REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL 495 OF 2008

SWAN CARRIERS LIMITED ..... APPELLANT

VERSUS

EASTERN PRODUCE LIMITED..... RESPONDENT

(Being an appeal from the Judgment delivered on 4th September, 2008 by Hon. Ms. W. Mokaya (SRM) Milimani Commercial Courts in CMCC No.9015 of 2003)

JUDGMENT

1. Through a plaint dated 23rd January, 2002 the Respondent, Eastern Produce Kenya Ltd, who was the Plaintiff in the lower court sued the Appellant, Swan Carriers Ltd for the sum of Ksh.623,327/= together with interest at 14% with effect from 6th July, 1998 till payment in full.

2. The Plaintiff's claim was based on a contract entered into with the Defendant for the transportation of the Plaintiff's tea from Nandi Hills District to the Port of Mombasa. The Plaintiff attributed the loss of the tea valued at Ksh.561,426/= to the negligence or breach of duty by the Defendant's employees or agents.

3. The claim was denied vide the statement of defence (amended) dated 29th October, 2002. The Defendant denied any contract, transportation of the tea or theft. In the alternative, the Defendant pleaded that if the contract existed, the same was void and unenforceable as the contract limited the sum payable to Ksh.20,000/=. It was further stated that the alleged agreement had an arbitration clause. The Plaintiff filed a reply to the defence. The reply reiterates the contents of the plaint.

4. During the hearing of the case, the Plaintiff called three witnesses. The Plaintiff's security officer, PW1 Samuel Muthumbi Chege's evidence was that based on the contract between the Plaintiff and the Defendant, the Defendant's motor vehicle registration No. KAK 957E was loaded with 12,600 Kg of tea valued at Ksh.1,500,000/= belonging to the Plaintiff for transportation from the Plaintiff's Nandi Hills factory to Mombasa. He stated that the tea did not reach it's destination and the motor vehicle was found abandoned at Mtito Andei while empty. That the driver and the loader of the motor vehicle were arrested by the police and some of the tea recovered. He further testified that the driver and the loader were subsequently arraigned in court for the offence of theft.

5. PW2 Jeremiah Ngero Sitati from Cunningham Lindsey Ltd loss adjusters testified that he assessed the Plaintiff's loss at Ksh.581,436.67 inclusive of Ksh.20,000/= insurance policy excess paid.

6. PW3 Dennis Onyango from ICEA (Insurance Company of East Africa) testified on the payment of Kshs.561,436/= by the insurance company to the Plaintiff and Ksh.61,891/= for the report on the investigations and report on the loss of the tea.

7. DW1 Parag Viwayak Ambgakar the Defendant's General Manager gave evidence that the motor vehicle registration No. KAK 957E was the one transporting the tea to Mombasa but failed to reach the destination. He stated that the motor vehicle was found abandoned at Mtito Andei and the matter was reported to the police. DW1 further testified that under the contract, the Defendant's liability was limited to Ksh.20,000/= and stated that it was not their responsibility to insure the goods. DW1 further stated that they expended money in a bid to recover the tea and recovered most of it.

8. The lower court entered judgment for the Plaintiff for the sum of Ksh.623,257/=, costs and interest. The Defendant was dissatisfied with the said judgment and appeal to this court.

9. In the memorandum of appeal the Appellant raised nine grounds which he summarized as follows:

a)Whether the trial magistrate made the correct interpretation of the agreement between the parties.

b) Whether the trial magistrate erred in finding liability based on evidence of a criminal charge.

c) Whether the trial magistrate wrongly applied the doctrine of subrogation.

d) Whether the trial magistrate failed to uphold the standard of proof required in a claim for special damages.

10. During the hearing of the appeal, the parties opted to proceed by way of written submissions. I have considered the said submissions together with the authorities cited.

11. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

12. An analysis of the evidence on record reflects that there is no dispute on the following facts:

- The existence of the contract.

- The transportation of the tea in question.

- That the goods did not reach their destination.

- That the driver and loader who were the Appellant's employees were arrested and charged with a criminal offence of stealing the tea.

13. The Appellant's submission is that the clause 1(h) of the agreement limited the Appellant's liability to Ksh.20,000/= in the event of any loss. The Appellant's side relied on the following cases to buttress the said argument:

a) **Gatobu M'ibuutu Karatho v Christopher Muriithi Kubai [2014]eKLR** where this court cited the decision of the Court of Appeal in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2002] EA 503** where it was stated:

> **"This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause."**

b) **Savings and loans Kenya Ltd v Mayfair Holdings ltd [2012] eKLR** where the Court of Appeal quoted the case of **Shore v Wilson [1842] 9CL & FIN 355** stating that:

> **"where the words of any written instrument are free from ambiguity in themselves...such instrument is always to be construed according to the strict, plain, common meaning of the words themselves."**

14. On the other hand, the Respondent's counsel submitted that clause 1 (b) & (d) of the agreement provided for the protection of the tea from damage and theft. He referred the court *inter alia,* to the law on bailie for hire and reward as set out in Halsbury Laws of England Vol.3(1) at paragraph 40 of the same it is stated:

> **"The burden is on the bailees to prove that the loss or damage of the chattel occurred without any neglect, default or misconduct on his part or on the part of any servant to whom he may have delegated his duty or that it occurred by negligence of a kind liability for which he is exempted."**

At page 42, it continues to state that:

> **"The custodian bailee is responsible to the owner of the chattel entrusted to him both for negligence of his agents or employees, and for their acts of fraud or other for wrongful acts, provided that those acts were committed in the course of their employment."**

15. Clause (b) of the agreement states as follows:

"Transport the company's tea efficiently and expeditiously in the said vehicles from factories in Nandi Hills District to the destined Warehouse (s) in Mombasa;

16. Clause (d) states:

"Maintain to the complete satisfaction of the company the said vehicles and all parts thereof and keep the same clean and in good and proper condition and repair and fit for transportation of tea with particular emphasis being placed on protection against water damage and control of theft;

17. Clause (h) states:

"Be responsible for the first ksh.20,000/= (Twenty Thousand shillings) of any loss, damage or contamination per vehicle transit and to give the company every assistance in processing insurance claim as and when necessary;"

18. It is not in dispute in the case at hand that the theft was carried out by the Appellant's employees. The evidence of DW1 clearly shows that their driver and turn boy were arrested and charged with the offence of theft of the tea in question. Although the outcome of the criminal case was not known to the witnesses herein, once it has been proved that the theft was carried out by the Respondent's employees, then the Respondent cannot be said to have complied with the clause (b) & (d) of the agreement.

19. The evidence of DW1 failed to show the measures taken by the Appellant to protect the goods against such theft e.g. was there an escort team? what kind of employees had the Appellant entrusted with the transportation as the driver and turn boy? The Appellant as the masters of their driver and turn boy are liable for the theft committed by their employees in the course of duty. I am persuaded by the exposition of this court in **Consolidated Bank of Kenya Limited v Securicor Security Services Kenya Ltd; Nairobi HCCC No. 594 of 2003** where it was stated:

"....The defendant did not carry out its duties in accordance with the express or implied terms of contract. The restrictions and limitations on liability are vitiated by the acts of negligence of the defendant. Those restrictions and exemptions are oppressive or unreasonable and do not wholly apply. The defendant is thus liable for negligence and damages."

20. The Appellant's correctly submitted that an insurer cannot claim more than the insured is entitled under the doctrine of subrogation. He relied on the case of **Leslie John Wilkins v Buseki enterprises Limited [2015] eKLR**, where this court had regard to the observations of the learned author Mac Gillvay and Parkingon **"Insurance Law"** at page 471 when he said the following in regard to the doctrine of subrogation:-

"The doctrine confers two distinct rights on Insurer after the payment of a loss. The first one is to receive the benefits of all its and remedies of the assured against third parties...the Insurer is thus entitled to exercise, in the name of the Assured, whatever rights the assured sasses to seek compensation for the loss from third parties."

21. Having held hereinabove that the limitation clause for the sum of Ksh.20,000/= is not applicable, under the doctrine of subrogation, the insurer would be entitled to no more than what the insured was entitled to.

22.The Respondent prayed for judgment for the total sum of Ksh.623,327/=. In paragraph No. 6 of the plaint, the Respondent gave the value of the tea as Ksh.561,436/=. The Respondent did not specifically plead for any other amount of money. It is not reflected in the final plaint how the total claim of Ksh.623,327/= was arrived at. Although the evidence of PW2 and PW3 shows that the sum of Ksh.61,891/= paid to the loss adjuster less Ksh.20,000/= excess policy comes to the total of Ksh.623,327/=, the said sum of Ksh.61,891/= was not specifically pleaded and ought to be deducted from the total award of the trial magistrate. Therefore the total claim which is specifically plead and proved is the sum of Ksh.561,436/=.

23. With the foregoing, the appeal is successful to the extent that the judgment of lower court is set aside and substituted with a judgment for the sum of Ksh.561,436/=, interest and costs. The appeal has been successful to the extent of about 10/100. The Appellant to pay 90/100 of the costs of the appeal and the costs in the lower court.

Date, signed and delivered at Nairobi this 24th day of Oct, 2017

B. THURANIRA JADEN

JUDGE