IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Gachuhi, Kwach & Lakha JJ A)

CIVIL APPEAL NO 112 OF 1989

DEVELOPMENT FINANCE

CO. OF KENYA LTD.....APPELLANT

JOSEPH K. MUIRURI .....APPELLANT

JOHN K. CEITA .....APPELLANT

AND

WINO INDUSTRIES LTD.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr Justice J F Shields) dated 20th April, 1989 in HCCC No 3220 of 1988)

JUDGMENT OF KWACH JA.

Wino Industries Ltd (Wino) filed a suit in the superior court against Development Finance Company of Kenya Ltd (DFCK) and Joseph Kamande Mwiruri and John Kanyora Geita (the receivers), seeking a number of reliefs including a declaration that Wino had fully repaid all monies legally due from it under two loan agreements entered into between DFCK and Wino; revocation of the appointment of the receivers and the discharge of charges, debenture and guarantees given as security for the repayment of the loans.

Wino's case as pleaded in its plaint was that the loan had been given in Kenya shillings and that it had repaid in Kenya shillings the amount legally due and owing to DFCK. DFCK filed a defence in which it contended that the first loan of Shs 2,000,000/- was given in Kenya shilling equivalent of Swiss Francs and Pounds Sterling and that the second loan was an amount of Dutch Guilders equivalent of Kshs 600,000/-. DFCK raised a counterclaim for a declaration that Wino was obliged under the loan agreement to repay the loans made to it by DFCK and interest thereon in the Kenya shilling equivalent of the foreign currencies specified in the statements of currencies issued by DFCK on 7th April, 1981 and 6th February, 1984.

Shields J heard the case and in one of the longest judgments I have ever seen from that learned judge ($71/_2$ typed pages), he gave judgment for Wino. He made no order on the counter-claim, but as he had found in favour of Wino, it followed as a matter of course that the counter-claim had been dismissed. The

judge held that the loans had been given in Kenya shillings, were repayable in Kenya shillings and had been fully repaid in Kenya shillings. DFCK and the receivers contest this view and have appealed to this Court on 6 grounds, namely:

(1) The learned trial judge erred in finding that, on a true construction of article 2.01, appearing in both loan agreements, the first appellant's obligation to lend was an obligation to lend a total of Kenya shillings 2.6 million, Kenya shillings being the currency of account, whereas the parties in fact agreed in article 2.01 that the currency of account was to be one or more convertible currencies to be determined by the first appellant.

(2) The learned trial judge further erred in failing to find as a fact that the first appellant determined to advance the first loan in Pounds Sterling and Swiss Francs as pleaded in paragraph 9 of the defence and that the first appellant determined to advance the second loan in Dutch Guilders as pleaded in paragraph 10 of the defence.

(3) The learned trial judge, as a consequence of having erred as stated in ground 1 of appeal, further erred in failing to find that precise compliance with article 2.11 was not a condition precedent to the loans being denominated in, or, in other words, having as their currency of account, foreign currency as pleaded in paragraph 11 of the defence.

(4) The learned trial judge erred in failing to give sufficient or any weight to his correct findings of fact that it was, from the outset, in the contemplation of the parties that the loans would be repaid in the Kenya shillings equivalent of the foreign currencies disbursed to the first appellant by the European Investment Bank.

(5) The learned trial judge erred in failing to hold, in the further alternative, that the respondents were estopped by the facts pleaded in paragraphs 13 and 14 of the defence from denying that the loans were made in the foreign currencies set out in the statements of currency and that the loans and interest are repayable in the Kenya shilling equivalent of the said foreign currencies at the rate of exchange prevailing at the date when payment became due as pleaded in paragraph 13 of the defence.

(6) That the learned trial Judge erred in failing to find that the statements of currency were accepted by the respondent as a result of the acts of the respondent pleaded in paragraph 14 of the defence.

Mr Deverell, for the appellants, argued grounds 1 to 4, which relate to the construction of the two loan agreements, together. The first agreement is dated 9th February, 1981. The clauses that have generated considerable controversy are to be found in article 2 and I will read them in full:

"2.01(a) Subject to the terms and conditions herein set forth DFCK agrees to lend to WIL and WIL agrees to borrow from DFCK an amount in one or more convertible currencies to be determined by DFCK equivalent to the sum of shillings Two million (Shs 2,000,000/-).

(b) The loan or part thereof shall be made available by DFCK from monies allocated by EIB (European Investment Bank) in accordance with the EIB finance contract.

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

2.11 If DFCK shall determine to advance the loan in a currency or currencies other than shillings DFCK shall so inform WIL stating the currency or currencies other than shillings (such currency or currencies

being below called “the specified currency”) in which DFCK wishes to make such advance. In such event the following provisions shall apply:

(a) The shillings equivalent of the loan in the specified currency shall be determined by DFCK using the exchange rates prevailing on the date of the disbursement and notified to WIL.

(b) Whatever part of the loan that has been advanced in the specified currency and interest thereon and any other charges provided for herein shall be payable in the specified currency’s equivalent in shillings at the exchange rate prevailing on the due date of payment.

2.12 Once the loan has been fully disbursed DFCK shall deliver to WIL a statement (hereinafter called the statement currencies, showing:

(a) The several 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 WIL the statement of currencies shall be deemed to form an integral part of this agreement.”

Mr Deverell submitted that under the terms of the first agreement there was no obligation on the part of DFCK to specify the convertible currency in which the loan was given before disbursement. According to him, DFCK could, as indeed it purported to do, specify the money of account and the money of payment after the event. For the definition the phrases “money of account” and “money of payment” I can do no better than refer to Lord Denning’s judgment in the case of *Woodhouse A C Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 2 QB 23 at page 54:

“At the heart of this case lies the difference between the money of account and the money of payment. It is this: The money of account is the currency in which an obligation is measured. It tells the debtor how much he has to pay. The money of payment is the currency in which the obligation is to be discharged. It tells the debtor by what means he is to pay. Take an example: Suppose an English merchant buys 20 tons of cocoa beans from a Nigerian supplier for delivery in three months’ time at the price of five Nigerian pounds a ton payable in pounds sterling in London. Then the money of account is Nigerian pounds. But the money of payment is Sterling.”

The judge held that the currency of account was Kenya shillings. Mr Deverell submitted that on a true construction of article 2.01 the parties had agreed that the currency of account was to be one or more convertible currencies to be determined by DFCK. According to him the determination was made in the letter dated 7th April, 1981 addressed to Wino, which was in the following terms:

“Dear Sirs

Statement of Currency of Loan

Reference is made to the loan agreement between us dated 9th February, 1981. In accordance with the requirements of article 2.12 of the loan agreement, there is set out below a statement of the currencies used in the disbursing of the loan of Shs 2,000,000/= equivalent.

1. The currencies disbursed are:

Currency	**Amount**	**Shillings**	**Percentage**
	Equivalent of Loan		
Swiss Francs	340,159.83	1,460,000	73
Pound Sterling	29,396.23	540,000	27
2,000,000		**100**	

2. Each payment of interest made in accordance with article 2.04 of the loan agreement, shall comprise the following proportions expressed as a percentage:

Currency Percentage

Swiss Francs 73

Pound Sterling 27

3. The amount of each currency payable on each of the payment dates set out below is as follows [specified].

Please confirm your acceptance of this letter by signing and returning the enclosed duplicate. As stated in article 2.12 of the loan agreement, this letter forms an integral part of that agreement.

Yours faithfully

S M Gachoki

Ag Accountant (R)”

Wino did not confirm its acceptance of this letter in the form required by the last paragraph but it did pay in Kenya shillings invoices expressed in those currencies as and when they fell due. Their conduct in that regard is the subject of the complaints in grounds 5 and 6 of appeal and I will come back to this latter.

Earlier, on 2nd April, 1981 DFCK had written to Wino in the following terms:

“Dear sirs,

Further to our letter of even reference dated 13th March 1981, we enclose herewith our cheque number 8155 for Shs 1,151,216.85 being the final balance of your loan of Shs 2 million. This payment is net of legal costs of Shs 43,232 loan advance of Shs 800,000 and the interest accrued thereon of Shs 5,551.15.

Meanwhile arrangement is being made to forward the statement of currencies of the loan in due course.

Please acknowledge receipt.

Yours faithfully

SM Gachoki

Ag Accountant (R)"

It is to be noted that the cheque was in Kenya currency and was stated to be

"the final balance of your loan of Shs 2 million."

The loan was never expressed as the Kenya shilling equivalent of Sterling Pound, Swiss Francs, Dutch Guilders or any other convertible currency. In the letter of 13th March, 1981 there is this paragraph:

"On the receipt of EIB loan funds, the balance of the loan will be remitted to you to complete the contracted loan of Shs 2,000,000." (Emphasis added).

It is clear to me beyond a peradventure that whatever may have been the original intentions of the parties during the course of negotiations and the understanding of DFCK as to the efficacy of the agreement, the loan ultimately given to Wino by DFCK was a Kenya shilling loan. I did inquire from Mr Deverell three times in the course of argument whether the agreement fully reflected what was agreed between the parties and he said it did. If the intention was that the money of account was to be one of the 3 convertible currencies as contended by Mr Deverell, this would have been inserted in article 12.01 of 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 the 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. I am reinforced in this view by the fact that all securities given by Wino under article 5 of the agreement (debentures, charges, guarantees, etc) state clearly that each one of them was given to secure a loan of Shs 2,000,000/- given to Wino by DFCK.

Once the loan was given in Kenya shillings as I have already found, there was no obligation on the part of Wino to pay back in a currency other than Kenya shillings which had to be the money of payment under the terms of the two agreements. The loan was not given in a currency other than Kenya shillings. It was given in Kenya shillings. The agreements are clear and the need to fall back on surrounding circumstances in interpreting the relevant provisions does not arise. Even if those circumstances were relevant, I would not have accepted Mr Deverell's invitation because the documents he wanted the Court to look at formed evidence of prior negotiations leading up to the conclusion of the agreements in question. In this regard I would refer to a passage in the judgment of Sir Charles Newbold, P, in the case of *Damodar Jinabhai & Co Ltd v Eustace Estates Ltd* [1967] EA 153 at page 155-F where he said:

"Before I deal with these submissions I think I should refer to four matters which were raised by Mr

Nazareth who appeared for the purchaser, though the precise reason for raising some of them was not very clear to me. The first matter was that the Chief Justice should have looked at a previous draft of the contract in order to determine the meaning of clause 7. The Chief Justice refused to do so and I entirely agree with his decision.

It is true that in certain circumstances evidence of surrounding circumstances may be admissible in order to interpret a document (see section 29, proviso 6 of the Evidence Act) but in no case is evidence of prior negotiations admissible (see *Virbai v Bhatt*) and the evidence of a prior draft which has been rejected, of a contract is *ipso facto* nothing other than evidence of prior negotiations."

In the same case Spry J A had this to say at page 159-B:

"I would begin by stating what I understand to be the law relating to the interpretation of contracts in Tanganyika. First, where the contract is in writing and its terms are clear and unambiguous, no extrinsic evidence may be called to add to or detract from it, but where necessary extrinsic evidence may be given of surrounding facts, although evidence of the negotiations is never admissible to vary the terms of the written contract."

In my own judgment in the case of *Kukal Properties Development Ltd v Tafazzal Hatimali Maloo & others* (Civil Appeal No 155/92)(unreported) I said:

"It was the appellant's case throughout that the agreements were conditional upon the respondents producing evidence of offers for loans from any financial institution by a given date and that the respondents had failed to do so. It was contended on behalf of the respondents, on the other hand, firstly, that through an arrangement made by the appellant through its agent, Nairobi Homes Ltd, the offers were to be obtained from the Housing Finance Company of Kenya Ltd, and secondly, that they had produced evidence of such offers within the contractual period. As regards the first contention, the respondents sought to rely on prior correspondence to modify or amplify special condition No 7. This, they could not do because, to my mind, the law on the point is clear. It is that in the construction of an agreement prior correspondence cannot be called in aid. The judge placed reliance on a letter dated 20th March, 1987, which was written before the execution of the agreements, by which Nairobi Homes Ltd confirmed to the Maloos that there was a loan arrangement of Shs 500,000/- with Housing Finance Company of Kenya Ltd provided they qualify for the same. If this was to be a term of the agreement, no doubt it would have been incorporated into the agreement which was subsequently executed on 23rd June, 1987. It was not. Such correspondence is regarded in law as forming part of the negotiation process."

In my considered opinion there is no substance in grounds 1, 2, 3 & 4 of appeal and I disallow them.

Grounds 5 and 6 of appeal deal with estoppel and waiver. The plea of estoppel which the judge rejected was grounded on the fact that statements of currencies were delivered to Wino by post. That Wino retained them and did not return the same to DFCK or in any way object to their contents and that having accepted them without demur and made payments against invoices submitted by DFCK over several years, had waived non-compliance with article 2.11.

Mr Inarmdar submitted that even if Wino did all those acts alleged, they did not in law amount to waiver or estoppel. He did not accept that Wino made any representations on which DFCK relied to its detriment. He cited the case of *Taylors Fashions Ltd v Liverpool Trustees Co* [1982] 1 QB 133 and submitted that before a plea of estoppel by acquiescence can prevail the case must be brought within the 5 *probanda* first laid down by Fry J in the case of *Willmott v Barber* (1880) 15 Ch D 96 at pp 105-106:

“A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description" In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant’s land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff’s mistaken belief of his rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.”

I do not, with respect, accept Mr Inamdar’s submission that the formulation of the requisites of estoppel in *Willmott v Barber* is comprehensive. In more recent cases a very much broader approach has been adopted by the English courts which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour. So regarded, knowledge of the true position by the party alleged to be estopped becomes merely one of the relevant factors in the overall inquiry and in certain cases it may even be the determining factor. See *Inwards v Baker* [1965] 2 QB 29; ER *Ives Investment Ltd v High* [1967] 2 QB 379; *Shaw v Applegate* [1977] 1 WLR 970, where Goff LJ after referring to *Willmott v Barber* said at p 980:

“But for my part, I share the doubt entertained by Sir Raymond Evershed M R in the *Electolux* 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.”

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 on the same basis over a number of years without raising any objection. For these reasons, it is contended on behalf of 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. Grounds 5 & 6 of appeal accordingly also fail.

For all these reasons, I would dismiss the appeal with costs. I would also make an order dismissing the counterclaim filed by DFCK with costs.

JUDGMENT OF GACHUHI JA.

On 9th February, 1981, Development Finance Company of Kenya Limited (DFCK) and Wino Industries Limited (WIL) entered into a loan agreement of Shs 2,000,000/- to assist WIL in its project which it had hatched at Nakuru for manufacturing writing ink. On 1st December, 1988 they also entered into another agreement similar to the earlier agreement for a further loan of Shs 600,000/- on the same terms. The

two loans were to be advanced by DFCK from funds disbursed to DFCK by European Investment Bank (EIB) in foreign currencies in accordance with EIB finance contract. Debenture, charges and guarantees executed by WIL and its directors were registered.

The two loans were disbursed to WIL in Kenya shillings on 2nd April, 1981 and 2nd February 1984. On the 7th April, 1981 and 6th February, 1984 DFCK forwarded statement of currency of loan as required by article 2.12 of the agreement which I will refer to later. The first loan was to be paid by 14 instalments and the other by 10 instalments at six months interval. DFCK forwarded to WIL invoices on due dates of repayment in foreign currencies converted into Kenya shillings and WIL paid them until the dispute arose in March 1987 before the due date of the 8th instalment, in the case of the first loan that the repayment should be in Kenya shillings and not in foreign currency.

DFCK appointed receivers and managers of the property and assets of WIL and took possession in order to recover the arrears of the instalments and the balance of the loans. WIL through its lawyers paid to DFCK by a bankers cheque a sum of Ksh 2,219,345.85 as being the total amount due and payable. WIL then filed suit against DFCK and the receivers and managers for injunction to restrain the receivers and managers from taking possession of the assets and for declaration that the plaintiff (WIL) has fully repaid all the monies legally due from it and that the first defendant (DFCK) do revoke the appointment of the second and third defendants as receivers and managers of the assets and property of the plaintiff and further that the first defendant do discharge and release debenture charges and guarantees. The plaintiff obtained an order for injunction and when the application came up for hearing *inter-partes* it was decided to proceed to hearing on affidavits and submission. Finally the learned trial judge gave judgment for the plaintiff and declared that the plaintiff has paid the full amount under the two agreements as pleaded in the plaint which judgment gave rise to this appeal.

The appellants appealed to this Court on grounds, the first 4 grounds on interpretation of the agreement and the other two on estoppel and waiver.

Mr Deverrel for the appellant argued that the learned trial judge erred in interpreting the two loan agreements and held that the obligation to lend and disburse Kshs 2.6 million was not in foreign currency as stated in the agreement but in Kenya currency and the disbursement of the loan was also in Kenya currency and so the money of account was Kenya shillings and the money of payment was also in Kenya shillings.

I do not believe that the respondent disputed that they agreed that the loan was to be obtained from EIB in foreign currency and the same to be disbursed to it in foreign currency. The articles relevant for the argument of this appeal are reproduced under:

“Article 2.01(a) Subject to the terms and conditions herein set forth DFCK agrees to lend to WIL and WIL agrees to borrow from DFCK an amount in one or more convertible currencies to be determined by DFCK equivalent to the sum of shillings two million (Shs 2,000,000/-)

(b) The loan or part thereof shall be available from monies allocated by EIB in accordance with the EIB finance contract.

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

2.11 If DFCK shall determine to advance the loan in a currency or currencies other than shillings, DFCK shall so inform WIL stating the currency or currencies other than shillings (such currency or currencies

being below called “the specified currency”) in which DFCK wishes to make such advance. In such event the following provisions shall apply.

(a) The shilling equivalent of the loan in the specified currency shall be determined by DFCK using the exchange rates prevailing on the date disbursement and notified to WIL.

(b) Whatever part of the loan that has been advance in the specified currency and interest thereon and any other charges provided for herein 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 2.10 shall be amended *mutatis mutandis* as though reference to the specified currency”.

The dispute between the parties is as contained in paragraph 10 of the plaint which states:

“After the said two loans had been disbursed a dispute arose between the plaintiff and the first defendant whether the sum of Kshs 2,000,000/- advanced pursuant to the first loan agreement and the further sum of Kshs 600,000/- advanced pursuant to the second loan agreement, should be treated for the respective purposes of the said agreements, as having been advanced in currencies other than Kenya shillings. The first defendant claimed that part of the said two loans should be treated as having been made in Swiss Francs a part in Pounds Sterling and the balance in Dutch Guilders and that therefore the said two loans should be repaid in the said foreign currencies equivalent in Kenya shillings at the rate of exchange prevailing on the due date of payment. The plaintiff on the other hand maintained (and still maintains) that in the event which happened, the said two loans were made and payable in Kenya shillings.”

I think I should express my difficulty here as I cannot find any consent dispensing with arbitration. Before the suit was filed, the appellant insisted on having the dispute referred to a single arbitrator but somehow there is no indication on record how the idea was shelved and the reference to arbitration was not raised in the defence. Perhaps in the light of *United Bus Services Ltd v The New India Insurance Co Ltd* (1969) EA 242, this was dropped.

The reason for this is because after the first agreement was signed there is a letter on record forwarding a certified copy of the agreement to the European Investment Bank, Luxenburg and copied to the respondent dated 9th March, 1981. On the same date the respondent wrote to the appellant requesting for an advance as follows:

“**M/s Wino Industries Ltd**

P O Box 1299

Nakuru

9th March, 1991

The Managing Director,

Development Finance Company of Kenya Ltd.

PO Box 30483,

Nairobi.

Dear Sir

Re: Wino Industries Limited

We would be most grateful if you could kindly agree to advance Shs. One million as the money is urgently required to us to open a letter of credit for the machinery and to complete the construction of the building. The balance of the loan can be disbursed when you have received an approval from European Investment Bank.

Thanking you.

Yours faithfully

Sgn."

There are other letters which may be relevant to my judgment though written before the signing of the first agreement. One letter is dated 8th January, 1981 to the Permanent Secretary Ministry of Commerce and it reads in part:

"We wish to advise you that we have approved a long term loan to Wino Industries Limited to finance the above project. The project will be financed from our funds from the European Investment Bank's Global Loan II to DFCK which will be in foreign currencies. We should be grateful if you would approve an import license to Wino Industries Limited to enable them to import machinery for the project. The machinery will be financed by us from the European Investment Bank funds."

The reason for referring to these letters is because both letters before and after the signing of the agreement refer to machineries which were to be bought from the funds provided by the European Investment Bank in foreign currencies.

There is also another letter dated 27th January, 1981 from the appellant to the respondent in which *inter alia* the first paragraph is as follows:

"I am pleased to inform you that the European Investment Bank has approved your project as suitable under the terms of its loan to DFCK and has advised us that the total loan to be made to WIL ie the equivalent in foreign currencies of Kshs 2,000,000/- will be disbursed in not more than two equal instalments."

The respondent negotiated for and obtained a loan from funds provided to the appellant in foreign currencies. The respondent applied and received an advance which was paid from the funds referred to above. The advance was paid in a letter dated 13th March, 1981 which reads in part:

"We are pleased to inform you that DFCK has agreed to advance you Shs 800,000/- pending EIB's arrangement to disburse the loan funds to DFCK for onward transmission to yourselves.

In the meantime, and in accordance with your request that you need these funds urgently to open a letter of credit for the importation of machinery and to meet part of the cost of the factory building currently under construction in Nakuru, we are prepared to advance to you the sum of Shs 800,000/- on condition that it will attract interest at 13% pa. This advance and accrued interest will be recovered form your loan.

On receipt of EIB loan funds, the balance of the loan will be remitted to you to complete the contracted loan of Shs 2,000,000/-."

The conditions in this letter were accepted.

On 2nd April, 1981 the balance of the loan, after deducting legal costs, the advance and accrued interest, amounting to Shs 1,151,216/85 was sent to the respondent. This letter further stated that meanwhile arrangement is being made to forward the statement of currencies of the loan in due course. The statement of currency of the loan in terms of article 2.12 was sent to the respondent on the 7th April, 1981 which provided as follows:

"Currency	Amount	Shilling	Percentage
Swiss Francs	340,159.83	1,460,000	73
Pounds Sterling	29,396.23	540,000	27
		2,000,000	100

The letter also provided the schedule for repayments in 14 instalments.

The respondent never signed the acceptance as requested but paid the invoices demanding instalments in foreign currencies as converted in Kenya shillings.

Similar steps were taken regarding the second loan of Shs 600,000/-. The second agreement was signed on 1st December 1983. The loan was disbursed on 2nd February, 1984 and the statement of currency of loan was sent on 6th February, 1984 which was four days later for 136,556.06 Dutch Florins equivalent to Kshs 600,000/-. Again, the respondent did not sign the acceptance as required by the agreement but paid the instalments as demanded in the invoices sent to the respondent claiming the repayment in foreign currency as in the case of the first agreement.

It has been submitted before us and in the superior court that the appellant did not notify the respondent before disbursement of the amount in foreign currency to be disbursed or the rate of exchange. I cannot find any basis of this claim in the agreement. The only notification I can find is under article 3.01 (g) and which notification is a letter dated 13th March, 1981 referred to above. Article 2.03 provided for notification thus:

"2.03 At any time after DFCK shall have notified WIL in accordance with article 3.01(g) that EIB has issued to DFCK a letter of allocation for the loan or part thereof under EIB finance contract disbursement of the loan shall be made by DFCK by one or more instalments upon request by WIL in writing delivered by DFCK within 14 days of such notification by DFCK to WIL and against each such disbursement WIL shall deliver to DFCK such receipt therefore as DFCK may reasonably request.

3.01(g) That DFCK shall have notified WIL that EIB has issued to DFCK a letter of allocation for the amount of the loan or part thereof".

I cannot find in the record, unless it was left out by mistake, a letter applying for payment by WIL as required by article 2.03.

Article 2.11 provides that DFCK shall so inform WIL stating the currency or currencies other than

shillings called “the specified currency”. There is no obligation on the part of DFCK to inform WIL the currencies before disbursement because, the currencies will not be determined until received from EIB and the same to be converted to shillings. The debtor received the equivalent of foreign currencies in Kenya shillings 2.6 million. There will be no purpose in informing the debtor the amount of foreign currencies before disbursement which amount may be different at the time of payment. Furthermore, there is no specified time for informing the debtor of the number of currencies since notification provided for is after disbursement which DFCK did in letters dated 2nd April, 1991 and 6th February, 1984. In my view this was a sufficient notification that specified currency was to be notified later.

There was no mistake of fact in not specifying foreign currency before disbursement. WIL accepted the position as it were and continued with repayment as invoices were sent to them. The entire transaction should be looked into. The way I see it is that this was and still is a tripartite transaction. The European Investment Bank has an agreement with the appellant (DFCK) for disbursing foreign currency to DFCK from which fund DFCK disbursed to the borrower. The European Investment Bank does not have in its transaction denomination in shillings that could be disbursed to the respondent. It deals in currencies convertible to shillings. When the appellant receives foreign currencies, it disbursed the same to the borrower converted into local currencies since the borrower does not deal in foreign currencies. The disbursement in Kenya shillings is the more appropriate currency, but the repayment has to be made in Kenya shillings equivalent to the foreign currency. It is for that reason that the foreign currency is protected in case of devaluation by reference to “money of account” and money of payment in article 2.11. These two phrases are well explained by Lord Denning MR in *Woodhouse AC Israel Cocoal Ltd and another vs Nigerian Produce Marking Co Ltd* (1971) 2 QB 23 at page 54 Letter C:

“At the heart of the case lies the difference between the money of account and the money of payment. It is this: The money of account is the currency in which an obligation is measured. It tells the debtor how much he has to pay. The money of payment is the currency in which the obligation is to be discharged. It tells the debtor by what means he is to pay.”

In my judgment, the obligation to lend was in foreign currency being “money of account” and the obligation to repay was in Kenya shillings converted into foreign currency. I do find that the rate of exchange cannot be ascertained before money of account is disbursed on a particular date. Equally the same the total foreign currency cannot be ascertained until after conversion. The agreement provides in article 2.12 that once the loan has been fully disbursed, the appellant shall deliver to the respondent a statement of currencies substantially in the form set out in schedule C which is part of the agreement. The appellant did comply with the agreement and forwarded to the respondent the said statement on 7th April, 1991 in connection with the first loan which was disbursed on 2nd April, 1981 and in the case of the second loan the statement was sent on 6th February, 1984, the loan having been disbursed on 2nd February, 1984. It may be argued and Mr Inamdar tried to do just that that the statement of foreign currencies should have been prepared before or simultaneously with the disbursement of the loan. For me, I would still say that such argument could merely be an afterthought because that is not what the agreement provided. The agreement is specific on this because the rate of exchange between EIB currencies and Kenya currency cannot be ascertained on the day disbursement was made but thereafter and that is what is provided for by article 2.12.

On my part, my view is different from that of the trial judge, that is, the loan was disbursed in foreign currency and the foreign currency is the money of account and the money of payment is in Kenya shilling convertible to foreign currency so that the European Investment Bank will be repaid in the same currency which the loan was disbursed. This, in other words, I see it as a tripartite transaction as stated above, in that the position of the appellant is that of an agent to facilitate the lending of money in foreign currency from EIB to the borrower WIL. The money received is passed over and so the repayment is in the same

manner – through the agent to EIB. This concludes the argument on the first four grounds.

Grounds 5 and 6 relate to estoppel and acquiescences (waver). Mr Deverrel submitted that the respondent having received claim of instalments payable in foreign currencies equivalent to Kenya shillings, and having paid the bills after many years, it cannot be said that the respondent acted in mistake belief so as to defeat the appellants claim. Mr Inamdar in reply, submitted that the respondent had no legal duty to point out the appellant's mistakes.

I do not accept Mr Inamdar's submission because the plaintiff having realized the mistake, if any, cannot sit on it and let the other party to go ahead with committing the same mistake which he should have pointed out to the detriment of the defendant. This defence of estoppel and acquiescence was considered in the case of *Edgar Bernard Clifton vs Arther John Hawley* (1966) EA 44 at page 51 letters B & C where Harris J referred to the decision of the House of Lords in *Cairncross vs Lorimer* (1860) 3 LT 130 at page 117 where the following conclusion was quoted:

"It is well settled that if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal."

This authority was applied by the House of Lords, in *Houghton vs Nothard, Lawe & Wills Ltd* 1928 AC 1, (1927) 44 TLR 76, by the Privy Council in *Sarat Chunder Day vs Gopal Chunder Lala* (1982) LR 19, 1A, 203, by the Court of Appeal in England in *In re Eaves, Eaves vs Eaves* (1940) Ch 109, (1939) 4 AER 260; and in *Re Williams Porter & Co Ltd* (1937) 2 All ER 361.

The citation also adds in the case of *Sarat Chunder Day v Gopal Chander Lala* (supra) that:

"the principle applies even if the party whose conduct is in question was himself acting without full knowledge or in error".

The learned trial judge in his opening remarks in the judgment commented:

"It was contemplated by both parties that the loans should be made by the 1st defendant from money made available to the 1st defendant by EIB. These monies were disbursed to the lst defendant in foreign convertible currencies, the 1st defendant then paid the same sum to the plaintiff who then repaid the amount in question to the 1st defendant in the Kenya shillings equivalent of the foreign currencies disbursed.

Since the making of the loans the Kenya shillings has had a disastrous cancer on the foreign exchange market and the borrowers if the contemplated transaction has to be performed in the way intended and contemplated will have to repay approximately 3 times the amount they would have had to repay had the Kenya shilling remained stable in the foreign currency market."

This to me is the correct statement of fact and I agree with it. The respondent having realized that it is bound to perform its obligation at a high cost is trying to avoid the agreement that it did not know that it were to repay in Kenya shillings equivalent to the foreign currency lent to it. The correspondence that were exhibited display the hardship the respondent had undergone in meeting its obligation and even in collecting its debts. Neither the DFCK nor EIB is responsible for the devaluation of the shillings.

On my part, the learned trial judge erred in the interpretation of the agreement and did not consider the

last two grounds of appeal commented above. There is nothing wrong with the agreement and the respondent having honoured the bills in foreign currencies it is estopped by conduct and cannot rely on any mistake of fact in the payments made and in the balance of the arrears of instalments.

The appellant had filed its defence with counter-claim. The counter-claim was for a declaration that the plaintiff is obliged by the loan agreement to repay the loans made to it by the 1st defendant (appellant) and interest thereon in the Kenya shillings equivalent at the time of payment to the foreign currencies specified in the statements of currency of loan dated 7th April, 1981 and 6th February, 1984 respectively. The trial judge did not deal with the counter-claim. In view of the fact that the trial judge gave the reliefs sought, the counter-claim is deemed to have been dismissed with costs. On appeal, the appellant prayed that the judgment of the High Court be set aside and judgment be entered on the 1st appellant's counter-claim.

I would declare that the plaintiff/respondent has not paid what it was bound to pay in full. I would therefore allow this appeal with costs and set aside the judgment of the superior court and substitute therefore judgment dismissing the plaintiff 's suit with costs and giving judgment for the 1st defendant's counter-claim.

As my brothers are of the view that the appeal should be dismissed with costs, there will be a judgment by the majority dismissing both the appeal and DFCK's counter-claim with costs.

JUDGMENT OF LAKHA JA.

This appeal is by the unsuccessful defendants against the decision of the superior Court (Shields J) given on April 20, 1989 whereby he granted to the plaintiff (the respondent) the reliefs claimed by it in its plaint. The issue is whether the two loans disbursed by the first appellant to the respondent should be treated as having been made in foreign currencies and should, therefore, be repaid in the said foreign currency equivalent in Kenya shillings at the rate of exchange prevalent on the due date of payment or, as the respondent contends should, in the events which happened, be made repayable in Kenya shillings.

By a loan agreement dated February 9, 1981 and made between the appellant of the one part and the respondent of the other (the first agreement) the appellant lent and advanced to the respondent a sum of Kenya shillings Two Million (Kshs 2,000,000) upon the terms and conditions therein mentioned. One of the provisions which is fundamental to these proceedings is article 2.01(a) which is as follows:

"Subject to the terms and conditions herein set forth DFCK (the first defendant) agrees to lend to WIL (the plaintiff) and WIL agrees to borrow from DFCK an amount in one or more convertible currencies to be determined by DFCK equivalent to the sum of shillings Two Million (Shs 2,000,000)."

By a further loan agreement dated December 1, 1983 and made between the appellant of the one part and the respondent of the other (the second agreement) the appellant lent and advanced to the respondent a further sum of shillings Six Hundred Thousand (Kshs 600,000) upon the terms and conditions there-in mentioned and contained, *inter alia*, a term similar to the one set out above in this further second agreement.

It is not in dispute that disbursement of the sum of Kenya shillings Two Million pursuant to the first agreement and that of shillings six hundred thousand under the second agreement were, completed on April 2, 1981 and February 2, 1984 respectively. It is also common ground that both the loans were in fact disbursed by the first appellant in Kenya shillings. On July 25, 1988 the first appellant wrote to the

respondent alleging that it was in default under both of the said loan agreements and gave notice that all the principal monies, interest and other charges were due and payable and that the securities given thereunder were enforceable. On July 29, 1988 the first appellant purporting to act under the debentures, (issued by the respondent to the first appellant pursuant to article 5 of the first agreement), appointed the second and third appellants as receivers and managers of the property and assets of the respondents. On August 2, 1988 the respondent through its advocates paid to the first appellant, by way of a banker's cheque, a sum of Kshs 2,219,345.85 as being the total amount due and payable to the first appellant under the aforesaid two loan agreements and called upon the first appellant to revoke the appointment of the second and third appellants as such receivers and managers and to discharge all the securities given in pursuance of the said two loan agreements. Upon its failure so to comply the respondent on August 8, 1988 instituted a suit in the superior court claiming a declaration, that the respondent had fully repaid all monies legally due from it under the first and second agreements, revocation of appointment of the second and third respondents a receivers and managers, a discharge and release of all securities and interim injunction.

On the same day, ie August 8, 1988 the respondent also filed an application for an interlocutory injunction and an *ex-parte* order obtained on the same day. The *inter-partes* hearing of the application was adjourned several times until February 2, 1989 when it was heard. By then the respondent had already filed an affidavit in support of the application through its director and so had the appellant through its Senior Legal Officer. There was a further affidavit presumably in reply on behalf of the respondent. These affidavits accompanied by their exhibits extended to about 440 pages.

At the announcement of *inter partes* hearing of the injunction both counsel, not surprisingly, agreed that the hearing of the application be treated as a full hearing of the action. I find nothing wrong with adopting such a procedure in an appropriate case (as this was) with a view to saving time and costs. Counsel may, on an application for an interlocutory injunction, consider that the facts and merits of the case are so clear that the Court is in as good a position to decide the case then as it would be at the trial of the action. If parties are so satisfied then, by consent, they may treat the application as the trial of the action and take final orders on the hearing of the application as was, in my opinion, very properly done in the present case.

The judge held that the money of account was Kenya shillings and that there was no estoppel. The judgment of the learned judge was attacked at the hearing of the appeal on two principal grounds. It was submitted, first, that as a matter of construction of the two loan agreements the money of account was foreign currency and that, secondly, there was an estoppel precluding the respondent the respondent from asserting otherwise.

The first question that arises for consideration is whether the money of account in the agreements was foreign or Kenya shillings. The money of account is the currency in which an obligation is measured. This was so held in the case of *Woodhouse AC Israel Cocoa Ltd SK vs Nigerian Produce Marketing Co Ltd* [1971] 2 QB where at p54 Lord Denning defined the money of account as follows:

"At the heart of the case lies the difference between the money of account and the money of payment. It is this: The money of account is the currency in which an obligation is measured. It tells the debtor how much he has to pay. The money of payment is the currency in which the obligation is to be discharged. It tells the debtor by what means he is to pay."

The determination of this question depends entirely on the construction of article 2.01(a) above set out. Applying the acknowledged canon of construction and giving the words used their natural ordinary and popular meaning the money of account is clearly set out to be Kenya shillings two million (Kshs

2,000,000). That is the currency in which the obligation of the respondent is measured and it tells the respondent how much he has to pay. I do not see any difficulty in construing the article as setting out the money of account being the Kenya shillings. The sum of money which the respondent was under obligation to pay to the appellant is not expressed in foreign currency and in my judgment it is clear that having regard to the terms of article 2.01(a) read together with article 2.11 the obligation of the respondent was clearly measured in Kenya shillings.

If the first appellant had determined to advance the loan in the currencies other than Kenya shillings and had followed the machinery set up by the first appellant it could have turned the Kenya shilling ie, a loan where the money of account is Kenya shillings into a foreign currency loan, ie a loan wherein the money of account is a specified foreign currency but the first appellant never followed the machinery so set up by itself. Indeed, the learned judge also held likewise when in his judgment he said:

“I must accordingly hold that the two loan never became foreign currency loans by the failure of the defendants to operate the machinery devised by themselves (the documentation for the loans was produced by the defendants lawyer) to turn a Kenya shilling loan to (that is a loan where in the money of account is Kenya shillings) into a foreign currency loan ie a loan wherein the money of account is a specified foreign currency.”

I am fortified in my conclusion by the provisions of article 2.10 of the first agreement which provides as follows:

“The obligation of WIL to pay in shillings the aggregate amount of the principal of and interest on the loan shall not be deemed to have been motivated 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 to be enforceable 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.”

In my judgment, therefore, the terms of the agreement make it plain that the obligation was to repay the loan in Kenya shillings. Further confirmation of this construction of the agreement is derived from the provision of article 2.11(b) which provides as follows:

“Whatever part of the loan that has been advanced in the specified currency and interest thereon and any other charges provided for herein shall be payable in the specified currency’s equivalent in shillings at the exchange rate prevailing on the due date of payment.”

It is common ground that the appellant actually disbursed both the loans in Kenya shillings and that it had not given any prior notice specifying any foreign currency in which it had decided to advance the loan. The need, of course, for prior notification or for delivery of statement of currency did not arise as the loan was made in Kenya shillings repayable in Kenya shillings and no foreign currency was involved.

Mr Deverell for the appellant while conceding that evidence of prior negotiations was strictly inadmissible relied on the dictum of Sir Charles Newbold P in *Damondar Jihabhai & Co Ltd and another v Eustace Sisal Estates Ltd* 1967 EA 153 at p 156 where he said as follows:

“Whatever may be the form of words, once the intention of the parties can be ascertained the Courts will give effect to that intention unless the words used cannot possibly bear that meaning. Further, if the words used are on the face of them meaningless in relation to the surrounding circumstances in which

they were used, then, if the Court is satisfied that the words used were intended to give effect to an agreement between the parties, the Court will not discard the words as meaningless or complete surplusage but will construe them in such a manner as to give effect to the intention of the parties; and in order to ascertain that intention the Court will have regard to the surrounding circumstances."

That evidence of surrounding facts may be considered is also clear from the decision of the House of Lords in *Prenn v Simmonds* [1971] 3 All ER 237 1971 in which it was held that:

"Although in construing a written agreement the Court is entitled to take account of the surrounding circumstance with reference to which the words of the agreement were used and the object, appearing from those circumstances, which the person using them had in view, the Court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations. Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and, objectively, the 'aim' of the transaction".

I therefore now turn to consider other circumstances and material available to determine if the construction I have placed is consistent with those surrounding circumstances. I will first examine some of the letters. The first is a board paper dated May 13, 1980 where the appellant clearly states that it was proposed to advance shillings two million (Shs 2,000,000) which in its board paper of May 8, 1980 the board was requested to approve an investment of shillings two million (Shs 2,000,000). In its letter of June 24, 1980 the first appellant advised the respondent that its board had approved an investment of Shs 2,000,000 and in its letter of September 2, 1980, the first appellant wrote to its advocates with a copy to the respondent stating that its board at its meeting held on June 5, 1980, approved loan of Shs 2,000,000. Again, by its letter of September 4, 1980 the first appellant's advocates wrote to the respondent asking for a copy of a resolution to borrow a sum of Shs 2,000,000 from the first appellant which was furnished. Finally, in its letters of March 13, 1981 and April 2, 1981 the first appellant wrote to the respondent stating that the contracted loan was for Shs 2,000,000. All these letters clearly show that the money of account was Kenya shillings.

As if that is not enough, the security documents (ie debenture, two legal charges and two guarantees all drawn by the first appellant's advocates) to secure both the loans clearly show that the money of account was Kenya shillings. The judge clearly held that the money of account of the two loans was Kenya shillings. In my judgment, there is no room or material for finding that the money of account was a foreign currency.

I, therefore, do not trouble myself (nor is it necessary to do so) with the additional argument of construing article 2.11 and 2.12 of the first agreement in view of the construction I have already placed on this matter.

Mr Deverell submitted, in the alternative, that if the Court found his construction of the agreement wrong (as I do) then he would rely on the ground of estoppel. This is based on the argument that the respondent did not object to the statement of currency expressing the loans as having been disbursed in foreign currency, not returning the loans, not objecting to the currency statements sent or objecting to subsequent invoices. Mr Inamdar replied to this contention at length submitting that the facts did not constitute in law either a waiver or an estoppel, that the silence on the part of the respondent could not constitute estoppel where there was no legal duty to speak and there was no duty to object when both parties were suffering from the mistake.

It is sufficient for the purposes of this judgment to reproduce what the learned judge found in dealing with

this aspect of the case. It appears at p 506 of the record and I reproduce it as hereunder:-

“The facts giving rise to the estoppel are basically the failure of the plaintiffs to point out to the defendant the error of the defendants in their operation of a contract of their own (defendants) devising and then payment of the sums demanded. The plaintiff did not represent anything. I am convinced that they were as ignorant of the true effect of the contract as were the defendants and that even if the silence was broken the defendants could not have remedied the situation that their carelessness had put them into. No representation by silence or payment had induced the defendant to do or refrain from doing anything. Accordingly there is no basis whatsoever for applying any of the doctrines of estoppel nor can I see that it is essentially just and righteous to exclude the true construction of the contract to the manner in which it has been operated.”

With the entirety of that paragraph, I respectfully agree.

Before I conclude, there are two matters which I must mention. First, it appears that the learned judge overlooked to deal with the counter-claim. Both counsel agree that this is an oversight. In view of the construction I have placed on the agreement and having regard to my concurrence with the judge on the issue of estoppel it follows that the counterclaim fails. Secondly, the respondent filed a notice of additional grounds affirming the decision of the learned judge. In view of the conclusion I have reached, it is not necessary, I think to deal with these grounds.

Accordingly and, for the reasons above stated, I would dismiss this appeal with costs and vary the decree appealed against by including an order dismissing the counter-claim with costs.

Dated and delivered at Nairobithis 20th day of December 1995

J.M GACHUHI

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JUDGE OF APPEAL

R.O KWACH

.....

JUDGE OF APPEAL

A.A LAKHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of theoriginal.

DEPUTY REGISTRAR