



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 38 OF 1997**

**SHABAHA INVESTMENT LIMITED.....PLAINTIFF**

**VERSUS**

**DHANJAL INVESTMENT LIMITED.....DEFENDANT**

**JUDGMENT**

1. The proceedings herein were commenced by a plaint dated 11<sup>th</sup> February 1997 and filed on the same day. The plaint was amended on the 15<sup>th</sup> May 2008 and filed on the same day seeking the following orders:

- a. A declaration that the Agreement for sale between the plaintiff and the defendant in respect of the suit property is valid.*
- b. Kshs.38, 700,000/= being the balance of the purchase price owed to the plaintiff by the defendant.*
- c. Interest on (b) at 30% per annum as agreed payable from the date the Defendant took possession of the suit property being the 27<sup>th</sup> January 1996 until payment in full.*
- d. General damages.*
- e. Mense profit from the 27<sup>th</sup> January 1996 being damage for breach of contract at Kshs. 407,891,537.56 as at 30<sup>th</sup> April 2008, until payment in full of the balance of the purchase price inclusive of all interest due and payable herein.*
- d. Costs of this suit.*
- e. interest on (d), (e) and (f) at courts rates*

2. The Defendant filed a defence to the plaint dated 11<sup>th</sup> February 1997 on the 7<sup>th</sup> March 1997 and later filed an Amended Defence and Counter-Claim dated **29<sup>th</sup> May 2008** seeking the recovery of Kshs 407,244,087 as at April 2008, and continuing at a monthly rate of Kshs 5,000,000/=, on account of loss of income worked at 50% of hotel bookings

3. By consent dated **7<sup>th</sup> September 2012**, entered into and recorded in the Court of Appeal in **Civil Application No. 200 of 1997** on the **17<sup>th</sup> April 2013**, the sum of kshs.**38,700,000/=** claimed in paragraph(b) of the Amended plaint was fully paid to the Plaintiff by the Defendant.

4. Prayer (e) of the Amended plaint being a claim for mesne profit amounting to Kshs.407,891,537.56/= was abandoned and no evidence was led to prove the claim for general damages.

5. The issue remaining for this court to determine is whether the Plaintiff is entitled to Interest on **Kshs.38, 700,000/=** at 30% per annum as agreed payable from the date the Defendant took possession of the suit property being the **27<sup>th</sup> January 1996** until payment in full.

**PLAINTIFF'S CASE**

6. **BRYAN WARUHIU** a director of the Plaintiff (herein referred to as PW1) testified that the Plaintiff was the registered owner of **LR 1549 Section 1 Mainland North Mombasa**, on which Piccolo Beach Hotel had been constructed. He further testified that the shareholders of the Plaintiff entered into an agreement for the purchase of shares with **Dhiran Kotak** and **Azziz Tayabali**. The same was never completed due to breach of the terms thereof. On or about May 1994 **Dhiran Kotak** and **Azziz Tayabali** Instituted **High Civil Case 289 of 1994** seeking specific performance of the agreement for the sale of shares. However, there were no orders issued against the plaintiff restraining it

from dealing with suit property. The parties in this suit then entered into an agreement for sale dated **3<sup>rd</sup> April 1995** for the sale of the same property at a sum of **Kshs 43,000,000**, a deposit of **Kshs.4,300,000/=** was paid and the balance was to be paid upon completion of the transaction.

7. Pw1 testified that based on good faith of the plaintiff, the defendant took possession of the hotel as a “going concern” before payment of the full purchase price on the 31<sup>st</sup> January 1996. After the agreement and taking of possession Mr. **Dhiran Kotak** and Mr. **Azziz Tayabali** subsequently instituted another suit being **HCC 85 of 1996** on **22<sup>nd</sup> February 1996** praying for an injunction against the six defendants sued therein, including the defendant, from dealing with the suit property. The Court issued orders of the status quo.

8. The suit property having been transferred to the Defendant herein, meant that Defendant was lawfully in possession. Later on the Court dismissed the application for injunction against the Defendants in relation to the suit property on the 27<sup>th</sup> November 1996.

9. It is PW1’s testimony that despite the clear pronouncement by the Court in **HCC 85 of 1996** the Defendant ignored the Plaintiff’s demands thereby necessitating this suit. The witness added that the agreement between the Plaintiff and the Defendant entitled the Plaintiff to charge 30% per annum interest and therefore the Plaintiff is entitled to claim a sum totaling **Kshs. 2, 387,895,223.07** from January 1997 to October 2012.

10. On cross-examination, PW1 stated that condition 1 of the agreement for sale dated 3<sup>rd</sup> April 1995 provided that **time was of the essence** and by November 1995 the Plaintiff had not obtained all relevant consents. He confirmed that at the time of signing the impugned agreement, a caveat registered on 28th October 1993 on the property had not been lifted and the Defendant was not aware. On cross-examination, he stated that there was no litigation on the property since **HCC. 289 of 1994** was only regarding sale of shares. He went on to state that the Plaintiff applied for a summary judgment against the defendant in **HCC 85 of 1996** and **Angawa J** (as she was then) ordered the balance of the purchase price be deposited in a joint interest earning account. He concluded on cross-examination that there was mutual agreement for extension in respect of a special condition and the Plaintiff’s claim for interest is thus from the date of possession, as provided by condition 6(1) of the LSK Condition of Sale 1989.

#### **Defendant’s Case**

11. DW1, **Nirmal Singh Dhanjal**, a director of the Defendant, testified that the parties who signed the Agreement are now deceased but he was fully involved in the transaction. He relied on Clause 8 of the Agreement dated 3<sup>rd</sup> April 1995 which tactically provided that the property was being sold as a going concern on “walk in walk out” basis and Clause 7 of the special conditions of therein which bound the Plaintiff to confirm that there was no litigation pending or against the property and/or business

12. DW1 testified that the Plaintiff disclosed the existence of a caveat lodge against the suit property and gave assurance that the same would be removed, hence the directors of the Plaintiff all executed a deed of indemnity guaranteeing and indemnifying the Defendant against all and any claim that may arise from the caveators. He admitted that the Defendant took possession on the **27<sup>th</sup> January 1996** and the transfer was effected on the **15<sup>th</sup> February 1996** before the balance of the purchase price was paid to the Plaintiff. He further stated that when the caveators discovered the transfer of the property, they filed **HCCC. No. 85 of 1996** on the **20<sup>th</sup> February 1996** and it was via **HCCC. NO 85 of 1996** that the Defendant discovered the existence of **HCCC. NO. 289 of 1994** in which the Plaintiff herein and its directors had been sued by the caveators

13. DW1 testified that in **HCCC. 85 OF 1996** filed by **Dhiran Kotak and Aziz Tayabali**, it was claimed that all the six defendants including the Defendant herein had all acted fraudulently and the Registrar of Titles was reckless, negligent in allowing the transfer of the suit property to Dhanjal investments limited (the defendant herein).

14. DW1 testified that it did not pay the balance of the purchase price because the injunction orders issued by **Waki J** maintaining the status quo as at 3 pm on the **22<sup>nd</sup> February 1996** was to be observed and the Defendant was barred from taking any other step towards completion of the transaction. In obedience of the said court order and because of advice from its advocates and on realization that the Plaintiff had breached clause 7 of the special conditions in the agreement for sale the defendant decided not pay the remaining balance of the purchase price.

15. DW1 testified that by conduct of the parties the requirement of time being of the essence was waived and was never re-introduced at any stage in the transaction to entitle the Plaintiff to claim any interest in the transaction.

16. DW1 testified that the ruling of the Court dated 24<sup>th</sup> April 2008 conclusively made finding that the Plaintiff had not issued proper summons in this suit and thereof summons were taken out by the Plaintiff on the 10<sup>th</sup> July 2007 for this suit that was filed in February 1997. Therefore, the Plaintiff cannot look upon the Defendant for redress in form of its claim for interest over that period.

17. On the Defendant’s counter-claim, DW1 testified that as per the deed of indemnity executed by the parties around February 1996 after a transfer in favour of the Defendant was rejected on account of an existing caveat, the Plaintiff was to make good forthwith any such loss, costs, charges and expenses that the Defendant may incur.

18. In Cross-Examination, DW1 stated that the Plaintiff only revealed the caveat but not the litigation in **HCCC. No. 289/94**.

19. In Cross-Examination, DW1 stated that in the year 2001 when **HCCC. 289/94** was dismissed for want of prosecution there was no order issued by the court in relation to the suit property.

20. In Cross-Examination, DW1 stated that when they purchased the Hotel it was a going concern and they later changed the name to

Travelers inn.

21. In Cross-Examination, DW1 stated that there was no court order that stopped them from trading and there was no order removing the Defendant from possession of the property. The only order in existence is the one for status quo as at 22<sup>nd</sup> February 1996 till 29<sup>th</sup> February 1996.

22. In Cross-Examination, DW1 stated that they participated in **HCCC. 85 of 1996** by praying for it to be dismissed since they were in possession and already trading.

23. In Cross-Examination, DW1 stated that after the ruling on the 27<sup>th</sup> November 1996, the Plaintiff demanded for the payment of the balance of the purchase price but the same was not paid. The Plaintiff applied for summary judgment against the Defendant which was entered in its favour but the Defendant opted to appeal against that decision to the Court of Appeal.

24. DW1 further stated that **HCCC. 85 OF 1996** was dismissed on the **13th July 2006** for want of prosecution and the Defendant still did not pay the balance of the purchase price to the plaintiff till on the **7<sup>th</sup> September 2012**.

25. He admitted that there was no logical explanation as to why the Defendant did not pay the balance between the years 2006 to the year 2012 and further that condition 6 of the LSK conditions of sale 1989 required the property to be kept in the same condition it was taken possession of and condition 6(2) e of the LSK conditions of sale 1989 requires the Defendant to pay interest on the purchase money while in possession.

26. It was the Defendant's position that when they discovered **HCCC. 289 OF 1994** they did not opt to rescind the agreement nor issue a completion notice to the Plaintiff.

27. About the Counter-Claim, DW1 stated that the Defendant had no audited accounts and had equally exhibited anything to show bed occupancy of the hotel during the period of possession while trading.

#### **ANALYSIS AND DETERMINATION**

28. This Court has carefully considered parties' pleadings, evidence and submissions. The Court has also considered the relevant law and jurisprudence on the key issues falling for determination. The key issues emerge for determination, namely:

- 1. Whether *time was of the essence* in the agreement for sale.**
- 2. Whether the plaintiff was in breach of the sale agreement for non-disclosure of material facts.**
- 3. Whether the doctrine of *lis pendens* is applicable in this transaction**
- 4. Whether interest was payable on purchaser in possession basis as per the sale agreement**
- 5. Whether the defendant counterclaim is valid**

#### **1. Whether *time was of the essence* in the agreement for sale.**

29. The Plaintiff entered into an agreement for sale with the Defendant dated **3<sup>rd</sup> April 1995**, a deposit of **Kshs. 4, 300,000/=** being 10% was paid and the balance was to be paid on completion of the transaction which was to be on the **15<sup>th</sup> April 1995**. The said agreement under Special Condition 1 provided that "***time was of the essence***". However, by November 1995, the Plaintiff had not obtained all relevant consents and a caveat registered on the 28<sup>th</sup> October 1993 against the suit property had not yet been withdrawn.

30. This meant that the Plaintiff was already in breach of Clause 1 of the Special conditions of the agreement which provided that time was of the essence in relation to the transaction.

31. The Defendants in order to protect their interests in the transaction, had their advocates draw a deed of indemnity which was executed by the Plaintiff's directors agreeing to make good forthwith any such loss, costs, charges and expenses that the Defendant may incur in relation to any claim by the caveators. (This deed of indemnity was registered in February 1996)

32. This Court finds that from the conduct of the parties by execution of the deed of indemnity in relations to completion, it can be derived that indeed ***time was not of the essence*** since both parties appreciated that there was an existing caveat against the suit property which needed "some ground work" for the same to be lifted and the Plaintiff had also executed a deed of indemnity in February 1996 in relation to the caveat entered on the **28<sup>th</sup> October 1993** by **Dhiran Kotak** and **Aziz Tayabali**.

33. The Defendant had a right to insist that *time was of the essence* in the transaction when the completion date was delayed, the Defendant failed to issue a completion notice to the Plaintiff but instead went ahead and entered into a deed of indemnity in February 1996, and nine (9) months after the completion date of 15<sup>th</sup> April 1995 had passed.

34. From the foregoing, it is crystal clear that the Defendant waived its right to rescind the sale agreement through its conduct and as a result,

it is estopped from relying on the Special Condition 1 which provided that time was of the essence. This what the Courts in this Country have set the law to be in various decisions.

35. The Court of Appeal In John Mburu v Consolidated Bank of Kenya [2018] eKLR stated as follows...

*“...this Court explored the history of the doctrine with Lord Denning in the case of McIlkenny vs Chief Constable of West Midlands, [1980] All ER 227, where he stated:*

*“..We have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else...The Court in that case considered estoppel by conduct and estoppel by election or waiver. The latter is an intentional relinquishment or abandonment of a known right or privilege. A person who is entitled to rely on a stipulation existing for his benefit in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. In the case of Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR, Maraga, J. (now Chief Justice) stated:*

*“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”*

36. In Kenya National Assurance Co Ltd v Kimani & another [1987] Eklr the Court of Appeal while relying on the case of Lickiss v Milestone Motor Policies at Lloyds [1966] 2 All ER 972 and 975 Lord Denning MR.held as follows...

*“The principle of waiver is simply this: that if one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him to do so.”*

37. In the case of Prisca Kemboi & 2 others –Vs- Kenya Post Office Savings bank [2014] Eklr, Justice Ndolo quoted from the case of Sita Rollngs Mills Ltd. –Vs. Jubilee Insurance Company ltd(supra) where the court states as follows:-

*“A waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intention then to waive it may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his rights”.*

38. In the case of Prisca Kemboi (supra) quoted from the case of Serah Njeri Warobi –Vs- John Kimani Njoroge [2013] Eklr where it was stated as follows:-

*“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person”*

39. Similarly, in Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR Pauline Nyamweya J held as follows...

*“Lastly, the court finds that the Defendant cannot seek refuge in the delay by the Plaintiffs to forward the completion documents, as it waived its rights arising from any breach of the sale agreement thereof by accepting the said completion documents and proceeding to transfer the suit premises to itself.”*

## **2. Whether the Plaintiff was in breach of the sale agreement for non- disclosure of material facts.**

40. It is the Defendant’s testimony that Clause 7 of the special conditions of the sale agreement dated 3<sup>rd</sup> April 1995 provided that the vendor was under a duty to confirm that there was no litigation pending against the property or the business. In cross-examination the Defendant’s witness stated that the Plaintiff only disclosed the caveat which they undertook to lift as it was just a disagreement but **HCCC. 289 of 1994** was never mentioned to the Defendants.

41. The Plaintiff in reply stated that there was no litigation on the suit property since **HCC. 289 of 1994** was only regarding sale of shares and it did not affect **LR 1549 Section 1 Mainland North Mombasa**, on which Piccolo Beach Hotel had been constructed.

42. This Court finds that the disclosure of the existence of **HCCC. 289 of 1994** was material to the Defendants interests, since the Defendant was buying a business that was a going concern and it ought to have been informed of the pending litigation. The issue of the agreement of sale of shares between the Plaintiffs shareholders and **Dhiran Kotak** and **Aziz Tayabali** would have affected the running of the Hotel had the Court ruled in favour of the said caveators in **HCC. 289 of 1994**. Also, the caveators shareholders would have been entitled the rights and privileges enjoyed by shareholders in a company which in a nutshell includes having a say in the decision making process and participation in the running of the hotel that was sold as a going concern.

43. Consequently, I do find that the Plaintiff was in breach of clause 7 of the Special conditions in the Agreement for Sale dated 3<sup>rd</sup> April 1995.

44. Having found the Plaintiff to have been in breach where does that leave the Defendant? The Defendant had the right to rescind the contract or affirm the contract and later on sue for damages. The conduct of the Defendant here shows he opted to affirm the contract and has filed a counterclaim dated **28<sup>th</sup> May 2008** in which it claim for loss of income, business and damages.

45. To this Court therefore, the breach notwithstanding the defendant waived his right to assert breach and is estopped from doing so.

46. The Court of Appeal In **SAPURA STUDIO V KENYA NATIONAL PROPERTIES LIMITED [1985] eKLR** held as follows...

***“Where a contract is in fieri, and the vendee chooses to rescind the contract, and sue for money had and received, he recovers only the money he has actually paid, viz the amount in the vendor’s hands. So, again, if he elects to affirm the contract, and to sue for the breach, he is entitled only to nominal damages.”***

### **3. Whether the doctrine of lis penden is applicable in this transaction**

47. It is a fact that the transfer of the suit property was effected on the 15<sup>th</sup> February 1996 and the suit property was registered in the name of the Defendant. On the 22<sup>nd</sup> February 1996 **HCC. 85 OF 1996** was instituted by **Dhiran Kotak** and **Aziz Tayabali** against both the plaintiff, the Defendant and other four defendants the result of which orders of status quo were issued by **Waki J** preserving the prevailing status as at **22<sup>nd</sup> February 1996 at 3:30 pm**. This Court agrees with the defendant on its submission that it could not disobey orders issued by Waki J, which barred any transaction from being undertaken by any party and that the release of the balance of the purchase price to the Plaintiff herein would have amounted to disobedience of the Orders issued by Waki J since both the Plaintiff and the Defendant herein were being accused of fraud by the caveators.

48. This Court while applying the doctrine of **lis pendens** finds that the balance of the purchase price was only payable after the final determination in **HCCC.85 of 1996** which was on the **13<sup>th</sup> July 2006** when the suit was dismissed for want of prosecution and not at the ruling stage.

49. Secondly, this Court finds that after the ruling delivered on the **27<sup>th</sup> November 1996** by Waki J dismissing the Caveators’ Application for injunction against the properties of the Defendant, the balance of the purchase price was not payable as the same would be equivalent to making the Plaintiff benefit from its own transgression before there was a proper determination of the dispute by the Court bearing in mind that the issue of purchase of shares would definitely have affected the running of the hotel since shareholders have rights and privileges to even challenge a transaction they believe was transacted fraudulently.

50. Warsame J In **GIVAN OKALLO INGARI & another v HOUSING FINANCE COMPANY OF KENYA LIMITED [2007] eKLR** stated as follows...

***“In my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression, until there is a proper determination of the dispute. The court is empowered to hear the circumstances that made the defendant to behave in the way it acted against the plaintiffs. The question that the court would ultimately have to answer is the amount due and payable by the plaintiffs.”***

### **4. Whether interest was payable on purchaser in possession basis as per the sale agreement**

51. The agreement dated 3<sup>rd</sup> April 1995 at Clause 4 provided that the sale was subject to the Law Society Conditions of Sale (1989 edition) in so far as they are not inconsistent with the conditions contained in the agreement. Under clause 4 of the special conditions in the said agreement, interest was covenanted to be payable at 30% p.a. The appurtenant conditions to this decision read and provide as follows

#### **(1) Possession before Completion**

***Where the purchaser takes possession of the property before completion other than under a lease or tenancy entered into before the contract, the purchaser occupies the property as licensee of the vendor and not as tenant and the taking of possession is not an acceptance of the vendor’s title or a waiver of the purchaser’s right to make requisitions or objections to title.***

#### **(2) From the date of taking possession until either completion or until the vendor retakes possession the purchaser shall:**

**a. Keep the property in good state of repair and condition as it was when he took possession.**

**b...**

**e. pay interest on the purchase money and..**

52. Since the completion date had been postponed and the Plaintiff was the one to be blamed for the postponement of the completion date, in order for the Defendant to avoid paying the contractual interest rate at 30%, as provided under clause 4 of the special conditions in the agreement for sale, the Defendant ought to have deposited the balance of the purchase price upon a seven days call at any bank in the town where the office of the vendor is situated and give a vendor a notice in writing of such deposit. The same is provided under Condition **8 (2)** **(a) Law Society Conditions of Sale 1989. Which provides:**

**2(a) where completion is delayed beyond the completion date by an act or default of the vendor or his mortgagee, the purchaser**

*may deposit the purchase money upon seven (7) days call at any bank in the town where the office of the vendor advocate is situated and give to the vendor notice in writing of such deposit*

53. Had the Defendant complied with that provision of the **Law Society Conditions of Sale 1989** and paid into an interest earning bank account the balance of the purchase price the moment Waki J in **HCC 85 of 1996** vacated the orders of *status quo*, then no contractual interest would have been payable to the Plaintiff and the only interest left would have been the one that accrued interest from the bank deposit.

54. As Parties to the material agreement voluntarily incorporated the above clauses and conditions in their agreement, this Court's business is never to vary any clause, however harsh they may be. The purpose and object of contractual interest is to compensate the person entitled to the money for the loss of his money being kept away bearing in mind that the hotel was sold as a going concern.

55. In **Naphatali Paul Radier vs. David Njogu Gachanja HCCC No.582 of 2003 (OS)** where Justice H.P.G Waweru held as follows:-

*“The Defendant has withheld the Plaintiff's money from August 2002. Justice demands that he pays it with interest. As no particular rate of interest was contracted, I shall award at court rates”.*

56. In the present case, parties had agreed on an interest rate of 30%. Therefore a Court of law will not interfere with a contract entered into between two consenting parties and the interest agreed upon unless the same is illegal, unconscionable or fraudulent.

57. In **NATIONAL BANK OF KENYA LTD. V. PIPEPLASTIC SAMKOLIT (K) LTD. AND ANOTHER [2001] KLR 112** at p. 118 this Court said:-

*“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, JA in the case of **FINA BANK LIMITED VS. SPARES & INDUSTRIES LIMITED (Civil Appeal No. 51 of 2000)** (unreported):*

*“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”*

58. The Defendant was bound to pay interest from the time when **HCCC.85 of 1996** was dismissed for want of prosecution which was on the **13<sup>th</sup> July 2006** as the doctrine of *lis pendens* was no longer preventing the Defendant from paying the balance of the purchase price.

59. By consent entered into and recorded in the Court of Appeal in civil Application no. 200 of 1997 a sum of **Kshs. 38, 700,000/=** was fully paid by the Defendant on the **7<sup>th</sup> September 2012** and adopted by the Court on the **17<sup>th</sup> April 2013**. The issue of the of interest payable on the balance of the purchase price (**Kshs.38, 700,000/=**) and costs was to be agreed upon by the parties and if not then it was to be settled by the superior Court.

60. It is the view of this Court that interest is payable at 30% to the Plaintiff as a result of the defendant being a purchaser in possession is from the **13<sup>th</sup> July 2006** to the **7<sup>th</sup> September 2012** when the balance of the purchase price was paid in full minus interest.

61. The total amount of interest payable to the Plaintiff would be  $38,700,000 \times 30/100 \times 6 = \text{Kshs. } 69,660,000/=$ . This Court awards that sum to the Plaintiff together with costs of the suit

##### **5. Whether the Defendant Counter-Claim is merited**

62. In Cross-Examination, DW1 **Nirmal Singh Dhanjal**, stated that there was no Court order that stopped them from trading and there was no order for the Defendant's removal or eviction from possession of the hotel. The hotel was sold to the Defendant as a going concern. The only order that was in existence, was the one for status quo as at **22<sup>nd</sup> February 1996** at 3:30 pm till the **29<sup>th</sup> February 1996** when the Caveators Application was dismissed by **Waki J**. To this Court, the evidence led shows that the Defendant had the liberty to trade without any hindrance, as the suit challenging sale to it was just an allegation yet to be proved. This Court finds that the Defendant was expected to mitigate its losses by continuing to trade and keeping the hotel as they found it in obedience to condition 6(2)(a) of the **Law Society Conditions of Sale, 1989** edition.

63. Additionally, It is trite that for the Defendant (in its counter-claim) to be entitled to special damages, which loss of income is, the same must not only be specifically pleaded but also strictly proved. See **Peter Njuguna Joseph and EARS vs. Anna Moraa Civil Appeal number 23 of 1991** where the court held that:-

*“Special damages must be pleaded with particularity and must be strictly proved. Loss of income is special damages, which must be pleaded and proved.”*

64. In **Central Bank Of Kenya vs. Martin King'ori Civil Appeal No. 334 of 2002** held while citing **Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992** that:

*“There can be no argument that the pleading particularized in the plaint was in the nature of special damages since these were damages*

*relating to past pecuniary loss calculable at the date of the trial. The law on such pleading is now trite that the same must be pleaded with as much particularity as circumstances permit and it is not enough to simply aver in the plaint that the particulars of special damages are to be supplied at the time of trial. If at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of the trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars.”*

65. The Defendant has submitted that they tabulated the loss of income and the same was particularized by a document annexed in its list of documents at page 82.

66. In Cross-Examination, DW1 **Nirmal Singh Dhanjal** stated that on the counter-claim they don't have audited accounts and they have equally not attached anything to show bed occupancy

67. Relying on the decision in **Central Bank of Kenya vs. Martin King'ori Civil Appeal No. 334 of 2002**, It is only when the particulars of the special damages are pleaded in the plaint or in a counter-claim that a claimant will be allowed to proceed to the strict proof of those particulars.” in this present case the Defendant failed to particularize it's loss of income and damages claim from 1<sup>st</sup> MAY 2008 at monthly rate of Kshs. 5 million and at that no material was availed towards proof of the damages.

68. Loss of income being a special damage the same ought to have been pleaded, particularized and strictly proved. Failure to particularize the special damage means that the Defendant will not be allowed to lead evidence towards strict proof of special damages not particularized in the Counter-Claim without being seen to depart from his pleadings and thus ambushing the Plaintiff.

69. In the upshot the Defendants Counter-Claim is dismissed with costs to the Plaintiff.

**SIGNED, DATED AND DELIVERED THIS 31st DAY OF MAY 2019.**

**P.J.O. OTIENO**

**JUDGE**