IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 132 OF 2001

BANK OF BARODA (KENYA) LIMITED ……. APPELLANT

AND

TIMWOOD PRODUCTS LTD. ……..…… RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Nairobi (Hewett, J) dated the 10th day of November, 2000

In

H.C.C.C. No. 1036 of 1997)

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JUDGMENT OF THE COURT

The genesis of this protracted litigation is the plaint dated 28th April, 1997 and filed in the High Court at Nairobi on 29th April, 1997 by Timwood Products Limited as plaintiff against Bank of Baroda (K) Limited as defendant. In that plaint, Timwood, the respondent to the appeal before us, had prayed for various orders against the Bank the appellant herein, and those orders were for

"(1) A mandatory injunction compelling the Defendant to release the sum of ?16,118.69 and U.S $15,591.40 to the plaintiff;

(2) Alternatively, the payment of the sum of ?16,118.69 and U.S $15,591.40 as money had and received by the Defendant to the use of the Plaintiff;

(3) Interest on the above sums at prevailing Commercial Bank rates;

(4) Return of the title deed for L.R. Number 209/3492 held by the Defendant;

(5) General Damages for breach of contract;

(6) Alternatively, damages arising out of the losses suffered by the Plaintiff on the said sums due to currency fluctuations;

(7) Damages for loss of credit, business reputation and loss of profit on contracts;

(8) Interest at court rates on all sums found to be due from the dates when such sums ought to have

been paid until payment in full;

(9) Costs of the suit."

It was agreed on the pleadings and on the evidence presented before the late Hewett, J. that Timwood had been a long-standing customer of the Bank. Timwood had operated various accounts with the Bank, namely:-

(i) pound-sterling retention account and at the time the dispute herein arose that account was in credit to the tune of ?16,118.69.

(ii) a U.S Dollar retention account which was also in credit to the tune of U.S $15,591.40 at the time the dispute arose.

(iii) a current account

In the month of May 1996 the Bank dishonoured a total of 18 (eighteen) cheques drawn by Timwood on its current account. Those cheques totaled Kshs.646,258/85 in value and when they were being dishonoured Timwood's current account had a credit balance of Kshs.3 million. Why did the Bank dishonour Timwood's cheques?

Timwood had two groups of share-holders. They were the Patels and the Bakranias – in fact two Patels and two Bakranias. A dispute arose between the two groups and on 19th April, 1996, A.N. Patel who was previously the chairman of Timwood wrote a letter to the Bank in the following terms:-

"A.N. PATEL

P.O. BOX 49387,

NAIR0BI.

19TH APRIL, 1996

The Manager,

Bank of Baroda

City Square Branch,

NAIROBI.

Dear Sir,

RE: Timwood Products/All Accounts.

Serious dispute has arisen between the directors/shareholders of Timwood Products Limited, resulting in the undersigned director being illegally and improperly locked out of the company premises.

Furthermore, the undersigned has been denied any access into the accounts of matters relative to the running of the company. I am currently seeking legal advice and have been advised that in the interim, I should inform you of the existence of this dispute and advise you that all or any of the above company's accounts must be frozen with immediate effect. This I hereby do .

I will of course keep you informed of any further developments.

Thanking you for your kind acknowledgment,

Yours sincerely,

Timwood Products Limited.

A.N. PATEL,

DIRECTOR."

A.N. Patel followed up this letter by another one dated 29th April, 1996 and in that letter he again stated as follows:-

"Kindly refer to my letter of 19th April, 1996 regarding the above accounts.

It has come to my notice that the relevant account has not been made non-operative and this has caused serious concern.

Documentary evidence has been handed over to yourselves confirming we are majority share-holders.

In view of the seriousness of the situation, we make it absolutely clear if the accounts continue to operate and substantial withdrawal are made, we will look upon you to make good all losses.

It is most important for yourselves to update your file since we are given to understand two of the present signatories on cheques etc are not approved by the Board of Directors nor such resolution having been passed in any of the previous meetings of the Board. We thank you for your confirmation per return.

Yours sincerely,

R.N. PATEL.

DIRECTOR.

c.c. Executive Chairman,

Bank of Baroda,

NAIROBI."

It appears that as these letters were being written the Patels sued the Bakranias in HCCC No. 1276 of 1996 for on 31st May, 1996, the late Pall, J recorded a consent order between the Patels and the Bakranias in the following terms:-

"1. ----------

2. THAT an injunction be and is hereby issued restraining the 1st and 2nd defendants [i.e. the Bakranias] from shutting out and depriving the 1st plaintiff [i.e. Narshibhai Patel] access to the premises books, documents, records and accounts of Timwood Products Limited.

3. THAT an injunction be and is hereby issued restraining the first and second defendants from

issuing and paying out the funds of Timwood Products limited without first obtaining the approval authority and signatures of the 1st plaintiff.

4. THAT prayer a (iii) (sic) will be deemed to be complied with if the cheques issued on the company are countersigned by the first plaintiff or he has sufficient opportunity to sign them."

This order was subsequently served upon the Bank and it was the contention of the Bank before the trial Judge and also before this Court that the order, in effect, had frozen Timwood's bank accounts maintained with the Bank and in terms of the two letters which the Patels had written to the Bank on 19th and 29th April, 1996. Mr. Fraser, learned counsel for the Bank, submitted at length before us that since the order had been served on the Bank, if the Bank had paid out the cheques which it had dishonoured with the remarks "***payment stopped***," the Bank could have been cited for contempt of the court's order in the sense that the Bank would have been treated as having aided and abetted the disobedience of the order. For that proposition, Mr. Fraser cited to us numerous authorities, among them being **ELLIOT VS KLINGER & OTHERS [1967] 1 WLR 1165**. The head-note to this case is that:-

"On an application for an interlocutory injunction certain undertakings were given by the defendants. The plaintiff subsequently moved for an injunction to restrain other persons who were not parties to the action, from aiding and abetting breaches of those undertakings.

On the preliminary objection that the court had no jurisdiction to grant an injunction against a person who was not party to the action,

Held***, refusing the injunction, that the proper remedy where a third party aided and abetted a breach of an injunction or undertaking was by way of motion for committal or sequestration.***

Per curiam: ***An injunction would give the plaintiff no advantage. All that is required is that the aiders and abettors should be given notice of the terms of the undertakings."***

Relying on this authority and the likes of it, Mr. Fraser contended on behalf of the Bank that since the Bank had been served with Pall, J's consent order of 31st May, 1996, if the Bank had ignored the order and honoured the eighteen cheques, the Bank, though not being a party to the case in which the orders were made, could well have been cited in civil or criminal contempt as an aider and abettor to the disobedience of the orders. It was accordingly contended on behalf of the Bank that it was entitled, indeed that it was legally bound, to dishonour the eighteen cheques. In its memorandum of appeal before us that position is clearly set out in paragraphs 1, 2 and 3 wherein it is stated:-

"1. The learned Judge erred in law in holding that the appellant was in breach of contract by complying with the directions given by A.N. Patel, a director of the respondent in his letter of 19th April, 1996.

2. The learned Judge erred in law in holding that the appellant was in breach of contract by complying with the terms of the order of Mr. justice Pall made on 31st May, 1996 in High Court Civil Case No. 1276 of 1996.

3. The learned Judge erred in holding that the cheques were wrongfully dishonoured by the appellant."

In answer to these contentions Mr. Nagpal, learned counsel who led the respondent's team of lawyers, submitted that the order of Pall , J did not at all freeze Timwood's accounts maintained with the Bank. All that the order did, contended Mr. Nagpal, was that before any payments could be made on any cheques drawn on the account, A. N. Patel had to countersign such cheques or that he had had sufficient opportunity to countersign them. There was no evidence that the cheques had not been countersigned or that A.N. Patel had not had sufficient opportunity to sign them. As to whether the Bank was entitled to obey the instructions of A.N. Patel contained in his two letters to the Bank, Mr. Nagpal's answer was that

Timwood was the owner of the money in the current account on which the cheques were drawn and that the cheques were properly drawn in accordance with the mandate given by Timwood and which mandate the Bank had in its possession. Mr. Nagpal went further to assert that the fact that some of the cheques drawn during the period were honoured clearly shows that the Bank was not in any way complying with the court order of 31st May, 1996 as was being contended by the Bank. According to Mr. Nagpal cases such as **ELLIOT V. KLINGER & OTHERS,** supra, were irrelevant to the issue at hand because the order of 31st May, 1996 did not freeze the account as had been the case, for example, in the case of **CUSTOMS & EXCISE COMMISSIONERS V. BARCLAYS BANK plc [2006] 3.** The Excise Commissioners of the United Kingdom, in seeking to recover outstanding amounts of VAT from two companies, obtained freezing injunctions in respect of their assets including funds held to specified accounts in a bank. The injunctions were notified to the bank which subsequently failed to prevent payments out of the accounts in breach of the injunctions. The Commissioners claimed damages for negligence against the bank. On trial of a preliminary issue the judge held that the bank did not owe the Commissioners a duty of care in relation to the loss they had sustained. The Commissioners appealed on the ground that their loss was foreseeable, their relationship with the bank was of sufficient proximity and it was fair just and reasonable to impose such a duty. There was an appeal and the Court of Appeal in England rejected the bank's submission that in any event and on the appropriate test, it could not be regarded as having assumed responsibility to the Commissioners, and reversed the trial judge's decision. The bank then appealed to the House of Lords and what is of interest to us in this appeal is Holding No. 2 wherein the House of Lords stated:-

"(2) That, since the bank on notification of the injunctive orders was obliged to comply with their terms and was exposed to the risk of punishment for contempt if it did not do so, and since there had been no relevant communication or act between the parties, or any reliance by the commissioners on the bank, it could not be understood as having voluntarily assumed responsibility for its actions so as to give rise to a duty of care towards them; that the court exercised its injunctive jurisdiction on the basis that its orders were enforceable only by its power to punish for contempt and the notified party's only duty was to the court; ----------"

We think the extract sets out a reasonable and practicable position with regard to third parties such as banks which are either served with or otherwise notified of the existence of an injunction either freezing a bank account or prohibiting the doing of some act and that aiders and abettors of those who are bound by such injunctions or orders would themselves be answerable to our courts. With respect, we adopt that position as correctly setting down the law applicable in Kenya.

Mr. Fraser, as we have seen contends that the Bank was under a duty to obey and comply with the order of 31st May, 1996 which was specifically served on them. Mr. Nagpal says the order of 31st May, 1996 did not freeze the account or accounts of Timwood with the Bank, and that, therefore, the legal position stated and adopted herein is wholly irrelevant to the issue at hand. What did the trial Judge say on the issue? We quote from his judgment:-

"The evidence for the Bank was a little surprisingly given by a Branch Manager of the Bank but not the man in charge of the City Square Branch on which the stopped cheques were drawn – quite why was not satisfactorily explained.

That his evidence was useful in that to a degree it was dispassionate and professional. He admitted for example that there was no letter from the plaintiff stopping the cheques. He attributed the Bank's action to the Court Order. All I can say is that if the Bank was relying on the court order either as the reason for stopping the cheques or for not releasing the funds in the forex accounts the Bank was either misadvised or failed to read the plaint English. There is nothing in the court order to countermand the Bank mandate and certainly nothing warranting 'payment stopped' endorsement – nor for that matter to refuse payment of the forex accounts."

As a first appellate court, it is our duty to reconsider the entire evidence, evaluate it ourselves and draw our own conclusions in deciding whether or not we should support the trial Judge's conclusions. The plain and simple truth, however, is that the order of 31st May, 1996 did not freeze Timwood's accounts

with the Bank. What that order did was to stipulate that the cheques drawn on the current account would only be honoured if it was shown that A.N. Patel had either countersigned such cheques or that he had been given sufficient opportunity to sign the cheques. The only witness who testified on behalf of the Bank (**David Ogega Nyaboga**)did not at any stage of his evidence say that the Bank dishonoured the eighteen cheques because they had not been countersigned by A.N. Patel or that the Bank had not been satisfied that A.N. Patel had been accorded sufficient opportunity to sign the cheques. Ogega could not have said any of these things simply because he was not a Branch Manager at the City Square Branch. Even at the time he gave his evidence, he was not the Branch Manager at the City Square Branch. Ogega's simple explanation was that the Bank was complying with the order of 31st May, 1996. He did not, for example, claim that the Bank was complying with the instructions contained in the two letters written to the Bank by A.N. Patel. He also agreed that the Bank did not receive any instructions from Timwood itself. In any case as has been pointed out, if the basis of dishonouring the cheques was the court order, there would have been no basis for passing other cheques and rejecting the eighteen. On the recorded word, we are ourselves satisfied that the Bank had no lawful basis for dishonouring the eighteen cheques. The learned trial Judge thought the Bank's action "*smacked of malice*." We think that remark was probably a reasonable inference from the evidence on record. In the circumstances, we confirm the learned Judge's conclusion that the Bank had no lawful basis for dishonouring Timwood's eighteen cheques. Grounds 1, 2 and 3 in the Banks memorandum of appeal accordingly fail and we reject them.

Grounds 4 and 5 deal with the issue of the forex retention accounts involving ?16.118.69 and US $15,591.40. It was admitted that Timwood by its letter dated 16th July, 1996 informed the Bank that it (Timwood) was closing all its accounts with the Bank, and asked the Bank to release the funds. The Bank refused to do so and only released the money after Ole Keiwua, J made an order for its release on 12th November, 1997. That was a period of approximately sixteen months from Timwood's letter of 16th July, 1996. The Bank's cheque releasing the money was dated 26th November, 1997. It is true Ole Keiwua, J's order was made pursuant to interpleader proceedings instituted by the Bank, but there cannot be any doubt that the Bank knew or ought to have known that the monies belonged to Timwood and not to the share-holders of Timwood. We have already rejected the reason or reasons preferred by the Bank for refusing to release the money or dishonouring the cheques . The Bank unlawfully withheld the money and the learned Judge was perfectly at liberty to award interest on the sums it unlawfully refused to release . The trial Judge said the period during which the money was unlawfully held to be 19 months; it was in fact some sixteen months. We will reduce the period of nineteen months to sixteen months.

On the issue of whether interest is a special damage which has to be pleaded and specifically proved, the simple answer is to be found in **section 26** of the Civil Procedure Act which gives the trial court absolute discretion to award interest at such rate or rates as it deems appropriate. There cannot be any question of specifically pleading and proving interest to be awarded on the sum claimed. The rate of interest, however, was not agreed upon in the contract of banking between the parties. Timwood had claimed interest at commercial rates without specifying what such rates are. In those circumstances the learned Judge should have ordered that interest on the forex retention accounts and on the either amounts awarded should have been at court rates. We shall so order. Save for this modification with regard to the rate of interest and with regard to the reduction from nineteen to sixteen months, grounds 4 and 5 must also fail.

Grounds 6 and 7 contained in the memorandum of appeal are that:-

"6. the learned Judge erred in awarding damages of Kshs.80,000/- as general damages for currency fluctuations. Any currency fluctuation was in the nature of special damages which should have been specifically pleaded and proved. Such damage cannot be the subject of an award of general damages.

7. There was no evidence to justify the award of damages of Kshs.80,000/- for currency fluctuations."

There does not appear to us to be any justification for the complaint contained in the two paragraphs above. In its plaint, Timwood had pleaded at paragraph 17 thereof that:-

"17. In the premises, the Defendant has wrongfully and in breach of the express term of the contract withheld the said monies in the Foreign Currency Account of the plaintiff and wrongfully deprived the plaintiff the use thereof, whereby the plaintiff has suffered and continue to suffer damage by reason of the loss due to fluctuation of foreign currencies and interest and loss of profit on contracts.

PARTICULARS OF LOSS AND SPECIAL DAMAGE

VALUE OF CRURRENCY: DATE RATE SELLING SHS.893,236 & 15,591.49 9.7.1996 57.29 ? 16,118.69 9.7.1996 89.03 1,435,047

TOTAL VALUE AT TIME OF NOTICE OF CLOSURE OF ACCOUNT - 2,328,283.

THE PRESENT MARKET VALUE:

& 15,591.49 25.4.1997 53.74 837,887 £16,118.69 25.4.1997 87.47 1,409,902

TOTAL LOSS 80,494"

The learned trial Judge in the end awarded Kshs.80,000/-. That was less than the sum of Kshs.80,494 pleaded in the plaint. It is not correct to say the sum was not pleaded. As to whether it was proved, there was evidence and we have already dealt with that point, that the Bank wrongfully refused to release the monies in the foreign currency account and only released the same some sixteen months from the date Timwood first demanded the release of the money. Only one witness, Vallabh Bakrania, testified on behalf of Timwood and on this point, he told the learned trial Judge:-

"It was nearly a year and a half since we asked for them [foreign currency deposits] while they held on to these grounds (funds?) the exchange rates fluctuated to our detriment, somewhere in the region of Kshs.80,000/-. I do not have the rates for 26.11.97."

Dealing with this point in his judgment, the learned trial Judge stated as follows:-

"The forex balances were demanded by the plaintiff on 27th June, 1996 and paid on 26th November, 1997 – a period of 19 months. Clearly if the refusal to pay was unjustified the plaintiff will be entitled to interest on those amounts as also the devaluation losses estimated by the plaintiff at Kshs.80,000/-"

Clearly there was evidence on record which justified this conclusion and there cannot be any reason why we should interfere with that award. Grounds 6 and 7 of the grounds of appeal must also fail.

We move to grounds 8, 9, 10 and 11 all of which deal with the award of Kshs.3,000,000/- as damages for loss of credit, business reputation and loss of profit. Those grounds are in these terms:-

"8.The learned Judge erred in awarding Kshs.3,000,000/- for loss of credit, business reputation and loss of profit.

9. Damages for loss of profit are in the nature of special damages which should have been specifically pleaded and proved. Such damage cannot be the subject of an award of general damages.

10. Damage for loss of profit was too remote and not within the contemplation of the appellant and is not recoverable.

11. The award of general damages was excessive and unjustified."

These grounds are somewhat confusing, giving the impression that two different awards of Kshs.3 million each were made. But the learned Judge made only one award of Kshs.3 million on the basis of the 18 dishonoured cheques, and that award must have been on the basis of loss of credit and business

reputation. In the prayers in the plaint (paragraph 7) damages were claimed for loss of credit, business reputation and loss of profit on contracts. It was wrong for Timwood to lump together loss of credit and business reputation with loss of profits because loss of profit is a special damage which ought to be specifically pleaded and proved.

As to loss of profits, apart from the fact that no particular paragraph of the plaint specifically dealt with the circumstances surrounding such loss, there was no evidence of what contracts, if any, were lost as a result of the Bank dishonouring the cheques. It was, for example, not proved that prior to the Bank dishonouring the cheques, Timwood had been making such and such profits but that subsequent to the dishonour of the cheques the profits decreased or were wiped out altogether. Bakrania who gave evidence for Timwood did not identify any specific contract they lost as a result of the dishonour of the cheques . No trading accounts were produced and for his part, the learned trial Judge contented himself by holding that:-

"It is of course worse for a trader's reputation to fail to honour a small cheque than a big one. If a small cheque fails, what is the benefit of a big one which is more likely to go the same way. The plaintiff tendered no evidence of a decline in profit or of turn-over or even of a dip in profits or turnover although I am sure the plaintiff is substantial enough and well enough managed to have both audited accounts and monthly or quarterly management accounts. In Kenya's topsy-turvey economy, such accounts are often not particularly meaningful in their detail so not too much should be read into that omission. ----------"

It may be that Kenya's economy is topsy-turvey and it may be that management accounts kept by companies such as Timwood may not be very useful, but if such accounts are kept and one is claiming damages for loss of profits, such accounts ought to be produced to assist the court in coming to a conclusion on the issue of whether there has in fact been a loss, and if so, the magnitude of the loss. We think the learned Judge was not right in simply dismissing the failure to produce evidence proving loss of profit on the basis that in a topsy-turvey economy such evidence would not be useful. But despite that misdirection, the learned Judge still thought a composite sum of Kshs.3 million would suffice on the head of claim of loss of credit, business reputation and loss of profit. We think that in all the circumstances of the case, the learned Judge was right. Put another way, we do not think the award of Kshs.3 million on the compendious head of loss of business credit, reputation and loss of profit was so inordinately high that the application of a wrong principle must be inferred and thus call for our intervention. Damages for wrongful dishonour of a cheque by a bank is clearly awardable – see **GIBSON OMBONYA SHIRAKU V. COMMERCIAL BANK OF AFRICA**, Civil Appeal No. 16 of 1985, (unreported), and also **KPOHRAROR V. WOOLWICH BUILDING SOCIETY [1964] 4 ALL E.R. 119**. The Bank's complaint in ground eleven is not that the sum was not awardable. All Mr. Fraser told us was that a temperate award is the usual thing in such matters and that the Kshs.3 million awarded was excessive and unjustified . We do not think so. Timwood was a trading company and the Bank knew that. In quick succession the Bank dishonoured a total of eighteen cheques amounting to Kshs.646,258/85; Timwood had a total of Kshs.3 million to its credit with the Bank. The reason given for the dishonour of the cheques was wholly untrue, i.e. that "cheque stopped." That could have been interpreted to mean that it was Timwood itself which had stopped the cheques. As the trial Judge correctly pointed out other more innocent words could have been used – like cheque not countersigned etc. We think and are satisfied that the Ksh.3 million awarded, in the circumstances of the case, was temperate, i.e. it is not so inordinately high that it calls for our intervention. We reject ground eleven of the Bank's grounds of appeal.

Ground 12 of the Bank's grounds of appeal deal with the award of interest at the rate of 20% per annum on the sums awarded. We have already dealt with that issue and have held that interest should have been awarded at court rates and that disposes of ground twelve.

We now turn to Timwood's notice of cross-appeal which contains basically one ground subdivided into three paragraphs, namely:-

"2. The grounds upon which the Respondent contends that the above mentioned decision ought to be varied are as follows:-

(a) The Learned trial Judge erred in awarding damages of K.shs.3,000,000/- only for loss of credit and business reputation;

(b) The Learned trial Judge erred in failing to award a general damages for breach of contract and in treating the award of Kshs.80,000/- in respect of currency devaluation as general damages in the alternative.

(c) The Learned trial Judge erred in failing to award exemplary or aggravated damages despite having found that the Appellant's action in using the words 'payment stopped' in dishonouring the Respondent's cheques 'smacks of malice' and in any event the award of Kshs.3,000,000/- is far too law in view of the finding of actual malice in respect of the Appellant."

As to paragraph (a) we have held that Timwood totally failed to place before the trial Judge any evidence proving loss of profits. Those claims were all lumped together and it was clearly the business of Timwood to prove the loss claimed, and we do not think there is any reason for us to interfere. Paragraph (a) in the notice of cross-appeal must fail.

As to paragraph (b) we are at a loss to understand what general damages could have been awarded in respect of a breach of contract. The learned Judge awarded Ksh.80,000/- as interest and loss arising from currency fluctuation. We see no other general damages which could have been awarded further on that head. Paragraph (b) in the notice of cross-appeal must also tail.

Mr. Nagpal addressed us at great length on paragraph (c) about the malice of the Bank and that was based on the trial Judge's remark that the dishonour of the cheques "*smacks of malice*."

It is worth noting that the learned Judge did not specifically hold that in dishonouring the cheques, the Bank was malicious; all he said was that the Bank's action "*smacks of malice*." He refused to award aggravated damages. He could not have awarded punitive or exemplary damages because in Kenya such damages are awardable only under two circumstances, namely:-

"(i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and

(ii) where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff – see OBONGO & ANOTHER V. MUNICIPAL COUNCIL OF KISUMU [1971] EA 91 which approved and applied the principles of the English case of ROOKES V. BANARD & OTHERS [1964] AC 1129".

OBONGO'S Case still remains the applicable law on the issue of exemplary or punitive damages in Kenya and in this case we were not asked to review that decision which has stood the test of time since 1971. Mr. Nagpal did not really press the issue of exemplary or punitive damages but concentrated his fire on the trial Judge's failure to award aggravated damages. But as we have pointed out the Judge did not specifically hold that the Bank was malicious in dishonouring the cheques; all that the Judge said was that the Bank's action "smacks of malice." The Concise Oxford Dictionary, 9th Edition, defines the word "smack" as follows:-

"HAVE A FLAVOUR OF; taste of (smacked of garlic). Suggest the presence or effects of (in a person's character etc.).; a barely discernable quality; (in food etc) a very small amount."

In our understanding, something which "smacks of malice" is not necessarily malicious;; it may have some element of malice but that is not the same thing as being malicious . That clearly is the context in which the learned trial Judge used the expression and this is confirmed by his express statement that he was not giving aggravated but compensatory damages. In all the circumstances of the case, we are satisfied the Judge was right in his approach on this aspect of the case and that being the position we take paragraph (c)in the notice of cross-appeal must also fail.

The net effect of all these is that the cross-appeal wholly fails and we order that it be and is hereby dismissed with the costs thereof to the Bank, the appellant herein.

What about the appeal by the Bank? That appeal succeeds to the extent that:-

(i) The period of 19 months used by the Judge is reduced to 16 months, with the result that interest on the forex account is to be calculated from 26th June, 1996 for a period of 16 months, i.e. upto 26th November, 1997.

(ii) The rate of interest shall be at court rates and not at 20% as awarded by the Judge.

Save for these minor amendments, the other orders made by the learned trial Judge are confirmed.

The Bank has had very little success in its appeal and we order that its appeal is dismissed with costs. These shall be the orders of the Court in the appeal and the cross appeal which (i.e. the cross appeal) is dismissed with costs.

Dated & delivered at Nairobi this 30th day of May, 2008

R.S.C. OMOLO

……

JUDGE OF APPEAL

P.K. TUNOI

……

JUDGE OF APPEAL

E.M. GITHINJI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.