



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE 254 OF 2009

SEGWAYS BEACH HOTEL LTD.....PLAINTIFF
VERSUS
AL SAI (K) LIMITEDDEFENDANT

RULING

This is an application under the provisions of the Arbitration Act and Order 39, rules 1 and 2 of the Civil Procedure Act. In the application the Plaintiff/Applicant seeks inter alia the following orders:-

1.
2. **An Interim measure of protection by way of or a:-**
 - (a) **A prohibitory injunction restraining the Defendant by itself, its servants and/or agents from using, destroying, disposing, levying, storage or any other charges, or in any other way interfering with the plaintiffs hotel, kitchen equipments, stocks, furniture, fittings, installations in the coffee shop, Chinese Restaurant and/or any of the plaintiff's goods pending the hearing and determination of this application, prayer No. 3 herein and/or the suit.**
 - (b) **A mandatory injunction compelling the Defendant by itself, its servants and/or agents to reinstate the Plaintiff's back into the suit premises until expiry of the contractual 60 months term or lawful determination pending the hearing and determination of the application, prayer No. 3 herein and the suit.**
3. **That this Honourable Court be pleased to refer this matter to arbitrate to an arbitrator appointed by the Chairman of the Law society of Kenya**

4. **Costs.**

The application is supported by an affidavit sworn by one Mr. David

Langat, the General Manager and a Director of the plaintiff company on 24th July 2009. The grounds set out by the Plaintiff/Applicant in the application are:-

1. *In consideration of a monthly rent/fee of Kshs.2,000,000/- the plaintiff under an agreement dated 31/05/2008 became entitled to lease/access, control and exclusive management of the suit premises hereinafter referred to as "the hotel" for a term of 60 months starting 31.05.2008.*
2. *The Applicant has dutifully paid the Kshs.2 million monthly rent/fee save for instances where it has sought and obtained indulgence from the Defendant that the Defendant will accept late payment and will not rely on such late payment to terminate or otherwise undermine the plaintiff's rights under the agreement.*
3. *In breach of the terms of the agreement, the Defendant on or about the 30/6/2009 purported by a notice of less than 24 hours to terminate the agreement on account, inter alia, that a sum of Kshs.2,650,000/- in management fee for June was in arrears.*
4. *Upon the purported termination, the Defendant has wrongfully converted all the plaintiff's movable including:-*

- (a) *All the equipment and cutlery used in the kitchen and coffee shop and Chinese Restaurant.*
 - (b) *Stocks including foodstuffs, exotic wine, and beers, furniture.*
 - (c) *Curtains and beddings for the rooms*
 - (d) *T.V. sets for hotel rooms*
 - (e) *Personal computers and stationeries*
 - (f) *Personal effects.*
5. *In furtherance to the conversions the Defendant has continued to used the plaintiff's said goods and properties in the hotel and the Defendant intends to dispose and/or confiscate the plaintiff's said goods in satisfaction of the Defendant's fabricated claims.*
 6. *The lease/agreement has an Arbitration clause requiring reference of disputes to an arbitrator.*
 7. *The plaintiff will suffer irreparable damage in loss of goodwill, and clientele in the highly sensitive and competitive hotel industry in addition to losing its investments and loss of jobs to the 86 employees of the Applicant unless the Interim protection measures are given pending reference to and/or the hearing and determination of the arbitration.*
 8. *The Respondent will not suffer any prejudice from the orders sought herein because they will continue to observe all its contractual obligations including paying the monthly and rent/fee.*

The Defendant/Respondent in opposition to the application filed a Replying Affidavit sworn by one Mr. Salim Sultan Mooloo, a director of the Defendant Company.

The Defendant filed its defence on 14th August 2009. It is

common ground that the plaintiff and Defendant entered into Management Agreement on 31st May 2008. By the said Management Agreement the plaintiff was to manage and run the Hotel on the suit premises. It was agreed that the plaintiff would be entitled to access and enjoy control and management and possession of the Hotel premises known as the Sai Rock Hotel located at Bamburi in Mombasa for 60 months starting 31st May 2008. In pursuance of the said agreement the plaintiff at all material times was in control, custody and possession of the said Hotel and its premises. The Plaintiff acquired the said management rights in consideration of paying the Defendant making various payments.

Under Clause 71, the plaintiff was to make the following payments:-

- A) Deposit Kshs.7.5. million plus VAT which was deposit shall be refunded upon expiry of the agreement or sooner determination and payable subject to clearance of all management fees and other outgoings.
- B) Fixed fee of Shs.1.5m plus VAT payable on or before 10th day of each month in advance for the first 6 months i.e. 1st June 2008 to 31st December 2008.
- C) A payment of Kshs.2.0 m plus VAT per month payable on or before the 10th Day of each month in advance for the next 6 months I.e. 1st January 2009 to 30th June, 2009.
- D) Thereafter a payment of Kshs.2.5million plus VAT per month payable on or before the 10th day of each month in advance for the rest of the Management period i.e. 1st July 2008 to completion of management period. It appears that the Management Agreement was placed into operation and there is no dispute that it commenced and went on without

any definitive problems until just before 30th June, 2009.

By a letter dated 30.6.2009 the Defendant through its advocates terminated the Management Agreement on the following grounds:-

- i. *That your three Cheques in the aggregate sum of Kshs.2,650,000 in payment of the Management Fee for June 2009 were returned unpaid for reasons that you did not have sufficient funds. This is the third or fourth time that your Cheques have bounced.*
- ii. *You have failed to renew insurance in terms of the agreement dated 31st May 2008 running the hotel with the insurance.*
- iii. *You have not paid electricity charges*
- iv. *You have not paid for water consumed in the hotel.*

You cannot expect to operate the hotel without payment of the management fees or insurance. Each of the defaults specified above constitute fundamental breach of the contract dated 31st May, 2008. By a letter dated 29th May 2009 addressed to your advocates you were duly notified that the insurance policy for the hotel was lapsing on 31st May 2009. You failed to heed that notice we would refer to our clients letter dated 26th June 2009 regarding insurance for the hotel.

TAKE NOTICE *therefore that you are not allowed and will not be allowed into the hotel with effect from 1st July 2009. You must therefore quit and vacate the hotel premises forthwith. This matter is issued without prejudice to such options as our client may have against you for antecedent breaches of the said agreement."*

The Defendant effected the said one day notice and took over the possession and running of the hotel from the plaintiff.

As a result the plaintiff was aggrieved by the said action and after any amicable settlement failed came to this court for redress. It is not disputed and is in fact common ground that there is an Arbitration Clause in the said Agreement. It states:-

“.....

ARBITRATION

29. All disputes arising in connection with this Agreement shall be referred to Arbitration under the Arbitration Act of Kenya by one or more arbitrators in accordance with the Rules. Mr. Kamal Bhat and Mr. Vincent Omollo or in their absence or inability to act as arbitrators to a single arbitrator to be appointed by the claimant of the Law Society of Kenya."

This clause is binding upon the parties. The only dispute is whether the plaintiff is entitled to seek an order that the dispute herein which has arisen be referred to arbitration and to an arbitrator appointed by the Chairman of the Law Society of Kenya or whether it should be referred to a Mr. Kamal Bhatt and Mr. Vincent Omollo in the first instance as stipulated in the agreement and in default, if they are unable to act to a single arbitrator to be appointed by the chairman of the Law Society of

Kenya. The Defendant submits that the Plaintiff cannot seek the said order directly at the first instance until it is shown that the 2 appointed arbitrators are unable or unwilling to arbitrate.

Upon consideration, I am in total agreement with the Defendant's submissions. The parties are bound by the terms and conditions of the agreement. For reasons known to themselves and what must be grounded on good intentions, they mutually agreed that if there is a dispute it would be referred to arbitration of the two persons named, i.e. Mr. Kamal Bhatt and Mr. Vincent Omollo. This court cannot re-write the Agreement for the parties.

I do find and declare on a prima facie basis that a dispute has arisen between the parties herein as envisaged by the Arbitration Clause 29 of the Agreement dated 31st May 2009. I am inclined to refer the matter to Arbitration despite the filing of a defence by the Defendant. The Defendant appears willing to go to Arbitration in any event.

The parties have chosen that such dispute be referred to Mr. Kamal Bhatt and Mr. Vincent Omollo for arbitration. There is no allegation or evidence that they are unable or unwilling to arbitrate.

I have considered the points of law relating to the affidavit in support of the Application. It is alleged that the deponent on his own admission had sworn the affidavit a week earlier than the date shown. I think it would be unfair if I make any finding without giving the Commissioner for Oaths Mr. Humphrey Njiru the opportunity to state his position. Any finding will affect him and in his profession. Secondly, sadly I do take judicial notice that in Kenya, the legal proceedings not all deponents of affidavits do in fact appear before the Commissioner for Oaths. Many a times due to the exigencies of legal practice and pressure of time Counsels who are instructed and Commissioners of Oath on trust between themselves obtain signatories in the presence of the Advocates instructed who relay, the same to the Commissioner for Oaths. I know that this may be against the law and is even a dangerous practice, but let one Advocate stand before the court and look into my eyes and tell me that he has never practiced that or done it. This is a real dilemma. In this case, I would require that the person making the allegations makes the statement on oath in an affidavit rather than through submissions.

I decline to make any finding in respect of the alleged defect of the affidavit in the circumstances of this case.

Under the Agreement the Defendant would be entitled to terminate it if there is failure to pay the management fees on due dates for a period of 2 months. Clause 16.1 and 16.2 provides:-

“Rights of Termination

16.1 This Agreement may be terminated by the First party by immediate notice in writing

16.2. If SBHL fails to pay to the first party the relevant fees on the dates they were due for a period of 2 months at anytime during the term.”

In the termination letter dated 30.6.2009, it is certain and very clear that what was outstanding was the management fee for June 2009. Cheques in settlement thereof had been returned unpaid. The plaintiff if at all was in default for only one month of the management fee. There is no provision for termination for non payment of electricity and water or renewal of insurance. While there could be fundamental breaches, they did not entitle the Defendant to immediate right of termination and repossession of the hotel in terms of Management thereof. I do find that the said act on the face if it was breach of the agreement. There is no evidence that the plaintiff was in law and fact insolvent. This was not proven in the letter of termination and it could not be a basis for wrongful termination. The defendant was obliged to have waited until end of July 2009 before invoking Clause 29 of the Agreement. Its action was not mitigation but amounted to aggression and forceful take-over. The defendant had deposits to secure non-payments for any outgoings like electricity and water etc. In any case any disconnections would have enhanced their case for termination only one month later. No one could tell if the Plaintiff in exercise of its rights to the second month of grace could not complete payment within the contractual time and inherent extensions and waiver.

It was not right for the defendant to speculate and self-servingly predict the default in the second month. The termination was premature and appears to be unilateral and not based on rights conferred on the owner by the Agreement.

There is no dispute that the plaintiff has and owns various kitchen equipment, stocks furniture, fittings, installations in the coffee shop, and Chinese Restaurant. In view of the finding that the termination and take over was unlawful and wrongful the plaintiff is entitled to an interim a measure of protection under Section 7 of the Arbitration Act.

The Defendant has taken the law into its hands and taken direct action instead of going through the legally prescribed procedure.

Referring to the words in **MUCUHA –V- RIPPLES (1990 – 1994) 1 EA. 388 1** – “having obtained an advantage by such wantonly unlawful acts the defendant ought not be allowed by the court to retain or maintain that benefit and the position must revert to a status quo as it existed before the unlawful eviction took place.”

It be would unconscionable for this court to allow the Defendant to continue using and controlling the Plaintiff’s goods that it has not disputed in its letters, affidavit and submissions.

The court is not a tooth-less and inert organ or institution. It is a Constitutional Organ clothed with immense powers, it is an arm of the Government and it has the strength and time to do all possible to enforce its orders and to ensure fairness and justice. This court will not be dissuaded or scared from discharging its functions by the tedious and difficult process required in enforcing its orders given herein. If necessary the court can move to the Hotel premises and be a stock-taker and separate, the spoons, forks , cutlery, bed sheets, blankets, cups, beds, etc. The court can in its discretion go to all lengths to do justice in each case before it.

However, I agree that the court will face a lot of challenges and difficulties in enforcing any order of prohibition with regard to the property of this plaintiff.

As a result, since it is the Defendant which created the present unfortunate situation through its unlawful and wrongful action, then it cannot be allowed to enjoy any perceived advantages or benefits.

I therefore do grant the following orders:

1. I do declare a dispute has arisen between the parties herein and order that it be referred to arbitration under the Arbitration Act by the joint Arbitrators nominated in the Agreement, namely Mr. Kamal Bhatt and Mr. Vincent Omollo.
2. I do hereby grant a prohibitory injunction in terms of prayer A of the Applications pending the determination of the Arbitration proceedings.
3. I was inclined to grant the mandatory injunction unconditionally sought by the plaintiff. However, in view of the circumstances and that the premises is a hotel and the agreement clearly shows that the legal possession would remain with the Defendant and in view of the potential impact in the long term on the business of the Hotel its image, reputation etc in the delicate, sensitive and competitive hotel industry, it would not be in the interest of either of the parties for such an order. This court apprehends a total closing down or closure of the hotel premises. This would be of no benefit for either of the parties.

The court also recognizes that the Agreement herein remains a Management Agreement which was for making of profits. It is not a dispute of ownership or title. Despite the defendant’s reprehensible conduct, court orders ought not be destructive. It must be manageable, beneficial and judicious. I have also considered the many employees and staff of the hotel, said to be over 86. I have also considered that upon arbitration the contract has possibility of continuance mutually or through the Arbitration.

I decline to grant that order. I therefore do direct that the Arbitrators act with haste and complete their deliberations and submit their Award to the parties within a period of 90 days from today.

4. The Defendants shall pay the costs of the application to the plaintiff.

Dated and delivered at Mombasa this 10th day of June 2010.

M. K. IBRAHIM
J U D G E

Coram:

Ibrahim, J

Court clerk – Kazungu

Mr. Ndegwa for the plaintiff/Applicant

Mr. Kinyua for the Defendant

Ruling delivered in their presence.