



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 610 OF 2012

STANLEY MWAWASI.....APPELLANT

- V E R S U S -

BOB MORGAN SERVICES LIMITED.....RESPONDENT

(Being an appeal from the judgement and subsequent decree issued on the 17th October 2012 by the lower court at Milimani Commercial Courts in CMCC no. 12290 of 2006 by Hon. T. S. Nchoe (Mr) , RM.)

JUDGEMENT

1. Bob Morgan Services Ltd, the respondent herein, filed an action vide the amended plaint dated 4th February 2008 before the Chief Magistrate's Court, Milimani Commercial Court, Nairobi against Walter Mong'are and Stanley Mwawasi (the appellant herein) personally and in their capacities as secretary and chairman respectively of Brightwoods Services. In the aforesaid plaint, the respondent sought for judgment against Walter Mong'are and the appellant as follows:

a) Kshs.435,348.40

b) Interest on (a) above at 24% p.a from 30/4/2006 until payment in full.

c) Damages for breach of contract.

d) Costs of this suit.

2. The appellant and his co-defendant filed their defences to deny the respondent's claim. When the suit came up for hearing before the trial court, the respondent presented the evidence of two witnesses before closing its case. The appellant and his co-defendant on the other hand opted to close their case without summoning witnesses to testify to buttress their defence. In his judgment delivered on 28.11.2012, Hon. Nchoe, learned Resident Magistrate, allowed the claim in favour of the respondent as prayed in the amended plaint save for the prayer for damages for breach of contract. Being aggrieved, the appellant preferred this appeal. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

3. On appeal, the appellant put forward the following grounds:

1. That the lower court erred in law and in fact by making a finding that the 2nd defendant had entered into a contract for provision of security services with the plaintiff whilst clearly the plaintiff produced exhibit 1, a contract that constituted the Guard Service Order Contract that

was solely and exclusively entered into between the plaintiff and the 1st defendant on the 1st October 2004 to the exclusion of the 2nd defendant.

2. That as a result of the above error in fact and in subsequent in law, the lower court wrongfully and irregularly proceeded to enter judgment for the plaintiff against the 2nd defendant for the sum of Kshs.435,348.40, interest and costs without any basis.

3. That the lower court in its finding erred in fact and in law by considering issues that were not pleaded by the plaintiff in its pleading nor adduced in its evidence thus effectively bending/distorting the rules of natural justice, evidence and thus the evidentiary burden of proof to the decided known standard in civil cases.

4. I have re-evaluated the case that was before the trial court. I have also considered the appellant's written submissions. Though the respondent's counsel was given time to file written submissions, none had been filed by the time of writing this judgment. It is the submission of the appellant that he was not privy to the contract allegedly entered between the respondent and the Walter O. Mong'are who was the 1st defendant in the trial court. The appellant pointed out that the learned Resident Magistrate fell into error when he found the appellant liable for a debt he did not incur nor acknowledge its existence. The appellant further pointed out that the trial magistrate ignored documentary evidence, which were heavily relied upon by the respondent and instead relied on oral evidence contrary to the provisions of Section 97 as read with Section 62 of the Evidence Act. I have carefully examined the documentary evidence produced by the respondent's witnesses. One of the documents produced by Leonard Nyatigire (PW1) is the Guard Order Service contract dated 1st October 2004 and produced as PExh 1. The aforesaid agreement was executed by one R. M. Ngala on behalf of Bob Morgan Services, the respondent herein and Mr. Walter O. Mong'are for and on behalf of the client. In the aforesaid agreement, it is stated that Mr. Walter Mong'are has booked for services of 2 day guards and 2 night guards deployed at Brightwoods Apartments along Chania Road, Yaya Centre. On the face of it, the document does not mention the name of Stanley Mwawasi, the appellant herein. PW1 further produced three very important correspondences exchanged between the respondent and Walter Mong'are who signed on behalf of Brightwoods Services. The appellant's name was not mentioned in those correspondences. The name of the appellant only featured in the cheque payment voucher dated 8.3.2005 as the chairman of Brightwoods Services which document is produced as PExh. 8. In the aforesaid document, the appellant's signature is not appended therein. PW1 stated that the appellant authorised payments.

5. The question which has been posed to this court to settle is whether or not there was a privity of contract between the appellant and the respondent. It is clear from the documentary evidence, that the appellant did not append his signature in any of the documents produced as exhibits. However it is alleged that the appellant was the chairman of Brightwoods Services. It is unfortunate that none of the parties supplied credible evidence to establish this fact. The foundation of this case is the contract document titled "**Guard order service contract**" dated 1st October 2004. The aforesaid contract was executed by the respondent and Walter O. Mong'are. I am convinced that the appellant was not a party to the contract. The learned Resident Magistrate therefore fell into error when he concluded that the appellant and his co-defendant entered into an agreement with the respondent yet the documentary evidence presented in court states otherwise.

6. In the end, I find the appeal meritorious. It is allowed as prayed. Consequently the order entering judgment against the 2nd defendant i.e Stanley Mwawasi (appellant herein), is set aside and is substituted with an order dismissing the suit against the appellant with costs. The appellant to also have costs of the suit.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent