



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 190 of 2006**

**DEW SECURITY SERVICES LTD.....PLAINTIFF**

**VERSUS**

**MUGOYA CONSTRUCTION & ENGINEERING CO. LTD.....DEFENDANT**

**RULING**

The Notice of Motion dated 2<sup>nd</sup> June, 2006 is brought under Order XXXV Rule 1(1) (a) and 2 of the Civil Procedure Rules seeking summary judgement in favour of the plaintiff for Kshs.8,112,573.52 plus costs and interest. The affidavit in support of that application is made by the Managing Director of the Plaintiff Company. He deponed that that he is familiar with the transaction the subject of this suit. That on 12<sup>th</sup> November, 2001 the plaintiff and the defendant entered into a contract for the provisions of security services by the Plaintiff to the Defendant. After the contract was entered into the Plaintiff supplied security services as per the contract and the Defendant was paying for that security service as per contract. That a time came when the Defendant began to default in the payment of that service and the reason given by the Defendant was that because they were undergoing a cash flow problem. That the Managing Director of the Defendant kept reassuring the Plaintiff that the Defendant was hopeful of receiving money from N.S.S.F. and Government projects. The Managing Director of the Plaintiff stated that the non-payment persisted and consequently the Plaintiff began to undergo problems in the payment of the salaries due to their guards. On 13<sup>th</sup> August, 2003 the deponent had a meeting with the Managing Director of the Defendant where the Defendant agreed to start making payment per month of Kshs.300,000/=. That payment was to commence on 18<sup>th</sup> August, 2003. On 18<sup>th</sup> August, 2003 the deponent went to the Defendant's Managing Director's office where by the said Managing Director said the Defendant was doing very badly financially and thereby offered the deponent a motor vehicle Registration No.KAA 835T which was worth Kshs.200,000/= and in cash form the Defendant gave him Kshs.200,000/=. Thereafter due to nonpayment the defendant wrote letters to the Defendant's managing director and it was his letter dated 3<sup>rd</sup> September, 2003 that received a response from the Managing Director of the Defendant where he requested the Plaintiff to contact him urgently. That letter was annexed to the present application. The nonpayment continued and on 24<sup>th</sup> October, 2003, because of the problem the Plaintiff was experiencing from its guards who were threatening to go on strike, the Defendant's operations Manager on being informed of this problem wrote a memorandum to the Managing Director of the Defendant whereby he informed the said Managing Director of the threatened strike and requested that the amount of Kshs.200,000/= be paid to obviate the said strike. The nonpayment indeed is said to have continued and the Plaintiff proceeded to instruct an advocate to make demands on its behalf. As a consequence of that demand another meeting was held whereby it was agreed that the Defendant be given credit for Kshs.2,905,239.35 which amount represented absent days of the guards. As a consequence of that meeting a reconciled statement was prepared by the Defendant and which was annexed to the application which showed that the Defendant as at 1<sup>st</sup> January, 2005 was

indebted to the Plaintiff for Kshs.8,112,573.52.

In response to the application, the Defendant swore replying affidavit where the Personnel and Administration Manager of the Defendant deponed that the present application cannot be granted by the Court because it does not meet the criteria set in law. He denied that there is proof of exchange of the motor vehicle as deponed by the Plaintiff and even denied that a payment of Kshs.200,000/= was made since the Plaintiff had failed to prove the same by receipt. He stated that the dispute in this case arose because the Plaintiff in preparing its statements failed to give credit for payments made by the Plaintiff. He said that persistent efforts by the Defendant to get the Plaintiff to give it its account had not been successful. That the said disagreement was evident in the Plaintiff's affidavit when the Plaintiff's Managing Director deponed that a credit was given to the Defendant after a meeting. The Defendant's Personnel & Administration Manager was of the view that the present claim is not a liquidated claim and that therefore, an application for summary judgement could not be entered. In a further affidavit sworn on behalf of the Defendant by the same person he deponed that there was no agreement ever arrived of the amount owed by the Defendant to the Plaintiff. He further stated that the statement of account annexed to the Plaintiff's application originated from the Defendant and was authored by an officer of the Company who was authorized to bind the Company. This averment is in paragraph 10 of the further affidavit sworn on 27<sup>th</sup> September, 2006. In support of the its submissions the Defendant relied on the case of **Commercial Advertising and General Agencies Ltd v Qureishi [1985] KLR** in the following passage:-

**2. Summary judgement is granted subject to there being no bona fide triable issue entitling a defendant to leave to defend. If a bona fide triable issue is raised, the defendant must be given unconditional leave to defend but no so in a case in which the court feels justified in thinking that the defences raised are a sham.**

**3. On an application for summary judgement, the plaint, the defence the counterclaims and the reply to defence, if any, and affidavits in support of and in reply as well as all relevant issues and circumstances are all proper material for consideration. Nothing is immaterial which helps justice to be done.”**

The Defendant also relied on the case of **Osodo v Barclays Bank International Ltd [1981]KLR** in the following passage:

**“where there are triable issues raised in an application for summary judgement, there is no room for discretion and the court must grant leave to defend unconditionally”.**

In considering the present ruling, I find that the contract deponed to by the Managing Director of the Plaintiff is not denied by the Defendant nor does the Defendant deny the services that were rendered to it by the Plaintiff Company. The Plaintiff in the affidavit in support has clearly shown the demands that were made for payment to the Defendant. Has shown a memorandum written by the Operations Manager of the Defendant to the Managing Director whereby he acknowledged that a crisis had occurred since the guards were threatening to strike in view of nonpayment of their salaries. The Plaintiff also evidenced a statement which is authored by the Defendant which reflects the amount claimed in this suit as the amount owed to the Plaintiff. The Defendant does not disown that statement.

Considering the above it is not true that the Defendant has shown any triable issue deserving leave to defend this suit. The court having considered the evidence before it finds that the issues raised by the Defendant are merely smokescreen designed to delay the Plaintiff in enjoying the fruits of its labour. The Defendant is clearly indebted to the Plaintiff for the amount claimed. The court therefore, will not hesitate to enter judgement as prayed in the application. The orders of this court are: -

**1. That judgement be and is hereby entered for the Plaintiff for Kshs.8,112,573.52 plus costs and interest.**

**2. That the Plaintiff is awarded costs of Notice of Motion dated 2<sup>nd</sup> June, 2006.**

**MARY KASANGO**

**JUDGE**

Dated and delivered this 2<sup>nd</sup> day of November, 2006.

**MARY KASANGO**

**JUDGE**