REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 208 OF 2010

HUSSEIN S. HUSSEIN T/A

NEW UKUNDA SERVICES STATION.............................APPEALLANT

VERSUS

GEORGE OGINGO T/A AGENTA CARE........................RESPONDENT

J U D G M E N T

1. In this appeal the Appellant faults the judgment by the trial court, Hon. Obura(Mrs) SRM dated 25/8/2010 by which the court entered judgment for the Respondent against the Appellant for the liquidated sum of Kshs.208,000/= plus costs and interests.

2. The claim as revealed by the plaint dated 20/3/2008 was on account of breath of contract of service for the provision of guard services.

3. Against that plaint, the defendant filed a statement of defence and counter claim in which the existence of any agreement was denied as much as the breach with *'a without prejudice'* pleading that if there was any agreement between the parties then the same was breached by the plaintiff. Based on that without prejudice pleading the defendant contended that the plaintiff did breach the agreement between the parties by failure to properly guard the premises and by leaving works early and leading to damage of the defendants oil tanks and spillage at the station as a consequence of which the defendant suffered a loss of Kshs.95,000/= being expenses for cleaning the spillage and a fine paid to NEMA.

4. On his part, the plaintiff filed a Reply to Defence and Defence to Counter-Claim and denied all the allegations in the defence and Counter Claim and invited strict proof thereof.

5. At trial, the plaintiff called one witness while the Defendant /counterclaimant called two witnesses.

Evidence by the plaintiff

6. PW 1 the Respondent, gave evidence that him and the Appellant executed a contract for provision of security guard services dated 30/11/2005 to run for three years at a monthly consideration of Kshs.8,000/=. He produced a copy of the agreement as exhibit P1. Sometimes in October 2006, when a guard reported on duty, the guard was told the contract had been terminated and there was another guard from Agape on site. That was done prior to any notice in writing. To the witness, the contract provided that any termination would be at the end of 3 years and never earlier. When he made a complaint, he received a reply to the effect that the Appellant lost list faith in their services but did not mention anything to with spillage or indeed any loss to the Appellant. He therefore prayed for the sum of Kshs.208,000/= being the consideration for the unexpired duration of 26 months plus costs and of suit interests.

7. On cross examination, the witness said that the agreement was for provision of only one night watchman. He denied having been told of theft of a battery while his watchman was on duty nor that such was recovered. He denied having employed guards by the names Ramadhan Tsuma or one Alex. He referred to Clause 15 of the agreement which provided that any party intending to terminate would give a quarter years notice at the end of 3 years.

8. On re-examination, the witness said that although their summary recommended two guards the Appellant could only manage to pay one guard hence that is what was contracted for. He denied having received any compliant and stressed that had there been any, it would have been in writing. With that evidence the plaintiff closed its case.

Evidence by the defendant

9. For the defendant, DW 1, EZEKIAL NGOMBO, was an employee of the Appellant since 2005 and knew the plaintiff and his security firm. He said that while guarding the Appellants premises, the Respondents guard stole a bakery and accepted responsibility and yet another attempted to steal oil and split it on the wall when he realized it was not what he wanted. On yet another incident, a guard failed to remit Kshs.500/= paid as parking fees to the supervisor. He said that the incidences were reported to the police at Diani and NEMA for which the Respondent undertook to clean the premises but failed to do so hence the contract was terminated. He said that he did not draw the contract between the parties but was of the view that it was to last one year and and that the contract was terminated verbally after the manager lost faith in them. He prayed for judgment as prayed in the counterclaim and dismissal of the suit.

10. On cross examination, he denied terminating the contract nor being vast with its terms. When shown the contract he conceded it was for a term of 3 years. He was unable to recall the Respondents guard who stole the battery the date of theft nor the G4S guard who reported him and was not sure if the theft was reported to the police. He admitted that the appellant did not pay for the unexpired period of the contract and did not pay for the termination. He however denied having seen the guard spill oil. On re-examination he said he did not work at night and cold not witness the wrong alleged against the Respondent's guards.

11. PW 2, HUSSEIN SADIQUE NYAJI, the appellant gave evidence and confirmed having entered into the contract with the Respondent for provision of night security guards. To him two incidences occurred which made him realize the plaintiff did not know its job. He identified the two incidences as a theft of a car battery which was retrieved in a guards house and oil spill which he was told was by a guard who then fled. He said the incidences were reported to police and NEMA. For oil spill he asked his employees to take photos but they did not. He also referred to a parking lot from which the guards were to collect parking fees and one did collect and disappeared with cash. He said he had to pay Kshs.95,000/= for oil spill after the Respondent disappeared hence he lost faith in them and therefore it was them and not the Appellant who breached the contract. He confirmed having terminated without Notice but also took the view that the contract was for one year not three. He sought damages in terms of the counterclaim and the dismissal of the suit.

12. On cross examination, the witness was unable to confirm how much was spent to clear the oil spill and that it was the manager who estimated the costs. He equally was unaware of the date and the guard who spilt the oil. On parking fees to be collected by guards he said the agreement was verbal but he was unaware who made that contract. He however confirmed that the contract sued on was for 3 years and that he did not give notice. When referred to the contract at Clause 7 he said the risks were to be covered by an insurance cover but the Respondents guards were responsible still on oil spillage. He could not recall if he ever issued payment for clearance of the spill not the person who cleared it because he came after some days and found the oil had been cleared and could not know if it is the plaintiff or a third person who cleared it. On termination, he confirmed that the contract had no clause for termination midstream and that he relied on natural law to end it.

13. After the plaintiff filed submissions the defendant didn't and the trial court retired to do its determination.The Judgment was dated 25/8/2010. In finding and holding against the Appellant the court said:-

> **"I have carefully considered oral and documentary evidence placed, before me and the written submissions by the plaintiff, no submission were filed by the Defendant. The Plaintiff's claim is based on contract under the law of contract, where there is a termination clause, the termination must be in accordance with the terms of the contract. The parties are expected to comply strictly with the terms of the contract. If the contract is unlawfully determined, the plaintiff is entitled to such damages as would as nearly as possible put him in the same position as if the contract had been completed. That is the rule in common law as was stated in the case of ROBINSON VS HARMAN (1848) 1 Exch 850 at pa 855 (per Banker B) and was cited in KILIMANJARO CONSTRUCTION VS THE EAST AFRICAN POWER AND LIGHTING CO. LTD Hcc No. 846 of 1982 (NBO) by Hon. J. Torgbor".**

and having isolated issues for determination the court said and held:

> **"It is the Defendant's contention that they lost faith in the Plaintiff's guards after a series of incidents. It was alleged that a battery went missing and it was the Plaintiff's guards who stole it. It was also alleged that a certain guard attempted to steal fuel and ended up spilling oil when he realized it was not what he wanted. There were claims that another guard failed to remit parking fees.**
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> **None of these claims are substantiated. There was no written complain to the Plaintiff alerting him of these alleged incidents. There was no documentary evidence to show that the incidents were reported whether to the Police or to NEMA as alleged. Further, as per the terms of the contract in paragraph (9) the services offered was guarding services. It is not indicated that the guards were to collect parking fees too. DW 2 had stated that it was a verbal contract. This cannot supersede a written one. His evidence in my view, was hearsay evidence as none of the Manager or workers who were present when the alleged incidents took place where also not called as witnesses. I find that the claims are nothing but an after though. Nothing could have been easier than to put the complaints in writing and issue written notice of termination. <u>In my view, there is evidence on a balance of probability that the Defendant was in breach of the contract when he failed to give written notice of termination as per the contact</u>".**

14. That judgment aggrieved the Appellant who filed a memorandum of Appeal dated 22/9/2010 on 23/9/2010 setting out 5 grounds of Appeal as follows:-

i) "THAT the learned magistrate misdirected himself on the principles of law applicable in determining the suit.

ii) THAT the learned magistrate erred in law and fact in failing to consider and assess the evidence adduced.

iii) THAT the learned magistrate erred in law and fact in failing to determine the matter on merit.

iv) THAT the learned magistrate erred in law in failing to hold that the defendant had discharged burden of proof on the issue of liability.

v) THAT the learned magistrate erred in law in failing to consider the defendant's counter-claim and that the plaintiff had himself breached the terms of the contract in existence as a result of which the defendant has suffered lots of damage".

15. All these grounds can be summed into one to the effect that the trial court did not properly and adequately consider the evidence led so as to apply the same to the law applicable and for that reason misconstrued and misdirected itself and arrived at an untenable decision allowing the Respondents suit and dismissing the Appellants counterclaim.

16. This being a first appeal, the court is bound to come to own conclusion upon reappraisal and reexamination of the entire record while guided by the principles that an appellate court should not lightly and freely interfere with a trial courts finding on facts unless it be demonstrated that the finding are contrary to the evidence and the law or otherwise perverse and unsupportable.[1]

17. On review of the evidence adduced, that the parties entered into a contract for provision of night guard security service at a monthly consideration of Kshs.8000 was not in dispute. Even the fact that the contract was for a period of three years and provided the mode of termination was conceded by the Appellant as defendant then. Even the fact that the Appellant terminated the contract without notice was conceded by the Appellant in his evidence when he said so twice. In his evidence in chief he said:-

"They do shoddy work. I then terminated without notice"

(pg 28 line 19)

18. In cross examination, the witness said:

"I did not give notice to terminate. The duration of contract was 3 years. (pg 29, line 9)

19. It is of note that the gravamen of the Respondents' claim was that the contract was terminated contrary to its terms and without notice. Effectively therefore the Appellant merely buttressed the Respondents position that there was an action by the appellant which went against the terms of the contract. That is the plain outcome of reading of the proceedings and judgment of the lower court.

20. For the court to see whether there was compliance or breach of the contract, the document itself must be looked at. The Record of Appeal did not include that critical documents but it was introduced by a supplementary Record of Appeal filed in court on 25/01/2016. The document at clause 15 provides:-

"15. This agreement is binding for 3 years from the date hereof and shall continue thereafter unless terminated at the end of the quarter of the 3rd year by either party giving one quarter's notice in writing. Beware that this contract is binding also to change ownership".

21. Drafting language may not be perfect but I read the clause to say that the parties intended that their contract would run for a period of three years and could only be terminated by a Notice equal to one quarter in the 3rd year or else it would continue thereafter.

22. The Law is that parties are bound by their bargain and a Court of Law has no business to re-write or review for parties their bargain. In ***Husamuddin Gulham Hussein Pothiwala vs Kidogo Basi Housing Co-operative Society Ltd & 31 Others***, Civil Appeal No. 330 of 2003 the Court of Appeal reiterated this principle of Law when it said:

"A Court of Law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved".

23. I have said hereinabove, that the existence of the contract was a admitted without equivocation. It follows that the validity of the contract was never made an issue for determination by the court. There being no contestation on the validity of the contract and it being admitted that it was terminated during the 1st years without notice, it was a clear case of breach by the Appellant.

24. It would thus be contrary to law and the mandate of this court as an appellate court, to reverse the trial court on such a clear finding based on evidence by both side. There is clearly no justification to fault the trial court and therefore this appeal cannot succeed on the finding by the court that the Appellant had breached the contract.

25. In essence the trial court did not misdirect itself on the applicable principle that suits are determined based on evidence adduced to support the pleadings filed. The trial court did fully and sufficiently consider the evidence adduced, gave the reasons for its decision and that is all a court of law is expected to do.

26. It may only be of note that in the defence filed, the Appellant did plead that the Respondent breached the terms of their agreement but without specifies as is mandatory under Order 2 Rule 4. To that extent, the Appellant was not permitted in law to lead evidence of such particulars without being seen to ambush the Respondent. Infact the Appellant ought not to have been allowed to lead evidence of the alleged theft by the Respondents guards or any other alleged transgressions.

27. However, even though they were allowed to lead that evidence without pleading it, the evidence itself, was hollow and largely hearsay. DW 1 said the transgressions were done at night in his absence and he did not bother to say who informed him. That evidence was to that extent in admissible and could not have been a basis to find on the appellant. The trial court was thus quite right to observe that it was hearsay. Even the evidence by the DW 2 was no better. His was that, he was informed by his Manager who was never called to give evidence. This are clear facts that make it difficult for an appellate court to fault the trial court and therefore make the Appellants complaint untenable and without merit.

How about evidence in support of the counterclaim?

28. It is true that the counterclaim was specifically pleaded as a liquidated claim and therefore a special damage. It required strict proof. However both DW 1 & DW offered no proof of that claim. DW 2, the Appellant's evidence was all enough to have the counterclaim dismissed. The witness said:-

> **"I cannot recall when the spillage was done. I cannot**
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> **recall if I issued the payment. I do not know the person who cleared the split oil. I came after some days to find the oil had been cleaned. I do not know if the Plaintiff or any other person (3rd party) cleared it"**.

29. Even DW 1 said nothing toward proof of the pleaded counter-claim.

> In all fairness, the Appellant hopelessly failed in his duty to discharge his 'burden of proof under sections 107, 108 and 109 of the Evidence Act and the trial court had no way of finding' than it did find that the counterclaim was never proved.

30. The foregoing being my finding, the appeal as filed and argued lacked merits and the same is hereby dismissed with costs to the Respondent.

Dated and delivered at **Mombasa** this **26th** day of **June 2018.**

P.J.O. OTIENO

JUDGE

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[1] **United Insurance Co. Ltd vs East African underwriters (K) Ltd [1985] KLR**