rebutted.

24. On whether loss had been suffered by the plaintiff, the court was invited to take notice that the plaintiff placed a lot resources in preparing for the tender so as to place itself in a position to be awarded the tender which efforts included sourcing for the required products and ascertaining the selling prices up to seeking, paying for and procuring the bid bonds. It was submitted that such endeavors involved expenditure of resources and that it should not come from the defendant that the legitimate expectation was remote. The extent of the loss was submitted to be capable of ascertainment from the tender document and the product quotation from the manufacturers which gave to the plaintiff a margin mark-up of the sum claimed in the suit which is contended was the actual loss suffered.

24. The decision in **Bell pacific (supra)** was quoted for the proposition of the law that while there existed a contract between the parties and one party breaches the same, the innocent party is entitled to damages measurable by the extent of loss that would naturally flow from such a breach or such as would be reasonably been expected to have been in the contemplation of the parties at the time of contracting, as the probable result of a breach. The decision in **speed wall building Technologies Ltd Vs County Government of Migori (2016) eKLR** was cited for the proposition that general damages are awardable to an innocent party to a breached contract to compensate the input by such party and any bank charges met in procuring a performance bond. On those submissions, the plaintiff urged that it be granted the remedies sought in the plaint.

Submissions by the defendant

25. From the onset of the submissions, the defendant takes the position that it is not liable because it dutifully abode the plaintiff's instruction and that if any misfortune was suffered by the plaintiff then the plaintiff self-authored such misfortunes solely over and above the fact that the loss if any is too remote as no guarantee would and could have been given that the plaintiff would win the tender.

26. It was then submitted that if any loss was suffered then the same was grounded and sounded upon a contractual relationship for which no general damages are recoverable.

27. On issue number (1) there is a tacit concession by the defendant that the bid bond indeed fell short of the registered validity period of 120 days by one day and was rejected by the procuring entity the Kenya Ports authority. I consider that concession to be a firm and valid ground to say that issue number 1 has been answered in the affirmative. It is thus determined that the request for bind Bond was specifically for a validity period of 120 days from 26th July 2011.

28. On issues (2) & (3) the defendant attacked the evidence led by the plaintiff upon cross-examination as having showed that the finance statement produced was not the one used for the bid; that there was never a guarantee to win the tender and that no evidence was available to

prove that had the bid bond been sufficient and appropriate the plaintiff would have won tender. There was a repeat that the plaintiff's case was at best speculative and the fact that the plaintiff ought to have scrutinized the bid bond before need could have saved the situation. In the absence of financial bid submitted and without the documented out came of the tender evaluation, it was never proved that the deficient bid bond was the only reason for failure to win the tender. The defendant cited the court the decision in **Bid insurance brokers Ltd – Vs – British united Provident fund (2016) eKLR** where the court held that in the absence evidence of goodwill or extensive efforts to expand business in Kenya, there was no basis for the purported growth.

29. **Kenya Breweries Ltd Vs Kiambu General Transport Agency Ltd (2000) eKLR and Kenya Ports authority vs with – Bell Welfare society (2016) eKLR** were cited from the principles of law that no general damages are awardable for breach of contract and that parties are bond by their pleadings with no room for departure and further that the burden of proof is always upon him who alleges and finally that the law operates in a binary system where a fact either happened or did not without a middle ground.

30. The decision in **Eric Omuodo Ounga vs Kenya commercial Bank (2017)** was cited for the proposition of law that the losses if any were too remote and speculative and not attributable to the bank.

31. On the basis of what is urged in issues (2) (3) the defendant submitted that no loss was proved to have been suffered just like there was no justification for the claim of USD 250,850 and that in conclusion the suit should be dismissed with costs because costs follows the event.

Analysis and determination

32. The totality of the evidence on record leaves no room to question whether or not the plaintiff requested for bid bond and the terms the request was made. I so say because in his evidence, D.w 1 was explicit that the letter by the plaintiff requesting for the bid bond was duly received and that its terms understood. The said witness indeed said that the guarantee given was for 119 days and not the requested validity period of 120 days that to me answers the issue whether the bid bond requested was specific on period of validity in the affirmative.

33. The foregoing determination remains the foundation upon which the subsequent remaining issues must be built. This follows for the position of law that contractual agreement and obligations of parties must remain what an objective construction of their words and conduct yields.

34. The letter by plaintiff requesting for the bid bond and upon which the Bid Bond was issued without alteration of terms, was explicit on what the parameters of the bid bond were to be and thus the contract between the parties. That document reads:

> **"We are in the process of submitting a tender document for the supply and delivery of Fenders to the Kenya ports Authority and the required tender security is Kshs 250,000 which should be in the form of a bank guarantee.**
>
> **Please note that the Bond Guarantee must be valid for 120 days from the date of closing the tender, which in this case is 26 th July 2011.**
>
> **In view of the above, we would wish to request you to provide us with the relevant tender security amounting to Kshs 250,000/=."**

35. When D.W 1, gave evidence, he admitted that the Bid Bond issued did not meet the plaintiff's needs, he did answer the first part of the 2nd issue in the negative. The bid bond issue was not the plaintiff has asked for. That is the position of evidence that dictates a finding that the defendant did breach the agreement between it and the plaintiff.

36. Does it matter that the plaintiff was given the document and he took it without a complaint? I start from the stand point that even though the two parties were contracting at arms-length, that is only to the extent that both put forth their desired position. However, the bank must be recognized to be what any bank must be reputed for – expertise and skill in the practice and conduct of banking business. For good and transparent corporate governance, banks negotiate and conclude financial contracts on day-to-day basis and are thus known and expected to be possessed knowledge in the negotiation, drafting, conclusion and execution of banking contractual instruments and contracts. Such is not the same of majority of bank customers. That I am prepared to take judicial notice of as matter of common notoriety. I am also appreciative that the requirements of section 4 as read with FIRST SCHEDULE to the Banking Act underscore the need and employment professional credentials and expertise on the officers of banks so that they be equipped to recommend sound practices devoid of ignoble considerations as well as ability to provide dispassionate advice to the bank. Such statutory imperatives leave no room for the banks to accept consideration for a financial accommodation without providing the value for such consideration. In the circumstances of this case the admission by the defendants' witness that the validity period required by the plaintiff was never met is enough to say that the plaintiff never got the consideration for what he paid. That must be a clear breach of the contract between the parties by the defendant.

37. In the letter requesting for the bond the validity period was emphasised and its effective date. It would follow that without a bid bond, this having been a public procurement process, the bid could only be non-responsive. If non-responsive, the bid had to fail without being progressed to the next level of consideration. I consider that to have been the fate, which befell the plaintiff tender because the procuring entity is unequivocal that '**the tender failed due to the fact that the tender security validity was 119 days contrary to 120 days as required by the tender document'.** The conclusion I make on issue (2) is that the bond issued did not match the plaintiff's requirements, was the reason for failure of the bid and that it matters not that the plaintiff accepted the bid bond without protestations before using same to submit the tender documents to the procuring entity.

38. On issue 3, there is no evidence that the plaintiff was ever guaranteed the outcome of the tender before-hand. The law on public procurement, I note the procuring entity is a public agency obligated to comply with the strict provisions of article 227 of the Constitution and the Public Procurement and Asset Disposal Act. The law in those two sources demand transparency, fairness, equity, competition and cost efficacy by procuring entities. It would thus be illegal for any person to expect or purport to give a guarantee to any tenderer before-hand

and in advance. I determine issue 3 to the effect that the plaintiff had no guarantee for the success in its tendering bid and that he could not validly and legal expect such guarantees.

39. Having found that there was breach of contract by the defendant and that it was such breach that determined the failure of the plaintiff's bid, I hold that the plaintiff thus lost the prospects to win the tender and thus the legitimate expectation to so win and derive the benefits expected to flow from clinching the tender. That loss must be quantified in terms of what the parties or one of them, reasonably and objectively anticipated as the financial benefit one would get if the tender were won by the tenderer and payment made after the good were supplied. In my mind, there is no prohibition in law that no damages ever issue in favour of a party who has proved breach and loss. In fact, I am of the learning that where a party take his time and other resources towards a patently beneficial and profitable venture but he loses his expectation and prospects by the sole reason of another with a contractual duty to the losing party, then it would be travesty of justice to say that such a person has no remedy in damages at all.

40. The author of **Anson's Law of Contract, 28th Edition at pg 589 and 590** states the law to be that:-

> **Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".**

41. One who injures another ought not to walk freely merely because the damages are intangible or difficult to assess. In a case like the one at hand the plaintiff did prove that he sought a quotation from the supplier of the goods to be delivered and availed that quotation which he compares with the quoted sum to come with the sum claimed as a mark-up or margin. In my opinion and view, that is not farfetched but a real situation of the probable loss that a reasonable business person would contemplate at the inception of the contract. The bank ought to have reasonably anticipated that their customer if he won the tender would make a profit measurable in terms of the difference between purchase and sale price. I consider that a reasonable yardstick and I have nothing compelling to discourage its use to measure the damages due. In **Kinakie Co-operative Society Vs Green Hotel (1988) KLR 242**, the court of Appeal held;-

> **"…where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages."**

42. The evidence availed here is that the plaintiff was indeed in the business of supplies and therefore a loss of an opportunity can be nothing else but loss of business. For such loss not only nominal but substantial damages are due for assessment and award. In **Nyamogo & Nyamogo Advocates Vs Barclays Bank of Kenya Limited (2015) eKLR, the court of appeal while affirming that damages are indeed recoverable for breach of contract leading to a proved loss, held:-**

> **"Applying the above to the rival arguments herein on normal damages, we are of the view that the appellant's claim does not fall into the category of claims that qualify for nominal damages only because the appellant was not merely seeking to negative a right but was saying that by the reason of his professional standing as a firm of advocates dishonor a cheque payable on its behalf had repercussion on their professional standing.**
>
> **… Their claim falls outside the nominal damages bracket but with a caveat that any intended award of damages, should not be so high because if alleged heavy losses were involved then these should have been quantified and claimed as special damages."**

43. I get the court to say that indeed damages are awardable either as specials when properly pleaded and proved or as general when at large but such general damages ought to be mitigated and checked so as not to appear too large. Applying those principles to the case at hand, I do find that on a balance of probabilities the plaintiff did prove its losses at US$ 250, 860 for which I enter judgment. Having done so I find that there was no further loss suffered to merit any award of general damages prayed for.

44. In conclusion, judgment is entered for the plaintiff against the defendant in the sum of USD 250,860 with cost and interest thereon at court rates from the date of the suit till payment in full.

Dated, **signed** and **delivered** at **Mombasa** this **26th** day of **February 2021.**

PATRICK J. O. OTIENO

JUDGE