



Inclusive Agencies (Msa) Ltd v Co-operative Bank of Kenya Limited (Civil Suit 14 of 2020) [2024] KEHC 16910 (KLR) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 16910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 14 OF 2020
F WANGARI, J
MARCH 1, 2024**

BETWEEN

INCLUSIVE AGENCIES (MSA) LTD PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit by way of the Complaint dated 15th February 2020, seeking the following reliefs against the Defendants:
 - a. Damages and loss of income after loss of tender
 - b. Costs of the suit
 - c. Interest of (a) above from 11th August 2018 and (b) from the date of judgment to full payment.
 - d. Any other order the court deems fit to grant
2. The Plaintiff averred that it was a customer of the Defendant Bank where it maintained A/C No. 0114857438500 at its Nyali Branch, Mombasa. In the course of its business, the Plaintiff tendered for Provision of Material, Handling and Logistical Support Services for Civil Works, Manda Airstrip, where a surety bond duly executed by a bank or insurance company was required.
3. The Plaintiff through a Board Meeting resolution nominated the Defendant to provide the surety bond for Kshs. 200,000, which as per the conditions of the tender document was to last for Kshs. 150 days. The Plaintiff approached the Defendant in its Kongowea branch for purposes of providing it with the surety bond. The Defendant was furnished with the tender document for purposes of complying with the conditions of the tender document.



4. In total disregard of the conditions, the Defendant executed a surety bond of 120 days to lapse on 5/7/2018 instead of 150 days which was to lapse on 11/8/2018. As a result of the Defendant's negligence, the Plaintiff's tender was deemed as 'non-responsive' causing the Plaintiff to lose the tender, hence suffering damages and loss of income.
5. The particulars of negligence of the part of the Defendant were said to be;
 - a. Deliberately failing to peruse the tender document which was in their possession
 - b. Failure to note that the date indicated 5/7/2018 was 36 days less than the required period of 150 days which was to lapse on 11/8/2018.
 - c. Failure to correct the same within 120 days while the tender was still open
 - d. Failing to issue proper surety bond in compliance with the tender document.
6. The Plaintiff filed this suit after demand and notice of intention to sue was issued but ignored by the Defendant.
7. The Defendant filed its Statement of Defence dated 20/3/2020. It denied the contents of the Plaintiff's Statement of Claim and put the Plaintiff to strict proof thereof. It was however admitted that the surety bond was to expire on 5/7/2018. The Defendant denied that it owed duty of care to the Plaintiff, for it to be held negligent. It denied the particulars of negligence as stated herein above.
8. The Defendant further averred that it was the Plaintiff's sole duty to ensure compliance of the tender document conditions, and having accepted a surety bond that was not in compliance, then the Plaintiff was to blame.
9. The Defendant sought to have this suit dismissed for failure of disclosing reasonable cause of action.
10. The Defendant thereafter through a Notice of Motion dated 9/6/2020 sought to have the suit struck out for failure to disclose a reasonable cause of action, further stating amongst others that the suit was an abuse of the court process. The application was dismissed with costs via the ruling dated 9/10/2020 and the suit settled down for hearing.

Evidence

11. At the hearing, the Plaintiff's Director, Mr. John Evangelist Otieno, relied on his statement dated 18/2/2020, which was adopted as his evidence. The Plaintiff relied on the documents in his Bundle of Documents dated 20th March 2023 which were produced therein as exhibits.
12. The Witness testified that he approached the Defendant Kongowea Branch Manager one Patrick Lundi for the surety bond. The Manager asked for the tender document for perusal. The surety bond issued was non-compliant and when it was submitted to the procuring entity, the bid was deemed to be 'non-responsive' and 'non-competitive'.
13. It was further explained that the non-responsiveness was for reasons that the surety bond was not valid as the requirement was for 150 days, and the non-competitiveness was due to budgetary issues. The witness blamed the Defendant for the negligence.
14. The procuring entity confirmed that the budget was for Kshs. 60,000,000. The Plaintiff bid for Kshs. 58,000,000 and the other bid was for Kshs. 158,000,000. The witness testified that were it not for the Defendant's negligence, it would have won the tender. This led to a loss of income of Kshs. 25,020,617



as per the Independent Auditor's Certificate which was produced as an exhibit. The witness produced all the document as per list of documents filed.

15. On cross examination, the witness reiterated the contents of his evidence in chief. He added that during the meeting with the bank manager, they did not talk of the validity period. The surety bond was collected from the bank by his employee and he was not informed that it had a problem. He also admitted that after receiving the document, he did not notice any problem.
16. He also admitted that in his bit, he quoted Kshs. 58,932,469 while in the Auditor's report, the bid was said to be for Kshs. 50,803,853. He also admitted that the auditor based his report on estimates.
17. On re-examination, the witness stated that it was the responsibility of the Defendant to get the validity period of the surety bond from the tender document. The bank must have failed to look at the document when it gave the validity period of 120 days.
18. The Defendant's witness, one Patrick Lundi who was the Kongowea Branch Manager at the time of the transaction subject to this suit, relied on his witness statement dated 12/8/2021 and which was adopted as his evidence. It is important to note that when the witness made reference to his witness statement, I pointed out to the defence that the said statement and any documentary evidence was missing from the court record.
19. It was directed that the Witness Statement and the documents to be relied on by the defence be filed by close of business 24/7/2023. I have confirmed from the court file and the e-filing platform that the same was not done. I shall therefore rely on the pleadings filed and the oral evidence by the defence witness.
20. On cross examination, he stated that he handled the tender document at a personal level. The bank charged Kshs. 5,000 for the surety bond, and the same was issued. The witness admitted that he did not peruse the tender document on the terms and condition, as it is usually the duty of the customer to give the instructions which is done verbally. He only confirmed the procuring entity from the tender document.

Submission

21. The Plaintiff filed submissions dated 20/9/2023. Counsel submitted that the Defendant Bank owed a duty towards its customer the Plaintiff. Reliance was on the cases of Eunice Wairimu Muturi & ano v James Maina Thuku & ano [2018] eKLR and Equity Bank of Kenya & ano. v Robert Chesang [2016] eKLR, where in summary it was held that the bank has an obligation to obey the customer's instruction based on the customer's mandate, and a breach of that obligation entitles a customer to an award of damages. By failing to adhere to the requirements of the surety bond, the Defendant breached its duty towards the Plaintiff.
22. It was also submitted that due to the breach by the Defendant, the Plaintiff suffered loss of income estimated to be Kshs. 25,020,617 as per the auditor's report. The Plaintiff prayed for compensation and retribution for the Defendant's negligence.
23. The Defendant vide the submissions dated 21/9/2023. It was submitted that the Plaintiff ought to prove that the Defendant owed it a duty of care, there was a breach of the duty and damages were suffered. Reliance was on the case of *Anastassios Thomos v Occidental Insurance Company Limited* [2017] eKLR. The Defendant denied that it had a duty to ensure that the surety bond was in compliance with the tender document, as that was the duty of the Plaintiff. Further, it was not the duty of the Defendant to ensure that the Plaintiff complied with the tender document.



24. The Defendant submitted the reservations it had on the letter from the procuring entity and the Tender Quotation Register which were produced as exhibits by the Plaintiff. This is not an issue for determination as the Defendant had raised an objection to their production, but the objection was found to be misplaced vide the Ruling delivered on 21/4/2022, and the said documents were produced as exhibits.
25. It was further submitted that the Plaintiff's claim that it would have succeeded in the tendering process if only the surety bond indicated the validity period to be 150 days, was a matter of conjecture, and it was the Plaintiff's duty to prove its case on a balance of probabilities.
26. On loss of income, it was submitted that was a claim of special damages in nature and it ought to have been specifically pleaded and strictly proven. Reliance was on the case of Kenya Tourist Development Corporation v Sundowner Lodge Limited [2021] eKLR.

Analysis

27. I have considered the pleadings and evidence as well as the submissions and authorities in support and opposition of the respective cases.
28. The issues for determination are;
 - a. Whether there is proof of negligence on the part of the Defendant
 - b. Whether the Plaintiff suffered damages and loss of income
 - c. Costs of the suit
29. It is the Plaintiff's duty to prove that the Defendant was negligent and as a result, he suffered damages and loss of income. Section 107 of the [Evidence Act](#) provides as follows;

Burden of proof

- (1) 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.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
30. The Plaintiff alleged that the Defendant owed it a duty of care by virtue of being its customer. The Defendant ought to have perused through the tender document and familiarise itself on the terms and conditions to be met in reference to the issuance of the surety bond. It's the Plaintiff's witness admission that when he met the bank's manger, they did not discuss about the validity period of the surety bond.
 31. The Defendant's witness also admitted that he did not peruse through the tender document. He relied on the verbal instructions by the Plaintiff's witness and it was upon the Plaintiff to ensure that the bond issued was in compliance with the tender document.
 32. Further, the Plaintiff's witness gave evidence that after the bank issued the surety bond, neither his staff or himself noticed that there was a problem. He went ahead and submitted the document together with the tender document. It is not until his bid failed to go through that he enquired from the procuring entity that he was informed that his bid was non-responsive due to the none compliance with the validity period of the bond.



33. As in the case of Eunice Wairimu Muturi (supra), the banks obligations towards its customers includes obeying instructions from the customer within its mandate. In this case, the customer did not specifically instruct the bank to issue a bond with a 150 days validity period. It was the Plaintiff's expectation that the bank would read through the tender document to get to know the conditions of the bond document.
34. In addition to lack of specific instructions, even after the non-compliant surety bond was issued to the Plaintiff, the Plaintiff did not note the mistake of the indicated 120 days validity period instead of 150 days. It is until the plaintiff's bid was unsuccessful that it was realised that the surety bond was non-compliant.
35. I find that the Plaintiff's lack of specific instructions and failure to have exercised due diligence before submitting the tender document, was negligent on its part. The Plaintiff cannot blame the Defendant for its own omissions. I find that negligence on the part of the Defendant has not been proved.
36. Even though negligence was not proved, this court will still go ahead and determine if there were any damages suffered by the Plaintiff. The Plaintiff stated that it lost the tender where a profit of over Kshs. 20 million would have been made. The Plaintiff produced an Auditor's report which was based on estimates. Even though the document was admitted as an exhibit, it is still subject to query.
37. The Plaintiff did not call the said auditor as a witness for purposes of qualifying the figures given. The Plaintiff's witness, though he produced that document as an exhibit, he was not an expert witness and the Defence counsel had reservations on the same and the witness was not cross examined on the document. I do agree with the Defendant that the report having been based on estimates, it was not established how the figures came to be, especially that the expected profits were about 50%.
38. The Plaintiff has failed to persuade this court that the Defendant was negligent and that he suffered damages as a result. In *Evans Nyakwana v Cleopas Bwana Ongaro* [2015] eKLR, it was held as follows;

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially assert the affirmative of the issue. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden....is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence.....”
39. Also in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526, it was held that the court ‘rules in favour of the party that persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place’. The Plaintiff has therefore failed do discharge the burden of proof on the above issues for determination.
40. On the issue of costs, a careful reading of Section 27 indicates that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540. It is, that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party. Being discretionary, each party shall bear its own costs.

Determination

41. Flowing from the above discourse, I proceed to make the following orders: The a. Suit is hereby dismissed



b. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 1ST DAY OF MARCH, 2024.

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F. WANGARI

JUDGE

In the presence of:

M/S Saisi Advocate for the Plaintiff

M/S Cheruiyot Advocate for the Defendant

Barile Court Assistant

