



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 162 OF 2014**

**NORTHWOOD SERVICES LIMITED.....APPELLANT**

**VERSUS**

**MAC & MORE SOLUTION LTD.....RESPONDENT**

**KENYA CARGO HANDLING SERVICES**

**LTD STAFF PENSION SCHEME.....2<sup>ND</sup> DEFENDANT**

**LUSTMAN & COMPANY (1900) LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The appellant herein was the 1<sup>st</sup> defendant in the lower court. The plaintiff in the lower court who is now the respondent had sued the appellant alongside two other parties for the sum of Kshs. 1,656,200/= being the value of goods said to have been stolen from the respondent's shop as a result of burglary. Those goods were described in the plaint as assorted 'electrical goods and appliances'.

The respondent blamed the loss on the part of all the defendants therein. After a full trial the lower court found in favour of the respondent herein which decision aggrieved the appellant leading to the present appeal. The memorandum of appeal herein has set out 8 grounds but it shall not be necessary for me address the same in their entirety.

Following directions by the court the appellant filed submissions to address the appeal herein but the respondent did not comply. The tenancy of the respondent therein was challenged on the basis that there was no privity of contract in the form of a tenancy agreement between the appellant and respondent herein.

In finding for the 1<sup>st</sup> respondent herein the trial court said in part as follows,

**“The court is satisfied on a balance of probability that there was a forced entry into the premises on the night of 2<sup>nd</sup> September, 2009. According to the plaintiff, he lost items worth Kshs.1, 656,200/=. He produced a list which the defendant asked the court to reject. The court has seen photographs taken by the plaintiff and presented in court showing the premises. Broken door locks, counters and furniture installed in the office. The plaintiff presented a list of stolen items with their value as presented to the police when the report was made. He had bought the items and costings. No reports were given for the same and according to the defendant authorities, special damages were to be pleaded and proved.**

**If money was stolen, it is not possible for the plaintiff to have wasted time going to the police and filing this suit. The plaintiff has been in business for many years and would know the prices of what was in stores and office. For purposes of proving the loss the court finds the authority presented by the plaintiff sufficient on a balance of probability.**

**Having considered the evidence and submissions, the court finds that the claim as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants has not been proved. The 1<sup>st</sup> defendant as the company providing security are wholly to blame and will pay costs of the other defendants. Judgment will be entered for Kshs. 1, 656,200/= plus costs of the suit and interest.”**

The 1<sup>st</sup> respondent had jointed the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein as owners of the building and management company respectively, in which his shop was situated. Having found that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not to blame, the issue of tenancy should have underscored the relationship between the 1<sup>st</sup> respondent and the plaintiff.

If the appellant herein provided security at the instance of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, it is clear that the negligence of the appellant would

have led to vicarious liability. The appellant was an agent of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and therefore the three cannot be separated.

That notwithstanding, the determination of this appeal shall not depend on whether there was a tenancy between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> defendant in the lower court. The decision will be founded on whether or not the 1<sup>st</sup> respondent proved its case as required under the law and decided authorities.

The only witnesses called by the 1<sup>st</sup> respondent was the owner and or managing director thereof. On the evening leading to the night of the said burglary he was not the last person to leave the office neither was he the first person to report on the following day when the burglary was noticed. The person who last left and who was the first to report on the following day is one Jacob Katonde.

On discovering the burglary Jacob informed the witness who came and took some photographs and prepared an inventory from a stocklist. A report was also made at Parklands police station. Mr. Jacob Katonde was not called as a witness. No police officer was also called as a witness. The 1<sup>st</sup> respondent's case was closed after P.W. 1 had completed his evidence. No one was ever charged with the said burglary.

Of significance are the pleadings as set out in the plaint. It is now trite law that special damages must be specifically pleaded and strictly proved. The goods said to have been stolen from the 1<sup>st</sup> respondent's shop were said to have been purchased locally and some imported. The list produced was said to have been generated from the the stock list. These were not produced yet they would have provided the foundation of the claim. No local purchase orders were availed before the lower court to prove that the goods were purchased locally.

For the goods said to have been imported, no documents whatsoever were produced in evidence to confirm the same. If they were available, P.W. 1 failed to produce the bill of lading, port clearance documents and taxes paid. If he did not have these documents in his possession then his clearing agent would definitely have them. Some goods were said to belong to customers but those goods were not identified neither were the customers called to testify. It is difficult to uphold the evidence of P.W. 1 as proof of loss under such circumstances.

Another curious observation appears in the judgment of the lower court cited above. There was no allegation that some money was stolen, at least from the pleadings. In that regard, the trial court turned itself into a witness to the prejudice of the appellant.

At the end, I find that the 1<sup>st</sup> respondent did not prove to the required standard, the loss pleaded and therefore his suit ought to have been dismissed. It follows therefore that, this appeal is allowed and the judgment of the lower court set aside in its entirety. The appellant shall have the costs of this appeal.

***Dated, signed and delivered at Nairobi this 18<sup>th</sup> Day of October, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**