REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 658 of 1992

DIANI BEACH COTTAGES LTD..... PLAINTIFF

versus

COSMOAIR PLC..... DEFENDANT

JUDGMENT

By an amended plaint and filed in Court on 29th September, 1992the plaintiff herein brought a claim against the defendant based ona written agreement dated 29th June, 1991. It is necessary to setout some parts of the plaint which in my view are instructive.

Paragraph 3 of the said amended plaint reads as follows:-

"3. By a written agreement dated 29th June, 1991 theparties herein contracted that the plaintiff wouldhold available and at the exclusive disposal of theDefendant, upon preferred allocation basis for theperiod beginning 1st November, 1991 to 31st October,1992 hotel accommodation at the Plaintiff's hotelat Diani Beach at the rate specifically shown onthe said agreement."

Paragraph 6A reads as follows:

"6A. In consequence of the said agreement the Plaintiffhas accommodated the Defendant's clients betweenNovember, 1991 and September 1992 and has invoicedthe Defendant in respect thereof in the sum of£15,725.00 (equivalent to KShs.974,950/- as at todaysmean exchange rate of KShs.62/- to the pound0sterling and which sum remains outstanding from the Defendant to the plaintiff."

The relevant prayers relevant to this judgment read as follows:

"REASONS WHEREFORE the Plaintiff prays for judgment against the Defendant for:

(i) A the sum of £15,725.00 (or KShs.974,950/- asset out in paragraph 6A of the amended plaint;

(i) B loss of revenue from 19th September, 1992 for all brochure bookings which have had to be transferred to other hotels because of Cosmosair PLC breach of contract.

(ii) Costs of and incidental to this suit;

(iii) Interest on (i) and (ii) at commercial rates;

(iii) A interest on (i)A and (i)B and (ii) at commercial rates."

The defendant filed a written statement of defence to the amendedplaint where liability was denied and alleged breach of the termsand conditions of the agreement by the plaintiff for which it soughtindemnity or set off.

Soon thereafter, the plaintiff filed an application by way ofNotice of Motion under Order 35 Rules 1 and 2 of the Civil ProcedureRules for summary judgment. The application was heard by Wambilyangah J.who on 27th November, 1992 gave judgment for the plaintiff "as prayedin the amended plaint."

Thereafter the defendant filed some applications to review theorders of the Court but those do not concern us at this stage. Thereis a ruling of this Court however dated 22nd September, 1994 whichis relevant to the issues at hand.

After Wambilyangah J. delivered his ruling on 27th November, 1992 aforesaid both learned counsel subsequently appeared before him on 18th December, 1992 and recorded a consent order in the following terms:-

"By consent the decree to be restricted to £16,725 inclusive of costs.-

The Plaintiff's claim for loss of revenue to proceed to hearing on a date to be fixed in the registry. „....."

When the matter was listed for formal proof a preliminary point was raised which was the subject of the ruling of this Court delivered on 22nd September, 1994 aforesaid. In dismissing the preliminary objection challenging the jurisdiction of the Court to hear the claim for loss of revenue, I observed that the plaintiff's case was not determined in full when Wambilyangah J. gave his ruling on the application for summary judgment. Noting that the prayer for loss of revenue was in the pleadings, I found the defendant had not been taken by surprise as it had notice of the claim which it denied in the statement of defence. To the best of my knowledge as far as the record can tell, there has been no appeal filed against the said ruling. The date for hearing was then set and that is the subject of this judgment.

The Chairman of the plaintiff one Andrew Nyoro Njenga gave evidencein support of the plaintiff's case while the defence called Mr. JedrejSawaicki, the overseas director of the defendant Company in chargeof operations in Mombasa.

There is no dispute that the parties herein entered into a writtenagreement as per paragraph 3 of the amended plaint set out above.Clause *one of the* said agreement which has been produced by the plaintiff's witness (PW.l) as Exhibit I reads as follows:-

"1.. The Hotelier shall hold available and at the exclusive disposal of Cosmos, upon preferred allocation basis for the period specified, the accommodation indicatedat the rates inclusive of all service charges, taxes, duties and commission as shown below upon the terms and conditions set out overleaf."

According to Exhibit I aforesaid, which has also been statedby PW. 1 in his evidence in chief, the plaintiff agreed to provide20 twins for the period stated at £12.50 per person per night halfboard. In effect to provide for 40 people per day. The contractalso provided for a Christmass supplement running from 24th December,1991 to 2nd January, 1992 both days inclusive at £8 per person perday. PW.1 added some details in his evidence which I do not deemnecessary to set out herein as they are set out in the said agreement-Exhibit 1.

PW.1 told the court that "loss of revenue was incurred becausethe guests did not arrive and this was occasioned by the failure ofthe defendant's company which is the contracting party to meet theterms of the contract. The period for the said loss was restrictedto 47 days - that is - from 16th September, 1992 to 31st October,1992. The total revenue expected from 40 people per day at £12.50amounted to £23,500.

The plaintiff's witness went on to produce Exhibit 3 showing the schedule of loss of revenue which

included the £23,500 above, average daily in house expenditure per guest at £20.00 for a la carte meals and drinks totaling £37,600 making a total of £61,100. Added thereto was interest at commercial rates up to 31st March, 1995 amounting to £75,018.12. in the end the plaintiffs total claim rested at #136,118.12

The production of Exhibit No. 3 was objected to by the learned counsel for the defendant. However the same was admitted by the Courtfor reasons to be given in the final judgment and further that thelearned counsel for the defendant was at liberty to cross examinethe witness on the contents thereof and make submissions at the closeof the hearing. I shall revisit this later in my judgment.

The defence witness deniied that there was any breach of thecontract by the defendant. On the contrary it was the plaintiff whocancelled the same by a letter dated 16th September, 1992 statingthat clients will no longer be received and the existing ones willbe trhrown out of the hotel.

As regards the terms of the contract the defence witness said it was not a guaranteed contract but a preferred allocation contract generally entered into between tour operators and hoteliers not onlyin Kenya but all over the world.

The said contract allows a tour operator to release the unsoldrooms back to the hotelier at an agreed specific time - normally, oneweek prior to arrival of each group. There is no contractual obligationon the part of the tour operator to fill the allocation. It is necessary to set out herein below part of Mr. Sawicki evidence. He told the court as follows:-

"Ext.l 20 double Rooms - 40 beds. Plaintiff was to makethese rooms available. In the event we were not able tosupply 40 guests we send a rooming list to the hotelier-by which any unsold accommodation is released back to thehotelier and this is stipulated in Clause 8 of the said if the hotelier expects the allotment to be full completelyhe should enter into a guaranteed contract by which a touroperator commits himself to paying for the rooms whetherthe clients arrive or not".

The defence witness added that there was no provision in thecontract. Until the defendant received notice demanding payment guestswere still being sent to the plaintiff and defendant was still readyto send guests until the expiry of the contract.

Mr. Sawicki gave the reason for delayed payment to the plaintiff.The defendant had received complaints from guests staying with theplaintiff and in line with Clause 5 of the contract funds were withheldwhich would in return be refunded to the clients. He however hadno figures of those who complained but added there was a large numberwho were dissatisfied with the arrangements. Complaints were basedon cleanliness, service and food quality. The defendant had to indemnifythese clients in excess of £20,000. In effect the defendant alsoincurred a loss in this arrangement.

The defence witness also disputed the figures reflected in Exhibit 3the schedule of loss of revenue as being grossly exegerated. Forexample he said he found it illogical that the plaintiff should beclaiming £20 for what he considered clients would spend on additionalfood and drinks when the contracted rate of £12.50 is in respect ofaccommodation, breakfast and dinner. Further to the foregoing hesaid he could not understand how the plaintiff could have expectedto have 160 clients arriving on 15th September, 1992 up to 28th October,1992 if during the whole summer season he only had 64 clients.

Both PW.l and DW.l were extensively questioned on their respective testimonies by learned counsel appearing for the parties. Both learnedcounsel have also addressed the Court on the salient issues and Ihave their submissions on record.

The entire cause of action in the amended plaint was based onthe agreement Exhibit 1. That agreement was to run from 1st November,1991 to 31st October, 1992. Paragraph 6A of the amended plaint claimeda specific sum for which the defendant had been invoiced from November 1991 to September, 1992. one was bound to ask, what about the balanceof the term of the contract.

The defendant, who was a party to the contract ought to haveexpected some development based on the

balance of the said term.I note that the amended plaint was dated and filed on 29th September, 1992 just about one month before the expected date of the expiry of the contract. There appear to be some misgiving about the mean expression of the alleged cause of action but when the body of the plaint isread with the prayers little doubt is left that there is a claim forloss of revenue. This cannot be said to be misconceived or bad inlaw. The answer-to issue number one is in the negative and that toissue number two in the affirmative. In respect of issue number three,going by the evidence now before me, the ruling of Wambilyangah, and that of this Court on jurisdiction, not all issues have beendetermined in relation to the pleadings. The defendant recognisedthis when the consent order of 18th December, 1992 was recorded.

There was a breach of contract dated 26th June, 1991. The partiesfell out in mid September, 1992. The question is, who was in breachof the contract? Both parties blamed one another. Two stages presentthemselves. First, the defendant withheld payments due and payable to the plaintiff. The letter dated 16th September, 1992 to the Defendant'sResident Manager was primarily a demand letter and the threat to evictthe guests can only be considered secondary to influence or facilitateurgent appreciation of the situation on the part of the defendant.

It will be noted that none of the guests were evicted as threatened.Instead the defendant did not send any guests and only after the suitwas filed and summary judgment entered did the defendant make paymentof the plaintiff's claim for special damages.

In the meantime, no rooming list was sent by the defendant tothe plaintiff and no surrender was made as required. The plaintiffin my view was bound to still reserve accommodation for the defendant'sclients otherwise he would be breaching the terms of the contract.

In my judgment taking all the evidence in totality I find thatit was the defendant which was in breach of the contract. As a resultof the said breach the plaintiff, it follows lost revenue. This wasexpected as per the terms of the contract. Such a claim cannot besaid to be remote. It is directly connected with the breach of contract.

Unlike special damages loss of revenue can be compared to lossof future earnings in a claim based on personal injury. Such a losscan be computed from past earnings but in the end falls under general damages.

I have already said that the plaintiff was duty bound to reserve .the accommodation requested by the defendant. The question of guaranteedcontract in my view does not arise. There was no communication fromthe defendant. No surrender. If the plaintiff let out the roomsto a third party and the defendant's guests/clients call in he wouldhave no explanation to give. The defendant, in my view is liable for the loss that the plaintiff incurred as a result of the breach.

I had said I shall revisit Exhibit 3 later. I do it now. Thatschedule was prepared by the plaintiff's Chairman. To me it is anexplanation leading to the last figures therein. With profound respecthowever only that part of the schedule related to the contract isrelevant. In the case of Hadley -vs- Baxendale (1843-60) All. E.R.461it was held that where two parties have made a contract which oneof them has broken the damages which the other party ought to receivein respect of such breach of contract should be such as may fairlyand reasonably be considered as either arising naturally i.e. accordingto the usual course of things, from such breach of contract itself,or such as may reasonably be supposed to have been in the contemplationof both parties at the time they made the contract as the probableresult of the breach of it.

The defendant placed the plaintiff in a position of uncertainty.One in such a situation given the nature of the contract cannot beexpected to mitigate the loss without running the risk of breachingthe same. In my judgment the claim for loss of revenue for 47 daysis sustainable. At £12.50 per day per person for 40 people, the losscomes to £23,500.

The plaintiff's claim for in house expenditure per guest placeat £20 for a la Carte meals and drinks is in

my view speculative.No supporting statics were produced, i note that the same was notincluded when the plaintiff made an application for summary judgment.

As for the claim of interest at commercial rates the plaintiffproduced Exhibit 2. The plaintiff was duty bound however to lay abasis for that exhibit. It was incumbent to first establish the business was run on an overdraft or loan. That the same was subject to theinterest charged therein. In C.A. No.154 of 1992 Mr. Charles C. Sandevs. Kenya Co-operative Creameries Ltd., evidence was led which clearlyshowed that the bank was charging interest at 17%. This was allowedon the award of special damages.

In my judgment, I am of the view that the rate of interest shouldbe 14% p.a. As this money would have been received by the plaintiffunder the said contract had the defendant not breached the same, Iorder that the same shall accrue from the date of filing the suit.

In the end I find that there shall be judgment for the plaintiffin the sum of £23,500 or its equivalent in Kenya shillings as at thetime of settling the decree plus costs of the suit and interest at14% from the date of filing the suit.

Orders accordingly.

A. MBOGHOLI MSAGHA

JUDGE

MOMBASA.30th June, 1995.