



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 1394 OF 1989**

BLACKWOOD HODGE COMPANY PLAINTIFF

VERSUS

JAMES OMORO JAGONGO & ANOTHER DEFENDANT

JUDGMENT

The suit before me was filed in 1989. The plaintiff Blackwood Hodge company Limited is a limited liability company. The second defendant is a security guard whilst the 1st defendant is an employee and guard.

The advocate for plaintiff stated that the suit before court is for subjugated rights of the insurance company. That the plaintiff had been robbed, through the negligence of the 1st and second defendant. That insurance company had paid the plaintiff over Ksh.3 million for loss suffered in goods stolen. The insurance company now wishes to recover that amount from the defendant. This was due to te breach of contract by the second defendants through the negligent act of their guards.

The defendants advocate submitted that the plaintiff was never called to give evidence to prove negligence. He relied on a liability clause in the contract. Further breach of the contract is not admitted. The evidence called in court by the advocate for the plaintiff is that of the loss assessor (PW1) and the Insurance Company representative (PW2). The first witness came to inform the court that a report from another company now managed with his present company had been prepared as to the loss sustained whilst the second witness gave evidence as to payment of those loss.

There are twelve agreed issues for determination a agreed by the parties in 1990.

Issue No.1

Was there a written contract entered into in 1987 between the plaintiff and second defendant?

The parties put in by consent a contract (copy) signed by Block Wood Lodge (K) Ltd and defendants to provide guards service day and night at Ksh.3,200/- per guard.

Issue 2

Was the plaintiff paying the second defendant a sum of Ksh.5,800/- in accordance with the agreement referred to in the plaint? The plaintiff did not come to give evidence that he was paying Ksh.5,800/-. There is therefore no evidence of this.

Issue No.3

Did the second defendant post the first defendant to guard the plaintiffs premises on 18.4.88 at 6.30 a.m?

No evidence was called by the plaintiff to prove the 1st defendant had been posted.

From the above two issues it is implied by the plaintiffs that the services were offered. It was imperative that a representative from the plaintiffs firm be called to establish the facts raised in the issue No.1, 2 and 3 unless liability is admitted by the defendant.

As to issue No.4 on whether the premises was broken into and goods worth Ksh.3,119,1244 stolen the plaintiff did not call evidence to prove this. They would have a representative from the company come to narrate the said loss through their books.

If liability was admitted by the defendant which it wasn't the witnesses may not have been necessary.

On the 5th issue as to whether the 1st defendant was negligent, no evidence was adduced to prove the particulars of negligence and hence the breach of contractual obligation.

The plaintiff required to show that the defendants had failed in the duties to provide the requisite service as required in the contract.

The defendants deny that they were in breach of their duty according to their defence.

In submission their advocate relied on the exception clause. That liability if any under the contract is limited to Ksh.25,000/-. He relied on the case of:- Cooper motor Corporation (K) Ltd. v Securicor Guards (K) Ltd. Hccc5260/90 (unreported) Aganyanya,J.

Where the court awarded Ksh.25,000/- as limited in the exception clause but dismissed the plaintiffs claim

The advocate for the plaintiff relied on the following cases dealing with exception clause.

1. East African road services Ltd. V. J.S. Davis & Co. Ltd. 1965 EA 676
2. Dodd v Nandha 1971 EA 58
3. Chhtrisha & Co. v Purancharnd & Sons 1959 E.A.233. which cases I have read.

In essence the cases state if it is shown that the defendants deviated from the performance of their court contractual obligation, then they cannot rely on the exception clause.

The defendants had amended their defence to rely on exception clause. No reply to the amended defence was filed.

I hold that there was a contractor between the parties. I further hold that the plaintiffs have failed to call evidence to prove negligence and a breach of that contract. This suit stands dismissed with costs to the defendants.

Dated this 16th day of July 2000 at Nairobi.

M.A. ANG'AWA

JUDGE