



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 228 OF 2019

BETWEEN

CHINA CIVIL ENGINEERING CONSTRUCTION CORPORATION.....PLAINTIFF

AND

CAPITALAND EAST AFRICA LTD.....DEFENDANT

AND

STANBIC BANK KENYA LTD INTERESTED PARTY

JUDGMENT

1. The plaintiff is incorporated in the Republic of China. It has been engaged in the construction business in Kenya since 2012 and has undertaken some of the large scale projects in Kenya including Phase I and Phase 3 of the Mombasa Southern By-Pass at over Kshs. 13 billion and Kshs. 5 billion respectively. The defendant is a limited liability company incorporated in Kenya while the interested party (“the Bank”) is a licensed bank operating in Kenya.

2. The plaintiff’s case against the defendant is set out in the plaint dated 26th September 2019 and it is that the defendant fraudulently caused it to apply for a construction tender in which it procured and caused the Bank to issue a Bid Bond for Kshs. 120,000,000/= to the defendant. After cancelling the tender, it called the Bid Bond causing it to file this suit in order to arrest the liquidation of the Bid Bond, the plaintiff filed this suit and it sought the following orders:

- i. Pending the dispute being referred to arbitration, an interim injunction to issue restraining the interested party from paying out Kshs. 120,000,000 or any other sums to the defendant from the Tender Guarantee No. MD xxxxxxxx;
- ii. That alternatively, a permanent injunction do issue restraining the Interested party from paying Kshs. 120,000,000 or any other sums to the defendant from the Guarantee No. MDxxxxxxx;
- iii. A return and thereafter, cancellation of Guarantee No. MDxxxxxxxxxxx from the Plaintiff to the defendant.
- iv. Damages for breach of contract against the Defendant.
- v. Costs of the suit and interest therein.

3. The plaintiff’s case is that on 8th August 2019, the defendant placed an advertisement in the Daily Nation requesting contractors to submit bids for the development of Executive Beach Villas on Plot L.R. NO. MN/111/1109.MTWAPA, KIKAMBALA, NORTH COAST, MOMBASA, KENYA being tender No. CEAL/02/01-11KKBL/2019-2020/104(“the property”).

4. As part of the tender process, the plaintiff’s representatives duly visited the site on 7th August 2019 and confirmed that the property belonged to the defendant. The plaintiff’s representatives also visited the defendant’s office at Mirage Towers, Waiyaki Way to be proved with further particulars of the proposed development but noted that there were no other bidders present. The defendant informed the

plaintiff's representative that the project would be financed by a Middle East-based Company called Abu Dhabi Sky Investment and Housing ("Abu Dhabi Sky"). The defendant's representative showed the plaintiff's representative a letter written by Abu Dhabi Sky to the defendant undertaking to finance the entire project. The defendant however declined to release a copy of the letter due to a Non-Disclosure Agreement but allowed the plaintiff's representative to take a photocopy of the top part of the letter without revealing the contents. Based on the defendant's representations and assurances, the plaintiff submitted and the defendant acknowledged its physical bid documents despite the fact that it had been expressly provided that all bids were to be submitted online via a system known as "Tendersure" which could not be accessed.

5. The plaintiff understood that the defendant would invite it for the formal opening of the bids scheduled for 30th August 2019 but this was not done and after making inquiries by telephone, the defendant informed the date would be communicated later. The plaintiff inquired about the tender opening date on 2nd September 2019 and by an email dated 2nd September 2019, the defendant informed the plaintiff that the tender had been cancelled.

6. The gravamen of the plaintiff's case is that one of the conditions of the tender was that the contractors were required to submit a Bid Bond for Kshs. 120,000,000/=. The plaintiff had requested its banker, the interested party, to issue a bid bond in the defendant's favour which provided, *inter alia*, that:

Undertake to pay you, upon receipt of this guarantee and your first written demand declaring the tendered to be in breach of Tender requirements...

7. Following cancellation of the contract, the plaintiff wrote to the defendant on 3rd September 2019 requesting for a return of their bid documents and Bid Bond. The defendant failed to return the document but informed the plaintiff that it would advise it when to collect the documents. On 6th September 2019, the defendant telephoned the plaintiff requesting for a meeting at the defendant's office. At the defendant's office, the plaintiff's representative was advised by the defendant's representative who advised him that the defendant had decided to award the tender to the plaintiff. The plaintiff's representative was shown a letter dated 6th September 2019 to that effect but it was not given to him as it was only executed by the defendant's Chief Executive Officer and was still awaiting the signature of Mr. Evans Mwaniki, the Supply Chain Manager.

8. The plaintiff avers that a day later, the plaintiff was requested by the defendant to provide their reference number to be inserted in the letter of award. On 12th September 2019, the defendant requested the plaintiff to collect the Letter of Award from its offices. When the plaintiff's representative went to collect the letter, he was requested by Mr Peter Gilbert to acknowledge the date of receipt of that letter as 6th September 2019 as the date when the defendant's board met and awarded the Tender and the two had to match. He also informed the plaintiff's representative that the letter cancelling the tender would be revoked and that it would receive a notification in writing.

9. Following the assurances given by the defendant, the plaintiff's representatives executed the letter of offer. The Letter of Award issued was materially different from what the plaintiff had been informed earlier. It did not contain the plaintiff's reference, it was not co-signed by Mr Evans Mwendwa and the date when the plaintiff submitted their bid was changed from 27th August 2019 to 30th August 2019.

10. To enable the plaintiff to move onto the site, and execute the formal contract which had to contain the particulars of the Bill of Quantities, the plaintiff's representative communicated with the defendant's CEO, Mr. Rogers Dave, on the execution of the Guarantee Letter. In a series of correspondence, the plaintiff was requested to wait. On 25th September 2019, the Bank informed the plaintiff that the defendant had sought to enforce payment of the Bid Bond on the basis that the plaintiff had failed to provide a performance bond within 14 days.

11. The plaintiff became suspicious of the defendant's conduct and after making inquiries it found the following; the property was not registered in the defendant's name as had been represented by the defendant. That Abu Dhabi Sky was a non-existent entity and was not involved in the financing of the project and the particulars of the defendant at the Companies Registry did not match those on the defendant letterhead or Tender Documents.

12. The plaintiff averred that the entire tender was a creation of the defendant to defraud the plaintiff of monies payable under the Bid Bond. In paragraph of the plaint, the plaintiff set out the following particulars of fraud.

PARTICULARS OF FRAUD AND MISREPRESENTATION

a. The defendant had in the bid documents stated that all bids would be submitted via an online platform 'Tendersure', which did not open. This was an act of deliberate omission and laid the foundation for perpetration of the fraud.

b. That the defendant, contrary to the provisions of the tender requested the plaintiff to submit a hard copy tender knowing that it would be easier to conceal any fraud on their part.

c. That the defendant, in response to a direct enquiry from the plaintiff, had informed the plaintiff that Plot LR. NO. MN 111/1109. MTWAPA, KIKAMBALA, NORTH COAST, MOMBASA on which the project was to be developed was owned by the Defendant which they knew was not true.

d. That the defendant in response to a direct question from the plaintiff had informed the plaintiff that the project would be funded by Abu Dhabi Sky, a fact which they knew or ought to have known was not true.

e. That the defendant had on 2nd September 2019, in writing, informed the plaintiff that the tender had been cancelled.

f. On 6th September 2019, the defendant informed the plaintiff that although they had been awarded the tender, the Letter of the Award could not be issued on that day as it had to be co-executed by the Supplier Officer.

g. That on 12th September 2019, the defendant requested the plaintiff to visit their offices to collect the Award letter and were informed that it had to be dated 6th September 2012 as that is the date the original Letter of Award had been issued.

h. That the insistence of the document being dated as 6th September 2012 was to enable the defendant to execute the fraud by calling in the Bid Bond before the expiry of 14 days.

i. That in response to a direct enquiry as to whether the cancellation of the tender would be revoked, the defendant informed the plaintiff that they would do so in writing.

j. Contrary in payment of the Tender Guarantee whilst knowing that the tender has been cancelled.

13. The plaintiff further avers that the entire contract was null and void for not complying with the Tender and in particular that the tender would be submitted online. That having cancelled the tender on 2nd September 2019, the entire bid process was terminated, including, *inter alia*, the Bid Bond submitted by the plaintiff. As a result, the plaintiff filed suit seeking the reliefs I have set out elsewhere above.

14. The plaint and summons to enter appearance were served on the defendant and when they failed to file defence, interlocutory judgment was entered on 17th January 2020 and the matter fixed for formal proof. The parties appeared before Kasango J on 11th March 2020 and she confirmed to the parties that this matter was fixed for formal proof today, 13th March 2020 before me, as she could not entertain any interlocutory application. The matter was listed for formal proof and the defendant was represented by counsel but when the matter was called out for hearing, the counsel was not in court and the matter proceeded for hearing.

15. At the hearing, Mr Hi Wei (PW 1), the Business Development Manager testified along the lines set out in the plaint and which I have outlined above and produced documents in support of the claim.

16. I have considered all the evidence on record and I am satisfied that the defendant issued such a tender and that the same was duly cancelled and a notice to that effect duly issued. The plaintiff produced tender guarantee reference xxxxxxxx dated 26th August 2019 issued by the Bank for Kshs. 120,000,000/- in which it undertook to pay the defendant in the event the plaintiff breached the tender requirements. The said tender was cancelled by the defendant through an email dated 2nd September 2019 referenced, "*Tender Cancellation..*" and informing the plaintiff to collect its tender documents. This was followed by the plaintiff's letter dated 3rd September 2019 notifying the defendant, that it was sending PW 1 to collect the bid documents. After the cancellations of the tender, the parties entered into fresh negotiations whereupon the tender was issued to the plaintiff but no contract was executed. The defendant wrote to the Bank a letter dated 25th September 2019 demanding payment of the guarantee, "*for failing to provide the Performance Security within the stipulated period as per the tender requirements after being awarded on 6th September 2019.*"

17. It is clear that the guarantee was called when the original tender had already been cancelled. The new negotiations and purported award of the fresh tender proceeded on a new basis and did not even result in the execution of a contract as show in the messages exchanged between the plaintiff and the defendant. It is clear that the purpose of the tender was in order to defraud the plaintiff of the Bid Bond. I therefore find and hold that the plaintiff has proved its case on a balance of probabilities.

18. Prayers (i) and (ii) of the plaint deal with arbitration but in view of the judgment, the same are not necessary and have been overtaken by events in view of the interlocutory judgment. As regards the special damages, it is trite law that these must be pleaded with particularity and proved to the required standard.

19. For the reasons I have set out above, I allow the plaint and order as follows:

a. GUARANTEE NO. xxxxxxxx dated 26th August 2019 issued by STANBIC BANK KENYA LIMITED to the defendant on behalf of the plaintiff is hereby cancelled.

b. The defendant shall bear the costs of this suit.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH, 2020

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mailu with him Mr Nondo instructed by LJA Associates Advocates for the plaintiff.

Mr Gathaiya instructed by Nick Ndeda and Associates Advocates for the defendant.

