

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HIGH COURT CIVIL SUIT NO 51 OF 2013

DOLAMITE ENGINEERING SERVICE LTD===== PLAINTIFF

VERSUS

EQUITY BANK (U) LTD===== DEFENDANT

BEFORE: HON MR JUSTICE HENRY PETER ADONYO

JUDGMENT

1. Background:

In March 2011, the Ministry of Local Government of the Government of the Republic of Uganda invited interested bidders to bid for the construction of the seven new urban markets in seven municipalities through separate lots upon its having received funding from the African Development Bank for that purpose. The invitation was placed the mass media. Of the seven new markets to be built was one was that for Lira Municipality, in Lira district of Lango sub region. One of the terms for any of the bidders to be considered during the procurement process was the requirement that any of the responders had to accompany the bid application with a bid bond guarantee of the value of Uganda Shillings Five Hundred Million Only (Ug Shs.

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500,000,000/-) issued by a commercial bank. Twelve companies responded to the bid invitation including the plaintiff. The Plaintiff bid was unsuccessful for its bid its bid were declared unresponsive due to lack of appropriate accompanying bid bond among other reasons. The plaintiff was aggrieved with the disqualification as it argued that it had submitted appropriate bid bond which it secured on the 20th day of May 2011 from the Defendant bank with guarantee reference number EBL/1002/BBG/1000/16311/SM for Uganda Shillings Five Hundred Million Only (Ug. Shs 500,000,000/-) as part of the market bid process and that the same was in the favour of the Ministry of Local Government of Uganda and that the bid bond complied with the requirements for competing in the bidding process for the construction of the new modern market in Lira Municipality which was being conducted by the Ministry of Local Government under reference number MOLG/AFDB/MATIP-1/WKS/LOT-01 with support from the African Development Bank. The Plaintiff argues after acquiring the bid bond guarantee, it did submit the same sealed together with its bid and other documents to the Ministry of Local Government on the 20th day May 2011 and that subsequently its account with the Defendant was on the 28th day of May 2011 debited with Uganda Shillings Five Million Only (Ug. Shs 5,000,000/-) which was the commission charged by the bank for issuing the bid bond but added that as the bid evaluation process were ongoing on the 6th day of June 2011 a Nyangoma Yerusa (DW4) wrote on behalf of the Permanent Secretary of the Ministry to the Defendant bank seeking to verify the authenticity of a bid bond guarantee number EBL/1002/BBG/1000/16311/SM it had submitted and the Defendant bank on the 21st day of June 2011 confirmed its authenticity and so the bidding process continued.

But that later upon seeing that things were not proceeding as well as they ought to be, it on the 22nd day of August 2011 wrote a letter to the Permanent Secretary of the Ministry of Local

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Government citing some irregularities it had seen in the procurement process among others its suspicion of underhand activities by the officials in the Ministry of Local Government wherein some of the bid documents were tampered with including the removal of some vital documents which included those submitted by it with the ultimate intention of making the Plaintiff's bid to be non-complaint to the bidding process requirements. That on the receipt of its allegations, the Permanent Secretary in the Ministry of Local Government responded to the Plaintiff on the 24th day of August 2011 advising it to apply for administrative review as provided for under the **Public Procurement and Disposal of Public Assets Act (PPDA Act)** and the Plaintiff obliged by writing so on the 31st day of August 2011 and the Public Procurement and Disposal of Public Assets Authority as a result halted the procurement process on the 7th day of September 2011. However, through its own further inquiry, investigation, the Plaintiff states that things continued to go not well as they should be and thus it was forced to on the 23rd day of September 2011 to write to both the Defendant bank and the Ministry of Local Government that actually the bid bond guarantee which had been confirmed to have been issued to it was not the one it had submitted to the Ministry of Local Government but that it was taken aback when on the 29th day of September 2011, the Permanent Secretary of the Ministry of Local Government informed it that arising from further investigations with the Defendant bank two contradicting bid bonds had been found sealed together with the bid of the Plaintiff for the construction of Lira market resulting in its being disqualified from the procurement process. The disqualification devastated the Plaintiff who even halted its pursuit of the administrative review process it had commenced even though the bidding process was still at stage two which was the stage of bid evaluation for commercial and technical eligibility for the performance of the contract. The disqualification aggrieved the Plaintiff so much that it sought legal redress against the Defendant bank because it

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believed that its disqualification arose as a direct result of the Defendant's breach of its banker/customer fiduciary obligation when it denied ever issuing the Plaintiff with any bid bond guarantee for the contract to construct the Lira market. The Plaintiff thus filed this suit in which it claims that having missed out on the bidding process for the construction of the market it lost of both financially in terms of loss for prospective profits to the tune of Uganda Shillings Six Billion Two Hundred Million Only (Ug Shs 6,200,000,000/-) as well as Uganda Shillings Eight Million One Hundred Only (Ug Shs 80,100,000/-) which was the cost of processing the bid. That the quantifiable loss was in addition to its losing its business reputation and as well as the very locus to challenge the procurement process before the contract for the construction of the market was awarded. As a result the Plaintiff seeking from court orders against the Defendant for compensation for the losses it incurred by way of special, general and exemplary damages.

The Defendant denies any responsibility for the non selection of the Plaintiff as the successful bidder for the construction of Lira Market even if it admits that indeed the Plaintiff was its customer with an operational account. It goes on to state that though the Plaintiff approached it to avail it with an unsecured bid bond guarantee for the construction of Lira Market did carry out an evaluation of the Plaintiff's application but found that the Plaintiff's request could not meet the set criteria of the bank for the issuance of such an unsecured facility given the magnitude of the project for which the bid bond guarantee was requested and so it advised the Plaintiff to provide a security in form of a land title to secure the facility requested but the Plaintiff did not do so and so the Defendant to declined to grant the same due to the Plaintiff's apparent lack of sufficient security. But that it was later extremely shocked to learn that the Plaintiff had obtained two separate bid bond guarantee documents Number EBL/1002/BBG/000/24610/SM and Number EBL/1002/BBG/1000/16311/SM which had been found in the Plaintiff's sealed bid

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at the Ministry of Local Government for the contract for the construction of Lira Market yet those documents had not been issued by it even though both originated from it yet it had declined to grant them but that after investigations it was found out that the Plaintiff and its directors had connived with one of its employee called Stella Mutumba who had issued the bid bonds together with several other documents to the Plaintiff without its authority yet when with the Plaintiff subsequently submitted the same to the Ministry of Local Government in support of its bid and upon inquiry and its denying them, the Plaintiff's bid were found to be unresponsive but the Plaintiff upon being disqualified embarked on a frenzy of accusations against officials of the Ministry of Local Government alleging corruption in the whole procurement process which in the view of the defendant were uncalled for and unqualified. The above summarises the facts of this case arising from the Plaintiff lost bid to secure the contract for construction of Lira Market.

2. Issues for determination of the dispute between the parties before court:

Preceding the trial of this matter, the parties herein filed a joint scheduling memorandum on the 14th day of November, 2013 wherein issues set out for the determination of the dispute between them were set out as follows.

- a) Whether the defendant issued bid bond guarantee number EBL/1002/BBG/1000/16311/SM.
- b) Whether the plaintiff obtained a bid bond guarantee number EBL/1002/BBG/1000/16311/SM by fraud.
- c) Whether the defendant is liable for the plaintiff's loss of the contract.
- d) Remedies available.

For the resolution of this dispute at hand, the court adopted those issues which are discussed and resolved as below.

3. Preliminary.

As is the case with civil matters, the burden of proof lies with the plaintiff to prove its case on a convincing balance of probabilities. The defendant may not even state anything but may offer rebuttal which if not countered may scuttle the whole case of a plaintiff. In this instant matter the Plaintiff states it failed to secure a contract for the construction of Lira market as a result of the disowning of a bid bond guarantee by the Defendant yet according to the Plaintiff it was the Defendant who issued the bid bond guarantee and so by denying that it issued them the Defendant breached its fiduciary relationship with the Plaintiff who was its customer.

4. Whether the Defendant issued bid bond guarantee number EBL/ 1002 /BBG / 1000/ 16311 / SM:

From the evidence on record it is stated that the Ministry of Local Government placed specific procurement notice in the New Vision newspaper of the 4th day February, 2011 inviting interested parties to place bids for the construction of several markets among which was the one of Lira Municipality Central Market. The copy of the notice is on record as Exhibit P.Exh.1. My perusal of the said exhibit show that among the many of the requirements indicated in it is one which requires bidders who intend to participate in the bidding process to have their bids eligible for consideration was to accompany it's the bid application with bid bond guarantee of the value of Uganda Shillings Five Hundred Million Only (Ug. Shs 500,000,000/-. The Plaintiff Company was one of those entities who saw the bid notice and got interested and actually responded to it for Jim Musinguzi who testified as PW1 and who is a director in the Plaintiff Company confirmed so. Mr. Musinguzi testified further that in to ensure that his company's bid complied

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with the requirements in the bid notice, his company on the 4th day of May 2011 applied for an unsecured bid bond security guarantee worth Uganda Shillings Five Hundred Million Only (Ug. Shs 500,000,000/-) from the Defendant bank vide a letter exhibited in court as P. Exh 3 with the application on the 20th day May, 2011 being reduced into a bank bid guarantee application form generated by the Defendant bank as Exhibit P. Exh 4 and that on the same date the Defendant bank made an offer as indicated by Exhibit P.Ex 5 to the Plaintiff in respect of the desired bank guarantee in favour of the Ministry of Local Government for consideration of a commission to be charged as per the bank tariff on such facility and the Plaintiff Company did accept the offer vide Exhibit P.Ex 6. Thus as a result a bid bond guarantee Number EBL/1002/BBG/1000/16311/SM (P.Ex 7) was issued to the Plaintiff in favour of the Ministry of Local Government for the construction of Lira Market which was to be undertaken under the procurement process number MOLG/AFDB/MATIO-1/WKS/LOT-01. The guarantee was said to have been signed by two of the defendant bank officials Wambui Maina and Apollo Njoroge being the a Legal Manager and Executive Director of the Defendant bank respectively and in accordance with the defendant's bank procedure, the Plaintiff's account was eventually charged for Uganda Shillings Five Million Only (Ug. Shs 5,000,000/-) being the bank's chargeable commission for the facility which charge was reflected in the Plaintiff's statement of account for the period 2nd January 2011 to 15th September 2012(Exhibit P.Ex 8) in addition to the Plaintiff being charged another Uganda Shillings Fifty Thousand Only (Ug.shs 50,000/-) for a comfort letter (P.Ex 9). That upon all these transactions being carried out a bank guarantee No. BBG/1000/16311 was issued in the favour of the Plaintiff for onward submission to the Ministry of Local Government to accompany the Plaintiff's bid. That was the process as stated by PW1 with the said witness insisting that the Plaintiff properly got the unsecured bid bond for the stated

amount in question based on the facility charge commission of 1% of the facility required. The fact of the facility commission percentage charge was not disputed by the Defendant's bank Apollo Njoroge Nderitu DW1 who as the bank's Executive Director confirmed that this was the policy of the bank prevailing at that time but Apollo Njoroge Nderitu denied grant of bid guarantee as he stated that the Plaintiff could not have obtained the bid bond guarantee for the amount in question at that time of the transaction for an unsecured facility since at that time before the end of the year 2012 the limit for an unsecured facility was a of Shs 35,000,000/- which was slightly changed to Ug. Shs. 50,000,000/- even though by 2014 when he testified the amount had been increased to Uganda Shillings One Hundred Fifty Million Only (Ug. Shs 150,000,000/-). This position was echoed by another defence witness called Abel Musiime. The perusal of the bid bond guarantee shows that it has on it the date of 20th day of May 2011 and is unsecured which seem to contrast with the view of PW1 who testified that he got the said bid bond for the amount on it yet we are told by Njoroge that at that particular time the limit for unsecured bid bond was Shs 35,000,000/-. The said Njoroge doubted the authenticity of the said document for he insisted that he did not authorize any amount beyond the limit further testifying that he met PW1 personally and told him in no uncertain terms that the bank would not issue the Plaintiff Company with a bid bond of over Ug. Shs 50,000,000/- without security. PW1 however denies ever meeting DW1 at any one stage insisting that he dealt with another officer of the bank called Stella Mutumba who actually gave him an already signed bid bond guarantee.

The issue which I am confronted with here would therefore be to unpackage the evidence adduced on record to determine as to whether the bid bond guarantee was indeed issued by the bank. On the one hand the Plaintiff Company through PW1 insists that it received the said document from an official of the Defendant while the defendant bank's other officials denies the

same. The fact of the matter is that the bank brought witnesses that is DW1 and DW2 in court to testify to those facts while the Plaintiff company did not produce the bank official called Stella Mutumba whom it alluded gave PW1 the signed document. By not doing so, the plaintiff watered down its case for it had the duty to rebut the defendant's testimony in that respect. This leaves a big question mark in my mind of whether the said document did in fact come out from the bank even if the Plaintiff through PW1 tried to impute previous grant of such facilities by the defendant bank for over bid guarantees of Shs. 50,000,000/=. In my view and as is required, it was imperative for the plaintiff produce Stella Mutumba to verify this position to enable the court put the necessary weight to the evidence in that regard which had been adduced in court but alas this was not to be leaving a big hole in the plaintiff's testimony on as to how it obtained such a facility which senior officials of the Defendant Bank disassociated themselves of yet the plaintiff Company wanted the court to believe that indeed it got the same from the defendant and they were properly authorised by the very bank officials who came to court.

The conclusion which I make from this latent gap in the sequencing of the evidence of the Plaintiff company is that of doubt for even ocular observation of the said documents show that even on its face it had issues as the type fonts and sizes on its various pages evidently show that they differ and thus could have resulted from manipulations than for a document properly issued in the normal course of business. I am thus tended to believe that the facility which the plaintiff adduced in court and testifying to as having obtained from the bank which was denied does not satisfy me as having come from the bank through lawful means. I am thus constrained to resolve this issue in the negative.

5. On whether the defendant issued bid bond guarantee No.

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This issue like the previous one similarly collapses for it clear that there was no proof adduced by the plaintiff to show how it obtained the same other than outside the normal bank process. The bid bond guarantee in issue was stated to have been signed by Wambui Maina who testified as DW2 and she gave an unchallenged evidence to the effect that as far as she was concerned by the 20th May 2011 the date when the guarantee was said to have been issued she had long since resigned her duties as Manager Legal Service of the defendant bank and had even returned to her home country of Kenya way back on the 5th day of May 2011. Her testimony was unshaken even in cross-examination and she did in fact show court her letter of resignation Exhibit D.Exh 7 and her passport Exhibit D.Exh. 10 which clearly indicated that she had left the Defendant Bank by the 5th April 2011 and had even exited Uganda through Entebbe Airport by the 5th day of May 2011. She further stated that for the months of May, June and the other months that followed shortly thereafter she never came back to Uganda thus challenging the Plaintiff to prove her otherwise which unfortunately the Plaintiff failed to do so. This piece of evidence left a big dent in the Plaintiff's claim that this witness was one of those who signed the bid bond guarantee in question for even this same witness denied the signature on it when she categorically stated in court and I quote;

“I know my signature. I did not sign the document as I had no capacity to sign as I was outside the country. It is not mine in the context it was used”

She was very was emphatic throughout cross-examination that she never signed the impugned guarantee and now if she never signed the said document at the time in question how come that the Plaintiff got hold of the same. The likely answer would come from the testimony of Mr. Apollo Njoroge (DW1) who testified that as far as he was concerned he declined to issue the guarantee in question on the basis that the Plaintiff had failed to avail substantial security

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sufficient to secure the bid bond guarantee amount thus raising the likely scenario that the his signature and that of DW2 were forged for the document in question to be issued. If that is the case, then it was the duty of the plaintiff to prove otherwise that indeed these two witnesses were telling lies in court by adducing showing that in fact they did sign the document in question for the court to believe otherwise for on the issue of whether the plaintiff obtained the bid bond guarantee number EBL/1002/BBG/1000/16311/SM other than through lawful means but fraudulently the defendant drew the attention of this court to the case of **Fredrick Zaabwe v Orient Bank Ltd & 5 Others SCCA No. 4 of 2006** where Justice Katureebe JSC defined fraud as a willful act with a specific intent to deceive, cheat for the purpose of causing financial loss to another and financial gain to oneself. When this holding is related to the instant case and taking into account that the defendant denied ever issuing the said document to the plaintiff then the likely conclusion would be that it was issued through fraudulent means with the instances of such fraud being repeatedly echoed in paragraphs 4 and 5 of the defendant's written statement of defence that the plaintiff colluded with one of its employees the very Stella Mutumba whom the plaintiff state provided it with the documents raising clear doubts as to how the said Mutumba could have secured such documents without the consent of her superiors in the bank since in cross-examination DW1 maintained that the entire bid bond guarantee transaction was fraudulent for it was the duty of the plaintiff to prove otherwise as it was not for the defence to call any better witness than the person who was said to have signed the document. In my view, the plaintiff had the duty to prove that this witness was telling court lies when he stated that he did not sign the document in question by adducing other convincing evidence to negate this witness assertion as it was the plaintiff who wished court to rely on the said document as being genuine for the testimony of DW1's raises doubt to the assertion by the plaintiff that he signed the

document which assertion would be taken as the truth in the absence of the plaintiff bringing in evidence otherwise.

To highlight this point further during cross examination, DW1 further confirmed that the entire transaction was fraudulently and solely handled by Stella Mutumba from the beginning to end with Abel Musiime DW3 the current Head of Trade Finance in the defendant bank testifying as to the procedure the defendant bank uses for issuing a bid bond guarantee which he confirmed as being complex and involving many departments within the bank with no single person in the bank able to complete such a transaction without the others being involved all through. I am in agreement with the defence that all the documents which were said to have originated from defendant Bank were either issued fraudulently and / or without the knowledge or authority of the bank for the defendant called Mr. Apollo Njoroge, who is the Executive Director and the Head of Business with the defendant whose testimony was to the fact that he was aware of the transaction to secure the bid bond stated that the plaintiff's request was assessed and found to be wanting with the bank requiring security in form of a land title to be able to issue the same given the amounts that was involved and the magnitude and complexity of the contract which the plaintiff was competing for with this witness further stating the bank's issuing of the guarantee would place the bank to a great risk if no proper procedures were followed and adequate security obtained. This witness was very categorical that he declined to issue the guarantee since the plaintiff company did not qualify for the same yet PW1 wanted the court to believe that the bank could agree to take on such a very big risk without any security at all. This I believe was a calculated lie to mislead court as it is clear to me that no credible banker could extend a facility of such magnitude without ensuring that its position was secured. Further PW1 stated that the plaintiff applied for the guarantee in issue on the 4th May 2011. He relied on Exhibit P.Ex 3 to

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support this contention. Annexure P.Ex 3 does not show that it was ever submitted and received by the Bank. Also PW1 relied on P.Ex 4 which he confirmed to have been signed by the Plaintiff Company on the 20th May 2011 but when this document is properly scrutinized it can be seen that the logo on P.Ex.4 which is said to be that of the Defendant Bank was completely different from that on P.Exh.5 and this difference was even conceded to by PW1 who however maintained that the two documents were issued by the Defendant Bank. These anomalies in my view can only point to the fact that the documents were not originating from the defendant and could possibly have been forged.

The other point to note is that during his testimony PW1 stated that the deadline for submission of the bid was the 20th day of May 2011 and that the time for opening the bids was in fact 10:30 or 11:00 a.m. yet it is evident from his testimony that Plaintiff the application was transformed into an application for such a guarantee on that very day of the 20th May 2011 as Exhibit P. Exh.4 show. I find it impossible to believe that the Defendant Bank could granted the offer on the same day with the Plaintiff accepting the offer on that day and the guarantee granted immediately the same as seen from Exhibit P.Exh.7. This would be out of the ordinary for it is notable that banks are normally very cautious in taking such grant and would in the normal course of business ensure that appropriate scrutiny is put in place to avoid any possible risk , a fact which is confirmed by the testimony of Mr. Musiime Abel DW3 who elaborated in detail of how such a procedure and final decision was arrived at and I take liberty to reproduce it hereunder for he had this to say;

“...in terms of the internal procedures of the Bank, secured bid bond guarantee are handled in the following manner;

- a) *A customer's application is received at the Branch where the customer's account is domiciled.*
- b) *The Branch forwards the application to head office Credit Risk Department.*
- c) *An officer in the credit department is assigned the customer's file and that officer prepares a sanction sheet. A sanction sheet entails the customer's brief background, the request, and customer's financials which include the Bank statement, audited books of accounts, cash flow, the projected works, company profile, current and previous works, and track record, among others.*
- d) *The Head office Credit committee convenes to discuss the veracity of the transaction considering the strength and weakness in the contemplated transaction.*
- e) *If the transaction falls within the mandate of the Head Office Credit committee, which is up to a maximum of UGX 100,000,000/-, the committee will approve or decline.*
- f) *For any transaction above UGX 100,000,000/- (Uganda Shillings One Hundred Million) the Head Office Credit Committee will only recommend to the Executive Credit Committee for further consideration.*
- g) *It is imperative to note that for secured facilities once it's approved, the Bank undertakes extensive due diligence on the agreed security (title) before the guarantee are issued. This involves confirming the authenticity of the title with lands office and registration of the Bank's mortgage on the title to secure the amount to be guaranteed..."*

When this procedure is considered in light of the testimony of PW1, it would appear inconceivable that the Defendant Bank could have received the Plaintiff's application on the same day, evaluated it, issued a comfort letter on the same day, issued the offer to the Plaintiff's

company and the guarantee on the same day and in a matter of minutes for the Plaintiff to submission the same by 10:00 am (the time for opening the bids) on the same day. That would clearly be an impossible task with my only inference to the testimony of PW1 in respect of the process elaborated above to be that the plaintiff of secured the guarantee outside the defendants normal procedure and the suspicion of incidence of forgery of the same cannot be overruled out taking into account that no rebuttal evidence was brought to show otherwise.

The other thing to note is that it appears to me that the Plaintiff did not take its burden proving its case to the level required seriously for it had the opportunity to prove its contention as it is trite he who alleges must prove but merely insisted that it was a customer of the bank who secured genuine documents which were not proved to have come from the bank. The fact of being a bank customer entails the duty to ensure that proper documents are secured from authorised bank officials and where such authorised bank officials such as ids the case here are denying having issued them then it was the duty of the plaintiff to produce incontrovertible evidence to prove that those witnesses were telling not telling the truth in court.

For as it stands now, DW1 who was the senior bank official emphatically denied ever offering the facility and DW2 categorically testified to the fact that she was no longer an employee of the defendant at the time when the said facility was said to have been issued thus turning the table against the plaintiff to prove otherwise with the failure of the plaintiff to do so raising latent doubt in my mind as to the authenticity and origin of the document in question and how it was obtained making it doubtful in terms of evidential value to prove the point of the plaintiff.

I am therefore constrained to resolve this issue in the negative as it has not been proved to the satisfaction of this court that the Plaintiff procured the bid bond guarantee not by ordinary way of business but possibly through fraud.

6. Whether the defendant is liable for the plaintiff's loss of the contract:

Having found in the two preceding issues that the bid bond guarantee did not originate from the defendant bank, I would be constrained to resolve this instant issue summarily but suffice to point out that Jim Musinguzi (PW1) testified to the fact that on the 29th September 2011 he was informed by letter Exhibit P. Exh17 which came from the Permanent Secretary of the Ministry of Local Government that the defendant bank had denied ever issuing the bid bond guarantee in issue to the plaintiff with the said letter accusing the plaintiff company of having submitted fraudulent documents and was copied to several person of both political and technical authority including the Inspector General of Government, the Inspector General of Police, the Executive Director, PPDA, the Country Representative African Development Bank and the Managing Director, Equity Bank Ltd. The said letter was written when the procurement process had been halted by the PPDA due to the Administrative review proceedings which had earlier been instituted by the plaintiff as P.Exh.14 shows. This means that at the time, the contract had not been awarded to any of the bidders as the process had been halted for Nyangoma Yerusa DW4 the Head of Procurement at the Ministry of Local Government testified that the plaintiff company was disqualified at stage two of the evaluation of bids which she 'termed' as the technical level of evaluation called a "***detailed evaluation to determine the commercial and technical responsiveness of the eligible and compliant bids***" with the entire evaluation of other bids having been concluded by June 2011. It is therefore evident from the above testimony that stage two entailed evaluation on both commercial and technical eligibility and not only the

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technical eligibility of the bidders meaning that for all intents and purposes by 29th September 2011 the plaintiff had already been disqualified on technical grounds as well as commercial eligibility following the defendant's letter to the Ministry denying the plaintiff's bid bond guarantee P. Exh. 16 for the defendant bank's response to the Ministry's inquiries fundamentally and fatally destroyed the plaintiff's right to legitimately challenge the procurement process before the contract could be awarded. The Plaintiff cannot therefore put the liability of its having made financial losses onto the defendant as it had a fraudulent bid bond guarantee in the first place. The plaintiff in fact failed to secure the contract due to its apparent inability to demonstrate that it had the requisite experience and / or track record in successful undertaking projects of the nature that was the subject of the bidding process. It showed no technical ability to undertake the project and had no bid 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 instant procurement and that the process followed these to the letter the evaluation criteria and methodology of Technical Compliance Section in line with Instruction to Bidders Evaluation and Qualification Criteria. DW4 confirmed to court that under that the plaintiff's bid was accompanied by a bid security document issued by Equity Bank Uganda Limited to the tune of Ug. Shs. 500, 000,000 among other documents and that the Ministry of Local Government considered the all the documents submitted by the Plaintiff including the bid bond guarantee from Equity Bank and on their strength then the plaintiff passed the preliminary stage of the procurement but that this position after stage two of the process which involved a detailed evaluation to determine the commercial and technical responsiveness of the eligible and compliant bids where a bidder had to satisfy it had in at least two (2) contracts within the last five (5) years carried out a contract each for the

value of at least Three million US Dollars (USD 3,000,000) that had been successful completed and that are similar to the proposed works.

With the Plaintiff 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 Seventy Two Million, Six Hundred Sixty Seven Thousand and Seventy Six).
- b) Construction of a 5-storied building at Sir Apollo Kagwa Road in October 2009 Valued at 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 Plaintiff Company was accordingly disqualified for lack of minimum experience and upon examination of the documents submitted by the Plaintiff; the Ministry of Local Government concluded that the Plaintiff lacked the technical capacity and ability to successfully build the said market thus the plaintiff was disqualified and this evidence was never challenged by the Plaintiff. From this, it is clear to me that there is no nexus between the decision to disqualify the plaintiff and the action or otherwise of the defendants as the Plaintiff company had applied for a job which it had no capacity, experience and track record to undertake and was therefore disqualified technically and the defendant bank cannot be held liable for its disqualification even if the bank had properly

issued to the Plaintiff the stated bid guarantee. As even the Plaintiff Company itself sought to challenge the circumstances under which its bid was disqualified in a letter when it state that;

“...our bid was the lowest priced bid...however to our disappointment, it was not considered...the reasons given to declare our bid none responsive do not amount to the government loosing UGX 1.7 Billion...our bid was declared non responsive and the evaluation reports changed only after we failed to raise a deposit of UGX 500 Million...”

And since the Plaintiff had been disqualified from the procurement by the 31st August 2011 long before the Defendant wrote to the Ministry on the 28th September 2011 for failure to meet the criteria set by African Development Bank then its disqualification had nothing to do with even the defendant bank documents even if they were disowned for the bid bond security would not have saved the plaintiff company for it had already been disqualified due to lack of experience, capacity and technical ability to perform the contract in question.

Also the issue of Administrative review was not applicable to this procurement as there were set procedures of challenging the decision of the Government which was not followed by the Plaintiff if the evidence of DW4 is to be taken into account for she confirmed that the Ministry received PPDA's letter instructing the Ministry to halt the procurement process and conduct an administrative review of the procurement process but the Ministry informed PPDA that administrative review was not applicable since the bid process was governed by African Development Bank rules in a letter dated 14th September 2011. (Annexture F) and that the Ministry accordingly refunded the administrative review fees of Ug. Shs. 2,500,000 to the plaintiff. with ADB finding that none of its procedure had been flouted and thus gave granted a No Objection to the Ministry to go ahead to secure a contractor for the market which the

Ministry went ahead and did so with even the procurement being subjected to reviewed by the Inspector General of Government following a complaint raised by the Plaintiff on the 26th August 2011 and the I.G.G found no fault with the procurement process thus leaving the plaintiff's contention that it would have been awarded the contract if administrative review had been conducted to be speculative and untenable in law and so the defendant cannot be held liable for its failure to have had a track record which would have guaranteed its consideration for the award of the contract.

From the above, I find that there was no iota of evidence linking the defendant to the failure of the plaintiff to secure the contract in question. I also answer this issue in the negative.

Issue 4: Remedies available:

I have found that the plaintiff has not proved its case against the defendant and its claim as indicated in paragraph 3, 5 and 6 of the plaint sought for recovery of **Shs 6,200,000,000/- (Uganda shillings six billion two hundred million only)** in lost profits, general and exemplary damages, loss of **Shs 80,100,000/- (Uganda shillings eight million one hundred thousand only)** being the cost of preparing the bid are not only untenable as were not proven and thus would have no remedy availed to it as it is not entitled to any in any event for I am of the firm view that there was no nexus between the government's decision to disqualify the plaintiff and the action or omissions of the Defendant. The Plaintiff failed to meet the criteria set by African Development Bank as it lacked the requisite capacity and ability to build Lira Central Market with the Plaintiff's attempt to seek for administrative review having been dismissed by the Ministry of Local Government as inapplicable and the plaintiff's whole contention that he would have succeeded and be awarded the contract for market was in my view speculative and I must I

condemn in the strongest terms the plaintiff's course of action of having known for sure that it was pursuing a matter which they knew was not only in the first place was tainted with corruption intent to put the defendant in bad light for their failure to openly compete for a contract which they were not capable of undertaking but resorted to underhand means to put other entities in bad light. This kind of nerve cannot and should not be allowed at all as such kind of behavior borders to criminality which should subject the plaintiff's directors to criminal investigations for fraudulent behavior and a company like the plaintiff should not be allowed to operate at all where it behaves like the proverbial ostrich burying its head yet leaving out for all to see its incapacity yet putting innocent persons under an unnecessary scrutiny at the same time. This to me is classical blackmail which ought to be punished by concerned authorities.

7. Orders:

From my finding above on all the issues, I find that the plaintiff company has not proven its case on a balance of probability and so in the circumstances I am constrained to dismiss this suit with costs to the Defendant.

Henry Peter Adonyo

Judge

21: Judgment in relations to claims on the basis of bid bond guarantee by Hon. Justice Henry Peter Adonyo: February, 2015

16th February, 2015