



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL NO. 185 OF 2007

DELAMERE ESTATE LIMITED.....APPELLANT

-VERSUS-

G4S SECURITY SERVICES (K) LTD....RESPONDENT

(An appeal from the Judgment of Hon. Chief Magistrate Florence Muchemi delivered on the 4th October 2007 in Naivasha SPMCC No. 724 of 2006)

JUDGMENT

1. At all material times the Respondent rendered security services to the Appellant pursuant to an agreement entered into on the 22nd November 2004 made between the parties at its Manera Farm upon terms agreed among them that the Defendant (appellant) would

(a) Pay in advance a monthly charge of Kshs.107,110/= plus value added tax thereon.

(b) That the plaintiff shall have the right to increase by 15% the amount due and payable by the defendant if it is not paid within 30 days of the date of invoicing and

(c) that the plaintiff shall be at liberty to increase the amounts payable if the operational costs are increased by circumstances outside its control.

2. It seems that the (appellant) defendant failed to pay the charges prompting the Respondent to file primary suit by a plaint dated 7th August 2006 seeking payment of a sum of Kshs.337,307/95 being money due and owing to the Respondent for services rendered as follows:

a) Total amount invoiced - Kshs.521,238/=

b) 15% surcharge on

unpaid amount - Kshs. 78,185/70

- Total **Kshs.599,423/70**
- Less paid - Kshs.262,115/75
- Balance - Kshs.337,307/95

3. By its defence dated the 4th October 2006, the Respondent's claim was denied in its totality but upon full hearing the trial court found in favour of the Respondent in the sum claimed plus costs and interest.

4. Being dissatisfied with the judgment the appellant preferred this appeal on grounds that the trial magistrate in summary, erred in law and fact by disregarding the Appellant's evidence by way of invoices, payment vouchers contracts, credit notes and correspondence exchanged thus arrived at an erroneous finding that the appellant owed the Respondent the said sum and failure to find that the 15% surcharge was not arbitrary.

5. In support of their respective positions the parties filed written submissions.

ISSUES

1. *Whether the appellant owed the Respondent any money in respect of security charges for the period November 2004 to March 2005.*

2. *Whether the 15% surcharge on late payment was arbitrary.*

6. **Section 78(2) Civil Procedure Act** empowers an Appellate court to perform as nearly as may be the duties of courts with original jurisdiction in suits before them - **Mwanasokoni –vs- Kenya Bus Services Ltd & Others (1982-88) 1 KAR 278 and Butt –vs- Khan (1987) 1 KAR** to the effect that an appellate court will not normally interfere with the trial court's findings of fact unless they are not based on the evidence or no evidence or on misapprehension of the evidence or to have been based on wrong principles.

7. **DW1 Joseph Muchina** the appellant's witness produced a survey of all invoices raised by the Respondent - **DExt 1** - and **DExt 2** being a bundle of invoices that were paid and as **PExt 7** invoices not paid. Explanations were stated on when they were paid. His further evidence that all the invoices were paid (running account from year 2002 to 2006) – relevant period inclusive).

On cross examination, DW1 averred that he could not pin point any specific payment for a specific invoice as bulk payments were being made.

8. On **PExt 7** – this witness could not confirm which invoices were for security guards and those for alarm system hence stated there was a mix up for the two companies being Delamere Estates and Delamere Audits Ltd.

He continued to testify that the mix up and lumpsums were not denied. Upon the said evidence, the trial magistrate found that it was difficult to prove which invoices and for which contracts payments were made. The court further observed that the respondent (plaintiff) issued a credit note when it realised that it had overcharged the defendant (Appellant) in two invoices.

9. The credit note was issued on the 28th February 2006 for Kshs.62,205/= one year after termination of the contract in what the Respondent averred was as a result of non-payment for services rendered.

10. I have examined **PExt 7** – it shows the statement of accounts between the two parties. It was well explained by PW1. The only payments by the Appellant by cheques are shown, a sum of Kshs.259,122/25 without the surcharge for late payment.

11. All invoices for the period (5 No.) were for Kshs.136,688/60 but the contract sum was for Kshs.124,247.60 a difference of Kshs.62,205/=.

PW1 therefore stated that the credit note issued was to reduce the indebtedness by the Appellant by Kshs.62,205/=, leaving a balance of Kshs.275,102/=.

12. I am satisfied with the analysis of the running account between the two parties as the Appellant could not explain its payment of the five invoices specifically as it also paid on account of other accounts including the credit note. On the issue as to whether or not the appellant owed the Respondent any money in respect of the security services, I am satisfied and uphold the trial magistrates findings that the said sums were not paid save for the credit note of Kshs.62,205/= that I understand to mean, out of the Kshs.337,307/99 claimed, it went to reduce the said sum to Kshs.275,102/=.

13. Consequently, I set aside the sum found due and owing to the Respondent by the Appellant and substitute it with a sum of Kshs.275,102/=.

14. **15% surcharge on late payments arbitrary?**

The contract of service executed by both parties was agreed by themselves. It is trite that a court of law has no authority or power to alter terms of an agreement between parties, and that its duty is to enforce the agreement except when it is found to have been obtained through fraud, coercion or undue influence and in which case such ought to be pleaded and proved.

15. In **National Bank of Kenya Limited –vs- Pipeplastic Samkolit (K) Ltd & Another (2001) e KLR** the Court rendered that:

“...A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved...”

16. The Respondent (**PW1**) in his evidence justified the surcharge and no issue arose from the Appellant in terms of the justification.

The appellant did not pursue or submit on this issue in support of the appeal.

17. Accordingly I find no merit in the appeal save in the variation and substitution of the sum payable to the Respondent by the Appellant being from Kshs.333,307/99 to Kshs.275,102/=.

This sum shall accrue interest from the date of filing of the primary suit at the subordinate court at court rates until payment in full.

18. The Appellant shall bear costs of the Appeal.

Dated, signed and delivered this 7th Day of March 2019.

J.N. MULWA

JUDGE