Texas Alarms (K) Limited v General Cargo (Transport) Limited (Civil Appeal 10 of 2021) [2023] KECA 1067 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1067 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 10 OF 2021

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

SEPTEMBER 22, 2023

BETWEEN

TEXAS ALARMS (K) LIMITED ..... APPELLANT

AND

GENERAL CARGO (TRANSPORT) LIMITED ..... RESPONDENT

(Being an Appeal against the Judgment and Decree of the High Court Mombasa, delivered by P. J. Otieno, J. on the 2nd December, 2016, in HCC Suit Number 201 of 2010)

JUDGMENT

1. The Respondent, General Cargo (Transport) Limited in a plaint dated 18th June 2010, filed a suit before the High Court at Mombasa (Civil Suit No 201 of 2010) against the Appellant, Texas Alarms (K) Limited. The suit was based on a contract for supply of security guards. The Respondent's claim was that as a result of the negligence of the Appellant's employees, servants or agents it had suffered loss and damages to the tune of Kshs 6,964,788.66. It also claimed general damages. The Respondent alleged that it had suffered loss and damage detailed its claim as follows:

    i. Cost of tyres Kshs 3,739,855/=

    ii. Letter of credit Kshs 56,097.83/=

    iii. Bank charges Kshs 2,000/=

    iv. Insurance Kshs 17,903/=

    v. Clearing charges Kshs 1,141,914/=

    vi. IDT fees Kshs 5,000/=

    vii. Other charges Kshs 10,000/=

viii. Profit on sale of tyres Kshs 1,982,018/= Total ..... Kshs 6,964,788.66/=

2. The Appellant, in its statement of defence dated 22nd July 2010 pleaded that it was a stranger to the claim as pleaded in paragraphs 3, 4, 5, 6, 7, 8 and 9 of the plaint, and put the Respondent to strict proof thereof.

Background

3. The Respondent's claim before the High Court was based on a contract for provision of security services in the nature of guards, dogs and alarms at its yard at Port Reitz area in Mombasa County. The contract was made between Texas Alarms (K) Limited and General Cargo Services Limited with the commencement date of 1st May 2005. That contract had a deeming clause to the effect that 'if not terminated by a notice made one month before the expiry of one year the contract shall be deemed renewed for a further period of one year.'

4. The Respondent claimed that on the 4th April 2010, while the contract was in force, a lorry registration number KWA 930 and trailer number 2B790 loaded with 494 pieces of SUV motor vehicle tyres was stolen from the Respondent's yard that was guarded by the Appellant's employee. The lorry was found abandoned in Mazeras/Mikindani area without the cargo.

Proceedings Before The High Court

5. The Respondent called two witnesses. PW1, Abdulrazak Omar Alamin was its Operation's Manager. He testified that at the period in question there was a contract between the parties in which the Appellant was to provide two security guards to the Respondent at its yard in Port Reitz, one for the day and one for the night. In addition, the Respondent had two night guards on duty at the premises. PW1 stated that he received a call on the 5th April 2010 that on the night before, the Respondent's guards were drugged and goods stolen. That he visited the yard and found their two guards lying on the ground. There was an abandoned uniform belonging to the Appellant's contracted guard who was also missing from the premises. He stated that the lorry was found abandoned at Mazeras/Mikindani area. That subsequently, the Appellant's guard was arrested and arraigned in Court. He did not know the outcome of the case against the guard. PW1 admitted that all the documents relied on for the claim were in the name of Auto Express Limited who were the owners of the cargo. He also stated that he did not know whether the cargo was insured and if any claim had been made to the insurers.

6. In cross-examination, PW1 admitted that the Respondent transported the goods in question in a vehicle without a tracking system but maintained that the tracking system was only required if the goods were to be transported outside Mombasa County, which was not the case. He also admitted that the contract for the security services was signed between the Appellant and General Cargo Services Limited, the latter which was not the Respondent in the case. He also admitted that the amount claimed by Auto Express Ltd from them was Kshs 900.000/- and that they paid.

7. The second witness (PW2) was Paul Muthigani who introduced himself as the Corporate Customer Service Assistant with Auto Express Ltd. He testified that in March 2010, Auto Express Ltd assigned the duty of clearing tyres, their storage and transportation to the Respondent. That on 5th March 2010 he received an advice from the Respondent that the 494 tyres they assigned to the Respondent had been stolen. That as the tyres were never recovered, Auto Express Ltd wrote to the Respondent a letter dated 14th April 2010 which put the cost of the tyres at Kshs 1,915,945.08/=. It also raised an invoice on account for the projected profit of the lost cargo at Kshs 900,000/=, which amount PW2 confirmed was paid to Auto Express Ltd by the Respondent. He also stated that the cargo was insured but that no compensation had been received.

8. The Appellant called one witness, DW1, Benard Odhiambo the Human Resources and Customer Relations Manager. He stated that the Appellant had an agreement with General Cargo Services Ltd for provision of security services at a built up godown with a perimeter wall. That at the time of the incident, the Appellant was providing one day and one night guard. However, prior to the incident the Appellant provided a dog, but that the Respondent withdrew that service. DW1 testified that the agreement between the parties provided that in case of loss implicating their guards, the Appellant would only compensate General Cargo Services up to Kshs 25,000/=. He stated that the General Cargo was expected to insure the goods before the Appellant's guards guarded them, that the Respondent's claim was against the terms of the agreement and that once a demand for compensation was made to it in line with the agreement, it was ready to pay. He admitted that the Appellant's guard was arrested, but that he did not know the outcome of the case.

Decision of The High Court

9. The learned Judge of the High Court, (P.J. Otieno, J.) after considering the evidence and the submissions of the parties and the issues raised by them compressed the issues framed to two: Whether the Appellant met its contractual obligation to the Respondent; and secondly, what was the effect of the exclusion clauses in the agreement between the parties.

10. The learned Judge found the parties insistence that the Court determines whether there was a contract for provision of security services between the Appellant and the Respondent a non-issue. The learned Judge posited that both parties were on record as per their pleadings and evidence that a contract for provision of security services existed between the parties by the posting by the Appellant of a day and night guard per day to the Respondent's premises, and that on the material day the Appellant's guard was indeed on duty.

11. On the identified issue whether the Appellant met its obligation to the Respondent, the learned Judge found that the Appellant's guard was guilty of abdication and dereliction of duty having fled from the premises he was guarding, leaving behind his uniform. He found the Appellant's defence a general denial and its evidence in an attempt to rely on a clause in the agreement limiting its liability to Kshs 25,000/- a deviation from its defence as filed and an ambush to the Respondent. He proceeded to find that due to breach of duty owed to the Respondent by the Appellant a loss of cargo occurred, that the lost cargo was in the hands of the Respondent as bailee, and that the Appellant was liable to the Respondent for the value thereof. He dismissed the Appellant's attempt to question whether the Respondent had title to the lost cargo. He found for the Respondent in the sum claimed but dismissed its claim for general damages.

The Appeal

12. The Appellant was dissatisfied with the judgment of the High Court and so filed this appeal. In the memorandum of appeal dated 8th February 202, the Appellant raises 14 grounds of appeal. They challenge the learned trial Judge's finding on the issue of the contract relied upon by the Respondent, averring that the Respondent had no locus to file the suit as it had no privity of contract with the Appellant. The Appellant took issue with the award of special damages on grounds loss was not proved. It also challenged the award on the grounds even if the Appellant was found liable, the liability was limited to a maximum of Kshs 25,000/- under the said contract. The Appellant challenged the failure by the learned Judge to find that the contract before the Court was between the Appellant and General Cargo Services Limited and not the Respondent. Further that it the contract required the General Cargo Services Limited to take out an insurance cover for any loss it and the Appellant would incur; and to use vehicles fitted with tracking system, which it failed to adhere to. The Appellant challenged

the learned trial Court of not considering whether theft and the locus in quo of the alleged theft was proved.

13. The Appellant seeks to have the appeal allowed; the judgment and decree of the High Court both made on the 2nd December 2016 be set aside in their entirety and the Respondent's suit be dismissed; and, the costs of the appeal and of the High Court Civil Suit number 2201 of 2010 be awarded to the Appellant.

Submissions.

14. The appeal was heard through this Court's virtual platform on the 27th March 2023. Present for the parties were learned counsel Mr. Randolph Tindika for the Appellant and Mr. Khatib for the Respondent. Mr. Tindika relied on his written submissions dated 22nd March 2023 together with his list and digest of cases. Mr. Khatib relied on his written submissions dated 24th March 2023. Counsel highlighted their respective submissions before us.

15. Mr. Tindika urged that the issues for determination were; whether there was privity of contract between the Respondent and the Appellant. Further, whether there was privity of contract between the Respondent and Auto Express Limited. In answer to this issue, counsel urged that the only agreement with regard to the provision of security guards was executed between the Appellant and General Cargo Services Limited. That there was no agreement between the Appellant and the Respondent in that regard. In the premises, the Respondent, being a non-party thereto, could not seek to enforce the said agreement.

16. Mr. Tindika, referring to the documents adduced by the Respondent urged that the document which was utilized to release the cargo the subject of this Appeal was CFS Release Order dated 26th March 2010 that demonstrates that the consignment herein was released to General Cargo Service Limited and not the Respondent. That the letter dated April 14th' 2010, from Auto Express Limited to General Cargo Services Limited with regard to the lost tyres made it clear that that the property lost belonged to Auto Express Limited, and the said Company, vide that letter demanded for compensation from the said General Cargo Services Limited, and not the Respondent herein. That therefore there was no privity of contract between the owner of the goods, Auto Express Limited, and the Respondent.

17. In support of his submissions, Counsel relied on case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR and of *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another* [2014] eKLR for the proposition that a contract cannot confer rights or impose obligations on any person other than the patties to the contract. Counsel submitted that the Respondent had no locus standi to file the proceedings and the learned Judge erred in failing to dismiss the suit accordingly.

18. On a without prejudice basis, Mr. Tindika urged that even if the Respondent had an agreement with Auto Express Limited, which it did not, it would have been acting as a clearing and transportation agent, and thus an agent acting for a disclosed principal. That though the legal principle is that an agent cannot be sued, where there is a disclosed principal the converse is true that an agent cannot sue where there is a disclosed principal. For that proposition counsel relied on the case of *Victor Mabachi & another v Nurtun Bates Limited* [2013] eKLR.

19. Mr. Khatib in response submitted that the Appellant did not plead the issue of privity of contract. Further, that the Appellant's witness in his evidence admitted that there was a contract between the Appellant and the Respondent to provide security services specified as guards, a dog and alarm services.

20. Mr. Tindika submitted that the second issue for determination was whether the amount claimed by the Respondent of Kshs 6,964,788.66/= as pleaded in the Plaint was strictly proved. Counsel urged

that from the evidence on record, it was clear that the Respondent did not produce any evidence to strictly prove that as the Plaintiff, it was entitled to the claimed amount of Kshs 6,964,788.66 or any of the amount thereunder or at all. That it did not prove that as a party to the agreements and or contracts herein, it had lost Kshs 6,964,788.66/=. That to the contrary, the evidence on record demonstrated that Express Kenya Limited had demanded Kshs 1,915,945.00/=, not from the Appellant or the Respondent, but from General Cargo Services Limited. That the said amount is not part of any of the amounts pleaded by the Respondent in the Plaint filed herein and thus there was no credible documentary evidence in support of the alleged special damages of Kshs 6,964,788.66/=.

21. Mr. Tindika urged that it was clear from the evidence on record that the Respondent did not have any property in the cargo allegedly lost herein because none of the cargo belonged to it nor was it released to the Respondent as per the exhibits it produced in Court. That being the position, the Respondent had not suffered the alleged or any loss, and thus had no capacity to sue the Appellant nor claim the value thereof against the latter.

22. Mr. Tindika urged that the third issue for determination was whether there was sufficient evidence to prove that the alleged theft took place in the Respondent's premises. Counsel urged that the Respondent's key witness in this matter, PW 1 in his evidence alleged that he received a call that their workers had been drugged, but no medical evidence was availed to demonstrate that the said allegation was true. The said guards were never called as witnesses, yet their evidence would have been crucial in unveiling what transpired. That to the contrary, the evidence available from the owner of the lost goods, Auto Express Limited, through PW2, proved that the said Company placed the blame squarely on the Respondent and/or Respondent's sister Company, General Cargo Services Limited. That Auto Express blamed General Cargo Services Limited for failing to fit the lorry with a tracking device, which was an indication that the alleged theft could have taken place outside the Respondent's yard while the truck was on transit. He submitted that there was no evidence to prove that the alleged theft took place at the Respondent's premises and that the learned Judge was at fault in relying on hearsay evidence and thus arrived at an erroneous finding.

23. In response, Mr. Khatib submitted that the Appellant's witness in his evidence admitted that the loss was a direct result of theft by its employee. He urged that the evidence adduced showed that the employee disappeared on the same day of the incident leaving his uniform behind. He urged that arising from the fact that the employee was later charged for the loss, the only conclusion that can be had is that the employee was responsible for the loss.

24. Mr. Tindika urged that the fourth issue for determination was what could have been the Appellant's ultimate liability had evidence been adduced against it. Counsel urged that the Agreement executed between the Appellant and General Cargo Services Limited, the Appellant's total liability would not exceed Kshs 25,000.00/= in any circumstances. He urged that this meant that this was the only amount awardable to General Cargo Services Limited had the proper party sued and proved its case against the Appellant. Counsel placed reliance on the case of *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR the effect of standard form contracts.

25. Mr. Khatib in response urged that if the Appellant was admitting only Kshs 25,000/=, then it should have offered that amount when the Respondent sent demand letters to them. To that submission, Mr. Tindika urged that the demand letters were not produced in Court so the Respondent could not rely on same. He also urged that the Respondent's claim was in tort, claiming in negligence under doctrine of vicarious liability and not a claim in special damages.

26. Mr. Khatib for the Respondent urged that only two issues required determination by this Court. The first one being whether the Appellant breached its obligation as required by the contract of service.

Counsel urged that the Appellant had an obligation to provide security at the Respondent's premises by controlling and guarding the main entrance and preventing intruders, thieves and or trespassers from entering, while the Respondent's two guards were also providing security within the yard. He urged that according to the evidence of the PW1 the motor vehicle registration KAW 930 X was in the guarded premises when it was stolen. He urged that when PW1 arrived at the scene he found the Respondent's guards were drugged and the Appellant's guard was nowhere to be found. Relying on paragraph 26 of the Judgment, counsel urged that the act of the Appellant's guard of being away from duty after the incident was a clear indication that the guard did not use any force to prevent the theft, and that consequently the Appellant was negligent in protecting the Respondent's premises as contracted. He submitted that the trial Judge was alive to the contract service and the manner in which such service was to be rendered, and that the learned trial Judge was right in holding that the Appellant was liable for the theft.

27. On the issue of the Respondent's locus standi to sue, Mr. Khatib submitted that the Respondent was a Bailee of Auto Express Ltd by virtue of a Transport contract, and that it was entitled to sue on their behalf as the party that had the custody of the cargo in question. In a quick response, Mr. Tindika submitted that the Respondent, being a Bailee of a disclosed principal had no claim and could not sue, without the principal being a party in the suit.

28. Mr. Khatib urged that the second issue for the determination by this Court was whether the respondent was entitled to the prayers sought. Counsel urged that the Respondent in its Plaint sought for payment of Kshs 6,964,788.66/=. That at the hearing, PW1 in his evidence tabulated how the amount was arrived at. Counsel turned to the filed statement of defence and urged that the first time the issue of the clause limiting liability of the Appellant to Kshs 25,000/ = came up was at the hearing of the Appellant's case. Counsel urged that since it was not pleaded, the Appellant should not be allowed to rely on the limiting clause.

29. Mr. Khatib, lauding the learned trial Judge for a correct decision, relied on the case of *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 others* [2014] eKLR where the Court of Appeal pronounced itself on the issue of unpleaded facts as follows:

> "It is now very trite principle of law that parties are bound by their pleadings and that any evidence by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averment of the pleadings goes to no issue and must be disregarded."

30. Mr. Khatib submitted that the Appellant has failed to prove that its Appeal had merit to warrant this Court to set aside the trial Court's finding. He invited us to find that the Appeal lacks merit and dismiss it with costs.

Analysis and Determination

31. This is a first appeal, and in that regard, the principles which this Court should apply have been set out in a number of decisions including the decision in the case of *Selle and another v Associated Motor Boat Company Ltd & other*s [1968] 1 EA 123, wherein this Court held: -

> "this court must reconsider the evidence,evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some

point to take account of particular circumstances or probabilities materially to estimate the evidence..." [Emphasis added]

32. In this regard we reiterate what this Court stated *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 287 that:

> " A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown to have demonstrably acted on wrong principle in reaching the finding he did."

33. We have considered the judgment of the learned Judge of the High Court, submissions by the advocates to the respective parties, the cases relied upon and the issues raised, and have analyzed and evaluated afresh the evidence adduced before the High Court, bearing in mind that we neither saw nor heard the witnesses, and giving due allowance. We think that the issues that fall for our determination are:

i. Whether there was privity of contract between the Respondent and the Appellant in regard to the contract for the provision of Security Services to the Respondent's company;

ii. Related to the first issue it the issue whether the Respondent as Bailee for Auto Express Ltd had the locus to sue;

iii. Whether the Respondent proved the Special damages claim as pleaded or at all;

iv. Whether evidence was adduced to establish that the cargo in question was stolen; and.

v. Whether the Appellant pleaded the existence of a clause on limitation of liability to the Respondent, and what was the effect of that clause, if any.

34. The applicable law as to the burden of proof lay with the Respondent, as stated in Section 107(1) of the *Evidence Act*:

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

35. Section 108 further provides that:

> " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

36. Having settled the basic principles that guide in weighing the evidence adduced before trail Court, let us turn to the issues for determination.

As to whether there was privity of contract between the Respondent and the Appellant and between the Respondent and Auto Express Limited regarding the contract for the provision of Security Services to the Respondent's company. Related to it is the issue whether the Respondent as Bailee for Auto Express Ltd had the locus to sue.

37. The Appellant's position is that there was no agreement between the Appellant and the Respondent and between the Respondent and Auto Express Ltd in that regard, and that in the premises, the Respondent, was a non-party and could not seek to enforce the said agreement. On the Respondent's side, they raised two arguments. First that there was a contract for provision of security services between the Appellant and the Respondent, as was admitted by the Appellant's own witness. Secondly, that

the Respondent was a Bailee of Auto Express Ltd by virtue of a Transport Contract and therefore had capacity to sue on its behalf for the loss it incurred while the cargo was in the Respondent's custody.

38. We wish to first deal with the contract that formed the basis for this claim. It is at page 37 of the record of appeal. The agreement shows the commencement date as 1st May 2005. It is between General Cargo Services Ltd and Texas Alarms (K) Ltd, the latter being the Appellant herein. It provides in part as follows:

> " 4. Subject.to Clause 13 of the Standard Condition overleaf, this contract shall remain in force for a period of one (1) year from the date hereof and unless a notice of termination is given in writing by either party to the other party at I east one calendar month before the expiry of the said period of one (1) year this agreement shall be deemed to have been renewed for a further period of one year on the same terms and conditions are as herein contained.
>
> 5. The charges set out above, are based upon the Company's charges ruling at the date of this contract. At any time after one month the Company may increase the charges by giving to the client a notice in writing specifying the amount of the increase and a dale (being a date not earlier than one month calendar month after the service of the notice) from which such increase shall be effective and payable by the client. The Client may within fourteen (14) days from the date of service of the notice give to the Company one month's notice in writing to terminals this contract and if such Notice of Termination is given, the charges for the one month's period of notice shall be the rate payable before the Company's Notice of Increase.
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> 6.
>
> (a) The Company shall have the right to increase by 15% the amount of the charge specified herein if it is not paid within thirty days of the date of invoicing.
>
> And further provided that the total liability of the Company shall not in any circumstances exceed (the sum of Kenya Shillings Twenty Five Thousand (Kshs 25,000/-) in respect of all and any incidents arising during any consecutive period of twelve months
>
> (b) Clause extending protection to servants and agents of the Company: If there shall happen any act or default of any servant or agent of the Company, Which may give rise to liability In such servant or agent of the Company to the Client for negligence, then It Is hereby expressly by the client with the Company on behalf of such servant or agent and for the benefit of such servant or agent that such servant or agent shall be entitled to the protection of all the terms and conditions thereof In any claim by the client against such servant or agent except the term relating to deliberately wrongful acts for which, as between the Client and the servant or agent, the servant or agent shall be liable),
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> 7. Terms defining and limiting liability to apply in all and any circumstances:

a. The potential causes that may be caused or be alleged to be caused by the failure of the Company or its servants or agents to perform any of the acts or services, or to take any particular precaution or care (whether as a result of breach of contract or negligence), or to avoid doing any act, are so great in proportion to the sums which can reasonably be charged hereunder by the Company that Company and its servants or agents cannot and will not assume any liability whatever In respect of any loss or damage howsoever caused outside or beyond the express provisions of these Conditions.

b. The losses that might be sustained in consequence of any negligence or breach of contract or other wrongful act whatever on the part of the Company, its servants or agents must, If the Client requires such cover, be covered by Insurance to be obtained separately by the Client and the Company and Its servants [r] or agents will not provide such or any insurance cover for the Client.

c. Tile liabilities which the Company is willing to assume, discharge are set out above and the Company will not and cannot accept liabilities beyond them. It is accordingly hereby expressly agreed by the Client with the Company {for the benefit of the Company and of the Company's servants or agents as aforesaid) both as terms hereof and as an-independent agreement made in consideration of the entry by the Company into this Contact which independent agreement. shall persist notwithstanding the termination of this contract by fundamental breach or otherwise that the- [exelusiens-and-timitabons-eMlability provided- herain- (includlng the provisions of condition .14-below)*shall-pialect. The. Cnmpany-and- iLs.KervHnlRnr][sic] agents in rail circumstances whatever, whether this Contractor any term expressed, or implied in it howsoever fundamental, be broken or repudiated, and whatever the consequences of any breach of contract or repudiation, and howsoever great may be the damages suffered by the Client, the consequences following from any negligence or breach of Contract or other wrongful act whatever on the part of the Company, its" servants or agents...

11. These Standard Conditions In conjunction with the provisions overleaf:

a. Shall constitute the entire contract between the Company and the Client and shall not Incorporate or be deemed to Incorporate the provisions of any extraneous document.

b. Shall supersede the provisions of any previous contract, warranty or representation made or given relating to the same services as are described in paragraph 2 overleaf."

39. The Appellant has denied the existence of any privity of contract between it and the Respondent. The Respondent denies this and places reliance on the 'admissions' by the Appellant's sole witness of the existence of such a contract. We considered the evidence of the Appellant's witness. He started by saying that the Appellant's company had provided security services to the Respondent since 2005. He then testified that the agreement that existed for the provision of the security services was entered into on 1st May 2005, and that it was signed between the Appellant and General Cargo Services Ltd. He explained that General Cargo Services Ltd changed its name to the Respondent in 2009. He then said that the two companies were sister companies. He produced the agreement as an exhibit. The Respondent on its part though represented by the Operations Director of General Cargo Transport Ltd, the Respondent in this case, offered no explanations as to the parties that signed the contract in issue in the case, nor did he explain the differences in the names between the Respondent and the company that signed the contract with the Appellant.

40. The learned Judge of the High Court at paragraph 26 of his judgment delivered himself thus:

> " 26. Simply put, the parties contracted that in - consideration of monthly charge or fee, the Defendant [Appellant] would provide guards/security services by deploying guards at the Plaintiff's [Respondent's] premises to watch over the intruders or felons and deep safety. That tasks 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 whistle They are so to speak watchman. A watchman is expected to be on watch out and to detect an unauthorized intrusion or trespass."

41. As the editors of *Chitty on Contracts*, Volume 1 state at paragraph 18-133, under the doctrine of privity of contract 'as a general rule a contract binds only the parties to it.'

42. In the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR on the issue of privity of contract, this Court held:

> " In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the patties to the contract Accordingly a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principle thus:
>
> > 'My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.'
>
> In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation v Lengetia Ltd* (supra), *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another* (supra) and *William Muthee Muthami v Bank of Baroda*, (supra).
>
> Thus, in *Agricultural Finance Corporation v Lengetia Ltd* (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:
>
> > 'As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact

that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party in the consideration does not entitle him to sue upon the contracts.'"

43. Further, in the case of *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another* [2014] eKLR:

> "It is trite that the doctrine of privity of contract is a long-established part of the law of contract. Save for the exceptions brought in by recent reforms of the law in this area which allow third parties for whose benefit the contract is made to enforce it, the essence of the privity rule is that only the people who actually negotiated a contract, and are thus privy to it, are entitled to enforce its terms. That is to say, only the parties to a contract have enforceable rights and obligations under it. A third party to the contract cannot enforce any of its terms nor have any burdens from that contract enforced on them. That is the law on the doctrine as I understand it and the Hon. Justice Visram has, in his judgment, given a splendid exposition of it.
>
> (6) Moreover the appellant not being party to the agreement of sale between the 1st and 2nd respondent there is no privity of contract between the appellant and the 1st respondent, and therefore the appellant is not bound by that agreement. Thus, there was no binding contract between the 1st respondent and the appellant upon which the order of specific performance sought by the 1st appellant could be anchored. Although this finding may be sufficient to dispose of this appeal, there is a further issue that require consideration."

44. As we stated earlier in this judgment, under Section 107(1) of the *Evidence Act*, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. As the Appellant had contested the existence of a contract between it and the Respondent, the burden of proving that there was privity of contract between the Appellant and the Respondent was the Respondent, as it was that fact that was the basis of filing the suit in the first place. The evidence of the Appellant's witness did not discharge that burden, neither could it serve as an admission given that it was self-contradictory. It is clear from his evidence that the Appellant's witness referred to the Respondent company and General Cargo Services Limited, as though they were one and the same thing, when in fact they were not.

45. With due respect to the Judge, the learned trial Judge fell into error when he found the issue of the existence of a contract between the parties a non-issue based on the evidence of the Appellant's witness, which he found was an admission. There was no evidence of privity of contract between the Appellant and the respondent. The authorities abound that show that the essence of the privity rule is that only the people who actually negotiated a contract, and are thus privy to it, are entitled to enforce its terms. That is to say, only the parties to a contract have enforceable rights and obligations under it. A third party to the contract cannot sue to enforce any of its terms, as the Respondent purported to do in this case. Accordingly, we find that the Respondent did not discharge its burden on this point.

As to whether the Respondent as Bailee for Auto Express Ltd had the locus to sue;

46. Mr. Khatib for the Respondent submitted that the Respondent was a bailee of Auto Express Ltd over the cargo in issue.

47. Mr. Tindika submitted that the Respondent was introducing a new term in the case at the appeal stage; that of being Bailee. He urged that even if the Respondent had an agreement with Auto Express Limited, which it did not, it would have been acting as a clearing and transportation agent, and thus an agent acting for a disclosed principal. Though the legal principle is that an agent cannot be sued where there is a disclosed principal, the converse is true that an agent cannot sue where there is a disclosed principal. In the premises, counsel urged, the only principal who could sue was the owner of the goods, but that it could not sue the Respondent nor General Cargo Services Limited. For that proposition, counsel relied on this Court's decision in the case of *Victor Mabachi & another v Nurtun Bates Limited* [2013] eKLR where this Court held:

> "(21) It remains now to consider the second issue whether the enjoinment of the appellants in the suit in the High Court breached the principle of law that an agent cannot be sued where there is a disclosed principal."

48. The case of *Anthony Francis Wareheim t/a Wareheim & 2 others v Kenya Post Office Savings Bank*, Civil Application Nos, Nai 5 & 48 of 2002, was quoted in *Victor Mabachi & another*, supra, where this Court unanimously held as follows:

> "It was also *prima facie* imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued."

49. Let us first consider who is a Bailee. The Court in *Equator Distributors v Joel Muriu & 3 others* [2018] eKLR observed as follows on the relationship between a bailor and bailee:

> "The basic rule is that the bailee is expected to return to its owner the bailed goods when the bailee's time for possession of them is over, and he is presumed liable if the goods are not returned."

50. Based on the evidence adduced by PW2, an employee of Auto Express Ltd, the Respondent's role and responsibility to Auto Express Ltd, the owners of the cargo were to 'clear the tyres, store them and transport them from the Port of Mombasa to the Respondent's yard and subsequently to Auto Express godown in Jomvu." As far as the cargo was concerned, the Respondent stood in the capacity of a bailee. Its role commenced with clearing the cargo at the Port and ended with the transportation of the cargo to Auto Express godown at Jomvu. *Black's Law Dictionary* Tenth Edn. defines a bailee as:

> "1. Someone who receives personal property from another and has possession of but not title to the property. A bailee is responsible for keeping the property safe until it is returned to the owner.
>
> 2. Someone who by warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them."

22. As for the term bailment, the same Dictionary defines it as:

> "1. A delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose, usually under an express or implied-in-fact contract. Unlike a sale or gift of

personal property, a bailment involves a change in possession but not in title."

23. Similarly, *Halsbury's Laws of England*, Fourth Edition 3(1) [2005] states that:

> " 1. Under modern law a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor). The legal relationship of bailor and bailee can exist independently of any contract and is created by voluntary taking into custody of goods which are the property of another, as in cases of sub-bailment or of bailment by finding.
>
> 2. The element common to all types of bailments is the imposition of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods. A claim against a bailee can be regarded as a claim on its own sui generis, arising out of the possession had by the bailee of the goods.
>
> Note: By design bailment is distinguishable from a sale, a relationship of mutuum, a relationship of licensor and licensee.
>
> 3. To constitute a bailment (which derives its name from the old French word bailer, to deliver or put into the hands of), the actual or constructive possession of a specific chattel must be vacated by its owner or possessor (the bailor), or his agent duly authorized for that purpose, in favor of another person (the bailee) in order that the latter may keep the same or perform some act in connection with it, for which such actual or constructive possession of the chattel is necessary, thereafter returning the identical subject matter in its original or an altered form.
>
> 4. Thus, a bailment may arise by attornment involving a constructive delivery of possession, as where, for example, a warehouseman holding goods as agent for an owner agreed to hold them for another person pursuant to the owner's instructions. There can be bailment by an owner without ever having taken possession of the chattel concerned, so long as the title to it or the right to possess it has passed to him."

51. As was said by Sachs L. J. in *British Road Services Ltd v Arthur Crutchley & Co Ltd (Factory Guards Ltd, third parties)* [1968] 1 All ER 811, 824:

> " The bailee is responsible for proper care being taken of the goods and to my mind he cannot escape from liability merely by employing sub-contractors for that purpose, however reasonable may be his confidence in them. Any contrary decision would make a serious and unjustifiable inroad on the rights of bailors, and for this inroad there does not appear to me to be any authority."

52. The legal position is that a bailee is responsible to the bailor and liable to him if the cargo is not delivered to the bailor or to the destination required by the bailor, as agreed or contracted between them. That being the case the Respondent, as bailee could not sue the Appellant for recovery of the loss suffered by the bailor. The Respondent was the principal party responsible for the loss to Auto Express Ltd,

and as a bailee it could not sue the Appellant on behalf of Auto Express Ltd for the loss the latter had suffered, if at all. The Respondent was non- suited and therefore lacked the locus to file the suit out of which this appeal arose.

The issue whether the Respondent proved the Special damages claim as pleaded or at all will be considered together with the issue whether evidence was adduced to establish that the cargo in question was stolen;

53. Mr. Tindika urged that PW1, the key Respondent's witness was not able to substantiate the claim for Kshs 6,964,788.16 as pleaded or at all. He urged that PW1 admitted that in their letter of 14th April, 2010, Auto Express Limited demanded from them Kshs 1,915,945.08/= and that the Respondent paid Kshs 900,000/=. He urged that PW1 admitted that duty was paid by the General Cargo Services Limited and not the Respondent herein and opined that General Cargo Services Limited will have to recover the said duty from Auto Express Limited. Mr. Khatib relied on the evidence of its witness, PW1 and urged that the claim was proved to the required standard.

54. Authorities abound that special damages must be specifically pleaded and strictly proved. Counsel for the Appellant referred us to the case of *Charles C. Sande v Kenya Co-operative Creameries Limited*, Civil Appeal No 154 of 1992. Much earlier in Hahn v Singh, Civil Appeal No 42 of 1983 [1985] KLR 716, this Court articulated that:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

55. See also the decision of this Court in *Daniel Gatihi Gachomo v Kenya Union of Teachers Nyeri Branch* [2013] eKLR; *Capital Fish Limited v Kenya Power and Lighting Company Limited* [2016] eKLR.

56. PW1 was the key witness for the Respondent and his evidence dwelt on the Respondent's claim. He produced documentary evidence in support of the claim. The Respondent's claim has been set out herein above. However, for ease of reference, we wish to reproduce it here. The claim as pleaded was as follows:

    i. Cost of tyres Kshs 3,739,855/=

    ii. Letter of credit Kshs 56,097.83/=

    iii. Bank charges Kshs 2,000/=

    iv. Insurance Kshs 17,903/=

    v. Clearing charges Kshs 1,141, 914/=

    vi. IDT fees Kshs 5, 000/=

    vii. Other charges Kshs 10, 000/=

    viii. Profit on sale of tyres Kshs 1, 982, 018/= Total Kshs 6,964,788.66/=

57. PW1 produced all the documents relied on for the claim. At page 72 is a tabulation of the loss by Auto Express Ltd addressed to General Cargo Services Ltd. The total amount claimed by Auto Express to General Cargo Services is Kshs 1,915,945.08/=. PW1 produced the Invoice at page 78 of Kshs 900, 000/= from Auto Express to General Cargo Transport Ltd, and at page 79 the cheque payment

voucher of said amount by General Cargo Transport to Auto Express. The rest of the documents spoke to Assessment of Duty; KRA deposit; Bill of Lading and Import Declaration Forms; and several invoices all in the name of the name of Auto Express. PW1 admitted that as per the documents he produced, the owner of the cargo was Auto Express, that all documents were in its name, and that the only amount it claimed from General Cargo Transport Ltd was Kshs 1.9 million, out of which Kshs 900,000/= was paid to it by the said General Cargo Transporters Ltd.

58. What this evidence shows clearly is that Auto Express was the owner of the cargo, and if any party knew the loss suffered, it had to be the one. The record shows that Auto Express claimed from General Cargo Transport Ltd, the Respondent herein. The amount it claimed has no relationship with the Respondent's claim in this suit. Not only was Auto Express not a party to the suit, there is no evidence or mention that Auto Express assigned either its rights or obligation to the Respondent.

59. The other important fact is that the claim by Auto Express, who were the owners of the cargo, was for Kshs 1.9 million and that Kshs 900,000/= was the amount settled by the Respondent, from whom they had claimed. There is no evidence adduced to show what the amount pleaded in the plaint of Kshs 6.9 million was based on, or how the said figure was arrived at. We find that even though the Respondent pleaded its claim in the plaint, there was no evidence adduced to proof loss or to substantiate the claim. Neither was there any evidence to support that the Respondent had suffered any loss or any part of the loss claim in the plaint.

60. We agree with the Appellant that from the evidence on record, it is clear that the Respondent did not produce any evidence to strictly prove that as the Plaintiff, it was entitled to the claimed amount of Kshs 6,964,788.66 or any of the amount thereunder or at all. Nor that as a party it had lost Kshs 6,964,788.66.

61. As to whether theft, the basis for the claim was proved. The Respondent's witness told court that he received information that a theft had occurred at the Respondent's yard at Port Rheitz. He said he proceeded there and could only find their guards lying on the ground. The Appellant's guard was not at the yard, but that later he was charged in court. It was not divulged what the outcome of the criminal case was. The Respondent's evidence was scanty, to say the least. Their two guards that were at the Respondent's yard at the material time and therefore critical witnesses were not called as witnesses. Not calling them reduced to hearsay the evidence by the Respondent's witness. It also did not aid the Respondent's case as there was no evidence that any theft occurred, or where if it did.

62. With due respect to the learned trial Judge, there was no basis upon which he could declare the Appellant's agent negligent, or the Appellant vicariously liable for his actions. As the basis of the Respondent's claim was on contract, the Respondent had the burden to prove that the theft took place at the yard, where, as per the contract the Appellant could be held liable if any loss occurred.

63. We find that the Respondent did not establish its claim as against the Appellant as per the contract under which it claimed.

As to whether the Appellant pleaded the existence of a clause on limitation of liability to the Respondent, and if so what was the effect of that clause, if any.

64. Mr. Tindika urged that if the Court found that the Appellant liable for any loss, then the same was limited to Kshs 25,000/= as per the contract the Respondent relied upon in the case. Mr. Tindika placed reliance on the case of *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR that discusses the effect of standard form contracts.

65. Mr. Khatib in response to the Appellant's counsel on the issue of limitation clause on liability, urged that if the Appellant was admitting only Kshs 25,000/=, then it should have offered that amount when the Respondent sent demand letters to them. To that submission, Mr. Tindika urged that the demand letters were not produced in Court so the Respondent could not rely on same.

66. Mr. Khatib urged that the Appellant could not rely on the limitation clause, as it had not pleaded the same in its Statement of defence. For that proposition, he placed reliance on the case of *Independent Electoral & Boundaries Commission v Stephen Muthinda Mule & 3 others* [2014] eKLR, and the case of *Wareham t/a A.F. Wareham & 2 others v Kenya Post Office Savings Bank* [2004] 2 KLR 91

67. We have considered the rival submissions by the counsels. The cases relied upon by the Respondent are clear, and indeed it is trite law that a party is bound by its pleadings. The Appellant relied on *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR on the effect of standard form contracts and the law or principles upon which it can be construed. Per Ailsa Craig, Lord Wilberforce said in part at page 102 -103 j:

> "Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly stated and unambiguously expressed, and, in such a contract as this, must be construed contra proferentem. ..... Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other to insure."

68. Mr. Khatib relied on the case of *Wareham t/a A.F. Wareham & 2 others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, where this Court stated on the importance of pleadings thus:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

69. We have considered the rival arguments by the parties. The Appellant denied that it had any contractual agreement with the Respondent, and put it to strict proof. As we have already found in this judgment, the Respondent did not prove that it had privity of contract with the Appellant. The Appellant statement of defence was not a bare denial, as the learned Judge found.

70. While it is trite that parties are bound by their pleadings, in this case, the contract for the provision of security services is on record having been produced by the Respondent's witness, being the basis of its claim and the most important document the Respondent had to support its case. Since the contract was before the Court, and since the Respondent relied on it, there was no harm in the Appellant referring to it and depending on it, being an uncontested document. Furthermore, as this Court held

in *Wareham t/a A.F. Wareham & 2 others*, *supra*, the burden of proof lay at the doorstep of the Respondent.

71. We have examined the contract to find out whether indeed there was an exemption clause in it. Clause 6(a) of the contract provides:

> "
>
> "6.
>
> (a) The Company shall have the right to increase by 15% the amount of the charge specified herein if it is not paid within thirty days of the date of invoicing.
>
> And further provided that the total liability of the Company shall not in any circumstances exceed (the sum of Kenya Shillings Twenty Five Thousand (Kshs 25, 000/-) in respect of all and any incidents arising during any consecutive period of twelve months."

72. There is indeed the Appellant's liability under the contract was limited to Kshs 25,000/=. More importantly, as we have already found, the Appellant was not liable to the Respondent under that contract, and therefore the Respondent had no case against it.

73. We have carefully considered this appeal and all the arguments of counsel and the finding of the Court. Having done so, we find that this appeal is for allowing. Accordingly, the orders that commend themselves to us are as follows:

1. We allow the appeal in its entirety;
2. We set aside the judgment of the High Court, (P.J. Otieno, J.) dated 2nd December, 2016, in High Court Civil Case No 201 of 2010 and substitute therefor an order dismissing the respondent's claim against the appellant.
3. The appellant will have the costs of this appeal and of the case in the High Court.

Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL