



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 7 OF 2017**

**SOROYA INVESTMENTS LIMITED.....APPELLANT**

**VERSUS**

**BYRON TRUSTKETT INVESTMENT LIMITED.....RESPONDENT**

**(Being an appeal from the Judgement and Decree of the Hon. D.O. Mbeja (Mr.) dated 8<sup>th</sup> December 2016 in CMCC No. 7018 of 2009 – Nairobi)**

**JUDGMENT**

This appeal arises from the decision of the lower court rendered on 8<sup>th</sup> December, 2016 following a suit by the respondent against the appellant arising from what was said to be a breach of contract. The appellant had hired the respondent to conduct cleaning and gardening services at a consideration of Kshs.138,000 per month which was reduced into writing and executed by both parties.

In the pendance of the said contract, the appellant by a letter dated 28<sup>th</sup> May, 2009 terminated the contract effective 30<sup>th</sup> May 2009 wherein the appellant cited poor performance and lack of provision of basic equipment.

Aggrieved by the act of the appellant the respondent moved to court claiming breach of contract and payment of two months invoice which was pending at the time of termination. The lower court found in favour of the respondent leading to the present appeal.

In deciding in favour of the respondent the lower court stated as follows,

**“There is a clear intention to create legal relation from the agreement executed between the parties on 2<sup>nd</sup> February, 2009. The notice for termination of contract dated 28<sup>th</sup> May, 2009 was not consistent with clause 6 (ii) of the contract executed on 2<sup>nd</sup> February, 2009 by the parties, which clause is binding upon the parties. I am satisfied that the plaintiff has a valid and legitimate claim against the defendant and in the result judgment is entered in favour of the plaintiff against the defendant as prayed for in the plaint. The plaintiff is also awarded costs of the suit plus interest at court rates.”**

In the plaint dated 24<sup>th</sup> September, 2009 the respondent claimed under paragraph 8 thereof Ksh. 278,000/= being two months’ pay in lieu of notice and Kshs. 278,000/= for cleaning services rendered in April and May, 2009 as per the invoices sent to the appellant making a total of Kshs. 552,000/=.

The appellant had pleaded that the respondent was in breach of the terms of the contract and the reasons for termination were known to the respondent. The entitlement pleaded by the respondent was also denied by the appellant.

As required of me, I have evaluated the evidence adduced before the lower court with a view to arriving at independent conclusions. It is true that the parties herein executed a contract relating to the services to be rendered. The said contract also expressly provided for termination thereof. This appeal was canvassed by way of written submissions which I have read. Clause 6 of the said contract is instructive.

Clause 6 (i) sets out the reasons that may lead to termination. These included failure to deliver cleaning services as per appendix 1, failure to perform any other obligation or obligations under the contract and if, in the judgment of the **“The Company”** the tenderer had engaged in corrupt or fraudulent practice in competing for or in executing the contract.

Sub clause 6 (ii) provided as follows, **“by either party giving the other two (2) months’ notice in writing.”**

In the letter dated 28<sup>th</sup> May, 2009 the appellant wrote to the respondent terminating the contract citing **“continued poor performance and lack of provision of basic equipment”**. It was also stated in the said letter that the appellant had drawn the attention the respondent to various issues which however had not been remedied leading to the said termination.

The appellant has submitted that no time was required under clause 6 (i) and therefore the appellant was correct to terminate the contract forthwith. With respect, that interpretation is misplaced. Clause 6(i) gives the reasons for termination and after those reasons have been set out, then a notice of two months should have been given to the respondent. It is true that courts cannot rewrite the contract between the parties but that is the only logical interpretation of this contract.

By giving two days notice the appellant was in breach of the same contract. Had the appellant given the two months notice to terminate the contract, the respondent would have worked for those two months and earned the payment reserved in the contract. That the contract, was terminated without any notice as provided in the contract the respondent was entitled to payment of two months in lieu of the notice. That is a clear implied condition of this contract. The lower court may not be faulted in that regard.

The respondent produced invoices relating to services rendered in April and May, 2009. These were exhibits 3a and 3b. The appellant's witness stated that they had settled these invoices. Proof of that settlement was not shown to the court. The lower court cannot be faulted in accepting the respondent's claim in that regard.

I have come to the conclusion that the respondent proved its case against the appellant and the lower court was therefore correct in deciding in favour of the respondent. The end result is that this appeal is dismissed with costs to the respondent. There is evidence on record that the decretal sum was deposited in an interest earning account in the names of both advocates. That sum shall now be released to the respondent within 14 days of this judgment.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 15<sup>h</sup> day of May, 2018.*

**A. MBOGHOLI MSAGHA**

**JUDGE**