



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 55 OF 2009

INTER SECURITY SERVICES LTD.....APPELLANT

VERSUS

MWANIKI ASSOCIATES LTD.....RESPONDENT

(Appeal from the original judgment and decree of Hon. Ms. A. Ireri in Milimani Commercial Courts CMCC No. 13593 of 2004 delivered on 16th January, 2009.)

JUDGMENT

1. The Appellant filed a claim against the Respondent in Milimani Commercial Courts CMCC No. 13593 of 2004. The said claim was dismissed by the trial court on the basis that the Appellant did not prove its case.
2. Aggrieved by that decision the Appellant filed this appeal on the following grounds:-
 - i. *That the learned magistrate erred in law and in fact in finding that the party sued is Mwaniki Associates and yet there is a properly amended plaint filed on 29th July, 2005 against the Respondent pursuant to an order of the court.*
 - ii. *The learned magistrate erred in law and in fact in failing to give due consideration to all the documents presented in support of the Appellants case and the matters pleaded in the amended plaint filed on 29th July, 2005.*
 - iii. *The learned magistrate erred in law and in fact in failing to find that the Appellant has proven its case on a balance of probabilities.*
 - iv. *The learned magistrate erred in law and in fact by considering matters that were not pleaded in the Respondent's defence.*
 - v. *The learned magistrate erred in law and in fact by dismissing the Appellant's evidence that security services were provided for both day and night guard and that the Respondent did pay for both services after being duly invoiced.*
 - vi. *That the learned magistrate erred in law and in fact by dismissing the Appellant's claim and yet the Respondent produced no evidence that payment was made for services rendered and duly invoiced.*
 - vii. *That the learned magistrate erred in law and in fact in finding that the Appellant was in breach of contract and yet it is the Respondent who failed to pay for services rendered.*
3. The issues that arise from the grounds above are; whether or not the Respondent was the proper Defendant in the suit, whether or not security services were provided for both day and night to the Respondent by the Appellant, and whether or not the Respondent paid for the services rendered.
4. This being a first appeal, this court is under duty to re-evaluate the facts afresh, assess it and make its own independent conclusions. See **Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.**

5. *The Appellant instituted the suit before the trial court by a Plaint dated 8th December, 2004. In that plaint, the Defendant was Mwaniki Ngure t/a Mwaniki Associates. Subsequently, an amended Plaint dated 10th February, 2005 was filed. In the amended Plaint, the Defendant was described as Mwaniki Associates Ltd. A further amendment was made by the plaint dated 13th July, 2005 where the Defendant was still named as Mwaniki Associates Ltd.*
6. *The Appellant made no submission in regard to the first issue before the trial court. The Respondent however, submitted that it admitted the existence of a contract but that the contract was entered into between the Appellant and Mwaniki & Associates who had not been enjoined as a party to the suit. It was claimed that the suit against it, Mwaniki Associates Limited was a nullity.*
7. *In this appeal, the Appellant submitted that the Appellant having filed the further Amended Plaint on 29th July, 2005 pursuant to leave granted on 12th July, 2005, and the matter proceeded to hearing with the Defendant as Mwaniki Associates Limited, Mwaniki Associates Limited was the proper Defendant. On the other hand the Respondent reiterated that the contract for provision of security services existed between the Appellant and Mwaniki and Associates and not Mwaniki Associates Ltd and that the latter was not privy to that contract.*
8. *In its statement of defence, the Defendant denied its description at paragraph 2 of the Plaint dated 8th December, 2004. In response to the Amended Plaint dated 10th February, 2005, a defence dated 16th May, 2005 was filed but which defence neither denied the contents of paragraph 2A and 3 of the Amended Plaint which paragraphs described the Defendant nor non suitedness of the Defendant. It was rather contended that the amendment of the Plaint was irregular as the amendment to the Defendant's name in the Amended Plaint did not correspond to that in the original Plaint. The Appellant further amended its Plaint on 13th July, 2005. No defence was filed in response to the Further Amended Plaint. It is also clear from the record that there was no objection to the Appellant's counsel Mr. Burugu when he sought the leave of court for amend the plaint further. The proper Defendant therefore in the proceedings in the lower was therefore Mwaniki Associates Limited as per the further Amended Plaint. In this regard, the trial court fell in error in holding that Mr. Mwaniki had been sued as trading as Mwaniki Associates.*
9. *In its defence, the Respondent dated 16th May, 2005, the Respondent denied privity of contract and produced an agreement between the Appellant and Mwaniki and Associates and another between the Appellant and Mr. Ngure Mwaniki. Both agreements were for provision of security services. I have read through the documents produced in evidence by the Respondent in the trial court. It is noteworthy that the names vary from Mwaniki and Associates to Mwaniki Associates Ltd to Mwaniki Associates. Mr. Mwaniki Ngure (DW1) however, stated in evidence that there were two contracts, one between himself and the Appellant and the other between Mwaniki and Associates and the Appellant. He stated that Mwaniki and Associates was later changed to Mwaniki and Associates Ltd and he denied privity to the contract alleged by the Appellant. The documents produced by the Respondent such as the credit note dated 22nd December, 1997, statement of account as at 30th July, 2002, 31st July, 2002 among others makes reference to Mwaniki Associates. Indeed the documents produced by the Respondent emanating from the Appellant makes reference to different names. However, the credit note dated 22nd December, 1997 was among the documents produced in evidence by the Respondent in an attempt to establish that it was overcharged by the Appellant. I do not therefore see how and why the Respondent deny privity to the contract referred to by the Appellant. While I acknowledge that there is an immense confusion as to how the Respondent is referred by the Appellant, I am satisfied that there was privity of contract from the Respondent's end and the confusion in the naming cannot in my view cancel such privity. I affirm that the Respondent was properly sued and was the right defendant and was answerable to the Appellant's claim.*
10. *The Appellant's claim was that it entered into an agreement dated 27th December, 1987 with the Respondent for security services at its premises at Mageta Road, Lavington. That the agreement was to commence on 30th December, 1987 at an initial cost of KShs. 1,750/- for a night guard per month. That the Appellant rendered the services which were invoiced for payment on a monthly basis until September, 2002 when the contract was terminated due to non-payment by the Respondent. That by that time the debt had accrued to KShs. 255,505/- and it is the said sum the*

Appellant sought in the suit before the trial court.

- 11. Josephine Muiruri (PW1) who was the Appellant's accountant exhibited a contract dated 30th December, 1997 (P. Exhibit 1), a master roll for a night guard (P. Exhibit 4), a master roll for a day guard (P. Exhibit 5) and invoices (P. Exhibit 2) in an attempt to prove that the Appellant rendered security services to the Respondent both at night and during the day and that a debt of KShs. 255,505/= accrued there from. She stated that as at 19th September, 2002, the said amount was still outstanding.*
- 12. Mr. Mwaniki Ngure (DW1) who is the Managing Director of Mwaniki Associates Limited contended that the contract was terminated due to irregularities in the accounts and the guards. He stated that the contract related to night guards and that the rate of payment for the said service was KShs. 1,600/= per month. He stated that the said rate fluctuated. That there were several instances of overcharging for instance in a credit note dated 22nd December, 1997 where the amount was indicated as KShs. 5,568/=. He stated that he made regular payments and referred to the statement dated 8th May, 2006 where the last entry for 23rd September, 2002 was KShs. 21,476/=. He stated that he made no payment between 30th July, 2002 and 31st July, 2002 but that there was a discrepancy. He acknowledged receipt of a demand letter dated 24th October, 2002 from Okule Avedi & Company Advocates demanding payment of KShs. 234, 029/= but stated that the services had by then been terminated. That although the letter stated that services were rendered up to November, 2002, no services were rendered. Mr. Mwaniki denied seeing a guard by the name Richard Okoth as per entry No. 1651 of the master roll. He contested that the said entry had been made in pencil. That the entry in the master roll for May and July, 2000 is up to 30th yet May and July have 31 days. He denied that the Respondent owed the Appellant and stated that payments were made after the services had been rendered. On cross-examination, Mr. Mwaniki stated that there were days when there was a day guard and a night guard. On re-examination Mr. Mwaniki stated that on 23rd August, 2002 KShs. 234,029/= was outstanding.*
- 13. I have analysed the evidence on record. The record of Appeal did not contain copies of the exhibits produced at the trial. However, I have looked at the original record which contains all the exhibits. PW1 produced a statement of Account as PExh2 running from 19/12/97 to 23/9/02. On the other hand the Respondent produced statements of Accounts as DExh5 and 6 for the period 19/12/99 to 23/8/02. The entries in these statements do not tally. The Appellant did not deny or dispute that the statements produced by the Respondent emanated from the Appellant's offices. The question that arises is why would there be different statements showing different figures for the same customer for the same period?*
- 14. The trial court found it difficult to resolve the apparent discrepancies in the documentation produced by the Appellants at the trial. The trial court therefore resolved the dilemma in favour of the Respondent on the basis that the Appellant had failed to properly prove its claim. Due to the same difficulties I have found in understanding the figures produced in the Appellant's document, I am unable to disturb the decision of the trial court. It is in that court that the Appellant was supposed to explain the discrepancies and prove its case with certainty and particularity. This it failed. The Appellant cannot throw documents on the face of the court and expect the court to discern what the Appellant is entitled to. To my mind, the Appellant did not prove its case to the standard required.*
- 15. Accordingly, I find the appeal to be without and dismiss the same with costs.*

Dated, Signed and Delivered at Nairobi this 5th day of June, 2015.

A. MABEYA

JUDGE