REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 139 OF 2017

BRINKS SECURITY SERVICES LIMITED.....APPELLANT

VERSUS

DAVID MUTAI CHELOGOI.....1ST RESPONDENT

NATIONAL CEREALS & PRODUCE BOARD.....2ND RESPONDENT

(An Appeal From the Decree and Judgement of Hon. L Gicheha (SPM)

Dated 22nd September 2017 In Nakuru CMCC No. 359 of 2008)

JUDGEMENT

1. The 1st respondent sued the appellant as well as the 2nd respondent claiming inter alia sum of Kshs 909,000 being the value of the wheat he had deposited for storage by the 2nd respondent. The appellant was undertaking the guarding business at the 2nd respondent's stores at that particular period.

2. It was the 2nd respondent who brought the appellant as a third party in the suit whom it attributed liability for the loss of the 1st respondent's wheat.

3. The matter proceeded to full trial where all the parties called their witnesses and produced the relevant documentary evidence. The trial court in its judgement attributed equal negligence and or liability of the loss of the 1st respondent's wheat upon both the appellant and the 2nd respondent and ordered that they shoulder the responsibility equally.

4. The appellant was dissatisfied with the said judgement and has filed this appeal citing several grounds. **The grounds include faulting the findings by the trial court that there was theft that took place yet there was no such evidence; that the 2nd respondent failed to invoke the arbitration clause between it and the appellant and that the appellant's guards could not have participated in the theft as they were not in possession of the keys to the silos.**

5. It is instructive to note that the 2nd respondent did not participate in this appeal and neither was it represented or at all.

6. The court directed that this appeal be disposed by way of written submissions which the parties have complied.

Appellants written submissions.

7. The appellant condensed its grounds of appeal into three. The first ground essentially covers grounds 1, 2 and three in which it submits that there was no evidence that there was any theft at the stores at that particular time. This it buttressed with the findings of the trial court that it was not clear how the wheat was removed from the store.

8. It went on to submit that the trial court ignored the fact that there was no evidence of any breakage to the stores during the material time. That according to the appellant there were no doors broken and even the area which it was alleged the wheat was removed from had cobwebs meaning that there was no entry.

9. The appellant cited **Section 107,108** and **112 of the Evidence Act** to suggest that the 1st respondent did not prove his case on a balance of probability.

10. On the 4th and 5th grounds the appellant contented that there was an arbitration clause within the agreement or contract between it and the 2nd respondent which implied that any dispute between them ought to have been referred to arbitration. The trial court ought to have exercised this as provided under **Section 6(1) of the Arbitration Act no 4 of 1995.**

11. The last three grounds basically dwelt on the fact that its employees had no access to the silos and it could not have been possible to steal therein considering that there was no breaking of the entry. It submitted that the evidence on record shows that the keys were kept by the 2nd respondent clerk.

12. The evidence as relied by the appellant also showed that the register showing what was in the store is kept by the 2nd respondent and not its guards. The same goes to the details of the vehicles leaving and entering the 2nd respondent's premises and in essence they did not handle any goods or at all.

13. It was thus incumbent upon the 2nd respondent to have submitted all the records to the court which were in its custody at that particular time.

14. Consequently, the appellant prayed that the appeal be allowed, and the judgment of the trial court against it be set aside and it be awarded costs of the appeal.

1st respondent's submissions.

15. The 1st respondent submitted in support of the trials court finding. Essentially he agreed with the facts as stated and went on to submit that it was not in control of what took place at the stores once he had delivered his wheat for storage.

16. That the contract between the appellant and the 2nd respondent had nothing to do with him. That it was the 2nd respondent who had brought the appellant as a third party.

17. He went on to state that it was improper for the appellant to link him with the loss of the wheat as he was no longer the custodian of the same. Indeed, the wheat was lost in the custody of the 2nd respondent who had contracted the appellant to guard.

18. On the second ground of appeal namely, the issue of arbitration, he submitted that the same was not available as the appellant chose to defend the matter by filing a defence contrary to the held principles that one ought to have applied for the stay of the proceedings before invoking the arbitration clause.

19. The 1st respondent relied on the case of **SAFARICOM LTD V. FLASHCOM LTD (2012) eKLR** to buttress the above assertion. In any case he argued, he was not a party or privy to the contract between the appellant and the 2nd respondent.

20. The 1st respondent urge this court to dismiss the appeal with cost to him.

Analysis and determination

21. From the above submissions by the parties, it is apparently clear that the issue before this court is whether in light of the evidence presented before the trial court the appellant was vicariously liable for the loss incurred by the 1st respondent.

22. It is not in dispute in my view and based on the documentary evidence presented that the 1st respondent delivered his wheat to the 2nd respondent for storage and the same was accepted. When he came back for collection he was informed that the same except some few remaining bags had been stolen and the police were carrying out the investigation.

23. The amount of the bags was computed through weighing and later being apportioned in form of bags which figures were not disputed. The costs of each 303 bag was equally computed and found to be worth kshs. 909,000.

24. At the same time, it is not disputed that the appellant had a security contract with the 2nd respondent which the 1st respondent was not privy to and the same was to guard the 2nd respondent's premises including the stores and manning of the gates.

25. That the wheat was stolen and or disappeared when the said contract was still subsisting which necessitated the 2nd respondent to enjoin the appellant in the suit. Again i find the role of the 1st respondent very remote in the affairs between the appellant and the 2nd respondent.

26. Is it true that the theft was not proved as submitted by the appellant? I respectfully disagree with this line of argument for the simple reason that the 2nd respondent in its evidence acknowledged that the 1st respondent brought his wheat for storage and there was sufficient paper trail produced as evidence. When he came back for collection he was told the same was not available as it had been stolen.

27. As a matter of fact, there was evidence that the store had been broken into as the screws to some of the iron sheets had been tampered with and there were tyre marks at the scene. The three security guards who were the appellant's employees had disappeared and as at the time of the trial of the matter they had not been traced. The police who had been tasked to trace them were unsuccessful.

28. For the above reasons, this court is not persuaded that the wheat was not stolen as advanced by the appellant. At the same time the

appellant cannot extricate itself from the theft since its duty was to guard the stores and man the gates. It mattered not in my view what was in the stores. Even if they were empty they had the solemn duty to take care of it 24 hours a day as long as its contract with the 2nd respondent was existing.

29. In the same vein, the entry and exit of the vehicles through the gate was its responsibility as per the evidence on record. Whatever they ferried into or outside the premises ought to have been recorded. By extension therefore whoever ferried the 1st respondent's wheat outside the premises ought to have been noted by the appellant's guards and by extension the 2nd respondent who ought to have authorised.

30. Consequently, and without belabouring the issues, the loss of the 1st respondent's wheat felt squarely upon the appellant's shoulders and by extension as truly found by the trial court on the 2nd respondent.

31. The other issue raised by the appellant was the question of arbitration clause within the contract between the appellant and the 2nd respondent. On this i side with the 1st respondent's submissions that he had nothing to do with the same. As a matter fact, if the appellant was to enjoy this clause, it ought to have sought stay of the proceedings and referred the same to arbitration as provided under Section 6 of the Arbitration Act.

32. This position was buttressed by the court in the **SAFARICOM LTD V. FLASHCOM LTD** (supra) when it said that;

> **"The second issue for determination is whether the Defendant has submitted to the Jurisdiction of this court by entering appearance and filing a defence and counterclaim. The Plaintiff cited several authorities regarding to this issue. In the case of CORPORATE INSURANCE CO. –VS- WACHIRA (1995-1998) 1EA 20 it was held that the arbitral clause in the contract in question was in the nature of a Scott-v-Avery clause which provides that disputes shall be referred to arbitration. The Court went to on to hold that;**
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> > **"In the present Case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence, the appellant lost its right to rely on the clause."**

In the case of FAIRLANE SUPERMARKET LIMITED –Vs-BARCLAYS BANK LIMITED NAI HCCC No. 102 of 2011 Odunga J held that: -

> **"The option to refer the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of CORPORATE INSURANCE CO. VS. WACHIRA (1995-1998) 1EA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence……any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration"**

33. In light of the above observations this court does not find any merit in this appeal. The trial court rightfully apportioned blame between the appellant and the 2nd respondent. The latter was the custodian of the 1st respondent's wheat while the appellant stood guard over the same. None was able to explain how the wheat disappeared.

34. The appeal is dismissed with costs to the 1st respondent.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 24TH DAY OF MARCH, 2022

H K CHEMITEI

JUDGE