



REPUBLIC OF KENYA



KENYA LAW

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**Taj Mall Limited v Cobra Security Limited (Civil Appeal 725 of 2019)
[2024] KEHC 2117 (KLR) (Civ) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2117 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 725 OF 2019

AN ONGERI, J

MARCH 1, 2024

BETWEEN

TAJ MALL LIMITED APPELLANT

AND

COBRA SECURITY LIMITED RESPONDENT

*(Being an appeal against the judgment and decree of Hon. K. I. Orenge
(SRM) in Milimani CMCC No. 3181 of 2014 delivered on 7/12/2018)*

JUDGMENT

1. The respondent filed Milimani CMCC No 3181 of 2014 against the appellant seeking payment for services rendered from the appellant in the sum of Kshs 1,657,184.00
2. The appellant filed a defence and raised a counterclaim and set off in the sum of Kshs 3,211,025.55 in respect of goods stolen from the appellant's premises while being guarded by the respondent.
3. The trial court found that the appellant was liable to pay the respondent Kshs 1,657,184.00 as the outstanding amount for services rendered.
4. The evidence in summary was that the appellant and the respondent entered into a contract on 26/3/2013 for the provision of security services at the appellants premises known as LR No 209/13839 (hereafter referred to as the suit premises).
5. The premises were broken into while the respondent's guards were on duty and the appellant terminated the services of the respondent.



6. The respondent filed a suit against the appellant claim outstanding payments of Kshs 1,657,184 and the appellant filed a defence and counter claim and set off seeking Kshs 3,211,025,55 in respect of indemnity for items stolen from the suit premises.
7. The trial court dismissed the counterclaim and entered judgment in favour of the respondent in the sum of Kshs 1,657,184.
8. The appellant has appealed to this court on the following grounds;
 - i. That the learned Judge erred in law and fact in misinterpreting the contract between the appellant and the respondent.
 - ii. The learned trial magistrate erred in law and fact in finding as he did that the store that was the scene of the crime was not within the schedule for delimitation area under the contract and therefore the plaintiff could not be held liable for negligence.
 - iii. That the learned Judge erred in law and in fact in finding that the appellant did not call evidence to dispute the fact that the area where the theft took place was outside the area of assignment.
 - iv. The learned trial Judge erred in law and fact in dismissing the appellant's counter claim.
 - v. That the learned trial magistrate erred in law and fact when he failed as he did to properly evaluate the evidence on record thus reaching an erroneous decision.
 - vi. The trial magistrate erred in law and fact when he based his decision on irrelevant matters and failing to base his said decision on facts and evidence on record.
9. The parties filed written submissions as follows; the appellant submitted that the service contract signed between the parties dated 26/3/2013 was the primary basis of the relationship that existed between the appellant and the respondent. the responsibility that was placed on the respondent as to which area the respondent was supposed to oversee. However. The respondents personnel allowed a break in the premises described in the contract and thus was in breach of the same.
10. The appellant submitted that the trial magistrate relied on photographs to ascertain the area of delimitation of the property and the extent of operation assigned to the respondent's guards. It was the appellants argument that this was a clear misdirection of the trial court as the area of delimitation had already been captured in the contract and therefore it was not open to the court to ascertain that area only by looking at the photographs.
11. The appellant further submitted that the court further misdirected itself when it dismissed the appellants counter claim on account that no evidence was led to support it. The appellant submitted that it is not in doubt that the break in happened at the premises of the appellant. no other evidence was required to prove the break in that happened. the respondent was therefore in breach of contract and the lower court decision should be vacated and the counter claim upheld.
12. The respondent alternatively submitted that it is the appellants submission that the contract was for the entire premises of the respondent, but no attempt was made to prove this allegation. The respondent nevertheless showed that the place of theft was outside the contract area with cogent evidence. PW! Produced photographs showing clearly that the area where the theft took place was clearly out of the contract.
13. The respondent submitted that a proper interpretation of the Contract will plainly show that the area of the theft of goods was outside the contracted area and the Appellant cannot be heard to introduce extrinsic evidence to controvert that position.



14. The respondent further submitted that the goods reported stolen did not belong to the appellant and belonged to Govinda and sons Kenya Limited. The said Govinda & Sons had no privity of Contract with the Respondent and it is unconscionable that the Appellant would expect that the Respondent would provide services upon all and any other persons who it has not been contracted to do so.
15. This being a first appeal, the duty of the first appellate court is to reevaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
16. The issues for determination in this appeal are as follows;
 - i. Whether the Respondent proved its case against the appellant.
 - ii. Whether the appellant proved its counterclaim and set off.
 - iii. Whether the trial court misinterpreted the contract between the parties.
17. On the issue as to whether the respondent proved its case to the required standard, I find that it was not in dispute that the services were rendered.
18. The respondent's evidence was that the premises broken into were not part of the assignment. I find that the appellant did prove that the shops broken into was part of the assignment.
19. On the issue as to whether the appellant proves its counter claim and set off, the appellants did not call any witnesses to prove the items were stolen from the appellant's premises.
20. I find that the trial court was right in dismissing the counterclaim and set off and finding for respondent.
21. I dismiss this appeal for want of merit with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
1ST DAY OF MARCH, 2024.**

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

