IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 138 OF 2009

BETWEEN

THIKA COFFEE MILLS ……APPELLANT

AND

MIKIKI FARMERS CO-OP SOCIETY ……1ST RESPONDENT

COFFEE BOARD OF KENYA…… 2ND RESPONDENT

(Appeal against the Judgment and Decree of the High Court of Kenya at Embu

(Khaminwa, J.) delivered on 30th April, 2008

in

H.C.C.C No.28 of 2006)

****

JUDGMENT OF THE COURT

1. The 1st respondent, Mikiki Farmers Co-op Society, is made up of 4,000 small scale farmers in Embu who cultivate coffee as a means of their livelihood. On 10th December, 1997, the 1st respondent entered into a written agreement (the 1st agreement) with the appellant whereby it was agreed that the 1st respondent would deliver all its parchment and cherry mbuni coffee to the appellant for milling; the appellant would deliver the milled coffee to the 2nd respondent, the Coffee Board of Kenya, for marketing. Under the 1st agreement, the appellant would provide the 1st respondent with financial guidance, loans, advances and farm inputs which would be secured against the coffee delivered and be paid against the proceeds of the said coffee.
2. Between December 1997 and March 1998, the 1st respondent delivered a total of 4,242 bags of parchment and cherry mbuni coffee to the appellant for milling and onward transportation to the 2nd respondent. Out of these, only 218 bags were delivered by the appellant to the 2nd respondent. The 1st respondent demanded for an account of the balance of 4,024 bags (comprising 3,439 bags of parchment coffee and 803 bags of mbuni coffee) which subsequently gave rise to the cause of

action before the High Court, the subject of this appeal.

3. By a plaint dated 8th June, 1999 and filed on 10th June, 1999, the 1st respondent (plaintiff in the High Court) sued the appellant (defendant in the High Court) seeking the following orders:

a. ***An order requiring the defendant to account for the 3,439 bags of parchment coffee and 803 bags of mbuni coffee.***
b. ***An order that the said 3,439 bags of parchment coffee and 803 bags of mbuni be delivered to the Coffee Board of Kenya.***
c. ***An order that the defendant do release the said 3,439 bags of parchment coffee and 803 bags of mbuni coffee to the plaintiff, the rightful owner.***
d. ***Taking of accounts.***
e. ***General damages.***
f. ***Exemplary damages.***
g. ***Costs of this suit and interest on (e), (f) and (g) and***
h. ***Such further and other relief.***

4. The 1st respondent contended that the appellant failed and or refused to deliver the balance of the coffee to the 2nd respondent and also refused to account for the coffee. The 1st respondent admitted that it had received a sum of Kshs. 12,947,004/= from the appellant as cash advance and fertilizer.
5. In its defence, the appellant denied that it had advanced the sum of Kshs. 12,947,004/= to the 1st respondent but stated that it had advanced the sum of US$ 230,683.43 (Kshs.13, 723,404/=).The appellant admitted that it had delivered 218 bags of the 1st respondent's coffee to the 2nd respondent which fetched a sum of US$ 58,421.31.The appellant contended that it did not refuse to deliver the coffee to the 2nd respondent but it was the statutory responsibility of the 2nd respondent (under the repealed Coffee Act, Cap 333 of the Laws of Kenya) to collect and transport the coffee from the appellant's warehouse. That at all material time, the appellant was willing to release the coffee to the 2nd respondent so long as the 2nd respondent collected and transported the same. The appellant relied on the provisions of **Rule 21 (1)** of the Coffee (Mills, Milling and Management) Rules 1994 which stipulates:

> '***21 (1) The Board, Planters and Millers shall enter into contracts regarding the running of the mills, delivery of coffee, payment of milling charges, handling and disposal of coffee from the mills to its central warehouses.***
>
> ***Notwithstanding the provisions of sub-rule (1), the Board shall be responsible for transporting all milled coffee from the mills to its central warehouse.'***

6. On 21st March, 2002, Mitey, J. as he then was, issued a conservatory order to prevent further decay and deterioration of the coffee. The order directed the 2nd respondent to collect and market the coffee. Between 26th April, 2002 and 10th May, 2002, a total of 1,796 bags were collected in addition to 2200 kgs pockets composed of 21 outturn. The coffee was sold by the 2nd respondent.
7. The issues that came up for determination before the trial judge were as follows:

a. ***What was the nature of relationship between the appellant and the 1st respondent;***
b. ***Whether the appellant was liable to,***

i) account for the 4024 bags of coffee;

ii) to transport the coffee to the 2nd respondent;

iii) for the loss or damage suffered by the 1st

respondent;

c. ***Whether the 2nd respondent, was responsible to transport the coffee from the appellant; and liable for any loss or damage suffered by the 1st respondent in relation to the 4024 bags of coffee;***
d. ***Whether the plaint disclosed a cause of action for a liquidated sum against the appellant despite the fact that special damages were not pleaded in the plant;***
e. ***Whether general and/or exemplary damages could be awarded for breach of contract; and***
f. ***What amount of loss was suffered by the 1st respondent?'***

8. The learned Judge (Khaminwa, J.) in the judgment dated 30th April, 2008 made the following findings:

> '***That the relationship between the appellant and 1st respondent was one of principal and agent; the appellant detained the 1st respondent's coffee for 4 years in breach of the contract between them; the appellant was under an obligation to notify the 2nd respondent to collect and transport the 1st respondent's milled coffee to its central warehouse for marketing; the 1st respondent suffered financial loss for the delay and failure of the appellant to deliver its coffee to the 2nd respondent; that coffee being a perishable commodity it deteriorated for all the time it was stored by the appellant until May 2002, when it was collected by the 2nd respondent.'***

9. Pursuant to a court order dated 10th November, 1999, Mr. Francis Mambo Gatumo prepared a valuation report (1st valuation report) which indicated the value of the coffee delivered to the appellant was Kshs. 92,557,780/80/=. The 1st respondent subsequently prepared a 2nd valuation report which gave the value of the coffee as Kshs. 78,930,234/=. The learned Judge found that the 2nd valuation report gave the true value of the coffee that was delivered to the appellant. The learned Judge deducted the sum of Kshs. 1,342,229/20/=, being the proceeds of the coffee sold pursuant to the court order, from Kshs. 78,930,234/=. Judgment was entered for the 1st respondent against the appellant in the sum of Kshs. 77,588,005/30/= which the learned judge found was the balance due to the 1st respondent.
10. The appellant contended that the 1st respondent's claim for liquidated damages was not pleaded in the plaint. On this issue, the learned judge expressed herself with reference to the second valuation report:

> "… ***It is my finding that in this case, the plaintiff applied for an account, an order which was granted. The amount found due on taking account has not been challenged and must be taken as admitted by the defendant and does not have to be pleaded. It is not special damages but a claim for loss. The defendant (appellant) did not apply for the account to be set aside. The account could not have been taken before the suit was filed and the defendant had opportunity to challenge the report but did not take the opportunity. It is therefore clear the plaintiff is entitled to judgment in the sum found due after taking of accounts. It is my finding that the loss suffered by the plaintiff was the amount due after the taking of account."***

11. The learned judge found that the conduct of the appellant in detaining the coffee was oppressive and calculated to gain benefit for itself, thus a sum of Kshs.7, 000,000/= was awarded as exemplary damages. In total, the judgment was entered for the 1st respondent against the appellant for the sum of Kshs. 84,588,005/30/= being made up of Kshs. 77,588,005/30/= for the loss in value of the coffee delivered and Kshs. 7,000,000/= as exemplary damages. Interest was awarded at court rates from the date of filing suit. The learned Judge found no liability for indemnity or contribution on the part of the 2nd respondent for loss or damage suffered by the 1st respondent.
12. Aggrieved by the judgment and findings of the learned judge, the appellant lodged this appeal. The memorandum of appeal lists 25 grounds which can be summarized as follows:
    1. ***That the learned Judge erred in law and fact by awarding the 1st respondent a sum of***

Kshs. 77, 588,005.30/= as loss though the said sum was never pleaded in the plaint.

2. ***The learned Judge erred in law and fact in awarding the sum of Kshs. 7,000,000/= as exemplary damages.***
3. ***That the learned Judge erred in introducing the issue of principal/agent relationship between the appellant and 1st respondent though the same was not pleaded.***
4. ***That the learned Judge erred in finding that the appellant had admitted that the sum due was as indicated in the valuation report prepared by Mr. Alfred J.M. Njiru because the same was unchallenged; and that no accounts were taken to form the basis for the award of Kshs. 77, 588,005.30/=.***
5. ***That the learned Judge erred in law and fact in failing to consider that the 1st respondent had included interest at 16% compounded annually in the valuation report when she ordered the appellant to pay interest on the decretal amount. Therefore, interest was awarded twice.***
6. ***That the learned Judge erred in finding that the 1st respondent was incapable of mitigating its loss and that the 1st respondent's coffee had deteriorated when this issue had not been pleaded.***
7. ***That the learned Judge erred in imposing a duty upon the appellant to deliver the 1st respondent's coffee to the 2nd respondent though Statute casted that duty on the 2nd respondent.***

13. At the hearing of the appeal, learned counsel, Mr. T.M. Macharia appeared for the appellant; learned counsel, Mr. M.G. Njage appeared for 1st respondent; while learned counsel, Mr. M.M. Maweu, appeared for the 2nd respondent.
14. Counsel for the appellant elaborated on the grounds of appeal reiterating that the main dispute is who was to deliver the milled coffee to the 2nd respondent's central warehouse. Mr. Macharia contended that under the Coffee Act (Cap 333 of the Laws of Kenya - now repealed), the statutory obligation to collect the milled coffee was placed upon the 2nd respondent; that the 2nd respondent failed to discharge this statutory obligation and should have been held liable for any loss or damage suffered by the 1st respondent. He submitted that the appellant had informed the 1st respondent that the 2nd respondent had failed and or refused to collect the coffee; therefore, it was incumbent upon the 1st respondent to mitigate its loss by either taking possession of the coffee or transporting it by themselves to the 2nd respondent's central warehouse.
15. On the sum of Kshs. 7,000,000/= awarded as exemplary damages, Mr. Macharia submitted that the purpose of damages is to recompense and not to enrich the recipient. That the learned Judge erred in granting exemplary damages to enrich the 1st respondent and holding that the appellant's conduct was oppressive and reprehensible when it was the 2nd respondent that had failed to collect the coffee. That the sum of Kshs.7, 000,000/= as exemplary damages was inordinately high.
16. Mr. Macharia contended that it was wrong for the learned Judge to enter judgment for Kshs.77, 588,005.30/= when the said sum was not pleaded as special damages in the plaint; that where damages can be calculated, it ceases being general damages and must be pleaded as special damages; that by awarding the sum of Kshs.77, 588,005.30/= as damages, the learned judge erred and misdirected herself by holding that special damages need not necessarily be pleaded.
17. The appellant submitted that the learned Judge erred in relying on the 2nd valuation report when the said report had not been interrogated. He further maintained that the learned Judge erred in abandoning the 1st valuation report prepared pursuant to a court and relying on the 2nd valuation report prepared unilaterally by the 1st respondent. Counsel for the appellant submitted that the learned Judge erred in holding that the appellant had admitted the sum of Kshs. 77,588,005.30/= indicated in the 2nd valuation; that the 2nd valuation report was prepared after the suit was filed and contained an element of 16% interest; and it was an error for the learned Judge to award interest on the judgment sum from the date of filing suit as it amounted to charging interest twice.
18. Mr. Macharia finally submitted that the 1st respondent's claim as stated in the plaint is based on breach of contract and it was misdirection on the part of the learned judge to find liability on the appellant based on principal /agent relationship which was not pleaded in the plaint.

19. Mr. Njage, learned counsel for the 1st respondent, in opposing the appeal submitted that the main issue was, what happened to the 4024 coffee bags that were delivered to the appellant. He submitted that the appellant is primarily liable for the loss suffered by the 1st respondent; the relationship between the appellant and the 1st respondent was of principal /agent which was expressly provided for in paragraph 2 of the 1st agreement; it was incumbent on the appellant to account for all bags of coffee delivered to it by the 1st respondent; the valuation report relied upon by the learned Judge in awarding the sum of Kshs. 77,588,005.30/= for loss of coffee was valid; the valuation was prepared based on the prevailing prices of coffee in June 1998, when the appellant ought to have delivered the milled coffee to the 2nd respondent. He maintained that the appellant never challenged the 1st and 2nd valuation reports and did not produce any counter report. PW1, Alfred N.M. Njiru (Mr. Njiru), who prepared the valuation report, was available for cross-examination by the appellant and the failure by the appellant to produce a counter report was an admission that the valuation report presented to court was accurate. He further maintained that even during the hearing of the suit, the appellant never provided an explanation as to what happened to the 4024 bags of coffee delivered to it. Therefore, the learned judge did not err in awarding Kshs. 77,588,005.30/= for loss of the coffee bags and Kshs.7, 000,000/= as exemplary damages.
20. Mr. Maweu, learned counsel for the 2nd respondent, submitted that there was privity of contract between the appellant and the 1st respondent pursuant to the 1st agreement; that under the said agreement, it was the responsibility of the appellant to transport and deliver the milled coffee to the 2nd respondent for marketing; that despite numerous written requests and demand from the 1st respondent, the appellant failed to deliver the milled coffee. He maintained that although the Coffee Act imposed a statutory obligation on the 2nd respondent to collect milled coffee, the practice was for the appellant to transport the milled coffee to the 2nd respondent. The 2nd respondent had no way of knowing how many bags a miller had in possession until the same was delivered; the 2nd respondent also wrote letters to the appellant requesting it to deliver the coffee to no avail. Therefore, the 2nd appellant should not be held liable for the delay in delivery of the coffee or for any resulting damage or loss. In reply to this particular submission, Mr. Macharia submitted that the 2nd respondent should not rely on a trade practice because a trade practice could not supplant statutory obligation.
21. This is a first appeal; in law, we are required to revisit the case that was before the High Court afresh, analyze it, evaluate it and come to our own independent conclusion but always bearing in mind that the trial court had the advantage of seeing and hearing the witnesses and giving allowance for that. (***See case of Selle & Another – v- Associated Motor Boat Co. Ltd. (1968) EA 123).***
22. We have examined the record of appeal, the grounds of appeal, the judgment of the High Court, list of authorities submitted by all parties and have taken into account rival submissions by counsel and the law. We are of the view that this appeal turns on the following questions:

- ***What was the nature of the relationship between the appellant and the 1st respondent?***
- ***Between the appellant and the 2nd respondent, who was responsible for transporting the 1st respondent's milled coffee to the 2nd respondent's central warehouse?***
- ***Did the 1st respondent suffer any loss due to delayed delivery and sale of its coffee? Was the 1st respondent under duty to mitigate its loss?***
- ***If any loss was suffered by the 1st respondent, what is the amount of loss or damage?***
- ***Between the appellant and the 2nd respondent, who is liable for any loss suffered by the 1st respondent arising from delay in transportation and delivery of the coffee?***
- ***In an action for account, must special damages be pleaded?***
- ***Did the trial judge err in entering judgment for the 1st respondent for loss of coffee in the sum of Kshs. 77,588,005.30/=?***
- ***Did the trial judge err in awarding exemplary damages?***
- ***Has interest been charged twice over the judgment sum as entered by the learned judge*****?**

23. We agree with the trial judge's finding that the relationship between the appellant and the 1st respondent was one of principal and agent. In ***National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd & Another*** ***(2001) KLR 112*** this Court stated at page 118

> "***...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."***

Paragraph 2 of Part I of the 1st agreement between the appellant and the 1st respondent provides as follows in paraphrase:

> '***Thika Coffee Mills (appellant) will provide transport services from factories of the client (1st respondent) to the Mills at Kshs. 40/= per bag and thereafter to Coffee Board of Kenya at shs 21/= per bag of the same milled coffee, if such services are requested by the client. Part II of the Agreement is titled Commission Agency where the appellant was to liaise between the client and the coffee marketing agent and provide financial services that will include crop advances and loan and farm inputs including fertilizers…. The client shall pay Thika Coffee Mills commission agency fees…. Part III of the Agreement is titled Management Agency. Paragraph 20 provides that Thika Coffee Mills shall keep proper records of all coffee delivered to it.'***

24. The general rule is that the intention of the parties to an agreement should be ascertained from the document, as it is deemed that what the parties intended is what was stated in the agreement. In ***Ford- vs-Beech*** ***(1848) 11 QB 852 at 866:*** *it was stated that:*

> *"**The common and universal principle ought to be applied: namely that (a contract) ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties to be collected from the whole agreement, and that greater regard is to be had to the clear intention of parties than to any particular words which they may have used in the expression of their intent."***

25. The object of construction of terms of a written agreement is to establish therefrom the intention of the parties to the Agreement which must be approached objectively. The question in this appeal is not what the appellant or the respondent meant or understood by the words used but the meaning which the particular clause would convey to a reasonable person having all the background information that was available to the parties at the time of the contract (See ***Investors Compensation Scheme Ltd. vs West Bromwich Building Society*** ***(1998) 1 W.L.R*** at 912). In ***Shore v Wilson(1842) 9 CI & Fin 355, 565*****Tindal C.J. held**:

> *"**The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves…"***

26. We find that the ordinary reading of the 1st agreement and the various headings point to an agency relationship between the appellant and the 1st respondent. The appellant was mandated to be the agent of the 1st respondent for purposes of transportation and delivery of milled coffee to the 2nd respondent. In consideration, the appellant became a commission agent and was given a lien over all payments due from the 2nd respondent. In performance of the contract, the appellant transported and delivered 218 bags of coffee to the 2nd respondent. The appellant is therefore estopped from denying that it had a duty to transport and deliver the (remaining bags or the entire consignment of) coffee to the 2nd respondent. The 1st agreement and the privity of contract arising thereon was between the appellant and 1st respondent; the 2nd respondent was not a party to the

agreement. Despite its statutory obligation, we find that under privity of contract, the 2nd respondent had no obligation to collect and transport the 1st respondent's milled coffee from the appellant. We find that responsibility and liability for delay in delivery of the milled coffee rests with the appellant on account of privity of contract and the doctrine of estoppel**.**

27. The appellant's counsel further submitted that by a 2nd agreement dated 4th August, 1998, the appellant's responsibility to transport the 1st respondent's coffee was made subject to an irrevocable letter of instructions being issued by the 1st respondent's bankers (Co-operative Bank) to pay a sum of US $ 215,621 to the appellant; that the appellant could only deliver the 1st respondent's milled coffee if the irrevocable instructions were received. We have considered this submission and with respect, it is not tenable. We find that the 2nd agreement was not retroactive in application; the 2nd agreement did not amend or cancel or rescind the 1st Agreement. The coffee in dispute between the appellant and 1st respondent was delivered between December 1997 and March 1998. The coffee was delivered pursuant the 1st Agreement; and we hold that the terms of transportation and delivery of this coffee was governed by the 1st Agreement dated 10th December, 1997.
28. The next issue is whether the 1st respondent suffered any loss as a result of delay in transportation and delivery of the coffee to the 2nd respondent's central warehouse. The 1st respondent delivered a total of 4242 bags of coffee to the appellant. Out of this, the appellant admitted in its defence that it delivered only 218 bags to the 2nd respondent leaving an unaccounted balance of 4024 coffee bags. The appellant further admitted that the 218 bags realized a value of US$ 58,421.31 equivalent to Kshs. 4,732,126.11/= in June 1998. The appellant applied to the High Court for a conservatory order to preserve the coffee on the ground that it was deteriorating in value. The order was granted and between 26th April, 2002 and 10th May, 2002, the 2nd respondent collected a total of 1,796 bags in addition to 2200 kgs pockets composed of 21 outturn from the appellant. The collected coffee was sold and realized a sum of Kshs. 1,342,229/20/=. We cannot help but ask the question, if the value of 218 bags was US $ 58,421.31,the equivalent to Kshs. 4,732,126.11/= can the value of 4024 bags be Kshs. 1,342,229/20/= which is equivalent to approximately US$ 16,570.73. Simple arithmetic shows that the value of 4024 bags cannot be equivalent to US $ 16,570.73. We therefore find that the 1st respondent suffered loss in decline in value as a result of the delay in delivery of its coffee for marketing. . In our minds, whether the claim was for breach of contract or principal /agent relationship signifies nothing. There was loss as a direct consequence of the delay in transportation and delivery of the 1st respondent's milled coffee to the 2nd respondent; and the loss is exactly the same whether the claim is in breach of contract or principal/ agent relationship.
29. The appellant contended that the 1st respondent was under duty to mitigate its loss between 1998 and 2001. It is trite law that in situations of breach of contract, a party is under an obligation to mitigate its loss. We agree with the appellant that the 1st respondent was under an obligation to mitigate its loss. Did the 1st respondent take action to mitigate its loss? The 1st respondent addressed a letter dated 28th May, 1998 to the appellant complaining that its instruction to immediately mill and deliver all its coffee to the 2nd respondent had not been complied with. By a further letter dated 14th August, 1998, the 1st respondent again instructed the appellant to immediately mill and deliver its coffee to the 2nd respondent. The 1st respondent wrote another letter to the appellant dated 27th August 1998 in the following terms:

> "***Reference is made to the visit to your offices by the Society Chairman on Friday 21st August 1998. As discussed between yourselves (Mugo) and our Chairman (Nyaga) we write to confirm as follows:***
>
> 1. ***That you will commence milling of our coffee parchment held by yourselves on or before 31/8/98.***
> 2. ***That the milling period should be complete by 4/9/98.***
> 3. ***That upon completion you will immediately deliver the clean coffee to the Coffee Board of***

Kenya for auctioning…."

A further letter dated 12th October, 1998 from the 1st respondent to the appellant stated:

> "***We surely fail to understand and or reasonably comprehend why you did not … deliver the bags to Coffee Board of Kenya for auctioning. This non-delivery has prejudiced our members' possible favorable earnings as the coffee prices were at their very best over the period March to mid June 1998."***

The letter ends by the 1st appellant stating that:

> "***We hereby instruct you to immediately deliver all the milled coffee (parchment and mbuni) to the Coffee Board of Kenya for marketing. By a copy of this letter, the Coffee Board is requested and duly authorized to receive and auction our coffee soonest…"***

By letter dated 16th October, 1998 addressed to the 2nd respondent, the 1st respondent states:

> "***At our Management Board meeting held today 16th October 1998, it was decided that we hereby irrevocably instruct you to demand from Thika Coffee Mills 4024 bags of parchment Coffee and Mbuni held by them…"***

30. The correspondence from the 1st respondent shows that the appellant was in possession of the coffee bags; under the 1st agreement, the appellant was to mill the coffee and deliver it to the 2nd respondent; the 1st respondent was concerned that no milling and no delivery was taking place; these concerns were brought to the attention of the appellant; the only way to mitigate the then potential loss to be suffered was by getting the milled coffee delivered to the 2nd respondent for marketing and auctioning; the 1st respondent did not have physical possession of the coffee to undertake this task; the appellant had possession and an obligation under contract to mill and deliver. We find that the 1st respondent through the various correspondences took measures within its control to mitigate its loss.
31. We further find that the appellant was also under a duty to mitigate the losses being incurred by the 1st respondent because he was in possession of the coffee. If indeed the 2nd respondent had refused to take delivery of the coffee, it was incumbent upon the the appellant to physically return the coffee to the 1st respondent. Save for the exchange of the numerous correspondences, there is no evidence that the appellant delivered the coffee to the 2nd respondent's warehouse and receipt was declined. The appellant recognized that it had a duty to mitigate the loss being incurred when it moved the High Court for conservatory orders. However, the appellant choose to mitigate the losses being incurred four years after receiving the coffee in 1998. Therefore, the appellant is liable for the loss that occurred in terms of deterioration of the coffee from the period of 1998 to 2002 when the coffee was sold.
32. One of the grounds of appeal is that the trial judge erred in awarding the sum of Kshs. 77,588,005.30/= for loss of coffee when the said sum was not pleaded in the Plaint and no claim for special damages was made in the plaint. The appellant further contends that the trial judge misdirected herself in finding that special damages need not necessarily be pleaded. The appellant cited the case of ***Siree Limited –v – Lake Turkana El Molo Lodges (2002) 2E.A. 521*** where this Court stated that:

> "***As regards the special damages awarded, this Court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages".***

The appellant also cited the case of ***Maritim & Another – v- Anjere (1990-1994) EA 312 at 316***, where this Court stated:

> "***In this regard, we can only refer to this court's decision in Sande – v- Kenya Cooperative Creameries Limited Civil Appeal no. 154 where as we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."***

33. The issue before us is whether or not damages (special or general) should have been awarded to the 1st respondent. In law, this Court will not disturb an award of damages by the High Court unless it is demonstrated that the learned Judge proceeded on wrong principles or that he misapprehended the evidence in some material aspects thereby arriving at a figure inordinately high or low such as to represent an entirely erroneous estimate. (***See Jivanji – v- Sanyo Electrical Company Ltd. (2003) KLR 425*****).** In short, before we interfere with the learned judge's award of damages, we must be satisfied that the court proceeded on wrong principles or that there was misapprehension of the evidence and pleadings in some material respect and thereby arrived at an erroneous conclusion. **(*See Great Lakes Transport Co. (U) Ltd. – v- Kenya Revenue Authority (2009) KLR 720, 728-729).***
34. In the instant case, the trial Judge approached the contention that special damages were not pleaded in two ways. Firstly, the judge distinguished the authorities cited by the appellant and secondly, she noted that a claim for taking of accounts and a claim for general damages had been pleaded in the plaint. The learned judge distinguished the case of ***Maritim & Another – v- Anjere (Supra)*** stating that it was a case of personal injuries in tort and not contract. The judge distinguished the case of ***Siree – v- Lake Turkana Elmolo Lodges (Supra)*** stating that the case dealt with a claim for general damages for wrongful closure of business and not a claim in contract. On taking of accounts, the trial judge expressed herself:

> "***Upon reviewing of the authorities cited by the defendant, it is my finding that in this case, the plaintiff applied for an account, an order which was granted. The amount found due on taking account has not been challenged and must be taken as admitted by the defendant and does not have to be pleaded. It is not special damages but a claim of loss. The defendant did not apply for the account to be set aside. The account could not have been taken before the suit was filed and the defendant had the opportunity to challenge the report but did not take the opportunity. It is therefore clear that the plaintiff is entitled to judgment in the sum found due after the taking of accounts. It is my finding that the loss suffered by the plaintiff was the amount found due after the taking of account."***

35. The issue for our consideration and determination is whether the trial judge erred in finding that the amount due and owing after taking of accounts ought not to have been pleaded as special damages. The appellant contends that since the sum of Kshs.77, 588,005.30/= was not pleaded as special damages, the 1st respondent is not entitled to any damages for the loss suffered. The upshot from the appellant's submissions is that the 1st respondent did not strictly prove special damages as there was no prayer for the same in the plaint; that the learned judge having found that no special damages were pleaded, she should have dismissed the suit. This court has in several decisions made it clear that a court has no power to grant a relief a party has not specifically prayed for. **(*See Malindi Air Services & Another – v- Halima A. Hassan- Civil Appeal No. 69 of 2000*).** However, in this case, the position is to an extent different. A claim for accounts was pleaded in the plaint; Paragraph 8 of the plaint states that in breach of the 1st agreement the appellant refused upon reasonable request to account for the coffee to the 1st respondent. In paragraph 10, it was pleaded that by reason of the breach, the 1st respondent suffered loss. In our view, the 1st respondent clearly raised the issue of accounting for the 4024 bags of coffee delivered to the appellant and a claim for loss due to delayed delivery; this is the matter which was before the court and the court had to deal with it. Evidence was given that the 1st respondent had been deprived the value of its coffee due to delayed transportation, delivery and marketing for a

period of 4 years. Due to this delay, the coffee deteriorated and loss was suffered. One cannot turn a blind eye to this aspect.

36. Both the trial court and this Court are courts of law and equity. There is no wrong without a remedy. Equity would not allow a wrong to be suffered without a remedy. Further the appellant as a reasonable man ought to have contemplated that his conduct of withholding the 1st respondent's coffee for a period of four years would result in deterioration of the coffee's quality and value occasioning loss to the 1st respondent. Therefore, the appellant is liable for the consequences of his action. In ***Overseas Tankship (UK) -vs- Morts Dock & Engineering Co. Ltd (1961) 1 ALL E.R 404 (Wangon Mound No.1)***, Lord Reid at page 413 stated,

> ***'For it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them), the answer is that it is not because they are natural or necessary or probable but because, since they have this quality, it is judged, by the standard of the reasonable man, that he ought to have foreseen them.'***

Lord Denning M.R. In ***Stewart -vs- West African Terminals Ltd.(1964)2 Lloyd's Rep.371 at 375*** held,

> ' ***it is not necessary that the precise concatenation of circumstances should be envisaged. If the consequence was one which was within the general range which any reasonable person might foresee (and was not of an entirely different kind which no one would anticipate) then it is within the rule that a person who has been guilty of negligence is liable for the consequences.'***

We hold that the 1st respondent was entitled to an award to compensate it for the losses suffered due to the delayed delivery of the coffee to the 2nd respondent's warehouse for marketing **(*See Great Lakes Transport Co. (U) Ltd. – v- Kenya Revenue Authority (2009) KLR 720, 733).***

37. The appellant contends that the trial judge erred in holding that it had admitted by implication the sum of Kshs. 77,588,005.30/= which was contained in the 2nd valuation report. The trial Judge expressed herself:

> *"**the amount found due on taking account has not been challenged and must be taken as admitted by the defendant and does not have to be pleaded. It is not special damages but a claim of loss."***

38. It is trite law that a fact can be admitted either expressly or by implication. After the accounts had been taken, the 1st valuation report was prepared by Mr. Francis Mambo Gatumo. This report was not produced in evidence but was attached to an affidavit sworn by the 1st respondent's manager, Mr. Stephen Gichovi Njue on 21st May, 2003. From the judgment, we are satisfied that the trial judge did not rely on Gatumo's valuation report and we find that this report is not relevant in the determination of this appeal.
39. The contended issue is whether the 2nd valuation report prepared by Mr. Njiru correctly determined the value of the coffee delivered to the appellant. The 2nd valuation report was prepared unilaterally by the 1st respondent and presented to the trial court by Mr. Njiru. In the report, the coffee was valued at US $624, 151. 24/ (equivalent then to Kshs.77,588,005.30/=) The appellant submitted that Mr. Njiru is an auditor and not a coffee valuation expert; therefore, he lacked an objective basis for the conclusion that the coffee was worth US $ 624,151.24 as at 3rd June, 1998 and no rationale was given for the cutoff date of 3rd June, 1998.
40. It is this 2nd report which valued the coffee at Kshs.77, 588,005.30/= that provided the basis for the trial judge's decision on the amount of loss suffered by the 1st respondent. In the words of the trial judge, "***the report and this value were not challenged and were deemed to have been admitted by the appellant."*** If accounts are taken and submitted to court, it is the duty of the court to verify and determine the accuracy and probative value of the accounts. If there is error on the

accounts, the court is not bound to accept the figures as given. It is a misdirection to hold that if the tendered accounts are not challenged, then the contents thereof are true and accurate and are deemed to have been admitted. It remains the duty of the court to ascertain and determine the correct accounts between the parties. Order 20 (4) of the Civil Procedure Act, places a duty on the court to certify the amount due and owing on taking of accounts.

41. We are of the view that the learned judge was correct in adopting the 2nd valuation report as the basis of determining the loss suffered by the 1st respondent. This is because firstly, the 1st valuation report was not submitted to the trial court pursuant to the then Order 19 of the Civil Procedure Rules; secondly, the 2nd valuation report was produced during the hearing and the appellant had the opportunity to interrogate its contents through cross examination of Mr. Njiru; thirdly, the appellant never controverted the content of the 2nd valuation report by producing a counter report; fourthly, the appellant never challenged the prevailing prices of coffee indicated in the valuation report; and fifthly, the appellant never challenged the exchange rate that was indicated in the valuation report. An extract of the valuation report is as follows:

‘ The valuation has been based on the prices fetched by various coffee grades during the auction sale No. 25 of 3rd June 1998 of the Coffee Exchange as contained in the catalogues obtained from the Coffee Board of Kenya. These prices were found to be authentic basis of valuation because on 28th May, 1998 the society had irrevocably instructed the miller to immediately deliver its coffee to the Coffee Board of Kenya for auctioning.

Premises

Interest – calculated at 16% per annum

Exchange rate – Kshs. 81/= to US$ 1.00

Cut-off- 28th February, 2005

Interest earning period -80 calendar months (1/7/98 to 28/2/05)

Amount owing to TCM (appellant) – Kshs 12,364,444/=

Hence:

Principal (would be) gross auction proceeds - US$ 624,154.24

ADD Interest : US$ 624,154.24 x16% x 80/12 - US$ 665,764.51

Total amount as at 28th February, 2005 -US$1,289,918.75

The gross proceeds converted at

US$ 1,289,918.75 x 81 - Kshs. 104,483,418.75

LESS Owed to Thika Coffee Mills, based on Kshs. 12,364.444

Principal Amount:

Kshs 12,364,444 +(12.364,444 x 16% x 80/12) =

Kshs. 25,553,184.25

Therefore, net due to the society Kshs. 78,930,234.50’

42. From the foregoing report, it is clear that the valuer deducted Kshs. 12,364,444/= as the amount owed to the appellant as opposed to Kshs. 12,947,004/= which was pleaded in the Plaint. Evidence was tendered before the trial court by Mr. Njiru that the sum owed to the appellant by the 1st respondent was Kshs. 12,364,444/=. The foregoing evidence was not controverted. We find that the sum which was owed to the appellant by the 1st respondent was Kshs. 12,364,444/=.
43. We cannot help but note that the learned judge found that Kshs. 1,342,229.20/= was realized from the sale of the 1st respondent's coffee pursuant to the court order of 2002. We have perused the record and we cannot find the basis of the learned judge's finding. The evidence available is two fixed deposit receipts dated 4th April, 2003 and 18th June, 2003 of Kshs. 176,570.50/= and Kshs. 1,104,784.45/= respectively. It was the uncontroverted evidence of the 2nd respondent that the said fixed deposit receipts represented the net proceeds of the coffee sold pursuant to the court order. Therefore, the learned judge erred in finding that the net proceeds of the coffee sold was Kshs. 1,342,229.20/= as opposed to 1,281,354.95/=.
44. Another contention that was raised by the appellant is that the learned Judge erred by introducing an extraneous matter stating that "**the appellant had detained the 1st respondent's coffee and acted for its own benefit in order to be licensed as a coffee marketer."** and then awarded exemplary damages. We agree. In the case *of* ***Great Lakes Transport Co. (U) Ltd. – v- Kenya Revenue Authority (supra),*** this Court stated,

> ***"It is now settled law that it is dangerous for a court to canvass its own matters in its judgment and to rely on evidence not canvassed before it by the parties".***

We find no basis for the learned judge introducing that extraneous aspect into the judgment and using it to award the sum of Kshs. 7,000,000/= as exemplary damages. In awarding the exemplary damages, the Judge ignored that remedies for breach of contract are geared to restitute the beneficiary to *status quo ante*; to recompense and not enrich the beneficiary. How the learned judge arrived at the figure of Ksh.7, 000,000/= is not stated. Punitive or exemplary damages should be sparingly and judiciously awarded. We hold that the learned judge erred in awarding exemplary damages. We hereby set aside the award of Kshs.7, 000,000/= as exemplary damages in favour of the 1st respondent.

45. The final issue for our determination is whether interest was charged twice in the judgment sum. In ***Salim& Another vs Kikava (1989) KLR 534*** *this Court* held that although a Court has wide discretion in awarding interest under *section 26* of the Civil Procedure Act, the discretion should be exercised judicially. Generally, interest should be awarded on general damages from the date of the assessment which is the judgment date because it is the earliest date when the liability to pay arises. Interest should only be awarded from date of filing suit where the amount claimed had actually been expended/ incurred at the date of filing the suit**.**
46. The trial judge in awarding damages for loss of coffee relied on the 2nd valuation report. It is our duty to examine if this sum includes interest. We have analyzed the 2nd valuation report and the calculations given by the valuer and find that the sum of Kshs. 53,926,925.31/- (US$ 665,764.51 x Kshs.81/=) has been included as interest; this amount of interest was for the period between 1st July, 1998 to 28th February, 2005; the trial court in its judgment dated 30th April, 2008 granted the 1st respondent interest over the judgment sum from the date of filing suit (10th June, 1999) until payment in full at court rates; the judgment sum included the interest calculated in the 2nd valuation report. The interest in the 2nd valuation report must be deducted from the judgment sum as the same amounted to interest being charged twice over the decretal amount.
47. From the foregoing and in relying on the above extract of the 2nd valuation report, we find the balance due to the 1st respondent as follows:

Principal amount - (US$ 624,154.24 x Kshs. 81) – Kshs.50,556,493.44/=

Less

Amount advanced by appellant	- Kshs.	12,364,444.00/=
Amount received from sale of coffee	- Kshs.	1,281,354.95/=
Balance due to 1st respondent	- Kshs.	**36,910,694.49/=**

48. We are inclined to follow the decision in ***Salim & Another vs Kikava*** ***(1989) KLR 534*** *and hold that in this case,* interest shall be awarded for the loss suffered in relation to the 4024 bags of coffee from the date of filing suit, since the coffee had been delivered in 1998 and demand for account had been made.
49. For the foregoing reasons, the decision of this court is that, the judgment of the High Court delivered on 30th April, 2008 awarding the 1st respondent a sum of Kshs. 84,588,005.30/= be and is hereby set aside. We substitute in its place judgment for the 1st respondent against the appellant in the sum of Kshs.36,910,694.49/= with interest at court rates from the date of filing the suit which is 10th June,1999. The appeal against the 2nd respondent be and is hereby dismissed. The appellant shall pay the costs of the appeal to the respondents.

Dated and delivered at Nyeri this 26th day of June, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

……

JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR