



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

**CIVIL APPEAL NO. 8 OF 2018**

**CENTRE FOR MATHEMATICS, SCIENCE AND TECHNOLOGY  
EDUCATION IN AFRICA (CEMASTEAM).....APPELLANT**

**-VERSUS-**

**APEX SECURITY SERVICES LIMITED .....RESPONDENT**

**JUDGEMENT**

**BACKGROUND**

1. The appeal before me emanates from the ruling and order of the subordinate court made on 14/12/2017.
2. The said impugned ruling and order of the subordinate court that gave rise to this appeal was pursuant to the Respondent's notice of motion dated 6/10/2016.
3. In response to the Respondent's notice of motion dated 6/10/2019 the Appellant herein filed grounds of opposition and chamber summons dated 25/8/2017.
4. The parties filed their respective submissions and the court delivered its decision, subject of this appeal.
5. The Respondent's notice of motion dated 6/10/2016 sought summary judgement against the Appellant in the sum of Kshs.6,088,000/=.
6. The Respondent relied upon the supporting affidavit of Stephen Mukora Thiong'o sworn on 6/10/2016 and the supplementary thereof of Charles Ndugu Ndirangu sworn on 23/8/2017 filed on 24/8/2017 and the annexures thereto.
7. It was not in dispute that a contract for the provision of security services was entered into between the Respondent and the Defendant.
8. What, however, was in dispute is whether it was the Respondent or the interested parties cited in the chamber summons dated 25/8/2017 entitled to the amount claimed in the plaint.
9. That Defendant/Appellant sought for a determination of the rightful owner of the monies claimed and upon payment to the rightful owner thereof its liability would be extinguished and protected from any further claim.
10. The interested parties named in the chamber summons dated 25/8/2017 were served with the application but none of them appeared. The interested parties having failed to appear and/or file a reply to

the summons the court declared that they are barred from laying a claim against the Defendant pursuant to Order 34 Rule 7 of the Civil Procedure Rules.

11. The Defendant/Appellant in support of summons filed an affidavit.

12. It is crystal clear that the amount claimed was not in dispute and the interested parties having been barred from laying a claim against the Defendant, the Defendant was obligated to pay the Respondent as ordered by the court.

13. The appellant was un happy with trial court verdict thus lodged instant appeal in which the grounds raised the following issues;

*Ø Did the Appellant admit the Respondent's claim?*

*Ø Was the amount claimed by the Respondent specified, due and payable or has been ascertained or is capable of being ascertained as a mere fact of arithmetic?*

*Ø Did the Appellant raise a bona fide triable issue?)*

14. Parties agreed to canvas appeal via submissions which they filed.

#### **APPELLANT'S SUBMISSIONS:**

15. The appellant submitted that, in the statement of defence dated 12<sup>th</sup> August, 2016, the Appellant admits that was a tender awarded to the company known as Apex Security Services Limited for provision of security services but denied it was the Respondent. The Appellant admits there was a contract entered but not with the Respondent.

16. The Appellant clearly states that the security services were rendered by Apex Security Services Limited based in Hurlingham and not the Respondent herein which is based in Development House. The Appellant, simply acknowledges that yes, there were security services rendered to the Appellant but not by the Respondent.

17. As seen above, it is mandatory requirement that for summary judgment to be entered the Defendant must admit the Respondent's claim. Never once did the Appellant herein, through the statement of defence dated 12<sup>th</sup> August, 2016 or otherwise, admit to owing the Respondent.

18. The plaint dated 14<sup>th</sup> July, 2016, the Respondent claims payment of Kshs.5,450,000.00/= in the notice of motion dated 6<sup>th</sup> October, 2016, the Respondent prays that judgment be entered for the sum of Kshs.6,088,000.00/= The Respondent does not bother to show how the sum is owed to it, rather, the precise calculations that brought him to the quoted figures.

19. As a result, thereof, the sum claimed is specified, but it remains unknown as to it is due and payable and cannot be ascertained or is not capable of being ascertained as a mere fact of arithmetic.

20. What's more, no explanation has been given as to the difference in the amount claimed, that is, Kshs.5,450,000.00/= in the plaint and Kshs.6,088,000.00/= in the said notice of motion and no amendment was been made to the pleadings to introduce the claim for Kshs.6,088,000.00/=.

21. It is trite law that summary judgment should be entered in the clearest of cases. The Appellant submit that it is not a clear case warranting summary judgment.

22. Did the Appellant raise a bona fide triable issue?

23. The Court of Appeal in *Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael*

*Rono [2015] eKLR* held that;

**“A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”**

24. According to our defence is not without its own substantial bonafide triable issued.

25. The Appellant entered into a contract with Apex Security Services Limited based at Hurlingham and led by Sydney Wahome Maina and Anne M. Njoroge, an entity different from the Respondent, which provided the security services expected in the contract dated 15<sup>th</sup> November, 2014 and marked in the Defendant’s replying affidavit sworn on 9<sup>th</sup> October, 2017 as BMS5.

26. The Appellant urge the court to take notice that the name of the official and his witness executing the said contract on behalf of Apex Security Services Limited; Sydney Wahome and Anne Njoroge are not officials, employees and or agents of the Respondent Company hereof based at Hurlingham.

27. The doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any other person other than the parties to a contract. Accordingly, a contract cannot be enforced by or against a third party. See *Savings & Loan (K) Limited v Kanyenje Karangaita Gikombe & Another [2015] eKLR*.

28. The Respondent have raised in their submissions the Interpleader chamber summons dated 25/8/2017. They state that because the interested parties named in the chamber summons (Sydney Wahome and Anne Njoroge) were served and none of them appeared and were consequently barred from claiming against the Defendant, the chamber summons rendered the Appellant’s statement of defence without any triable issue.

29. Again there is also an issue of unjust enrichment. The statement of defence dated 12<sup>th</sup> August, 2016 establishes in clear terms that the Respondent herein did not provide the services rendered under the subject contract.

30. In the statement of defence dated 12<sup>th</sup> August, 2016, the Appellant is clear in its averments that the tender was awarded to a company known as Apex Security Services Limited but deny it was the Respondent.

31. The Appellant is also clear in stating that there are two companies Apex Security Services Limited based in Hurlingham and Apex Security Services Limited based in Development House. The Appellant states that Apex Security Services Limited based in Hurlingham is the entity that provided the security services.

32. In *Job Kilach vs Nation Media Group Ltd, Salaba Agences Ltd & Michael Rono [2015] eKLR* the court relied on the case of *Giciem Construction Company vs Amalgamated Trade & Services LLR No. 103 (CAK)* where it was held;

**“As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the Respondent is entitled to judgement.”**

RESPONDENT’S SUBMISSIONS

33. The respondent submitted that upon perusal of the pleadings filed before the subordinate court, the statement of defence reveals the following;

*a) Admits that the tender for provision security services was awarded to a company known as Apex Security Services Limited but deny that it was the Respondent.*

*b) Admits that the Respondent presented a bundle of invoices for settlement upon expiry of the contract.*

*c) Denies that it has refused to the Respondent's claim. They has rendered any security services to the Defendant.*

*d) That the Respondent herein and the tenderer are two different entities bearing the same names and having different offices.*

*e) The Defendant issued cheques for payment of services rendered but the cheques were later uncashed and the Defendant cancelled them.*

*f) That the Respondent should inter-plead among themselves as to whom the said funds should be released to. The Defendant is ready and willing to pay the said monies to the legitimate entity as this Honourable court may direct upon inter pleading.*

34. As analysed above, the Appellant filed an inter pleader vide chamber summons dated 25/8/2017 to address the question/issue as to which person(s) are entitled to be paid. The interested parties named in the said chamber summons dated 25/8/2017 were served and none of them appeared.

35. The court proceeded to issue an order as sought by the Appellant herein pursuant to Order 34 Rule 7 declaring them and all persons claiming under them forever barred against the Defendant the Appellant herein and the person claiming under it.

36. It is worth noting that the said interested parties did not prefer an appeal or seek to set aside the said order.

37. The inter-pleader vide chamber summons dated 25/8/2017 rendered the statement of defence without any triable issue.

38. Holding that the Defendant/Appellant was in breach of the contract;

The court having found that there was a valid contract and security services were rendered by the Respondent/Respondent, the learned Magistrate was right in reaching a conclusion that the Appellant had breached the contract by not paying. There was clear admission that services were rendered and what was in contention was whom to pay which was resolved vide an inter-peader.

39. Applied wrong principles in deciding issues raised;

It is trite law that there cannot be a right to defend if the defence does not raise triable issues. If this suit was to be remitted for trial what issues would a trial magistrate be adjudicate upon?

40. The Learned Magistrate entered summary judgement for a sum of Kshs.6,088,000/= despite the Respondent having pleaded a claim of Kshs.5,540,000/=

Indeed the plaint discloses a claim of Kshs.5,540,000/= and not Kshs.6,088,000/=. The difference in the amount claimed in the sum of Kshs.638,000/= is as a result of a two (2) months extension of the contract at the rate of Kshs.319,000/= per month. The initial claim of Kshs.5,540,000/= was for a period of one year provided for in the contract.

41. If the court is inclined to the persuasion by the Appellant that the Learned Magistrate ought to have awarded the sum claimed in the plaint, then it submits that the sum of Kshs.6,088,000/= with Kshs.5,540,000/= be substituted with interest and costs. With tremendous respect to the Appellant, the grounds of appeal No. 6 to 11 inclusive, were subsumed and addressed in the Appellant's own interpleader, vide chamber summons dated 25/8/2017.

42. The Respondent relies on the ratio *decindi* in the case of **Apex Security Services Limited Vs Kenya Medical Research Institute HCC No. 411 of 2015** (Commercial). In the above cited case the court observed that it was the contractual obligation for the Respondent to render services and the Defendant conversely to pay the Respondent and undisclosed dispute between or amongst the Respondent's directors holds no water and should not be reason to deny the Respondent its rightful entitlement.

43. The Respondent also relies on the ratio *decindi* in the case of **Diamond Industries vs Miss Yahamara Gulamstafa musa and Jamal Abdulkarim Musa HCC No. 199 of 2012** (Mombasa) in holding No. 23 the court stated as follows;

***“ In making this order I take note that even in the plaint, there are two sums pleaded; Kshs.18,000,000/= at paragraphs and 18,420,795 at paragraphs 6 & 7 as well as prayer (a). The application under consideration is however supported by affidavit under oath and a specific sum of Kshs.18,000,000/= is shown as. That is the sum of which I enter judgement for the Respondent against the Defendant.”***

#### ISSUES:

44. After going through the materials on record and the parties submissions, I find the issues are: whether the trial magistrate went into error in entering summary judgement in respondents favour? What is the order as to costs?

#### ANALYSIS AND DETERMINATION:

45. The law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court of appeal decision in the case of **Continental Butchery Limited vs Samson Musila Ndura, Civil Appeal No. 35 of 1997** where this Court stated:

***“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.***

***If a bona fide triable issue is raised the Defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham”.***

46. The statement of defence filed by the appellant, reveals the following;

- o ***Admits that the tender for provision security services was awarded to a company known as Apex Security Services Limited but deny that it was the Respondent.***
- o ***Admits that the Respondent presented a bundle of invoices for settlement upon expiry of the contract.***
- o ***Denies that it has refused to the Respondent's claim. They has rendered any security services to the Defendant.***
- o ***That the Respondent herein and the tenderer are two different entities bearing the same names***

*and having different offices.*

*o The Defendant issued cheques for payment of services rendered but the cheques were later uncashed and the Defendant cancelled them.*

*o That the Respondent should inter-plead among themselves as to whom the said funds should be released to. The Defendant is ready and willing to pay the said monies to the legitimate entity as this Honourable court may direct upon inter pleading.*

47. As analysed above, the Appellant filed an inter pleader vide chamber summons dated 25/8/2017 to address the question/issue as to which person(s) are entitled to be paid. The interested parties named in the said chamber summons dated 25/8/2017 were served and none of them appeared.

48. The court proceeded to issue an order as sought by the Appellant herein pursuant to Order 34 Rule 7 declaring them and all persons claiming under them forever barred against the Defendant the Appellant herein and the person claiming under it.

49. It is worth noting that the said interested parties did not prefer an appeal or seek to set aside the said order.

50. The inter-pleader vide chamber summons dated 25/8/2017 rendered the statement of defence without any triable issue.

51. Holding that the Defendant/Appellant was in breach of the contract;

52. The court having found that there was a valid contract and security services were rendered by the Respondent/Respondent, the learned Magistrate was right in reaching a conclusion that the Appellant had breached the contract by not paying. There was clear admission that services were rendered and what was in contention was whom to pay which was resolved vide an inter-peader.

53. Applied wrong principles in deciding issues raised;

54. It is trite law that there cannot be a right to defend if the defence does not raise triable issues. If this suit was to be remitted for trial what issues would a trial magistrate be adjudicate upon?

55. The Learned Magistrate entered summary judgement for a sum of Kshs.6,088,000/= despite the Respondent having pleaded a claim of Kshs.5,540,000/=

56. Indeed the plaint discloses a claim of Kshs.5,540,000/= and not Kshs.6,088,000/=. The difference in the amount claimed in the sum of Kshs.638,000/= is as a result of a two (2) months extension of the contract at the rate of Kshs.319,000/= per month. The initial claim of Kshs.5,540,000/= was for a period of one year provided for in the contract.

57. The trial magistrate made an error in awarding what was not sought in the plaint thus he ought to have awarded the sum claimed in the plaint, thus this court will correct by replacing the sum of Kshs.6,088,000/= with Kshs.5,540,000/= with interest and costs.

58. This court is guided by the ratio *decindi* in the case of ***Diamond Industries vs Miss Yahamara Gulamstafa Musa and Jamal Abdulkarim Musa HCCC No. 199 of 2012 (Mombasa) judgement entered is for a) in holding No. 23*** the court stated as follows;

***“ In making this order I take note that even in the plaint, there are two sums pleaded; Kshs.18,000,000/= at paragraphs and 18,420,795 at paragraphs 6 & 7 as well as prayer (a). The application under consideration is however supported by affidavit under oath and a specific sum of Kshs.18,000,000/= is shown as. That is the sum of which I enter judgement for the Respondent against the Defendant.”***

59. Thus the court makes the following orders;

*i. The appeal succeeds partially to the extent that the judgement of trial magistrate is substituted with Ksh.5,540,000/-. Otherwise the appeal is dismissed on the other grounds.*

*ii. The respondent is entitled to 2/3 costs and interest at court rates.*

**DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019.**

.....

**C. KARIUKI**

**JUDGE**