



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 367 OF 2016

MITSUMI COMPUTER GARAGE LIMITED.....PLAINTIFF

-VERSUS-

FREIGHT IN TIME LIMITED.....DEFENDANT

-AND-

TANDU ALARMS SYSTEMS LIMITED.....1ST THIRD PARTY

SECUREX AGENCIES (K) LIMITED.....2ND THIRD PARTY

EVEREADY SECURITY GUARDS COMPANY.....3RD THIRD PARTY

GA INSURANCE LIMITED.....4TH THIRD PARTY

J U D G M E N T

1. By a plaint dated 13/9/2016, the plaintiff claimed from the defendant a sum of **Kshs. 46,069,375/50** being the value of the plaintiff’s goods that were stolen from the defendant’s warehouse, professional fees paid to the loss adjusters and investigators fees.
2. In the plaint, the plaintiff claimed that, by a Service Agreement made on 3/7/2013 (“the agreement”), the defendant agreed to provide the plaintiff with the services of clearing and forwarding as well as the warehousing and distribution of the plaintiff’s goods.
3. It was the plaintiff’s contention that the agreement stipulated that the defendant would be responsible for ensuring the safety and security of the goods while they were in its custody. That the defendant would further be responsible for any damage and/or injury to the goods while in its warehouse arising from fire or robbery.
4. In its defence dated 3/2/2017, the defendant denied the plaintiffs claim in total. It denied the existence of any contractual relationship with the plaintiff for the provision of clearing and forwarding services. It further denied that any of the plaintiff’s computers and accessories were stored in its warehouse. It therefore denied any responsibility for the alleged loss.
5. The defendant further denied being contractually liable nor negligent as a bailee. It pleaded that, if there was any breach, it was on the part of the plaintiff as it failed to conform to minimum requirements in the industry and failed to take out a proper insurance policy for the value of its goods.
6. Although the defendant issued a Third Party Notice to four (4) 3rd parties, it failed to take directions as to the hearing of the claim between it and the said Third Parties. At the hearing, the defendant failed to attend, although it was aware of the hearing date and the hearing therefore proceeded ex – parte.
7. The plaintiff called 4 witnesses to prove its case. Its case as presented by **Pw1 Manish Shah** was that, on or about 16/9/2013, its goods consisting of computers and computer accessories were stolen from the defendant’s warehouse. That a security guard from Tandu Guards who had been deployed to guard the warehouse on the material day, entered the warehouse accompanied by a thug dressed in black and a canter vehicle. Several other thugs joined them. They proceeded to load the truck with assorted items including the plaintiff’s computers and computer accessories and drove off.

8. **Mayfair Insurance Company Limited** had covered the plaintiff's goods in case of loss. The insurance company procured the services of a Chartered Loss Adjuster, **Cunningham Lindsey Kenya Limited** who assessed the value of the stolen goods at Kshs. 45,164,052/50. The Insurance Company compensated the plaintiff less 5% excess and therefore paid the plaintiff Kshs. 42,905,850/-.

9. It was the plaintiff's case that the defendant was in breach of its duty of care to the plaintiff as a bailee and was therefore negligent. That the defendant's as a the bailee was to ensure the safety and security of the plaintiff's goods from the time of receipt in the warehouse until leave the warehouse. The plaintiff having been compensated to the extent of 95% of its loss by its insurer, this suit was brought in the name of the plaintiff under the doctrine of subrogation.

10. **Pw2 David Nyaundi**, was a Senior Claims Officer from Mayfair Insurance Company. He told the Court that they appointed a Loss Adjuster who adjusted the claim for which the plaintiff paid Kshs. 870,000/- as professional fees. Arcane Insurance Investigators who investigated the circumstances surrounding the theft were paid Kshs. 35,322/=.

11. **Pw3 (Gabriel Muigai Gatoye)** and **Pw4 (Mohamed Khalif Khan)**, the Loss Adjuster and the Investigator, respectively testified and corroborated the evidence of **Pw1 and Pw2** in material particular. They identified and produced the documents prepared by their respective firms.

12. The court has considered the pleadings on record and the testimonies of the witnesses given in court on 22/2/2021. The issues for determination are; **whether there was any Service Agreement between the parties, if so, whether it had been breached by the defendant, and if so, whether the plaintiff is entitled to the reliefs sought.**

13. On the first issue, the plaintiff claims that there was a Service Agreement between it and the defendant. In proof of its contention, the plaintiff produced a copy of the service agreement at pages 1-7 of **Pexh1**. The said agreement was duly signed by both parties on 13/7/2013.

14. The recitals to the said agreement are to the effect that; the defendant was to provide clearing and forwarding services within East Africa. This included warehousing and distribution. That the plaintiff was engaged in the business of importation of Electronics IT and Communication material and required the services provided by the defendant. That the plaintiff had requested the defendant for such services which the defendant had agreed to offer on the conditions contained therein.

15. In this regard, the Court finds that there was a valid Service Agreement in existence between the parties. That agreement was not challenged as the plaintiff's evidence on that fact remained uncontroverted. The first issue is therefore answered in the affirmative.

16. On the second issue, the Court has carefully considered the said agreement. **Paragraph 5.6** of the agreement provides: -

"The company will be responsible for ensuring the safety and security of the goods while the goods are in storage at the Warehouse. The company confirms having adequate CCTV cameras and alarm and security for the warehouse."

17. While paragraph 5.7 states:

"The company shall only be responsible for any damage and/or injury to the goods while in storage at the warehouse arising from fire and robbery. The company has various insurance policies. Our current carrier liability policy is covered for an amount of Ksh.20 million and of which cover such incidents which may occur to the goods while in the company's custody..."

18. The agreement is explicit that the defendant was responsible for any damage and/or injury to the plaintiff's goods while in the warehouse arising out of fire or robbery. The parties are bound by the terms of the contract. The Court must apply the provisions of the contract, unless the same is illegal, or was procured under coercion, fraud or undue influence. The Court cannot re-write the parties' contract. The Court only enforces that which the parties have agreed on. (See **National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999**).

19. In **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] Eklr**, where it was stated: -

"We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."

20. In this regard, the Court finds that the defendant was bound to take care of the plaintiff's goods while in its custody. That it was in breach of the contract when the plaintiff's goods were lost while in its custody. Loss by robbery and fire were the two incidents that were specified in **paragraph 5.7** of the service contract that would give liability to the defendant.

21. **Pw4** told the Court that when Mayfair Insurance Company contacted him to investigate the subject robbery claim, he visited the scene and prepared a report dated 7/1/2014 setting out his findings. He observed that there was negligence on the part of the defendant because there had been a similar incident, a month before, where thugs entered the warehouse and attempted but failed to steal goods therefrom. That the CCTV cameras had been switched off a week prior to the robbery. He further noted that the guard failed to carry out the normal security procedures on the material day.

22. It should be recalled that, **paragraph 5.6** of the service contract provided that the defendant had adequate CCTV cameras and alarms. There is no evidence to rebut the plaintiff's evidence that the CCTV Cameras were not working on the material day.

23. In the circumstances, the Court is satisfied that the second issue is also answered in the affirmative.

24. As regards the reliefs sought by the plaintiff, the plaintiff produced evidence that proved that it had suffered loss as follows; value of the stolen goods - **Kshs. 45,164,052/50**, fees paid to the Loss Adjuster - **Kshs. 870,000/00** and Investigators fees - **Ksh. 35,322/00**.

25. Accordingly, judgment is entered for the plaintiff against the defendant for **Ksh. 46,069,374/50** together with interest at court rate from the date of filing suit until payment in full. The plaintiff will also have the costs of the suit together with interest thereon at court rate.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2021

A. MABEYA, FCI Arb

JUDGE