Sundowner Lodge Limited v Kenya Tourist Development Corporation (Civil Application Sup 19 of 2018) [2023] KECA 1131 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1131 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION SUP 19 OF 2018

HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA

SEPTEMBER 22, 2023

BETWEEN

SUNDOWNER LODGE LIMITED ..... APPLICANT

AND

KENYA TOURIST DEVELOPMENT CORPORATION ..... RESPONDENT

(An Application for leave to appeal to the Supreme Court against the judgment and order of the Court of Appeal at Nairobi (Ouko, Kiage & Murgor, JJ.A.) dated 28th September, 2018 in Civil Appeal 120 of 2017)

RULING

1. On 6th August, 2003 Sundowner Lodge Limited (the applicant), by a plaint dated 29th July, 2003 instituted HCCC. No. 481 of 2003 against the respondent in the High Court of Kenya at Nairobi claiming special and general damages for alleged breach of a lending contract between itself and the respondent. Its grievance was that the respondent unilaterally and without any lawful and/or reasonable justification withdrew a loan offer of Kshs.15 million to the applicant by a letter dated 18th January, 1999. The applicant claimed that it intended to utilize the loan to construct a two-star hotel.

2. In its statement of defence dated 15th September, 2003 filed in court on 17th September, 2003 the respondent maintained that the development of Sundowner Lodge at the lake Nakuru National Park on Plot No. 367, Nakuru Municipality, has never been approved as required. Therefore, the offer could not take effect due to the applicant's breach of fundamental requirements for the loan.

3. The High Court (Ogola, J), in a judgment dated 8th April, 2014 concluded that there was bad faith on the part of the respondent who unilaterally terminated the loan offer. The learned judge found the respondent guilty of breach of the contract between itself and the applicant and awarded the applicant Ksh. 153,000/= and Kshs.30,000,000/= being special and general damages respectfully.

4. Dissatisfied by the said judgment, the respondent appealed to this Court being Civil Appeal No. 120 of 2017 challenging the award of general damages. The applicant filed a cross-appeal praying for enhancement of the award. By a judgment delivered on 28th September, 2018 this Court set aside the award of Kshs.30 million general damages. The relevant part of the judgment states:

> "With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule, general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *Dharamshi v Karsan* (1974) EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so, it would be. See also *Securicor (K) v Benson David Onyango & Anor* (2008) eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs.30 million merely because he believed that the respondent "had suffered serious damages" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms, which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.
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> It is thus clear that other than for nominal damages – which really represent damages only in name, being in quantum quite negligible – what monies would have been recoverable would have been in the nature of special damages properly quantified, pleaded and proved which, in the event, the respondent laid before the trial but failed to prove."

5. Aggrieved by the above Judgement of this Court, the applicant filed a notice of appeal against the said judgment on 30th April, 2019 pursuant to leave granted to it by the Supreme Court vide a ruling delivered on 29th April, 2019.

6. By an application dated 12th October, 2018 the subject of this ruling, the applicant entreats this Court to grant it leave to appeal to Supreme Court against the said judgment and orders dated 28th September, 2018. It also prays that this Court issues a certificate certifying the impugned decision to be a matter of general public importance. Lastly, the applicant prays for costs of the application to be provided for. The application is brought under Article 163(4) of *the Constitution*.

7. The motion is supported by grounds on its body and the supporting affidavit of Samuel Warugu Kimotho sworn on 12th October, 2018 together with annexures thereto. Though counsel for the respondent indicated that the respondent had filed a replying affidavit sworn and filed on 18th May, 2023 the same is not available in the court's e-filling system. The motion was canvassed through the parties' pleadings, written submissions and legal authorities relied upon by counsel in support of their respective positions. During the virtual hearing of the application on 30th May, 2023 learned counsel Mr. Manyara, appeared for the applicant, while Mr. Okole held brief for Mr. Musyoka for the respondent.

8. The core ground urged by the applicant is that the impugned judgment will affect the general public because it decreed that general damages are not payable for breach of contracts as a matter of law in Kenya. The applicant maintains that the impugned judgment has caused confusion in legal practice and it has misinterpreted previous decisions of this Court, which has resulted in conflicting decisions by this Court, and the High Court is split on this Court's decision on award of damages in contracts. The applicant maintains that the decisions relied on by this Court particularly the East African Court of Appeal decision in *Dharamshi v Karsan* (1974) EA 41 and this Court's decision in Securicor (K) v Benson David Onyango & Anor (2008) eKLR do not support the position that damages are not payable for breach of contract. Conversely, the applicant argues that the said decisions appreciate the courts' discretion to award damages. The applicant relied on *Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya* (2015) eKLR where this Court reduced an award of Kshs. 10,000,000/= to Kshs.500,000/= for breach of contract and the High Court decision in *Speedwall Building Technologies Limited v County Government of Migor*i (2016) eKLR which awarded general damages for breach of contract.

9. To persuade this Court that its intended appeal raises a matter of general public importance, the applicant cited the Supreme Court's finding in *William Olotch v Pan Africa Insurance Company* (2020) eKLR where the principles to be considered by a court were succinctly summarized.

10. The applicant argued that its intended appeal raises substantial points of law whose determination will go beyond its case, since it wants the position of law to be settled on whether general damages are recoverable for breach of contract in Kenya. The applicant argued that one bench of the Court of Appeal has said that general damages are not recoverable for breach of contract and another bench has held that they are recoverable in exceptional circumstances. The applicant submitted that in the High Court, the situation is worse because the High Court leans on decisions cited before it, hence, there is a need for the Supreme Court to settle the position.

11. On whether such question of law arose in this Court or the court below, and whether it was the subject of judicial determination, the applicant argued that whereas, in the High Court the applicant was awarded Kshs.30,000,000/=, the award was reversed on the ground that damages are not recoverable for breach of contract. It is the applicant's case that the issue raised herein formed part of the judicial determination in the courts below.

12. The applicant maintained that there are conflicting precedents in the Court of Appeal, the High Court and the subordinate courts. Depending on which decision a party quotes, the lower courts tend to agree. Further, whereas some decisions are specific on the issue of damages not being recoverable for breach of contract, others hold that it is a general rule with exceptions. Further, some decisions hold that they are not recoverable in addition to quantifiable damages.

13. It is also the applicant's case that if the position is as advanced in the Dharamshi case, then there arise other drawbacks, which need to be settled with finality by the Supreme Court. These are whether when a party who has demonstrated exceptions to the general rule can be awarded both general and quantified damages. The applicant argued that the Dharamshi Case and the Securicor case cited before this Court in the impugned decisions held that as a general rule general damages are not recoverable in cases of alleged breach of contract. It argued that it had proved the exceptions to the general rule

and relied on *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* (2016) eKLR which held that:

> " The appellant having conceded to the general proposition regarding the award of damages for breach of contract, it was incumbent upon it to lead evidence so as to bring the respondent's conduct into the exceptions it alluded to above."

14. Also, the applicant cited this Court's decision in *Delilah Kerubo Otiso v Ramesh Chander Ndingra* (2018) eKLR which held that:

> " The issue then becomes whether the judge was justified in the award of general damages. As can be gleaned from the above extract, the Judge was alive to the issues of voiding the agreement for want of consent of the land control board; that ordinarily breaches of contract do not attract general damages; and that there were exceptions to that general rule. We entertain no doubts that the Judge was right in his conclusions."

15. It is the applicant's case that there is a confusion among judges on the issue of award of general damages in breach of contract cases since some of the judges are liberal in their interpretation of the applicable principles guiding award of damages in contracts such as in *Ethiopian Airlines Ltd v Daniel Tanui & 11 Others* (2019) eKLR, where the High Court rejected the position that in Kenya no damages are awardable for breach of contract, while other judges are now applying the impugned judgment in a straightjacket manner as the High Court did in G N Macharia (*Gichuhi Ndiragu Macahria v Barclays Bank of Kenya* (2019) eKLR, which held:

> " The defendant was correct in its submissions general damages are not recoverable for a claim in breach of contract. This is what the Court of Appeal stated in the case of *Kenya Tourist Development Corporation v Sundowner Lodge Limited* (2018) eKLR."

16. The applicant urged that the determination of the intended appeal cuts across the socio-economic demographic and will have a huge impact on the jurisprudence on award of general damages in breach of contract cases. Lastly, it submitted that the application meets the threshold for certification for leave to appeal to the Supreme Court.

17. The respondent through its counsel, Mr. Okole maintained that this Court restated the general rule as established in the previous decisions of the Court, such as Dharamshi v Karsan (*supra*); *Provincial Insurance Co. EA Ltd v Mordechai Mwanga Nandwa* 1995 – 1998) 2 EA 289; *Joseph Urigadi Kedeva v Ebby Kangishal Kavai Kisumu* Civil Appeal No.239 of 1997 (UR); and Securicor Courier (K) Ltd v Benson David Onyango & Another (2008) eKLR. Nevertheless, the said general rule, like all other general propositions and principles, has exceptions as was held by this Court in Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited (*supra*) and *Delilah Kerubo Otiso v Ramesh Chander Ndingra* (2018) eKLR. Therefore, there is no confusion brought by the decision of this Court nor are there conflicting decisions from the courts since this Court did not rule out exceptions to the general proposition regarding the award of damages for breach of contract.

18. It is also the respondent's submission that from the pleadings, the applicant failed to plead and establish that the conduct of the respondent fell within the exceptions. For example, it was not established that the respondents conduct was oppressive, insolent, highhanded, outrageous or vindictive. Further, such questions never arose for determination in both the High Court and in this Court. The respondent cited *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others* (2015) eKLR where the Supreme Court declined to certify a matter as one involving issues of general public importance.

19. In conclusion, the respondent argued that the intended appeal would, at best, be an academic exercise dealing with hypothetical issues, which would have no bearing on the dispute between the parties. This is because the applicant, under disguise of the intended appeal being one involving matters of general public importance, intends to bring up entirely new matters for litigation before the Supreme Court, which is not permissible.

20. We have considered the application, the submissions by counsel for both parties and the case law cited. The sole issue for determination is whether the applicant has demonstrated that its case involves a matter of general public importance to merit certification by this Court to appeal to the Supreme Court under Article 163(4) (b) of *the Constitution*. Under the said Article, appeals lie from the Court of Appeal to the Supreme Court under the following circumstances: (a) as of right in any case involving the interpretation or application of *the Constitution* and (b) in any other case in which the Supreme Court or the Court of Appeal certifies that a matter of general public importance is involved. However, the Supreme Court may review certification under paragraph (b) and affirm, vary or overturn it.

21. The Supreme Court and this Court have consistently held that in applications for certification under Article 163(4) (b) of *the Constitution*, only exceptional cases, which raise cardinal issues of law or of jurisprudential moment will deserve the attention of the Supreme Court. (See *Peter Oduor Ngoge v Hon. Francis Ole Kaparo & 5 Others*, SC Petition No. 2 of 2012 [2012] eKLR and *Koinange Investment and Development Company Limited v Ian Kahiu Ngethe & 3 others* (Being sued as the personal representatives of the Estate of Robert Nelson Ngethe (Deceased) (2019) eKLR. The reason behind the above approach is that the Supreme Court was never intended to serve as an additional tier for all and sundry appeals from this Court. Conversely, the requirement for certification was intended to serve as a filtering process to ensure that only appeals with elements of general public importance engaged the Supreme Court, whose role may not be relegated to that of correcting errors in the application of settled law, even where they are shown to exist.

22. The onus to satisfy the court that such matter or matters of general public importance exist rests on the applicant. *The Constitution* does not define "a matter of general public importance" nor does the *Supreme Court Act* nor rules made thereunder. In our view, the omission to define the said phrase may have been deliberate considering that matters of general public importance may be limited in time and scope depending on varying circumstances over a period of time. However, in *Hermanns Phillipus Steyn v Giovanni Gnecchi-Ruscone* (2013) eKLR the Supreme Court held:

> "Before this Court 'a matter of general public importance' warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: it impacts and consequences are substantial, broad based, transcending the litigation- interests of the parties, and bearing upon the public interest".

23. Public interest was defined by this Court in *Kenya Civil Aviation Authority v African Commuter Service* (2015) eKLR, as follows:

> "Public interest, although not susceptible of precise definition, has certain characteristics which are inherent in the term itself. As stated in *R (Corner House Research) vs. Director of SFO* [2008] 4 All ER 927
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> > "it must mean something of importance to the public as a whole rather than just to a private individual." The Black's Law Dictionary defines public interest as: "the general welfare of the public that warrants recognition and protection, something

in which the public as a whole has stakes, especially that justifies Government regulation."

24. The question is whether the applicant has satisfied this Court that this matter is one of general public importance to justify certification to appeal to the Apex Court. In *Town Council of Awendo v Nelson Oduor Onyango & 13 Others* (2015) eKLR the Supreme Court gave guidance in dealing with Article 163 (4) b as follows:

    i. for an intended appeal to be certified as one involving a "matter of general public importance," the intending appellant is to satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

    ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant is to demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

    iii. such question or questions of law is/are to have arisen in the Court or Courts below, and must have been the subject of judicial determination;

    iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

    v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of *the Constitution*;

    vi. the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance," which he or she attributes to the matter for which certification is sought;

    vii. determinations of fact in contests between parties are not, by and of themselves, a basis for granting certification for an appeal before the Supreme Court;

    viii. issues of law of repeated occurrence in the general course of litigation may, in proper context, become 'matters of general public importance', so as to be a basis of certification for appeal to the Supreme Court;

    ix. questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;

    x. questions of law that are destined to continually engage the workings of the judicial organs, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;

    xi. Questions with a bearing on the proper conduct of the administration of justice, may become 'matters of general public importance,' justifying certification for final appeal in the Supreme Court."

25. In order to demonstrate elements of general public importance, the applicant has adopted principles i, ii, iii, iv, vi, viii, ix, and x. as elucidated by this Court in the above decision. Specifically, the applicant states that:

    i. That the public will be affected by the declaration that general damages are not payable for breach of contract as a matter of law in Kenya.

    ii. That the impugned decision has brought confusion in the legal practice and has misinterpreted previous decisions of this Court and its predecessor as there are now conflicting decisions from the same court. i.e. the lower courts and High Court are divided on this Court's decisions on the subject.

    iii. The decision is likely to fundamentally affect commercial transactions and contracts in general especially on compensation in cases of breach of contract.

26. We have carefully analyzed the impugned judgment, the principles laid down by the Apex Court in decided cases and this Court's decisions. The question is whether this Court held that general damages are not awardable for breach of contract cases. It is imperative to quote verbatim the relevant findings of this Court on the issue of the general damages awarded by the High Court, which were set aside by this Court. Here, we need to understand the reason why this Court set aside the award of Kshs.30,000,000/=. This Court stated as follows:

> "With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In Dharamshi v Karsan (1974) EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so, it would be. See also Securicor (K) v Benson David Onyango & Anor (2008) eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs.30 million merely because he believed that the respondent "had suffered serious damages" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.
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> Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent's claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages.
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> Other than the fact that there was no justification, and on proper appreciation of the law perhaps no jurisdiction, to grant general damages in a case such as was before him, we must also point out that even if such damages had been recoverable, it was a wholly erroneous approach on the part of the learned Judge to award some Kshs.30 million with absolutely no foundation. There was no authority cited on quantum, no discussion, no justification

> and no comparable that would have led to that sum. Essentially, as Mr. Musyoka complains, the learned Judge whimsically and capriciously imposed that figure, literally plucking it out of the air. That cannot be a proper way to arrive at damages because it is a judicial exercise not an oracular pronouncement. The sum, even were it awardable would have been, with respect, impossible to comprehend, less still defend.
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> In view of our analysis, it is plain that the appeal succeeds and the award of Kshs.30 million in damages is accordingly set aside. Consequently, and logically, the cross appeal for enhancement fails and is dismissed."

27. Notably, from the foregoing excerpt, this Court differed with the learned judge's finding that the court has a large and wide discretion in awarding general damages in cases of breach of contract. A reading of the judgment shows that this Court appreciated that as a general rule, damages are not awardable in breach of contract cases. It is also clear that the main reason why the award was set aside was that this Court was categorical that even if the general damages were recoverable, it was erroneous for the learned judge to award Kshs.30,000,000/= with absolutely no foundation since there was no authority cited on quantum, no discussion, no justification and no comparable that would have led to that sum.

28. We also note that the issue whether general damages for breach of contract, where quantifiable, are not allowed since the same would amount to duplication, was never urged in the High Court and neither was the same urged in this Court.

29. The jurisdiction of the Supreme Court under Article 163(4) (b) is not a jurisdiction to be invoked merely for the purpose of rectifying errors. Nor is it a jurisdiction to be invoked merely for the determination of contested facts between the parties. (See *Malcolm Bell v Daniel Toroitich Arap Moi & Another*, SC App No. 1 of 2013).

30. We are not satisfied that there is any cardinal issue of law or an issue of great jurisprudential moment at stake. On the contrary, we find that there is no confusion in the legal practice as this Court did not misinterpret previous decisions of the court which is that as a general rule, general damages are not awardable for breach of contract except in exceptional circumstances, which have to be justified. This is an issue that is well settled and beyond contestation. It does not need to be interpreted by the Supreme Court. We are guided by the dictum in Malcolm Bell v Hon. Daniel Toroitich arap Moi & Another (*supra*) where the Supreme Court (at paragraph 46,) - expressed itself thus:

> " In principle, this Court believes these Court of Appeal decisions should be aligned, to create consistency ... The Court of Appeal itself has the competence to deal with this question in its subsequent decisions. As stated in peter Ngoge vs Ole Kaparo, this Court ought to safeguard the respective jurisdictions of other courts in the hierarchy of courts in Kenya, and should resist the temptation to encroach on their proper spheres of work."

31. As was underscored by the Supreme Court in *Peter Oduor Ngoge v Hon. Francis Ole Kaparo & 5 Others* Supreme Court Petition No. 2 of 2012 (2012) eKLR, before invoking its jurisdiction, the guiding principle to be borne in mind is that the chain of courts in the constitutional set-up, running up to the Court of Appeal,have the professional competence and proper safety designs to resolve all matters turning on the technical complexity of the law.

32. In conclusion, upon evaluating the grounds cited in support of the plea for certification, we find and hold that the applicant has not discharged the burden of satisfying that his intended appeal to the Supreme Court raises matters of general public importance within the meaning of Article 163(4) (b)

of *the Constitution*. Accordingly, the applicant's notice of motion dated 12th October, 2018 is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR