



**Wings Enterprises Limited v SBM Bank (Kenya) Limited (Commercial Case 53 of 2019)
[2023] KEHC 22315 (KLR) (Commercial and Tax) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 53 OF 2019
WA OKWANY, J
SEPTEMBER 21, 2023**

BETWEEN

WINGS ENTERPRISES LIMITED PLAINTIFF

AND

SBM BANK (KENYA) LIMITED DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff herein, Wings Enterprise Limited, is a limited liability company incorporated in Kenya.
2. The Defendant is a licensed banking institution and the Successor in title and law of Chase Bank Limited, which was in receivership prior to being purchased and taken over by the Defendant.
3. The Plaintiff sued the Defendant through the plaint dated 29th January 2019, seeking the following orders: -
 - a. General Damages for libel.
 - b. Compensation for Loss of business.
 - c. Punitive, Exemplary and Aggravated damages.
 - d. Costs of this suit.
 - e. Interest at Court rates on items (a), (b), (c) above at Court rates.
 - f. Orders directing the Defendant to tender an appropriate apology to the Plaintiff.
 - g. Any other or further relief that this Honourable Court may deem fit and just to grant.



The Plaintiff's Case

4. The Plaintiff's case is that sometime in the month of July 2018, Lake Victoria North Water Services Board (hereinafter "the Board") advertised a tender for the supply and delivery of goods for NRW project for rehabilitation and improvement of Mumias and Kimilili Towns Water Supply Systems (2 slots). The Plaintiff states that it was qualified to undertake the said works and consequently tendered a bid for the same.
5. It was a condition of the said bid/transaction that a bidder would lodge a bid security worth Kshs. 500,000/= with the Board,
6. The Plaintiff claims that on or about the 25th July 2018, the Defendant, then trading as Chase Bank (In Receivership), issued it with a bid security for Kshs. 500,000/= valid until the 3rd January 2019 after which the Plaintiff proceeded to lodge all the required documentation with the Board in a timely and proper manner, and in the belief that it lodged the best tender.
7. The Plaintiff states that it was therefore shocked when, on the 17th October 2018, the Board informed it that its bid was unsuccessful on account of the invalidity of bid security issued by Chase Bank.
8. The Plaintiff states that it subsequently established that the Defendant had written to the Board indicating that the bid bond was not valid. It further states that the Defendant's said letter influenced the Board into failing to award the tender to it, thus causing the Plaintiff loss, harm and damage to reputation.
9. The Plaintiff avers that its bid was rejected at the behest of the Defendant and that the subject tender was awarded to a company which had placed a bid that was higher than the Plaintiff's bid.
10. The Plaintiff accuses the Defendant of malice, misrepresentation and ill will. It enumerated the particulars of malice as follows: -
 - a. Failing to disclose that the Plaintiff's bid bond was valid.
 - b. Failing to take into account the fact that the Plaintiff had paid consideration for the bid bond.
 - c. Misleading the Plaintiff's client as to the validity of the Plaintiff's bid bond.
 - d. Failing to notify the Plaintiff of what it had informed the Plaintiff's client in good time.
 - e. Failing to rectify the factual position in good time.
11. The Plaintiff avers that amongst the communication sent by the Defendant was an e-mail dated 10th September, in response to an enquiry from Board over the Plaintiff's bid bonds by which the Defendant responded that: -

“..... kindly note the bid bonds issued with Chase Bank IR LTD are not valid.....”
12. It was the Plaintiff's assertion that read in their natural and ordinary meaning, the Defendant's above mentioned words were understood by all and sundry to mean in ordinary way or in the alternative by way of innuendo that: -
 - i. The Plaintiff was a fraudster;
 - ii. The Plaintiff is a member of a cartel of thieves;
 - iii. The Plaintiff was not fit for what they purported to be;



- iv. The Plaintiff had held itself out in a way that was false;
 - v. The Plaintiff was a common thief;
 - vi. The Plaintiff is a person of doubtful moral standard and probity.
 - vii. The Plaintiff was attempting to obtain some advantage by false pretense.
 - viii. The said the authorship and publication of the said words by the Defendants were driven by malice, malevolence and spite.
13. The Plaintiff further avers that the Defendant wrote the said libelous defamatory words and statements in the knowledge that they were libelous and were made with reckless disregard as to whether or not they were libelous, in order to cast improper aspersions on, or damage to the Plaintiff's name, character and reputation.
 14. The Plaintiff adds that the Defendant had, at the same time, established that the prospect of material advantage to themselves by reason of their publications, outweighed the prospect of material loss, thus being actuated by malice.
 15. It was the Plaintiff's case that it has all along, prior to the publication of the said words, enjoyed an excellent reputation in Nairobi and in the country, but has now been exposed to ridicule, odium and contempt by right thinking members of the society which has resulted in massive injury to their credit and reputation for which they claim damages.
 16. It was also the Plaintiff's case that it has suffered loss and damages as a result of the matters aforesaid. It listed the particulars of loss as follows: -
 - i. Loss of a tender worth over Kshs. 31,618,642.00 (Kenya Shillings Thirty One Million, Six Hundred and Eighteen Thousand, Six Hundred and Forty Two).
 - ii. The Plaintiff has been put to great trouble, inconvenience and expense, and has thereby suffered loss and damages.
 17. At the hearing, the Plaintiff presented the evidence of one witness, Mr. Isaac Hassan Abei Mamo (PW1), who adopted his witness statement dated 29th January 2019 as his evidence in chief. The witness's statement mirrors the averments made by the Plaintiff in the plaint. He produced the Plaintiff's list of documents filed on 8th February 2019 as Plaintiff's Exhibits 1 – 8.
 18. On cross examination, PW1 testified that the Plaintiff had earlier, in 2015, applied for yet another tender number LVNWSB/KBWF/PQ/05/2015 which was also unsuccessful but that when the Plaintiff enquired from LVNWSB (hereinafter "the Board") why the 2018 bid was not accepted, the Board informed them that they received a letter from the Defendant that the bid bond they had given was invalid.
 19. PW1 confirmed that besides the bid bonds, the Board considers several issues in an application for tenders, including qualification, experiences, resources, equipment etc.
 20. The witness testified that in a tender such as the one in question, an Applicant is evaluated on all the issues including the expected technical capacity and that the financial capacity comes at the last stage of evaluation.
 21. On further cross examination, PW1 confirmed that the Board's letter to the Plaintiff dated 29th October 2018 indicated that the Plaintiff was disqualified at the preliminary stage of the evaluation. The



witness also confirmed that, in tenders, the mere fact that an Applicant has presented all the requisite documents is not a guarantee that the tender will be successful.

22. PW1 confirmed that Kshs. 31,618,642/= was the tender amount and not the profit that the Plaintiff would have earned from the transaction. He conceded that the proper claim would have been the profit that the Plaintiff would have made from the tender. He also conceded that he did not adduce any evidence to show the profit the Plaintiff expected to make had it won the tender or the cost incurred in obtaining the bid bond.
23. On defamation, PW1 testified that since the tender bids are done online, it was in the public domain that the Plaintiff submitted a fake bid bond the basis of which their application was rejected.
24. On further cross examination, PW1 stated that no organization had come out to say that it would not give the Plaintiff business because of the Defendant's letter disputing the validity of the bid bond.

The Defendant's Case

25. The Defendant opposed the Plaintiff's suit through its statement of defence dated 1st April 2019 wherein it denies the averments pleaded in the plaint and specifically denies any knowledge of the alleged tender and the bid if any, submitted by the Plaintiff.
26. The Defendant avers that it had no contractual or business relationship with Chase Bank (in Receivership) as at 25th July 2018 and had no knowledge of the Bid Security of Kshs. 500,000/= and further, that it was not privy to the circumstances under which the same was issued.
27. The Defendant denies knowledge of any matter relating to the Plaintiff's tender or any bid security issued to the Plaintiff since Chase Bank had been placed in Receivership on 7th April 2016.
28. The Defendant avers that it did not have knowledge of any bid security issued by Chase Bank and that any queries over the validity of such bid security should have been referred to Kenya Deposit Insurance Corporation (KIDC), the receivers that were wholly in charge of the affairs of Chase Bank.
29. The Defendant explained that it could only confirm the validity of bid security that it had re-issued to customers of the said Chase Bank (in Receivership) and that since it had not re-issued any bid security to the Plaintiff, it was unable to confirm the bid security issued to the Plaintiff by Chase Bank.
30. The Defendant further averred that it informed the Board to confirm the validity of the bid bond from Kenya Deposit Insurance Corporation through its letter of 27th November 2018.
31. It was the Defendant's case that it had no role whatsoever on the award or rejection of any tender that the Plaintiff had applied for as such an award was exclusively at the discretion of the procuring entity.
32. The Defendant denied the claim that it acted out of malice, misrepresentation or that its pronouncements were in any way defamatory or libelous.
33. The Defendant further denied the Plaintiff's alleged loss of a tender worth Kshs. 31,618,642.
34. At the hearing, the Defendant's witness Mr. Kelvin Kimani (DW1), adopted his witness statement dated 1st April 2019 as his evidence in chief. He produced the Defendant's list of documents also dated 1st April 2019 as Defence Exhibits.
35. On cross examination, DW1, confirmed that the Defendant wrote to the Board confirming that the bid bonds issued by Chase Bank were not valid. He explained that following the Defendant's acquisition of Chase Bank on 18th August 2019 there were certain transition challenges that occurred at the time their customer service officers indicated that the bid bond issued by Chase Bank was invalid. He noted



that the Defendant's officers ought to have verified the correct and factual position on the bid bonds from KDIC who were the managers of Chase Bank. He confirmed that the bid bond issued to the Plaintiff was genuine and that when the Defendant noticed its mistake in November 2019, attempts were made to engage the Plaintiff in order to get an amicable resolution of the error, but that the issue was not resolved.

36. Parties canvassed their respective cases by way of written submissions.

Plaintiff's Submissions

37. The Plaintiff submitted that it lost business as a result of the Defendant's cancellation of the bid bond/guarantee. It was submitted that the Defendant conceded that it wrongly cancelled the bid bond/guarantee. Reference was made to the decision in *Sinohydro Corporation Limited vs GC Retail Ltd & Another* [2016] eKLR where it was held: -

“Further in the case of *Kenindia Assurance Company Limited vs. First National Finance Bank Limited* Civil Appeal No. 328 of 2002 the Court of Appeal also held as follows;

“A bank, which gives a performance guarantee, must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the bank has notice.....As to the fulfilment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken at its face value unless the contractor can establish that the beneficiary's stand is motivated by fraud, misrepresentation, deliberate suppression of material facts or the like of which would give rise to special equities in favour of the contractor. In absence of such elements the bank guarantee has to be honoured by the bank and the beneficiary cannot be restrained from enforcement..... The performance bond in the instant case is in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security guaranteeing payment by a third party and in such cases the most important factor to consider before liability can attach is whether there has been default. Once default is established and that there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security.....Performance bonds fulfil a most important role in international trade. If the seller defaults in making delivery, the buyer can operate the bond. He does not have to go too far away countries for damages, or go through a long arbitration. He can get damages at once, which are due to him for breach of contract. The bond is given so that, on notice of default being given, the buyer can have his money in hand to meet his claim for damages for the seller's non-performance of the contract. The courts must see that these performance bonds are honoured. The courts always recognize that the bonds affected the 'tempo' of the parties' obligations but not their substantive rights.....In the instant case the appellant's obligation was to pay upon demand which the obligation was established when it was served with a notice of default and upon a demand of



payment being made. Liability to pay in the circumstances is not and cannot be an issue.”(Emphasis supplied)

38. It was submitted that the Defendant’s actions prevented the Plaintiff from winning the tender to supply and deliver the goods even after it was successfully evaluated and shortlisted for the said contract.
39. The Plaintiff argued that the Defendant’s actions were libelous as the procurement was done through the government’s e-commerce portal that was accessible to many users. The Plaintiff maintained that by declaring that the Plaintiff had submitted forged documents, the Defendant published this information which could be seen by other tenderers and that this would cause blacklisting of the Plaintiff.
40. It was submitted that the Plaintiff made big losses, over and above losing the contract, as a result of the Defendant’s actions.
41. The Plaintiff submitted that it had established all the elements of defamation, namely: -
 - a. That the defendant made a defamatory statement to a third person.
 - b. That the statement was false.
 - c. That the defendant was legally at fault in making the statement; and
 - d. That the plaintiff suffered harm.
42. The Plaintiff urged this court to award it the sum of Kshs. 7,000,000/= as compensation for defamation and Kshs. 31,618,642/= for loss of business.

Defendant’s Submissions

43. The Defendant highlighted the following as the issues for determination: -
 - i. Whether the bid bond issued to the Plaintiff by Chase Bank was valid.
 - ii. Whether the Defendant, by taking over Chase Bank, also took over the Plaintiff’s bid bond and had no basis to state that it was invalid.
 - iii. Whether the actions by the Defendant were illegal.
 - iv. Whether the Defendant’s actions were libelous or defamatory towards the Plaintiff.
 - v. Whether the Plaintiff is entitled to the reliefs sought.
 - vi. Which party will bear the cost of the suit?
44. Regarding the validity of the bid bond issued to the Plaintiff by Chase Bank, the Defendant submitted that it did not issue the said bid bonds or any bid security to the Plaintiff and was therefore not privy to the contract between the Plaintiff and Chase Bank. It was therefore the Defendant’s case that bid security issued by the then Chase Bank cannot be enforced against it under the doctrine of privity of contract. For this argument, the Defendant cited several authorities including the case of David Njuguna Ngotho vs Family Bank Limited and Another [2018] eKLR where the doctrine of privity of contract was discussed as follows: -

“The essence of the Privity rule is that only the parties that actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Basically, it postulates that a contract cannot



confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.”

45. It was submitted that the Defendant was under a statutory, professional and ethical obligation to ensure that any bid securities issued are correctly issued and was therefore under no duty to confirm the validity of bid securities that it did not issue.
46. On whether its actions were illegal, the Defendant submitted that the Plaintiff did not explain or define which of its actions were illegal and added that at no time did it undertake any illegal action or omission towards the Plaintiff with respect to the bid bond.
47. The Defendant argued that it had no power to influence the granting of the tender to the Plaintiff.
48. On whether the Defendant’s actions were libelous or defamatory against the Plaintiff, the Defendant noted that there is a distinction between libel and defamation and that, in any event, none of its actions, words or statements were libelous or defamatory for this argument, the Defendant cited the decision in *Musikari Kombo vs Royal Media Services Ltd* [2018] eKLR as affirmed in *Barclays Bank Kenya Ltd vs Hellen Seruya Wasilwa* [2021] eKLR where the court held that the law of defamation is concerned with the protection of a person’s reputation. In the said case, the court quoted Patrick O’Callaghan in the Common Law Series. *The Law of Tort* at paragraph 25.1 which reads: -

“The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: “As a general rule, English law give effect to the ninth commandment that a man shall not speak evil falsely of his neighbor. It supplies a temporal sanction...’ Defamation protects a person’s reputation that is the estimation in which he is held by others; it does not protect a person’s opinion of himself nor his character....”

49. On whether the Plaintiff is entitled to the reliefs sought, the Defendant submitted that it did not give any guarantees to the Board or any other person on the validity of a bid bond which it had not itself issued or reissued and further, that it was under a statutory duty to act cautiously with respect to such matters.

Analysis and Determination

50. I have considered the pleadings filed herein, the evidence presented by the parties and their respective written submissions. I find that the main issue for determination is whether the Plaintiff has made out a case for the granting of the orders sought in the plaint. The following are the other issues for determination: -
 - a. Whether the Defendant’s actions prevented the Plaintiff from winning the Board’s tender.
 - b. Whether the Defendant’s said actions were defamatory of the Plaintiff.
 - c. Whether the actions by the Defendant were illegal, malicious and baseless and amounted to misrepresentation.
 - d. Whether Plaintiff incurred losses as a result and the extent of the said losses.
 - e. Whether Plaintiff is entitled to the reliefs sought in the Plaint?
51. I find that the following issues were not disputed: -
 - a. That on 25th July 2018 Chase Bank Limited issued the Plaintiff with a bid bond of Kshs. 500,000/=.



- b. That the said bid bond was to be valid until 3rd January 2019.
- c. That Chase Bank went under Receivership some time on 7th April 2016 after which it was purchased/taken over by the Defendant as its successor in title and law.
- d. That the Defendant informed the Board that the Plaintiff's bid bond was not valid.

Libel/Defamation

- 52. The Plaintiff's case was that the Defendant wrote libelous/defamatory words by responding to an enquiry by Lake Victoria North West Services Board on the validity of the bid bonds issued by Chase Bank and stating that the said bid bonds were not valid.
- 53. The Defendant, on its part, argued that none of its words or statements were libelous or defamatory. The Defendant also noted that there was a clear distinction between libel and defamation.
- 54. I have perused the e-mail threads in respect to the correspondence between the Board and the Defendant. On 10th September 2018 the Board sent an email to the Defendant as follows:

“Lake Victoria North Water Services Board advertised and received bids for tender to supply water meters, pipes and associated items. The bids were opened on 27th July, 2018.

Among other requirements the bidders were required to attach a bid bond valued at KES 500,000.00 from a reputable bank. One of the bidders attached a bid bond from Chase Bank (Under Receivership). Kindly advice on whether the bid bond is valid.”

- 55. The Defendant's reply replied to the enquiry as follows: -

“We acknowledge receipt of your email.

Kindly note that the bid bonds issued by Chase Bank IR LTD are not valid. They need to be reissued at clients domicile SBM bank Kenya Branch for them to be valid.

We value you as our client.

In case of further enquiries feel free to reach us.”

- 56. The Plaintiff's claim is that the Defendant's response to the Board's email was not only defamatory, but also resulted in the Board's rejection of its bid thus occasioning it loss and damage.
- 57. As I have already noted in this judgment, the Defendant conceded that it informed the Board that the bid bonds issued by Chase Bank were invalid. During the hearing, the Defendant's witness further conceded that the Defendant ought to have verified the correct and factual position on the bid bonds from KDIC who were the managers of Chase Bank. The witness also confirmed that the bid bond issued to the Plaintiff was genuine/valid and that attempts were made to amicably resolve the Defendant's error in November 2019 which attempts did not yield any fruits. The defence witness testified as follows during cross examination: -

“An honest mistake arose during transition from Chase Bank to SBM hardly a month after the collapse of Chase Bank. Bid bond is genuine. It was a mistake. The Bank engaged the Plaintiff in trying to get an amicable way of solving the issue.”

- 58. From the contents of the aforementioned communication between the Board and the Defendant, it is not in doubt that the Plaintiff's bid for the subject tender was under consideration by the Board



and that the Plaintiff stood a good chance of winning the tender had his bid bond been ratified by the Defendant as valid. This is to say that the Defendant held the keys to the Plaintiff's success in the tender process.

59. The Defendant argued that it was under no duty to confirm the validity of bid securities that it did not issue. According to the Defendant, the Board should have sought such a confirmation from KDIC.

60. Defamation occurs when false statements, whether spoken or written, harm the reputation of an individual or an entity, including a company. Proof of defamation typically requires the company to show that the statements made against it were false, published to a third party and resulted in harm to their reputation or financial losses. In *Phineas Nyagah vs. Gitobu Imanyara* Civil suit no. 697 OF 2009[2013] eKLR, Odunga J, (as he then was) held that: -

“ defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right -thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the Plaintiff attributing him to any form of disgraceful conduct such as crime, dishonesty, cruelty and so on...”

61. In *J. Kudwoli & Another vs Eureka Educational & Training Consultants & 2 others* (1993) eKLR, Kuloba J. (as he then was) had the following to say: -

“Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person....

.....A defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit....

62. In *Murphy vs Ha March* (13 DLR 3d 484) the British Columbia Supreme Court stated as follows: -

“Defamation is where a shameful action is attributed to a man (he stole my purse), a shameful character (he is dishonest), a shameful cause of action (he lives on the avails of prostitution) or a shameful condition (he has small pox). Such words are considered defamatory because they tend to bring the man into hatred, contempt or ridicule. The more modern definition of defamation is words tending to lower the plaintiff in the estimation of right-thinking members of the society generally.”

63. In order to succeed in an action on the tort of defamation, a claimant must establish the following elements in the affirmative: -

- a. That the statement tends to lower the Plaintiff's reputation in the estimation of right-thinking members of society generally either in their natural and ordinary meaning or by innuendo;
- b. That the statement refers to the Plaintiff;
- c. That the statement was published by the Defendant;
- d. That the statement is false and/or malicious.



64. I have already reproduced the contents of the impugned publication elsewhere in this judgment. The next step is for this court to determine whether the publication had the effect of lowering the Plaintiff's reputation in the eyes of the right-thinking members of the society generally. The Plaintiff's case was that the Defendant's email that of 10th September 2018 led to the Board's disqualification of its bid. I note that through a letter to the board dated 25th October 2018, the Plaintiff sought to know the substantive reasons for the rejection of its bid. The Board responded to the Plaintiff's enquiry as follows:

“We acknowledge receipt of your letter Ref: LVNWSB/WASSIP-AF/GI/5/2018/01 dated 25th October 2018 on the above subject matter.

You were required to submit a bid security worth KES. 500,000.00 from a reputable bank.

It was noted that you submitted a Bid security from M/s Chase Bank (Under Receivership). The bid security was found not be valid upon inquiry from M/s SBM Bank Kenya Ltd.

This led to your firm being disqualified in the preliminary stage of the evaluation.

Attached is a printout of our e-mail enquiry and the M/s SBM Bank's response for your ease of reference.”

65. I have fully addressed my mind to the entire correspondence between the Plaintiff, the Board and the Defendant through the lenses of a reasonable, right thinking member of the society as a third party. My finding is that the bid bond was a critical prerequisite to the Plaintiff's success in the tender process with the Board. In this regard, I find that the Defendant's position/email to the effect that the said bid bond was invalid not only ruined the Plaintiff's chances of securing the tender but also tainted its reputation as it portrayed it as a dishonest bidder who had no qualms about presenting an invalid bid bond in an attempt to secure the tender. Needless to say, the Defendant's email resulted in the disqualification of the Plaintiff's bid.

66. My further finding is that having conceded that it informed the Board that the bid bonds issued by Chase Bank were not valid and further, having conceded that it ought to have verified the factual position of the said bid bonds before responding to the Board's enquiry, the Defendant cannot turn around and claim that it was under no duty to confirm the validity of the said bonds. It did not escape the attention of this court that the Defendant conceded that it belatedly realized its folly and attempted to make good the Plaintiff's injury which attempts did not bear fruit.

67. Based on the Defendant's own admission of fault, it is not in doubt that the statements it made against the Plaintiff were false. I therefore find that the Plaintiff is justified in its claim that the Defendant's actions were not only defamatory but also led to the loss of the chance the Plaintiff had to clinch the deal with the Board.

68. It is my humble view that if indeed the Defendant was sincere in its claim that only KDIC could verify the validity of the bid bonds, then the question which begs an answer is why the Defendant took it upon itself to issue an incorrect advisory over the said issue in the first place.

69. I further find that the Defendant ought to have taken cognizance of its fiduciary obligation to act in the best interest of its clients and customers and to exercise a high standard of care, loyalty, and honesty when handling their affairs. In the instant case, the Defendant conceded that it should have sought a verification of the validity of the Plaintiff's bid bond before sending the impugned email to the Board. This means that had the Defendant exercised due diligence by verifying validity of the bid bonds, the



damage caused to the Plaintiff's reputation would not have occurred. It is therefore my finding that all the elements of defamation were proved.

Loss of Business

70. The Plaintiff claimed the sum of Kshs. 31,618,642.00 being the value of the tender that it lost as a result of the Defendant's communication to the effect that the its bid bonds were not valid. At the hearing of the case, however, the Plaintiff did not establish that it would have won the tender had the Defendant ratified its bid bond as valid. The Plaintiff also conceded that the sum of Kshs. 31,618,642 was the entire value of the tender and not the profit it could have earned.
71. I find that the claim for loss of business was not proved as the Plaintiff pleaded the entire amount of the tender without distinguishing the capital from the profit element thereof. Moreover, it was not proved that the Plaintiff would have won the tender in question even assuming that the Defendant had stated that the bid bonds were valid.
72. It is trite that a claim for special damages must not only be pleaded but must also be proved. This is the position that was taken in the oft cited case of Hahn vs Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
73. A natural corollary to the above holding has been that the Courts have insisted that a party must present actual receipts of payments made or loss incurred in order to substantiate loss or economic injury. In the present case, I find that the special damages were not proved to the required standards and I therefore decline to make any award under the said heading.

Damages for Defamation

74. Having found that the elements of defamation were proved, I find that the Plaintiff is entitled to general damages to compensate it for the harm caused to its business reputation by the defamatory publication.
75. The Plaintiff also prayed for aggravated or exemplary damages. The Court of Appeal, while quoting the case of John vs GM Limited [1993] QB 586 stated as follows in the case of Miguna Miguna vs The standard Group Ltd & 4 others [2017] eKLR.
- “Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.”
76. The principle that emerges from the above decision is that exemplary damages go beyond compensation as they are meant to punish the wrongdoer and acts as a deterrent against similar conduct in future (See Ken Odondi & 2 others vs James Okoth Omburah T/A Okoth Omburah & Company Advocates [2013] eKLR).
77. In the case at hand, I am not satisfied that it was established that the Defendant was driven by malice in making the impugned publication. It is also clear that the Defendant did not plead or insist on the defence of justification in these proceedings. The Defendant conceded that it made attempts to make



good the Plaintiff's claim before the matter ended in court. In the circumstances of this case, find that an award for exemplary damages is not merited.

78. Turning to the claim for damages for defamation, it is trite that an award of damages in defamation case is discretionary. This means that there is no set formula for assessing damages. The common method appreciated in practice is to compare cases of similar nature and take a perspective of damages based on such comparisons. In *C A M vs Royal Media Services Limited* Civil Appeal No. 283 of 2005[2013] eKLR the Court of Appeal stated that:

“No case is like the other. In the exercise of discretion to award damages for defamation, the court has wide latitude. The factors for consideration in the exercise of that discretion as enumerated in many decisions including the guidelines in *Jones V Pollard* (1997) EMLR 233-243 include objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published and any repetition; subjective effect on the Plaintiff's feelings not only from the prominence itself but from the Defendant's conduct thereafter both up to and including the trial itself; matters tending to mitigate damages for example, publication of an apology; matters tending to reduce damages; vindication of the Plaintiff's reputation past and future.”

79. In *Standard Media vs Kagia and Co. Advocates* [2010] eKLR the court took the view that in situations where the author or publisher of a libel could have, with due diligence, verified the libelous story or in other words, where the author or publisher was reckless or negligent, these factors should be taken into account in assessing the level of damages. The court also stated that the level of damages awarded should be such as to act as deterrence and to instill a sense of responsibility on the part of the authors and the publishers of libel and that personal rights, freedoms and values should never be sacrificed at the altar of profiteering by authors and publishers.

80. The plaintiff submitted for an award Kshs. 7 million for general damages while the Defendant did not make any proposal on the amount due to the plaintiff as damages for defamation. I have considered the following awards made by the High Court and Court of Appeal in cases of defamation.

- i. In *Hon. Uhuru Muigai Kenyatta vs Baraza Limited* [2011] eKLR Rawal J. (as she then was) awarded Kshs.7,000,000/= to the Plaintiff.
- ii. In *Patrick Nyoike vs People Limited* [2013] eKLR the Court awarded the plaintiff Kshs.4,000,000 general damages and Kshs.100,000 as aggravated damages.
- iii. In *Ken Odondi & 2 Others vs James Okoth Omburah T/A Okoth Omburah & Company Advocates* (supra) the Court of Appeal awarded the appellant Kshs. 4,000,000/= general damages for libel and the award of Kshs. 500,000/= aggravated damages.
- iv. In *Samuel Ndungu Mukunya vs Nation Media Group and Another* [2016] eKLR the plaintiff was awarded Kshs 20,000,000/-. The circumstances of that case are far more egregious than in the present case.
- v. In *J P Machira v Wangethi Mwangi and Nation Newspapers Nairobi* HCCC No 1709 of 1996, the plaintiff was awarded 10,200,000/= in 2001.
- vi. In *Daniel Musinga v Nation Newspapers Ltd Mombasa* HCCC No 102 of 2000, the plaintiff was awarded Kshs 10,000,000/= in May, 2005.
- vii. In *CK Kariuki vs The Standard Ltd and Association of Kenyan Insurers Meru* HCCC No 5 of 2000 the successful plaintiff was awarded global damages of Kshs 20,000,000/= in 2001.



81. Taking into account the facts of this case, the principles of law discussed herein as well as the above cited decided cases and doing the best that I can, I find that the right compensation for the plaintiff is Ksh6,000,000 as general damages for defamation.
82. The plaintiff also prayed for an unconditional apology. I however find that the period between 10th September 2018 when the defamatory words were published and today 21st September 2023 is such a long period of time that an order for apology would have no effect on the Plaintiff's reputation. I find guidance in the decision in Wilson Kalya & another vs Standard Limited & 2 others [2002] eKLR where an award of Kshs. 300,000 was made for damages in lieu of an apology. Accordingly, I award the plaintiff Kshs 600,000.00 damages in lieu of an apology. This is in line with the plaintiff's prayer in his plaint for "any other relief that this court may deem fit to grant."

Disposition

83. Given all the foregoing findings, the analysis of comparative suits and awards discussed hereinabove, I award the Plaintiff the total sum Kshs. 6,6000,000/= being general damages for defamation and damages in lieu of an apology.
84. I also award the plaintiff costs of this suit and interest on damages and costs at court rates from date of this judgment until payment in full.
85. It is so ordered

JUDGMENT SIGNED, DATED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS ON THIS 21ST DAY OF SEPTEMBER, 2023.

W.A. OKWANY

JUDGE

