



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 566 OF 2017**

**G4S KENYA LIMITED .....APPELLANT**

**- V E R S U S -**

**BELLE AFRICA TOURS AND TRAVEL LTD.....RESPONDENT**

*(Being an appeal from the judgement of Hon. Mrs. G. A Mmasi (SPM) in Nairobi CMCC No. 3647 of 2017 dated 20<sup>th</sup> September 2017)*

**JUDGEMENT**

1. On 20.9.2017, Hon. G. A. Mmasi, learned Senior Principal Magistrate, allowed the respondent's motion dated 25.5.2017 by granting an interlocutory injunction to restrain the appellant herein from terminating the contract to supply motor vehicles for transport services.

2. Being aggrieved by the aforesaid order, the appellant preferred this appeal and put forward the following grounds:

***1. The honourable magistrate erred in law and in fact by holding that the contract between the parties for the provision of transport series for the period 1<sup>st</sup> February 2015 to 31<sup>st</sup> January 2017 had been renewed orally for a similar period and on similar terms without any evidence to support the alleged oral extension.***

***2. The honourable magistrate erred in law and in fact in holding that the terms of the contract dated 1<sup>st</sup> February 2015 was governing the parties when in fact***

***a. The said contract had lapsed by effluxion of time on 31<sup>st</sup> January 2017.***

***b. From 1<sup>st</sup> February 2017 until the 25<sup>th</sup> May 2017 when suit was filed, the parties had been operating under Local Purchase orders evidencing contracts for the period of one month stated therein.***

***c. During the period 1<sup>st</sup> February 2015 to 21<sup>st</sup> January 2017, the respondent used and paid for 6 motor vehicles as set out in the contract while from 1<sup>st</sup> February 2017, the respondent only issued the respondent Local Purchase Orders for specific vehicles that the appellant required from the respondent.***

***d. As at 25<sup>th</sup> May 2017 when the respondent filed the suit, the appellant was only using and paying for two (2) motor vehicles.***

***e. The relationship between the parties was governed by the terms of the monthly Local Purchase Orders.***

***3. The learned magistrate erred in law and fact by holding that the respondent had disclosed a prima facie case against the appellant as the contract dated 1<sup>st</sup> February 2015 had lapsed and was incapable of being breached. There was no threatened breach of contract to the injury of any kind likely to be suffered by the respondent in the circumstances.***

***4. The learned magistrate erred in law and fact in holding that the respondent stood to suffer irreparable loss and harm while it was demonstrated that the respondent's rights under the contract dated 1<sup>st</sup> February 2015 had been extinguished upon the expiry of the contract on 31<sup>st</sup> January 2017.***

***5. The learned magistrate failed to appreciate that no loss whatsoever had been demonstrated as the appellant properly exercised its right under the monthly Local Purchase Orders to terminate the series of the respondent.***

***6. The learned magistrate erred in law and fact in holding that the loss that the respondent stood to suffer was irreparable and could not be compensated by damages.***

***7. The order granted in effect forces the appellant to contract with the respondent in terms of an expired contract. This order was made while it had been disclosed to the court that from March 2017 the appellant contracted the series of a third party, Holiday Car Hire Limited to offer transport services. Holiday Car Hire Limited started offering the transport services to the appellant with effect from 1<sup>st</sup> April 2017.***

***8. The learned magistrate erred in law and fact in holding that the balance of convenience tilts in favour of the respondent in the circumstances.***

***9. That as a consequence of the foregoing grounds; the honourable magistrate erred in allowing the application for injunction.***

3. When the appeal came up for hearing this court directed the appeal to be disposed of by written submissions. I have re-evaluated the arguments that were made before the trial court. I have further considered the rival written submissions. It is the submission of the appellant that the respondent failed to prove that there was an oral agreement for the extension of the contract between it and the appellant therefore the learned Senior Principal Magistrate fell into error in granting the order for injunction. It is the further submission of the appellant that the trial magistrate fell into error by holding that the contract between the parties had been renewed orally for a similar period and on similar terms without evidence to support the alleged oral extension. The learned Senior Principal Magistrate was also accused of failing to consider the contents of the affidavit of Faith Thiongo thus arriving at erroneous findings on the facts of the case.

4. The respondent urged this court to find no fault in the trial court's decision. It is the respondent's submission that the trial magistrate was right in holding that the contract that existed between the parties was extended after its expiry and that the respondent performed satisfactorily and to the expectation of the appellant and that is the reason why it was asked to continue and provide more vehicles to the appellant for that service. The respondent further argued that the trial court correctly issued an order for injunction when it found that the respondent had shown it had a prima facie case.

5. There is no doubt that this appeal arises from the ruling of the trial court where the respondent was granted an order of injunction to restrain and prohibit the appellant from terminating the contract to supply motor vehicles for transport services by the respondent. The respondent and appellant had entered into a contract for a period of two years with effect from 1<sup>st</sup> February 2015 upto 31<sup>st</sup> January 2017. The aforesaid agreement which was in writing contained a renewal clause subject to the satisfactory

performance of the contract by the respondent. It is the submission of the respondent that it performed satisfactorily and to the expectation of the appellant and that is why it was asked to continue and provide more vehicles to the appellant for that service.

6. It is apparent from the averments and arguments that they do not agree on the question as to whether or not the agreement between the parties was orally extended. I have on my part reconsidered and re-evaluated the material placed before the trial court. The main thread holding the respondent's arguments is that the appellant had sent an email to the respondent on 1<sup>st</sup> February 2017 whereof it stated to the respondent inter alia that the vehicle required is a 4x4 vehicle in addition to what we have at existing rates of 6K per day =VAT. It is said that the aforesaid email was followed by an oral renewal of the contract. The appellant had a different interpretation of the email. It is the appellant's submission that the alleged email does not mention renewal of contract nor its terms. The appellant also stated that the email correspondence was in respect of a specific type of a motor vehicle for a specific assignment and that upon the lapse of the contract, it engaged the respondent on the basis of monthly local purchase orders. With respect, I do not agree with the submissions of the appellant. I am satisfied that the email correspondence the appellant made to the respondent indirectly referred to the contract which had just lapsed. The decision of the learned Senior Principal Magistrate cannot therefore be faulted. I am satisfied that the respondent had shown it had a prima facie case with a probability of success and that it would suffer irreparable loss if the order for injunction was denied.

7. In the end, I find no merit in the appeal. The same is ordered dismissed with costs being awarded to the respondent.

**Dated, Signed and Delivered in open court this 16<sup>th</sup> day of February, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondent