

KENYA / JUDGMENT

Securicor (Kenya) Ltd v Ea Drapers Limited & another [1987] KECA 88 (KLR)

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COURT

Court of Appeal

BEFORE

JM Gachuhi

CASE / FILE NUMBER

Civil Appeal 67 of 1985

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Securicor (Kenya) Ltd v Ea Drapers Limited & another (Civil Appeal 67 of 1985) [1987] KECA 88 (KLR) (3 July 1987) (Ruling)

Securicor (Kenya) Ltd v EA Drapers Ltd & another[1987] eKLR

Neutral citation:

[1987] KECA 88 (KLR)

Republic of Kenya

In the Court of Appeal at Mombasa

Civil Appeal 67 of 1985

JM Gachuhi, JA

July 3, 1987

Between

Securicor (Kenya) Ltd

Appellant

and

Ea Drapers Limited

1st Respondent

Combined Warehouses Ltd

2nd Respondent

(Appeal from a Judgment and Decree of the High Court at Mombasa, Bhandari J)

Ruling

1.This is an application filed by the appellant under Rule 44(1) of the Court of Appeal Rules. The appellant is seeking leave to file and to argue at the hearing of the appeal two additional grounds of appeal. The grounds under which these grounds become necessary arise out of the issues placed before the Court and from the judgment of the High Court. These grounds were neither directly pleaded nor argued at the trial, but arise from the interpretation of documents put in by consent as exhibits. The argument by the applicant is that in order to bring the matter to finality and to do justice between all parties concerned, these additional grounds should be considered. The two grounds are :“2AHaving held that Combined Warehouses Limited (CWL) had delegated to Securicor no part of its duty of care towards the plaintiff by engaging Securicor to provide a guard over its premises, the Learned Judge erred in holding that Securicor owed a duty of care to the plaintiff and in holding Securicor liable to the plaintiff for the theft of its goods:2BAssuming that Securicor owed any duty of care to plaintiff (which is denied),a)the said duty arose solely by virtue of Securicor’s contract with CWL (exhibit 4) under which Securicor’s liability for the loss of the warehouse contents were heavily circumscribed; in the premises, the ambit of the said duty was defined by the terms of the said contract and the liability for its breach was either excluded by the provisions of clauses 1 and/or 4 thereof or limited under the provisions of clause 5 thereofb)Likewise or alternatively, the scope and ambit of the said duty were delimited and defined by the terms of the contracts between the plaintiff and CWL (exhibits 1, 2 and 3) where under the plaintiff renounced any obligation of care in its favour, not only as against CWL but also as against any noncontractual party (such as Securicor) engaged in the performance of the contract.”

2.The facts of the suit is in a way a tripartite contract. The plaintiff is E.A. Drapers Ltd. Now the first respondent. Combined Warehouses Ltd. were the original first defendant now the second respondent. Securicor (Kenya) Ltd. was the original second defendant now the appellant. The plaintiff is the owner of goods which were stored with the Combined Warehouses Ltd. (CWL) as bailee. CWL employed Securicor (Kenya) Ltd. to provide day and night guard to guard the premises. One Securicor employee while on guard broke and stole 16 cases of clothing from the premises. He was convicted and sentenced to two years’ imprisonment.

3.The parties were represented before me. Mr. Lakha who appeared for the 2nd Respondent did not participate in the submission.

4.The plaintiff filed the suit against the defendants for the recovery of the loss of the said 16 cases of clothing valued at Kshs.230,532.

5.At the time of the loss there was in force contracts between the plaintiff and CWL and CWL with Securicor. During the hearing there was no oral evidence led by either party. The parties put in by consents certain documents in exhibits some of which were contract documents.

6. On the pleadings, the first defendant denied the plaintiff's claim and relied on exception clause. In the alternative it claimed total indemnity or alternatively contribution for the plaintiff's claim from the second defendant. The first defendant then took out third party proceedings. Second defendant's defence to the plaintiff's claim denied any liability. It claimed that the contract between the first and second defendant is subject to conditions and exceptions therein contained and further more enumerated other conditions. This defence was also a defence to the third party claim. The defence also set up a limitation of the claim in damages as contained in the agreement. By an amendment, the second defendant sought and obtained leave to amend its defence by setting a counterclaim against the first defendant. The counterclaim was for total indemnity from the first defendant on the provisions of the contract between the first defendant and the second defendant.

7. The parties settled what they called agreed facts which were filed. The contract documents were Warehouses Warrants Exhibits 1 to 3 and employment agreement between CWL and Securicor, exhibit 4. They were referred to in the agreed facts. Defence by the first defendant to the counter claim set up by the second defendant was a denial of indemnity. It also referred to the agreed facts where it was agreed that the stolen goods belong to the plaintiff and that the second defendant is estopped from denying that the said goods belong to the plaintiff or to show that the said goods were at the material time owned by the first defendant. The position of the first defendant was a bailee.

8. Counsel for the parties extensively submitted on liability based on these contracts. The first defendant relied on interpretation of the exception condition in the contract exhibits 1, 2 and 3 to avoid the plaintiff's claim. The second defendant similarly relied on exception condition in avoiding liability in the first defendant's third party proceedings. It was then left to the trial Judge to interpret the effect of these conditions.

9. The plaintiff obtained judgment against the second defendant having lost its case against the first defendant on interpretation of exception clauses. The second defendant filed the appeal against the whole judgment. In its application for amending grounds of appeal, the applicant bases its application on the grounds that the said two additional grounds arise out of the issues tried and from the judgment given by the court below and that it is necessary with a view to finally determining all the points arising between the parties and to do justice between them, that they be considered on the hearing of the appeal. The applicant in its endeavour to have the amendments agreed intimated to the respondent of the need to amend the grounds of appeal to include these two grounds but the request was met with noncooperation, hence the filing of this application. Mr. Gautama for the respondent conceded ground 2A and did not submit on it but certainly opposed Ground 2B.

10. In support of the motion Mr. Inamdar for the applicant deponed in his paragraph 5 of the affidavit: "That the ground of appeal intended to be raised by paragraph 2B was not raised on the pleadings nor was it argued before the court below. In the result, the Learned Judge did not have occasion to consider it in his judgment. I submit however that since the said ground raises a pure argument of law based on admitted facts and admitted documents, it is a matter which might properly be considered and decided on appeal."

11. He further submitted that grounds 2B (a) and (b) are referred to in paragraph 3 and 4 of the Amended Statement of agreed facts. The applicant is seeking to rely on the proposed additional grounds in interpreting the contract between the plaintiff, 1st and 2nd defendants. The 1st defendant relied upon the same contracts against the plaintiff. Ground B (a) is purely a question leading to the construction and effect of the actual contract between CWL and the applicant for its term. Similarly Ground 2B (b) raises the question of interpretation of the contract entered into between the plaintiff and the first defendant.

12. Mr. Gautama in opposing the submission on Ground 2B submitted that to allow the amendment is to allow a departure for the case to be argued on different grounds, cloaking behind the agreed facts. These matters were not raised in the pleadings and no submissions made regarding them. If they had been raised, the plaintiff would have decided what course to take may be by calling evidence. He stressed that it is on exceptional cases the amendment of this nature would be allowed. *The United Marketing Company v Hasharu Kara* [1963] EA 276.

13. Mr. Inamdar started off by submitting that these matters were never pleaded or submission made on them but the amendment is precipitated by the contract documents put in by consent and that no further evidence would be called for. What is the position in law in cases of such amendment? Exhibits 1 to 4 have exceptional clauses which need interpretation, and which does not need further evidence or pleading. A number of authorities were referred to by Mr. Inamdar. First, he referred to the headnote in the Privy Council decision of *The Connecticut Fire Insurance Company v Kavanagh* (1882) 61 LJ PC 60; that "When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts admitted or proved beyond controversy, it is not only competent but expedient to entertain the plea; but this course ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would support the new plea. To accept the proof adduced by a defendant on a charge of fraud representing all the evidence which he could have brought forward to rebut a charge of negligence might be attended with injustice."

14. If my understanding of the argument by Mr. Inamdar is correct, all the evidence that ought to have been put before the Learned Judge was adduced. The documents were put in by consent. These documents needed no further evidence to prove them. All the agreed facts were placed before the court. The court would be required to interpret and give effect to them on the points raised by the additional ground. I do not think that the point now intended to be introduced raises a new cause of action. Wilmer LJ adopted the words of Lord Watson in *Connecticut Fire Insurance Co. v Kavanagh* (ibid) while delivering Judgment of the Court of Appeal in *Donaghey v*

P. O'Brien & Co. and Another [1966] 2 All ER 822. He also quoted Lord Herschell in *Owners and Freight Owners of the Tasmania v Smith, Owners of the City of Corinth, The Tasmania* (1890) 16 App. Cas. 223 at p. 225 as follows: "A point not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. A Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time if it is satisfied beyond doubt first, that it has before it all the facts bearing upon the new contention .. as would have been the case if the controversy had arisen at the trial, and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

15. In the present case the determination on whether a duty of care could arise where there is no privity of contract or whether exception clauses or limit of contribution would arise outside the terms of a contract depends on the interpretation of the contract documents. The role of the applicant in execution of its duty is in the agreement. There is no controversy on facts. It will be a matter of construction. The enunciation of the law in *Connecticut Fire Insurance Co. v Kavanagh* (1892) A.C. 473 has been followed in the Judgment of the Privy Council in other cases *Donaghey v P O'Brien & Co and Another* [1966] 2 All ER 822, and by the Predecessor of this Court in *Armarshi Madhavji and Others v sardarital Ltd. and Others* C.A. No. 5 of 1975 (unreported). All these authorities have reference to the effect that if a new point of law is raised for the first time in a court of last resort it could be entertained in the interest of justice so far it does not introduce a new cause of action. I am satisfied that the proposed new grounds raise points of law that reasonably require interpretation and application in the interest of justice as between the parties.

16. I would exercise my discretion and allow this application, to include grounds 2A and 2B. The amended version of grounds of appeal is to be filed within seven days from the date hereof.

17. Regarding costs, I am given to understand that the appeal is due to be heard very soon. In all fairness cost on the amendment should be costs in the appeal.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF JULY 1987.....J.M
GACHUHI JUDGE OF APPEAL

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