



Monarch Insurance Company Limited v Kingdom Bank Limited (Arbitration Appeal E071 of 2023) [2025] KEHC 1053 (KLR) (Commercial and Tax) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1053 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ARBITRATION APPEAL E071 OF 2023
PM MULWA, J
FEBRUARY 27, 2025**

BETWEEN

THE MONARCH INSURANCE COMPANY LIMITED APPELLANT

AND

KINGDOM BANK LIMITED RESPONDENT

JUDGMENT

Introduction

1. This is an appeal against the Arbitral Award published on 9th August 2023 by John M. Ohaga, SC (the Arbitrator). The facts leading to the dispute that gave rise to the arbitration proceedings and the Award are common ground and are that; sometime in 2013, a company, Dancos Engineering and Contractors Limited (the Contractor), who was at the time a customer of the Respondent Bank, secured a tender and subsequent contract for Construction Works for Mwala Cluster Water Supply Project floated by Athi River Water Services Board (the Employer).
2. The contract between the Contractor and the Employer provided among other terms that the Contractor obtains an Advance Payment Guarantee of Kshs. 111,666,555.72 in favour of the Employer, which Guarantee was to secure performance of the Contractor's obligations specific to refunding an advance payment granted to it by the Employer.
3. The Contractor sought the Guarantee from the Bank which was granted on 6th November 2019 upon the Contractor fulfilling various conditions including obtaining a credit risk insurance from the Appellant (Monarch) in favour of the Bank. In February 2020, the Contractor sought a Performance Bond of Kshs. 58,333,277.00 from the Bank which was to be granted subject to the Contractor obtaining a credit insurance from Monarch for the sum of Kshs. 46,666,621.60 in favour of the Bank.



4. The Contractor then sought an extension of the Guarantee for a further 12 months through a letter dated 5th October 2020 which was granted on condition that the Contractor would provide a suitable performance bond for Kshs. 93,333,277.00 from Monarch under policy number HDO/1312/000025/2020 dated 19th October 2020 (the Policy).
5. The Contractor defaulted in complying with the terms of the advance payments and the Guarantee was recalled by the Employer on 30th July 2021 and in turn, the Bank sought the indemnity in the sum of Kshs. 93,333,245.00 from Monarch under the performance bond. Monarch was unresponsive prompting the Bank to declare a dispute and refer the matter for arbitration.
6. After hearing the parties, the Arbitrator sought to determine inter alia the following issues:
 1. Whether the financial risk covered under the policy arose on 22nd October 2020 when the Bank issued the Guarantee in favour of the Employer
 2. Whether the Letter of Offer dated 15th October 2020 from the Bank to the Contractor gave rise to any financial obligation to the Bank
 3. Whether the Bank had any insurable interest under the Policy at the time it was issued
 4. Whether the Bank was aware of any material facts affecting the Policy before the loss under the Policy occurred and if so, whether the Bank notified or informed Monarch of such facts before the loss occurred.
 5. Whether Monarch was notified by the Bank when the Guarantee was recalled by the Employer
 6. Whether the Bank was entitled to any of the orders sought in the Statement of Claim.
7. On the first issue, the Arbitrator found that the financial risk covered under the Policy arose on 19th October 2020 when the Contractor indeed obtained the insurance cover noting the interest of the Bank as the beneficiary. That this was because the obligations of the Bank in the Contract, in accordance with the letter of offer dated 15th October 2020 was to arise immediately the Contractor fulfilled the conditions set therein. Thus, the date when the actual Guarantee was issued to the Contractor would not matter.
8. On the second issue, the Arbitrator found in the negative and stated that at the time the offer letter was accepted and signed, the Bank had no financial obligation to the Employer, as the issuance of the Guarantee in favour of the Employer was dependent upon the Contractor obtaining a policy in favour of the Bank.
9. On the third issue, the Arbitrator held in the affirmative that the Bank had an insurable interest under the Policy at the time it was issued and that the insurable interest arose immediately Monarch issued the Policy to the Contractor.
10. On the fourth issue, the Arbitrator stated that since the Policy was issued by Monarch to the Contractor, the primary obligation to disclose material facts rested with the Contractor and not the Bank and that in any event, breach of utmost good faith must specifically be pleaded and the same should be proved. The Arbitrator noted that no material had been placed to show that the Bank had in any way breached this duty and therefore the tribunal was unable to find them at fault and accordingly found and held that the Bank was not aware of any material facts affecting the Policy before the loss under the Policy occurred and had, in any event, no obligation to notify or inform Monarch of such facts before the loss occurred.



11. On the fifth issue, the Arbitrator found in the affirmative and stated Monarch was indeed notified by the Bank when the Guarantee was recalled by the Employer. On the last issue, the Arbitrator held that the Bank was entitled to indemnity under the Policy on 5th August 2021 or soon thereafter, that being the date when it made payment to the Employer. The Arbitrator also held that the Bank was entitled to interest from the date when the loss arose until payment in full.
12. Monarch is dissatisfied with the aforementioned findings and as stated, it has now lodged the present appeal which was disposed by way of written submissions which I have made reference to in my analysis and determination.

Analysis and determination

13. I am in agreement with the Monarch's submission that as per Procedural Order No. 1 of the arbitration proceedings, the parties agreed to reserve the right of appeal under Section 39 of the Arbitration Act and Monarch further submits that its appeal is anchored under Section 39(2) therein which provides as follows:
 - (2) On an application or appeal being made to it under subsection (1) the High Court shall—
 - (a) determine the question of law arising;
 - (b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.
14. An appeal limited to matters of law does not permit the appellate court to substitute the tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts (see *John Munuve Mati v Returning Officer Mwingi North Constituency, IEBC & Paul Musyimi Nzengu* [2018] KEHC 8738 (KLR)).
15. In *Mercy Kirito Mutege v Beatrice Nkatha Nyaga, IEBC & Samuel Mucheru* [2014] KECA 697 (KLR) the Court of Appeal also stated that when a court that is limited to dealing with matters of law has a concern regarding the issues that dealt on facts, then the court will also be limited to re-evaluation of the lower court's conclusions; and if the conclusions are erroneous; that is, not supported by evidence and the law; the matter becomes a point of law.
16. As outlined in the introductory part, Monarch is dissatisfied with the Arbitrator's findings.
17. In finding that the financial risk covered under the Policy arose on 19th October 2020 when the Contractor obtained the insurance cover, the Arbitrator stated that the conditions listed in the Letter of Offer dated 15th October 2020 were to be fulfilled before the Guarantee was issued and that one of those conditions was taking out an insurance cover acceptable to the Bank. That from the Policy document, Monarch understood that it would cover any loss that may arise after the Bank issued the Guarantee to the Contractor where the Contractor would have acted contrary to the requirements of the Contract between the Employer and the Contractor.
18. It follows that, Monarch issued the Policy in full understanding that the Guarantee would be issued thereafter based on the Trade Financing Agreement between the Contractor and the Bank. The Arbitrator found that the Letter of Offer dated 15th October 2020, whose acceptance was through endorsement of the signature by the Contractor, was accepted and formed a binding obligation. This is to mean, the financial obligation of the Bank was to arise, immediately after the conditions stipulated in the Contract have been met by the Contractor.



19. I find no perverse finding from the above reasoning of the Arbitrator because Monarch was always aware that the Guarantee could only be issued after the Contractor obtained the Policy and that once the Policy was secured, Monarch ought to have been reasonably aware that the risk arose once the Policy was issued, which was on 19th October 2020 and not on 22nd October 2020 when the actual Guarantee was issued to the Contractor. The Bank had before this date agreed to issue the Guarantee in favour of the Employer and a legal and insurable risk and interest arose that was capable of enforcement had the Bank not issued the Guarantee whereas the Contractor had fulfilled the conditions set out in the Letter of Offer.
20. I also find nothing that warrants the court's interference in the finding that at the time the offer letter was accepted and signed, the Bank had no financial obligation to the Employer, as the issuance of Guarantee in favour of the Employer was dependent upon the Contractor obtaining a policy in favour of the Bank. The obligation of the Bank was dependant on the Contractor obtaining the Policy. The Bank could not have been obligated to the Employer if the Contractor had not fulfilled the conditions of obtaining the Guarantee which included obtaining the Policy.
21. It was also not legally flawed for the Arbitrator to state that the insurable interest arose immediately Monarch issued the Policy to the Contractor and that the Bank had a legal and insurable interest under the Guarantee capable of being insured at least going by the Letter of Offer and the Policy itself.
22. On the issue of disclosure, the Arbitrator cannot be faulted for stating that this primary responsibility of disclosing all material obligations and facts lay with the Contractor who was the obligor that took out the Policy rather than the Bank who was the beneficiary. This is provided for by Article 8 and 11 of the Policy Document and the Arbitrator was correct to rely on this provision in finding that it was the obligor and not the beneficiary that had an obligation of notifying Monarch of any event or circumstance that might lead to or materially increase the likelihood of a loss (see *Co-Operative Insurance Company Ltd v David Wachira Wambugu* [2010] KECA 481 (KLR)).
23. In any event, I have gone through the record and I do not find anything done or omitted by the Bank that can be deemed to be of material non-disclosure that ultimately affected the Policy. If anything, the record indicates that Monarch was informed about the recall of the Guarantee by the Employer and the obligation required of the Bank to honour the Guarantee by making the pay-out to the Employer. It was also informed prior to issuing the Policy of the Guarantee and the Letter of Offer and if at all Monarch was dissatisfied with this information prior to or after issuing the Policy, nothing could have been easier than for them to request for further information or seek further clarification.
24. Having come to the aforementioned conclusions, it was only logical that the Arbitrator awards the Bank the insured sum of Kshs. 93,333,245.00 which was what the Bank was entitled to in the first place under the Policy, being 80% of the guaranteed sum. There was also no fault in awarding interest on this amount as an Arbitral Tribunal has the discretion to award interest within the confines of Section 32C of the *Arbitration Act* which was simple rather than compounded and therefore, there is no reason for the court to interfere.

Disposition

25. In the foregoing, it is my finding that the appeal herein has no merit and the same is dismissed with costs.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2025.

PETER M. MULWA



JUDGE

In the presence of:

Mr. Owiti for Appellant

Mr. Gichangi for Respondent

Court Assistant: Carlos

