**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 172 of 1997**

**STEPHEN MUKIRI NDEGWA ……..……..…. ……1ST PLAINTIFF**

**CONTINENTAL MARKETING LIMITED……..……2ND PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED……DEFENDANT**

J U D G M E N T

The 1st and 2nd Plaintiffs filed this suit on 28th January, 1997 against his chargee and its bankers respectively, Kenya Commercial Bank Limited (hereinafter referred to as Defendant or Bank). The plaint was amended on 30th April 1999 to which the Defendant filed an amended defense on 22nd December 1999.

**THE PLEADINGS**

The 2nd Plaintiff a Limited Liability Company applied for an overdraft facility from KCB between 1987 and 1989, which as granted against security provided by the 1st Plaintiff. The 1st Plaintiff charged two properties, L.R. Nos. NYANDARUA/MALEWA/385, and NYANDARUA/MALEWA/489, (hereinafter referred to as the suit property), in favour of the Defendant Bank, to secure the 2nd Plaintiff's overdraft facility with it. It is the 2nd Plaintiff's contention that between July and December 1993, it transferred to the Defendant a total of US$.144, 037,654.60, from Overseas Banks, with instructions that the amounts be credited into the 2nd Plaintiff's Account, which the defendant failed to do. The Plaintiffs contend that during the same period, the 2nd Plaintiff owed the Defendant Kshs.477, 067.35 which sum should have stood paid against the transferred sums, and that the 2nd Plaintiff's account with the Defendant should have been in credit and that consequently, the 1st Plaintiff's securities should have stood discharged. The Plaintiffs contend that instead, the Defendant failed to credit any of the Plaintiffs' accounts with the said remittances, yet it continued to hold on to both the securities and the transferred amounts, and continued charging interests above the highest rates agreed between them, until 10th January, 1997, when the Defendant attempted to sell or illegally sold the charged suit properties in exercise of its Statutory Power of Sale.

The Plaintiffs complain further that the Defendant declined to finance any further business deals by the 2nd Plaintiff and instead closed its accounts with it without giving it notice, thereby causing it to suffer loss. The Plaintiffs seek the following prayers in their amended plaint.

1. An order that the Defendant by itself or through its Agents or Advocates be restrained from transferring or in any way doing any act to complete the sale of Nyandarua/Malewa/385 and Nyandarua/Malewa/489.

2. An order that the Defendant by itself or through its Agents or Advocates be restrained from interfering with the 1st Plaintiff's title in Nyandarua/Malewa/385 and Nyandarua/Malewa/489.

3. The Defendant do give a full account of all monies received from the Plaintiffs but not reflected in the 2nd Plaintiff's account together with interest accrued thereon at commercial rates from 1993 until payment in full.

4. A declaration that the sale of Nyandarua/Malewa/385 and Nyandarua/Malewa/489 carried out on 10th January, 1997 by Kenya Shield Auctioneers is illegal, null and void and the charge on said properties be deemed to have been discharged forthwith.

5. A Declaration that the loan and/or overdraft granted to the second Plaintiff by the Defendant under account No. 239541912 has been fully and completely repaid and redeemed.

6. A declaration that the Defendant does deliver title Nos. Nyandarua/Malewa/385 and Nyandarua/Malewa/489 to the first Plaintiff duly discharged and released and free from all encumbrances.

7. Judgment for:

(iA) Payment of Kshs.9,929,092/70

(ii) General Damages for loss of business and breach of contract plus interest thereon at court rates.

(iiiA) Interest on (i) above at 44% p.a. with effect from

July, 1983, until payment in full.

(iv) Costs of this suit plus interest thereon at court rates.

(v) Further or any other relief that the Honourable Court might deem fit to grant.

The Defendant in its amended defense denies that during the period between July to December 1993, it received the sum of US$. 144,037.65 from either of the Plaintiffs, with instructions that the amounts be credited into the 2nd Plaintiff's account or that it failed to credit or account for any funds it received from the Plaintiffs.

The Defendant avers that in addition to the loan amount the 1st Plaintiff held with the Defendant, and the overdraft account the 2nd Plaintiff had with the Defendant, the Defendant had granted Express Coffee Exporters Company Limited (hereinafter referred to as the Company) a Packing Credit facility at the request and instance of the 1st Plaintiff. The Defendant avers that the 1st Plaintiff was a director and shareholder of the Company and that it was agreed between the parties that the proceeds of sale for all the coffee or tea exported by the Company, and received by the Defendant, would be for the credit of the Company's Packing Credit facility account.

The Defendant avers that all the funds it received from the Plaintiffs were utilized for their credit as per their instructions and that since the Statement of Account given to the Plaintiffs by the Defendant was accepted by them, they are estopped by their conduct from making the allegations contained in their amended plaint.

The Defendant denied that the US dollars received by it liquidated the amount outstanding in the 2nd Plaintiff's overdraft account, or that there was any credit balance in its account, or that the security for the overdraft was discharged. The Defendant contends further that the 2nd Plaintiff continued to utilize the overdraft facility and that on 31st December, 1995, the sum of 813,414.55 was due and owing from it to the Defendant. That further, the 2nd Plaintiff admitted owing the said sum when a notice demanding the payment of the said amount was sent to it, and that therefore the 2nd Plaintiff is estopped by its conduct from denying its indebtedness and liability to the Defendant. The Defendant avers further that since the 2nd Plaintiff failed to comply with the said notice within the prescribed period, the Defendant is entitled in law to sell the charged properties in exercise of its Statutory Power of Sale and that therefore the auction was not illegal. The Defendant also denies that it failed to give credit to the 2nd Plaintiff for funds it received for the credit of the Plaintiffs as claimed in the plaint.

The Defendant also denies that it was under any obligation in law to finance any further or other business deals by the 2nd Plaintiff and that it therefore cannot be liable for its alleged loss of business. The Defendant avers that it charged interest in strict compliance with the contract between it and the 2nd Plaintiff. The Defendant has pleaded in the alternative that the Plaintiffs' claim is barred by the provisions of the Limitation of Actions Act. A Notice of Preliminary Objection filed by the Defendant on 20th July, 2000, raising this same issue was heard and dismissed by the Court.

Lastly, the Defendant avers it did not receive any notice of the Plaintiffs' intention to institute the suit. It prays that the Plaintiffs' suit be dismissed.

The Plaintiffs filed a reply to the amended defense on the 6th April, 2000. In it the Plaintiffs join issues with all the allegations contained in the Defendant's amended defense.

The Plaintiffs aver that by denying having received US dollars 144,037.65 in paragraph 3 of the amended defense, and that at the same time setting out the same amounts and purporting to account for them under paragraph 5 of the amended defense, the Defendant was approbating and reprobating in its pleadings, which the Defendant should not be allowed to do as it amounts to an abuse of the court process. The Plaintiffs aver that the analysis in paragraph 5 of the amended defense was inaccurate, fabricated and incorrect and further that the Statements of Accounts, explanations and analysis, reluctantly given by the Defendant to the Plaintiff from time to time, differ and are contradictory.

The Plaintiffs aver that it was not proper for the Defendant to draw in the Company into the suit as it was not a party and that in any event, nothing turns on the fact the 1st Plaintiff is a director and shareholder of both the 2nd Plaintiff and the Company.

The Plaintiffs aver further that the 1st Plaintiff had no loan with the Defendant and that he was only a guarantor to the 2nd Plaintiff through charges of the two suit properties.

The Plaintiffs in reply to paragraph 4(b) of amended defense denied that the foreign currency funds received by the Defendant on account of the 2nd Plaintiff, were to be held in a Packing Credit account, and stated that the arrangement was that the said foreign currency funds would be held in a Foreign Currency account in the name of the 2nd Plaintiff, and would be applied to pay off the 2nd Plaintiff's overdraft and such of the 2nd Plaintiff's suppliers and creditors as the 2nd Plaintiff would, from time to time direct.

Lastly, the Plaintiffs aver that the facts pleaded by the Defendant without more, do not disclose any estoppel by conduct or otherwise, as no misrepresentations were pleaded nor detriment to the Defendant referred to, and that therefore, the plea of estoppel must be struck out *in limine*.

**THE ISSUES FOR DETERMINATION**

The issues for determination by the court were filed by the Plaintiffs' advocates on 6th April, 2000. The Defendant did not file any issues for determination and neither did it oppose or object to those filed. For the purposes of this case, therefore, the Plaintiffs' list of issues for determination by the Court will be the ones considered in this judgment.

There are twelve issues listed in the following terms.

1. Whether or not the Defendant received a sum of US Dollars 144,037.46 from the second plaintiff for the account of and to the credit of the second plaintiff?

2. Whether or not the Defendant utilized the funds it received for the credit of the Plaintiffs as directed by the first plaintiff from time to time.

3. Whether or not the First Plaintiff had a loan account with the Defendant, and if so, whether the loan account was serviced, paid for or accounted for through funds received on account of the Plaintiff as directed by the first Plaintiff from time to time?

4. Whether or not foreign currency in dollars received on account of the Second Plaintiff were ever applied towards settlement of the accounts held by either the first plaintiff or by Express Coffee Exporters Company Limited and if so, on whose instructions?

5. If such foreign currency funds were applied to the accounts of the First Plaintiff and/or Express Coffee Exporters Company Limited, whether such application was authorized in writing or otherwise, by either of the Plaintiffs and/or Express Coffee Exporters Company Limited?

6. Whether or not the overdraft account held by the Second Plaintiff with the Defendant has been repaid in full.

7. Whether or not the amounts in US Dollars received by the Defendant on behalf of the Plaintiffs was US$98,717.06, and if so whether the Defendant has accounted for the amount in full to the satisfaction of the Plaintiffs.

8. Whether or not the doctrine of Estoppel has any application to the true facts of this case.

9. Whether or not the Defendant had any right to put up for sale the First Plaintiff's two properties namely Title numbers: Nyandarua/Malewa/385 and Nyandarua/ Malewa/489.

10. Whether or not the Plaintiffs' suit is barred by the provisions of the Limitations of Actions Act, Cap.22, Laws of Kenya.

11. Whether or not the Defendants have acted in breach of contract by charging interest higher than the rate set out in the charge documents.

12. Whether or not the first Plaintiff is entitled to the relief's sought, that is to say:

i) Injunction to restrain the Defendants from selling the First Plaintiff's properties.

ii) Full accounts of all monies received by the Defendant for the Plaintiffs' account.

iii) Declarations that the overdraft facilities have been fully paid and therefore the properties charged should be discharged and released to the First Plaintiff.

iv) Kshs.9, 929,092.70 together with interest at 44% per annum with effect from July, 1993.

The issue numbered 10 above is mute as it was the subject of a ruling by **Hon. Ringera, J.** (as he then was), as stated in this judgment. Likewise, item 12(ii) of the issues was disposed of in an application filed by the Plaintiffs and determined in their favour by **Ringera, J.** in which, on 22nd March 2004, the Court appointed a Referee to carry out a review of the accounts between the Plaintiffs and the Defendant, and make a report thereon to the Court. The report is Plaintiffs' exhibit 3 produced by PW1 **Alfonce Karugu**.

In regard to the rest of the issues, I propose to determine them alongside the evidence adduced by the parties.

**THE EVIDENCE**

**ALFONCE KARUGU**, the Plaintiff's first witness, is an Accountant from SCI KOIMBURI TUCKER & CO. SCI KOIMBURI TUCKER & CO., a firm which was appointed by the court as the Referee to examine and investigate the accounts rendered by the Defendant, and make a report thereon. This followed an application by the Plaintiffs in a chamber summons dated 5th November 2002**.** **Karugu** was called by the Plaintiffs to testify to the findings reached by him and his firm as Referee, as per their report. The report was produced as Plaintiffs' exhibit 3.

**Karugu** testified that the issue between the parties was dispute over amounts of monies remitted by the 2nd Plaintiff to the Defendant during the period between July 1993 and December 1993. **Mr. Karugu** testified that his firm was mandated to look at the supporting documents and determine if the amounts in dispute had properly been accounted for. **Karugu** submitted that he requested and received several documents from both parties, to enable them carry out their mandate. The documents received from the 2nd Plaintiff were produced as Plaintiffs' exhibit 1. **Karugu** testified that his firm exchanged several correspondences with the Defendant bank and its lawyers which he identified to the Court and produced as P. exhibit 2.

The witness stated that he held several meetings with **Mrs. Onyango**, the Bank Officer assigned by the Defendant to assist him with all the information required. **Mrs. Onyango** was in charge of Foreign Bills Department at Industry Area Branch, during the period under review and was also the sole witness for the Defendant in this case.

**Karugu** testified that the firm did carry out its mandate but that it faced limitations, among them, faded memory and the lack of accounts from the Defendant allegedly as a result of a fire in its go downs in 1999. The witness testified that these limitations necessitated the Referee to rely on correspondences and documents supplied by both parties.

In summary, the conclusion arrived at by PW1, after reviewing and examining each specific amount complained of, is considered hereafter item per item, together with the evidence of the parties and submissions by Counsel.

**ITEM NO. 1.**

In regard to US $8800 received from Tanzania in July 1993, **Karugu** said that the Plaintiffs claimed that the amount received was US$17,600, while the Defendant confirmed receiving only US $8800. **Karugu** testified that during this time, it was a requirement that 50% of foreign currency received by Banks had to be deposited with the Central Bank of Kenya (CBK). **Karugu** continued to state that upon examining the credit slip with that in mind, they saw that the Defendant credited the 2nd Plaintiff with an equivalent of 50% of the remittance declared and sold to CBK i.e. US$ 4400. That on the same day US $8800 in the equivalent of Kshs.580, 275/50 was deposited in a Retention Account No. 950189008. **Karugu** stated that they came to the conclusion that the 2nd Plaintiff was credited with 50% of the total remittance being US $8800, in its equivalent in Kshs. that is, 644,075/80, and that the balance has not been accounted for. Mr. Karugu testified that he saw a letter by the Plaintiffs dated October, 1998 in which inquiry was made regarding the outstanding balance of US $8800, and that the Defendant bank failed to respond denying or otherwise such a receipt at the earliest opportunity, until the matter was taken to court.

**Mr. Karugu** stated that they were able to be shown only one Statement of Account to indicate how the remittances were accounted for in compliance with the Exchange Control Regulations. The witness testified that indeed the Statement, Appendix II(c) of the report, did not clearly indicate the transactions, and did not give a clear picture of the 2nd Plaintiff's account. **Mr. Karugu** stated that there was clear evidence to show that in some instances, sale of 50% of foreign currency remittances was not adhered to as required under the Exchange Control Regulations, and that it was clear evidence that there was failure to keep proper accounts, which made it difficult to track down the remittances and payments going through the account.

In his report under title "**BALANCE DUE TO THE PERIOD OF THE REMITTANCES"** Mr. Karugu has this to say:

"***We note that if the amounts in dispute had been properly accounted for and credited to the 2nd Plaintiff's account, the account may not have been overdrawn to this extent and there would have been less interest, if any."***

**Mr. Ougo** for the Defendant has cautioned the court to view the Accountants' conclusion while bearing in mind the very serious limitations faced by the Accountants as expressed in their report. It was **Mr. Ougo's** view that the Accountants arrived at the conclusion they did because of lack of documents as a consequence of the long period of time which had elapsed.

Counsel has relied on the English Case of **GoldSmid vs. Tunbridge Wells Improvement (1966) 1 Ch App 349** and **Liverpool Corporation –vs- H. Coghill & Sun (1918) Ch 307,** for the preposition that a court should always be guided by the facts and not by the results of Scientific Investigations carried out.

**Mr. Mogeni** on his part has heavily relied on the Accountants report, but has put a caveat on the findings of the Referee contending that the report did not include all the remittances disputed by the and Plaintiff amounting to the sum claimed of US$ 144,037.46.

**Mr. Ougo's** submission regarding the evidence of scientific Investigations cannot be faulted. This court has not relied solely on the Accountants' Report, P. exhibit 3 but has examined the evidence and facts of the case as adduced by both parties, both oral and documentary,

and has drawn its own conclusions from the analysis. I agree that the Report ought not to be used as final and that the court must examine the facts and evidence before it and to draw its own conclusions, which is what I have endeavored to do in this case.

I must comment on **Mr. Ougo's** submission regarding the limitations encountered by the Referee. It is true that relevant documents were missing. The Referee has shown that they could not immediately obtain any statement of the Retention Account held in the Defendant Bank in favour of the 2nd Plaintiff. That finally, when they received one, there were obvious omissions and shortcomings in it. **Mr. Karugu** explained that he relied on other correspondences between the parties and documents held by them to make the report. The documents relied upon are all part of the report and the exhibits produced in this case.

I must state here the observations I made regarding this case. There is evidence to show that the Plaintiffs request for accounts for amounts received on its behalf by the Defendant in 1998 went unheeded, until December 10th, 1998, when **Ms Biamah**, the Senior Legal Officer of the Defendant, wrote the letter at page 30 of the Plaintiffs' bundle of documents. It was referenced the instant case and was in reply to the Plaintiffs letter of November, 1998. It is **Ms Biamah's** letter which **Mrs. Onyango** declined to comment on. It is however clear from the evidence adduced, that an attempt was being made for the first time by the Defendant Bank, to account for the various amounts disputed by the Plaintiffs. It was admitted that Appendixes referred to in the letter i.e. Appendixes 1, 2, 2A, 4, 5 and 5A were never supplied. The 1st Plaintiff said that he was unable to understand the explanation given in that letter in the absence of the Appendixes. That could be the same reason that may have led **Mrs. Onyango** to decline to comment on the letter, and in my view that is quite understandable in the circumstances.

Prior to this letter was another by the same officer to the Plaintiffs, at page 29 of the Plaintiffs' bundle, dated 9th November 1998. It enclosed a schedule. The Plaintiffs in that letter claimed that documents and receipts for other remittances were not traced by the Defendant. There is yet another letter dated 20th November 1998, in which the officer requests the Plaintiffs to provide documentary proof of remittances disputed. There is an admission in this letter that the Bank could not trace some documents and thus its request for documents from the Plaintiffs before responding to the Plaintiffs request.

Evidence was adduced by **Mrs. Onyango** that the Bank's warehouse was burnt down in September, 1999. Therefore at the time the Plaintiff was raising queries over the disputed amounts in 1998 and before, the Defendant should have had all its documents, if at all they kept them as required. Further the Defendant should have responded to the Plaintiffs within an opportune time.

I also noted that the Defendant did not have any proper procedure of informing the Plaintiffs of remittances received by it on its behalf, not even through a statement of account. Most of the documents evidencing remittances were copies supplied by the Plaintiffs. I also noted, curiously, that despite the fact that the Defendant ran, or at least was supposed to maintain, a Retention Account in the 2nd Plaintiff's name, for dollar amounts it received for the 2nd Plaintiff's credit, that account was not availed until the one signed by **Mrs. Onyango** dated 21st October, 1997. It is found at Appendix VIII (b) of the Referee's Report, also at page 45 of Defendant's bundle and is pleaded as paragraph 5 of the Defendant's amended defense. I have commented elsewhere that the statement was incomplete and had obvious omissions of remittances received by the Defendant for the credits of the 2nd Plaintiff, during the period under review. In fact the first date of accounting is September 1993, while some of the amounts in dispute were received in July 1993, two months prior to that date. The Statement was not a proper account for the amounts in dispute.

In order to understand what the issues in this matter are, it must be remembered that the matter in disputes related to two accounts held by the Defendant for the 2nd Plaintiff. The first was the Current Account which was maintained in Kenya Shillings and the second was the Retention Account maintained in US dollars. It is not disputed that at the time in question, the Exchange Control Regulations, under the Exchange Control Act, Cap 27, required that all receipts in foreign currency received by banks on behalf of customers:

1. Had to be declared to the Central Bank of Kenya,

2. 50% of the foreign currency declared had to be sold to CBK

3. The balance of 50% had to be credited in Foreign Currency into a Retention Account in customer's name.

There was no dispute between the parties on these facts. The 2nd Plaintiff's contention is:

1. It was not advised of credit remittances received by the Defendant on its account. That no Statements of Account were regularly supplied to it by the Defendant either for the Current Account or the Retention Account. That the Defendant bank was most notorious in withholding especially the Retention account.

2. That the Defendant Bank did not give it credit for all foreign currency remittances received by the Defendant for its credit.

None of the counsel submitted on the duty owed by the Defendant to the 2nd Plaintiff or generally on the rights, responsibilities or duties of a bank to its customers or vice versa. However, it goes without saying that the relationship between a Bank and its customer is based on contract. Even though the contract entered between the two parties was not adduced in court, under the Cheques Act (Cap 35) and the Bills of Exchange Act (Cap 27), a bank generally is under an obligation to act in good faith, without negligence and in the ordinary course of business adhere to current bank practice. The role performed by the Defendant bank to the 2nd Plaintiff cannot be described as that of a collecting bank or paying bank, as envisaged under Sections 3 and 4 of the Cheques Act. This is because the remittances it received for the 2nd Plaintiff were from foreign banks and remittances did not originate from banking instruments delivered to it by the 2nd Plaintiff. Conversely the Defendant was it paying a prescribed instruments drawn on it, whether by the 2nd Plaintiff or not, to a banker. In fact the funds in issue were in foreign currency, received directly by the Defendant bank for the 2nd Plaintiff's credit from foreign banks. The remittances were through bank drafts and such electronic or other funds transfer, not necessarily involving the Clearing House.

It is however clearly understood that in the normal banking practice, part of the duties of a bank to its customers includes maintaining proper statements of accounts, giving accurate and up to date information of all business transacted through the account, including all credits received. The other duty also goes without saying and is that the bank had a duty to give the 2nd Plaintiff periodic bank statements, kept as stated above, in order to inform the 2nd Plaintiff of the true state of its finances. The statements of account could have enabled the 2nd Plaintiff detect any deficiency in the account and to raise the issue with the Defendant bank within a reasonable time. What has been shown in this case is that the Defendant failed in both duties, leaving its customer groping in the dark. At the same time, it left the 1st Plaintiff, who had secured an overdraft and other banking facilities advanced to the 2nd Plaintiff by the Defendant, reeling at the speed at which demands to pay and threats to sell the suit properties was pursued.

The conclusion that follows this analysis is that the Defendant did not maintain proper accounts for the 2nd Plaintiff, which was its duty to do. The Defendant also failed to produce vital information to the 2nd Plaintiff despite repeated requests to do so. The Defendant acted below the standard reasonably required of it as a Banker. The Defendant's action not to keep proper accounts, and to withhold information to its customer, was in bad faith and in total disregard to the interest of its customer, the 2nd Plaintiff. In my view, it was a breach of the Defendant's duty and responsibility as a banker to the 2nd Plaintiff.

The excuse floated in this case, that the Defendant's warehouse burnt in an inferno in 1999, and therefore the lack of documents, is not acceptable since at the time the Defendant had the opportunity to respond to the Plaintiffs and to give account, it failed to do so, and at that time, the fire had not broken out and its records had not been burnt. It was frustrating to the 2nd Plaintiff, its client, to grope in the dark between 1993 and 1998, regarding the state of its accounts with the Defendant. By 1998, when the Defendant gave the first positive response, I note that the Plaintiffs had admitted being indebted to the Defendant, and even tried to negotiate, before eventually deciding to go to court. The Defendant made heavy weather of the Plaintiff's admission and of its request to sell the suit property by private treaty. This is the document at page 10 of Defendant's bundle. That admission does not excuse the Defendant for its failure to maintain Statements of Accounts for the 2nd Plaintiff. The 1st Plaintiff gave a reasonable explanation why the admission of indebtedness was made, which he said was geared at trying to save his property, which explanation I find reasonable in the circumstances.

I also noted that the Bank had more energy to pursue the sale of the 1st Plaintiff's property to recover what it had not shown or established as owing to it. How could it without a Statement of account, a basic minimum banking document it was expected to maintain?

Regarding US$ 8800, **Mr. Ndegwa** stated that this amount was received from Tanzania in July 1993, as part of US$17600. **Mr. Ndegwa** complained that the balance of US$ 8800 was credited into Retention Account No. 9501890008, which did not belong to the 2nd Plaintiff, and that therefore the money was never accounted for. The credit advice into the said Retention Account is exhibited at page 5 of Plaintiffs' bundle. **Mr. Ndegwa's** letter dated 16th October, 1998 raised the issue with the Defendant, and his argument in that letter was that the said sum was part of a remittance from Tanzania in the sum of US$ 17,600. **Mr. Ndegwa's** claim in that letter was that only US$ 8800 which was 50% of the sum received was credited in favour of the 2nd Plaintiff, but that the balance was not accounted for. He annexed documents to his letter to the Defendant in proof of the remittance. Unfortunately the documents were not annexed to this exhibit. In **Mr. Karugu's** report, Appendix 11(a) is a Current Account Transfer Credit dated 13.7.93 showing Kshs.644, 075/80, being equivalent of US$ 8800 was credited into the 2nd Plaintiff's Account No. 239541912.There was no corresponding credit transfer into the 2nd Plaintiff's Retention Account.

**Mrs. Onyango** on her part, testifying regarding this sum, stated that the bank did not receive US$ 17,600, but that it received only US$ 8800. The witness testified that this amount was converted to Kshs.644, 075/80 and credited into the 2nd Plaintiff's account.

**Mr. Mogeni** in the written submissions maintained that the sum was 50% of total received of US$17,600, and that it was not accounted for.

**Mr. Ougo** on his part submitted that the US$8800 was accounted for as a (whole) amount received in July 1993 and credited into the Plaintiffs' account No. 239541912 as Kshs.644, 075/80, being the conversion amount calculated to US dollars. **Mr. Ougo** urged the Court to accept **Mr. Ndegwa's** response in cross-examination regarding this money and hold that the money was properly accounted for. **Mr. Ougo** referred to **Mr. Ndegwa's** answer in cross-examination on 28th September 2007 where he stated:

"***Yes, I see a credit of July 15th, 1993. Yes there is a credit of 644,075/80. Yes I do confirm that US$8800 was converted to Kenya shillings and credited into the account***"

I have considered the evidence adduced in regard to this amount, the documents available and submissions by Counsel.

I note that the Defendant bank credited US$ 8800 into Retention Account No. 9501890008. **Mr. Ndegwa** has denied that the 2nd Plaintiff had a Retention Account by that number and has maintained that the money was not received by it.

The Defendant has annexed the 2nd Plaintiff's Statement of Manually controlled Retention Account at page 45 of its exhibits. The said sum is not reflected anywhere in this statement. It was incumbent on the Defendant to demonstrate that the said sum was credited to the 2nd Plaintiff's favour because it was the custodian of all Statements of Account and other documents related to these transactions. I find no such demonstration. The Plaintiff's evidence that the Retention Account No. 9501890008, where the sum was credited, did not belong to the 2nd Plaintiff is uncontroverted and unchallenged. The Plaintiff's evidence receives support from the Manually Controlled Retention Account by the Defendant, which itself has no account number. Taking into consideration the requirements of the Exchange Control Act at the material time that required Banks to sell 50% of Foreign Currency received for the credit of its customers to the CBK, it follows that if the Defendant gave the 2nd Plaintiff credit for US$ 8800 in its equivalent in Kenya Shillings, the other sum of 50% should have been accounted for by a credit into the Retention Account. The Manually controlled Retention Account held by the Defendant for the 2nd Plaintiff's benefit, had no credit of such amount. In fact the Statement covers the period after September 1993. That means the amount in issue, which the Defendant

admits it received in July 1993, was not accounted for at all. On a balance of probabilities, I am satisfied that the Defendant has not accounted for this amount of US$8800.

In regard to US $44,858.98, **Mr. Karugu** testified that the amount was received from a Karachi Bank in July 1993. The witness stated that the Defendant confirmed receiving the said amount, and claimed that it credited it to the account of Express Coffee Exporters Limited i.e. the Company. **Mr. Karugu** stated that the Defendant bank contended that it did not require an express authority from the 2nd Plaintiff to credit the account of the Company. The Defendant justified that position on the grounds that where directors or shareholders of one company are common with those of another; the Bank had the right to set off one account with another. **Mr. Karugu** testified that all other banks, including CBK's Bank Supervisory Department, whom he interviewed, maintained that an express authority was required by a bank to set off the account of one company with another, even where a director or shareholders were common. **Mr. Karugu** testified that despite seeking for any express authority from the 2nd Plaintiff to the Bank to credit the Company, he found none and that therefore, the Referee concluded that the amount should have been credited into the 2nd Plaintiff's account and thereafter authority sought to transfer the amount to the Company. **Mr. Karugu** concluded that the Defendant had no such authority.

Regarding this amount, **Mr. Ndegwa's** complaint was that the Defendant bank remitted the same into the Packing Credit Account of the Company without authority from him to do so. **Mr. Ndegwa** stated that at the time the remittance was received by the Defendant bank, he was out of the country and could not have given any instructions. In cross-examination however, **Mr. Ndegwa** admitted giving oral instructions to the bank to effect the said transfer.

**Mrs. Onyango** did not adduce evidence in answer to this item. However, **Mr. Ougo** for the Defendant bank in his submissions urged the court to accept **Mr. Ndegwa's** admission in court on the 29th November, 2007 that he gave oral instructions to the bank to transfer the money in question.

I do agree that **Mr. Ndegwa's** initial complaint regarding this amount was not consistent with his testimony in court. From a summation of his evidence, it is clear that **Mr. Ndegwa** gave oral instructions to the bank to transfer the funds to the Company and that the Defendant acted accordingly. Having given oral instructions, I find and hold that the Plaintiffs could not turn around and complain about the transfer. I do find that the bank accounted for these funds.

In regard to remittances of US$12,974 received in August, 1993, and US$19084 and US$19423 received in September 1993, **Mr. Karugu** stated that they analyzed these sums together in order to show how the Defendant Bank handled these remittances. **Mr. Karugu** testified that the Defendant Bank confirmed receiving all three remittances totaling US $51,288.24. **Mr. Karugu** stated that there was proof that the Defendant utilized the amounts in accordance with the 1st Plaintiff's instructions and that they were satisfied, despite the Plaintiff's complaints otherwise, that the said funds were utilized as directed. **Mr. Karugu** stated that the only sum not accounted for was US$182.76.

**Mr. Ndegwa** on his part chose to deal with each item separately going by the Defendant's letter in response to his dispute, dated 10th December, 1998. That letter is set out in full in this Judgment. I have commented elsewhere in this judgment that the response by the Bank, signed by **Mrs. Biamah**, was in reply to a letter by the Plaintiffs dated November 1998, in which the Plaintiffs attached documents in prove of remittances of the various amounts in dispute. Regarding each of these three amounts US$ 12,974, US$ 19,084 and US$ 19,433, Mr**. Ndegwa** merely stated that he did not agree with the Defendant's explanation for reason the Appendixes upon which the explanations were pegged were never supplied. In cross-examination however, **Mr. Ndegwa** admitted that he instructed the Defendant to make certain payments against these amounts. In effect **Mr. Ndegwa** admitted he authorized payments to the tune of US$ 20,314.

**Mrs. Onyango** on her part admitted that the Defendant received all the three amounts in September 1993. The witness testified further that the money was paid out as per the Plaintiff's instructions. Her explanation goes hand in hand with **Mr. Karugu's** findings under item No. 3 of his report and I need not repeat it there. Out of that enumeration, the amount shown to be outstanding is US$ 182.76. The instructions to the Defendant by the Plaintiff are annexed in the Referees Report as Appendixes (V) c, (IV) d and (IV) e. The credit slips for the payments are Appendices IV (a) and IV (b) of the Referees report.

**Mr. Mogeni** in his submissions stated that the Defendant Bank did not account for either sums and that it withheld information from the Plaintiffs regarding the receipt of the said sums.

**Mr. Ougo** on his part urged the court to find that the Defendant utilized the sums as instructed by the Plaintiffs and dismiss the claim.

I have fully considered the evidence and submissions in support of these three sums. I find evidence to establish that the Defendant disbursed the sums in issue as per written instructions by the 2nd Plaintiff. Out of the entire sum of US$ 51,288.24, only the sum of US$ 182.76 is outstanding to date.

In regard to US$19142 received from Pakistan in August 1993, **Mr. Karugu** testified that the Defendant bank denied having received such an amount. The witness stated that he saw a remittance advice from the Pakistan Bank, and correspondence from the Plaintiff to the Defendant inquiring about the said sum, in September and October 1993. The witness stated that the Defendant did not appear to have responded to the Plaintiff either way, and that they had conceded that unless the Defendant proved otherwise, the Plaintiff's position was the correct one.

**Mr. Ndegwa** on his part identified a Remittance Advice from Bank of America in Lahore, Pakistan, at page 10 of the Plaintiff's list of documents. It is a document dated August 30, 1993 and it shows that US$ 19,142 was sent to KCB Limited Industrial Area Branch, to the Account of Continental Marketing Limited A/C No. 239-541-912. Connected to that was **Mr. Ndegwa's** letter, Appendix V(b) in Referee's Report, dated 1st October, 1993, in which **Mr. Ndegwa** reminds the bank that US$ 19,142 was sent to it from Pakistan for the Credit of the 2nd Plaintiff. **Mr. Ndegwa's** contention was that the Defendant did not credit the amount to the 2nd Plaintiff's favour and neither was the money accounted for to date.

**Mrs. Onyango** for the Defendant, while admitting in cross-examination that such a remittance was made as per the Bank of America Document at page 10 of Plaintiff' bundle, denied that the money was received. The witness also admitted that the Bank sought documentary proof of the remittance in question from the 2nd Plaintiff in 1998, five years after the fact.

**Mr. Mogeni** in his submission urged the court to find that the Defendant had failed to either explain or account for the said sum of US$19,142.

**Mr. Ougo** on his part made no submissions regarding this amount.

Having weighed the evidence adduced before me regarding this sum, and considering the documents relied upon and submissions by Counsel, I find as follows:

I find that the Plaintiff has established that there was indeed a remittance from Bank of America, Pakistan, in the sum of US$ 19,142. The Plaintiff has also shown that the Defendant Bank did not give it credit for this sum, meaning that the amount remained unaccounted for to date.

I have perused the Bank Statements of the 2nd Plaintiff for the period in question. The sum is nowhere reflected in the said statement. I have also perused the Statement of Manually Controlled Retention Account prepared by **Mrs. Onyango** on 21st October, 1997 and nowhere is the sum accounted for.

On a balance of probabilities, I find in favour of the 2nd Plaintiff that the Defendant received US$ 19,142 for the 2nd Plaintiff's credit, and that the sum has not been accounted for to date.

In regard to US$ 4,744.50, **Mr. Karugu** stated that the Defendant maintained that the said sum was part of US$12974 received earlier in August 1993 (item 3 of the Report). **Mr. Karugu** testified that that was not supported by the Defendant's documents which indicated that the Defendant declared 50% of US$9489, in accordance with the Exchange Control Regulations, which implied that the sum was received as a separate remittance and not part of another. Further, that the CD3 form No. 890162 and the credit slip dated 28th September 1993, as per Appendix IV (b) of the report, the sum of US$ 9,489 was a separate transaction received from Tanzania, while the one the Defendant Bank to be the one was a different remittance received from Pakistan. **Mr. Karugu** stated that as Referee, he was of the view that the said sum was not fully accounted for.

Regarding this amount, **Mr. Ndegwa** identified to the Court a Telegraphic Transfer dated 28th September, 1993, for US$ 9489, found at page 17 of the Plaintiffs' documents. The Telegraphic Transfer shows that it was from the Industrial Area Branch of the Defendant Bank, to the 2nd Plaintiff, indicating a credit of 50% of the amount reflected was made into the said account, as per Statement Sheet No. 150. The credit was converted to its equivalent in Kenya Shillings. **Mr. Ndegwa** stated that 50% of the amount, being US$ 4744.50 which should have been credited into the Retention Account, was never accounted for. To confirm this fact, I checked the Statement of Manually Controlled Retention Account supplied by the Defendant Bank. There is no credit appearing on it in such a sum during the period in question.

**Mrs. Onyango** on her part declined to testify or comment on the contents of a letter by **Mrs. Biamah,** the Defendant Banks Senior Legal Officer, dated 10th December 1998, in which an explanation is given for various amounts complained of by the Plaintiffs. **Mrs. Onyango** said that she knew nothing about the letter or explanation made. At page 1 of that letter is a list of money in US dollars and conversions in Kenya Shillings showing the exchange rate applied in respect of each sum received in US $. Item 8 in that list is US$ 9489, converted to kshs.654,115.50 using an exchange rate of 68.9341. That amount is the sum in issue here. **Mrs. Onyango** offered no explanation or answer to the Plaintiff's claim touching on this sum. The letter is set out in full here below.

**10th December, 1998**

**Continental Marketing Limited**

**Uganda House**

**Kenyatta Avenue**

**NAIROBI**

**Dear Sirs,**

**RE: HCCC NO. 172 OF 1997**

**We refer to past correspondence and discussions in connection with the above matter culminating in your letter dated 23 November,**

**1998.**

**Your claim that you do not owe the Bank money and that, on the contrary, the Bank owes you money, is based on your contention that the Bank received the following funds in September 1993 on your behalf and interest deemed to have accrued thereon to date:-**

| | USD | RATE OF EXCHANGE | KSHS. | CENTS |
|---|---|---|---|---|
| 1. | 44,858.98 | KSHS.59.75 | 2,680,324 | 055 |
| 2. | 12,974.00 | KSHS.68.9341 | 894,351 | 013 |
| 3. | 15,000.00 | KSHS.67.32 | 1,009,881 | 00 |
| 4. | 19,084.98 | KSHS.68.9341 | 1,315,605 | 92 |
| 5. | 19,423.00 | KSHS.68.9341 | 1,333,907 | 24 |
| 6. | 12,964.00 | KSHS.68.9341 | 893,661 | 67 |
| 7. | 8,409.66 | KSHS.68.9341 | 579,712 | 34 |
| 8. | 9,489.00 | KSHS.68.9341 | 654,115 | 75 |

**The above statement is based on a schedule which was provided by your good self and attached herewith as "appendix 1".**

**We have looked at our books and wish to comment as follows on the above eight items: -**

**1) USD <u>44,858.98</u>**

**The amount was credited to our agency account with Bankers Trust Company New York from united Bank of Karachi on 13 July, 1993 (less commission) as USD 44,788.98. The amount was converted to the account of Express Coffee Company Limited (packing credit account number 239 581 029).**

**A copy of the relative current account credit advice and the statement confirming the entries are attached herewith as "appendices 2 and 2A".**

**2. <u>USD 12,974</u>**

**Following your two notification both dated 10 August, 1993 (which you had marked as 'SMN No. 2A") to expect the equivalent of USD 13,000 (RS 390,000), we sent a telex to Habib Bank Lahore (which you marked as "SMN No. 2 B" and which we have marked as "appendix 3 B") to forward the funds to our account with Bankers Trust New York. Habib Bank Lahore vide their telex dated 22 September, 1993, instructed Habib Bank New York to remit the USD 12,974 (which you marked as SM No. 2C and now marked appendix 3 C) to our agency account with Bankers Trust New York. This amount was received on 24 September, 1993 net of Bankers Trust charges in the sum of USD 12,694. The utilization of this amount is as per the statement marked "appendix 4".**

**3. <u>USD 15,000</u>**

**We attach a copy of our advice dated 10 December, 1993 which you had marked as 'SMN No. 3A" and nor marked "Appendix 5" showing that the account of continental Marketing Limited (Account Number 239 541 912) was debited with the sum of Kshs.1, 009,881 equivalent to USD 15,000) and the amount credited to the account Express Coffee Exporters Company Limited packing Credit aforesaid.**

**We attach, herewith, copies of the account statement for Continental Marketing Limited and Express Coffee Exporters Company Limited marked "appendix 5 and 5A" respectively.**

**4. <u>USD 19,084.98</u>**

**This amount was from Tanganyika Coffee Company Limited by way of T.T. that originated from Stanbic Bank Kenya Limited for the credit of our account with Bankers Trust New York on 7 September, 1993. The utilization of this amount is as shown in the above mentioned statement marked as "appendix 4".**

**5. <u>USD 19,423</u>**

**This amount had the same origin as in item 4 above but was credited to our account with Bankers Trust New York on 13 September, 1993. Its utilization is as shown on the above mentioned "appendix 4".**

**6. <u>USD 12,964</u>**

**This amount is a duplication of the sum of USD 12,974 referred to under item 2 above.**

**7. <u>USD 8,409.66</u>**

**In your letter dated 23 November, 1998, you have explained that the correct amount is USD 8,906.42. this amount is the sum total of three debits being USD 1,661.92, USD 2,500 and USD 4,744.50 which are part of the above mentioned statement marked as appendix**

**4.**

**In your letter dated 10 November 1998, you enclosed copies of debit advices for USD 4,131.86, USD 7,637.31, USD 2,500 and USD 1,661.92. We wish to draw your attention to the fact that no account numbers were indicated because the debits were against the foreign currency receipts.**

**8. USD 9,489**

**This amount is the sum total of the three debits referred to under item 7 above plus the last debit of US 582.28 reflected in the statement refereed to above and marked as "appendix 4".**

**9. The following entries on the accounts need clarification**

**(1) Kshs. 3,061,664.70 Cr, and Kshs. 3,075,782.40 Dr. made on 9 August, 1993 on the account of Express Coffee Exporters Company Limited (packing credit account number 239, 581 029).**

**The credit entry represents a US dollar standby facility from BHF Bank which was meant to support foreign exchange transactions by your company. Since the amount fell due for repayment to BHF Bank, the original dollar amount of USD 51,241.25 represented the above credit of Kshs.3, 061,664.70 while the above debit represented the repayment of USD 51,477.53. The difference between the credit and the debit amounting to USD 236.28 (or Kshs.14, 117.70) represented interest paid to BHF Bank.**

**(2) Credit of kshs.522,000= to Continental Marketing Limited Account number 239 541 912 and Kshs.5,190,886.80 to Express Coffee Exporters Company Limited account number 239 581 029.**

**These details represent write-downs of the debts against provisions and do not remove the liability of the debtor.**

**Please be advised accordingly.**

**Yours faithfully,**

**G.J. BIAMAH (MRS.)**

**SENIOR LEGAL OFFICER**

**FOR ASSISTANT GENERAL MANGER (CREDIT AND BAS)**

**cc: MANAGER**

**INDUSTRIAL AREA BRANCH**

**Bcc THE CHAIRMAN**

**GENERAL MANAGER**

**AGM, CREDIT AND BAS**

**MANAGER**

**CREDIT REMEDIAL & LEGAL DIVISION**

**ORARO & COMPANY**

**ADVOCATES**

**FINANCE HOUSE**

**NAIROBI**

**Your reference No. KCB/CRT/1572 refers"**

**Mr. Mogeni** for the Plaintiffs urged the court to find that the Defendant withheld information from the Plaintiffs regarding the receipt and disbursements of the sum of US$ 4744.50, which was 50% of the amount received from Tanzania of US$ 9,489, and which sum ought to have been credited into the 2nd Plaintiff's Retention Account.

**Mr. Ougo** on his part urged the court to find that the said sum of US$ 4,744.50 was utilized to make various payments on instructions received from the 2nd Plaintiff's letters exhibited at pages 27 to 30 of the Defendant's bundle.

Page 27 is a letter dated 24th September 1993 from the 2nd Plaintiff, signed by the 1st Plaintiff, requiring the Defendant through **Mrs. Onyango**, to pay 1661.92 is US dollars to Express Kenya Limited against the 2nd Plaintiff's Retention Account.

Page 28 and 29 are the Remittance Advice from the Defendant Bank in sum of US$ 1,661.92 and Draft in similar sum respectively, paying Express (K) Limited. Page 30 is a letter from the Plaintiffs to the Bank asking it to draw a draft in the sum of US$ 2,500 in the name of Wigglesworth Exporters Limited against the Retention Account.

I have confirmed from the Statement of Manually Controlled Retention Account that both sums of US$ 1,661.92 and US$ 2500 are reflected.

It did not escape my notice that the analysis of how this sum was utilized by the Defendant is the same analysis used to account for a different sum of US$ 12,974 received in August 1993 from Pakistan. It would be wrong to allow a mix-up or confusion of these two figures. The sum of US$ 12,974 was received and utilized with two other sums of US$ 19,084 and US$ 19,423, received in September 1993. The sum of US$ 9,489 was received from Tanzania in September 1993 and is accounted for by documents in the Defendant's bundle at page 15. The document is a credit into the 2nd Plaintiff's current account, with 50% of US$ 9,489 in Kenya Shillings, converted using the exchange rate of 66.7948. It quotes CD3 No. 890162.

The CD3 No. 890162 is exhibited by the Plaintiff at page 22 as CD3 Exports from Kenya No. 890162. It is from the 2nd Plaintiff to Tanganyika Coffee Curing Company Limited, Moshi in the sum of Kshs 559,000/-.

I also noted the Export Retention form exhibited as Appendix VI (a) of the Referees' report, which shows that the Defendant Bank declared US$ 9,489 as a total amount received in favour of the 2nd Plaintiff, and surrendered US$ 4,744.50 to the Central Bank of Kenya.

From these documents, I am persuaded that the sum of US$ 9,489 was a remittance from Moshi Tanzania received by the Defendant Bank in favour of the 2nd Plaintiff. I am persuaded that this sum was different from US$ 12,974 received a month before from Pakistan. The accounting analysis given by the Defendant to account for this sum had no connection with the amount in issue here. The Defendant should have credited US$ 4,744.50 into the 2nd Plaintiff's Retention Account, to account for this money. That was not done as evidenced in the Defendant's exhibit of Manually Controlled Retention Account.

On a balance of probabilities, after considering the entire evidence before me and the submissions and exhibits on record, I find that the Defendant has not accounted to the 2nd Plaintiff, the sum of US$ 4,744.50 to date.

In regard to US$ 15,000 received in December 1993, **Mr. Karugu** testified that this sum was transferred by the Defendant from the 2nd Plaintiff's account to the Account of the Company. The witness stated that the only authority they saw regarding this sum was a letter by the 2nd Plaintiff to the Defendant dated 27th September 1993 authorizing the Defendant to utilize the amount to repay itself and that it could not have been taken as a conditional authority to transfer the money from the 2nd Plaintiff to the Company only if the Defendant advanced US$18,000 to the 2nd Plaintiff, as the Plaintiffs contend.

**Mr. Karugu** stated that his firm saw the Defendant's letter to the 2nd Plaintiff advising it that the US$18,000 advance sought by it would not be given but that he saw nowhere a condition that since the credit facility sought was not advanced, then the Defendant ought not to have utilized the US$15,000 to repay itself.

In regard to this amount, even though the Plaintiff denies it gave authority to the Defendant to transfer the same to pay itself, there is a letter by the Plaintiffs to the Defendant dated 27th September, 1993 showing otherwise. Among the instructions given in this letter is an authority in the following terms: -

"***Further to our discussion today with you relating to repayment of outstanding dollars on our account, vis-à-vis our packing credit, we authorize you to debit our retention account with US$ 15,000.00 on 30th September 1993 to repay yourselves and credit our packing credit with Kenya shillings thereof."***

The letter is Appendix VII (b) in the Referee's Report and page 18 of the Defendant's bundle. The letter speaks for itself. It authorizes the Defendant to transfer US$ 15,000 from the 2nd Plaintiff's Retention Account to pay itself for outstanding repayments relating to the Packing Credit. There is no dispute that the Packing Credit facility had been offered to the 1st Plaintiff's other company, Express Coffee Exporters i.e. the Company. I am satisfied that this sum was fully accounted for. The Plaintiffs cannot be heard to challenge their own authority given to the Defendant in writing, authorizing it to transfer these sums to pay itself. I find that on a balance of probabilities the Plaintiff's were unable to establish that the Defendant did not account for the sum of US$ 15,000.

The 1st Plaintiff in his evidence maintained that there were other monies which the Referee, PW1 **Mr. Karugu** did not review, but which remained un accounted for by the Defendant Bank and therefore in dispute. These are the ones in the Defendant's letter to the 2nd Plaintiff dated 10th December, 1993, and set out in full hereinabove. Using this letter against the Referees report P. exhibit 3, I note that both these documents deal with 8 remittances in US dollars. Of these, US$ 8,409 and US$ 12,964 listed in the letter as item 6 and 7 and US$ 8,800 and US$ 19,142 listed as items 1 and 4 in the Referees report appear only once in either document.

I have already considered all the items except item 6 and 7 in the Defendant's letter of 10th December 1998.In that regard, UD$ 12,694, which is item7 in the Defendant's letter, all **Mr. Ndegwa** stated concerning it was that he was not claiming that sum twice, as **Mrs. Biamah** implied in her letter. **Mr. Ndegwa** did not show in evidence how and when the Defendant received this sum. **Mr. Ndegwa** did not show that the money was ever received by the Defendant for the 2nd Plaintiff's credit. Having failed to show this, naturally the Defendant cannot be expected to account for it.

Regarding US$ 8,409.66, **Mr. Ndegwa** testified that he annexed the debit advises for several remittances totaling US$ 84,099.66, to his letter to the Defendant Bank dated 10th November, 1998. Those documents were not annexed in the copies exhibited in court. Since **Mr. Ndegwa** did not offer any further evidence in regard to this sum I am unable to make a ruling on these two amounts. The Plaintiffs' contention that this form part of larger amount of money sent to the Defendant for the 2nd Plaintiff's credit has not been substantiated and is accordingly dismissed.

**<u>ISSUES FOR DETERMINATION BY THE COURT</u>**

I will next consider each of the issues raised and give an answer with reasons thereon.

In regard to the issue numbers 1, 2, 4, 5, 6 and 7, I find as follows:

On issue No. 1 whether the Defendant bank received a sum of US$ 144,037.46 from the 2nd Plaintiff for the account of and to the credit of the 2nd Plaintiff. Considering the evidence adduced by both parties, I am satisfied that the Defendant received a total sum of US$ 157,580.98

for the account of and to the credit of the 2nd Plaintiff. Out of the said sum, the Plaintiffs raise issue with US$ 144,036.48. The total sum of US$ 157,580.98 is broken down as follows.

1. US$ 17,600 50% of which was accounted for.

2. US$ 44,858.98 the whole of which was accounted for

3. US$ 51,491 broken down as US$ 12,974, US$ 19,084 and US$ 19,433, of which US$ 51,288.24 was accounted for, leaving a balance outstanding of US$ 182.76

4. US$19,172 which has not been accounted for

5. US$ 9,489 out of which 50% which is US$4,744.50 has not been accounted for

6. US$ 15,000 which has been accounted for in full

In regard to whether the said sums were utilized by the Defendant as directed by the Plaintiffs;

For US$ 8800 out of the US$ 17,600 received, the Defendant has continued to deny receiving this amount. I have found on a balance of probabilities that it did receive the said sum and certainly it did not utilize it as instructed nor did the 2nd Plaintiff benefit from it.

In the case of item 2 and 6 US$ 44,858.98 and US$ 15,000 respectively. The Plaintiffs orally instructed the Defendant to transfer US$ 44,858.98 to the Packing Credit Account owned by a sister company of the 2nd Plaintiff, i.e. the Company. As for the US$ 15,000, the Plaintiffs in writing instructed the Defendant to withdraw this sum to pay itself.

In regard to item 3, I found that the Defendant utilized the amount as instructed, except for the US$ 182.76 which is still outstanding to date.

In regard to item No. 4 of US$ 19,142, the evidence is clear. On a balance of probabilities the Defendant received the sum for the 2nd Plaintiff's credit, but it failed to credit it into the 2nd Plaintiff's account.

In regard to item No. 5 of US$ 9,489, only 50% of this sum was utilized by the Defendant as instructed. The rest was not utilized as instructed nor was it credited into the 2nd Plaintiff's account.

The total sum not accounted for in my considered view, having considered all the evidence adduced, documents, pleadings and submissions herein, is US$ 32,869.26.

In regard to issue No. 4 whether or not foreign currency in dollars received on account of the 2nd Plaintiff were ever applied towards settlement of the accounts held by either the 1st Plaintiff or by Express Coffee Exporters Company and if so, on whose instructions? I believe this question has been answered in this judgment. In brief, I have found that US$ 44,858.98 was applied towards settlement of the accounts held by Express Coffee Exporters (or the Company) on the oral instructions of the 1st Plaintiff.

No funds were applied towards settlement of the 1st Plaintiff's Accounts. In fact, as will be shown later, the 1st Plaintiff did not have any account with the Defendant Bank.

The issue no. 5 has been dealt with under *inter alia*, issue no. 4 and is therefore answered.

In regard to issue 6, whether or not the overdraft account held by the second Plaintiff with the Defendant has been paid in full, I must indicate here that while the Plaintiffs referred to the facility as an overdraft, the Defendant referred to is as a loan or Banking facility. None of the parties questioned the term used by the other. In that regard by the term overdraft I understand it to mean both loan and banking facility as the parties interchangeably referred to this facility.

The Defendant wrote to the Plaintiffs through their Advocates, Oraro & Rachier, a letter dated 3rd July, 1995, demanding the sum of Kshs.648, 302.35 in respect of a loan advanced to the 2nd Plaintiff at the 1st Plaintiff's request. Subsequent to that, on 19th January, 1996, the same firm of Advocates wrote to the 2nd Plaintiff informing it that Kshs.813, 414/55 was outstanding on its loan Account as at 31st December 1995.

Getting back to the matter in issue and taking into account the amount of US$ 32,869.26 not accounted for to the 2nd Plaintiff as of 1993, I would say that the outstanding sum owing to the 2nd Plaintiff by the Defendant was enough to cover the sums claimed to be due by the Defendant and its Advocates in 1995.

Going by the Bank Credit Advices in both parties bundle of documents, and also found in the Referee's Report, the exchange rates in operation at the time ranged between 59 shillings to the dollar, being the lowest and 69 shillings to the dollar being the highest. None of the parties raised issue with the exchange rates quoted in their documents filed herein as exhibits and therefore, I find that the exchange rates quoted in these documents are accepted by the parties. In particular **Mrs. Biamah's** letter detailed the exchange rate applied to each sum converted to Kenya shillings for the 2nd Plaintiff's credit. If the rate of Ksh.59 to the US dollar was applied, the sum of US$ 32,869.26

converts to Kshs.1,939,286.30. If the Defendant had given the 2nd Plaintiff credit for this amount as was its duty to do, it is abundantly clear that the 2nd Plaintiff's account would have had credit balances far higher than the sums claimed to owe. In answers to this issue, I find that the 2nd Plaintiff's loan and or overdraft account should have reflected a credit balance, had the Defendant given all credit due to it timeously. In that regard I find that the 2nd Plaintiff's overdraft or Loan account stood fully paid as of 1993, when the credits in issue in this case were received.

Issue No. 7 of whether the Defendant received US$ 98,717.06 for the credit of the 2nd Plaintiff and whether the sum was accounted for, no evidence was adduced by the Plaintiffs in support of this amount. My answer to this issue is that no such sum has been shown to have been received by the Defendant for the Account of the 2nd Plaintiff.

Going back to the third issue of whether or not the first Plaintiff had a loan account with the Defendant and if so, whether the loan account was serviced, paid for or accounted for through funds received on account of the 2nd Plaintiff as directed by the 1st Plaintiff from time to time.

**Mr. Karugu** in his evidence said that after examining documents provided by the parties and interviewing them, he came to the conclusion that the 1st Plaintiff did not have any account, loan or overdraft or other account, with the Defendant Bank. The 1st Plaintiff on his part has vehemently denied having any account with the bank of whatever nature.

The Defendant's witness, **Mrs. Onyango** did not offer any evidence on that issue even though it was pleaded at paragraph 4(a) of the Amended Defense. I find that item 3 of the issues for determination was a non issue. There was no evidence to show that the 1st Plaintiff was a customer. **Mr. Ougo** in his submissions wondered why the 1st Plaintiff was a party in the suit. **Mr. Mogeni** offered no answer. In my own view, being the registered owner of the suit property, I find he was not a busy body in the suit. The 1st Plaintiff had a cause of action in this suit and had a right to sue. However he had no account with the Defendant bank.

The next issue for determination is issue no. 8 which is whether or not the doctrine of estoppel has any application to the true facts of the case.

In paragraph 5(a) and 5(b) of the Amended Defense the Defendant averred as follows: -

"***5(a) The Defendant states that the foregoing statement was given to the Plaintiffs who accepted the same as correct and instructed the Defendant to convert the final balance to Kenya shillings and credit the same to the second Plaintiff's current account number 239 541 912, in the Defendant's books.***

***5(b) The Defendant accordingly states that the Plaintiffs are estopped by their conduct from making any or all of the allegations contained in the Amended Plaint or from the Account as presented by the Defendant."***

In the reply to the Amended Defense the Plaintiffs at paragraph 8 averred as follows:

"***8.In reply to paragraph 5(b) of the Amended Defense, the Plaintiffs contend that the facts pleaded by the Defendant, without more, do not disclose any estoppel by conduct or otherwise as no mis-representation is pleaded no detriment to the Defendant is referred to. The plea of Estoppel must be struck out in limine."***

I find no submissions by Counsel under this item. It was not sufficient for the parties to join issues on this issue. They ought to have discussed it in their respective cases and submitted on it in their submissions. Since none saw it fit to submit on it, I decline to consider that issue and offer no finding on it.

The remaining issues, itemized as Nos. 9, 11 and 12 will be considered together as they concern the Charges over the 1st Plaintiff's suit properties and the terms of the said Charges. These issues are:

9. Whether or not the Defendant had any right to put up for sale the First Plaintiff's two properties namely Title numbers; Nyandarua/Malewa/385 and Nyandarua/ Malewa/489.

11.Whether or not the Defendants have acted in breach of contract by charging interest higher than the rate set out in the charge documents.

12.Whether or not the first Plaintiff is entitled to the relief's sought, that is to say:

(i) Injunction to restrain the Defendants from selling the First Plaintiff's properties.

(ii) Full accounts of all monies received by the Defendant for the Plaintiffs' account.

(iii) Declarations that the overdraft facilities have been fully paid and therefore the properties charged should be discharged and released to the First Plaintiff.

(iv) Kshs.9, 929,092.70 together with interest at 44% per annum with effect from July, 1993.

On item 9, I have considered the submissions by counsel on this point and all cases cited in support thereof. I agree with the *ratio decidendi* in these cases especially the **Mrao Limited vs. First American Bank & 2 Others [2003] KLR 125**, **Godfrey Ngumo Nyaga, vs. Housing Finance Company Kenya CA No. 134 of 1987** where the Courts held that once a debt is admitted the court cannot stop a chargee from exercising its Statutory Power of Sale. The qualification is that in the instant suit, no debt was owed and therefore, the statutory right had not accrued.

I do not wish to restate my findings afresh. Suffice it to say that, having found that the Defendant did not maintain proper Statements of Accounts for the 2nd Plaintiff's Accounts with it, and having found, on a balance of probabilities that the 2nd Plaintiff is owed a substantial sum of money which is in excess of the sum claimed to be owed by the Defendant, the inevitable and proper conclusion to reach is this. The Defendant's right to exercise the Statutory Power of Sale under **Section 74** of the **Registered Land Act** had not accrued at the time it sent the Statutory Notices to the Plaintiffs, as there was no debt owing at the time. As I stated earlier, given the circumstances of the case and the conduct of the Defendant towards the Plaintiffs, the 2nd Plaintiff's admission that a debt was owed to the Defendant was made out of frustration and out of a failure to know the true state of the 2nd Plaintiff's accounts. The evidence adduced has shown that the dispute between the parties was not just about accounts. The evidence shows that the Defendant failed in its duty to the Plaintiffs as expected of it in the normal Banking practice. The Defendant bank failed to keep proper accounts and to keep its customer informed of the balances of its accounts within reasonable time or at all. That left its customer in the dark and totally ignorant of the true nature of the balances in its accounts. The evidence adduced before me has established that a false impression was created, due to the Defendant's failure to give all the credit due to the 2nd Plaintiff's. It has been shown that in fact no debt was owed to the Defendant. The Defendant deliberately and with impunity failed to provide information requested of it by the customer, the 2nd Plaintiff, which its customer had a right to access. The Defendant bank cannot be allowed to benefit from its failure. A bank which deliberately withholds information to its customer, leaving it in the dark as to the balances in its account and creates a wrong impression that the customer is indebted to it and therefore causing the customer unnecessary anxiety cannot go scotch free.

In regard to issue no. 11, no evidence was adduced to support this issue by either party to the suit and I declare it mute.

In regard to issue nos. 12(i) (ii) and (iv), I would simply state that in view of my findings in this matter, the answer to the three issues is that the Plaintiff is entitled to some of the reliefs sought. In regard to issue no. 12(iv) the Plaintiffs were unable to prove that the sum claimed of Kshs.9, 929,092/70 was owed to them. The 2nd Plaintiff, as explained in this judgment, established that the sum owed to it was US$ 32,869.26.

**Mr. Ougo** urged the court not to find in favour of the Plaintiffs in regard to the prayer for judgment in sum of Kshs.9, 929,092/79. Counsel's argument was that prayer 7(iA) of the amended Plaint, on which this issue is framed, contradicted paragraph 9 of the amended plaint in that the latter paragraph claims an amount in US dollars and avers that the equivalent of that amount is Kshs.9.9m, based on an exchange rate of US$ 68.9341 to the dollar. Counsel submitted that the Plaintiffs did not adduce any evidence to support the exchange rate quoted.

**Mr. Ougo** relied on two authorities, **Warehum & 2 others vs. Kenya Post Office Bank CA Nos. 48 of 2003** and **Siree vs. Lake Turkana El Molo lodges Limited [2002] 2 EA 521** for the preposition that a court lacks jurisdiction to make findings on unpleaded matters or to grant any relief which is not sought.

**Mr. Mogeni** camouflaged his admission in the submissions that no evidence was adduced to support the exchange rate, by saying that what was pleaded was the thing claimed. The issue is whether there was a contradiction between prayer 7(iA) and paragraph 9 of the Amended Plaint. Paragraph 9 avers as follows: -

"***During the period July to December 1993 on or about the 25th September, 1993 the 1st second Plaintiff transferred to the Defendant a sum of US$ 144,037.65 46 US$ 12,974 from Pakistan Overseas with instructions that the amounts be credited into the second Plaintiff's account which sum the Defendant failed to credit into the 2nd. Plaintiff's account. The amount of US$ 144,037.65 is made up as follows:***

***a) July 1993 US$ 8800.00***

***b) July 1993 US$ 44,858.98***

***c) August 1993 US$ 12,974***

***d) August 1993 US$ 19,142***

***e) September 1993 US$ 19,084***

***f) September 1993 US$ 19,433***

***g) September 1993 US$ 4,744.50***

***h) December 1993 US$ 15,000.00***

***(equivalent to Kshs. 9,929,092.70 exchange then used by Defendant was Kshs.68.9341 to the dollar)***

***" 144,037.46***

***And the second Plaintiff claims this amount from the Defendant"***

The paragraph lays a basis for the claim in US dollars and suggests a conversion rate of 68.9341. It is the suggested exchange rate that the Defendant contends was not supported in evidence. For sure, the Plaintiffs did not adduce any oral evidence in support of the specific exchange rate suggested in the pleadings. All the Plaintiffs did was to put in various statements supplied to it by the Defendant, showing various exchange rates applied by it.

The case of **Siree Lake vs. Turkana El Molu Lodges Limited,** Supra, cited by **Mr. Ougo**, is distinguishable from the instant case as the Plaintiffs' claim herein was pleaded while in the cited case it was not.

As stated the 2nd Plaintiff adduced no evidence in support of the suggested rates. It cannot succeed under prayer 7(iA) of the amended plaint. In the same plaint however, is prayer 7(v) which prays '***further or any other relief that the court might deem fit to grant thereon'***. In my humble view, the 2nd Plaintiff finds grace in prayer 7(v) which seeks for such "***further or any other relief that the court might deem fit to grant thereon***". The Plaintiffs have proved they are owed something but not the amount pleaded in 7(iA). That something can be awarded under this prayer.

Having come to the conclusion I have on this issue, I find that the 2nd Plaintiff has a right to judgment in the sum of US$ 32,869.26 with interest at the court rates from the date of filing of this suit to the date of settlement in full, under prayer 7(v) of the amended plaint.

Let me now turn to prayers in the amended plaint which have not been considered so far. In prayer 7(ii) of the amended plaint, the Plaintiffs' pray for General damages for loss of business and breach of contract plus interest thereon at court rates.

**Mr. Ougo** did a splendid job in his submissions on these two prayers and I wholly agree with him that both these prayers are in the nature of special damages claims. The Plaintiffs ought to have specifically pleaded each of the two heads of damages claimed as a special damage.

The case of **Siree Lake Turkana,** supra, Counsel submitted that a Plaintiff is disentitled to claim general damages where damages can be calculated to a cent, because they cease to be general and must be claimed as special damages. **Mr. Ougo** also relied on **Karauri vs.**

**Ncheche [1959-1998] 1 EA** 177 for the preposition that loss of business, just like loss of earnings is a special damages claim which much be specifically pleaded and proved.

**Mr. Mogeni** on his part submitted that the Plaintiffs claim for general damages for loss of business could not be determinable and that it was left for the court to decide.

I have considered submissions by Counsel on this point. As I have already stated, I need not say more than what the learned judges of the Court of Appeal said in both cases, **Siree,** supra**,** and **Karauri,** supra. Loss of business can be determinable to the cent. The Plaintiffs should have shown what business it was that they lost, first by specifically pleading the loss and then adducing evidence to support the claim. The Plaintiffs' evidence was that the 2nd Plaintiff's accounts were closed in 1993, after the Defendant alleged that the 2nd Plaintiff owed it money. The 1st Plaintiff in his evidence alleged it lost business. The witness did not specify what kind of loss was suffered. Loss of business cannot be claimed as costs at large. They must be known and therefore pleaded. I find that this claim does not lie and that it cannot succeed.

In regard to general damages for breach of contract, **Mr. Mogeni** submitted that the Plaintiffs were entitled to this claim because the law recognized the relationship between a bank and its customers is contractual. Counsel submitted further that the bank owes a fiduciary duty of care to its customers. He relied on the case of **Intercom Services Limited & 4 Others vs. Standard Chattered Bank [2002] KLR 1**. What **Mr. Mogeni** did not disclose, or may not have known, is that the Court of Appeal disagreed with **Hon. Visram, J**. on appeal in that case. The decision is reported in [2004] 2 KLR 183. On the issue of fiduciary duty owed to customers by banks, the Court of Appeal was of the view that none arose in the cited case. In any event, I would distinguish that case with the instant case in that the issue before that Court related to the duty of a collecting bank to the owner of the cheque, itself and others who may be affected by it, when making inquiries before paying the cheque. No such issue is before this court.

**Mr. Mogeni** also relied on the Court of Appeal decision of **Onjallah vs. Kenya Commercial Bank Limited [2004] KLR 702**. Again in my humble view, this case is easily distinguishable from the instant case in that the issue before the Court of Appeal was whether a remission of money into a customer's bank account was refundable and the court ruled it could only be refunded if it is proved to be a mistake and it is shown that the customer was not entitled to the amount. The issue in the instant case had to do with accounting for sums remitted from Foreign Banks in favour of bank's customer and has nothing to do with debiting the customers account with money credited into the account by mistake.

**Mr. Mogeni** submits that the sum of US$ 162,317.36 should be paid to the Plaintiffs under this head.Just by merely quoting this figure proves **Mr Mogeni** wrong as it shows he was undecided whether the claim was in special or general damages.

**Mr. Ougo** did not agree with **Mr. Mogeni**. **Mr. Ougo** submitted that general damages are not awardable for breach of Contract since they are quantifiable. **Mr. Ougo** cited **Habib Zurich Finance (K) Ltd. vs. Muthoga & Another [2002] 1 EA 81** where the Court of Appeal quoted from **Dharamshi vs. Karan [1974] EA 41**, a case from the **Court of Appeal for Eastern Africa** thus:

"***This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for a breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general."***

I have considered the issue of general damages for breach of contract and I find myself well guided by the Court of Appeal case of **Habib Zurich,** supra**.** The Plaintiffs' claim for general damages for breach of contract should have been specifically pleaded as damages for breach of contract should be quantifiable. What is however the most important point, and which runs through the entire case, is the fact that the two Plaintiffs in this case are separate legal entities capable of suing and being sued. Each Plaintiff should be considered in that light. That being so, in the claim for damages under contract, each Plaintiff must have had a contractual relationship with the Defendant bank in order to be under contract.

**Mr. Ndegwa** in his evidence explained that the general damages were claimed due to fact that the Defendant bank closed the 2nd Plaintiff's accounts without communicating it to the client. **Mr. Ndegwa** explained that as a result of the closure, the 2nd Plaintiff was stopped from trading in December 1994.

**Mr. Ndegwa** has not alleged that he had any contract with the Defendant bank in his personal capacity. He cannot be entitled to any damages under this head as there was no privity of contract between him and the bank over the 2nd Plaintiff's accounts.

In regard to the 2nd Plaintiff, it needed to show what terms of the contract it had with the Defendant which the Defendant breached. It was not sufficient for the Plaintiff's Advocate to submit that it was trite knowledge that a bank and its customer have a contractual relationship. The terms of the contract and its scope should have been disclosed. That is the only way the 2nd Plaintiff could have laid a basis for its claim under this head.

I do find that the 2nd Plaintiff treated this issue rather casually and in so doing did not establish its claim under this head.

There is another issue that is raised by the Defendant in its amended defense and in the written submissions, that the Plaintiffs did not give it notice before filing suit. None of the Counsel made submissions to suggest what should be the penalty for failing to give notice. I believe the plaintiffs should be penalized through costs. However, given the circumstances of this case, I decline to penalize either party for this failure.

Having considered the issues before me, the evidence adduced before me both oral and documentary, submissions by Counsel, pleadings and cases relied upon; and having come to the conclusions I have of this matter as stated herein, I make the following orders.

Judgment be and is hereby entered for the Plaintiffs against the defendant as follows: -

**1. Injunction be and is hereby issued restraining the Defendant by itself or through its agents or advocates from interfering with the 1st Plaintiff's title in Nyandarua/Malewa/385 and Nyandarua/Malewa/489.**

**2. A Declaration be and is hereby issued that the loan and/or overdraft granted to the 2nd Plaintiff by the Defendant under account No. 239541912 has been fully and completely repaid and redeemed.**

**3. A Declaration be and is hereby issued that the Defendant does deliver title Nos. Nyandarua/Malewa/385 and Nyandarua/Malewa/489 to the 1st Plaintiff within 30 days from the date of service with this order duly discharged and released and free from all encumbrances.**

**4. Further, in terms of prayer 7(v) of the Amended Plaint, judgment be and is hereby entered for the 2nd Plaintiff against the Defendant in the sum of US dollars 32,869.26 with interest at court rates from date of filing suit until payment in full.**

**5. The Plaintiffs will also get costs of the suit with interest thereon.**

**6. Prayers 1, 3, 4, 7(iA), 7(ii) and 7(iiiA) of the amended plaint are dismissed.**

**Dated at Nairobi, this 2nd day of May, 2008.**

LESIIT, J.

JUDGE

***Read, signed and delivered, in the presence of:***

Mr. Anyonga for Prof. Githu Muigai and Mr. Mogeni for Plaintiff

Mr. Ougo for Defendant

**LESIIT,J.**

JUDGE