IN THE COURT OFAPPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 114 OF 2015

BETWEEN

SECURICOR SECURITY SERVICES KENYA LIMITED.....APPELLANT

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Kimondo, J) Dated 4th July, 2013

in

H.C. Civil Case No. 594 of 2003)

****

JUDGMENT OF THE COURT

This is an appeal arising from the Judgment of the High Court (**G.K.Kimondo, J.**) dated the 4th day of July, 2013.

The background to the appeal is that, the respondent and the appellant entered into a standard form contract entitled **"Temporary works order"** dated the 23rd day of December, 2002, pursuant to which the appellant contracted to convey Kshs.18,530,000 in a portable container from the respondents' Maua Branch, Meru County, to its Koinange street branch, Nairobi. The container was lost enroute to Nairobi, prompting the litigation resulting in this appeal. The respondent sued the appellant on 19th September, 2003, seeking damages for the loss of the consignment, alleging breach of contract and negligence on the part of the appellant as particularized in the plaint.

In its defence dated the 25th day of October, 2003, the appellant admitted executing the **"Temporary works order"**, contract with the respondent, but denied any liability for the loss. It was also averred *inter alia*, that the respondents' claim against it, if any, stood vitiated first by the operation of the exemption clauses incorporated in the said contract, and second, for the failure to issue a written notification of loss within the fifteen (15) days stipulated in the said contract.

The suit was disposed of by oral evidence tendered and submissions made by the respective parties. The learned Judge after evaluating and analyzing the record, discounted the exemption clause(s), was satisfied with the respondent's assertion on its compliance with the notification of loss notice, and on that account, found the appellant wholly liable for the loss of the said consignment and entered Judgment for the Respondent against it, (the appellant) in the sum claimed of Kshs, 18,550,000.00; together with costs and interest.

The appellant was aggrieved and filed this appeal, raising twelve (12) grounds of appeal, which may be summarized as follows: That the learned Judge erred in:

> ***(1) failing to hold that the contract between the respondent and the appellant was contained in the Temporary works order No. 712355 dated the 23rd December, 2002.***
>
> ***(2) holding that matters of deviation and negligence were pleaded as a separate cause of action.***
>
> ***(3) holding that the exemption clause(s) incorporated in the contract contained in the Temporary works order No. 71235, did not exclude liability for negligence or were vitiated by the negligent performance of the contract; or that they could be excluded if found onerus, unreasonable, oppressive, and inoperative; and lastly that exemption clause(s) would not apply***

when there was a deviation in the performance of the contract.

(4) failing to hold that the respondent had not given written notice of the loss or damage within fifteen (15) days of such loss or damage and that the appellant was therefore under no liability to make good any loss the respondent may have suffered in the circumstances.

(5) determining the case based on research and authorities which had not been placed before him by either party and on which the appellant had no opportunity to respond.

The appeal was canvassed by way of written submissions which learned counsel for the respective parties fully adopted but elected not to highlight.

In support of the appeal, the appellant submitted that the learned Judge fell into error: when he framed his own issues and ignored those framed and agreed upon by the respective parties; for citing case law that parties had no opportunity to comment on; for failing to exclude liability based on negligence; for holding that there was deviation in the performance of the contract by the appellant; and lastly for the failure to hold that the respondents' claim stood vitiated for the failure to serve the notification of loss notice within the stipulated fifteen (15) days of such loss.

To buttress the above submissions, the appellant cited the case of **United Manufacturers versus Wafco Ltd [1974] EA 233; Chitty on Contract, twenty- seventh (27th) edition, Volume 1 page 646 Pr. 14-015; African Safari Club Limited versus Kenya Kazi Limited [1990] KLR 572; Securicor Courier (K) Limited versus Benson Onyango [2008] 2KLR 252,** all on principles that guide the Court on the construction of contracts incorporating exemption clauses.

In opposition to the appeal, the respondent urged us to find that the Judge merely reframed the distilled issues based on the pleadings, the evidence tendered and submissions filed by the respective parties but did not frame his own issues. We were on that account, invited to distinguish the facts of this appeal from those faulted by the court in **Coastal Bottlers Limited versus George Karanja [2015] eKLR,** where the Judge framed own issues contrary to the grounds of appeal laid before him.

The Respondent continued to urge that the Judge correctly interrogated the intent of the **"Temporary works order"**, applied common law principles to the terms contained therein and rightly discounted the application of the exemption clause(s), as upholding them would not only have been tantamount to aiding the appellant and its employees to run away from any proven negligence in the performance of their part of the contract, but would also have been very oppressive to the respondent. It was also the respondent's submission that matters of the appellant's negligence and deviation in the performance of their part of the contract were pleaded by the respondent in paragraphs 6, 7 and 8 of its plaint, and were also responded to by the appellant in its defence; that the Judge's finding that the exemption clause(s) was onerus, unreasonable, and oppressive was in line with the respondent's legitimate expectation that the appellant and its employees would exercise proper care and diligence in the discharge of its obligations under the Contract. On that account the respondent urged us to distinguish and discount the application of the principle enunciated in **Africa Safari Club Limited versus Kenya Kazi Limited (supra);** and **Securicor Courier (K) Limited versus Benson David Onyango & Another** (supra), to the circumstances of this appeal. It was further submitted that basing the appellant's lia4th day of July, 2013.

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bility to make good the loss occasioned to the respondent on the conviction of the appellant's employees would not only have amounted to raising the standard of proof in a civil case to one of proof beyond reasonable doubt, but would also have amounted to a misapprehension of the law notwithstanding that it would also have amounted to aiding in the commission of fraud or theft against the respondent by the appellant's employees.

To buttress the above submissions, the respondent cited **Ann Mukami Muchiri versus David Kariuki Mundia [2008] eKLR** and **Joseph Kahinda Maina versus Evans Kaman Mwaura & 2 others [2014] eKLR** for the proposition that liability for a civil claim is not depended

on or conditional to a conviction in criminal proceedings arising from the same set of facts.

Turning to the issue of the notification of loss, the respondent submitted that the requisite notification of loss of the consignment within the stipulated fifteen 15 days of the loss was complied with, first through constructive notice as the appellant was notified of the loss immediately it occurred through its own crew, and second through a formal notification to that effect.

On the evidence tendered in support of the respondent's contention that there was deviation in the performance of the contract, the respondent reiterated that deviation was raised by the respondent in paragraphs 6 and 7 of the plaint and responded to by the appellant both in its defence and the evidence tendered through its own witness, a **Mr. Gaitho,** who in the respondent's view, conceded that the appellant's employees used the Maua- Ruiri road, as opposed to the usual Maua-Meru-Nairobi Highway route. The respondent also contended that deviation was also confirmed by the OB entries whose copies were tendered in evidence to identify the exact location of the theft.

To buttress the above submissions, the respondent relied on **African Safari Club (Supra),** and Koigi **Wamware versus Attorney General [2015] eKLR; and United Manufactures Limited, versus Wafco [1974] E.A. 233** to support their submission that the Judge was entitled to apply any principles of law from his own research where the parties have left gaps.

This being a first appeal, our duty is as was aptly stated in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123:**

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that is 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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saifvs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270."**

This Court further stated in **Jabane vs. Olenja [1986] KLR 664,** thus

> **"More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did -see in particular Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88)1KAR 870."**

We have considered the record in the light of the rival submissions and principles of law relied upon by the respective parties as already highlighted above. In our view, the issues that fall for our determination are whether the learned Judge fell into error when he:-

(1) framed his own issues for determination in lieu of those framed and filed by the respective parties.

(2) held that negligence and deviation had been pleaded and responded to by the appellant

(3) held that the exemption clause(s) did not exclude liability in negligence; that these were also onerus, unreasonable and oppressive in the circumstances; and that the conviction of the appellant's employees was not conditional to a finding of liability against the appellant.

(4) failed to hold that the appellant's liability to make good the loss of the consignment to the respondent was vitiated by the respondents' failure to give the requisite written notification of loss to the appellant within the stipulated fifteen (15) days of the loss.

(5) relied on and applied principles of case law not cited before him by the respective parties.

With regard to issue number 1, the approach the Judge took when confronted with the two sets of issues separately framed and filed by the respective parties was as summarized here under as follows:

> **"7. *I have considered the evidence. I have also considered the pleadings and written submissions by the parties. The plaintiff's submission 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 distil the following five broad issues for determination.....***

From the above excerpt from the impugned judgment, it is evidently clear that the Judge was confronted with two sets of issues filed by the respective parties for his determination. Distilling the issues framed by the respective parties and settling for five broad issues as the issues for determination, was in our view, within the ambit of the Judge's obligation under **Order 11rule 3(1) (b).** We therefore find the Judge used the correct approach in reconciling the two sets of issues filed by the respective parties and settling for the five broad issues. Further, we find no justification in the appellant's complaint in the approach the Judge took in distilling the five broad issues for determination, in the absence of any complaint on their part that the broad issues as distilled and identified by the Judge were irrelevant to the issues in controversy in the case. The remedial action taken by the Judge in the circumstance of this appeal was therefore distinguishable from that which obtained and was therefore properly faulted by the Court in **Costal Bottlers Limited versus George Karanja case** (supra).

With regard to issue number 2, it is evident from the record that the Judge set out paragraphs seven (7) and eight (8) of the plaint, which

contained the particulars of negligence. He also set out paragraph twelve (12) of the appellant's defence in which the appellant denied the particulars of negligence as pleaded in paragraphs 7 and 8 of the plaint. From the above, it is our finding that negligence was not only pleaded by the respondent, but was also denied by the appellant in its defence.

As for the supportive evidence on proof of negligence and deviation, **Mr. Wanjohi,** while testifying on behalf of the respondent stated, *inter alia,* that, on this occasion, the appellant failed to use armed police men in the escort of the consignment as they were supposed to; that they failed to promptly radio call their Headquarters to report the incident for immediate intervention; and lastly that the OB entry of 23/12/2002 confirmed that the robbery took place on the Maua-Ruiri road which was a deviation route as opposed to the usual popular Maua-Meru-Nairobi road. In contrast, **Mr. Gaitbo,** on behalf of the appellant, though asserting that there was no requirement for using any particular route, admitted that the appellant was supposed to use armed escort and if none were used, then that was a breach of the contract on their part. In the light of the above evidence, we find no error in the Judge's findings that the respondent's pleadings and evidence on negligence and deviation had not been sufficiently rebutted by the appellant, and on that account found negligence proved against the appellant. We find the said finding was based on sound evidence on the record. We affirm the same.

Issues numbers 3 & 4 deal with liability. They are also interrelated, and will be dealt with as one. When resolving the issue on liability, the Judge made observations on the terms of the contract, then considered them in the light of the pleadings, evidence and submissions on the record before him. He also considered a wealth of case law on the construction and application of exemption clause(s) as cited before him and also as researched on his own. All these were extensively discussed, in the impugned Judgment, at the conclusion of which the Judge declined to uphold the exemption clause(s) contained in the **"Temporary works order"**

The reasons the judge gave for declining to uphold the exemption clause(s) were, *inter alia* that, they purported to aid the appellant's employees to run away from proven negligence in the performance of their part of the contract; and that they were onerous, ambiguous and even unreasonable. They also offended the duty of care extensively and or generously pleaded in paragraphs 6 and 7 of the plaint. In addition, the Judge was also of the opinion that the history of the contractual relationship between the parties, and the evidence of **Mr. Wanjohi** were sufficient basis for his finding that the duty of care entrenched in condition **3(b)** of the contract had been breached. It is the same duty of care which, in the Judge's view, required the appellant to provide an armed escort for the said consignment, which had not been provided. This default on the part of the appellant, coupled with the respondent's undisputed evidence that the appellant's employees were obligated to use a secure route in the transportation of the said consignment, were sufficient to base a finding that there was deviation in the performance of the contract by the appellant.

It was further the Judge's finding that the entire evidence on the record as well as all the relevant circumstances surrounding the incident, unerringly pointed to the appellants' crew as having been complicit in the loss of the consignment. It was further held that requiring the securing of a conviction against the appellant's crew men1bers or limiting the appellant's liability to the respondent, to the amount stipulated in the contract would not only have been unreasonable and oppressive, but would also have been tantamount to allowing the appellant and its employees to wriggle out of its obligations under condition 3(b) of the contract which obligated it to perform its part of the contract with proper care.

On our own, we find no error on the above findings. We find them sound because on the evidence before the Judge, it was correctly observed that there was no explanation on the part of the appellants' employees as to how a vehicle whose reason for stopping was allegedly a deflated tyre was suddenly commandeered and driven away by the supposed hijackers with no apparent problem. The Judge was also entitled on the same facts to find no reason given as to why the appellant's crew on this particular day deviated from using the busy Maua-Meru-Nairobi road from where help was easily available from other motorists and instead used a less busy road of Maua Ruiri-Nairobi road. The Judge was also in order when he found that there was no explanation given by the appellants' crew for its failure to promptly radio-call their Headquarters for reinforcement.

Our own re-evaluation and re-analyzing of the evidence on liability, we find that the Judge's conclusion that the conduct of the appellant's employees as displayed by the above factors was meant to facilitate the flight of those who had conveniently caused the disappearance of the consignment both logical and persuasive. On that account, the appellant's liability to make good the loss suffered by the respondent at the instance of its employees was well founded both in law and the evidence on the record. We find no reason to interfere with the Judge's finding on liability

With regard to the alleged failure to comply with the stipulated fifteen (15) days notification of loss notice, the Judge made the observation that the original envelope in which the notification of loss letter of 24th December, 2002 was dispatched to the appellant was not tendered in evidence. But he noted there was a letter from the Loss Adjusters dated 26th day of February, 2003, which enclosed a copy of the said envelope. The Judge perused it and made observation thereon that it had a franking machine mark bearing the date of 8th January, 2003, which date, according to the Judge, was the date the post office acknowledged the contents for onward transmission to the appellant. The Judge also added that the said date of 8th January, 2003, was within the stipulated fifteen (15) days from the date of the report to the respondent of the loss of the consignment. The Judge went further and took judicial notice of the fact that both the originator and the addressee of the said letter were based in Nairobi. He also took judicial notice of the fact that between 24th December, and early January of every year, there are holidays. The Judge has opined that, in the light of all the above matters that he had taken judicial notice of, the respondent could not therefore in the circumstances be blamed for any delays in the delivery to the appellant of the letter of notification of loss on account of the intervening holidays. We absolutely agree with the Judge on that line of reasoning as the fact of the addresses of both the originator and recipients of the said notice being in the same locality, Nairobi and the existence of holidays in between as indicated above were not in dispute. The Judge also made observation that the receipt stamp of 13th January, 2003 on the subject letter was self-serving because according to the Judge, there was no mention of any receipt stamps on the other letters similarly sent by the respondent to the appellant during the same period of time and over the same subject. In the Judge's view, since the notification of loss notice was not a statutory notice, constructive notice of the loss could suffice as sufficient notice especially when it was undisputed that the appellant got to know of the loss of the consignment on the very day the consignment was lost.

We have considered the above reasoning and conclusions reached by the Judge when upholding the respondent's assertion on compliance with the fifteen (15) days notification of loss notice, and find no error in them. Our reasons for so finding are that, if the receipt stamp of 13th January 2003 on the respondent's letter dated 24th day of December, 2002 had been affixed as a matter of routine, then as opined by the

Judge, the other mentioned follow up letters addressed to the appellant by the respondent over the same period of time and subject matter would in all probability have had receipt stamps on them. The appellant's Loss Adjusters' letter of 26th February, 2003 only made mention of a receipt stamp on the respondent's letter of 24th December, 2002. We therefore find no error in the Judge's conclusion that the receipt stamp on this crucial letter was self-serving, more so when the appellant's own witness, a **Mr. Gaitho** offered no useful guide on the issue as he made no mention that it was a routine practice in their office to affix receipt stamps on all incoming correspondence.

Turning to the Judge's observation that there were involuntary holidays between the date of 23rd December, 2002 when the letter of notification of loss was posted by the respondent to the appellant, and the date of 8th January, 2003, when it was franked by the post office for onward dispatch to the appellant, we agree that this was a matter for judicial notice and was therefore a clear demonstration that the respondent's letter for the notification of loss was posted within the stipulated period of fifteen (15) days from the date of the loss. The Judge was therefore right in absolving the respondent from any responsibility for any delay in the delivery of a letter whose origin and destination were both within the same locality-Nairobi. In addition to the above finding, we also do not find the Judges' finding that constructive notice would also suffice in the circumstances of this appeal considering that there is no dispute that the appellant had notice of the loss of the consignment on the very day that the loss occurred. The sending of the requisite notice of notification of loss, in our view, was merely ceremonial. It was for purposes of compliance with the prerequisites in the contract.

Turning to the last issue, it is common ground that indeed, the Judge considered and took into consideration case law not cited before him by learned counsel for the respective parties. The appellant cited no principle of law in support of its invitation for us to fault the Judge for the said action. The respondent on the other hand has invited us to have recourse to the overriding objective principle of Civil Litigation in addition to the inherent power of the court principles to affirm the Judge's action. Our re evaluation and re-analysis of the record leaves no doubt in our mind that the Judge was alive to the fact that as at the material time the matter was before him for determination, there was no legislation in this jurisdiction on the application of exemption clauses. He was also alive to the fact that he was bound by the Court of Appeal decisions in **United Manufacturers Limited versus Wafco Limited** (supra), and **Securicor Courier Limited versus Benson Onyango** (supra), that common law principles were the guiding principles for the Court when determining issues of construction of exemption clause in any given contract in this jurisdiction. The Judge cannot therefore be faulted for carrying out his own case law research on the subject. The Judge's industry as displayed is commendable as the same was well intended. It was meant to fill up any gaps in the principles of case law cited before him by the respective parties in aid of the determination of the competing interests before him, as was correctly put in their submissions by the respondent notwithstanding that these may have been merely persuasive. We therefore find no error in the approach taken by the Judge as above.

The upshot of the above assessment and reasoning is that, there is no merit in this appeal. It is accordingly dismissed with costs to the Respondent.

Dated and Delivered at Nairobi this 22nd day of June, 2018.

P.N. WAKI

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JUDGE OFAPPEAL

R.N.NAMBUYE

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JUDGE OFAPPEAL

P.O. KIAGE

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JUDGE OFAPPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR