



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 467 of 2009**

**FRAN INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**G4S SECURITY SERVICES LTD.....DEFENDANT/RESPONDENT**

**RULING**

This ruling relates to the notice of motion application brought under order XII rule 6, Order L rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The same seeks the following orders.

- (a) That judgment on admission be and is hereby entered for the Plaintiff against the Defendant in the sum of Kshs. 607,000/- together with interest and costs.
- (b) That the costs of this application be provided for.

During the hearing of the application, Mr. Ochieng, the applicant's counsel referred the court to the grounds that are on the face of the same and the supporting affidavit of one Teresia W. Mbaita. In addition to the above, he also relied on the attached annexures. Further to the above he also submitted that at the material period, there was a contract for provision of security services for the Plaintiff's cash in transit. In furtherance of the above, the Plaintiff gave the defendant, a sum of Kshs. 607,000/- for purposes of depositing into his bank account. Mr. Ochieng further submitted that the defendant has admitted in his defence the fact that the employees had received the above amount of money. Unfortunately, the said cash was not deposited into the account of the applicant/plaintiff.

Besides the above, Mr. Ochieng also submitted that when the applicant made a demand, the respondent paid a cheque for Kshs. 607,000/- that was later dishonoured. The same was done due to the fact that the applicant refused to sign a discharge voucher that was prepared unilaterally by the respondent. According to Mr. Ochieng, the applicant refused to sign the said voucher due to the unfavourable conditions that were set out in the same. He concluded by demanding the money together with costs.

In reply, Mr. Okullo for the respondent, admitted that the sum of Kshs. 607,000/- was reported missing. Further to the above, notwithstanding the fact of a criminal case the respondent agreed to settle the matter in order to maintain a commercial relationship. Apart from the above, he also submitted that the settlement was on a without prejudice basis and on the basis that the applicant/plaintiff would sign a standard discharge voucher. On receipt of the same, the applicant's counsel sent the same to his client

who refused to sign the same. On that basis the cheque was stopped. The learned counsel was of the opinion that due to his conduct the applicant was not entitled to costs and interest. In support of the above submission, he relied on the authority of Affiliated Business Contracts Limited vs. The Public Procurement Complaints, Review & Appeals Board Misc. Appl No. 516 of 2006.

This court has carefully considered the application together with the submissions by the learned counsels. No doubt, the applicant gave out cash Kshs. 607,000/- to the respondent's employees to bank the same for him. Unfortunately, the said employees embezzled the said cash and that is why the respondent had agreed to refund the amount. The respondent knew very well that he was vicariously liable. In the case of Muwonge vs. Attorney General – Uganda EALR [1967] at page 18 the Court stated as follows: -

*“A master is liable for the acts of his servant committed within the course of his employment or, to be more precise in relation to a policeman, within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment or, in this case within the exercise of the policeman's duty. The acts may be so done even though they are done contrary to the orders of the master.”*

Following the conduct of his employees, it is unreasonable and unfair for the respondent to impose any conditions whatsoever on the applicant. One would have expected more humility and remorse. In view of the above, I hereby concede to the application on the following terms:

- (a) That judgment on admission be and is hereby entered for the Plaintiff against the Defendant in the sum of Kshs. 607,000/- together with interest and costs.
- (b) Costs to the applicant in any event.

Those are the orders of this court.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open court in the presence of:

Mr. Ochieng for the Plaintiff/Applicant - present

Okullo for the Defendant/Respondent - absent

MUGA APONDI

JUDGE

6<sup>TH</sup> NOVEMBER, 2009