REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 247 of 2002

SEASCAPES LIMITED …….....……APPELLANT

AND

DEVELOPMENT FINANCE COMPANY OF KENYA LIMITED….RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Mr. Justice P.J.S. Hewett) dated 27th July, 2000

in

H.C.C.C. NO. 604 OF 1994)

****

JUDGMENT OF THE COURT

The facts giving rise to the suit that was before the superior court and which is now before us on first and last appeal are in general not in dispute. It is the interpretation and the application of these same facts by the trial court that has prompted this appeal. If we understand both counsel representing the litigants well, the main dispute is as to whether, the learned trial Judge (Hewett J.), having made a definite finding, that the subject loan advanced was so advanced and recoverable in Kenya shillings, he should have proceeded to renege on that finding, and make yet two other findings resulting in part of the eventual judgment that he delivered on 27th July, 2000.

The brief facts are that the appellant Seascapes Limited was, in the year 1985, interested in developing a tourist or a beach hotel consisting of sixteen (16) cottages at the South Coast of Kenya, in Kwale District. It wanted financial assistance to the tune of Ksh.6,000,000 (six million) to add to whatever funds it had, to complete the project. It approached the respondent, Development Finance Company of Kenya Limited (hereinafter referred to as DFCK or simply the respondent) for that financing assistance. The respondent acceded to the appellant's request but subject to the loan being secured by a first legal charge in favour of the respondent over land known as Title Numbers KWALE/MSAMBWENI "*A*" 2996, 2997 and 2998 all situate in Kwale District of Coast Province and owned by Adsite Limited original second plaintiff in the superior court, which also guaranteed the loan. There were several other conditions of the loan such as Debenture Legal Charge and guarantee by Adsite Limited. These were all entrenched in a Loan Agreement made on 2nd May, 1985. Earlier, on 13th September, 1984, a letter to the guarantor Adsite Limited informed the same guarantor that the respondent had approved an investment of Shs. 6,000,000 in a secured foreign currency(ies) loan in SSL repayable over eight years including two (2) years grace period at an interest rate of 14% per annum subject to the sponsors increasing their contributions to the cost of the project from Shs. 4.8 million to Shs. 6.1 million by way of equity or shareholders non interest bearing account, and other two terms that are not relevant here. That letter was

accepted by the guarantor. The clauses 2.01, 2.02 and 2.03 of Article 2 of the Agreement specifically dealt with Agreement for loan and stated:-

"***2.01. Subject to the terms and conditions herein set forth DFCK agrees to lend to the company and the company agrees to borrow from DFCK an amount in one or more convertible currencies to be determined by DFCK equivalent to the sum of Shillings six million (6,000,000).***

2.02. The loan shall be advanced to the company and the company shall repay the principal of the loan and shall pay interest therein as provided in this agreement.

2.03. Disbursements on account of the loan shall be made by DFCK from time to time in amounts of not less than shillings one million five hundred thousand (1,500,000/-) upon request by the company in writing delivered to DFCK after the completion of the DFCK security according to Article 3.01 (a) herein and at least 60 days prior to the proposed date of disbursement. ……"

There were other provisions in the agreement. We will refer to them when necessary in this judgment. However, as regards the currency in which the loan was allegedly advanced, clauses 2.10, 2.11 and 2.12 are important. The first two clauses state:-

"***2.10. The obligation of the company to pay in shillings the aggregate amount of the principal and interest on the loan shall not be deemed to have been novated discharged or satisfied by any tender of (or recovery of judgment expressed in) any currency or currencies other than shillings except to the extent to which such tender (or judgment) shall result in the effective payment of the said aggregate amount in shillings at the place specified pursuant to this agreement and accordingly such obligation shall continue in force for the purpose of recovering in shillings the amount (if any) by which any such effective payment shall fall short of the said aggregate amount.***

2.11. If DFCK determine to advance any part of the loan in a currency or currencies other than shillings DFCK shall so inform the company stating the currency or currencies other than shillings (such currency or currencies being hereinafter referred to as "the specific currency") in which DFCK wishes to make such advance. In such event the following provisions shall apply:-

(a) The shilling equivalent of whatever part of the loan that has been advanced in specified currency shall be determined by DFCK using the exchange rates prevailing on the date of the disbursement or disbursements of such part and notified to the company.

(b) Whatever part of the loan that has been advanced in the specified currency and interest thereon shall be payable in the specified currencies equivalent in shillings at the exchange rate prevailing on the due date of payment.

(c) The provisions of Article 2.01 shall be deemed to be amended mutatis mutandis as though reference to shillings in the said Article were reference to the specified currency.

(d) The company shall bear the responsibility of any exchange rate."

We make haste to add here that in Article 1 of the same agreement, at clause 1.01 (a) the term "*shillings"* and its contraction "*Shs"* is defined to mean Shillings in the currency of Kenya. Clause 2.12 provides:-

"***Once the loan has been fully disbursed DFCK shall deliver to the company a statement (hereinafter referred to as "the statement of currencies") substantially in the form set out in schedule C hereto showing:-***

(a) the secured currencies in which the loan has been made and the amount of each currency .

(b) the proportion of each payment of interest payable in each currency.

(c) the amount in each currency payable on each repayment date in accordance with Article 2.07.

Upon delivery to and acceptance by the company the statement of currencies shall be deemed to form an integral part of this agreement."

After the signing of the agreement. The respondent proceeded to make disbursement of the agreed loan to the appellant. In a letter dated 29th August 1985 and addressed to the appellant, the respondent enclosed a cheque dated 27th August, 1985 for Ksh.1,958,244/70 being the final disbursement of the loan of Ksh.6,000,000/=. That letter stated as follows:-

"***FINAL LOAN DISBURSEMENT***

We are pleased to enclose our cheque No. 16223 dated 27th August, 1985 for Ksh.1,958,244/70 being the final disbursement of our loan of Kshs.6,000,000/=. The final figure was arrived at as follows:-

	Kshs.	
Approved loan	***6,000,000/30***	
Less first disbursement	***1,500,000.00***	
Second disbursement	***2,500,000.00***	
Further Legal fees	***5,854.00***	
Commitment fees	***25,881.00***	***4,041,755***
	1,958,244/70	
	==========	

We are soon to forward to you a statement of currencies used in disbursing the entire loan.

Please acknowledge receipt of the above cheque.

Yours faithfully,

S.P. Murage

ASSISTANT ACCOUNTANT."

Thus, the entire loan was disbursed before the respondent complied with Article 2.11 of the loan agreement of which we have set out above. This was not in dispute as indeed in the penultimate paragraph of the letter dated 29th August, 1985, reproduced above, the respondent indicated that it would comply with that requirement later. Apparently, in a letter dated 4th December, 1985, addressed to the appellant over three months after the final disbursement, it purported to comply with that article. That letter stated as follows:-

"***REPAYMENT SCHEDULE***

Reference is made to the loan agreement between us dated 2nd May 1985. The loan of Shs.6 million equivalents was disbursed to you as follows:-

Stg£ 200,000.00

DM 235,422.60

We attach the relevant payment schedule for your records and it would be appreciated if you acknowledged receipt.

Yours faithfully,

S.P. Murage

ASSISTANT ACCOUNTANT."

The appellant did not sign that repayment schedule. It proceeded to service the loan and there is evidence on record which is not controverted that it paid fully the amount equivalent to the amount advanced which the respondent claimed was in respect of Deutschmark currency. It also paid some amounts towards settling the part of the loan that was stated to be in pound sterling. The appellant claimed that after it had paid amounts totaling to Ksh. 13,270,183/95 against the loan which was for Ksh.6,000,000/=, but the respondent still insisted that there was a substantial amount still outstanding all because the loan, according to the respondent, was a advanced in foreign currencies, namely pound sterling and Deutschemark. The appellant felt that the claim was not proper as in his view the loan was advanced in Kenya currency and not in foreign currencies and further, it claimed that if it was advanced in foreign currencies, which it denied, then it was entitled to credit pursuant to Legal Notice No. 14 of 1991 published by the Exchequer and Audit and under which the respondent was required to pass credit for all amounts payable by the government for the Exchange Risk Fund and to deduct all interests charged on those amounts. The respondent however, would not accede to that and pressed on with its demand for settlement of the debt by the appellant or else it would put the properties charged as securities on sale. It however, proceeded and worked out the exchange loss refundable to the appellant from 1st July 1989 to 31st December 1992 and credited the appellants account with Ksh. 400,100/= which the appellant felt was not the correct amount due to it on the exchange loss refunds covered by the Legal Notice on Exchange Risk Assumption Fund (ERAF). Several correspondences ensued on that issue. The respondent then sent two notifications of an event of default first being dated 28th January 1993 and another dated 6th August, 1993. In the latter notification, the arrears were put at Ksh.3,841,616/45. Letters were also addressed to the guarantor on the matter. Eventually, on 27th January, 1994 properties KWALE MSAMBWENI *"A"*/2996, 2997, and 2998 were advertised for sale on Friday 25th February, 1993 by Panama Risks auctioneers acting for the respondent. Notification of sale was also issued.

The move by the respondent prompted a suit: Civil Suit No. 604 of 1994 filed by the appellant and Adsite Limited, the guarantor of the loan, in the High Court of Kenya at Nairobi. In that suit, the appellant relied on several Articles in the loan agreement which it alleged were breached by the respondent and sought judgment to be entered for it for a declaration that the loan advanced was so advanced in Kenya Shillings and that the principal loan, interest and all charges had been repaid in full. It also sought injunction to issue restraining the respondent from advertising, alienating or selling either by public auction or by any other way whatsoever the suit properties, and that the respondent be ordered to discharge and release the debenture issued pursuant to the loan agreement; and to release the first legal charge over the subject properties and guarantee issued by the appellant and the guarantor. It also sought as alternative to those prayers, a declaration that the appellant was at all times entitled to credit under the Exchange Risk Assumption Fund Regulations and that no interest was chargeable or payable by the appellant and further that the respondent was to render a detailed account of the monies advanced to the appellant taking into account all payments made and any overpayment be refunded to the appellant. Other prayers were for damages for unlawful advertisement of auction sale of the suit properties and costs together with interest thereon at court rates. The court was also requested to order any such relief it might deem fit. In an equally lengthy statement of defence, the respondent denied the allegation that the loan

advanced to the appellant was so advanced as a local currency loan. The respondent also pleaded in the alternative that if the same loan was advanced in local currency and therefore payable in local currency, then the appellant was by his conduct estopped from pleading that it was in local currency, and further that it must be taken to have, by conduct waived its rights to rely on the condition stipulating repayment of the same in local currency. It thus sought dismissal of the suit. The appellant also applied for temporary injunction but that is no longer relevant in this judgment. Before the matter came up for hearing the parties, by consent, filed nineteen issues for determination by the superior court. All these issues in effect revolved around the main issues which were set out as the first and second issues. These were:-

"***1. Whether the loan advanced by the defendant to the plaintiff was advanced in foreign currency or in Kenya Shillings.***

2. Whether repayment of the loan was to be made (sic) in foreign currency or in Kenya Shillings."

The other issues we may touch on were:-

"***15. Is the plaintiff estopped from saying that the loan advanced to it is a foreign currency loan?***

16. Has the plaintiff by its representation and conduct waived its right (if any) to rely on the condition stipulating repayment of the loan in foreign currency?

17. Has the plaintiff repaid the entire loan in terms of the agreement?

18. Is the plaintiff entitled to the orders sought?"

We make it clear that whereas the other issues needed consideration as well, we do feel that from the submissions that were before us as well as the judgment appealed from, we are of the view that the issues we have reproduced above captured what we will need to consider in this appeal as on the main, the judgment and submissions left no doubt that the other issues did revolve around the above issues.

The suit proceeded to hearing before the superior court (Hewett, J). The appellant called one witness, Rameshchandra Shah, the Managing Director of the appellant Seascapes Limited and the guarantor Adsite Limited. The respondent also called one witness, John Kamunyori, who was then the company Secretary for the respondent company. As we have stated above, when crystalised, the evidence by the two witnesses on the main did not result into serious dispute(s) on facts as to the main issues that were before the learned Judge of the superior court.

The learned trial Judge, having analysed the evidence that was before him and having considered the law did partly give judgment in favour of the appellant and partly in favour the respondent, awarding the appellant 80% of its costs at the higher scale and all its taxable disbursements. He accepted and made a definite finding on the question of which currency was the currency of the money of account and money of payment. He stated on that issue as follows:-

"***The next place to look for difference between this case and Wino is whether DFCK prayed in aid section 2.11. It is quite clear that DFCK failed to do so; specifically it failed to determine and advance the loan in a foreign currency and it failed to inform Seascapes of the fact. It advanced Kenya Shillings. Accordingly the provisions of section 2.11 (a), (b), (c) and (d) do not apply and Kenya Shillings is the currency of the money of account and the money of payment. That was the decision in Wino on the same facts and I am bound by that. I adopt the reasoning of Kwach JA and Lakha JA which I will not repeat."***

There is a slight difference between Wino and Seascapes at this point in that DFCK did send a letter substantially in the form of Schedule C to Wino whereas in this case DFCK wrote to Seascapes on 4th December, 1985 in a letter headed "Repayment Schedule" setting out the equivalent foreign currencies and enclosing repayment schedules which were expressed in Ksh. DMs and Pounds Sterling. In the

latter two the repayment schedules were for what DFCK considered the appropriate portions of the loans in those currencies but, confusingly, for the whole amount of six million in Kenya Shillings. If anything DFCK in Seascapes was further than proper compliance with clause 2.11 than in Wino."

Having made that specific decision that the loan was, because of the non compliance with clause 2.11 of the agreement, advanced in Kenya Shillings and was repayable in Kenya Shillings, the learned Judge went on to consider whether or not on the evidence that was before the court, the doctrines of estoppel and of waiver could possibly apply. Having done so, he stated:-

"***13. Dealing with waiver first, I think I can see on the evidence before me that there was a contract that Seascapes would, in consideration of DFCK agreeing to an early repayment of the DM loan, agree to repay in the Kenya Shillings equivalent of the loan expressed in DM's.(sic)***

The evidence is not very strong but I think it is there. If it is there, then by contracting to repay the DM portion early, Seascapes had waived the right to reopen the DM account.

If I am held to be wrong in that or the evidence is thought to be too thin, then I consider that Seascapes is estopped by its conduct which I have set out earlier from re-opening the DM loan reinforced by its conduct in repaying early.

I hold that Seascapes had waived, alternatively, is estopped from re-opening the DM account."

And on what he called the sterling account, he held:-

"***I do not consider there is any contract which could be construed as a waiver by Seascapes of its right to pay or repay the sterling loan in the currency of Kenya……***

In the case of the sterling loan, it is not quite so clearly an estoppel but it is I believe an estoppel nevertheless in taking into account Mr. Kamunyori's evidence that DFCK was always trying to repay its foreign loans promptly even if its borrowers were in default to DFCK."

All the above led the learned Judge to conclude his judgment as follows:-

"***15. That brings me back to the prayer in the plaint, but I prefer to treat the so called DM loan and the so called sterling loan separately.***

(i) (a) DM loan. I declare that the DM loan plus interest and charges has been repaid in full. The legal obligation to repay the same was in Kenya Shillings but Seascapes has waived, alternatively is estopped from so alleging and has further waived or is estopped from alleging that the DM loan has been overpaid in Kenya Shillings terms and has waived or is estopped from demanding a refund of any overpayment.

(b) Sterling loan. I declare that the legal obligation to repay the sterling loan was in Kenya Shillings but Seascapes is estopped from so alleging at least in respect of the payments already made. Seascapes' evidence which was not controverted was that in Kenya Shillings terms the sterling loan had been overpaid, but Seascapes is estopped from alleging that the sterling account has been overpaid in Kenya Shillings terms and is estopped from demanding a refund of any overpayment.

(ii) I grant the injunction as prayed for.

(iii) I grant the discharges prayed for.

(iv) (a) and (b) I dismiss the declarations sought.

(v) Damages for unlawful advertisement were not proved; the claim is dismissed.

(vi) Cost; as Seascapes has succeeded in its main claims but has failed as regards both waiver and estoppel, I award Seascapes 80% of its costs on the higher scale and all its taxable disbursements."

The appellant felt aggrieved by that decision, particularly as pertains to the parts that denied the appellant any refund in respect of the overpayments it allegedly made to the respondent on grounds that it either waived those claims or was estopped from making those allegations on account of its conduct. It was also aggrieved by the award of costs. It moved to this Court and hence this appeal before us premised on five grounds namely that:-

"***1. The learned Judge erred and misdirected himself by firstly holding that the appellant's obligation to pay the DM (Deutsche Mark) loan was in Kenya Shillings and thereafter finding that there was no overpayment.***

2. The learned Judge further erred in holding that the appellant, Seascapes Limited was estopped or had waived its right to demand refund of overpayment in Deutsche Mark in the absence of any evidence of such waiver or estopped or any other material.

3. The learned Judge erred and misdirected himself in firstly holding that the appellant's (Seascapes Limited) obligation to repay the sterling loan (£) was in Kenya Shillings and thereafter finding that there was no overpayment despite evidence thereof.

4. The learned Judge further erred in holding that the appellant (Seascapes Limited) was estopped or had waived its right to claim refund on the overpayment in the absence of any evidence of such waiver or estoppel or any other material.

5. The learned Judge erred in apportioning costs of only 80% instead of awarding the entire costs to the appellant who had virtually succeeded in the suit. The learned Judge erred in depriving appellant of 20% costs of the suit on the ground that he did."

Mr. Gautama, the learned counsel for the appellant, urged us in a lengthy submission to allow the appeal. The thrust of his argument, if we understood him, was that the main and only dispute before the learned Judge was whether the loan advanced to the appellant by DFCK of Ksh.6,000,000/= was advanced in foreign currency or in Kenya Shillings and whether it was repayable in foreign currency or in Kenya Shillings. Once that knot was untied by the learned Judge in favour of the appellant, that the loan was in fact and in law advanced in Kenya Shillings and was repayable in Kenya Shillings, the matter ended there and any overpayment made as a result of the confusion created by the respondent's failure to comply with clause 2.11 of the loan agreement, was refundable to the appellant whether it was in respect of Deutsche Mark (DM) or in terms of pound sterling (£). He thus emphasized over and over again that for the learned Judge to introduce into the matter issues of waiver and estoppel which were never properly relevant to the matters before him, the learned Judge was clearly in error both in law and in fact.

Mr. Kiura, the learned counsel for the respondent, was of a different view. He submitted that the first prayer in the memorandum of appeal was inconsistent with the prayers sought in the plaint and could, on that score, not be granted. He further submitted that as the first prayer in the plaint was allowed and as the Court had made a finding in the judgment that there was indeed overpayment, the first prayer in the plaint was satisfied. Further, the second and the third prayers in the plaint were all granted. In effect, he submitted, the main prayers in the plaint were allowed by the learned Judge. As to the prayer for overpayment which amounted to Ksh.4,872,313/40, the court properly found that it could not be refunded on the basis of the doctrine of estoppel and waiver. In his view, the appellant made representations upon which the respondent relied to the respondent's detriment in that the appellant represented to the respondent that it was repaying the loan in foreign currency and the respondent in that belief made payments to their creditors and received what later were overpayments. He pleaded that it would be unconscionable to allow the recovery of overpayment. He conceded that during the hearing of the suit, the issue of overpayment was canvassed but the respondent did not challenge it.

We have anxiously considered the pleadings, the issues that were framed by the parties for the court,

the evidence adduced in court at the trial of the suit before the superior court, the exhibits, including the loan agreement and particularly Article 2.11 of the agreement, the letter dated 27th August, 1985 enclosing final disbursement, the letter dated 4th December 1985 on the Repayment Schedule, the judgment of the learned Judge of the superior court, the grounds of appeal before us, the submissions by both learned counsel and the law. We are also aware that this is as we have stated first and the last appeal. As the first appeal, we are enjoined to revisit the evidence that was before the superior court afresh, analyse it, evaluate it and arrive at our own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that – see the case of ***Selle vs. Associated Motor Boat Company Ltd***, [1968] EA 123. Having done so, we accept that the learned Judge was plainly right in his finding by holding that the loan was advanced in Kenya Shillings. He was perfectly on the right wicket when he found that as a result of the failure to comply with clause 2.11 of the Agreement of Loan, as is clear from the reading of the two letters cited hereinabove, the loan remained in Kenya currency i.e. Kenya Shillings and was payable in Kenya Shillings. The learned Judge could not be faulted in following the majority judgment in the well known case of ***Development Finance Company of Kenya Limited & 2 Others vs. Wino Industries Limited*** Court of Appeal Civil Appeal No. 112 of 1989 (UR). In that case, the salient facts were similar to the facts in this case, and the loan agreement was in fact exactly the same. Kwach JA, stated as follows in his judgment:-

"***It is clear to me beyond a peradventure that whatever may have been the original intentions of the parties during the cause of negations and the understanding of DFCK as to the efficacy of the agreement; the loan ultimately given to Wino by DFCK was a Kenya shillings loan. ..... if the intention was that the money of account was to be one of the three convertible currencies as contended by Mr. Deverell, this would have been inserted in Article 2.01 by the Agreement. I cannot accept Mr. Deverell's submission that notwithstanding. The clear language of Article 2.11 of the agreement the determination of the money of account can be made after disbursement as DFCK purported to do. Under that Article if DFCK determined to advance the loan in currencies other than shillings it had to inform Wino stating currencies*** "*in which DFCK wishes to make such an advance"*

That decision on a true construction of the Article had to be made in relation to a future event. It could not be made to apply to events which had already occurred. I am satisfied, and I agree with Mr. Inamdar, for Wino, that the money of account was Kenya Shillings."

That decision reflects to a large extent the situation which obtained in this case. The final disbursement was made vide letter of 27th August 1985 long after that event, the respondent, purported to inform the appellant that that loan was disbursed in foreign currencies. That was obviously in non-compliance with Article 2.11 of the agreement which even stated at 2.11(a) that the shilling equivalent of the loan in the specified currency "***shall be determined by DFCK using exchange rates prevailing on the date of the disbursement and notified to the company."***

The above are the reasons why we think the learned Judge was right in his finding that the currency in which the loan was disbursed was Kenya shillings and not foreign currency.

However, when the learned Judge, having made that specific finding on the matter, proceeded to consider other "*routes"* to get to where he was going, as he put it in first paragraph of his judgment, and when he introduces the doctrines of waiver and estoppel into the matter and proceeds in the application of these principles to refuse the applicant refund for overpayment which he clearly accepted was due, then we find it difficult to appreciate his approach. In our understanding, the doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of its existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination. In this case, the doctrine of estoppel would have been applied, if evidence existed, to preclude the appellant Seascapes Limited from asserting that the loan was in Kenya currency and thus the court would, in applying that doctrine find that the loan was in foreign currency or in case of a waiver, the appellant would be found to have waived his right to assert that the loan was in Kenya currency and thus the eventual finding would be that the loan was in foreign currency. Thus, if the learned Judge

applied those principles as he purported to do, then he would not have made a finding that the loan was in Kenyan currency as he did. Put another way, once he made a specific finding that the loan was in Kenya currency then he had no business making another finding that estoppel or waiver operated or was confined to recovery of overpayment. We agree with Mr. Gautama, that once he had found and held that the currency of the loan was Kenya shilling, that, was the end of the matter and if applying that currency there was overpayment, it had to be recovered.

Further, the learned Judge in settling for the application of estoppel in case of the loan in pound sterling and waiver in respect of loan in DeutschMark found that the Seascapes conduct of:-

"***(i) making repayments by reference to the DM***

(ii) entering correspondence with DFCK admitting it had taken foreign loans;

(iii) requesting that foreign loans be converted to local currency."

amounted to waiver in respect the already paid Deutschmark and estoppel for the balance of the loan the respondent was still seeking in respect of pound sterling particularly as the appellant had been credited Kshs.400,100/= being credit received from foreign exchange losses under Exchequer and Audit Regulations L.N. 14 of 1991. As the learned Judge also appreciated, there was no sufficient evidence to warrant application of those principles. He stated in his judgment when considering the same:-

"***The evidence is not very strong but I think it is there. If it is there, then by contracting to repay the DM portion early, Seascapes had waived the right to re-open the DM account.***

If I am held to be wrong in that or the evidence is thought to be too thin, then I consider that Seascapes is estopped by its conduct which I have set out earlier from re-opening the DM loan reinforced by its conduct in repaying early."

And as to sterling account he stated:-

"***I do not consider there is any contract which could be construed as a waiver by Seascapes of its right to pay or repay the sterling loan in the currency of Kenya. However I think that there is ample evidence by Seascapes so conducting itself in a similar way in making repayments by reference to sterling as it did in DM; by entering correspondence with DFCK admitting it had taken foreign loans and by requesting foreign loans be converted to local currency. The only difference between DM loan and sterling loan is that the DM loan was repaid in full early in DM terms whereas the sterling loan was not. In the case of the sterling loan, it is not quite so clearly an estoppel, but it is I believe an estoppel nevertheless taking into account Mr. Kamunyori's evidence that DFCK was always trying to repay its foreign loans promptly even if its borrowers were in default to DFCK."***

One sees in the above parts of the judgment we have reproduced concerning the questions of estoppel and waiver, a Judge at pains to arrive at a set conclusion he had envisaged in the first paragraph of his judgment. He sees clearly that the evidence in support of application of the doctrine of waiver was not strong at all and at times he is not certain it is there, yet he applies the doctrine notwithstanding that aspect. He sees that in case of sterling account there is no estoppel and he says it is not quite so clearly an estoppel, yet to arrive at the conclusion that it is, he imports into the judgment a statement by Mr. Kamunyori that DFCK would pay its credits even before its debtors paid it, thereby attempting to show that the respondent acted on the presentation of the appellant to its detriment and thus satisfying the application of the doctrine of estoppel. That, in our view, cannot sustain the application of the doctrine of estoppel. First, the appellant having received the respondent's letter of 4th December 1985 felt that the loan had to be repaid as the respondent wanted notwithstanding the legal flaws. Second, there is no evidence that the respondent told the appellant that it was paying its creditors even before its debtors paid it and so it would not be proper to say that the respondent acted to its detriment on any presentations of the appellant. In the case of Wino (supra) to which we have referred, Kwach, JA cited the case of ***Shaw v. Applegate*** (1977) I WLR 970, where Goff L.J. after referring to ***Willmott v. Barber*** said at page 980.

"***But for my part, I share the doubt entertained by Sir Raymond Evershed M. R. in The Electrolux case, whether it is necessary in all cases to establish the five tests which are laid down by Fry J., and I agree that the test is whether, in the circumstances it has become unconscionable for the plaintiff to rely upon his legal right."***

and stated:-

"***That is the test which should be applied in this case in gauging the conduct of Wino. It is said that Wino received statements expressed in foreign currencies which it did not return to DFCK but retained. It is also said that Wino settled invoices prepared in the same basis over a number of years without raising any objection. For three reasons, it is contended on behalf DFCK that Wino thereby waived DFCK's non-compliance with Article 2.11. I cannot accept this submission because I have already found as a fact that the money of account and money of payment was Kenya shillings. In those circumstances Wino could never be under any obligation to repay the debt in foreign currency and Article 2.11 of the Agreement did not come into operation at all."***

That is similar to what we have stated hereinabove. The learned Judge had made a finding that the loan was in Kenya currency and repayable in Kenya currency. He made that finding on the basis that the respondent did not comply with article 2.11 of the loan agreement. The doctrines of waiver and estopped could have only been applied to defeat that allegation of non compliance with the said article. Once that finding was made, nothing remained for the application of those doctrines. In any case, as a first appellate court, we do not see, on what we have stated herein, any evidence in support of those two doctrines. The learned Judge was not certain whether such evidence really existed. In considering those two doctrines, he was in error.

We allow the appeal and set aside that part of the judgment which stated that Seascapes had waived, or alternatively was estopped from alleging that the legal obligation to repay the same was in Kenya shillings and that the appellant was estopped from demanding a refund of any over payment. We also set aside part of the judgment which stated that the appellant was estopped from alleging that the legal obligation to repay sterling loan was in Kenya shillings and that the appellant was estopped from alleging that that loan was overpaid and demanding any overpayment. We substitute the same orders with the following order:-

1. We declare that both the loan granted to the appellant, the subject of the suit in the superior court plus interest and charges were granted in Kenya shillings and the obligation to repay was in Kenya shillings. The same loan has been overpaid both in respect of what the trial court marked as Deutschmark and sterling accounts;

2. The overpayment in respect of the entire loan amounting to Kshs.4,872,313/40 at the date the suit was filed, be paid to the appellant together with interest at court rates as from the date the suit was filed to the date of full payment of the superior court's judgment to the date of full payment;

3. Costs awarded by the superior court at 80% of the entire costs is set aside and in its place we award all costs in the superior court to the appellant;

4. Costs of this appeal to be paid by the respondent;

5. All other orders of the superior court specifically those marked (ii) (iii) (iv) and (v) are confirmed.

Dated and delivered at Nairobi this 9th day of October, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR