



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC NO. 329 OF 2015**

**THATCHMAANZ LIMITED.....PLAINTIFF**

**Versus**

**PRIDE INN LIMITED.....DEFENDANT**

**JUDGMENT**

1. The basis of the Plaintiff's claim is an alleged oral agreement entered between it and the Defendant sometime in April 2014.

2. The Plaintiff carries on business of managing, supply and sale of alcohol beverages while the Defendant operates a chain of Hotels in Nairobi and Mombasa. It is the Plaintiff's case that prior to the agreement, the Defendant maintained a strict no alcohol policy. This, according to Anthony Ngunga (PW1) affected the revenues of the Defendant. Ngunga was the Chief Executive Officer (C.E.O) of the Defendant between 10.2.2014 and 2.12.2014. Consequently, a decision was made for the Defendant to allow the sale of alcohol but in a manner compatible with the religious beliefs of the owners of the Defendant.

3. The acceptable model was that the money from the sales of the alcohol beverages would not be received directly by the Defendant. This required a third party to supply the beverages and to set up and run a bar in each of the Defendant's units in Nairobi.

4. Enter the Plaintiff into the scene. Edward Ahn (PW2) is a Director of the Plaintiff Company. He was personally known to Ngunga and was in the bar and restaurant business and would be the sort of person the Defendant would be looking for. Ngunga set up a meeting between Ahn and the Managing Director of the Defendant Company. It is in this April 2014 meeting that the Plaintiff alleges that an oral agreement in the following terms was reached between it and the Defendant:-

*a. The Agreement was to subsist for a period of 3 years from May 2014 to May 2017.*

*b. The Plaintiff was to supply alcoholic beverages to the Defendant's hotels within Nairobi for the use of the Defendant's restaurant and conference halls.*

*c. The Plaintiff was to construct, set up and run the bar at the Defendant's hotel at Lantana.*

*d. It was an agreed term of the contract between the parties that the Plaintiff would supply the alcoholic drinks used at functions held at the Defendant's hotels.*

*e. This Agreement was renewable at the end of the term to offset any expenses incurred by the Plaintiff in setting up and running the bar.*

*f. It was agreed that the Plaintiff would supply the alcoholic drinks for the use of the Defendant's hotel and the amounts incurred by the Defendant would be paid in arrears.*

*g. The Agreement between the parties stipulated that the Defendant would pay the Plaintiff for the drinks supplied once the Plaintiff provided the Defendant with the requisite invoices.*

5. The Plaintiff set up a bar unit in the Defendant's hotel at Lantana Road and towards the end of May 2014, all restaurants in all the units had been stocked with alcohol and staffed and were selling alcohol.

6. The Plaintiff however complains that by the end of July 2014, all invoices issued by it from 19<sup>th</sup> May 2014 had not been settled by the

Defendant. The Plaintiff sought the intervention of PW1 who made assurances that payments would be made. But default continued to the end of November. The Plaintiff threatened to pull out of the deal.

7. But sometime in December 2014, the Managing Director of the Defendant promised to settle the outstanding invoices now at Kshs.1,500,000/= within a week of the meeting. On the strength of that assurance the Plaintiff continued to supply the beverages. The payment did not come forth and the Plaintiff makes the following claim:-

- a. Outstanding invoices of Kshs.2,104,770/=.
- b. Special damages:
  - i. Kshs. 1,000,000/= being the amount used to set up the construction and purchasing compliant machines and equipments.
  - ii. Kshs.648,000/= being salaries paid to staff.
- c. Damages for loss of business and profits amounting to Kshs.7,366,695/=.
- d. Costs of this suit.
- e. Interest at Court rates on (a) (b) (c) and (d) hereinabove from the date of filing of this suit until payment in full.

8. The Defendant denies the existence of the agreement and the entire Claim by the Plaintiff. In the alternative and without prejudice to that denial, the Defendant avers that the arrangement entered between the Plaintiff and P.W.1 was done without its authority and could not bind the Defendant.

9. Further, that its premises were not licensed to sell alcoholic beverages and so the claim by the Plaintiff was not enforceable by dint of the doctrine of *Ex turpi causa non ortur actio* (no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal). In the end the Defendant seeks for the dismissal of the claim.

10. In addition to Anthony Ngunga (PW1) and Edward Ahn (PW2), the Plaintiff called two other witnesses, Michael Kimotho Kamau (PW3) and Moses Muhavi (PW4). A feature of the Plaintiff's case is that three of its four witnesses being PW1, PW3 and PW4 were former employees of the Defendant and in employment at the material time. The Defence called Nicholas Ochieng (DW1), its Group Human Resource Manager and Secretary to the Board.

11. Each side proposed a different set of issues which have received due consideration by the Court. Looking at the pleadings and bearing those proposals in mind, the Court formulates the following questions for determination:-

- a) Was there a contract for the sale of alcoholic beverages by the Plaintiff to the Defendant?
- b) If so what was the nature of the contract?
- c) Was the contract based on an illegality?
- d) If not is the Defendant in breach?
- e) If so is the Plaintiff entitled to the Claim?
- f) What is a good order on costs?

12. The evidence of PW1 is that desirous of boosting its revenue from the banqueting hall and restaurants, the Defendant agreed to break with its no alcohol policy. Pw1 was tasked with identifying a suitable supplier of alcoholic beverages to the Defendant's 3 hotels in Nairobi. The person identified was Edward Ahn (PW2) who was the Managing Director of the Defendant.

13. On or about April 2014 there was a meeting between Edward, the Managing Director and PW1 in which the following arrangement was entered:-

- a. *The Agreement was to subsist for a period of 3 years from May 2014 to May 2017.*
- b. *The Plaintiff was to supply alcoholic beverages to the Defendant's hotels within Nairobi for the use of the Defendant's restaurant and conference halls.*
- c. *The Plaintiff was to construct, set up and run the bar at the Defendant's hotel at Lantana.*
- d. *It was an agreed term of the contract between the parties that the Plaintiff would supply the alcoholic drinks used at functions held at the Defendant's hotels.*

e. This Agreement was renewable at the end of the term to offset any expenses incurred by the Plaintiff in setting up and running the bar.

f. It was agreed that the Plaintiff would supply the alcoholic drinks for the use of the Defendant's hotel and the amounts incurred by the Defendant would be paid in arrears.

g. The Agreement between the parties stipulated that the Defendant would pay the Plaintiff for the drinks supplied once the Plaintiff provided the Defendant with the requisite invoices.

14. In his evidence PW2 corroborates the testimony of PW1 in regard to this meeting. The evidence of the two was consistent and not debunked in cross-examination. On the other hand, the Defendant did not call its Managing Director (who was said to be in the meeting) to discount this account. This Court, on a balance of probabilities, believes the story of the Plaintiff.

15. This Court is urged by the Defendant to invoke the Sale of Goods Act (Chapter 31 Laws of Kenya) in order to discover whether or not there was a contract of Sale of the alcoholic beverages as asserted by the Plaintiff. Under section 3 of the Sale of Goods Act a sale and agreement to sell is:-

“1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

(2) There may be a contract of sale between one part owner and another.

(3) A contract of sale may be absolute or conditional.

(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(5) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred”.

16. But there may be a uniqueness about the transaction between the Plaintiff and the Defendant. The evidence of PW1 who drove the agenda to introduce the sale of alcohol in the Pride Inn outfits was that, prior to this, Pride Inn had a strict no alcohol policy. This, it was explained, was because of the religious belief of the owners of the Defendant. DW1 for the Defendant alludes to this policy in the following evidence:-

“Pride Inn does not deal with alcohol and beef. No alcohol is sold in any of our units”.

Of course whether or not alcohol was sold in the course of the purported contract between the Plaintiff and Defendant will be interrogated shortly. For now there is consensus that at one time the Defendant observed a no alcohol policy.

17. It would be against that backdrop that the model said to be agreed was that the Plaintiff will bill the Defendant directly by way of invoices for alcohol consumed by the customers and patrons. In addition the Plaintiff was to construct and set up a bar in the Lantana Road Unit. Further, the Plaintiff bought ETR and PDQ machines for the 3 units and so any purchases paid for by credit or debit cards would go directly to the Plaintiff's account.

18. The entire essence of this model was that the Defendant did not wish to handle the alcoholic beverages yet wanted to avail them to its customers and patrons. It is for this reason that this Court holds that no property in the alcohol beverages was transferred or passed from the Plaintiff to Defendant in the sense contemplated by Section 3 of the Sale of Goods Act. It could not! Ownership of alcohol was abhorred by the Defendant! For this reason the transaction cannot be viewed through the prism of the Sale of Goods Act.

19. Evidence of the meeting in April 2014, (in which the oral agreement was allegedly entered) was not countered by the Defendant. An important participant in the meeting was Hassan Noorani who is the Managing Director of the Defendant. PW1 told Court that Noorani is based at the Pride Inn Mombasa. He would therefore be available to testify. But he chose not to and this Court is inclined to believe the Plaintiff on this. Was this contract performed?

20. The evidence of PW1 is that he embarked in the business by supplying stocks of alcohol drinks for each of the Defendant's hotels. He recruited and trained barmen. He purchased ETR and PDQ machines and constructed a bar at the Defendant's unit at Lantana Road at a cost of Kshs.150,000/=.

21. The supply and sale of alcohol was supported by the evidence of PW1, PW2 and PW4 who worked with the Defendant at the material time. PW2 was the CEO, PW3 was the General Manager and PW4 a bar Manager at Lantana. PW4, for instance, made reference to the supply of the alcohol beverages from the Defendant to its guests out of the main hotel premises and produced gate passes to corroborate his testimony (see Plaintiff's supplementary list page 3 to 7).

22. As further proof of implementation of the contract, the Plaintiff produced a copy of a cheque dated 15<sup>th</sup> December 2014 (P supplementary list page 7) for Kshs. 322,000/= paid to it by the Defendant in partial settlement of outstanding invoices. How did the defence react to this cheque? PW1 stated,

*“This is drawn in favour of the Plaintiff. I do not know what that cheque was for. Credit control would be aware”.*

But no witness came forward from credit control of the Defendant to challenge the allegation by the Plaintiff that it was made within the arrangement that is the subject of this dispute.

23. This Court finds that there is sufficient evidence to prove that the Plaintiff supplied the alcohol beverages as contracted.

24. But before examining whether there was default, one aspect of the defence has to be considered. In paragraph 8 of the Defence, it is averred:-

*“8. The Defendant further avers that its premises are not licensed to sale alcoholic beverages and shall raise a preliminary objection on the legal principle of ex turpi causa non ortur to have the suit herein struck out”.*

In support of this defence DW1 testifies,

*“Pride Inn has never held a liquor licence”.*

25. In his further written statement of 4<sup>th</sup> April 2106, PW2 posits that the responsibility of obtaining the license lay with the Defendant who cannot rely on its absence to defeat the claim. PW3 who was the General Manager of the Defendant’s unit at Westlands was tasked with overseeing the entire food and beverage operations of the Pride Group. He says that in May 2014 he visited City hall for purposes of obtaining a liquor licence for the sale of alcohol at the Defendant’s units but then the Alcohol Licensing Board was yet to be constituted. He was asked to pay for the license and book for inspection of the premises while awaiting the formation of the Board. His testimony was that inspection was carried out and the Defendant was allowed to sell alcohol after May 2014. He told the Court that the receipt for payment of inspection fees was with the Defendant.

26. However, he showed Court a receipt dated 4<sup>th</sup> February 2015 (P supplementary Exhibit page 5) for Kshs.6,000/= being payment for application and licence fees. Also produced was an application for Grant or Renewal of An Alcoholic Drink License of 5<sup>th</sup> February 2015. He sought to explain that these were issued in 2015 after the Board was constituted although payment had been paid in May 2014.

27. Whatever the date of payment of the licence, the testimony of PW3 and the documents seem to support the Plaintiff’s argument that it was the Defendant’s responsibility to obtain the Licence. But how is this to be taken in context of Section 7(2) of The Nairobi City County Alcoholic Drinks Control and Licensing Act 2014 cited by the Defendant? This section provides:-

*“(2) No person shall -*

*(a) manufacture or otherwise produce;*

*(b) sell, dispose of, or otherwise deal in,*

*any alcoholic drink except under, and in accordance with, a licence issued under this Act”.*

28. Defence Counsel submits that the law imposes the responsibility of obtaining the Licence on the person selling the alcoholic beverages and not the buyer. That argument is well and good but ignores the peculiarity of the arrangement between the Plaintiff and the Defendant alluded to earlier. The Plaintiff was to sell alcohol within the premises of the Defendant to the Defendant’s customers and patrons. The Plaintiff was not a tenant in the premises but this arrangement was informed by the need for the Defendant to avail these beverages to its customers and patrons yet remain within the bounds of the Director’s/Shareholder’s religious beliefs.

29. In the circumstances of this case, the onus was on the Defendant to obtain the Licence and indeed took steps through PW3 to do so. Failure to obtain the Licence cannot therefore be used by the Defendant to defeat the Plaintiff’s claims as being illegal.

30. The Plaintiff produced various unpaid invoices (P Exhibit page 2-42) and statement (P Exhibit page 50-51). The aggregate sum is Kshs.2,104,770/=. This is the only claim proved. The other special damages and damages for loss of business and profits were not proved. Those fail.

31. The outcome is judgment is entered for the Plaintiff against the Defendant for Kshs.2,104,770/= plus interest at Court rates from the date of filing of the suit. The Plaintiff shall also have costs of the suit.

**Dated, Signed and Delivered in Court at Nairobi this 15<sup>th</sup> day of February, 2019.**

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**F. TUIYOTT**

**JUDGE**

Present -

Okimaru for Plaintiff

Wakhisi for Morara for Defendant

Nixon – Court Assistant