**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAKURU**
**CIVIL APPEAL NO. 67 OF 2003**

**SECURICOR SECURITY SERVICES (K) LTD……...…PLAINTIFF**
**VERSUS**
**WACHIRA MURITU……...……..RESPONDENT**

**JUDGMENT**

The Appellants, Securicor Security Services (K) Ltd sued the Respondent, Wachira Muritu, for the sum of Kshs 113,039/50 on account of Alarm rental and Maintenance Services for the period January 1998 to July 1999 including a 15% surcharge in terms of the agreement entered between the Appellant and the Respondent. The Respondent, in his defence, denied having entered into an agreement with the Appellant. He further denied that he owed the Appellant the said sum of Kshs 113,039/50. During the hearing of the case before the trial magistrate, the Appellant called one witness who testified on its behalf. The Respondent chose not to call any witness. After the conclusion of the case, the trial magistrate, after considering the evidence adduced by the parties to the suit dismissed the Appellant's claim with costs to the Respondent. The Appellant was aggrieved by the said dismissal and has appealed to this Court.

Mr Mbiyu, Learned Counsel for the Appellant submitted that the trial magistrate erred in law in her interpretation of the contracts submitted as Plaintiff's Exhibits No. 1 and 2 by finding that the Appellant had relied on an expired contract which was not the case. He contended on behalf of the Appellant, that clause 1 (a) of the said agreement did not give the contract period of the said agreement as twelve months. It was his argument that the said clause only provided that the contract could only be terminated after the expiry of twelve months. It was further argued that the intention of the parties when they entered into the said contract was that the said contract could only be terminated once a termination notice had been issued. The Appellant argued that the agreement subsisted until when it was terminated in July 1999. The Appellant referred to the Plaintiff's Exhibit No. 3 where the Respondent had written to the Appellant acknowledging the existence of the contract and had asked the Appellant to remove the alarm equipment. It was contended that each customer of the Appellant had been issued with a code which appeared in the invoices issued and in the agreement. The Appellant argued that the Respondent had not denied that there existed a contract between him and the Appellant.

The Appellant submitted that it was proved that the services in issue were rendered by the Appellant but were not paid for by the Respondent. The Appellant referred the Court to the decision of **Liverpool City Council –versus- lrwin & Anor [1976]2 All E.R. 39** where it was held that in interpreting an agreement entered between the parties, the entire document has to be read to get the true purport of the said agreement. Learned Counsel submitted that in some contracts some provisions are

implied unless the parties had specifically excluded them. In the instant case, the Appellant argued that the Court could imply the term to give efficacy to the said contract. The Appellant argued that the Plaintiff's Exhibit No. 3 could not have been written if an agreement did not exist between the parties. The Appellant argued that it had proved its case on a balance of probabilities.

It was submitted by the Appellant that the trial magistrate had erred in interpreting the contract in isolation to the other provisions of the agreement. The Appellant submitted that clause No. 17 of the agreement dealt with the issue of the increment of charges. The Appellant argued that it had issued circulars to all its customers including the Respondent. It was contended that if the trial magistrate had looked at the facts in the said light she would not have reached the decision dismissing the Appellant's case. The Appellant submitted that the agreement existed from 1991 until it was terminated in 1999. It was argued by the Appellant that the invoices issues quoted the contract number, which proved that it referred to the specific contract that was entered between the Appellant and the Respondent. The Appellant argued that the evidence that was adduced on its behalf was not controverted. The Appellant submitted that the issue of the expiry of the contract only came from the Court as the issue had not been a matter in issue between the parties. The Appellant submitted that the standard of proof in civil case was proof on a balance of probabilities. It was the Appellants submission that it had proved its case on a balance of probabilities.

Mr Nyangweso, Learned Counsel for the Respondent opposed the Appeal. He submitted that the Appellant had not proved its case on a balance of probabilities. He argued that the evidence tendered by the Appellant was inconsistent in so far as the claim was based on clause 1(c) which had provided that the contract would only subsist for a period of twelve (12) months. The Respondent submitted that the contract had expired and the trial magistrate was correct in finding that the said contract had expired and therefore could not be enforced. The Respondent submitted that the said clause could not be interpreted to mean that the contract would continue beyond the provided period of twelve months. The Respondent submitted that the said clause was ambiguous. The Respondent further submitted that the invoices tendered in evidence were contradictory. They referred to different premises at different times. The Respondent submitted that he had not been issued with a Notice of increment as provided by clause 17 of the agreement. The Respondent argued that the invoices did not tally with the contract and therefore the Appellant had not proved its case on a balance of probabilities. The Respondent argued that the point of contention was the interpretation of clause 1(c) and 17 of the agreement and not the entire agreement. It was his argument that the Appellant had not established its case to the required standard and therefore the Appeal ought to be dismissed.

In reply, Mr Mbiyu for the Appellant submitted that the two issues raised by the Respondent, namely the twelve months period and the increment were issues which the Respondent had not pleaded in his defence. Neither did the Respondent argue the same during the trial. The Appellant submitted that no evidence had been adduced to controvert the evidence which was adduced by the Appellant.

This is a first Appeal. As the first Appellate Court in Civil Cases, this Court is mandated to re-consider the evidence adduced before the trial magistrate, re-evaluate it and reach its own independent decision **(See Selle –versus- Associated Boat Limited [1968] E. A. 23).** In the instant appeal, the issue that came to the fore during the trial and during the hearing of this Appeal is whether there existed a contract between the Appellant and the Respondent at the material time that the Appellant claimed it rendered services to the Respondent and was not paid. The trial magistrate was correct, in my view, in first considering whether, in the circumstances of this case, there existed an agreement between the Appellant and the Respondent which was capable of being

enforced by the Court. The issue that vexed the mind of the trial court and also the minds of the counsels who argued this Appeal is the interpretation of clause 1(c) of the agreement which provided as follows:-

> *"1. ( c) "contract period" means a period commencing on the installation date (as hereinafter defined) and continuing thereafter until termination under the terms hereinafter appearing or by either party giving the other not less than one calendar month's notice in writing expiring not earlier than the last day of the period of twelve months from the installation date"*

The plain reading of the above clause is that the contract could be terminated by either party after giving a notice of not less than one month after the expiry of twelve months. The contract could subsist beyond the twelve months period provided that when either party wanted to terminate the said agreement, he had to give one months notice. None of the parties could terminated the agreement before the expiry of twelve months. To address the issue in dispute therefore, clause 1 (c) did not provide that the said agreement only subsisted for period of twelve months. The period which the said contract could subsist was indefinite. It could only be terminated by either party given one month's notice. According to the evidence which was adduced by Nicholas Kimotho (PW 1) on behalf of the Appellant, the Respondent entered into a contract with the Appellant whereby the Appellant was to install an alarm system in the premises owned by the Respondent. There seems to have been no problem between the time the agreement was entered into in December 1991 to January 1998 when the Respondent started neglecting to pay for the said services. According to PW 1 the Respondent did not pay for the said services from January 1998 to July 1999 when the said contract was terminated by the Appellant. The Appellant claimed the sum of Kshs 98,295.20 plus a 15% surcharge as provided by the agreement making it a total of Kshs 113,039.50. It was the Appellant's case that it sent invoices to the Respondent which invoices the Respondent did not settle. The Appellant then filed suit claiming the said amount. During the hearing of the case, the Respondent did not call any witness to testify on his behalf.

On re-evaluation of the evidence adduced by the parties to this suit, it is the finding of this Court that the evidence adduced by the Appellant was not controverted. While it was incumbent upon the trial magistrate to evaluate the evidence adduced and make a determination whether the Appellant had proved its case on a balance of probabilities, in the instant case, it is the finding of this Court that the trial magistrate did not properly evaluate the evidence that was adduced. The Respondent in his defence denied that he had entered into any agreement with the Appellant and therefore did not owe anything to the Appellant. The Appellant established that it had a valid agreement between itself and the Respondent. It also proved, on a balance of probabilities, that it had rendered services to the Respondent which services were not paid for. This evidence was not controverted. The Respondent chose not to adduce any evidence to controvert the evidence adduced by the Appellant. It is therefore the finding of this Court that the Appellant did prove its case on a balance of probabilities.

In the circumstances therefore, the Appeal filed by the Appellant is allowed, the decision of the trial magistrate dismissing the Appellants case is hereby set aside and substituted by an order of this Court entering judgment for the Appellant against the Respondent for the sum of Kshs 113,039/50 being the amount owing to the Appellant for services rendered to the Respondent which were not paid for. The Appellant shall have the costs of the suit in the lower court and the costs of this appeal. Interest of the said amount shall be applied from the date the suit was filed in the lower court.

**DATED at NAKURU this 17th day of December 2004.**

**L. KIMARU**
**JUDGE**