



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 92 OF 2018**

**STRAIGHT SECURITY SERVICES LTD.....APPELLANT**

**VERSUS**

**SHONGHAO OVERSEAS CONSTRUCTION ENGINEERING LIMITED....RESPONDENT**

*(An appeal from the judgment of the Chief Magistrates Court at Thika,*

*Hon. V. Kachuodho, RM in the CMCC No. 36 of 2013 dated 23<sup>rd</sup> July, 2018)*

**JUDGMENT**

1. **STRAIGHT SECURITY SERVICES LTD** (hereinafter Security Firm) sued before the Thika Chief Magistrate's court **ZHONGHAO OVERSEAS CONSTRUCTION ENGINEERING LIMITED** (hereinafter the client) seeking judgment in that court for Kshs.486,640/=. The security firm pleaded that the amount claimed against the client was accrued due to security services it rendered to the client between 23<sup>rd</sup> November, 2010 to 9<sup>th</sup> March, 2012 plus the interest accrued thereof. Although the client filed a defence denying the claim, the client failed to call any evidence and that defence therefore remained unproved.

2. The trial court by its judgment dated 23<sup>rd</sup> July, 2018 awarded the Security Firm Kshs.106,140/= plus costs and interests. The Security Firm was aggrieved by that judgment and has filed this appeal. The first appellate court has jurisdiction to review the evidence of the trial court in order to determine whether the trial court's conclusion should stand. That jurisdiction has to be exercised with caution because the appellate court does not have the benefit of seeing and hearing the witnesses: see the case **PETER V. SUNDAY POST LIMITED (1958) EA 424**.

3. The relationship between the Security Firm and the client was regulated by the agreement dated 23<sup>rd</sup> November, 2010. The trial court considered the provisions of that agreement and found that the Security Firm should have, as provided in that agreement, terminated the agreement within two months from when the client failed to pay for security services. It is for that reason that the trial court only awarded the Security Firm payment for security services offered to the client for only two months. That award was made by the trial court on the basis that the Security Firm could only be entitled two months security fees, the period within which it ought to have terminated the agreement for lack of payment by the client.

4. I have considered the parties submissions in this appeal. The only issue for consideration by this Court is whether the Security Firm proved its case on required standard of proof of its entitlement of Kshs.486,640/=.

5. By that agreement, the monthly payment for security services payable by the client was Kshs.10,000/=. The Security Firm produced invoices raised by it payable by the client for the period 23<sup>rd</sup> November, 2011 to 9<sup>th</sup> March, 2012. The invoices raised for that period were supported by a statement which reflected an outstanding amount owed by the client of Kshs.347,600/=. The witness for the Security Firm also stated that the outstanding amount attracted 5% interest as provided in the agreement.

6. The trial court award to the Security Firm two months payment for security services which was influenced by **paragraph 13(ii)** of the agreement which provided:-

***“The company (Security Firm) can terminate if the client fails to pay for services rendered for two consecutive months.”***

7. This is what the trial court had to say about the above paragraph:-

***“From the above terms of the contract, it's clearly spelt out how the same agreement could be terminated by either party. It's***

***not clear why the plaintiff chose not to exercise either of the above options after according to it the Defendant (the client) failed to remit the amount due for two months but waited to exercise the said option on 8/03/2012 a clear 10 months of the Defendant (the client) non-payment and/or breach, ...”***

8. The documentary evidence produced by the Security Firm shows that demand for payment was made to the client by email on 8<sup>th</sup> March, 2012 which the client responded by email on 9<sup>th</sup> March, 2012, whereby the client stated it had terminated the agreement and had made final payment to the Security Firm.

9. The said allegation by the client that it terminated the agreement previous to when it wrote that email was not supported by any written notice as required by the parties’ agreement under **paragraph 13(i)** of that agreement.

10. In my view, the trial court erred in finding the Security Firm should have terminated the contract within two months of non-payment by the client. The use of the word “can” in **paragraph 13(ii)** of the agreement implies termination was optional. In other words, the Security Firm had the option of terminating services to the client on non-payment for two months period. The fact Security Firm did not terminate after two months of non-payment by the client cannot be interpreted to mean that the Security Firm was not entitled to payment for more than two months. The use of the word “can” in the agreement confers on the Security Firm discretion to decide either to terminate or not to terminate the agreement.

11. Having perused the evidence adduced at the trial court, I am satisfied that the Security Firm met the Civil Standard of proof, on a balance of probability. That standard of proof was considered in the CANADIAN CASE R. VS. LAYTON, 2009 SCC 36 (CanLII), [2009] 2 SCR 540 as follows:-

***“4. What does “proof on a balance of probabilities” mean? It does not mean proof beyond a reasonable doubt — that standard of proof applies only in criminal trials. In civil trials, such as this one, the party who has the burden of proof on an issue must convince you that what he or she asserts is more probable than not — that the balance is tipped in his or her favour. You must examine the evidence and determine whether the party who has the burden of proof on an issue is relying on evidence that is more convincing than the evidence relied on by the other side. In short, you must decide whether the existence of the contested fact is more probable than not.”***

12. For the above reasons and because the case was proved by the Security Firm on the required standard of proof this appeal does succeed and I make the following orders:-

(a) The Lower Court’s judgment is hereby set aside.

(b) Judgment is entered for the appellant, **Straight Security Services Ltd**, as prayed in the plaint in **Thika CMCC No. 36 of 2013**.

(c) The costs of this appeal are awarded to the appellant.

13. **JUDGMENT, SIGNED DATED and DELIVERED at KIAMBU this 28<sup>th</sup> day of OCTOBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Nancy

For Appellant : Mr. Muthomi

For Respondent: Mr. Ochieng

**COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**