

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 171 OF 2014

CONSOLIDATED WITH

CIVIL CASE NO. 20 OF 2016

BETWEEN

UBA KENYA BANK LIMITED.....PLAINTIFF

AND

MIT S ELECTRICAL COMPANY LIMITED.....1ST DEFENDANT

SATYA BHAMA GANDHI.....2ND DEFENDANT

PRIEYA DARSHANI GANDHI.....3RD DEFENDANT

JUDGMENT

Introduction and background

1. The facts leading to the consolidated suits were largely undisputed. The 1st defendant (“MITS”) requested the plaintiff (“the Bank”) to open 7 Sight Letters of Credit (“LCs”) in favour of Mitsubishi Corporation (“Mitsubishi”) in Japan in order to facilitate the manufacture and importation of passenger elevators and escalators. Once the LCs were opened, the Bank would open a loan facility to facilitate each transaction. It was agreed that MITS would repay the Bank within 7 to 15 days of successful installation, commissioning and testing of the lifts which would take 90 days of arrival in Mombasa. The facilities were guaranteed by the 2nd and 3rd defendants who were directors of MITS. In addition, MITS was to provide 10% value of the LC as its equity contribution, insurance cover from Africa Trade Insurance Agency (ATI) to the extent of 90% of the value of the contract and Stand By Letters of Credit (“SBLCs”) from Suisse Credit Bancorp Limited.

2. By a plaint dated 29th April 2014, MITS claimed that the Bank delayed in issuing the LCs and caused it loss and damages. It therefore claimed damages and lost fees on the LCs amounting to Kshs. 15,000,000.00 against the Bank together with interest thereon.

3. In its plaint dated 16th January 2016, the Bank claimed that MITS defaulted in paying back the amount advanced to it. It prayed for judgment against MITS, the 2nd and 3rd defendants for USD 610,764.06, being the principal amount of USD 409,895.64 together which had accrued thereon as at 31st December 2015. The Bank prayed for interest at a rate of 19.5% per annum from 1st January 2016 until payment in full and costs of the suit.

4. Both suits were consolidated and at the pre-trial conference, the parties agreed on facts and issues.

Pre-trial Conference, Agreed facts and Issues for determination

5. The parties agreed on facts and issues for determination as follows:

[2] It is hereby agreed that the plaintiff did grant the defendants and the defendants did accept the facilities set out in paragraph 4 and 7 in the plaint in Milimani Civil Suit No. 20 of 2016 to the tune of USD 427,400.68.

[3] The defendants admit that the plaintiff disbursed the sum of USD 409,895.64 and that the defendants paid USD 21,640.72 which was not credited to the accounts bringing the total amount disbursed to USD 388,254.92.

[4] The issues for determination are as follows:

(1) Whether the defendants owe the plaintiff USD 427,400.68 with interest thereon at 19.5% per annum from the date of default until payment in full.

(2) Whether the defendants paid the plaintiff USD 21,640.72 as alleged.

(3) Whether the defendants are entitled to the sum of Kshs. 15,000,000.00 as damages as a result of the later issues of Letters of Credit in the “Tuffoam Mattress, Kisumu” contract.

6. The parties agreed to admit their respective bundle of documents filed in support of their respective cases hence there were no contested documents. At the hearing, George Mwangi Wanjeru (PW 1), a Credit Officer, testified on behalf of the Bank while Satya Bhama Gandhi (DW 1) testified on her own behalf and on behalf of the other defendants. In view of the agreed facts, documents and issues, I shall not rehash the entire testimony of the parties but refer to it when necessary to deal with a contested point or clarify a matter. The parties also filed written submissions at the end of the hearing.

The Sight Letters of Credit

7. The parties did not dispute the fact that the Bank issued Letters of Credit as pleaded in the plaint and shown as follows:

Facility No/Letter of Credit	Project	Account No.	Amount Disbursed
UBA/KENLC/13/05	Specialized Power Systems	[xxxx]	USD 27,822.60
UBA/KENLC/13/06	Luxury Apartments	[xxxx]	USD 94,699.80
UBA/KENLC/12/04	Beach Residence Hotel	[xxxx]	USD 34,884.00
UBA/KENLC/13/10	Nairobi West Hospital	[xxxx]	USD 32,470.20
UBA/KENLC/13/09	Pharmacy and Poisons Board	[xxxx]	USD 77,468.40
UBA/KENLC/13/03	BAT	[xxxx]	USD 89,690.40
UBA/KENLC/13/11	Stima Mall	[xxxx]	USD 98,404.20
TOTAL			USD 455,439.60

8. The defendants also admitted that the cash margin of 10% which MITS contributed was taken into account with the result that the loan balance due to the Bank as admitted was USD 427,400.68.

9. Under the Letter of Offer dated 25th March 2013, application of the interest rate depended on whether the facility was in dollars or in local currency. If it was in foreign currency, it was 2% above the Bank’s Foreign Currency Prime Lending Rate set at 7.5% per annum making a total of 9.5% per annum. The rate for local currency was 2% above the Bank’s Local Currency Prime Lending Rate pegged at 17.5% per annum making a gross rate of 19.5% per annum. The letter of offer is clear that the facility was in USD and indeed that facilities were in USD hence the agreed rate of interest applicable under the letter of offer was 9.5% per annum.

Whether the 1st Defendants paid USD 21,640.72 which was not credited to its account

10. The basis of this assertion is set out in MIT’s statement of defence dated 15th March 2016 against the Bank’s claim. According to the defendants, USD 21,640.72 ought to have been credited to its accounts hence the amount outstanding would be USD 388,344.92 and not the USD 427,400.68 claimed by the Bank. This claim, in my view, amounts to a set-off.

11. The amount not credited and claimed by MITS is summarized and illustrated in the following table:

Project	Account No.	Date	Amount
1. BAT HQ	[xxxx]	31 st January 2013	USD 3,132.00
2. STIMA MALL	[xxxx]	20 th January 2014	USD 3,247.02
3. HOLIDAY INN	[xxxx]	19 th March 2014	USD 3,040.00

4.	STIMA MALL	[xxxx]	24 th March 2015	USD 2,782.26
5.	STIMA MALL	[xxxx]	24 th March 2015	USD 3,432.10
6.	BAT HQ (Error in difference between demand in plaint and statement)	[xxxx]	19 th January 2016	USD 1,712.68
7.	STIMA MALL (Error in difference between demand in plaint and statement)	[xxxx]	31 st December 2015	USD 4,062.30
8.	STIMA MALL (Amount omitted)	[xxxx]	1 st January 2014	USD 5.41
9.	Overstated interest in Books of Account of UBA		Errors in all loan statements	USD 226.95
	TOTAL			USD 21,640

12. Items 1, 2, 3, 4, 5 and 6 above amounting to USD 15,633.58 together with the statements of account provided by the Bank were put to DW 1 in cross examination. When shown the statements, she admitted that Items 1 and 3 were indeed credited to MITS accounts and had the effect of reducing the loan balance. She also confirmed that items 2, 4 and 5 were cash margin payments made by MITS in respect of each LC. I therefore find and hold that claim to the extent that USD 15,633.58 was not proved as these amounts had already been taken into account in the amounts claimed by the Bank.

13. As regards Items 5, 7, 8 and 9 above, the claim is the difference between what was claimed in the plaint and the statements of account produced by the Bank. The statements were admitted by consent as proof of the claim and in view of the admission made by the parties, I do not find any merit in those claims. Accordingly, I reject the claim for USD 21,640.72.

Whether the 1st defendant is entitled to Kshs. 15,000,000.00 as damages.

14. The basis of this claim by MITS is set out in paragraph 16 of the plaint dated 29th April 2014 as follows:

[16] The Plaintiff further avers that the Defendant delayed in issuing letters of Credit as contracted between the Plaintiff and the Defendant in the contract secured and paid by the Plaintiff in Tuffoam Mattresses, Kisumu leading the Plaintiff to lose the contract and incur loss to a tune of the sum of Kshs. 10,000,000 in anticipated profits. The contract sum is Kshs. 27,500,000/=.

15. In addition to the aforesaid, in prayer (a) of the plaint dated 29th April 2014, MITS states that it seeks, “Kshs. 15,000,000/= which includes fees lost for the SBLCS”.

16. In answer to the aforesaid claim, the Bank in its statement of defence dated in 25th May 2014 stated that MITS failed to provide SBLCs as required in the letter of offer after failing to secure the insurance guarantee from ATI. It added that some documents in respect of the LC had discrepancies and were returned to MITS for correction. The Bank further contended that MITS failed to provide all the documents necessary to open the LC. The Bank’s position was that the alleged delay could not be attributed to it and that MITS admitted that the delay was caused by adverse weather conditions, shortage of materials, congestion at the port and non-payment of duties and taxes.

17. The Bank further pleaded in its defence that it discovered that MITS had received Kshs. 10,000,000.00 from Tuffoam which had been used for other purposes other than execution of the contract. It added that it required MITS to furnish it with an undertaking from Tuffoam that the balance of the contract proceeds would be paid into MITS account at the Bank but MITS failed to provide an Irrevocable Domiciliation Agreement as requested hence it could not issue the LCs.

18. It is common ground that the Bank did not issue the LC to support the Tuffoam contract.

19. The gravamen of MITS claim is as follows. MITS entered into a contract with Tuffoam Mattress Limited (“Tuffoam”) of Kisumu for the supply and installation of passenger elevators and escalators for an agreed price of Kshs. 27,000,000.00 on 18th April 2013. On 16th July 2013, MITS applied to the Bank to open an LC. As part of the conditions, Suisse Credit Capital provided an SBLC as advised by Imperial Bank on 19th August 2013. The terms of the LC were not agreed upon immediately as there was correspondences on or about 25th July 2013, showing that Mitsubishi wanted some amendments to the documents. MITS claims that despite the fact that it issued instructions to the Bank crediting its account with the 10% cash margin and paying the required fee and marine insurance, the Bank never opened the LC causing it to suffer loss.

20. DW 1 testified that Tuffoam paid MITS Kshs. 10,000,000.00 on or about 14th May 2013. She reiterated that emails were still being exchanged on the matter and that even after MITS had paid the cash margin and purchased the insurance, the Bank did not open the LC causing it to lose the contract after cancellation.

21. When cross-examined by counsel for the Bank, DW 1 told the court that when she applied for the LC on behalf of MITS, she was required to provide a guarantee to the Bank which was provided when Imperial Bank confirmed the same on or about 18th August 2013. She also confirmed that the Bank requested assignment of proceeds of Tuffoam. In the meantime, Tuffoam had paid Kshs. 10,000,000.00 as part of its equity contribution. MITS used this money to pay charges for other LC transactions. She stated that MITS was forced to refund Tuffoam from other sources.

22. From the nature of the claim set out in its plaint, the issue is whether the Bank delayed in opening the LC to support the Tuffoam contract there causing MITS loss and damage.

23. MITS applied for the LC by an application dated 16th July 2019. Thereafter the LC was not issued due to what were termed as technical issues including the fact that Mitsubishi requested some changes to the LC. In August 2013, DW 1 informed the Bank in an email dated 26th August 2013 that there was a delay in the manufacture of the lifts and escalators hence MITS required an extension of the shipment and expiry dates in the LC. She noted that, *"They has found difficulty to manufacture and ship out your order by LC ... We would like you to ask for an extension of the shipment date and expiry date of the LC by 1 month."*

24. The Bank finally issued a letter of offer dated 18th September 2013. DW 1 and the co-director signed on behalf of MITS on 20th September 2013. DW 1 blamed the Bank for the delay in issuing the LCs and stated that the Bank admitted as much in a letter dated 11th September 2013. I have looked at the letter dated 11th September 2013 and it is addressed to the Bank by DW 1. She stated, in part, as follows:

Dear Wallace,

As per our telephone conversation we advised you that we are in a very embarrassing and damaging reputation with this client and it would be really helpful if you are able to issue a letter as below so that the client knows that we have not been neglecting his order

DW 1 then proceeded to set out a draft of a letter it wanted the Bank to write to MITS titled, *"Delay in establishment of letter for credit for Tuff Foam Plaza – Kisumu for USD 252,711.90 "*. The proposed draft letter from the Bank concluded that, *"We however regret that although the draft was issued to you on 20th August 2013, were unable to swift the Original LC due to some technical problem faced with our Head Office. However we assure you that we are trying our best to solve this problem and the LC should be in place shortly."*

25. That letter shows that the delay was not of the Bank's causing. It was intended to cover MITS from embarrassment from its client. The Bank did not write the letter MITS proposed. It issued the letter of offer dated 18th September 2013. The fact that the issue of delay was not attributed to the Bank was further confirmed by the email dated 19th September 2013 written by DW 1 before she collected the letter of offer. It stated as follows:

Dear Wallace,

Ekeya got late to collect our fresh letter of offer. To be able to return that duly executed letter of offer which all documents, we kindly request you to send the security documentation by email so that we can keep all attachments ready to avoid delay in the opening for Tuffoam.

Kindly keep the letter for Tuffoam ready so that we can renew custom with client.

Regards

Satya

26. Under the terms of the letter of offer dated 18th September 2013, the client was required to provide insurance bond/guarantee to the extent of 90% of the value of the contract from ATI and or SBLC from Suisse Credit Bankcorp Limited or any first class bank acceptable to a limit of USD 1,000,000.00 where the ATI guarantee was not available. The said letter of offer provided for *"Conditions Precedent to Draw Down"* included receipt of the executed letter of offer, executed cash margin mandate, 10% cash margin and all fees upfront. Under the provision *"Other Conditions/Covenants"* MITS was required to provide an irrevocable domiciliation of contract proceeds from the contract employers.

27. The question for resolution then is whether MITS met all the requirements for establishment of the LC and if so, whether the Bank was liable for failure to issue the LC.

28. In its submissions, MITS contended that the Bank varied the terms of the letter of offer and demanded an Irrevocable Domiciliation Agreement which it provided. The fact is that MITS executed the letter of offer dated 18th September 2013 as a condition precedent for the Bank to issue the LC in support of the Tuffoam contract. The domiciliation agreement was a term of the agreement. MITS submitted that it furnished the agreement by providing an undertaking for payment signed by Foam Mattress Limited dated 5th October 2013. The letter of undertaking was addressed to MITS and it stated in part as follows:

For smooth execution of the contract and as per your request, we undertake to pay you balance of KSH 17,500,000/-, subject to retention money of 5% of contract value which is KSH 1,375,000 which shall be released only after the handing over of the elevators and escalators.

29. The undertaking furnished by Foam Mattress Limited was not an Irrevocable Domiciliation Agreement contemplated in the letter of offer. It was an undertaking issued to MITS. The letter of undertaking to MITS was not a guarantee for payment to the Bank. In a domiciliation agreement, the Bank's customer allows the Bank to collect payments directly from the customer's client. In other words, it is an assignment of the contract proceeds by the client to the Bank. In this case, MITS did not provide an undertaking from Tuffoam to pay the monies due to MITS to the Bank directly. In this respect, MITS failed to meet the conditions of the letter of offer to enable the Bank issue the LC.

30. There is also evidence that in late October 2013, discrepancies were noted in the shipping documents presented for negotiation and payment. The Bank's Lagos office identified the issue and informed the Nairobi office by an email dated 31st October 2013. DW 1 was duly informed of this by an email dated 1st November 2013. By that email, DW 1 was required to provide a signed letter accepting the discrepancies. There is no evidence that MITS furnished the letter confirming the errors to enable the Bank process the LC.

31. From the evidence I have outlined, I accept the Bank's defence that it did not process the LC as MITS failed to meet the conditions in the letter of offer dated 18th September 2013. MITS case was also undermined by subsequent events between it and the Bank as evidenced by correspondence between the parties between November 2013 upto the time the MITS filed its suit in May 2014.

32. For example, there was a meeting on 4th November 2013 between DW 1 and the Banks' officers. It was memorialized in an email of even date from the Relationship Manager, Mr Wallace Makembo to DW 1, in which he stated, in part, as follows:

As agreed in the meeting kindly assist us in finalizing on the following issues at the earliest:

1. Obtaining the originals of the SBLC (Still we have not sighted the originals).

2. Obtaining the letter of assignment of contracts proceeds to UBA from BAT to enable you draw down on the invoice discounting line to pay up on the mature LC. Thereafter any shortfall will be financed by Mits Electrical Limited.

Nothing in that meeting or the subsequent emails touched on the Tuffoam contract despite it being a fresh matter.

33. At this time, the Bank was already concerned that MITS was defaulting on the other facilities advanced to it. On 26th November 2013, Mr Makembo sent to DW 1 an email in which he set out particulars of the 7 facilities and requested DW 1 to confirm the information and to, "please amend where necessary to give correct reflection of the current status." This email did not elicit any response that dealt with MITS concern over the Tuffoam issue.

34. In due course, the Bank issued two demand letters dated 24th January and 5th February 2014. In an email dated 25th February 2015, the Bank's Head of Risk Management confirmed that there had been a meeting with DW 1 and one of the action points agreed upon was that, "MITTS to provide a detailed snag-list for each contract, clearly indicating what needs to be done and timelines thereof, to facilitate full execution of the contracts and processing of payments." It is not apparent that the issue of Tuffoam was raised as one of the pressing matters. In any case, MITS did not respond substantively until the Bank threatened to refer the default to the Credit Reference Bureau. By a letter dated 17th March 2014, DW 1 gave a detailed response on the outstanding payments and only raised the issue of Tuffoam in the penultimate paragraph as follows:

Kindly consider this extension request and we will shortly be sending you out schedule of damages suffered as a consequence of the Bank requesting us to open SBLC's and never opened LCS also leading to cancellation of Tuffoam Contract and in breach of the letter of offer for USD 1M LCS, leaving our LC facility unutilized fully while the bank recovered a full amount of processing fee of 1%.

35. Thereafter, the parties continued to exchange correspondence but were unable to reach any settlement. By the letter dated 25th April 2014, MITS, through its lawyers, *Ongoto and Company Advocates*, wrote to the Bank requesting for indulgence on the ground that the delay in construction was occasioned by delays which were beyond its control. The lawyers requested the Bank to "hold any precipitate action herein for three (3) days from the date hereof to accord us time with our client as we work out a concrete proposal on settling the pending LC payments." As progress could not be reached, MITS filed suit against the Bank.

36. In conclusion and as regards the Tuffoam contract, I find and hold that the Bank is not liable for delay or for failure to issue the letters of credit. MITS failed to comply with the terms of the letter of offer dated 19th September 2013 which would have enabled the Bank issue letters of credit to support the Tuffoam contract.

37. A claim for lost fees and anticipated profits is by its nature a claim for special damages. In this respect, the well settled principle is that special damages must be pleaded and proved and that degree of certainty and particularity of proof required must depend on the circumstances and nature of the loss and damage (see *Hahn v Singh* [1985] KLR 716 and *Capital Fish Kenya Limited v Kenya Power and Lighting* [2016] eKLR). In *Banque Indosuez v DJ Lowe and Company Ltd* [2006] 2KLR 208 the Court of Appeal held that;

It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves.

38. From MITS claim, which I have set out at para. 14 and 15 above, the issue for determination is three-fold, whether there was a delay in issuing the LC and whether MITS lost the contract and anticipated profits as claimed. It also claims fees lost for SBLC's.

39. Regarding the claim of lost fees for SBLC, I have looked at the plaint dated 29th April 2014 and it does not state or detail how the fees lost for SBLC's from Suisse Bank Corporation are made up. Under the letter of offer dated 25th March 2013, Suisse Bank Corporation was required to provide SBLC's a part of the collateral for each transaction. At paragraph 9 of the plaint, MITS set out the LC's issued by the Bank following the letter of offer dated 25th March 2013. It further stated that all the LC's were honoured except the one concerning Tuffoam Mattresses and DC Control Tower, Dar-es-Salaam.

40. MITS did not state in what circumstances the SBLC fees were lost and how much. In the written submissions, MITS has attempted to detail the lost fees amounting to Kshs. 989,515.08 from the various LCs. I cannot admit this claim as it was not pleaded with particularity in the plaint. Failure to plead the claim as required in law cannot be cured by written submissions which are neither pleadings nor evidence. Of the claim of Kshs. 15,000,000.00, I must dismiss part of the claim for Kshs. 5,000,000.00 as it is not pleaded or proved.

41. As regards the claim for Kshs. 10,000,000.00, I have already held that the Bank was not liable for the delay or failure to issue the LC in respect of the Tuffoam contract. Further, MITS did not exhibit or produce a letter of cancellation from Tuffoam to not only demonstrate that the contract was cancelled but also that the cancellation was a direct consequence of the Bank's action.

42. Even if I accept the Bank was liable for the delay in issuing the LC causing Tuffoam to cancel the contract, the appellant must prove that it was entitled to loss of profit. It is not disputed that the contract price was Kshs. 27,000,000/-. But how much of that amount was profit due to MITS. DW 1 did not tell the court or produce documentary evidence to show how the profit of Kshs. 10,000,000.00 was arrived at. In simple terms, the profit due would constitute the financial benefit realized by MITS when the costs of business are deducted from the sale or contract price. In this case, nothing in the evidence demonstrated any loss of profit other than plain statements which do not bear any weight.

Conclusion and Disposition

43. MITS admitted that it obtained financial accommodation through provision of letters of credit by the Bank. Save for the amount it alleged was not credited to its account and which I have dismissed, MITS admitted indebtedness. In some of the emails and correspondence I have discussed elsewhere in this judgment, MITS sought indulgence to settle the debt due to the Bank. It did not show that it had repaid any amount advanced to it despite several demands. There is also no dispute that the facilities were guaranteed by the 2nd and 3rd defendants to whom demand and notice of default was issued.

44. In its plaint dated 28th April 2014, MITS seeks an order restraining the Bank from circulating its name or those of its directors to the Credit Reference Bureau, the Kenya Bankers Association and all other financial institutions in Kenya as bad debtors. I cannot grant this order for the simple reason that I have found that MITS and directors are indebted to the Bank.

45. For the reasons I have set out, I find and hold that the defendants' claims lack merit. I further find that the Bank has proved its case on the balance of probabilities. I therefore make the following orders:

(a) The defendants' suit against the plaintiff is dismissed.

(b) Judgment be and is hereby entered for the plaintiff against the defendants jointly and severally for **USD 427,400.68** together with interest accruing at a rate of 9.5% per annum from **6th February 2014** until payment in full.

(c) The defendants shall pay the plaintiff's costs.

DATED and DELIVERED at NAIROBI this 3rd day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

Mr Mumia instructed by Mwanikii Gachoka and Company Advocates for the plaintiffs.

Mr Isinta with him Mr Kedogo instructed by Isinta and Company Advocates for the defendants.