



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 202 OF 2012

BETWEEN

KENYA RAILWAYS CORPORATION..... APPELLANT

AND

DEVELOPMENT BANK OF KENYA LIMITED.... RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (**Mutava, J.**) given on 15th March, 2012 In H.C.C.C. No. 209 of 2010)*

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (**Mutava, J.**) allowing with costs the respondent's application for striking out the appellant's suit under **Order 2 Rules 15(b) (c) and (d) of Civil Procedures Rules, 2010** and **sections 1A, 1B and 3A of Civil Procedure Act**.

[2] The appellant by an amended plaint dated 16th April 2010 prayed for judgment against the respondent bank (**bank**) herein for:

a. Shs.50,000,000 due under bank guarantee No. GDBK/2009/066 dated 8th July 2009 issued by the respondent as tender security on behalf of Erdermann Property Limited.

b. Shs. 215,000,000 due under bank guarantee No. GDBK/2009/067 dated 8th July 2009 issued by the respondent as tender deposit on behalf of Erdermann Property Limited.

The appellant in addition claimed for interest and costs.

[3] The facts on the basis of which the claim was made and pleaded in the plaint are stated in paragraphs 3.1-3.8 hereunder thus:

[3.1] In the months of June and October, 2009, the appellant on its behalf and on behalf of its employees' retirement benefit scheme, the Kenya Railways Retirement Benefits Scheme, invited bidders to lease three properties – LR No. 209/11379 registered in the appellant's corporate name and LR No.s 209/11953 and LR. No. 8760 registered in the name of the retirement benefits scheme.

[3.2] The decision to invite one bid for the three properties, details of property ownerships, the encumbrances thereto and entire transaction plan were all disclosed in the bid documents classified as TENDER NO. KRC/PLM/59/08.

[3.3] It was a fundamental term as contained in the tender documents that:

a. All bidders shall deposit a tender security comprising 2% of their bid on total premium and annual rent excluding the standard premium and annual rent of the contingency bid.

b. The tender security shall be required to protect the appellant from risk of bidders failing to honour their obligations within the stipulated time which would warrant security's forfeiture.

c. The tender security may be forfeited if a tenderer withdraws its tender during the tender validity or in the case of successful bidder if the bidder fails to sign the contract.

[3.4] It was also a fundamental term that to protect the appellant against a successful bidder if the bidder fails to complete the transaction within the tender validity period of 120 days, the bidder shall deposit the equivalent of 10% of the standard premium and annual rent excluding the standard premium and annual rent of the contingency bid for LR. No. 209/11379.

[3.5] It was a fundamental term that both the security and the deposit should be in the form of either a banker's cheque or a bank guarantee.

[3.6] A company known Erdemann Property Ltd. (Erdemann) participated in the tender and submitted a bank guarantee dated 8th July 2009 for Shs. 50,000,000/- issued by the bank as tender security and a bank guarantee dated 8th July 2009 for Shs. 250,000,000/- issued by the bank as tender deposit. It was a further fundamental term that the bank shall unconditionally guarantee as a primary obligation and not merely as a surety the sums due under each guarantee document and shall pay the sums due to the appellant on first demand without raising any objection whatsoever.

[3.7] Despite having been declared the winner, Erdemann did not execute the contract and has not paid the required tender deposit. By a letter dated 26th October, 2006 Erdemann declined to sign the contract in the prescribed form and forwarded for execution a contract document that was not part of tender documents and such refusal is a singular and express breach of the terms of the tender documents which breach entails the appellant to forfeit the tender security and the tender deposit.

[3.8] By a letter dated 30th October 2009, the appellant notified the bank of Erdemann's refusal to execute the contract and demanded for the transfer of funds held under the two guarantees to the appellant's bank account but the bank refused or neglected to transfer the funds thereby breaching the terms of the guarantee.

[4] The bank in its statement of defence admitted that it issued the two guarantees and that it was notified of refusal by **Erdemann** to execute the contract and that a demand for payment of the same under the guarantee was made. The bank however, raised various defences to the suit. It averred, *inter alia*, that the appellant's undertaking with Erdemann to lease the three properties was contrary to statute and against public policy; that the entire undertaking was a bid fixing exercise, an act of corruption, illegal, null and void by violation of Public Procurement and Disposal Act, Public Officers Ethics Act, and Anti-Corruption and Economic Crimes Act, and a breach of the court order of maintenance of status quo made in **ELC No. 605/2008**.

The bank also raised other substantial defences. It averred that Erdemann having successfully bid, the bid guarantee was rendered otiose; that the tender security guarantee was unenforceable as the contract was not executed and that it is the appellant who refused to execute the contract in terms of the Public Procurement and Disposal Act.

The appellant filed a reply to defence. It denied the allegations of illegality and corruption and maintained that Erdemann flatly refused to execute the contract requiring the forfeiture of supporting guarantee.

[5] By a notice of motion dated 15th June 2010, the appellant sought summary judgment against the bank. On the other hand the bank filed a notice of motion dated 10th January, 2012 for an order that the suit be struck out. It is also apparent from the ruling of the High Court appealed from that, Erdemann also filed an application dated 28th November, 2011 seeking to be joined in the suit. The Ruling of the High Court appealed from shows that all parties agreed that the bank's application to strike out the suit be heard in priority to the other two.

[6] The bank's application for striking out the plaint was supported by the affidavit of **Celestine Otieno** to which she annexed various documents relating to the tender. The application was based on several grounds. It was averred that the suit was frivolous and/or vexatious and would embarrass and prejudice the bank's right to a fair trial; the suit was premature as there was an arbitration clause; that the contract violated the stamp Duty Act; there was no valid Board resolution to institute the suit and that the provisions of the Retirement Benefits Act, the Public Officers Ethics Act and the Anti-Corruption and Economic Crimes Act were flouted. It was also averred that the guarantees were not enforceable for the reasons that Erdemann made a successful bid, the contract was not executed; the parties have proceeded to negotiate the terms of the contract after the bid was successfully made and that it was the appellant who failed to conclude the contract.

[7] The appellant filed a lengthy replying affidavit sworn by **Stanley Gitari** to which many documents related to the transaction were annexed.

[8] The learned Judge at the outset identified the criteria for the determination of the application and stated that the determination of the application revolved entirely on the question of the enforcement of the two guarantees particularly, at which point such guarantees were enforceable. The learned Judge then considered the law as to whether a guarantee can be enforced without any recourse to underlying contract and made a finding thus:

“The enforcement for a bid and performance guarantees must necessarily be embedded upon and triggered by events taking place in the underlying contract.”

The learned Judge next considered when and at what point the two guarantees were enforceable.

Starting with the bid bond, the learned Judge considered clause 2.1.21 of the tender documents which stipulated the conditions upon which the security may be forfeited particularly clause (b) which provides:

“In case of a successful tender, if the tenderer fails to sign the contract in accordance with paragraph 2.21.”

The learned Judge observed that on perusal of the tender documents, clause 2.21 did not exist. Nonetheless, the learned Judge considered the contractual nature of the bid bond and who between the appellant and Erdemann breached the contract and made a finding thus”

“In my analysis the failure to contact was wholly attributable to plaintiff for two main reasons....”

The learned Judge considered the two reasons and ultimately came to the conclusion that the bid bond was not enforceable as Erdemann did not breach the condition and as the appellant failed to sign the contract. The learned Judge also discussed the enforceability of the performance guarantee and came to the conclusion that the enforcement of the performance security was premature.

The learned Judge discussed the other matters such as the sale of one of the properties the subject of the tender to a third party and concluded that that sale effectively released each party from legal obligations in respect of all accrued rights and legal obligation.

To cut the long story short, the learned judge came to the final conclusion thus:

“I am emboldened in reaching the verdict that the substratum of the suit herein has been fully canvassed within the context of the present application and there are no triable issues meriting subjection of the matter to a full trial.”

With that finding, the bank’s application was allowed with costs.

[9] The appellant relies on 20 grounds of appeal which deal with broad subjects. The learned Judge is accused of making multiple errors both of law and facts, misapprehending the principles applicable to striking out pleadings, converting the hearing of the application into a full trial, relying on evidence which was not adduced by parties in court, making conclusive finding of law and fact, and acting in excess of jurisdiction and bias. **Mr. Mwaniki Gachoka** learned counsel for the appellant made written and oral submissions. Similarly, **Mr. Gichuki King’ara**, the respondent’s counsel made written and oral submissions.

[10] We have considered the grounds of appeal and the respective submissions. The application to strike out the plaint was mainly made under Order 2 rule 15(1) of the Civil Procedure Rules, 2010 which provides:

“At any stage of proceedings the court may order to be struck out or amended any pleading on the grounds that –

a. It discloses no reasonable cause of action or defence in law;

or

b. It is scandalous, frivolous or vexatious; or

c. It may prejudice, embarrass or delay the fair trial of the action; or

d. It is otherwise an abuse of the process of the Court.”

[11] The application was based on grounds (b), (c) and (d) of Rule 15(1) and not on allegation that the suit did not disclose a reasonable cause of action.

The appellant’s counsel relied on the principles governing the granting of the remedy of striking out a pleading enunciated in **DT Dobie & Company (Kenya) Limited v. Joseph Mbaria Muchina & Anor [1980] eKLR (Muchina case)**.

The discretion is exercised in plain and obvious cases and very sparingly. A plaintiff should not be driven from the judgment seat unless the case is unarguable. The summary jurisdiction is not intended to be exercised by a minute and protracted examination of documents and facts of the case and the discretion should not be exercised in a manner that amounts to usurpation of the function of the trial court by embarking upon a trial without discovery and oral evidence tested by cross-examination.

[12] In reaching the decision, the learned Judge stated that he had warned himself of the parameters set out in the Muchina’s case. The learned judge also stated that the only issue that the defence joins issue with the plaint remained entirely the question of the interpretation of if and when the bid security and the performance bond were enforceable.

The learned counsel for the respondent has submitted that the decision of the learned judge was hinged on two issues, namely, the interpretation of the law and the application of law.

[13] The question still remains whether the learned judge in fact adhered to the correct principles. The appellants submitted that the learned judge erred by making many definitive findings of fact many of

which were arrived at by minute examination of documents and without any basis whatsoever.

The appellant referred to what it called a few instances but those few instances are in fact 14 instances. At paragraph 8 above, we have endeavored to show albeit briefly the process of the reasoning that led the learned judge to reach the final decision.

[14] The learned judge considered the law and cited authorities relating to the nature of and enforceability of bid bonds and performance bonds and made conclusive findings of law. The learned judge also considered several clauses of the tender documents. He particularly considered the issue of the enforcement of the bid bond in great detail at paragraphs 20 and 26 of the judgment. In that context, he considered the issue whether Erdemann had failed to sign the contract in terms of paragraph 2.21. He found that paragraph 2.21 did not exist in the tender documents. The appellant's counsel stated in the written submissions that if a trial was held, the appellant would have shown that paragraph 2.21 which refers to signing of a contract is in fact paragraph 1.23 of the Tender documents. The learned judge after a detailed examination of the evidence including post tender negotiations which is not contained in the respective affidavits made a definitive finding of fact that the failure to consummate the contract was wholly attributable to the appellant and gave two reasons which he considered in detail.

[15] The issue of the enforcement of the performance bond was treated in a similar manner. The court considered the alleged sale by the appellant of one of the three properties, the subject of the tender and made a finding of fact about that sale and its legal consequences in relation to the tender contract. The evidence relating to post tender negotiations was gathered from some of the correspondence annexed to the supporting affidavit to the bank's application exchanged between Erdmann's lawyers, the appellant and the retirement benefits scheme. That evidence was not subjected to cross-examination.

The ruling of the learned judge unmistakably demonstrates that the decision was reached after a minute and thorough analysis of the law and documentary evidence. The concluding paragraph of the judgment left no doubt that the learned judge reached a verdict on the substratum of the suit.

[16] In our view, the plaint disclosed an arguable case for the enforcement of both the bid and the performance guarantee and there were serious legal issues to be determined at the trial as the disputed facts required thorough examination at the trial. The application and the grounding affidavit did not satisfy the requirements of order 2 rule 15(a) (b) (c) and (d). The trial judge embarked on a trial and usurped the function of the trial court thereby exceeding his jurisdiction under Order 2 rule 15(1). The final findings on serious matters of law and final findings on disputed facts greatly prejudiced the appellant. We are satisfied that the decision was made in excess of jurisdiction as aforesaid.

Having reached that conclusion, it is not necessary to express an opinion on the correctness or otherwise of the impugned decision on the findings on the issues of law and fact.

For the foregoing reasons, the appeal is allowed with costs to the appellant. The ruling of the High Court delivered on 15th March, 2012 striking out the suit is set aside in its entirety. The respondent's notice of motion dated 10th January, 2012 is dismissed with costs to the appellant.

Dated and delivered at Nairobi this 9th day of June, 2017.

E. M. GITHINJI

.....

JUDGE OF APPEAL

H. M. OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR