

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 713 OF 2012

GALANA OIL KENYA LIMITED.....APPELLANT

VERSUS

LONGONOT PLACE LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree by the senior principal magistrate Mrs. R. O. Oganyo at Milimani Commercial Court, Nairobi delivered on 29th November, 2012 in CMCC No. 4760 of 2008)

JUDGMENT

This appeal arises from the decision of the lower court delivered on 29th November, 2012. The appellant was a tenant of the respondent and had sued the respondent for breach of the tenancy agreement between them. The cause of action was founded on the loss of goods stolen and vandalised following a break-in into the premises occupied by the appellant.

The appellant complained that the respondent failed to provide adequate security personnel to ensure that common access ways were safe and properly guarded.

The respondent was also blamed for failing to provide adequate security personnel to patrol and guard the premises, which failure permitted a break in to occur into that building. As a result of that breach the appellant claimed a sum of Kshs. 873,181/= being the cost of lost items and loss adjusters fee.

The appellant was said to have been insured by UAP Provincial Insurance Company Limited, which company brought the suit in the appellant's name under the doctrine of subrogation, having compensated the appellant following that loss.

The respondent denied the appellant's claim the thrust of which was that it was under no contractual obligation to secure the premises, to provide adequate security personnel or ensure that the common area ways were safe and properly guarded, and that it was to provide adequate security personnel to patrol and guard the building or to prevent any break in .

After the hearing, before the lower court, the appellant's suit was dismissed hence this appeal. It was not in dispute that the appellant was the respondent's tenant in premises known as Longonot place. In determining the matter against the respondent, the lower court found that the letter of offer was not a final document with regard to the tenancy in question.

The lease agreement on the other hand was said to have exonerated the respondent from any liability in the event of loss due to burglary. Having found that the relationship between the parties was based on the lease agreement produced, the lower court found that the appellant's claim was not proved on a balance of probability, and therefore could not have been held liable for any break in that occurred leading to the loss claimed. The suit was therefore dismissed with costs.

In the memorandum of appeal the appellant complained that the lower court disregarded the letter of offer, having found that the appellant was the respondent's tenant, and that its offices were burgled during the tenancy. The lower court was also faulted for finding that the respondent was absolved from liability as per the exemption clause in the lease agreement. The trial court was also faulted for failing to assess the damages that the appellant would be entitled to, and finally that the judgment was inconsistent with the evidence adduced.

The lease agreement executed by the parties crystallised the relationship between the appellant and the respondent. It therefore superseded the letter of offer. Clause 7 D vii provided that the respondent would not be liable to the appellant for any loss or damage caused by any burglary, theft or break in. This is what the learned trial magistrate relied on in dismissing the appellant's case.

In the case of **Curtis vs. Chemical Cleaning And Dyeing Company Limited (1951) 1 KB 805** Lord Denning LJ said as follows,

“If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exemption clauses, unless the signature is shown to be obtained by fraud or mis-representations.”

As required of me, I have made an independent evaluation of the evidence on record and come to the conclusion that the lease agreement, considered in its full tenor and context, has no ambiguity whatsoever. The respondent was clearly exempted from liability and therefore the claim by the appellant could not stand the test of the material presented. The lower court was therefore correct in its assessment of the evidence and the conclusion arrived at. The appeal is lacking in merit and therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 28th day of March, 2019.

A. MBOGHOLI MSAGHA

JUDGE