



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, SHAH & BOSIRE JJ.A)
CIVIL APPEAL NO. 219 OF 1998
BETWEEN

GALAXY PAINTS COMPANY LTD APPELLANT
AND
FALCON GUARDS LTD RESPONDENT

(Appeal from the judgment of the High Court of Kenya at
Nairobi (Akiwumi, J.) dated the 6th June, 1989

in
H.C.C.C. No.4477 of 1986

JUDGMENT OF THE COURT

The appellant, Galaxy Paints Company Limited, which we shall hereafter refer to as the appellant, unsuccessfully impleaded, Falcon Guards Limited, hereafter referred to as the respondent, for pecuniary damages of Kshs.219,975/= being the value of 45 drums of assorted chemicals, each weighing 200 kilos, which were stolen in the course of a burglary at its premises in the Industrial area of Nairobi. The appellant's case was that the respondent was contractually bound to provide two guards, one at day time and the other at night time, who would be stationed at the factory to prevent any breakage into and theft from the factory premises, but due to negligence on the part of its guards, a burglary and theft took place. In dismissing the appellant's claim, the trial Judge, Akiwumi, J. (as he then was) found as fact, inter alia, that indeed 45 drums of assorted chemicals were stolen as claimed, their value was as pleaded in the plaint, that the respondent's guards either actively or passively participated in the burglary and theft and because of that the respondent was not liable because of an exemption clause in the defendant's standard conditions of contract, which both parties in this appeal agreed, governed their contractual relationship. He therefore dismissed the appellant's case and thereby provoked this appeal.

Several grounds of appeal were raised in the memorandum of appeal, but when the appeal came on for hearing Mr Le Pelley for the appellant, narrowed them to only one, namely, whether on the evidence before the trial court, the trial Judge was justified in finding that the respondent's guards must have passively or actively participated in the burglary and theft, the subject matter of this litigation.

In or about 1982, at the request of the appellant, the respondent, a limited liability company incorporated in Kenya which provides security guards to desiring persons, agreed to provide one day and one night guard for its factory in the Industrial Area, Nairobi. No written contract was executed, but evidence was adduced to the effect that the respondent delivered to the appellant a document containing standard conditions upon which the guards were provided, which document had a form for the appellant to complete and sign but which it failed to do. The appellant never raised any objection to any of its terms. One of the conditions on that document was an exemption clause from liability, which read thus:

"General provisions as to liability of company: The Company in providing services and acting for the purposes of the contract herein, will (to the extent only set out below) be responsible for any

want of proper care on the part of the company itself in the selection or employment of the employee put on and in charge of such services. Subject thereto the company shall not be responsible to the client under any circumstances whatever for any deliberate wrongful act committed by any employee of the company in or with reference to such services or otherwise. The company shall, so far as concerns any loss suffered by the client through burglary, theft, fire or any other cause (to the extent only set out below) be liable only if and so far as such loss is caused by the sole negligence of the company's employees acting within the course of their employment."

The trial Judge found as fact that the standard conditions aforesaid governed the relationship between the parties herein, and on that, there is no dispute. He also found that the appellant's claim was based on breach of a term thereof. Whilst the contract was still in force, the appellant's factory was burgled and the 45 drums of assorted chemicals were stolen. The guard on duty, an employee of the respondent, neither raised an alarm nor did anything to prevent the burglary and the theft. The burglary and theft, as found by the trial Judge, happened this way.

The appellant's factory which abutts Kitui road had a chain link wire fence around it and another one within the factory compound surrounding an open yard where the appellant stored the drums containing assorted chemicals. The burglars made an opening on each of the two fences and gained access into that yard. They rolled and spirited away 45 of those drums on or about the night of 27th and 28th August 1984. There was only one guard on duty. He was not called to testify, but the evidence which was adduced and accepted by the learned trial Judge was to the effect that the guard neither raised any alarm nor took any other steps to warn the police or the guards in neighbouring premises about the burglary, nor did he activate the burglar alarm which the appellant, by private arrangement with the guards, had provided to him. He did not report the burglary and theft to anybody. The theft was discovered by the employees of the appellant on the morning of 28th August 1984.

The learned trial Judge after evaluating that evidence and the further evidence that the drums which were stolen were heavy, and that each of them needed more than three men to load onto a lorry, came to the conclusion that the loading must have taken quite a long time, a fact which would not have escaped the attention of the guard on duty. Consequently, he said, the circumstances were such that the guard was either passively or actively involved in the act, which act, in his view, brought the respondent within the exemption clause, aforesaid.

In his submissions before us, Mr Le Pelley stated that in order to be entitled to rely on the exemption clause the respondent was obliged to but failed to show that it did all that it was bound to under the contract. He surmised that the respondent's guard must have been absent when the burglary took place, otherwise he would have triggered the distress alarm or shouted for help.

Mr. Ojiambo for the respondent, in answer to that submission, expressed the view that the appellant's case as pleaded in the plaint and as presented to the court was not that the respondent's guard was absent from the appellant's factory, but that the guard was present but was negligent. The trial Judge he said, heard and decided the case on the basis of the pleadings and he could not therefore, be properly faulted in that regard.

It is trite law, and the provisions of O.XIV of the Civil Procedure Rules, are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination.

In *Gandy v. Caspair* [1956]EACA 139 it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record. And in *Fernandes v. People Newspapers Ltd* [1972] EA 63 Law Ag V.P. said:

"A civil case is decided on issues arising out of the pleadings. No allegation of negligence against

the appellant has ever been made, and it was not open to the court to find negligence on his part."

The issues in this case were agreed upon between the parties, and the learned trial Judge, in a well considered judgment, dealt with all those issues on the basis of the evidence which was before him. None of those issues related to the possibility of the respondent's guard being absent from the appellant's factory on the material night of the burglary and theft in that factory. Was it therefore open to the learned trial Judge to consider the issue? In our view no. Even if he was minded to do so, there was no evidence before him to lead to that conclusion. The appellant's case as pleaded was, as rightly pointed out by the trial Judge, based on alleged negligence on the part of the respondent's employees, and the particulars in that regard were that he failed to exercise due care, or remain alert, failing to warn or give any alarm of the burglary, or to prevent it or to notice those who committed the burglary. Nothing was alleged about them being absent at the time of the burglary. That being so, and the appellant having not based its case on fundamental breach of the contract of service between the parties, it is our judgment that the learned trial Judge, quite properly came to the conclusion that the guard or guards were either passively or actively involved in the burglary and theft which gave rise to this suit. The evidence and the circumstances of the case clearly support that conclusion. We find no basis for interfering with the decision. In the result, we dismiss the appeal with costs to the respondent both here and in the court below.

Dated and delivered at Nairobi this 14th day of April, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR