

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL COURT DIVISION)**

**CIVIL SUIT NO. 45 OF 2007**

**GENTEX ENTERPRISES LIMITED:.....PLAINTIFF**

**VERSUS**

**SECURITY GROUP (UGANDA) LIMITED:.....DEFENDANT**

**BEFORE HON. LADY JUSTICE HELLEN OBURA**

**JUDGMENT**

The plaintiff's claim against the defendant in this matter is for a declaration that the defendant breached the contract it entered into with the plaintiff and the defendant is vicariously liable for the acts of its servant/worker, an order for compensation in the sum of UShs. 38,700,000/= (thirty eight million seven hundred thousand shillings only) general damages, interest and costs of the suit.

It is the plaintiff's contention that the defendant entered into an agreement with the plaintiff for guard services. The defendant indeed provided the guards and, on or around 6<sup>th</sup> November 2006, the plaintiff's premises were broken into and money amounting to Shs. 38,700,000/= was stolen. One of the defendant's guards who had been deployed to guard on the night in question was missing and his gun was found abandoned at the premises. The plaintiff sought compensation from the defendant which referred the plaintiff to its insurers but there was no progress.

The defendant's case however is that it entered into a security guarding services contract with the plaintiff to provide one day and one night armed guard at the plaintiff's factory premises in Ntinda Industrial Area. The defendant thereafter rendered excellent guarding services from 29<sup>th</sup> September 2006 until 6<sup>th</sup> November 2006 when the plaintiff alleged that their office premises

had been broken into and a sum of Shs. 38,700,000/= was missing from the office drawer of the Financial Controller of the plaintiff who had allegedly kept it there. The defendant stated that in spite of the alleged incident it continues to provide guarding services to the plaintiff. It was contended that the defendant is not vicariously liable for the alleged theft of Shs. 38,700,000/= and or general damages in respect thereof.

During the scheduling conference which was done before Arach-Amoko, J (as she then was) the following issues were agreed upon:-

- 1) Whether or not the plaintiff's premises were broken into on or around the 6<sup>th</sup> November 2006.
- 2) Whether or not there was theft of the sum claimed in the plaint.
- 3) Whether or not the defendant's servant was involved in the theft of the said money.
- 4) Whether or not the defendant is vicariously liable.
- 5) What remedies are available to the parties?

At the hearing of the case, Mr. Samuel Mugisa Mukeri appeared for the plaintiff while Mr. Moses Ibaale appeared for the defendant. Each party called two witnesses to prove its case. Upon conclusion of hearing evidence, written submissions were filed based on the agreed issues although counsel for the defendant combined the 2<sup>nd</sup> and 3<sup>rd</sup> issues in his arguments.

I will consider the issues in the same order in which they were framed as above.

**Issue1: Whether or not the plaintiff's premises were broken into on or around the 6<sup>th</sup> November 2006.**

I wish to observe that there was no basis for framing this issue because the allegation of breaking into the plaintiff's premises as contained in paragraph 4 (c) of the plaint was not specifically denied in the written statement of defence. In fact the defendant confirmed that allegation by attaching a police report indicating that the incident was reported by the defendant's officer. The defendant's witnesses also confirmed that fact and so it is not in dispute that the plaintiff's premises were broken into on the night of 6<sup>th</sup> November 2006. This therefore answers the 1<sup>st</sup> issue in the affirmative.

**Issue 2: Whether or not there was theft of the sum claimed in the plaint.**

Mr. Suther P.N (PW1) the Financial Controller of the plaintiff company testified that there was a break in into his office and Shs. 38,700,000/= was stolen. He explained that the cash was proceeds from two days sales of the plaintiff's products and was meant to pay taxes to URA for their imported goods. In cross examination he stated that it was their practice to pay URA taxes by cash and not by cheques.

Mr. George Murungi Nyakaana (PW2) the Customer Relations Officer of Threeways Shipping Services (Group) Ltd whose evidence was meant to prove that the plaintiff had imported goods pending clearance when the theft took place testified that around 2006 he handled clearance of the plaintiff's goods by making customs entry to enable it pay taxes to URA. He identified Exhibits P13& P14 as the customs entries that bear his company stamp affixed on 8<sup>th</sup> November 2006.

Based on the above evidence, the plaintiff's counsel invited court to answer this issue in the affirmative. The defendant's counsel on the other hand submitted that it could not be said with certainty whether the alleged theft occurred since no finger prints nor arrests were made and invited court to hold that the plaintiff has not proved to the required standard the alleged theft of the amount of Shs. 38,700,000/=.

I have carefully reviewed the plaintiff's evidence and the documents adduced indicating the details of the 2 days sales and the contention that the proceeds from those sales were kept in the drawer awaiting payment to URA as taxes for its imported goods. The customs entries (Exhibits 13 &14) show that the plaintiff paid those taxes on 9<sup>th</sup> & 10<sup>th</sup> November 2006 and the goods were released as per the release order bearing URA stamp dated 10<sup>th</sup> November 2006 (Exhibit P12(a)).

The plaintiff first reported theft of Shs.40,000,000/= to the police but its claim in this suit is for Shs. 38,700,000/=. PW1 explained in his evidence that the report to police was made before they had computed the actual amount which later turned out to be Shs. 38,700,000/=. I am satisfied with that explanation because the disparity between the two figures is a minor one which would not affect credibility of the plaintiff's claim provided there is documentary proof.

I do appreciate the fact that apart from reporting to police, no arrest has occurred nor is investigation in this matter concluded. That notwithstanding, it is not in dispute that PW1's office was broken into and the drawer was also broken. That seemed to be the target of the

breaking in. There must have been an attraction to that office which happened to be for the plaintiff's Financial Controller. The question is what could have been stolen from that drawer if at all or was the break in merely for fun?

Upon carefully addressing my mind to this question I find the plaintiff's claim that money was stolen convincing in the circumstance of this case. That leads me to the next question as to how much was stolen. It was PW1's evidence that they had Shs. 38,700,000/= from two days sales in the drawer. That evidence was not challenged during cross examination. Nevertheless, I have had the benefit of looking at all the cash sales receipts (Exhibits P11 (i) –P11 (XL) and they are all dated 6<sup>th</sup> November 2006 implying that they all relate to the cash sales made on that day. The total sum of those receipts is Shs. 22,311,300/=. Not a single cash sales receipt was exhibited to support the opening balance of Shs. 16,823,400/= indicated on Exhibit P8. It was merely stated by PW1 that the amount stolen was proceeds of two days cash sales.

It is a settled principle of law that special damages must be specifically pleaded and strictly proved. Without any single proof that cash sales were made by the plaintiff on the 5<sup>th</sup> November 2006, I find it very difficult to believe that the proceeds of those sales was also stolen. What the plaintiff has proved on a balance of probability is the cash sales of 6<sup>th</sup> November 2006 to the tune of Shs. 22,311,300/=. When you deduct the expenses of Shs. 430,000/= as per Exhibits P10 (i) and P10 (ii) the balance would be Shs. 21,881,300/=. I am convinced that it was that amount that was stolen from the plaintiff and I so find.

**Issue 3: Whether or not the defendant's servant was involved in the theft of the said money.**

On this issue, both parties are in agreement that on the morning of the theft the night guard deployed by the defendant was missing and his gun was found abandoned at the plaintiff's premises. This is also confirmed by the police report (Exhibit P3).

Counsel for the plaintiff submitted that if the plaintiff's servant was not involved in the alleged theft then why did he abandon his guard post and gun? He argued that the conduct of the guard of disappearing and abandoning his gun is inconsistent with innocence. He therefore invited court to find that the guard was involved in the break in and theft basing on the principle of *res ipsa loquitur*.

Conversely, the defendant's counsel submitted that even though the defendant's employee's whereabouts could not be ascertained as of the morning of 7<sup>th</sup> November 2006, it could not be stated with any degree of certainty as to who may have taken the alleged sum of Shs.38,700,000/= as no suspects were arrested and or convicted. Neither was any finger print taken from the broken drawer where the missing money had allegedly been kept. More over according to counsel, the guard was forbidden from entering the offices and therefore could not have been privy to the fact that some money was being kept there so as to come up with a plan to appropriate the same.

He argued that in the premises court should hold that the plaintiff did not discharge his burden of proving the case to the required standard and should answer issue 3 in the negative.

I have carefully addressed my mind to the circumstances of this case and the arguments for both parties as well as looked at the evidence on record. While it is true that there is no direct evidence linking the guard to the theft, his conduct of disappearing from the very sight which he was meant to securely guard in accordance with the terms of the contract in my view is suspect. If at all he was not part of the scheme he would have at least resisted the break in by firing some bullets since he was armed with a gun or even by making an alarm. No evidence has been led to show that this took place and he is not available to explain what happened.

PW1 testified that about ten of the plaintiff's staff reside in the flats on the 2<sup>nd</sup> and 3<sup>rd</sup> floors of the same building where the plaintiff's office premises and the factory are located. If at all there had been any form of resistance by the guard even by merely making an alarm the said staff would have been alerted about the break in. Unfortunately there was none. To my mind the failure of the guard to resist the break in coupled with his absence from the scene of the crime leads only to one conclusion that he was in league with the thieves. The argument that he has never been found or arrested and prosecuted in my view does not exonerate him. I therefore find that the plaintiff has proved on a balance of probability that the defendant's servant was involved in the theft of the money thus answering the 3<sup>rd</sup> issue in the affirmative.

#### **Issue 4: Whether or not the defendant is vicariously liable.**

Having found under the previous issue that the guard was involved in the theft of the money, the next question is whether the defendant is vicariously liable.

It is not in dispute that the guard was a servant of the defendant company who was deployed under the contract to provide security services to the plaintiff's premises. In **Muwonge v Attorney General of Uganda [1967] EA 17** it was held (as per **Newbold, P**;) that:-

*“An act may be done in the course of a servant's employment so as to make his master liable even though it is done contrary to the orders of the master; and even if the servant **is acting deliberately, wantonly, negligently or criminally, or for his own benefit**, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable”.* (Emphasis added).

It was argued for the defendant that there was no proof that its servant entered into the offices of the plaintiff's Financial Controller and made off with the money and so the defendant could not be vicariously liable for the alleged theft. It was argued in the alternative but without prejudice that even if the defendant was vicariously liable which is denied, the condition printed overleaf in clause 4 of the standard contract exempts the defendant from being liable to the plaintiff for any loss or damages in a sum over and above Shs. 800,000/=.

I will deal with the issue of exemption clause later in this judgment but as regards the question of vicarious liability this is my observation that will form the basis of my decision. The plaintiff company under a contract entrusted the security of its premises in the hands of the defendant company that provides security services to its customers. The defendant company then deployed its servant on the premises of the plaintiff with a gun to secure it in accordance with the terms of the contract.

I have already found herein above that the said servant is culpable for what happened. Should the defendant then not take responsibility for its servant's act? I think for all fairness it should. It is the defendant that is squarely responsible for the recruitment, training and deployment of its guards. Should it therefore be allowed to unleash all manner of guards on the unsuspecting customers and get away with it? Who would then trust security companies to do what they hold out to do, that is, provide security if they cannot be held liable where their servants are found culpable for theft or any form of misconduct that compromises the security of their customers?

Of course by stating so I am not overlooking the fact that each case should be judged on its own merits and circumstances. But in the circumstances of this case, the defendant would be held vicariously liable for the acts of the guard and I so find.

This brings me to the argument by counsel for the plaintiff that the defendant breached the contract to provide security to the plaintiff company. I will also consider the argument on the exemption clause canvassed by counsel for the defendant basing on clause 4 of the conditions and the cases of *L'Estrange v. F. Graucob (1934) ALL ER at page 16* and *Curtis v. Chemical Cleaning and Dyeing Co. Ltd (1951) 1 ALL ER 631* which were not even attached to the submissions.

Although breach of contract was not framed as a separate issue, it was pleaded and the plaintiff's counsel submitted on it but counsel for the defendant did not make any specific reply to it in his submission.

I have had the benefit of looking at the two standard service order contracts for the provision of security services (Exhibits P1 & P2). Details of the service are described in both contracts as:-

*“To guard and protect the client's premises located at Ntinda Industrial area”.*

The contract was stated to be subject to the conditions printed overleaf. Those conditions are in very small prints and there are 13 clauses in all. I have found it necessary to reproduce clause 4 that is relied upon by the defendant to limit its liability to Shs. 800,000/=. It provides as follows:-

*“4 Limitation of Liability*

*The Company undertakes no liability for any loss or damage to property or any person whatsoever or bodily injury sustained by the client or his/its servants or agents whatsoever or howsoever caused by its employees whilst performing their duties within the scope of their employment PROVIDED ALWAYS that any liability of The Company hereunder shall not exceed in the aggregate the sum of Ushs. 800,000 (Eight hundred thousand shillings only) PROVIDED FURTHER that any liability of The Company or its servants or agents to The Client hereunder shall not on any ground or any cause whatever or under any*

*circumstances extend to any consequential or indirect loss sustained by The Client or its servants or its agents, howsoever arising”.*

There is a provision at the bottom of those conditions for both parties to sign. But both copies of the contracts that were tendered in court were not signed by any of the parties. The front page of the contract which was mainly filled in with a pen was signed by both parties. Just before the space provided for the client’s signature there is a sentence to the effect that:’

*“I confirm that I have read and accept all the terms and attendant conditions overleaf”.*

There is no doubt that the above condition in clause 4 just like all the others was tailored to suit the defendant’s interest. This being a standard form document designed by the defendant, the plaintiff did not participate in negotiating and drafting it.

I have had the benefit of reading the decision in the case of ***L’Estrange v. F. Graucob (1934) ALL ER at page 16*** as reported in **[1934] 2 K.B. 394**. The principle stated in that case is that when a document containing contractual terms is signed, then, in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

The exceptions to the above principle was stated in the case of ***Levison and Another v. Patent Steam Carpet [1978] 69*** where it was held that the effect of an exemption clause is that it gives exemption for negligence but not for a fundamental breach of the contract and the onus of proof is on the party seeking to rely on the exclusion clause to prove that it was not guilty of fundamental breach and if it failed to discharge that burden then it cannot rely on the exclusion limitation.

Commenting on such clauses where there is inequality of bargaining power, **Lord Denning MR** observed in that case that effect should not be given to an exemption clause, if it is unreasonable, particularly in standard form contracts where there is inequality of bargaining power. I totally agree with that observation.

**Lord Denning MR** then stated from pages 78-79 in reference to the facts of that case as follows:-



*“The conditions were at the back of the standard form. The customer was asked to sign them without being given any opportunity of considering them or taking objection to them. It is a classic instance of superior bargaining power, to which Lord Diplock drew attention in **Instone v. A Schroeder Music Publishing Co. Ltd.** [1974] 1 W.L.R. 1308, 1316:*

*“This [standard form contract] is of comparatively modern origin. It is the result of concentration of particular kinds of business in relatively few hands...The terms...have not been the subject of negotiation between the parties to it, or approved by any organization representing the interest of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: ‘If you want these goods or services at all, these are the only terms which they are obtainable. Take it or leave it.’”*

In *Cheshire, Fifoot and Furmston’s Law of Contract 16<sup>th</sup> Edition, Oxford University Press pg 230 and 243* the learned authors in addition to expounding on the above principles also stated that when it comes to exclusion clause, the question is not that of substantive law but depends on the interpretation of the individual contract before the court.

In the instant case, the defendant entered a contract to provide security services to the plaintiff to guard and protect its premises. It follows that protecting the plaintiff’s premises from burglary or trespass by any unauthorized person was a fundamental term of the contract whose breach goes to the root of the contract. By the defendant’s servant failing to guard and protect the premises as agreed, the defendant as the contractor and employer would be guilty of fundamentally breaching the terms of the service order contracts for the provision of security services and I so find. For that reason, the plaintiff cannot now rely on the exemption clause whose terms are so unreasonable. In the premises, the defendant’s plea on the exemption clause is rejected.

**Issue 5: What remedies are available to the parties?**

Following my findings on the above four issues, judgment is entered for the plaintiff in the following terms:-

- 1) It is declared that the defendant fundamentally breached the service order contracts for the provision of security services.
- 2) The defendant is vicariously liable for the acts of its servant who was guarding the plaintiff's premises on the night there was a break in and theft of Shs. 21,881,300/= that has been proved in court. I accordingly order the defendant to pay that amount to the plaintiff.
- 3) Interest is awarded on (2) above at the rate of 20% per annum from the date of filing this suit until payment in full.
- 4) General damages for breach of contract and the inconveniences suffered as a result of the theft is awarded to the plaintiff in the sum of Shs. 10,000,000/=.
- 5) Interest is awarded on the general damages at 8% per annum from the date of this judgment until payment in full.
- 6) Costs of the suit are awarded to the plaintiff.

I so order.

Dated this 26<sup>th</sup> day of April 2013.

Hellen Obura

**JUDGE**