



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 106 of 2000**

**INTERIOR DESIGNS COMPANY LTD..... APPELLANT**

**VERSUS**

**FALCON SECURITY LIMITED .....RESPONDENT**

**J U D G M E N T**

The appellant Interior Designs Company Ltd, was the defendant in the Senior Principal magistrate's Court where the respondent Falcon Security Limited had filed a suit seeking judgment against it for Kshs.62,880/= being the amount due and owing to the respondent from the appellant in respect of security services rendered by the respondent at the appellant's request. The appellant filed a defence and counter claim denying being indebted to the respondent for the sum of Kshs.62,880/=-, contending that the security guards provided by the respondent to guard the appellant's premises were negligent in the performance of their duties causing the appellant loss of property valued at Kshs.162,000/=-. The appellant conceded having received compensation of Kshs.98,120/= from its insurers. The appellant claimed a setoff for the balance of Kshs.63,880/= against the amount of Kshs.71,908.20 which was due to the respondent. The appellant claimed that it had paid the respondent the balance of Kshs.8,828.20 in full and final settlement. The appellant therefore sought to have the respondents suit dismissed with costs and judgment entered in favour of the appellant in the sum of Kshs.63,880/= together with costs of the counterclaim.

During the hearing before the trial magistrate, the respondent called two witnesses. These were its Operations Manager, Meshack Rumbia Mutula and the Credit Controller David Irungu. Their evidence was that the respondent and the appellant had an agreement for the respondent to provide guards services to the appellant. From 1<sup>st</sup> December, 1994 to end of February, 1995, the appellant was provided with one day guard and two night guards. The appellant claimed that their premises were broken into on 8<sup>th</sup> December, 1994. They wrote to the respondent giving a list of goods allegedly stolen. The respondent disputed the theft and also sought assistance from Parklands Police Station but the police confirmed that there was no physical breaking at the appellant's premises. Because of that dispute the appellant refused to pay for the guard services. As at February, 1995 the appellant owed the respondent Ksh71,908/=-. The appellant paid a sum of Kshs.8,000/= leaving a balance of Kshs.63,880/=-. The suit was adjourned on two occasions but the defendant did not call any witness. On the basis of the respondent's evidence, the trial magistrate entered judgment in favour of the respondent as prayed in the plaint and dismissed the appellant's counterclaim for lack of evidence.

Being dissatisfied, the appellant lodged this appeal on the following grounds: -

(i) The learned trial magistrate erred in law in failing to direct her mind and thereby misdirected herself in that there was a contractual responsibility between the appellant and the respondent who for valuable

consideration undertook to protect and guard the premises of the appellant.

- (ii) That the learned trial magistrate therefore erred in law in failing to address her mind on the question of negligence and therefore failed to appreciate the *ratio decidendi* of established authorities.
- (iii) The learned trial magistrate failed to appreciate that special damages had been proved but presuming it was not proved to the satisfaction of the Court there was still total misdirection in failing to hold that the respondent (plaintiff) was negligent and was liable in damages.
- (iv) The learned trial magistrate further erred in law in giving judgment in favour of the respondent and not directing her mind to the question of the loss suffered by the appellant arising from the direct negligence of the respondent.

Counsel for the appellant has submitted in support of the appeal that there was no evidence that the respondent had rendered any services to the appellant. The trial magistrate was faulted for having failed to consider the defence even though the same was on record. It was further contended that the trial magistrate failed to exercise her discretion judiciously when she refused to grant an adjournment to the appellant, as she failed to take into account that the appellant wished to be represented by Mr. Hira and not Mr. Mutinda. The following cases were relied upon by counsel for the appellant: -

- ***Shah vs Mbogo (1967) EA 166***
- ***Civil Appeal No.280 of 2005 Baraka Apparel EPZ Kenya Ltd vs Rose Mbula Ojwang.***

For the respondent it was submitted that the appeal had no merit. It was contended that the contractual relationship between the parties was established through an agreement which was produced in evidence. It was contended that invoices and statements of account were produced which showed that services were provided to the appellant and that out of Kshs.71,908.20 which was due and owing, the appellant only paid Kshs.8,000/= leaving a balance of Kshs.63,880/= outstanding. It was maintained that the appellant did not call any evidence to controvert the respondent's case and therefore there was nothing to be considered in the defence which was just a bare denial. It was further contended that the respondent having been given an opportunity to be heard on their defence, and having failed to take advantage of that opportunity, the trial magistrate could not be blamed for refusing to grant an adjournment.

I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. There was evidence from the respondent's witness that there was an agreement between the appellant and the respondent for provision of guard services. This agreement was evidenced by the works order which was duly signed by the appellant's general manager. The exchange of correspondences between the appellant and the respondent which was also exhibited confirmed that the respondent did provide guard services to the appellant. The dispute between the parties that led to these proceedings was whether there was a breaking in at the appellant's premises, if so whether the breaking in was caused by negligence on the part of the respondent's agents and if so whether the appellant suffered loss and whether it is entitled to off-set this loss against what was due to the respondent.

In its reply to the defence, the respondent denied that the appellant's property worth Kshs.162,000/= were stolen from the appellant's premises due to negligence on the part of the respondent's servants or agents. Under Section 109 of the Evidence Act the burden was upon the appellant who was alleging theft of its goods and negligence on the part of the respondent's servants to prove the existence of those facts. However, the appellant not having called any evidence, the defence and counterclaim could not stand as there was no evidence in support of the alleged theft or negligence.

The issue of the refusal by the trial magistrate to grant an adjournment to the appellant was taken up by the appellant's counsel at the hearing of the appeal. It was contended that the trial magistrate did not exercise her discretion judiciously. However, I find no merit in this contention for the following reasons. First, this was not one of the grounds raised on appeal. Secondly, the appellant did not appeal against the trial magistrate's order refusing to grant an adjournment, thirdly, an examination of the proceedings of the

lower court show that the trial magistrate had previously adjourned the case to accommodate the appellants. Further the contention that the appellant wished to be represented by Mr. Hira and not Mr. Mutinda cannot be true as Mr. Mutinda continued appearing for the appellant long after the order refusing the adjournment was given. I find that the trial magistrate exercised her discretion judiciously as it was apparent that the appellant was not anxious to have the matter finalized.

For the above reasons, I find no merit in the appeal and do therefore dismiss it with costs.

Orders accordingly.

**Dated and delivered this 29<sup>th</sup> day of October, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Weru for the appellant

Kimani H/B for Kyungu for the respondent