



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 201 OF 2010
GEN CARGO (TRANSPORT) LIMITED.....PLAINTIFF
VERSUS
TEXAS ALARM (K) LIMITED.....DEFENDANT

JUDGMENT

1. It is pleaded in the plaint dated 18th June, 2010 that during the year 2010, there was a contract between the parties by which the Plaintiff contracted the Defendant to provide security services by way of security guards for its premises being a yard situate at PORT REITZ area, Mombasa County. The Plaintiff pleads that there was an implied term in the contract that the Defendant would provide honest and competent security guards who would ensure the safety and security of the Plaintiffs property lying at the premises.
2. It is further pleaded that on the 4th April 2010 when the said contract was in force, a motor vehicle registration No. KWA 930 x ZB 790 Load with 1 x 40 ft container containing 494 pieces of motor vehicle tyres was stolen from the yard the Defendant was contracted to guard and the motor vehicle was later discovered abandoned but without the good which were lost and whose value the Plaintiff claims from the Defendant in the sum of Kshs.6,964,288.66 together with general damages.
3. To that plaint, the Defendant filed a statement of defence dated 22nd July, 2010 in which other than the description of the parties, the Defendant denied the allegations by the Plaintiff's including the fact that the Plaintiff owned a garage, the existence of the guarding contract the terms of the contract, the theft or loss as pleaded and the recovery were all denied and no admission tendered.
4. There is then the alternative pleading made without prejudice to the foregoing denial that if there was theft of the motor vehicle and its cargo then the same was as a result, or consequence of the Defendant's agent's negligence.
5. Both sides filed witness statements and bundles of documents. In those witness statements and documents it is a common ground that in deed there existed a construct between the parties as pleaded. The witness statement by one BENARD ODHIAMBO ADUDA proceeds to admit the fact that theft occurred and he made a report of the same at Changamwe Police Station and that thereafter an empty container was found without the goods within Changamwe area. In that statement it is contended that it was part of their security service to provide extra night guard to reinforce security once informed of an expensive or a large cargo when need arose.
6. The parties also filed a statement of agreed issues dated 17th August, 2010 which identified 5

substantive issues and the sixth (6th) being the consequential issue on costs of the suit.

7. From the pleadings, statements and document filed, it is apparent that the existence of the contract to supply security guards is not in dispute and can therefore not be an issue for determination. That therefore means that on the questions of the terms of the contract, the quality of the service to be provided, the fact of whose is to blame for the admitted theft and the loss, if any, was suffered are the issues this court has to determine based on the evidence tendered.

EVIDENCE

8. At trial the Plaintiff called two witnesses while the Defendant called one witness. PW1, ABDULRAZAK OMAR ALAMIN the operations director of the Plaintiff gave evidence and produced the documents filed by the Plaintiff. That production was never objected to by the Defendant's. His evidence was that there was a contract to provide security services between the parties by which the Defendant was to provide one security guard at a night and one at day time. He said the plaintiff also had own two (2) own guards.

9. That on 5th April, 2010, he received a telephone call that their guards had been drugged and goods stolen. He went to the premises at Port Reitz and found their two askaris lying on the ground but Defendant's askari was not around but had abandoned his uniforms on site.

10. Later on in the day, the lorry KAW 930X, was found abandoned at Mazeras – Mikindani area without the goods which were in it and the Defendant's guard was subsequently arrested. He then produced the documents as follows:- Letter dated 6th April, 2010 by the Plaintiff to the Defendant conveying the fact of the theft and holding the Defendant liable. That demand was acknowledged by the Defendant's some 10 days later by a letter of 16th April, 2010 in which the Defendant confirmed the disappearance of their guard and their concerted efforts to have him arrested and prosecuted.

11. Equally exhibited were the Defendant's offer for a reward of Kshs.25,000 towards arrest of the guard, photographs of the guard as well as invoices from the Defendant to the Plaintiff and statement of accounts.

The witness equally produced an invoice demanding the value of tyres being Kshs.4, 982, 770.66 and Kshs.1,982,018 being damages for the loss. That sum of Kshs.1, 982, 018 was the anticipated (Projected) profits.

12. Equally exhibited and produced was invoice for Auto Express Ltd for Kshs.9,000,000 and a payment voucher for the same sum. Last on the list was a demand letter by the Plaintiff's Advocates dated 24th May, 2010 demanding the sum of Kshs.6,964,788.66.

13. On that day PW1 was stood down due to time constraints for cross examination on a date to be taken at the registry. Cross-examination then commenced before Kasango J. on 30th June, 2015. In the course of cross-examination the witness referred to the documents and he confirmed that their client, Auto Express Ltd had demanded the sum from them and blamed them for transporting the goods on a motor vehicle without tracking device. He admitted that the agreement between the Plaintiff and Auto Express Limited was that the Plaintiff was to transport the goods in a motor vehicle with a tracking device.

14. On the agreement between the Plaintiff and the Defendant, the witness conceded that the initial agreement was to provide guards and dogs but he pointed out that they stopped the provision of a dog because the Defendant's would tie the dog the whole night.

15. On the same agreement the witness said it was signed between the Defendant and General Cargo Services and not General Cargo (Transport) Ltd the Plaintiff herein. From that time the cross-examination then veered into the question of whether or not the Plaintiff ever insured the goods, whether they had made a claim and why they were claiming for that which had not been claimed by the owner of

the goods – Auto Express Limited. The Cross-examination also concerned why sums paid by the General Cargo Services Ltd was being denied by the Plaintiff and the interpretation of clause 3 of the agreement on liability of the Defendant.

16. On re-examination the witness said that clause 3 of the agreement provided for keys and cars and not goods. He gave the breakdown of the Plaintiffs claim as; Tyres Kshs.3,379,855.50, Letter of Credit Kshs.5,697.83, Bank Charges Kshs,2,000, Insurance Kshs.17,903, Clearing, 1,159,914, IFC Kshs.5,000 other charges 10,000 and profit on tyres Kshs.1,982,018 making a total of Kshs.6,964,788.66. He was not aware if there had made a claim to the Insurer and if compensation had been made and on the issue of transporting the lost goods on a motor vehicle with a tracking devise he said that within Mombasa there was no obligation as the obligation was only imposed from import between Mombasa and Nairobi.

17. The second witness was one PAUL MUTHIGANI who works for Auto Express as the Cooperate Customer Service Assistant. His evidence was that during the year 2010, his employer contracted the Plaintiff to clear cargo of tyres, store same and thereafter transport same to Nairobi. The consignment comprised of 494 pieces of tyres and that on 5.4.2010 he received an advice from the Plaintiff that the consignment had been stolen.

As a consequence they demanded from the Plaintiff the value of the tyres and a further sum of Kshs.900,000.

18. On cross-examination, the witness was affirmative that his employer was paid only Kshs.900,000 and not the value of the tyres and that his said employer had not sued the Plaintiff for recovery of the value of the lost goods. With that evidence the Plaintiff case was closed and the Defendant herein called one witness to support his case.

19. DW1, BENARD ODHIAMBO ADUDA introduced himself as the Human Resource and Customer Relations Manager of the Defendant. He admitted a contract for the provision of security services to include guards, dog and alarm services. That at the time of the incident sued upon they were only providing guard services one at day time and one at night. His evidence was that their guard was to be at the gate of a built-up godown and yard secured with a perimeter wall. The duty of that guard to him was to control entry into and exit out of the premises. He added that the guard on duty on the fateful day was arrested and charged in court with the theft. He added that the agreement between the parties provided and limited liability of Defendant to a maximum of Kshs.25,000. To him the Plaintiff's claim was against the terms of the agreement as it was their duty to insure the goods

20. On cross-examination, the witness said that it was the duty of the Defendant to guard the Plaintiff property but he was not sure if it was the guard who stole. All he was aware was that the guard could not be traced after the theft. He admitted that at the time of the incident, there was a contract in force between the parties.

In re-examination, the witness said that they were giving an offer for reward for the arrest of their guard because he was a suspect and that as at the date of giving evidence the Defendant did not have any claim against the Plaintiff on account of security services rendered.

With that evidence the Defendant's case was closed and parties were then directed to file written submissions and to attend court later to highlight the submissions filed.

SUBMISSIONS BY THE PARTIES

21. Pursuant to the court's directions for parties to file written submissions the Plaintiff filed submissions on 9th December, 2015 while the Defendant did so on 20.11.2015. Contrary to the state of the evidence as supported by witness statements and documents, both parties persisted on the admitted fact of the existence of the contract of provision of security services as an issue for determination.

22. I have said before in this decision that both sides agree that indeed there was in force an agreement for

provision of security services by posting of a day and a night guard per day and that on the material day the Defendant's guard was in deed on duty. To this court a fact that is pleaded by one side and admitted by the adversary is not an issue for the determination by the court. It remains admitted and invite no determination.

23. I will not seek to make any pronouncement on a fact that is not in dispute. Granted that the statement of defence denies the existence of a contract, the witness statement file the documents of deployment and payment for the same service and the evidence offered at trial confirm the agreement and therefore the defence must be taken for what it is; an allegation of fact that must be proved by evidence.

24. I have read and taken into account the evidence by the parties and note at this juncture that both parties made very minimal efforts to assist the court on the all-important questions of the effect of the exclusion cases in the agreement which to this court have the direct impact on the determination of the issue No.2 of the agreed issues. Instead the parties veered to address the question of estopped by contract which was never pleaded not made an issue in the suit.

ANALYSIS OF EVIDENCE AND DETERMINATION

25. Even though there are 4 identified and agreed issues pending determination by the court, issues No.2, 3 and 4 can be handled together and seen as asking the court to determine whether or not the Defendant met its contractual obligation to the Plaintiff.

26. To determine that question, one would have to interrogate the substratum of the contract between the parties. Simply put, the parties contracted that in consideration of a monthly charge or fee, the Defendant would provide guards or security services by deploying guards at the Plaintiff premises to watch over the plaintiff's goods and to secure their safety from possible damage or loss by the intruders or felons. That task would be achieved by doing what was reasonably possible regard being had to the fact capable of judicial notice that such guards are at best only guard with a baton and a whistle. They are, so to speak, watchmen. A watchman is expected to be on watch out and to detect an unauthorised intrusion or trespass. Depending on the amount of threat or force an intruder possess as against the watchman, the watchman is expected to raise alarm or use reasonable force to repulse the intrusion. He might as well escape from the premises and raise alarm or just report to the nearest law enforcement or crime prevention agencies.

27. According to the evidence led in this case, the guard or watchman deployed by the Defendant did not undertake any of those expected actions. Instead the evidence is that he not only escaped and fled from the scene but also abandoned his uniform there. The question then is did the Defendant furnish the consideration for which it was contracted and paid?

28. To this court the evidence let is a total abdication and dereliction of duty and therefore a total failure of consideration on the part of the Defendant. That to this court goes to the root of the contract and would be called a fundamental breach or just what is unconscionable, unfair and unreasonable even if allowed by a clause in the agreement between the parties.

A court of law, being bound to do justice between the parties is bound to construe the contract between the parties, and in setting out to construe such contract assign to it a meaning and intention that resonate with fairness and reasonableness.

29. In this matter the defence filed as pointed out earlier in this decision did not plead any specific clause in the agreement between the parties instead it made general denial which denials were effectively displaced by its own witness statement and documents filed. In such circumstances, this court takes the view and finds that the evidence offered as it sought to rely on a clause limiting liability at Kshs.25,000= was a deviation from the defence filed and therefore not permissible. This court take the view that litigation is conducted without ambush in that parties only lead evidence to support the pleading filed.

I found that due to breach of the duty owned to the Plaintiff by the Defendant, there occurred a loss of the

cargo sued upon, which cargo was in the hands of the Plaintiff as a bailee and that the Defendant is liable to the Plaintiff for the value thereof.

30. It matters not that the owner of the goods had not sued the Plaintiff. That the Defendant was contracted to guard the Plaintiff premises with all the goods therein placed on the Defendant a specific obligation to ensure safety of the goods without any right to question the plaintiff's title to such goods. The defendant's duty was to the guard and not the right to inquire of the Plaintiff whose goods they were and on how the Plaintiff came to be in custody or possession thereof. Theirs was to provide guard services which in this case they did not perform.

31. The failure to perform the very purpose of the contract is to this court a matter that goes to the root of the same contract and it would be contrary to the notion of fairness, reasonableness and therefore justice to exonerate the Defendant merely because their standard contract limited or ruled out their liability. For the payment they received they owed a duty which I have found was breached and for that breach the Defendant must be liable.

32. The upshot is that the Plaintiff succeeds against the Defendant and I enter judgment for the Plaintiff against the Defendant as prayed in the sum of Kshs.6,964,788.66 with interest from the date of the suit till payment in full

33. The prayer for general damages was never proved and in any event having ordered restitution of the lost value no other damages are to this court available to the Plaintiff.

34. I equally award to the Plaintiff the costs of this suit together with interest thereon at court rates.

Dated and delivered at **Mombasa** this **2nd** day of **December, 2016**.

HON. P.J.O. OTIENO

JUDGE