**IN THE COURT OF APPEAL OF TANZANIA**

**AT ZANZIBAR**

**(CORAM: OTHMAN, C.J.,KIMARO,J.A. And MUSSA,J.A.)**

**CIVIL APPEAL NO. 120 OF 2015**

**ARABIAN VENTURES ZANZIBAR LIMITED**
**t/a OCEAN PARADISE RESORT.....APPELLANT**

**VERSUS**

**1. MAX VILLAGE LIMITED**
**2. UARIDI (WARIDA) BEACH RESORT LIMITED**
**3. MASSIMILIANO BRAMUCCI.....RESPONDENTS**

**(Appeal from the Judgment and Decree of the High Court of Zanzibar at Vuga)**

**(Abraham Mwampashi,J.)**

**dated the 31st day of October, 2014**
**in**
**Civil Case No. 20 of 2011**

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## JUDGMENT OF THE COURT

9th & 14th December, 2015

**MUSSA, J. A.:**

In the High Court of Zanzibar, sitting at Vuga, the appellant instituted Civil Case No. 22 against the respondents and another. In the trial proceedings the respondents stood as, respectively, the first, second and fourth defendants, whereas their co-defendant, namely, We Can Tour T.O. Srl, who does not feature in this appeal, was the third defendant.

From the pleadings and proceedings below, it is common ground that the appellant is a limited company incorporated in Zanzibar, owning and operating a beach hotel resort situated at Pwani Mchangani, Zanzibar. Equally commonplace, is the detail about the third respondent being the Managing Director of the first respondent which is also a limited Company incorporated in Zanzibar. It was not disputed that the latter company also owns the second respondent, a beach Hotel resort which is similarly situated at Pwani Mchangani. The third defendant who did not enter appearance in the entire trial proceedings, was alleged to be a company incorporated in Italy.

The appellant's claim against the respondents was with respect to hotel rentals and services rendered to a group of thirty (30) visitors who were accommodated by the appellant, allegedly, at the instance of the third respondent. The allegation was that the third respondent requested the appellant to accommodate the visitors due to the fact that his hotel facility was not ready to provide the services. In the plaint, the appellant prayed for judgment and decree jointly and severally against the defendants as hereunder:-

"(a) *That the defendants should be ordered immediately jointly and severally pay to the Plaintiff US $ 18.000.00 (US Dollars Eighteen Thousands) for services rendered plus interest of Commercial Bank rate of 20% from the date the payment became due (01st January, 2010) to the date of satisfaction of the claim in full.*

*(b) That the defendants should be ordered immediately jointly and severally pay to the Plaintiff general damages to be assessed by the Court of not less than US $ 10.000 for breach of contract and for loss of use of the outstanding monies by the Plaintiff.*

*(c) That the defendants should be ordered immediately jointly and severally pay to the Plaintiff Punitive damages of US $ 15.000 due to Defendants conduct and lies to the Plaintiff officials which has interfered with the Plaintiff of circulation of money and liquidity."*

The respondents denied the claim and conversely prayed for the dismissal of the suit with costs. That being the position, the following issues were agreed for the determination by the trial court:-

1. *Whether the 1st and 2nd defendants hotel resort was not ready to accommodate guests and tourists by the second week of December, 2009 and whether the 1st and 2nd defendants in order not to be liable for breach of contract and not to pay the attending penalties and damages asked the plaintiff through the 4th defendant to accommodate some of their guests and tourists promising to pay the bill after getting paid by the 3rd defendant.*

2. *Whether the plaintiff gave accommodation for the groups of the defendants' guests from the 24th of December, 2009 to the 29th of December, 2009 at the request of the 2nd defendant through the 4th defendant.*

3. *Whether the plaintiff is entitled jointly and severally from the defendant to the*

*sum of US $ 18.000.00 for services rendered plus interest of commercial Bank rate of 20% from the date the payment became due to the date of satisfaction in full of the claim.*

4. *Whether the 1st, 2nd and 4th defendants at different material dates had received deposit payments from the 3rd defendant for services to be rendered and rendered by the plaintiff.*
5. *Whether the plaintiff is entitled to general damages to be assessed by the court but not less than US $ 10.000.00 for breach of contract and for loss of use of the outstanding monies by the plaintiff jointly and severally against the defendants.*
6. *Whether the plaintiff is entitled to punitive damages of US $ 15.000 due to the defendants conduct and lies to the plaintiff officials which has interfered with the plaintiffs circulation of money and liquidity jointly and severally from the defendants.*
7. *What are the reliefs' including costs.*

Having framed the issues, the appellant then featured four (4) witnesses to buttress its claim. The appellant's version was pioneered by the testimony of its General Manager, namely, Ms. Lakshai Moolray (PW1). Her account was to the effect that sometime in December, 2009 she received a call from a close friend, namely, Mr. Palumbo Domenico who, incidentally, also gave testimony as PW4. According to PW1, PW4 informed her that he was trying to assist the third respondent to secure accommodation for his visitors at the appellant's hotel. PW4 further informed PW1 that the third respondent could not accommodate the visitors at his facility on account of a faulty power generator. Evidence was further to the effect that after her conversation with PW4, PW1 directly discussed the matter with the third respondent, whereupon the latter's request was accepted. The agreed rates were raised against the second respondent's name and posted in two profoma invoices which were collectively adduced into evidence as exhibit P1.

It is pertinent to observe that, in his testimony, PW4 confirmed that he was the one who introduced the third respondent to the appellant's hotel staff. According to him, he did

so after the third respondent phoned him and personally requested to help him find a hotel to accommodate his guests because his own hotel could not be finished in time to be able to accommodate the guests. PW4 further informed the trial court that he later learnt that the third defendant made deposits to cover the hotel bills for the guests. The witness claimed that the third defendant actually sent him an e-mail and copies of cheque leafs to fortify the deposits. We, however, note that the referred email and cheque leafs were not ultimately adduced into evidence.

Against the foregoing backdrop, a group of thirty (30) visitors were received and accommodated by the appellant between the 24th and 29th December, 2009. The first group which was comprised of twenty eight (28) visitors stayed at the Hotel for five (5) nights at the total expense of USD16, 800.00, whereas the remaining two guests were booked for five nights at a total cost of USD 1,200.00. This detail about the bookings of the visitors was confirmed by the appellant's Assistant Finance Manager, namely, Mr. Satish Shetty (PW2).

Apart from replicating PW1's account with respect to the transaction with the third respondent and the arrival of the visitors, PW2 told the trial court that he personally transmitted by e-mail, the raised profoma invoices to the third respondent on the 23rd and 24th December, 2009. In response, the third respondent initially promised to settle the hotel bill but, after the visitors had departed, he became dilatory and; eventually, on the 25th January, 2010 he transmitted an e-mail to the Hotels' front office Manager advising that the profoma invoices should be redone and sent to him in the name of third defendant. That was done but there was no positive response from the third respondent who, instead, made a turn about and proposed to the appellant by e-mail to allow or authorize him to act as its agent in making follow ups for the payment of the bill from the third defendant. The e-mail excerpts between the third respondent and the appellant's Hotel staff were collectively adduced into evidence as exhibit P2. There then followed a wave of reminders and demand notices to the third respondent which were to no avail, hence the suit giving rise to this appeal.

The respondent's reply to the claim was comprised in the sole testimony of the third respondent, Mr. Massimiliano Bramuccu (DW1). The witness prefaced his testimony with details of the agreement with the third defendant of which, we think, it is best if we tape from his own telling:-

> *"In November 2009 I entered into a contract with we can Tour (3rd defendant) on behalf of Max Village Limited (1st Defendant). The contract was for rent of 34 rooms for three years. For this contract We Can Tour had to deposit 60,000 Euro. On the date we signed the contract we were paid 10,000 Euro (OPR 7). Then they sent us another 15,000 Euro (OPR 8). After that on 23/12/2009 they sent us another 45,000 Euro (OPR 9). Lastly they paid 20,000 Euro (OPR 10) but the cheque bounced because the company (We Can Tour) had collapsed. The total is 60,000 Euro, which is the contract sum".*

In the aftermath of the so-called collapse of the We Can Tour Company, more specifically, on the 22nd December, 2009

DW1 sent the company (We Can Tour) an e-mail informing her that he cannot receive any of their guests on account that the contract for the 60,000 Euro deposit was not fully performed. The witness completely disassociated himself with the guests who were booked at the appellant's hotel, just as he distanced his agreement with the We Can Tour Company from the transaction involving the guests. More particularly, he told the trial court:-

> *"The agreement by the plaintiff Hotel in regard to the guests was done between them and the officials of We Can Tour who were here in Zanzibar."*

DW1 further claimed that all he did, at a later stage, was to tell the appellant's staff to give him the invoice so as to assist them realize the outstanding bill but, as he made a follow up in Italy, he was confronted with the detail that the company ( We Can Tour) had actually gone bankrupt. Lastly, DW1 refuted the allegation that he could not entertain the guests because his hotel was unfinished. Rather, he reiterated his claim that he was not paid by the third defendant to accommodate the particular visitors who were, as he put it, none of his business. With his sole

account, DW1 rested the case on behalf of himself as well as the first and second respondents.

On the whole of the evidence, the learned trial Judge (Mwampashi, J) determined the matter in the light of the issues that were framed. It is noteworthy that the first issue had two limbs and the first limb which posed the question whether or not DW1's hotel facility was ready to accommodate the guests was answered in the affirmative. As regards the second limb as to whether or not the third respondent undertook to pay the bill after being redressed by the third defendant, the learned Judge found insufficient evidence and answered the issue in the negative.

Coming to the second issue, whilst accepting as an established fact that the appellant did actually accommodate thirty guests between the 24th to the 29th December, 2009 the judge found no good evidence showing that it was the third respondent who made the bookings.

The fourth issue posed the question as to whether or not the first, second and third respondents did receive deposits from the third defendant for the purpose of providing services to guests.

Whilst accepting that the respondents did actually receive deposits from the third defendant, the Judge found insufficient material to link the deposits with the services rendered by the appellant to the thirty guests. And, so the issue was answered in the negative.

Having considered and determined the first, second and fourth issues, the learned trial judge deemed it unnecessary to make any finding with respect to the remaining issues and, in the upshot, he found that the appellant's claim fell short and, accordingly, dismissed it with costs. To this verdict, the appellant is presently aggrieved upon a memorandum of appeal which is comprised of five (5) grounds, namely:-

> *"1. That the honourable judge erred in law and fact in holding that the Respondents hotel was ready to accommodate guests against the weight of the evidence adduced.*
>
> *2. That the honourable judge erred in law and fact in holding that there was no weighty evidence that the Third Respondent had booked and committed himself to pay for We Can Tour guests.*

3. *That the honourble judge erred in law and fact in not holding that the Appellant accommodated We Can Tour Srl guests on behalf of the Respondents herein.*

4. *That the honourable judge erred in l aw and fact in holding that the deposits made to the First and Second Respondent which was initially denied to have happened had no connections with payment for the guests accommodated to the Appellant hotel.*

5. *That generally speaking the decision is against the testimonies and the weight of the evidence adduced".*

At the hearing before us, the appellant was represented by Mr. Salim Mnkonje, learned Advocate, whereas the respondents had the services of Mr. Rajab Abdallah Rajab, also learned Advocate. Both counsels fully adopted their written submissions either in support or in resistance to the points raised in the memorandum of appeal. We propose to consider and determine the points raised in the memorandum of appeal in their serial

order and as we do so, we will also reflect on the counsels submissions, if need be. But, ahead of our consideration, we deem it instructive to remind that this is a first appeal to which we are entitled to treat the evidence to a fresh and exhaustive scrutiny and, where appropriate, to arrive at our own conclusions (see the case of **D. R. Pandya V Republic** [1957] EA 336).

The first aground of appeal has a bearing on the first limb of the first issue that was framed and determined by the trial court. If we may express from the very outset, in resolving this ground of appeal we need not venture so far as to determine whether or not the third respondent had a valid licence as seems to be the invitation from the appellant's submissions. The material presented before the trial court by the oral testimony of PW1 was to the effect that the third respondent's hotel facility was not ready to accommodate the quests. The third respondent refuted the claim and suggested that only a portion of the hotel was under construction. Nonetheless, to us, what lends assurance to PW1's telling is the confirmatory evidence of PW4. In this regard, it may be opportune to extract a paragraph from PW4's testimony:-

*" Mr. Bramucci (4th defendant) called me at one time asking me to help him find a hotel to accommodate his guests because his hotel could not be finished and ready in time the guests arrive in Zanzibar.I therefore, introduced the 4th defendant to the plaintiff's hotel."*

It is significant to note that counsel for the third respondent did not, at all, specifically cross-examine PW1 as well as PW4 to impeach their telling about the third respondent's hotel not being ready to accommodate the guests. To that extent, the appellant's evidence on that particular claim sailed through unshaken. Thus, upon our own re-evaluation, we are constrained to find, with respect, that there was unshaken evidence from the appellant that tended to establish, on a balance of probabilities that the third respondent's hotel facility was indeed, unable to accommodate the guests at the material times. In the result, we are minded to sustain the first ground of appeal.

The second ground of appeal relates to the second limb of the first framed issue which posed the question as to whether or not the third respondent undertook to pay the bill after being

redressed by the third respondent. On this issue, it is again PW4 who comes into picture with his account that upon being requested by the third respondent, he introduced him to the appellant's hotel staff so that the latter could assist to accommodate his (third respondent's) guests. Going by the testimony of PW1 and PW2 the third respondent then made a formal request and undertook to make good the hotel bills for the guests. That explains why the profoma invoices were initially raised against the name of the second respondent. The fact that the third respondent was involved throughout the transaction is partly reflected in his own testimony when he said:-

> *"Before the guests arrived on 24/12/2009 I with Mr. Palumbo (PW4) and the officers from We Can Tour met on 23/12/2009 to discuss how to accommodate the guests. I stuck to my guns that only after being paid that we would receive the guests. We however looked for hotels together and I called the plaintiff's hotel but it was Valentino from We Can Tour who went to talk to the hotel."*

As is patently obvious from the extract, the third respondent was throughout involved but during the trial he wittingly sought to shift the blame to the third defendant. But, going by the unchallenged evidence, the third respondent did not feature anyhow in the transaction between the appellant and the third defendant. As PW1 succinctly summed it up:-

> *"Our agreement was with the 2nd and 4th defendant. We did not have any agreement with the third defendant. It is suprising why the 4th defendant is trying to shift the blame to the 3rd defendant. This is not right. We had no contract with the 3rd defendant. Our contract was with the rest of the defendants."*

To this end, the third respondent's suggestion that the third defendant was involved in the transaction is unsubstantiated and, that being so, we would accept, as more weighty, the version as told by the appellant's witnesses to the effect that the third respondent, on his own, transacted the deal and undertook to pay for the bills. That would suffice to sustain the second ground of appeal, albeit, only to the extent that the respondents, through

the third respondent, committed themselves and not on behalf of the third defendant, to pay for the guests.

The third and fourth grounds of appeal are somehow interrelated. They also have a bearing on the fourth framed issue which posed the question as to whether or not the respondents received payments from the third defendant for services to be rendered by the plaintiff. As we address the issue, we cannot help a remark that it is unfortunate that the attempt to draw in the third defendant in this matter is just as well seemingly orchestrated by the appellant in her submissions. In this regard, we wish to clearly point out that the appellant was not privy to contract between the respondents and, on the whole, the trial evolved from the issue whether or not the respondents, as distinguished from the third defendant, were liable to the appellant. On this issue, the learned trial Judge made the following finding:-

> *"Though there is evidence from PW3 that the 3rd defendant did really pay some amount as deposit to the 1st and 2nd defendants there is no good evidence*

*from the plaintiff showing that the amount so paid had any connection to the services rendered by the plaintiff to the guests in question. The available evidence show (sic) that the amount was paid in connection with the contract between the 3rd defendant and the 1st defendant to which the plaintiff was not a party and as it has been pointed above the contract was breached by the 3rd defendant by failing to pay the agreed amount within the agreed period of time"*

We entirely subscribe to the foregoing finding by the trial Judge and, in the result, we so find, grounds Nos. 3 and 4 of the memorandum of appeal are bereft of merits.

In sum, having found that the respondents made a request and committed themselves to pay for the bills of the guests who were booked at the appellants hotel, we are fully satisfied that the appellant established her claim on a balance of probabilities. That would suffice to reverse the verdict of the trial court and we, accordingly, enter judgment in favour of the appellant with costs.

In the final event, we will grant the prayer (a) comprised in paragraph 18 for the principal sum of USD 18,000.00 save that the interest should be at the commercial rate as it was then prevailing at the material times. As for the general damages, upon our assessment, we grant them in the sum of USD 8,000.00. Having found that the appellant was not privy to the contract between the respondents and the third defendant, we do not deem it appropriate to grant the prayer for punitive damages. In fine, the appeal partly succeeds to the extent as indicated.

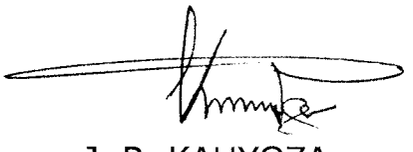
**DATED** at **ZANZIBAR** this 11th day of December,2015.

M. C. OTHMAN
**CHIEF JUSTICE**

N. P. KIMARO
**JUSTICE OF APPEAL**

K. M. MUSSA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



J. R. KAHYOZA
**REGISTRAR**
**COURT OF APPEAL**