



ARM Engineering Company Limited v Kenya Commercial Bank Limited (Civil Suit 225 of 2019) [2024] KEHC 13960 (KLR) (Commercial and Tax) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 225 OF 2019
FG MUGAMBI, J
NOVEMBER 8, 2024**

BETWEEN

ARM ENGINEERING COMPANY LIMITED PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

JUDGMENT

Background and introduction

1. The plaintiff filed this suit vide a further amended plaint dated 26th October, 2022 seeking inter alia the following prayers:
 - i. A declaration that plaintiff suffered loss of opportunity and profits as a result of defendant's actions;
 - ii. The payment of special damages of Kshs 11,211,500/= plus interest at a court rate of 12% per annum from the tender's submission date;
 - iii. Compensation of Kshs 20,000,00/= for breach of contract and loss of opportunity;
 - iv. Costs of the suit.
2. The plaintiff contends that at all material times to the suit, it was engaged in the business of providing electrical engineering and related energy solutions. The plaintiff also maintained a customer-bank relationship with the defendant, from whom it sought financial assistance on several occasions.
3. In August 2014, the plaintiff contends that it was invited to tender for the design, supply, installation, and commissioning of a substation and medium voltage line in Kokotoni, Wundanyi, Sabaki, Kaloleni,



and Mtonia in the coastal region, which was later changed to Mukurweini and Murungi. The tender was issued by the Kenya Power Lighting Company (hereinafter KPLC).

4. The plaintiff claims that it was required to submit the tender documents along with a bid bond in favor of KPLC for the amount of \$100,000 (equivalent to Kshs. 10 million) valid for 210 days, by the deadline of 24/09/2014. This deadline was later extended to 16/10/2014. The plaintiff states that on 13th August 2014, it approached the bank to request the facility, providing clear and explicit instructions regarding the specific timelines involved.
5. The plaintiff further asserts that the defendant agreed to provide the bid bond through a letter of offer dated 2/9/2014. In exchange the plaintiff charged land title no. Nairobi/Block 110/654 as security for the facility. The plaintiff claims to have made numerous follow-ups during which the defendant assured it that the bid bond would be issued by 16/10/2014 in time to meet the submission deadline.
6. The plaintiff alleges that when it went to collect the bid bond, it was unexpectedly asked to deposit Kshs. 9 million as additional security, despite having already provided land as collateral. After providing numerous explanations, the bid bond was finally released on 16/10/2014 at 10:10am, by which time KPLC had already closed the submission period. As a result, the plaintiff missed out on a significant opportunity. The plaintiff attributes this loss to the negligence and reckless actions of the defendant, as well as a breach of the letter of offer dated 2/9/2014.
7. The defendant (hereinafter "the Bank") opposed the suit through a statement of defence dated 2/10/2019. The Bank, however, confirmed its relationship with the plaintiff and acknowledged that the plaintiff had applied for a bid bond facility, which was approved, and a letter of offer was issued. The Bank denied the plaintiff's claims, asserting that the plaintiff had been informed of the terms and conditions of the bid bond before the execution of the advancement letter.
8. It further contends that the time taken to release the bid bond was reasonable. The Bank denies any allegations of recklessness or breach of contract, arguing that any loss of business opportunity suffered by the plaintiff cannot be attributed to the defendant, as the Bank was not a party to the tender agreement. The defendant additionally averred that there was a similar suit pending between the parties in CMCC no. 3860 of 2017; Arm Engineering Company Ltd vs Kenya Commercial Bank and that as such, the plaintiff's case ought to be dismissed.

The evidence presented by the plaintiff:

9. During the hearing, the plaintiff called three witnesses to support its case. The first witness (PW1) was Rogers Andai, the plaintiff's Managing Director. He corroborated the statements made in the plaint and in his own witness statement. He also confirmed the agreement between the parties for the facility and acknowledged that the plaintiff signed the offer letter dated 2nd September 2014.
10. While attributing the plaintiff's failure to win the tender to the delay caused by the defendant in issuing the bid bond, PW1 acknowledged that the KPLC tender document was not presented before the court. He also admitted that the plaintiff had not submitted any receipts to support the costing schedule it had relied on.
11. In his testimony, he stated that the plaintiff had expected to win the bid, having offered a lower quote than the winning bid, but ultimately missed the opportunity due to their inability to comply with the submission deadline.
12. During re-examination by his advocate, the witness confirmed that the security property had already been charged by the Bank, and there was no issue regarding perfecting the security in this case. He



further affirmed that, on 26/9/2014, the plaintiff had explicitly informed the Bank that time was of the essence in securing the bid bond.

13. In response to the testimony regarding the absence of tender documents before the Court, the witness explained that it was an open tender, publicly advertised in a newspaper, and the Bank would have had access to the relevant documents. He added that, in any case, the Bank never questioned the legitimacy of the tender or the purpose of the funds when the plaintiff applied for the facility.
14. PW2, Charles Omega, an accountant by profession, testified regarding the quantum of the plaintiff's losses, having reviewed the plaintiff's documentation. During cross-examination, he admitted that he was not aware of when the tender was advertised and, therefore, could not confirm whether the worksheets used to calculate the losses were prepared before or after the tender. The witness also acknowledged that the plaintiff had not provided employment contracts or all of the professional certificates of the team involved in preparing the tender documents. However, he testified that the documents presented did show that expenses were incurred and payments were made to various people.
15. PW3, Erick Simiyu Otido, who was the plaintiff's Project Engineer at the material time, testified regarding his familiarity with the process of bidding for tenders while working for the plaintiff. He stated that, on the deadline for the KPLC bid, all of the plaintiff's documents were ready, except for the bid bond. He further testified that the plaintiff was unable to submit its bid because the bid bond was issued after the closing time for bids had passed.
16. He confirmed that the team working on the tender worked at night counterchecking and ensuring that the documents were in order. He noted that it was common for the team to work such hours, especially given the size and complexity of the tender document, which required thorough input and attention to detail.

The defendant's case:

17. The Bank, on its part, called one witness, Geoffrey Obai, the Branch Manager at Sarit Center Branch. He confirmed the relationship between the parties, the plaintiff's application for the bid bond, and the process the Bank followed in issuing the facility. The witness explained that the plaintiff was required to meet the conditions set out in the offer letter before the bid bond could be issued.
18. DW1 also confirmed that the plaintiff's account was overdrawn and that the plaintiff was aware of the need to regularize the account. He acknowledged his understanding of the strict timelines associated with tender applications, such as the one the plaintiff had applied for, and confirmed that the Bank was aware of the intended purpose of the funds. He further stated that the plaintiff was asked to deposit Kshs. 9,000,000/=, and the bid bond was ultimately issued on 16/10/2014.

Analysis and determination

19. At the close of the hearing, the parties filed written submissions in support of their respective arguments which I have carefully considered alongside the pleadings, authorities and evidence. The following issues arise for determination:
 - i. Whether the defendant acted negligently and breached the contract with the plaintiff;
 - ii. Whether the Plaintiff incurred losses and the extent of the losses incurred; and
 - iii. Whether the plaintiff is entitled to the reliefs sought.



Whether the defendant acted negligently and breached the contract with the plaintiff:

20. There is no contestation that there was a customer/bank relationship between the parties herein. It is also not controverted that the plaintiff approached the Bank for a financial facility in the form of a bid bond of USD 100,000. The various witnesses confirmed that a letter of offer was issued by the bank and that the plaintiff signed the letter of offer. By executing the offer letter, the parties bound themselves to its terms and conditions.
21. What then does the law state about such written terms and conditions? It is a well-established principle of contract law that parties to a contract are bound by the terms that they have negotiated and agreed upon. Generally, even Courts do not have the authority to rewrite the terms of contracts freely entered into by parties.
22. In *National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another*, [2001] eKLR, the Court of Appeal held that:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
23. The letter of offer containing the terms and conditions of the agreement between the parties is found at page 15 of the plaintiff’s bundle of documents. It is dated 2/9/2014 and has been executed on behalf of the plaintiff. Clause 2 of the said letter of offer makes it clear that the facility was subject to the fulfilment of the conditions precedent.
24. Amongst the condition precedents set out under clause 7 of the letter of offer were as follows:

“7. 2. Bank shall have received all of the documents, items and evidence required herein and shall have confirmed that each is in the form and substance satisfactory to it.

7. 3 The borrower shall have complied with all the terms of the letter.

7. 4 The borrower shall have paid in cleared funds, all fees, expenses and other sums due and payable by the borrower in relation to the facility and perfected the security referred to in clause 8 below.”
25. At its core, this case hinges on the question of whether the Bank was negligent in issuing the bid bond on the morning of 16/10/2014, after the tender submission deadline had already passed. The plaintiff’s primary complaint is that it was unexpectedly asked to deposit Kshs. 9,000,000/=, which they claim caused the delay in the issuance of the bid bond.
26. The plaintiff’s argument is that, despite meeting all the necessary requirements as stipulated in the letter of offer, the bid bond was eventually issued, though late, on the same day the tender submission was due.
27. From the plaintiff’s perspective, all conditions precedent were fulfilled in a timely manner. The plaintiff emphasizes that, regarding the security requirement, a further charge was registered on 26/9/2014, in accordance with the letter of offer. The plaintiff contends that after this, the Bank did not communicate any further issues or indicate that the plaintiff had failed to comply with any other condition precedent. Given the absence of additional communication from the Bank, and having made numerous follow-ups, the plaintiff remained confident that the bid bond would be issued without further delay.



28. A review of the chronology of events, as evidenced by the record, shows that through a letter found on page 13 of the plaintiff's bundle of documents, the plaintiff applied to the Bank for a facility of USD 100,000 through a letter dated 13/8/2014. While this letter refers to an attachment, namely, the tender document, the content of the tender document, if it exists, has not been proven or placed before this Court for consideration.
29. Be that as it may, this Court further notes that, in the same application letter, the plaintiff acknowledges operating an overdraft facility of Kshs. 10,000,000/= with the Bank, secured by a guarantee from a title deed already in the Bank's possession and expressly requested that the Bank charge the same title.
30. It is evident that this application was accepted, leading to the issuance of the letter of offer previously mentioned. Having signed the letter of offer, the plaintiff cannot now deny being fully aware of the terms and conditions precedent to the issuance of the bid bond. I respectfully disagree with the plaintiff's submission that it was the Bank's responsibility to remind the plaintiff of any unmet conditions.
31. In my view, the letter dated 10/10/2014, while it should have prompted a response from the Bank, does not shift the burden onto the Bank to inform the plaintiff of any non-compliance with the conditions precedent before issuing the bid bond.
32. The plaintiff has claimed that several reminders were made to the Bank. However, no evidence has been provided to confirm that such reminders were actually sent or that the Bank failed to act on them. If such evidence had been available, it would have been crucial in proving the plaintiff's claims of negligence or breach on the part of the Bank. In the absence of any proof, these allegations must fail.
33. At this point, it is important to recall the provisions of Section 107(1) of the *Evidence Act*, which states:

“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.”
34. The plaintiff refers to an email of 10/10/2014 which the Bank did not respond to. This is the only communication from the plaintiff confirming that there was a follow up on the bid bond. The email appears at page 12 of the plaintiff's document and was written 5 days to the deadline for submission of the tender.
35. Despite the plaintiff having stated that "we feel we have submitted everything," it would be disingenuous for the plaintiff to argue that the demand for Kshs. 9,000,000/= was a new term of the contract. This is especially after acknowledging the existence of an overdraft facility. Clause 7.4 of the letter of offer was very clear that in order for the plaintiff to access the facility, any amounts due and owing to the Bank had to be settled first. Therefore, the demand for Kshs. 9,000,000/= cannot be considered an unexpected or new condition.
36. In this regard, the submission by DW1 that the plaintiff's account had been overdrawn by Kshs. 9,541,838/= as of 11/10/2014 remains unchallenged. This fact undermines the plaintiff's claim that, as of 10/10/2014, it had fully complied with all conditions necessary for the issuance of the bid bond. The evidence provided does not clarify when this amount was ultimately paid to settle the account.
37. It was the plaintiff's responsibility to prove that the funds were paid and to provide a timeline demonstrating when this was done in order to support its claim that the Bank acted recklessly. As the record now stands, with less than five days remaining before the bid submission deadline, it is evident that the plaintiff had not fulfilled all the conditions required for the issuance of the bid bond.



38. This fact is further corroborated by the email dated 10/10/2014, which states, in part: we would like to appeal to the bank to assist in expediting this bid bond. That is the only way we can service our bank accounts. This clearly shows that, as of the time the email was written, the plaintiff was fully aware that it needed to service its account.
39. It is important to emphasize that the settlement of the account was a condition precedent, not a condition subsequent to the issuance of the bid bond facility. Based on this email, the Court can only conclude that the plaintiff had not yet fulfilled all the required conditions as of that date.
40. Having failed to discharge its burden of proof to the required standard, it follows that the other prayers in the plaint cannot stand. Without sufficient evidence to support the plaintiff's claims for negligence or breach, the Court is unable to grant the requested reliefs.

Disposition

41. Accordingly, the further amended plaint dated 26th October, 2022 is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

F. MUGAMBI

JUDGE

