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Advocates:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 658 of 1992

DIANI BEACH COTTAGES LTD..... PLAINTIFF

versus

COSMOAIR PLC..... DEFENDANT

JUDGMENT

By an amended plaint and filed in Court on 29th September, 1992 the plaintiff herein brought a claim against the defendant based on a written agreement dated 29th June, 1991. It is necessary to set out some parts of the plaint which in my view are instructive.

Paragraph 3 of the said amended plaint reads as follows:-

"3. By a written agreement dated 29th June, 1991 the parties herein contracted that the plaintiff would hold available and at the exclusive disposal of the Defendant, upon preferred allocation basis for the period beginning 1st November, 1991 to 31st October, 1992 hotel accommodation at the Plaintiff's hotel at Diani Beach at the rate specifically shown on the said agreement."

Paragraph 6A reads as follows:

"6A. In consequence of the said agreement the Plaintiff has accommodated the Defendant's clients between November, 1991 and September 1992 and has invoiced the Defendant in respect thereof in the sum of £15,725.00 (equivalent to KShs.974,950/- as at today's mean exchange rate of KShs.62/- to the pound sterling) and which sum remains outstanding from the Defendant to the plaintiff."

The relevant prayers relevant to this judgment read as follows:

"REASONS WHEREFORE the Plaintiff prays for judgment against the Defendant for:

- (i) A the sum of £15,725.00 (or KShs.974,950/- as set out in paragraph 6A of the amended plaint;
- (i) B loss of revenue from 19th September, 1992 for all brochure bookings which have had to be transferred to other hotels because of Cosmosair PLC breach of contract.
- (ii) Costs of and incidental to this suit;
- (iii) Interest on (i) and (ii) at commercial rates;
- (iii) A interest on (i)A and (i)B and (ii) at commercial rates."

The defendant filed a written statement of defence to the amended plaint where liability was denied and alleged

breach of the terms and conditions of the agreement by the plaintiff for which it sought indemnity or set off.

Soon thereafter, the plaintiff filed an application by way of Notice of Motion under Order 35 Rules 1 and 2 of the Civil Procedure Rules for summary judgment. The application was heard by Wambilyangah J. who on 27th November, 1992 gave judgment for the plaintiff "as prayed in the amended plaint."

Thereafter the defendant filed some applications to review the orders of the Court but those do not concern us at this stage. There is a ruling of this Court however dated 22nd September, 1994 which is relevant to the issues at hand.

After Wambilyangah J. delivered his ruling on 27th November, 1992 aforesaid both learned counsel subsequently appeared before him on 18th December, 1992 and recorded a consent order in the following terms:-

"By consent the decree to be restricted to £16,725 inclusive of costs.-

The Plaintiff's claim for loss of revenue to proceed to hearing on a date to be fixed in the registry. ,,,,,,,,,,"

When the matter was listed for formal proof a preliminary point was raised which was the subject of the ruling of this Court delivered on 22nd September, 1994 aforesaid. In dismissing the preliminary objection challenging the jurisdiction of the Court to hear the claim for loss of revenue, I observed that the plaintiff's case was not determined in full when Wambilyangah J. gave his ruling on the application for summary judgment. Noting that the prayer for loss of revenue was in the pleadings, I found the defendant had not been taken by surprise as it had notice of the claim which it denied in the statement of defence. To the best of my knowledge as far as the record can tell, there has been no appeal filed against the said ruling. The date for hearing was then set and that is the subject of this judgment.

The Chairman of the plaintiff one Andrew Nyoro Njenga gave evidence in support of the plaintiff's case while the defence called Mr. Jedrej Sawaicki, the overseas director of the defendant Company in charge of operations in Mombasa.

There is no dispute that the parties herein entered into a written agreement as per paragraph 3 of the amended plaint set out above. Clause *one of the* said agreement which has been produced by the plaintiff's witness (PW.1) as Exhibit I reads as follows:-

"1... The Hotelier shall hold available and at the exclusive disposal of Cosmos, upon preferred allocation basis for the period specified, the accommodation indicated at the rates inclusive of all service charges, taxes, duties and commission as shown below upon the terms and conditions set out overleaf."

According to Exhibit I aforesaid, which has also been stated by PW. 1 in his evidence in chief, the plaintiff agreed to provide 20 twins for the period stated at £12.50 per person per night halfboard. In effect to provide for 40 people per day. The contract also provided for a Christmas supplement running from 24th December, 1991 to 2nd January, 1992 both days inclusive at £8 per person per day. PW.1 added some details in his evidence which I do not deem necessary to set out herein as they are set out in the said agreement-Exhibit 1.

PW.1 told the court that "loss of revenue was incurred because the guests did not arrive and this was occasioned by the failure of the defendant's company which is the contracting party to meet the terms of the contract. The period for the said loss was restricted to 47 days - that is - from 16th September, 1992 to 31st October, 1992. The total revenue expected from 40 people per day at £12.50 amounted to £23,500.

The plaintiff's witness went on to produce Exhibit 3 showing the schedule of loss of revenue which included

the £23,500 above, average daily in house expenditure per guest at £20.00 for a la carte meals and drinks totaling £37,600 making a total of £61,100. Added thereto was interest at commercial rates up to 31st March, 1995 amounting to £75,018.12. in the end the plaintiffs total claim rested at #136,118.12

The production of Exhibit No. 3 was objected to by the learned counsel for the defendant. However the same was admitted by the Court for reasons to be given in the final judgment and further that the learned counsel for the defendant was at liberty to cross examine the witness on the contents thereof and make submissions at the close of the hearing. I shall revisit this later in my judgment.

The defence witness denied that there was any breach of the contract by the defendant. On the contrary it was the plaintiff who cancelled the same by a letter dated 16th September, 1992 stating that clients will no longer be received and the existing ones will be thrown out of the hotel.

As regards the terms of the contract the defence witness said it was not a guaranteed contract but a preferred allocation contract generally entered into between tour operators and hoteliers not only in Kenya but all over the world.

The said contract allows a tour operator to release the unsold rooms back to the hotelier at an agreed specific time - normally, one week prior to arrival of each group. There is no contractual obligation on the part of the tour operator to fill the allocation. It is necessary to set out herein below part of Mr. Sawicki evidence. He told the court as follows:-

"Ext.1 20 double Rooms - 40 beds. Plaintiff was to make these rooms available. In the event we were not able to supply 40 guests we send a rooming list to the hotelier by which any unsold accommodation is released back to the hotelier and this is stipulated in Clause 8 of the said if the hotelier expects the allotment to be full completely he should enter into a guaranteed contract by which a tour operator commits himself to paying for the rooms whether the clients arrive or not".

The defence witness added that there was no provision in the contract. Until the defendant received notice demanding payment guests were still being sent to the plaintiff and defendant was still ready to send guests until the expiry of the contract.

Mr. Sawicki gave the reason for delayed payment to the plaintiff. The defendant had received complaints from guests staying with the plaintiff and in line with Clause 5 of the contract funds were withheld which would in return be refunded to the clients. He however had no figures of those who complained but added there was a large number who were dissatisfied with the arrangements. Complaints were based on cleanliness, service and food quality. The defendant had to indemnify these clients in excess of £20,000. In effect the defendant also incurred a loss in this arrangement.

The defence witness also disputed the figures reflected in Exhibit 3 the schedule of loss of revenue as being grossly exaggerated. For example he said he found it illogical that the plaintiff should be claiming £20 for what he considered clients would spend on additional food and drinks when the contracted rate of £12.50 is in respect of accommodation, breakfast and dinner. Further to the foregoing he said he could not understand how the plaintiff could have expected to have 160 clients arriving on 15th September, 1992 up to 28th October, 1992 if during the whole summer season he only had 64 clients.

Both PW.1 and DW.1 were extensively questioned on their respective testimonies by learned counsel appearing for the parties. Both learned counsel have also addressed the Court on the salient issues and I have their submissions on record.

The entire cause of action in the amended plaint was based on the agreement Exhibit 1. That agreement was to run from 1st November, 1991 to 31st October, 1992. Paragraph 6A of the amended plaint claimed a specific sum for which the defendant had been invoiced from November 1991 to September, 1992. One was bound to ask, what about the balance of the term of the contract.

The defendant, who was a party to the contract ought to have expected some development based on the balance of the said term. I note that the amended plaint was dated and filed on 29th September, 1992 just about one month before the expected date of the expiry of the contract. There appears to be some misgiving about the meaning of the alleged cause of action but when the body of the plaint is read with the prayers little doubt is left that there is a claim for loss of revenue. This cannot be said to be misconceived or bad in law. The answer to issue number one is in the negative and that to issue number two in the affirmative. In respect of issue number three, going by the evidence now before me, the ruling of Wambilyangah, and that of this Court on jurisdiction, not all issues have been determined in relation to the pleadings. The defendant recognised this when the consent order of 18th December, 1992 was recorded.

There was a breach of contract dated 26th June, 1991. The parties fell out in mid September, 1992. The question is, who was in breach of the contract? Both parties blamed one another. Two stages present themselves. First, the defendant withheld payments due and payable to the plaintiff. The letter dated 16th September, 1992 to the Defendant's Resident Manager was primarily a demand letter and the threat to evict the guests can only be considered secondary to influence or facilitate urgent appreciation of the situation on the part of the defendant.

It will be noted that none of the guests were evicted as threatened. Instead the defendant did not send any guests and only after the suit was filed and summary judgment entered did the defendant make payment of the plaintiff's claim for special damages.

In the meantime, no rooming list was sent by the defendant to the plaintiff and no surrender was made as required. The plaintiff in my view was bound to still reserve accommodation for the defendant's clients otherwise he would be breaching the terms of the contract.

In my judgment taking all the evidence in totality I find that it was the defendant which was in breach of the contract. As a result of the said breach the plaintiff, it follows lost revenue. This was expected as per the terms of the contract. Such a claim cannot be said to be remote. It is directly connected with the breach of contract.

Unlike special damages loss of revenue can be compared to loss of future earnings in a claim based on personal injury. Such a loss can be computed from past earnings but in the end falls under general damages.

I have already said that the plaintiff was duty bound to reserve the accommodation requested by the defendant. The question of guaranteed contract in my view does not arise. There was no communication from the defendant. No surrender. If the plaintiff let out the room to a third party and the defendant's guests/clients call in he would have no explanation to give. The defendant, in my view is liable for the loss that the plaintiff incurred as a result of the breach.

I had said I shall revisit Exhibit 3 later. I do it now. That schedule was prepared by the plaintiff's Chairman. To me it is an explanation leading to the last figures therein. With profound respect however only that part of the schedule related to the contract is relevant. In the case of Hadley -vs- Baxendale (1843-60) All. E.R.461 it was held that where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

The defendant placed the plaintiff in a position of uncertainty. One in such a situation given the nature of the contract cannot be expected to mitigate the loss without running the risk of breaching the same. In my judgment the claim for loss of revenue for 47 days is sustainable. At £12.50 per day per person for 40 people, the loss comes to £23,500.

The plaintiff's claim for in house expenditure per guest placed at £20 for a la Carte meals and drinks is in my view speculative. No supporting statistics were produced, I note that the same was not included when the plaintiff made an application for summary judgment.

As for the claim of interest at commercial rates the plaintiff produced Exhibit 2. The plaintiff was duty bound however to lay a basis for that exhibit. It was incumbent to first establish the business was run on an overdraft or loan. That the same was subject to the interest charged therein. In C.A. No.154 of 1992 Mr. Charles C. Sandevs. Kenya Co-operative Creameries Ltd., evidence was led which clearly showed that the bank was charging interest at 17%. This was allowed on the award of special damages.

In my judgment, I am of the view that the rate of interest should be 14% p.a. As this money would have been received by the plaintiff under the said contract had the defendant not breached the same, I order that the same shall accrue from the date of filing the suit.

In the end I find that there shall be judgment for the plaintiff in the sum of £23,500 or its equivalent in Kenya shillings as at the time of settling the decree plus costs of the suit and interest at 14% from the date of filing the suit.

Orders accordingly.

A. MBOGHOLI MSAGHA

JUDGE

MOMBASA. 30th June, 1995.



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