



**Securex Agencies (K) Limited v Two Rivers Development Limited (Civil Suit E187 of 2021)
[2024] KEHC 11985 (KLR) (Commercial and Tax) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11985 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E187 OF 2021
PM MULWA, J
OCTOBER 3, 2024**

BETWEEN

SECUREX AGENCIES (K) LIMITED PLAINTIFF

AND

TWO RIVERS DEVELOPMENT LIMITED DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit through a plaint dated 9th March 2021, seeking judgment against the defendant for the sum of Kshs 21,138,410.00, interest thereon at court rates from 12th October 2020 until payment in full and costs of the suit plus interest thereon at Court rates.
2. The plaintiff's case is that it provided security services to the defendant's predecessor, Two Rivers Lifestyle Center Limited pursuant to an agreement dated 19th January 2016. The agreement was initially for three years from 1st February 2016 at an agreed sum of Kshs 6,0292,710.00 per month inclusive of VAT.
3. On 22nd September 2019, the defendant took over the overall management of the affairs of Two Rivers Mall. It also ratified the agreement between the plaintiff and the defendant's predecessor. The plaintiff went on to provide the security services to the required standard. However, the defendant failed to pay the bills and its debt accumulated to Kshs 21,138,410.00 between 15th May 2019 and 28th April 2020.
4. At a meeting held between the parties' representatives, the defendant acknowledged owing the plaintiff Kshs 24,828,060.00 and undertook to settle the outstanding amounts in three instalments; that is Kshs 11,411,380.00 by 29th February 2020 and two equal instalments of Kshs 6,411,380.00 in March and April 2020. It however failed to do so, prompting this suit.



Response

5. The defendant filed a defence dated 3rd June 2021. Its case is that Two Rivers Lifestyle Centre Limited is its subsidiary and that it did take over the agreement between it and the plaintiff. Nonetheless, it denied that the plaintiff provided services to the standard required under the agreement. It contended that the plaintiff breached its contractual obligations by failing to monitor and check vehicular and pedestrian movements into and out of the premises; provide sufficient number of guards and appropriate supervision; providing guards who became involved in the theft inside the Mall; station guards at mutually agreed places within the premises and report material occurrences within a reasonable period.
6. Due to the plaintiff's breach and negligence, electrical cables worth Kshs 17,357,627.20 were vandalized and stolen from the premises by persons including the plaintiff's own guards occasioning the defendant loss of which it holds the plaintiff responsible. The defendant claims that out of that amount Kshs 13,809,444.20 is due from the plaintiff as only Kshs 3,548,183.00 was recovered from its insurer, UAP Old Mutual.
7. The defendant further denied liability for security services worth Kshs 9,318,300 out of the total amount claimed on grounds that the plaintiff failed to provide invoices.

Reply to defence

8. The plaintiff filed a reply to defence dated 23rd July 2021. It joined issue with the defendant in its defence save in so far as the same consisted of admissions. It contended that the contract between the parties did not include a provision for liability on its part for losses that would be occasioned by the negligence of either party; that there is no justification for the defendant holding on to the admitted sum of Kshs 11,820,110.00; that the defendant is precluded from arguing that it has set off an amount from the plaintiff leaving it with a balance of Kshs 1,989,334.20; that the defendant has not filed a counterclaim for consideration by the Court and the mathematical exercise is not only invalid but also irregular on the face of it.

Evidence

9. At the first instance, hearing proceeded before the late Hon. Mr. Justice D. A. S. Majanja on 17th November 2021. Due to loss of the proceedings, parties took directions for the matter to start de novo.
10. On 9th May 2024, the plaintiff called its financial controller, Peter Ngugi Kiumu, at the re-hearing, as PW1. He adopted his witness statement dated 27th September 2023, similar to the plaintiff, as his evidence. He also produced the plaintiff's bundle of documents dated 9th March 2021 and the supplementary bundle of documents dated 23rd July 2021.
11. Upon cross-examination, Mr. Ngugi acknowledged that he did not deal with the defendant directly during his time as the plaintiff's financial controller. He admitted that the entity indicated in the invoices as Tribus TSG Kenya (Tribus) is not the defendant. He also confirmed that the email dated 27th November 2016 was sent by the plaintiff to Tribus and that statements were also issued to Tribus. The plaintiff also received correspondence from Tribus.
12. However, Mr. Ngugi mentioned that the plaintiff had supporting documents to show why it was dealing with the defendant and that the plaintiff would explain the relationship between Tribus and the defendant.
13. Mr. Ngugi confirmed that the plaintiff received Kshs 11,820,110.00 from the defendant and there were documents showing this. However, he clarified that this was not the full and final payment and that



the payment was pursuant to other transactions. He further confirmed that there was no dispute in the rate chargeable to security services and that among the documents, there was no letter issued by the plaintiff to the defendant.

14. On re-examination, he stated that the plaintiff was engaged by the defendant which directed it to effect billings by addressing them to Tribus. The defendant re-negotiated the agreement and this was to apply to both entities, Tribus and the defendant.
15. The defendant called its operations manager, James Okoth Otieno as DW1. He adopted his witness statement dated 3rd June 2021, similar to the defence, as his evidence. He also produced the defendant's bundle of documents of the same date. He stated that Tribus and the defendant are different companies; that invoices billed to Tribus have no relevance to the engagement between the plaintiff and the defendant and that there is a separate suit filed against Tribus before the lower court.
16. On cross-examination, Mr. Otieno acknowledged that he received an email from Jeremiah Thuo in response to his earlier request for a meeting to resolve the dispute and that the meeting was conducted and minutes were produced. However, he maintained that there were no contractual engagements between the defendant and Tribus. He indicated that when he received the demand letter for Tribus, he noted that there were only two issues outstanding and that was why he proposed the meeting. He confirmed that he attended the meeting of 18th January 2020 after which the plaintiff wrote an email breaking down the payments. He did not dispute the Kshs 9,318,300.
17. He also confirmed that the email from Titus of 25th February 2020 copied to him and others from both entities regarding the meeting held on the same date was titled 'Payment of Tribus and TRDL'; that in that meeting, there was a breakdown of the payment of the balance; that Kshs 11,820,110.00 was credited on 3rd April 2020 as the agreed balance in the meeting of 25th February 2020 and that at the time no issue was raised about invoices not being provided; that all the people copied in the email could not have failed to notice if there was an error.
18. On re-examination he asserted that the subject of the email is payment of Tribus and that the defendant cannot take liability for invoices relating to Tribus. He pointed out that while there was a discharge voucher discharging UAP Insurance, there is no document showing the discharge of the plaintiff from liability.

Submissions

19. The plaintiff filed written submissions dated 31st May 2024 while the defendant filed written submissions dated 24th June 2024.

Analysis and determination

20. I have considered the pleadings, evidence and submissions by the parties. The issues for determination are:
 1. Whether the plaintiff has proven its claim against the defendant
 2. Whether the plaintiff is liable to the defendant for the negligent actions of its employees.
 3. Whether the defendant is entitled to set off.
 4. Whether the plaintiff is entitled to the remedies sought.



21. Section 107 of the *Evidence Act* provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”

22. It is common ground that in January 2016, the plaintiff was awarded the tender for the provision of security services to the defendant. The plaintiff’s claim is for settlement of outstanding amount of Kshs 21,138,410/- together with interest, on account of unpaid security services.

Claim for Kshs 21,238,410.00

23. The defendant submitted that the plaintiff has failed to prove that it is entitled to payment of Kshs 21,238,410.00. According to the defendant, Kshs 9,318,300.00 out of the amount claimed is not supported by invoices. The defendant argued that some of the invoices produced by the plaintiff are addressed to Tribus which is a separate and independent legal entity and cannot be used to support a contractual claim against the defendant.

24. However, the plaintiff submitted that all the invoices had been supplied as the defendant directed it to effect billings by addressing them to Tribus; that in September 2017, Tribus, within the same premises as the defendant, contracted the plaintiff to provide security services; that the contractual negotiations on behalf of the defendant and Tribus were handled by the same persons and that email correspondence between the plaintiff and the defendant would sometimes make reference to Tribus for context purposes.

25. I have gone through the record. The plaintiff produced a letter dated 13th February 2019 which captured that in September 2017, the plaintiff’s GM Finance and Tribus’s Head of Security entered into an oral agreement for the provision of security services. From my reading, it is clear that the agreement was between the plaintiff and Tribus and that the defendant was not involved in the formation of this contract.

26. The plaintiff claimed that the negotiations by Tribus and the defendant were handled by the same persons and that email correspondences made reference to Tribus. Reference was made to a thread of email correspondences. The plaintiff submitted that the emails through which it received invoices amounting to Kshs 24,828,060.00 as of 25th February 2020, the defendant “admitted by silence” and actually made part-payment of Kshs 11,820,000.00 on 3rd April 2020.

27. I have gone through the thread of emails. I note that the plaintiff’s witness together with other employees of the defendant communicated with the plaintiff’s representatives. It is not disputed that a meeting between the respective parties was held on 25th February 2020. By an email dated 24th February 2020, captioned ‘Payment Demand Letter – Tribus’, Mr. Otieno proposed a meeting be held to discuss issues regarding the outstanding payments from Tribus and the agreed Tribus/Securex Rate. In response, Gaurav Panda wrote back on behalf of the plaintiff, stating as follows:

“Dear James,

Hoping this mail finds you well!

I appreciate today’s meeting between Mr. Titus Musau (TRDL and Tribus), you and Clementine (Securex) where below issues were deliberated among other things

A. TRDL

1. Balances as at 25th February 2020



We agreed that balances were to be paid in four months as earlier agreed with Samson by Securex receiving Kshs 11.4M which is the First and Second instalment before 29th Feb 2020. Payment plan will be adhered to ensure the remaining two instalments each of Kshs 6,411,380 will be paid fully in March and April 2020 or before.

Balance as at 25 th February 2020 Kes. 24,828,060.00	
Month	Amount
20-Jan (DUE)	5,000,000.00
20-Feb (DUE)	6,411,380.00
20-Mar	6,411,380.00
20-Apr	6,411,380.00
	...

B. Tribus TSG Kenya

1. Balances as at 25th February 2020.

We agreed, against the outstanding Kshs 22,189,098.59 as at 25th Feb 2020, a payment of Kshs 14M will be transferred to Securex Agencies (K) LTD on or before 29th February 2020.”

28. From the above, it is clear that in the caption of the email, reference was made to both the defendant and Tribus. It is also clear that there were two separate payments to be made by the defendant (Kshs 24,828,060.00) under part A and Tribus (Kshs 22,189,098.59) under part B. There is lack of clarity in the explanation given by the plaintiff as to why it elected to rely on invoices addressed to Tribus with respect to its claim for Kshs 9,318,300.00. What is more, there is no consistency in the amount claimed in this suit Kshs 21,138,410.00 and the amount owing as per the email (Kshs 24,828,060.00). Thus, this case is distinguishable from *Mobile Telephone Networks Business Kenya Limited v Iphone Global Limited* [2017] eKLR cited in the plaintiff’s submissions. Accordingly, I do not agree with the proposition that there was an admission by silence by the defendant.
29. It is well established that a company is a separate and independent legal entity from its shareholders, directors and agents unless there are factors warranting the lifting of the corporate veil. See *Salomon v Salomon & Co. Ltd.* [1897] AC 22 and *Victor Mabachi & another v Nurtarn Bates Ltd* NRB CA Civil Appeal No 247 of 2005 [2013] eKLR. Again, if the persons acting for Tribus were its agents, the general principle is that the agent of a disclosed principle cannot be sued. See *Anthony Francis Wareheim t/a Wareham & 2 others v Kenya Post Office Savings Bank*, (NRB CA Civil Application Nos. Nai 5 & 48 of 2002).
30. To my mind, therefore, the explanation proffered by the plaintiff is without basis and cannot stand. As such, I am inclined to find that the invoices addressed to Tribus cannot be used to sustain a contractual claim against the defendant. The plaintiff’s claim for Kshs 9,318,300.00 therefore fails.



31. The plaintiff's witness confirmed that the plaintiff received Kshs 11,820,110.00 from the defendant and there were supporting documents. The issue that now remains is whether the defendant is entitled to a set-off of Kshs 13,809,004.20 from Kshs 11,820,110.00.

Set off of Kshs 13,809,004.20 from Kshs 11,820,110

32. The defendant argued that it is entitled to set off Kshs 13,809,004.20 on account of loss occasioned due to the plaintiff's negligence which led to vandalism and theft of electrical cables at the defendant's premises.

33. On the issue of set off on account of negligence, the plaintiff faulted the defendant for failure to file a counterclaim for consideration by the Court. It has been held that a set-off need not be pleaded in a counterclaim for consideration by the Court as it may be considered as pleaded in the defence. See; *Twiga Chemical Industries Ltd. v Rotam Agrochemical Co, Ltd* (Civil Appeal No 16 of 2016) [2019] eKLR *Vithaldas v Hyderabad Spinning & Weaving Co. Ltd.* (1022) 21 Bom. 328 and *Panalpina Airflo B.V v PJ Dave Flora Limited* [2021] eKLR

34. The plaintiff also argued that the mathematical exercise on which the set-off is based is not only invalid but also irregular on the face of it. I have considered this matter and I find that there is indeed an error because the defendant seeks set-off from Kshs 11,820,110.00 which has already been paid. It is my considered view that the claim of the loss occasioned cannot be dealt with in this instance.

35. In conclusion, the plaintiff's suit against the defendant is dismissed for want of merit with costs.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024.

.....

P. MULWA

JUDGE

In the presence of:

Mr. Kaula for plaintiff

Ms. Khauser h/b for Mr. Omondi for defendant

Court Assistant: Carlos

