CFC Stanbic Bank Limited v Kenya Haulage Agency Limited (Civil Appeal E041 of 2022) [2025] KECA 1034 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KECA 1034 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E041 OF 2022

AK MURGOR, P NYAMWEYA & GV ODUNGA, JJA

JUNE 5, 2025

BETWEEN

CFC STANBIC BANK LIMITED .... APPELLANT

AND

KENYA HAULAGE AGENCY LIMITED .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (P.J. Otieno J.) delivered on 26th February 2021in Mombasa HCCC No. 180 of 2012.)

JUDGMENT

1. CFC Stanbic Bank Limited, the Appellant herein, has appealed against a judgment delivered on 26th February 2021 by the High Court of Kenya at Mombasa [P. J. Otieno J] in Mombasa HCCC No. 180 of 2012, in which it was ordered to pay Kenya Haulage Agency Limited, the Respondent herein, an award of USD 250,860/= as special damages with costs and interest. The Respondent had filed the said suit in the High Court seeking a declaration that the Appellant was negligent as a result of which it suffered loss and damages.

2. The Respondent's case was that in mid-2011, it tendered for Tender No. KPA/207/2010-11/AHM, for the supply of 10. No Ribbed Type Pneumatic rubber fenders. A condition of the tender was that the tenderer had to produce a tender security in the form of a bank bond of Kshs 250,000/-, valid for 120 days after the closing of the tender. The Respondent claimed that through a letter dated 12th July 2011, it accordingly requested the Appellant to provide a bond for the bid, and gave them specific and express instructions. The Appellant agreed to provide the said tender security which it did on 26th July 2011, the closing date of the tender, and stated that the guarantee was to remain in force until the expiry date being 21st November 2011; and if no demand was made to it by close of business on the expiry date, the guarantee would become null and void whether or not the original guarantee would have

been returned to it for cancellation. The Respondent thereafter issued a bid bond for Kshs 250,000/- in favour of Kenya Ports authority concerning the tender.

3. After bidding, the Respondent received a letter dated 28th September 2011 from the Kenya Ports Authority informing that it lost the bid because the tender security given had not met the requirement of 120 days, and only covered 119 days, one-day shy of the tender requirements. The Respondent's claim therefore was that that it lost the bid as a result of the Appellant's negligence and lack of care. Furthermore, that having secured a supply of the required goods on CIF basis for the sum of USD 342,100/-, it also incurred a loss of USD 250,860/=, which was the difference between the declared price of the goods in the tender documents of USD 592,960/- less the purchase price. The Respondent accordingly sought a declaration that the Appellant was negligent and as a result of the said negligence the Respondent suffered loss and damage, special damages of USD 250,860/=, and general damages.

4. In response, the Appellant filed a Statement of Defence dated 18th October 2012 in opposition to the claim, in which it admitted that it enjoyed a client/ bank relationship with the Respondent, but denied receiving the Respondent's letter dated 12th July 2011 with the bid-bond terms. The Appellant admitted that it received a request from the Respondent's director, Mr. Paul Munyao, for the issuance of a bid bond in favour of Kenya Ports Authority whose validity would be up to 21st November 2011, which it executed as requested, but denied knowledge of the Respondent bidding for the tender. The Appellant further denied that the Respondent lost the bid to supply the goods to Kenya Ports Authority on account of any negligence or lack of care on its part; that it breached any duty of care towards the Respondent; or that the Respondent suffered the loss in the sum of Kshs USD 250,860/-. The Appellant further averred that there was no guarantee that the Respondent would have won or have been successful on the tender and any loss suffered was too remote and could not be claimed, as it was not and could not be within the reasonable contemplation of the Appellant.

5. The Appellant and Respondent called one witness each during the hearing of the suit in the High Court, who both relied on their witness statements which reiterated the parties' respective pleadings. Paul Munyao, who testified for the Respondent, in addition stated on cross- examination that he relied on quotations of the cost at which a supplier would have availed the goods; he did not produce any invoice, and the sum claimed as special damages was the Respondent's anticipated profits.

6. The Appellant's witness, Mr. William Mwashumbe, testified that the Respondent was to blame for failing to ensure that the security issued met the requirements of the tender, and that the loss claimed was too remote and not capable of contemplation by the Appellant at the time the bid bond was issued. On cross-examination, he confirmed that the validity of the bid bond was for a period of 119 days and not 120 days.

7. After hearing the parties, P.J. Otieno J held that the totality of the evidence on record was explicit that the letter by the Respondent requesting for the bid bond was duly received, and that the guarantee given was for 119 days and not the requested validity period of 120 days. Accordingly, that there was breach of contract by which the Respondent lost the prospects to win and derive the benefits ordinarily expected to flow from clinching the tender. In addition, that the loss must be quantified in terms of what the parties or one of them, reasonably and objectively anticipated as the financial benefit one would get if the tender were won by the tenderer and payment made after the goods were supplied. Therefore, that on a balance of probabilities, the Respondent did prove its losses at US $ 250,860/- for which judgment was entered. However, that there was no further loss suffered to merit any award of general damages.

8. The Appellant being aggrieved by the decision lodged a Memorandum of Appeal in this Court dated 9th March 2022, in which it has raised eleven [11] grounds of appeal which challenge the findings of the

High Court on two main issues namely, that there was breach of contract, and the award of the sum of USD 250,860/= as damages for the breach of contract. The Appellant prays that that the decision of the High Court allowing the Respondent's claim against the Appellant in the sum of US $ 250,860/- be set aside and substituted therefore with a decision dismissing the Respondent's claim, and that the cost of these proceedings and the proceedings before the High Court be awarded to the Appellant.

9. We heard the appeal on this Court's virtual Platform on 15th July 2024, and learned counsel Mr. Sanjeev Khagram appeared for the Appellant, while learned counsel Mr. Gikandi Ngibuini appeared for the Respondent. This being a first appeal, the duty of this Court is set out in the decision of *Selle & Another v Associated Motor Boats Co. Ltd & Others* [1968] EA 123. We shall accordingly reconsider the evidence adduced in the trial Court, evaluate it and draw conclusion of facts and law. We will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1968] KLR 661; or where its discretion was exercised injudiciously as was held in *Mbogo & Another v Shah* [1968] EA. 93.

10. Mr. Khagram and Mr. Gikandi relied on their respective written submissions dated 27th February 2023 and 3rd June 2024 to present their arguments. On the issue of whether there was a breach of contract by the Appellant, Mr. Khagram cited the decision in *Independent Electoral & Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* [2014] eKLR to submit that the Respondent's cause of action was premised on the tort of negligence and failing to provide the bid security as requested, and the trial Judge erred in holding the Appellant liable for breach of contract, when none had been alleged nor claimed, and in awarding the Respondent a sum of US$ 250,860/- as damages therefor. It was his submission that the question of a breach of contract was introduced in the Respondent's written submissions and despite the Appellant's protest in its written submissions, the trial Judge proceeded on the basis of a cause of action premised on a breach of contract. Additionally, that the question of legitimate expectation was not raised nor addressed by any of the parties and appears to have been introduced by the trial Judge. Therefore, that the learned Judge ignored the Appellant's case, pleadings and issues before him for determination and instead, proceeded to determine the matter on the premise of a cause of action for breach of contract which was neither pleaded nor canvassed before him.

11. Mr. Gikandi on his part submitted that the facts of the case were sufficiently pleaded, as the Respondent decried the conduct of the Appellant leading to the loss of legitimate expectation to win the tender and derive a benefit therefrom. In addition, that the Respondent had been assured of the tender security which the Appellant issued negligently and in breach of its assumed responsibility. Counsel argued that the use of the word 'negligence' in the pleading did not imply the cause of action was purely of the tort of negligence, and cited the decision in *Kiamokama Tea Factory Co. Ltd v Joshua Nyakoni*, Civil Appeal No 169 of 2009 to submit that one should not look at the nomenclature but the substance to deduce the cause of action, and that the pleadings filed and the course taken by the parties clearly demonstrated that the claim lay in both tort and contract and reliance was placed on the cases of *Hedly Bryne & Co. Ltd v Heller & Partners* [1964] AC 465 and *Odd Jobs v Mubia* [1970] EA 476 on the concurrence of liability in tort and contract.

12. Therefore, that it was erroneous for the Appellant to submit that there was no breach of contract ever pleaded, simply because they did not locate the said nomenclature, and to use the remedies sought in the plaint as a yardstick to guess the cause of action. Counsel reiterated that there was tacit assumption of responsibility by the bank to provide the required bank guarantee for the benefit of the Respondent, and following its failure to do so, there was pure economic loss as a result of the negligence. Thus, there was a duty of care under tort and breach of that duty under contract, and the consequence of the negligent undertaking was a loss of the bid and the bank's actions were not too remote and an award

of damages was foreseeable. Counsel also placed reliance on Article 159 [2][d] of the *Constitution* to submit that technical arguments ought not to be allowed to defeat this claim.

13. We have perused the record of appeal, and note that the claim in the Respondent's plaint dated 20th September 2012 stated as follows in paragraphs 10 to 12 thereof:

> " 10. The plaintiff states that after bidding it received a letter dated 28th September, 2011 from Kenya Ports Authority that the plaintiff had lost the bid due to the fact that the tender security given had not met the requirement of 120 days. The tender security had only covered 119 days one day shy from the tender requirements.
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> 11. The plaintiff states that as a result of the defendant's negligence, lack of care, the plaintiff lost the bid. Further, the plaintiff had secured a supply on CIF basis of the required goods in the sum of USD342,100 [US Dollars Three Hundred and Forty-Two Thousand One Hundred]. However, as per the tender documents the declared price schedule for the supply to Kenya Ports Authority by the plaintiff was USD 592,960 [US Dollars Five Hundred and Ninety-Two Thousand Nine Hundred and Sixty].
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> 12. The plaintiff states that due to the defendant's actions the plaintiff lost USD 250,860 [US Dollars Two Hundred and Fifty Thousand Eight Hundred and Sixty] which is the tender amount less the purchase price on CIF basis."

14. In paragraph 14, the Respondent stated that "in the foregoing circumstances the plaintiff prays for a declaration for the defendant was negligent and that as a result of the said negligence the plaintiff suffered loss and damage" and the relief the Respondent sought was the said declaration and special damages of and general damages. A cause of action is defined in *Black's Law Dictionary*, Ninth Edition as "a group of operative facts giving rise to one or more bases for suing"; and "a factual situation that entitles one person to obtain a remedy in court from another person". Pleadings filed in court by parties are required to provide a concise statement of one's claim and of the material facts relied upon, and not the evidence by which the claim will be proved. The material facts are in this respect determined by the key elements of the cause of action pleaded, and the relief that a party seeks.

15. It is also trite that the function of a pleading in civil proceedings is to alert the other party to the case they need to meet, and to define the precise issues for determination so that the court may conduct a fair trial. it. This Court rendered itself in this respect as follows in *Dakianga Distributors [K] Ltd v Kenya Seed Company Limited* [2015] eKLR :

> " A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell [The Common Law Library No.
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> 5] where the learned authors declare:-"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which

will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

16. It is evident from its pleadings that the gist of the Respondent's claim was that it made a request for a bid bond, which was availed by the Appellant, but which, due to the Appellant's negligence and lack of care, was not for the required period of 120 days, as a result of which the Respondent suffered loss and damage. The trial Judge in this respect, after affirming that the bid bond requested was specific on the period of validity, proceeded to hold that "in the circumstances of this case the admission by the defendants' witness that the validity period required by the plaintiff was never met is enough to say that the plaintiff never got the consideration for what he paid. That must be a clear breach of the contract between the parties by the defendant".

17. It is notable that particulars of the contract between the parties, nor of the breach of the terms and the manner of that breach were not pleaded by the Respondent. What was specifically pleaded was a breach of the duty of care and negligence by the Appellant in the issue of the bid bond. As explained in the foregoing, the general rule is that parties are bound by and confined to their pleadings, and courts should determine a case on the issues that flow from the pleadings or such issue as the parties have framed for the court's determination. See *Galaxy Paints Co. Ltd v Falcon Guards Ltd*, [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited v Intercom Services Limited & 4 Others*, [2004] 2 KLR 183. It is thus our finding that the trial Judge erred by making a finding on an issue which was not pleaded, namely breach of contract, and by failing to interrogate the issue and cause of action that was specifically pleaded, being that of negligence on the part of the Appellant in the manner of execution of the request made by the Respondent.

18. As a first appellate Court, we are under a duty to re-examine the pleadings and evidence to determine if there was a breach of duty of care pleaded by the Appellant. For liability in negligence to be founded, four key ingredients must be present namely; a duty of care owed by the defendant to the claimant, breach of that duty, damage which is caused by the breach and foreseeability of such damage. The legal test in determining whether a duty of care is owed by a defendant has evolved since the neighbour principle first set out by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, namely, that a person owes a duty to take reasonable care to avoid acts or omissions which he or she can reasonably foresee would be likely to injure their neighbour. A neighbour was stated to be any person who is closely and directly affected by the act in question and ought to reasonably be in contemplation as being so affected. The test was further developed and is now set out in the persuasive decision by the English House ofLords in *Caparo Industries plc v Dickman* [1990] 2 AC 605, being that a duty of care arises where harm is reasonably foreseeable as resulting from the defendant's conduct, a relationship of proximity exists between the defendant and the claimant; and it is fair, just and reasonable to impose liability. The standard of care required is not that of the defendant himself, but that of a person of ordinary prudence or a person using ordinary care and skill, while for professionals, the standard of care is that of an ordinary professional.

19. On the aspect of the appellant's liability, the first question we need to answer is whether the appellant owed a duty of care to the respondent. Mr. Khagram, while making reference to the provisions of section 59 of the *Evidence Act* and the decisions in *Jeneby Mawira v Annwhiller Rugendo & another* [2017] eKLR and *Morris Munameza Isiye & 2 others v African Banking Corporation Ltd* [2019] eKLR, faulted the learned trial Judge for taking judicial notice of the specialised knowledge of banks as opposed to their customers. Counsel submitted that quite apart from the fact that no evidence was led by the Respondent to demonstrate that while banks are possessed of knowledge in the negotiation and drafting of banking instruments and contracts and individual bank customers are not; there was in fact evidence to the contrary that the Respondent's Managing Director was a seasoned businessman and

knowledgeable in tender supplies. Consequently, the trial Judge could not and ought not to have found this to be a matter of common notoriety. Additionally, the question of the competence of customers in so far as matters of banking and financial instruments and contracts are concerned, varied from customer to customer, and could not be the basis of taking judicial notice.

20. Mr. Gikandi on his part submitted that the learned trial Judge was right in invoking the presumption that one must be reputed for exercise and skill in the practice and conduct of banking business, since section 4 and the 1st Schedule of the *Banking Act* provides conditions to be fulfilled or satisfied for an entity to be licensed to do banking business, including the professional and moral suitability of officers of a banking institution.

21. It is notable that it is not disputed that there was a bank and customer relationship between the Appellant and Respondent. The Appellant in its defence and evidence admitted that it at all material times enjoyed a client/bank relationship with the Respondent, and did not contest that it received the request for the bid bond which was required to be valid for 120 days. The relationship between a bank and its customer, according to the authors of *Paget's Law of Banking*, 11th Edition, is a "relationship peculiar to banking" which embraces mutual duties and obligations and offers privileges to both parties. The authors state that it is a relationship of contract consisting of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services. The special contract in this appeal was a guarantee, which was an agreement where the Appellant as guarantor, promised to fulfil the obligation of the Respondent as the principal debtor, if the Respondent failed to do so under the bid.

22. In honouring its customer's instructions, a bank is under a duty to exercise due diligence as well as reasonable care and skill, which duty was expressed in *Karak Brothers Company Ltd v Burden* [1972] 1 All ER 1210 as follows:

> " .... a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances."

23. It was in this respect held in In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [*supra*] that there can be tortious liability for negligent misstatements where parties are in a special relationship resulting from the defendant's assumption of responsibility towards the plaintiff. Lord Morris distinguished the cases where there is some contractual or fiduciary relationship between the parties and a person voluntarily or gratuitously undertakes to do something for another person, in which case the person is under a duty to exercise reasonable care; and cases where a person issues a document which should be the result of an exercise of the skill and judgment required by him in his calling and where he knows and intends that its accuracy will be relied upon by another. In the latter case, the learned Judge, after examining various judicial decisions expressed that:

> " ... I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry,

a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

24. In the present appeal, the Appellant's duty of care involved ensuring the guarantee was issued according to the terms agreed upon with the Respondent, verifying that the amount claimed was within the guarantee's scope, and acting promptly to honour the guarantee upon a valid demand. The Respondent's evidence that the guarantee issued by the Appellant was not in accordance with their instructions, and was valid for 119 instead of 120 days as requested, and this fact was not controverted by the Appellant. It is our finding that there was a breach of the duty of care which was owed by the Appellant in the circumstances, arising from the relationship it had with the Respondent, both as its banker and guarantor, and arising from its duty to exercise reasonable care and skill in this regard. To this extent, the learned Judge did not err in recognising that the Appellant was possessed of special skills, and as a result had a duty of care to the Respondent in exercising its skills.

25. The second question we then need to answer is whether there was harm or loss suffered by the Respondent as a result of the breach of duty of care. The Respondent in this respect produced in evidence the letter dated 28th September 2011 from Kenya Ports Authority, informing that its bid was not successful for the reason that the tender security validity was for 119 days and 120 days as required by the tender documents. The Respondent therefore proved that there was harm which was directly caused by the Appellant's breach of duty of care, and the legal requirement of causation was met in the circumstances. What remains to be clarified, is the actual nature of harm that was suffered by the Respondent as a natural consequence of the Appellant's actions, and whether it stemmed from the failure by the Appellant to take appropriate care in the particular circumstances of this appeal..

26. This leads us to the second issue of quantum of damages, and specifically whether the award of damaged of US $ 250,860/- was justified. Mr. Khagram submitted that the Respondent's evidence and the testimony of its Managing Director stated that the Respondent had secured a supply of the goods on a CIF basis for US $ 342,100/= which it intended to supply to Kenya Ports Authority for US $ 592,960/=, in quantifying its loss as US $ 250,860/=. Counsel submitted that the Respondent did not sustain any loss since the document produced before the Court from Pacific Marine and Industrial was only a quotation and not an invoice. Additionally, the Respondent witness was categorical that there was no guarantee of winning a tender supply; the learned Judge erred in awarding the Respondent a sum of US $ 250,860/- by way of damages based on a legitimate expectation of profit arising out of a breach of contract; and even if the Appellant was liable, the Respondent's claim at best was for prospective loss and was wholly speculative and too remote.

27. In support of these arguments, counsel relied on the decisions in *Bid Insurance Brokers Limited v British United Provident Fund* [2016] eKLR, *Kenya Airports Authority v Mitubell Welfare Society & 2 others* [2016] eKLR, *Kenya Breweries Limited v Kiambu General Transport Agency Limited* [2000] eKLR, *Twokay Chemical Limited v Patrick Makau Mutisya & another* [2019] eKLR, *Wilfred Nzioka Mutua v Barclays Bank of Kenya Ltd & another* [2017] eKLR and *Eric Omuodo Ounga v Kenya Commercial Bank Ltd* [2017] eKLR.

28. Mr. Gikandi's submissions were that the Respondent was justified in claiming pure economic loss as a result of the Appellant's negligent actions for the reasons that were it not for the said negligent actions, the Respondent would not have lost the legitimate expectation of profit arising out of the breach of contract and breach of duty of care. Counsel referred to the tests for remoteness in contract and in tort, and while citing the decision in *Hedly v Raxendale* [1854] 156 ER 145, submitted that in contract, if a defendant could reasonably contemplate the type of loss at the time of contracting, then the loss will

not be too remote; while on the other hand, the tortious test, as established in Wagon Mound [No.1], is where a defendant could reasonably foresee the type of loss tests at the time of the breach.

29. Counsel also placed reliance on the decision of the English Court of Appeal in *Wellesley Partners LL.P v Withers LL.P* [2015] EWCA Civ 1146, that the mere fact that the extent of loss could not be predicted at the date of the formation of the contact was not sufficient reason to hold that the contract breaker had not assumed responsibility for the loss. In sum, Mr. Gikandi's submission was that it was not too remote to contemplate that the Appellant, having assumed responsibility to give the bid bond and having negligently given it, the loss of the tender was apparent and essentially the loss of legitimate expectation to win a tender and derive benefit therefrom. Thus, the loss was not too remote as argued by the Appellant.

30. The learned trial Judge in this respect did make a finding that the Respondent had no guarantee of success in its tendering bid, and that it could not validly and legally expect such guarantees. The learned Judge then proceeded to hold as follows:

> " 39. Having found that there was breach of contract by the defendant and that it was such breach that determined the failure of the plaintiff's bid, I hold that the plaintiff thus lost the prospects to win the tender and thus the legitimate expectation to so win and derive the benefits expected to flow from clinching the tender. That loss must be quantified in terms of what the parties or one of them, reasonably and objectively anticipated as the financial benefit one would get if the tender were won by the tenderer and payment made after the good were supplied. In my mind, there is no prohibition in law that no damages ever issue in favour of a party who has proved breach and loss. In fact, I am of the learning [sic] that where a party take his time and other resources towards a patently beneficial and profitable venture but he loses his expectation and prospects by the sole reason of another with a contractual duty to the losing party, then it would be travesty of justice to say that such a person has no remedy in damages at all."

31. We have already found that the Respondent's action was not founded on breach of contract, and therefore this reasoning by the learned Judge for the basis of the award of damages cannot therefore stand. In a claim for negligence, when a duty of care is found to exist in law one element in that finding is foreseeability of the risk of injury. A defendant is liable to pay damages in respect of the kind of injury the foreseeability of which was the necessary element enabling a finding to be made that a duty of care existed, and is not liable to pay damages for causing a kind of injury which is not foreseeable. Such damage can be described as too remote or it may be said that there is no duty of care to avoid the risk of that kind of injury. That is the principle established by *Wagon Mound [No. 1]* [1961] AC 388, and *Wagon Mound [No.2]* [1967] 1 AC 617 .

32. In the present appeal, the loss that the Respondent claimed were the profits it expected to make from the subject tender. The applicable principles of law are therefore those governing the recovery of pure economic loss arising from a negligent statement in breach of a duty to take care. It is settled that where personal injury or physical damage to property is caused by a negligent act or statement, the damages which may be recovered include compensation for all pecuniary loss suffered as a result of the injury or damage subject to the foreseeability test that we have set out hereinabove. When it comes to recovery of pure economic loss, which is loss that is purely financial or economic in nature and not directly linked to any physical damage to the claimant or to the claimant's property, as is the case in this appeal, the position is not settled.

33. The general rule before the decision in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd* [*supra*] was that pure economic loss suffered as a result of a negligent statement or act was not recoverable in damages. However, in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd* [*supra*] the English House of Lords paved the way for exceptions where damages could be awarded for pure economic loss arising from negligent statements. Lord Devlin held that he could find "neither logic nor common sense" in distinguishing between financial loss caused through physical injury and financial loss caused directly, while Lord Pearce while referring to the decision in *Morrison Steamship Co. Ltd. v Greystoke Castle [Cargo Owners]* [1947] AC 265 that economic loss alone, without physical or material damage to support it, can afford a cause of action in negligence by act. Lord Devlin also considered that the fundamental question settled by their decision was that purely economic loss will be recoverable if there is sufficient proximity between the parties to give rise to a special duty relationship.

34. The applicable exceptions when pure economic loss is recoverable for breach of duty of care was also the subject of the majority decision of the English Court of Appeal in *Spartan Steel & Alloys Ltd. v Martin & Co. [Contractors] Ltd.* [1973] 1 QB 27, wherein the following circumstances were suggested:

 a. by Lord Denning [at page 37] that a consideration of all the facts of each particular case is made with a view to determining, as a matter of judicial policy, whether in those particular circumstances purely economic loss should be recoverable;

 b. by Lawton LJ [at page 47] that economic loss will be recoverable only if immediately consequential upon injury to property or person; and

 c. by Edmund Davies LJ [dissenting] [at page 45] that economic loss will be recoverable if it is "a reasonably foreseeable and direct consequence of failure in a duty of care".

35. Claims for financial loss not consequential upon property damage have succeeded in Canadian, American and Australian courts. In *Seaway Hotels Ltd. v Cragg [Canada] Ltd.* [1959] 21 DLR [2d] 264 the plaintiff was awarded damages for loss of earnings when the defendant negligently severed a cable carrying power to the plaintiff's hotel, thereby compelling it to close its restaurant and bar and depriving it of rent. In *Rivtow Marine Ltd. v Washington Iron Works* [1973] 40 DLR [3d] 530 the plaintiff obtained damages compensating it for the loss of earnings which it sustained by reason of the defendants' failure to give prompt notice of a defect in a crane, which resulted in the plaintiff's vessel being out of commission at the height of the fishing season for the defect to be remedied. Had the notice been given earlier the crane could have been repaired without significant loss of earnings. In the United States, fishermen successfully recovered damages reflecting their loss of earnings due to the pollution of fishing grounds by reason of the defendant's negligent spillage of oil in *Union Oil Co. v Oppen* [1974] 501 F [2d] 558.

36. The issue of recovery of economic loss was extensively dealt with by five learned judges of the High Court of Australia in their decision in *Caltex Oil [Australia] Pty Ltd v Dredge "Willemstad"* [1976] 136 CLR 529 [hereinafter "the Caltex Oil Case"], who examined in detail the judicial decisions and policy considerations at play before and after the decision in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd* [*supra*]. The decision in the Caltex Oil Case was on appeal from a decision of the Supreme Court of New South Wales, which had found that the only loss suffered by Caltex Oil, as a result of negligent drawings and misrepresentations which led to the damage of a pipeline owned by a third party during a dredging exercise, was economic loss which was not recoverable. In allowing the appeal by Caltex Oil, the learned judges of the High Court of Australia gave various reasons and bases why economic loss was recoverable.

37. Gibbs J. after considering the majority decision of the English Court of Appeal in in *Spartan Steel & Alloys Ltd. v Martin & Co. [Contractors] Ltd.* [supra] held as follows in his opinion:

> "36. In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him such damage by his negligent act. It is not necessary, and would not be wise, to attempt to formulate a principle that would cover all cases in which such a duty is owed; to borrow the words of Lord Diplock in *Mutual Life & Citizens' Assurance Co. Ltd. v Evatt* [1970] UKPCHCA 2; [1970] 122 CLR 628, at p 642; [1971] AC 793, at p 809 : "Those will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them..."[Emphasis ours].

38. Stephen J. was of the opinion that in cases of purely economic loss, the need for some further control of liability apart from that offered by the concept of reasonable foreseeability arises in part because, in cases of physical injury to person or property, the concept has been given a very far- reaching operation, which is far more extensive than may be thought to have been conveyed by Lord Atkin in *Donoghue v Stevenson* [*supra*]. In addition, that if economic loss is to be compensated its inherent capacity to manifest itself at several removes from the direct detriment inflicted by the defendant's carelessness makes reasonable foreseeability an inadequate control mechanism and the sole measure of liability for economic loss, as illustrated by *The Wagon Mound [No. 2]* [*supra*].

39. The learned Judge therefore held as follows:

> "44. Some guidance in the determination of the requisite degree of proximity will be derived from the broad principle which underlies liability in negligence. As Lord Atkin put it in a much-cited passage from his speech in *Donoghue v Stevenson* the liability for negligence "is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay" [1932] AC, at p 580 . Such a sentiment will only be present when there exists a degree of proximity between the tortious act and the injury such that the community will recognize the tortfeasor as being in justice obliged to make good his moral wrongdoing by compensating the victims of his negligence.
>
> Again, as Lord Morris said in the Dorset Yacht Case courts may have recourse to a consideration of what is "fair and reasonable" in determining whether in particular circumstances a duty of care arises [1970] AC, at p 1039; so too, I would suggest, in determining the requisite degree of proximity before there may be recovery for purely economic loss..." [Emphasis ours].

40. On his part, Mason J. was of the view that the test is one which effectively narrows the class of plaintiffs eligible to recover financial loss, and held as follows:

> "23. It is preferable, then, as Mr. P. P. Craig suggests in his illuminating article, "*Negligent Misstatements, Negligent Acts and Economic Loss*" Law Quarterly Review, vol. 92 [1976], p. 213, that the delimitation of the duty of care in relation to economic damage through negligent conduct be expressed in terms which are related more closely to the principal factor inhibiting the acceptance of a more generalized duty of care in relation to economic loss, that is, the apprehension of an indeterminate liability. A defendant will then be liable for economic damage due to his negligent conduct when he can reasonably foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct. This approach eliminates or diminishes the prospect that there will come into existence liability to an indeterminate class of persons; it ensures that liability is confined to those individuals whose financial loss falls within the area of foreseeability; and it accords with the decision in *Rivtow* [1973] 40 DLR [3d] 530..." [Emphasis ours].

41. Jacobs J. and Murphy J were of a similar view, and held that it is an error to concentrate attention on the question whether a particular loss is pecuniary or economic and did not accept the principle that economic loss not connected with physical damage to the plaintiff's property is not recoverable. Jacobs J held that it is was necessary to examine the circumstances of the loss, and if a duty of care was found to exist and the injurious physical effect was of a foreseeable kind, then damages were recoverable. It is therefore apparent that a more stringent test than mere foreseeability applies for one to recover pure economic loss arising out of a negligent statement, and there is an additional requirement that there be some proximity between the negligent statement and the loss caused, and this proximity will be present where the tortfeasor had knowledge that the claimant would suffer loss as result of the negligent act or statement.

42. In the present appeal, the letter by the Respondent requesting for the bid bond, which was stamped as received by the Appellant on 14th July 2011, read as follows:

> "12th July, 2011
>
> The Branch Manager, CFC Stanbic Bank Ltd
>
> Box 84414 MombasaDear Sir,
>
> Ref: Bid Bond For Tender No Kpa/207/ 2010 -11/ Ahm For Supply Of 10 No Ribbed Type Pneumatic Rubber Fenders
>
> We are in the process of submitting a tender document for the supply and delivery of Fenders to the Kenya Ports Authority and the required tender security is Kshs 250,000/- which should be in form of a Bank Guarantee.
>
> Please note that the Bond Guarantee must be valid for 120 days from the date of closing the tender which in this case is 26th July 2011.
>
> In view of the above, we would wish to request you to provide us with the relevant tender security amounting to 250,000/- .
>
> Thank you. Yours faithfully

For: Kenya Haulage Agency Ltd Patrick Munyao

Managing Director:”

43. The appellant was therefore made aware that the respondent was submitting a tender; the purpose of the bank guarantee was to be the tender security; and the said guarantee was to be valid for 120 days from the closing of the tender, which was on 26th July 2011. It is also notable that the letter of 28th September 2011 from the Kenya Ports Authority referred to the respondent’s bid not being successful for the reason that “the tender security validity was for 119 days and not 120 days as required by the tender documents”. The *Public Procurement and Asset Disposal Act* provides in section 79 that a tender bid is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents, and it is upon being found to be responsive that it proceeds to evaluation. In light of the purpose of a tender security, which serves as a guarantee that a bidder will honor their submitted bid and sign the contract if awarded, it cannot be argued that the non- conformity by the Appellant was a minor deviation or an error or oversight that could be corrected.

44. We therefore find that the loss of the actual tender was not only foreseeable but also a proximate loss in the circumstances, given the Appellant’s actual knowledge as regards the purpose of the bank guarantee, and the legal effect of that non conformity, and it cannot therefore be argued that the loss of profits arising from the loss of the tender is too remote. We are of the view that the loss of profits the Respondent would have made from the subject tender was recoverable, since the Appellant was responsible for denying it the opportunity to proceed with the tender as a result of its negligent statement. The Respondent did in this respect produce evidence to prove the profits it had expected to make from the tender.

45. In the end we reach the same decision as did the High Court, but for different reasons and on a different basis, as explained in this Judgment. This appeal is accordingly dismissed in its entirety with costs to the Respondent.

46. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF JUNE, 2025

A.K. MURGOR

....

JUDGE OF APPEAL

P. NYAMWEYA

....

JUDGE OF APPEAL

G.V ODUNGA

....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR