THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MADRAMA AND MULYAGONJA, JJA)

CIVIL APPEAL NO 110 OF 2015

DOLAMITE ENGINEERINGS SERVICES LTD} ..... APPELLANT

VERSUS

EQUITY BANK (U) LTD} .....RESPONDENT

(Appeal from the judgment and orders of Hon. Mr. Justice Henry Peter Adonyo in High Court (Commercial Division) Civil Suit No. 51 of 2013 dated 16th February 2015)

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

The Appellant's (who was the plaintiff) suit against the respondent (who was the defendant and thereafter referred to as the appellant and respondent respectively) was dismissed with costs by the High Court. The appellant's action against the respondent was for recovery of Uganda shillings 6,200,000,000/= for loss of profits, general and exemplary damages for breach of contract and for costs of the suit. The appellant's case was that the Ministry of Local Government advertised invitation for bids for the construction of seven markets including Lira Central Market. The appellant purchased the bid documents from the PPDA unit of the Ministry of Local Government at a cost of US$200 on 9th May 2011. The appellant carried out a technical evaluation for the construction works at a cost of Uganda shillings 74,550,000/=. There was a bid security requirement at Uganda shillings 500,000,000/= for the bid to construct the market and subsequently the appellant applied for the bid bond guarantee security from the respondent bank. Subsequently, the appellant submitted its bids to the Local Government Public Procurement and Disposal Unit indicating that its cost for construction would be Uganda shillings 24,865,628,780/= and it paid Uganda shillings 5,000,000/= for the bid bond guarantee to the respondent

bank. The respondent wrote to the Permanent Secretary Ministry of Local Government informing him about the appellant's facility at the respondent bank and confirmed that the respondent would extend to the appellant credit to the tune of Uganda shillings 3,000,000,000/= to enable the appellant execute the works. In the course of correspondence, the respondent confirmed to the Ministry of Local Government that the bid bond security the appellant had secured was authentic. On 27th September, 2011, the Ministry of Local Government wrote a letter to the respondent seeking to confirm whether certain two bid bond security documents it had allegedly issued were genuine. On 28th September 2011, the respondent replied to the letter of the Ministry of Local Government and stated therein that it never issued the security in question.

The appellant's action was that the act of disowning the bid security issued to the appellant was intentional and callous and in breach of contract and caused loss of profit amounting to Uganda shillings 6,200,000,000/= inclusive of Uganda shillings 80,100,000/= being the costs of the bid including its technical evaluation as well as loss of business reputation.

The respondent denied the claim and allegations in plaint and averred inter alia that the bid bond documents in question had been forged. The High Court dismissed the appellant's suit and the appellant being aggrieved by the decision, appealed to this court on 10 grounds of appeal as follows:

1. The learned trial judge erred in law and in fact when he misconstrued the role and absence of Stella Mutumba, a key defence witness against the appellant and thereby arrived at a wrong conclusion.

2. The learned trial judge erred in law and in fact when she shifted the burden of proving fraud and forgery of the respondent's bank documents on the appellant and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.

3. The learned trial judge erred in law and in fact when he ignored the requisite standard of proof for fraud and went ahead to hold the

appellant liable for fraud and forgery without any evidence to support that conclusion, thereby occasioning a miscarriage of justice.

4. The learned trial judge erred in law and in fact when he solely relied on the uncorroborated evidence of DW1 as well as the inconclusive evidence of DW 2 to hold the appellant liable for fraud and forgery without properly considering the evidence of the appellant.

5. The learned trial judge erred in law and in fact when he misconstrued the evidence of DW 3 and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.

6. The learned trial judge erred in law and in fact when he failed to properly evaluate the evidence on record and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.

7. The learned trial judge erred in law and in fact when he failed to relate the banks negligence and breach of trust in the suit transaction to the resultant loss of contracts suffered by the appellant due to the rejection of its bid.

8. The learned trial judge erred in law and in fact when he relied on the uncorroborated evidence of DW3 to confirm the rejection of the appellants bid purportedly at stage 2 of the procurement evaluation process on technical grounds only without the requisite evaluation report and ignoring the fact that the same stage required commercial responsiveness of the bidder and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.

9. The learned trial judge erred in law and in fact when he relied on the opinion of DW4 to hold that the administrative review was not applicable to the procurement process instead of the provisions of the Public Procurement and Disposal of Assets Act, 2003 Vis-à-vis the African Development Bank Procurement Rules.

10. The trial judge erred in law and in fact when he held that the appellant was not entitled to the remedies sought in light of the evidence before him whereas not and thereby occasioned a miscarriage of justice.

The appellant prays that the appeal is allowed with costs and the decision of the High Court set aside.

The appellant was represented by learned counsel Mr Mukwaya Kizito Deo and the respondent was represented by learned counsel Mr Kizza Businge Fred. The respondent's counsel was new, having been instructed to take over the conduct of the appeal on 15th July 2022 in time for the hearing of the appeal. Notice of instructions dated 15th July 2022 from Messieurs Katende Sempebwa & Co advocates were filed on court record. With leave of court, the respondent's counsel was allowed to file his written submissions in addition to written submissions on record filed by previous counsel and filed the supplementary submissions on court record on 29th July 2022. Similarly, the appellant's counsel had filed written submissions but supplemented them with further written submissions which were filed on court record on the 10th July 2022. The matter was adjourned for judgment on notice.

Written submissions of the Parties.

The appellants filed written submissions on 20th July 2016. However, before the hearing of the appeal on 19th July 2022, the appellant filed further supplementary submissions on 18th July 2022. These supplementary submissions are not categorised into the grounds of appeal and particularly address certain pertinent issues namely:

1. The validity of the bank guarantee presented by the appellant to the Ministry of Local Government as being issued by the respondent.

2. The consequential loss, if any, suffered by the appellant as a result of the respondent's statements to the Ministry of Local Government as well as the respondent's liability for the same.

On the other hand, the specific grounds of appeal were addressed in the written submissions filed on court record on 20th July 2016. The amplification of the submissions by supplementary submissions seem to cover the gist of the issues in the appeal that the appellant wishes this court to consider. Nonetheless, in compliance with the rules of this court, I will consider the grounds of appeal as set out in the submissions of the appellant in the written submissions dated 20th July 2016 and consider the subsequent submissions as an amplification of the grounds of appeal.

The appellants counsel argued grounds 1, 2, 3, 4 and 5 of the appeal jointly and also submitted on grounds 6, 7, 8 and 9 together.

In relation to ground 1, 2, 3, 4 and 5 of the appeal, the appellant's counsel submitted that the decision of the learned trial judge in respect of the respondent's contention was that the appellant procured the bid bond guarantee in issue through fraud and the same was a forgery. After referring to the Judgment of the learned trial judge, the respondent submitted that the learned trial judge did not consider the burden and standard of proof for allegations of fraud in as far as he put the burden on the appellant and the standard used was unknown. The appellant's counsel submitted that it is trite law that fraud must be specifically pleaded and strictly proved. It cannot be inferred from the facts. The law requires a higher standard of proof of fraud than that in ordinary cases (see **Kampala Bottlers Ltd Vs Damanico (U); Civil Appeal No 22 of 1992; Fredrick Zaabwe Vs Orient Bank (U) Ltd and others SCCA No 6 of 2006**. He submitted that in the context of the bank customer relationship, the trial judge ought to have examined whether the fraud alleged was premised on contractual liability which does not require the fault principle of common law fraud which is premised upon the fault principle. Contractual liability is based on the allocation of contractual risk or liability and does not involve the fault principle which requires imputing liability for fraud, on the party at fault (See **Kornak Investments (U) Ltd vs Stanbic Bank Uganda Ltd HCCS No 116 of 2010**).

The appellant's counsel submitted that in the specific case of the appellant, in the absence of a specific contract as to the bid bond guarantee, the fraud that was examined was the common law fraud which required proof that the appellant was the party at fault. He submitted that the evidence of DW1 and DW 2 could not be relied upon to discharge the burden of proof required to impute fraud on the appellant. The testimony of DW1 was to the effect that the respondent bank had conducted an internal investigation wherein its former employee Stella Mutumba confessed that she had fraudulently connived with officials of the appellant to obtain a forged bid bond guarantee for the appellant. The testimony of DW2 was to the effect that she could not be the legal officer who signed the bid bond guarantee because at the material time she had already resigned from the bank and had left the country.

Appellant's counsel further submitted that they did not go ahead to produce a report of the findings of the internal investigation conducted into the alleged fraud which had purportedly led to the dismissal of Stella Mutumba from the respondent bank. DW1 did not disclose how the investigation was conducted but it can be inferred from the testimony that the so-called investigation was solely based on an alleged confession by the said Stella Mutumba that she had forged and fraudulently obtained a bid guarantee on behalf of the appellant.

The appellant's counsel contends that the respondent was under obligation to bring the said Stella Mutumba as a witness and not the appellant as the appellant. This is because the evidence of DW1 relied on confessions of Stella Mutumba and therefore it was inadmissible because it amounted to hearsay unless the respondent brought the actual witness to testify against the appellant. PW2 could not deny her signature based on the mere fact that she had at the time resigned from the bank. The appellant's counsel contended that the resignation letter of DW2 was not conclusive or absolute. The letter indicated that whereas DW2 had resigned, she was still available for any assistance. The appellant's counsel maintains that the appellant was not under any obligation to prove that DW 2 had actually not

signed the said bid bond guarantee. It was the duty of DW2 to adduce evidence of a handwriting expert to determine that the signature of the bid bond guarantee was not hers.

The appellant's counsel invited the court to consider the testimony of DW 3 to the effect that obtaining a bid bond guarantee was a complex process that could not be accomplished by one person because it involves several semiautonomous departments within the bank. Stella Mutumba could not have single-handedly accomplished anything. He submitted that, this was the logical import of the testimony of DW 3. However, the learned trial judge instead construed the same as proof that all documents issued by the respondent to the appellant had been forged whereas not. He contended that if this was true, the appellant's bank account could not have been debited with a charge of Uganda shillings 50,000/= and Uganda shillings 5,000,000/= as demonstrated by the statement of accounts exhibit P8 and exhibit P9. The respondent did not adduce any evidence to challenge any of the documents from the bank to the appellant as a customer other than merely alleging fraud and forgery by way of inference. In the premises, the appellant's counsel submitted that the learned trial judge erred in law and fact and thereby came to erroneous conclusions which occasioned a miscarriage of justice.

Ground 6, 7, 8 and 9.

The appellant's counsel submitted that grounds 6, 7, 8 and 9 of the appeal essentially focus on the respondent's breach of the fiduciary relationship between a bank and customer in as far as the respondent breached its duty of care towards the appellant by making a dishonest disclosure to officials of the Ministry of Local Government thereby leading to its disqualification from the procurement process.

The appellant's counsel after making reference to the judgment of the trial judge submitted that it is evident that the learned trial judge considered the burden of proving that the appellant was not fraudulent in its dealings with the bank without ever considering whether the respondent who had alleged

fraud and forgery against the appellant had proved the same to the required standard or even made out a prima facie case against the appellant to warrant it to give an explanation. Counsel submitted that nevertheless, the requisite explanation was given to justify the fact that the bid bond guarantee was legitimately obtained from the respondent bank and the same was paid for by the appellant. He submitted that the respondent did not prove fraud and forgery against the appellant to the requisite standard and as such the learned trial judge misdirected himself in law and in fact and thereby arrived at a wrong conclusion, occasioning a miscarriage of justice.

Further, the appellant's counsel submitted that the respondent's conduct constituted an abdication of its duty of care towards the appellant as its customer in as far as it deliberately rendered dishonest disclosure against the appellant to a third party. The appellant's counsel contended that this is a wrongful and dishonesty disclosure which led to the disqualification of the appellant from a competitive international bidding procurement process. Further, on the basis of the strength of the respondent's dishonest disclosure, the appellant lost its locus standi to challenge the irregularities of its disqualification using the provisions of the Public Procurement and Disposal of Public Assets Act, 2003.

In the premises, the appellant's counsel submitted that it is trite law that the liability of the respondent's action against the appellant lies in negligence in as far as the respondent had an implied duty to render honest disclosure to a third party arising from the fiduciary relationship between the parties as bank and customer (See **Kornak Investments (U) Ltd versus Stanbic bank (U) Ltd (supra); Makau Nairuba Mabel Versus Crane Bank Ltd H.C.C.S number 380 of 2009**).

Further I have considered the supplementary submissions of the appellant's counsel which were filed on court record on 18th July 2022. At best they amount to an application of the facts and the law in support of the arguments in the main submissions and they will be taken into account in the determination of this appeal.

In the premises, the appellant maintains that the appellant was entitled to the remedies sought in the trial court and prayed that the appeal is allowed with costs.

I have further considered the written submissions of the respondent's counsel in reply, filed on court record on 8th August 2016 as well as the supplementary submissions filed on 29th July 2022 wit leave of court.

In the written submissions filed on 8th August 2016 the respondent's counsel raised several preliminary objections to the appellant's appeal on the following grounds:

1. That the notice of appeal was served out of the statutory period for service of the same and without leave of court or extension of time.

For this submission, the respondents counsel relies on rule 78 of the (Judicature Court of Appeal Rules) Directions which provides that an intended appellant shall, before or within seven days after lodging a notice of appeal, serve copies on all persons directly affected by the appeal.

With reference to a copy of the notice of appeal, the respondent's counsel pointed out that the stamp of the High Court (Commercial Division) and endorsement of the registrar of the court indicate that the notice was lodged in the registry on 26th of February 2015. Thereafter seven days elapsed on 5th March 2015. However, the appellant served the notice of appeal on 10th of March 2015 five days after the statutory period had elapsed according to the acknowledgement of receipt of the notice which is also part of the record. In the premises, the respondent's counsel submitted that the appellant failed to take an essential step within the prescribed time. The appellant took it upon herself to serve the notice of appeal out of time without leave of court and in disregard of the powers of the court to extend time limited by the rules under rule 5 of the Rules of this court. He submitted that failure to serve in time and to apply for extension of time exhibits laxity on the part of the appellant in pursuing its appeal and adhering to the rules of court. In **Kasibante Moses vs Electoral Commission Election Petition Application Number 07 of 2012** the notice of appeal was struck out for failure

to serve in time. Counsel submitted that the appellant abdicated its duty as the appellant. Further that failure to serve the notice of appeal in time has an effect of having the notice of appeal struck out pursuant to rule 82 of the Court of Appeal Rules.

2. The appellant did not extract the decree of the lower court before filing the appeal.

The respondent's counsel submitted that section 66 of the Civil Procedure Act, cap 71 provides that unless otherwise expressly provided in the Act, an appeal shall lie from the decrees or any part of the decrees and from the orders of the High Court to the Court of Appeal. He contended that the import of the section was that if there is no decree or order of the High Court, no appeal lies to the Court of Appeal. He submitted that the record has no decree and none was extracted. The undated certificate of correctness that is the filed certified copy of the record of proceedings reflects the true record of the lower court which has no decree. He prayed that this court upholds the objection and finds that there is no decree of the High Court and therefore there is no appeal in the Court of Appeal. He prayed that the appeal be struck out with costs. The respondents counsel further submitted that the two preliminary objection dispose of the appeal. In the event that the court is inclined to proceed with the appeal, he prayed that ground eight of the appeal be dismissed or expunged from the memorandum of appeal for offending rule 86 (1) of the **Judicature (Court of Appeal Rules) Directions**.

3. Ground 8 of the appeal is argumentative and therefore should be dismissed/expanded from the memorandum of appeal.

The appellant's counsel submitted that under rule 86 (1) of the **Judicature (Court of Appeal Rules) Directions**, the memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against. He submitted that ground 8 of the appeal is not only a narrative but grossly argumentative. Save for the first three lines of that ground, the rest of the contents of the

grounds are arguments and amount to submissions he prayed that ground 8 of the appeal be struck out accordingly (see **Imere Vs Uganda; Criminal Appeal No 0065 of 2012**).

In the relation to grounds 1, 2, 3, 4, 5 and 6, the respondent's counsel submitted that the appellant was disqualified from the bidding process not because of the guarantee, but because of other factors not connected to the respondent. The matter in controversy was that the appellant contended that the bid bond guarantee in controversy was delivered to its directors by one Stella Mutumba who at the time, was an employee of the respondent. On the other hand, the respondent contended that the said Stella Mutumba connived with the appellant to forge the bid bond guarantee document. The respondent's counsel further submitted that exhibit P7 which is the bid bond guarantee in controversy was allegedly signed by DW1 and DW2 on behalf of the respondent. DW1 and DW2 denied signing or issuing exhibit P7. It is on the basis of this testimony that the learned trial judge directed himself on how to approach the matter when he stated that the issue confronting the court was therefore to unpack the evidence adduced on record to determine as to whether the bid bond guarantee was indeed issued by the bank. Further the learned trial judge directed his mind to the standard of proof as decided by the Supreme Court in **Fredrick Zaabwe vs Orient Bank Ltd and others** (supra). The respondent's counsel further submitted that the learned trial judge rightly directed himself on the law and believed the evidence of DW1 and DW2 to the effect that they never signed exhibit P7. Further there is unchallenged evidence that DW2, the alleged co - signatory of the document had resigned from her employment and had returned to her country in Kenya by the time exhibit P7 was purported to have been signed. The fact that she was in Kenya was confirmed by her passport exhibit D 10.

The respondent further submitted that there is no legal requirement for corroboration of the evidence of a witness in fraud and forgery cases. That notwithstanding DW1 and DW2 corroborated each other in respect of the fact. Further there is a statement made by Stella Mutumba confirming that

she connived with the appellant and the statement was admitted in evidence as exhibit D4. This was sufficient and proved on behalf of the respondent, it's the defence that it never issued exhibit P7, the bid bond guarantee.

In the premises, the respondent's counsel submitted that the respondent established a prima facie defence that she never issued exhibit P7 and the burden shifted to the appellant to prove otherwise. The appellant never adduced any evidence to contradict the respondents defence.

The respondent's counsel contended that it is the appellant who ought to have called Stella Mutumba, the person who delivered exhibit P7 to the appellant to prove that the respondent actually issued exhibit P7. By not doing so, the learned trial judge rightly held that the appellant watered down its case for it had a duty to rebut the respondent's testimony in that respect.

The respondent submitted that failure by a party to call as a witness any person whom he might reasonably be expected to call, if that person's evidence is favourable to him or her, may prompt the court to infer that the person's evidence would not have helped the party's case (see **Kimotho vs Kenya Commercial Bank [2003] 1 EA 108**).

With regard to the evidence of DW 3, the respondents counsel submitted that the trial judge never misconstrued the evidence and contended that it is incomprehensible that the transaction to guarantee Uganda shillings 500,000,000/= and further to undertake to advanced Uganda shillings 3,000,000,000/= could be initiated and completed in two hours without security. Further the respondent's counsel submitted that while the respondent was entitled to a commission of Uganda shillings 5,000,000/=, exhibit P8 indicates that the appellant's bank account never had those funds at the time exhibit P7 was issued. There is no evidence of any arrangement to pay the said sum later. In light of the evidence of DW1, the commission was paid later in time to try to legitimise the otherwise unauthorised transaction. In the premises, the respondent's counsel submitted that the

learned trial judge properly evaluated the evidence and came to the right conclusions on matters of fact and law.

Grounds 7, 8 and 9.

Respondent's counsel submitted that the grounds argued by the appellant were to the effect that the respondent was negligent or breached the trust implied in banker/customer relationship. However, the respondent's counsel submitted that this is a departure from the pleadings. Negligence or breach of trust on the part of the bank was not specifically pleaded and proved in the trial and was not canvassed at the scheduling conference and therefore no evidence was led in that regard. None of the issues framed at the trial reflected the banks negligence or breach of trust.

In the premises, the submissions of the appellant's counsel were a departure from the pleadings and the appellant was thereby trying to introduce a new cause of action that was never tried in the lower court. The respondents counsel submitted that negligence was not pleaded and particulars thereof were not specified as required by law. The submission and the grounds were an ambush that cannot be canvassed at the appellate level (see Uganda Breweries Ltd versus Uganda Railways; Civil Appeal Number 6 of 2001) he prayed that grounds 7, 8 and 9 be dismissed.

With regard to ground 10, the respondents counsel submitted that the ground was abandoned by the appellant and prayed that it is dismissed. In the premises, he prayed that there are no grounds for interfering with the findings of fact and law of the trial court and that the Judgment of the High Court be upheld and the appeal dismissed with costs to the respondent.

In the supplementary submissions, the respondent's counsel gave a detailed and chronological account of the evidence for purposes of this appeal. From the reappraisal of evidence, the respondent's counsel highlighted the following facts.

The bidding process was open to all bidders and was concluded in accordance with the open international competitive bidding procedures

contained in the African Development Bank (ADB), Rules of Procedure for Procurement of Goods and Works. Secondly, the appellant applied for a job it had no capacity, experience and track record to undertake as it lacked the technical capacity and ability to successively build Lira market. Thirdly, the appellant obtained the unsecured Bid Bond Guarantee exhibit P7 which was contrary to the respondent's policy and above its limit unlawfully through fraud and forgery. Fourthly the appellant could not have applied for the Bid Bond Guarantee on the same day that the respondent evaluated, and issued the letter of comfort, issued and offered to the appellant and finally issued the Bid Bond Guarantee on the same day in a matter of hours before 10 AM. Fifthly, the respondent presented four witnesses who presented evidence to show that it did not issue the forged bid bond guarantees and the appellant did not call any evidence to controvert the same. Sixthly, the appellant procured the guarantee number EBL/1002/BBG/100/163/SM by way of fraud or forgery. On the seventh ground, there was no evidence adduced to show that by 4th May 2011, the appellant made an application for security (Bid Bond Guarantee) of Uganda shillings 500,000,000/= and which was ever received by the respondent's. On the eighth ground, the African Development Bank (ADB) was satisfied with the bidding process and it had no objection to the process. On the ninth ground, by the time the appellant wrongfully applied for administrative review, the bidding process had been concluded. On the tenth ground, to date, the appellant has never applied for administrative review in the right forum according to exhibit P1. Lastly, the Inspector General of Government found no fault with the procurement process.

The respondent's counsel submitted that from the foregoing, the appellant cannot therefore place the liability for its alleged financial losses, if any, on the respondent as it had a fraudulent bid bond guarantee in the first place and in fact failed to secure the contract due to its apparent inability to demonstrate that it had the requisite technical experience or track record in successfully undertaking projects of the nature that was the subject of the bidding process.

Further, the respondent's counsel submitted that the appellant showed no technical ability to undertake the project and had no bid bond guarantee worth talking of and therefore could not be a successful bidder with the procurement process having been guided by the African Development Bank Rules and Regulations which applied to the procurement and the process followed the rules to the letter. The evaluation criteria and methodology of technical compliance in line with instructions to bidders' evaluation and qualification criteria.

Further, the appellant never had the technical capacity and ability to successfully build the said Lira Market as it did not meet the required minimum value of the United States dollars 3,000,000 and for that reason the appellant was disqualified.

According to the evidence on record, the bidding and contract award process ended in June 2011 leading to the contract signing of 5th September 2011. Further, the respondent disowned the bid guarantee on 28th September 2011 following an inquiry from the Ministry of Local Government on 27th September 2011, way after the disqualification of the appellant from the bid process and the contract was awarded to Arab Contractors. The respondent further submitted that there is no nexus between the decision to disqualify the appellant and the action or otherwise of the respondent as the appellant had applied for a job which it had no capacity, technical experience and track record to undertake and was therefore disqualified technically and the respondent cannot be held liable for its disqualification even if the respondent had properly issued to the appellant the said bid bond guarantee. Further, evidence was led to show that by 31st August 2011, when the application for administrative review was wrongfully lodged by the appellant before the PS, Ministry of Local Government, and the bid process and contract award had already been concluded. Secondly, the administrative review application which was lodged, was lodged in violation of exhibit P1 and was contrary to the open international competitive bidding procedures contained in the ADB Rules of Procedure of Procurement of Goods and Works. The respondents counsel further submitted that under

section 4 (1) of the Public Procurement and Disposal of Public Assets Act No 1 of 2003, where the PPDA Act conflicts with an obligation of the Republic of Uganda arising out of an agreement with one or more states, or with an International Organisation, the provisions of the agreement shall prevail over the Act.

In the premises, the respondent's counsel submitted that the administrative review was not applicable in the circumstances as there were set procedures for challenging the decision of government which was not followed as the bid process was governed by the ADB Rules. Further the IgG found no fault with the procurement process and established that the ADB procedures had not been floated and it therefore issued a no objection letter to the Ministry of Local Government to go ahead and secure a contractor. Further, the respondent's counsel submitted that even if the administrative review had been conducted, it would only serve academic purposes since the reason for the disqualification of the appellant was lack of a track record which would not have given the appellant a chance to be considered among the 12 bidders. In the premises, there was no iota of evidence linking the respondent to the failure to secure the contract in question. The appellant failed to meet the criteria set by ADB as it lacked the requisite capacity and ability to build Lira Central Market with the appellant's attempt to seek administrative review having been dismissed by the Ministry of Local Government, as inapplicable and the appellant's contention that it would have succeeded and be awarded the contract was speculative.

On the issue of the validity of the bank guarantee the respondent's counsel submitted that the position of the appellant was that the respondent had not established the fraud and that no counterclaim had been filed by the respondent in the trial court. In reply to the submissions of the appellant, according to the evidence on record, the bid process and award of contract was concluded in June 2011. The evidence shows that the contract between the Ministry of Local Government and the Arab contractors was signed on 5th September 2011. The same evidence shows that the appellant was

disqualified for lack of technical capacity and ability to successfully build the market which show that it had no capacity, experience and track record to undertake. The same evidence showed that the respondent only disowned the bid bond guarantee on 28th September 2011 after an inquiry from the Ministry of Local Government by letter dated 27th September 2011 long after the conclusion of the bid process, contract award and signing of the contract.

The respondent contends that based on the evidence, there was no breach of contract. Further, that there is no iota of evidence linking the respondent to the failure of the appellant to secure the contract in question. The appellant failed to meet the criteria set by ADB as it lacked the requisite capacity and ability to construct the Lira Central Market with the appellant's attempt to seek for administrative review having been dismissed by the Ministry of Local Government as inapplicable and the appellant's contention that it would have succeeded and be awarded the contract ahead of all the other 11 bidders for the market is highly speculative. In the premises the authorities cited by the appellant are irrelevant and inapplicable to the circumstances of the case.

With regard any duty owed, the appellant relied on **Hedley Byrne and Company Ltd Vs Heller and Partners Ltd [1964] AC 465** to advance the tort of deceit or negligent misstatement and a duty of care. Secondly that the relationship between bank/customer established a contractual and fiduciary relationship where the latter trusted the former not to act to its detriment. The appellant further contended that the respondent assumed the responsibility towards the appellant at the point of issuing the bid bond guarantee to secure not only its financial interest but also ensure that the plan succeeds in the procurement endeavour undertaken. In reply the respondents counsel submitted that according to rule 32 (1) of the Judicature (Court of Appeal Rules) Directions, on any appeal, the court may so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court.... The respondent submitted that the tort of deceit or negligent misstatement and generally negligence or breach of trust on the

part of the bank was not specifically pleaded and proved before the trial court and cannot be raised at the appellate level. Further, under rule 32 (1) of the Judicature (Court of Appeal Rules) Directions, this court has no powers to confirm, reverse or vary the decision of the High Court on any other ground apart from the grounds arising from the decision of the High Court.

The respondent further submitted on the consequential loss if any suffered by the appellant and submitted that the appellant suffered no consequential loss.

In rejoinder, the appellant's counsel submitted that the preliminary objections against the appellant ought to be overruled because the respondent ought to have proceeded by notice of motion supported with affidavit evidence proving the allegations that the appellant failed to take an essential step and as a result the respondent suffered substantial prejudice rendering the appeal a nullity. Further the form in which the respondent addressed the court offends rule 82 of the Judicature (Court of Appeal Rules) Directions which prescribes a specific procedure for a respondent who desires to have a notice of appeal struck out. Further, he submitted that this contention was brought to the attention of the court over a year after the impugned service and amounts to inordinate delay. As such the respondent cannot be said to have suffered substantial prejudice as to render the appeal nugatory. He prayed that the preliminary objections be construed as mere afterthoughts from which the respondent did not suffer any prejudice whatsoever.

The respondent submitted that the notice of appeal was served out of the statutory period of service of the same and without the leave of court or extension of time. The appellant relies on **Sitenda Sebalu versus Sam K Njuba and Electoral Commission; Supreme Court Election Petition Appeal number 26 of 2007** in which an application for striking out a notice of appeal for failure to serve the respondent within seven days under section 62 of the Parliamentary Elections Act and rule 60 (1) of the Parliamentary Elections (Election Petition) Rules was considered on the footing of whether

the provision was mandatory or directory. The court found that the rule was directory. The appellant submitted that rule 78 ought to be read in light of rule 5 of the rules of court which gives this court discretion for extension of time in order to ascertain the true purpose of the provisions as to compliance with time. The purpose and intention of rule 78 is to ensure the expeditious disposal of the appeal and rule 5 allows enlargement of time within which to comply with time limitations and discloses the intention of protecting the appellant's right of appeal from the rigidity of technicalities in line with the principle of substantial justice under article 126 (2) (e) of the Constitution of the Republic of Uganda.

On the question failure to extract a decree, the appellant's counsel submitted in rejoinder that section 66 of the Civil Procedure Act, only applies to magistrate's courts and the High Court and does not extend to the Court of Appeal. The provisions are not binding on the Court of Appeal. The jurisdiction of the Court of Appeal is derived from section 10 of the Judicature Act cap 13 and also article 134 (2) of the Constitution which both prescribe that an appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law. Further rule 87 (1) (g) of the Judicature (Court of Appeal Rules) directions contextualises the word "decision" as the judgment or reasoned order and is one of the essential documents required to constitute a record of appeal from the High Court and not a decree. See **Hussain Abdallah Hamdan Vs Hussain Tharel Amuhi Malkan S.C. civil Application No 4 of 2001** where it was held that since rule 82 (2) of the Rules of this court did not require a decree to be part of the record of appeal, it was right to contend that the absence of the decree did not per se affect the validity of the appeal. In the premises, the preliminary objection lacked merit and ought to be dismissed.

With regard to preliminary point number 3, on the ground that ground number 8 of the memorandum of appeal is argumentative, contrary to rule 86 (1) of the Rules of this court, the respondent submitted that the memorandum of appeal was not drafted under rule 66 of the Rules of court but under rule 86 whose provisions are couched differently. Counsel

submitted that while rule 66 (2) of the rules of this court is restrictive, while the provisions of rule 86 (1) of the Rules of this court are wide enough to allow the court discretion to decipher what is a narrative or argumentative. Counsel submitted that the nature of the ground of appeal is that it should depict any error, defect or irregularity in any order affecting the decision of the case. In the premises, the appellant's counsel maintains that ground 8 of the memorandum of appeal sets forth concisely depicting the error affecting the decision appealed against and is neither a narrative nor argumentative.

In rejoinder on the reply to the respondent's submissions in opposition to the grounds of appeal, the Appellant's counsel addressed grounds 1, 2, 3, 4, 5, 6 and submitted that while the learned trial judge relied on the case of **Fredrick Zaabwe Vs Orient Bank Ltd and others** (supra) for the definition of fraud, it did not follow the principles therein to find proof of fraud. Further, it was evident from the record of proceedings that the evidence of DW1 in alleging fraud based it on the alleged confession of one Stella Mutumba and it was necessary for the respondent to produce the said Stella Mutumba to come back to testify even for purposes of tendering exhibit D4 which is the alleged confession statement. In the absence of that, there is no primary proof. It was not the duty of the appellant to produce Stella Mutumba as a witness since the appellant never alleged fraud in its claim whatsoever. The learned trial judge therefore shifted the burden of proof onto the appellant contrary to the law of evidence (see sections 101 (2) and 103 of the Evidence Act). Counsel contends that it is the respondent who alleged fraud in its written statement of defence and the burden of proof was on it.

For the argument that the transaction could not have taken two hours to complete, it was superfluous because the trial court was never shown the timeframe within which such a transaction could be completed. Further the argument that the surcharge was deducted from the appellant's account after completion of the transaction and therefore irregular is not tenable because if the transaction was irregular or a forgery, the bank system could have rejected the payment. In fact, this fact corroborates the evidence and

confirms the transaction because the bank system recognised the surcharge and automatically debited the appellant's account as soon as the account was credited with money. In the premises, the respondent's arguments lack merit and ought to be disregarded.

Submissions in rejoinder to grounds 8, 7 and 9.

With regard to the submission that the allegations of breach of duty and negligence constitute a departure from pleadings, the appellant's counsel submitted that the court framed the issue as to whether the respondent is liable for the appellant's loss of the contract. The essence of the issue was to explore the customer bank relationship between the appellant and the respondent which is a fiduciary relationship and breach of which constitutes or connotes negligence. Counsel further submitted that the issue is derived from paragraphs 4 (n), (o), (p) and 5 and 6 of the plaint. From the Judgment of the learned trial judge, it is evident that the trial determined the issue as a procurement issue rather than a bank/customer relationship issue. It was therefore inevitable that the trial judge misdirected himself on the law applicable as it is evident that he considered none. Further counsel submitted that the learned trial judge strongly dwelt on the evidence of DW3 whose testimony as the procurement expert was based on documents including the evaluation criteria and methodology as well as the valuation report which were never attached to her witness statement nor tendered in evidence for purposes of verification. It was therefore erroneous for the witness to testify about information contained in specific documents without availing them to court for scrutiny. By reason of this testimony, the court descended into the arena of procurement giving much attention the contents of an evaluation report which was not part of the court record. The evidence was not relevant to facts in issue and therefore lacked credibility.

Further the appellant's counsel submitted that the issue of the respondent's negligence directly arose from the breach of fiduciary and contractual duty to the appellant as a customer and the same was pleaded but erroneously, considered in the judgment as a procurement issue rather than a bank/customer issue.

With regard to ground 10 of the memorandum of appeal, this court was invited to consider the appellant's submissions in the lower court in the absence of any visible consideration within the judgment. The appellant reiterated its submissions in justification for the claim and other remedies incidental thereto.

Consideration of appeal

I have duly considered the written submissions of the Appellant and Respondent, the record of appeal and the law. The duty of this court as a first appellate court includes the duty, where necessary, to reappraise the evidence on record and to draw inferences of fact (See rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions). In **Peters v Sunday Post Limited [1958] 1 EA 424** the East African Court of Appeal held that the duty of a first appellate court is to review the evidence in order to determine whether the conclusions drawn by the trial court should be upheld. In reappraisal of evidence, the first appellate court should caution itself regarding the shortcoming of not having had the advantage of seeing and hearing the witnesses testify and should defer to the observations of the trial judge where issues of credibility of witnesses arise.

I have carefully considered the preliminary points of law touching on the competence of the appeal wherein the respondents seek to have the appeal struck out as incompetent.

The first objection to the appeal is that the notice of appeal was served out of time. The question of fact is not in dispute. The notice of appeal was lodged in the High Court on 26 February 2015 and it was subsequently served on the respondent on 10th March 2015. This is apparent on the face of the notice of appeal that was filed with the record of appeal.

There is no controversy about the fact that rule 78 (1) of the Judicature (Court of Appeal Rules) Directions requires the respondent to be served before or within seven days after the lodging of the notice of appeal. Rule 78 (1) of the Rules of this court provides that:

78. Service of notice of appeal on persons affected.

(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies of it on all persons directly affected by the appeal; but the court may, on application, which may be made ex parte, direct that service need not be effected on any person who took no part in the proceedings in the High Court.

In other words, it is not in dispute that the requirement to serve the notice of appeal on the respondent within seven days was not complied with. The appellant's argument is that, while it is true that the respondent was not served within time, the respondent ought to have applied to strike out the notice of appeal under rule 82 of the rules of this court. I agree that this is the correct position of the law and has to be read together with the rule 102 (b) which provides that no person will be allowed to raise an objection on the competence of the appeal which could have been raised under rules 82 of the Rules of this court. Rule 82 provides that:

82. Application to strike out notice of appeal or appeal.

A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

The respondent was served with the notice of appeal on 10 March 2015 and the appeal was subsequently filed on 18 June 2015. The appeal only came for hearing in July 2022. To avoid costs, it is clear that an application to strike a notice of appeal on the ground that it was not filed within time ought to have been filed under rule 82 of the Rules of this court promptly. This would save the parties time and costs. Secondly, under rule 102 (b) of the rules of this court, an objection to the notice of appeal cannot be made at the time of making arguments without leave of court, if such an objection could have been made by application under rule 82 of the Rules of this court. Rule 102 (b) provides that:

102. Arguments at hearing.

At the hearing of an appeal in the court—

(a)

(b) a respondent shall not, without the leave of the court, raise any objection to the competence of the appeal which might have been raised by application under rule 82 of these Rules;

The respondent never sought leave to object to the appeal on the ground of competence of the appeal. In the premises, without leave, the objection cannot be raised. The objection on the ground that the notice of appeal was filed out of time is therefore not prejudicial to the respondent in that the respondent had notice of the appeal, the respondent filed a notice of address of service, the respondent also participated in the scheduling conference as well as filing written arguments. I would in the circumstances overrule the objection.

The second objection is that there is no decree on the record of court. The respondent argued that no appeal lies because under section 66 of the Civil Procedure Act, an appeal lies from the decree of the court. Section 66 of the CPA provides that:

66. Appeals from decrees of High Court.

Unless otherwise expressly provided in this Act, an appeal shall lie from the decrees or any part of the decrees and from the orders of the High Court to the Court of Appeal.

Additionally, a decree is defined under Section 2 (c) of the Civil Procedure Act as:

(c) "decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within section 34 or 92, but shall not include—

(i) any adjudication from which an appeal lies as an appeal from an order; or

(ii) any order of dismissal for default;

Clearly section 2 of the CPA means a decree which is extracted from the decision of the court. However, section 66 just means that an appeal may lie from a decree or order of the High Court. This has since been superseded by the provisions of the Constitution of the Republic of Uganda 1995 and the Judicature Act Cap 13, which are later statutes which provide that an appeal lies to the Court of Appeal from decisions of the High Court.

Article 134 (2) of the Constitution supersedes section 66 of the Civil Procedure Act as the Constitution under clause 2 is the Supreme Law of Uganda and any law that's inconsistent with its provisions is null and void to the extent of the inconsistency. Article 134 (2) of the Constitution provides that:

> (2) An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law.

Further, section 10 of the Judicature Act is similarly worded and provides that:

> 10. Jurisdiction of the Court of Appeal.
>
> An appeal shall lie to the Court of Appeal from decisions of the High Court prescribed by the Constitution, this Act or any other law.

To crown the issue Rule 87 of the Rules of Court lists the contents of a record of appeal for purposes of an appeal from the High Court in the exercise of its original jurisdiction and omits a decree because it provides that:

> 87. Contents of record of appeal.
>
> (1) For the purpose of an appeal from the High Court, in its original jurisdiction, the record of appeal shall, subject to subrule (3) of this rule, contain copies of the following documents—
>
> (a) an index of all the documents in the record with the numbers of the pages at which they appear;

(b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service, then as required by rule 78 of these Rules, his or her last known address and proof of service on him or her of the notice of appeal;

(c) the pleadings;

(d) the trial judge's notes of the hearing;

(e) the transcript of any shorthand notes taken or any other notes howsoever recorded at the trial;

(f) the affidavits read and all documents put in evidence at the hearing, or if those documents are not in the English language, certified translations of them;

(g) the judgment or reasoned order;

(h) the order, if any, giving leave to appeal;

(i) the notice of appeal; and

(j) any other documents necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant.

(2) The copies of documents referred to in subrule (1)(d), (e) and (f) of this rule shall exclude copies of any documents or any parts of them that are not relevant to the matters in controversy on the appeal.

Clearly rule 87 (1) (g) provides for the inclusion of a judgment or reasoned order. The record of appeal contains a judgment and it is from a judgment that a decree is extracted. While including a decree is not a requirement, its inclusion is not forbidden. In the premises the second ground of objection has not merit and is hereby overruled.

On the 3rd ground the respondent argued that ground 8 of the appeal is argumentative and offends the rules of court.

The appellant averred in ground 8 avers that:

> The learned trial judge erred in law and in fact when he relied on the uncorroborated evidence of PW3 to confirm the rejection of the appellants bid purportedly at stage two of the procurement evaluation process on technical

grounds only without the requisite evaluation report and ignoring the fact that the same stage required commercial responsiveness of the bidder and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.

Rule 86 (1) of the Rules of this court provide that:

"(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make."

Ground 8 of the appeal clearly gives the grounds of objection to the decision of the learned trial judge though in an argumentative style. It is my considered ruling that the grounds of objection specified the points which are alleged to have been wrongly decided and the grounds of objection thereto. As conceded by the respondent's counsel at least the first three lines of ground 8 of the appeal comply with the rule 86 of the Rules of this court. In the premises, I would overrule the objection and find that ground 8 of the appeal is only badly drafted and it a matter of form and not substance.

The appellant's counsel argued grounds 1, 2, 3, 4 and 5 of the appeal jointly. In these grounds of appeal, the appellants counsel contended that it was an appeal mainly against the decision of the trial judge in respect of the respondent's contention that the appellant procured the bid bond guarantee in issue through fraud and the same was a forgery. An analysis of the grounds of appeal indicate that the first ground is on the misconstruction of the role and absence of a key witness, one Stella Mutumba. Secondly, the burden of proof in proving fraud and forgery of the respondent's bank documents was erroneously shifted to the appellant and it was the respondent who alleged that the documents had been obtained through fraud and forgery and this covers ground two of the appeal. With regard to ground three of the appeal, it is contended that the trial judge ignored the requisite standard of proof of fraud and went on to hold that the appellant was liable for fraud and forgery without evidence in support thereof. In ground four, it is contended that the learned trial judge erred to rely on the

uncorroborated evidence of DW1 and inconclusive evidence of DW 2 to hold that the appellant was liable for fraud and forgery without properly considering the evidence of the appellant. Lastly, in ground five, it is alleged that the learned trial judge misconstrued the evidence of DW 3 and arrived at a wrong conclusion occasioning a miscarriage of justice. The common thread in all the grounds of appeal is the conclusion that the learned trial judge erred to find that the appellant was guilty of fraud and forgery of the bid bond guarantee. Further this is the pivotal issue in the appellant's suit in the High Court.

The common issue of fact in the five grounds of appeal is the fact that the appellant had bid for the construction of a market in Lira Municipality which bid was not successful and the contention was that the bid was unsuccessful because the respondent informed the Ministry of Local Government upon its inquiry to the effect that the bid bond guarantee said to be issued by it in support of the bid was not a genuine one thereby leading to disqualification of the appellant. Underlying this question is another fact which needs to be established as to whether the appellants bid was disallowed solely because of the problem with the bid bond guarantee. If there are other grounds for the disallowance of the bid to construct the Lira market, then the entire claim of the appellant has to collapse because it is premised on the fact that the appellant lost the contract to construct Lira Market because of the problem with the bid bond guarantee caused by the respondent bank.

A plaintiff can only prove the cause or causes of action and the facts disclosing the causes of action it has averred in the plaint and not other causes of action or facts not pleaded. The background to this case is that the appellant who was the plaintiff in the lower court claimed against the respondent who was the respondent in the lower court for recovery of Uganda shillings 6,200,000,000/= in lost profits, general and exemplary damages for breach of contract and for costs of the suit. The cause of action pleaded in paragraph 4 of the plaint was that on 4th February 2011, the Ministry of Local Government advertised in the New Vision, the Daily

Monitor and other newspapers of the local press, inviting interested parties to bid for construction of seven markets including Lira Central Market. The appellant purchased the bid documents from PPDA unit of the Minister of Local Government at a sum of US$200 on 9th May 2011 with particular interest in the construction of Lira Central market. Subsequently the appellant visited the site and carried out a technical evaluation of the project at a cost of Uganda shillings 74,550,000/=. Further the specific procurement notice referred to required security valued at Uganda shillings 500,000,000/= for the bid. Consequently, the appellant applied for a bid bond guarantee from the respondent. The respondent consequently offered the appellant the bid bond guarantees and invited the appellant to accept it. On the same day on 20th of May 2011 the respondent issued a bid bond guarantee to the appellant. On the same day the appellant submitted its bid bond guarantee to the Ministry of Local Government public procurement and disposal unit at a cost of Uganda shillings 24,805,628, 784/=. The appellant paid Uganda shillings 5,000,000/= for the bid bond guarantee to the respondent bank. Again on 20th of May 2011 the respondent bank wrote to the Permanent Secretary of Ministry Local Government giving information that the appellant had a bank account with the respondent. There are several other facts averred in the plaint. Particularly the Permanent Secretary Ministry of Local Government wrote to the respondent to confirm the authenticity of the bid bond guarantee. On 21st of June 2011 the respondent in reply to the inquiry wrote confirming that a specific bid bond security was authentic. The appellant averred that this was clearly an error because the bid bond security offered by the respondent bank was not EBL/1002/BBG/000/24610 but EBL/1002/BBG/1000/16311/SM.

On 27th September 2001, the Minister of Local Government wrote a letter to the respondent bank seeking to confirm which of the two securities was genuine. On 28th September 2011 the respondent bank replied and stated that the bid bond security number EBL/1002/BBG/1000/16311/SM was never issued by the respondent and stated that the earlier confirmation of the bid bond security number EBL/1002/BBG/000/24610 was made in error for which they expressed regret. In the premises the respondent denied the

authenticity of the bid bond security number EBL/1002/BBG/1000/16311/SM for which the appellant had paid the respondent bank's charges. On 29th September 2011 the Ministry of Local Government wrote to the appellant alleging that the appellant had committed fraud and that it would ensure that the Local Government officials handed the matter to police for investigation with a view to prosecute the directors of the appellant. Consequently, the appellant was disqualified from the bid process.

In paragraph 5 of the plaint, the appellant pleaded that the respondent's act of disowning the bid bond security issued to the appellant was intentional, callous and in breach of contract and caused the appellant to suffer loss and pleaded the loss as indicated in the claim. In paragraph 6, it is averred that the bank is liable in law and equity for the loss occasioned to the appellant who will ask the court to order the respondent bank to pay the appellant general damages for breach of contract equivalent to loss of profit, punitive damages for intentional breach of contract; general damages for loss of prospective business due to destruction of reputation, costs of the suit, special damages of Uganda shillings 80,100,000/=. The loss of profit is claimed at Uganda shillings 6,200,000,000/=.

The respondent denied the claim and averred inter alia that the respondent never issued the bid bond guarantee in question and the said documents were fraudulently obtained/procured by the appellant or its directors. Further that the 5,000,000 paid by the appellant was done in collusion with the respondent's employee, one Stella Mutumba, in pursuance and concealment of the fraudulent actions. The payment was an attempt to legitimise what was an illegality and this came to the respondent's knowledge after discovery of the forgery/fraud. That Stella Mutumba was part of the scheme and the BANK guarantee was confirmed in error. The respondent further averred that it never issued the said documents and the documents were fraudulently obtained or procured by the appellant/appellant directors in furtherance of their illegal enterprise. The respondent denied any responsibility for alleged signing of the documents and contended that the appellant and its directors are liable for the

consequences of their fraudulent actions. Several other facts are pleaded inclusive of particulars of fraud. In addition, it is averred in paragraph 8, that the appellant's loss of contract was a result of their own failure to meet the criteria set by the Ministry of Local Government for whose actions the respondent had no control. In the premises the respondent averred that any loss suffered by the appellant was not based on the bid bond guarantee issue and the appellant was not entitled to any remedies.

I have further considered the joint scheduling memorandum endorsed by the appellant the respondent's counsel wherein the issues that were framed where as follows:

1. Whether the respondent issued the bid bond guarantee number EBL/1002/BBG/1000/161 1/SM.
2. Whether the appellant obtained the bid bond guarantee number EBL/1002/BBG/1000/16311/SM by way of fraud?
3. Whether the respondent is liable for the appellant's loss of the contract sum
4. The remedies available.

Relevant documents relied on by both parties were admitted by consent of the parties.

The learned trial judge reproduced the issues set out in the scheduling memorandum endorsed by both counsel of the parties and went ahead to consider all the issues. On the question of whether the respondent issued bid bond guarantee number EBL/1002/E BG/10004/161 1/SM, the trial judge as a matter of fact found in the negative and found that it did not come from the bank through lawful means.

On the question of whether the appellant issued the bid bond guarantee in PL/1002/BBG/1000/16311/SM, the learned trial judge resolved the issue in the negative and held that it has not been proved to the satisfaction of the court that the appellant procured the bid bond guarantee not by the ordinary way of business but possibly through fraud.

The question was whether the respondent is liable for the appellant's loss of the prospective contract.

The trial judge found that having answered the first two issues in the negative, he was inclined to resolve the issue summarily but considered it. He found that the appellant in fact failed to secure the contract due to its apparent inability to demonstrate that it had the requisite experience or track record in successfully undertaking projects of the nature it bid for. Further that it had no technical ability to undertake the project and had no bid guarantee worth talking of. The trial judge also found that the appellant had passed the preliminary stage which proceeded upon consideration of all the documents submitted by the appellant including the bid bond guarantee from Equity Bank. This is what the trial judge concluded:

> "DW4 confirmed to court that under that the appellant's bid was accompanied by a bid security document issued by Equity Bank Uganda Limited to the tune of Uganda shillings 500,000,000/= among other documents and that the Ministry of Local Government considered all the documents submitted by the appellant including the bid bond guarantee from Equity Bank and on the strength then the appellant passed the preliminary stage of the procurement but that this position after stage two of the process which involved detailed evaluation to determine the commercial and technical responsiveness of the eligible and compliant bids where a bidder had to satisfy it had at least two (2) contracts within the last (5) years carried out a contract each for the value of at least Three million US Dollars (USD 3,000,000) that had been successfully completed and that are similar to the proposed works.
>
> With the appellant only listing the following works to demonstrate its track record in undertaking projects of similar nature;
>
> a) Construction of a 5-storied building in October 2007, valued at UGX 1,172,667,076 (One Billion One Hundred and Seventy-Two Million, Six Hundred Sixty-Seven Thousand and Seventy-Six).
> b) Construction of a 5 – storied building at Sir Apollo Kaggwa Road in October 2009 valued ay UGX 772,672,100.
> c) Construction of Medical Drug Store in Amuria District in December 2006, valued at UGX 59,572,320.
> d) Construction of Pader Police station in August 2007 valued at UGX. 294,175,291

None of the above met the required minimum value of USD 3 Million and the Appellant Company was accordingly disqualified for lack of minimum experience and upon examination of the documents submitted by the Appellant; the Ministry of Local Government concluded that the appellant lacked the technical capacity and ability to successfully build the said market that the appellant was disqualified and this evidence was never challenged by the appellant. From these, it is clear to me that there is no Nexus between the decision to disqualify the appellant and the action or otherwise of the respondents as the appellant company had applied for a job which it had no capacity, experience and track record to undertake and was therefore disqualified technically and the respondent bank cannot be held liable for its disqualification even if the bank had properly issued to the appellant the stated bid guarantee. As even the appellant company itself sought to challenge the circumstances under which its bid was disqualified in the letter when he stated that... And since the appellant had been disqualified from the procurement by 31 August 2011 long before the respondent wrote to the Ministry on 28 September 2011 for failure to meet the criteria set by the African Development Bank then its disqualification had nothing to do with even the respondent bank documents even if they were disowned for the bid bond security would not have saved the appellant company for it had already been disqualified due to lack of experience, capacity and technical ability to perform the contract in question.

In the above passage, the learned trial judge came to the conclusion that the bid bond security could not have been the reason why the appellant was disqualified. This also goes to resolution of grounds 8 and 9 of the appeal. That is the crux of the problem with grounds 1, 2, 3, 4, 5 and 6 of the appeal in that the grounds proceed from the premise that the reason for disqualification of the appellant from the bid process was a statement of the respondent to the Ministry of Local Government that the bid bond security documents were a forgery. If this court finds that there were other grounds for disqualification of the appellant, then there would be no need to consider grounds 1, 2, 3, 4 and 5. In the circumstances, I would consider the issue of the bid bond documents as well as the chronology of events and by doing so would resolve grounds 1, 2, 3, 4 and 5 of the appeal if I agree with the conclusion of the learned trial judge.

I have already indicated that the learned trial judge found as a matter of fact that the bid bond document, the subject matter of the appellant's complaint in the High Court was not issued by the respondent. The crux of the appellant's grievance in the High Court is evidenced by a letter dated 10th October 2011 written by Kaggwa & Kaggwa advocates addressed to the Managing Director Equity Bank (U) Ltd in which they wrote inter alia as follows:

> Our client applied for and was offered a bid security bond Ref No EBL/1002/BPG 100016311/SM dated 20th May 2011 for the construction of Lira Market whose expiration is 20th of March 2012. This bid security bond is obviously paid for officially and is authenticated in your system. The total bid security is in the sum of Uganda shillings 500,000,000/=...
>
> Following the evaluation and award of tender, our Client was dissatisfied not only with the process but also the result and therefore opted to apply for administrative review as provided for under the Public Procurement and Disposal of Assets Act. This process was initiated on 31st August 2011 and fees for it duly paid for in the sum of Uganda shillings 2,500,000/=...
>
> While our Client's application for administrative review was ongoing, the Permanent Secretary, Ministry of Local Government wrote a letter dated 21st September 2011 requesting for your confirmation on the authenticity of the bid security together with the second one whose origin is unknown, but emanated from the said Local Government Permanent Secretary's Office.
>
> You wrote back vide a letter dated 28th September 2011 Ref: MD/EQBUL/1/28/09/11 in which you not only categorically stated that our Clients bid security Ref: EBL/1002/BBG/1000/16311/SM was fraudulent but also withdrew your earlier confirmation that our clients bid was authentic.
>
> This action on your part has not only frustrated our clients administrative review application but has closed all doors for any further action to redress our client's grievances. The Ministry of Local Government has written to our Client and copied the letter to among other people/institutions, the Inspector General of Police requesting criminal investigations which has heightened our client's anxiety.
>
> Your actions have had a direct effect on our client as follows:

(i) Our clients administrative review has been completely frustrated as the contract has now been awarded.

(ii) Our client is under criminal investigation for fraud, forgery and uttering false documents arising out of your negligence.

(iii) Our client is in danger of being blacklisted by Donor Funded Projects especially ADB because of your negligent utterances.

(iv) Our Client story appeared in the Red Pepper of Friday, 7 October 2011 in which various defamatory statements were bandied around.

(v) Our Client has no doubt lost business reputation among other contractors for which they hold you liable.

Our instructions are to demand from your loss of profit of 25% on the Uganda shillings and 4.8 billion shillings' tender price to cover loss for the above action, together with damages for defamation and likely loss of future business....

The letter of the appellant's lawyers more than anything also demonstrates the chronology of events which shows that the tender was awarded before the letter of the respondent complained about. It follows that the letter of the respondent to the Permanent Secretary, Ministry of Local Government, could not and did not lead to the award of the tender to someone else or to put it in another way, it did not lead to the disqualification of the appellant from the bid process. The salient facts which emerge from the letter of the lawyers are as follows:

- There was an evaluation process and award of tender.
- The appellant was dissatisfied not only with the process but also with the award and commenced an administrative review process on 31st August 2011.
- After this, the Permanent Secretary Ministry of Local Government, wrote a letter dated 21st September 2011 to the respondent asking about whether the bid bond security purportedly issued by the respondent was authentic.
- The respondent replied on 28th September 2011 and wrote to the PS Ministry of Local Government that the bid bond security was not issued by the respondent and was not authentic.

It can be concluded from this correspondence alone that the grievance of the appellant at the time was that the administrative review process was frustrated because of the letter of the respondent. It is also clear that there was an award of tender by 31st of August 2011 before the respondent replied to the PS Ministry of Local Government on 28th September 2011. The letter of the PS as stated above could have been as a result of commencing of the administrative review process and not the award of tender. Secondly, the respondent could not have caused the award of the tender to another person by stating that the bid bond security was not authentic. This supports the conclusion of the learned trial judge that the appellant was disqualified for other reasons which he included in his Judgment. For emphasis, I have carefully reviewed the correspondence and taken into account the chronology of the events leading to the award and secondly the administrative review process and lastly the issue of authenticity of the bid bond guarantee which came a bit later.

Starting with the administrative review process, the appellant on 31st August 2011 wrote to the Permanent Secretary Ministry of Local Government on the subject inter alia of **Administrative Review for Procurement of Works for Construction of Lira Main Market**. The appellant wrote expressing discontent on how the procurement process for the procurement was conducted and requested for administrative review. Particularly the appellant gave the following grounds for the administrative review:

> 1. Breach of the Act on the display of notice of the best evaluated bidder. The Procurement Act (PPDA) requires that a notice of the best evaluated bidder shall be displayed on a procuring or disposing entity's noticeboard and the authority's website. It further stipulates that at the time of its display, the same notice shall be sent to all bidders and the proof of receipt by bidder, obtained. This regulation was not complied with as per Section 224 (1), (2), (3), (4), (5), (6) and (7) of the PPDA Act 2003.
>
> 2. Our bid was the lowest priced bid at Ugx. 24.8 Billion only and was substantially compliant and responsive to the preliminary examination detailed technical and commercial requirements of the bidding document. However, to our disappointment, it was not considered.

3. There was also siphoning of documents in and out of our bid during the procurement process by the Ministry Officials responsible for MA TIP program. This involves removal of our key documents from our bid and smuggling in forged documents in order to make bid non-compliant and unresponsive.

4. There was in addition, exchange of huge sums of money between the foreign contractors and the Ministry officials responsible for the programme making the procurement process a buy and win process.

5. Our earlier verbal communication to you and later a written communication expressing concern over an ethical code of conduct and corruption practices by your team handling the MATIP program were all ignored.

6. The reasons given to declare our bid non-responsive do not amount to ....

7. Our bid was declared non-responsive and the valuation reports changed only after we had failed to raise a deposit of Ugx. 500 Million only to one Mr ... and Mr. represented the Ministry and the Technical Evaluations Committee. This was a part payment of the required kickback of Ugx. 1.5 Billion demanded by the Ministry.

8. There was also misinformation from the Head Procurement on the tendering process saying the process was not yet complete by 22nd of August, 2011. It was after a communication to the Ministry of 23 August, 2011 enquiring on the display of the best evaluated bidder that the Ministry finally informed us on the 25th of August, 2011 in writing that the display was done on the bank's website on 11 August, 2011.

We therefore contend that there was a high level of corruption of this nature has hindered growth of local firms in Uganda hence increasing unemployment.

Based on the above grounds, we hereby seek for an administrative review to this effect.

We further request that you advise us on the administrative review fees payable.

What can be gleaned from the above facts in the appellant's own letter is that by 31st of August 2011, there was an award of tender and display of best evaluated bidder by display on the bank's website on 11th August 2011. Secondly, the appellant alleged corrupt practices and indicated the said corrupt practices in the letter as the reason why they were not awarded the tender. It follows that the award of tender to some other firm was not

caused and could not have been caused by the letter of the bank dated 28th September 2011 on the subject of the authenticity of the bid bond guarantee. This letter of the respondent which is alleged to have caused the grievance of the appellant came way after the administrative review process had commenced. In addition, on 22nd August 2011, the appellant's managing partner wrote to the PS Ministry of Local Government on the subject of "*Information on Irregularities Surrounding the Procurement Process for Construction of Lira Main Market Supreme Court*". This letter proves the facts of the appellant's grievance with the award of tender to someone else in that the appellant wrote *inter alia* as follows:

> The following are a few of the irregularities:
>
> - Siphoning off key bidder's documents in and out of the bidder's submission.
> - Pulling out and burning of bidder's key documents aimed at making their bids non-compliant and non-responsive.
> - Exchange of huge sums of money between the foreign contractors and your team at the ministry responsible for this program.
>
> We pray that you carry out a check on the above issues as they may cause future complications.
>
> We thank you
>
> Rogers Matsiko
>
> Managing Partner

What is even more curious is that in the previous letter of 31st of August 2011, which letter was also addressed to the Permanent Secretary, the appellant alleges that there was in addition the inserting or smuggling in of forged documents in order to make the bid of the appellant non-compliant and non-responsive. There is no information as to what these "forged" documents were.

The allegations of the appellant were taken seriously in that the Permanent Secretary replied in a letter dated 24th of August 2011 to the said letter and highlighted two aspects of the information supplied by the appellant that there was altering and tampering with bidders' documents and receipt of

money by officers in the course of their duties from foreign bidders or construction companies. The Permanent Secretary noted that these allegations were very grave and criminal in nature and were grounds to support an application for administrative review. He advised the appellant to formally apply for administrative review in line with the provisions of the PPDA regulations 343, 344 and 345 to enable his team investigate and take appropriate action on the allegations. In the joint scheduling memorandum, counsel for the appellant and counsel for the respondent agreed to admit in evidence all the documents I have referred to above. In fact, the letter seeking administrative review is dated 31st August 2011.

As noted above, the appellant's action in the plaint was for loss of profits, general and exemplary damages for breach of contract and for costs of the suit. The loss of profits arose from the allegation that it was the respondent bank which caused the appellant to lose the award of tender through its negligent reply to the PS Ministry of Local Government. From an analysis of the documents alone, it is clear that the initial position of the respondent was that it had lost the administrative review process on account of the denial of the documents by the respondent. I find that this is far-fetched and I agree with the learned trial judge that there were other grounds for the tender not being awarded to the appellant. The loss of the administrative review or the administrative decision therefore was not pleaded. In any case, it could, if factual, have been the subject matter of an action against the Ministry of Local Government officials or the Attorney General but not the respondent, challenging the decision or irregularities etc. it in the High Court and subjecting those matters alleged against the ministry officials to judicial scrutiny.

Secondly, the issue of the letter to authenticate the bid bond guarantee requested by the Permanent Secretary Ministry of Local Government came after the award of the tender. It was therefore not the basis for refusal of the award of the tender to the appellant. For that reason, I do not see any good in establishing whether the bid bond guarantee was actually a forgery or not. In any case, it was the appellant who alleged in its own

correspondence that there was tampering with its documents by the Ministry of Local Government officials and corrupt practices which is the main reason it lost the anticipated award of tender. It sought for an administrative review. There is no decision in the administrative review case and the issue could have become the subject matter of an application for review or other action in the High Court.

Section 89 of the PPDA Act which provides for the remedy of administrative review stipulates that:

> A bidder may seek administrative review for any omission of breach of a procuring and disposing entity of this Act, or any regulations or guidelines made under this Act or of the provisions of bidding documents, including best practices.

In addition, under section 89 (4) it is stipulated that:

> (4) The Authority shall issue its decision within twenty – one working days after receiving the complaint, stating the reasons for its decision and remedies granted, if any.

Clearly, the provisions of the law were not followed and the grievance of the appellant is misdirected against the respondent bank. The respondent could not have caused the failure of the appellant to get the tender to construct Lira market. If it is alleged that the respondent caused the appellants failure to succeed in its judicial review application, this is not the cause of action pleaded in the plaint and is alien to the suit. The administrative review request was received by the Ministry of Local Government, according to its acknowledgment stamp on 31st August 2011. This was an application for review by the PS and the PS was supposed to make a decision within 15 days thereafter. This decision would have come before the letter of the Respondent dated 28th September 2011 and therefore that letter could not have caused a problem in the review process. Further, a bidder is required to submit the application for review within 15 days after becoming aware of the administrative grounds in terms of Regulation 344 of the PPDA Regulations No. 70 of 2003. The review was received by the Ministry of Local Government on 31st of August 2011. Thereafter, rule 346 (4)

of the Regulations provides the accounting officer shall issue the decision within 15 days. During that time the process it suspended. The regulations provide inter alia that:

> 346. Administrative review by an accounting officer
>
> (1) Upon receipt of an application for administrative review, an accounting officer shall immediately suspend the procurement or disposal proceedings where a continuation of the proceedings might result in an incorrect contract award decision or a worsening of any damage already done.
>
> (3) An accounting officer shall institute an investigation to consider—
>
> (a) the information and evidence contained in the application;
>
> (b) the information in the records kept by a procuring and disposing entity;
>
> (c) information provided by staff of a procuring and disposing entity;
>
> (d) information provided by other bidders; and
>
> (e) any other relevant information.
>
> (4) An accounting officer shall issue his or her decision in writing within fifteen working days after receipt of the application and the decision shall indicate —
>
> (a) whether the application is upheld or rejected;
>
> (b) the reasons for the decision; and
>
> (c) any corrective measures to be taken.
>
> (5) An accounting officer shall submit a copy of his or her decision to the Authority.

There is no evidence that a decision was made by the Accounting Officer within 15 days. What should be highlighted is the fact that this would have been issued before the letter of the respondent dated 28th September 2011. Further there was a further right of review by the PPDA Authority and rule 347 provides for the additional review possibility:

> 347. Administrative review by the Authority

(1) A bidder may submit an application for administrative review to the Authority where an accounting officer does not issue a decision within fifteen working days or the bidder is not satisfied with the decision of an accounting officer.

(2) An application to the Authority for administrative review shall be submitted within ten working days after the date of the decision by an accounting officer or the date by which an accounting officer should have issued a decision.

(3) The application to the Authority for administrative review shall include —

.....

(6) The Authority shall issue its decision in writing within twenty-one working days after receipt of the application.

The appellant purported to move for review under the PPDA Act and Regulations. The issue of award under other regulation are for the moment irrelevant. The best case scenario was an application for review by the High Court against the PS Ministry of local Government. Instead, the appellant filed an ordinary suit against the respondent bank when its alleged grievance was against the officials of the Ministry of Local Government.

In the premises, I would disallow grounds 6, 7, 8 and 9 on the ground that there were other reasons or grounds specifically stated by the appellant in its application for review which show that there were other grounds or reasons why it was not awarded the tender other than the letter of the respondent dated 28th of September 2011 confirming that the documents relating to the bid bond guarantee of the appellant were not authentic. Moreover, as far as the chronology of material events are concerned, the appellant had already lost the tender and was not a successful bidder before the letter of the respondent could have caused any harm to its bid for the tender to construct Lira Central Market.

In the premises, in the absence of judicial review of administrative action or in the absence of a decision in the review of the Permanent Secretary under section 89 of the PPDA Act or of the PPDA Authority under rule 347 of the PPDA Regulations, the respondent could not be responsible for any loss of

income directly related to the failure of the appellant to obtain the award of the construction tender in issue.

It follows that the issues relating to whether it was proved that the bid bond guarantee in question was forged in grounds 1, 2, 3, 4, 5 need not be resolved at all because the issues are inconsequential to the issue of award of tender to another firm other than to the appellant. Having agreed with the holding of the learned trial judge on the existence of other grounds why the tender for the Construction of Lira Main Market was not awarded to the appellant, this appeal has no merit and I would issue an order that it be dismissed with costs to the respondent.

Dated at Kampala the 2nd day of Nov 2022

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion, Madrama and Mulyagonja, JJA)

CIVIL APPEAL NO 110 OF 2015

DOLAMITE ENGINEERINGS SERVICES LTD:::::::::::::::: APPELLANT

VERSUS

EQUITY BANK (U) LTD ::RESPONDENT

(Appeal from the judgment and orders of Hon. Mr. Justice Henry Peter Adonyo, dated 16th February 2015, in High Court (Commercial Division) Civil Suit No. 51 of 2013)

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned brother Christopher Madrama, JA. I agree that the appeal fails and should be dismissed with costs for the reasons that he has given.

Dated at Kampala this 2nd day of Nov 2022.

Irene Mulyagonja

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion, Madrama and Mulyagonja, JJA)

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JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my learned brother Madrama JA, and I agree with him that this appeal should be dismissed with costs for the reasons he has given.

Since Mulyagonja JA also agrees, the appeal is dismissed with costs to the respondent.

It is so ordered.

Dated at Kampala this.....day of.....2022

Cheborion Barishaki

JUSTICE OF APPEAL