



REPUBLIC OF KENYA



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Kleen Homes Security Limited v Jacqueline Awuor t/a Cabrando Enterprises Ltd (Civil Appeal E163 of 2023) [2024] KEHC 14663 (KLR) (26 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E163 OF 2023
S MBUNGI, J
NOVEMBER 26, 2024**

BETWEEN

KLEEN HOMES SECURITY LIMITED APPELLANT

AND

JACQUELINE AWUOR T/A CABRANDO ENTERPRISES LTD . RESPONDENT

((Being an appeal arising from the judgment, decree and orders of the Learned Magistrate Honorable V.A Amboko delivered on 11th October 2023 at Chief Magistrate's Court at Kakamega in Civil Suit No. E062 of 2022))

JUDGMENT

Brief facts of the case.

1. The Appellant and the Respondent herein entered into a contract on 29th January 2021. The Appellant was to provide security services to the Respondent's premises along Kakamega- Webuye Road. The contract was signed by both the Appellant and the Respondent. It was agreed by both parties impliedly that the scope of the place to be guarded was the bookshop, petrol station, undergoing construction and an office.
2. The Appellant allegedly performed and fulfilled its contractual obligations as per the agreement. The property allegedly was burgled on 10th August 2021, outside the scope of the place that the Appellant was obligated to guard, hence the filing of a suit by the Respondent in the lower Court. The case proceeded to full hearing and judgment was delivered in favor of the Respondent.
3. Having been dissatisfied with the judgment proffered in the trial court, the appellant filed a memorandum of appeal dated 19.10.2023 on the following grounds: -
 - a. That the learned Trial Magistrate misdirected herself by failing to appreciate that the Appellant performed its contractual obligations as per the contract number 601.



- b. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate and consider the full scope of the place that was to be guarded by the Appellant's guards.
 - c. That the Learned Trial Magistrate erred in law by failing to find that the Appellant had no contractual obligation to guard the Respondent's premises where the incident of theft occurred.
 - d. That the Learned Trial Magistrate erred in Law and in fact in finding that the Respondent proved her case on a balance of probabilities.
 - e. That the learned Trial Magistrate misdirected herself by awarding Special Damages of Kshs. 450,000/- to the Respondent.
 - f. That the learned trial Magistrate erred in law and fact by failing to determine the case on the basis of the law and the available facts before her.
4. The appellant prayed that the Appeal be allowed, the Judgment, Decree or Order of the lower Court delivered by the Learned Magistrate Honourable V.A Amboko be set aside and the Costs of this Appeal be borne by the Respondent.
 5. The appeal was canvassed by way of written submissions.

Appellant's Case.

6. Vide its submissions, the appellant isolated two key issues for determination:
 - i. Whether the Honourable Magistrate erred in law and fact by holding that the Appellant breached the contract entered between Appellant and the Respondent and whether the Appellant was negligent?
 - ii. Whether the Honourable Magistrate erred in law and fact by awarding the Respondent Special damages of Kshs. 450, 000, with costs and interest?
7. On issue(i), the appellant submitted positively; stating that the contract between the appellant and the respondent was valid, however its impliedly agreed that the scope was limited to the bookshop, petrol station, undergoing construction and an office. The appellant further stated that the respondent's property was burgled behind the petrol station, a place where the appellant and respondent did not agree on and the respondent did not inform the appellant that she wanted additional guards on her property. It cited the case of *Hassan Zubeidi v Patrick Mwangi Kibanya & another (2014) eKLR*.
8. Also, the appellant submitted that the learned magistrate deviated from the intentions of the parties under contract and that the appellant did not breach the terms of the contract.
9. On issue(ii), the appellant submitted that even if they lower court found the appellant to be liable, the respondent should have been awarded only Kshs. 25,000/- and not 450,000/- as per clause 3 of the contract between the appellant and respondent and cited the case of *Parbat Siyani Construction Limited v Bob Morgan Security Services Limited.(Civil Suit 301 of 2015)[2022] eKLR* .

Respondent's Case.

10. Vide submissions dated 06.08.2024, the respondent identified four key issues for determination.
11. The respondent submitted that indeed there was a valid and binding contract between the parties for provision of security services.



12. On whether the appellant was expected to guard the adjoining premises belonging to the respondent where the burglary occurred, the respondent submitted in the affirmative; stating that the appellant ought to have reasonably instructed its guards to man the identified and adjoining premises, further submitting that negligence on the appellant's side was proved in the lower court suit as per the guidelines set out in Clerk & Lindsell on Torts 18th Edition.
13. Further, the respondent submitted that the applicant's failure to exercise care and attention by its employees was what led to the respondent incurring losses after the burglary and referred the court to the case of London Distillers (K) Ltd vs Ilani Enterprises Ltd (Civil Appeal E136 of 2023)
14. Lastly, the respondent submitted that the trial court's award of Kshs. 450,000/- was commensurate and was specifically pleaded and proved by way of receipts which were formally produced during the trial court proceedings. She urged that the appeal be dismissed with costs to the respondent.

Analysis and Determination.

15. This being a first appeal, this Court has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the Court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

16. I have looked at the memorandum of appeal, the proceedings and judgment by the trial court and submissions by both parties.
17. Both the appellant and the respondent agree that there was a valid contract between them and the lower court held so.
18. Both the appellant and the respondent in their submissions agree the scope/area where the appellant was to guard was not specifically stated in the contract.
19. The lower court in paragraph 15 of its judgment also found the same. It stated :

15. The contract does not specify which premises the defendant's employees were to guard. The defendant's contention that they had no obligation to guard the area where the incident occurred is not supported by any term in the contract.”

But relied on Clause 1A(iv) to find the appellant liable.

16. Clause 1A(iv) of the contract provides: “The company shall so far as concerns any loss suffered by the client through burglary, theft, fire or any other cause (to the extent only set out below) be liable only if and so far as much loss is caused by the negligence of the company's employees acting within the course of their employment.””

The respondent's counsel invoked the doctrine of implied terms into a contract and submitted that the appellant had the duty to guard the adjoining areas where the burglary happened.



Determination.

20. The basis of any suit in contract performance or non-performance is as per requirements of Subsection 3 of the Law of contract. Act (Cap 23 of the Laws of Kenya).

21. The essential components of a contract as was observed by Harris JA in *Garvey v Richards* {2011} JMCA 16 ought to ordinarily reflect the following principles:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

22. It was held in the Supreme Court of United Kingdom in *RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G.* {2010} UKSC 14:

“The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement.”

23. The issue to determine in this matter is whether it could rightfully be implied that the appellant was supposed to guard the adjoining areas as submitted by the respondent’s counsel.

24. What is an implied term in a contract?

Implied terms are clauses that are not directly mentioned in a contract but are deemed essential elements of the agreement and assist in filling the potential gaps in a written agreement. They promote fairness, reasonableness, and effectiveness in the contractual relationship. Contract terms can be implied in a number of ways: customary business practice, common law precedent, and statutory law.

25. Just like other contracts, provision of security services contract should have essential elements like:

- i. Consideration: The contract must be based on an exchange of something of value, such as services, property, or insurance.
- ii. Acceptance: Both parties must explicitly accept the contract.
- iii. Intention to be legally bound: Both parties must intend to enter into a legally binding agreement. This intention can be express or implied.
- iv. Capacity: Both parties must have the legal capacity to enter into the contract.
- v. Confidentiality: Both parties must have a mutual provision in place to protect confidentiality.



- vi. Compliance: The business must comply with wage and hour laws, such as minimum wage, overtime pay, and rest break requirements.
 - vii. The names of the company, organization, or individual involved
 - viii. The duties and location of the security guards
 - ix. The number, standards, and working hours of the security guards
 - x. The price and payment method
 - xi. The service performance method
 - xii. The rights and duties of both parties
 - xiii. The methods for dispute and litigation resolution
 - xiv. The duration and validity of the contract
26. The courts have powers to imply terms into contracts if the terms are not expressly stated so long as the implied terms will only assist in actualizing the intentions of the parties for the courts do not rewrite the terms of contracts.
27. In the case of *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* Civil Appeal No. 95 of 1999 {2001} KLR the court clearly clarified the consensus theory of contract that:
- “a Court of Law cannot rewrite a contract between the parties once ascertained that the intention was to enter into a valid contract. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
28. On implied terms of fact in the case of *Shah v Shah* {1988} KLR the court held:
- “the Court must give effect only to the intention of the parties.
29. It was the burden of the respondent to prove on balance of probabilities that the appellant was supposed to guard the adjoining areas. Section 107 of the *Evidence Act* states:
- Burden of proof
- (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.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
30. Since the scope of the area to be guarded by the appellant was not expressly stated in the contract it was incumbent upon the respondent to show that the appellant was routinely/customarily guarding the adjoining area prior to the date of the incident, so that the court can imply a term that the appellant was ordinarily required to guard the adjoining area and the parties legitimately expected and took that to be part of the bargain.
31. From the evidence on record, the respondent never adduced such evidence. Therefore, the court is unable to imply such a term into the contract.



32. To this court, in contracts for provision of security services, it is a must to specify in the contract document the scope/area/jurisdiction in clear simple words where the security services are to be offered. For example, if it is guarding of a property, the registration number of the land, location, house number etc.
33. Where a fundamental term(s) of a contract is/are not ascertainable, that contract becomes void thus unenforceable. No right/duty/obligation accrues/attaches to any party.
34. I am persuaded by the holding in the case of Nairobi Homes Ltd v Major Bastur Kalyan Civil Appeal No. 30 of 1985 the court observed:

“Where the agreement is uncertain on the fundamental term on the payment of purchase price, in that it does not provide for the time within which the balance of the purchase price is payable or secure the payment. It makes the entire agreement void for uncertainty and neither party can be held to be in breach of the agreement or to be entitled to any damages from the abortive agreement.”

35. By these two reasons (see paragraphs 31 and 32 above) I find that the lower court erred in finding that the appellant was reliable for breach of the contract which to this court was void.
36. Therefore, I find the appeal has merit. The same is allowed in the following terms:
- I. The lower court judgment dated 11.10.2023 is hereby set aside.
 - II. The respondent’s suit(plaintiff) in the lower court is dismissed with costs to the defendant(appellant).
 - III. The respondent to bear the costs of this appeal.
37. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Appellant – absent

Respondent – absent

Counsels - absent

Court Assistant – Elizabeth Angong’a

