



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 470 OF 2016

RONGAI COMMODITIES LIMITED APPELLANT

VERSUS

SECURITY GROUP KENYA LIMITED.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 471 OF 2016

SECURITY GROUP KENYA LIMITED.....APPELLANT

VERSUS

RONGAI GENERAL COMMODITIES LIMITED....RESPONDENT

(Being an appeal from the judgment of Hon L. P. Kassan delivered in CMCC No. 6068 of 2008 dated 13th June 2016)

JUDGMENT

1. These two appeals were consolidated for hearing and determination as they both challenged the decision of the learned trial magistrate *Hon. Mr. L. P. Kassan* delivered in Milimani CMCC No. 6068 of 2008 on 13th June 2016.

2. Rongai General Commodities Limited which is the appellant in HCCA No. 470 of 2016 and the respondent in HCCA No. 471 of 2016 was the plaintiff in the suit filed in the lower court while *Security Group Kenya Limited*, the appellant in HCCA No. 471 of 2016 and the respondent in HCCA No. 470 of 2016 was the defendant. HCCA No. 470 of 2016 was made the lead file.

For ease of reference, I will henceforth refer to *Rongai General Commodities Limited* as the 1st appellant and *Security Group Kenya Limited* as the 2nd appellant.

3. In its plaint dated 25th September 2008, the 1st appellant sued the 2nd appellant claiming special damages in the sum of KShs.2,461,000 being the value of assorted trade commodities, cash and other items as well as fixtures and fittings which were either stolen or damaged when its business premises along Ababa /Athi River Road was broken into on the night of 26th September 2005.

4. It was the 1st appellant's case that around November and December 2004, the parties executed an unwritten agreement for provision of security services pursuant to which the 2nd appellant was to install an automatic alarm system in the 1st appellant's premises with an alarm back up service. The alarm system was to automatically detect any break in into the premises and relay the information to the 2nd appellant which would then intervene using the back up service to secure the premises by foiling the break in.

5. The 1st appellant averred that on the night of 26th September 2005, there was a burglary in its aforesaid premises and despite distress signals being sent to the 2nd appellant, the 2nd appellant in breach of its obligations under their contract failed to send its back up service to prevent the burglary and that it was therefore entitled to the sum claimed.

6. The 2nd appellant in its statement of defence dated 10th November 2008 denied liability as claimed in the plaint. It denied existence of any contract between it and the 1st appellant. On a without prejudice basis, the 2nd appellant claimed that it had terminated the service contract

with the 1st appellant on 17th June 2005 for non payment of service charges long before the burglary occurred and it was thus not responsible for the security of the 1st appellant's premises at the material time.

7. After a full trial, the learned trial magistrate entered judgment in favour of the 1st appellant for the sum claimed but apportioned liability between the parties in the ratio of 50:50 after finding that the 1st appellant was partly to blame for the burglary as it had not paid the service charge due to the 2nd appellant. Each party was ordered to bear its own costs of the suit.

8. Both parties were aggrieved by the decision of the trial court. The 1st appellant was the first to lodge its appeal being HCCA No. 470 of 2016 in which it advanced six grounds of appeal as follows:

i. The Learned Trial Magistrate erred in law and in fact in finding that the Appellant's payments for service charges due to the respondent for security services were in arrears on the date its premises were broken into.

ii. The Learned Trial Magistrate erred in law and in fact in finding that the appellant paid the service charges to the Respondent for the security services by way of a post-dated cheque when there was no evidence to that effect.

iii. The Learned Trial Magistrate erred in law and in fact in holding that whether or not the appellant had received the letter of 1st June 2005 which communicated the alleged suspension of services for non payment of service charge was of no consequence.

iv. The Learned Trial Magistrate erred in law and in fact in finding that the condition of the alarm and back up system was unknown on the night of the break in when there was uncontroverted testimony by PW2 that the distress signals from the equipment it had installed in the appellant's premises were received in the respondent's control room during the break in.

v. The Learned Trial Magistrate erred in law and in fact in finding that the Appellant blameworthy and apportioning 50% of the liability on it against the weight of the evidence.

vi. The learned trial magistrate in the totality of the circumstances misdirected himself and as a result arrived at a wrong decision.

9. The 2nd appellant filed its appeal through a memorandum of appeal dated 13th July 2016 in which it relied on the following three grounds:

i. That the Learned Magistrate erred in fact and in law in apportioning liability in the ratio of 50:50.

ii. That the Learned Magistrate erred in fact and in law in failing to hold that the alleged robbery from the documents tendered had occurred on the night of 25th September 20015.

iii. That the Learned Magistrate erred in fact and in law in failing to hold that the respondent had breached its obligations under the security contract.

10. When the appeals came up for hearing, learned counsel for each of the parties consented to having the appeals prosecuted by way of written submissions which each party duly filed.

11. I have carefully considered the grounds of appeal encapsulated in the memorandum of appeal filed by each appellant, the evidence adduced before the trial court as well as the rival written submissions filed by the parties.

12. Having done so, I find that it is not disputed by either of the parties that they had entered into a contract pursuant to which the 2nd appellant was to provide security services to the 1st appellant's business premises by providing or installing an automatic alarm system with an alarm back up service in consideration of payment of a monthly fee of KShs.6,000. The business premises consisted of a godown where the 1st appellant used to store its stock in trade and an office.

13. In support of its case, the 1st appellant called three witnesses while the 2nd appellant called one witness. Through its witnesses and in its submissions, the 1st appellant contended that on the night of 26th September 2005 when the break in occurred, its contract with the 2nd appellant was still in force as it had cleared the rental charges that were hitherto in arrears; that the automatic alarm system was in working order and that in failing to respond to the distress signals triggered by the break in, the 2nd appellant breached the terms of their agreement and was liable to compensate it for the loss it incurred after the burglary.

14. Further, the 1st appellant submitted that the trial court was correct in its finding that it had proved its claim for breach of contract against the 2nd appellant but faulted the court's apportionment of liability between the parties in the ratio of 50:50.

15. The 2nd appellant on its part denied the 1st appellant's claim that the burglary occurred on the night of 26th September 2005 and that at the time of the burglary, the 1st appellant had paid up all its monthly rental/service fees. It claimed that from the stock sheets produced in evidence by the 1st appellant, it was evident that the burglary occurred on the night of 25th September 2005 by which date the 1st appellant was in arrears in its service charge payments; that the arrears were paid vide a post dated cheque dated 30th September 2005 meaning that at the time the burglary occurred, the 1st appellant was not entitled to any security service since it had already breached the terms of their

contract.

16. The 2nd appellant therefore submitted that the trial court erred in finding that the 1st appellant was entitled to payment of the sum claimed and in its apportionment of liability arguing as did the 1st appellant that this was a clear misapplication of the law by the trial court since the 1st appellant's claim was premised on breach of contract not negligence.

17. This is a first appeal to the High Court. The duty of the first appellate court has been restated in numerous authorities by both the High Court and the Court of Appeal. It was succinctly summarized by the Court of Appeal in *Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR* where 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 reanalyse 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.

See also: *Kenya Ports Authority versus Kuston (Kenya) Limited 2000 2EA 212; Selle & Another V Associated Motor Boat Company & Others [1968] E A 123.*

18. After perusing the pleadings and considering the entire evidence presented before the trial court, I fully concur with the submissions made by both parties that the 1st appellant's claim was premised on allegations of breach of contract. The learned trial magistrate went off course and clearly erred in law when he apportioned liability between the parties in the ratio of 50:50 as if the 1st appellant's claim was founded on the tort of negligence. Apportionment of liability can only be done where the plaintiff's claim is anchored on the tort of negligence and contributory negligence is pleaded and proved by the defendant.

19. A reading of the trial court's judgment reveals that the learned trial magistrate expended a lot of time and effort in seeking to establish whether the 1st appellant had cleared all its service charge arrears by the date the burglary took place. The learned trial magistrate held that since the 1st appellant had fully paid for the service charge vide a postdated cheque by the date of the incident, it had fulfilled its part of the bargain under the contract and the 2nd appellant by not activating its back up service and preventing the burglary was in breach of the terms of the contract and was liable to compensate the 1st appellant for the loss it suffered after the theft.

20. In my considered view, the above was a misdirection on the trial magistrate's part because given the pleadings and the evidence on record, whether or not the 1st appellant was upto date in its service charge payments though relevant was not material to the determination of the dispute between the parties. Having established the existence of a contract between the parties, the trial magistrate should have proceeded to determine whether the terms of that contract had been proved and whether they included a term stipulating that the 2nd respondent was going to compensate the 1st appellant for any loss incurred if its premises were broken into and property stolen during the subsistence of the contract.

21. It is trite law that he who alleges must prove. This cardinal principle of the law of evidence is codified in *Sections 107 and Section 109* of the *Evidence Act*. The burden of proof lay on the 1st appellant to establish by tangible evidence on a balance of probabilities that not only did a contract exist between the parties but that one of the terms of the contract was that it was entitled to compensation in the event that there was theft in its premises when the contract was in force.

22. The two documents that formed the basis of the contract, that is, the letters dated 19th and 25th November 2004 were basically quotations for the supply and installation of an automatic alarm system in the 1st appellant's business premises and installation of additional equipment to the aforesaid system. The quotations specified the services that would be rendered and the equipment required for that purpose. They also stated the money that was to be paid in exchange for the service rendered. There was no indication in any of the two documents that the 2nd appellant would be liable for any loss incurred by the 1st appellant should it fail to undertake its obligations under the anticipated contract.

23. Further, all the three witnesses called in support of the 1st appellant's case did not testify on whether the parties had agreed on what would happen if any of the parties breached the terms of the contract. PW2 who was a director of the 1st appellant did not in his evidence claim that besides the aforesaid two documents on which the contract for security services was predicated, there existed an additional oral contract between the parties which obligated the 2nd appellant to compensate it in the event that there was theft in its business premises during the subsistence of the contract. I say so because contracts can either be written or oral.

24. It is settled law that as a general rule, parties are bound by the terms of their contract. I fully associate myself with the holding of *Korir J* in *Intercity Secure Homes Limited v Jane Njeri Miringu T/A Mango Bar & Restaurant [2019] eKLR* where when dealing with an appeal whose facts were largely similar to the facts in the consolidated appeals, the Hon. Judge held as follows:

“27. In a claim for breach of contract, the plaintiff must establish the existence of a contract and the express term of the contract allegedly breached. If the plaintiff relies on an implied term then there is need to state what that implied term is and the basis of reading it into the contract.

28. The Respondent did not adduce any evidence of an express term showing that the Appellant was to compensate her for any theft that was to occur in her premises. She did not point to any legal provision from which it could be implied that a person who contracts to provide security services is liable for any loss or damage that occurs at the premises of the consumer of the security services.”

25. Since the 1st appellant did not prove that one of the terms of the contract with the 2nd appellant provided that he was to be compensated for any loss sustained after a theft in its premises, I am satisfied that the learned trial magistrate failed to properly interrogate the evidence that was placed before him and thereby arrived at the erroneous conclusion that the 1st appellant had successfully proved its claim for breach of contract against the 2nd appellant when in actual fact it had failed to do so. The learned trial magistrate erred in law when he read into the contract a term that the parties had not agreed upon.

26. For all the foregoing reasons, I find merit in the 2nd appellant's appeal being HCCA No.471 of 2016. The same is hereby allowed. For the same reasons, I do not find any merit in the 1st appellant's appeal in HCCA No. 470 of 2016 and the same is hereby dismissed. The judgment of the lower court is consequently set aside and is substituted by an order of this court dismissing the 1st appellant's suit with costs to the 2nd appellant.

27. On costs of the appeal, the best order that commends itself to me is that each party shall bear its own costs.

28. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of September, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Wanjohi for the appellant

Mrs. Githae for the respondent

Mr. Salach: Court Assistant