



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 411 OF 2015

APEX SECURITY SERVICES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE.....DEFENDANT/RESPONDENT

AND

AUTOBACS LIMITED.....INTENDED 1ST INTERESTED PARTY/APPLICANT

PAUL KIMANI.....INTENDED 2ND INTERESTED PARTY/APPLICANT

RULING

1. Before this Court for is the Notice of Motion Application dated **20th August 2019** by which **AUTOBACS LIMITED** (the 1st Interested Party/Applicant) and **PAUL KIMANI** (the 2nd Interested Party/Applicant) seeks the following Orders:-

“1. SPENT

3. THAT the judgment on admission issued on the 9th February 2017 be stayed pending the hearing and determination of this application.

4. THAT the costs of the suit be provided for.”

2. The application which was premised upon **Order 1 Rule 8,9 and 10 of the Civil Procedure Rules, Article 159 of the Constitution of Kenya 2010** and all other enabling laws was supported by two Affidavits of even date sworn by **MARY NJERI** a Director of the 1st Interested party and a second supporting Affidavit sworn by the 2nd Interested Party. The 2nd Interested party also swore a Further Supporting Affidavit dated **14th February 2020**.

3. The Application was opposed by the Plaintiff **APEX SECURITY SERVICES LIMITED** who filed a Replying Affidavit dated **3rd October 2019** sworn by **CHARLES NDUGU NDIRANGU** a Director of the Plaintiff. The Defendant **KENYA MEDICAL RESEARCH INSTITUTE** also opposed the application through the Replying affidavit dated **25th November 2019** sworn by **JOHN KYANESA MUSAU** the Deputy Director (Administration) of the Defendant.

4. The application was canvassed by way of written submissions. The Interested Parties/Applicants filed their written submissions on **27th February 2020**, whilst the Plaintiff/Respondent filed its submissions on **20th February 2020**. The Defendant did not file any written submissions at all.

BACKGROUND

5. The 2nd Interested Party is a Director of the 1st Interested Party. The Interested Parties allege that they entered into a formal agreement with the Plaintiffs by which the Directors of the Plaintiff gave their consent for the Interested Parties to trade in the name of the Plaintiff Company subject to the Plaintiff being granted a commission.

6. The Interested parties claim that on this understanding they sought and secured a contract with the Defendant which contract was fully

financed and managed by the Interested Parties. That the business was operated from the premises of the Interested parties offices at **King Group Ltd, Yaya Centre** in Nairobi and that payments in respect of the said contract were channelled through a new account opened by the Interested Parties on **31st May 2012** being, Account No. [particulars withheld] held at **Family Bank, Yaya Centre Branch**. That the 2nd Interested Party was a signatory to the said account.

7. The Interested Parties allege that the Plaintiff clandestinely filed this suit **HCCC No.411 of 2015** without the knowledge of the Interested parties and that the Plaintiff obtained judgment in their favour for **Kshs.14,325,000** knowing full well that they were not entitled to that amount as they had already been paid the commission agreed upon for the contract. Hence the present application seeking to stay the execution of said judgment pending the hearing and determination of the suit.

ANALYSIS AND DETERMINATION

8. I have considered the submissions filed by the parties in this matter as well as the relevant law. By Prayer 2 of the Notice of Motion the Interested parties sought to be enjoined in the suit. This particular prayer was granted by this Court on **28th August 2019**. Accordingly, prayer 2 of the application is spent.

9. Regarding prayer (3) seeking a stay of the judgment on Admission delivered on **9th February 2017** the Plaintiffs submits that this prayer has been overtaken by events as they have already been paid this sum of **Kshs.14,325,000/-**. In the Replying Affidavit dated **3rd October 2019** it is averred that said payment was made and received by the Plaintiff, thus in the circumstances there is nothing to stay.

10. The Defendant vide their Replying Affidavit dated **25th November 2019** confirm that following the judgment of **9th February 2017**, the Defendant did pay out the sum of **Kshs.14,325,000** to the Plaintiff. Annexed to the said Replying Affidavit are copies of Documents proving that the Defendant made said payment.

11. Despite this evidence of payment, the Interested parties adamantly insists that the Defendants have not yet made any payment to the Plaintiff. They insist that the Plaintiffs avail certified copies of the **RTGS** & their Bank statement to prove that they did receive the payment.

12. The standard of proof in civil cases is on a balance of probability. I have looked at the documents produced in support of the allegation that payment was in fact made to the Plaintiff. Annexure **JKM"2"** is a payment voucher dated **17th February 2017** prepared by the Defendant for **Kshs.14,325,000**. The details of the payment voucher read as follows:-

“Being payment for security services for eight months and ten days as per attached court order...” [own emphasis]

It is clear that this payment voucher was generated by the Defendant in response to the courts judgment of **9th February 2017**.

13. Annexure **JKM"2"** also contains a Debit Advice dated **6th November 2019** indicating that a sum of **Kshs.14,325,000** was debited from the Defendants Account. The beneficiary of said funds is indicated as **Apex Security Services** who are the Plaintiffs herein. There is also a copy of the Defendants Bank statement confirming that on **23rd February 2017** a debit was made of **Kshs.14,325,000** by **SWIFT** payment to **Apex** (Plaintiff) which debit reference corresponded to the reference in the Debit Advice.

14. From the above, I am satisfied that it has been proved on a balance of probability that this payment of **Kshs.14,325,000** was in fact made by the Defendant to the Plaintiff way back in **February 2017**.

15. The judgment in question was delivered on **9th February 2017**. The Interested Parties filed their application on **20th August 2019** seeking to stay a judgment delivered two (2) years earlier. This application came too late in the day and I find that the same has been overtaken by events. The payment the Interested Parties are seeking by this application to stay has already been made. There is therefore nothing to stay. This court will not make orders in vain.

16. Finally, I find no merit in the present application. The Notice of Motion dated **20th August 2020** is hereby dismissed with costs to the Plaintiffs. I note that the value of the claim on this suit is **Kshs.14,325,000** which amount falls within the jurisdiction of the Chief Magistrates Court. Accordingly, I hereby transfer this file to Milimani Chief Magistrates Court for hearing and determination of the main suit. It is so ordered.

Dated in Nairobi this 2nd day of October, 2020

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Justice Maureen A. Odero