REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 404 OF 2011

TRAVEL CREATION LIMITED.....APPELLANT

VERSUS

PARADISE SAFARI PARK LTD.....RESPONDENT

J U D G M E N T

This appeal arises from the judgment and decree of Hon. P. Gichohi Principal Magistrate delivered on 12th August 2011 in NRB CMCC 6378 of 2006. Paradise Safari Park Ltd sued Travel Creations Limited claiming for a liquidated sum of US Dollars 16,798/75, costs of the suit and interest of Court rates.

It was alleged in the plaint dated 31st March 2006 that the claimed sums of money were in respect of provision of hotel accommodation for the respondent's guests amongst other hotel services for an annual conference, and that the appellant had incurred a total of USD 139,906/30 whereby the respondent made part payment leaving a balance of USD 16,798/75.

The respondent filed a defence denying the claim that the appellant was entitled to the sums claimed and admitted obtaining hotel accommodation for its guests at the appellant's premises but contending that the alleged outstanding balance of USD 16,798/75 claimed was set off against

i. Transfers not honoured on 26th February and 2nd March 2005 …USD 325.

ii. Shuttle transfer Windsor delegates

26th February 1st and 2nd March 2005 … USD 1,050

iii. Accommodation difference at Windsor Golf

and country club … USD 12,315

iv. Complimentaries not honoured … USD 3,108.75

The respondent therefore pleaded for a set off and prayed for dismissal of the appellant's suit with costs.

The appellant filed a reply to defence denying the respondent's alleged set off.

The learned magistrate, upon hearing both parties to the dispute found in favour of the plaintiff as having

proved their claim as required of a special damage claim and dismissed the defendant's set off claim as pleaded in the defence with costs to the respondent. It is that judgment delivered on 12th August 2011 that provoked the appeal herein challenging the findings and decision of the trial magistrate.

The memorandum of appeal raises 6 grounds of appeal as follows:

1. The learned Magistrate erred in law and in fact in the assessment of the evidence before her.

2. The Learned Magistrate totally misdirected herself in failing to take into account the correspondence between the parties prior to the local purchase order of 24th January 2005.

3. The Learned Magistrate erred in law and fact in rejecting the defence of set off put forward by the defendant.

4. The learned Magistrate erred and misdirected herself in holding that the plaintiff's case is merely based on provision of service set out in the local purchase order.

5. The learned Magistrate erred in law and fact in holding that the plaintiff had proved its case in awarding judgment to the plaintiff in the sum of USD 16,798.75.

6. The learned Magistrate misdirected herself in holding that the defendant as being responsible for its loss in seeking remittance from its client for sum not agreed upon.

The appellant proposed that the entire judgment be set aside and the respondent suit be dismissed with costs and the appellant's defence of set off be held to be a full defence for the claims by the respondent.

In the judgment, the trial magistrate found that the local purchase order of 24th January 2005 was a reflection of final agreement and that the defence exhibit 10 was the final agreement and so, was satisfied that the plaintiff having incurred bills amounting to USD 139,906.30 and the defendant having settled part of it, they were liable for the balance of USD 16,798.75 which they had retained as a set off.

In her view, the issue of complimentaries seem to have been misunderstood by the appellant and misinterpreted, and regardless of the number, under the general contract, there were to be a maximum of two complimentaries or one complimentary for every 15 full paying guests. She dismissed the appellant's claim that they were entitled to 63 complimentaries as claimed, as that would not be a reflection of the negotiations that they had before final agreement was reached and that it made no business sense. She found the set-off issue as a misplaced venture taking into account defence exhibit No. 10 (local purchase order for 24/1/2005).

When this appeal came up for hearing, both advocates for the respective parties agreed to have it disposed of by way of written submissions. The appellants filed their submissions on 16/9/2014 whereas the respondents filed theirs on 12th September 2014.

The parties written submissions also relied heavily on their written submissions filed in the subordinate court as contained in the record of appeal.

The appellant maintains that the amended local purchase order of 24th January 2005 did not constitute the entire evidence of a relationship between the parties and that the court should have taken into account the various correspondences and therefore the trial magistrate was in error in so finding and in failing to consider the local purchase order of 22nd December 2004 and that she misapprehended the issues before her and failed to find that the various assurances contained in several emails from September 2004 culminating in the 22nd December 2004 local purchase order were representations given by the respondent and were intended to be relied on and acted on and indeed that the appellant did act on them by informing its client of the negotiated charges.

On shuttle transfers the appellant's counsel maintains that since it was agreed that the respondent would provide this service to the guests at no extra cost, but which was not honoured, they were entitled to a set off.

On complimentary rooms the appellant laments that the trial magistrate treated this issue rather casually yet all the correspondences were clear that the appellant would be entitled to 1 room for even 15 fully paying guests.

The respondent's written submissions support the findings of the lower court and maintains that the correspondences referred to by the appellant did not amount to a contract until the local purchase order No. 8096 defence exhibit No.10 and as revised on 16th February 2005 produced as defence exhibit No. 12 was issued which formed the basis of a formal contract between the parties herein. They maintain that it was pointless for the appellant to have informed their clients in October 2004 of the charges before reaching an agreement on how much the respondent had agreed to give to the appellant. It is further submitted that parties could not revert to previous correspondences, meetings, negotiations or discussions after an agreement had been reached and a local purchase order prepared by the appellant.

They maintained that the respondent could not be held to account for the differences in prices charged at Windsor Golf Country Club as that was a different entity. On the shuttle expenses, the respondent maintains that they provided the shuttle services as promised as shown by the documentary evidence in the form of gate passes and as no complaint was raised by the appellant in the course of the conference concerning the shuttle services for the guests.

They further maintained that defence exhibit No. 12 was clear on the number of complimentaries the appellant would be entitled to and not 63 as claimed. They urged the Court to dismiss the appeal and uphold the lower court's judgment and decree.

Neither of the parties relied on any precedents. They also did not cite any relevant law applicable in the circumstances of the case before the lower court and on appeal herein.

This being the first appeal, on the law as regards what is required of this court on a first appeal, it is now settled in the well known case of **Selle – Vs – Associated Motor Brat Company (1968) E.A. 123**, **Sir Clement De Lestang** that:

> ***"This Court must consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither heard witnesses and should make due allowance in this respect. However, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif – Vs – Ali Mohammed Sholan (1955), 22 EACA 270)"***

It is with the above in mind that I have set out in brief the facts that gave rise to the claim as was adduced in the evidence of witnesses and as complimented by the submissions of the parties' advocates on record.

As I have stated in the earlier part of this judgment, the respondent claimed from the appellant payment of USD 16,798.75 being balance of the sums incurred in accommodating the appellant's guests during an annual conference held at the respondent's hotel. The total sum incurred inclusive of other hotel serves was USD 139,906/30 out of which the appellant paid part thereof and retained the 16,798.75 claiming that it was entitled to a set off.

The appellant, from the defence filed and the evidence adduced, did not deny the claim, but alleged that the respondent who had breached their part of the bargain thereby causing the appellant to incur extra expenses at the Windsor Golf and Country Club and on guest shuttles.

Further that the promised complimentaries were not honoured. As a result, the appellant decided on their

own accord, to set off all the promised bargain against the balance of USD 16,798.75.

This being the first appeal as earlier stated, the duty of this Court is clearly spelt out in section in 78 of the Civil Procedure Act and espoused in the cited authorities above.

Having examined the pleadings, evidence adduced in the lower court rival submissions by advocates both in the lower court and in this appeal, and having warned myself of the necessary limitations in interfering with the findings of fact reached by the learned trial Magistrate who had the opportunity to see and hear the witnesses as they testified in Court; Before I make my determination, I observe that:-

First is that there was no serious issue raised concerning the credibility of witnesses who testified. Second, that neither the parties nor the subordinate court referred to any specific legal or statutory provisions or even any decided case on the subject herein, giving the impression that the suit below was based on simple facts that did not require any inferences based on the existing law.

Contrary to that impression, the claim in the subordinate court was based on a negotiated contract between the parties, to the suit, for provision of services. Although the duty of the court is not to re-write contracts between the parties, but it has a duty to interprete the same and make inferences to establish the intentions of the parties, particularly where the terms of the contract are not clear and unambiguous.

Secondly, the appellant's claims in the Court below on a set off was based on what the appellant refers to as representations of facts or undertakings.

Based on the above observations and on examining the appellant's grounds of appeal and submissions by both parties to this appeal, the following issues emerge for determination:

i. Whether the correspondences between the parties prior to the local purchase order of 24th January 2005 formed part of the contract and therefore ought to have been incorporated in the said local purchase order of 24th January 2005 regarding the overflow of extra guests to Windsor Golf and Country Club.

ii. Whether the appellants proved and were therefore entitled to the claim for bed complimentaries of one bed for every 15 full paying guest as submitted.

iii. Whether the appellant proved on a balance of probability that they were not accorded the shuttle transfers complimentary as promised by the respondent.

iv. Whether the learned trial magistrate's assessment of evidence adduced as a whole was erroneous or based on misapprehension of the facts and the law.

Before I determine the above issues as identified, I shall identify the undisputed and disputed facts.

The undisputed facts include that the respondent provided accommodation and other hotel services to the appellant's guests during the annual conference as scheduled. The negotiations culminating into the said event of hosting begun in September 2004 with parties hereto through their respective representatives exchanging correspondences on proposals of how the hosting was to be undertaken and the cost implications.

They also had one on one meetings where the issues of overflow to Windsor, shuttle transfers – and bed complimentaries were discussed. It is also undisputed fact that the event was a success as no correspondence of dissatisfaction from or by either party was produced or alluded to in evidence.

The disputed facts included the assertion by the appellant that all correspondences and negotiations, proposals and counter proposals between the parties, whether or not they were included in the final contract, formed part of the contract and therefore gave rise to a cause of action. Secondly, that the respondent gave an undertaking touching on complimentaries, transfer shuttles and overflow of guests to

Windsor Golf and Country club which undertaking was relied on by the appellant but the respondent reneged which amounted to breach of contract that led to the appellant incurring losses which were recoverable in the set off.

On the above, the respondent contended that it does not make business sense to give one complimentary bed for every 15 full paying guests and that it honoured the undertaking on shuttle transfers.

It also contends that it was not bound to compensate the appellant for the extra charges on accommodation paid at Windsor as Windsor was an independent entity; and that although they had been willing to negotiate the rates for the overflows, they pulled out upon learning that the appellant had an independent contract with Windsor Golf and Country Club, their competitor and therefore asked the appellants to negotiate separately and directly with Windsor Golf and Country Club. The trial Magistrate agreed with all aspects of the respondent contention as summarized above.

MY FINDINGS:

On issue No. 1 for the appellant to succeed in a claim that all the correspondences produced as exchanged between the parties to the dispute and appeal herein formed part of the contract, their claim of set-off had to be based on misrepresentation of facts by the respondent, and that as a consequence of such misrepresentation the appellant having relied on the same, the respondent was estopped from resiling with the respondent maintaining that the last local purchase order signed by the parties on 24th January 2005 was the bedrock and cornerstone of the whole agreement between the parties (culmination of their negotiations); The central question is whether the appellant actually relied on the entire correspondence in signing that local purchase order and whether the said correspondences or any part thereof amounted to misrepresentations that when relied on led to an actionable claim against the respondent for the loss allegedly incurred by the appellant. For avoidance of doubt, the evidence adduced shows that Windsor Golf and Country Club was not part of the negotiations. What I gather from the appellant and respondents correspondences and intentions is that all this time, it was expected that once the two parties hereto agreed on the hosting of the conference, and as it was clear that the respondents could not provide accommodation and conference facilities for all the anticipated guests, the respondent would negotiate with Windsor Golf and Country Club and any other hotel, to host the extra guests at the rates agreed upon between the respondent and appellant and which rates would be the ones payable to the respondent. There is no evidence to show that Windsor was during this time of negotiations aware of the arrangements for the hosting of the conference. The question I ask myself is whether the appellant was misled or dubbed into believing that the respondent had negotiated with Windsor concerning the overflows.

A perusal of the defence and set-off as presented by the appellant in the Court below alleges that the respondent made undertakings to outsource any overflow to Windsor Golf and Country Club or any other hotel at rates communicated to the appellant but that:- at paragraph 7 of the defence filed on 28th June 2006:

> ***"The defendant states that in breach of the aforestated undertakings the plaintiff failed, refused, or neglected to negotiate, confirm and obtain rooms in terms and at the rates confirmed or to obtain at its behest over-flow accommodation into the Windsor Golf and Country Club at the rates agreed."***

From the above defence, it is clear that at no one time did the respondent negotiate, confirm and or obtain rooms at Windsor and represent to the appellant that it had done so or that the respondent made the appellant believe that it had done so to the detriment of the appellant.

Therefore, the appellant's submissions that tended to raise the defence of promissory estoppel by inference was not available to it. Parties are bound by their pleadings and the above quoted paragraph is clear that there was no negotiation or confirmation with Windsor. The other submission that the respondent misrepresented facts to the appellant is also not available as there was no pleading of particulars of misrepresentation as required under the provisions of Order 2 rule 10 (1) (a) of the Civil

Procedure Rules. The pleadings in the defence thus fell short of proving the defence of promissory estoppel which operates as a shield and not a sword.

In my assessment, the appellant relied on promissory estoppel as a sword in their claim for a set off by inference which was a distinct action from the defence against the respondent's claim. Black's Law Dictionary defines promissory estoppel as:-

> ***"The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promise to rely on the promise and if the promise did actually rely on the promise to his or her detriment."***

Promissory estoppel has also been described as having 4 elements or ingredients which the appellant should have proved in their defence if they relied on it

a) That there was a promise

b) That the promise was reasonably relied upon

c) That it resulted in legal detriment to the promise

d) That justice requires enforcement of the promise.

In the case of **Benjamin Airo Shiraku – Vs - Fauzia Mohammed HCC 272 of 2011** **Justice Havelock** (as he then was) and quite recently retired, citing **Lord Denning** in **Coube – Vs – Coube [1951] 2 KB 215** held that:

> ***"Where one party by his words of conduct made to the other a promise or an assurance which was intended to affect their legal relations and to be acted on accordingly then once the other party has taken him at his work and acted on it. The one who gave the promise or assurance cannot afterwards, be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him.***
>
> ***But he must accept the legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by consideration but only his word."***

In other words, if one promises another and the other acts on that promise then the promisor cannot resile.

What the appellant is submitting as facts which 'facts' were not expressly pleaded, other than the use of the term undertaking is that the respondent made promises to the appellant through correspondences as exchanged and one on one meetings held between their respective authorized managers, which promises were representations which were relied on in respect of the expected overflows to Windsor, transfer shuttles and one complimentary bed for each 15 fully paying guests and that as a result of the respondent's representations or promises, the appellants lost and or incurred losses or damages, which they sought/claimed by way of set-off.

It is not in dispute that there was prolonged correspondences exchanged between the parties but the issue is whether the said 'alleged' promises formed clear and unequivocal promises or assurances that were relied on by the appellant until the time of the conference or a time too proximate to the conference or that the said promises formed part of the entire transaction. In other words, how far did that promise get prior to the holding of the conference? Was the promise so express and unequivocal and certain that the appellant was placed in a position of uncertainty when the guests started arriving, they were placed in such a situation; given the nature of the arrangements that they (appellants) could not have been expected to mitigate the loss without running the risk of breaching the contract, or incurring more losses?

In my view, albeit the respondent and appellant commenced their negotiations on all the three matters namely overflow to Windsor, shuttle transfers and complimentaries much earlier, these negotiations were

proposals and were concluded when the local purchase order for 24th January 2005 was raised, and with the appellant fully aware that parts of the negotiations had broken down by 7th January 2005 when they learnt that the respondent would not cater for the overflow to Windsor whose rates were much higher.

The evidence shows the appellant saying that as at October 2004, they had communicated the issue of overflow and applicable rates to their clients who had made deposits for the rates as offered by the respondent earlier and that they were not willing to accept the new Windsor rates!

For the appellant to succeed on this issue, they had to prove several facts. Section 107 of the Evidence Act Cap 80 laws of Kenya provides that,

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

Section 108 of the same Act provides that

> ***"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."***

In my humble view, the burden of proving that there was representation and undertaking relied on to its detriment lay on the appellant. The appellant had to prove that:

1) They informed their clients on the "negotiated" Windsor overflow rates as early as October 2004 as alleged by the appellant, and

2) That the clients did respond rejecting or refusing to accept the 'new' rates after they had paid the deposit based on the resiled arrangement or negotiations with the respondent.

Nothing in the form of emails or any other form of correspondence or communication from the appellant to their clients and vice versa was produced in Court to support that allegation. In my humble view, therefore, if remained a mere allegation. As the appellant relied on the alleged communication and rejection of the new rates to claim for a set-off resulting as a loss incurred by paying the differences between the charges/rates at Windsor and Safari Park, and this being a special damage arising from a loss due to breach of an undertaking, the appellant was not only expected to specifically plead the claim, but also strictly prove it.

The appellant also failed to prove that they paid from their own pockets after the clients refused to pay the rates at Windsor, insisting that they have to pay the rates for Safari Park as allegedly communicated to them (clients) in October 2004.

DEX18 produced by the appellant was contradictory in the sense that whereas it states that the appellant was advised on 10th January 2005 that the respondent would not honour 'our' agreement and that the appellant should negotiate with Windsor directly, the said document dated 1st April 2005 says that "in our email of 7th January 2005 we confirmed that the rates Windsor offered were not acceptable as we had already received deposit from our clients based on the rates that Safari Park offered." This letter only came after the conference was over, enclosing a cheque for USD 42,275.05 as final payment for the conference with attached computations showing deductions.

Noting that throughout the negotiations, Windsor was not a party or privy to the said negotiations and hence the pleading by the appellant in paragraph 7 of the defence on the respondent's refusal to negotiate with Windsor, and as it would have required the presence of Windsor to negotiate for the assignment of the contract with the respondent, it was the appellant's own failing not to make inquiries with Windsor concerning overflows. There is no evidence that as the parties hereto negotiated, the respondent prevented the appellant herein from negotiating or inquiring from Windsor whether there were rooms for possible overflow and on the charges or rates applicable.

The settled law is that an assignment of a contract must be acceded to by all parties concerned. Quoting from **Halsbury's Laws of England 4th Edition para 329** that

> ***"The doctrine of priority of contract is that, as a general rule, a contract cannot confer rights or impose obligations on strangers to it. That is parties who are not parties to it. The parties to a contract are those persons who reach an agreement…"***

It is my humble view that as Windsor was neither a business partner nor a subsidiary of Safari Park, being an independent service provider it was incumbent upon the appellant to inquire and confirm whether there was a possibility of getting similar rates like the ones offered by Safari Park and or whether Safari Park had negotiated for them the issue of overflows and rates to apply to them in accommodating the excess guests.

As I have stated before, the appellant did not adduce any evidence to prove that following the breakdown of the negotiations with the respondent, the appellant communicated the new rates to their clients who rejected them and or threatened to pull out of the conference thereby compelling the appellant to incur the extra or unexpected costs.

The appellant did not say that there was insufficient time from the time it became clear to them that the respondent would not negotiate for them the overflows with Windsor and the time the guests were to arrive for the appellant to communicate the new developments with their clients and get feedback without jeopardizing the planned conference. To my mind, from the correspondence produced and particularly the local purchase order issued on 22nd December 2004 which the respondent rejected as it contained overflows to Windsor, it became clear from that time that the respondent was unwilling to engage with Windsor, their competitor. I am fortified by the evidence that upon the respondent rejecting the first local purchase order, the appellant unconditionally issued an amended or revised local purchase order on 24th January 2005 almost one month later, and a month away from the event dates.

This Court does not believe that the negotiations which were proposals formed the substratum of the contract prior to the local purchase order of 24th January 2005 because when DEX1 was offered on 27th September 2004 Zainabu was not happy with the response as some of the issues therein had not been discussed earlier, on complimentaries. In addition, the appellant refused to sign DEX10 and DEX11 as they had not agreed with the contents therein yet at the hearing of the suit in the Court below, they wanted the Court to believe that the said exhibits were binding on them. It is this Court's view that where parties intent to be bound by a document, then that document must be signed by both parties.

In my humble view, for that transaction to be completed, it was essential that each party plays its role in the transaction by ensuring that the rights, obligations and duties of each party are protected. The appellant was under a duty to conduct due diligence. They were not, from the evidence, amateurs in that business. They should have ensured that there were adequate measures to protect their interests and to complete the bargain on the overflow to Windsor and failure to do so altered the true position and could not later be relied upon to recover money from the respondent as if the latter had promised to indemnify the appellants for any eventual loss occasioned by the high charges at Windsor.

And the purported undertaking not having been incorporated in the local purchase order last issued, there was therefore in my humble view, no condition precedent for completion of that agreement in order to assign some liability to the respondent. In my view, therefore the foundation of the negotiation for the possible overflow to Windsor failed or ceased to exist when the parties herein failed to incorporate that aspect into the local purchase order dated 24th January 2005, which, as a matter of fact, removed any reference to Windsor overflows, from the local purchase order of 22nd December 2004 an indication that the appellant was consciously doing so and accepting to deal with Windsor directly, without reference to the respondent. The court infers that the issue of overflows to Windsor was unworkable upon the appellant issuing the local purchase order of 22nd December 2004 and that, that is the only reason why they had to amend it later and replace it with the one of 25th January 2005.

The trial magistrate was therefore correct in rejecting the appellant's contentions and I find no reason to interfere with her findings.

On the issue of the bed complimentaries, the appellant contends that the trial magistrate erred in finding that it made no business sense to grant one complimentary for every 15 fully paying guests, and that the appellant misconstrued the arrangement.

The evidence contained in the correspondences DEX7 states that

> ***"We will avail credit for 2 twin rooms per night during the period."***

This was on 7th January 2005. And on 15th January 2005 per PEX11, it became clear that after the authorized agents for the parties hereto met, they discussed and agreed, and made it clear that ***"complimentary rooms would be 2 twin rooms per night during the period."*** And not 1 room per 15 fully paying guests.

Further on 16th February 2005, a few days to the event, the parties exchanged correspondence that stated "one complimentary bed only for every 15 full paying guests upto a maximum of 2 twins for use by couriers/tour leaders." No complaint was raised before and after the guests checked in. The issue was only raised in the letter of 1st April 2005. It is this part of the final details that was relied upon by the appellant to mean 1 room per 15 full paying guests.

The PEX1 also referred the appellant to the contract rates for the period January 1st – December 31st 2004. The appellant never denied this aspect of the said exhibit which they acknowledged. The appellants further did not deny that they were given 2 twins for use by their couriers/tour leaders. They instead demanded and deducted for 1 for every 15 full paying guest yet there is no evidence of any agreed computations in lieu of the applicable rates for complimentary rooms for bed only as contained in the correspondence. PEXC3 on page 99 of the record of appeal clearly shows that the invoice No. 3569 did provide rebate for 2 complimentary rooms as per contract amounting to Sh. 14,241.56.

There is no evidence that during the negotiations, the respondent made some kind of camouflaged representation to the appellant that they would give rebate for 1 room fo every 15 full paying guest period! The negotiations in my view were as per the invoice No.3569 and as explained by PW1 and as found by the trial Magistrate.

I quite agree that in the commercial world, it would not make any business sense to give such an exorbitant rebate.

Commerce is about profit making not losses. The latter are the exception and not the general rule. This was discussed in the Court of Appeal case of **Campling Bros & Vanderwal Ltd – Vs – United Air services Ltd [1952] XIX 155** that :

> ***"A term can only be implied if it is necessary in the business sense to give efficacy to the contract."***

Explaining this holding, **Sir Barclay Nihill** (President of the Court of Appeal for Eastern Africa) referring to the case of **Rufate – Vs – Union Manufacturing Co (Ramsbolton([1919] LRI KB 592**, where **Scrutton J** said thus:-

> ***"The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract that is, if it is such a term that can comfortably be said that if at the time the contract was being negotiated someone had said to the parties***
>
> ***"What will happen in such a case,"***

They would have replied, "of course so and so will happen, we did not trouble to say that – it is too clear."

Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

In this appeal, examining and re-evaluating the evidence and the assessment thereof and thereof and findings of the learned trial Magistrate. I am fully satisfied that the parties intention was not to provide complimentaries for the 63 beds as claimed by the appellant and that indeed, it would not make business efficacy to read and apply terms that did not occur to both parties' minds at the time of negotiations and conclusion of their agreement.

What emerges from the evidence on the record is that the appellant appeared utterly forceful and overbearing, though not keen to undertake due diligence. For example, they refused to sign DEX11 and DEX12 and issued local purchase order for 22nd December 2004 by inserting therein the overflows to Windsor when it appeared clear that from their negotiations, the respondent was unwilling to engage with Windsor over the overflows hence the subsequent amendments to that local purchase order by that of 25th January 2005. And it was the same DEX11 and DEX12 which at the hearing, the appellant wished the Court to find that they were binding on both parties. A contract is a voluntary engagement between parties and it is for that reason that the law of contract frowns upon contracts entered into under duress.

I am persuaded by **Hon. Justice Emukule's** holding **in Gimalu Esates Ltd & 4 Others – Vs – International Finance Corporation and National Bank of Kenya NRB HCC H606 of 2003** thus:-

"For example, equity presumes bargains with expectants to be unconscionable. Expectants include not only heirs apparent and presumptive but those who have either a vested or a contingent remainder or any reversionary interest. Relief has been granted against usurious loans (as in Benyon – Vs - Cooke [1875] LR 10 CH 382, 391 Per Jessel MR). The person claiming the benefit of the bargain can rebut the presumption by showing that it is fair, just and reasonable. It is not however only bargains with expectants that equity may presume to be unconscionable. Equity will intervene to prevent any "unconscionable use of power" when there is weakness on the one side and extortion on the other, and will set aside improvident bargains, made with a poor or ignorant person acting without independent advise which cannot be shown to be a fair and reasonable transaction (per Lord Brightman, PC in Harman – Vs – O'Conner [1988] AC 1000, 1023 – 1024)."

In another case of **Alec Lobb Ltd – Vs – Total Oil (G.B.) Ltd [1983] 1WLR 87, 94-95 Peter Millet QC** sitting as Deputy Judge of the High Court concluded thus:-

"If cases are examined, it is almost that three elements have invariably been present before the Court has interfered."

First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advise, or otherwise so that circumstances existed which unfair advantage to the other could be taken e.g. in **Blomley – Vs – Ryan [1954] 99 CLR 362** where to the knowledge of one party, the other was by reason of his intoxication in no condition to negotiate intelligently.

Secondly, this weakness, by the other party in some morally culpable manner, for example in **Clark – Vs – Malpas [1862] 25 ER 1238**, where a poor illiterate man was induced into entering into a transaction of unusual nature, without proper independent advise, and in great haste.

Third, the resulting transaction has been not merely hard or improvident, but overreacting and oppressive."

The above cases were cited by **Hon. Justice Emukule** in **NRB HCC 606/2003** where he also gave an analogy as follows:-

"For instance, where there has been a sale at an undervalue, as often happens in the mortgage market in this country, the undervalue has almost always been substantial, so that it calls for an explanation, and is itself indicative of the presence of fraud, undue influence, or other such feature. In short, there must therefore be some impropriety, both in the conduct of the stronger party and in terms of the transactions itself … "which shocks the conscience of the court" and makes it against equity and good conscience for the stronger party to retain the benefit of a transaction he has unfairly obtained."

The above propositions are made to emphasize the point that the resulting transaction between the parties to this appeal, if it were to be believed that the appellant would be entitled to the 63 complimentaries as claimed, would not merely be hard or improvident, but over reaching unconscionable and oppressive and would no doubt shock the conscience of the Court. In addition, the appellant cannot justify that rebate as being reasonable, fair and just.

The negotiating parties to the appeal herein cannot be said to have been poor or weak, they appeared well accustomed to the negotiating of such contracts but it is clear that they did not seek any expert independent advise to assist in interpreting any of the terms that would have appeared unclear to either party. Each party unfortunately appear to have understood the agreement differently and there seemed to be no disagreement until after the event.

Having said so much on the bed complimentaries and Windsor overflows, I conclude that the appellant's expectations were subjectively unreasonable hence I find that the respondent did not renege on its promise to the appellant, on the above two issues.

I am in agreement with the findings of the learned trial magistrate that the appellant misconstrued the undertaking on bed complimentaries which was fully honoured, that being the only reasonable expectations from the documentations availed to the Court and as observed by the learned trial Magistrate who had the opportunity to hear and see the witnesses as they testified.

On the issue of shuttle transfers, the appellants produced DEX6 which was clear that the transfers from Safari Part Hotel to Windsor and back will be with compliments of the hotel,once in the morning and the evening. On the other hand, that as per PEX11, complimenaries <u>on airport transfers would only be offered a few pick ups capacity allowing</u> and that <u>any extra transfer would be undertaken by the appellant</u>. The gate passes PEX4 clearly showed what transfer shuttles the respondents provided on the respective dates. The appellant produced invoices from Sher Safari Services Ltd. However, it was clear that the respondent would offer, as a firm undertaking, <u>only transfers to Windsor and a few airport transfers capacity allowing. There was no commitment on the latter</u>.

The departure schedules produced by the appellant showing transfers to Windsor and Safari Park and airport transfers on the dates allegedly not served by the respondents are overwritten with comments creating contradictions and doubt as to whether Sher Safari Services Ltd did offer the services on those dates as invoiced.

See page 27 of the record of appeal item one on 27th February 2005 indicating basel: -

Transfer from Safari Park – JKIA is overwritten with "Windsor has invoiced us Peta Fischel – took taxi from Windsor 1X Pajero to JKIA – "please check Pajero was not used!!"

Page 28 – item 2 – 2 March – Ghana – transfer from Safari Park – JKIA

1x8 seater – pax to Windsor)took 1 24 seater, please check

Item 4 – 02 March – Jeddah at 1x luggage van overwritten with (<u>no luggage van</u>)

Item 7 – 02 March Basel transfer from Safari Park – JKIA 1x8 seater – overwritten with (<u>"who was this?, Basel group was staying at Windsor."</u>

Item 8 – 2 March – Lebanon. Transfer from Safari Park – JKIA 2 X 24 seaters – overwritten with comment! pax staying at Serena"

Page 29 at the bottom remarks after an arrow pointing at 04 March – Nigeria – transfer from Windsor – JKIA 1x8 seater. *Deduct Ksh. 700 from USD 35.00 as Rajays' driver came late and we had already called a taxi from Safari Park.* And the overwritten areas are circled where the amounts are indicated.

I have compared these details with the witness statement/testimony at page 64 of the record of appeal and the claim in the set off and compared with the invoices dated 12th March 2005. I am unable to find any transfer schedule undertaken by the said Sher Safaris on 26th February 2005. Furthermore, as stated earlier, the undertaking was clear that the respondent would, in the case of airport transfers offer only those complimentaries capacity allowing. There was no binding duty arising from this undertaking on airport transfers and therefore I find that the respondents were not liable whatsoever.

In the case of shuttle transfers to and from Safari Park and Windsor, I have carefully examined the schedule by Sher Safaris and there is none relating to such schedule covering 26th February 2005, and 1st and 2nd March 2005. What I have seen is invoice No. 0515 item 5 which simply states: Windsor – Safari Park (ARR) 5 transfers = USD 350 – with no date for the transfer.

The same applies to invoice No. 05112 for 5 transfers at USD 70 = 350 with no date. There is therefore no proof that Sher Safaris undertook the alleged shuttle transfers on 26th February, 1st and 2nd March 2005 to and from Windsor to Safari Park and vice versa.

On the other hand, the respondents exhibits 4a, b, c, d, e, company vehicle gate passes at pages 100 – 104 of the record of appeal clearly show that on 26th February 2005, 2nd March 2005 and 1st March 2005, the respondent did undertake/carry out shuttle transfers using motor vehicles shown thereon and at the specific times indicated against the authorization to Windsor and to the airport. This evidence was not controverted by any other credible evidence.

Furthermore, no complaint was ever raised concerning or relating to the alleged respondent's failure to offer the shuttle transfer services during the conference period and therefore the belated deductions on accounts due were baseless. Noting that the appellant was overzealous on ensuring that they get what they had bargained for, it is surprising that they kept silent until one month later after the conference is when they raised the issue by deducting from the amount due and owing to the respondent as a set-off.

The upshot of all the above is that I find no merit in the appeal herein as filed on all the 6 grounds of appeal. I further find that the learned magistrate did not err in the assessment of the evidence before her that guided her in arriving at the decision that she did, in dismissing the appellant's defence and set-off. I find no reason to interfere with the same.

Accordingly, I uphold the learned trial magistrate's judgment allowing the respondent's claim against the appellant and dismissing the appellant's defence and set-off with costs and interest and proceed to dismiss the appeal herein with costs to the respondent.

Dated, signed and delivered at Nairobi this 30th Day of October, 2014.

R.E. ABURILI

JUDGE