



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 590 OF 2012**

**INTEGRATED CCTV SECURITY LTD. .... PLAINTIFF**

**VERSUS**

**KENYA AIRPORTS AUTHORITY ..... DEFENDANT**

**RULING**

1. This is one of those unfortunate cases where co-operation between the parties has broken down at the 11<sup>th</sup> hour thus resulting in the court having to step in to rule upon a formal application to enlarge time. By way of the history of this matter, the Plaintiff came before court during the last court vacation under Certificate of Urgency by way of Notice of Motion dated 7 September 2012. That Application sought orders that a temporary injunction do issue to restrain the Defendant itself, its servants, agents or employees from awarding a tender for the supply, installation and commissioning of CCTV cameras and surveillance equipment and systems at Jomo Kenyatta International Airport, Nairobi (“the Airport”). According to the Affidavit in support of that Notice of Motion sworn by one Joseph Njenga Mwai, a director of the Plaintiff company dated 7 September 2012, the Plaintiff had been awarded a tender floated by the Defendant in May 2011 for the supply, installation and commissioning of CCTV cameras as above. The Plaintiff was the successful bidder and obtained a contract from the Defendant dated 29 September 2011 being Agreement No. CL/102/2011 (hereinafter “the Agreement”). The Agreement had been terminated by the Defendant on 26 July 2012 wherein the Plaintiff maintained that it had executed 95% of the contract.
2. To cut a long story short, the parties’ counsel appeared before this court on a number of occasions from the 10<sup>th</sup> September onwards. Indeed, on the 14<sup>th</sup> September 2012, I granted an interim order preserving the status quo at the Airport to the extent that the Defendant should not in any way interfere with the installation of equipment supplied by the Plaintiff already carried out at the Airport in relation to the Agreement. The Plaintiff’s said Application dated 7 September 2012 came for hearing on 9 October 2012. On that day I expressed surprise that the Plaintiff’s said Application was withdrawn with costs to the Defendant. As I detailed in my Ruling of the 11 October 2012 what had emerged out of the proceedings to date was a necessity for carrying out a valuation of the work done by the Plaintiff at the Airport under the Agreement. On the one hand, the Defendant had no objection to a valuation being carried out provided it was carried out on behalf his client by the Ministry of Works’ valuer. The Plaintiff’s counsel indicated that his client would be uncomfortable with a valuation being undertaken solely by the Ministry. His client would be prepared to pay for an independent valuer to value the works carried out. After some debate, I directed that a joint valuation of the work by the done by the Plaintiff under the Agreement with the Defendant dated 29 September 2011 which would be carried out by the Ministry of Works’ valuer and an independent valuer appointed and paid for by the Plaintiff. I

- directed that such joint valuation report would be carried out, completed and filed in this court by 31<sup>st</sup> of October 2012. I then directed that the matter be mentioned before court to ascertain progress on 5 November 2012.
3. On that day, Mr. Omolo, learned counsel for the Plaintiff, indicated that a joint inspection had been carried out on the work done at the Airport but it did not go quite the way that the parties had anticipated. By way of explanation, Mr. Lutta, learned counsel for the Defendant, explained that where the parties had differed as far as the joint inspection was concerned, was that the Plaintiff had stated that for the inspection it wanted to bring in a server, apparently for the purpose of showing the valuers the software that had been installed for the working of the CCTV cameras. On the Defendant's part its valuer understood that what was required to be done was to ascertain what was on site and had been supplied or otherwise in reference to the said Agreement. Mr. Lutta observed that the proposed server to be introduced contained the software but had not been previously installed by the Plaintiff. If it was allowed to install it, that would mean a fresh supply of equipment in relation to the stopped Agreement. In turn, Mr Omolo stated that the Defendant had paid for the software but it did not have the hardware on site to give effect to such software. Unless a server was brought in, the extent and value of the software could not be ascertained. The desktop computers belonging to the Defendant which were supposed to handle all the software were unable to cope with the same, hence the need for a server to be brought on site. Eventually the debate before court on 5 November 2012 led to naught and the matter was stood over for the parties to consider further, their respective positions. After three other false starts, learned counsel for the parties appeared before court on 30 November 2012.
  4. By that date, the Plaintiff had filed a further Application by way of Notice of Motion dated 2 November 2012 which is the subject of the current proceedings before court. That Application requested a review of my Order dated 11 October 2012. It also prays for an enlargement of the time when the valuation of the works pursuant to the Agreement should be undertaken and to enlarge the time within which a Joint Valuation Report be filed. Among the grounds in support of the Application, the Plaintiff noted that the timelines set by this court as regards the filing of a joint valuation report have expired and it was in the interest of justice that the timelines be reviewed. The Application was supported, once again, by an Affidavit sworn by the said Joseph Njenga Mwai dated 2 November 2012. Mr Mwai had been present when the first valuation exercise was carried out at the behest of this court. He noted that the valuation exercise had begun by establishing that the CCTV cameras and related cabling had been installed and this aspect went without a hitch. However, when the deponent requested to be allowed to demonstrate the software aspect as per the Scope of Works, as working, he had been informed that this was unnecessary and the exercise was abruptly terminated. Mr. Mwai continued with his affidavit by saying that as far as the Plaintiff was concerned, the Scope of Works under the Agreement was a composite of the hardware and software aspect. He maintained that the hardware aspect was covered under items (a), (c), (f) and (g) of the Scope of Works, while the software aspect were contained in items (b), (d), (e) and (f). The deponent continued by stating that in his Affidavit at paragraph 8 (c):

**“In order to prove that the software component contemplated by the Scope of Works is working and to aid the Joint Valuation the plaintiff shall need to be allowed to carry to the Jomo Kenyatta International Airport and connect to the cameras and cabling, certain items namely A Server, The Encoder Blades, A Monitor, Keyboard, Mouse and a Laptop.”**

5. The Plaintiff's Application dated 2 November 2012 is opposed. The Defendant's Electrical Engineer one Owen Waithaka swore a Replying Affidavit on 15 in November 2012. The deponent stated that he had read the Affidavit in support of the Application and observed in relation to the Agreement that the cabling had all been done and was fully paid for. 17 cameras and PTZ Controller keyboards had not been installed as at the time of the termination of the Agreement and were delivered post-contract. He also maintained that no software had been installed on the Defendant's systems. The deponent stated that he had been present when the Plaintiff's representatives had come to the Airport to carry out the court ordered joint valuation. During the course of the inspection, the deponent stated that the Plaintiff had sought to bring in a server from outside. The deponent stated that he refused to allow this as it amounted to the Plaintiff making a

fresh supply both of software and hardware which were not installed into the Defendant's existing systems by the time that the Agreement was terminated. Paragraph 7 of the deponent's Replying Affidavit was, to my mind very significant. He stated:

**“THAT I honestly believe that we are unlikely to agree on anything with the Plaintiff even if time is enlarged.”**

6. Unperturbed by this statement, Mr. Mwai swore a Supplementary Affidavit dated 20 November 2012 made in response to Mr. Waithaka's said Replying Affidavit. In his Supplementary Affidavit, Mr. Mwai expressed amazement that the Defendant herein was opposed to an independent valuation bearing in mind that it was the very same Defendant who had prayed the court for the valuation to be done. He felt that Mr. Waithaka had arrogated upon himself to look for that the fact that no software was installed on the Defendant's systems. It was the Plaintiff's view that the question as to whether software was installed or otherwise was precisely the one to be addressed by the joint valuation report ordered by court. The deponent was of the opinion that Mr. Waithaka proposed that the valuation be done without involving outsiders, only to turn around now and frustrate the exercise. Mr. Mwai then referred to the Plaintiff's averments as contained in the Plaint as to the amount of work that it had done under the Agreement. The deponent maintained that the workings of the software were successfully tested and demonstrated by using desktop computers provided by the Defendant along with the Plaintiff's laptop earlier in 2012. This has been done because the Defendant's servers were either out of commission or lacked the capacity to carry out the tasks of the milestone software supplied by the Plaintiff.
7. This then was the position when the learned counsel for the Plaintiff and the Defendant appeared before court on 30 November 2012. Mr. Omolo for the Plaintiff referred to the three Affidavits relevant to the Application and commented that he was aware that an effort had been made to carry out a joint evaluation but, somewhere along the line, the parties had agreed that the valuation would be carried out without the intervention of an outsider. However, in the course of the valuation exercise, there were disagreements as between the parties and in counsel's view no joint valuation was now possible. It was the Plaintiff's position to go back to the parties as per the Order of this court of 11 October 2012. However, the Plaintiff noted that the court's said Order allowed the Plaintiff only 2 persons to carry out the joint valuation on its side. In counsel's view this was too few and he requested the court to allow five persons per side on site. Counsel for the Plaintiff noted that there were three aspects to the joint valuation – the hardware component, the software component and the third component which was ancillary falling between the two – user and technical training, testing and installation of the system and after sales support. He observed that when his client sought to bring equipment on site to test the workings of the cameras, the Defendant declined that this be allowed. A test had been carried out involving software but only as regards certain cameras. His client only sought not to test the entire system but that the cameras were doing what they were required to do. In counsel's opinion it was in the interest of both the Plaintiff and the Defendant to permit the Plaintiff to undertake the software demonstration. He felt that it was important to point out that his client had issued an invoice for commissioning of the system prior to the contract termination. There was no risk that his client would put in another invoice. The original invoice was for a sum of Kenya Shs. 9,740,212 .36.
8. On his part, Mr. Lutta opposed the Application and maintained that the Orders that are now being sought by the Plaintiff were not contained in the original suit filed. It was the court that ordered that the joint valuation be done and in a particular way. A consent in that regard was reached between the parties that another method of valuation be used. It had not been demonstrated that the Defendant acted in contempt of that Order. All that the Plaintiff had stated was that it was forced or tricked into a separate method of solving the dispute which the Plaintiff now sought to portray. The Order which the court granted had been spent by the parties of their own volition when they departed from the method that the Court had ordered, so that there is no proper basis for extension of time. Counsel then referred me to paragraph 8 (c) of the Affidavit in support of the Application which he maintained had been ingeniously inserted in the said Affidavit but not in the Orders sought in the Notice of Motion. Counsel maintained that even in his discussion with Mr. Omolo, the exercise of carrying out a joint valuation or by having an independent investigation, the position of the parties will remain the same as the said paragraph 8 will not be entertained by

the Defendant. If this court was to make such an order it would be an exercise of futility and in vain. Mr. Lutta observed that if the Plaintiff required to bring equipment on site at the Airport to test its software supplied that meant that such equipment was not already in situ and had not been supplied under the Agreement. The Plaintiff had maintained that 95% of the work had been done. This would mean that the system would be up and running. As per the Replying Affidavit of Mr. Waithaka, the joint valuation had been done. All that has been varied was the method. Mr Waithaka had confirmed that the cabling had been done and fully paid for. As per paragraph 4 (ii) of the Replying Affidavit 17 cameras were lying on site not installed as were the PT controller keyboards. If these things had not been done, there was no way that 95% of the work of been completed. Mr. Waithaka had said that when the Plaintiff sought to bring in a server as regards testing the software, he had refused to allow it. These facts have not been challenged by the Plaintiff. In counsel's opinion, it would be most unfair if the items detailed in the said paragraph 8 of the Affidavit in support of the Application were brought in. The Defendant maintained that only 23% of the work under the Agreement had been done. One did not have to introduce something new when the rest was there. Whatever was supposed to be supplied was detailed in the Bills of Quantities and nothing extra. If the court allowed the Plaintiff to bring in a laptop computer or a server, it would mean that there was nothing existing in place which would allow the system to work. It was the Defendant's considered opinion that if the court decided to enlarge time, it should make its own inspection on site at the Airport before any Order is made. There are bound to be disagreements on the ground. The Supporting Affidavit has been very economical as to the agreements and disagreements between the parties. As regards the ancillary aspect of the Agreement at 5% referred to by Mr. Omolo, such was irrelevant if the court allowed the Plaintiff to bring in equipment to demonstrate how the system worked. Without the software component, there is no way that the system can work. The invoice to which the court had been referred was that of the Plaintiff and the work covered by that invoice had not been valued and it had not been agreed upon. Mr. Lutta asked that the court should not entertain the Application for extension of time, it should dismiss the same and make a site visit instead.

9. In a brief reply, Mr. Omolo stated that the Plaintiff had no problem with the court making a site visit if it be inclined to do so. Counsel noted that difficulties had begun at the joint inspection when the Plaintiff requested to be allowed to demonstrate that the software aspect of the scope of the work had been completed. If it is necessary to conduct a valuation as per the Defendant's request, why had it not been done? If the valuation had been carried out as counsel had said, why was it not attached to the Replying Affidavit? The Plaintiff had not been allowed to demonstrate the software application so how could a valuation have been done? As regards the Plaintiff's said invoice, the Defendant had not produced any material to show that the work covered by the invoice had been inspected. Nothing as contained in the invoice had been challenged and until such time as evidence is produced, the invoice should stand. In that invoice, the word "commissioning" had been used. In counsel's view, this is the final act to show that the final product has been installed and that it works. It is at the end of the process. The Plaintiff has not said that it has commissioned the works. The keyboard as detailed in the Supporting Affidavit is not the controller keyboards detailed in the Bills of Quantities. You cannot have a monitor and operate it without a keyboard. It is not the keyboard in the Bills of Quantities which is a controller keyboard. Counsel maintained that the equipment referred to in paragraph 8 are working tools and need to be taken into the Airport to test the software and thereafter taken away again. All such equipment is necessary to show that the software works. The Plaintiff maintained that the valuation exercise had begun but it had now stalled. In counsel's opinion the interests of justice would require that this court allow the Plaintiff to carry out the testing. That part of this Court's Order is not spent.
10. It appears from what counsel for the parties have told this court that there has been a partial carrying out of this court's Order of 11 October 2012. The Defendant maintains that the valuation of work carried out by the Plaintiff under the Agreement at the Airport is to all intents and purposes complete. On the other hand, the Plaintiff disagrees and asks the question as to how it can be considered complete when an integral part of the work, being the software provided, remains untested. It maintains that such cannot be tested unless "tools of the trade" are brought into the Airport premises for such testing purposes. Engineer Waithaka clearly states in his Replying Affidavit that he refused the Plaintiff permission to bring such testing equipment on site

for, in his opinion, such testing equipment should have been supplied by the Plaintiff under the Agreement, for the software to be commissioned. What has caused me more pain is Engineer Waithaka's viewpoint, which seems to be shared by the Defendant's counsel, that the parties are unlikely to agree on anything whether or not the Application for extension of time is allowed or otherwise. Further, Mr. Lutta has said that the Orders sought by the Application fall outside the prayers of the Plaint and therefore should not be allowed. That is as may be under the strict rules of procedure but does not take into account this court's inherent jurisdiction.

11. However, there seems to be some agreement between counsel for the parties that in view of the stalemate between them, this court should entertain a site visit, more or less as a final attempt to resolve the parties' disagreements. I am going to go along with that suggestion and upon delivery of this Ruling a suitable date will be fixed for the court to visit the site. In this regard, the court will be assisted by its own technical expert in this particular field. Needless to say the question of the technical expert's professional fees will be the subject of argument as to who is to pay for the same. In the circumstances, this court need not rule on the Plaintiff's Application before it at this stage only to say that the time for the review of the court's Order dated 11 October 2012 is temporarily extended. Furthermore, the time for the valuation of the works pursuant to the Agreement between the parties will also be enlarged on a temporary basis for a period of up to 14 days after the court's site visit as ordered as above. Costs of the Application are reserved.

**DATED and delivered at Nairobi this 30<sup>th</sup> day of January 2013.**

**J. B.HAVELOCK**

**JUDGE**