



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HIGH COURT CIVIL APPEAL 134 OF 2008

**AFRICAN MARINE & GENERAL ENGINEERING CO.
LTD.....APPELLANT**

VERSUS

**TANZANIA NATIONAL ROADS AGENCY (TANROADS) AS AGENCY OF THE MINISTRY
OF INFRASTRUCTURE**

**DEVELOPMENT OF THE GOVERNMENT OF
TANZANIA.....RESPONDENT**

J U D G E M E N T

1. In its plaint dated 6.09.2006, the Plaintiff accused the 1st defendant for wrongfully and in breach of the agreement between the parties demanding from the 2nd defendant the sum of US\$ 18,500, pursuant to a bid security. The plaintiff then mounted prayers for a declaration that the demand for payment of US\$ 18,500 made by the 1st defendant to the 2nd defendant on account of the plaintiff was wrongful, unlawful irregular and unenforceable; and injunctions against the defendants from paying and receiving the sum from each other.

2. After service the defendants filed notices of appointment of advocates as well as Notices of Preliminary objections both challenging jurisdiction of the court among other grounds. One common ground of the preliminary objection was that the trial court lacked pecuniary jurisdiction to handle and determine the suit. When the matter came before court for the hearing of the application dated 6/9/2016 and simultaneously filed with the plaint, the parties agreed that only the 2nd defendants Notice of preliminary objection be canvassed. Even then the court narrowed down the arguments and consideration to the question whether or not it had requisite pecuniary jurisdiction to entertain the suit.

3. It is to be noted that the trial court took the objection on the same point twice and on a truncated manner in that, there is a ruling dated 7/9/2006 and the second one dated 20/6/2016 but delivered on the 9/7/2016, the subject matter of this appeal.

In that ruling the trial court found and held that:

“Although Mr. Khagran tried to persuade the court that the issue of the bid gurantee can be looked at separately from the issue of the bid itself, I am persuaded by the argument of Ms. Ngugi that it would be improper to try and divorce the issue of the bid gurrantee from bid itself. Even the plaint itself refers in seven paragraphs to the bid and even “contract” and in

view of the undisputed fact that the bid sum itself was US dollars 925,000 which is more in excess of this court's pecuniary Jurisdiction, it would be unwarranted usurpation of for this court to handle this dispute regarding the bid guarantee as the same is founded upon a bid beyond this courts power. It is this courts view that since the main contract is not within the realm of this court, then this court cannot properly exercise any jurisdiction on a matter touching Upon the intended contract”.

4. When the matter came up for consideration before the trial court on 21/11/2007, Ms. Ngungi for the 2nd defendant did not submit on the objection but adopted what Mr. Muniyithya had submitted earlier on the 1/11/2006. On that day Mr. Muniyithya had argued against the suit and submitted that there was never leave sought to serve summons outside jurisdiction as was mandatory under Order 5 Rule 21; that the *ex parte* orders were never served within 3 days as the law mandates; That the first dependant being an agent of the Ministry of the Republic of Tanzania no injunction could issue against it besides the fact that the contract was to be performed in Tanzania outside the territorial jurisdiction of the Kenyan court; that the Resident Magistrate court did not have pecuniary jurisdiction to entertain the matter for its jurisdiction was limited to the sum of Kshs.500,000/- and lastly that the tender documents exhibited disclosed that it was the legal system of Tanzania in the public Procurement Rules to apply and not otherwise. Those are the submissions Miss Ngugi adopted before Olao C.M. on the 21/11/2007.

5. Mr. Khegrau for the plaintiff and respondent to the preliminary objection resisted the Preliminary Objection on various grounds among them that the points raised did not qualify as preliminary objection by the definition in the celebrated case of Mukisha Biscuits Ltd vs West End Distributors Ltd.

6. On territorial jurisdiction he referred the court to the decision in Republic vs International Trustees [1931]2 ALL E.A. 164 as applied by Khaminwa J in Valentine Investment Co. Ltd vs Republic of German. He stressed that when parties enter into a contract the intention of the parties must be discerned from the contract itself and that such discernment would invite evidence hence outside the province of a preliminary objection.

7. Mr Khaigramm then relied on several decisions to support his submission that the Kenyan courts had the option to exercise jurisdiction even where the contract was entered in Kenya and contracted to be performed outside the country.

8. In her response Miss Ngugi maintained that the issues raised perfectly qualified as issues of law to be raised in *limine* and even by the court *suo motto*. On distinction between the bid value and the bid guarantee she submitted that the two were inseparable and seeking divorce same would lead to difficulties. She stressed that had there been no contract between the plaintiff and the 2nd defendant the bid guarantee would not have issued.

9. In the reserved ruling excerpts of which I have reproduced above, the trial court choose to decide the question of Pecuniary jurisdiction only.

Pecuniary jurisdiction of the magistrate's court.

10. To this court a cause of action is the heart of the complaint which is the set of facts entitling one to initiate a suit and seek remedies. In the matter giving rise to this appeal the Plaintiff/Appellant made a complaint that the 1st defendant, seeking to enforce payment of US\$ 18,500 for the 2nd defendant, now Respondent, was acting unlawfully and in a manner not enforceable regard being had to the relationship between the parties.

11. From the plaint, it is clear that the orders the plaintiff sought from court was geared toward resisting payment of US\$ 18,500 which when converted to the Kenyan currency was approximately 1,800,000/-. I say approximately 1,800,000 after taking notice that by the year 2007 the exchange rate between the US\$ and Kenya shilling was in the region between Kshs.90-100 to the dollar.

12. I equally take notice that at that time the highest cadre of magistracy being the Chief Magistrate,

which Olao Boaz was, had a pecuniary jurisdiction of up to 3,000,000. Pursuant to, **The Statute Law (Miscellaneous Amendment) Act, No. 2 of 2002.**

13. It is apparent to me that in the ruling the trial court did not find that he was not seized of jurisdiction to entertain a dispute over the bid guaranteed of US\$ 18,500. Rather the court found that its jurisdiction was exceeded by the contract sum of US\$ 925,000.

14. A lot was said about whether or not the bid security could be separated from the bid itself so that it could form a cause of action on itself. The bid security sued upon is to be found at page 106 of the record. At the relevant clause it provides:-

“At the request of the Bidder, WE NIC Bank Limited of P O Box 99793, 801007 Mombasa having our registered office at NIC House, Masaba Road, Nairobi hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount US\$ 34,000/- (read United states Dollars Thirty Four Thousand Only) upon receipt by us of your first demand in writing accompanied by Written statement stating that the Bidder is in breach Of its obligation(s) under the bid conditions, because The Bidder:

(a) Has withdrawn its Bid during the period of Bid validity specified by the Bidder in the Bid Sub-mission form; or

(b) Having been notified of the acceptance of its Bid by the purchaser during the period of bid validity as stated in the Bid Submission Form or extended by the Employer at any time prior to expiration of this period, (i) fails or refuses to execute the contract, if required, or (ii) fails to refuses to furnish the Performance Security, in accordance with the ITB.

15. My understanding is that between the plaintiff and the two defendants there existed atleast three different contract. The first contract was the contract for the supply of the two ferries between the plaintiff and the 1st depondent. The second contract was the one for provision of bid security between the plaintiff and the second defendant. Yet there was a third contract between the defendants by which the 1st defendant undertook to pay to the US\$ 34,000 to the 2nd defendant if the plaintiff was to commit a breach of contract between them.

16. In my view, those three contracts, albeit related and even intertwined, could as well be seen very distinctively for what they were. Being so distinct the performance or manner of performance of each would give birth to a distinct cause of action.

17. I find that the plaintiff’s cause action was grounded on the contract for the provision of bid security in which the Plaintiff was the person to benefit in case of due execution and the one to suffer in case of a breach.

18. By the letter dated 4.9.2016, the 2nd defendant in its demand to the 1st defendant wrote:-

“THEREFORE we, the Tanzania National Roads Agency, hereby demand payment of US \$ 18,500 being 2% of the Bid Price immediately upon receipt of this demand notice in our account “TANROADS Administrative & Operations” No. 01J10429818002 at the CRDB Bank Tower Branch, Dar es Salaam, Tanzania.”

19. The dispute before court therefore only concerned and the court could only determine whether or not the 1st Defendant was entitled to demand and secure from the 2nd defendant on account of the plaintiff the sum of US\$ 18,500. The question of performance of the contract of supply of ferries by the plaintiff, was with respect, not a cause of action or a complaint before the court and the court was not entitled to go into it. I say it was not before the court because no prayers were advanced in that respect.

20. It is now trite that jurisdiction of a court can only be conferred by law and not otherwise. As at the date of hearing and decision on the objection on pecuniary jurisdiction, the Magistrates Court Act, gave jurisdiction to a Chief Magistrate of upto Kshs.3,000,000. The dispute having been limited to US\$ 18,500 or Kshs.1,800,000. There is no doubt that Mr. Boaz Olao, Chief Magistrate, as he then was, was properly seized of the jurisdiction to entertain and determine the matter so long as the subject of the dispute remained US\$ 18,500/-

21. To the extent that the trial court considered that the bid and the bid security were inseparable the trial court erred in its appreciation of both facts and the law for which error I am constrained to interfere with the decision thereby arrived at.

22. The result is that the decision by the Chief Magistrate dated the 20/6/2008 and delivered on the 9/7/2016 is set aside with the consequence that the suit is reinstated for hearing before any magistrate with requisite pecuniary jurisdiction to entertain the matter.

24. It therefore follows that the appeal succeeds and is allowed with costs to the Appellant.

Dated, signed and delivered at Mombasa this **19th** day of **September 2016**.

P.J.O. OTIENO

JUDGE

19/9/2016