REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 475 OF 1995

DAVID E. KIIRU & ANOTHER ……APPELLANT

VERSUS

FLAME TREE REFRIGERATION LTD.……..RESPONDENT

J U D G M E N T

The plaintiff-appellants herein had sued the defendantrespondents to claim from them a sum of Kshs.52,800/= being the balance of the agreed sum and reasonable value for security guard services rendered to the respondents by the appellants at the respondents request - - - - - -. The plaint was filed in the court of the Chief Magistrate at Milimani Commercial Courts on 20th November, 1998.

A defence filed by the respondents in the same court on 24th December, 1998 the respondents admitted the appellants claim but counterclaimed the sum of Kshs.247,200/= being the diference between Kshs.300,000/= the value of a welding machine (Kshs.160,000/=) and a tool box with tools (Kshs.140,000/=) the items which were stolen from the respondents premises while under the guard of the appellant's servant and/or agent on the night of 18th November 1995.

A reply to the defence and counter claim dated and filed in court on 18th January 1999 averred that though a theft was committed at the respondent's premises sometime in 1995 the issue had been conclusively dealt with by the parties and the police and that thereafter the parties continued operating under the terms of the contract for a period of two years.

The case was heard by the Resident Magistrate (M.M. Kamunyi) on 19th July 1999 and 23rd July 1999 when parties testified. Judgment was delivered on 5th October 1999 when the learned magistrate awarded the respondent the amount in the counter – (Kshs.247,200/=) plus costs and interest.

This decision disappointed the appellants who lodged an appeal to this court on 4th November 1999, in a memorandum of appeal which listed seven (7) grounds of appeal.

These grounds were that the learned magistrate erred in disregarding the specific terms of the contract between the appellant and the respondent; that he erred in law and fact in substituting his own assumptions for the special terms of the contract between the appellant and the respondent; that he erred in finding that the respondent's counterclaim had been proved yet no credible evidence of the existence or value of the alleged stolen items had been tendered in court. Ground 4 of appeal was that the learned magistrate erred in law and fact in holding that the appellant was under a legal duty to conduct investigations of the alleged theft and to inform the respondent of the out come of the same yet the conduct of the criminal investigations is the function of the police; that he erred in concluding that the

appellant's agent or servant was guilty of theft yet such finding could only be made by a criminal court after a full trial that he erred in finding that the respondents counter claim had been proved on a balance of probabilities and that he erred in awarding costs to the respondent.

The appeal was heard by this court on 17th February 2003 when counsel for the parties appeared to either present or oppose the same.

Counsel for the appellant repeated that the learned magistrate erred in disregarding the terms and conditions of the contract and or going outside them, that there was no sufficient evidence to show the existence of the items alleged to have been stolen; hence alleged theft of the items was not proved.

According to counsel, the appellants had discharged their duty by reporting the theft of the respondent's items to the police; hence the magistrate's finding that they did not carry out investigations into the theft was not correct.

That the magistrate's conclusion that there was a theft by the appellant's servant or agent was not supported by evidence nor was the claim of negligence pleaded – and/or proved. Counsel prayed that the appeal be allowed with costs.

Counsel for the Respondent submitted that the learned magistrate did not apply assumptions of his own in dealing with and deciding the case and that the appellants did not plead the terms of contract in the claim.

That the appellant did not want to be governed by the provisions of the agreement.

Counsel stated that there was evidence that there was a theft committed in the respondents premises where a welding machine and tool box with tools was stolen, when the appellant's night guard was on duty and that this theft was discovered by day guard. That the night guard was picked by police and questioned. According to counsel this was very important piece of evidence over which the appellant cannot turn round to claim there was no theft and that the respondent was entitled to an explanation from the former, as to how this theft was committed. That the appellant should not rely on exclusion clauses and where the respondents set up a set off and counterclaim and won, they were entitled to costs.

That the appellants continued to pay for security services because they were promised investigations were going on and that the matter was being taken up by the appellant's insurance company. Counsel prayed for the dismissal of the appeal with costs. These are the submissions made in this appeal which the court has perused and considered. The court has also perused and considered the lower court record of proceedings and judgment. When the case came up for hearing before the lower court, counsel for the parties agreed that there was no dispute about the appellant's claim against the respondent and that the evidence was only led over the set off and/or counterclaim by the respondents in respect to their claim of Kshs.247,200/=.

In contesting this suit before the lower court, the parties relied on the contract entered into between them and dated 15th July 1994. Paragraph 11 of that agreement stated as follows:

> **- "If any dispute shall arise between the parties to this contract touching or concerning any matter which is the subject of or arises out of any clause or special provision or the interpretation thereof the same shall be referred to arbitration in accordance with the Arbitration Act and the making of any award t here under shall be a condition precedent to the right of any party to institute legal proceedings in any court of law."**

This was a contract signed by both parties which bound them and ousted the court jurisdiction to hear and/or entertain any proceedings arising therefrom and counsel for the respondent was clearly wrong in stating in his defence and counterclaim that the lower court had jurisdiction to entertain the suit.

That the defendant admitted the claim of the appellant was neither here nor there because it was the

jurisdiction of the court which was at issue and not whether or not the parties had any agreement to record at that court.

What of the set off and counterclaim? It was in form of a counter suit which by virtue of the arbitration clause, ought not to have been filed in court too.

It would have been sufficient for the respondents to plead lack of jurisdiction of the lower court to entertain the appellant's suit and ask for it to be struck out and not to go ahead and plead a set off and/or counterclaim.

Even during the adduction of evidence, no reference was made of this important aspect of the case but since the agreement in which the Arbitration Clause is mentioned was produced as part of the evidence in the case (see plaintiff's exhibit 1) the learned magistrate was duty bound to peruse it and use it in deciding the case.

Moreover, it does appear that after the police picked up the night guard by the name Caleb Onyango or Caleb Owino, for questioning and released him, the respondent played down the issue and continued using the services of the appellants without seeking any compensation from them under the arbitration claim.

And even when the appellants wrote the various correspondence to the respondents for payment of arrears for services rendered, the latter did not raise the claim which was later raised in the form of the counter claim in the defence.

The theft had been committed in 1995 and for the respondents to wait until the appellants filed a suit to raise it in 1998 as a counterclaim was an afterthought.

They had not written any letter either to the appellants or their insurance company to make a claim in respect of this theft and it is proper to take it that they had forgiven the appellant for the incident.

In the circumstances of this case, I order that the lower court had no jurisdiction to entertain the lower court suit and or the counterclaim; and to dismiss this appeal and to strike out the counterclaim. There will be no order for costs for this appeal or the lower court case..

Delivered this 12th day of March 2003.

D.K.S. AGANYANYA

JUDGE