Searite Holdings v Isle Gardens Limited (Civil Appeal E441 of 2023) [2024] KEHC 9856 (KLR) (Civ) (5 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9856 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E441 OF 2023

AC BETT, J

AUGUST 5, 2024

BETWEEN

SEARITE HOLDINGS .... APPELLANT

AND

THE ISLE GARDENS LIMITED .... RESPONDENT

(Being an appeal against the Judgment and order of Hon. D.S.Aswani RM/ Adjudicator made on 4th May 2023 in Milimani SCCC No. E852 of 2023)

JUDGMENT

1. By a statement of claim filed in the Small Claims Court, the Respondent claimed a sum of Kshs. 850,000/= being the value of its items that were stolen by a security guard who was an employee of the Appellant Company while in the course of his employment with the Appellant which had a contract for provision of security services with the Respondent. It was the Respondent's assertion that the Appellant was vicariously liable for the theft by its employee who turned into a thief and stole the property he was meant to protect.
2. The Appellant in its response admitted that the theft did occur but denied liability and stated that as at time of the incident the Respondent owed them kshs.52,000/= being two months arrears and that by the time of filing of suit, the arrears had risen to kshs.187,447/= which they claimed by way of counter claim.
3. The Respondent filed a response to the Counterclaim in which it denied the claim of arrears and maintained that the same was a ploy by the Appellant, to evade liability.

4. Each party filed copies of the documents it sought to rely on. The Respondent on his part filed copies of receipts and invoices for its equipment and stock as well as two witness statements, and the contract to provide security between the two parties.

5. On its part, the Appellant filed the Respondent's financial statement, demand letter for the arrears, and witness statement.

6. The claim proceeded by way of written submissions and on 4th May 2023, the trial resident magistrate/ adjudicator delivered judgement in favor of the Respondent for kshs.850,000/=, interest and costs, and dismissed the Counterclaim.

7. The Appellant was dissatisfied with the judgment of the trial court and filed an appeal. Listing 10 grounds of appeal. The Appellant faulted the trial court for: -Failing to take into account the terms of the contract between the parties under clause (a), (b) and (c) thereby occasioning serious miscarriage of justice;Finding the Appellant vicariously liable for the actions of its employee;Failing to appreciate the law of contract;Failing to find in its favor with respect to the counterclaim;Relying on hearsay evidence to the effect that its employee was caught on CCTV footage committing the crime of theft yet no footage on evidence was produced by the Respondent; and,Delivering a judgment whose entire reasoning was fatally flawed and erroneous in law. In a nutshell, the aforesaid are the Appellants lengthy grounds of appeal.

8. In its submissions in support of the appeal, the Appellant identified three issues of determination which this court hereby adopts: -

    a. Whether the appeal raises points of law or fact.

    b. Whether the honorable Adjudicator misinterpreted, misapplied and rewrote the contract between the parties by imposing liability upon the Appellant.

    c. Whether the Appellant is entitled to payment is accrued arrears amounting to kshs.187,447/=.

9. The Appellant submitted that its appeal raises matters of law as envisaged by Section 38 of The *Small Claims Act*, 2016. The said section states: -

    (1) A person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court or matters of law."

10. The Appellant submitted that their appeal does not raise matters of fact as the existence of the contract was admitted.

11. It was its submissions that the trial court failed to interpret the contract and apply its terms faithfully and judiciously. The Appellant contended that in misinterpreting the contract, the trial court rewrote the same in that whereas clause (e) of the contract had a provision to expressly limit liability "if the client has not paid in full any account payable in advance of the first week of the current month."

12. It was their submission that at the time of the robbery the Respondent's arrears stood at Kshs. 52,000/ = as proven through its invoices. According to the Appellant, the Respondent did not rebut their evidence of the existence of arrears.

13. The Appellant further submitted that the trial court misinterpreted, misapplied and rewrote the contract between the parties by finding that the Respondent had given sufficient notice of its claim when there was a clear proviso in the contract as follows: -

b. The security firm shall not be responsible in any circumstances or to any extent whatsoever, whether for breach of contract or negligence, unless written notice is received by the security firm within seven (7) days of the occurrence of the event giving rise to the claim."

14. On the obligation to insure, the Appellant submitted that although the wording was couched as advice, the clause explicitly provides that the Respondent had an obligation to insure its property. For avoidance of doubt, I will reproduce the said clause:

a. Clients Obligation To Insure

The client is advised to insure and remain insured

for the duration of the contract with a reputable

insurance company the premises and property

therein against loss by fire, burglary and such any

other reasonable risk."

15. The Appellant relied on the case of *International Aircraft Group SA vs Airway Kenya Aviation Limited* [2020eKLR in which the court stated as follows: -

> "...Parties to a contract that they have entered voluntarily are bound by its terms and conditions."

16. Also cited by the Appellant is *Pius Kimayo Langat vs Co-operative Bank of Kenya Ltd* [2017] eKLR where the Court of Appeal held: -

> "We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties,they are bound by the the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

17. The Appellant submitted that the terms contained in the contract were clear, straightforward, and unambiguous and therefore must be applied by the courts. The Appellant referred the court to the case of *Joseph Kangethe Irungu vs Peter Ng'ang'a Muchoki* [2018] eKLR, and *Eunice Kamau vs AAR Insurance (K) Ltd* 2017 and submitted that the Respondent was in arrears, had failed to tender written notice within 7 days of the robbery and had failed to insure its premises and goods, the adjudicator ought to have dismissed its claim. It submitted that by allowing the claim, the adjudicator was rewriting the contract between the parties.

18. The Appellant also submitted that the adjudicator ought to have entered judgment in its favor in terms of the counterclaim as it proved that as at the time the contract ended, the Respondent owed kshs.187,447.00/=.

19. It contended that the finding by the adjudicator that burglary of the Respondent's goods amounted to a breach of contract and automatically discharged the Respondent from paying the security services provided is fundamentally flawed.

20. The Respondent on its part submitted that all the 10 grounds of appeal indicate that the trial court erred in law "and in fact" and the Appellant's submissions are largely based on facts. The court was referred to the case of *Twaher Abdulkarim Mohammed vs IEBC And 2 Others* [2014] eKLR.

21. They submitted that the court did apply the law correctly and reached its decision judiciously. It was the Respondent's submissions that the adjudicator did not fail in finding the Appellant vicariously

liable for the wrongs committed by its security guard. Reliance was placed on the case of *Nairobi Club Registered Trustees vs JMN* [2019] eKLR where it was held: -

> " ...the relationship between the Appellant and the Respondent was that the Appellant owed the Respondent a duty of .... At no time did the guards raise any alarm. In fact, there is no indication that any back-up alarms existed in these premises. There were some guards at the gate who did not even hear what was going on in the premises. This confirms that the premises were unsafe, and this can only be attributed to the Appellant. The Respondent was left exposed and vulnerable. The negligence on the part of the guards extended to the Appellant. The finding in liability cannot be faulted."

22. The Respondent further relied on the cases of *Samson Kairu Chacha vs Isaac Kiiru Kingori* [2016] eKLR where the court held that the doctrine of vicarious liability was rightfully applied as an anchor for a claim for loss of goods which occurred when the Appellant's guard was on duty.

23. On the issue whether the Appellant discharged its contractual obligations, the Respondent submitted that whereas clause (a) advices the Respondent to insure its property, clause (b) imposes an obligation on the Appellant to make good any loss as a result of breach of contract and negligence.

24. Clause (e) of the security services contract between the parties' states: -

    (e) Limitation Of Liability

    The Security Firm undertakes no liability for any loss or damage to property or person whatsoever or howsoever caused by the client unless due to the negligence of or willful default by the security firm or its employees while performing their duty within the scope of their employment Provided Always. The security firm will not entertain any liability if the client has not paid in full any outstanding account which is payable in advance of the first week of the current month..."

25. The Respondent submitted that it had demonstrated through the particulars of negligence meticulously listed in the statement of claim, the extent of the Appellant's guard's negligence in securing the Respondent's property.

26. The Respondent also submitted that it was the Appellant's core duty to provide security to the Respondent and it cannot rely on an ouster clause of alleged non-payment to avoid liability as that would be tantamount to essentially downing its tools.

27. The Respondent submitted that the trial court was right in its determination and urged the court to dismiss the appeal.

28. Section 32 of The *Small Claims Court Act* provides: -

    (1) The court shall not be bound wholly by the Rules of evidence.

    (2) Without prejudice to the generality of (1), the court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other court under the law of evidence.

29. The trial court was acting within the provisions of the law in allowing the parties to rely on the witness statements, documents, pleadings and submissions in proof of their claim and counterclaim.

30. In determining the appeal, I find that the grounds number 8 and 9 relate to finding of facts by the trial court in that considering the claim and the counterclaim vide the evidence adduced by both parties, the adjudicator made a finding allowing the Respondents claim and dismissing the Appellant's claim. These are matters of fact. The adjudicator considered the relevant factors before arriving at her decision as she considered the pleadings, witness statements and the documents produced.

31. The adjudicator believed the Respondent's claim that its property was stolen under the Appellant's watch. The adjudicator also believed that the Respondent was in arrears in its payment for the security services.

32. From the record of the proceedings, I am satisfied with the court's finding of fact with respect to the theft of the Respondent's property as it was not against the weight of the evidence at hand. The finding of fact was that the Appellant's employer was responsible for the loss of the Respondent's goods. However, having found in favour of the Respondent, the adjudicator then proceeded to dismiss the Appellant's counterclaim on account of breach. By virtue of the law, the Appellant is deemed vicariously liable for the misdeeds of its employee.

33. The Appellant sought to rely on what it terms as breach of the contract to avoid liability. In the case of *Dormakaba Limited Vs Architectural Supplies Kenya Limited* [2021] Kehc 210 (klr), Mativo J stated as follows: -

> "..... to successfully claim damages, a plaintiff must also show that; (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the Plaintiff suffered damage (loss) as a result of the Plaintiff's breach. The plaintiff is not required to establish the causal link between the breaches of an agreement and damages, with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what could probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary cause of human affairs, rather than an exercise in metaphysics."

34. Based on the above analysis, I find that in view of the existing contract for security services, the Appellant was under obligation to secure the Respondent's property, while the Respondent was obliged to pay for the security services as each party was to ensure they faithfully observe their obligations arising from the contract. Upon the loss of the Respondent's property under the watch of the Appellant, the Respondent expected that the Appellant would compensate it for its loss.

35. The Appellant in turn denied liability, citing the Respondent's breach of certain clauses in the contract for its denial.

36. This appeal concerns a contract which the Appellant seeks to repudiate on account of breach of certain clauses by the Respondent. In the English case of *Pan Atlantic Ins. Co. Ltd And Another Vs Pine Top Insurance Co. Ltd* [1994] 3 ALLER 581, the House of Lords in implying that not every breach of an insurance condition entitles an insurer to repudiate an insurer rendered itself through Lord Templeman thus: -

> "On behalf of the underwriters, Mr. Hamilton OC submitted that a circumstance was material if a present insurer would have "wanted to know" or would have "taken into account" that circumstance even though it would have made no difference to his acceptance of the risk or the amount of premium. If this is the result of the risk or the amount of premium. If this is the result of the judgement of the Court of Appeal in CTI case then I must disapprove that case. If accepted, this submission would give carte blanche to the

avoidance of insurance contracts on vague grounds of non-disclosure supported by vague evidence even though disclosure would not have made a difference. If an expert says "if I had known I would not have accepted the risk or I would have demanded on higher premium, his evidence can be evaluated against other insurance accepted by him and against other insurance accepted by him and against other insurance accepted. But if the expert says "I would have wanted to know but the knowledge, would not have made any difference then there are no objective or rational grounds upon which this statement of belief can be tested. The law is already sufficiently tender to insurers who seek to avoid contracts for innocent non-disclosure and it it not unfair to require insurers to show that they have suffered as a result of non-disclosure. Of course, they suffer if the risk matures but that is a risk accepted by an insurer.

37. Quoting the above passages in *Pan Atlantic Ins. Co. Ltd* (supra) case with approval, the court in *Elius Gachi Karanja vs Concord Insurance Company Limite*d [1997] eKLR stated: -

> " The above exposition of the law applies to non-disclosure of material facts, but I suppose the statement will apply with equal force to misrepresented facts. My understanding of the passage above, and I must state at the outset that I agree entirely, it is not every alleged or proved breach which will entitle and insurer to avoid a policy of insurance.
>
> Each case has to be considered on its peculiar facts and circumstances, and the insurers be permitted to avoid the policy if they can be able to show that they have suffered as a result of the non-disclosure or misinterpretation of material facts."

38. Although the present case is based on a contract to offer security services and not a contract of insurance, I am the of the view that the reason in the Pan Atlantic case (supra) is of relevance to the present appeal because the facts and circumstances appear to be analogous.

39. Certainly, not all breaches of the terms of a contract would entitle the innocent party to repudiate the contract. In the Book Law Of Contract In East Africa by P.W. Hodgin, KLB, the learned author dealt with the issue of breach of contract. In a passage cited by the court of appeal in the case of *Edward Mugambi vs Jason Mathiu* [2007] eKLR, he stated as follows: -

> " In deciding whether there has been a fundamental breach of the contract, it is necessary to ask whether it is a condition or a warranty that has been broken. As we saw earlier, it is not an easy task to differentiate between the two. We can say that a condition is a major term of the contract and a breach of such a term allows discharge of the contract, and that a warranty is a minor term that attracts only an award of damages. If the breach goes to the root of the contract and affects its commercial liability, it is said to discharge the contract...............
>
> It is possible for a breach of condition to be treated merely as a breach of a warranty in that the injured party elects to affirm the contract or is compelled because he has already derived substantial benefits from it. In such a case the condition becomes a warranty ex post facto.

40. In the present appeal, the court is called upon to decide whether the adjudicator was right in finding the Appellant liable for breach of contract notwithstanding the existence of a clause in the service contract that the Appellant would not be liable in the event of breach by the Respondent of the conditions set out in the contract to wit: -

    a. The Respondent was advised to remain insured for the duration of the contract.

b. The Respondent was required to lodge complaints against the Appellant in writing within 24 hours of occurrence to enable it deal with the issue.

c. That the Appellant would not entertain any liability if the client has not paid in full any outstanding amount which is payable in advance of the first week of the current month.

41. A simple interpretation of Clause (a) of the contract is that the Respondent was not under a mandatory obligation to insure its property. While it was desirable and maybe beneficial to the Respondent company, this advice, which was a mere recommendation, was not a fundamental term or condition of the contract. In Black's Law Dictionary 2nd Edition, the word "advice" is defined as "to give an opinion or counsel, or recommend a plan or course of action, also to give notice."

42. In the circumstances therefore, I find that the failure by the Respondent to insure its property as advised was not a fundamental breach of the contract that would limit the Appellant's liability in any way.

43. With regard to the question as to whether the failure by the Respondent to issue written notice of the theft of its goods to the Appellant within 24 hours of occurrence of an incident would entitle the Appellant to avoid liability, it is instructive to note that from the outset, the Appellant was made aware of the theft through phone. From the statement made to the police on 2nd October 2022 at 14.35 hours by one Benson Muriithi Kibira, a director of the Respondent company, he received information of the theft at 9.30a.m on 29th September 2022 and immediately called the manager of the Appellant company a Mr. Chege to inform him of the incident.

44. In response, Mr. Chege is said to have sent the company's security men to the site where they confirmed the theft of the goods. From the said witness' statement, it is evident that the Appellant was fully aware of and took active part in the police investigations that ensued from the report of the incident, and they even admitted that the incident did occur.

45. The admission was made through the written statement of George Chege Kaburi who was the Appellant's managing director and who stated: -

> " The Respondent has provided assistance to the police conducting the investigations in the matter and is not aware of any conviction against any of its employees on this matter."

46. Given the circumstances of this case, I find that the failure to issue the 7day written notice did not amount to fundamental breach of the contract as the written notice would not have made any difference to the Appellant which received notice, in less than a day, of the incident and took active part in the investigative exercise that ensued.

47. It is my opinion that an interpretation of a contract is not a rewriting of a contract. I believe that like the court held in the Elius Gachii Karanja (supra), not every alleged breach will entitle the innocent party to avoid the contract. Every contract has its peculiar characteristics. In interpreting the clauses of a contract, the courts cannot be said to be rewriting them.

48. The final question is whether the failure to pay the monthly contractual sum of Kshs. 26,000/= was a fundamental breach entitling the Appellant to avoid liability.

49. I find that clause (e) of the agreement was in simple, clear terms. It gave the Respondent notice that should it default in paying the monthly service fee of Kshs. 26,000/= per night guard, in advance within the first week of the current month then, the Appellant would not entertain any liability.

50. The Respondent has argued that the Appellant cannot rely on clause (e) of the contract to repudiate the contract as it is tantamount to essentially downing its tools. The evidence led before the court is that the Appellant did perform its part of the contract by dispatching its security staff to the Respondent's premises as agreed.

51. It cannot therefore be alleged that the Appellant failed to discharge its obligations under the contract. The fact that the Appellant did not rescind the contract for non-payment does not deprive it of its rights. In any event, clause (n) of the contract covered such eventualities as the obtaining one. The clause states as follows: -

> " Waiver
>
> The waiver by the Security Firm on any breach of this agreement shall not preclude the Security Firm from enforcing any subsequent breach of that or any other term and shall not be considered a waiver of the subsequent breach also."

52. The Appellant opted not to terminate the contract for non-payment. On-payment is a fundamental breach of a contract. Under clause (g) of the contract, the Respondent was under legal obligation to promptly settle the monthly dues which was referred to as "service charge".

53. The Respondent executed the contract with the full knowledge that if it failed to pay the service charge as set out in the agreement, the Appellant would not entertain any liability.

54. The Respondent failed to abide by the said terms and conditions. The theft occurred on the night of 29th September 2022. According to the counterclaim witness statement and statement of accounts produced by the Appellant, the Respondent owed the Appellant kshs.52,000/= as at 12th September 2022. This was two month's arrears since the contract stipulated that service charge payment should be made in advance of the current month before the 5th day of the month.

55. The Respondent was in fundamental breach and the Appellant was entitled to invoke clause (e) of the contract to avoid liability. The Respondent cannot visit the blame for the avoidance upon the Appellant.

56. It is the author of its own misfortunes. As a business, its directors ought to have considered the possible consequences of its failure to make prompt payments for the security services as stipulated in the contract.

57. Regarding the Appellant's counterclaim, the same was proven through the documents filed in court. The learned adjudicator did not address the claim save to casually dismiss it on account of breach. After the incident, the Appellant continued to offer security services to the Respondent who enjoyed the same. The Respondents did not rescind the security service for breach.

58. For the above reasons, this appeal must succeed. I hereby set aside the judgment and award of the learned adjudicator. Instead, I substitute it with a judgement in favor of the Appellant. I therefore make orders setting aside the judgement of the learned adjudicator and enter judgement in favor of the Appellant for the sum of kshs 187,447/= plus costs and interest.

59. The Appellant shall have the costs of this appeal assessed at Kshs. 50,000/=.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 5TH DAY OF AUGUST 2024.

A.C. BETT

JUDGE