



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 14 OF 2020

INCLUSIVE AGENCIES (MSA) LIMITED.....PLAINTIFF

-VERSUS-

CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

1. In the suit, the plaintiff seeks damages for what it calls and alleges to have been occasioned to it by the defendant, as its bankers, under a contract for the provision of a security bond intended to support the plaintiff's tender for provision of '**material handling and logistical support services for civil works Manda Airstrip**'.

2. The plaintiff's claim is that it sought and paid for a bond that was to cover a period of 150 days but owing to the defendant's negligence and breach of duty of care the defendant provided a security bond for a shorter period of 120 days as a consequence of which the tender was declared non-responsive.

3. It is that plaintiff the defendant now seeks to have struck out for failure to disclose a reasonable cause of action and thus frivolous, vexatious and otherwise an abuse of the process of the court. The defendant premises its attack on the plaintiff on the foot of a letter dated 17/05/2018 by the procuring entity and communicating the outcome of the tender. In that letter the procuring entity tells the plaintiff that its tender was non-responsive but the entire tender was non-competitive for which reason no award was made.

4. The defendant's position is that the entire tender having been non-competitive, it mattered not even if the security bond given had been for 150 days to make the plaintiff's tender responsive because in all even no award would have been made.

5. It is well established now that no pleading deserves being struck out unless it is so weak, frivolous and tenuous as to be incapable of infusion with life by way of an amendment^[1]. A mere semblance of a cause of action is enough to refuse striking out. The court must always remember that every litigant deserves a day in court even if on the face of argument by the other side the case would appear to be weak. The court of Appeal in *Crescent Construction Co. Ltd vs Delphis Bank Ltd [2007] eKLR* advised caution in dealing with applications to strike out pleadings and stated as follows:

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

6. The flip side of that trite position of the law is another trite position that there is no magic in insisting on a matter proceeding to hearing when there is no substance to be urged at such a hearing^[2]. During the era of the East African Court of Appeal, the law had been set that when a defendant alleges, as Mr. Kongeres client has alleged here, that the plaintiff reveals no cause of action then the court looks at no evidence beyond the plaintiff. In *Jevaj Shariff & Co. vs Chotui Pharmacy Stores [1960] E.A. 374*, the court said:

“The question whether a plaintiff discloses a cause of action must be determined upon a perusal of the plaintiff alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true”.

7. I have perused the plaintiff here and I am of the view that there is a question to be investigated whether or not there was a wrong upon the plaintiff by the defendant.

8. While it is the law, as argued by both counsel, that in a claim grounded on breach of duty of care one must establish the existence of duty, the breach thereof and the ensuing damage/loss, in this matter the presence or absence of a reasonable cause would depend on whether or not it was the non-responsive face of the security bond provided by the defendant alone which led to the failure by plaintiff. That is a matter that must come from evidence. That evidence must await the hearing. Before that evidence I am unable to find, conclusively, that it was the non-competitive outcome of the entire tender process as opposed to non-responsive face of the plaintiff tender that led to the failure by the plaintiff to win the tender.

9. I am not convinced in the least that the plaint here is so hopeless as to have no semblance of a cause of action to invite the draconian and drastic remedy of striking out.

10. I find no merit in the application and I order that it be dismissed with costs.

Dated, signed and delivered this 9th day of October 2020

P J O OTIENO

JUDGE
