



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO.492 OF 2013**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....PLAINTIFF**

**VERSUS**

**TOTAL SECURITY SURVEILANCE LIMITED.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 8<sup>th</sup> November, 2013 brought under the provisions of Order 51 Rule 1, Order 40 Rules 1 of the Civil Procedure Rules and Sections 3A of the Civil Procedure Act, the Plaintiff sought an order:-

***“to restrain the Defendant/Respondent whether by itself employees, servants and/or agents howsoever from unlawfully entering and/or continuing to be within the Plaintiff/Applicant’s various premises countrywide pending the hearing and determination of the suit.”***

The Plaintiff relied on the grounds on the body of the motion and the supporting affidavit of Catherine Nyambura Kimani sworn on 8<sup>th</sup> November, 2013.

2. The Plaintiff contended that it entered into a contract for the provision of security services with the Defendant on 5<sup>th</sup> November, 2012 for a period of one year with effect from 1<sup>st</sup> November, 2012. That subsequently, the said contract lapsed at midnight on 31<sup>st</sup> October, 2013 and neither party requested nor agreed to an extension or variation of the same. That on 1<sup>st</sup> and 2<sup>nd</sup> August 2013, the Plaintiff initiated the process of sourcing for a firm to provide security services for the period of 1<sup>st</sup> November 2013 to 31<sup>st</sup> October, 2014 through tender reference number KeNHA/749/2013 by advertising in the local dailies. It was further averred that the Defendant was among the 19 security firms that bid for the tender, but that after the evaluation process, the Defendant’s application was unsuccessful. That this prompted the Defendant to challenge the outcome of the aforesaid tender process through an application for review in the Public Procurement Administrative Review Board (“PPARB”) which to date, is still pending hearing. That owing to this application for review, the Plaintiff was yet to sign any contract with the successful bidder in tender reference number KeNHA/749/2013 for the security services as it was requested not to do so by the PPARB. That in the interim, the Plaintiff had secured the services of another security firm, Babs Security, for a month to secure its premises pending the determination of the Defendant’s application at the PPARB.
3. It was further contended that to date, the defendant had failed to remove its security guards from

the Plaintiff's premises countrywide despite the numerous requests by the Plaintiff for it to do so. The Plaintiff contended that the defendant still purported to offer security services despite there being no contractual obligation to offer such services. That by failing to vacate the premises, the defendant was trespassing and interfering with the Plaintiff's quiet possession of its various offices countrywide. It was thus argued that the presence of the two security firms in the Plaintiff's premises had resulted into various problems which had the potential of compromising the security of its properties.

4. Mr. Dulo, learned Counsel for the Plaintiff submitted that the application by the Plaintiff was meritorious as it had demonstrated a prima facie case with a high probability of success. He relied on the cases of **Fontana Enterprises Limited-v- Mwangi Chomba (2008) eKLR**, **Silvester Momanyi Marube –v- Gulzar Ahmed Motors & Another (2012) eKLR** in support of his submissions. It was further submitted that the contract that was a subject of review was for the period of 1<sup>st</sup> November 2013 to 31<sup>st</sup> October, 2014 and as such the notification of the PPRAB did not act as stay order that could affect the interim contract between Barbs Security and the Plaintiff. According to Mr. Dulo, the direct procurement of Barbs Security was a stop gap measure given that there was need for security services by the Plaintiff. The Plaintiff therefore urged the court to grant the orders as sought in the application.
5. The Defendant opposed the application through a Replying Affidavit by James Cherutich sworn on 13<sup>th</sup> November, 2013. The Defendant admitted that it had entered into a contract with the Plaintiff for the provision of security services with effect from 1<sup>st</sup> November, 2013 and which was set to lapse on 1<sup>st</sup> October 2013. That upon the expiry of the contract, the same was extended verbally by the Plaintiff as it was yet to make an award for a new tender for the provision of security services. That there was therefore no need to remove its security guards from the Plaintiff's premises countrywide. It was further contended that the Plaintiff did not serve any written notice to the Defendant indicating the termination of the contract. That it was therefore clear that the defendant had been providing security services to the Plaintiff to date. The Defendant further affirmed that it lodged a review at the PPARB challenging the Plaintiff's tendering process for the provision of private security services on 31<sup>st</sup> October, 2013. That the PPARB notified the Plaintiff that the Defendant had lodged the said review and that no contract with respect to the provision of security services should be awarded until the determination of the review proceedings.
6. Mr. Bundotich, learned counsel to the Defendant submitted that the Plaintiff disobeyed the orders issued by the PPARB by awarding a one month contract to Babs Security without the leave of the said tribunal or permission from the Public Procurement Oversight Authority (PPOA). As such it was submitted that the Plaintiff had come to court with unclean hands and was not entitled to the orders sought. Further, the defendant asserted that both the suit and the instant application were an abuse of the court process as the Plaintiff's intent was to circumvent the Order and directive of the PPARB. That any order sought from this court was likely to contradict the order that would be issued by the PPARB. Further, Mr. Bundotich submitted that the orders sought were vague and incapable of enforcement as the Plaintiff had not prayed for an order of eviction. Additionally, it was submitted that the wording of prayer number 3 of the Plaintiff's application did not have the effect of a mandatory injunction as the Defendant was still in the Plaintiff's premises. That as such the various authorities cited by the Plaintiff in support of the application were inapplicable. The Defendant therefore urged the Court to dismiss the said application with costs.
7. I have carefully considered the Application, the Supporting Affidavit and the Replying Affidavit. I have also considered the various cited authorities and the submissions by learned counsel. The issues for determination in my view are whether the Plaintiff has satisfied the requirements for the grant of an injunction as sought in prayer 3 of its application.
8. The threshold for the grant of an injunction are well set out in the case of **Giella v Cassman Brown (1973) EA 358** to the effect that an applicant must show a prima facie case with a probability of success, that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage; and that when the court is in doubt, it will decide the application on the balance of convenience. On the other hand, in considering an application for a mandatory injunction, it is clear that such orders are given at the interlocutory stage only under exceptional circumstances. See the case of ***East African Fine Spinners Ltd (In Receivership) & 3 Others vs. Bedi Investments Ltd Civil Appl. NAI. 72/94 (ur)*** where **Gicheru, JA** (as he then was)

cited *Megarry J in Shepherd Homes Ltd v Sandahm [1971] 1 ch. 34*, stating in part:

***“....., it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.....”***  
(emphasis mine)

9. Further in **Halsbury’s Laws of England volume 24 paragraph 948** the learned authors state that ;-

***“A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notices that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.”*** (emphasis added)

10. From the foregoing, it is clear that the Plaintiff must satisfy the conditions in the *Giella* case and further prove that there are special or exceptional circumstances for the grant of a mandatory injunction. In addition, in determining this application, the court is well aware that it is not required to make any definitive or conclusive findings of fact and law at this stage. However, this does not preclude the court from expressing a prima facie view of the matter.
11. From the foregoing, the first issue to be determined is whether the Plaintiff has established a prima facie case. Prima facie has been defined by the Court of Appeal in ***Mrao Limited –vs- First America Bank of Kenya Ltd & 2 Others (2003) KLR 125*** to mean a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been breached by the opposite party that calls for an explanation of rebuttal from the latter.
12. It is the Plaintiff’s case that the Defendant has unlawfully insisted on continuing to offer private security services to the Plaintiff without any contract under the alleged misguided notion that since it has filed an application for review with the PPARB, then the contract between the two parties, which lapsed by effluxion of time, was extended by implication and operation of law. In view of this argument, it is important to determine whether there is a contract in existence between the parties.
13. It is common ground that there was a contract for provision of private security services between the parties dated 5<sup>th</sup> November 2012. The same was for one (1) year from the 1<sup>st</sup> of November, 2013. Although the Defendant contended that the same was lapsing on the 1<sup>st</sup> October, 2013, a simple reading of page 2 of the contract will show that same was for one (1) year. Under the interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya “a year” is equivalent to 12 months. That contract therefore was to run from 1<sup>st</sup> November, 2012 to 1<sup>st</sup> October, 2013, which period has lapsed. However, the Defendant asserted that after the lapse of the contract period on 31<sup>st</sup> October, 2013, the Plaintiff extended the same verbally. Given the nature of the contract and the fact that the Plaintiff is a public institution, I find it unlikely that the same could be extended verbally or by implication as argued by the Defendant. The alleged implication being the provision of service between 2<sup>nd</sup> October, 2013 and 31<sup>st</sup> October, 2013 cannot hold in view of what I have already stated. In most cases, parties to a contract arising from a procurement exercise such as the one in question will vary the contract period in writing. The same also requires prior approvals by a public entity’s respective committee such as the tender or procurement committee of the public institution. This is in accordance to Section 47 of the Public Procurement and Disposal Act, 2005.

14. The Defendant has failed at this stage to adduce evidence that such approvals were given. In the foregoing, I find that on a prima facie basis, a verbal agreement for the extension of contract cannot suffice. Further, I agree with Mr. Dulo's submission that the Plaintiff could not have extended the contract between itself and the defendant verbally, and then advise its landlord on the changes of its security service provider as evidenced by the exhibit marked "CNK2" annexed to the application. In a nutshell, I find that on a prima facie basis, the contract having lapsed; the Defendant does not have the right to purport to still offer security services to the Plaintiff. A party cannot force a contractual obligation on an unwilling party where there is no contract in existence. In the foregoing, I am of the view that a right of the Plaintiff had been breached and that this calls for an explanation in rebuttal by the Defendants.
15. I now turn to the issue of the Plaintiff coming to this court with unclean hands in seeking for an injunction. It is not disputed that an appeal on the tender process had been lodged with the PPARB by the defendant. The same was in connection with tender number KeNHA/749/2013 for the provision of private security services for the period of 1<sup>st</sup> November, 2013 to 31<sup>st</sup> October, 2014. See Exhibit "DB2" and DB3" respectively. The Plaintiff was notified of the appeal on 31<sup>st</sup> October, 2013 by the Board Secretary. However, the question that begs is whether the notice issued by the PPARB had the effect or implication of extending the contract between the parties. Based on the evidence before court, I find that the Notification of Appeal by the PPARB dated 31<sup>st</sup> October, 2013 was in connection with tender number KeNHA/749/2013 and did not serve to maintain the status quo as asserted by the Defendant. A reading of the said letter reveals that the PPARB only directed that there be no contract signed by the procuring entity and the tenderer that was awarded the contract in tender number KeNHA/749/2013 unless and until the appeal by the Defendant was finalized. The Defendant has not produced any proof that the Plaintiff has violated this directive save for stating that the hiring of the firm of Babs Security was in direct violation of the PPARB order.
16. The notion that the Plaintiff disobeyed the orders of the PPARB by hiring another firm with effect from 1<sup>st</sup> November 2013 holds no merit. This is so because the said security firm was procured directly by the Plaintiff under a different tender (KeNHA/767/2013) for a period of only thirty days i.e. between 1<sup>st</sup> and 30<sup>th</sup> November, 2013. Direct procurement is allowed under Section 74 of the Public Procurement and Disposal Act, 2005 where there is urgent need for the services and the circumstances for such urgency are unforeseeable. This court therefore agrees that the procurement of the aforesaid firm was only in the interim given that the tendering process for the provision of private security services had been put on hold pending the hearing of the appeal by the Defendant and the Plaintiff was still in need of security services. Under the circumstances, the Plaintiff had every right to remedy the gap in the services needed as the contract with the defendant had lapsed. There is no provision in law that required the Plaintiff to seek the direction of the Public Procurement Oversight Authority (PPOA) in sourcing the 30 day contract with Babs Security, though PPOA could have offered advice on the situation. Further, Tender number KeNHA/767/2013 is not the tender that is the subject of the review in the PPARB, but the appeal is in connection to tender number KeNHA/749/2013. There is no proof that Babs Security was the successful bidder in that tender to point to the fact that the PPARB's orders or directive was defied. I therefore reject the argument by the defendant that the Plaintiff has sought the orders prayed with unclean hands.
17. From the foregoing, I am satisfied that the Plaintiff has established a prima facie case with a probability of success. Has the Plaintiff proved that there are special circumstances that warrant the issuance of a mandatory injunction? In *Principles of Injunctions, by Richard Kuloba Oxford University Press 1987, at Page 95 paragraph (g)*, the learned author noted ;-

***"a mandatory injunction may be granted to stop a continuing trespass.....the Plaintiff must establish both on facts and in law, that he has some legal right, title or interest in the suit premises, sufficient to enable him to maintain an action of trespass"***

From the foregoing, it is clear that a mandatory injunction can issue where there is a continuing trespass. It is not in doubt that the Plaintiff has interest in the premises that are subject to this suit and that the Defendant is still in the premises purporting to offer security services. In the Plaintiff dated 8<sup>th</sup>

November, 2013, the Plaintiff is pursuing a trespass claim against the defendant for the violation of its property rights under Article 31 of the Constitution. Trespass to land deals with the direct, and intentional invasion of a claimant's interest in his person, his land or his goods. In this case, the Plaintiff has alleged that the Defendant is trespassing in its premises by refusing to vacate after the lapse of the private security services contract. As such, it was proper for the Plaintiff to come to this court for an injunction to restrain the defendant from the continuing trespass of its premises.

18. On the issue of damages, my understanding is that the law does not allow a party to blatantly trample over the rights of another at the pain of paying damages. For the rule of law to be maintained, courts should desist from holding the view that parties who are capable of paying damages can chest thump and be allowed to go against the law and await trial to assess the damages payable to the victims owing to their illegal acts. See the case of ***Joseph Siro Mosioma – v- H.F.C.K and 3 others Nairobi HCCC No. 265 of 2007 (UR)***.

19. Having come to the foregoing conclusions, can the orders sought be granted? The Plaintiff in prayer number 3 of its Notice of Motion sought one prayer ;-

***“(3) THAT at the inter parties hearing, the Honourable Court be pleased to grant an interim order restraining the Defendant/Respondent whether by itself , employees, servants and/or agents howsoever from unlawfully entering and continuing to be within the Plaintiff/Applicant’s premises countrywide pending the full hearing and determination of this suit.”***

20. It was submitted by the Defendant that the orders sought are vague. Mr. Bundotich further submitted that the prayer had been coached in a manner to suggest that the Defendants were outside the premises and should be restrained from having access to the premises of the Plaintiff. In a rebuttal, Mr. Dulo submitted that under Order 41 Rule 2 of the Civil Procedure Rules, the court is allowed to intervene when a right of a party has been infringed. That the Plaintiff has clearly demonstrated that the right to quiet possession of its premises has been infringed by the Defendant's continued presence. On whether a mandatory injunction can be granted in negative terms, the Plaintiff was emphatic that the same could be granted given the circumstances of this case. That further the order sought was not one for eviction, but one to restrain the Defendants from accessing the Plaintiff's premises.

21. Considering the rival arguments by the parties, the question that arises is whether the injunction sought can be issued as prayed for in the Prayer Number 3 of the Plaintiff's application. It is now settled that a prohibitory injunction restrains a party from taking specified steps. On the other hand, a mandatory injunction compels a party to take a specified step, which in essence has the opposite effect of a prohibitory injunction.

22. A reading of prayer number 3 of the motion shows that the order sought is both in prohibitory and mandatory terms. Prohibitory I that it prohibits the Defendants from entering into and mandatory in preventing the Defendant from remaining in the premises. It was submitted on behalf of the Defendant that since the Defendant was already in the premises it cannot be prevented from entering the premises. That since there was no prayer for eviction, Prayer No. 3 cannot be granted. That the same is vague and cannot be enforced. The question that arises is can a mandatory injunction be sought in negative terms? In ***O'Hare & Browne Civil Litigation, 15<sup>th</sup> Edition, Sweet & Maxwell at page 432 paragraph 27-010***, the learned authors noted that ;-

***“In many cases in which an interim mandatory injunction is granted, the injunction is worded in negative form even though it is positive in effect. In Rover International –v- Cannon Film Sales Ltd (1987) 1 W.L.R 670, Hoffman J described cases such as these having a “dynamic status quo”.....”***

23. From the above, it is clear that it is possible to have a mandatory injunction worded in negative form in exceptional circumstances. However, the same has to have a positive effect. The services at the center of this dispute are peculiar in their own way. The security personnel go in and out of the premises in shifts when providing security to the premises. Perhaps, it is due to the nature of this service that the Plaintiff chose to word prayer number 3 as it did in order to cover all the diverse situations.

24. At page 35 of the contract between the parties under “Technical Specifications” Clauses 1 and 2 thereof specifies the nature of the services contracted. It reads:-

*“1. The firm shall provide security services by deploying adequately trained and well-discipline security personnel who shall safeguard the KeNHA site, buildings, moveable and immovable assets, equipments and other items from any thefts, pilferage or damage and also ensure safety of the employees, visitors, guests or any other persons working in its complex/premises.*

*2. The security personnel shall be deployed round the clock in shifts at the various locations to safeguard of the premises.”*

25. My view is, although prayer No. 3 is unhappily worded, it is clear that from the nature of the services concerned, it is still possible to comply with an order issued in such terms. Since the guards are supplied or deployed by the Defendant on regular and shift basis, once prohibited from entering the premises, then it will be expected that no additional guards will be deployed. Those already in the premises will be removed upon expiry of their shift.

26. Nowhere in the contract of Affidavits was it alleged or shown that the Defendant either occupies any offices in the premises of the Plaintiff or has supplied equipment which are lying in those premises. Since the alleged presence is broken by shifts or successive deployment of guards, an order in terms of prayer No. 3 will be effective.

27. It was submitted that an order of this court will conflict with an order that may be given by the PPARB. I do not think so. My understanding is that the PPARB will be deciding whether the impugned Tender was properly awarded or not and if not so, it will give directions in accordance with the law on such Tender. If the Defendant is awarded that or any other tender, then it will have the exclusive right to return its guards to the Plaintiff’s premises. As far as this court is concerned, the Defendant does not have the right to enter the Plaintiff’s premises and offer security services thereat under the Contract No. KeNHA/ADM/HR/62/2012. Unless it acquires fresh rights, its continued entry into the Plaintiff’s premises remains unlawful.

28. Accordingly, I am of the view that the Plaintiff’s application is meritorious and I allow the same in terms of Prayer No. 3 of the Motion. The Plaintiff will also have the costs of the Application.

**DATED and DELIVERED** at Nairobi this 18<sup>th</sup> day of November, 2013

.....

**A. MABEYA**

**JUDGE**