



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 492 OF 2013**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....APPLICANT**

**VERSUS**

**TOTAL SECURITY SURVEILLANCE LTD.....RESPONDENT**

**RULING**

1. By Notice of Motion Application dated 27<sup>th</sup> November 2018, pursuant to **sections 1A & 1B Civil Procedure Act Cap 21, Order 2 Rule 15 Civil Procedure Rules, 2010** and all other enabling provisions of the law, the Applicant sought orders;

- a) That this Court strikes out the Defense dated 28<sup>th</sup> January 2014 as filed by the Respondent herein upon *inter partes* hearing.
- b) That Judgment be entered in favor of the Plaintiff in terms of prayers (a), (e), (f), (g), (h) and (i) of the Plaint dated 8<sup>th</sup> November 2013.
- c) That the costs of this application be provided for.

2. The application was based on grounds;

- a) That the Plaintiff/Applicant herein filed a Notice of Motion application dated 8<sup>th</sup> November 2013 seeking orders inter alia that this Court do issue an interim order restraining the Defendant/Respondent whether by itself, employees, servants and/or agents howsoever from unlawfully entering and/or continuing to be within the Plaintiff/Applicant's premises countrywide pending the full hearing and determination of this suit.
- b) That pursuant to the Applicant's application aforesaid the Hon Mabeya, J. on the 18<sup>th</sup> November 2013 delivered a ruling (herein after referred to as the said ruling), which provided that unless the Respondent herein acquires fresh rights from the Applicant herein, its continued entry into the Applicants premises remains unlawful.
- c) That Hon. Mabeya J. issued an order both prohibiting the Respondent herein from entering into the Applicant's premises countrywide and a mandatory order preventing the Respondent from remaining in the said premises.
- d) That the Applicant simultaneously filed a Plaint and the application herein both dated 8<sup>th</sup> November 2013. The reasons wherefore the Plaintiff prayed for judgment under the Plaint against the Defendant herein in terms of paragraph a, b, c, & d have been granted by dint of the ruling aforementioned.
- e) That the Defendant/Respondent filed a defense dated 28<sup>th</sup> January 2014, which was rendered otiose by the said Ruling and is just but a mere denial, does not disclose any reasonable defense, is frivolous and vexatious and such an abuse of the court process.

3. In the supporting affidavit sworn by Charles Orinda Dulo, advocate for the Plaintiff, he deposed that the Defendant/Respondent was awarded **Tender No. KeNHA/ADM/HR/62/2012** which commenced on the 1<sup>st</sup> November 2012 to provide security services to the Plaintiff/Applicant for a period of one year and as such determined on the 31<sup>st</sup> October 2013 by effluxion of time.

4. The Applicant stated that when the contract ended the Defendant/Respondent tendered to have them considered to provide security services for the subsequent year beginning 1<sup>st</sup> November 2013.

5. The Defendant/Respondent notwithstanding the fact that they were not successful in their tender bid for the provision of private security services for the Applicant's offices they failed, refused, and/or neglected to vacate the Plaintiff/Applicant's premises nationwide.
6. The Applicant averred that the Defendant/Respondent on 31<sup>st</sup> October 2013 filed a request for review with the Public Procurement Administration Review Board (hereinafter referred to as the said board) challenging the legality or otherwise of the tendering process for Tender No. KeNHA/749/2013 for the provision of private security services for the Applicants offices.
7. The Applicant stated that the averments in paragraph 3 and 4 of the defense are matters that are already *res judicata* as the court rightly stated in paragraph 13 of the said ruling that;

***“given the nature of the contract and the fact that the Plaintiff is a public institution, I find it unlikely that the same could be extended verbally or by implication as argued by the Defendant. The alleged implication being the provision of service between 2<sup>nd</sup> October 2013 and 31<sup>st</sup> October 2013 cannot hold in view of what I have already stated. In most cases parties to a contract arising from a procurement exercise such as the one in question will vary the contract period in writing.... I find on a prima facie basis, a verbal agreement for the extension of contract cannot suffice.”***

8. The Applicant stated that the averments of the Defendant in paragraph 8 of its defense had already been addressed by the court in the ruling aforesaid where the court in paragraph 16 stated that;

***“...direct procurement is allowed under section 74 of the Public Procurement and Disposal Act, 2005 where there is urgent need for the services and the circumstances for such urgency are unforeseeable. ... the Plaintiff had every right to remedy the gap in the services needed as the contract with the Defendant had elapsed. There is no provision in law that required the Plaintiff to seek the direction of the Public Procurement Oversight Authority (PPOA) in sourcing the 30 day contract with Babs Security, though the PPOA could have offered advice on the situation.”***

9. The Applicant stated that the Notification of Appeal dated 31<sup>st</sup> October 2013 issued by the Public Procurement Administrative Review Board indicated that no contract may be signed between the procuring entity (the Applicant) and the tenderer awarded the contract unless the appeal has been finalized. Marked as **COD2** is a copy of the said notification of appeal.

10. The Applicant averred that the contract between the litigants herein was for a period of one (1) year running from 1<sup>st</sup> November to 31<sup>st</sup> October 2013 a fact of which the court had affirmed in its ruling. Further that it was evident from the letter dated 1<sup>st</sup> November 2013 sent to the Officer Commanding Kilimanjaro Police division that the Plaintiff/Applicant had taken steps to bring to the Respondent's attention that the contract was no longer subsisting. The said letter is marked as **COD3**.

11. The Applicant deposed that the averments in paragraph 13 and 14 of the defense lack merit and are baseless in law; a fact of which the court in the said ruling observed in paragraph 14 by stating that;

***“in a nutshell, I find that on a prima facie basis, the contract having lapsed; the Defendant does not have the right to purport to still offer security services to the Plaintiff. A party cannot force a contractual obligation on an unwilling party where there is no contract in existence.”***

#### **REPLYING AFFIDAVIT**

12. The application is opposed vide an affidavit dated 15<sup>th</sup> January 2019 sworn by James Cherutich an employee/Marketing Manager of the Defendant herein. The Defendant stated that the averments in paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the deponent's affidavit are admitted.

13. The Defendant in response to Plaintiff's application and the affidavit in support of the same, deposed;

a) The Plaintiff filed the suit herein after the Defendant had filed a request for Review Number 43 on 31<sup>st</sup> October 2013 with the Public Procurement Administrative Review Board, and which suit the Plaintiff sought ten (10) prayers as set out in the Plaintiff.

b) Alongside the Plaintiff, the Plaintiff filed a notice of motion dated 8<sup>th</sup> November 2013 in which they sought an interim order to restrain the Defendant from unlawfully entering and or continuing to be within the Plaintiff/Applicant's premises countrywide pending the full hearing and determination of the suit.

c) It is not in dispute that Hon. Mabeya J. granted the interim order on 18<sup>th</sup> November 2013.

d) The request for review was unsuccessful and the contract between the Plaintiff and the Defendant lapsed.

e) Upon the interlocutory application being granted and the request for review being dismissed, it was incumbent upon the Plaintiff to either set down the suit for hearing and or withdraw the same.

f) The Defendant has denied having breached the contract and/ or having acted in breach of the law prior to the Board determining the request for review and the burden lies upon the Plaintiff to prove any violation upon full hearing and determination of the suit.

g) The defense does disclose a viable defense and at the time raised triable issues that demonstrate that the Plaintiff's Plaint lacked merit and the same lacked to demonstrate any *prima facie* case with a probability of success.

h) The Defense on no account exhibits characteristics of *res judicata* as alleged by the Plaintiff/Applicant as at the time *status quo* was maintained by the Board, after the Board notified the Plaintiff/ Applicant of the Appeal.

i) The Deponent's affidavit is just a mere reply to the Defence disguised as a supporting affidavit. The affidavit attempts to discredit the defense by relying heavily on Hon. Mabeya, J. Ruling delivered on 18<sup>th</sup> November 2013.

j) The Plaintiff/Applicant has come with unclean hands as its suit intended to circumvent the order and directive of the Board and any findings with regard to the tender. This is evident by the fact that since the Defendant/Respondent filed its defense on 28<sup>th</sup> January 2014, the Plaintiff/Applicant stayed for four (4) years and eight (8) months in order to file affidavit to oppose the dismissal of the suit after a Notice to Show Cause was served upon them on 21<sup>st</sup> September 2018.

k) The Board delivered its decision with regard to the tender, hence rendering the Plaintiff's/Applicant's Notice of Motion meritless as the suit has been overtaken by events.

l) The Deponent alleging that the Defense does not disclose viable or *bona fide* or reasonable defense, in turn renders the Plaintiff's/Applicant's suit frivolous, vexatious and an abuse of court process as the Defense lays emphasis on key proponents of conflict between the two contracting parties, which the Plaintiff/Applicant selectively chose to overlook hence deluding the Court.

## **PLAINTIFF'S SUBMISSIONS**

### **ISSUES**

#### **Whether the defense dated 28<sup>th</sup> January should be struck out;**

14. The Plaintiff/Applicant submitted that the substantive law governing striking out of pleadings is founded in the provisions of **Order 2 Rule 15 of the Civil Procedure Rules. Sub-rule 15 (1)** of the aforementioned order, enacts that;

***“(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-***

***a) It discloses no reasonable cause of action or defense in law; or***

***b) It is scandalous, frivolous or vexatious; or***

***c) It may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court;***

***And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”***

15. The Applicant submitted that the defense is scandalous frivolous and vexatious and may prejudice or delay the fair trial of the case. Also, the defense is an abuse of the court process and raises no reasonable cause of action or defense against the Plaintiff's claim in view of the interlocutory ruling.

16. Subsequently the Applicant submitted that the following sufficiently expounds the principles underlying the striking out of pleadings under **order 2 rule 15 (1) of the Civil Procedure Rules, 2010**

17. It was the Applicant's submission that the defense is an abuse of the process for it is both frivolous and vexatious. In the case of **DT Dobie & Company (Kenya) Ltd vs Muchina (1982) 1 KLR**, where the court held;

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously disclosed no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.”***

#### **Whether judgment should be entered in the terms is the Plaintiff**

18. The Applicant relied on the case of **Kenindia Assurance Co. Ltd vs Commercial Bank of Africa Ltd & 2 Others [2006]eKLR** where the Court of Appeal held:

***“The law on summary judgment procedure has been settled for many years now... in Kenya Trade Combine Ltd vs M. M. Shah (Civil Appeal No. 194 of 1999) the court held... ‘in a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial...’***

Also in **Postal Corporation of Kenya vs Inamdar & 2 Others [2004] 1 KLR 359 at 365** where the Court of Appeal held;

***“with a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35, subject to there being no triable issues which would entitle a Defendant leave to defend.”***

19. The Applicant further relied on *AAT Holdings Limited vs Diamond Shields International Ltd [2014]eKLR* reiterating the principles guiding summary judgment that;

***“1) That summary judgment is a draconian measure that should be given in only the clearest of cases.***

***2) That a trial must ordered if a bona fide issue is found or one which is fairly arguable is found to exist. But a triable issue does not mean one that will succeed. It means an issue which raises a prima facie defence and which should go to trial for adjudication. See the opinion of Duffus P. and Sheridan J. in Patel vs EA Cargo Handling Services Ltd [1974] EA 75***

***3) But a trial should not be ordered in a case where the Court strongly feels it is justified in thinking that the defences raised are a sham.***

## **DEFENDANT/RESPONDENT’S SUBMISSIONS**

**Whether the defense dated 28<sup>th</sup> January 2014 should be struck out;**

20. The Respondent submitted that a defence in law is one that raises triable issues. A triable issue has been defined in the Black’s law dictionary as an issue that is subject or liable to judicial examination and trial. In the case of *Kenya Trade Combined Ltd vs Shah, Civil Appeal No. 193 of 1999*, and as quoted in the case of *Desbro (Kenya) Limited vs Polypopies Limited & Another [2018]eKLR*, the Court of Appeal stated;

***“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”(emphasis mine).***

21. The Defendant submitted that the gist of the Plaintiff’s claim is that the Defendant allegedly committed an act of trespass by failing to vacate the premises which in turn has led to the Plaintiff hosting 2 security firms in their premises and that the Defendant’s alleged unlawful presence posed serious operational challenges and threats to the Plaintiff’s properties and business operations.

22. The Defendant’s Defense accordingly points out that the Defendant in remaining within the Plaintiff’s premises acted in accordance with the Orders issued by the Board pending determination of its application requesting for review and that the Defendant had the right to seek legal reprieve where it felt aggrieved.

23. It was the Defendant’s submission that the Courts have jealously guarded against striking out of pleadings more so because this denies a party (the Defendant in this case) an opportunity to be heard, the opportunity which can only be adjudicated upon during full trial where the parties argue their cases then Courts issue the final determination and the Court in the case of *Metro Petroleum vs WAMCO Petroleum (2006) eKLR* was of the view that:

***“...the remedy of striking out a pleading is a drastic one as it denies a party the right to trail, it is a remedy not lightly to be granted...”***

24. It was the Defendant’s submission that where a Defendant has raised a defense in law, then the same ought to be accorded a fair trial and is consequently one raised in good faith and as such not a shambolic display of pleadings on the Defendant’s part. The same then cannot be found to be vexatious or frivolous as the Defendant has not deposed mere denials aimed at defeating the Plaintiff’s access to justice or abusing the Court process.

25. The Defendant submitted that upon filing of the Defense on 28<sup>th</sup> January 2014, the Plaintiff stayed for four (4) years and eight (8) months without taking any action to prosecute its claim despite the request for review being dismissed by the Board. The Plaintiff has failed to prosecute the matter and has by conduct shown that their claim is merely of an academic exercise.

26. The matter remained dormant until the Court issued a Dismissal Notice *suo moto* against the Plaintiff’s suit when the Plaintiff subsequently filed the instant application seeking the orders for damages and costs. The Defendant cannot be punished for wishing to access justice where it feels aggrieved and thus prays that the application be dismissed and it be accorded a fair hearing.

In the case of *DT Dobie vs Macharia (1982) KLR*, the court stated;

***“...The power to strike out should be exercised only after the Court has all the facts that it must not embark on the merit of the case itself as this is solely reserved for the Trial Judge. On an application to strike out pleadings no opinions should be expressed as would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case...”***

## **DETERMINATION**

27. The Court considered pleadings and submissions by Counsel to the instant application filed on 3<sup>rd</sup> December 2018 seeking that the Defense of 28<sup>th</sup> January 2014 by the Respondent be struck of.

Both Parties through respective Counsel have ably outlined the law on striking out of any pleading as outlined above.

The issue for determination is whether, the defense ought to be struck out or not?

### **PLAINT**

28. The Plaintiff filed Plaintiff on 11<sup>th</sup> November 2013 and outlined the Plaintiff's claim as follows;

The plaintiff entered into a contract Ref **KENHA/ADM/HR/62/2012** for provision of security services for its premises countrywide. The Defendant/Respondent was awarded **Tender No. KeNHA/ADM/HR/62/2012** which commenced on the 1<sup>st</sup> November 2012 to provide security services to the Plaintiff/Applicant for a period of one year and as such determined on the 31<sup>st</sup> October 2013 by effluxion of time.

29. The Applicant stated that when the contract ended the Defendant/Respondent tendered to have them considered to provide security services for the subsequent year beginning 1<sup>st</sup> November 2013.

30. The Defendant/Respondent notwithstanding the fact that they were not successful in their tender bid for the provision of private security services for the Applicant's offices they failed, refused, and/or neglected to vacate the Plaintiff/Applicant's premises nationwide.

31. The Applicant averred that the Defendant/Respondent on 31<sup>st</sup> October 2013 filed a request for review with the Public Procurement Administration Review Board (hereinafter referred to as the said board) challenging the legality or otherwise of the tendering process for **Tender No. KeNHA/749/2013** for the provision of private security services for the Applicants offices.

32. The Plaintiff sought by virtue of Notice of Motion filed on 8<sup>th</sup> November 2013 and the Plaintiff orders of;

- a) Declaratory order that entry of Defendant and/or its employees, agents or any of its representatives to the Plaintiff's premises/properties is curtailed as it will be an act of trespass and Plaintiff's right to property vide **Article 31 of COK 2010**.
- b) A mandatory injunction compelling removal of Defendant and/or his employees, agents, officers or representatives from Plaintiff's properties countrywide.
- c) A mandatory injunction to compel the Defendant and/or their employees/agents anybody to return possession of Plaintiff's properties countrywide.
- d) An order of permanent injunction restraining the Defendant from trespassing or continuing to trespass upon Plaintiff's properties countrywide, its business operations and offices.

33. The Notice of Motion of 8<sup>th</sup> November 2013, sought the following order(No3);

- a) To restrain the Defendant/Respondent whether by itself employees, servants and/or agents howsoever from unlawfully entering and/or continuing to be within the Plaintiff's various premises countrywide pending hearing and determination of the suit.

### **DEFENCE**

34. The Defense filed on 28<sup>th</sup> January 2014, at Paragraph 8, the Defendant averred that Public Procurement Administrative Review Board (PPARB) notified the Plaintiff of the Appeal and that orders issued were that the Plaintiff was directed not to sign any contract until the Appeal was determined.

35. The Defendant in Paragraph 9, further averred that the Plaintiff proceeded to award 1month contract to Babs Security without leave or permission of Public Procurement Administrative Review Board (PPARB) and which action was illegal null and void and which the said Board already faulted in its Ruling.

36. The Defendant avers in Paragraph 10, that at no time did the Plaintiff serve them with any notice indicating that the contract was no longer subsisting and/or requiring the Defendant to hand over and it is also clear that from 31<sup>st</sup> October 2013 the Defendant continued providing security services to the Plaintiff.

37. The Defendant at Paragraph 15 (c) stipulated that according to the Contract **Article 3.14 & Clause 2.14** of the special conditions of the contract that disputed parties shall be referred to Adjudication or Arbitration.

38. Paragraph 15(d) & (e) of defence the Defendant deposed that the suit herein is abuse of Court process and it is to circumvent findings, orders and directives of Public Procurement Administrative Review Board (PPARB) which is mandated under the PPDA 2005 (now repealed) allowed to provide advice and assistance to procuring entities.

## **RULING OF 18<sup>th</sup> NOVEMBER 2013**

39. This Court, as per the Ruling by Hon. A. Mabeya delivered on 18<sup>th</sup> November 2013, heard and determined the Application /Notice of Motion of 8<sup>th</sup> November 2013 and granted orders as follows;

***“27. It was submitted that an order of this Court will conflict with an order that may be given by the PPARB. I do not think so. My understanding is that PPARB will be deciding whether the impugned Tender was properly awarded or not and if not so, it will give directions in accordance with the law on such Tender. If the Defendant is awarded that or any other tender, then it will have exclusive right to return to its guards to the Plaintiff’s premises.”***

***As far as this Court is concerned, the Defendant does not have the right to enter the Plaintiff’s premises and offer security services thereat under Contract KeNHA/ADM/62/2012. Unless it acquires fresh rights, its continued entry into the Plaintiff’s premises remains unlawful.***

***28. Accordingly, I am of the view that the Plaintiff’s application is meritorious and I allow the same in terms of Prayer No 3 of the Motion.”***

40. The Court, of equal, competent and concurrent jurisdiction heard and determined the claim/dispute and granted orders on the same. These orders have not been reviewed, set aside, varied or successfully appealed against to date.

No new evidence claim or developments have been pleaded by parties to necessitate hearing and determination of a new claim. This claim/cause of action/dispute is *res judicata*.

Section 7 Civil Procedure Act provides on *Res judicata*;

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

41. The Defendant’s issues raised in paragraph 3 and 4 of the defense are matters that are already *res judicata* as the court rightly stated in paragraph 13 of the said ruling that;

***“given the nature of the contract and the fact that the Plaintiff is a public institution, I find it unlikely that the same could be extended verbally or by implication as argued by the Defendant. The alleged implication being the provision of service between 2<sup>nd</sup> October 2013 and 31<sup>st</sup> October 2013 cannot hold in view of what I have already stated. In most cases parties to a contract arising from a procurement exercise such as the one in question will vary the contract period in writing.... I find on a prima facie basis, a verbal agreement for the extension of contract cannot suffice.”***

42. Paragraph 9 of the Defense was determined in paragraph 16 of the Ruling as follows;

***“...direct procurement is allowed under section 74 of the Public Procurement and Disposal Act, 2005 where there is urgent need for the services and the circumstances for such urgency are unforeseeable. ... the Plaintiff had every right to remedy the gap in the services needed as the contract with the Defendant had elapsed. There is no provision in law that required the Plaintiff to seek the direction of the Public Procurement Oversight Authority (PPOA) in sourcing the 30 day contract with Babs Security, though the PPOA could have offered advice on the situation.”***

43. Paragraph 10 of the Defense was heard and determined vide Paragraph 27 of this Court’s Ruling. A written Notice to handover and vacate was not necessary as the subsisting contract expired by effluxion of time unless the PPARB any rights to the Defendant then the Court Ruling stands that a mandatory and prohibitory injunctions were issued against the Defendant

44. At Paragraph 25 of the Court Ruling; prohibited guards from entering the premises and mandatory order that the no additional guards would be deployed and those already in the premises would be removed after expiry of their shifts.

45. Paragraph 15 of the defence, the Defendant raised the issue of Court jurisdiction which the Defendant deposed that the disputes were to be referred to Adjudication and or Arbitration. The Defendant submitted to the jurisdiction of this Court by fully participating in hearing and determination of Notice of Motion of 8<sup>th</sup> November 2013.

Secondly, in the same Defense, the defendant again continued to submit to the jurisdiction of this Court;

Yet at paragraph 19 of the Defense, the jurisdiction of this Honorable Court is admitted.

46. The Court finds that there is the Ruling of 18<sup>th</sup> November 2013 which remains a valid, legal and regular order of the Court until it is reviewed or successfully appealed against. The court determined the issues pleaded in the defence. The rest of the dispute was /is to be canvassed before PPARB and unless or until there is an appeal from the Tribunal, the Court has no claim before it to hear and determine. What was sought in the Plaintiff and Notice of Motion are identical and orders were granted and there no claim for hearing and determination.

Conversely, there is no defense that raises triable issues for hearing and determination as the issues raised herein were dealt with by the existing orders of this Court vide Ruling of 18<sup>th</sup> November 2013.

**DISPOSITION**

47. **The Notice of Motion of 3<sup>rd</sup> December 2018 is granted as follows;**

48. **The Defense of 28<sup>th</sup> January 2014 is dismissed with Costs and**

49. **Judgment is entered in favor of the Plaintiff in terms of Prayers a, b, d, h & i of the Plaint of 8<sup>th</sup> November 2013.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 31<sup>ST</sup> MAY 2021(VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**KALE MAINA & BUNDOTICH ADVOCATES FOR RESPONDENT – N/A**

**DULO & CO. ADVOCATES FOR APPLICANT- N/A**

**COURT ASSISTANT- TUPET**