



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 590 of 2012

INTEGRATED CCTV SECURITY LTD.....PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY.....DEFENDANT

RULING

1. The Plaintiff in this suit filed an Application by way of Notice of Motion dated 7 September, 2004 in which it sought a temporary injunction to restrain the Defendant itself, its servants and agents or employees from awarding the tender for supply, installation and commissioning of CCTV cameras or surveillance equipment and systems to any other person and further, sought an order to restrain the Defendant from interfering with the contract being carried out by the Plaintiff at Jomo Kenyatta International Airport, Nairobi. The Plaintiff had detailed in its supporting Affidavit to the said Application that it had been awarded the tender for the supply, installation and commissioning of CCTV cameras at the said airport under an agreement with the Defendant dated 29 September, 2011. Thereafter, the Plaintiff maintained that the Defendant, without any justifiable cause, terminated the said agreement on 26 July, 2012.

2. When the Application came before me for hearing on 10 September, 2012, I certified the same as urgent but would not grant any interim orders as prayed for, until the hearing of the Application *inter partes*. When the inter partes hearing took place on the 14 September, 2012, Mr. Lutta appeared for the Defendant and requested more time to file a Replying Affidavit, as he had only just been instructed. Time was allowed but Mr. Ndegwa for the Plaintiff requested me to order that the status quo should be maintained on site at the said airport as his client was concerned that there would be interference with the work already carried out by his client which, he indicated to court, was substantial. Consequently, I directed that the status quo should be maintained.

3. The Defendant duly filed its Replying Affidavit and the firm of Amolo & Kibanya came on record for the Plaintiff, replacing Mr. Ndegwa, on 3 October, 2012. However, when counsel appeared before me for what I assumed would be the hearing of the Plaintiff's said Application on 9th October 2012, I was a little surprised when Mr. Amolo for the Plaintiff indicated that he wished to draw withdraw the Application, which order I duly made with costs to the Defendant. Mr. Lutta had indicated to court that he had no problem with the withdrawal and consented to it, subject to costs. However, during the submissions made by both counsel in relation to the withdrawal of the Plaintiff's said Application, it emerged that what was of considerable concern to the Plaintiff was the necessity for carrying out a valuation of the work done by it at the said airport. Counsel had been in discussion in this regard and Mr. Lutta had indicated that his client would have no objection to a valuation being taken, provided it was carried out by the Ministry of Works. On his part, Mr. Omolo indicated that his client would be uncomfortable with a valuation being

undertaken solely by the Ministry of Works, being part of Government, always bearing in mind that the Defendant was a para-statal thereof. He indicated to court that his client would be prepared to instruct an independent valuer and would be happy to cover his fee.

4. Mr. Omolo then embarked upon an oral submission from the bar that under the provisions of **sections 1A, 3A and 3B** of the *Civil Procedure Act*, this court had powers to make orders for the just and judicious disposal of the suit. He noted that paragraph 18 of the Plaintiff brought out clearly the issue that the Defendant had refused to carry out the valuation. However, more fundamentally, it was the Defendant who has suggested a valuation be carried out by the Ministry of Works. Mr. Omolo didn't quite understand why the Defendant was now refusing his client's proposal for an independent valuer. Having recorded the consent to the withdrawal of the Plaintiff's said Application, I indicated to both counsel that I would like time to consider Mr. Omolo's oral application to court.

5. It is quite clear from the *Civil Procedure Rules* as per **Order 51 rule 1**:

"All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in Chambers or unless the rules expressly provide."

As far as I am aware, the only express provision for oral applications to court is under **Order 22 rule 7 (1)** with regard to oral applications for execution by a decree-older at the time of passing the decree. Thus, as it stands, there can be no application presently before this court as regards the taking of a valuation as to the work done by the Defendant at Jomo Kenyatta International Airport. However, with the advent of the new Constitution, courts in Kenya are required **"to facilitate the just, expeditious, proportionate and affordable resolution"** of civil disputes. In that regard, and in this case, it is obvious to me that if a valuation of the work carried out by the Plaintiff under the said agreement with the Defendant dated 29 September, 2011, is undertaken, then, when it comes to the question of assessment of damages in this suit in due course, such valuation will prove invaluable to the court and most probably, to the parties. In this regard, I did mention to counsel when they were before me on 9 October, 2012, that the parties may consider a joint valuation to be carried out and a report made to both this court and the parties themselves. It appeared to me that both counsel were not completely adverse to this idea.

6. To my mind, such possible resolution to matters of money and the taking of a valuation entails the use of Alternate Dispute Resolution. Valuers are professional people trained in their own sphere of work, such being well beyond the expertise of a commercial Judge! Accordingly, under the provisions of **Order 46 rule 20** it seems that this court has the mandate to adopt an alternative dispute resolution and may make orders for and issue such directions as necessary in this regard. **Order 46 rules 20 (1) and (2)** read as follows:

"(1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.

(2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution."

With the above in mind, I direct that a joint valuation of the work done by the Plaintiff under the said agreement with the Defendant dated 29 September 2011 will be carried out by the Ministry of Works' valuer and an independent valuer appointed by the Plaintiff. Such joint valuation and report will be carried out, completed and filed in this court by 31 October, 2012. The Plaintiff will cover the costs of the said independent valuer and the Defendant will cover, the costs incurred by the valuer from the Ministry of Works. The Plaintiff will be entitled to appoint a maximum of 2 of its employees/agents who may accompany the valuers to the said airport in order to point out the work carried out by the Plaintiff thereat. In the meantime and until the valuation has been carried out, the status quo as previously ordered will be maintained.

7. There will be a mention of this matter before court on Tuesday 5 November 2012 so as to ascertain the position with regard to the valuation report and how to progress this matter forward to determination and conclusion. Orders accordingly. Costs will be in the cause.

DATED and delivered at Nairobi this 11th day of October 2012.

**J. B. HAVELOCK
JUDGE**