



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**COMMERCIAL CASE NO. E058 OF 2018**

**LAVINGTON SECURITY LIMITED.....PLAINTIFF**

**VERSUS**

**THE JUDICIARY.....DEFENDANT**

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

1. By a plaint dated 24/8/2018, the plaintiff claimed that on diverse dates between January, 2015 and October, 2017, the plaintiff and the defendant entered into contract agreements by which the plaintiff supplied security services to the defendant at a quarterly consideration of Kshs. 59,438,400/=.
2. That the security services were to be provided to the defendant's court stations and Judges' residences.
3. The plaintiff claimed that in pursuance of the said contract agreements, it rendered the aforesaid services in accordance with the contracts and to the defendant's satisfaction. However, the defendant defaulted in payment of part of the agreed contract price as a result of which there was due and owing from the defendant a sum of Kshs. 52,294,649/= together with interest.
4. In its defence dated 21/1/2019 and amended on 29/11/2019, the defendant denied the plaintiff's claim and contended that the suit was incompetent, bad in law, fatally defective and an abuse of the process of the court. That the alleged contract agreement violated the provisions of the **Public Procurement and Asset Disposal Act** and was therefore null and void *ab initio*. That even if the contract was valid, the plaintiff failed or neglected to supply the services for which the contract was entered into.
5. At the trial, each party called one witness. **Raymond Koech (PW1)** testified for the plaintiff. He adopted his witness statement dated 23/8/2018 and produced the plaintiff's bundle of documents as **PExh.1**. He gave a detailed background to the claim on how the plaintiff was contracted by the defendant to offer security services. That the plaintiff offered the services contracted for but the defendant failed to pay for the same.
6. He produced various contracts that were executed by the parties and the invoices that were raised in respect thereof and sent to the defendant for settlement. That at no time before the filing of the suit, and even the hearing, had the defendant challenged the contract or complained that the services were not offered.
7. He told the Court that subsequent to the filing of this suit, the defendant paid a sum of Kshs. 14,567,755/= on account of court stations leaving a balance of Kshs. 5,171,375/68. However, in respect of the claim for the judges' residence, no payment had been received and there was still an outstanding sum of Kshs. 12,696,527/70 on the principal amount. That under the **Public Procurement & Asset Disposal Act 2015**, the plaintiff was entitled to claim interest at 14% per annum on the outstanding sum.
8. On the judges' residences, he testified that the plaintiff received various instructions from the defendant to deploy guards to the residences of the named judges. That the plaintiff provided the defendant with the checklists signed by the guards, a supervisor and the executive officers of the respective court stations as evidence of deployment of guards thereto. That all attendance sheets were properly signed as such and were in the possession of the defendant.
9. He testified that page 91 of **PExh.1** was an invoice relating to contract number **JUD/102-B/2014-2015** which was in respect of "*provision of security services to the judges' residence during the month ending 31/8/2017*". He also pointed other invoices in respect of other tenders or contracts like tender number JUD/049/2016-2017 for the financial year 2016 – 2017.
10. The defence called **James Nyaga (DW1)**, an Assistant Director, Human Resource and Management of the defendant. He testified that part of his duties included verifying payments from vendors to ensure that they comply with the regulations before being processed for payment. He adopted his witness statement of 17/7/2020 and produced the defendant's list of documents filed on 26/6/2019 as **DExh.1**.

11. He admitted that the plaintiff was awarded a tender to provide security services to the defendants' court premises and was still the defendant's vendor. That there was no contract for the services rendered to the judge's residences. That when the plaintiff submitted its claims, he would verify the same together with the plaintiff's representative to establish those payable and those not payable.

12. He told the Court that the supporting documents were the daily attendance sheet that were signed by the Court administrator or head of station. That on scrutinizing the plaintiff's claim, the defendant realized that there were some amounts which were not payable either because attendance sheets were not properly supported with signatures or irregularities in the way the plaintiff submitted the supporting documents. This made him conclude that there were no services rendered in some court stations.

13. On cross examination, he testified that he was not aware of contract number **JUD/102-B/2014-2015**. That contracts are ordinarily signed by the Chief Registrar of the Judiciary and he had not inquired about the aforementioned contract. He admitted that the letter dated 3/6/2019 by the Chief Registrar of the Judiciary did not suggest that there was no contract for the provision of security to the judges' residences.

14. Both parties filed their respective submissions which the Court has considered.

15. The issues for determination are; ***whether the suit is defective for failure to enjoin the Attorney General, whether the contract for security services to the judges' residences was contrary to law and unenforceable and finally, whether the plaintiff has proved its case to the required standard.***

16. On the first issue, the Court knows of no statutory requirement that the Attorney General must always be the defendant when the state is sued. He is only the chief legal adviser to the government. Otherwise government bodies can sue and be sued in their own right.

17. In **Republic V Principal Magistrate, Hon. Shadrack A Okato Of Chief Magistrate Court At Nairobi Milimani Commercial Court Ex-Parte Equity Bank Limited & Lucy Ndururi[2012] Eklr**, the court held: -

***“It is not wrong for the Attorney General to be included as a respondent in an application like the one before me. Failure to include the Attorney General as a respondent does not however render the application fatally defective since a proper defendant/respondent has been included. The Attorney General being the chief legal advisor of the Government actually played his role in these proceedings by defending the respondent. In my view therefore the application before me is proper”.***

18. In the present case, the Attorney General entered appearance for the defendant on 1/3/2019 and filed a defence on the same date. Thereafter, he did not participate in the proceedings. On the other hand, the defendant as a body corporate entered into the subject contract in its own capacity. It is a body corporate capable of suing and being sued in its own name. I therefore find that this suit is not fatally defective for non-joinder of the Attorney General.

19. The second issue is whether the contract is unenforceable for not being in writing. There was no dispute that there was a contract in writing in respect of the security services for court stations. What was contested was services to the judges' residences.

20. Firstly, while the defendant alleged that there was no contract between the parties, it did not specifically plead this fact in its defence. On the other hand, the plaintiff relied on a series of documentary evidence to show the existence of such a contract. This was contained at pages 71-154 of **PEXh.1, to wit Contract No. JUD/102-B/204-2015 Provision of Security Services to the Judge's Residence and Tender No. JUD/049/2016-2017 Provision of Security Services to the Judge's Residence.**

21. As regards the existence or otherwise of the said contracts, **Dw1** testified that he had not been advised about the existence or otherwise of the said contracts. He did not state that he had confirmed from the Chief Registrar of the Judiciary whether or not the referred to contracts existed.

22. Secondly, when these invoices were sent and received by the defendant, it did not question either the invoices or the referred to contracts.

23. Thirdly, at no time before the hearing did the defendant challenge the legality of the services being rendered to its senior officers in the cadre of Judges of the High Court and Court of Appeal.

24. Finally, **Pw1** produced at pages 156 and the following pages, email communications from senior officers of the defendant instructing the latter to deploy guards to the residences of the named Judges. The plaintiff acted on the representations made by senior officers of the defendant to believe that the services were required and were properly sourced.

25. One of such communication was dated 8/1/2015 by **Mr. Molu Boya**, the defendant's **Ag. Deputy Director Human Resources and Administration**. It was addressed to a Mr. George of the plaintiff thus: -

***“Dear Mr. George,***

***We have received approval to temporarily deploy security guards to the following two judges residence as we await AP's to be deployed. Hon. Justice Fatuma Sichale lives in... Her telephone number is ... Hon. Justice Ole Kantai lives in... His number is.... Please immediately deploy security guards one (1) day time and one (1) at night to each residence until Monday January 12 2015. Regards”.***

26. What is clear to Court is that the defendant did not question the services being rendered to the defendant before the suit was filed. The allegation that there was no contract in writing was but an afterthought.

27. Further, the defendant alleged that there were no services rendered to the named judges as claimed. The plaintiff's claim was very specific. It referred to specific Judges and times that the services were alleged to have been offered. The defendant did not call any of the said judges as witnesses or procure from them any written confirmation that no such services were rendered at their residences.

28. What is clear is that, the defendant entered or lured the plaintiff to enter into legal relations with it and offer the alleged services with full knowledge of its effect and tenor. The defendant benefited from what it now terms an "illegal contract". Is it then right to allow the defendant to run away from the alleged "illegal contract" which it participated in and benefited from? The Court thinks not.

29. The defence of illegal contract put up by the defendant holds no water. The Court finds that the plaintiff has sufficiently demonstrated that the services to the Judge's residence was based on instructions that were in writing. Further, the defendant initiated and actively participated in the transaction that it now terms illegal. I have always known the position of the law to be that a party cannot be permitted to benefit from its own wrong.

30. In **Westminster Commercial Auctioneer v Diamond Trust Kenya Limited [2021] Eklr**, it was held: -

***"It is at the point of payment that the applicant sought to avoid its obligations. A party cannot be allowed to benefit from his/her own wrongdoing. The applicant cannot have only woken after the respondent had undertaken the exercise for it to realize that the contract it had given him to undertake was illegal.***

In **Macharia Mwangi Maina & 87 others v. Davidson Mwangi Kagiri [2014] Eklr**, the court held: -

*'This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive justice rather than technical and procedural justice..'*

31. Accordingly, the defence of illegality is hereby rejected. The claim in respect of provision of security services to judges' residences therefore succeeds.

32. I now turn to the claim in respect of non-payment of services allegedly offered to the court's premises. At the hearing, **Pw1** testified, and it was admitted by **Dw1**, that the defendant had made payment of Kshs. 14,567,755/= and what was outstanding was Kshs. 5,171,375./68 together with interest. The defendant contended that the said amount was not settled as it related to services which were not rendered.

33. **Dw1** testified that the defendant could not pay the said amount as it related to the plaintiff's invoices which were not supported by monthly attendance sheets, duly signed by the respective court station's executive officers.

34. The evidence on record is that, after the services were rendered, the plaintiff raised invoices and attached the requisite attendance sheets and submitted them to the defendant for payment. There was no evidence that the defendant disputed them at any time before the suit was filed.

35. After the invoices and the attendances sheets were submitted to the defendant, there was no evidence to show that the defendant had at any point indicated that they were not payable for any reason. It kept quiet despite many letters calling for payment.

36. In any event, the defendant did not offer evidence of the affected court stations. Further, it did not produce the alleged invoices and the incomplete attendance sheets to prove its allegation that they were incomplete. It should be noted that **Dw1** testified that it is after he had verified the invoices against the missing or incomplete attendance sheets, that he formed the opinion that the claims were not payable.

37. The Court holds that, it is he who alleges that must prove. It was for the defendant to produce evidence of the court stations affected, the invoices and copies of the incomplete attendance sheets. These were in its possession. Having failed to produce them, the Court holds that, had the same been produced, they would have been prejudicial to the defendant.

38. It was submitted that it was for the plaintiff to prove that the services were offered. The plaintiff had discharged its evidentiary burden. It is clear that the claim was huge at the time of filing the suit. Midway, the defendant sifted through the invoices and paid Kshs. 14 million and left invoices amounting to Kshs. 5,171,375/68 on the basis that they were in respect of court stations where no services were offered. The court stations were not specified nor the affected dates.

39. The defendant having failed to demonstrate the basis on which it denied the payment of kshs. 5, 171,375.68/=, I find that the same is due and owing to the Plaintiff.

40. The plaintiff claimed interest on the unpaid amount. The defendant did not challenge this fact. **Section 140 of the Public Procurement & Asset Disposal Act 2015** provides: -

***"The following shall apply with respect to delayed performance and overdue amounts owed by a procuring entity and a contractor under a performance contract for a procurement:***

***a) Unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts.***

***b) The contractor shall be liable to liquidated damages for delayed performance.***

*c) The interest on liquidated damages to be paid under paragraph (a) and (b) shall be determined by Central Bank of Kenya.*

*d) The method of computing interest liquidated and ascertained damages shall be prescribed in the Regulations.*

41. The evidence on record is clear that the defendant delayed to settle the invoices on time. It paid part of the claim after the suit had been filed. In the premises, I find that the defendant is liable to pay interest on the delayed amount.

42. The plaintiff had pleaded and proved a total sum of Kshs. 19,859,709/30 as in interest due as at the date of filing fees. That amount is allowed as there was proof of delayed payment. The principal sum shall continue to attract interest at the rate of 14% per annum.

43. Accordingly, the Court finds that the plaintiff has proved its case to the required standard and judgment is hereby entered in its favor as follows: -

a) Kshs. 5,171,375/68 for services rendered at the court's premises together with interest thereon at the rate of 14% per annum from 5/8/2018 until payment in full.

b) Kshs. 12,696,527/70 together with interest thereon at 14% from 5/8/2018 until payment in full.

c) Kshs. 19,859,709/30 being interest accrued on the principal sum before the filing of the suit.

d) Costs of the suit together with interest thereon at Court rate.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF MAY, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**