



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 464 OF 2016

BETWEEN

SAHKAR LIMITED1ST PLAINTIFF

DAVID LIVINGSTONE LIMITED2ND PLAINTIFF

AND

AFRICAN HOTELS &

ADVENTURES (EAST AFRICA) LIMITEDDEFENDANT

JUDGMENT

Plaintiffs' Case

1. The Plaintiffs' case is set out in the Plaint dated 16th November 2016. The 1st Plaintiff ("Sahkar") is the lessor of the properties; NAROK/CIS-MARA/LEMEK/ 189 and 190 ("the suit property") which it granted to the 2nd Plaintiff ("David Livingstone") the exclusive right to use and licence to undertake business in the name and style of "David Livingstone Safari Resort".
2. The Defendant is involved in the business of travel and tours and lodge management and in that respect it owns and operates several lodges in Tanzania.
3. By a Joint Venture Agreement dated 24th July 2013 ("the Agreement"), the Plaintiffs and the Defendant agreed to incorporate a company, Herne Limited ("Herne"), for the purpose of conducting the Plaintiffs' resort business operating under the name, "*Mara River Lodge*." ("the Lodge"). David Livingstone was to hold 60% while the Defendant would hold 40% of the shareholding of Herne. Notwithstanding the date of the Agreement, its implementation date was 15th July 2013.
4. According to the Plaintiffs, the Defendant operated the Lodge under the Agreement from 24th July 2013 until it abandoned it in November 2014 in breach of the Agreement. Among the breaches pleaded in the Plaint, is that the Defendant unilaterally dismissed the Managing Director, Jayesh Shanghavi. That the Defendant unilaterally continued to employ and dismiss other employees of the Lodge contrary to the Agreement. They accused the Defendant of failing to market the Lodge leaving it with low bed occupancy resulting in unprecedented losses and that it also failed to appoint a substantive marketing

manager in spite of having undertaken to oversee the marketing of the Lodge. They complained that the Defendant assumed and performed the Plaintiffs roles under the Agreement. The Plaintiffs claimed that the Defendant failed to refund the Capital Expenditure (CAPEX) contribution to the 2nd Plaintiff amounting to USD 400,000.00 which was to be refunded upon execution of the Agreement.

5. The Plaintiffs further pleaded that the Defendant failed to submit quarterly reports to them since 15th July 2013 save one that was issued on 8th April 2014. They complained that the Defendant managed the resort in a casual and haphazard manner, failed to take out insurance cover over the suit property causing them to take out the cover instead. They also faulted the Defendant for failing to disclose fundamental issues affecting the Lodge and abandoning it without informing the Plaintiffs.

6. The Plaintiffs stated that they issued a 30-day notice to the Defendant demanding that it remedy the alleged breaches but the Defendant failed to comply with the notice. Instead of complying with the notice, the Defendant issued a notice dated 3rd March 2015 terminating the Agreement. The Plaintiffs stated that as a result of the breaches, they suffered loss and damage amounting to USD 1,928,900.00 claimed in the plaint. They also prayed for aggravated damages for loss of business and profits, dishonest business practices and breach of contract.

Defendant's Case

7. In its Amended Defence dated 13th June 2019, the Defendant admitted that the Plaintiffs, the Defendant and Herne entered into the Agreement but at that time the Defendant, which was incorporated on 22nd October 2013, was not capable of entering into the Agreement. It further pleaded that the Defendant did not ratify the Agreement hence the Plaintiffs have no recourse against it therefore the suit is incompetent.

8. In the alternative, the Defendant denied the allegations of breach against it. It stated that the Plaintiffs failed to make the agreed capital contribution of USD 400,000.00 which was due when the Agreement was signed. That they failed to transfer prepayments and deposits received by them to Herne and that they also failed to effect payment of agreed CAPEX and operating expenses. The Defendant stated that it left the Lodge after receiving the letter dated 28th September 2015 from the Plaintiffs' advocates demanding that it vacate the Lodge. Since it complied with the demand, it denied that it abandoned the Lodge.

9. The Defendant also denied that it dismissed the initial managing director, Mr Shanghavi as he tendered his resignation from Herne by his letter dated 7th March 2014. In answer to the allegation that it failed to submit quarterly reports, the Defendant stated it was required to submit the reports to the Herne Directors and not the Plaintiffs. It accused the Plaintiffs of refusing to provide it with a copy of the insurance policy for the Lodge despite several requests forcing it to procure an insurance policy as prudent business venture.

10. The Defendant maintained that it was the Plaintiffs who were in breach of the Agreement and as such the claim ought to be dismissed.

Pretrial Conference

11. At the Pretrial Conference, the parties agreed on several undisputed facts. That Sahkar, the lessee of the suit properties, granted to David Livingstone exclusive licence to run the Lodge on the terms pleaded in the plaint. The Lodge was to be run on the basis of the Agreement executed by Plaintiffs, Defendant and Herne. By the time the Agreement was executed, the Defendant was yet to be incorporated and was only incorporated on 22nd October 2013. It was agreed that the Defendant operated the Lodge from 15th July 2013 until 13th May 2015. It was also not disputed that the Defendant issued the notice to terminate the Agreement on 3rd March 2015.

12. The parties framed the following issues for determination by the court:

- (a) Whether the Plaintiffs and the Defendant entered into Agreement.
- (b) Whether the Agreement was binding on the parties.
- (c) Whether the Defendant's acts are referable to the Agreement.
- (d) Whether the Defendant implemented the Agreement by taking over and running the Lodge from 15th July 2013.
- (e) Whether the Defendant breached the Agreement and if so whether the Plaintiffs are entitled to the reliefs sought.

13. The Plaintiffs called one witness; Gopal Patel (PW 1), a shareholder and director of the Plaintiffs. The Plaintiffs intended to call another witness, Godfrey Mwika, an accountant, who was to produce an Internal Audit Report dated 23rd October 2020 on the Joint Venture ("the Audit Report"). After hearing PW 1, the suit was adjourned for hearing of the accountant's testimony but when the matter came up on 10th March 2020, the Plaintiffs' counsel elected to close its case without calling the witness. It appears the Plaintiffs' had a change of mind for as they filed an application dated 24th June 2020 seeking to re-open the Plaintiffs' case and call another witness to produce the accounts. I dismissed the application on 14th July 2020 for non-attendance. Thereafter, I fixed the defence case for hearing. On 11th August 2020., I heard the testimony of the Defendant's only witness, Moses Masinde (DW 1), a director of the Defendant.

14. During the proceedings, the Plaintiffs' filed a Notice of Motion dated 7th August 2020 seeking my recusal from hearing the suit. I heard the application and by a ruling dated 21st September 2020, dismissed the application. On the same day, I also fixed the Plaintiffs' Notice of Motion dated 21st July 2020 and filed on 23rd August 2020 seeking to set aside the dismissal order made on 14th July 2020. On 30th September 2020, counsel for Plaintiffs informed the court that they wished to withdraw the application and it was accordingly marked as withdrawn. I thereafter reserved judgment in the matter.

Whether the suit is competent

15. Issues (a), (b) and (c) are based on the undisputed fact that the Defendant was incorporated on 22nd October 2013 after the Agreement had already been executed. Whether the Defendant had capacity to enter into the agreement was the subject of the Defendant's Notice of Motion dated 14th December 2016 which sought to strike out the claim. The Defendant argued that when the Agreement was executed on 24th July 2013, the Defendant was not a corporate body hence the Plaintiffs could not maintain the claim against it based on Agreement.

16. Although Tuiyott J., dismissed the application by the ruling dated 22nd September 2017, he dealt with the nature and effect of agreements entered into by Companies prior to incorporation. The learned Judge reiterated the legal principle governing pre-incorporation of agreement, which the Court of Appeal accepted in ***Consolidated Chemicals Ltd v KEL Chemicals Ltd* NRB CA Civil Appeal No. 6 of 1981 [1981] eKLR** and is summarized in ***Halsbury's Law of England* (4th Ed., Vol 7) at para 728** as follows:

In order that the Company may be bound by agreements entered into before its incorporation, there must be a new Contract to the effect of the previous agreement, although this new contract may be inferred from the company's acts when incorporated, except when such acts are done in the mistaken belief that the agreement is binding.

17. At the hearing of the application the learned Judge dealt with the parties' contentions. The Defendant took the position I have set out above that a pre-incorporated Contract cannot be ratified by a company after its incorporation. The Defendant also referred to the following dictum in ***Newborn v Sensolid (Great Britain) Ltd* [1953] ALL ER 708**;

The Contract was made, not with the Plaintiff, whether as agent or as principle, but with a limited company which at the date of the making of the contract was non-existent and therefore, it was a nullity and the Plaintiff could not adopt it or sue on it as his contract.

18. Although the Plaintiffs accepted that a company cannot ratify a pre-incorporation contract, they argued that there may be circumstances from which it can be inferred that a company, after incorporation, has made a new contract to the effect of the previous contract. Counsel for the Plaintiffs referred to the decision in ***Trevor Price & Another v Raymond Kesall [1957] EA 152*** where the court accepted the general principle but held that a new contract may be inferred from the company's acts after incorporation however no new contract will be inferred when such acts are done in the mistaken belief that the agreement is binding. Sir Kenneth O'Connor stated that:

I think it would be more exact to say that no new Contract can be inferred where all the subsequent acts of the Company are referable to the previous agreement which the Directors erroneously supposed to be binding

19. In the ruling, Tuiyott J., reviewed the letters dated 3rd March 2015 and 4th April 2015, from the Defendant addressed to the Plaintiffs giving notice to terminate the Agreement. He also referred to the replying affidavit of Moses Masinde sworn on 14th December 2016 in which he deponed that the Defendant took over the management of the Lodge and did its best to perform its obligation under the Agreement despite the Plaintiffs' own non-compliance with the terms of that Agreement. After analyzing the facts, the learned Judge concluded as follows:

*[16] What is clear from the letter and the contents of the affidavit is that the Defendant was under the belief that the agreement was binding on it. What is less clear is whether there were other acts done by the Defendant which were not referable to the previous agreement. Obviously if all subsequent acts are referable to the previous Agreement, then on the authority of ***Trevor Price*** (supra), no new Contract can be inferred. The converse is true, if some subsequent acts are not referable to the previous agreement then a new Contract can be inferred.*

[17] For the Defendant to benefit from its Preliminary Objection it needed to unequivocally state, and then demonstrate that :-

- (i) It was under the mistaken belief that the Joint Venture Agreement was binding and,*
- (ii) All its subsequent acts are referable to the Joint Venture Agreement.*

While the Defendant made out a good case of the former, it failed to provide clear and plain evidence on the latter.

20. I agree with the findings and conclusions reached by Tuiyott J. It is correct to state and the facts as disclosed by the correspondence between the parties shows that they proceeded on the basis of the Agreement. Both sides made claims against each other and demanded that each party perform their respective obligations based on Agreement. Indeed, each party blamed the other for committing breaches of the Agreement hence the conclusion that the Defendant was under mistaken belief that the Agreement was binding. The question whether the Agreement was binding and whether all subsequent acts are referable to the Agreement is a question of fact.

21. Apart from the evidence set out in correspondence between the parties under the Agreement, it is important to recall that the parties also agreed to conduct the joint vehicle through a company incorporated for that purpose. Although the Defendant was incorporated on 22nd October 2013, under the Agreement, the parties agreed that the Lodge would be run by Herne which was incorporated on 24th April 2013 where the Plaintiffs were to hold 60% shareholding and the Defendant 40% shareholding. It is instructive to note that by the time Herne was incorporated, the Defendant was still not incorporated yet the parties proceeded on the basis that the Agreement and its consequences were in force.

22. DW 1 adopted his Replying Affidavit sworn on 14th September 2016 in his testimony in which he annexed the bank statements from I & M Bank for Herne for the period 17th July 2012 to 31st December 2015 and a draft audit report from PKF Accountants for the year ending 31st August 2014. He also produced sale invoices, cash sale receipts and documentary evidence of transactions of and concerning Herne all of which leave no doubt that the Defendant intended to be bound by and acted in accordance with the Agreement.

23. As I have stated, when the parties' relationship started falling apart, they made demands on each other based on the Agreement. I therefore have no difficulty finding that the Defendant, by its conduct, adopted the Agreement and it was accordingly bound by it.

Whether the Defendant breached the Agreement

24. The substance of the Plaintiffs' claim is that the Defendant breached the Agreement. They therefore bear the burden of proving the particulars of breach pleaded in paragraph 9 of the plaint on a balance of probabilities.

25. It is apparent that some of the particulars pleaded are over broad, vague and lack material particulars hence the Defendant has not even responded. For example, the Plaintiffs complained that the Defendant breached the provisions on management of the business, the budget covenants, covenants relating to marketing, covenants on technology and other related costs, marketing and operating expenditure covenants as provided in the Agreement. These covenants referred to by the Plaintiffs are long and detailed and without the Plaintiffs referring to specific provision breached and demonstrating by evidence how each provision was breached, it is not only difficult for the Defendant to defend itself but also for the court to make a determination. Both PW 1 and DW 1 adopted their witness statements and documents.

26. The position of Managing Director was provided for under Clause 2.4.2 of the Agreement as follows:

2.4.2 The Parties record that the initial managing director of the Business shall be Mr Jay Shanghavi (hereinafter "the Managing Director") and that Newco shall conduct the Business on a sound commercial basis and in terms of the current budget under the control of AHA as shareholder, in accordance with Annexure "B".

27. The Agreement did not have any provision on how Mr Shanghavi's contract would be terminated. On its part, the Defendant produced a letter dated 7th March 2014 addressed by Mr Shanghavi to Herne tendering his resignation and a statutory declaration sworn by him on the same day confirming that he had resigned. Since Mr Shanghavi resigned on his own volition, the Plaintiffs claim of breach lacks merit.

28. The Plaintiffs complained that the Defendant unilaterally appointed and dismissed other employees at the Lodge in breach of the Agreement. I find this averment rather vague. PW 1 did provide the names of the employees engaged or dismissed in contravention of the Agreement. Without the names of the employees or reasons for engagement, it would be difficult to tell whether the Defendant contravened the Agreement. It is also apparent that the Defendant had the discretion to hire and fire employees as provided under Clause 1.6 of the Annexure "B" which stated that:

1.6 AGA will in its sole discretion on behalf of Newco, be entitled to appoint and remove staff, including the general manager of the Lodge.

29. The Plaintiffs complained that the Defendant failed to market the Lodge as required by Clause 5 of the Agreement which required it to undertake marketing of the Lodge within its wider marketing programs. PW 1 did not demonstrate how the Defendant failed to market the Lodge in a manner that violated the Agreement. He did not produce evidence to show that the Lodge made losses as a result of the Defendant's failure to market it.

30. The Plaintiffs claimed USD 400,000.00 being a refund of the 2nd Plaintiff's CAPEX contribution

under Clause 2.3.2 of the Agreement stating that:

2.3.2 Each Party shall on the Signature Date contribute the sum of United States of America Dollars Four Hundred (US\$400,000.00) as funding into Newco, on the basis set out in this Agreement.

31. Their case was that the Defendant failed to contribute to the USD 400,000.00 meant for upgrading the Lodge to 4 Star status. The Defendant blamed the Plaintiffs for failing to make its CAPEX contribution leaving it to fund refurbishment of the Lodge on its own. As I stated before, the Plaintiffs bear the burden of proving its case. Since they did not produce accounts to show the transactions between them and the Defendant, it is difficult for the court to determine whether the Defendant made the capital contribution.

32. The other grievance against the Defendant was that it failed to submit quarterly reports to the Plaintiffs. In his letter dated 17th March 2014, PW 1 wrote to the Defendant demanding financial statements and related documents. The Defendant rebuffed this complaint by pointing to Clause 3.2 of the Agreement which states as follows:

3.2 AHA shall be responsible to ensure that Newco prepares quarterly management reports and deliver (the) same to the directors as soon as possible after each month end and in any event no later than the 15th day of the month following the quarter to which such accounts relate.

33. DW 1's evidence was that the reports were to be made to the Herne directors and not to the Plaintiffs. He further stated that as majority shareholders, the Plaintiffs failed to attend meetings, approve budgets or respond to any communications. I agree with the Defendant that the obligation to provide the reports was to Herne and not the Plaintiffs individually.

34. The Plaintiffs made a general allegation that the Defendant was, “*managing the resort in a casual and haphazard manner exposing the Plaintiffs to unnecessary losses, such as taking out insurance cover over the property whilst there was an existing cover taken out by the Plaintiffs which was unnecessary and amounted to wastage of the already limited joint venture resources.*” The allegation I have set out, is broad, lacks particulars and was not supported by any evidence submitted by the Plaintiffs.

35. As regards the insurance premium, the Plaintiffs' complaint is that they had paid a premium of Kshs. 1 million to Jubilee Insurance but the Defendant took out the same insurance with GA Insurance Limited. The Plaintiff did not produce any evidence to show that there was concurrent insurance taken. On the other hand, the Defendant explained that it had to take out the insurance because the Plaintiffs failed to provide evidence that it had taken out insurance and it had to act prudently to protect the business. The Plaintiffs did not rebut the Defendant's evidence on this issue supported by emails.

36. The Plaintiffs complained that the Defendant abandoned the Lodge contrary to the Agreement. According to PW 1, the Defendant breached the Agreement causing the Lodge to suffer loss and diminish in value. Noting those concerns, PW 1 addressed a letter dated 17th March 2014 to the Defendant raising the breaches. In that letter, the Defendant demanded to be given among others budget and financial statements, income and cashflow statement, management reports, marketing, capital expenditure and human resource plans. He also expresses concern about the low occupancy rates, uncontrolled expenditure and the failure to meet shareholder expectations.

37. It appears that these issues were not resolved or at any rate, the Defendant denied that it was in breach. The Plaintiff then issued a 30 day notice dated 8th April 2020 requiring the Defendant to remedy the breaches. The Defendant then addressed a, “*Notice of Intended Termination of the Joint Venture Agreement dated 24th July 2013 ...*” dated 3rd March 2015 setting out various breaches of the Agreement by the Plaintiffs. It accused the Plaintiffs of failing to make its capital contribution of USD 400,000.00 and ensuring that the Lodge was refurbished to 4 star standards. It also accused PW 1 of failing to attend meetings making it impossible to conduct Herne affairs including approving budgets and accounts. It also

accused PW 1 and the Plaintiffs of making bookings but failing to remit the amount collected. It therefore demanded that the Plaintiff's remedy the breaches. The Plaintiff through the advocates, *Kipkenda and Company Advocates*, responded to the notice of intended termination by the letter dated 5th March 2015 in which it denied the allegations and drew attention to Clauses 7.1 and 12.1 regarding termination of the Agreement.

38. It appears that the stalemate between the parties continued and the parties engaged in without prejudice negotiations to resolve the matter. The Plaintiffs demanded payment of USD 1,000,000.00 while the Defendant proposed that each party bear their respective losses. The Defendant instructed the firm of *Iseme, Kamau and Maema Advocates* to address the Plaintiffs advocates, a letter dated 11th September 2015 informing them that since the parties had failed to agree on a budget within 60 days in accordance with Clause 3.1 of the Agreement and all endeavors to resolve the matter having failed, then under Clause 3.1.2, the Agreement lapses and ceased to be of any effect on 24th September 2013. They concluded by inviting the Plaintiffs to meeting to explore the options available to restoring the parties to their respective positions prior to the Agreement. Despite the assertion that the Agreement had come to an end, the Defendant did press this case in subsequent correspondence.

39. As no progress was taking place, the Plaintiffs' through *Kipkenda and Company Advocates*, addressed to the Defendant the letter dated 28th September 2015. The letter recalled the contents of the earlier letter dated 8th April 2013 requiring the Plaintiffs to remedy the breaches which form the basis of this suit. It further referred to a subsequent letter dated 5th March 2015 which invoked Clause 7.1 and 12.1 of the Agreement by giving notice of intention to terminate the Agreement. The letter then concluded as follows:

Our clients therefore demand that you immediately vacate the premises at your own expense as well as recompense them the sum of One Million Dollars (USD 1,000,000) as damages for loss of business and profits, dishonest business practices and breach of contract.

TAKE NOTICE that unless we receive the said sum of One Million Four Hundred Thousand Dollars (USD 1,400,000) thereafter with a written confirmation of your acceptance to vacate the premises within FOURTEEN (14) DAYS from the date hereof, our instructions are to institute the requisite legal proceedings for recovery and eviction against you at your own risk as to costs thereby incurred and other consequences ensuing therefrom.

40. The Defendant admitted that it received the letter dated 28th September 2015 and that it merely complied with it by leaving the Lodge on 15th November 2015 after meeting its statutory obligations.

41. Clause 12 of the Agreement allows either party to terminate the Agreement if one party commits a material breach of the Agreement which is not remedied within 30 days after receiving the written notice of the breach. The Plaintiffs' exercised that option and terminated the Agreement. It cannot therefore complain that Defendant abandoned the Lodge when, in effect, it demanded that it vacate.

42. From my own appreciation of the totality of the evidence, I find and hold that the Plaintiffs have failed to prove particulars of the breach pleaded in the plaint. What is clear though, is that the Agreement was not implemented successfully. Both parties blamed each other for the failure. The Defendant notified the Plaintiffs of its intent to terminate the Agreement but the Plaintiffs pulled the plug by issuing the termination notice with which the Defendant complied by vacating the Lodge.

Whether Special Damages were proved

43. Had the Plaintiffs succeeded in proving breach of the Agreement, the next issue for consideration would have been whether they are entitled to damages. The Plaintiffs claimed USD 1,928,900.00 as special damages. The law on special damages is well settled and it is that special damages must be particularised and proved to the required standard. In *Maritim & Another v Anjere [1990-1994] EA 312 at 316*, the Court of Appeal emphasized that:

*In this regard, we can only refer to this court's decision in **Sande v Kenya Cooperative Creameries Limited Civil Appeal No. 154 of 1992 (UR)** where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.*

44. The Plaintiffs did not plead how the sum of USD 1,928,900 was made up. Further PW 1 did not produce any evidence on how this sum claimed was made up. The Audit Report the Plaintiffs intended to rely on was only marked for identification. Since the Plaintiffs failed to produce it, it could not be relied on to establish the nature and extent of special damages. The totality of the evidence is that the Plaintiffs did not prove the special damages flowing from the alleged breaches.

Disposition

45. It now clear that the Plaintiffs suit must fail. It is now dismissed with costs to the Defendant.

DATED and DELIVERED at NAIROBI this 23RD day of OCTOBER 2020.

D. S. MAJANJA

JUDGE

Ms Ndinda instructed by T. K. Rutto and Company Advocates for the Plaintiffs.

Ms Wataka instructed by Anjarwalla and Khanna LLP Advocates for the Defendant.