



Editorial Summary

1. *Civil Appeal*

2. *Subject of Main Subordinate Court Case*

CONTRACT

2.1 *Services rendered but not paid for.*

2.2 *Services*

i) *Guard services to building*

Ksh. 58,500/=

ii) *Cleaning services to building*

Ksh. 27,100/=

-

Total

Ksh. 85,600/=

For the month of October 2009

2.3 *Appellant/original plaintiff files suit on*

4th November 2009

(3 days after due date of 1st day of a month)

(9 days after due date of 25th day of a month)

- 2.4 *Suit brought against agent of principal*
- 2.5 *Principal directs agents to pay appellant/
original plaintiff*
- 2.6 *Agents declines to pay at first but does so after
termination of contract.*
- 2.7 *Application for summary judgment dated
25th January 2010.*
- 2.8 *Held:*
Triable issues raised
a) *Is it the correct party to be sued?*
b) *Does the original defendant have authority
from the landlord?*

3. *Appeal to High Court filed 10th May 2010*

Hon. Magistrate erred in law and facts:

- 3.1 *... by ignoring the submissions of the appellant ...
and affidavit evidence.*
- 3.2 *... by failing to appreciate appellant had proven
his case to a balance of probabilities to
warrant exercise of discretion in the
appellant's favour.*
- 3.3 *... using its discretion ... without regard to
the law.*

3.4 ... failing to exercise his discretion in favour
of the appellant.

4. Respondent fails to attend court on :

- i) 20th May 2011
- ii) 15th June 2011 for directions
- iii) 14th November 2011 for hearing of
appeal (served 8th September 2011 at noon)
- iv) Order 42 r 20 (2) Civil Procedure Rules
applied.

5. Appel arguments:

- i) Sum of Ksh. 85,600/= clearly by due
and owing from the defendant.
- ii) Admission by principal of payments due.

6. Held:

- i) Appeal allowed.
- ii) Summary judgment entered for plaintiff in
subordinate court

7. Case Law:

8. Advocates :

i) A.O. Ombwayo instructed by M/s Odawa Ombwayo & Ochich & Co Advocates for
appellant/original plaintiff

ii)
defendant

N. Harun instructed by Nelson Harun & Co Advocates for respondent/original

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURT

Civil Appeal 160 of 2010

ISAAC OTIENO t/a

TOUGH SECURITY GUARDS &

WORLD WIDE MARKETING SYSTEM APPELLANT/ ORIGINAL PLAINTIFF

VERSUS

KIRAGU & MWANGI LTD RESPONDENT/ORIGINAL RESPONDENT

*(Being an appeal from the entire Ruling and Order of Hon. P. Riechi Esq Chief Magistrate in Civil Case
No. 7647 of 2009 dated 4th May 2010 at*

Milimani Commercial Courts, Nairobi)

JUDGMENT

I. BACKGROUND

1. The appellant/original plaintiff had entered into a contract with a proprietor of a building in the Westlands area of Nairobi from

1st February 2004 and 1st September 2004 respectively. The services rendered was that of “guard” and “cleaning” of the building.

2. The respondent/original defendant were agents managing the building and were to make payments to the said appellant. In the month of October 2009, they defaulted in making payments

For guard services to the building Ksh. 58,500/=

For cleaning services to the building Ksh. 27,100/=

Total Ksh. 85,600/=

3. The terms of the contract was that payments were to be made on the 25th and 1st of every month respectively. A month and three days after the default in payment respectively, the appellant filed suit in the subordinate court at Milimani Commercial Law Courts, Nairobi.

4. The agents/respondents declined to make payment. When they did pay the sum of Ksh. 85,600/-, they alleged it was payment of termination of one month “in lieu of notice.”

5. The appellant filed an application for summary judgment dated

25th January 2010. They were able to show a letter from the principals that the said amount for the month of October 2009 be paid.

6. The respondent in the subordinate court raised issues that:

- i) They cannot be sued as they were the wrong party
- ii) They do not have authority from the landlord to make payments

7. The trial magistrate held in his ruling of 4th May 2010 that there were triable issues raised. The application was accordingly dismissed.

8. Being aggrieved, an appeal was filed to this High Court on

10th May 2010.

II APPEAL

9. The appeal was admitted to hearing on 16th December 2010

(Maraga J). Directions were taken on 20th may 2011 and 5th June 2011 (Ang’awa J). The respondents duly served failed to attend court.

10. The appellant set down the appeal for hearing on

14th November 2011, having duly served the respondent’s advocates firm on 8th September 2011 at noon. The respondents failed to attend court. The rules under order 42 r 20(2) Civil Procedure Rules applied. This is where the respondent does not attend court and where under Order 42 r 16 Civil Procedure Rules the respondent has NOT made a declaration that written submissions would be filed, the court may hear the appeal exparte. This court proceeded with the appeal exparte.

11. In the Memorandum of Appeal, the appellant stated that the Hon. Magistrate erred in law and facts:

11.1 ... by ignoring the submissions of one appellant ... and affidavit evidence.

11.2 ... by failing to appreciate [that the] appellant had opined his case to a balance of probabilities to warrant excuse of discretion in the appellants favour.

11.3 ... using its discretion ... without regard to the law.

11.4 ... failing to exercise its discretion in favour of the appellant.

12. The arguments put forward is that the appellant was owed

Ksh. 85,600/=, as of 29th October 2010 for service rendered. The respondent refused to pay and claimed that payments made was for termination of the contract. There was admission that they were liable to pay the sum.

13. The two issues raised by the respondents in the subordinate courts is that:

13.1 Whether they, the defendants, were the correct parties to be sued?

13.2 Even if they were, the correct party to be sued, they had no authority to pay.

14. The subordinate court ruled that the respondents were the correct party to be sued. That the respondents are agents and liable to pay but the court held that there were triable issues.

15. The appellant prayed that this appeal be allowed and orders of the trial magistrate set aside and be substituted by a judgment in favour for the appellant being Ksh. 85,600/= debt for the month of October 2009.

III OPINION

16. The prayer in the plaint was for payment due for October 2009 totalling a sum of Ksh. 85,600/=. That is the summary judgment raised by the appellants to the Hon. Magistrate.

17. By a letter of 9th November 2009, contained in the subordinate court file, the directors/landlord wrote to the advocates of the appellant the following:

RE: PAYMENT FOR TOUGH SECURITY GUARDS AND WORLDWIDE MARKETING SYSTEM

“We write to you that we had authorized Kiragu & Mwangi Co Ltd (our agent) to pay the above company for the services they rendered in the month of October 2009.

The invoices were signed by the chairman of the Board of Directors.

We fail to understand why Kiragu & Mwangi Co Ltd have not paid them as they have been doing every month.

Its our wish that Kiragu & Mwangi Co Ltd remit the payment from the rent collected. These will enable the two companies pay their staff and other liability.”

18. In a replying supporting affidavit the appellant admitted that despite the said letter, the sum for October had not been paid. The sum for November was paid.

19. The issue before the Hon. Magistrate was a liquidated sum of

Ksh. 85,600/= for services rendered by the appellants. Should they have been paid? The appellant claim the original landlords authorized the agents to pay. They failed to do so and were sued.

20. Summary judgment should only be granted in the clearest terms. The respondents herein were agents to the landlord. They had an express authority to pay the appellant for services rendered for the month of October 2009.

21. I find that the trial magistrate erred in rejecting the summary judgment application.

22. The appeal be and is hereby allowed. the trial magistrate's judgment orders be set aside. That the judgment be substituted by orders of judgment for the plaintiff for the sum of Ksh. 85,600/= in favour of the appellant.

23. There will be interest from the date of filing suit.

24. I award the costs of this appeal to appellant. In the subordinate courts, the costs be and is awarded to the appellant original plaintiff.

DATED THIS 15TH DAY OF NOVEMBER 2011 AT NAIROBI

M.A. ANG'AWA

JUDGE

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Advocates :

iii) *A.O. Ombwayo instructed by M/s Odawa Ombwayo & Ochich & Co Advocates for appellant/original plaintiff*

iv) *N. Harun instructed by Nelson Harun & Co Advocates for respondent/original defendant*