REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 62 OF 2008

P.N. MASHRU LIMITED ……APPELLANT

VERSUS

HUSSEIN SERVICE STATION…….....RESPONDENT

J U D G M E N T

1. The appellant herein has challenged the judgment of the trial court, MDIVO JB, (SRM) dated 13/3/2008 in the original Mombasa SRMCC 3152 of 2001 on grounds that:

> **i) The learned Magistrate erred in law and in fact in allowing the Plaintiff's Claim as prayed in the Plaint whereas it was clear and plain that the Plaint as filed by the Plaintiff was defective in form and substance.**
>
> **ii) The learned Senior Resident Magistrate was wrong in dismissing the counterclaim and yet the same had been proved on balance of probability as required by law.**
>
> **iii) In the said Judgment dated 13th March, 2008, the Senior Resident Magistrate failed to take into consideration and/or analyse all the issues raised in the pleadings and trial and did not give a considered Judgment.**

2. That judgment was on the suit by the plaintiff, now Respondent, and a counter claim by the Defendant now Appellant.

3. The suit was initiated by a plaint dated 3/7/2001 and seeking judgment in the sum of Kshs.65,630/= on account of **"various professional services rendered to you by our client at your request and instance".** The plaintiff also sought to be awarded costs and interests.

4. In opposition to that claim the defendant filed a defence and counter-claim which denied owing to the plaintiff the sum as claimed or any part thereof and at all and put the plaintiff to strict proof thereof. The counter-claim was grounded upon an alleged loss of Kshs.100,000 occasioned to the defendant when its motor vehicle Registration No. KAM 956L-ZB 8356 parked at the plaintiff's premises was vandalized and two complete wheels lost or stolen. The plaintiff upon service did file a Reply to defence and Defence To the Counter-claim in which it reiterated the claim in the plaint but denied the loss alleged by the defendant. There was an alternative and without prejudice pleading that the arrangement for parking was at the defendant's own risk as to security and that the defendant would arrange for its own security. In effect the defendant denied ever assuming responsibility for the safety of the plaintiffs motor vehicle while so parked.

5. With those pleadings after the pleadings closed, the records reveal that the matter was fixed for hearing at which the plaintiff called one witness one Kioo John Ngula, the manager of the plaintiffs station while the defendant called two witnesses, David Masai Olima, a Claims Manager with the defendant and No. 33823 P.C. James Araya a police officer, then stationed at Changamwe Police Station.

Evidence by the plaintiff

6. PW 1 gave evidence to the effect that during the years, beginning 1999, the defendant did, by way of Local Purchase Orders, request to be supplied with oil products on the understanding that the defendants would effect the supplies and issue invoices with the details of the products supplied and prices thereof and payment would be due at the end of every month after statements of accounts are provided for the month. The arrangement also envisaged a running account which showed a balance of Kshs.65,630 as at 30.11.2000. The witness produced, the Local Purchase Orders, Invoices and Statements of Account as exhibits P1-P3.

7. On the counter -claim the witness admitted that the motor vehicle KAM 956L -ZB8356 trailer was parked at the petrol station but not upon any contract and was so parked at owner's risk courtesy of a warning placed on the wall to the effect that 'VEHICLES DRIVEN & PARKED AT OWNERS RISK'.

8. He conceded that on the 1/11/2000 he received a report from the watchman that the vehicle had its two wheels missing as a result of which the watchman and the turnboy were arrested by the police but he did not follow the case. He denied receipt of any demand letter by the defendant.

9. On cross examination the witness referred to the statement of accounts and admitted that the defendant had been a good customer paying big amount cheques and that there had been no balance upto November 2000.

10. On the loss claimed by the defendant the witness said that the compound used for parking was wall -fensed and security given by a watchman whom he said was sufficient. He admitted that the defendant paid parking fees of Kshs.200/= for the night. He was then shown 3 letters dated 18/3/2001, 25/4/2001 and 18/6/2001 from the defendant and demanding payment of Kshs.100,000/- from the plaintiff. He said the letters were to the plaintiff's Managing Director and that he was with the managing director. He however maintained that the plaintiff was not liable to the defendant for the loss because of the Notice that the parking was at owner's risk. The ensuing re-examination largely dealt on the discrepancies on the description of the motor vehicle in the three letters of demand. To this court such discrepancies did not go to the root of the dispute since the loss was acknowledged.

Evidence by the Defendant/Counter Claimant

11. DW 1, the defendants claims manager, admitted that the defendant owed to the plaintiff the sum of Kshs.65,000/= but maintained that the defendant declined to pay because they had a claim as against the plaintiff in the sum of Kshs.100,000/= on account of the loss to their motor vehicle while parked at the plaintiffs premises. He then produced a police abstract to the effect that on the 1/11/2000 two wheels were lost from their motor vehicle while parked at the plaintiff premises together with a quotation from a dealer on the cost of replacement at Kshs.100,000 as exhibits DEXH 1 & DEXH 2. He therefore prayed that the claim be dismissed and the counter claim allowed as prayed.

12. On cross examination and when shown the receipts for parking he confirmed that there was not in it any reference to security but that it was agreed in their conversations. He however denied that there were ever posted any notices that parking was at owners risk as alleged by the plaintiff.

13. DW 2 No. 33823 P.C. James Ayara was an officer from Changamwe Police Station where the theft was reported and the person who received the report. His evidence was that the vehicle had been parked there on 31/10/2000 and left in the custody of the plaintiff who could not explain now the wheels got lost. He said the watchman and turn boy were arrested and questioned but no criminal prosecution was preferred because there was no evidence showing their involvement in the theft.

14. In cross examination he said that he visited the scene the same day and arrested the watchman and the turnboy but later released the two. He however maintained that the station, on account of parking fees was obligated to ensure the security of the motor vehicle.

Submissions by the parties

15. After production of evidence was closed, parties then addressed orally the court on their respective cases. The plaintiff took the view and submitted that its claim had been admitted by the DW 1 and therefore it was entitled to judgment as prayed.

16. On the counter-claim, the plaintiff reiterated its defence that there was no obligation on it to provide security as vehicles were parked at owners risks as shown on the Notices displayed court the premises.

17. Curiously though and contrary to the evidence by the three witnesses the plaintiffs advocate submitted that there was no arrest as a result of the theft and again that there was no consideration for the services rendered. He prayed that the counter-claim be dismissed with costs. He added that the counter-claim was improperly filed in the suit and was thus misjoinder of causes of action and ought to have been raised separately in a different suit.

18. For the defendant, it was submitted that the plaintiffs claim was defective in that it did not have a date the debt was incurred and further that defect could not be cured by production of evidence. On the counter-claim the counsel submitted that there having been no tenant/landlord relationship, the duty to provide security was therefore inferred upon plaintiffs and hence, the theft was the plaintiffs liability since the defendant had paid the agreed parking fees. He prayed that the suit be dismissed and counterclaim allowed with costs.

19. When given a chance to respond to the defendants submissions, limited to the question of law raised on the defect on the plaint, the plaintiffs counsel took the view that the plaintiff gave brief statement as envisaged by the then **Order VI Rule 3 and 8 Civil Procedure Rules** and that the defendant had the right to request for particulars but opted not to request. He stressed that there was sufficient evidence to prove the plaintiffs claim.

20. Having received the evidence and submissions and in a reserved but very brief judgment dated and delivered on the 13/3/2008, the court found and held in a very brief judgment:-

> **"On the issue of the counterclaim first, there is no proof that the plaintiff owed the defendant a duty of care as regards safeguarding the vehicles, no security contract. Secondly, their own witness has confirmed that he held the station watchmen and turn boy and later released both for lack of evidenced, so even vicarious liability that would have accrued if their employee was the thief does not accrue. Thirdly, it is a separate claim. Let them file a suit and prove their claim. The counterclaim is dismissed.**
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> **As for the services rendered, the court finds that from the L.P.Os and the invoices raised, the plaintiff has proved their claim and their prayers are allowed as prayed in the plaint. Interest thereon to accrue at court rates from the date of filing the suit".**

Analysis and determination

21. This being a fast appeal, the mandate and duty of the court is to reappraise and reexamine the entire evidence afresh and come to own conclusions while being aware that it did not see and observe the witnesses as they testified.

22. This appeal faults the trial court on 3 grounds all of which can be seen to ask the question '*whether or not the trial court was right in the manner it found by allowing the Respondent's suit and dismissing the counter-claim'*.

23. To determine the appeal the court has posed for itself the following questions for determination and will seek to answer them seriatim

i) Did the plaintiff prove its cause and claim against the defendant?

ii) Did the plaintiff in allowing the defendant to park its motor vehicle in the plaintiffs premises at a fee incur any obligation to ensure its safety and security?

iii) Did the Defendant incur any loss by reason of the motor vehicles' two complete wheels being stolen or just lost while at the parking?

Did the plaintiff prove its cause and claim against the defendant?

24. Granted that the plaint pleaded a claim based on the alleged 'professional services' but led evidence that the sum was indeed for goods sold and delivered, that claim was, on oath unequivocally admitted by the Defendants witness, DW 1 in so certain and plain language.

25. This court proceeds from the standpoint that the duty of the court is to establish the truth of the dispute between the parties based on the evidence adduced. That Order 2 Rule 6 forbids a party from departure from his pleadings only underscores the right to a fair hearing devoid of ambush. For a departure to be seen to amount to ambush it must be of a substantial nature and evidently intended to catch the opposite party by surprise.

26. In this case, the dealing between the parties as regards sale of oil products on credit upon request by Local Purchase Orders is not in contest. In fact the defendant did admit the sum to be owing only that the defendant had not paid because it had a counterclaim. That state of affairs would miliate against construing Rule 6 of Order 2 to override an admission made on oath. To do that would put the rules in the pedestals of masters of justice rather its handmaids. It would be an affront to the dictate that justice be dispensed without undue regard to procedural technicalities. I do find that the trial court was perfectly within its rights under the law to find as it did that the plaintiff had proved its case the requiste standards. That finding, although evidently reached without regard for the need for detailed analysis and isolation of issues for determination and reasons therefore, was sound and deserve no disturbance.

Did the plaintiff in allowing the defendant to park its motor vehicle in the plaintiffs premises at a fee incur any obligation to ensure its safety and security?

27. Both sides agree that the motor vehicle KAM 956L -2B 8356 was on the 31/11/2000 parked at the premises owned by the plaintiff at a fee of Kshs.200/= It is also common ground that on the 1/11/2000 two complete wheels were found missing from the motor vehicle and that the plaintiff's watchman and the defendants turnboy were arrested, questioned and released after some two days, according to DW 2. What is in dispute is however whether the plaintiff owed to the defendant a duty of care to ensure that the motor vehicle remained safe while so parked. That question is closely related to the purpose of the parking fees and for what reason the plaintiff kept a watchman to it premises.

28. To this court, the parking fees as the name suggest was fees to park the vehicle there overnight. The purpose of the guard or watchman was to watch over the premises and all in it for the benefit of the owner. That benefit of the owner included the benefit derived from the earnings in parking fees. That must be differentiated from any payment to rent a parking lot.

29. I do find that by charging parking fees and allowing the defendant's motor vehicle to be parked there the plaintiff assumed a duty of care to ensure the safety of the motor vehicle therein parked. When it was conceded that two wheels were lost, while so parked, that duty of care was breached and the Defendant was then entitled to compensate for the loss thereby ensuing. However, one has to consider whether that duty was displaced or diminished by an exclusion clause said to have been served, and therefore made a terms of contract between the parties, by a notice posted at the premises to the effect that the motor vehicles were parked at owner's risk. That defence was equally and adequately pleaded at paragraph 4 of

the Reply to defence and Defence to Counter-Claim. It was a matter alleged in the pleadings and thus fell for proof at trial by production of evidence.

30. Since ***Parker vs South East Railways [1877] 2 CPD 416***, the law was laid and has remained trite that whoever intends to rely on an exclusion clause must prove that the same was brought to the attention of the opposite side. For the Appellant here, having pleaded that there was a notice limiting or excluding its liability to the plaintiff, it was its duty under the provisions of sections 107-109 of the Evidence Act to prove that exclusion of liability.

31. However the record shows that not enough was done to discharge that duty. PW 1 was content by saying that there were notices posted on the walls. Nothing would have been easier than to just avail photographs of such notices or indeed invite the court to visit the *locus in quo*. This was particularly important noting that the defendant had denied the existence of said notices. The failure to avail that kind of evidence left the pleading and the evidence by PW1 bare and far below the threshold of proof on a balance of probabilities. I do find that the plaintiff breached its duty of care to the defendant for which it has to answer to the defendant.

Did the Defendant incur any loss by reason of the motor vehicles two complete wheels being stolen or just lost while at the parking?

32. The plaintiff agreed that there occurred a loss of two complete wheels from the defendant's motor vehicle while parked at it premises. The defendant did produce EXH D1 a quotation from the dealers placing the costs of replacement at Kshs.100,000. That document was never contested by the plaintiff. It thus presented sufficient evidence on a balance of probabilities as to the cost and value of the loss. It was therefore an error on the part of the trial court to find that the counter-claim had not been proved.

33. The other glaring error by the trial court was the finding that the fact that the watchmen and turn boy were arrested and later released was a proof that vicarious liability did not attach. This was a glaring error because the doctrine of vicarious liability is only applicable on the tort of negligence and not a claim grounded on breach of duty of care based upon a contract. It is also a glaring error that the trial court held that a counter-claim is a separate claim could not have been pleaded as such but should have been filed as a separate suit. That finding flies on the face of Order 7 Rule 3. It cannot be left to stand and it is set aside.

34. For the foregoing disclosed errors, the decision as far as it dismissed the counter-claim is set aside and on its place is substituted a judgment allowing the counter-claim as prayed with costs.

35. The foregoing finding then begs the question as to how the two opposing decrees may be enforced. In order that the process of enforcement be simplified, it is ordered that the judgment in favour of the plaintiff be offset against that in favour of the plaintiff with the result that the plaintiff shall pay to the defendant the difference between the two sums being Kshs.34,370/=.

36. That sum shall attract interest at court rates from the date of judgment in the lower court to the date of payment in full.

37. On costs, I award to the Appellant ½ the costs of this appeal while I make the order that for the trial before the trial court each party shall bear own costs.

Dated and delivered at **Mombasa** this **13th** day of **July 2017**.

HON. P.J.O. OTIENO

JUDGE