IN THE COURT OF APPEAL AT NAIROBI

(CORAM: WAKI, G.B.M. KARIUKI & M'INOTI, JJ.A)

CIVIL APPEAL NO. 132 OF 2008

BETWEEN

KENYA COMMERCIAL BANK LTD. .....APPELLANT

AND

1. STEPHEN MUKIRI NDEGWA

2. CONTINENTAL MARKETING LIMITED .....RESPONDENTS

***(An appeal from the judgment and decree of the High Court of Kenya at Machakos (Lesiit, J.) dated 2nd May, 2008* in**

H.C.C.C. NO. 172 OF 1997)

****

JUDGMENT OF THE COURT

Introduction.

1. The appellant, ***Kenya Commercial Bank Limited*** (KCB) and the two Respondents, ***Stephen Mukiri Ndegwa*** (Ndegwa) and ***Continental Marketing limited*** (CML), in their cross appeal, challenge the following orders made by the High Court (Lesiit, J.) in its judgment delivered on 2nd May 2008:

1) "Injunction be and is hereby issued restraining the defendant by itself or through its agents or advocates from interfering with the first 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 second plaintiff by the defendant under account number [particulars withheld] has been fully and completely repaid and redeemed.

3) A declaration be and is hereby issued that the defendant does deliver title numbers Nyandarua/Malewa/385 and Nyandarua/Malewa/489 to the first 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 paint, judgment be and is hereby entered for the second plaintiff against the defendant in the sum of US dollars 32,869.26 with interest at court rates from the date of filing suit until payment in full.

5) The plaintiffs be and are hereby awarded the costs of the suit with interest thereon.

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

2. In the appeal before us, KCB was represented by Mr. W.A. Amoko instructed by **M/s Oraro & Company Advocates** while Ndegwa and CML were represented by Ms. Purity Makori, instructed by **M/s Kelvin Mogeni, Advocates.**

Background.

3. In the year 1987, CML was in the business of exporting tea, horticulture and manufactured goods and was a customer of KCB. It held a Current Account No. 239541912 with the Industrial Area branch of that bank. Ndegwa, on the other hand, was the managing Director of CML and the registered proprietor of two parcels of land otherwiseknown as Nyandarua/Malewa/385 (plot 385) and Nyandarua/Malewa/489 (plot 489) measuring 8.3 acres and 20 acres, respectively. Despite claims made by KCB, he did not personally have any account with the bank. There were also four other companies in which Ndegwa was a Director, including Express Coffee Exporters Company Ltd (ECEC), which also had bank accounts with KCB, but they are not parties to these proceedings.

4. In September, 1991, with a view to supporting its export business, CML negotiated an overdraft facility with KCB to the tune of Ksh.500,000/= upon written terms agreed between them including interest and security of the two plots held by Ndegwa. Barely four years down the line, in June 1995, KCB notified CML that its account was overdrawn by Ksh.600, 302. 00 and threatened to realize the security held over the account if the indebtedness was not cleared. It stopped the operation of CML's account. CML could not understand that demand and the precipitate action threatened by KCB. According to it, the current account it held with the bank had been regularly serviced by remittances of foreign currency from Pakistan and Tanzania through KCB between July and December, 1993. As at that time the overdraft facility was about Ksh.477, 067.35 and the remittances made amounted to United States Dollars (USD) 144,037.46 or the equivalent of Ksh.9,929,092.70 at the prevailing exchange rate of Ksh.68.9341 to the dollar. There should not, therefore, have been any debt to talk about in 1995 since CML's account ought to have been in credit by December 1993.

5. After fruitless efforts made by Ndegwa and CML to discuss the account of CML and the threatened auction of the two securities, they filed suit against KCB in January 1997. An injunction was subsequently issued to maintain the status quo pending the hearing and determination of the suit.

The Pleadings.

6 In their amended plaint, Ndegwa and CML asserted that the continued demand for payment and the threat to auction the securities was illegal as there was no debt owed to KCB. They further asserted that the current account held by CML was in credit to the tune of Ksh.9,929,092.70 (or USD 144,037.65) which KCB ought to account for and refund. They sought the following orders from the court:

"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.*

1 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.

2. 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.

3.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.

4. A declaration that the loan and/or overdraft granted to the second Plaintiff by the Defendant under account No [particulars withheld] has been fully and completely repaid and redeemed.

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

6. 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, 1993 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."

7. In response to the averments in the amended plaint, KCB denied that it received any sums amounting to USD 144,037/65 between July and December, 1993 for the account of CML. It asserted instead that Ndegwa had a loan account with it and that CML had an overdraft facility. There was also Express Coffee Exporters Company Ltd (ECEC) which was granted a packing credit facility by KCB. By agreement with Ndegwa, who controlled both companies, all foreign currency proceeds from coffee and tea exports would be credited to the account of ECEC. KCB thus received various amounts in USD and disbursed it according to the agreement and the balance was credited to the CML current account no.[particulars withheld]. Ndegwa was subsequently given the statement on the disbursements which he did not dispute and he was therefore estopped from doing so. In sum, the foreign currency received by KCB did not liquidate the indebtedness by CML which stood at Ksh.813,414.55 as at 31st December, 1995. KCB further pleaded that it served a demand notice which was acknowledged by CML and in default of payment proceeded to exercise its statutory power of sale. It confirmed that the two securities were lawfully advertised for sale in January, 1997 but were not sold. The debt continued to accrue further interest at the agreed rates and it stood at Ksh.1,459,012.05 as at the date of filing the defence in July, 1997. A plea that the suit was caught up by limitation periods was later considered and rejected by the court and there was no appeal against that rejection. KCB prayed for dismissal of the entire suit.

8. In a quick rejoinder, Ndegwa and CML wondered how KCB could deny receiving any foreign currency and in the same breath talk about disbursing it to various accounts; denied any connection of ECEC with the affairs of CML and asserted that there was an agreement that the funds received by the Bank would be credited to the CML account; denied that Ndegwa had any personal bank account with KCB; observed that all statements issued by KCB to explain the accounts were materially different; and pleaded that the doctrine of estoppel was inapplicable.

The Evidence.

9. In view of prayer No. 3 in the amended plaint and the complexity of the accounts, both parties recorded a consent order for engagement of an expert (or referee) to examine the disputed accounts and report to the court. The expert was ***Alfonce Karugu*** **(PW1)** (Karugu) a qualified accountant in the firm of ***M/s Koimburi Tucker & Muita, Certified Public Accountants***. Karugu and his team called for records relating to the matters in dispute, from both sides, held meetings with the parties' representatives, and delved into the task placed before him. The only limiting factor was the

claim by KCB that some of the documents relevant to the matter were lost in a fire that engulfed its godown in Industrial Area in September 1999. Ndegwa had lost some relevant documents too. Karugu filed the report, testified under oath, and was cross examined at length.

10. In the process, he explained the law that existed at the time under the **Exchange Control Act, Cap 27**, and the procedures dictated by the Central Bank of Kenya (CBK) where foreign currency was remitted to banks in Kenya. They included:

· Declaration of the foreign currency to CBK

· Sale of 50% of it to CBK

· Crediting of the balance to a Retention Account in the name of the customer.

He took the court and the parties through each of the disputed foreign currency remittances and in the end concluded that there was a net sum of USD 82,472.75 owed to CML which should be offset against its indebtedness with KCB as at the end of December 1993.

11. Ndegwa also testified as PW2 on behalf of himself and CML. Amongst other evidence on which he was cross examined at length, he denied that he had any personal account with KCB and stated that he only offered security for the overdraft negotiated by CML in the sum of Ksh.500, 000. He also denied that ECEC's accounts and the packing credit facility which was well secured by other properties had anything to do with the suit. He continued to maintain that KCB was holding USD 144,037.46 for the credit of CML by the time it was making its demand and the securities he had provided ought to have been released to him. It did not matter that he had at some point admitted owing the money demanded by the bank, explaining that he did so to buy time to question the accounts and save his property from illegal auction. Finally, he insisted that the KCB caused financial losses to CML when it closed its operating account from 1994, and he sought reparations for that.

12. For the bank, the officer incharge of Foreign Bills Department at the time material to the suit, ***Ms. Ann Anyango Onyango*** (Onyango), gave evidence as the sole witness. She testified, amongst other things, that the account of CML had a debit balance of Ksh.703,479.65 in July 1993 when the bank received some USD 8800 (Ksh.644,075.80) for the credit of the account thus reducing the overdraft to Ksh.59,421.85. A further credit of Ksh.39,685.30 was made to the account in October, 1993. Other remittances in USD were also received at the time but, according to her, instructions were given by Ndegwa to credit the amounts to the account of ECEC as well as other beneficiaries. By July 1995, the account of CML had a debit balance of Ksh.648,302.35 and the bank had to issue instructions to its lawyers for recovery of the amount. She did not agree with the conclusion reached by the accounting expert that the bank had not accounted for a sum of USD 82,472.75. According to her, it was possible that some USD which were evidently remitted by CML did not reach the bank.

Findings by the High Court.

13. There was a raft of twelve issues framed by Ndegwa and CML for determination but KCB did not file any and did not dispute them either. The trial court cautioned itself, correctly in our view, that although Karugu's evidence was sought by consent of both parties and could properly be received as neutral expert evidence, or evidence of scientific investigations, the court would not merely rely on his evidence but must consider it in the totality of the other oral and documentary evidence adduced in the suit.

14.It went ahead to answer the twelve issues and in the process made the following findings which may be summarized and paraphrased:

· *That KCB failed to maintain proper records of CML accounts and thus failed in the Banker's duty to its customer of giving accurate and uptodate vital information of all business transactions made in the accounts despite repeated requests to do so*

· *That the admission of indebtedness by CML when it was first served with a demand notice was reasonably explained, considering that KCB had frustrated CML which was groping in the dark seeking explanations from the bank on the state of its accounts between 1993 and 1995.*

· *That KCB did not account for a sum of USD 8,800 received by it for the credit of CML in July, 1993.*

· *That a sum of USD 19,142 from Pakistan, was remitted through the Bank of America in Lahore in August, 1993 and was received by KCB but was not accounted for.*

· *That only half of the sum of USD 9,489 (i.e USD 4,744.50) remitted from Moshi Tanzania in September 1993 was accounted for by KCB, leaving a sum of USD 4,744.50 unaccounted for.*

· *That Ndegwa, on behalf of CML gave instructions for payment of USD 44,858.98 received from a Karachi bank in July,1993 to a third party and KCB was not liable for it.*

· *That three remittances amounting to USD 51,288.24 received in August and September,1993 were properly accounted for by KCB save for a sum of USD 182.76*

· *That Ndegwa, on behalf of CML, authorised KCB, by letter dated 27th September, 1993, to pay a third party the sum of USD 15,000 and therefore KCB had accounted for that amount.*

· *That there was no proof that a sum of USD 12,964 separate and different from the sum of USD 12,974 received on 24th September, 1993, which KCB accounted for was ever remitted or received by KCB for the credit of CML Retention account.*

· *That there was no proof that a sum of USD 8,409.66 was remitted to KCB or that it was unaccounted for.*

· *That there was no evidence that a sum of USD 98,717.06 was received by KCB for the credit of CML.*

· *That, in totality, KCB received a sum of USD 157,580.98 for the account of and to the credit of CML and accounted for the whole amount except for the sum of USD 32,869.26.*

· *That the sum due to CML in the sum of USD 32,869.26 (the equivalent of*

Ksh.1,939,286.30 at the undisputed exchange rate of Ksh.59 to the dollar) was enough to offset the amount demanded by KCB in the sum of Ksh.648,302.35 as at July,1995, leaving a credit balance in the account of CML.

· *That the overdraft account of CML was fully paid up as at December 1993.*

· *That the issue of estoppel, though pleaded, was not argued by the parties and was therefore abandoned.*

· *That Ndegwa did not have an account with KCB and no funds were utilised in servicing such account.*

· *That the bank's Statutory Power of Sale under* ***Section 74*** *of the* ***Registered Land Act*** *had not accrued at the time KCB sent statutory notices since there was no debt owing at the time. The amount owed to CML exceeded the amount due from it.*

· *That the dispute between the parties was not about accounts but about normal banking practice and the duty of a bank to its customer which KCB was in breach of.*

· *That no evidence was adduced as to the proper rate of interest applicable to the overdraft facility.*

· That there was no proof that the sum of Ksh.9,929,092.70 was due from KCB to CML. Only the sum of USD 32,869.26 or Ksh.1,939,286.30 was found due and was recoverable under the consequential prayer for ***"any other relief that the court may deem fit to grant".***

· That CML has a right of judgment for the sum of USD 32,869.26 with interest thereon at court rates from the date of filing suit until payment.

· That the claim for general damages for loss of business and breach of contract was in the nature of special damages which ought to have been specifically pleaded and strictly proved but was not. It did not therefore lie. In any event, there was no bank/customer relationship between Ndegwa and KCB.

· That in all the circumstances of the case, an injunction should issue to restrain KCB from interfering with plots 385 and 489.

Those were the findings that informed the orders issued by the trial court, as stated in the introduction above.

The appeal by KCB and submissions of counsel.

15. Nine grounds of appeal were laid out in the memorandum of appeal and may be summarized thus:

The learned judge erred in:

1. issuing an injunction in respect of plots 385 and 489;

2. declaring that the overdraft in CML account was paid up;

3. directing KCB to deliver up the titles to the two securities free from encumbrances;

4. entering judgment for USD 32,869.26 with interest thereon when there was no evidence to support the finding;

5. entering judgment for the total sum found due without offsetting amounts due to KCB;

6. failing to award costs to KCB on the issues it was successful on;

7. misconstruing the provisions of the Exchange Control Regulations and thereby erroneously finding that USD 8,800 due to CML was not accounted for;

8. finding that USD 19,142 was received by KCB, and failing to appreciate that evidence of remittance was not evidence of receipt;

9. granting judgment which had not been prayed for on the basis of a prayer that was not sustainable in law.

16. Both parties agreed to have the appeal disposed of on the basis of their written submissions which they briefly highlighted orally. In his submissions, learned counsel Mr. Amoko gave primacy to the issue of entering judgment for CML in the sum of USD 32,869.26 contending, in the first place, that there was no prayer made in the plaint for such relief. The prayer made by CML in accordance with ***Order VII Rule2(1)*** and ***(6)*** of the **Civil Procedure Rules** ("*the Rules*") which required specification of the amount of money claimed, was for judgment for Ksh.9,929,092.70 which the court found unproved and therefore ought to have dismissed wholly instead of granting a judgment which was not prayed for. Secondly, he submitted, it was contrary to the law for the court to enter judgment in foreign currency when there was no specific relief sought in that currency. In support of those submissions, Mr.Amoko relied on various authorities, including **Heco Uberseehandel v.**

Mac's Pharmaceutical Ltd [1992] LLR 5842; Wareham & 2 Others v.

Kenya Post office Savings Bank [2002] LLR and **Siree v. Lake**

Turkana El Molo Lodges Ltd [200] 2 EA 521.

17. Combining the first three grounds of appeal, Mr. Amoko further submitted that there was no basis in fact or in law for the trial court to find that the overdraft granted to CML was fully paid up, and thereby proceeding to order the release of the securities thereon and an injunction to restrain KCB from exercising its statutory powers of sale.

That is because there was a statement of accounts served on the debtor which showed the debt owed and which was admitted by the debtor. The actions of KCB cannot therefore be faulted or halted in law. For this submission, Mr. Amoko relied on several decisions including **Habib Bank**

Ag Zurich v. Popin (K) Ltd & Others [1989]LLR 3069; Nyaga v.

Housing Finance Co of Kenya Ltd [1987] LLR 2187 and Mwakio v.

Kenya Commercial Bank Ltd [1984] eKLR.

18. In response to the first broad issue, Ms. Makori cited the provisions of **Order VII Rule 2(1)** and **(6)** of the Rules which, before amendments in 2010, stated in relevant parts as follows:

"(1) Where the Plaintiff seeks the recovery of money, the Plaint shall state the precise amount claimed, except where the Plaintiff sues …… for an amount which will be found due to him on taking unsettled accounts between him and the Defendant. (emphasis added)".

…….

(6) Every plaint shall state specifically the relief which the plaintiff claims, either specifically or in the alternative……"

19. Pursuant to that Rule, she pointed out, CML had pleaded specifically in paragraphs 9 and 18 of the amended plaint, the precise amount in USD 144,037.65 which KCB had received on its behalf and had converted that sum into Ksh.9,929,092.70 at the prevailing rate of conversion. That pleading complied with the first part of the Rule. On the second part, CML pleaded in paragraph 3 as follows:

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."

20. Ms. Makori submitted that it was on the basis of the latter pleading that the parties recorded a consent for appointment of an accounting expert (referee) on the basis of whose evidence, amongst other evidence, the trial court made a finding that USD 32,969.26 was owed to CML instead of USD 144,037.65. There was therefore no error of law, either in awarding the claim or in expressing the judgment in USD. She relied on the ***Heco case*** (supra) for that proposition. According to her, the only issue arising would be the applicable exchange rate , which is normally determined at the date of judgment, but in this case CML had determined the rate as at the time of filing suit and was therefore bound thereby.

21. As for the injunction granted by the court, Ms. Makori submitted that it was properly granted after the finding, correctly made, that there was no debt outstanding between CML and KCB. Ndegwa, who owned the properties, had no account or debt with KCB and there was no reason therefore to continue holding his Titles encumbered or at all. Relying on the authority of **Kiska Ltd v. De Angelis [1969] 1EA 6**, Ms. Makori observed that there was no counterclaim made in the suit by

KCB, and there was nothing more to consider in the matter. On the principles applicable on the exercise of the court's discretion to grant injunctions, she relied on the case of **Mrao Ltd v. First American Bank & two others [2003] KLR 125** and submitted that there was no misdirection, misapprehension of facts, or other indiscretions in law to warrant the interference of the trial court's order.

Discussion and Determination of the main Appeal.

22. It is pertinent to spell out the principles of law that will guide us in considering the appeal and later the cross appeal before us. As the first, and possibly final appellate court, it is our duty to reconsider, reassess, and reevaluate the factual evidence laid before the trial court, as far as is relevant to the appeal, and reach ourown conclusions in thematter. See **Selle & Another v. Associated Motor Boat Company Limited & Others [1968] EA 123**. In doing so, however, we must be cautious and always bear in mind that the trial court had the advantage of seeing and hearing the witnesses testify and was in a better position to assess the significance of what was said, how it was said, and equally important, what was not said. See **Peters v Sunday Post Ltd [1958] EA 424** and **Hahn v. Singh [1985] KLR 716**.

23. Where the trial court's findings depend on credibility of the witnesses, the court will also have gauged this throughcrossexamination and observations on the demeanor of the witnesses. The findings of the court based on credibility of witnesses will thus command considerable deference and this Court will generally be slow to interfere. See **Tayabu v. Kinanu [1983] KLR 114**. As the Supreme Courtrecently stated in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others , Supreme Court Petition No. 2B of 2014 :**

"The issue of credibility or implausibility of witness testimony is a question of fact and was not open to the Court of Appeal to consider. We benefit, in this regard, from the learned Judgment of the Supreme Court of the Philippines, in the cases of Republic v. Malabanan, G.R. No. 169067, October 632 SCRA 338, 345 and New Rural Bank of Guimba v. Fermina S Abad and Rafael Susan; G.R No. 161818 (2008), where it was thus held:

'We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth… by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re examine findings of fact which were made by the trial court…. absent any showing that there are significant issues involving questions of law."'

And also:

"We cannot overemphasize the commonplace that the trial Court is alone the custodian oftrue knowledge of witnesses and their quirks, and can pronounce on issues of credibility. Short of an appraisal of witness account appearing as absurd, or decidedly irrational, it behoves the Court sitting on appeal to respect the trial Judge's appraisal of primary fact."

24. This Court will nevertheless interfere with the findings made by the trial court, as a matter of law, if those findings were based on no evidence at all or on a misapprehension of it, or if the trial court is demonstrably shown to have acted on wrong principles. See

Mwangi v. Wambugu[1984] KLR 453 and **Mwanasokoni v.**

Kenya Bus Services Ltd [1985] KLR 931.

25. Where the court is being called upon to interfere with the exercise of discretion of the trial court, the principles were set out in the *locus classicus* case of **Mbogo & Another v. Shah [1968] EA 93 at Page 96**, where this Court stated as follows:

"An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

26. The first broad issue raised by KCB is threepronged: whether the specific prayer or claim made by CML under the rules of pleadings was Ksh.9,929,092.70 and if so, whether that claim was proved; if it was not proved, whether the trial court was right in giving judgment in favour of CML for USD 32,869.26; and thirdly whether, in law, the judgment could be made in foreign currency. An offshoot of that issue is whether in granting judgment to CML for USD 32,869.26, the trial court should have given credit for the amount owed on the overdraft account.

27. We have carefully gone through the pleadings, the evidence on record, the findings of the trial court, the submissions of counsel and the authorities relied on and have formed the following view of the first issue:

The provisions of ***Order VII Rules 2*** and ***6*** which are called into question have been reproduced above. In its amended plaint, CML pleaded paragraphs 9 and 18 as follows:

"During the period July to December 1993 the Plaintiff transferred to the Defendant a sum of US$ 144,037.65 46 from 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 1997 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

"144,037.46 (equivalent to Kshs.

9,929,092.70 exchange then used by Defendant was Ksh.68.9341 to the dollar)

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

"18. The second Plaintiff therefore, claims the sum of US$ 144,037.65 equivalent to Kshs.9,929,092.70 from the Defendant being the amounts had and received by the Defendant to the account of the second Plaintiff and which the Defendant has failed to account to the second Plaintiff."

28. It also stated the final prayers pursuant to those pleadings in prayer No. 7(iA), thus:

"Judgment for payment of Ksh.9.929,092.70."and prayer No. 3, thus:

"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."

29. In our view, the pleadings and the prayers were consistent with the rules of procedure on "specificity" and "unsettled accounts", and we find no basis for the challenge made by KCB in that regard. The parties were evidently transacting their business in both foreign and local currency and we find no impropriety in giving judgment in foreign currency as the trial court did. See ***Heco Uberseehadel case*** (supra). It is instructive that neither of the parties raised any issue with the conversion rates prevailing at the time and used to express the currencies. Ordinarily, the conversion rates would apply as at the date of judgment, but in this case CML chose the rates at inception of the pleadings and is therefore bound by those pleadings.

30.The trial court found in its judgment that CML had not proved its entitlement to the total sum it claimed, USD 144,037.46 or its equivalent in Ksh.9,929,092.70. It rejected that claim and dismissed the prayer. It found however, that out of the total amount claimed, CML had proved entitlement to USD 32,869.26. That was the result of an inquiry made through an accounting expert or referee appointed with the consent of the parties and pursuant to prayer 3 of the amended plaint. We may quote the trial court verbatim:

"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 2 nd Plaintiff. Out of the said sum, the Plaintiffs raised 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$51,288.24 was a accounted for, leaving a balance outstanding of US$

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."

31. The court went further and examined in detail whether those amounts were utilised for the credit of CML as directed, and concluded that " ***The total sum not accounted for in my considered view, having considered all the evidence adduced, documents, pleadings and submissions herein, is USD***

32,869.26". With respect, the conclusion arrived at by the trial court was consistent with the pleadings and the relevant prayers made, including prayer **7(v)** "***Further or any other relief that the Honorable court deems fit to grant***". The prayer flows from the pleading on "unsettled accounts" and was a legitimate prayer to make in the circumstances of the case. In sum, we do not find any substance in the submission that the trial court, contrary to the Rules of Procedure, granted judgment for a claim that was not pleaded or prayed for or that the judgment recorded in foreign currency was unlawful. The two authorities relied on by Mr. Amoko; the ***Wareham case*** (supra) and the ***Siree case*** (supra), have no application here. That ground of appeal is dismissed.

32. In ground 5 of the memorandum of appeal, KCB complains that the judgment did not take into account the amount owed to it which should have been set off. CML opposes that ground on the basis that there was no counterclaim and therefore, no basis for setting off the debt. It is indeed correct to say that KCB did not make a counterclaim in its pleadings. It only threatened to do so in paragraph 18 of its amended Defence. But the trial court made an inquiry on the transactions carried out between the parties and established that between July and December 1993 various remittances were made on behalf of CML and credited to its account. However, the account was still overdrawn. On the evidence, the overdraft stood at Ksh.648,302.35. That is the amount the trial court found ought to have stood liquidated if KCB had fully accounted for USD 32,869.26. We may quote the trial court on that finding:

And later:

"The Defendant wrote to the Plaintiffs through their Advocates, Oraro & Rachier, a letter dated 3rd July, 995, demanding the sum of Kshs.648,302.35 in respect of a loan advanced to the 2nd Plaintiff at the 1st Plaintiff's request……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 Plaintiff by the Defendant was enough to cover the sums claimed to be due by the Defendant and its Advocates in 1995."

"If the rate of Kshs.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 so, 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 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 2 nd Plaintiff's overdraft or loan account stood fully paid as of 1993, when the credits in issue in this case ware received."

33. It stands to common sense, therefore, that the final judgment should be net of the amount due on the overdraft facility and the ground of appeal raised by KCB is thus legitimate. We allow it.

34. The other broad ground of appeal relates to the finding that the sum of USD 32, 869.26 was owed to CML and that it effectively liquidated the debt owed, thus necessitating the release of the securities held by the bank. This is an issue of mixed fact and law. It is a factual matter whether the amount was unaccounted for by KCB and was owed to CML.

The trial court relied on the documentary and oral evidence of three witnesses and believed the evidence tendered on behalf of CML. We have no reason to fault the credibility of those witnesses and on our own evaluation there was a proper basis for making the finding that KCB did not account for the funds found due. We agree with the learned Judge that the major inquiry in this matter was not about accounts but whether KCB discharged its duty of care in the maintenance of its customer's account with it. On this, the trial court found it wanting and on our own assessment of the evidence, we do not fault that finding.

35. The issue of law that arises is whether KCB can be restrained from exercising its statutory power of sale where there was admission of debt, regardless of subsequent disputations by the customer

on the accounts. The straight answer to this is in the authority cited by Mr. Amoko, the ***Habib Bank case*** (supra) where Kwach JA had this to say:

"As I understand the law, a dispute as to the exact amount owed under a mortgage is not ground upon which a mortgagee, who has served a valid statutory notice, can be restrained from exercising its statutory power of sale. If any authorities were needed for this elementary proposition one need not look beyond Bharmal Kanji & Anor v Shah Depar Devji (1965) EA 91; J.L. Lavuna & Others v Civil Servants Housing Co. Ltd & Another (Civil Application No. NAI. 14/95) (unreported); and Halsbury's Laws of England, volume 32, 4th edition, paragraph 725. I summarised the position in my ruling in Lavuna case in these terms:

"Notwithstanding the stand taken by Mr. Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage."

See also the ***Mwakio case*****.**

36. In our respectful view, those authorities are distinguishable from the circumstances of this case. The suit here was not merely for challenging the bank's statutory power of sale and there was no unequivocal admission of debt. We agree with the trial judge that CML was questioning the execution of the bank's duties which resulted in unexplained disappearance of funds remitted to the bank despite express instructions to credit them to the customer's account. For a period of two years before the suit was filed, the customer tried without success to get answers from the Bank and therefore submitted the dispute to the court for resolution. The explanation he gave for admitting the debt at first was accepted by the trial court and in the circumstances of this case, we do not fault that finding. Furthermore, KCB provided no proof that Ndegwa had an account with the bank as it pleaded and the finding that he was not a customer of KCB cannot be faulted. He merely provided securities and if it was true, as found by the trial court and confirmed by this Court, that CML was not indebted to the bank, then there was no purpose in detaining the securities further. The learned judge was right, in our view, in the manner she exercised the discretion in issuing an injunction and ordering the discharge of the securities. For the above reasons, we reject the second ground of appeal also.

Discussion and Determination of the Cross appeal.

37. Both Ndegwa and CML gave notice of cross appeal containing 15 grounds which may also be restated and summarized, thus:

The learned judge erred in:

· *failing to examine the report filed by the accounting expert (referee) and thereby making the wrong conclusion*

· *allowing KCB to rebut documentary evidence by oral evidence;*

· *failing to find that KCB did not keep any proper records on CML's account with it;*

· *finding that CML authorised payment of USD 51,581 to third parties;*

· *failing to find that there were no instructions given to KCB to divert any funds due to CML to third parties;*

· *accepting a manually prepared retention account document contrary to banking practices;*

· *relying heavily on a letter written by an officer of KCB which was disowned in court by the Bank's witness;*

· *failing to find that 8 remittances amounting to USD 98.717.06 were unaccounted for by KCB;*

· *failing to apply the exchange rate of Ksh.69 to the dollar;*

· *failing to award general damages to CIL after finding that KCB breached its duty to keep proper accounts and in withholding information due to its customer, thus occasioning loss which was not quantifiable.*

It is proposed to ask this Court to set aside the decree and enter judgment for USD 144,037.46 or its equivalent Ksh.9,929,092.70; award general damages; declare that Ndegwa's title deeds are held irregularly and award interest on the above amounts at commercial lending rates.

38. In written and oral submissions before us, Ms. Makori contented that CML had proved that it had remitted USD 162,317.36 to KCB and was entitled to recover it; that the bank gave a lame excuse that vital documents were lost in a fire within its offices and did not therefore rebut documentary evidence of remittances made by CML; that the learned judge confused CML's specific monetary claim which was based on contract, with its claim for general damages which was based on tortious liability; and that the court erred in accepting that there were oral instructions given by Ndegwa for payment of some funds to third parties.

39. In response thereto Mr. Amoko submitted that the challenge made in the cross appeal was based on findings of fact which the trial court made on the basis of the evidence on record and there was no demonstrated error or reason to challenge those findings. In his view, the claim for general damages was not tenable in law since no damages are claimable for breach of contract and there was no special pleading on loss of business or specific proof as by law required. Finally, he observed that the report of the referee did not identify any documentary instructions for payments made to third parties but Ndegwa himself in sworn testimony confessed that he gave oral instructions for payment, He cannot blow hot and cold.

40. We have considered the grounds laid out in the cross appeal and the submissions of counsel. In the end we have come to the conclusion that the cross appeal has no merits.

The main challenge is the findings of fact made on the amount due to CML. The complaint as we understand it is that the trial court differed with the referee who said he did not find supporting documents for various payments made out of the remittances due to CML while the court found, on the evidence, that Ndegwa had given oral instructions for such payments. Considering the evidence in totality, as we have, the decision of the court cannot be faulted. Part of that evidence was the letter written by the bank's officer, one Mrs. G.J. Biamah on 10 th December 1998, which was properly produced in evidence and was extensively referred to on all sides. We find no basis for excluding such evidence as suggested by CML.

41. As for the submission that the claim for general damages was erroneously dismissed as it was based on a tortious and not contractual liability, we note that the amended plaint contained no such pleading. The relevant pleading was under paragraph 12 which stated:

"Further the Defendant refused to finance any further business deals by the 2nd Plaintiff thereby making it to lose a lot of business and making sure that it could not raise any further capital from elsewhere."

On the basis of that pleading, prayer 7(ii) sought:

"***General damages for loss of business and breach of contract plus interest thereon at court rates."***

42. How did the trial court deal with that claim?

It relied on the holding of this Court in the ***Siree case*** (supra), that:

"When damages could be calculated to a cent, they ceased to be general in nature and had to be claimed as special damages. Damages for loss of profits were classified as special damages and as such, had to be specifically pleaded and proved; Sande v Kenya Co operative Creameries Ltd applied. Where a plaintiff claimed loss of profits on a continuing basis, he was obliged to amend the plaint at or before the time of hearing to quantify and claims those damages. In this instance, the trial Judge erred in awarding the Respondent damages for claims that it had not specifically pleaded and those awards would be disallowed."

The court then stated:

"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."

44. As for general damages for breach of contract, the court relied on this Court's decision in **Dharamshi v. Karan [1974] EA 41**where it stated as follows:

"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."

45. The court also found that for the claim of damages to lie the party must prove the contractual relationship. Ndegwa had no contractual relationship with the bank and as for CML:

"**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."

46. With respect, the trial court cannot be faulted for applying those clear propositions of law and we uphold the findings made.

Disposition.

47. For the reasons given above we hereby make the following orders:

1. The main appeal be and is hereby dismissed, save to the extent of correcting the decree by offsetting the amount found due to the 2nd Respondent, USD 32,869.26 converted to Ksh.1,939,286.30, from the debt owed to the bank in the sum of Ksh.648,302.35.

2. The cross appeal be and is hereby dismissed.

3. Each party shall bear its own costs of the appeal and cross appeal.

Dated and delivered at Nairobi this 11TH day of JULY, 2014

P.N. WAKI

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

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

REGISTRAR

K. M'INOTI

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JUDGE OF APPEAL