Ecobank Kenya Limited v Bob Morgan Services Limited (Commercial Appeal E058 of 2020) [2023] KEHC 2453 (KLR) (Commercial and Tax) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2453 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E058 OF 2020

FG MUGAMBI, J

MARCH 17, 2023

BETWEEN

ECOBANK KENYA LIMITED ..... APPELLANT

AND

BOB MORGAN SERVICES LIMITED ..... RESPONDENT

JUDGMENT

Brief Facts

1. This is an appeal against the decision of the Chief Magistrates Court Nairobi delivered by Hon L.L Gicheha on 15th September 2020. The appellant *vide* a plaint dated 19th February 2015 instituted a suit against the respondent seeking judgment for Kshs 15,592,586. The appellants case in the lower court was that the appellant had parked its motor vehicle registration number KBW 608H at Eco Towers Nairobi where the respondent had been contracted to provide security. It was the appellant's contention that the respondent vide its employees negligently allowed the said motor vehicle to be stolen. The appellant faulted the respondent for failure and neglect by its employees to give security services.

2. The matter proceeded to full trial and the learned magistrate dismissed the appellants case on the grounds that the appellant could not recover under the contract between the respondent and Eke Property Limited.

3. The Appellant being aggrieved with that decision vide its Memorandum of Appeal dated 14th October 2020 appealed to this court on the grounds that;

    i. The Learned Magistrate misconstrued the nature of the suit before her as one of breach of contract when the suit before her was based on negligence of the Defendant's employees and brought by the Insurance Company under the doctrine of Subrogation.

ii. The Learned Magistrate erred in law and fact by failing to evaluate the evidence before her which unequivocally showed gross negligence and willful misconduct by the Defendant's employees.

iii. The Learned Magistrate erred in law and fact in that she disregarded the written submissions submitted by the Appellant thus resulting to a miscarriage of justice.

iv. The Learned Magistrate erred in law and fact by failing to evaluate the entire evidence on record thus arriving at an erroneous finding.

v. The Learned Magistrate erred in law holding that even if she were to allow the suit, she would grant the Appellant Kshs. 10,000.00 when the Court of Appeal in Civil Appeal No.114 of 2015 - *Securicor Security Services Kenya Limited v Consolidated Bank of Kenya Limited* affirmed the decision of the High Court in *Consolidated Bank of Kenya Limited v Securicor Security Services Kenya Limited* (2013) eKLR that Courts cannot allow unreasonable exclusion cannot clauses on liability

vi. The Learned Magistrate erred in law in failing to find the Defendant vicariously liable for the negligent acts of its employees.

4. The orders sought in the appeal are as follows;

a. This Appeal be allowed with costs

b. This Honourable Court sets aside the Judgement of the Subordinate Court delivered on 15th September 2020.

c. This Honourable Court be pleased to re-assess and re-evaluate the entire evidence on record and arrive at its own independent conclusion and grant the Appellant the Orders sought in the plaint dated 19th February 2015

Appellant's submissions

5. The parties canvassed the appeal by way of written submissions. The thrust of the appellant's appeal is that the learned trial magistrate misconstrued the suit before her as one of breach of contract. The appellant submit that the suit was based on negligence of the defendant's employees and the right of the appellant to claim compensation under the doctrine of subrogation. Counsel further submitted that this court had an obligation to determine the suit based on whether the appellant had made out its case for negligence as no party had pleaded breach of contract.

6. It was the appellant's submissions that the learned magistrate had failed to evaluate the evidence presented before court which demonstrated gross negligence and willful misconduct on the part of the respondent's employees. That there was error in failing to hold that the car was stolen out of the willful misconduct of the respondent's employee who allowed strangers to enter the suit premises and drive out with the appellant's motor vehicle. Counsel further submitted that the learned magistrate erred in law in failing to find the defendant vicariously liable for the negligent acts of its employees and that the theft of the appellant's vehicle arose out of the acts of the guard who was an employee of the respondent.

Respondent's submissions

7. The respondent submitted that the court had rightfully applied its mind in examining the issue of contract which was critical in determining the nexus between the appellant and the respondent.

Counsel submitted that it was important to establish that there was a relationship between the parties that gave rise to breach of duty of care.

8. It was further submitted that the contract between the parties provided that security services would not be extended to third parties and therefore the appellant ought to have pursued Eke Properties Limited as owners of the property for the loss. Counsel submitted that the appellant had failed to produce evidence showing that the respondents employees were grossly negligent or willfully misconducted themselves leading to the loss of the vehicle.

Analysis

9. It is the law that this court as the first appellate court has a duty to re-evaluate the evidence and to draw its own conclusions. See *Selle v Associated Motor Boat Co Ltd.* I have considered the pleadings and rival submissions by the parties. The grounds of appeal in my view, raises one key issue being whether this suit is founded on the doctrine of subrogation and whether the appellants can successfully claim against the defendant under this head and to what extent.

10. The doctrine of subrogation is the right that an insurer who has paid for a loss has to recover the loss and receive the rights and benefits of the insured against third parties. For an insurer to be subrogated to the rights of an insured the latter must have been indemnified by the former. The subrogation is therefore founded on an initial contract of insurance. In absence of the policy or a credible explanation for its absence, the claim under insurance has no foundation.

11. Order 2 rule 1 of the *Civil Procedure Rules* requires that:

> Every pleading in civil proceedings including proceedings against the Government shall contain information as to the circumstances in which it is alleged that the liability has arisen and, in the case of the Government, the departments and officers concerned. (emphasis)

12. The upshot of Order 2 rule 1 is the well settled principle that Courts of law make determination of issues raised in pleading or issues brought by the parties for determination. This principle, that parties are bound by their pleadings has been the subject of numerous decisions including the Court of Appeal decision in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 8 others* [2014] eKLR where the court cited with approval the following passage:

> "The appellant cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir jack Jacob entitled "*The present importance of pleadings*". The same was published in [1960] Current legal problems, at P174 whereof the author had stated;
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> > "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleading.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one

> of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice..... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called: Any other business" in the sense that points other than those specific may be raised without notice."

13. I find this passage very relevant to the present suit. I have looked at the plaint, the particulars pleaded and the prayers sought. There was no pleading to the extent that the claim was a subrogation claim on the material loss. To answer the question on whether the learned trial magistrate misdirected herself to the nature of claim, one only needs to go back to the plaint. As pleaded, the suit was based on negligence. With respect this was not a claim on breach of contract.

14. The appellants waited until they had filed their witness statements before the learned trial magistrate to invoke the doctrine of subrogation. The appellant then purported to lead evidence as if he had properly pleaded his case. Every claim under the law of insurance relies on the existence of a contract of insurance defined in an insurance policy. It is on this basis that the insurance contract between the appellant and Sanlam Insurance Company was produced in evidence.

15. Up to that stage the appellant had not pleaded that his claim was under the doctrine of subrogation and nor had his pleadings shown that he was insured and had received payment from his insurance. There was no reference to the insurance policy. It is no wonder the learned trial magistrate reached the conclusions that she did.

16. Having found that the plaint discloses a suit based on negligence and not on subrogation, I now turn to answer the question on whether the claim by the appellant ought to succeed.

17. From the facts pleaded, the defendant was contracted to provide security for Eke Property Limited and the same was sealed by a contract. The appellant was not party to this contract. There was therefore no nexus between the appellant and the respondent. For these reasons, I find that the appellant has not established that the respondent owed it duty of care. Under the circumstances, the appellant ought to have recovered his loss from Eke Property Limited. Since the appellant has already received compensation for his loss, the law of insurance does not entitle one to double compensation. For these reasons this appeal is dismissed with costs to the respondent.

SIGNED, DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 17TH DAY OF MARCH 2023

F. MUGAMBI

JUDGE