REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Commercial Civil Case 40 of 2009

NALINKUMAR M. SHAH…….PLAINTIFF

VERSUS

MUMIAS SUGAR COMPANY LTD……DEFENDANT

JUDGMENT

By a plaint dated 17th August 1995, and amended on 7th October 1998, Nalinkumar Meghji Shah (hereinafter "*the plaintiff*"), instituted this suit against Mumias Sugar Company Limited (hereinafter "*the defendant*") seeking special damages in the sum of Kshs. 49,460,576.46, general damages for breach of contract, interest at 32% p.a. or at commercial rates or such other rate as the court may apply on the total award of damages from the date of filing this suit until payment in full and costs. In the amended plaint, the plaintiff pleaded as follows: He carries on the business of sugar distribution in Kenya. By an agreement made between him and the defendant, he agreed to purchase from the defendant and the defendant agreed to sell to him 10,000,000 kilogrammes of sugar packed in 100 and 50 kilogram bags at the price of Kshs. 319,882,000/=. In pursuance of the said agreement and in part performance thereof, the defendant supplied to the plaintiff and he took delivery of a total of 2,103,000 kilogrammes of sugar at the cost of Kshs. 67,967,750/=. Subsequently and by a letter dated 13th April 1995, the defendant purported to repudiate the agreement and refused any longer to comply with the terms thereof notwithstanding that the defendant had been paid and accepted full payment of part of the consignment of sugar. Further or in the alternative, notwithstanding repeated demands by

the plaintiff, the defendant has wrongfully and in breach of the said agreement failed and/or refused to allow the plaintiff to take delivery of more sugar at the agreed rate and price and has refunded to the plaintiff Kshs. 248,533,067.50 in respect of sugar not supplied which the defendant only accepted to mitigate his losses and without prejudice to the claim herein. By reason whereof the plaintiff has lost the benefit of the agreement and lost the business and profit he would otherwise have made under it and has thereby suffered loss and damage.

The particulars of loss and damage were expressed as follows:-

(i) Kshs. 3,381,182.50 being part of the purchase price paid to the defendant by the plaintiff and not refunded plus a sum of Kshs. 212,899.03 by way of damages for loss of use of the said sum of Kshs. 3,381,182.50 calculated by way of interest during the period 2nd May 1995 to the date of filing this suit.

(ii) Kshs. 41,559,750/= being the profit the plaintiff would have made on the sugar that the defendant failed and/or refused to supply.

(iii) Kshs. 4,306,744.95 being the interest paid to the bank by the plaintiff as interest on the sum of Kshs. 251,914,250.00.

The defendant filed its defence on 13th October 1995. In paragraph 2 thereof, it admitted that the plaintiff entered in an agreement with it for the sale of sugar but denied that the nature or effect of the said agreement was as set out in the plaint. In paragraph 3, the defendant pleaded that the said sale was subject to certain implied conditions. In paragraph 4, the defendant admitted receiving the plaintiff's orders by fax, and bankers' drafts in payment for the said sugar but denied that the particulars given in the plaint were of the nature and effect stated in the plaint. In paragraph 5, the defendant pleaded that on or before 13th April 1995, the plaintiff took delivery of 2270 bags of 50 kgs each at the total price of Kshs. 26,464,483/=.

In paragraph 6, the defendant pleaded that on or about 13th April 1995, the Minister of Agriculture varied the price at which sugar could be sold by the defendant and the defendant could no longer sell sugar at a discounted price to any one including the plaintiff. In paragraph 7, it is pleaded that if there was a concluded agreement for the sale of sugar, then the same was frustrated by virtue of an act of Government. In paragraph 8, it is pleaded that subsequent to 13th April 1995, the plaintiff took further delivery of 6330

bags of 50 kgs each and 10,027 bags of 100 kgs each at the total price of Kshs. 44,854,450/= which was the price at which the defendant could sell the sugar to the plaintiff pursuant to the order of the Minister aforesaid. In paragraph 9, the defendant pleaded that the suit was an abuse of the process of the court in view of the Minister's said order.

In his reply to defence filed on 14th November 1995, the plaintiff, *inter alia*, denied that the said agreement of sale was subject to the implied conditions stated in the statement of defence and that the order of the Minister for Agriculture could act retroactively on sugar already sold to him and prayed that the defendant's defence be struck out and judgment be entered in his favour as prayed in the plaint.

On 12th March 1997, the parties framed the following issues:-

(1) Whether by an agreement made between the plaintiff and the defendant prior to 13th April 1995, the latter agreed to sell to the plaintiff 10,000,000 kgs of sugar packed in 100 kg and 50 kg bags at the price of Kshs. 319,882,000/=.

(2) Whether the particulars of the agreement mentioned in 1 above were of the nature and effect mentioned in paragraph 1 of the plaint.

(3) Whether, in any event, the said agreement was subject to the implied conditions set out in paragraph 3 of the defence and was of the nature and effect set out in paragraph 4 of the defence.

(4) Whether on or before 13th April 1995, the plaintiff took delivery of 2270 bags of 50 kgs each and 7055 bags of 100 kgs each at the total price of Kshs. 24,464,483/= and subsequent to 13th April 1995 took further delivery of 6330 bags of 50 kgs each and 10027 bags of 100 kgs each at the total price of Kshs. 44,884,450/=.

(5) If the answer to paragraph 4 hereof is in the negative whether the plaintiff took delivery of a total of 210300 kgs of sugar at the cost of Kshs. 67,967,750/=.

(6) Whether by virtue of the order of the Minister for Agriculture made on or about 13th April 1995, the contract

mentioned in 1 above was frustrated and the defendant thereby discharged from further performance thereof.

(7) If the answer to paragraph 6 above is in the affirmative, whether the defendant could thereafter sell sugar at a price no less than that prescribed by the Minister in the said order.

(8) Whether the plaintiff is entitled to damages as particularized in paragraph 8 of the plaint.

On 5th November 1998, the parties recorded a consent judgment on liability and after numerous adjournments for various reasons the suit proceeded before me for assessment of damages on 11th May 2005, 12th May 2005, 26th October 2005, 27th October 2005, 14th February 2006, 17th October 2006, 22nd May 2007, 31st July 2007, 15th October 2008, 14th May 2009 and 22nd February 2010.

The plaintiff's evidence was given through Meghji Shah Paresh (PW 1), the plaintiff's General Manager and Sanjeet Shah (PW 2), who worked for various banks between 1990 and 2005. PW 1 testified as follows: He became the General Manager of the plaintiff's business in 1987. The business dealt in all kinds of merchandise including Colgate Palmolive products, sugar, rice, fertilizer, salt and other fast moving consumer goods. In 1995, he was still such General Manager and at the time of his testimony he was working in America. The plaintiff started purchasing sugar in the later part of 1994 from the defendant until the latter blacklisted the plaintiff when this suit was instituted. Previously sugar could only be purchased through Kenya National Trading Corporation (K.N.T.C.) and not directly from millers. In 1994/1995, however, that changed and millers, including the defendant, could sell sugar directly to the market. The price per metric ton of sugar in the first three quarters of 1994 was 34,000/=. That price was higher than the price of Kshs. 28,000/= per metric ton which was the price at which imported sugar was being sold. The effect was that there was preference for imported sugar and local sugar millers, including the defendant, piled up stocks. To clear those stocks, the defendant offered its sugar to traders at a discount of 5% on the purchase of 5000 metric tons for which the plaintiff paid a total of Kshs. 161,642,500/= on 30th March 1995. On 4th April 1995, PW 1 again negotiated a discount of 6% on another purchase of 5000 metric tons of sugar for which the plaintiff paid Kshs. 158,239,500/= on 6th April 1995.

Pursuant to the said agreement, the defendant issued sugar release orders and the plaintiff took certain deliveries of sugar at the price of Kshs. 67,967,750/= when the defendant stated that it would not continue to supply sugar at any discounted price at all because the Minister for Agriculture had directed accordingly. The defendant further informed PW 1 that deliveries would be restricted to 500 tons per week at the full price. The defendant gave the plaintiff two options: *(1) To return the deposit made for the sugar or (2) the sum be retained by the defendant for sugar to be delivered at the full price*. The plaintiff declined to take any of the said options and insisted that the defendant meets its obligation under the contract. PW 1 further testified that the plaintiff declined both alternatives because they were unreasonable; the terms were different, deliveries were staggered and the defendant required the plaintiff to waive his right to make any other claims.

The defendant then refunded by way of cheque a sum of Kshs. 248,533,067.50 which cheque was cleared on 2nd May 1995 and was less by a sum of Kshs. 3,381,182.50. That sum had not been refunded to date. That sum, according to PW 1, could have earned compound interest of Kshs. 212,899.03 if it had been placed on a Fixed Deposit account between 2nd May 1995 and 17th August 1995. Arising from the defendant's breach of contract, according to PW 1, the plaintiff suffered loss of profits amounting to Kshs. 41,559,750/= which is the difference between the contract price and the price at which the plaintiff would have sold the undelivered sugar.

PW 1 further testified that the plaintiff paid Kshs. 4,366,744/98 as interest on the sum of Kshs. 251,914,250/= (value of undelivered sugar) paid by the plaintiff to its bank. The said interest, according to PW 1, constituted damages for which the defendant was liable. In PW 1's view the plaintiff lost the use of the said sum of Kshs. 251,914,250/=. The plaintiff's total claim was therefore Kshs. 49,460,576.48.

In cross examination, PW 1 stated that it would have taken the plaintiff 3 to 4 weeks to sell 10,000 metric tons of sugar if the same had been delivered by the defendant pursuant to the contract. He further testified that after the Ministerial directive the defendant delivered some of the sugar bought on a restricted basis. He reiterated that the alternatives given by the defendant after the directive were not acceptable to the plaintiff and further that the plaintiff could not at the time obtain sugar from other millers who preferred to deal with their customers. Consequently the relationship between the plaintiff

and the defendant became strained which situation was not helped when the defendant black listed the plaintiff after filing this suit. PW 1 however, admitted that even if the defendant had not breached the contract, the plaintiff would still have had to pay his financiers.

The second witness for the plaintiff was Sanjeet Shah. He testified that he was a banker by profession and had, save for 2 years, worked for various banks between 1990 to the date of his testimony on 14th February 2006. The banks were, Trust Finance which merged with Trust Bank where he was a Branch Manager in 1996; Bullion Bank where he was a Senior Manager upto 2000; City Bank which he joined as a Relationships Manager/Corporate Director, Fina Bank upto 2005 where he rose to become head of Retail Division and finally Imperial Bank where he worked as a Manager Business Development.

PW 2 testified that at the request of the plaintiff he prepared two schedules, PEX 11 and P.EX 12, showing how he had calculated interest on Kshs. 3,381,182.50 and Kshs. 49,460,576/46 respectively. With regard to the first figure, he calculated interest from 2nd May 1995 to 17th August 1995 and arrived at the figure of Kshs. 212,899/03 as interest which would have been earned had the plaintiff placed the said sum on a Fixed Deposit Account. With regard to the second figure, he calculated interest from 18th August 1995 to 31st March 2006 and arrived at the figure of Kshs. 161,926,723.18 as interest that would have been earned if the plaintiff had placed the said sum in a similar account.

In cross examination, PW 2 admitted that interest on deposit varies from customer to customer and from Bank to Bank. He also admitted that even the amount deposited affects the rate of interest earned.

The defendant on its part called one witness, Ernest Kivai. I shall refer to him as DW 1. At the time of his testimony, he was the defendant's Treasury Manager and at the time of the transaction he was its Finance Accountant. He testified that the plaintiff purchased 10,000 metric tons of sugar from the defendant in two lots at discounted prices. He stated that the defendant offered its sugar at a discount whenever it had large stocks and was unable to sell thereby experiencing cash flow problems. After the purchase, which DW 1 acknowledged was massive, there was a Ministerial announcement the effect of which was to limit the quantity of sugar to be sold to traders at the price of Kshs. 3,400/= per bag. To its large customers, such as the plaintiff, the defendant was allowed to avail 500 tons per week. In compliance with the Ministerial directive, the defendant informed the plaintiff of

the changed circumstances and offered to supply sugar to the plaintiff at the said Government dictated price. The plaintiff rejected the defendant's offer and demanded that the defendant meets its obligations under the agreement. The parties could not agree and the defendant elected to refund sums paid by the plaintiff less the value of the deliveries made. In the event, the defendant refunded Kshs. 248,533,067.50. That refund did not take into account certain deliveries which had infact not been made. The sum refunded was therefore short by Kshs. 3,381,182.50.

With regard to the interest of Kshs. 212,899.03 claimed on the said sum, DW 1 stated that the rate applied could not be confirmed to be the bank rate applicable then. With regard to the plaintiff's claim for loss of profits of Kshs. 41,559,750.00, DW 1 testified that the same is incorrect and that according to the defendant the correct sum due to the plaintiff for loss of profits is Kshs. 16,583,750.00.

In cross examination, DW 1 acknowledged that the plaintiff purchased large quantities of sugar from the defendant for re-sale and was entitled to immediate delivery if he so wished having paid for the same in advance. DW 1 further admitted that in 1994 sugar trade was liberalized and foreign sugar flooded the market and was offered at favourable rates. The effect was that local sugar could not compete and millers started piling stocks. To compete with imported sugar the defendant offered its sugar at discounted prices to its customers including the plaintiff.

DW 1 further testified that on 5th April 1995, there was a freeze on imported sugar and a directive not to sell sugar at a discount. Further, large customers like the plaintiff were restricted to 500 tons per week. The defendant, according to DW 1, interpreted the Ministerial directive as affecting the contract between it and the plaintiff. He (DW 1) however, admitted that the sum of Kshs. 3,381,182.00 should have been refunded but had not been so refunded and that the plaintiff had been denied the use of the said sum for the last 13 years. As a corollary he also admitted that the defendant had had the use of the same money for the same period.

DW 1 further admitted that immediately after the Ministerial directive, the retail price of sugar rose.

On conclusion of the evidence, parties agreed to exchange and file written submissions which they highlighted on 22nd February 2010. In his submissions on behalf of the plaintiff, Mr. Inamdar submitted that the total sum claimed in the plaint dated 17th August

1995 and amended on 7th October 1995 was Kshs. 49,460,576.45. That sum comprised the following:-

1(a) Kshs. 3,381,182.50 being part of the purchase price of 10,000 metric tons of sugar which should have been but was not refunded by the defendant to the plaintiff consequent upon breach of contract.

1(b) Kshs. 212,199.03 being compound interest on the figure in 1(a) above for the period from 2nd May 1995 (the date on which the said sum should have been refunded) to 18th August 1995 (the date of filing suit).

2) Kshs. 41,559,750.00 being damages for loss of profit resulting from the defendant's breach.

3) Kshs. 4,366,744.95 being damages in the form of interest charged on the sum of Kshs. 251,914,250.00 (the sum enjoined by the defendant between 30th March 1995 and 2nd May 1998).

4) Counsel further submitted that Interest on the total sum of Kshs. 49,460,576.45 as general damages was being claimed on compound basis at commercial rates from the date of filing this suit until payment in full.

With regard to 1(a), counsel submitted that the same had been admitted as due by the defendant's witness Ernest Kivai (DW 1). With regard to 1(b), counsel submitted that had the plaintiff deposited the sum of Kshs. 3,381,182.50 in a fixed deposit account for the period from 2nd May 1995 (when the defendant should have refunded the same) and 18th August 1995, the date when this suit was filed, the plaintiff would have earned compound interest of the said sum of Kshs. 212,199.03.

With regard to the claim in 2 above, counsel submitted that the same was claimed as the loss the plaintiff suffered directly and naturally in the ordinary course of events from the defendant's breach of contract. Counsel invoked the decisions of **Hadley – v – Baxendate [1854] 9 Exch. 341, J. Leavy & Company Limited – v – George Hirst & Company Limited [1943] 2 All ER 581 and Harlow & Jones Limited – v – Panex (Int) Limited [1967] 2 Llyods Rep 509,** among others, for his contention that the facts in this case showed that section 51 (2) of the Sale of Goods Act (Cap 31) applied, since the plaintiff had no available market to which he could resort to purchase substitute sugar when the defendant failed to deliver sugar in terms of their contract. In counsel's view,

the defendant alone could not constitute available market on the facts of this case.

On mitigation of damages, counsel submitted that the rejection by the plaintiff of the defendant's offer to sell sugar to the plaintiff at changed prices was reasonable in the circumstance of this case. The basis for that submission was that the defendant's changed terms were unfavourable to the plaintiff and further that the plaintiff would have had to waive his right to any other claim. In the premises, according to counsel, the rejection of the defendant's offer was reasonable. Counsel distinguished the facts in the case of **Saundeers [1919] 2KB 581.** He again invoked the decision of **Harlow & Jones Limited – v – Panex (Int) Limited (supra)** for the proposition that a plaintiff is entitled to act reasonably to mitigate his damages but is not bound to nurse the interests of the contract-breaker. Also invoked were the decisions of **Homdsditch Warehouse Company Limited – v – Waltex Limited [1944] 2 All ER. 518 and Stindlere – v – Northern Raincoat Limited [1960] 2 All E.R. 239** for the proposition that the defendant's offer to compromise the plaintiff's claim for breach of contract meant that the plaintiff had no obligation in law to accept the compromise.

With regard to the claim for Kshs. 4,366,744.95 (3 above), counsel submitted that it was by way of damages for the interest actually paid by the plaintiff to his bank on the sum of Kshs. 251,914,250.00 being the purchase price paid in advance of the undelivered sugar during the period from 30th March 1995 to 2nd May 1995. The foundation of the claim is that, as a result of the defendant's failure to deliver sugar valued at Kshs. 251,914,250.00, the plaintiff suffered the loss of interest on that amount by having that sum tied up as a loan incurring interest for the period from 30th March 1995 (the date of the contract) to 2nd May 1995 (the date on which the defendant's cheque for refund, was cleared). In counsel's view the interest is awardable at common Law. He invoked the decisions of **Hungerfords – v – Walker [1989] HCA 8 (Australia) and Sempra Metals Limited – v – 1RC [2007]3 WLR 354** for that proposition.

On behalf of the defendant, Mr. Kimani, Learned Counsel, acknowledged that the plaintiff's claim for Kshs. 3,381,182.50, being part of the purchase price of the 10,000 metric tons of sugar, was admitted by DW 1, Ernest Kivai and had not been refunded by the defendant due to an administrative error when Kshs. 248,533,067.50 had been paid to the plaintiff on 27th April 1995.

With regard to the plaintiff's claim for 212,199.03 for loss of use of the said sum of

Kshs. 3,381,182.50, counsel submitted that the plaintiff had not provided direct evidence of what he would have done with the said sum of Kshs. 3,381,182.50 and that there was no evidence that the plaintiff had previously utilized sugar proceeds as stated by PW 1. It was counsel's further contention that compound interest was not payable and that interest prior to the date of the suit would only be claimed where it was so stipulated in the contract or allowed by mercantile practice or statute. Counsel invoked the cases of **Highway Furniture Mart Limited – v – The Permanent Secretary [2006]2 EA 94 (CA, Mukisa Biscuit Manufactruring Limited – v – West End Distributors Limited [1970] EA 469 (CA) and Madison Insurance Company Limited – v – Kinara & Another [2005] 1 EA 24.**

Also cited in aid of the proposition that compound interest should not be awarded was the Chief Justice's practice note No. 1 of 1982 which directed that the interest rate applicable was 12% in the absence of valid reasons for ordering a higher or lower rate of interest.

Counsel further submitted that the casesof **Sempra Metals Limited – v – 1RC** was unhelpful for the proposition that compound interest should be awarded in this case.

On the plaintiff's claim for Kshs. 41,559,750.00, by way of damages for loss of profit resulting from the defendant's breach of contract in failing to deliver sugar agreed to be sold and delivered, counsel submitted that the loss herein had been incurred as a result of the plaintiff's own independent commercial decision consequences whereof the plaintiff should bear. Counsel made that submission because the defendant had made an offer to supply sugar to the plaintiff at altered prices and the plaintiff had rejected the offer and had thereby failed to mitigate his damages. His loss, according to counsel, was avoidable. The plaintiff had therefore acted unreasonably and was not therefore entitled to recover. Counsel invoked the decisions of **Soholt [1981] 2 Lloyds Rep. 574 and Darbishire – v – Warran [1963] 1 WLR 1067** for those propositions.

It was counsel's further submission that the plaintiff chose to sit back and do nothing instead accepting the defendant's offer and earning Kshs. 6,583,750.00. In counsel's view the decision to sit back was bad in Law. Reliance was placed upon the decisions of **Gebrudere Matelman – v – NBR [1984] 1 Lloyds Rep. 614, Hayes – v – James & Charles Dudd [1990] 2 All ER 85, Standard Chartered Bank – v – Pakistan National Shipping Corporation [1999] 1 Lloyds Rep. 747** and **Dayle – v – Coby Iron**

mongers Ltd [1969] 2 QB 158.

With regard to availability of a market after the breach of contract counsel submitted that on the authority of **Payzu – v – Saunders (supra),** the defendant constituted the available market when it made the new offer to the plaintiff. To buttress that submission, counsel also cited the cases of **Strutt – v – Whitnell [1975] 2 A;; ER, The Elena Damico [1980] 1 Lloyds Rep 75, British Westinghouse Electric & Manufacturing Company – v – Underground Electric Railways Company of London Ltd. [1912] AC 673.**

Counsel further submitted that the defendant's offer after the breach of contract was not an offer of compromise or settlement and the plaintiff could not have lost his right to seek further relief. Counsel, in this regard distinguished the case of **Honndisditch Warehouse Company Limited – v – Waltex Limited (supra)** contending that that case concerned sale by sample which is not the case herein. The **Shidler – v – Northern Raincoat Limited (supra)** was also distinguished because the case involved employment law which of course is not the case here.

Finally, on this aspect of the plaintiff's claim, counsel submitted that the defendant did not know the plaintiff's intended use of the sugar he bought from it and could not therefore claim for loss of profit under the second limp of the rule in **Hadley – v – Baxendale (supra).** The case of **Seven Seas Properties Limited – v – Al-Asse & Another [1993] 3 All ER 577** was also invoked for the same proposition.

On the claim for Kshs. 4,366,744.95 by way of damages for interest on the sum of Kshs. 251,914,250.00, counsel for the defendant submitted that the same did not result from the defendant's breach of contract because the plaintiff would still have had to honour his credit facility obligations to his bank irrespective of whether there was a breach of contract or not and that the plaintiff had not informed the defendant of any credit facility obligations at all. It was the defendant's further submission that the said claim had in any event, no basis in law since, on authority, bank interest is too remote, too unreasonable and too unforeseeable to be regarded as damages. The cases of **Borag [1981] (supra)** and **Hadley – v – Baxendale (supra)** were cited for those propositions.

Having set out the state of the pleadings, the evidence and the rival submissions, it is now convenient to consider the issues raised in this suit. When the parties recorded a consent judgment on liability on 5th November 1998, the only issue for the determination

of the court is the quantum of damages which the plaintiff is entitled to and whether or not the plaintiff is entitled to the interest claimed. It is now clear that the plaintiff's claim in paragraph 8(i) of the amended plaint viz Kshs. 3,381,182.50, being part of the purchase price of the 10,000 metric tons of sugar, which should have been but was not refunded by the defendant to the plaintiff, must be allowed having been unequivocally admitted by the defendant's witness Ernest Kivai, (DW 1).

The plaintiff also claims Kshs. 212,199.03 in paragraph 8 (1) of the amended plaint. The claim is made on the basis that it represents the plaintiff's loss of use of the said sum of Kshs. 3,381,182.50 during the period from 2nd May 1995 (when the plaintiff should have been paid that sum) to 18th August 1995 (the date on which this suit was filed). The plaintiff's General Manager, Paresh Meghji Shah (PW 1) testified that the plaintiff would have earned interest on that sum for the said period calculated on a compound interest basis. If the plaintiff had deposited the said sum on a fixed deposit account with his bank he would have earned the said sum of Kshs. 212,199.03 for the said period. PW 2, Sanjeet Shah, a banker by profession produced Exhibit P3 showing how the said sum had been arrived at.

In his submissions on this aspect of the plaintiff's claim, counsel for the defendant, whilst acknowledging that the plaintiff would be entitled to the loss of use of the said sum of Kshs. 3,381,192.50 for the said period, argued that the plaintiff had wrongly made the claim as he had not given evidence directly himself and had not also demonstrated that he had previously deposited money from proceeds of selling sugar with his bank and earned the interest he was claiming. Counsel for the defendant further challenged the plaintiff's claim for the said sum on the ground that he had applied compound interest which could not be sought and further that even though simple interest could be sought it would not be sought for the period antecedent to the suit as there had been no agreement for the same, nor had mercantile usage been demonstrated and the same had also no statutory backing. The defendant buttressed its contentions by a number of cases already referred to earlier in this judgment.

The plaintiff on his part based his claim on common law and he too invoked various local and foreign decisions to support his position. In his view the foundation of his claim was that the defendant's non-payment of the said Kshs. 3,381,182.50 deprived him of the use of that sum which loss he calculated by way of compound interest had the sum been

invested in a fixed deposit account.

Having considered the rival submissions on this aspect of the plaintiff's claim, I have no hesitation in finding as not serious the defendant's argument that the claim should fail because the plaintiff himself did not testify. The testimony of his General Manager, Paresh Meghji Shah, suffices. After all, he was the person with whom the defendant dealt as regards the material contracts. It was also never suggested to him when he testified that he was not qualified to put forward the plaintiff's case. I accept the plaintiff's submission that the challenge raised in the submissions against the want of the plaintiff's direct testimony is rather too late. In any event the defendant, through DW1, Ernest Kivai, and its counsel's submissions acknowledged that the plaintiff had been denied the use of the said sum of Kshs. 3,381,182.50.

As to whether the said sum of Kshs. 212,199.03 was awardable at all was a completely different cup of tea. Counsel for the defendant argued that interest was only awardable under section 26 of the Civil Procedure Act for the period commencing from the date of filing suit to the date of payment and that such interest can only be simple interest. It was the defendant's further argument that interest for any period prior to the date of filing suit could only be claimed where there is an agreement between the parties for such payment or where such interest is allowed by mercantile usage or under a statutory provision or where an agreement to pay interest can be implied from the course of dealings between the parties. In the defendant's view the plaintiff had not satisfied any of the above requirements and his claim being one of interest should fail.

Section 26 of the Civil Procedure Act reads as follows:-

> **"26(1) Where and in so far as a decree is for the payment of money the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."**

As can be observed, the section makes no reference to the type of interest. The

section is also clear that interest can be awarded for the period prior to the date of the suit. Section 26(1) of the Civil Procedure Act cannot therefore be invoked to defeat the plaintiff's claim for Kshs. 212,199.03.

The question of interest antecedent to filing suit has been the subject of numerous decisions in and outside our jurisdiction some of which have been cited by the parties herein. In **Highway Furniture Mart Limited – v – Permanent Secretary and Another [2006] 2 EA 94,** the Court of Appeal held, *inter alia*, that interest antecedent to the suit is only claimable where, under an agreement, there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties.

It is significant that in that case, the plaintiff claimed interest antecedent to the date of the suit but did not pray for the same. It is also significant that in the judgment which was being considered by the Court of Appeal, the issue of antecedent interest had not been considered by the trial judge. It should further be observed that the Court followed an earlier decision in **Lata – v – Mbiyu [1965] EA 592** where it was held as follows:-

> **"The justification for an award of interest on the principal sum is, generally speaking to compensate a plaintiff for the deprivation of any money or specific goods through the wrong act of a defendant."**

The case of **Madison Insurance Company Limited – v – Kinara and Another [2005] 1EA CAK 240** was decided one year earlier by the same court. The dispute involved an insurance contract where the insured had sued for the value of insured goods (which had been stolen) and a further sum as special damages for lost income for a period of 41 months. The court held as follows:-

> **"There is no support in law for the contention that what is not expressly excluded by a contract of insurance is included. The insured in theory is not entitled to make a profit of his loss while there is nothing to stop the parties agreeing in their contract of insurance that consequential loss will be compensated, an ordinary policy of insurance would not cover such loss unless the parties specially contract that such loss would be covered……..**

There was no provision in the contract of insurance for payment of interest at 30%, that rate being merely a loan repayment rate on an agreement between the insured and a third party financier. Interest would therefore be payable at court rates from the date of filing suit until payment in full."

The Court of Appeal was categorical that the basic concept underlying a contract of insurance is that the insured's intention in paying premiums to insure his property is not to make profit out of the transaction but rather that the insurer will replace the property in the event of loss or pay reasonable charges for repair where the property is damaged. However, if the parties desire to cover consequential loss they are perfectly at liberty to expressly make provision for the same.

In **Mukisa Biscuit Manufacturing Company Limited – v – West End Distributors Limited (No. 2) [1970] EA,** the Court of Appeal held *inter alia* as follows:-

"(vi) While the judge had power to award interest from a date prior to judgment, where damages have to be assessed by the court, interest should only be given from the date of judgment."

The dispute in that case involved breach of a distribution contract where the High Court had awarded general damages with interest from the date the contract would have expired. At page 475 of the judgment the court said as follows:-

"The principal that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until assessed, and therefore interest is only given from the date of judgment."

The court did not discuss the circumstances when interest may be claimed prior to filing suit despite the statement made by Spry V.P. that the High Court judge in that case, had power to award interest antecedent to the suit.

The issue was also considered in **New Tyres Enterprises Limited – v – Kenya Alliance Insurance Company Limited [1987] KLR 380,** Kwach Ag. Judge of Appeal, as he then was, stated that where a party has been deprived of land or movable property and receives a monetary award in compensation for the loss, the usual practice is to award

interest from the date of such deprivation. In that case, however, the liability of the party in breach was not determined until the date of judgment which was the date interest was payable. Kwach Ag. J.A cited with approval the case of **Kimani – v – Attorney General [1969] 502** where a respondent who had been dispossessed of land was awarded interest at 8% p.a. from the date of dispossession until judgment because he did not receive the value of the land on dispossession. It is significant that the respondent had not claimed the interest but the High Court Judge had amended the proceedings in a manner which allowed a claim for interest to be made and restricted interest from the date of judgment which according to Sir Charles Newbold P. was wrong.

In **Trust Bank Limited – v – Jim Choge t/a Jim Choge & Company Advocates [HC Misc. Civil Application No. 34 of 1998 (UR)** Onyango Otieno J, as he then was considered a claim for interest antecedent to the suit where the respondent was sued on his undertaking to pay Kshs. 16,000,000/=. The Learned Judge held that the applicant was entitled to interest on account that it had lost the opportunity of earning the same interest on the 16 million from the date of default. The Learned Judge took into account the fact that the applicant traded in money.

It can be observed that the Kenyan position on interest antecedent to a suit is not cut out and dry. The English position has however crystallized in the majority decision of the House of Lords in the case of **Sempra Metals Limited – v – Inland Revenue Commissioners and Another [2007] 3WLR 354.** The case involved advance payment of United Kingdom Corporation Tax by the appellant (Sempra) which payment was found to be contrary to European Union Law. The issue before the House was: the principles to be applied in quantifying the award to be made to the appellant by way of damages or restitution, for the detriment that it suffered as a result of the payment made contrary to the European Law. The House of Lords held as follows:-

> **"(1) that the time had come to recognize that a court had jurisdiction to award compound interest where a claimant was seeking restitution of money paid under mistake; that such an award could be made (per Lord Hope of Graghead, Lord Nicholls of Birkenhead and Lord Scoll of Foscote) in the exercise of the court's common law restitutionary jurisdiction, (per Lord Walker of Gestingthorpe and Lord Mance) in the exercise of the court's discretionary equitable**

jurisdiction; that (per Lord Hope of Craighead, Lord Nicholls of Birkenhead and Lord Walker of Gestingthorpe) in the case of personal restitution the money award reversing unjust enrichment had to take into account the value of the use of the money over the time during which it had been retained by the defendant; that (per Lord Hope of Craighead and Lord Nicholls of Birkenhead) such value was prima facie the reasonable cost to the claimant of borrowing the same sum over the same period unless the defendant could show that he had in fact gained no such benefit himself; that (per Lord Scott of Foscote and Lord Mance) only if the money had been proved to have actually earned interest in the hands of the defendant would the claimant be entitled to recover any interest.

(2) that (Lord Scott of Toscote and Lord Mance dissenting) the assumption that the Government had derived some benefit from the premature payment of the tax had not been displaced; that, however, the Government was in a different position from ordinary commercial borrowers and could borrow money at favourable rates; and, that accordingly, the claimant's claim for restitution ought to be measured by an award of compound interest at conventional rates calculated by reference to the rates of interest and other terms applicable to borrowing by the Government in the market during the relevant period.

(3) (Lord Scott of Foscore and Lord Mance dissenting) that the anomalous and unprincipled exception, with regard to interest losses by way of damages for breach of contract or tort should no longer be sanctioned, that, consequently, it would always be open to a claimant to plead and prove his actual interest losses caused by late payment of a date; that those losses might include an element of compound interest; that such loses would be subject to the principles governing all claims for damages for breach of contract such as remoteness and failure to mitigate; and that, accordingly, the courts had a common law jurisdiction to award

interest, simple and compound as damages on claims for non-payment of debts as well as on other claims for breach of contract and tort."

Before Sampra's case the position regarding interest in English common law was that the court had no power, in the absence of any agreement, to award interest as compensation for late payment of a debt or damages. The House of Lords confirmed that position in the case of **London, Chatham and Dover Railway Company – v – South Eastern Railway Company [1893] AC 429.** The displeasure of the House over the position was expressed by Lord Herschell L.C. in his speech at page 437 as follows:-

"I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events."

The English position was modified in 1952 when it was recognized that loss due to late payment could be recoverable if it constituted special damages within the contemplation of the parties (2nd limp of **Hadley – v – Baxendale (supra).** That development was approved in **President of India – v – La Pintada CIA Navigation SA [1985] AC 104.** Lord Brandon of Oakbrook held at page 131 of the judgment that no sufficient case had been made out for a departure from the decision in the London, Chotham and Dover Railway case.

The decision in Sempra (supra) therefore represented a milestone in Common Law jurisdictions of which Kenya is part. Australia had taken the lead in the case of **Hungerfords – v – Walker [1989] HCA 8, [1989] 171 CLR 125 F.C. 89/008.** One of the issues in that case was whether at common law a court when awarding damages for breach of contract or negligence, can include in its award damages, assessed by reference to appropriate interest rates, for the loss of the use of money which the plaintiff paid away and lost as a direct consequence of the defendant's breach of contracts or negligence. The

court held *inter alia* as follows:-

> **"40. Although the admiralty model has obvious attractions, the common law has steadfastly declined over a very long time to adopt the admiralty approach in awarding compensation for late payment of damages in the general run of cases. But we see no reason for allowing the reluctance of the common law to extend to cases where the defendant's breach of contract or negligence has caused the plaintiff to pay away or the defendant to withhold money and, as a result, the plaintiff has been deprived of the use of the money so paid away or withheld. The recovery of compensation for the loss may be ascribed to the operation of the second limp in Hadley – v – Baxendate. However, we would prefer to put it on the footing that it is foreseeable loss, necessarily within the contemplation of the parties, which is directly related to the defendant's breach of contract or tort."**

The Supreme Court of Canada in the case of **Bank of America Canada – v – Mutual Trust Company [2002] 2 SCR 60** held *inter alia* as follows:-

> **".....the trial judge was correct in awarding compound pre and post-judgment interest. His award yields a satisfactory result with respect to both expectation damages and restitution damages."**

That decision is dated 11th December 2002 and was therefore made before Sempra. In Canada therefore as early as 2002, the courts had jurisdiction to award pre-judgment and post-judgment interest at both common law and equity.

New Zealand, which is another Common Law country, followed Sempra's decision in **Clarkson and Another – v – Whangamata Metal Suppliers & Another [2007] NZCA 590** which case involved breach of contract. The court concluded as follows:-

> **[49] We conclude that, in an appropriate case, interest, including compound interest could be awarded in a breach of contract case, if the plaintiff can satisfy the normal remoteness test in Hadley – v – Baxendate. However, such loss needs to be pleaded and proved. There was no relevant pleading in this case and the evidence did not establish loss."**

In view of the developments in England, Australia, New Zealand and Canada and may be other countries, which have not been cited to me, what should be the position in Kenya with respect to a claim for interest simple or compound for late payment of a debt? Is the decision in **Highway Furniture Mart Limited – v – Permanent Secretary and Another supra** cast in stone? In that case as already stated the Court of Appeal held that interest antecedent to the suit is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where interest is allowed by mercantile usage (which must be pleaded and proved) or where there is a statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. The answer is found in the same case. At page 99 of the judgment their Lordships stated as follows:-

> **"The justification for an award of interest on the principal sum is generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant."**

That principal was however not developed. It had infact been earlier stated in the case of **Lata – v – Mbiyu [1965] EA 592** which considered interest on general damages for personal injuries and determined that interest on such damages should not be awarded for the period between the date of filing suit and judgment whereas interest on special damages should normally be awarded from the date of filing suit. The use of the word *"normally"* suggests in my view that the court recognized that there may be instances where interest may be awarded for a period antecedent to filing suit. That came out quite clearly in **Omega Enterprises Kenya Limited – v – Eldoret Sirikwa Hotel Limited & Others (supra).** The Court of Appeal at page 7 said as follows:-

> **"There is no doubt that if a party is deprived of the use of his money he must be compensated therefore by an award of interest thereon from the date he (was) (sic) so deprived."**

Prior to the decision in **Omega Enterprises Kenya Limited – v – Eldoret Sirikwa Hotel Limited (supra)** Onyango Otieno J, as he then was, had allowed compound interest antecedent to filing suit in **Trust Bank Limited – v – Jim Choge t/a Jim Choge & Company Advocates (supra).** With regard to the question of interest the Learned Judge delivered himself as follows:-

> **"I do accept that the letter of 31st October 1998 did not commit the**

Respondent to pay interest on the amount of Kshs. 16,000,000/= and although the letter dated 15th November 1996 from the Bank (Applicant) to their Advocates, M/S Ndungu Njoroge & Kwach is talking of interest, only 15 days later, the letter of undertaking never talked of interest. In my opinion, this means that if the Respondent had honoured his undertaking and had made the payment to the Bank not later than 30th November 1996, he would have had a perfect defence on the question of interest which the Bank was talking about even on 15th November 1996. But what about the period that has elapsed from the date this money was to be paid to the date it will be fully paid?.....

However, in this case, my understanding is that the Applicant is seeking interest by way of losses in respect of it having been denied opportunity to utilize the same money. The Applicant is a bank and trades in money. If it is denied the opportunity to use the same money it clearly suffers loss. …….. The Applicant is entitled to interest on account that it has lost the opportunity of earning the same interest on the same 16 million from 1st December 1996 to date."

The above analysis informs my conclusion that Kenyan courts have power at common law to award interest for late payment of a debt or damages irrespective of whether or not there is an agreement between the parties and there is also no impediment to awarding compound interest for the late payment if circumstances justify the same and if such interest will serve the ends of justice. After all a commercial transaction deserves the same treatment whenever and wherever it takes place. As to whether the plaintiff herein has made out such a case will shortly be considered.

For now, I turn to the question of mitigation of damages. This issue is discussed in relation to the plaintiff's claim for Kshs. 41,559,750.00 by way of damages for loss of profit resulting from the defendant's breach of contract in failing to deliver a substantial quantity of sugar agreed to be sold and delivered. The defendant contended that it made an offer to sell sugar to the plaintiff in its letter dated 13th April 1995 (Ex. P1 page 18) which offer should have been accepted by the plaintiff to avoid loss. The plaintiff's

refusal of that offer, according to the defendant, amounted to an independent commercial decision which resulted in his loss for which the defendant is not liable. In the defendant's view the plaintiff did not act reasonably and is viewing this litigation as a profiteering venture which the court should frown upon. Several decisions were invoked including the case of **Payzu – v – Saunders [1919] 2 KB 581** to buttress that position. The following test was set in the said case:-

> **"The question, therefore, is what a prudent person ought reasonably to do in order to mitigate his loss arising from a breach of contract…….. Business often gives rise to certain asperities. But I agree that the plaintiffs in deciding whether to accept the defendant's offer were fully entitled to consider the terms in which the offer was made, its bona fides or otherwise…….and it must be remembered that an acceptance of the offer would not preclude an action for damages for the actual loss."**

In the defendant's view, had the plaintiff accepted the defendant's offer, he would have earned Kshs. 16,583,750.00, but instead he unreasonably refused and earned nothing.

Another decision invoked by the defendant is that of **Strutt – v – Whitnell]1975] 2A;; ER 510** in which the following passage appears:-

> **"In that case the defendant in breach of contract had failed to deliver goods to the plaintiff at the contract price and on the contract conditions, but had offered him goods of the same price but on less favourable conditions. If the plaintiff had accepted them he would have suffered only a small loss because of the less favourable conditions which he could still have recovered by way of damages. But he refused the offer. In those circumstances it was held that he could not recover the difference between the market price and the contract price. There was no question in that case of the plaintiff being required to return goods which had already become his property forfeit his right to substantial damages. That is the difference between Payzu Limited – v – Saunders and cases 2 and 3…….there was no evidence of any offer by the Defendants to buy back the property at the contract price. The evidence did no establish**

that the Plaintiff had unreasonably refused such an offer."

In that case it was stated at page 90 as follows:-

"If at the date of the breach, there is an available market, the normal measure of damages will be the difference between he contract rate and the market rate for chartering in a substitute ship for the balance of the charter period. If however, the time charterer decides not to take advantage of that market then, generally speaking, that will be his own business decision independent of the wrong, and the consequences of that decision are his. If he judges the market correctly, he reaps the benefit; if he judges it incorrectly then the extra cost falls on him."

AND viscount in LC in **British Westinghouse Electric and Manufacturing Company – v – Underground Electric Railways Company of London Limited [1912] AC 673** delivered himself as follows:-

"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him claiming any part of the damage which is due to his neglect to take such steps."

There is no doubt the above cases pronounce the appropriate principles to be considered in considering whether a plaintiff should be awarded any damages at all. The question as to what is reasonable for a plaintiff to do in mitigation of his damages is however not a question of law, but one of fact in the circumstances of each particular case the burden of proof being upon the defendant (See **African Highland Produce Limited – v – Kisorio [1999] LLR 1461 (CAK).**

The measure of damages payable on breach of contract by a seller to deliver goods is governed by section 51 of the Sale of Goods Act (Cap 31) which reads as follows:-

"(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of

events, from the sellers breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or if no time was fixed then at the time of the refusal to deliver."

So what are the facts in this case? The plaintiff's witness, PW 1 testified that after the breach of contract by the defendant, the latter gave the plaintiff two alternatives namely:-

1) Return of amount paid for undelivered sugar.
2) Balance be retained by the defendant and deliveries be of 500 tons per week at Kshs. 34,000/= per ton.

The plaintiff rejected both alternatives on the grounds that the defendant offered the sugar on different and unfavourable terms: The delivery period was altered and the deliveries were to be staggered; further the price was enhanced. PW 1 further testified that the defendant sought the plaintiff's waiver of his right to make any other claims if he accepted any of the options made to him by the defendant. He also testified that there was no sugar at the time from other millers as they were selling to their large-scale customers and could not deal with the plaintiff as it was known that the plaintiff was the defendant's customer. PW 1 further testified that the relationship between the plaintiff and the defendant became strained and he could not make further purchases from the defendant which subsequently blacklisted him.

The plaintiff's said witness was cross examined at length but it was never suggested to him that the above testimony was not infact true. Indeed the defendant's only witness, Ernest Kivai, who testified as DW 1, expressly stated that the alternatives given to the plaintiff, contained in the defendant's letter dated 13th April 1995, were in settlement of the dispute between the plaintiff and the defendant. Several findings flow from the said testimony of PW 1. Firstly, that the plaintiff did not act unreasonably when he rejected the defendant's said alternatives. Secondly, that the defendant could not constitute an alternative available market. Thirdly, that there was indeed no other available market to which the plaintiff could resort to satisfy his sugar requirements. Fourthly, that the

plaintiff is not guilty of failure to mitigate his damages. Fifthly, that the cases of **Payzu – v – Saunders (supra), Doyle – v – Olby, (Irionmongers) Limited, The Elena D. Amico** are clearly distinguishable from the facts of this case. Sixthly, that the plaintiff's damages should be assessed by reference to sub-section 51 (2) of the Sale of Goods Act. The sub-section incorporates the first limp of the rule in **Hadley – v – Baxendale** (supra).

The defendant also argued that the plaintiff's claim for loss of profits does not meet the requirements set out in **Victoria Laundry – v – Newman [1949] 2 KB 528** expressed by Asquith LJet page 543 as follows:-

> **"in order that the plaintiff should recover specifically and as such the profits expected on these contracts, the defendants would have had to know at the time of their agreement with the plaintiffs of the prospect and terms of such contracts."**

The defendant contended that the plaintiff did not inform it of the intended use of the sugar and cannot therefore hold it liable. Related to this argument is the defendant's contention that the plaintiff should have given written notice of the intended use of the sugar. To buttress that argument, the defendant invoked the case of **Seven Seas Properties Limited – v – Al-Asse and Another [1993] 3 All ER 577** where the following passage is found:-

> **"In these circumstances the plaintiffs' claim based on the second limp of Hadley – v – Baxendale must fail. The defendants were not on notice of the Grangeville contract and accordingly any loss in respect of such contract arising from the defendant's, default under the plaintiff's contract was not within their contemplation as required by the second limp."**

I have read the two cases relied upon by the defendant. The case of **Victoria Laundry – v – Newman** in reality supports the plaintiff's position. It was held *inter alia* as follows:-

> **"(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.**
>
> **(3) What was at that time reasonably or foreseeable depends on the**

knowledge then possessed by the parties or at all events, by the party who later commits the breach.

(4) For this purpose, knowledge *"possessed"* is of two kinds; one imputed, the other actual. Everyone, as a reasonable person is taken to know *"the ordinary course of things"* and consequently what loss is liable to result from breach of contract in that ordinary course."

In this case there is no dispute that the plaintiff under the two contracts made a huge purchase of sugar. Indeed his customers on several occasions collected part of the sugar directly from the defendant. The defendant cannot, with seriousness claim that it did not know the plaintiff's intended use of the sugar. DW 1 expressly admitted that the sugar was for re-sale. I find and hold that the defendant knew that the sugar which the plaintiff purchased from it was for resale at a profit. This case is therefore clearly distinguishable from the case of **Seven Seas Properties Limited – v – Al-Asse and Anor (supra).** That case involved sale of a leasehold interest, an obviously different commodity from the commodity in this case. The following portion of the decision in that case puts the matter to rest.

"Since the plaintiffs had deliberately withheld from the defendants the fact that they intended to sell on, the loss suffered by the plaintiffs in respect of the contract for re-sale was not within the contemplation of the parties. The plaintiff's claim for damages arising out of the re-sale would therefore be dismissed."

Notice that the plaintiff had in that case, deliberately withheld from the defendants the fact they intended to re-sell. That is not the position in this case, where infact the defendant dealt directly with some of the plaintiff's customers to whom the sugar had been resold.

In the premises, I accept the plaintiff's testimony that if the defendant had delivered the sugar pursuant to the terms of the contracts, the plaintiff would have resold the same at the rate of Kshs. 37,500/= per metric ton for the 50 kg bags and Kshs. 37,000/= per metric ton for the 100 kg bags. Several factors would have led to that result. Soon after the breach, there was a sugar shortage as there was a ban on importation of sugar. Nearly all sugar factories were due to close for their annual maintenance thereby severely limiting

supply. With reduced sugar supply, the plaintiff would have made the tidy profit particularized in PEX 3 at pages 4 and 5. In the end I find and hold that the plaintiff has, on a balance of probabilities proved his claim for Kshs. 41,559,750.00 pleaded in paragraph 8 (ii) of the amended plaint being the profit he would have made on the sugar which the defendant failed and/or refused to supply to the plaintiff in breach of the two contracts between them.

I turn now to the plaintiff's claim for Kshs. 4,366,744.95 which is said to be interest paid to the bank by the plaintiff on the sum of Kshs. 251,914,250/= part purchase price paid in advance for the undelivered sugar for the period between 30th March 1995 and 2nd May 1995. The foundation of this claim is that as a result of the defendant's refusal to deliver sugar of the value of the said Kshs. 251,914,250/=,the plaintiff suffered a loss of interest on the said sum since the sum was tied up as a loan incurring the said interest for the said period.

I have already held that interest including compound interest may be awarded at common Law subject to certain conditions already discussed being satisfied. The discussion in my view does not cover the plaintiff's claim for Kshs. 4,366,744.95. This is interest paid by the plaintiff to his financier to finance the purchase of sugar. PW 1, the plaintiff's General Manager, admitted that the plaintiff would have had to honour his credit facility obligations to his financier irrespective of whether there was a breach of contract by the defendant or not. The witness expressly admitted that if the defendant had delivered all the sugar, the plaintiff would not have made the said claim. He would in my view have been expected to recover his cost of financing the contract from his profit which is the subject of his claim in paragraph 8 (ii) of the amended plaint. In my judgment, success of the plaintiff's claim in paragraphs 8 (i) and 8 (ii) of the amended plaint would render the claim for Kshs. 4,366,744.95 in paragraph 8 (iii) unmaintainable. It would indeed amount to unjust enrichment.

The claim must also fail for failing the test set out by Lord Denning MR as he then was in **The Borag [1981] 1WLR 274, 282G** which is:

> **"Is the consequence sufficiently closely connected with the cause as to be the subject of compensation or not?"**

I agree with the defendant that the interest charged on a credit facility arranged by the plaintiff prior to his contract with the defendant cannot be fairly and reasonably be

considered to arise naturally or in the usual course of things from the breach of contract. Neither was it in the reasonable contemplation of the parties. The test set in **Hadley – v – Baxendate (supra)** was therefore not satisfied. In the premises the plaintiff's claim for Kshs. 4,366,744.95 by way of damages for interest charges on the said sum of Kshs. 251,914,250.00 has not been proved as awardable on a balance of probabilities.

I return to the plaintiff's claim for Kshs. 212,199.03. I have already found that the court has power under Common Law to award interest including compound interest for late payment of a debt. This indeed, is the plaintiff's claim. The said sum is claimed by way of damages for loss of use of the sum of Kshs. 3,381,182.50 which the defendant failed to refund to the plaintiff after the breach of contract. The rate of interest applied is 24% p.a. and is for the period between 2nd May 1995 to the date of filing suit. The plaintiff's second witness, Sanjeet Shah, produced PExhibit 3 page 3 which shows how the said sum of Kshs. 212,199.03 was arrived at. In his testimony, the plaintiff's General Manager, Paresh Meghji Shah, stated that if the plaintiff had been paid the said sum of Kshs. 3,381,182.50, he would have placed the same with his bank on a fixed deposit on roll-over terms and earned interest thereon during the said period calculated on the basis of compound interest by reference to the prevailing commercial rates.

The fact that the plaintiff was denied the use of the said sum of Kshs. 3,381,182.50 was not disputed by Ernest Kivai (DW 1), the only witness called by the defendant. He indeed expressly acknowledged that fact in his testimony. In his submissions on this part of the plaintiff's claim, counsel for the defendant stated as follows:-

> **"16. The defendant submits that whilst the plaintiff would be entitled to the loss of use of the amount which ought to have been refunded by the defendant, his claim for the amount of Kshs. 212,199.03 is wrongly made for the following reasons:-**
>
> **(a) The plaintiff himself has provided no direct evidence of what he would have done twith the Kshs. 3,381,182.50; rather Mr. Meghji Shah Paresh (General Manager) provided evidence.**
>
> **(b) No evidence by Mr. Meghji Shah that he was given authority by the plaintiff to make investment decisions on his behalf.**

(c) **There is no evidence that plaintiff in the past deposited money from proceeds of selling the sugar with Bullion Bank and obtained interest on this amount.**

(d) **Compound interest cannot be sought. Can only seek simple interest;**

(e) **S. 26 has no application to interest prior to the date of the suit which is a matter of substantive law. Highway Furniture Mart Limited – v – The Permanent Secretary [2006] 2 EA 94 (CA).**

(f) **Interest antecedent to the suit is only claimable under an agreement where there is stipulation for the rate of interest (contract rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage or where there is a statutory right to interest or where an agreement to pay interest can be implied from the course of dealings between the parties Highway case."**

I have already discussed these contentions and held that compound interest is claimable for any period and that the plaintiff himself need not have testified in person to legitimize his claim. I also do not detect any bar for a plaintiff to claim compound interest for the period antecedent to the suit and after. The defendant is a manufacturer and seller of sugar. For the period in question, as it retained the plaintiff's money, it continued with its operations. There is therefore no gainsaying that it had the use of the plaintiff's money and benefited from the same. It should compensate the plaintiff accordingly and as stated in Halsbury's Laws of England (4th Edition) Volume 12 at page 490 **"the rate of interest should therefore reflect the earning capacity of money during the time the plaintiff has been kept out of his money."** In the premises, I am persuaded on a balance of probabilities that the plaintiff is entitled to the said sum of Kshs. 212,199.03.

Related to this claim is the plaintiff's claim for loss of an opportunity to invest his total claim of Kshs. 49,460,576.48 on a fixed deposit with a bank on roll over terms which would have yielded compound interest at the current or market rates prevailing during the

whole period he has been kept out of his money. I agree with the plaintiff that the claim is perfectly legitimate. In principle, the sum is claimable as I have already discussed but is it awardable in this case? Before determining this issue, I make the following observations: This suit was filed on 22nd August 1995. Apart from costs, the plaintiff claimed special damages of Kshs. 51,219,776/=, general damages and interest at 32% p.a. or at commercial rates or such other rate as the court may rule. It is significant that compound interest as damages was not claimed save for Kshs. 4,306,744.95 being the interest paid to the bank by the plaintiff on the sum of Kshs. 251,914,250/=.

It is also significant that in the issues framed by the parties dated 11th March 1997, compound interest as general damages was not sought save for the interest actually paid. It is in the amended plaint of 7th October 1998 that the plaintiff introduced the claim for Kshs. 212,899.03 by way of damages calculated by way of interest at the rate of 24% p.a. during the period from 2nd May 1995 to the date of the suit.

On 5th November 1998, a consent judgment on liability was recorded and assessment of damages was fixed on 13th November 1998. Then for one reason or another evidence on the assessment was not commenced until 11th May 2005, seven (7) years later and concluded on 22nd February 2010 almost fifteen (15) years later. Given that history, I am reluctant to grant the plaintiff's prayer for compound interest on his total claim in the circumstances of this case. To do so would convert the court into an investment institution and would encourage litigants not to conclude actions based on breach of contract particularly where liability is admitted. This view is not new. In **Mukisa Biscuit Manufacturing Company Limited – v – West End Distributors Limited (No. 2) (supra),** Spry V. P. cited with approval the decision in **Kawoko Estate Coffee Factory Limited – v – Zassa (Civil Appeal 32 of 1969 (UR)** that:

> "……..**undue delay in bringing an action may be a good ground for refusing interest on money wrongly with held. I think that failure to prosecute a suit with diligence might well have the same result."**

So, whereas I recognize that the court has jurisdiction to award compound interest where a claimant is seeking restitution of money or interest by way of damages for breach of contract to pay a debt (see **Sempra Metals Limited – v – I.R.C. (supra),** I am not inclined to do so in this case. The court in my judgment should retain the discretion to

make such an award. Lord Nicholls of Birkenhead said as follows in his speech in the Sempra Metals case:

> **"95. In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. What form the loss takes the court will here as elsewhere draw from the proved or admitted facts such inference as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law."**

As per Lord Hope of Graighead, in the same case:

"Interest losses which are recoverable as damages should be calculated on a compound basis where the evidence shows that this is appropriate. This should be applied to the restitutionary remedy at Common Law."

AND as per Lord Mance (dissenting):

> **"Using their discretion, courts will be able to keep equitable claims seeking to investigate and recover any actual benefit obtained by the use of the money had and received within sensible bounds, ……the sensible exercise of such a discretion should go someway to meet concerns like those expressed to and recognized by the Law Commission in cases where the sums on periods involved are small. Courts should be able to discourage or refuse expensive demands for discovery by claimants…….While the general basis of any award made should be to recoup any actual benefit, this does not entitle a claimant to insist either on full investigation or full disagreement or to compound interest in every case. The court can take a robust and general approach."**

In the end the plaintiff's claim for compound interest save for the claim in 8

(i) is denied.

With regard to costs, the defendant submitted that the plaintiff should bear the defendant's costs since the defendant consented to judgment on liability and that the plaintiff's other claims are unreasonable. The only claims disallowed are the interest paid by the plaintiff to another party pursuant to arrangements made before the contract between him and the defendant and compound interest claimed on the entire claim. That claim has been denied for reasons given which do not include unreasonableness. The defendant has further not paid a single cent of what it admitted way back on 15th October 2008. The plaintiff has in any event substantially succeeded in his claims against the defendant and as costs normally follow the event, I find and hold that the normal rule should apply. The plaintiff will therefore have the costs of this suit.

The plaintiff applied for costs for two counsel. I note however, that although counsel submitted extensively on the issues of compound interest and mitigation of damages, the issue before the court was a simple one of assessment of damages for breach of contract, the defendant having conceded liability for the breach. I am, in the circumstances, not persuaded that a certificate for two counsel should issue.

SUMMARY

1) Judgment is hereby entered for the plaintiff against the defendant as prayed in paragraph 8 (i) of the amended plaint in the sum of:
   (a) Kshs. 3,381,182.50
   (b) Kshs. 212,192.03
2) Judgment is also entered for the plaintiff against the defendant as prayed in paragraph 8 (ii) of the amended plaint in the sum of Kshs. 41,559,750.00.
3) The plaintiff will have the costs of this suit.
4) Interest is awarded on (1) and (2) above at court rates from the date of filing suit until payment in full and on 3 above at the same rate from the date of taxation until payment in full.

Those then are the orders of the court.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL 2010.

F. AZANGALALA

JUDGE