



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 53 of 2007

BRINKS SECURITY SERVICES LTD. PLAINTIFF

VERSUS

NEW KENYA CO-OPERATIVE CREAMERIES LTD. DEFENDANT

RULING

(1) On the 5th February 2007, Brinks Security Services Ltd. (“**the Plaintiff**”) instituted this suit against New Kenya Co-operative Creameries Ltd. (“**the first Defendant**”) seeking, *inter alia*, for an order of specific performance of a contract to provide security services to the first Defendant. Pursuant to a Chamber Summons also filed on the same date under Order XXXIX rules 1 and 2 of the Civil Procedure Rules, the Plaintiff was granted an interim injunction to restrain the first Defendant from breaching the said contract or otherwise denying the Plaintiff the opportunity to offer security services to the first Defendant in Nairobi and Mombasa. Such orders have been extended from time to time.

(2) The second, third and fourth Defendants were enjoined in the suit by order of the court and the Plaintiff amended to reflect this fact on the 19th March 2007. Only the fourth Defendant would appear to have filed its Statement of Defence on the 18th April 2007 denying the averments in paragraphs 3A and 3B of the Amended Plaintiff.

On the 24th April 2007 after making the following observations –

“There is evidence to show that there are 4 security firms on the premises of the first defendant. There is utter confusion that each security firm would be providing services to the 1st Defendant. The confusion reflects the precarious position of the 1st Defendant who might ultimately be ordered to shoulder the payment of such services which some parties might be actually be providing. The 2nd Defendant is at Mombasa and Nairobi. And that is where the Plaintiff had been notified to provide security. It is alleged Kenya Shield Security Services was awarded Nakuru and Eldoret. But later Delta Guards was given Nakuru and Eldoret, while Kenya Shield Security Services took the place initially given to the Plaintiff. Delta was also given Mombasa. All these confusions creates unnecessary contradiction and in contrary to the order given by Justice Waweru on 6th February 2007. Therefore in addition to the order of 6th February 2007, I order the parties to revert to their position prior to 30th January 2007.”

Warsame, J made the following, among other orders:

- 1) **It means the Plaintiff shall remain at the designated areas it was notified to provide security service.**
- 2) **I order the removal of all security guards of the 2nd Defendant from all the premises of the 1st Defendant with effect from 30th April 2007 until further orders of this court.**
- 3) **I order Kenya Shield Security Services Ltd to revert to its position as at 30th January 2007. It means it was ordered to vacate from all premises and positions taken after 30th January 2007 till further order of this court with effect from 30th April 2007.**
- 4) **Since Delta Guards Ltd was not among the successful bids initially awarded or notified to provide security service, I order its removal, eviction and vacation from all premises belonging to the 1st Defendant.**
- 5) **In order to bring sanity and security for the property of the 1st Defendant the Plaintiff and 3rd Defendant shall be the only security firms providing security services within their designated areas as at 30th January 2007 till further orders of this court.”**

All the parties subsequently recorded the following orders by consent on the 28th May 2007:

“By Consent:

- 1) **The orders of 24th April 2007 be extended until the date of award.**
- 2) **The Plaintiff and 3rd Defendant be paid for the services rendered from 1st May 2007 till the award of the new tender.**
- 3) **Each party be at liberty to apply.”**

(3) It is against this background that the third Defendant took out a Notice of Motion on the 4th December 2007 under Sections 3A and 63(e) of the Civil Procedure Act. The Motion seeks the following three orders:

“(a) That the court do order the 1st Defendant/respondent to honour the terms of court order issued on 28/5/07 and pay the 3rd defendant/applicant for the period running from 1st May, 2007 to 31st May, 2007 amounting to Kshs.794,440/=.

(b) That the court do order that the 1st defendant do pay interest at commercial rate (21.8%) on the said sum from 31st May, 2007 until payment in full together with costs of the application.

(c) That in default of compliance a decree do issue and the 3rd defendant be at liberty to execute.”

(4) The application is made on the principal grounds that the consent order made on the 28th May 2007 required the first Defendant to pay the third Defendant for services rendered from the 1st May 2007 until the award of the new tender and the first Defendant having failed, refused and or neglected to pay, the third Defendant is entitled to immediate payment together with interest. Moses Kaniaru Kamau, a Director of the third Defendant, swore two affidavits in support of the application on the 29th November 2007 and the 12th May 2008 and in the former, he says that the sum of Kshs.793,440/= is due for services rendered during the month of May 2007.

(5) The first Defendant in opposition to the application relies on the affidavit made by its Legal

Officer, Mr. Peter Kennedy Ombati, on the 5th February 2008 while the fourth Defendant filed the affidavit of its Managing Director, Mungai Mukuri, sworn on the 28th July 2008. The second Defendant did not file any papers, though its learned counsel attended the proceedings and addressed the court on points of law. The second Defendant also filed no papers and did not wish to be heard on the application and was excused.

(6) I have considered the application in light of the pleadings and all the affidavits filed as aforesaid as well as taken into account the submissions of learned counsel and have come to the conclusion that the application must fail for a number of reasons.

(7) Firstly, the consent order made on the 28th May 2007 that –

“The Plaintiff and 3rd Defendant be paid for the services rendered from the 1st May 2007 till the award of a new tender.”

failed to specify the respective amounts payable to the Plaintiff and the third Defendant or to provide for any remedy in default of payment. From the replying affidavits of the first and third Defendant, there is clearly a dispute as to the amount payable to the third Defendant. The consent order is not a decree and cannot be construed or interpreted as such.

Secondly, there is no record of the third Defendant having issued and served on the first Defendant a notice making its claim pursuant to Order I rule 21(1) of the Civil Procedure Rules.

Finally and in the absence of a suit as between the third Defendant and the first Defendant, I reject the submission made by Mr. Njuguna, learned counsel for the third Defendant, inviting me to invoke the inherent power of the court and make orders that would virtually amount to entering summary judgment against the first Defendant.

(8) For these reasons, the third Defendant’s Notice of Motion filed on the 4th December 2007 fails and I order that it be and is hereby dismissed with costs but only to the first and fourth Defendants only.

It is so ordered.

Dated and delivered at Nairobi this Twenty-sixth day of September, 2008.

P. Kihara Kariuki

Judge.