IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE, KIAGE, JJ.A)

CIVIL APPEAL NO. 33 OF 2015

BETWEEN

SAMSON KAIRU CHACHA t/a

SKY SECURITY SERVICES……...APPELLANT

AND

ISAAC KIIRU KING'ORI…….RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nyeri

(Wakiaga, J.) dated 28th November, 2014

In

Nyeri High Court Civil Appeal No. 58 of 2011)

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JUDGMENT OF THE COURT

The appellant **Samson Kairu Chacha T/A Sky Shepherd Security Services** took out a plaint dated the 20th day of October, 2009 filed in the Chief Magistrates Court at Nyeri in CMCC No. 597/2009, directed at the respondent **Isaac Kiiru Kingori,** seeking the recovery of Kshs.9,000/= together with interest and costs,

for security services provided by the appellant to the respondent pursuant to a mutual agreement between them. The respondent denied that claim and filed a counterclaim dated the 17th day of December, 2009, in which he counter claimed for the sum of Kshs.45,000.00/- being the cost of ten (10) gas cylinders whose loss was occasioned and/or contributed to by a dishonest guard the appellant had provided to guard his premises.

The appellant's response to the counterclaim was that he was a total stranger to the alleged theft of the respondent's ten (10) gas cylinders and put him to strict proof; that if any guard was charged with a criminal offence then that could not form a basis for the respondent's counterclaim.

On the 29th October, 2010 the appellant sought leave of Court to take out 3rd party proceedings

against one **Joseph Nguturu Gichuki** the guard who had been assigned guard duties at the respondent's premises the night the loss of ten (10) gas cylinders occurred; the third party was apparently served but neither entered appearance nor filed a defence to the appellant's claims. On 21st March, 2010, at the instigation of the appellant the trial magistrate (**J Wambilyanga RM)** being satisfied that the 3rd party had been duly served on the 30th November, 2010 but had failed to file any papers in opposition thereto entered interlocutory judgment against the said 3rd party.

The merit disposal of the suit is what gave rise to the judgment of **J. Wambilyanga RM** of 9th May, 2011 in which she declined to enter judgment on the counterclaim in favour of the respondent as against the appellant because there was already a judgment in the respondents favour as against the 3rd party.

The respondent was aggrieved by that judgment and appealed against it to the High Court vide **HCCA No. 58 of 2011**. The merit disposal of this said appeal resulted in the judgment of **J. Wakiaga, J** dated the 28th day of November, 2014 in which the learned judge found in favour of the respondent for the reasons that evidence on the loss of his ten (10) gas cylinders had not been rebutted; the appellant had admitted that his guard who had been deployed to guard the respondent's premises had indeed been charged and convicted in connection with the theft of the said gas cylinders and liability against the appellant and the 3rd party not having been determined, the appellant was liable for all the acts of the said guard. He then reversed the findings of the subordinate Court as it had failed to appreciate the law as regards 3rd party proceedings and liability; allowed the respondent's appeal as against the appellant, set aside the trial magistrate's judgment and substituted it with an order allowing the respondent's counterclaim as against the appellant to the total tune of Kshs.45,000/= with costs.

The appellant was aggrieved by that judgment and filed this appeal initially raising ten (10) grounds of appeal. At the hearing, **Mr. Waweru Macharia** learned counsel for the respondent drew our attention to the provisions of **section 79 (c)** and **72** of the Civil Procedure Act Cap 21 Laws of Kenya which obligated the appellant to seek leave of Court before preferring an appeal against the dismissal of his claim as laid in the plaint. **Mr. Gathiga Mwangi** for the appellant conceded to that objection, and with it went grounds 4, 5, 6, 7, 8, 9 and 10 of the appeal; leaving 1, 2 and 3 which relate to the respondents counterclaim for our determination. They read that the learned judge erred in law:

1. **in holding that the appellant's guard was charged and convicted on the theft of gas cylinders and therefore the appellant was liable for the theft.**

2. **in entering judgment in the counterclaim when there was no evidence adduced that the five (5) gas cylinders stolen outside his shop were worth Kshs. 45,000/=.**

3. **in determining the issue of vicarious liability whereas the respondent had failed to join the 3rd party in the appeal.**

In his submissions Mr**. Gathiga Mwangi** urged us to disallow the respondent's counterclaim on the grounds that the respondent never tendered any evidence regarding the loss of gas cylinders; the respondent's claim being a special claim, the law obligated him both to plead and strictly prove the same which obligation he had not fulfilled as the evidence tendered by the respondent fell short of the required threshold for establishing vicarious liability against the appellant

To buttress his arguments the appellant relied on the case of **Hahn versus Singh [1985] KLR 716** and **Michael Hubert Kloss & Another versus David Seroney & 5 Others [2009] eKLR** for the propositions that special damages must not only be specifically claimed but also strictly proved, save that the degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves. The case of **Tabitha Nduhi Kinyua vs Francis Mutua Mbuvi & Another [2004] eKLR (Nakuru)** for the proposition that an employer will be held to be vicariously liable of the acts if its employee was actually within the course and scope of employment at the time the tort was committed.

In response to the appellant's submissions, **Mr. Waweru Macharia**, urged us to dismiss the remainder of the appeal on the grounds that the learned judge had evaluated the record before him, applied correct principles of law to the evidence tendered by either side and arrived at the correct conclusions on the matter which we should affirm. Further that since it is not disputed that the relationship between the appellant and the respondent was contractual, we should find that the appellant vicariously committed a fundamental breach of the said contract through the guard he provided to the respondent's premises who was prosecuted, found guilty and convicted in connection with the loss of the respondent's gas cylinders. That the appellant acknowledged the binding effect of the said fundamental breach when he took out third party proceedings against the said guard, which third party proceedings gave rise to an interlocutory judgment in his favour of (the appellant).

As for meeting the threshold for proof of a special claim, **Mr. Waweru** was of the view that the respondent's claim in the counterclaim met the threshold set by the principles in **Hahn versus Singh** (supra) as the claim was pleaded and particularized and proved by the testimony of the respondent which testimony was believed and accepted by the learned judge as credible.

In reply to the respondent's submissions, **Mr. Gathiga** reiterated his earlier stand that the respondent's counterclaim was neither properly laid or proved; the complaint raised against the guard being a tort in nature, the appellant needed to give particulars of both the negligence attributed to the guard and the fundamental breach of the said contract attributed to the appellant.

This is a second appeal. By virtue of **section 72(1)** of the **Civil Procedure Act** Cap 21 (Laws of Kenya) we are restricted to considering only matters of law unless if there is demonstration that the two Courts below considered matters they should not have considered; or, failed to consider matters they should have considered; or, that looking at the whole decision it is bad in law or perverse **(see Kenya Breweries Ltd vs Odongo Civil Appeal No. 127 of 2007 (UR)**

We have given due consideration to the totality of the record we have assessed above. In our view, only one issue falls for our determination; that is whether the respondent's counterclaim was properly sustained against the appellant by the first appellate Court.

The subordinate Court (**J. Wabilyanga R.M**.) allowed the respondent's counterclaim save that she rerouted the obligation to make it good from the appellant to a 3rd party, the guard who was successfully prosecuted and found guilty in connection with the loss of the respondent's gas cylinders. This rerouting was on account of the said guard having been served which 3rd party proceedings and summons to enter appearance at the instigation of the appellant to which he filed no response prompting the entry of the interlocutory judgment against him on 21st March, 2011. The High Court likewise took to issue with the respondent's counter claim as laid and also gave it a clean bill of health save that it reversed the obligation to make it good to the respondent from the 3rd party to the appellant there by prompting this appeal.

The respondent's claim is contained in paragraph 3 of the defence and paragraph 4 of the counter claim. These reads:

> **"3. The defendants states that while he had engaged the services of the plaintiff, the plaintiff allocated him dishonest guard which led to loss of property which loss he claims against the plaintiff under the doctrine of vicarious liability.**
>
> **Counterclaim**
>
> **4. The defendant states that he terminated his contract with the plaintiff when the guard allocated to him stole in the premises being guarded.**
>
> **Particulars**

10 gas cylinders with gas at Ksh.4,500/- per cylinder Ksh.45,000/- and the defendant counter claims the sum of Ksh.45,000/- against the plaintiff".

The appellant's response to the above claim is contained in paragraph 5 & 7 of his defence to the counter claim. These reads:

"5. In reply to paragraph 4 of the counter claim, the plaintiff denies that the contract was terminated due to the alleged theft and further states that the defendant terminated the same without any reason and the plaintiff denies that any property was stolen by the guards allocated by the plaintiff. The defendant is put to strict proof.

7. ….the plaintiff states that if any guard was charged with any criminal offence (which is denied) the same cannot form a basis for the defendants counter claim unless and until the said criminal case is heard and determined.

In his evidence in chief the appellant made no mention of any obligation on him or otherwise to meet the respondent's counterclaim. When cross examined in Court, he admitted that he learned from the police station that 6kg gas cylinders worthy Ksh.45,000/- had been stolen; that the guard who was guarding the premises when the gas cylinders got lost was charged and convicted; in connection with the said loss that the respondent had counter claimed for the value of the lost gas cylinders from him but denied any obligation to make good the loss suffered by the respondent at the hands of his guard. Instead, he contended that the respondent ought to have insured his property and he should therefore turn to his insurance or the guard for compensation for the loss, thought he accepted that he had a duty to give the respondent an honest guard.

The respondent on the other hand reiterated the content of his counterclaim that he used to consume security services from guards supplied by the appellant; he suffered loss of gas cylinders to the total value of Ksh.45,000/-; he reported the loss to police and also raised the issue with the appellant who told him to wait for the outcome of the investigations. The investigations resulted in the prosecution of the guard who was found guilty and convicted in connection with the said loss added that he had counterclaimed from the appellant because he was the one who had provided the guard who had occasioned the loss of the said gas cylinders.

The position in law with regard to proper pleading has now been settled by a long line of case law emanating both from the predecessor of this Court, the Court of Appeal for Eastern Africa and as refined by this Court itself. We cite a few to illustrate this point. **Candy versus Caspair [1956] 23 EACA 139**, **Odd Jobs Versus Mubia [1970] 476, Nairobi City Council versus Thabiti Enterprises Ltd [1995-1998] 2EA 231** and lastly but not least the **Great Lakes Transport Co. Ltd versus Kenya Revenue Authority [2009] KLR 720** all for the prepositions that: (i) A proper pleading is one that contains a concise statement of the material facts on which the party pleadings relies: (ii)The relief claimed has to be founded on the same material facts and lastly: (iii) A Court of law has no mandate to make a determination of any unpleaded issues unless these are shown to have arisen in the course of the trial and parties mutually consented to the Court making a determination on those issues.

The Court went further in the case of **Independent Electoral and Boundaries Commission and another versus Stephen Mutinda Mule and 3 others [2014] eKLR** in which it drew inspiration from persuasive cases of **Malawi Railways Ltd versus Nyasalu [1998] MWSC3** in which the Court had quoted with approval **SirJack Jacob** publication entitled **"The present importance of pleadings published in [1960) Current Legal Problems.":** The case of **Libyan Arab Uganda Bank for Foreign Trade and Development and Another versus Adan Vassilliadis [1986] UGCA6**; and the case of **Adetoun Oladeji (Nig) Ltd versus Nigeria Breweries PLC S.C 91/2002** all for the propositions that for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made; second, a judge sits to hear and determine the issues raised by the parties not to conduct an investigation or examination; third, that it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led 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 averments of the pleadings, goes to no issue and must be rejected.

Applying the above to the appellant's first complaint, it is our finding that the appellant is bound by the pleading he put forth in response to the respondents counter claim in which he never raised any issue with regard to lack of particulars for the pleaded breach of contract and negligence attributable to both the appellant and the guard under the doctrine of vicarious liability. We may also add that he also had an opportunity to apply for the supply of those particulars before trial which he never did. When he took the witness stand he took no issue with the respondent's mode of pleading in the counter claim. His only issue as at the time he filed his response was that it did not lie as the criminal proceedings arising from the loss had not been determined.

As for proof of the claim to the required threshold, we have set out above both the opposing pleadings and evidence and on the counter claim. We have also made observations that the two Courts below had no issue with either the format of the pleading in the counterclaim or the evidence tendered in its support and in fact allowed these to pass as presented. They only differed as to which party was to make good that loss to the respondent with the subordinate Court pinning down the guard as the proper party who was to meet that claim, whereas the learned judge settled for the appellant who was the principal of the guard as the proper party.

On our own, and bearing in mind the principle in **Hann versus Singh** (supra) it is our view that the doctrine of vicarious liability was rightfully relied upon by the respondent as an anchor for his claim as the appellant admitted the guard who occasioned the loss was his employee, that the loss occurred in the course of duty of the said guard with the appellant; that the loss was reported to the police and the police informed him so on his visit to the police in connection with the incident. The first time he raised objection to the respondent's claim was on account of the claim being premature for the reason that the criminal proceedings had not been determined. At the trial he admitted the criminal proceedings had ended in favour of the respondent as the guard had been found culpable for the offence in connection with the loss but only sought to shift the responsibility to meet the loss either to the guard or to the respondent's insurance company. In this regard, it is our finding that the respondents pleadings in the counter claim met the threshold for pleading and giving of particulars.

With regard to the application of the doctrine of vicarious liability, as submitted by **Mr. Waweru**, the appellant acknowledged his obligation to the respondent under the doctrine of vicarious liability that is why he took out 3rd party proceedings against the guard and obtained interlocutory judgment against him. Having admitted the existence of a contract under which the guard who occasioned the loss was subsequently successfully prosecuted and convicted for the loss occasioned to the respondent, the appellant can only be allowed to wriggle out of his obligation to make good the said loss to the respondent if it can be demonstrated that the circumstances under which the loss occurred were outside the parameters permitted for assigning responsibility under the said doctrine of vicarious liability.

This Court differently constituted in the case of **Tabitha Nduhi Kinyua versus Francis Mbuvi and Another** Nakuru **Civil Appeal No. 186 of 2009** explored and also expounded on the parameters for the application of the doctrine of vicarious liability from various case law. We reflect a few on the record by way of illustration. The case of **Kenya Bus Services Ltd versus Kawira Civil Appeal No. 295 of 2000 and Messina association Carriers versus Kleinhaus [2001] 3 All SA 285** (SCA) for the proposition that an employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed. The case of **Pritoo versus West Nile District Administration [1968 EA 428** for the proposition that liability placed upon an employer/master due to a master/servant relationship is not absolute. It can only arise where there is demonstration that the tort feasor was a person whose negligence the owner is responsible. The case of **Joseph Cosmas Khayigila versus Gigi & Co Ltd & Another Civil Appeal No. 119 of 1986** for the proposition that vicarious liability will arise where there is demonstration that the tort feasor was at the time of the occurrence of the delict a servant or an agent of the principal. Lastly, the case of **Minister of Police versus Rabie [1986](1) SA 117 (A)** for the proposition that a master may be liable even for acts which he has not authorized provided that they are so connected with an act which he had authorized.

Applying the above principles to the rival arguments on this it is our finding that the existence of a master and servant relationship is not in dispute. There is also no dispute that the acts of the guard to guard the respondent's premises were authorized by the appellant. The loss of the respondent's gas cylinders though not authorized by the appellant arose in the course of the guard's authorized acts of provision of security services to the respondent. The appellant's admission that he was under an obligation to provide the respondent with an honest guard pins the responsibility vicariously on him to make good the loss of the gas cylinders to the respondent as they were the contracting parties. The learned judge rightly found the guard not to be directly liable for the respondent's loss on account of nonexistence of a direct contractual relationship between the respondent and the said guard. We agree with the learned judge's view that the guard would only have been held responsible for that loss had directions on the liability as between the appellant and the said guard been taken on the 3rd party proceedings.

In the result and in view of our reasoning set out above we find no merit in this appeal. The same is dismissed with costs to the respondent both on appeal and the Court below.

Dated and delivered at Nyeri this 3rd day of February, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

….....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR