



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 63 OF 2018

EQUITY BANK (K) LIMITED.....APPELLANT

VERSUS

LEGEND CONSTRUCTION COMPANY LTD.....RESPONDENT

[Being an appeal from the Judgment and Decree given on the 18th day of June 2018

by the Principal Magistrate's Court at Winam (Hon. Benard Kasavuli SRM)

in WINAM PMCC NO. 24 of 2017]

JUDGMENT

By a Judgment dated 18th June 2018, the trial court awarded to the Plaintiff the sum of Kshs 2,307,984.42 as compensation for Loss of Profits. The trial court awarded interest on that amount, calculable from the date when the suit was filed.

1. Finally, the Plaintiff was awarded the costs of the suit.
2. The Defendant lodged an appeal, challenging the Judgment.
3. In determining the appeal, I will re-evaluate all the evidence on record and draw therefrom my own conclusions.
4. Whilst carrying out the process of re-evaluation, I will bear in mind the fact that I did not have the benefit of observing the witnesses when they were testifying.
5. At paragraph 4 of the Plaint, it was asserted that the Plaintiff, **LEGEND CONSTRUCTION CO. LIMITED**, received a letter of **NOTIFICATION OF TENDER** on 4th April 2014. The said letter was dated 28th March 2014, and had been written by the **KENYA URBAN ROADS AUTHORITY (KURA)**.
6. At paragraph 5 of the Plaint, it was stated that, pursuant to the Notification of Tender issued by **KURA**;

“..... it was a condition precedent that the Plaintiff do furnish within 21 days from the date of the letter, a bank guarantee amounting to 10% of the tender sum which was to be Kshs 923,193.77/=.”
7. It was the Plaintiff's case that it approached the Defendant, **EQUITY BANK LIMITED**, to provide a **PERFORMANCE GUARANTEE BOND TO KURA**, within the stipulated time, as contained in the Notification of Tender letter dated 28th March 2014.
8. At paragraph 8 of the Plaint, it was stated that the Plaintiff needed to add the sum of Kshs 138,000/=, to the amount of Kshs 323,600/=, (which the Defendant was already holding), so as to raise Kshs 416,000/=, which was 50% of the cost of the “*performance security*”.
9. It was the Plaintiff's case that it deposited the required top-up with the Defendant on 26th April 2014.
10. Notwithstanding the said top-up, the Defendant failed to submit the Performance Security Bond to **KURA** by 2nd May 2014, which date the Plaintiff described as the deadline for the provision of the Bond.

11. At paragraph 11 of the Plaintiff, it was stated thus;

“The plaintiff avers that the said performance bond was subsequently, dishonoured by Kenya Urban Roads Authority for the late submission and the same was returned to the plaintiff vide a letter dated 07.10.14 and subsequently returned to the defendant on 09.10.14.”

12. As far as the Plaintiff was concerned;

“..... the late submission of performance bond and the subsequent repudiation of the tender award by the Kenya Urban Roads Authority was occasioned by the defendant’s violation of its contractual duty of reasonable care and skill owed to the plaintiff, as its banker the defendant failed, neglected and/or refused to respond to the plaintiff’s application in any way whatsoever before the lapse of the (sic!)”

13. The Plaintiff claimed the sum of Kshs 3,000,647/96 as Loss of Profits, arising from the Defendant’s alleged breach of its contractual duty of reasonable care and skill.

14. The Plaintiff also claimed Kshs 18,620/= on account of the fees it had paid as premiums for insurance.

15. In answer to the claims, the Defendant denied the contentions that it had caused the Plaintiff to suffer any loss or damage.

16. As far as the Defendant was concerned, it had acted diligently.

17. In particular, the Defendant asserted, (at paragraph 4 of the Defence) that;

“..... upon receipt of the application aforementioned, the Defendant, pending processing of the said application, via a letter dated the 25th day of April 2014, duly informed the Authority of receipt of the application and its processing

18. According to the Defendant, the processing of the application included the issuance of an offer by the Defendant, (which was done on 7th May 2014), and the acceptance thereof by the Plaintiff, (which was done on 8th May 2014).

19. During the trial, the Plaintiff called 2 witnesses, whilst the Defendant called 1 witness.

20. PW1, ANDREW ONYANGO ABOR, is the Managing Director of Legend Construction Company Limited. He testified that the case was about the failure of Equity Bank to give to **KURA**, a performance security bond, on time, so as to enable the Plaintiff secure the contract with **KURA**.

21. He testified that the bond was to have been submitted within 21 days;

“... from the date of the letter, which comes to 2-5-2014.”

22. However, it was not until 8th May 2014 when the Defendant issued the bond.

23. PW1 delivered the Bond to **KURA**, but it was rejected by the Tender Board, due to the fact that the bond was late.

24. PW1 testified that the Plaintiff did not get the contract because it did not submit the bond on time.

25. Therefore, **PW1** explained that the Plaintiff’s claim of Kshs 3,019,265.96 was in respect of the Plaintiff’s *“Estimated Profit, inclusive of VAT.”*

26. During cross-examination, **PW1** confirmed that;

“On 24.4.14 is when I applied to the bank.

The bank wrote to KURA that they had accepted to give us the performance bond.

I took the letter to Kura. We had an offer from the bank.

.....

It was accepted. It is dated 7/5/14. I accepted it on 8/5/14.”

27. I find that the piece of evidence negates the contents of paragraph 12 of the Plaintiff, wherein the Plaintiff had asserted that the Defendant failed, neglected and/or refused to respond to the Plaintiff’s application for a performance bond.

28. PW2, AGUMBA MOSES OROT, a Civil/Structural Engineer. He testified that the Plaintiff had asked him to give his expert opinion on the matters in issue in this case.

29. PW2 delivered his written report, dated 17th January 2018.

30. It was his evidence that the margin of profit was between 15% and 20% for Civil Engineering; and 26% to 30% for Road Works.

31. However, where the award was of

“Small Value Engineering Works, like the case at hand, the profit margin is 20-30%.”

32. In his considered opinion, **PW2** said;

“1) Loss of Expected Profit Based on the Contract sum of Kshs 9,231,937.70, this can lie between Kshs 1,846,387.50 to Kshs 2,769,581.31. My most likely amount is the midway point of Kshs 2,307,984.42 due to the small value of this civil engineering works contract.”

33. During cross-examination **PW2** said that;

“The performance security was to be issued within 21 days from the date of letter (P Exhb 4).

The contractor is the one to make the application to security.”

34. Exhibit 4 is the Notification of Award letter dated 28th March 2014.

35. Since **PW2** made it clear that the performance security bond was to be issued within 21 days from the 28th of March 2014; and because it was the obligation of the Plaintiff to apply for the said performance security bond, I hold the considered view that;

a. The 21 days period, (in the understanding of PW2) was to run from 28th March 2014.

By my calculations, the 21 days would lapse on 18th April 2014; and

b. By the time PW1 wrote to the Defendant on 23rd April 2014, the period of 21 days, (as specified in the Notification of Award dated 28th March 2014), had already lapsed.

36. If, as the Expert Witness said, the 21 days was calculable from 28th March 2014, it would never have been possible for the Defendant to comply with the requirement to deliver the performance security bond on time, as the Plaintiff first asked the Defendant to provide it after the period had already lapsed.

37. Incidentally, it was not only the Expert Witness who testified that the 21 days period was calculable from the date of the Notification of Tender: at paragraph 5 of the Plaintiff, the averment was the same.

38. Furthermore, the letter dated 28th March 2014, which constituted the Notification of Award, also expressly stipulated that the performance security, in the form unconditional Bank Guarantee was to be provided to **KURA** within 21 days from the date of the letter.

39. The learned trial magistrate held as follows;

“There is equally no doubt that as a result of the Plaintiff’s failure to provide a Bank Guarantee, he lost the chance to effect the tender as awarded.”

40. If the trial court was of the view that the Defendant failed to give a Bank Guarantee altogether, that would be a serious misdirection, because the Defendant did provide a Bank Guarantee.

41. The learned trial magistrate held that;

“... time was of essence in the dealings between the plaintiff and KURA”

42. About that finding there is no dispute.

43. Therefore, it means that it was incumbent upon the Plaintiff to ensure that the Bank Guarantee was provided to **KURA** within 21 days, from 28th March 2014.

44. Notwithstanding the Plaintiff’s acknowledgement that time was of the essence in the dealing between the Plaintiff and **KURA**, the

evidence tendered by the Plaintiff shows that it was not until 24th April 2014 that the Plaintiff wrote to the bank, to request for the required Bank Guarantee.

45. If any person was guilty of the delay, which made it impossible for a Bank Guarantee to be made available to **KURA** within the time stipulated in the Notification of Award, it would be the Plaintiff.

46. The Plaintiff submitted that;

“..... the reason for cancellation was the failure to provide the performance security bond on time.”

47. This court was invited to conclude that, on a balance of probability, the cancellation of the tender award could have been due to the failure to prove the performance security bond, on time.

48. In other words, the Plaintiff was not citing the actual reason for the cancellation of the tender award.

49. Pursuant to the provisions of **Section 107** of the **Evidence Act**;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

50. In this case, the Plaintiff had asserted that the reason for cancellation of the tender award was the delay occasioned by the defendant, in the provision of the performance security bond.

51. Therefore, I find that the onus was upon the Plaintiff to prove that assertion.

52. Having re-evaluated all the evidence on record, I found no evidence to prove the Plaintiff's assertion.

53. In my considered view, it should have been very easy and straight forward for the Plaintiff to make available the letter from **KURA**, which spelt out the reasons why the tender award had been cancelled.

54. In the absence of evidence from **KURA**, it would be speculative to say that the tender award was cancelled because the Defendant provided the performance security bond late.

55. The Plaintiff has drawn my attention to the concession made by the Defendant's witness, to the effect that the Plaintiff had met all the requirements for the issuance of the bond.

56. The said concession must be understood within context, as the bank's Credit Manager said that the bank had given its offer letter on 7th May 2014. He added that;

“We issued the bond after signing the offer letter. Performance bond was issued on the same day offer letter was signed. The date of performance bond was 8/5/14. 21 days from 28/3/14 ends at or around 18/4/14.

The period taken to produce bond depends on the securities to be prosecuted (sic!).

The plaintiff's security was money in fixed deposit A/C and property charged to the bank.

The title deed was in our possession. The title deed was in the bank.

I confirm the plaintiff had complied with requirements of issuance of the bond.”

57. When the Plaintiff's Managing Director was being cross-examined, earlier, he confirmed having the offer letter from the bank. He said that the offer letter dated 7th May 2014, was accepted by the Plaintiff on 8th May 2014.

58. I therefore find that it was after the Plaintiff had accepted the offer from the Defendant that the Plaintiff was deemed to have met the requirements for the issuance of the performance security bond.

59. As the offer was accepted by the Plaintiff on 8th May 2014, it could not be expected that prior to the Plaintiff and the Defendant agreeing on the terms for the issuance of the bond, the Defendant would have issued the bond.

60. In so far as the Defendant was not a party to the contractual relationship, (if any) between the Plaintiff and **KURA**, the terms and conditions governing such a relationship were not binding upon the Defendant. I so find because the Defendant was not privy to such a contractual relationship.

61. In conclusion, I find that the learned trial magistrate erred when he found the Appellant liable for the cancellation of the tender award which **KURA** had given to the Plaintiff.

62. On the question of the sum awarded as compensation for Loss of Profit, it must be noted that the claim was couched as Special Damages.

63. It is cardinal rule of civil cases that claims for Special Damages must be specifically pleaded, and must thereafter be strictly proved.

64. In the case of **MARY MUKIRI Vs NJOROGE KIANIA, CIVIL APPEAL NO. 48 OF 1996**, the Court of Appeal made it clear that the Appellant was not entitled to an award for Loss of Earnings or Earning Capacity, because she did not prove the said loss with any certainty.

65. In this case, the Plaintiff had 2 claims under Special Damages, as follows;

“ **Loss of profit** **Kshs 3,000,647.96**

. **Fees on Insurance....** **Kshs 18,620.00**

TOTAL Kshs 3,019,267.96

66. In terms of pleading, the Plaintiff was very specific about the quantum of Special Damages claimed.

67. At the trial, **PW1** produced the receipt issued by **UAP** Insurance Company Limited, for the sum of Kshs 18,624/=. He also produced Policy Documents, from which it was clear that the sum of Kshs 18,624/= was paid on account of Premium for the policy of Insurance to cover the Contract in which **KURA** had awarded a tender to the Plaintiff, for the construction of a road in Kimilili Municipality. The Contract price was specified as Kshs 9,231,937/=.

68. I find that the evidence in that regard was strictly proved.

69. As regards the claim for Loss of Profits, the evidence was adduced by **PW2**. The evidence was in the nature of an Expert Opinion. He said;

“Normally, the margin of profit expected by Contractors in Building Works normally lie in the region 15 to 20%, while the margins in Civil Engineering Contracts is usually between 20 to 30%. These margins can always be exceeded by may be 5% or so, depending on the Contractors available Equipment and facilities or place of site relative to its Head Office, etc.

Building Works are more precise with ‘small works within it such as plastering/ screeding’, being easy to quantify and thus lower margins.

However, Civil Engineering works such as road works cover extensive distances with variability in physical conditions such as soils, ground levels, etc and are therefore risky to price and hence attract larger profit margins by bidders.”

70. The subject matter of the tender between **KURA** and the Plaintiff was a road. Therefore, in line with the Expert’s opinion, the contract could be risky to price, due to variability in physical conditions.

71. Having taken into account the factors he considered applicable, the Expert Witness said that;

“Most likely a better basis of profit estimation by the Contractor would lie between 20 to 30%, with 25% being most likely as the lower margin because of its small size in the class of civil engineering works.”

72. As the witness said, he was talking about “*profit estimation.*”

73. He then said that the loss of expected profit could lie between Kshs 1,846,387.50 and Kshs 2,769,581.31.

74. Finally, the witness settled for the

“midway point of Kshs 2,307,984.42 due to the small value of this civil engineering works contract.”

75. In my considered opinion, the evidence adduced fell short of the required “*strict proof.*” However well founded the evidence was, the conclusion arrived at was an estimation of the possible loss of profits.

76. In conclusion, the appeal is successful. I therefore set aside the Judgment in its entirety and substitute it with an order dismissing the suit.

77. The Appellant is awarded the costs of the appeal as well as the costs of the suit.

FRED A. OCHIENG

JUDGE

DATED, SIGNED and DELIVERED at KISUMU This 30th day of January 2020

T. W. CHERERE

JUDGE