REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

CIVIL APPEAL 80 OF 2009

SAFE RENTALS LIMITED………..………………........……...……APPELLANT

AND

LEISURE LODGE LIMITED T/A

LEISURE LODGE HOTEL CLUB CASINO……………...……...RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (**Hon. Mr. Justice J. W. Mwera**) dated 2nd November, 2006*

in

H.C.C.C. NO. 89 OF 1995)

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JUDGMENT OF THE COURT

1. This is an appeal arising from a judgment delivered by **Mwera J.** in a suit filed by **Safe Rentals Limited** who is now the appellant. The suit was against **Leisure Lodge Limited t/a Leisure Lodge Hotel Club Casino** who is now the respondent. In the suit the appellant was seeking judgment against the respondent for special damages of Kshs.8,299,384/- arising from breach of an agreement entered into between the appellant and the respondent. The agreement related to installation of metal safety deposit boxes (safes), at the respondent's hotel by the appellant; the rental of the safety deposit boxes to individual guests at the respondent's hotel by the respondent, on behalf of the appellant; and the payment of a commission to the respondent by the appellant. The agreement was to last for a period of 5 years, but was terminated after barely a year.

2. In an amended defence filed on 19th November, 2004, the respondent admitted having entered into an agreement with the appellant, but denied having breached or repudiated the agreement. In the alternative, the respondent contended that if the agreement was repudiated, then the appellant did not accept the repudiation within a reasonable time. The respondent further contended that the market demand for safes was greater than the appellant's ability to supply the market, and therefore, the appellant should be only entitled to damages for consequential loss, up to the time when the appellant ought to have succeeded in hiring the safes to a new hirer. The respondent further alleged that the safes were not reasonably fit for the purpose for which they were installed; that there was an implied term in the

agreement that the installation of the safes would not hurt or in any way injure the defendant's business; that the performance of the agreement became impossible and the contract was frustrated when the respondent's overseas tour operators required that all their clients be provided with safes free of charge. In the alternative, the respondent pleaded that even if the appellant suffered any loss or damage, the respondent was not liable to compensate the appellant for special damages as claimed.

3. During the hearing of the suit, the appellant called four witnesses. These were; **Ferdinand Tabu Kadzagamba** (an employee of the appellant), **Lazarus Kahindi Kenga** and **Julius Katana Chengo** (both former employees of the appellant), and **Franco Esposito**, a Director of the appellant. The respondent called one witness **John Mutua**, who described himself as Chief Executive of Leisure Lodge.

4. In a nutshell, the evidence adduced by the appellant's witnesses was as follows: **Esposito** and his wife are directors of the appellant company which is involved in the business of installation and hire of safes in the South Coast of Mombasa and Malindi. Initially the appellant had entered into a contract with the respondent for supply and installation of unit safes, for rental of the safes to hotel guests for one year. The contract was thereafter renewed up to 6th July 1994, when the parties entered into another agreement which was to last for a period of five years. About a year later, by a letter dated 27th July 1995, the respondent wrote to the appellant informing it, that its Board of Directors had decided to purchase and install safes in all its hotel rooms and club, in accordance with the international standards; that the safes were due to be delivered by the end of October 1995; and that the appellant should make arrangements to remove their safes from the respondent's establishment. The appellant considered the respondent's action to be a breach of contract, and protested through their advocates. The appellant left the safes at the respondent's premises but continued making losses until June 1996.

5. Sometime in the beginning of July, 1996 the appellant removed the safes from the respondent's premises and stored them at their offices in Malindi. The appellant maintained that the action of the respondent was a breach of the contract, in consequence of which the appellant has suffered loss and damage. This was because the appellant's revenue from the hire of the safes fell drastically between November, 1995 and June 1996. The safes were specifically manufactured by the appellant for the respondent's lodge, by specifications given by the respondent. After removing the safes, the appellant was unable to rent them out to other hotels, as other hotels already had their own safes. The appellant denied the respondent's allegations that there were thefts which occurred from the safes installed in their guest rooms by the appellant. The appellant maintained that there was an allegation made but there was no evidence of any break-in or forced entry to the safe, but that the guest had apparently left the keys to the safe accessible to room boys. The appellant maintained that although the appellant kept a key to the safe, the respondents are the ones who had the key to the hotel rooms. The appellant produced a bundle of documents showing the income from the hotel and the club from May 1994 to May 1995, showing that the rental of safes was good, and also receipts and income from the club up to July 1996 showing that the income drastically fell.

6. For the respondent, **John Mutua** testified that he took over as Chief Executive in February, 2001. The transactions relating to the safe rentals, was done by one **Mr. Kuckenberg**, who was the General Manager of the lodge until 1995/1996 when he retired. **Mutua** was however able to trace the records relating to the transaction and this was the source of his evidence. He conceded that there was an agreement between the appellant and the respondent regarding the installation and rental of safes; that there was a letter dated 7th April, 1995 from the Leisure Lodge Club Manager complaining about some cheques having been removed from a safe; that the safes were removed in 1996 when the respondent installed safes with combination locks in the club and hotel rooms; that the installation of safes was in accordance with international standards, for service in a five-star establishment. The witness maintained that he did not trace any document regarding the renting of the respondent's safes to hotel guests; that there were no records to show that the respondent asked the appellant to install safes of a specific type, or even to take over the safes which the appellant had installed; and that the safes installed by the appellant were outdated.

7. Written submissions were duly filed by each of the party's counsel, in which each counsel urged the court to find in favour of their client. In his judgment, the trial Judge found that there was an agreement

entered into between the appellant and the respondent providing for installation and maintenance of safes at the respondent's premises; that clause 5 of the agreement provided for termination; that the agreement provided for a five year term which could be terminated by the respondent, giving a month's notice before the expiry date; and that the agreement could also be terminated if either party committed a breach, provided that in the case of the respondent, he could give twenty eight days' notice of intention to terminate. The following extract of the judgment summarizes the conclusion of the trial Judge.

"In the present case the court has concluded that the defendant repudiated the agreement between the parties by breach and so brought it to an end. The plaintiff could not continue with its part of the agreement e.g. by keeping its safes at the lodge when no income was being earned. The lodge customers were glad to use the free service offered by the defendant.

On the other hand the court has found that although the plaintiff would be entitled to some measure of general damages in the circumstances, it did not plead accordingly. It opted to lay claim on special damages, a relief this court finds was not proved. All in all this court is left with a distinct impression that the plaintiff suffered loss and even if it did not seek relief generally for that, it is fair and just that it does not leave this forum empty handed. So on its own random approach to the issue, shs.300,000/- is award [sic] as general damages to the plaintiff."

8. The appellant is aggrieved by that judgment. By a memorandum of appeal dated 9th April, 2009, the appellant has raised fifteen grounds. In a nutshell, the grounds are: that the trial Judge erred in failing to award the appellant the sum of Kshs.8,299,384/- by way of special damages; that the Judge failed to appreciate the appropriate documentary evidence which adduced in support of the special damages; that the documents were audited accounts showing the revenue earned, and the expenses incurred in connection with all the appellant's business transactions including the installation of the safes for renting out; that the Judge failed to realize that the appellant was relying on actual receipts issued by it to the respondent, in respect of the rental income received, and letters forwarding the plaintiff's cheques to the respondent for commissions earned for renting the appellant's safes; and that the trial Judge erred in failing to award the appellant costs.

9. Hearing of the appeal proceeded exparte as there was no appearance for the respondent despite the respondent having been properly served with the hearing notice. **Mr. Nanji** learned counsel who appeared for the appellant highlighted the main issue in the appeal which he pointed out as: the failure by the trial Judge to allow the appellant's claim for special damages, which claim was properly pleaded and particularized; that the trial Judge failed to appreciate documentary evidence which was adduced in support of the special damages; that the evidence adduced established the income received by the appellant in regard to the rental of the safes, and the commission paid to the respondent by the appellant for the period 26th May, 1994 to 25th April, 1995 for the hotel; and the income and the commission paid to the respondent for the period 27th September, 1994 to 25th April 1995 in regard to the club; that a net average monthly profit of Kshs.120,112/- and Kshs.82,312/- for the hotel and club respectively, was established; that that average monthly profit was the basis of the appellant's claim for special damages as particularized in paragraph 7 of the plaint.

10. Mr. Nanji argued that once the plaintiff's bundle of documents was admitted in evidence by consent, the contents of the documents were admitted in evidence, and there was no need for the makers of the documents to be called to produce them; that the defence witness did not challenge the plaintiff's evidence relating to special damages, and therefore there was no basis for the trial Judge's rejection of the evidence; that the trial Judge was wrong in awarding general damages for breach of contract, which damages were in any case not sought by the appellant. **Mr. Nanji** therefore urged the Court to allow the appellant's claim for special damages, as well as interest at compound rates and costs of the suit.

11. We have carefully reconsidered and reevaluated the evidence as we are expected to do in this first appeal. We do note that the respondent has not cross appealed against the findings of the trial Judge. Therefore the finding of the trial Judge on liability remains unassailed as is the finding that the respondent was in breach of the agreement it entered into with the appellant in regard to the safes. Basically, the appeal is against the trial court's finding and award on damages. In this regard, before this Court can

interfere with the High Court's refusal to award any damages, both special and general it must be satisfied that the High Court proceeded on wrong principles or that it misapprehended the pleadings in some material respect and thereby arrived at an erroneous conclusion. (See **Great Lakes Transport Co. (Uganda) Limited vs. Kenya Revenue Authority [2009] KLR 720).**

12. The evidence which was adduced by the appellant in regard to special damages were statements of accounts showing the rental income received from the hotel and the club, and the commission which was paid to the defendant. These statements of accounts were supported by receipts issued by the respondent for amounts collected by it on behalf of the appellant, and letters addressed to the respondent forwarding cheques issued by the appellant in favour of the respondent in regard to amounts paid in respect of the commissions.

13. During the trial the appellant served a notice to produce on the respondent, requiring it to produce all documents in its possession relating to the matters in dispute, as admitted pursuant to discovery of document, under **Order X Rule 11** of the former Civil Procedure Rules. It was conceded by the defence witness that no documents were produced by the respondent. The defence witness conceded that he had no personal knowledge of the matters in issue, other than the records which he had come across. Surprisingly, the witness made no mention of the payments collected by the respondent on behalf of the appellant for the hire of the safes, or payments received by the respondent from the appellant as commissions for hire of the safes. In the plaint, the appellant specifically pleaded the special loss and gave particulars of the special loss in paragraph 7. This paragraph was responded to in paragraphs 8, and 9 of the amended defence which stated as follows:

"8. In reply to paragraphs 4, 5, 6, and 7 of the Plaint and the circumstances as pleaded, the defendant avers that the market demand for safes was greater than the plaintiff's ability to supply the market.

9. In the premises, the plaintiff is only entitled to damages for consequential loss at the contractual rate for the period of time between October 1995 and the time when the plaintiff ought to have succeeded by virtue of reasonable mitigation steps in hiring the safes to a new hirer."

14. It is noteworthy from the above paragraphs, that the respondent has not specificallydenied that the appellant suffered loss. To the contrary, the respondent concedes that the appellant is entitled to damages for consequential loss from October, 1995 subject to reasonable mitigation of its loss by hiring the safes to a new hirer. In light of this clear admission, the trial Judge was under a responsibility to make a finding on the specific loss alleged to have been suffered by the appellant, whether the appellant had a responsibility to mitigate the loss, and whether the appellant did actually mitigate the loss.

15. The appellant relied on a bundle of documents which the appellant's witness **Exposito,** described as accounts which he made for the period May 1994 to May 1995, and April 1994 to 1996, for the hotel and club respectively. The record prepared by the witness was supported by receipts which were duly issued to the respondent, for monies received from the respondent, as proceeds from the rental of the safes. The witness explained that the statements he prepared were in relation to all the appellant's transactions for the period in question, including transactions involving other establishments. The trial Judge was of the view that the statement of account was confusing, and that audited and certified accounts would have been more appropriate. While we do not disagree that audited and certified accounts would have been easier to understand, the evidence adduced by **Exposito** in regard to the summary of the gross income from the hotel and club, the commission paid and the net income, was acceptable.

16. We say this for the following reason. The appellant served the respondent with a notice to produce all documents and records relating to the safes, but it would appear that the respondent did not produce any document either in support or opposition to the appellant's evidence, although the respondent had filed a list of documents dated 27th November, 2002, admitting that the documents relied upon by the appellant were in its possession. The record prepared by **Exposit**o reflected all the payments which were received by the appellant from the respondent and receipted. The respondent did not deny having made those payments to the appellant, nor did the respondent deny having received the commissions. **Exposito** produced a summary of all the amounts the appellant received from the respondent's hotel and the

respondent's club. It is from this summary that the average net monthly income received from the hire of the safes emerged as Kshs.120,112/- for the hotel and Kshs.82,312/- for the club. We are satisfied that the trial Judge erred in rejecting this evidence as it was sufficient to establish the appellant's average special loss.

17. The appellant having established that the net average monthly loss of profit from the hire of safes was Kshs.120,112/- for the hotel, and Kshs.82,312/- for the club, the issue is, is the appellant entitled to recover the loss of profit for the period 27th September, 1995 to 25th August, 1999 (date of filing suit) as claimed? In this regard, we note that the agreement which was entered into between the appellant and the respondent in regard to the installation and hire of the safes was for a fixed term of 5 years. Clause 6 and 20 of this agreement are significant. They state as follows:

"6. This agreement may be terminated by either party if the other party shall commit any breach of the terms contained herein but the club upon this contingency must furnish the company with 28 days' notice in writing of its intention to do so.

20. Upon the termination of the agreement pursuant either to clause 5 or 6 hereof the company may without notice retake possession of the safes and may for that purpose by itself, its servants or agents without previous notice enter upon any land or premises on or in which the safes are situated."

18. It was established as a fact that the agreement was terminated before the expiry of the five-year term, by the breach committed by the respondent. As at 27th July, 1995, the appellant was put on notice that by end of October that year, the respondent would be installing its own safes. As observed by the trial Judge, it was implied in the respondent's notice that the appellant should make arrangements to remove its safes. Indeed clause 20 afore-stated, gave the appellant the power to retake possession of the safes. Nonetheless, the appellant did not retake possession of the safes, but left them in the respondent's premises for another one year. The question is, whether the appellant mitigated its losses arising from the respondent's breach.

19. The guiding principles of law in mitigation of losses was stated in **African Highland Produce Limited vs. John Kisorio, Civil Appeal No. 264 of 1999** (unreported) where this Court applying **Halsbury's Laws of England, 3rd edition Vol. 11 page 289** had this to say:

"The guiding principle of law in mitigation of losses is as follows: It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests, but also in those of the defendant…. The question, what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant."

20. In this case, the appellant claims special damages from 27th September, 1995 up to 28th August 1999, i.e. the unexpired period of the fixed term. It is not disputed that the appellant left the safes at the respondent's premises for a further one year after the respondent had installed its own safes. The appellant has not given any reasonable explanation as to why it did not act in accordance with clause 20 of the agreement until one year later. Secondly, the appellant has maintained that it was not able to hire out the safes to any other hotel as they already had safes and that the safes installed by the appellant were specifically made for the respondent's hotel and club. This evidence was not controverted. It is clear from the agreement that the safes remained the property of the appellant and therefore it was in the appellant's interest to mitigate its loss. By leaving the safes at the respondent's premises, the appellant failed to mitigate its loss. In the circumstances we would only allow the appellant special damages claim for a period of 24 months only, from 27th September 1995. Thus special damages are given as follows:

For the hotel: Kshs. 102,112 x 24 = Kshs. 2,450,688

For the Club: Kshs.82,312 x 24 = ***<u>Kshs. 1,975,488</u>***
Total: ***Kshs. <u>4,426,176/-</u>***

To this amount is to be deducted the sum of **Kshs.319,000/-** which was due to the respondent from the appellant, leaving a sum of **Kshs. 4,107,176/-.**

21. It is clear from the pleadings that the appellant was not claiming general damages. In **<u>Great Lakes Transport Co. (Uganda) Limited vs. Kenya Revenue Authority</u> [2009] KLR 720**, it was observed that the Court has no power to grant a relief to a party who has not specifically prayed for such relief. In this case, the appellant not having sought general damages, we concur with **Mr. Nanji** that the trial Judge erred in the awarding the appellant general damages.

22. Under **Section 27(1)** of the Civil Procedure Act, the award of costs is within the discretion of the trial Judge. However that discretion must be exercised judiciously so that, where the trial Judge decides not to award costs to a successful litigant, there must be good reason to support the exercise of such discretion. In this case, there was absolutely no reason given by the Judge for denying the appellant costs of the suit.

23. The upshot of the above is that we allow this appeal to the extent of setting aside the award of general damages; the order dismissing the appellant's claim for special damages and the order on costs. We substitute thereto an order awarding the appellant special damages of Kshs. 4,107,176/- together with costs and interest at court rates from the date of filing suit.

Dated and delivered at Mombasa on this 19th day of July, 2012.

E.M. GITHINJI
…………………………
JUDGE OF APPEAL

M. K. KOOME
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JUDGE OF APPEAL

H. M. OKWENGU
…………………………
JUDGE OF APPEAL

I certify that this is a true copy of the original

<u>DEPUTY REGISTRAR</u>