Manchester Outfitters Suiting Division Ltd & another & another v Standard Chartered Financial Services Ltd & another & another (Civil Appeal 88 of 2001) [2002] KECA 303 (KLR) (4 October 2002) (Judgment)

Manchester Outfitters Suiting Division Ltd & another v Standard Chartered Financial Services Ltd & another [2002] eKLR

Neutral citation: [2002] KECA 303 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 88 OF 2001

PK TUNOI, AA LAKHA & E OWUOR, JJA

OCTOBER 4, 2002

BETWEEN

MANCHESTER OUTFITTERS SUITING DIVISION LTD & ANOTHER & ANOTHER & ANOTHER & ANOTHER & ANOTHER & ANOTHER .... APPELLANT

AND

STANDARD CHARTERED FINANCIAL SERVICES LTD & ANOTHER & ANOTHER & ANOTHER & ANOTHER & ANOTHER & ANOTHER .... RESPONDENT

(Appeal from the judgment and decree of the High Court at Nairobi (Githinji J) dated 30th July 1999 in HCCC No 5002 of 1990)

Receivership unlawful due to absence of a valid debenture

The plaintiffs challenged the appointment of receivers over their company by a bank, arguing that the debenture relied upon had been superseded by a 1986 loan agreement, which required a new debenture that was never executed. The High Court dismissed their claim, upholding the validity of the receivership. On appeal, the Court of Appeal found that the absence of a registered debenture rendered the receivership unlawful. The court also criticized the trial judge's four-year delay in delivering judgment. It set aside the lower court's decision, awarded the plaintiffs Kshs 251,000,000 in damages, and ordered payment with interest at 14% per annum.

Reported by John Ribia

Judgment*- delivery of judgment - delay in delivery of judgments - inordinate delay - inexcusable and unjustified delay - whether delay vitiated a judgment - when delay occasioned a failure of justice.*

Banking Law *– loans – securities – debentures – reclamation of debenture by receivers - whether a subsequent loan agreement that altered the terms of an existing facility superseded an earlier debenture and required the execution of a new security instrument - whether a financial institution could validly appoint receivers in the absence of a properly executed, stamped, and registered debenture*

Company Law *- receivers - appointment of receiver - appointment of receiver where there is no valid debenture - whether absence of debenture renders appointment of receivers null and void.*

Banking Law *- debenture - validity requirement of a new debenture to cover a fresh agreement - whether correspondence and documents between parties could create a debenture.*

Banking Law *– loans – securities – debentures - reclamation of securities – reclamation of securities of a creditor when their case was being determined by the appellate court - whether the disposal of a litigant's assets during the pendency of an appeal constituted an unlawful deprivation of property*

Damages *– trial court's mandate to award damages – where a trial court delays in issuing judgement – general damages vis-à-vis special damages - failure to plead special damages -where the appellate court issues damages instead of referring the matter for retrial –whether a trial court's delay in delivering judgment can result in a miscarriage of justice and could vitiate a judgment - circumstances in which the appellate court may assess damages - whether an appellate court could assess damages instead of remitting the matter for retrial where a significant delay has occurred - whether damages for the wrongful sale of a litigant's property could be assessed as general damages in the absence of specific pleadings for special damages - whether damages for the wrongful sale of a litigant's property could be assessed as general damages in the absence of specific pleadings for special damages – whether interest on damages awarded for wrongful deprivation of property should be calculated from the date of the wrongful act or from the date of judgment*

Legal Systems *– sources of Law in Kenya – maxims of equity – applicability of maxims of equity in finance law - whether a financial institution could rely on equitable principles to justify the enforcement of an unregistered or informal security agreement.*

Brief facts

The plaintiffs, a group of companies, had obtained a loan from the defendant bank under a 1982 debenture, which provided security over their assets. In 1986, the parties entered into a new agreement that localized the loan, altering its terms. The plaintiffs contended that this new agreement superseded the 1982 debenture and required the execution of a fresh debenture, which was never done. Despite this, on 5 September 1990, the bank appointed receivers over the plaintiffs' assets, claiming authority under the 1982 debenture.

The plaintiffs filed suit in the High Court, seeking a declaration that the receivership was unlawful, an injunction restraining the receivers, and damages. The bank counterclaimed for repayment of the outstanding loan, asserting that the 1982 debenture remained valid security. The trial court upheld the bank's position, ruling that the debenture was enforceable and dismissing the plaintiffs' claim. The judgment, however, was delivered four years after the conclusion of the trial, leading the plaintiffs to argue that the delay compromised the fairness of the decision.

On appeal, the plaintiffs challenged the validity of the receivership, the enforceability of the debenture, and the impact of the trial court's delayed judgment on the outcome of the case.

Issues

i. Whether absence of debenture renders appointment of receivers null and void.
ii. Whether correspondence and documents between parties could create a debenture
iii. Whether a financial institution could validly appoint receivers in the absence of a properly executed, stamped, and registered debenture.
iv. Whether a subsequent loan agreement that altered the terms of an existing facility superseded an earlier debenture and required the execution of a new security instrument.
v. Whether a trial court's delay in delivering judgment can result in a miscarriage of justice and could vitiate a judgment.

vi. Whether the disposal of a litigant's assets during the pendency of an appeal constituted an unlawful deprivation of property.
vii. Whether an appellate court could assess damages instead of remitting the matter for retrial where a significant delay has occurred.
viii. What were the circumstances which an appellate court may assess and award?
ix. Whether damages for the wrongful sale of a litigant's property could be assessed as general damages in the absence of specific pleadings for special damages.
x. Whether a financial institution could rely on equitable principles to justify the enforcement of an unregistered or informal security agreement.
xi. Whether interest on damages awarded for wrongful deprivation of property should be calculated from the date of the wrongful act or from the date of judgment.

Held

Per Lakha and Owuor, JJA (Majority)

1. The appointment of receivers over the plaintiffs' company was illegal, null, and void. The bank's attempt to rely on a debenture dated April 5, 1982 to appoint receivers was without legal basis, as a subsequent agreement in 1986 had effectively superseded all prior agreements. The 1986 agreement localized the plaintiffs' foreign currency loan and set new terms, requiring a fresh debenture to secure the new advances. However, no such debenture was executed, stamped, or registered. In the absence of a valid debenture, the bank lacked the authority to appoint receivers, rendering the appointment of the second respondents on September 5, 1990 unlawful.
2. The trial court erred in upholding the validity of the debenture. The trial court had relied on the equitable maxim that "equity looks on that as done which ought to have been done," reasoning that the debenture and legal charge remained valid securities despite the absence of a formal amendment or ratification deed. However, that approach ignored the principle that "equity followed the law," stating that a debenture was a legal instrument that requires proper execution, stamping, and registration. Mere correspondence or informal arrangements between the parties could not create a valid debenture. The failure to execute a new debenture meant that the bank had no security upon which it could appoint receivers, and therefore, the plaintiffs were entitled to challenge their appointment.
3. The Court of Appeal was critical of the trial court's delay in delivering judgment. The trial concluded on July 31, 1995, but the judgment was not delivered until July 30, 1999; four years later. The delay was inordinate and unjustifiable. Delays of that magnitude undermined public confidence in the judicial process and deprived litigants of a fair and timely resolution of their disputes. Excessive delays could lead to errors in judgment, as the trial court may lose the advantage of immediacy in assessing evidence and witness credibility. Given the length of the delay and the numerous errors and contradictions in the judgment, the trial court's decision could not stand.
4. Following the dismissal of the plaintiffs' suit and the granting of the bank's counterclaim, the bank proceeded to sell the plaintiffs' assets, including land, plant, and machinery. The plaintiffs attempted to obtain an injunction and a stay of execution but were unsuccessful. The trial court failed to assess damages at the time of judgment, a practice that was strongly discouraged. Even where a court dismissed a claim, it was desirable for it to assess damages in case an appeal succeeded. The failure to do so in the case left the appellate court with no choice but to make an independent assessment.
5. Given that all of the plaintiffs' assets had been sold, the bank had effectively deprived the plaintiffs of their property without lawful justification. The bank could not take advantage of its own wrongful actions and that it had an obligation to restore possession of the assets to the plaintiffs. However, since the assets had already been sold, the plaintiffs were entitled to damages for their loss.
6. The bank's contention that damages should not be assessed at the appellate stage was rejected. The court had the authority to take into account events that had occurred since the trial judgment, particularly in cases where an injustice would otherwise result.

7. Valuation reports submitted by the plaintiffs estimated the value of the land at Kshs 76,500,000 and the plant and machinery at Kshs 1,906,958,959. The valuation of the land reasonable but considered the estimate for machinery and plant to be grossly exaggerated. The valuation was reduced; the valuation of the machinery to 10% of the suggested figure, arriving at a total award of Kshs 266,500,000. From that amount, the Court of Appeal deducted Kshs 15,500,000 to account for the bank's counterclaim, leaving a net balance of Kshs 251,000,000 payable to the plaintiffs. He also awarded interest at 14% per annum from August 1, 2002 until full payment.

Dissenting opinion

Per Tunoi, JA (Dissenting)

1. A delay of five years in delivering a judgment was clearly inordinate and increased the stress and anxiety caused by litigation. It also weakened public confidence in the whole judicial process.
2. A delay in delivering judgment did not vitiate a judgment.
3. The vice in a delayed judgment was not the mere fact of delay, but when the delay involved was not satisfactorily explained or it occasions failure of justice if, for example, the trial judge denied himself the opportunity the impression a witness makes or loses the advantage of immediacy.
4. In the instant case there was no explanation or account for such an inordinate delay to justify it or render it excusable.
5. In the absence of a new duly executed debenture no receiver could be legally appointed by the Bank over the plaintiff's companies, hence the appointment of the receiver was illegal, null and void.
6. The fresh agreement entered into by the parties required a new debenture to put in place machinery to enable the terms thereof to be enforced.
7. Correspondence and documents between parties did not create a debenture, a debenture could only be created by a legal document requiring execution, stamping and registration.
8. No estoppel could be created against the statute if a debenture required as in this case to be registered according to the law.
9. It was always desirable in a suit for damages for the trial court to make a finding as to the amount to which he thought the plaintiff would be entitled if successful, even though he gave judgment for the defendant.
10. It was a general principle that damages were assessed once and for all at the time of the trial even though the plaintiff may subsequently suffer greater or lesser loss than anticipated, and an Appellate Court had power to receive farther evidence, particularly of matters which have occurred after the date of the trial.
11. The general principle was that the Appellate Court should not assess damages but instead it should remit the case to the High Court for assessment of damages.
12. The Appellate Court may assess damages where there are other compelling reason not to remit the case such as where:
    a. it will entail a farther long trial of several years with unjust delay and the case is already more than twelve years.
    b. the parties will suffer further punishment in stress, time and expense
    c. part of the record has clearly gone missing with the memory of witnesses and or parties faded or likely to have faded.
    d. the events of the litigation are close to 20 years old with no likelihood of a truly just decision being reached.
    e. it would no longer be just to remit the case to the superior court for assessment of damages as little or no purpose was left since the land and all machinery, subject of trial and receiverships had already been sold leaving no possible assistance.
13. (Per Tunoi JA, (Dissenting)) "It is rare and exceptional for a final Appellate Court to assess damages in a situation like this where it is obvious that the respondents would have the opportunity of an appeal and

yet it is faced with a huge crippling award. This court should not undertake the assessment especially in the particular circumstances of this case".

Appeal allowed.

Orders

i. *The decree of the Superior Court dated July 30, 1999 were set aside and substituted by the following:*
   1. *The receiver appointed by the Bank was declared null and void*
   2. *There was no valid debenture or one in existence.*
   3. *The first defendant was to pay to the plaintiffs the balance sum of Kshs 251,000,000/= with interest at 14% pa from August 1, 2002 until full payment within 30 days failing which execution may issue and*
   4. *The 1st defendant was also to pay to the plaintiffs the costs of the suit before the Superior Court.*

Citations

1. *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1985] 3 All ER 52; [1986] Ch 246; [1985] 2 WLR 908

2. *Bishopsgate Investment Management Ltd (in prov Liq) v Maxwell* [1993] BCC 120; [1992] 2 All ER 856

3. *Barangaza, Elizabeth v Tyson Habenga* Civil Appeal No 285 of 1997 4. *Gardner v James* [1998] 2 All ER 1069; 65 TLR 36; 92 SJ 732

5. *Selle v Associated Motor Boat Co Ltd* [1968] EA 123

6. *Curwen v James* [1963] 2 All ER 619; [1963] 1 WLR 748

7. *Jenkins v Richard Thomas & Baldwins, Ltd* [1966] 2 All ER 15; [1966] 1 WLR 476

8. *Murphy v Stone Wallwork (Charlton) Ltd* [1969] 2 All ER 949; [1969] 1 WLR 1023

Statutes

No statutes referred.

JUDGMENT

Lakha Judgement

1. This is the plaintiffs' appeal from a decision of the Superior Court (Githinji, J) given on 30 July 1999 whereby he dismissed the plaintiffs' suit against the defendants with costs. He also allowed with costs the defendants' counterclaim and other related reliefs. The present suit by the plaintiffs was filed on 26 September 1990 and by their re-re-amended plaint the plaintiffs therein claimed, inter alia,a declaration that the purported appointment on 5 September 1990 by the first respondent (the bank) of the second respondents (the Receivers) to be receiver and manager of the plaintiffs' company allegedly pursuant to a debenture dated 5 April, 1982 was invalid and of no effect;an injunction against the Receivers to restrain them from acting as receivers and managers of the plaintiff companies;an order for delivery of possession of all assets and property of the plaintiff companies in their possession;an account of all moneys of the plaintiff companies received while purporting to act as receiver and manage; andDamages

2. On the other hand the bank counterclaimed for Kshs 24,833,999/= by way of balance of its loan with interest thereon at 19% pa from 1 February, 1992 and the Receivers counter claimed Kshs 2,337,261.75 being their expenses with interest likewise. Each of the defendants also sought a declaration that the debenture dated 5 April, 1982 issued by the first plaintiff to the Bank was valid and subsisting security for the indebtedness of the first plaintiff to the defendants.

3. Until 1981 the liquidity position of the plaintiffs was not serious but then injenction of capital was required. By a loan Agreement dated 22 March, 1982 the plaintiffs agreed to borrow in foreign currency from among the Bank. In or about 1986 this foreign loan was terminated and localized and a loan in local currency on fresh terms and conditions was arranged by mutual agreement.

4. It was the plaintiffs' case that the said agreement superseded all previous agreements between the parties whether written, oral or implies and brought them to an end among which was the debenture of 5 April, 1982 under which the Bank had purported to appoint the second respondents as receivers.

5. The new agreement, according to the plaintiffs, also required a new debenture to secure the new localized advances. But no debenture was either ever executed or registered. Consequently there is neither an old debenture nor a new one in existence with the result that no receiver can be appointed by the bank over the plaintiffs' properties and the purported appointment of the present receivers on 5 September, 1990 is illegal null and void.

6. Upon the plaintiffs applying for an injunction to restrain the receivers from continuing with the exercise of the power of a receiver or manager, Bosire, J (as he then was) expressed doubt as to the validity of their appointment with the result that on 18 October, 1990 receivers wanted to return the factory which they did on the following day.

7. That concludes broadly and in general terms the narrative of the facts of this case until judgment was delivered. We will advert to the events after judgment hereafter. The trial took 16 days for the hearing of the case and four full years from its conclusion to the date when judgment was delivered which was 30 July, 1992 and Five years less two months from when it was filed.

8. A delay of five years in delivering a judgment is clearly inordinate. It was therefore not surprising when Mr Nowrojee for the appellants made this quite properly but regretfully his first ground of appeal. In normal circumstances the trial judge who had seen and heard the witnesses had an advantage which was likely to prove decisive when his findings were disputed on appeal.

9. There had been two other occasions in recent years when the Court of Appeal in England had censured judges for delay in delivering reserved judgments: Rolled Steel Limited v British Steel Corporation [1986] Ch 246, an eight-month delay after a 19-day trial and Bishops Gate Investment Management Ltd v Maxwel (1993) BCC 120, a five-month delay after a five-day hearing.

10. The delay in those cases were substantially shorter than the delay of five years in the present case, even when due allowance was made for the judge's other duties. A delay of the magnitude here involved was inexcusable.

11. I agree that a delayed judgment prolongs and increases the stress and anxiety caused by litigation. It also weakens public confidence in the whole judicial process. With respect, a delay by itself does not vitiate a judgment. The vice in a delayed judgment is not the mere fact of delay but when the delay involved is not satisfactorily explained or it occasions failure of justice if, for example the trial judge denies himself the opportunity the impression a witness makes or loses the advantage of immediacy. This is borne out by the case in this Court of Elizabeth Barangaza -v- Tyson Habenga, Civil Appeal No 285 of 1997 (unreported) where Akiwumi, JA (as he then was) said:

> "The record of appeal and indeed, the file of the court below clearly show that it really did take, and without there being indicated my justification for it, nearly sixteen months for the learned judge to deliver her judgment" (emphasis supplied)

Tunoi JA said:

> "He submitted that this long delay resulted in the learned judge making material findings which were not justified by the evidence on record". (emphasis supplied)

12. On the other side of the line is the case of Garoner v James [1998] TLR 644, also a decision of the Court of Appeal, where there was a 22-month delay between the conclusion of a trial and the delivery of judgment. In a letter to the Court, the judge, however, referred to the fact that at the time particularly heavy burden had been placed on him because of his judicial duties. The judge had been responsible for establishing the Mercantile Court in Manchester and there was no doubt that his general reputation in respect of the conduct of that court had been in the highest. The Court had been very successful and as a result many cases had been disposed of expeditiously and more economically than would otherwise have been the case.

13. Having considered that material, the Court of Appeal unanimously held that it would be wrong to interfere with the judge's decision.

14. In the present case there is no explanation or account for such an inordinate delay to justify it or render it excusable. In addition, upon a careful consideration of the judgment it appears that there were numerous errors, clear contradictions and incompatible findings because of delay resulting in there being no fair determination and a real likelihood of a failure or miscarriage of justice. I am satisfied that on this first ground of appeal alone the appeal may be allowed and the judgment set aside. Having heard the advocates for the parties and the reasons advanced by them, I agree with them that in the circumstances of this case no purpose is left in ordering a retrial nor would it be just to do so.

15. The second question which arises is whether the purported appointment of the second respondents as receivers was null and void. The plaintiffs' primary submission is as follows:

> In or about 1986, the foreign loan was terminated and localized in local currency. This superseded all previous agreements including the previous debenture of 5 April 1932 which the bank purported to appoint the receiver but the new agreement also required a new debenture to secure the new localized advances. Yet no new debentures has ever been executed. In the absence of a new debenture having been executed, there is neither an old debenture nor a new one in existence. Consequently, no receiver can be appointed by the Bank over the plaintiffs' companies and the appointment of the receivers on 5 September 1990 was and is illegal, null and void.

16. It is not in dispute that no new debenture was executed, stamped or registered. It is clear, in my view, that the fresh agreement required a new debenture to put in place machinery to enable the terms thereof to be enforced. There is nothing to show that the parties in any way reflected the altered position.

17. The learned judge, with respect, held to the contrary in the following terms:

> "Lastly, I have found that the re-execution of the securities was not intended by the parties and that it would not have in any case been possible considering the nature of the transaction. It is true that as a matter of form the debenture and legal charge do not reflect the altered position of the parties. Perhaps some form of amendment deed or rectification deed should have been executed to alter the recital and reflect the changed position of the parties. But even without such a document the parties considered the debenture and legal charge as valid securities for the altered transaction. As learned counsel for the defendants

submits equity looks on that as done which ought to haven done. So, lack of amendment or ratification deed does not affect the validity of securities." It is not possible, in my respectful view, to hold that correspondence and documents between the parties would create a debenture, if at all. A debenture cannot be created by such documents. A debenture can only be created by a legal document requiring execution, stamping and registration. No estoppel can be created against the statute if a debenture requires, as is the case, to be registered according to law."

18. The learned judge relied on the maxim that equity looks on that as done which ought to have been done. But, with respect, he overlooks to apply the maxim that equity follows the law. In holding, therefore, that lack of amendment or ratification by a new document did not affect the validity of the securities, the learned judge erred. On the contrary, a new debenture providing machinery for the enforcement of the new charge was necessary and in its absence no receiver can be properly or legally appointed by the bank. Accordingly, the plaintiffs were entitled to challenge the appointment of the receivers as valid. It follows that their appointment was, as I hold, illegal, void and of no effect.

19. I now turn to consider the consequence of the events after the judgment which is all that this appeal is about. The plaintiffs' suit having been dismissed with costs and the defendants' counterclaim having been allowed with interest and costs the defendants commenced sale of the assets in the hands of the receivers. In doing so they sought to sell the securities, namely the two plots of land held by the first appellant on a leasehold title for a period of 99 years with effect from 1 October 1980. This property (the immovable property) is located off Mombasa Road while being within Athi River Township of Machakos District. Secondly, the defendants also sought to dispose of the plant and machinery which had been established for the production of textile cloth. It consisted of weaving department, processing department, printing department, packaging department and tailoring department with ancillary equipment. While every attempt was made to obtain an injunction and a stay these failed. Mr Le Pelley who appeared for the defendants before us and in the Superior Court submitted during the course of his opposition to an application for stay as follows:

> "We are not executing decree. Appeal will not be rendered nugatory. Bank can repay if appeal succeeds. There is no valuation......"

20. It is unfortunate that once the learned trial judge dismissed the plaintiffs' suit he did not assess any damages. It is always desirably that even in such a case damages should be assessed in case the plaintiff later succeeds. As was said by Law, JA In Selle –v- Associated Motor Boat [1968] EA 123 at 131:

> "As to the amount for which judgment should be entered, it is most unfortunate that the learned judge made no finding in this respect. It is always desirable, in a suit for damages, for the trial judges to make a finding as tot eh amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the defendant. As it is, I can see no alternative other than to remit this case to the High Court of Zanzibar, with a direction to the judge to adjudicate upon the issue of damages, and to enter judgment for the first and second appellants for such sums by way of special and general damages respectively as he shall deem fit."

21. It is also unfortunate that all the plaintiffs' assets and property have been sold despite objection and while this appeal had already been filed and was pending. I have already held that the appointment of the receivers was bad in law and therefore void. Then no person can take advantage of his own wrong. In my judgment the bank would have to restore to the plaintiffs possession of their assets.

22. If it should not do that because it had sold the assets, there might be a serous question whether it had forfeited its right altogether, the plaintiffs having an action for damages for conversion for any loss not recouped by return of the properties sold or return of the proceeds and I now need to purse that further.

23. Although it is general principle that damages are assessed once and for all at the time of the trial even though the plaintiff may subsequently suffer greater or lesser loss than was anticipated, an Appellate Court has power to receive further evidence, particularly of matters which have occurred after the date of trial – seeCurwen v James [1963] 2 All ER 619, CA, where the Court of Appeal itself made the re-assessment;Jenkins v Richard Thomas Baldwins Ltd [1966] 2 All ER 15, CA where the Court of Appeal reviewed the assessment having regard to further evidence; andMurphy v Wallwork (Charlton) Ltd [1969] 2 All ER 307, HL.

24. In the light of the above authorities the following emerged without much dispute:

    (1) The Court could take into account evidence since judgment;

    (2) Respondents had agreed to repay if the appeal succeeds;

    (3) The resultant monetary order to follow.

25. Both the advocates who appeared before us strongly urged the Court not to remit the case to the Superior Court but to undertake a re-assessment of such a monetary order.

26. Normally I would long hesitate to reject such a submission made by both advocates of the parties to a civil litigation, particularly when there are, as in the present case, advocates of acknowledged learning and considerable experience. There are other and compelling reasons not to remit this case to the Superior Court. First, it will entail a further long trial of several years with unjust delay when the case is already more than twelve years old. Secondly, parties will suffer further punishment in stress, time and expense. Thirdly, part of the record has clearly gone missing with memory of witnesses and/or parties faded or likely to have faded. Fourthly, the events of the litigation are close to twenty years old with no likelihood of a truly just decision being reached. Fifthly and finally, it would no longer be just to remit the case to the Superior Court for assessment of damages as little or no purpose is left since the land and all the machinery, subject of trial and receiverships, have already been sold leaving no possible assistance.

27. In making a re-assessment of the monetary order, I remind myself that there are no pleadings available making a claim for such damages. The absence of a pleading and claiming special damages precluded the plaintiffs from leading evidence as to loss they suffered of the value of their property. Where the loss suffered is capable of precise calculation this should, I agree, be pleaded as special damage and the exact amount stated. The instant case is very different. The plaintiffs' case was, that by reason of the sale of their property the plaintiffs have lost their goods permanently and have been deprived of an opportunity to have them valued. It is quite impossible to say what the various items would have realized and it is known that prices fluctuate. Who can say how the market would behave. The plaintiffs' claim is on quite a different basis: it is for damages for the value of their goods which defendants have sold pending this appeal which are not capable of exact assessment. In the circumstances, damages in this case are at large and are property claimed as general damages. I do not see how, as a practical proposition, these damages could have been claimed and pleaded as special damages.

28. In assessing the damages to be awarded I used, as a basis for my calculations, two reports submitted to us from the Bar by Mr Nowrojee for the plaintiffs. This was without any objection by Mr Le Pelley. Nor did he take any objection as to their admissibility at the time they were produced. His only objection was that there should have been a formal application as rule 42 of the Rules of this Court did not apply

since this was not done in the course of the hearing and would have no effect on the judgment. On this part Le Pelley gave three different version of his stand and was not helpful. First, he said, it would take him about a month's time to produce a valuation report which would entail an adjournment of hearing of the appeal. Secondly, he said, he had receipts of various sales which would give a fair indication of the value. Finally, he said he would need to cross examine the makers of the reports. He did not produce receipts nor any valuation reports. Nor did he apply for any cross examination order or adjournment. I take a dim view of this attitude and conduct in withholding evidence and being less than candid. I have therefore decided, where necessary, to draw adverse influence against the defendants. I have used the reports as a guideline and to do my best in a case where certainty was wanting which was occasioned solely by the sale of the property by the defendants.

29. As for the immovable property referred to above, it has been suggested that its proper value would be Kshs. 76,500,000/=. In the absence of any other assistance or indication otherwise, on my part doing the best I can I accept this figure as reasonable and fair. Not so for the indication of the value of the machinery and plants that were sold. I deducted a substantial proportion as I took the view that the total value of 1,906,958,959/= was a gross exaggeration and nowhere near the reality of the matter. This machinery and plant had been in use for a period of not less than 10 years and the suggested figures represent are placement of new items. The best I can do and having given most anxious consideration my assessment is 10% of what has been suggested and I assess a figure of Kshs 190,000,000/ = (rounded) as reasonable and fair, adding up to a total sum of Kshs.266,500,000/= (rounded). From this total sum should be deducted the defendants' counterclaim (allowed to be contested by way of an amendment) the principal sum which I propose to allow being KShs.9,000,000/=, the figure claimed by the defendants of Kshs 27,000,000/= includes interest of 10% p.a. calculated on monthly basis. Since I have already held the debenture void or not in existence the rate therein stipulated cannot apply. I allow the Court rate of interest of 14% to be calculated on the basis of simple interest for 10 years. This brings it to a round figure of 15,500,00/= leaving a net balance of KShs.251,000,000/= to be paid by the defendants to the plaintiffs.

30. In the resultant and, for the reasons above stated, I would allow the appeal with costs to be borne by the first respondent and the decree of the Superior Court dated 30 July, 1999 be set aside and substituted by the following:

(1) The receiver appointed by the Bank is declared null and void

(2) There is no valid debenture or one in existence.

(3) The first defendant shall pay to the plaintiffs the balance sum of Kshs 251,000,000/= with interest at 14% pa from 1 August, 2002 until full payment within 30 days failing which execution may issue and

(4) The first defendant shall also pay to the plaintiffs the costs of the suit before the Superior Court.

OWUOR JUDGMENT

31. I have had the advantage of reading in draft the judgment prepared by my brother, Lakha JA. I gratefully adopt his narrative facts and history of these proceedings. I am in agreement with his conclusions and orders proposed by him. I too would allow the appeal.

TUNOI JUDGMENT

32. # I have had the advantage of reading in draft the judgment of Lakha JA. I agree that the appeal be allowed but only for the reason which I shall now endeavour to set out.

33. The learned judge, Githinji J concluded the trial on 31st July, 1995. For unexplained reasons he did not deliver judgment until 30th July, 1999, a period of four years after the hearing. It has been argued by Mr Nowrojee, for the appellants, that the delay was inordinate and prejudicial to the interests of the appellants. Moreover, the argued, the delay only goes to show that there was not fair determination of the suit and this amounted to a denial of justice to the appellants.

34. In the case of Elizabeth Braganza v Tyson Habenga Civil appeal No 285 of 1997 unreported I had this to say:

> "In this case the delay (of 15 months) was too inordinate and should not have occurred unless there were compelling reasons which the learned judge should have explained in the judgment. No doubt, by the time she wrote her judgment, human as she is, the learned judge lacked the "feel" of the case. Also, the length of time between hearing the case and writing of judgment gave rise to suspicion that a miscarriage of justice had occurred through submissions being forgotten or lost."

35. These observations equally apply to the four years delay of the learned judge in delivering his judgment which is the subject matter of the appeal before us. In the circumstances I would agree with Mr Nowrojee that such a judgment so delayed lacks credibility of a judgment. For this reason alone the appeal must be allowed.

36. It is not in dispute that all the appellants assets, land and machinery included, have been sold by the receivers. The appellants have valued these at:

    Land Shs 76,500,000

    Plant and Machinery Shs 1,906,958,959

37. The Superior Court was not availed of these valuations and therefore did not have the occasion to assess the damages suffered by the appellants. It is indeed manifestly clear that what is demanded in the form of damages, about Shs 2 billion, is quite staggering, to say the least, considering the condition and state of the project before the receivership.

38. It is trite that damages are assessed once and for all at the time of the trial. It is rare and exceptional for a final Appellate Court to assess damages in a situation like this where it is obvious that the respondents would not have the opportunity of an appeal and yet it is faced with a huge crippling award. This court should not undertake the assessment especially in the particular circumstances of this case.

39. I would remit the case to the Superior Court for assessment of damages so that there would be an opportunity to appeal if any party is aggrieved.

40. As the majority does not agree, the order of the Court shall be as proposed by Lakha JA

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2002

PK TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

OWUOR

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JUDGE OF APPEAL