



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 594 OF 2003

CONSOLIDATED BANK OF KENYA LIMITED..... PLAINTIFF

VERSUS –

SECURICOR SECURITY SERVICES KENYA LTD.....DEFENDANT

JUDGMENT

1. On 23rd December 2002, the plaintiff contracted the defendant to convey a portable container from its Maua branch, Meru County to its Koinange street branch, Nairobi City. The contents of the parcel are disputed. The plaintiff alleges that it contained Kshs 18,550,000. The defendant pleads it was unaware of the amount of cash in the container. The consignment was lost. It is pleaded that somewhere between Maua and Meru town, armed men attacked the cash-in-transit vehicle and stole the money. The parties had entered into a written contract entitled *Temporary Works Order* dated 23rd December 2002. The plaintiff brings this action for breach of contract and for negligence as pleaded at paragraphs 6 and 7 of the plaint. The plaintiff claims Kshs 18,550,000 together with interest and costs. There is also a prayer for general damages.
2. The defendant's case is on a three-strand: That all the rights and duties of the parties were contained in the *Temporary Works Order* including the terms on its reverse. To that extent, the liability of the defendant would be limited to either the sum of Kshs 2,500,000 or Kshs 100,000 depending on certain conditions in the order. Secondly, save that a robbery took place as alleged, the defendant denied being negligent or breaching the contract. The defendant pleaded that none of its employees was convicted of an offence under the penal code. Thirdly, the plaintiff failed to issue a written notice of loss within the prescribed 15 days in the contract. As the defendant denies knowledge of the full cash contents in the parcel, it denies liability to the plaintiff for the special damages. The claim for general damages is also contested.
3. The plaintiff called one witness, Erastus Karimi Wanjohi. He is now the plaintiff's manager, Nyeri branch. At the material time, he was the operations manager at Maua branch. He relied on his two witness statements dated 16th September 2011 and 10th May 2012. He produced a bundle of documents filed in court on 2nd November 2004 and a supplementary bundle filed on 9th March 2012 (Exhibit 1 and 2 respectively). On 23rd December 2002, the bank instructed the defendant to collect a portable container containing Kshs 18,550,000 for carriage to Koinange street branch, Nairobi. The defendant had previously transported cash for the plaintiff.
4. The defendant's employees prepared the *Temporary Works Order*. The witness signed it. It had details of the armored cash-in-transit vehicle KAP 935 A. He was issued with a receipt. He was later called and informed that the vehicle was carjacked and the consignment lost. He blames the defendants for a number of reasons. First, the defendant failed to use armed police escort. Secondly, the loss was suspicious because the defendant's employees did not call the bank or their

- Securicor offices in Nairobi to report the robbery: they instead abandoned the vehicle and reported the incident to Meru police station. It is alleged that the crew diverted from their usual route. Having lost the consignment, the defendant is thus in breach of contract and also liable in negligence.
5. Upon cross-examination, he conceded that the defendant's employees were absent when the cash was packed into the container. He was present when the cash was packed. The defendant's employees were not supposed to know the contents for security reasons. There were criminal proceedings against the defendant's employees and crew commander relating to the claim in this suit but the witness was unaware of any conviction. He learnt later that the crew commander of the transit vehicle, Mr. Desderio Koome was murdered in the year 2004 in an unrelated incident before conclusion of the criminal case. He produced the *Temporary Works Order* (page 1 of exhibit 1) and the police abstract report on the theft.
 6. The defendant called one witness Kephah Gaitho. He relied on his statement dated 18th June 2012 and the defendant's bundle of documents (Defendant's exhibit 1). He stated further that none of the defendant's employees have ever been convicted for the material robbery. He testified that the plaintiff did not notify the defendant of its claim until 13th January 2003. He relied on page 4 of the defendant's bundle. The letter of demand is stamped by the defendant on 13th January 2003. He was not present in Maua or Meru at the material time. He confirmed that motor-vehicle KAP 935 A is a standard armored cash-in-transit vehicle. The defendant was supposed to obtain armed escort but there was no requirement to follow a specific route. He is aware of the terms of the contract and exclusion clauses. He denied that failure to make a radio call back to their office comprised negligence or breach of contract.
 7. I have considered the evidence. I have also considered the pleadings and written submissions by the parties. The plaintiff's submissions and list of authorities are dated 27th May 2013. Those of the defendants are dated 11th May 2013 and a further response dated 31st May 2013. There are two sets of separate issues filed by the parties on 10th May 2012 and 21st June 2012 respectively. I distill the following five broad issues for determination.
 - i. Was the contract between the plaintiff and the defendant contained in the *Temporary Works Order* 712355 dated 23rd December, 2002 and the Conditions of Contract printed on the reverse thereof? If so;
 - a. What were the terms of the contract?
 - b. Did the defendant carry out its duties in accordance with the express or implied terms of the contract?
 - c. Was there any restriction or limitation on the liability of the defendant? If so, what was the restriction or limitation?
 - ii. Was the defendant negligent? If so, is it liable for damages?
 - iii. Did the portable container have Kshs 18,550,000? Is the plaintiff entitled to special damages of Kshs 18,550,000?
 - iv. Did the plaintiff issue a proper notice to the defendant?
 - v. Who is to pay the costs of the suit?
 8. It is common ground that the defendant had supplied cash-in-transit services to the plaintiff for a long time. It is not also disputed that on 23rd December 2002, the plaintiff contracted the defendant to transport or convey the portable container and contents specified in the *Temporary Works Order*. As I will discuss shortly, the plaintiff's assistant manager had telephoned the defendant's offices at Meru on 21st December 2002 to book cash-in-transit services for the 23rd December 2002. There was thus a clear offer and acceptance. The parties intended to create binding legal relations. The plaintiff was paying for the services. Consideration is not disputed. I readily find that the *Temporary Works Order* constituted the primary contract between the parties.
 9. Parties are bound by commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. See *Morris & Company Vs Kenya Commercial Bank* [2003] 2 E A 605 and *National Bank of Kenya Limited Vs Pipeplastic Samkolit*

and another [2001] KLR 112. See also *Balbir Singh Sadhu and another Vs Rose Detho and others* Nairobi, High Court case 259 of 2003 [2012] e KLR, *Isaac Gathungu Wanjohi Vs Samson Njoroge and another* Nairobi, High Court case 615 of 2010 [2013] e KLR. See also *Prime Bank Limited Vs Mulji Devraj & Brothers Limited and 2 others* Nairobi, High Court case 318 of 2007 (unreported).

10. It is then imperative to interrogate the contract further. The *Temporary Works Order* number 712355 (page 1 of plaintiffs exhibit 1) is on the note paper of Securicor cash services, the defendant. It was a standard form agreement which the plaintiff executed without amendment. It is for services to the plaintiff bank. The order was confirmed by the defendant's employee Mr. Desderio Koome. He was the crew commander or supervisor for the cash-in-transit vehicle KAP 935 A. The time was 08.55 hrs and the container was to be transported for 574 kilometres to Nairobi at the rate of Kshs 60 per kilometer to be paid by invoice. An official receipt number 991765 was issued by Mr. Koome, as supervisor, and he entered the details his identify card as 11169744. On the reverse of the order are 11 conditions of the contract which include exemption and limitation clauses. A document must be read and interpreted in its totality. That canon of documentary interpretation is well founded. I thus find that those conditions of contract including the exemption clauses formed part of the contract. This is clear in the language of clause 8 of the conditions of contract. It provides that the document constituted the entire contract between the parties. The exemption or limitation clauses do not however apply blindly: if the clauses are onerous, unreasonable or oppressive, they may be excluded.

11. I will set out in detail the key conditions of the contract:

3. *“In consideration of the payments hereafter agreed to be paid by the Customer to the Company and by way of limitation of liability of the Company, the Company shall subject as hereinafter mentioned during the continuance of this Contract:*

- a. *Carry out with proper care and subject to the provisions of this contract the services described in the schedule hereto.*
- b. *Subject to the provisions of Clause 4 hereof indemnify the Customer against all loss of or damage to valuables up to a maximum of Kenya Shillings Two million, five hundred thousand (Kshs 2,500,000/-) in respect of any one period of twenty four hours which may occur during any period of the Company's responsibility and which are due to forgeryor are due to any employee of the Company committing an offence or offences under Divisions V to VIII inclusive of the Penal Code (Cap 63), provided that the Company shall not be under any liability whatsoever in respect of any such loss or damage unless the employee guilty of such criminal conduct shall have been duly convicted of the relevant offence under the Penal Code and unless the Customer shall have given written notice of such loss or damage to the Company within 15 days immediately following either the discovery thereof or the end of the period of the Company's responsibility (whichever shall be the earlier) but in any event such liability will not arise unless such notice is given by the Customer to the Company within 15 days of the date upon which the valuable were collected by the Company”.*

4. *“a) The Company shall not in any circumstances whatever be liable for nor shall the indemnity mentioned in Clause 3 (b) hereof extend or apply to any loss or destruction of or damage to any property whatsoever (including valuables) or any loss or damage (including consequential loss) on the part of the Customer arising directly or indirectly, from or in consequence of any of the excepted risks or to which any of the excepted risks shall have contributed or for any expenses whatsoever resulting or arising therefrom.*

b) Save as provided by Clause 3(b) the Company will not in any circumstances be liable to the Customer (either directly or vicariously) for any loss of or damage to any valuable or property received or intended to be received by the Company its servants or agents pursuant to this contract, or for any or other loss or damage allegedly caused by any such loss or damage, whether arising from the alleged breach of contract or negligence on the part of the Company its servants or agents or from fraud or dishonesty or other criminal act on the part of any servant or agent of the Company or howsoever

arising.

c) *If the service to be provided by the Company involves the Company in the carriage or custody of valuables which are to be transported or held in custody in bags, boxes or other portable containers filled by the Customer or by any other third party, then (without prejudice to the overall limit imposed by clause 3 (b) above) the Company's liability in respect of any loss of or damage to the contents of each such bag, box, or portable container shall be further limited to a maximum of Kenya Shillings One Hundred Thousand (Kshs 100,000/-) in respect of any such bag, box or portable container as aforesaid.*

d) *Exclusions and limitation of liability and indemnity to apply in all and any circumstances. The Company provides the indemnity mentioned above subject to the stated exceptions and conditions. Liability for late or mis-delivery or non-delivery is either excluded entirely or limited to Kenya Shillings Five Thousand (Kshs 5,000/-). The Company and its servants or agents shall not be liable to the Customer outside or beyond the provisions aforesaid with reference to the reception care carriage or delivery of any valuable whatever on any ground of liability whether or not the Company its servants or agents shall have been guilty of any other dishonest or criminal conduct and it is hereby agreed (to the intent that these clauses defining excluding or limiting liability and the extent of the indemnity shall operate as terms of this Contract and as a separate and independent agreement made in consideration of the entry by the Company into this Contract which independent Contract shall persist after any termination of the Contract howsoever caused) that the Company and its servants or agents (subject to paragraph (g) below) shall be entitle in all and any circumstances to the protection of these clauses excluding defining and limiting, and in particular whether or not the Company has been guilty of any breach of the terms of this Contract express or implied, and howsoever fundamental and howsoever serious the consequences of such breach and whether or not the Contract for any other purpose has been terminated by such breach or by accepted repudiation or howsoever otherwise”.*

12. I said earlier that the contract of carriage had been used by the parties before. From Mr. Wanjohi's witness statements and oral evidence, Securicor had transported cash from the bank's Maua branch every week. That is corroborated by the witness statement of Kepha Gaitho, the defendant's sole witness. So both parties knew the terms on the reverse. Mr. Wanjohi, signed the contract. And so did Mr. Koome. There was money in the portable container which was packed by Mr. Wanjohi and other bank's employees. I have no evidential basis or reason to doubt that a sum of Kshs 18,550,000 was packed. The defendant's witness was not there. The plaintiff's witness explained that for security reasons, the defendant's employees were kept in the dark about the value. Their duty was to deliver the sealed container to the consignee. I see nothing untoward there considering that the defendant's driver and crew were not senior management officials of the defendant company. But the defendant and plaintiff must, from the custom and history of previous transport arrangements be fully aware not just of the written and express terms of the contract but the implied terms of duty of care. It is not for example rebutted that the container had cash or valuables: all that the defendant's witness stated is that they did not know the amount.

13. I have said I have no cause to doubt Mr. Wanjohi's evidence of the amount in the container. From the incident report on the defendant's note paper at page 15 of the plaintiff's bundle, the defendant had received a call from the plaintiff on 21st December 2002 to collect cash at Maua. Doubt is removed further by the internal memo (plaintiff's supplementary bundle at items 2, 3, 4 and 5 filed on 9th March 2012). It shows the breakdown of currency and cash movements. Secondly, in the incident report on Securicor's note paper (page 15 of plaintiff's bundle) it is stated that the crew found a letter from the bank to its head office stating shipment was Kshs 18,550,000. A buff envelope was also found with US \$ 170 in bank notes. It does not then take serious imagination to know that the defendant's crew in KAP 935 A or at least Mr. Koome who signed for the consignment knew it was a cash box. That is why there was an armored cash-in-

transit vehicle.

14. There is further evidence that the defendant knew of the cash contents: The incident report on the defendant's note paper at page 15 of the plaintiff's bundle. The opening paragraph states as follows:

“On Saturday 21st December the Assistant Manager of Consolidated Bank, Meru telephoned our Meru branch to book a C.I.T. trip. The booking was made for a trip to collect cash from Consolidated Bank, Maua and to take to Consolidated Bank Head Office, Nairobi on Monday 23rd December 2002. During our service at Consolidated Bank, Meru on Saturday 21st December 2002, an empty box was collected to be used for the Maua trip on the following Monday”.

The defendant was then required by condition 3 (a) of the contract to exercise proper care under the contract. The defendant had used armed escort before? Why did it not do so on this occasion for example? This is the context in which the exemption clauses and their limitation of liability must be viewed.

15. There were other important terms of the contract. The plaintiff was required to give notice of loss within 15 days. The defendant's witness stated in oral evidence that it was 10 days. The correct number of days is 15. That is clear at clause 3 (b). The defendant would not be liable if notice was not delivered. Similarly the defendant's maximum liability was 2,500,000 but only where its employees were convicted of an offence under division V to VII of the Penal Code. Clauses (e) and (f) that I set out earlier limited liability to Kshs 5,000 or Kshs 100,000 for non-delivery or loss of valuables respectively. I have said enough to answer issue number 1(a) and partly answer issue 1 (c). The terms of the contract were contained within the four corners of the *Temporary Works Order* dated 23rd December 2002 including the conditions on the reverse. But the exemption clauses and limitations are not absolute in the context of a claim for negligence pleaded by the plaintiff. What is left is largely issue number 1 (b); Did the defendant carry out its duties in accordance with the express and/or implied terms of contract?

16. I will now turn to the key legal principles. It is for the party seeking to rely on an exemption or limitation clause to show “*on its true construction, covers the obligation or liability which it purports to restrict or exclude*” and also that “*the plaintiff's case is within that clause*”. See *Chitty on contracts* 27th edition, Sweet & Maxwell, paragraph 14 – 016.

17. In England, exemption clauses in standard contracts are governed by common law, and in some cases by statute. See for example *George Mitchell (Chester Hall) Limited Vs Finney Lock Seeds Limited* [1983] 2 AC 803. The statutes in question include Supply of Goods (Implied Terms) Act 1973, The Unfair Contract Terms Act 1977, the Sale of Goods Act 1979 and Consumer Contracts Regulations 1994. In Kenya, equivalent legislation has not been passed save for the Consumer Protection Act 2012 which came into force on 14th March 2013. Exemption clauses are largely governed by common law. In *Securicor Courier Kenya Limited Vs Benson Onyango and another* Court of Appeal, Civil Appeal 323 of 2002 [2008] KLR 252, [2008] e KLR, the Court confirmed that position:

“In our jurisdiction however, such contracts are purely governed by common law. It seems that the current law governing the exemption clauses is as expressed by the House of Lords in Photo Production Limited Vs Securicor Transport Ltd [1980] 1 ALL ER 556 and in George Mitchell (Chester Hall) Ltd (supra)”

18. An exemption clause should not be construed in the very strict terms of clauses of complete exclusion of liability or indemnity. See *Securicor Courier (K) Ltd Vs Benson*

Onyango (supra), Ailsa Craig Fishing Company Limited Vs Malvern Fishing Company Limited [1983] 1 ALL ER 101. The key requirement is that an exemption clause must be clear and unambiguous. If it is clear and unambiguous, the Court will, as a general rule, enforce it. In the present case, the contracting parties are a bank and a courier company. The contract is a standard form document drawn by the courier company. It was not pre-negotiated. The bank signed it as drawn. I cannot say that the bank was a weaker party. From a pure law of contract standpoint and the fact that Kenya does not have the equivalent of, say, the Unfair Terms of Contract Act, it is not truly the business of the contract to question whether the clause is unreasonable or unfair. The authorities cited by the plaintiff in Gillespie Brothers & Company Ltd Vs Roy Bowles Transport and another [1973] 1 ALL ER 193 and Levinson and another Vs Patent Steam Carpet Cleaning Company Ltd [1977] 3 ALL ER 498 relate to the concept of fundamental breach of contract. The English courts have since disregarded it in the Photo production case (supra) and as confirmed by our Court of Appeal decision in Securicor Courier Kenya Limited case (supra).

19. But the absence of equivalent legislation akin to the United Kingdom's Unfair Contract Terms Act 1977 does not render our courts impotent. I do not agree on that score with the decision of Amin J, in Africa Safari Club Vs Kenya Kazi Limited [1990] KLR 572. In my view a bailee cannot take cover behind an exemption clause unless *he can show that the loss occurred in a way covered by that clause or it could not have occurred in a way which was a fundamental breach of contract*. See United Manufactures Limited Vs Wafco [1974] E A 233. There, the bailee's employees were guilty of complicity in theft of the bailor's goods. In our present case, we are not dealing with mere non-delivery. There is an underlying allegation that the defendant's employees were complicit in the robbery or were negligent. From the document at page 13 of the plaintiff's bundle which was admitted by consent, the employees were charged for the criminal offences of stealing by agent under section 283 (b) of the Penal Code and giving false information to the police contrary to section 129 (b) of the code.

20. But there is another matter here. The plaintiff claims *negligence*. The defendant submitted that this entire claim is based on breach of contract and that there is no plea based on tort. I disagree. Paragraph 7 of the plaint states as follows:

"In breach of the Agreement the Defendant its employees or agents neglected, refused and/or failed to deliver the consignment as required or at all and, further or in the alternative,

- i. *Negligently and/or recklessly transported or conveyed or attempted to transport or convey the consignment without any, or any armed police or other escort, as would normally be expected of a reasonable bailee;*
- ii. *Negligently and/or recklessly omitted to employ and use the two way radio equipment in the vehicle to summon any help the Defendant's agent may have required while in the course of transporting or conveying or attempting to transport or convey the consignment;*
- iii. *Negligently and/or recklessly omitting to take advantage of the protection and safety afforded by the bullet resistant vehicle by locking themselves in the armoured vehicle in the event of a hostile confrontation or attack by third parties to forestall any breaking into the said vehicle;*
- iv. *Negligently and/or recklessly omitting to activate the warning siren mounted on the vehicle or the fuel cut off device so as to forestall any hostile take over by third parties of the said vehicle and the consignment;*
- v. *Negligently and/or recklessly deviating from the main and safer Maua-Meru-Nairobi highway into the more deserted and bushy Ruiru Road, and;*
- vi. *Negligently and/or recklessly failing to deliver the consignment to the Plaintiff"*.

21. At paragraph 8, the plaintiff has set out the particulars of loss. Negligence and the particulars of negligence are thus clearly pleaded. The next question becomes whether the plaintiff led evidence of negligence. The plaintiff's witness Mr. Wanjohi stated as follows in his oral testimony:

“The defendant was negligent because they are supposed to have armed policemen. I did not see any. If anything happens, they should report to their head office. They didn't. They abandoned the vehicle and went to report to police at Meru instead of radio-calling their office. They lost our money negligently”.

22. In addition, the witness had executed two statements dated 16th September 2011 and 10th May 2012. They were both admitted as part of his evidence in chief. Paragraph 8 of the latter statement and paragraph 6 of the former statement state that the defendant was negligent. The defendant's sole witness did not offer sufficient evidence in rebuttal. In cross-examination the defendant's witness, Kepha Gaitho, conceded that the defendant's crew may have used a different route. He testified that there is no requirement to use a specific route. At paragraph 7 (v) of the plaint, it is pleaded that the defendant's crew deviated from the “*safer Maua-Meru-Nairobi highway into the more deserted and bushy Ruiru Road*”.

23. Pleadings are not evidence. The plaintiff's witness did not deal directly with that matter. First, it is not lost on me that the plaintiff through Dan Nguchu swore an affidavit dated 23rd September 2003 in which at paragraph 3, he depones that those pleadings are correct. That would not be enough. There is the police abstract at page 28 of the plaintiff's supplementary list of documents dated and filed in court on 9th March 2012. The Occurrence Book entries 23/12/2002 indicate the robbery took place at Ruiru as pleaded in the plaint and that *unknown amount of money was stolen from a broken safe behind the vehicle inside the carrier*.

24. The defendant's witness Kepha Gaitho did not contest that fact, only stating that “there is no requirement to use a specific route”. He conceded however that failure to use armed escort was a breach. He said the following in cross-examination:

“On armed escort, we are required to have armed escort. If they were not there it would be a breach”.

25. The law there is on the plaintiff's side. When there is a deviation from the journey, the exemption clauses will not apply unless the carrier shows the loss would have happened in any event. See *Chitty on Contracts* (supra) paragraph 14 – 026, *Scrutton on Charter Parties* 19th edition, 1984 page 259, *London & North Western Railway Vs Nelson* [1922] 2 AC 363, *Schluter & Company Ltd Vs Railway Corporation & others* [1975] E A 157, *Harbutt's Plasticine Vs Wayne Tank & Pump Company* [1970] 1 ALL ER 406, *Hartstoke Fruiterers Vs L.M. & S Railway* [1943] KB 362. To my mind the evidence discloses negligence by the defendant. The onus of proof for the benefit of the exclusion clause or that it inures in favour of the defendant is squarely on the defendant. The witness proffered by the defendant did not do a good job at it. Certainly he conceded elements of that negligence (on failure to have armed escort) and offered no plausible explanation for the deviation of the journey.

26. The spotlight then turns on whether negligence was excluded by the conditions of contract. True, the defendant had limited its liability to Kshs 2,500,000 or Kshs 100,000 respectively on any claims. But was negligence expressly excluded? This is important because in all probability no contracting party will absolve the other entirely from consequences of the latter's own negligence. That statement is found in *Chitty on Contracts*, 27th edition, London, Sweet & Maxwell paragraph 14 – 010:

“But since it is inherently improbable that one party to the contract would intend to absolve the other party entirely from the consequences of the latter's own negligence, more exacting

standards are applied to clauses which are alleged to exclude altogether liability for negligence. The duty of a court in approaching the consideration of such clauses was summarized in the form of three propositions in the opinion of the Privy Council delivered by Lord Morton in Canada Steamship Lines Ltd Vs The King. These tests, or guidelines, have been subsequently approved and applied both by the Court of Appeal and the House of Lords;

- i. If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequences of the negligence of his own servants, effect must be given to that provision.
- ii. If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens.
- iii. If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence on the part of the servants'.

27. Condition 4(b) of the contract refers to "negligence on that part of the [defendant] its servants or agents or from fraud....." So far so good. But where an exemption clause relates to negligence, or it is particularly onerous, there is a duty on the defendant to show that the clause was brought to the attention of the plaintiff. Thompson Vs Lms Railway [1930] 1 KB 41, Interfoto Picture Library Limited Vs Stiletto Visual Programmes Limited [1988] 1 ALL ER 348. See also 9 Halsbury's Laws of England, 4th edition, paragraph 233. Chitty on Contracts (supra) paragraph 14 – 015 says:

"It has from time to time been suggested that if the breach by one party evinces "a deliberate disregard of his bounden obligations", it will not be covered by an exemption clause".

See also Sze Hai Tong Bank Company Ltd Vs Rambler cycle Company Ltd [1959] AC 576 at 588. Such exemption clauses, if ambiguous, will also be interpreted *contra proferentem*.

28. A proper question in those circumstances is whether the term has been incorporated into the contract, and secondly whether the clause covers the loss in question. If the term was not brought to the attention of the plaintiff, it would be unrealistic to say it accepted it. In that event, that exemption clause will not form part of the agreement. See Olley Vs Marlborough Court [1949] 1 KB 532, Thornton Vs Shoe Lane Parking [1971] 2 WLR 585. If there is a written contract which is signed, the aggrieved party is bound irrespective of their knowledge of the terms L'Estrange Vs Grafcob [1934] 2 KB 394. What happened here? Mr. Wanjohi testified that the Securicor staff came in the morning. They prepared the *Temporary Works Order*. It was a standard form contract that had not been pre-negotiated. The plaintiff did not amend it. He signed. The exemption clauses are on the reverse of the document. On the front, the last line states the order "with effect from this date will incorporate the conditions overleaf until a formal contract is prepared and signed". There is a sense in which the terms were deliberately hidden. But by signing, the defendant became bound by the terms on the reverse. See Securicor Courier Kenya Limited Vs Benson Onyango [2008] KLR 258 (supra). I have already stated that by clause 8, the *Temporary Works Order* constituted the entire contract. As I have shown however, where an exemption clause runs away from negligence of the defendant's employees or is particularly onerous, the common law and courts have intervened by restricting its application.

29. I do not think the implied terms are as extensive or generous as pleaded at paragraphs 6 and 7 of the plaint or even paragraph 6 of Mr. Wanjohi's further statement. But from the history of contractual relations between the parties, and the evidence of Mr. Wanjohi, I come to the following conclusion: The defendant's employees (at least Mr. Koome) knew or ought to have known they were transporting cash. Never mind the amount. That is why they brought an armored cash-in-transit vehicle. Mr. Koome is now dead unfortunately. The defendant needed to perform the contract with "proper care" for safety of the consignment. The performance by the

plaintiff of its duties with proper care was a vital condition to ground its reliance on the exemption clauses. Transporting a huge consignment of cash required basic care: a special vehicle as the one defendant brought, professional security guards and an armed escort, and to use a secure route. It is implied. It had been done before.

30. On this occasion, and which speaks volumes, no such escort was provided. What happened next is quite telling: The document at page 15 of the plaintiff's bundle is an incident report on Securicor's note paper. It states as follows:

“About 15 km from Meru, the driver, felt that the vehicle was not handling properly and thought he had a flat tyre. He stopped and alighted to check and found a front tyre was partially deflated. He decided to change the tyre. Whilst doing so, he was ambushed by 4 persons of apparently Somali origin so, who were armed. They boarded the vehicle, which was then driven away with our crew held at gunpoint on board.....”

31. The crew of the vehicle after collecting the cast took a different route, Ruiru road instead of the Maua – Meru – Nairobi road. I have dealt with that aspect of the evidence and applicable precedents earlier. They did not radio back their base or notify the bank. Instead, they abandoned the vehicle and reported the incident in Meru. All the documents in the bundles of both parties were admitted into evidence by consent. The totality of that documentary and oral evidence and circumstances point suspiciously at the defendant's crew. They were charged for the criminal offences I highlighted earlier. I am unable to say from the evidence that the defendant can be said to have taken all reasonable precaution or that it properly performed the contract in question. The particulars of negligence pleaded at paragraph 7 of the plaint are thus proved. They have not been disproved by the defendant. The failure of duty of care owed to the plaintiff is the defendant's failure to take reasonable care of the bailors goods. Looked at from that perspective the exemption clauses in the contract drawn by the defendant are oppressive and inoperative. I will provide a basis for that conclusion below.

32. In the incident report at page 15 of the plaintiff's bundle, the defendant's managing director notes that two of his crew members involved in the theft had been arrested. They were out on Kshs 1 million bond and police investigations were continuing. The plaintiff's witness referred to those criminal proceedings. He was unaware of any conviction. The crew commander who was charged is now dead. To then expect the plaintiff to have a conviction first under divisions V to VII of the Penal Code so that it can get 2,500,000 compensation is unreasonable and oppressive: oppressive because it has no control over such processes. It is not contested that the defendant's employees were charged for the offence of stealing by servant and giving false information to the police in criminal case number 15 of 2003 at Meru. (Page 13 and 15 of plaintiff's bundle).

33. The plaintiff lost Kshs 18,550,000. The defendant's exemption clauses would mean compensation to the plaintiff of a meager Kshs 100,000. That is unreasonable in the circumstances of the defendant's failure to perform the contract with proper care as required in clause 3 (b) of the contract. In *Salvage Association Vs Cap Financial Services* [1995] F.S.R 654, limitation of liability in a computer accounting contract to £ 25,000 was held unreasonable. See also *First National Bank Plc Vs Loxley* [1996] E.G.C.S 174 (C.A.).

34. To uphold those unreasonable and oppressive exemption and limitation clauses in the contract here will be to turn a blind eye to the negligence of the defendant. Issue number 1(b), the remainder of issue 1 (c) and issue number 2 are thus answered as follows: The defendant did not carry out its duties in accordance with the express or implied terms of contract; The restrictions and limitations on liability are vitiated by the acts of negligence of the defendant. Those restrictions and exemptions are oppressive or unreasonable and do not wholly apply; The defendant is thus liable for negligence and damages.

35. I will deal first with the prayer for general damages. The plaintiff's witness did not lead evidence that would assist the court to assess general damages. Furthermore, general damages are

not generally available for breach of contract. A guiding principle in such matters is *restitutio in intergrum*. See *Dharamshi Vs Karsan* [1974] E.A 41, *Joseph Ungandi Kedera Vs Ebby Kangisah Kawai* Court of Appeal, Civil Appeal 239 of 1997, *Lino Stationers Limited Vs Independent Electoral and Boundaries Commission* Nairobi, High Court case 247 of 2007 [2012] e KLR, *Securicor Courier Kenya Limited Vs Benson Onyango and another* [2008] KLR 252, [2008] e KLR. The plaintiff's claim for general damages is dismissed.

36. I would then turn to the claim for special damages of Kshs 18,550,000. I have dealt at length on whether the container in question had Kshs 18,550,000. I stated that the evidence of the plaintiff's witness was not controverted. He packed the money into the container with his staff. Page 30 and 31 of the supplementary bundle dated 9th March 2012 has a breakdown of the cash packed, the denominations, movement and the cashier's memo. The container was taken by the defendant's employees and signed for by Mr. Koome, their supervisor or crew commander. I referred to the document at page 15 of the plaintiff's bundle: An incident report on the defendant's note paper. The relevant part states as follows:-

“The vehicle was found as described by the crew. In the box belonging to Consolidated Bank a letter was found from Consolidated Bank Maua Branch to Head office indicating that the shipment consisted of Kshs 18.5 million. A buff envelope was also found containing US \$ 170 bank notes”.

37. Issue number 3 is thus answered in the affirmative. The portable container had Kshs 18,550,000. It was in the custody of the defendant's employees when it was lost. The plaintiff can only look up to the defendant for redress. I have held the exemption clauses in that regard are inoperative. Consequently, the defendant is liable to the plaintiff for the special damages which have been pleaded and specifically proved of Kshs 18,550,000/-.

38. I now turn to the issue of notice. The defendant stated that notice of loss was not delivered to the plaintiff until 13th January 2003 – well outside the 15 days specified in the contract. The plaintiff contests that assertion. I have then looked at the documents. There is a letter at page 3 of the defendants bundle. It is dated 24th December 2002, a day after the incident. It is addressed to the General Manager of the defendant and noting the plaintiff's claim for Kshs 18,550,000. There is then another letter dated 13th January 2003 from the plaintiff to the defendant. It refers to the letter of 24th December 2002. It enclosed the incident report and the police abstract. There is a further letter to Securicor dated 24th January 2003 complaining that the defendant had not responded to the earlier letters. This last letter is to the attention of Mr. Ahenda and refers to a discussion with a Mr. Ochwada of Consolidated Bank.

39. The defendant acknowledged receipt of the notice only on 13th January 2003. I think that is self serving. I say so because of the following three reasons. First, the defendant's witness did not lead evidence on that point. It remains unrebutted. Secondly, I have looked at the letter dated 26th February 2003 at page 10 of the plaintiffs bundle. It is from the *defendant's* loss adjusters Cunningham & Lindsey: That letter acknowledges receipt by Securicor of *all* the 4 letters. It states:

“We represent the Insurers of Securicor Security Services Kenya Limited and copies of your letters of 24th December 2002, 11th January 2003, 13th January 2003 and 24th January 2003 have been passed to us for attention. First, we apologise for the delay in responding....”

40. To be fair to the defendant, that letter draws the attention of the plaintiff to condition 3 of the contract and proceeds to state:

“Your letter of claim dated 24th December 2002 was received at Securicor's Head

office on 13th January 2003 i.e. 20 days after the incident. We have a copy of the enclosing envelope which bears postmark dated 8th January 2003. Having regard to the terms of the contract your claim is out of time”.

41. A few things can be said about the letter. It is a late acknowledgment of the letters by the plaintiff. It is dated 26th February 2003. The *original* enclosing envelope with a post mark of 8th January 2003 was never brought into evidence. To be fair to the defendant, there is an index to their bundle of documents filed on 21st March 2012. The plaintiff’s letter of 24th December 2002 is annexed. It has a Securicor stamp for 13th January 2003. A copy of the envelope (I presume) appears next. It has a franking machine impression of 8/1/2003. The defendant’s witness led no evidence on this important matter. The plaintiff’s witness said he could not comment on it either. The period between 24th December of the year and early January of the next year is a holiday season. That is a matter of judicial notice. What is clear is that by 8th January 2003, and well within the notice period, a formal letter had been sent to the defendant. The sender and addressee both have postal addresses for Nairobi. The defendant has chosen to admit receipt on a date conveniently outside the prescribed period. I have formed the view that a timely notice was issued.

42. It is also not lost on me that there was additional constructive notice. The notice required of 15 days is a private notice in the contract between the parties. It is not a statutory notice. The purpose of notices generally is to inform the other party within a reasonable period of a likely claim. If I can borrow from the insurance world, it enables an underwriter to investigate the claim before the trail gets cold. There is the incident report at page 15 of the plaintiff’s bundle. As early as 21st December 2002, the defendant was aware of the impending contract for transport of cash from the plaintiff’s bank. The defendant knew the consignment was lost. That is why the report refers to tracing of its vehicle that I referred to and the letters and buff envelope left inside on the loss of Kshs 18,550,000. The final paragraph of that note states:

“As is normal in such situations, both crew members were arrested and are continuing to assist police with their inquiries. Both are presently on bail against a bail bond of Kshs 1 million police enquiries are ongoing”.

I am then fortified in finding that a notice was delivered timely. The defendant’s defence on that score is a red herring. Issue number 4 is thus answered in the affirmative.

43. The last issue is on costs. Costs follow the event and are at the discretion of the court. The plaintiff is entitled to costs. No evidence was led on the item of interest. Under section 26 of the Civil Procedure Act, I will order interest from the date of the decree until payment in full. That is entirely within my discretion. I have considered the amount in question and the interests of justice. In the end, I have found that the plaintiff has proved its case on a balance of probability and is entitled to judgment against the defendant.

44. In the result, judgment is hereby entered in favour of the plaintiff against the defendant for Kshs 18,550,000. Interest is awarded on that sum from the date of the decree until full payment. I also award the plaintiff costs of the suit.

It is so ordered.

DATED and DELIVERED at NAIROBI this 4th Day of July 2013.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Ms G.G. Ogalo for Mr. Makori for the Plaintiff.

Mr. K.A. Fraser for the Defendant.

Mr. Collins Odhiambo - Court Clerk.