



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CIVIL APPEAL NO. 58 OF 2011**  
**BETWEEN**  
**ISAAC KIIRU KING'ORI.....APPELLANT**  
**AND**  
**SAMSON KAIRU CHACHA t/a**  
**SKY SHEPHERD SECURITY SERVICES.....RESPONDENT**  
**(Being an appeal from the judgment and decree of Hon. J. Wambilyanga, RM,**  
**delivered on 9th May 2011 in Nyeri CMCC No.597 of 2009)**

**JUDGMENT**

By a plaint dated 26th October 2009, the respondent sued the appellant for a sum of Kshs.9,900/= being the amount due and outstanding in respect of security services rendered to the same plus cost and interest.

By a defence dated 17th December 2009 the appellant denied owing the said sum and by way of counter claim the appellant pleaded that he terminated the services when the guard allocated by the respondent to him stole Ten gas cylinders valued at Kshs.45,000/= which he claimed.

On 29th November 2010, the respondent issued third party notice against one Joseph Nguthiru Gichuki for indemnity and or contribution in respect of the appellant's counter claim on 21st March 2011 at the request of Mr. Gathiga Mwangi Advocate for the respondent. Judgment was duly entered against the 3rd party allegedly as prayed.

At the trial herein Samson Kairu Chacha testified that he had provided security services at Kshs.4500/= per guard to the appellant who did not pay for the same for one month and nine days. Under cross examination, he confirmed that one of their guards was charged and convicted of the theft of the appellant's gas cylinders. He further stated that the agreement between the parties was verbal but that he was under a duty to issue the appellant with an honest guard. He further stated that the appellant should have lodged his claim with the insurance company.

The appellant in his defence stated that the respondent had provided him with two guards for rental/residential houses and one guard for the shop and for the month of January he paid on 3rd February 2009 Kshs.13500/= for three guards. On 1st February 2009 the shop was broken into and his property stolen and immediately the guards were withdrawn. Under cross examination, he stated that he was not

supplied with guards from 1st – 9th February and that the guards were withdrawn on 2nd February. It was his further testimony that he was paying for the services in arrears and that he paid on 3rd February 2009.

Based upon the said pleadings and evidence, the trial court found that the appellant had not paid for the guards for the month of January and therefore entered judgment for KShs.9000/= and held that the respondent was not liable to the counter claim.

Being aggrieved by the said judgment, the appellant filed this appeal and raised the following grounds:-

- 1. The learned trial magistrate erred in law and fact by failing to find that the appellant had paid the respondent in full for all services rendered.*
- 2. The learned trial magistrate erred in law and fact by failing to find for the appellant on the counterclaim.*
- 3. The learned trial magistrate erred in law and fact by entering judgment against the 3rd party and failing consequently to find for the appellant against the respondent on the counterclaim.*
- 4. The learned trial magistrate erred in law and fact by finding that the appellant's cause of action was solely against the 3rd party while the 3rd party was a disclosed agent of the respondent.*
- 5. The learned trial magistrate erred in law and fact by finding that the appellant failed to produce a receipt for payments for December 2008 whereas the issue was whether the appellant had paid for the month of January 2009.*
- 6. The learned trial magistrate erred in law and fact by finding that the respondent was not liable since there was judgment already against the 3rd party.*
- 7. The learned trial magistrate erred in law by misdirecting herself on the law of agency and thereby arrived at an erroneous decision.*
- 8. The learned trial magistrate erred in law and fact by failing to harmonize the judgment against the 3rd party with the final judgment.*
- 9. The learned trial magistrate erred in law and fact by failing to find there was vicarious liability against the respondent for the acts of his servant.*
- 10. The judgment of the trial court is inconclusive.*
- 11. The judgment of the trial court is against the weight of the evidence.*

## Submissions

Directions were given that the appeal be disposed off by way of written submissions which have now been filed.

## Appellant's Submissions

On behalf of the appellant it was submitted that the trial court erred in failing to find that the appellant had paid in full for the services against its own finding of facts that receipt dated 3rd February 2009 was for the month of January and since the plaint was for the period between January 2009 and part of February 2009, the respondent's claim should have failed.

It was further submitted that the trial court erred in failing to harmonize the judgment against the third party and the final judgment. It was submitted that the trial court failed to take cognizance of the

principle of vicarious liability. It was submitted that the judgment entered against the 3rd party was in favour of the respondent. It was therefore submitted that the evidence on record was sufficient to lead to a conclusion in favour of the appellant and therefore the appeal should be allowed.

#### Respondent's Submissions

On behalf of the respondent it was submitted that if the appellant had paid for the month of January 2009 he ought to have produced all the receipts and that having admitted that the payment was in arrears, the appellant could have first cleared the arrears for December.

It was further submitted that the appellant should have enjoined the third party to the appeal. It was further submitted that the trial court was right in holding that the respondent was not liable in respect of the acts of the third party since the appellant did not plead agency.

From the proceedings and submissions herein, the court has identified the following issues for determination:-

- a. Whether the respondent had proved his case against the appellant in respect of the claim for Kshs.9900/=.*
- b. Whether the appellant had proved his counter claim against the respondent and if so who should pay for the same.*
- c. Whether the trial court was right in her finding on the issue of third party liability.*
- d. What order should the court make in respect of this appeal?*

On the issue of proof of the respondent's claim, parties are bound by their pleadings which must then be supported by evidence. The respondent's claim was for a sum of Kshs.9900/= being the amount due from the services rendered for the month of January and part of February 2009. He did not claim for any sum due for the month of December. It therefore follows that the trial court having found as a fact that the receipt dated 3rd February 2009 was for the month of January 2009, the appellant was not under any obligation to produce receipt for the month of December 2008. The trial court's finding that the appellant made payment for the missing months was not supported by the pleadings and evidence and therefore find that the same fall into error.

It was not for the trial court to fill gaps in the respondent's case and therefore find that the respondent failed to prove his case against the appellant on a balance of probability and would therefore allow the appeal on this ground and substitute the court's judgment with an order dismissing the respondent's case against the appellant with costs.

On the issue of the counter claim, the evidence tendered by the appellant in respect of the loss of his gas cylinder was never rebutted. The respondent admitted that indeed his guard was charged and convicted of the theft of the said items. It is trite law that the respondent is the one who brought in the third party for indemnity and or contribution and therefore the trial court was under a duty to give direction as to how the issue of liability between the respondent and the third party was to be determined.

The court having not given directions and the respondent having admitted that the 3rd party was his guard that he had posted to the respondent's premises as against the appellant and the respondent, the respondent was liable for all the Acts of the said guard. I would therefore agree with the submissions by the appellant that the trial court failed to appreciate the law as regards third party proceedings and liability and therefore the same fell into error.

The appellant having proved his loss of the said cylinders, the same was entitled to judgment against the respondent who was if he had proved his claim for indemnity and or contribution against the third party would have been entitled to the benefit of the said judgment. I therefore find that the appellant had

proved on a balance of probability his counter claim and would therefore set aside the trial court's judgment, dismiss the same and substitute it with a judgment in favour of the plaintiff against the respondent for the sum of Kshs.45,000/= together with costs and interest thereon.

Failure by the appellant to join the said third party in the appeal herein is not fatal to the appeal herein since the court had not given direction as to how the issue of the claim between the third party and the respondent would be determined. The judgment entered against the same was therefore not proper.

I would therefore allow the appeal herein and set aside the judgment herein and substitute the same with judgment dismissing the respondent's claim against the appellant for want of proof and allow the appellant's counter claim with costs and interest thereon from the date of the said judgment.

**Signed and dated this day of 2014**

**J. WAKIAGA**

**JUDGE.**

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November, 2014

**J. NGAAH**

**JUDGE.**

In the presence of:

----- for Appellant

----- for Respondent

**Dated day of 2014**