



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: PLATT, APALOO JJA & MASIME Ag JA)

CIVIL APPEAL NO 67 OF 1985

SECURICOR (KENYA) LIMITED.....APPLICANT

VERSUS

EA DRAPERS LIMITED1ST DEFENDANT

COMBINED WAREHOUSES LIMITED.....1ST DEFENDANT

(Appeal from the High Court at Mombasa, Bhandari J)

RULING

The applicant Securicor (K) Limited, gave notice on October 21 1986 that it would move the court for an order that leave be granted to the applicant, to amend the applicant's memorandum of appeal, which had been filed in Civil Appeal No 67 of 1985. The appeal so filed had been taken against judgment in favour of the original plaintiffs EA Drapers Limited and the original first defendant Combined Warehouse Limited. The application was brought under rule 44(1) of the Court of Appeal rules, and was first heard by Gachuhi, JA in chambers. The latter having given his ruling, Mr Satish Gautama gave informal notice that he would refer the matter to the full court under rule 54 of the rules.

As the procedure was somewhat doubted, we should make it clear, that a formal application for amendment under rule 44 should be heard first by a single judge, as provided by rule 52 of the rules, without prejudice to the full bench's right to give leave to amend on an informal application during the hearing of an appeal under rule 44(2) of the rules. After the single judge has made his decision, a reference to the full bench may be made by either side under rule 54 of the rules. The full bench may vary, discharge or reverse the decision of the single judge after rehearing the matter.

It may help to make the matter easily intelligible if we indicate at the outset what disputes arose between the parties. The plaintiff EA Drapers Limited had sued Combined Warehouses Limited as first defendant for damages. The plaintiff had stored its goods at godown 15, Zanzibar Road, Mombasa, under contracts set out in warrants, which the plaintiffs had entered that the first defendant had undertaken, expressly or impliedly, to take reasonable care of the goods as bailees for reward. Unfortunately 16 cases of these goods were lost and the value of the lost goods was put at Kshs 230,532. That sum was claimed as damages.

Further and without prejudice to the situation between the plaintiff and first defendant on the basis of

bailment for reward, the plaintiff averred that the first defendant had entered into a contract with the second defendant, to provide a security guard for the protection and safety of the goods stored in godown No 15. However, on December 11 1977, the security guard Moses Aila, stole 16 cases or caused them to be stolen, in the course of his employment. Moses Aila was convicted on March 25, 1978 of store breaking and theft, contrary to section 306(a) of the Penal Code and imprisoned. No doubt, this pleading aimed at reliance on section 47A of the Evidence Act (cap 80); but the theft by Moses Aila is not denied as such by the second respondent. It is said that the act complained of was not within the scope of the employment of the guard and was wholly unauthorized.

The first defendant then issued a third party notice to the second defendant, claiming indemnity or contribution.

The defences of the defendants are as follows: On the contract between the plaintiff and first defendant, the latter finally claims that there was a condition exempting the defendant from liability for any loss or damage of any kind resulting wholly or partly from the negligence or willful default of the defendant or its agents or servants. Hence as the contract between the first defendant and second defendant was admitted with the object no doubt of showing that the second defendant was the agent or servant of the first defendant, the exemption clause covered any negligence or willful default of the first defendant itself, and that of its agent or a servant, the second defendant.

The defence of the second defendant against the third party notice relies on similar conditions. The second defendant was to be liable for any want of proper care on its part in the selection or employment of the men put on and in charge of the services provided. Otherwise the company would “not be responsible to the client under any circumstances whatever for any deliberate wrongful act committed by any servant of the company in or with reference to such services or otherwise.” As far as burglary, theft, fire or other cause, is concerned, the company would only be liable if the employee was solely negligent and acting within the course of his employment. Then there was a condition of notice being given within one month, and one limiting the maximum claim for fire or theft to Kshs 100,000. Consequently, the second defendant denied liability to indemnify or contribute to the first defendant.

But that leaves open the plaintiff’s attack on the second defendant. There was no contract between them. The plaintiff alleged that Moses Aila an employee of the second defendant stole the plaintiff’s goods (and his conviction would be conclusive proof under section 47A of the Evidence Act (cap 80)), and that this theft occurred in the course of his employment, and therefore the second defendant would be vicariously liable, as we suppose, under the general principles of the law of Tort. The second defendant’s answer in the amended defence; was that while Moses Aila was employed by the second defendant as a guard at the first defendant’s premises (but not otherwise), the act complained of was not done “as such guard,” and was not within the scope of such employment and was wholly unauthorized. Consequently, the second defendant denied vicarious liability.

The parties then agreed on a statement of facts, and having called no evidence, put forward their arguments. In the course of the hearing, the second defendant was permitted to amend his defence against the first defendant, by adding a counter-claim, and a fresh agreed statement of facts was put before the court, with a few facts adjusted, which are not important in the present context. We mention this so as to do justice to Mr Gautama’s general contention that changes in the position of a party may require adjustments by the other parties. The final agreement on the facts is as follows:-

1. “At all times material to this suit, the plaintiff was the owner of the goods referred to in paragraph 4 of the plaint (hereinafter referred to as the said goods).
2. At all times material to this suit, the first defendant (CWL) carried on the business of warehouse keepers who accepted, for reward, goods belonging to their customers for storage.
3. Under contracts in writing contained in warehouse warrants numbers 67976, 71065 and 71151 dated June 16, 1977; October 22, 1977 and November 9, 1977 respectively issued by CWL the plaintiff stored the said goods in CWL’s godown No 15 at Zanzibar Road, Mombasa, on the terms

and conditions contained in the said warehouse warrants. The said warehouse warrants are annexed hereto and marked exhibits 1,2 and 3.

4. At the time the said warehouse warrants were issued, the said goods were already insured by the plaintiff against, *inter alia*, loss by theft under a general policy of Insurance covering all goods belonging to the plaintiff and warehoused with CWL and other warehouse keepers. At no time did the plaintiff request CWL to insure the said goods with its CWL's underwriters against the risk of loss by theft or otherwise.

5. By a contract in writing dated September 30, 1977 and made between CWL and the second defendant (Securicor), Securicor agreed to provide security services, *inter alia*, at CWL's said godown No 15 at the places and on the terms and conditions (including the standard conditions referred to herein) contained in the said contract. The said contract is annexed hereto and marked exhibit 4.

6. Neither Securicor nor its guards were ever in possession of the said godown or its contents.

7. In pursuance of the contract referred to in paragraph

5 hereto, Securicor employed one Moses Aila (hereinafter referred to as "Moses") to provide the security services referred to in the said contract as a night guard at the said place.

8. On about December 11, 1977, while purporting to act as such night-guard Moses stole 16 cases of clothing of the value of Kshs 212,802 being part of the said goods from the said godown.

9. No written notice of any claim arising out of or in respect of the said theft was even given by CWL to Securicor."

(In view of paragraph 8 above, we are not certain why judgment was given for Kshs 230,538).

On these facts and exhibits the learned trial judge found that the first defendant, was not liable on the exemption clauses contained in the warehouse warrants, and indeed Securicor was an independent contractor, to whom the plaintiff must look for compensation. On the other hand, the learned judge held that Securicor was liable to the plaintiffs, because Securicor owed a duty to the owners of those goods to guard =and must be liable if its own servant stole them. The second defendant Securicor could not claim indemnity from the first defendant the warehousemen.

Against those findings, Securicor has appealed; and having taken the obvious issues on vicarious liability, now wishes to add two more grounds, the subject of this ruling. Securicor has challenged its vicarious liability. In ground 2 objection is taken because the learned judge should have held, as it is said, that the act of theft on the part of Securicor's servant was not within the scope of his employment. Now the appellat Securicor wishes to add grounds 2A and 2B.

Ground 2A has not been objected to; and covers the dispute that if the judge found that the warehousemen had not delegated to Securicor any part of their duty of care to the plaintiff, the judge was in error in holding Securicor liable to the plaintiff, on the basis that Securicor owed the plaintiff a duty of care, and holding Securicor liable to the plaintiff for the theft of the goods. It is ground 2B which the plaintiff alone disputes.

"Assuming that Securicor owed any duty of care to the plaintiff (which was denied)-

a) the said duty arose solely by virtue of Securicor's contract with CWL (exhibit) under which Securicor's liability for the loss of warehouse contents was heavily circumscribed; in the premises, the ambit of the said duty was defined by the terms of the said contract and the liability for its breach was either excluded by the provisions of clauses 1 and/or 4 thereof or limited under the provisions of clause 5 thereof; and

b) likewise or alternatively, the scope and ambit of the said duty was delimited and defined by the terms of the contract between the plaintiff and CWL (Exhibits 1,2 and 3) whereunder the plaintiff renounced any obligation of care in its favour, not only as against CWL but also as against any non-contractual party (such as Securicor) engaged in the performance of the contract.”

It is clear now, that the debate has moved on from the level of vicarious liability, to that of the exclusion of liability under the contracts, in only one of which, the plaintiff was a party. We hope it is not too great a simplification to describe the issues in this way. If the Warehousemen (or “CWL” as the parties have described them), have entered into a contract with Securicor, in which Securicor’s liability is heavily limited, can the plaintiff stand in a better position than the Warehousemen? Is not the plaintiff like the Warehousemen, similarly limited, Securicor offering the same terms to both?

The second side is whether the plaintiff, learning that it had to insure the goods itself, entered into a contract with the exclusion clause, so renouncing any duty of care by the Warehousemen; and by the terms of the exclusion clause, covered non-contractual parties as well, so embracing Securicor. In other words, if the plaintiff released the Warehousemen from liability did it also release any other party doing work, connected with Warehousing, seeing that the Warehousemen were not required to be insurers for the plaintiff.

These being the amendments, what effect do they have?

In the first place, it is obvious that the terms and setting of the exclusion clauses in both contracts must control the inquiry into these problems. It was a case decided upon agreed facts. Would there be any other agreed facts? It is frankly admitted that these issues were not debated in the high court. Would this court benefit from any opinion expressed on these matters in the high court? In one sense this court is in as good a position as the high court to construe these contracts. But this court is a court of last resort.

Unfortunately a great deal of time has elapsed since the goods were deposited in the Warehouse in 1977. It would surely not be just to send the dispute, which has now emerged, back to the High Court. The situation is such that this court must either allow the amended memorandum of appeal or disallow it. It is the purpose of the reference to reconsider afresh the various aspects of the application.

The general principle is that expressed in the *Connecticut Fire Insurance Co v Kavanagh* (1882) 61 LJPC 60

“When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts admitted or proved beyond controversy, it is not only competent but expedient to entertain the plea; but this course ought not to be followed unless the Court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts fully investigated would support the plea.”

That statement of principle has been accepted in all the cases we have been referred to. The statement most applicable to this case is that when there is a matter of construction of a document and no question arises of calling evidence or of dealing with disputed facts, not only may a new point be taken, but it may be the court’s duty to decide it.

However, as Mr Gautama points out with force, the decisions actually taken are usually that the new point has not been allowed to be taken for the first time in court of final resort. There is the august view of Lord Birkenhead establishing the hierarchy of the courts and emphasising the value of the opinions of the judges in the courts below-

North Staffordshire Railway Co v Edge (1920) AC. It was repeated in *United Marketing Co v Hasham Kara* [1963] EA 276, a case principally relied upon by Mr Gautama. Let there be proper respect for every one and indeed a first-class trial is of the greatest benefit; but let us also weigh the value of the most pertinent appreciation of a problem against the hierarchical factor. It must surely weigh heavily on the side of justice that the hierarchy is not saddled with a partially perceived view of a problem and a decision

which may be an embarrassment. It must surely be a satisfaction to the litigants that the whole of their problem has been considered rather than part of it. The idea of providing the parties with the best construction or interpretation of documents, is akin to the principle that where a matter of law is involved, especially one of jurisdiction; it should generally be dealt with. Law, JA summed up the situation with characteristic robustness of expression, in holding that it would be intolerable for the Court of Appeal for Kenya, to be required to leave undisturbed an incorrect statement of the law, because it had not been challenged. (See *Amarshi Madhavji v Sardarilal Ltd* (1977) KLR p 8 at p14). It is dangerous knowingly to leave mistakes or misunderstanding of law upon the records of the superior courts. Similarly, it may be dangerous to leave ill-considered constructions of contracts, which may be similar to many other contracts in actual use as the basis of a decision binding on other courts. It would lead to uncertainty.

But Mr Gautama seriously warned this court of the dangers of such a course. Certainly the cases show that the discretion must be exercised sparingly. The evidence must all be on the record and the new point must not raise disputes of fact. The new point must not be at variance to the facts or case decided in the court below.

Mr Gautama spent sometime emphasizing the fact, that the high court had not dealt with this problem, which must be so *ex hypothesi*. What was not so explicit was what the plaintiff would have done had the problem been raised in the court below. The attractive side of Mr Inamdar's case is that no evidence was recorded. The parties agreed the facts, and while

there was an adjustment of one fact by the Warehousemen when Mr Inamdar added his counterclaim, it is difficult to see that that adjustment was really of any significance. It was merely to withdraw a reference to godown No 15 at which guard Moses Aila was working. The plaintiff did not need to add anything. If now the scope of the exclusion clauses is in point, it is their construction rather than any facts which will be in point. But will that cause the plaintiff any prejudice? The plaintiff has conceded the contract between Securicor and the Warehousemen; he has referred to the conditions of that contract; the clauses in the contract are no surprise to the plaintiff. The problem has always been whether there is a nexus between them. The facts of a supposed tortuous nexus have been agreed. Moses Aila was on guard, but he had no possession of the godown or the goods inside, as Securicor's employee. He stole the plaintiff's goods. That must surely be all that there is to say. The questions that remain relate to

the scope of the contracts. Although Mr Gautama refused to speculate on the effects of the amendments on the plaintiff's case, in our opinion it is certain that no new facts can profitably arise. It is the essence of the problem that, if, which is disputed, vicarious liability case arise on the facts, then the question is whether the exclusion clauses provided exemption. That is merely a matter of construing the contracts, and therefore this case is distinguishable from Privy Council decisions referred to us, affecting other jurisdictions. It is the duty of this court to allow these amendments and decide all the issues that might arise.

In our opinion, Gachuhi JA was quite right to allow the amendment and the reference is dismissed with costs.

Dated and Delivered at Mombasa this 28th day of September, 1987

H.G. PLATT

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL

J.R.O. MASIME

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Ag. JUDGE OF APPEAL