



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 177 OF 2013

ISAAC OTIENO ODUOR T/A

TOUGH SECURITY GUARDS AND

WORLDWIDE MARKETING SYSTEMPLAINTIFF

VERSUS

MPAKA HOLDING LIMITEDDEFENDANT

R U L I N G

1. **ISAAC OTIENO ODUOR** trading as **TOUGH SECURITY GUARDS, WORLDWIDE MARKETING SYSTEM** (the Plaintiff) has sued **MPAKA HOLDING LIMITED** (the Defendant).

2. The Plaintiff has pleaded that he entered into two contracts with the Defendant, one for provision of security and the other for provision of cleaning services, at Mpaka House, Mpaka Road, Westlands Nairobi. It is the Plaintiff's claim that the Defendant breached those two contracts, by termination, and he seeks damages in the form of payment for the unexpired period of the contracts.

3. A Memorandum of Appearance was filed, after summons and Plaint were served. In that Memorandum of Appearance it is stated:

“PLEASE ENTER APPEARANCE for the Defendant herein MPAKA HOLDINGS LIMITED whose address for service for purposes of this suit shall be C/O KINYUA MWANIKI AND WAINAINA ADVOCATES...”

4. Attention is drawn to the party for whom the Memorandum of Appearance was filed. It was filed for MPAKA HOLDINGS LIMITED. The difference in the name of the party for whom the Memorandum of Appearance was filed and the named Defendant in this case is the “S” after the word HOLDING. The Defendant in the pleadings is named as MPAKA HOLDING LIMITED and the party for whom the Memorandum of Appearance is filed is MPAKA HOLDINGS LIMITED.

5. A defence was filed in which there is admission of the description of the parties save the name of the Defendant where it was stated the correct name was MPAKA HOLDINGS LIMITED.

6. In the defence the written contract for security and cleaning services were described as non-existent and if they existed they were stated to be invalid and not binding on the Defendant.

7. The Plaintiff Isaac Otieno stated in evidence that he entered into 20-year agreement with the Defendant to provide 24-hour security guard services at Mpaka House. The contract provided for monthly payment of Kshs. 30,000. He stated that he provided those services diligently and that the Defendant paid promptly for the same.

8. The Plaintiff stated that he also entered into a contract with the Defendant for him to provide cleaning services at Mpaka House for 20 years at the price of Kshs. 22,600. He stated he offered those services diligently and that the Defendant promptly paid for the same.

9. The Plaintiff stated that he offered those services in the months of November and December 2009 but the Defendants failed to pay for those services. The Defendant eventually removed the Plaintiff and his staff from Mpaka House on 27th April 2010. The Plaintiff pleads breach of contract and seeks damages represented by the remaining period of the contract.

10. On being cross-examined the Plaintiff confirmed that Tough Security Guards is a business of his father who operates it under the

business name "Tough Security Guards." He however said that he had been a Manager of that business since 1999.

11. I wish to first determine whether the case filed by Isaac Otieno on behalf of Tough Security Guards is properly before me.

12. Order 30 Rule 9 of the Civil Procedure Rules provides:

"any person carrying on business in a name or style other than his own name may be sued in such a name and style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this order shall apply."

13. Bearing in mind that rule, above, I shall then look at Order 30 Rule 1 which provides that a partners may sue or be sued in the name of a partnership. It follows from that provision that it was Isaac Otieno's father, Francis Oduor Otieno being the proprietor of the business name Tough Security who should have filed this case and not Isaac Otieno. This point was clarified in the case: **AGATHA KALUKI MUTIE V DIRECTOR, ST. TERESA'S ACADEMY [2013] eKLR** where the Court stated:

"Halsbury's Laws of England (4th Edition; Volume 37; paragraph 268) refers to Order 81 Rule 9 Civil Procedure Rules of England which mirrors Kenya's own Order 30 Rule 9 of our Civil Procedure Rules 2010; and states

"An individual carrying on business within the Jurisdiction in a name or style other than his own name may be sued in that name as if it were the name of the firm"

The text then under footnote 3 goes on to state that

"if he sues, however, he should do so in his own name, describing himself as 'trading as'

This is also the position taken in the Supreme Court of Kenya decision *in Lakhman Ramji Vs. Shivji Tessa & Sons [1965] E.A;* where *Rudd J* at page 128, held thus:

The legal position is quite clear, a sole proprietor of a business cannot sue in the name of that business if that name is not his own. He should not even sue in his own name trading in the business name. He should sue in his own name simpliciter and then in the body of the Complaint he can say he carries on business in the name of whatever his business name happens to be and is the sole proprietor of that business."

14. In Isaac Otieno filing the case on behalf of Tough Security Guards when that business name is registered under his father's name make the suit to be incompetent. Isaac Otieno has no *Locus Standi* in this matter in as far as it relates to his father's business Tough Security Guards. He could have been a witness in the case of Tough Security Guards but he had no legal standing to file the case in his name. For that reason, the case filed by Tough Security Guards is dismissed. The case of Worldwide Marketing System will survive because that is a business registered by Isaac Otieno.

15. The Defendants denied the existence of the contract with the Plaintiff. The basis for denying that contract is because the contract was signed by Ebrahim J. P. Jiwani on behalf of the Defendant who the Defendant alleged he was not a Director of the Defendant.

16. That allegation is defeated by the evidence of the Defendant's witness Manjulal Patel. She was able to confirm the at the photo shown to her of Ebrahim Jiwani Punja Jiwani was that of a person she knew as Ebrahim Jiwani. She did not deny that Ebrahim Jiwanni she knew was a Director of the Defendant.

17. Further the allegation is defeated by the fact the Defendant, who bore the evidential burden, failed to provide the Form of Annual Return of the Defendant for the year 2009, the year in which contracts were signed.

18. I therefore find and hold that the contract between Isaac Otieno and the Defendant was signed by a Director of the Defendant.

19. In that vein I also reject the Defendant's contention that it was wrongly sued as "Mpaka Holding Limited". The Defendant is the author of this misunderstanding. While signing the contract with the Plaintiff at some part it is described as Mpaka Holding Limited and at other places it is described as Mpaka Holdings Limited.

20. Most telling is a letter written on letter-head of "Mpaka Holding Ltd" dated 9th November 2009. The signature part of that letter is reflected the name Mpaka Holdings Limited.

21. The Defendant inter-changeably uses both of the above names and may be the reason why there is presently a confusion.

22. Although the writer of the letter of 9th November 2009, Dr. Mahesh Kumar, was said not to be a Director of the Defendant having failed to provide its annual return of the year 2009 has failed to shift the burden it bears to prove he was not a Director.

23. Even though I have make a finding that the contract, between the Plaintiff, as proprietor of Worldwide Marketing System, and the Defendant was signed by the Defendant Director the question then that arises is; is that contract enforceable.

24. The contract is dated 1st September 2004. It describes Mpaka Holding Limited as the Company. It then describes Worldwide Marketing

System as the client. It is a contract for cleaning services at Mpaka House. The period of the contract is provided as 20 years. The monthly charges for those services is Kshs. 22,600. The terms and conditions of that contract are:

“TERMS AND CONDITIONS

6. It shall be a condition of this contract, that the either party shall terminate the contract by PAYING for the remaining period of the contract of FAILING to renew at the end of expiry which shall be 20 years as from 1st September, 20014.

7. Client will pay for the services in between 1st to 25th of the month that the service is being rendered to enable the company pay the cleaners or before 30th of that month.

8. Client should secure his property, furniture, fittings, and any other movable items. As the company is absolved from any theft or damage within the premises to be cleaned.

9. In the event that the company shall find it necessary to revise the rates, a written notice containing the proposed revisions and the proposed dated of commencement thereof shall be delivered to the address of the client giving at least 20 days’ notice. At the expiry of the notice, in the event that there is no objection from the client the proposed revisions shall come into force.”

25. When reading the above Terms and Conditions one needs to bear in mind the description of the parties set out above. The Plaintiff who was providing the cleaning services was described as the client. The Defendant who was benefiting from those cleaning services is described as the company. Clause 7 of the Terms of Conditions provides that it is the client (the Plaintiff) who was to pay the company. Since that is what is provided in that term the Plaintiff cannot lay claim for payment when the contract, the Plaintiff relies upon, provides it is him who was required to pay.

26. Since the parties contract was reduced into writing it is not permissible for other evidence to be introduced to alter that written contract. This was so stated by the Court of appeal in the case **748 AIR SERVICES LIMITED V THEURI MUNYI (2017) eKLR** as follows:

“We are well aware of the parole evidence rule which prohibits the adduction of extrinsic evidence to alter the terms of a written contract between parties. In the case of **Prudential Assurance Company of Kenya Ltd vs Jutley & Another [2005] eKLR** the following passage from *Oggers Construction of Deeds and Statutes (5th Edn)* at p.106 was cited stating thus:

“It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence”.

In *Halsbury’s Laws of England (4th Edn)* vol. 9 (1) at para 622, it is further stated as follows in respect of the rule:

“Where the intention of parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms”.

The Court further stated in that case:

“As **Mwera, J.** (as he then was) stated in **Housing Finance Company of Kenya Ltd vs Njuguna LLR 1176 (CCK)**:-

“Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they choose.”

The function of Courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - **Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others (supra)** - Lord

Justice Beatson stated as follows:

“Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.”

27. The Plaintiff’s case (Worldwide Market System) in view of what is stated above fails and is dismissed.

28. Although both claims by the Plaintiff have failed I make a finding that the Defendant is not deserving in costs of the suit. This is because the Defendants unwarrantly alleged it did not contract with the Plaintiff because the contract was signed by a person who was not a Director. This is my view was untruthful. I formed a clear opinion that the Defendant’s witnesses in denying the Directorship of the signatory of the contract were less than candid. The Defendant could have cleared the air if they had provided the annual return for the year 2009. It failed to provide and I hold that failure adversely against the Defendant.

29. In the end therefore I dismiss the Plaintiffs case with no orders as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this **4TH** day of **OCTOBER**, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**