



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 5494 OF 1993

JOHN WARUI MATHENGE 1ST PLAINTIFF

WANARUONA SAWMILLS LTD. 2ND PLAINTIFF

VERSUS

DEVELOPMENT FINANCE COMPANY DEFENDANT

JUDGEMENT

Two cases were consolidated vide a ruling of the court given on 22nd January 1997. These were HCCC No. 293 of 1993 filed at Nakuru and HCCC No.5494 of 1993 (O.S) filed at Nairobi Court. The Plaintiffs in both of them were John Warui Mathenge and Wanaruona Sawmills Limited and Defendant in both of them was Development Finance Company Limited. I heard both of them together as a consolidated suit.

HCCC No.292 of 1993 was commenced by way of a plaint and was seeking in its prayers the following judgment:

***“(a) Injunction restraining the defendant from transferring Plot No. Block 3/857 Nakuru or in any other way interfering with any or all of the Plaintiffs properties.*”**

(b) A restriction order on title to Plot No. Block 3/857 restraining any dealings in the said plot until determination of this suit.

(c) Costs of this suit.

(d) Account of the loan and repayment thereof.

(e) Costs of this suit.

(f) Any other or further relief this court deems fit to grant.”

I have reproduced the judgment sought in that suit as it is in a plaint available. Any mistakes such as repetition of prayer for costs of the suit are reproduced as they appear in the pleading.

HCCC No.5494 of 1993 (O.S) was an Originating Summons and it sought determination of the following questions:

***“1. Whether all redemption monies lawfully payable under the said Debentures and/or the loan Agreements between DFCK and WSM and/or under the said legal charges been paid in full.*”**

2. Whether the Plaintiff is entitled to reconveyance and/or discharges of all the debentures and the said charges or other encumbrances on the said titles.

3. Which party is liable to pay the costs of this summons.”

Again I do not apologise for any mistakes such as can be seen in prayer 1 as I have reproduced it as it is in the originating summons. These prayers are sought on the basis (as can be gathered from the plaint in HCCC 293 of 1993 and the Affidavits in support of HCCC 5414 of 1993) that the First Plaintiff was at all material times the registered proprietor of Plot No. Block 3/857 NAKURU. He is one of the Directors of the 2nd Plaintiff to which a total of KSh.2.95 million was given as a loan by the Defendant against the security of the same plot No. Block 3/857 and debenture signed by the Plaintiffs. The Plaintiff maintains that the same loan has been paid in full or if not yet paid in full the amount outstanding is so negligible that the loan should be declared as fully paid and the plaintiff is entitled to reconveyance and/or discharge of all the debentures and the said charges or other encumbrances on the said titles. The Defendant denies the allegations and says the amount that was advanced to the 2nd Plaintiff was KSh.3,100,000 and not KSh.2.95 million as alleged by the Plaintiffs. It denies the Plaintiffs' allegations.

I have perused the record as regards HCCC 5495/93 which is originating summons to see if any directions were given under the relevant procedure necessitating it being heard as a plaint, but none seems to have been given. I will however accept that when it was consolidated with Nakuru HCCC 293/93 which is a plaint, the intention could have been only to have it heard as a plaint in open court for having been consolidated with a plaint, the originating summons could no longer be treated otherwise other than as a plaint.

The Plaintiff called two witnesses whereas the Defendant called one witness. The first Plaintiff's witness was the director and owner of the 2nd Defendant. Both himself and second Defendant were involved in the work of Timber sawing. At first he asked for a loan of KSh.1,450,000/- from Development Finance Company of Kenya (now called Development Bank). The loan was given. He signed loan agreement with Defendant and also they took debenture on Saw Mill. Later he wanted a machine for furniture and he went to the Defendant again and obtained a loan of KSh.1,500,000.

He signed another agreement in respect of that second loan. That loan was released in installments or in batches and he was not given one cheque for it. This second loan had a grace period of two years but the Plaintiffs were paying the first loan. When he was still paying the first loan he was surprised when Receivers went to his place of work. This was without notice nor any letter of demand from the Defendant. The Receivers went to take over before two years of grace for the second loan expired yet the second loan had a grace period of two years. The Receivers were A. Molloy and T. Aikman of Deloitte, Haskins & Sells. These Receivers stayed there for two months and they left. The Defendant then sent their own employee called Josephat Warui Murage who took over from the first Receivers. The witness said Murage was there for a long time but he could not tell how long Murage was there. He left on condition that they leave the business to him but he would add more security. Plaintiff offered to give the Defendant more security. They took more security. He complained about the conduct of Murage who was taking Plaintiff's timber to his employees who would take the same to Ol Kalou where Murage was constructing a house. Witness provided information to C.I.D. During the time Murage left, as a result of the conduct of the Defendant in insisting on Bank security, the plaintiff was not able to do any business as they had no money to run the business and the plaintiff even got into problem with Forestry Department. The Defendant sent another Receiver Joseph K. Muiruri. Witness took police to Olkalou where Murage was constructing a house. Plaintiffs' two employees, Esther Wairimo Kimano and Henry Thubi both did swear affidavits in support of the complaints against Murage. Receivers did not supply the plaintiffs with any accounts of what they were doing but they gave them to the Defendant who gave the witnesses the accounts. He did not agree with the Defendants accounts. Muiruri also did not stay there as Receiver for long but the witness was not able to tell how long he stayed there. Defendant ordered him to leave. When Muiruri left the factory was closed but the Plaintiff reopened it. He then approached an accountant and he found that he had overpaid the Defendant. When he discovered that he had overpaid them he requested them to return to him the documents but the Defendant refused and hence his filing the case in court. His property was not attached. He ended his examination in chief by saying he had also sworn two affidavits

in the matter – i.e. one on 8.11.9e and another on 8.11.94. He produced a bundle of documents as Exh.1 and said he relied on the same documents. He denied being indebted to the Defendant in the sum of KSh.8,367,234/1-. In cross examination this witness agreed he borrowed money from the Defendant. He signed the first loan agreement on 14.11.78. He took another loan of KSh.1,500,000/- but he could not remember the date he signed agreement for it. When they had appointed first Receiver, witness asked for more time to pay the loans. The two agreed and another agreement was signed but Defendant did not comply with that agreement. Shown agreement at page 7 of Exh. 1, he admitted that as was written therein the first loan was still outstanding at KSh.960,000. He also admitted as true that on the first loan interest was KSh.110,232/- and on the second loan the interest outstanding was KSh.239,309/40. Those were outstanding amounts before Receiver was appointed. He admitted interest accrued before receiver was appointed. Shown page 76 of the same agreement he agreed that he and his wife (another Director) signed it on behalf of Receiver and as signed on 14.6.84. He did not know whether that agreement was complied with as the Receiver was there and was the one controlling the business of the plaintiffs. Shown a statement which was then marked MFI. D1, he said that he could not understand it and that all he knew is that he paid as agreed even if he did not comply fully with the agreement. He did not pay installment that was due on 30.9.84. He did not pay installment of 31.3.85. He did not pay any installments during the time of the receiver. He also did not pay the installments in respect of the 2nd account as the receiver was still there. He denied having got another short term loan and said it was the Receiver who got it. The loan was for KSh.150,000. He was to repay it by KSh.12,500/- per month. Shown statement for the same loan he said he did not know whether that loan was paid or not. He did not know when Receiver left the company but he agreed that it could have been on 29.3.1985 as was suggested by Defence counsel. After the last receiver left the plaintiff proceeded to pay. Last receiver left the company on 22.7.1987. The first Receiver left after two months. In 1986 Murage was receiver. He admitted that in accordance with MFI.D1, Plaintiff had not paid installments which were to be paid on 30.9.92. He had nothing to show that he had paid installments for September 1993. He also agreed that there was grace period for payment of principal amount in respect of second loan but interest was still payable. First loan had arrears. He did not himself report to police that Murage had taken some properties but the defendant did make the same report. None was taken to court on the allegations of theft as Murage was the one to report it. Theft was in the book. He admitted having signed Plaintiff's balance sheet prepared by Karara & Company – MFI.D4. Shown that statement he admitted that according to that statement for 1989, he had a loan of KSh.4,370,838. He maintained that he had paid the same loan. He paid it in small installments for a long time after Receiver had left. He paid it after accounts had been prepared. In 1993 he had paid the whole debt from the Defendant but he did not have receipts for the payments. He denied being in any debt by the time the suit was field in court. Shown page 150 of Exh.1 and page 153 of the same exhibit he admitted that Plaintiff did not pay according to agreement and he sent proposal seeking removal of interest. He confirmed that the security has not been sold as he got injunction in the Nakuru cas

In re-examination he said first Receiver went to the company on 8.2.83 and was there for two months and left. The second Receiver Murage was there for a long time and then the third Receiver Mwangi Muiruri was there as Receiver till 22.7.87 so that Receivers were there from 8.2.83 to 22.7.87 according to this witness. During that time Receiver was the one receiving money and it was his work to repay the loan. Before 8.2.83, there were a number of cheques received but after 8.2.83, Receivers did not show the witness the statements of accounts. He would not tell whether loan was being repaid or not. Defendants did not give him any notice of outstanding arrears.

Hezekiah Wangombe Gichohi is an accountant. He was the second Plaintiffs' witness. In later 1993, they were instructed to examine accounts and documents of Wanaruona Saw Mills particularly to examine the documents related to the loan advanced to the Plaintiffs by the Defendant. They were to reconcile the statements from the Defendant with the payments made by the Plaintiff to the Defendant. They were also to write to Defendant and seek details which would enable them to form proper opinion and to give their opinion after carrying out full examination of the accounts and the report which was to cover the period 16.7.1978 to 4.8.1998. They wrote to the Defendant and also consulted their client. They got some information from the Defendant but did not get all information. They wrote several letters but the Defendant replied that they would not avail all information as the matter was in the court. They then prepared a report Exh.1. They noted that various amounts received by the Defendant had not been reflected in the statement availed by the Defendant e.g. amount of KSh.339,056/50 which was handed

over to Murage (Receiver) but which was not reflected in the accounts; there was an amount of KSh.530,571/30 which was an amount for goods and services utilised by the second Receiver Manager which Defendant said was being investigated and there was a cheque for KSh.200,000/- through Barclays Bank Molo Branch which had earlier not been reflected but was later reflected in the statements. The basis of charging interest on arrears was not clear and Defendant offered no explanation. There were amounts of KSh.210,000 and KSh.119,624/05 which were charged, on the account – KSh.210,000/- was charged by the first Receiver and KSh.119,624/05 was said to be travelling expenses. These could not be justified and no internal control measures were availed for them. Those included charges of per diem of KSh.600/- but it was not stated for how many days this was charged. There was according to this witness no good reason for appointing a receiver in the first place as at the time Receiver was raised, the Plaintiff had only incurred one installment on the first account and the second account did not justify the appointment of a Receiver as the costs of Receivership exceeded the amount in arrears. In his conclusion, he found that the net effect was that the Plaintiff had overpaid the loan by an amount of KSh.1,773,671/35 as is shown in the Report.

In cross examination, he stated that according to the documents availed to him, there was one installment unpaid on one account and interest not paid on the other account. He admitted that he saw loan agreement and debenture. The first loan was payable by two installments in a year and on the second loan interest would be paid but there was a reschedule which had been agreed upon by the time he was appointed. First Receiver was appointed on 4.2.1983 but the loan was rescheduled on 25.11.1988. On being shown the Plaintiffs bundles of documents he accepted that the first loan was rescheduled on 14.6.1984. Shown MFI.D1 he stated that according to that document, the loan was in arrears of KSh.130,000/- as at 30.9.1980 and it was paid on 28.10.1984. Another KSh.120,000/- was due on 31.3.81 but was paid on 16.7.81. Second loan was going through grace period and only interest was due to be paid and only one installment of interest was due and payable. The Defendant also agreed that the amount of KSh.210,000/- charged by the Receiver was on the higher side and had also queried the same amount. Defendant appointed another Receiver because the first Receiver did not conduct the matters properly. The witness in his report did not include the Receivers charges, and all amounts in respect of which no supporting documents were availed. They examined what they considered necessary and in tune with their ability to understand the document. Shown Plaintiffs bundle at page 77 – article 5.07 he said he was aware of that clause and considered it at the time of his report. He admitted that he would relook at that aspect and reconsider his evidence on that aspect. Shown page 4 of Exh.1 (his report) he said the amount of KSh.530,571/30 was a matter that was still being investigated. He excluded it from the loan but if that was reversed then the interest element would be important. He remembers the question of KSh.530,571/30 as being investigated by C.I.D. but he was not aware if anybody had been charged. The amount of KSh.200,000/- was reflected in the account when the matter was about to come up for hearing and there is an amount of interest which accrued on it from the time it was paid to the time when it was credited. He agreed that Plaintiff was responsible for paying Receivers but the payments had to be reasonable. If the payment is made in respect of Receivers, interest would accrue and would be paid by the company. There was no statement in the instruments stating as to how many installments had to be in arrears before the Receivers could be appointed. The amount of KSh.339,056/50 was a part of the handing over done by the First Receiver to Second Receiver but he could not remember when the handing over took place but there was no satisfactory explanation as to how KSh.339,056/50 was accounted for.

In re-examination he said care should be taken before appointing a receiver as it increases the cost and payments to the receivers in this case did not make any economic sense. The object of appointing a receiver is to be in the interest of the financier. He is supposed to settle the loans and hand over to the financier. In his answer to the court he said that according to the figures they prepared 30% is what they felt was overpaid, but he did agree that they might not have had a proper figure to work on as the amounts had kept on changing from time to time.

As I said earlier, the Defendant called one witness. He was Martin Kariuki Muragu, the Assistant Manager, Project Financing Department who said he was familiar with Plaintiffs' project. He said that first loan was given to Plaintiff in 1978 – First Disbursement of KSh.500,000/- and another of KSh.950,000/- was disbursed on 23rd November 1978 making a total of KSh.1,450,000/-. That was loan No.1. He produced Exh. D1 – statement of the same loan. On 24.3.1982, second loan was advanced to

Plaintiff. That was KSh.1,500,000/-. That is shown in Exh. D2 which he produced. Each of the loans were supported by loan agreement and Debentures. First loan agreement was dated 14.11.78. First loan had a grace period of 2 years and thereafter it was to be paid by 2 installments every year i.e. after every six months. First payment was due on 1.9.1980. During the Grace period, interest was payable by two installments in a year. First receivers were two Receivers appointed as individuals – they were Aileman and Molly. The installment then due was payable on 30.9.82. That installment had been outstanding for 5 months before receiver was appointed. Arrears of interest was also outstanding at the time receiver was appointed, though the second loan was still undergoing grace period and as at 30.9.82 interest in arrears was KSh.116,875/-. First Receivers were appointed on 8.2.1983, and they left on 27.2.83. When they left Receivership was not lifted but they were replaced by Defendant's officers. They left because their bill of KSh.241,000/- which was later reduced to KSh.210,000/- was felt to be excessive by the Defendant. One Murage was then appointed. All this time the company was functioning and employees were working. Company was advanced another small loan of KSh.150,000/-. The first loan was rescheduled and loan arrears amounting to KSh.480,00/- was deferred over a period of 2 years and also interest in respect to that first loan of KSh.110,232/- were deferred but interest on second loan which was in arrears and which was KSh.239,309/40 was capitalised and was deferred and rescheduled. The total loan statement for loan 3 was prepared in Exh. D3 – that was short term loan. The capitalised Deferred Installments Statement was produced as Exh. D3(a). After the rescheduling, Plaintiff continued to be in default as payments made by them were inadequate and irregular and this is shown in Exhibits 3 and 3(a). On 19th September 1986, the Plaintiff was put under Receivership again. Muiruri was the Receiver. That receivership was lifted on 22.7.1987 after the Plaintiff asked for indulgence through the Office of the President when the Defendant was requested to assist the Plaintiff by lifting the Receivership and restructuring the loans. The Defendant made another proposal for rescheduling the loans sometimes in 1988. Plaintiff accepted the proposals but did not sign the agreement although he signed acceptance. That resulted in the proposed rescheduling not being complete. He produced Exh. 3(b) to that effect. As at 30.11.2002 the outstanding debt was KSh.12,136,093/30 which Defendant is demanding. On the allegation on KSh.530,000/- the allegation was received, investigated, but no evidence was adduced to support the same allegation. The total expenses were for a year and were not in total more than KSh.400,000/-.

In cross-examination he agreed that the charge of KSh.210,000/- was excessive but said that was why they exchanged the Receivers. Defendant was responsible for formulating agreement for fixing Receivers costs. They appointed first receiver without first agreeing on the expenses. The appointment of Receiver was proper as arrears were there. He did not attend any meeting on this matter, but initially he was involved in the matter. He knew that at the beginning, the Plaintiff was doing very well. The witness was dealing with project appraisal. It was a condition that one of the staff of the Defendant would be appointed a director of a company to be given a loan should Defendant need to do so, and it did exercise that right on a number of companies. The witness was not one of the people who decided to put Plaintiff into Receivership and he gave the names of the officers who decided on that issue which included Mr. Kagwe, the officer who was attending to Plaintiffs matter. That group is the one which decided also on the appointment of the Receiver but the witness did not know if they carried out any quotation for appointment of a Receiver nor does he know if they carried out any selection of a Receiver. Although none of the members of that group had died and none has immigrated from Kenya, none is working with the Defendant company. Charge and Debenture were prepared by Defendant's lawyers and the final copy was sent to Defendant for execution. Although the same are prepared on consultation with the Plaintiff he was not sure if it was sent to them for approval before the final copy was sent for execution. Normally there is no warning sent to the Borrower that a Receiver is being appointed or being removed. Murage gave a statement of cash, receipt and payment. Murage's stewardship went upto June 1985 but he finished being a Receiver in March 1985. There were allegations that Murage was using Plaintiffs' materials. There were affidavits of people who had carried materials to Murage's farm. Shown a letter at page 143 of the Plaintiffs bundle which contained a letter addressed to Chairman and he admitted he had not seen it. He also did not see document at page 145 of the same bundle. There is no specific file on this matter as there are many files. Shown letter at page 142, and 140, he agreed that Plaintiff sent Affidavits on Murage to Defendant and Defendant carried out investigations on the matter. An officer was assigned to investigate the matter but he does not know the officer's name. The officer carried out investigations and reported to Defendant but the witness did not read the report and is not aware of the report. He is not aware whether report was communicated to Plaintiff and whether Murage was asked about the allegations

as he has not seen any letter from Defendant to Murage seeking explanation. Murage's salary was being paid by the Defendant when he was a Receiver. Shown document at page 189, he agreed that the Plaintiffs arrears had not accumulated to KSh.2.4 million as at the time Receivers were appointed. Mercantile Finances Company wanted to attach Plaintiff's property and High Garage also wanted to attach Plaintiff's property. Mercantile was threatening to repossess their tractor but there was no letter from Defendant to Plaintiff warning Plaintiff of the consequences of such threats to attach their property.

In re-examination, he said the KSh.2.4 million arrears related to both loans. It was the amount outstanding as in the year 1986. Company did not see evidence to support allegations against Murage. During Murage's period of receivership expenditure was KSh.153,788/- for period between February and August 1985. Plaintiff's lawyers Mr. Muthoga attended meetings on the whole issue of Receivership. If a Director was appointed to the Board of a company given loan, such Director would not involve himself in day to day running of the project. When Plaintiff was in Receivership, the witness assisted Murage on matters of receivership particularly payment of salaries and expenses. When Murage took over as Receiver Plaintiff was employed to assist him.

The above is the summary of the entire evidence that was tendered in this entire case i.e. Nakuru case as well as the Nairobi Originating summons by way of oral evidence. There were also several affidavits tendered as well as exhibits. I was also addressed by the learned counsels who also did, apart from addressing me orally on their respective submissions, also filed written submissions. I have considered the evidence both oral and by way of affidavits and exhibits, the submissions and the legal proposals contained in the authorities to which I was referred by the learned counsels.

As I have stated above in the High Court at Nakuru Civil Case No.293 of 1993, the two plaintiffs i.e. John Warui Mathenge and Wanaruona Saw Mills were seeking injunction, to restrain the Defendant from transferring the Plot No. Block 3/857 Nakuru and a restriction order on title to Plot No. Block 3/857 restraining any dealings on the said plot. They were also seeking Account of the loan and repayments thereof. At that time, although that plaint was filed in 1993, the Plaintiffs did not plead matters on the interest computations and calculations after appointment of receivers and the alleged mismanagement of the Plaintiffs' business by the Receivers appointed by the Defendant and the effect of the same upon the loan. In fact, in the Affidavit sworn by JOHN WARUI MATHENGE on 24th May 1993 in support of his application for injunction in that case and filed together with the plaint in that case the Defendant says at paragraphs 3, 4, 5, 6 and 7 as follows:

“3. THAT between the years 1978 and 1982 the said company secured a loan of KSh.2.95 million from Development Finance Company of Kenya Limited herein after called (DFCK)

4. THAT the said loan was secured inter alia by Plot No. Block 3/857 Nakuru.

5. THAT payments of the said loan have been going on smoothly.

6. THAT the said plot was advertised for sale by Public auction on the 8 th day of April 1993.

7. THAT I vehemently remonstrated to D.F .C.K. not to proceed with the sale as the outstanding loan had to the best of my knowledge been paid by WANARUONA SAW MILLS.”

He then went on and said the Defendant sent him a statement showing he was indebted to the Defendant in the sum of KSh.8,288,952/-. He objected to that statement and hired his own auditor to reconcile the statements. Thus in that plaint, the main contention was on accounts. In the originating summons filed in Nairobi, the two questions that the court was required to determine were whether all redemption monies lawfully payable under the Debentures and/or the loan agreements between the Plaintiffs and Defendants have been paid in full and whether the Plaintiff is entitled to reconveyance and/or discharge of all the debentures and charges or the encumbrances on the said titles. Again to my understanding the main

questions raised here are on the accounts.

Thus, I will need to consider the question of accounts first to see if what the Plaintiffs set out to prove has been proved namely that the loans advanced to them by the Defendant have been fully paid. Thereafter, I will consider the other aspects which have been raised by the Plaintiffs i.e. the appointment of receivers, conduct of the same receivers and the effect of the same upon the loan repayment and the effect of the way the interest was computed after the receivers were appointed.

The Plaintiff Managing Director PW.1 who is also the First Plaintiff in Nakuru Court John Warui Mathenge, accepted that he and his company received two loans one for KSh.1,450,000/- and another for KSh.1,500,000/-. By the time Receivers were appointed the first loan of KSh.1.45 million which was being paid by two installments every year was in arrears of one installment whereas the second loan was still undergoing grace period and only Interest was being paid but even the same interest was in arrears. This witness however, did not go into the evidence of how the two loans were paid. His evidence therefore does not help the court on the issue as to whether the loans were literally fully paid. He left that aspect to PW.2 Hezekiah Wangondu Gichoki, an accountant who reconciled the accounts. PW.2 produced Exh. 1 which was his report on the two loans and his reconciliation. In my mind, this was the main evidence on the issue as to whether the loans had been fully paid or not. I have perused it exhaustively. In the notes to the loan schedules, this witness states at page 5 as follows at

Clause 1:

“1. We have taken interest on loans not due and disregarded interest on arrears during and after first Receivership because our client would have met the loan and interest as and when they became due if the company had not been placed under Receivership.”

And at page 6 Clause 4 he states:

“4. We have not taken interest charged on the loans and receivership expenses incurred during both receiverships because we are of the opinion that the company should not have been placed under receivership considering that Development Finance Company of Kenya Limited has not disclosed the unsecured creditors who were threatening to attach the assets of the company.”

I do agree with the learned counsel for the Defendant that these remarks were misplaced and seriously affected this witnesses report. It is certain the witness was not supposed to arrogate unto himself the duty of deciding whether the Receiver should not have been appointed or not. His duty as I understood it was to factually carry out the accounts and inform the court of what he found. Further, this witness, in his report excluded several payments including Receivers fees, traveling expenses from his accounts. In my feeling, all he needed to do was to give an account as it would stand if such payments were included and also give the account as it would be if such payments were excluded. In that way the court would be in a position to know whether the account would reflect full payment if the same payments were included or not. As matters stand, this report with so many payments left out and with interests left out as stated in the report, it cannot be of any help to me. Further in cross examination when this witness was referred to page 77 of the Plaintiff's bundle on the question of interest article 5.07 which says that if the company shall default in payment of any installment of the principal amount of the loan under article 5.05, or payment of any interest due under article 5.04 interest shall be payable on the amount and for the period of default at the rate of 17% per annum, he said inter alia, as follows:

“I will relook at the aspect and reconsider my evidence on that aspect.”

I am not satisfied that this witness's evidence has proved within the standard required that the loans have been fully repaid. As against the Plaintiff's evidence the Defendant did produce Exh.D1, D2, D3 statements of the Plaintiffs' account upto 30.6.88 as well as Exh.D4 Balance Sheet upto 30th September 1989. These were not challenged. They show that the Plaintiff owed some money to the Defendant and there is no evidence that the same has since been paid. Further this is strengthened by a letter which was

annexed by the Defendant as JKN 1 in the Defendants' Affidavit sworn on 4th June 1993. That letter was dated 7th April 1993 and was addressed to the Defendant by the Provincial Commissioner, Rift Valley Province. He was interceding on behalf of the Plaintiff. The letter stated as follows:

“The General Manager,

Development Finance Corporation of Kenya, P.O.

box 30483,

NAIROBI.

Dear Sir,

RE: L.R. NO. NAKURU MUNICIPALITY BLOCK 3/857

The above named plot within Nakuru Municipality is scheduled for auction on 8th April, 1993 having been charged to finance the operations of Wanaruona Saw Mills whose proprietor is Mr. John Warui Mathenge.

We are in the process of assisting Mr. Mathenge to raise the money owed to you, which we expect to be paid fully within the next two months.

We are aware that we have made similar appeal in the past on his behalf but you realise that the sum owed is huge and could not be raised immediately due to some hiccups in the arrangements.

We are convinced that Mr. Mathenge has now made a breakthrough and will definitely be able to meet his commitments with you. We sincerely regret that the situation has come to this but it is our hope that this matter will now be sorted out amicably.

Thanking you so much in anticipation.

Yours faithfully,

E.M. IRUNGU

FOR PROVINCIAL COMMISSIONER

RIFT VALLEY”

I do agree that this letter was written before PW.2 completed his report as can be seen from the Plaintiff's affidavit sworn on 24.5.1993 paragraph 9 where he said that he objected to the inflated figure of KSh.8,288,952/- and instructed his auditor to reconcile the accounts. The auditor as I have said has not helped much.

The learned counsel for the Plaintiffs Mr. Muthoga however raises certain issues that he feels would adversely affect the Defendants' figures. These are the matter I now need to consider.

The first is that the Receivers messed up the Plaintiffs' business with one of them charging exorbitant figure of KSh.210,000/- for its services for a period below one month and another involving himself in outright theft. First, I would readily agree that the figure charged by the first receiver was exorbitant. The Defendant admitted that much and acted quickly to remove them. I also agree that a prudent person, in Defendant's position ought to have done some “shopping” for a person to appoint as a receiver and doing so the charges of such a person should have been quoted and considered before

appointing the person. My only difficulty on this point is having accepted that to that extent Defendant was careless and may have occasioned loss to the Plaintiff, what was the correct amount. That the Receiver deserved some payment is certain and that he overcharged is also certain but what amount do I allow for this expenditure and how would that amount affect the overall figure having considered the interest on it as well? I have not been given that answer and I cannot ignore that expenditure completely as it is not in dispute that the Receiver carried out some services. In any case as the Defendants account has not in my finding been challenged (except by evidence which I have rejected), I do not see as if the amount of KSh.210,000/- or part of it would change the position to enable one conclude that the total loan amount has been fully paid. On the question of the other receiver who is alleged to have stolen Plaintiffs' property, as can be seen above, I have no concrete evidence such as that the same receiver was charged and convicted in the court of law to enable me conclude that he stole. Further as is evident from the above, the question of Receivers wasting the Plaintiffs' properties and business was never an issue even in 1993 when Nakuru case was filed and when the Originating Summons was filed. A look at the Affidavit in support of the originating summons (which would be treated as pleadings in this case as viva voce evidence was received) shows it never talked about Receivers wasting the property. Further the Receivers were never sued for the same alleged wastage. I have no reason to declare the loans fully paid on account of the alleged Receivers conduct.

The last point I will now consider is the question of interest. In the Affidavit in support of the originating summons, the Applicant states as follows at paragraph 7(b) (c) and (d):

“7. I am advised by my advocates and verily believe that under the law and on the basis of the agreements between DFCK and WSM: -

(b) The interests payable under the said agreement s and debentures at various rates is calculable on simple and not compound interest basis.

(c) In any event all interest payable on the advances for all periods when the account was non -mercantile is chargeable on simple inte rest basis.

(d) All penalty charges or interest upon interest charged during any period after the appointment of the first receiver i.e. after 8 th February, 1983 have been wrongly charged for the reason that the Defendant placed Plaintiff under Receiversh ip unjustifiably and wrongfully and in breach of the relevant provisions of the applicable agreements.”

I have anxiously considered this aspect. I have also perused the various loan agreements and debentures. I have not been shown which provision(s) of the agreement or debenture documents were breached. I do agree with the authorities to which I was referred but the same must relate to our case. Further, it cannot be said that the appointment of the Receivers was improper nor was it unjustifiable. I do agree that it was done in haste as only one installment of loan was in arrears and interest on the other loan was in arrears and in my mind the Defendant should have exercised some patience for sometime, but again one has to put in mind that any delay in taking action could have ended in the arrears piling up to an uncontrollable levels and the Defendant would have in the end been blamed in such circumstances for delay in taking action to safeguard its interest. I do however think it would have been prudent to wait till the next payment was also not made. However, what the Defendant did in appointing the Receiver was not illegal nor was it in breach of any provision of the agreements. In any case, I have not been shown the relevant provisions of the agreement, the placing of the Plaintiff into Receivership breached. As I have stated, default was not denied and the case of ***Hastings Irrigation (K) Ltd. vs. Standard Chartered Bank (K)Ltd. and two other (1982 -88)1 KAR 1139*** to which I was referred supports this view. Clause 9 of the further Debenture dated 10th July 1984 which is similar to Clause 8 of the first Debenture as read with Clause 8 of the second Debenture makes it clear that the Defendant could appoint Receiver even if the Plaintiff was in default for only one installment. The effect of this finding I have made is that the complaint that all Penalty charges or interest upon interest charged during any period after the appointment of the first Receiver i.e. after 8th February 1983 were wrongly charged for the reason that the Defendant placed the Plaintiff under receivership wrongfully cannot stand by the very reason that the Defendant's appointment of Receiver was not in my finding wrongful.

However, during the submissions, Mr. Muthoga the learned counsel for the Plaintiff submitted that compound interest was charged after the loans had been recalled and that was according to him not proper as after the recall of the loan, the relationship between the Plaintiffs and the Defendant ceased to be that of customer and banker and became that of creditor and debtor and thus compound interest should not have been charged. I have not been shown that compound interest was charged during the period of receivership and PW.2 did not prepare what the correct amount would be if compound interest was charged and what the correct amount would be if simple interest was charged to enable me see if under those circumstances I would conclude that the loan had been repaid. However, when was the loan recalled? In short when did the loan cease to be mercantile. In the case of *National Bank of Greece SA vs. Pinios Shipping Co. No.1 and another – The Maira*, the interest that was being charged – compound interest was awarded by the court below. The subject matter was not under the control of Receiver at the time compound interest was being awarded and in any case there was no express provision in the mortgage entitling the bank to charge compound interest. These are the reasons why I stated above that the authorities I was referred to must be relevant to the case before me. In my mind that case is distinguishable from the case before me. Further, that issue that compound interest was charged as between bank and customer after the recall of the loans was introduced only at the point of submissions. That is why I did reproduce hereabove the part of the Affidavit in support of originating summons as relates to interest. I have not been shown by concrete evidence that interest both on principal amount and on arrears was charged in breach of agreements and/or debentures. Article 5.07 of the Further loan Agreement is clear on this and it states (I have produced it hereinabove) that interest on arrears would be 17%. This was accepted and the Plaintiff did execute the same agreement. There is no evidence that higher interest was charged or I have not been shown the same.

The other issue that was raised was that the Defendant obstructed the Plaintiff in its business by failing to provide all the documents that the Plaintiff wanted. I note as I have stated above that the Plaintiff filed this case in May 1993 and in the affidavit he filed while seeking injunction, he clearly stated that he had an auditor. Once he filed the case, and he had an auditor, one wonders what stopped the Plaintiffs from seeking the production of the documents by way of Civil Procedure rules? Plaintiffs have not stated why they could not do so.

In conclusion, I do agree with Mr. Muthoga the learned counsel for the Plaintiffs that when Defendant entered execution of the project by its appointment of Receiver/Managers out of its own staff, it became jointly responsible with the Plaintiff for the proper execution of the project which included repayment of borrowed capital, but in this case, the plaintiffs have only themselves to blame for having not sued the Receivers at the relevant time for whatever waste they perpetuated over the project and further they have only themselves to blame for having availed no proper evidence of this waste by Receivers – particularly by Murage. They have only themselves to blame for having not had the same Murage prosecuted for theft if any such theft took place. In short they have only themselves to blame for having not taken action to have proper evidence of whatever waste the Receivers or any of them committed.

The sum total of all the above is that no evidence has been availed to prove that in fact the loan has been fully repaid including the second loan which was in fact still undergoing grace period when problems started. Further, I am not satisfied that evidence has been availed to lead me into a conclusion that through illegal charge of interest and waste of the project by the Receiver the Defendant can no longer be allowed to claim its money. The suits lack merit and are dismissed with costs to the Defendant.

Judgment accordingly.

Dated and delivered at Mombasa this 25th Day of March, 2003.

J.W. ONYANGO OTIENO

JUDGE