Mocam Security Service Limited v Masinde Muliro University of Science and Technology (Civil Appeal 32 of 2024) [2025] KEHC 6970 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6970 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 32 OF 2024

SC CHIRCHIR, J

MAY 29, 2025

BETWEEN

MOCAM SECURITY SERVICE LIMITED ..... APPELLANT

AND

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY ..... RESPONDENT

(Being an appeal from the Ruling of Hon. A. Odawa(PM) delivered on 24/01/2024 in Kakamega CMCC No.83 OF 2022)

JUDGMENT

1. This Appeal arises from the decision of the magistrate's court at Kakamega , in which the court dismissed the Appellant's suit seeking payment for services rendered to the respondent. The Appellant was aggrieved by the outcome and filed this appeal, seeking the following orders:

    a. That the appeal herein be allowed

    b. The judgement delivered on 24th January 2024 in Kakamega CMCC No. 183 of 2022 be set aside.

    c. The appellant's suit in Kakamega CMCC No.183 of 2022 be allowed.

    d. Costs of this appeal and in the lower court be granted to the appellant as against the respondent.

2. The appeal is premised on grounds that:

    1. The learned trial magistrate erred in law and fact in holding that the appellant failed to prove its case against the respondent on a balance of probability.

2. The learned trial magistrate erred in law and fact in holding that the contract extension in PPARB No. 53 of 2016 was declared illegal in Nairobi High Court Judicial Review No.395 of 2016

3. The learned trial magistrate erred in law and fact in holding that the respondent had made full payment to the appellant

4. The learned trial magistrate erred in law and fact by failing to take into consideration the appellant's oral and documentary evidence and the submissions

5. The learned trial magistrate erred in law by awarding the respondent costs of the suit yet it had incurred none having been represented by the office of the Attorney General

6. In all circumstances of the case, the findings of the learned trial magistrate cannot be sustained in law on the basis of the evidence adduced.

The plaintiff's case

3. Through a plaint dated 24th August, 2022 the plaintiff, sought for judgment against the respondent for Kshs. 3, 455,664.10, plus interest on the sum, at court rates from 2nd September,2016 and costs of the suit, on account of services rendered but unpaid.

4. It was the plaintiff case that it was contracted to provide security guarding services to the Defendant by posting security guards to the defendants various campuses for a period of two years between 1/8/2014 to 31/7/2016. That through a letter dated 10th August, 2016 the respondent extended the contract pending the hearing and determination of the Review No. PPARB No. 53 of 2016 before the Public procurement Appeals Review Board.

5. That it dutifully rendered the security services to the respondent upto 2/9/2016 when it stopped at the instruction of the defendant; that at the conclusion of the contract the defendant failed to pay a sum of ksh. 3,455,664.10.

6. The Plaintiff called one witness. The witness produced the plaintiff's statement of account of what was owed to it, the guarding services contract, the letter on extension and the high court decision in Judicial Review Application No. 395 of 2016 , three invoices issued for services rendered in the month of August 2016.The Plaintiff's statement of Account showed that it was owed ksh. 3,455,664.10 by the defendant

The Respondent's case

7. The respondent filed a statement of defense in which it denied the allegations made in the plaint and stated that it had paid all the sums due; that the extension of the services if any, was illegal as it was nullified by the court under Judicial Review Application No. 395 /2016 and therefore there was no valid contract upon which the payment could have been made. The Respondent witnesses testified and produced the statement of account indicating the invoices received and the payment made. The statement showed that there was nil balance on what was owed to the Appellant

8. The Appeal was canvassed by way of written submissions.

The Appellant's Submissions.

9. The appellant submitted that the trial court misconstrued the decision of the High Court and came to an erroneous conclusion that the learned judge had declared illegal the extension of the contract between the parties herein.

10. It was further submitted that the trial court erred in holding that the respondent had made full payment to the appellant; that the court took into consideration the respondent's statement of account and disregarded the statement of account presented by the appellant.

11. It was also submitted that during trial the respondent did not deny that the appellant rendered the contracted services. That in light of the express admission by the respondent's witnesses that the appellant provided services, the appellant ought to be paid for the services rendered because failure to do so would be perpetuating an injustice against the appellant.

The Respondent Submissions.

12. The respondent submits that the trial court never erred in holding that the decision in Nairobi High Court Judicial Review No.395 of 2016 rendered the extension of the contract in PPARB No. 53 of 2016 as invalid and therefore the appellant was not entitled to be paid for services rendered during the said extension.

13. The respondent further submits that being a public entity it is not obligated to pay for services rendered when the contract had expired, as it would be against the provisions of Section 135 of the *Public Procurement and Asset Disposal Act*, 2015

14. It is also submitted that the appellant claim for Kshs. 3,455,664.10 was not supported by any invoice as the invoices produced by the appellant only amounted to Kshs. 1,892,740 which according to the statement of account by the respondent, the same was fully paid.

15. It is finally submitted that the respondent failed to prove its case on a balance of probabilities.

Analysis and determination

16. On a first Appeal, the role of this court is as a first appellate court is settled. In the case of Gitobu Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR) the role was set out as follows: " it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L."

17. I have considered the grounds of appeal, the lower court record and the submissions of the parties herein, and in my view the following issues arise for determination:

    1. Whether there was an extension of contract after 31st July 2016

    2. Whether the Appellant proved its claim on a balance of probabilities.

Whether there was an extension of the contract after 31st July 2016.

18. There is common ground that the parties entered into security guarding services contract which ended on 31st July 2016. From the record it is apparent that the Appellant lost the tender for renewal and went before the public procurement Administrative Review Board (The Review Board) to pleads its case. The Review Board directed the Respondent to re- tender and in the interim directed as follows:: " For avoidance of doubt and further to the order No. (g)of the decision given on 29th June 2016in PPARB APPL.NO.38 OF 2016, the procuring entity is directed to extend the contract of the current service provider , namely the Applicant herein until such time as it shall complete the procurement process herein" . In the proceedings before the review board, the procuring entity was the respondent herein and the service provider was the Applicant.(see order (f) of the final orders at page 29 of the Board's decision in Application No. 53 of 2016). The procuring entity before the Review Board was the respondent herein and the Applicant was the Appellant.

19. The Respondent herein, moved to the high court to challenge the Review Board's decision and the order for extension of the contract by the Review became one of the issues for determination.

20. On delivering her Judgment on the Judicial review Application , the Judge stated: " On whether the order that the 1st interested party continue guarding the Applicant's premises until the process as directed complete, I find that there was no error as no contract had been entered into with the 2nd interested party and in any event , therefore section 135 of the Act had not been complied with....". The 1st interested party was the Appellant herein and the 2nd interested party was the new service provider whose winning bid was being contested

21. There is no ambiguity in the above finding. The Judge was simply stating that there was no mistake in the Board directing the respondent to continue the provision of services by the Appellant herein pending the re-tendering process. The Judge went on to state that there was no error in that directive because in accordance with section 135 of the *public procurement and Asset disposal Act* , the procuring entity would not be expected to have sign a new contract with the proposed provider .

22. The trial court's finding therefore that the judge found the extension to have been void was a misapprehension of the Judgment of the judgment of the high court.

23. The respondent has argued that payment in the absence of the contract would have gone against the section 135 of the public procurement and disposal Act., which prohibits payment in the absence of a contract. I find this argument to be diversionary . Firstly the directive was came from the review board. It was a legal order by a competent body. If the respondent found the directive to be erroneous , then it should have appealed against it immediately or sought its stay. That is how court or tribunal orders are dealt with. One does not have the liberty to disobey a court or tribunal order on grounds that "it is illegal"

24. Further in compliance with of the directive by the Review Board, the respondent wrote the letter dated 10/8/2018 addressed to the Appellant. The letter stated " Reference is made to the above matter and attendance before the board yesterday 9th August 2016. Kindly note that the contract has been extended until the hearing and determination of the Review" The letter was signed by Prof. F.A.O.Otieno – vice – Chancellor. On 2/9/2016 another letter was sent to the Appellant directing it to cease redeploying the guards forthwith. This was after the delivery of the high court Judgment. The pertinent question is, what was the respondent terminating ,if by then , the contract had ceased to exist?

25. In view of what I have stated in paragraphs 23 ,24 and 25 hereof , the respondent should not be head to say the extension was a nullity and therefore there is no basis for payment. It is the finding of this court that the contract was duly extended.

Whether the Appellant proved its claim

26. The parties herein produced statements of account generated internally by each party. The Appellant has stated that there are discrepancies between the two statements, which I agree. The Appellant has faulted the trial court for relying on the respondent's statement and ignoring theirs. The Appellant has further argued that its statement is persuasive, but without laying a basis for that line of submissions.

27. In the face of such a dispute as to what was billed, what was billed and not paid ; what was underpaid , I expected the parties to provide more evidence, independent of their individual statements. However the burden was on the appellant to prove its case. That is the burden placed on it by section 107 of the *Evidence Act* . The section provides as follows:

> 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

28. The Appellant ought to have availed invoices , not just a statement , then the Respondent would then have been left with the burden of proving that it made payment in respect of the particular invoice(s).

29. However the Appellant produced three invoices amounting to ksh. 1,892,740. These are invoices Nos:M002934, for ksh. 1,565,280, No. M002935 for ksh. 133,800 and No. M002936 for ksh. 193,600.

    The Respondent did not claim to have made this payment . Their argument was such payments would have been illegal, or the contract if any, was illegal.

30. I have already found that the extension of one month was on the strength of a tribunal order and as was affirmed by the high court. Further DW2 told the court that the Appellant provided services in the month of August though he was not sure whether the service ran for the whole month. The dates of the invoices show that they were for August 2016. The respondent failed to demonstrate that it made payment in respect of the above invoices. To that extent, only, the Appellant's claim was valid.

31. In conclusion I hereby proceed to make orders as follows:

    a. The Judgement of the trial court is hereby set aside

    b. Judgment is hereby entered for the Appellant as against the Respondent for a sum of ksh. 1, 892,740.

    c). The award will attract interest at court rates from the date of filing suit

    d). Costs of this Appeal as well as the lower court is awarded to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO, THIS 29TH DAY OF MAY 2025.

S. CHIRCHIR.

JUDGE.

In the presence of :

Roba Katelo- Court Assistant

Mr. Kiprono for the Appellant.