Factory Guards Limited alias Factory Guards K Limited v Bergmiier (Civil Appeal 624 of 2019) [2023] KEHC 20546 (KLR) (Civ) (14 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20546 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 624 OF 2019

CW MEOLI, J

JULY 14, 2023

BETWEEN

FACTORY GUARDS LIMITED ALIAS FACTORY GUARDS K LIMITED ..... APPELLANT

AND

UWE BERGMIIER ..... RESPONDENT

(Being an appeal from the judgment of Hon. D.O. Mbeja (SRM) delivered on 30th September, 2019 in Nairobi Milimani CMCC No. 3188 of 2015)

JUDGMENT

1. This appeal emanates from the judgment delivered on 30th September, 2019 in Nairobi Milimani CMCC No. 3188 of 2015. The suit was commenced by way of a plaint filed on 20th July, 2015 by Uwe Bergmiier, the plaintiff in the lower court (hereafter the Respondent) against Factory Guards Limited aka Factory Guards K. Limited the defendant in the lower court (hereafter the Appellant). The claim was for general damages, the sum of Euros 9,160, and costs and was founded on negligence and/or breach of contract on the part of the Appellant.

2. The Respondent averred that on 25th September, 2009 he entered into a Guard Service Contract with the Appellant for the provision of day and night security services at his residence situated along Kitsuru Road, House No. 1.4A (the subject premises). That it was a term of the contract that the Appellant would at all material times ensure that both the Respondent's residence and his properties therein would be secure. That on the 18th of March, 2014 at about 2.35am the house was broken into and the Respondent's family robbed of items valued at Euros 9,160. The Respondent pleaded that he reported the matter to the police and investigations were conducted. The Respondent attributed the loss of items on failure on the part of the Appellant and/or its agents to prevent the incident to negligence.

3. The Appellant filed statement of defence on 17th August, 2015 denying the key averments in the plaint including the existence of a service contract between itself and the Respondent. The suit proceeded to full hearing during which both parties adduced evidence. In its judgment, the trial court found in favour of the Respondent and entered judgment in the sum of Euros 9,160 plus costs of the suit and interest.

4. Aggrieved with the outcome, the Appellant filed the memorandum of appeal dated 29th October, 2019 challenging the decision of the trial court on the following grounds:

> " 1. That the learned trial magistrate erred in law and in fact in finding that the Appellant was indebted to the Respondent as per the sum claimed in the Plaint on the basis of a mere list of items and their estimated value alleged by the respondent without any proof of the same.
>
> 2. That the learned trial magistrate overstepped his mandate by diverting his entire judgment to address the issue of breach of contract by the appellant when the respondent's cause of action against the appellant as framed in the plaint was one based on negligence.
>
> 3. That the learned trial magistrate erred in law and in fact by failing to determine the issue as to whether the appellant was negligent in his duty to the respondent which was the main issue at the centre of the suit and as per the respondent's list of issues and submissions.
>
> 4. That the learned trial magistrate erred in law and in fact by finding that the appellant was indebted to the respondent for the sum claimed in the Plaint based on the hearsay testimony of a single witness which did not prove any negligence against the appellant or prove loss of items listed in the plaint.
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> 5. That the learned trail magistrate erred in law and in fact by disregarding the appellant's submissions on liability and quantum and wholly relying on the respondent's submissions in arriving at his decision.
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> 6. That the learned trail magistrate erred in law and in fact by considering irrelevant factors and leaving out relevant ones in arriving at his judgment.
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> 7. That the learned trail magistrate judgment was arrived at in a cursory and perfunctory manner without properly analyzing the respondent's cause of action and evidence presented in support of the same and his decision against the appellant was devoid of any merit, unproven and based on hearsay evidence." (Sic)

5. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decisions in Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) and Benjamin Mwenda Muketha suing as the legal representative of Mercy Nkirote v Abdikadir Sheik & 2 others [2018] eKLR to argue that the testimony by the Respondent was mere hearsay having been absent from the subject premises on the material day, the evidence could not be the basis for a finding of liability against the Appellant. Counsel submitted that in the present instance, the Respondent did not prove his case against the Appellant on a balance of probabilities and hence the trial court ought to have dismissed it with costs.

6. On that score, counsel relied on the case of Nyoike Joel & another v Benard Mutheke Munyoki & another (suing as the personal representatives of the late George Munyoki Mutheke) [2021] eKLR. It was submitted that whereas a service contract existed between the parties, the Respondent did not adduce any evidence to prove the particulars of negligence pleaded or establish the value of the items which were purportedly stolen from the subject premises. Moreover that the Respondent did not produce the police abstract in proof of the averment that a report was made concerning the theft and nature of the items purportedly to have been stolen. On that basis, the court was urged to allow the appeal and to set aside the decision by the trial court.

7. The Respondent on his part defended the trial court's findings in his favour. Counsel cited Section 107 of the *Evidence Act* as well as the decision in Jubilee Insurance Company of Kenya Ltd v Zahir Habib Jiwan & another [2017] eKLR to assert that proof of the theft and items stolen a well as their value was tendered at the trial. Counsel further contended that the finding by the trial court was based on both breach of contract and negligence, the particulars of which were proved by the Respondent to the required standard. Reference was made to the decision in Tembo Investments Limited v Josephat Kazungu [2005] eKLR and Mitchell Cotts (K) Ltd v Musa Freighters [2011] eKLR in that regard.

8. Additionally, it was contended that the trial court considered the submissions by both parties in its decision, and all relevant factors, thereby arriving at a sound decision. The court was therefore urged to dismiss the appeal and to uphold the decision by the trial court.

9. The court has considered the memorandum of appeal, the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

10. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

11. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court's view the appeal turns on the twin issues being whether the trial court misdirected itself in entering judgment in favour of the Respondent; and whether the trial court acted correctly in awarding the sums sought on the value of the stolen items. Pertinent to the foregoing are the pleadings, which

form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

12. The Respondent by his plaint averred at paragraphs 3,4,5,6,7 and 8 that:

> "
>
> " 3. On 25th September, 2009 the plaintiff entered into a Guard Service Order contract with the defendant for provision of one night and one day guards at his Residential premises situate along Kitsuru Road House no 1.4A.
>
> 4. It was an express and implied term of the said contract that the defendant will provide all the necessary security and ensure the plaintiffs premises and all items within are secure.
>
> 5. On 18th March, 2014 at 0235hrs while the plaintiffs family was asleep, thugs armed with weapons broke their door and tied the plaintiffs wife and children with ropes and robbed them while stealing several items including the following;
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> ...
>
> The plaintiff claims the value of the said items at Euros 9,160/= or its equivalent in Kenya shillings.
>
> 6. The plaintiff promptly reported the matter to the police and investigations were conducted.
>
> 7. The plaintiff squarely blames the defendant and its guards for their negligence and failure to stop the incident.
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> ParticularsofNegligence
>
> A) Being away from duty and staying away from place of work.
>
> B) Failing to notice or see the thugs entering the plaintiff's compound and or to raise alarm or alert the plaintiff.
>
> C) Failing or neglecting to press or raise the alarm for prompt response.
>
> D) Colluding with the thugs.
>
> E) Failing to stop the robbery incident.

F) Being asleep on duty.

8. The plaintiff has suffered great trauma and psychologically for the experience his family underwent and prays for damages. ” (sic)

13. The Appellant filed a statement of defence denying the key averments in the plaint by stating as follows in paragraphs 4,5 and 6:

“

“ 4. Without prejudice to the foregoing, the defendant denies the averments made at paragraph 7 of the plaint and in particular that the defendant and its guards were to blame for their negligence. The particulars of negligence set out in Paragraph 7(A-F) are all denied as if they were set out herein and traversed seriatim.

5. In the alternative and without prejudice to the contents of paragraphs 2,3 and 4 above, the defendant states that if any loss occurred as pleaded by the plaintiff or at all (which is denied), the plaintiff is fully to blame for or substantially contributed to the same by his negligence.

Particulars of Negligence of The Plaintiff

i) Leaving his premises open.

ii) Leaving his premises without taking reasonable steps to have his properties protected.

iii) Failing to raise alarm or alert security in time or at all when thugs came onto his compound.

iv) Failing to take the known and/or advised security measures to avoid the incident.

6. In the alternative and without prejudice to the foregoing, the defendant states that if such incident occurred, it was under circumstances beyond the control of the defendant and/or its guards and/or outside the alleged service order.” (sic)

14. The trial court after restating and examining the evidence found that the existence of a contractual relationship between the parties was established and that by failure on the part of the Appellant’s employee(s) to give adequate warning on the invasion of the subject premises and theft comprised a breach of the contract, making the Appellant liable. The trial court further found that the Appellant’s employee(s) had failed in their duty to exercise reasonable care and skill. The trial court therefore allowed the sums sought in the plaint.

15. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay squarely on the Respondent. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:

“ [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that

the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

16. From a reading of the pleadings, it is apparent that the Respondent's cause of action was founded on negligence arising out of a contractual relationship subsisting between the parties at all material times. The court notes that the trial court did not address its mind to the question of negligence, and limited itself to the issue of breach of contract.

17. Suffice it to say that at the hearing of the suit, the Respondent who was PW1 adopted his witness statement as his evidence-in-chief and produced his bundle of documents as P. Exhibits 1-4. He then stated that he had entered into a contract with the Appellant and that following the theft incident, the matter was reported to the police.

18. In cross-examination, the Respondent stated that he was out of the country at the time of the incident but that he made the report at Spring Valley Police Station and was issued with a police abstract. The Respondent also stated that the night security guard's shift ran from 6pm into the night, but that the said guard was only armed with a security alarm button, which his family was unable to access on the date of the incident. That the five robbers were armed with crude weapons and having broken into the subject premises, threatened his family and made off with the items listed in the plaint while the security guard went into hiding only resurfacing later on. It was his evidence that it took more than one hour for other guards to respond to the incident, and that he has never received a response from the police on the outcome of the investigations.

19. Sara Halake Adi, an employee of the Appellant, testified as DW1. He testified that he was on duty on the material date and that upon the intrusion by the thugs, he hid in the flower garden but pressed the security alarm button and waited for the alarm response team to arrive at the scene. That he was not armed and there was nothing more he could do given the number of the robbers.

20. In cross-examination, the witness stated that he was awake and alert when the thugs who were about 10 in number broke in. That following the incident, he too recorded a statement at the police station. That the thugs took off with goods from the subject premises. During re-examination, it was his testimony that the thugs were in the subject premises for about one hour.

21. From its re-examination of the pleadings and material on record, it is clear that the parties herein had a contractual relationship at all material times. The Respondent tendered as P. Exhibit 1 a Guard Service Order Contract dated 25th September, 2009 to show that he has engaged the services of the Appellant to provide security services in the form of one (1) day and night guard respectively. It is apparent that the said services were rendered to the Respondent by the Appellant through its employees, at all material times including the date of the incident.

22. On the question whether the particulars of negligence were established against the Appellant's employee, the court observes that the Respondent who was the sole plaintiff witness at the trial was not present in the subject premises on the material date and hence his testimony constituted hearsay evidence. The Respondent did not call his wife, children or any other person who witnessed the incident to testify.

23. Moreover, although the Respondent stated that he reported the matter to the police and was issued with a police abstract, he did not tender a copy of the same or state the outcome of police investigations

if any. Similarly, the Respondent did not tender any report or credible documentation in respect of the alleged stolen items and their value. These omissions notwithstanding, the trial court proceeded to find that the Respondent had proved its case on a balance of probabilities.

24. The court is of the view that the finding by the trial court was not based on admissible and credible evidence by the Respondent. The Respondent's evidence did not warrant a finding of liability whether on alleged negligence or breach of contract, and no facts were established from which any inference of negligence could be made against the Appellant and therefore call for a rebuttal. See Nandwa v Kenya Kazi Ltd [1988] KLR 488 and Karugi & Another v Kabiya & 3 Others (supra).

25. While there is no indication that the trial court ignored the submissions filed by the Appellant before it, it is clear that the finding of liability against the Appellant was without evidential foundation and cannot stand. In the circumstances, this court must interfere with that finding by setting it aside. Consequently, it will serve no purpose for the court to address the issue of quantum.

26. In the result, the appeal is hereby allowed and the judgment of the trial court is hereby set aside. The Court substitutes therefor an order dismissing the Respondent's suit with costs. The costs of the appeal are awarded to the Appellant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Bore h/b for Mr. Waweru

For the Respondent: N/A

C/A: Carol