Avic Intl Beijing (E.A.) Co. Limited v Mellow Traders Auctioneers & another (Civil Appeal 30 of 2020) [2024] KEHC 9286 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9286 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 30 OF 2020

BM MUSYOKI, J

JULY 31, 2024

BETWEEN

AVIC INTL BEIJING (E.A.) CO. LIMITED ..... APPELLANT

AND

MELLOW TRADERS AUCTIONEERS ..... 1ST RESPONDENT

UNTOUCH SECURITY SERVICES LIMITED ..... 2ND RESPONDENT

(Being an appeal from judgement and decree of Honourable Bernard Kasavuli PM dated 9-03-2020 in Mavoko Chief Magistrate Court civil case no. 141 of 2017)

JUDGMENT

1. The appellant had in Mavoko Chief Magistrate's case number 141 of 2017 sued the respondents asking for the following orders;
    a. An order to stop the defendants from interfering, disposing and dealing with the plaintiff's movable property.
    b. A permanent injunction restraining the respondents from dealing, disposing or interfering with the appellant's immovable property.
    c. Compensation of losses valued at Kshs 697,500.00 and interest thereof from commencement of the suit to its conclusion.
    d. Any other remedy/reliefer the court deems just in the circumstances.
    e. Costs of the suit.
2. The above prayers were as per amended plaint dated 3-08-2018. The suit was based on pleaded facts that the appellant had contracted the 2nd respondent who was a security company to provide security

over its premises and due to negligence of the 2nd respondent, there occurred a theft in the appellant's premises. It was alleged that the 2nd respondent was negligent in discharge of its contractual obligations as a result of which the appellant lost assets valued at Kshs 697,500.00 through theft. The 1st respondent was sued for having demanded payment of money owed by the appellant to the 2nd respondent as a result of the same contract.

3. The respondents filed their defence and denied liability. The 1st respondent stated that it was non-suited and the suit against it was misconceived while the 1st respondent admitted the existence of the contract but denied negligence. The 2nd respondent counterclaimed for Kshs 377,000.00 which was made up of Kshs 317,000.00 being for service rendered and not paid and Kshs 60,000.00 being payment for one month in lieu of notice for termination of the contract. After full hearing, the honourable magistrate dismissed the appellant's claim and allowed the 2nd respondent's counterclaim. This is the judgment which sparked this appeal.

4. This is a first appeal and as such I am called upon to re-examine and re-evaluate the evidence on record and come to my own independent conclusion but I should bear in mind that I did not have the advantage of taking the evidence first hand or seeing the demeanour of the witnesses. This has been held in several cases including *Jackson Kaio Kivuva v Penina Wanjiru Muchene* [2019] eKLR in which Justice EC Mwita held that;

> 'This being a first appeal, parties are entitled to and expect re-hearing, re-evaluation and re-consideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of a re-trial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusion, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that"

5. The appellant called one witness known as Dennis Muchiri who described himself as legal officer of the appellant. He adopted his witness statement dated 7-11-2018. He told the court that on 22-07-2016, the appellant entered into an agreement with the 2nd respondent where the 2nd respondent was to provide security services to the appellant in 24 hours basis. The 2nd respondent was to deploy two guards at night and one guard during the day at costs of Kshs 15,000.00 per month per guard. He stated that on 11-10-2016, there was an incident of theft where several tyre tubes and batteries valued at Kshs 273,450.00 were stolen. Again on 30-11-2018, there was another incident where two tippers valued at Kshs 17,000,000.00 were stolen. These two incidents were reported to the police.

6. He added that the appellant sought for reinforcement of administration police to curb the theft but the 2nd respondent continued being negligent and other items were stolen on various occasions during the day when the security guards were on duty and a further theft took place on 12-12-2017 where items worth Kshs 424,050.00 were stolen. Again on 10-01-20217, another theft occurred which resulted to unilateral withdrawal of the 2nd respondent's services due to breach of the terms of the contract. The witness told the court that they terminated the contract since the 2nd respondent did not compensate them for the loss as per the contract. The witness added that it recovered one tipper while they were compensated for the other tipper by their insurers. He said that the appellant was now claiming a sum of Kshs 697,500/= being the cost of the lost batteries and other spare parts.

7. The witness added that the appellant commenced investigations on the theft and some of the 2nd respondent's guards were implicated for the theft but the 2nd respondent failed to produce them. He highlighted clause 5 of the contract and produced the following exhibits;

    1. inventory of motor vehicles tyres worth Kshs 31,050.00.

2. inventory for the stolen items as exhibit 2.

3. Importation documents.

4. Police abstract for the theft.

5. Interpol report dated 13-12-2016.

8. According to this witness, the theft could be attributed to the 2nd respondent's guards because when they brought the police for the night duty, no theft was reported at night. Instead, the incidents shifted to daytime. It was for this reason that the appellant lost faith in the 2nd respondent and terminated the contract after which the 2nd respondent instructed the 1st respondent to recover the debt. He denied that they owed the 2nd respondent anything as the 2nd respondent did not offer services it was contracted to offer. He ended his evidence in chief by stating that the insurance refused to pay for the lost spare parts.

9. In cross examination, he said that their insurance cover did not absorb the 2nd respondent from its liability on negligence. He maintained that the customs documents he produced were proof that the items were stolen in the factory. He added that the items were within their premises which had a perimeter wall with secured fence and that the guards did not raise the issue with the fence. He also stated that there were no insecurity issues indicated by the 2nd respondent.

10. The 1st respondent did not testify in the matter. The 2nd respondent called one Josephat Omondi Wagumba. He stated that he was the operations manager of the 2nd respondent. He adopted his statement dated 11-04-2017. He confirmed that on 22-07-2016, the parties entered into an agreement as narrated by the appellant. Payments were to be made on 5th day of the month. In early month of August, the appellant started preparation of ground for construction with some of its operations running for 24 hours but towards the end of August, the appellant introduced five new brand trucks on the site without consulting the 2nd respondent and the 2nd respondent only realised this from a report filed by the guards.

11. According to this witness, the 2nd respondent was not able to secure the new trucks because of which he met a representative of the appellant who told him that it was a temporary measure. Upon discussions between the appellant and 2nd respondent and evaluation of the security status, the 2nd respondent made some recommendations for improvement of the security. This was among other rafts of changes. The witness said that he also wrote a further report to the appellant on 21-09-2016 after another meeting after the appellant brought more trucks against his recommendations. The 2nd respondent also recommended that the perimeter wall be reinforced with an electric fence and razor wire and a backup alarm be installed and the number of guards be increased. He also asked for provision of lighting because the area had no security lights.

12. The defence witness confirmed that there was a burglary on 11-10-2016 and some property was stolen even as the construction was going on. The incident was reported to the police and the guards gave their reports. According to him, the plaintiff did not claim any compensation because it knew the status of the ground and the 2nd respondent's recommendations. The appellant promised to work on the 2nd respondent's recommendations but did not. The witness added that the appellant continued to bring other trucks on the site to the point that it was not possible to tell the number of trucks on site as some were delivered in containers as chassis only and assembled on site with no one in charge. The witness said that the appellant did not furnish the 2nd respondent with a manifest of the items and goods in the site.

13. On 28-11-2016, the 2nd respondent's supervisor went to the site at 9 pm but found that the guards were not on site neither the administration police. When he went round, he found the administration police outside the gate and the gate was not locked and when he went in, he found one of the guard's shoes at the gate which made him suspect foul play. The witness proceeded to the site and could not detect anything missing other than the missing guards and due to the nature of the site, things were thrown all over and were different stages of completion. The following morning, the appellant established that two trucks were missing. According to the witness, the appellant could also not tell how many prime movers, plant equipment, machines or tyres were on site.

14. The witness stated further that the 2nd respondent was at all times willing to cooperate with the police towards recovery of any goods lost but the appellant frustrated the efforts by lack of communication despite several meetings including the reports made to it. It was further testimony of this witness that in January 2017, the appellant's representative asked the 2nd respondent's guards to leave the premises and terminated the contract. He added that the 2nd respondent had applied for four guards each for the four months and requested additional guards during Christmas holiday as agreed.

15. The 2nd respondent claimed Kshs 317,000/= for the service and Kshs 60,000.00 being payment in lieu of notice. He added that the 2nd respondent had issued invoices but the appellant had failed to pay. The witness asked the court for judgement for the said sums. He added that the 2nd respondent was not responsible for the added items unless there was another contract.

16. The record shows that the defence witness produced the following exhibits;

    a. security contract as defence exhibit 1;

    b. email dated 21-09-2016 as exhibit 3;

    c. email dated 16-09-2016 as exhibit 4;

    d. invoices numbers 523, 522, 507, 490 and statement dated 30-01-2017 as exhibit 5;

    e. and demand letters dated 12-01-2017 and 31-01-2017 as exhibit 6.

17. It is not clear to this court what was the defence's exhibit 2. In cross examination by Mr. Kitindio, the witness stated that in the contract, there was no mention of two premises. He confirmed that at day time, they had one guard and two guards at night. He said that they were hired to guard the open yard and admitted that he did not have minutes for the meetings he held with the appellant.

18. From the above and having read the pleadings and submissions of the parties, I have formed a considered opinion that there are three issues for determination in this appeal which are;

    a. Whether the appellant was justified in unilaterally terminating the contract.

    b. Whether the appellant lost goods valued at Kshs 697,500.00 and if so whether the 2nd respondent was responsible for payment for the same.

    c. Whether the 2nd respondent is entitled to Kshs 317,000.00 as claimed in the counter-claim.

19. I have formed the above opinion because it is not disputed that the parties had a contract for provision of the services as pleaded and that the 2nd respondent provided the services from August 2016 to early January 2017. The terms of the contract are also not disputed.

20. I have read through the contract of service dated 22-07-2016. This contract was a simple one with only eleven clauses. The only clause which had a bearing on the manner of termination of the contract was

clauses 3 which provided that 'this agreement shall remain in force but may be terminated by either party in giving one month's notice or payment in lieu.'

21. The appellant did not make any attempt to show that there was any exception to this clear provision. In fact, it admitted through its witness that it unilaterally terminated the contract. There was no correspondence from the appellant showing that it was dissatisfied by the services of the 2nd respondent except for the evidence adduced by the appellant's witnesses. I do understand that this was a security contract which required high level of trust between the parties. However, it appears to me that the appellant freely and voluntarily tied itself to the terms of the contract including the mode of termination. The appellant did not plead any vitiating factor and there was no attempt made by the witnesses to show that any existed. The appellant did not even plead any vitiating factor leave alone attempt to prove. This court cannot re-write a contract for parties unless it is shown that the same was attended by vitiating factors. In *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal held that;

> 'We are alive to the hallowed legal maxim that it is not the business of the Courts to re-write contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.'

22. It is common ground that there were security laps during the period the 2nd respondent was in service. I also note that the 2nd respondent had made several recommendations for beefing up security which went unattended by the appellant. The 2nd respondent's witness testified that instead of attending to the measures recommended for improving security, the appellant added more trucks and spare parts which made the work of the 2nd respondent more difficult. It is on record that the incident of 28-11-2016 was suspected by the 2nd respondent to have been foul play. It may not be known whether the 2nd respondent's guards colluded with the appellant's employees. However, what is clear from the evidence of the 2nd respondent's witness which has not been rebutted is that the ground was overwhelming for the 2nd respondent's guards and that came with more frustrations since the appellant was not cooperating in improving the security situation on the ground.

23. The appellant did not in the court below deny receiving the reports sent to it by the 2nd respondent neither did it show any efforts it made in making the environment safer for everyone. In these circumstances, it is my finding that the security lapses came from both sides and I am unable to blame the 2nd respondent for the incidents of theft.

24. Whereas the appellant may have been justified in being dissatisfied with the services of the 2nd respondent, it was important that it to played its part in ensuring the provision of security was smooth. The fact that a party has enlisted services of security to a contractor does not mean it should abandon or ignore all security laps from its side. Doing so would be frustrating the service provider and in my view, a breach of the contract on its part. It is understandable that the appellant had no obligations to keep the 2nd respondent in service for eternity. However, it would seem that the deal was not good for the appellant in terms mode of termination of the contract but it was a freely executed agreement and this court cannot help the appellant out of it. I do not see the reason for disturbing the lower court's finding that the appellant breached the agreement by failing to give a one month's notice of termination of the contract.

25. The appellant had claimed loss of Kshs 697,500.00 as compensation for the lost spare parts. This could only be considered if indeed there was any negligence proved against the 2nd respondent's guards. The lower court found that the appellant's guards were never charged and convicted of failing to prevent the commission of a felony. I find that position to be wrong in law. It is not a requirement that a person

must to have been found guilty in a criminal trial for a finding of negligence to be returned against them. The standard of proof in criminal cases are higher than in civil negligence.

26. Notwithstanding my above observation on negligence, I find that the appellant did not provide enough evidence to prove that the 2nd respondent's guards were negligent. The 2nd respondent made a raft of recommendations to the appellant for beefing up security which were ignored. There was also the incident where the gates of the appellant's premises were found open leading to the 2nd respondent's supervisor suspect foul play. The appellant did not lead evidence to show whether the 2nd respondent's guards were responsible for opening and closing of gates. Apart from reporting to the police station, the appellant did not show the court that it provided evidence or witnesses to the police which would have made the respondent's guards suspects. The appellant claims that the 2nd respondent failed to avail its guards to record statements. One would be interested to know what efforts the appellant made to have its own employees provide evidence to impute negligence on the part of the 2nd respondent's guards. I cannot see any even in this case leave alone to the police. It was recorded that in the day the trucks were stolen, there were works going on during day and night meaning that the appellant's employees or other contractors were on the ground when the two trucks went missing. With this scenario, I find it hard to attribute negligence on the part of the 2nd respondent.

27. Even if I were wrong on the issue of negligence, I would still not award the sum appellant claimed as compensation. Apart from a list prepared by the appellant, there was nothing produced in the lower court to prove the value of the alleged lost spare parts. All the appellant's exhibit 2 shows is a list of items generated from the appellant's system. The value of the same was not proved. The police abstract produced by the appellant as its exhibit 4 shows that only the two trucks were stolen. The appellant did not produce an abstract for the spare parts. In that case, there is no basis for awarding the amount claimed. I find and hold that the loss which to me is a special damage claim was not proved and the same is declined.

28. The last issue is whether 2nd respondent was entitled to the amount of Kshs 377,000.00 awarded by the lower court. The honourable magistrate found in his judgement that the appellant had implemented some of the recommendations by adding an extra guard. Apart from the entries in the invoices produced by the 2nd respondent, I have not seen any evidence to that effect. Letter dated 16th September which talks of provision of extra guards is not signed and does not have proof that it was delivered or acknowledged. There is no written request of additional guards from the appellant. The only evidence on the number of guards provided is the agreement dated 22-07-2024 which is acknowledged by the parties. I would therefore make no finding that the appellant added a fourth guard to the three provided in the agreement. In my view, there was no basis for entry of judgment for Kshs 60,000.00 as payment in lieu of notice.

29. The respondent's witness told the court that the appellant did not implement their recommendations and actually that is why it became difficult for them to work properly and efficiently. One month's pay for the three guards was Kshs 45,000.00 and this is what the 2nd respondent was entitled to. I therefore disturb the finding for Kshs 60,000.00 and substitute it for Kshs 45,000.00.

30. On the amount of Kshs 317,000.00, I have looked at the statement dated 30-01-2017. I have noted that the appellant did not challenge the statement. It did not indicate or tell the court that it paid any of the sums pleaded. The services were provided at an agreed amount of Kshs 45,000.00 per month. I however note that I have already found that there was no evidence of the additional guards for December 2016. In my opinion, the 2nd respondent should have been paid Kshs 45,000.00 for the same month.

31. I also note that I have already granted the 2nd respondent a sum of Kshs 45,000.00 being payment in lieu of notice. The appellant terminated the contract on 11-01-2017 which means that no services were

provided for the rest of the month. The 2nd respondent therefore can only claim services for 11 days which would translate to Kshs 16,500.00. The above would therefore adjust the debt owed to the 2nd respondent by reducing December dues by Ksh 15,000.00 and January 2017 by Kshs 28,500.00.

32. In conclusion I find that this appeal is not merited and it is dismissed with costs. Owing to the adjustments I have mentioned above, the lower court's judgment is set aside and replaced with judgment of this court for the 2nd respondent against the appellant as follows;

    1. Kshs 273,499.90 for the unpaid contract dues.
    2. Kshs 45,000.00 for payment in lieu of notice.
    3. The above sums shall attract interest at court rate from the time of filing the lower court's suit until payment in full.
    4. The 2nd respondent will have the costs of this appeal recoverable from the appellant.
    5. The 2nd respondent is will have costs in the lower court.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered in;

In presence of Miss Muia holding brief for Mr. Kitindio for the appellant; and

In absence of counsel for the respondent.