



**Intersecurity Services Limited v Stower (Civil Appeal 483 of 2019)
[2022] KEHC 12591 (KLR) (Civ) (25 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 483 OF 2019

JK SERGON, J

AUGUST 25, 2022

BETWEEN

INTERSECURITY SERVICES LIMITED APPELLANT

AND

DAVID STOWER RESPONDENT

*(Being an appeal from part of the judgment of the Honourable Resident Magistrate
S.G. Gitonga (Mrs) delivered on 24th July 2019, in CMCC No.7929 of 2016)*

JUDGMENT

1. The appellant herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated July 20, 2016 and filed on November 21, 2016 and for judgment against the respondent in the following manner:
 - a) The sum of Kshs 819,691/=.
 - b) Costs of this suit.
 - c) Interest on (a) above.
2. The appellant averred in his plaint that they entered into a contract dated March 4, 2012 for the provision of security services at the respondent's property in Nyari Estate, Nairobi, and then went on to deliver the aforementioned services diligently and satisfactorily as agreed, raising invoices on various dates for settlement by the respondent.
3. The appellant pleaded in his plaint that the respondent in total breach of the contract entered into with him, failed to settle all the invoices leaving a balance of Kshs 819,691.99/=.



4. The respondent entered appearance on being served with summons and filed its statement of defence and counterclaim on January 12, 2017 respectively to deny the appellant's claim.
5. The respondent stated that the agreed charges for provision of security services was Kshs 9,000/= per month and that he overpaid the appellant by Kshs 599,000/= for the alleged services and hereby demands a refund of the same.
6. The respondent further stated that on diverse dates between April 18, 2012 and October 9, 2013 while the appellant was providing security services, he lost through theft at night, building materials from the building site and therefore suffered great loss as a result of the appellant's negligence.
7. The respondent averred that he suffered great loss as a result of the appellant's negligence and gave the particulars of the appellant's negligence on paragraph 13 of his statement of defence and counterclaim.
8. The respondent therefore prayed for the appellant's suit to be dismissed with costs and judgment be entered against the appellant for;-
 - a) The sum of Kshs 1,049,500/=
 - b) Costs of this suit
 - c) Interests on (a) and (b) above.
 - d) Any other relief this honourable court may deem fit and just to grant.
9. At the hearing of the suit, appellant relied on the testimony of one (1) witness while the respondent testified together with one more other witness in support of their case. After the full hearing the appellant's suit together with the respondent's counterclaim were dismissed.
10. Being aggrieved by the aforementioned judgment, the appellant sought to challenge the same by way of an appeal. Through his memorandum of appeal dated August 19, 2019 the appellant put in the following grounds:
 - i. That the learned magistrate erred in law and in fact when she found that the summary of invoices raise for security services rendered by the appellant to the respondent were not sufficient evidence of the Kshs 819,691/= owed to the appellant.
 - ii. That the learned magistrate erred in law and in fact when she found that she could not establish how the appellant had arrived to the Kshs 819,691/= owed to it by the respondent.
 - iii. That the learned magistrate erred in law and in fact when she alluded to the fact that the only way to determine how much was owed to the appellant for services rendered was by the production of the invoices raised yet there was an invoice summary already on record.
 - iv. That the learned magistrate erred in law and in fact when she dismissed the appellant's claim in its entirety.
11. This court gave directions to the parties to file written submissions on the appeal. The appellant vide his submissions dated November 23, 2021 argues that the summary of invoices produced by the appellant at trial is sufficient evidence of the monies owed and that the court did find that indeed there was a contract between the appellant and the respondent.
12. The appellant further argues that the appellant produced the contract dated March 4, 2012 which indicates at the time the respondent needed a night guard and that he was required to pay Kshs 17,400/=, later the respondent required a day guard thus doubling the cost of the service he required.



13. The appellant submitted that there is no evidence that the respondent ever protested the invoices raised and if anything a perusal of the customer balance details indicates he made various payments to the appellant albeit never paying the full amount.
14. The appellant further submitted that the customer balance detail produced by them is a true indication of the sums owed by the respondent for the reason that the demand letter issued to him dated April 21, 2015 claimed Kshs 819,691/= which he did not respond but instead raised the issue of loss of site material, however the respondent did not dispute the amounts raised by the appellant.
15. It is the appellant's contention the denial of the sums claimed for by the respondent was an afterthought and an attempt to mislead the court, which unfortunately succeeded, and that the summary of invoices provided a clear picture of the transactions from the amount raised by the appellant, the amount settled by the respondent, as well as the outstanding balances.
16. In reply, the respondent submitted that there was no formal agreement between the parties to the lawsuit; the court-produced document from March 4, 2012, was not signed by the respondent, and there was no proof that the document had been provided to him. The parties may have implied an agreement by their actions.
17. It is the respondent's submissions that since the respondent insists that the agreed-upon amount was Kshs 9,000, the appellant claims that there was an alleged figure payable but has not provided any evidence to support this claim. Additionally, there is no evidence to support the claim that the respondent signed a new contract requiring two guards.
18. The respondent submits that the appellant agrees that the agreement from March 4, 2018 was not signed by the respondent. The appellant further verified that payment claims were made through invoices, but also confirms that the documents were not presented in court.
19. This being a first appellate court, and as required under section 78 of the *Civil Procedure Act*, this court must reassess and re-valuate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. See *Selle v Associated Motor Boat Co Ltd & others* [1968] EA 123).
20. Having considered the four grounds of appeal above, the evidence and submissions presented by both parties before the trial court and the written submissions canvassing this appeal and supporting statutory and case law, in my humble view, the issues for determination in this are: -
 - a) Whether there was a contract of service between the parties?
 - b) Whether the appellant has proved his claim of Kshs 819,691/=
21. On the first issue, the appellant produced a contract agreement between the parties dated March 4, 2012, and the rates mentioned in the document were Kshs 17,400/= which was not signed by the respondent.
22. In this case, since the respondent did not sign the alleged contract, it cannot be stated that its terms represent a legally binding understanding between the parties. The respondent did agree that the appellant firm did, in fact, offer security services and that the appellant company did make certain payments.
23. The respondent also stated that he overpaid the appellant and that he is suing for the destruction of building materials that were in the complex, which he accuses the appellant firm of failing to remove as stipulated in their contract.



24. This clearly shows that a contract existed between the parties, which is inferred from the parties' actions, and that the appellant offered the respondent security services, which is uncontested.
25. From the record, it is also been seen that the respondent paid for the security services even though it was not consistent a fact that the appellant company representative and respondent mentioned during the hearing at the trial court.
26. That there were also email correspondences between the parties implying a relationship between them. I therefore also find that indeed there was a contract of service existed between the parties.
27. In the case of *Taylor v Caldwell* [1863] EB & E 746, 789, the court implied a term that the parties were all the time aware that performance of the contract dependent upon the continued existence of the subject matter. This principle was made into law under the *Sale of Goods Act* 1993.
28. On the second issue, on whether the appellant entitled to the Kshs 819,691/= ,in their evidence, the appellant claimed that they invoiced the respondent at the end of each month, despite the fact that the services reportedly began in March but the bills begin in June and no justification was provided.
29. The customer information was illogical and could not be justified in court for the purported services, and the appellant failed to submit the exact bills it had issued to the respondents to demonstrate to the court how the amount claimed was calculated.
30. Since it is obvious that a summary of a customer detail balance cannot serve as definitive evidence of the amount of money that the respondent owes the appellant, I conclude that the appellant did not established his case on the balance of probabilities against the respondent.
31. The upshot of all the above analysis and evaluation is that I find no merit in the appeal. I accordingly dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF AUGUST, 2022.

JK SERGON

JUDGE

In the presence of:

..... for the appellant.

..... for the respondent.

