Bob Morgan Services Limited v Eco Bank Limited & another (Commercial Appeal 24 of 2019) [2023] KEHC 3941 (KLR) (Commercial and Tax) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3941 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL 24 OF 2019

DAS MAJANJA, J

APRIL 28, 2023

BETWEEN

BOB MORGAN SERVICES LIMITED ..... APPELLANT

AND

ECO BANK LIMITED ..... 1ST RESPONDENT

EKE PROPERTY LIMITED ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Wanjala, SRM dated 27th June 2019 at the Nairobi Magistrates Court, Milimani in CMCC No. 7279 of 2016)

JUDGMENT

1. This is the first appeal against the judgment of the Subordinate Court awarding the Respondents Kshs. 3,059,000.00 together with interest and costs. The Respondents, who were the Plaintiffs before the trial court, filed suit against the Appellant, as Defendant, for compensation following loss of motor vehicle registration number KBC 583S ("the motor vehicle") which was stolen from the Respondents' premises secured by the Appellant under a Security Services Contract No. BMS/EKE001 between the Appellant and 2nd Respondent signed on 24th January 2013 ("the Contract").

2. The Respondents case, as set out in the Amended Plaint dated 13th January 2017, was that on 20th October 2013, the 1st Respondent's motor vehicle was parked at its designated parking and the ignition keys handed over to the Appellant's employee for safekeeping. On 22nd October 2013, the motor vehicle was missing. After an investigation it was discovered that the motor vehicle was stolen as a result of collusion between some thieves and an employee of the Appellant, one JK. The Respondents claimed that the Appellant was liable for breach of contract, gross negligence and willful misconduct.

As a result, they claimed damages amounting to Kshs. 3,059,000.00 under the doctrine of subrogation having been compensated for the said amount by Kenyan Alliance Insurance Company Limited.

3. The Appellant denied the Respondents' claim in its Defence dated 19th January 2017. It also denied that it was liable as claimed by the Respondents. While it admitted that the Contract was between it and the 2nd Respondent and the fact that the motor vehicle was missing, it denied the claims of breach of contract as alleged. It stated that it ensured that its guards were vetted through the Criminal Investigation Department and that they obtained certificates of good conduct as a mandatory requirement before recruitment and that it trained its guards at the commencement of employment and offered continued training to ensure that it provided the highest quality standards of service under the Contract.

4. The Appellant also denied that the Respondents were entitled to the sum of Kshs. 3,059,000.00 as claimed. It relied on Clause 11.2 of the Contract which excluded liability, "for any loss of whatever nature howsoever arising by third parties unless in either case of gross negligence and or/willful misconduct on the part of the Company or its employee ..." and Clause 11.3 which limited liability in the event the Appellant was liable in any circumstances to a maximum payment of Kshs. 10,000.00 in theft of a wheeled vehicle.

5. At the hearing, the Respondents called two witnesses; Simon Kariuki (PW 1), the 1st Respondents Head of Security and Anthony Kariuki (PW 2), the Head of Technical Services at Kenyan Alliance Insurance Company Limited. The Appellant called Abel Dalidi (DW 1), a Supervisor of Guarding Services and Dennis Orina Michieka (DW 2).

6. After considering the pleadings, evidence and submissions, the trial magistrate rendered the Judgment finding the Appellant fully liable. The trial magistrate framed three issues for consideration. On the first issue as to whether the Appellant was liable, the court found that the Appellant failed to protect the Respondents' property and that there was evidence of collusion between JK, the night supervisor, and the alleged thieves to steal the motor vehicle. It found that the Appellant was vicariously liable for the actions of its employees on a balance of probabilities. The second issue was whether the limitation clause applies, to which the court concluded that the Appellant by invoking Clause 11.3 would be oppressive to the Respondents whose vehicle was stolen and it would be unreasonable to hold that motor vehicle would cost Kshs. 10,000.00. The trial magistrate concluded that, "I find the clause on limitation of liability in the circumstances of this case oppressive and unreasonable." On the last issue of quantum, the court held that the Respondents had proved special damages by producing a discharge voucher compensating the 1st Respondent for the loss of the motor vehicle.

7. It is the Judgment that has precipitated this appeal which grounded on the Memorandum of Appeal dated 22nd July 2023. Although the Appellant has raised 8 grounds of appeal, it has condensed them into three issues. First, whether the trial court was entitled, on the evidence before it, to make a finding that the Appellant was fully liable for loss of the motor vehicle. Second, whether the limitation of liability clause in the Agreement was oppressive and unreasonable and last, whether the Appellant's liability was for the full value of the suit motor vehicle as compensated by the insurer. Both parties have filed written submissions in support of their respective positions.

8. Before I consider the appeal, it is important to recall the jurisdiction of this court in dealing with appeals from the Subordinate Court. The court is guided by the established principle set out in several decisions holding that the first appellate court is entitled to review the record before the trial court and come to an independent conclusion as whether the findings of the trial court are correct but at all times making allowance for the fact that it never heard or saw the witnesses testify so as to assess their demeanour (see Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira &

Co. Advocatess[2013] eKLR and Selle and Another v Associated Motor Boat Company Limited and Others [1968] EA 123). I now turn to consider the appeal based on the issues raised by the Appellant.

9. The Appellant argues that the trial court erred in failing to find that there is no privity of contract between the Appellant and the 1st Respondent since it was not disputed that the 1st and 2nd Respondents were separate legal entities and the Contract was between the Appellant and 2nd Respondent. It contends that since the Contract was between the Appellant and the 2nd Respondent, the 1st Respondent could not sustain a cause of action based on the contract to which it was not a party.

10. Although the Appellant raised this issue before the trial court in its defence and written submissions, the Respondent did not respond to it and the trial court failed to deal with it. In my view, it is a fundamental issue since the Respondents' claim was based on the Contract. It is not in dispute that the Contract was between the Appellant and the 2nd Respondent. It is trite that a third party to a contract cannot sue under it or benefit from it. This position was elucidated at length by the Court of Appeal in Savings and Loan (K) Limited v Kanyenje Karangaita Gakombe and Another NRB CA Civil Appeal No. 272 of 2006 [2015] eKLR as follows:

> In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC rendered the principles thus:
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> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."
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> In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporationv Lendetia Ltd(supra), Kenya National Capitalcorporation Ltd v Albert Mario Cordeiro & Another(supra) and William Muthee Muthamiv Bank Of Baroda,(supra).
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> Thus in Agricultural Finance Corporationv Lendetia Ltd(supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:
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> "As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."
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> Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in Shanklin Pierv Detel Products Ltd [1951] 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contract to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

> While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In Darlington Bourough Councilv Witshire Northern Ltd[1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms.
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> "The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."
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> Some jurisdictions have, accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties Act, 2001 have respectively been enacted.

11. Turning back to the case at hand, it is only the 2nd Respondent who had contracted the Appellant who could sue under the Contract for loss and damage. In this case though, it is the 1st Respondent who claimed that it had suffered loss as a result of breach of contract, that is, breach of a contract it was not party to. It is also a fundamental rule that parties are bound by their pleadings (see Independent Electoral and Boundaries Commission and Another v Stephen Mutinda Mule and Others [2014] eKLR). In Raila Amolo Odinga and Another v IEBC and Others [2017] eKLR, the Supreme Court expressed the following view:

> In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

12. At paragraph 7 of the Plaint, the Respondents pleaded that the theft was a result of breach of contract, gross negligence and/or willful misconduct. They then pleaded particulars in reference to the Contract; failing to provide security in accordance the Contract, failing to vet its employees and failing to carry out proper supervision which are all terms of the Contract. Even though it was possible for the 1st Respondent to make its case against the Appellant on the basis of negligence, in which case, the issue would have been whether the Appellant owed a duty of care to the 1st Respondent, this issue was foreclosed by the nature of the pleadings before the court. The Respondents' cause of action was squarely based on contract and had the trial court considered the pleadings, evidence and the Appellant's submission on this issue, it would have come to the conclusion that the 1st Respondent did not have a cause of action as pleaded and that the 2nd Respondent did not suffer any loss and damage as a result of the breach of the contract.

13. Having reached the conclusion that the 1st Respondent could not sue on the Contract, the issue of the limitation and or exemption clause does not arise. It is for the reasons I have set out above that I allow the appeal and order as follows:

    a. The Judgment of the Subordinate Court dated 27th June 2019 be and is hereby set aside and substituted with an order dismissing the suit with costs to the Appellant.

    b. The Respondents shall pay costs of this appeal assessed at Kshs. 50,000.00 only.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2023.

F. MUGAMBI

JUDGE

Court Assistant: Mr M. Onyango.

Ms Songok instructed by Hamilton Harrison and Mathews Advocates for the Appellant.

Mr Kiplagat instructed by Munene Wambugu and Kiplagat Advocates for the Respondents.