



**Onix Computer Services v National Social Security Fund Board of Trustees;
Gillys Security and Investigations Limited (Third party) (Civil Suit 636 of 2015)
[2023] KEHC 22041 (KLR) (Commercial and Tax) (4 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 636 OF 2015
JWW MONG'ARE, J
SEPTEMBER 4, 2023**

BETWEEN

ONIX COMPUTER SERVICES PLAINTIFF

AND

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES . DEFENDANT

AND

GILLYS SECURITY AND INVESTIGATIONS LIMITED THIRD PARTY

JUDGMENT

1. By a plaint dated 1/10/2015, the Plaintiff filed a suit against the defendant seeking the following prayers;
 - a) Special Damages for the loss of office machines amounting to Kshs.2,758,000/-.
 - b) Present value of assets Kshs.5,507,560.52/-.
 - c) Damages for the loss of business amounting to Kshs.19,823,411.38/-.
 - d) Loss of goodwill of Kshs.3,000,000/-.
 - e) Costs of the suit.
 - f) Interest on the above at commercial rates from the date they became due.
 - e) Any other relief the Honourable court deems appropriate.”



2. The Plaintiff's case was that at all material times it was a tenant at View Park Towers in Nairobi while the Defendant was the lawful owner of the premises and its landlord. That as a result the tenancy relationship was governed by a lease agreement signed by the parties, directives were issued by the landlord and customs/practices in the administration of the building.
3. It was a condition of the lease agreement that any equipment being removed from the building had to be accompanied by a detailed gate pass with the description, including the serial number of the item(s) being removed, prepared and issued by the managing agents and signed by the tenant. It was the plaintiff's case that in spite of the above condition being a standard operating procedure for all the tenants in the premises, on 17/1/2012, the Defendant's agents in charge of security, without the authorization from the Plaintiff, carried away assorted computers and other items from the Plaintiff's premises valued at Kshs.2,758,400/-.
4. As a result of the said actions of the Defendant, the Plaintiff contends that it has incurred loss of business valued at Kshs.19,823,411.38/- resulting from the loss of assets as at the time of filing this suit and a further loss of goodwill valued at Kshs.3,000,000/-. To replace the lost assets, the plaintiff claims that at the present market value is Kshs.5,507,560.52/-, which it seeks compensation from the Defendant.
5. During the trial the Plaintiff called 2 witnesses to testify. PW1 was Wavinya Ndeti, a director of the Plaintiff. She adopted her witness statement dated 16/12/2017 as evidence. She testified that in the lease agreement signed by the Plaintiff and the Defendant, it was a requirement that for a tenant to be allowed to order to take any item out of the building, the Defendant would issue a gate pass containing a description and serial number of the equipment being removed from the building and the Plaintiff would sign the pass. She however confirmed the said procedure was not followed by the Defendant and the Defendant said they would pay the Plaintiff and surcharge the 3rd party.
6. PW2 was Valeria Rading who had recorded her witness statement on 27/2/2020 and adopted the same as evidence in chief. She testified that she is an actuary by profession and that she prepared a financial prospectus for computer services which is found in the Plaintiff's bundle of documents.
7. On cross examination she testified that she prepared the said report on 1/9/2015 but she was not licensed to practise as an actuary in 2015. That she used annual financial reports provided by the Plaintiff as the basis for the prospectus but she did not know who made the Plaintiff's reports and that in 2012, the Plaintiff should have made a profit of Kshs.5.9 million, therefore the total profit lost was Ksh.5.9 million.
8. The Defendant filed a statement of defence dated 2/2/2016. In its statement of defence the Defendant averred that indeed the parties had a lease agreement which specifically indemnified it from the claims posed by the Plaintiff and that it was always incumbent upon the Plaintiff and any other tenant in the premises to ensure that their assets and equipment's were fully ensured against any eventualities.
9. Without prejudice to the foregoing, the Defendant averred that it had employed a security firm, the 3rd party herein, to provide security services at the premises. That its contract of engagement with the 3rd party totally indemnified it from any form of liability arising from the kind of matters alleged by the Plaintiff.
10. Further the Defendant denied undertaking to settle the Plaintiff's claim and that the Plaintiff was merely looking for an excuse not to pay the huge rent arrears that they have been accumulating which it would seek to recover. The Defendant relied on one witness, Isaac Koskei, its security officer who testified as DW1. DW1 testified that it was a term in the lease agreement that tenants must insure



all their properties against any risk including that of theft and burglary and that the tenant must indemnify the landlord fully against any losses arising from the loss of the tenant properties while in the premises. Further that the contract for security services stipulated that the security company would indemnify the Defendant against all losses arising directly or indirectly from the provision of their services.

11. The 3rd party herein also lodged a statement of defence dated 15/5/2018. The 3rd party denied that there was a valid contract for provision of security services between itself and the Defendant as the purported agreement was never stamped and registered as required by law. Without prejudice to the foregoing, the 3rd party averred that if there was a valid contract between it and the Defendant, there was no liability to indemnify the Defendant for losses incurred by tenants.
12. It was asserted that the Plaintiff was responsible for the theft of its property and is not entitled to compensation by the Defendant. In the alternative, without prejudice to the above assertions, the 3rd party averred that the Defendant had admitted at paragraph 5 of its defence that the lease executed between themselves and the Plaintiff provided an indemnity for this kind of claim therefore there could not be another legal indemnity provided by the 3rd party for the same actions and any purported indemnity imposed on the 3rd party by the Defendant is null and void.
13. Having analysed the entire record, the issues for determination are:-
 - 1) Whether the Defendant is liable to the Plaintiff for the loss of property which occurred at the Defendant's premises at View Park Towers.
 - 2) If so, whether the Defendant is entitled to indemnity from the third party.
 - 3) Whether the Plaintiff suffered loss and damage and to what extent as a result of the loss of property.

Issue 1: Whether the Defendant is liable to the Plaintiff for the loss of property which occurred on 17/1/2012.

14. Parties agree that at all material times, the Plaintiff was the Defendant's tenant at View Park Towers Nairobi while the 3rd party was contracted by the Defendant to carry out security services. Further, from the record it is not in dispute that the Plaintiff's items were taken away and/or stolen from its shop at the premises on 17/1/2012 causing losses to the Plaintiff.
15. The Plaintiff's case is that the Defendant's agents, the 3rd party, manning the security desk on the material day allowed their property to be removed from the premises without prior authorization from the Plaintiff as was required under the lease agreement. Annexure 4 to 18 of the Plaintiff's bundle of documents comprises of correspondence between the parties herein after the incident of 17/1/2012 which I have analysed.
16. In summary the Plaintiff placed blame on the 3rd party who was in charge of security for the theft of its goods. The Director of Criminal Investigations(DCI) also placed blame on the security supervisor for his failure to use all means to prevent the theft and charged him accordingly as evidenced in the letter dated 24/4/2012 found on page 16 of the Plaintiff's bundle.
17. Further the 3rd party proceeded to engage its insurance company, Jubilee Insurance, to process the Plaintiff's claim. Jubilee insurance then obtained the service of a loss adjuster to process the loss as claimed by the Plaintiff. There are various letters from the Defendant and/or the 3rd party requesting for further documentation on the stolen items from the Plaintiff in order to process the claim in its



favour. For instance there is a letter dated 11/7/2012 on page 24 of the bundle from the 3rd party addressed to the Defendant where it states in part:

“From the report it is indicated that Onix Computers has not provided the information needed by the Loss Adjusters to enable them to fast track the process. We would request that you impress upon Onix Computers to speed up the supply of the required information to the adjusters for speedy processing of the claim.”

18. It appears that the 3rd party had accepted liability for the theft of the Plaintiff's goods and had even gone ahead to claim cover from its insurers. However, the correspondence indicates that such compensation from the 3rd party was not paid at all despite various requests from the Plaintiff and Defendant.
19. My understanding is that the Defendant had the responsibility to provide security services to the Plaintiff under the lease and in so doing obtained the services of the 3rd Defendant. The practice in the building was that a gate pass, authorised by a tenant, was required before items could be carted out of the premises. In the instant case, it is clear that the 3rd party failed and/or neglected to do this on the material day but accepted liability to compensate the Plaintiff for the losses caused and even engaged its insurance company to indemnify it.
20. I find therefore that the 3rd party cannot now deny having liability having accepted it earlier. Further, I note that under clause 5.6 of the contract between the Defendant and the 3rd Party, the 3rd Party assumed entire responsibility and indemnified the Defendant against all losses, liabilities, claims, costs and expenses arising directly or indirectly out of or in connection with the service under the agreement.
21. This answers issue 2 and 3.

Issue 3: Whether the Plaintiff suffered loss and damage and to what extent as a result of the loss of property.

22. The Plaintiff submitted that the total cost of items picked from the Plaintiff's premises was valued at Kshs.2,758,000/- and the present value of the items at the time of filing suit was Kshs.5,507,560/-. Further that the loss of business opportunity amounted to Kshs.19,823,411. The Plaintiff relied on PW2's expert report in arriving at the aforementioned values.
23. The Defendant poked holes in the said report arguing that PW2 testified that she was not independent and that she prepared the report in 2015 when she was not licensed to practise as an actuary. Further that the evidence of the expert witness is based on the annual financial statements provided which were also expert evidence and their makers were not called to produce them. No explanation was provided as to why the makers were not called to produce and therefore they have no evidential value since they amount to hearsay. Therefore, they are inadmissible.
24. It is trite law that a claim for special damages must be specifically pleaded and proved before they are awarded by the court. In the case of *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR the court held:-

“In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court.

...

A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough



for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test.”

25. Guided by the authority above, I note that the Plaintiff has not provided proof of the cost of the stolen items which could be through purchase documents such as receipts. The much that has been shown to this court is an inventory of the machines stolen as seen on page 12 of the Plaintiff's bundle of documents. This cannot be used to ascertain the actual cost and the loss occasioned to the Plaintiff. I therefore find that the Plaintiff has not proved its entitlement the special damages that claimed in the Plaintiff.
26. The Plaintiff also claimed damages for the loss of business amounting to Kshs.19,823,411.38/-. This figure was derived from PW2's report which was essentially a predictive analysis of the Plaintiff's business growth and turnover and was based on the Plaintiff's financial reports for the year 2010 and 2011. In the case of Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR it was held:-

“It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence.” An expert report is therefore only as good as the assumptions on which it is based.”
27. The said financial reports were provided by the Plaintiff and PW2 was not aware who had prepared them nor was the author of such reports called to testify in court on the said financial reports. The opinion of an expert ought to be based on facts which are proved to the required standard. Based on the foregoing, I find and hold that the Plaintiff has not established its claim under this heading and is therefore is not entitled to the claim of loss of business as stipulated in PW2s evidence.
28. On the claim for loss of goodwill worth Kshs.3,000,000/-, the Plaintiff has not provided an iota of evidence to support this claim. No material was placed before the court to ascertain that indeed the plaintiff had incurred a loss of goodwill or at and more so how the same was ascertained to be the sum of Kshs.3,000,000/- as pleaded in the plaint. The prayer for payment of goodwill is therefore dismissed.
29. In conclusion therefore the court finds while the Plaintiff has established that the Defendant was liable to compensate it for the loss of its goods on account of breach of terms of the lease agreement, the Plaintiff has not been able to prove the claims for special damages or loss as required by the law. Indeed, there was negligence on the part of the 3rd part in dealing with the Plaintiffs goods as established in the suit herein. The law however requires that a claim for monetary compensation be proved by evidence specifically. In the present case the Plaintiff has failed to establish its claim for loss to the required degree of proof. The court cannot therefore award the monetary reliefs sought in the plaint.
30. Costs follow the event. The Plaintiff has established their case for breach of the tenancy agreement but failed to establish the monetary claims. The court is satisfied that the Plaintiff, irrespective, is entitled to costs. The same shall be borne by the Defendant who shall be indemnified by the 3rd Party.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2023.



J. W. W. MONG'ARE

JUDGE

In the Presence of:

Ms. Leah Ezekiel holding brief for Willis Otieno for the Plaintiff.

Mr. Muuo holding brief for Mrs Mbaabu for the Defendant.

