IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, KIAGE & MURGOR JJ.A)

CIVIL APPEAL NO. 120 OF 2017

BETWEEN

KENYA TOURIST DEVELOPMENT CORPORATION.....APPELLANT

AND

SUNDOWNER LODGE LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court at Nairobi (E.K. Ogola, J.) dated 18th April, 2014

in

H.C.C.C. No. 481 of 2003)

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JUDGMENT OF THE COURT

The sole issue that falls for our determination in this appeal is whether, as contended by the appellant, the High Court (E.K. Ogola, J.) erred in awarding Kshs. 30 million general damages to the respondent for breach of contract or, as the latter contends in its cross-appeal, such damages were payable but ought to have been a lot higher.

The dispute between the parties was triggered by the appellant's unilateral withdrawal on 18th January 1999 of a letter of offer dated 19th April 1996 by which it had agreed to grant the respondent a Kshs. 15 million loan for the construction of a Two-Star Hotel in Nakuru to be eponymously named. Whereas the respondent pleaded and maintained that the withdrawal was unwarranted and amounted to a breach of contract which caused it to suffer much loss and damage in the form of opportunity costs and loss of business profits hence the claim for a total of **Kshs. 421,760,000,** the appellant contended that the respondent brought that eventuality upon itself for having been in fundamental breach of the requirements preceding the confirmation of the loan. Those breaches included provision of a security issued by a stranger, who never consented to the charge of its property; failing to provide architectural drawings; failing to accept the offer within the stipulated time; and failing to pay committal fees. The appellant also contended that instead of putting up the promised 72-room Sundowner Lodge as per the plans and designs it availed, the respondent built a different establishment, to wit a ***Nyama Choma*** **Ranch**, and on a property other than the one on which the lodge was to be developed.

The suit eventually proceeded for hearing before the learned Judge who, by his impugned judgment rendered on 8th April 2014, substantively dismissed the main prayer for **Kshs. 421,760,000** which he treated as special damages pleaded and particularized as;

(a) Opportunity cost - Kshs. 292,656,000.

(b) Loss of business profits from 1999 to 2003 – Kshs. 128,604,000.

The learned Judge expressed the opinion that the sum having been special damages needed to be strictly proved. Moreover, so large a sum

could not be based on guess work or inconclusive or conflicting reports as was the case before him. He was, however, satisfied that the respondent had paid some Kshs. 153,000 as appraisal and application fees, which were duly receipted and he granted that sum.

The learned Judge then proceeded, despite the dismissal of the main claim, to find that before the respondent filed the matter in court, it "*had suffered serious damages*" (sic) and awarded it Kshs. 30 million, which is the subject of the contending appeal and cross-appeal.

The appellant's memorandum of appeal raises some eight grounds of appeal but the sole substantive complaint therein is that the learned Judge erred in awarding the said sum, which had neither been pleaded nor proved, without legal basis and in a misdirection that he had discretion to award general damages contrary to settled law that the same could not be awarded for alleged breach of contract. The cross appeal, on the other hand, faults the learned Judge in four grounds all to the effect that the award was inadequate to compensate the respondent for the apparent huge financial loss it suffered, and for not including punitive damages.

Both parties filed written submissions which were highlighted before us in plenary hearing. Going first, **Mr. Musyoka**, learned counsel for the appellant contended that in making a discretionary award of Kshs. 30 million as general damages, the learned Judge improperly exercised his discretion and committed an error of law entitling this Court to interfere with such discretion as damages do not lie for breach of contract. He cited ***MBOGO vs. SHAH*** **[1968] EA 93.**

Counsel faulted the learned Judge for awarding general damages for breach of contract against the weight of authorities and contended that he erroneously misapprehended if this Court's decision in ***JOHN WAMBUGU NJOROGE vs. KENYA COMMERCIAL BANK LTD*** **Kisumu Civil Appeal No. 179 of 1972** an authority for grant of damages in a case involving failure to advance a promised loan since what was awarded therein was not general damages at large, but specified pleaded special damages. He continued that in this case the learned Judge gave neither explanation nor had a basis for the award of Kshs. 30 million which could only have been awarded capriciously or whimsically.

Regarding the cross appeal, **Mr. Musyoka** submitted that the learned Judge was correct to find that the sum of Kshs. 461 million sought in the plaint was special damages and that the same was not proved. He went on to assert that even though the loan applied for was Kshs. 15 million and the respondent qualified for Kshs. 14 million in 1996, it did not request for its disbursement until October 1998 and the failure to disburse it could not justify an award of Kshs. 30 million as damages which he termed capricious and whimsical and amounted to an unjust enrichment of the respondent. This was especially so because the respondent was able to complete the project notwithstanding the non-issuance of the loan and so without having to borrow funds from elsewhere. It therefore suffered no prejudice and the cross appeal for enhancement ought to be dismissed.

On his part **Mr. Oyugi,** the respondents' learned counsel argued that the learned Judge found that the breach of contract was actuated by malice and that "*as a result the project had to be abandoned."* The respondent's complaint was therefore that the learned Judge "should have multiplied the loan figure [of Kshs. 30 million] by ten times" and he urged us to enhance the sum accordingly. We were unable to find the basis for counsel's choice of the multiplier of ten. He prayed for dismissal of the appeal and that the cross appeal be allowed.

In his reply, Mr. Musyoka posited that establishing liability for breach of contract is not enough and the respondent needed to as well establish quantum. Compensation must be based on loss actually suffered and demonstrated and, in counsel's view, this had not been proved in what was merely a lender-borrower transaction.

We have given due consideration to those submissions, the authorities cited before us and the entire record of appeal in keeping with our duty as a first appellate court to re-evaluate and reassess the entire evidence with a view to arriving at our own inferences of fact and independent conclusions thereon. See ***ABOK JAMES ODERA T/A A.J ODERA & ASSOCIATES vs. JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR; MWANA SOKONI vs. KENYA BUS SERVICES LTD [1985]*** **931**. We are mindful that we do not have the advantage the trial court had of hearing and observing the witnesses as they testified and are therefore generally slow to disturb findings of fact arrived at, to which we pay due respect. We also pay some deference to decisions made in exercise of discretion but this is not say we follow them slavishly. Where there is a basis for upsetting such decisions we shall do so and that would be the case if the findings in question are based on no evidence, or a misapprehension of the evidence; a consideration of irrelevant matters of a failure to consider what ought to have been considered; or if the Judge is shown demonstrably to have acted on wrong principles in reaching a particular finding of fact or conclusion of law or if the decision is generally perverse and unsupportable.

As we have indicated, it is common ground that the issue for determination here is the legality of the award of damages, and a corollary of which, and depending on our finding of the main issue, the propriety of the sum of Kshs. 30 million. As far as the principles governing the award of damages go, it seems clear to us that the learned Judge was well alive to them and he cannot be faulted for reasoning thus at paragraph 108 of his judgment;

> ***"108. The plaintiff has produced very good authorities and has impressed the court and convinced me that they are entitled to damages. As was stated VICTORIA LAUNDRY (WINDSOR) LTD vs. NEMAN INDUSTRIES LTD; COULSON & CO. LTD (THIRD PARTIES) [1949] 2KB 528,***

'It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position so far as money can so as if his rights had been observed.'

It is therefore this Court?s conviction that the defendant is liable to compensate the plaintiff for the loss and damages suffered when the defendant unilaterally terminated the letter of financial offer, The defendant?s action was actuated by sheer malice and there was no legal justification for that action."

The learned Judge went on to find that the respondent "suffered huge fundamental loss and an opportunity to complete and operate its intended business after completion." He was, however, confronted by a difficulty of the respondents' own making which he captured in his analysis as fallows and is worthy of reproduction *in extenso;*

"111. However, the only problem this Court has is how to measure the said damages. The plaintiff has claimed special damages of Kshs. 421,760.00. This is not a small sum of money. Moreover, the requirement of the law is that special damages must be specifically pleaded and strictly proved.

112. The first limb of the special damages is the opportunity cost based on the equity at Kshs. 292,656,000/=. I cannot place my eyes on such a figure either in the feasibility study or in the report by PW1 (pages 75 to 84 of the joint list of documents). The plaintiff has not given any evidence to show how it arrived at this figure.

113. The second limb is the loss of business profits from 1999 to 2003 at 128,604,000/=. This figure is not to be found anywhere in the report of PW1. However, at page 81 of the joint list of documents PW1 estimated loss of revenue from 1998 to 2003 at Kshs. 29,940,494. It is not in doubt that the projections used in arriving at the said figure were derived from the feasibility study of J.P.N. Karara & Co. The said report is not credible as it turns out that the projections therein were based on a four star hotel and not a two star hotel.

114. Pursuant to the foregoing paragraphs of this judgment I find absolutely no proof for the said special damages that were suffered. As I have stated at paragraphs 100, 101 and 102 of this judgment, the said damages as based on the conflicting feasibility study report which even though formed part of the agreed bundle of documents herein, was conflicting and in contradiction.

115. A claim as big as this cannot be based on guess work or on inconclusive or conflicting reports. Such a claim must be based on an authentic report whose makers must be called to confirm or justify the claim if the sum is not agreed on. The report must be clear on issues it is addressing. In the instance case, the report is based on the rate of a four star hotel while the hotel under construction was a two star hotel. This is not a matter of guesswork. I am therefore unable to know the exact amount of loss in terms of special damages, for the plaintiff has failed to prove it. This limb of the claim must fail."

We think that the learned Judge was correct to approach the sums claimed as quantified special damages properly pleaded. The problem, however, lay in the fact that the evidence tendered, such as there was, either failed to touch on the specific sums pleaded or was contradictory, inconclusive or speculative. This fell way short of the requirement not only of specific pleading but, also, indeed the more, strict proof. See ***BANQUE INDOSUEZ vs. DJ LOWE & CO. LTD [2006] 2KLR 208***. ***HAHN vs. SINGH [1985] KLR 716***. That proof having lacked, the learned Judge was perfectly entitled to dismiss the huge claim and to grant only the satisfactorily proven amount of **Kshs. 153,000** paid as appraisal fees.

Instead of stopping there, however, the learned Judge took a decidedly curious path. Even after noting that general damages are not normally awarded in breach of contract cases, he expressed the view that ***"there are exceptional circumstances when general damages may be awarded [because] this Court has the discretion to award damages to the plaintiff for breach of contract. The measure and nature of damages are not restricted to special damages."*** Considering himself fortified by *Treatise in the Law of Contracts* 20th Edn to the effect that damages for breach of contract are compensation to the aggrieved party and a restitution of what he has lost by the breach; and by Halbury's Laws Of England; 4th Edition Vol. 12 on contracts to pay or lend money which states that damages under that head may be nominal or substantial according to the circumstances of each case which will determine the reasonable contemplation as to the loss; which is liable to result for the loss as well as this Court's decision in ***JOHN WAMBUGU NJOROGE vs. KENYA COMMERCIAL BANK LIMITED*** (supra); the learned Judge proceeded to express himself thus;

"In the upshot, I am satisfied that the case before the Court is one in which the court may correctly exercise its discretion to award damages. Before the plaintiff filed this matter in court, the plaintiff had suffered serious damages. Taking into account the loan that was to be awarded to the plaintiff in 1996, I award the plaintiff the sum of Kshs. 30,000,000/= in damages."

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 vs. 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) vs. 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.

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. The claim was one under a contract to lend money, an executory contract the remedies for which available to the borrower are rendered by the learned authors of **CHITTY ON CONTRACTORS** 37th Edition Vol. II, Specific Contracts par 36-208 (p609) as follows;

> ***"If a person contracts to lend money, and then, in breach of contract, refuses or fails to advance the money, the borrower cannot sue for the money agreed to be loaned as a debt, for this would be tantamount to an order of specific enforcement, and such an order will not normally be granted for a contract of loan. But the borrower can claim damages for the failure to advance the money. The damages will very often be merely nominal, but if expense has been reasonably incurred in procuring the loan elsewhere, that expense is recoverable as special damage provided it was caused by the breach and was within the contemplation of the parties. If the borrower can only procure the loan from other sources at a higher rate of interest than that agreed under the contract, and this was reasonably foreseeable at the time when the contract was made, it seems that the borrower can recover the additional interest he will have to pay as damages from the lender. If the borrower is unable to raise the money from other sources at all, and he is consequently unable to enter into or complete some transaction for which the money is required, the lender may be liable for loss of profit on such a transaction or other consequential loss."***

We see in these sentiments no conflict with that which was expressed by Dr. Harvey McGregor the learned author of McGregor on Damages 18th Edn in the passage at par 25-028 (p982) cited by counsel for the respondent;

> ***"BREACH BY LENDER***
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> ***In contracts for the loan of money the normal measure of damages for the lender?s failure to provide the money is the amount required by the borrower to go into the market and effect a substitute loan for himself less the amount that the contractual loan had required. It has been said Day J. in Manchester & Oldham Bank v Cook that „nominal damages … are usually given in the case of breach of contract to lend money, for the reason that usually if a man cannot get money in one quarter he can in another.? Thus in South African Territories v Wallington, since the claimant gave no evidence showing a loss beyond this, nominal damages were awarded. But the Court of Appeal recognized that the damages could be substantial for failure to provide the loan. Chitty L.J. said that „the damages in such a case may be large or small, or merely nominal, according to the circumstances.? They will be nominal if the claimant, as a man of good credit, can readily obtain a loan elsewhere, but „if he cannot obtain the money except at a higher rate of interest, or for a shorter term of years, or upon other more onerous terms, the damages would be greater and might be very substantial. The burden of providing the amount of the loss sustained rests on the plaintiff.?"***

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.

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.

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.

As regards costs, and in consideration of the full circumstances of this case, we order that each party shall bear its own costs of this appeal.

Dated and delivered at Nairobi this 28th day of September, 2018.

W. OUKO

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR