REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 180 OF 2011

MILIMANI SECURITY GUARDS LIMITED ……….............………..PLAINTIFF

- VERSUS –

THE PREBYTERIAN UNIVERSITY OF EAST AFRICA……..............DEFENDANT

RULING

1. I have before me a notice of motion by the plaintiff dated 8th July 2011 praying for summary judgment in the sum of Kshs 3,587,026 against the defendant.

2. The gist of it, as can be discerned from the supporting affidavit of John Chege Mwangi of even date, is that the defendant has no defence to the claim. No annextures were attached to the affidavit in support of the claim save that there was reference to the plaintiff's documents filed with the plaint. At the time of the application, the defendant had not filed its statement of defence but has now done so. From the plaintiff's list of documents it appears the plaintiff supplied security or guard services to either the Presbyterian College or the Presbyterian University of East Africa. Both institutions share the same address at Kikuyu and from the correspondence attached, they both would seem to be related to the Presbyterian Church of East Africa of the same address at Kikuyu.

The plaintiff claims in this suit the above sum being the fees for those services from the defendant here who is Presbyterian University of East Africa. From the statement of accounts annexed to the plaint, at some point, the plaintiff was owed Kshs 2,807,384 in 2006 by the Presbyterian College. A letter from the college dated 31st December 2007 addressed to the Deputy Secretary of the aforementioned church was advising the latter to pay the plaintiff that sum. Relations then took a downturn and by a letter dated 9th January 2009 from the Presbyterian University of East Africa, the named defendant here, the services of the plaintiff were terminated.

3. The defendant's opposition to this application primarily is that the named defendant did not contract the services of the plaintiff. The defendant says it is a distinct legal entity from both the aforementioned church and college. That in my view would have been a legitimate argument but the defendant itself at the hearing of this application applied to strike out and expunge paragraph 3 of the replying affidavit of Professor Paul Mbugua sworn on 11th November 2011. It was allowed to do so by the court. That is the paragraph that had raised the matter of distinct entities of the defendant. There is a similar pleading at paragraph 5 of the statement of defence.

At paragraph 5 of the replying affidavit the defendant admits writing the letter of 9th January 2009 terminating the plaintiffs services. I would thus find that by terminating the contract, the plaintiff *ipso*

*facto*admitted the contract for the services with the plaintiff as either the contracting party or successor or assignee.

4. What the defendant is saying at paragraphs 7,8 and 9 is that it should only be billed for certain parts of the contract. It also raises up cudgels with theft at its premises for which it blames the plaintiff and which the defendant is following up with the police. It does not specify the part of the claim that it should then be billed for. It is also instructive that there is no counterclaim and the letter of 9th January 2009 by the defendant proposed that "any issues arising from (the plaintiff's) relationship with the university will be mutually discussed and resolved".

5. I am of the considered opinion that the defence herein is thus calling for an account. I have already held that I am not in doubt that the named defendant on the basis of the letter of 9th January 2009 and the averments at paragraph 5 of the replying affidavit has admitted the contractual relationship with the plaintiff. By admitting that it would be liable for portions of the claim for a portion of the contract period without specifying it in monetary terms and without any counterclaim, I find the statement of defence is a mere denial and to that extent is contradictory and evasive.

There is also a disconnect between that defence and the averments in the replying affidavit aforesaid. Such a defence is not a good defence and courts will frown upon it. It cannot be better said than in the decision in *Magunga General Stores Vs Pepco Distributors Ltd* [1987] 2 KAR 89 where it was held as follows;

"First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given".

6. The legal principles underpinning summary judgment are well settled. Summary judgment is to be granted only in the clearest cases and where there is no triable issue capable of going to trial. It is to be granted where the defence set up is a mere sham or a stratagem to delay trial.

7. Order 36 rule 1(1) (a) provides that in all suits where the plaintiff seeks judgment for a liquidated sum with or without interest he may apply for judgment. The burden then shifts to the defendant at rule 1(2) to demonstrate by affidavit or otherwise that he should be granted leave to defend. Such leave will be granted if the defendant demonstrates he has a good defence to the action. This position of the law is buttressed by the provisions of section 25 of the Civil Procedure Act.

8. If a defendant demonstrates there is a triable issue, the court has no recourse but to grant unconditional leave to defend. See the decision in *Osondo Vs Barclays Bank International Limited* [1981] KLR 30. The same principle is espoused by the Court of Appeal in *Momanyi Vs Hatimy* [2003] 2 E.A. 600. Again, the purpose of summary judgment is to expedite determination of cases but is an inappropriate procedure where the court is being invited to decide "difficult questions of law which call for detailed argument and mature considerations" and which would best be left to evidence at the trial. See *American Cyanamid Co. Vs Ethicon Limited* [1975] 1 ALL ER 504, [1975] AC 396.

9. This general principle can be again gleaned from the old case of *Churanjilal & Co Vs Adam* [1950] 17 E.A.C.A 92 where Sir Graham Paul V-P said of summary judgment application:

" .. It is desirable and important that the time of creditors and of courts should not be wasted by the investigation of bogus defences. That is one important matter but it is a matter of adjectival law only, embodied in Rules of Court, and cannot be allowed to prevail over the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the court. All the defendant has to show is that there is a definite triable issue of fact or law"

10. In the result, I find the defence set up by the plaintiff to be hollow and a sham and one that does not

traverse the plaintiff's claim or raise a triable issue. In the end, I find that the plaintiff has proved its case and is entitled to summary judgment at this stage. I would thus enter judgment in favour of the plaintiff against the defendant for Kshs 3,587,026. I also award the plaintiff the costs of this motion and of the suit. Interest shall apply on those sums from the date of the decree till full payment.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 2nd day of December 2011.

G.K. KIMONDO
JUDGE
Ruling read in open court in the presence of
Mrs. Macharia for the Plaintiff.
No appearance for the Defendant.