**Siree v Lake Turkana El Molo Lodges Ltd**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 28 May 2000

**Case Number:** 229/98

**Before:** Omolo, Shah and Owuor JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Damages – Special damages – Loss of profits – Continuing damages – Failure to fully plead loss of*

*profits – Amendment of plaint required – Award of loss of profits by trial court under the head of general*

*damages – Whether the Respondent was entitled to recover special damages not pleaded.*

*[2] Public Office – Abuse of – Closure of lodge by government officer – Application for damages –*

*Whether the officer was empowered to close the lodge – Whether the government was liable for his*

*actions.*

**Editor’s Summary**

**JUDGMENT**

**SHAH JA:** A tourist business establishment known as Lake Turkana El Molo Lodges Ltd, the Respondent (hereinafter referred to as “the Lodge”) was ordered closed on the orders of one R R Siree, then, the District Officer Loiyangalani Division of Marsabit District of Kenya, the First Appellant (hereinafter referred to as “the DO”), on 2 April 1990, claimed that the closure was unlawful, wrongful, arbitrary and without any valid reason. The district officer effected the closure by his letter of 2 April 1990 addressed to the manager in charge of “Turkana El Molo Lodge”. The reasons given by the District Officer for the closure of the lodge were as follows:

“1 The proprietor (*sic*) has been evading (*sic*) to make payments to the Marsabit County Council: Since 1986 to date: Annual Land rent of KShs 3 000 Regulated Licenses Caterers License and Boarding Lodging License

2 The proprietor has also evaded the Marsabit Trade Licenses despite the fact that some trade officers brought the licenses to Loiyangalani. These licenses are: The Caterers B2 The Regulated Retail Trade B4 Boarding and lodging B5 and Liquor Licensing 3 A bove all, the Turkana El Molo lodges and Hotel is being operated as class ‘D’ one yet it is supposed to be a class ‘C’. For instance at this juncture, a big bottle (*sic*) of beer costs KShs 20= while an export costs KShs 15”.

The lodge responded to the said letter of the District Officer saying that it had sent money to Marsabit District Commissioner (for 1988 and 1989) and that it had all the necessary licenses, the 1990 ones being: 1 1 990 Regulated Retail License B4 No 683127; 2 C aterer’s License B2 No 72373; 3 M iscellaneous Occupation Boarding B5 No 173034 and Lodging license; 4 L iquor License and three other documents were to be delivered to the District Officer by the lawyers of the lodge. The lodge also showed that the Ministry of Tourism’s Hotel and Restaurant Authority had classified the lodge as class D Tourist lodge. The lodge responded promptly to the said letter of 2 April 1990 by its letter of 5 April 1990 and gave full details of its compliance for obtaining all the requisite licenses and payment of rates. The lodge also called upon the District Officer not to close a lodge such as the one here, arbitrarily and without notice as tourists would be inconvenienced. The reasons given for such wrongful closure, the lodge stated, were unlawful and vague and the District Officer went further by ordering the Police Officer Commanding Police Post, Loiyangalani, to ensure that the lodge remained closed until further notice. The district officer was not satisfied with the explanations given by the lodge and on 29 October 1990 wrote a letter to the District Commissioner Marsabit complaining that the lodge was not co-operative at all in some aspects. In particular he referred to the alleged non-contribution by the lodge to the many “Harambees” he had held saying that the lodge manager was sacked for contributing to the Presidential Bursary Fund. He also complained about the lodge not offering reduced accommodation charge to civil servants visiting the Division; that the lodge proprietor (*sic*) had formed a tendency of misusing the public and promoting “thuggery”; that he had terminated employment of about 35 employees; that having offered employment to four Shangillas (Dasanash) he turned them away; he accused the lodge of not paying salaries thereby prompting the staff to steal from the lodge. In effect there was a tirade of accusations against the lodge and its managing director (referred to as a proprietor by the District Officer). He recommended that the liquor license for the lodge not be renewed. When giving evidence before the superior court the district Officer said that whilst collecting money for the Presidential Bursary Fund from the lodge he had noticed that the Presidential Portrait was not displayed therein; that no liquor license was displayed; none of the other requisite licenses were available; he ordered closure on 2 April 1990. He went back to check if the licenses had been obtained and as none were obtained on 15 April 1990, he opted not to prosecute the “proprietor”; that his aim was to pressurize the lodge into obtaining licenses; he ascertained that no land rent had been paid since 1986 but stated that rent for the plot was paid. The district officer said further that as District Magistrate III he was empowered to close the lodge. In response to the evidence of the District Officer, Mr Kamanda the managing director of the lodge produced in court Catering License for 1989, Miscellaneous License 1989, Regulated Trade License for 1990, Caterers License for 1990, Hotel Managers License for 1990, Food Drugs and chemicals License for 1990, Liquor License for 1990, Hotel Managers License for 1989. He produced in all eleven (11) such licenses to show that he had been complying with requisite laws. Did the District Officer have powers to close the lodge for the alleged infraction of the licensing laws namely The Trade Licensing Act, Cap. 497 Laws of Kenya, The Hotels and Restaurant Act Cap. 494, The Liquor Licensing Act Cap. 121 and The Local Government Act, Cap 265? I will deal with each of these Acts. The Trade Licensing Act at the material time provided penalties for infraction thereof. Section 22 empowers an administrative officer or licensing officer or a police officer of or above the rank of an inspector to enter the premises to ensure compliance with Cap. 497. When a person is found guilty of an offence under the Act where no penalty is specifically provided the penalty is imprisonment for a term not exceeding five thousand shillings or both. The Act does not provide for closure of a business even on a conviction. In this particular case, it must be noted that the lodge was never even charged with an offence under the Act. Quite obviously the District Officer exceeded his powers under the Act. The Trade Licensing Act regulates grant of licenses to carry on several categories of trade and primarily the purpose is to collect fees for grant of licenses under the Act. It was quite unlawful and arbitrary on the part of the District Officer to order closure of the lodge on such flimsy grounds. It would appear that after he was shown the Licenses he purported to open the lodge premises only to later tell the district commissioner not to issue a liquor License to the lodge. He must have been motivated, in so acting, by a desire other than seeking compliance with relevant law. The Hotels and Restaurants Act Cap. 494 which was declared to commence from 1 February 1992 does not empower a district officer to close a hotel or a restaurant. The Hotels and Restaurants Authority (“the Authority”) established under section 3 of Cap. 494 is empowered to review the standards of hotels and restaurants, to issue licenses in accordance with section 5, to investigate and determine complaints in accordance with section 7 and to vary, suspend or cancel licenses in accordance with section 8. Where it would appear to the Authority that a hotel or restaurant is being conducted contrary to good hotel or restaurant management (see section 8 of Chapter 494), the Authority must give the licensee an opportunity of being heard. Then it may require the licensee to remedy the shortcomings. Thereafter, if the licensee does not comply with the remedial measures suggested, the Authority may call for prosecution under Chapter 494. Without prejudice to liability of the licensee, the Authority may call upon the licensee to show good cause and then only can it suspend, vary or cancel the license. The district officer in this case ought to have referred the matter to the Authority for it to take action rather than unlawfully ordering closure of the lodge. Again the District Officer exceeded his powers and became the complainant, the prosecutor and the court or the Authority. He was clearly acting illegally. The Liquor Licensing Act (Chapter 121) is aimed at regulating the sale and supply of liquor and incidental matters. The power to search premises where liquor is sold is donated to a police officer with written authority by a magistrate. The general penalty for an offence under Cap. 121 is a fine not exceeding five hundred shillings or imprisonment not exceeding one month. A district officer has no power to order closure of previously licensed premises.

It is only when licensee is charged with an offence under Cap. 121 that a court can in addition to any other penalty which it may lawfully impose, order the license forfeited and that it may order that no license be issued to the accused for such period as the court may order. Once again it is quite clear that the District Officer not only exceeded his powers, but misused them. Yet again I come to the view that the District Officer was moved by motives other than legal in ordering closure of the lodge. The Local Government Act (Chapter 265) authorizes a local authority to charge fees for any license on permit issued by it. Such fees and charges are regulated by by-law or by a resolution of the local Authority with the consent of the Minister for Local Government. If a person omits to pay for and/or obtain a license lawfully required by a local authority he is subject to the discipline of section 257 of Cap. 265. He can be fined on conviction, to a sum not exceeding two thousand shillings or imprisoned for a period not exceeding two months or both but there is no provision in Cap. 265 empowering a district officer to close a business or establishment which needs to be licensed in any authorized manner by a local Authority. Yet again, I say that in this case the District Officer exceeded his authority and powers in ordering the closure of the lodge. What the District Officer forgot, perhaps, is that he is a public servant. He acted as, and behaved like, a village tyrant literally. I cannot fault the Learned Judge in the manner in which he answered the first four issues relating to liability of the District Officer and his employer the government of Kenya. The Learned Judge held that the closure of the lodge was unlawful, wrongful and without any reasonable cause; that the Respondent was not given any warning or notice prior to closure of the same: that the District Officer’s action was in bad faith, malicious and contrary to the rules of natural justice; that the District Officer had no authority to order closure of the lodge. I respectfully agree. I think it is time irresponsible officers of the government are told in no uncertain terms that they must act within the law and not like tin-pot dictators or village tyrants. We are told that the District Officer is still in employment of the government. Despite all the unlawful illegal actions perpetrated by him and which will cause the taxpayers to suffer, he is still employed by the government. We will see a way to surcharge this particular officer. As we urged in the superior court, it was urged before this Court that letter of 16 April 1990 addressed to the lodge by the District Officer is a redeeming feature. In my view it is not. I think the Learned Judge correctly pointed out that the alleged re-opening of the lodge was merely cosmetic. The district officer was at pains even in October 1990, to say to the District Commissioner that the lodge’s liquor license ought not to be renewed. Mrs *Madahana* who appeared for the Appellants attempted valiantly to urge that the Appellants were not liable; that the District Officer had powers under Chapter 479 to order a closure; that the Respondent failed to comply with the requirements to trade lawfully and hence the District Officer’s actions were justified. I have set out what action the relevant authorities could take in the event of non-compliance by the lodge with any relevant statute. There is no justification in law or even morally for what the District Officer did. The first fifteen grounds of appeal which relate to the issue of liability therefore fail. It does not lie in the Appellants’ province to say that the Respondent company instituted a suit without the authority of the directors of the company. No member of the Respondent company (the lodge) has taken any such action; a limited liability company can sue for the righting of any wrong done to it by a third party without the third party being entitled to ask for the authority to sue. Mrs *Madahana* attempted to differentiate between Mr Wamanda and the lodge. True there is a distinction. If the lodge had rented the premises from Mr Wamanda the lodge still has a cause of action as it had here. As regards damage to the buildings, which apparently belong to Mr Wamanda, it would transpire, eventually, that nothing turns on that distinction. Mrs *Madahana* attempted to put the blame for the closure of the lodge on public health authorities who allegedly closed the lodge for failure to meet health requirements. There is no evidence that public health authorities closed the lodge at the material time. Even if they did so later it would certainly appear that that was done on the machinations of the District Officer. I come now the issue of damages. The Learned Judge proceeded to assess damages as follows:

“*General Damages* (i) Loss of profits for the period of 3 April 1990 to 31 December 1996 KShs 49 670 270 (ii) Refurbishing cost for lodges KShs 3 200 000 ( iii) Replacement cost for damaged and condemned buildings KShs 7 300 000 (iv) KTDC loan interest KShs 5 157 970 (v) KCB Loan interest KShs 130 564 Total KShs 65 458 804 *Special Damages* (i) Damaged hotel stock KShs 2 285 943 (ii) Gitobu and Company Accountants (fees) KShs 391 600 ( iii) Wahome and Company, Valuers (fees) KShs 285 500 (iv) Directors salaries KShs 4 050 000 (v) Outstanding debts KShs 96 043 (Advertising) Sub-Total KShs 7 082 086 Grand Total KShs 72 340 890-50 It must be noted that loss of profits for the period 3 April 1990 to 31 December 1996, was not claimed general damages. The Learned Judge however awarded the same in the sum of KShs 49 670 270. It is trite law that loss of profits do not qualify to fall under the head of general damages. Such special damages must be pleaded and strictly proved. This Court said, pointedly in the case of *Sande v Kenya Co-operative Creameries Ltd*, civil appeal number 154 of 1992 (UR): “In this connection it was the duty of the Appellant to put before the judge through his pleadings the claim for KShs 14 151 650-70; though the Appellant had an opportunity to amend his plaint before leading evidence on that issue he chose not to do so ..”. Earlier this Court said, in the *Sande* case: “During the trial in the High Court the Appellant was allowed, and without any sort of objection whatsoever from the Respondent, to lead evidence to the effect that as a consequence of the alleged breach of contract by the Respondent, he had suffered a loss of KShs 14 151 650-70 and that he was claiming that sum from the Respondent though he had not pleaded it in his plaint. Mr *Lakha* who led Mr *Gikandi* before us readily admitted that the claim for the said KShs 14 151 650-70 was in the nature of special damages and ought to have been specifically pleaded in the plaint”.

The Learned Judge in the *Sande* case disallowed the said claim despite evidence having been led, without objection by the Respondent, on the basis that the sum claimed being in the nature of specific damages should have been specifically pleaded and that he (the Judge) had been in error in allowing the Appellant to lead evidence on the issue. This Court agreed with what the Learned Judge in the superior court said in the *Sande* case. By the same token of reasoning the claim (not pleaded) in the sum of KShs 49 670 270 is disallowed and set aside; such an award should not have been made unless pleaded and unless strictly proved as a special damage claim. However, “loss of profits” was claimed under the heading “special damages”, and not general damages. The only damages pleaded in the amended plaint amount to KShs 9 766 182, of which the most substantial claim was KShs 5 400 000 which is pleaded as “loss of profit in respect of lodge accommodation from date of closure and counting”. The lodge was bound by the rules of pleading and procedure to amend the plaint at or before the time of hearing in the superior court so as to quantify and claim the so-called “and continuing” damages under the head of “loss of profits”. It did not do so. The audited accounts of the lodge for the year 1989 show a net profit, for the year, of KShs 3 327 849 and for the period 1 January 1990 to 2 April 1990 the audited accounts show a profit of KShs 1 653 944. But the lodge had suffered losses, during the years 1987 and 1988, as follows: Loss for the year 1987 KShs 1 543 070 Loss for the year 1988 KShs 1 874 779 Total for two Years KShs 3 417 849 This two-year loss of KShs 3 417 849was brought forward to the year 1989 and the net profit for the year (KShs3 327 849) was wiped out showing a net loss at the end of the year of KShs 90 000. It is in the state of affairs that the lodge claimed its loss of profits in the superior court for the period 2 April 1990 to 31 December 1996 the award in which respect I have set aside for the reason that general damages cannot be asked for or awarded in lieu of special damages and that they must be specifically pleaded. However, I cannot overlook the fact that the loss of profits claim was pleaded under the heading “particulars of loss and damage” in the plaint I have no reason to think that the 1989 profits the lodge made amounted to KShs 3 327 849and that net profits for the period 1 January 1990 to 2 April 1990 amounted to KShs1 653 944. The plaint was filed exactly one year after the date of closure of the lodge. I would allow special damages for one year prior to filing of suit at KShs 3 330 000 taking the sum as a round figure. I cannot allow the pleaded sum of KShs 5 400 000 as no proper basis was laid for such a figure as connoting loss of profits for one year. Looking at the matter realistically, I think I would adopt the 1989 profits as proper guide to base my award under this heading. I come now to all other losses and damages as awarded: refurbishing costs for the lodge, replacement cost for damaged and condemned buildings, KTDC loan interest and KCB loan interest as awarded by the Learned Judge in the sums of KShs 3 200 000, KShs 7 300 000, KShs 5 157 970 and KShs 130 564 respectively under the heading “general damages” was, in my view, erroneous.

These are special damages and ought to have been pleaded as special damages. All these claims were quantifiable prior to the hearing date but were not quantified for inclusion in the pleadings. I would therefore disallow all the said awards and set the same aside. I have refered to, earlier, the special damages awarded by the Learned Judge. The claims in respect of the accountant’s fees and the valuer’s fees were not pleaded. I would disallow and set aside the awards in respect thereof in the sums of KShs 391 600 and KShs 285 000 respectively. The claim for director’s salaries comes out of profits of a company. Under the heading “Expenditure Administration” in the 1989 profit and loss account of the lodge, salaries and wages are shown in the sum of KShs 247 641. Directors’ expenses are shown in the sum of KShs 240 000. There is no payment shown in respect of directors’ salaries. This particular claim is therefore untenable. The “damaged hotel stock” claim as awarded by the Learned Judge is KShs 2 285 943. The sums claimed in the plaint which may be classified as “damaged hotel stock “ are as follows: (1) Foodstuffs which went to rot KShs 49 632 (2) Drinks in locked up store – Wines, spirits, whiskey, beers, soda and mineral water KShs 156 900 (3) Transport charges in respect of soft drinks KShs 12 000 (4) Transport by Air Kenya of foodstuff @ 20 per kilogram KShs 6 000 T otal KShs 224 532 The Learned Judge awarded the sum of KShs 2 285 943 under the heading “damaged hotel stock”. He arrived at this figure from the evidence of Mr Nahashon Kinyua Murange (PW3), an accountant with the accounting firm M/S Gitobu and Company. He saw the stock list as at the closure of the hotel. The stock then was valued at KShs 3 047 943 of which he found stock worth KShs 2 285 943 completely damaged. This award is based on an unpleaded figure and hence cannot be allowed, as it is in the nature of special damages. I would substitute, for the award of KShs 2 285 943, a sum of KShs 224 532. I will also mention that it was not prudent on the part of the lodge to let the stocks rot. The stocks could have been disposed of. There is no evidence of even any attempt to do so. I come now to two other substantial claims as pleaded in the plaint, namely of profits in respect of non-use of the lodge swimming pool and motor-boat at KShs 1 080 000 and KShs 905 000 respectively. It is obvious that these claims are covered or ought to be covered under the heading “loss of profits” of the lodge in the sum of KShs 3 327 849 including profits made from the swimming pool and boat tours. These claims, as separately made, are untenable as they are part of the normal annual profits made by the lodge. These are misconceived and I would disallow the same. In all the circumstances of this case I would assess the special damages at KShs 3 524 532arrived at as follows: Damages for loss of profits the lodge suffered as a result of unlawful closure thereof, confined to pleadings KShs 3 300 000 Damages for stocks rendered useless and costs of transport for salvaging some stock KShs 224 532 Total KShs 3 524 532 I come now to the issue of general damages. The high-handed and illegal manner in which the District Officer acted calls for an award of exemplary or punitive damages. This is an exceptional case. As pointed out earlier the District Officer acted in total disregard of the relevant law of the land. Such conduct deserves severe censure as well as an award of exemplary or punitive damages, the acts of the District Officer being tortious. No exemplary damages are claimed so I would add that the award of special damages is based on the pleadings. The award of special damages will carry interest at the court rate from 2 April 1991 until date of payment in full. I would therefore allow this appeal to the extent that I have stated, set aside the award made by the Learned Judge in the sum of KShs 72 540 890-50 and substitute that figure with an award of KShs 3 524 532. As the Appellants have succeeded on the issue of damages only and have failed on the issue of liability I would make no order as to costs of this appeal but I would order that the Respondent do have its costs in the superior court, to be taxed on the basis of an award of KShs 3 524 532.

**OMOLO JA:** I had the advantage of reading in draft form the judgment by Shah JA. I broadly agree with that judgment and the orders proposed therein and I only wish to add a few words of my own. R R Siree, the First Appellant and the Honourable the Attorney-General, the Second Appellant, appeal against the judgment of Mbogholi Msagha J in which that Learned Judge found them liable to the Respondent, Lake Turkana El Molo lodges Ltd and ordered them to pay to the latter a total of Shs 72 340 890-50. The Appellants, through Mrs *Madahana,* sought to persuade us that the judge of the superior court was wrong in finding them liable, and that in the circumstances of the case the First Appellant who was a district officer in the employment of the Kenya government, was entitled to close down a lodge operated by the Respondent. With the greatest respect to Mrs *Madahana*, I am totally unable to visualise any system of law under which the actions of the First Appellant could go unpunished. Shah JA has set out in his judgment all the relevant Acts of Parliament which govern the operations of a company such as the Respondent. None of those Acts gives a district officer the power to close down the operations of a company such as the Appellant and it is abundantly clear from the recorded evidence that the First Appellant, in closing down the operations of the Respondent, was motivated more by a desire to show to the Respondent how powerful he was as a district officer. I would go so far as to say he was plainly malicious. He purported to close down the lodge on behalf of the government of Kenya; the First Appellant’s actions were plainly unlawful. The second Appellant, the Honourable the Attorney-General is plainly liable for the crude acts of the First Appellant. I agree with my Lord Shah that the First Appellant is nothing more than a village tyrant and a bully. The government of Kenya who has placed him in a position where he is able to hurt the businesses of other Kenyans must be prepared to pay for his excesses. There is no merit in the appeal as concerns liability and like Shah JA, I would also reject that aspect of the appeal. As regards the special damages awarded, this Court has said time and time again that when damages can be calculated to a cent, then they cease to be general and must be claimed as special damages. In this regard, loss of profits, which formed the bulk of the Respondent’s claim for damages, are in the nature of special damages and must be specifically pleaded *before* they can be strictly proved. If company “A” says it has been earning Shs 10 000 net profit per month but that by the unlawful action of “B” it has been deprived of that profit for a period of twelve months, then surely there can be nothing unjust or too difficult to demand of “A” to specifically plead these facts and then *strictly prove* them, of course upon a balance of probabilities, during the ensuing trial. If the loss continues even at the time the matter comes to trial, then there can surely be nothing on earth to prevent “A” asking the court to allow an amendment of the plaint to cover the period subsequent to the filing of the suit. These are the principles to be found in this Court’s decisions such as *Sande v Kenya Co-operative Creameries Ltd* [1992] LLR 314 (CAK), *Eldama Ravine Distributors Ltd and another v Samson Kipruto Chebon c*ivil appeal number 22 of 1991 (unreported), *Coast Bus Services Ltd v Danyi and others* [1992] LLR 318 (CAK) and many more recent decisions on the same point. In *Sisco’s* case (*supra*), the Court stated: “We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit, and, in this connection, it is not enough to simply aver in the plaint as was done in this case, the particulars of special damages were to be supplied at the time of the trial. If at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars”. This Court has consistently followed these principles and for my part, I can find nothing in the circumstances of this case that would justify a departure from them. The only damages pleaded by the Respondent in its amended plaint dated 2 December 1992 amounted in all to KShs 9 766 182-00 and those were the only damages he was entitled to prove during the trial. It is noteworthy that those damages included a claim for loss of profits for the years 1990, 1991 and 1992. The Respondent was certainly able to quantify its lost profits and that being so, the damages ceased to be at large and could only be claimed as special damages. In the event, the learned trial Judge awarded to the Respondent the sum of KShs 49 670 270-00 which was said to be in respect of: “Loss of profits for the period of 3 April 1991 to 31 December 1996”. There was no such claim in the plaint and the Learned Judge was not entitled to award it to the Respondent without an amendment of the plaint. I agree with Shah JA that the only special damages which were validly claimed and proved by the Respondent amounted to KShs 3 524 532-00. I would also award that sum to the Respondent. As I said at the beginning of this judgment, the actions of the First Appellant were high-handed, oppressive and at times downright malicious. However, the Respondent did not claim punitive or exemplary damages; had the Respondent done so, I would have awarded such damages. As it is, we cannot award to the Respondent such damages as they were not claimed. The Respondent also claimed general damages. We have awarded to it damages which put it in the position in which it would be, had its operations not been closed down by the unlawful acts of the First Appellant. In the circumstances, we cannot have any legal basis for awarding general damages to the Respondent.

As Owuor JA agrees, the orders of the Court shall be those proposed in the judgment of Shah JA. (Owuor JA concurred in the judgments of Shah and Omolo JJA.)

For the Appellants: *Mr Madahana*

For the Respondent:

*Information not available*