Case Number:	Civil Appeal 181 of 2004
Date Delivered:	31 Jul 2008
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Philip Kiptoo Tunoi, John walter Onyango Otieno, Erastus Mwaniki Githinji
Citation:	Kenya Commercial Bank Limited & another v Samuel Kamau Macharia & 2 others [2008] eKLR
Advocates:	-
Case Summary:	**Unjust enrichment** – economic duress - application of the doctrines of unjust enrichment, restitution and economic duress – ingredients of the doctrine of unjust enrichment – circumstances in which restitution may be denied – claim for the repayment of monies allegedly paid under economic duress and failure of consideration – monies having been paid under a deed executed by the claimant and with the representation of advocates – claimant having attested to his indebtedness and not having protested against the payment – whether the claimant had been the monies voluntarily and under a contractual obligation so that the doctrines of economic duress and unjust enrichment were excluded.
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	1263 of 1992
Case Outcome:	Appeal allowed
History County:	Nairobi

Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 181 OF 2004

KENYA COMMERCIAL BANK LIMITED ..... FIRST APPELLANT

KENYA COMMERCIAL FINANCE COMPANY LIMITED .....SECOND APPELLANT

AND

SAMUEL KAMAU MACHARIA .....FIRST RESPONDENT

MADHUPAPER INTERNATIONAL LIMITED .....SECOND RESPONDENT

KENYA NATIONAL CAPITAL CORPORATION LIMITED….....THIRD RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Kuloba, J.) dated 23rd January, 2003

in

H.C.C.C. No. 1263 of 1992)

****

JUDGMENT OF TUNOI, J.A

This is an appeal by Kenya Commercial Bank Limited and Kenya Commercial Finance Company Limited, the first and the second appellants respectively, from the judgment of the High Court of Kenya at Nairobi, (Kuloba, J.) dated 23rd January, 2003 whereby the learned Judge entered judgment for ***Samwel Kamau Macharia*** and ***Madhupaper International Limited***, the first and the second respondents respectively, against the appellants and Kenya National Capital Co-operation Limited the third respondent jointly and severally in the sum of Shs.56 million allegedly obtained by the appellants from the first and the second respondents through coercion, intimidation, duress and executive blackmail.

For the purposes of convenience I shall hereinafter refer to the first appellant as ***KCB***, the second appellant as ***KCFC***, the first respondent as ***Macharia***, the second respondent as ***Madhupaper*** and the third respondent as ***KNCC***.

KCB, **KCFC** and **KNCC** are a reputable bank and financial institutions, respectively, operating in and outside Kenya. At the time material to these proceedings the Government of Kenya was their sole shareholder. ***Macharia***, as will become apparent in this judgment, is an enterprising businessman in the country and Chairman of the Board of Directors of Madhupaper.

It is the case for Macharia and Madhupaper as can be gleaned from the records placed before us and the testimony tendered in the trial court that in or about 1976 Macharia promoted Madhupaper with the aim of manufacturing toilet tissue used to make toilet paper, the raw material being waste paper collected within the City of Nairobi. He was the principal shareholder of Madhupaper with 95% of the shares. In order to commence

operations, Madhupaper borrowed Shs.30 million from KCB, Shs.13 million from KCFC and Shs.7 million from KNCC. As security for the loans Madhupaper executed an "All Assets" debenture charging all the Company's undertakings, goodwill, assets, book debts and property in favour of KCB, KCFC and KNCC. It is noteworthy that there is no dispute as to the fact of the borrowings and the existence of the debenture and the supplemental debentures.

It is not an exaggeration and the learned Judge so found that Madhupaper did not have a happy beginning. First of all, it did not commence production immediately on incorporation. Secondly, it is apparent that the monies initially borrowed were utilized on feasibility studies and pre-project costs which had nothing to do with the mooted production. It was not surprising, therefore, that soon thereafter, repayment became a problem resulting in serious default and in or about October, 1985 the officials of KCB and KNCC went to the offices of Madhupaper accompanied by ***Mr. R.L.E. Kerr*** and ***Mr. R.D. Cabil,*** local Receivers, and demanded of the Company immediate payment of all monies owed to KCB and KCFC and warned that if no payment was immediately forthcoming then the two aforementioned persons would take over at once as receivers and managers of Madhupaper. The total sum then demanded was Shs.53,780,000/= or approximately Shs.54,000,000/= for convenience. It is indisputable that no money was immediately forthcoming and Madhupaper was soon thereafter placed under receivership by virtue of the debenture. The Receivers appointed by the debenture – holders were Messrs ***Peat Marwick***, Certified Accountants.

It is pleaded in the Amended Plaint that during the course of receivership, the Receivers invited tenders for the purchase of the assets of Madhupaper and this move compelled Macharia to seek negotiations with KCB, KCFC and KNCC. At the same time Macharia and Madhupaper filed several suits against the Government, KCB, KCFC and KNCC. These cases included: -

H.C.C.C NO. 3438 of 1985

H.C.C.C. NO. 1126 of 1986

and

H.C.C.C. NO. 3888 of 1988

The reliefs sought in the cases were, *inter alia*, compensation from the Government because of its alleged deep involvement in the affairs of Madhupaper by the Chief Secretary; the lifting of the receivership and orders allowing Macharia and Madhupaper to repay the outstanding debts allegedly because KCB and its subsidiary financial institutions had refused to accept payment offered by both Macharia and Madhupaper. After the suits were lodged in court, the parties embarked on a settlement and the outcome of the intense negotiations between the Government and all the parties was that there should be a settlement with a view to lifting the receivership. The learned Judge found that three basic points were agreed upon between all the parties as follows: -

"1. Macharia and Madhupaper were to pay to the appellants Shs.54 million agreed as the entire amount of the loans owed by Macharia and Madhupaper to the appellants and the payment would be in full and final settlement of the debt.

2. Macharia and Madhupaper would withdraw all the then pending cases filed against the Government and the appellants.

and

3. Upon Macharia and Madhupaper fulfilling the foregoing two undertakings, the appellants would

unconditionally lift and withdraw the receivership, discharge the charges and debentures, and hand back Madhupaper to Macharia."

Macharia testified in the superior court that upon the above settlement being reached he carried out his undertaking. For example, he paid Shs.54 million and withdrew all the court cases. He produced before that court documentary evidence to support his oral testimony. He went on to state that the appellants on their part and in fulfillment of the settlement reached temporarily removed the receiver managers and allowed Macharia to resume the management of Madhupaper. However, this lasted for one week only as the Chief Secretary and the appellants ordered Macharia out of the Company and the receivership was slapped back and in a surprise move the appellants returned to Macharia and Madhupaper the sum of Shs.54 million which he had earlier on paid pursuant to the settlement. Macharia avers that no explanation was given for this sudden turn of events and it is pleaded in the Amended Plaint:-

"11. Thereafter Mr. Joseph arap Letting then the Permanent Secretary in the Office of the President and Secretary to the Cabinet published to the Plaintiffs words to the effect that His Excellency the President had issued a directive that the aforesaid money, Kshs.54 million, be returned to the Plaintiffs and the KCB proceed to sell the assets of Madhupaper International Limited to Malde Transporters Limited. The said Letting intimated to the Plaintiffs that the proposed sale would go on unless the Plaintiffs paid Kshs.110 million, an amount that was kshs.56 million in excess of the Kshs.54 million legally owing.

13. As a result of the communications aforementioned the Plaintiffs entered into negotiations with Barclays Bank overseas for securing the Kshs.110 million then demanded by the said Mr. Letting as a condition precedent to the second plaintiff's getting control of the assets of Madhupaper International Limited. The plaintiffs made it known to the Kenya Commercial Bank that they had raised the Kshs.110 million then being demanded.

14. The defendants then informed the plaintiffs that an agreement for sale of the assets of Madhupaper International was already finalized with Malde Transporters Limited. Subsequently the defendants proposed and produced an agreement to rescind the agreement aforesaid in which they would pay the deposit paid by the buyer and the plaintiffs would pay the sum of Kshs.110 million. The agreement was entered into and signed by the plaintiffs, the defendants, the buyer and receivers."

Macharia told the trial court that despite his and Madhupaper's payment of the sums demanded, the assets of the Company were not handed back to them as earlier on agreed between the parties and that, instead, what happened was that the appellants unexplainably had those assets given to ***Ketan Somaia***, ***Ajay Shah*** and ***Isaac Githutu*** in return for the trio paying a sum of Shs.250 million to Macharia and Madhupaper. In the suit, Macharia and Madhupaper demanded the payment of Shs.56 million allegedly extracted from them under undue influence and fraud. The sum is said to represent the difference between the legal entitlement to the appellants i.e. Shs.54 million and the sum that was paid to them by Macharia and Madhupaper to lift the Company from receivership i.e. Shs.110 million plus interest accrued thereon as from the date of payment to the appellants.

The appellants, as defendants in the suit, filed detailed statements of defence which were later amended. In essence they aver that Madhupaper always represented by Macharia as the Chairman of its Board of Directors was granted various banking accommodation by the respondents on the security of Debentures and charges registered against Madhupaper's property. It is the appellants' main contention that the amount outstanding as at 22nd, June, 1989 was as follows: -

KCB Shs. 66,653,416.70

KCFC Shs. 25,574,174.49

KNCC **Shs. 19.453,778.75**

TOTAL **Shs.101.681.369.94**

The appellants state that these sums were duly acknowledged in writing by Macharia as agent and representative of Madhupaper and witnessed by the then Madhupaper's Company's Advocates Messrs. P.K. Muite and M.M. Ng'ang'a, both partners in the firm of Messrs. Waruhiu & Muite. There was default in the repayment of the monies due to the appellants and KNCC, and consequently, receiver – managers were appointed. However, Madhupaper and Macharia would not let go their assets. After lengthy negotiations between the parties the receivership was lifted upon certain conditions, the principal one being payment by Madhupaper and Macharia of a sum of Shs.54 million and withdrawal and abandonment of the cases aforesaid. Subsequently, Madhupaper tendered cheques totaling that sum and abandoned litigation but the appellants returned the cheques and proceeded to sell the companies assets, because of what they called certain "unacceptable terms of tender".

The appellants contended that in exercise of the powers granted to the Receivers by the Debenture the assets of the Company were sold to **Ravi Investments Limited** who had earlier on made a deposit of the purchase price. The appellants further averred that Macharia and Madhupaper offered to redeem the amount outstanding to the financiers after the completion of the Sale Agreement by the Receivers whereupon the two: -

(a) Entered into an agreement with Ravi Investments Limited to rescind the Sale Agreement.

(b) Agreed to pay the whole amounts due or owing to the Financiers.

The appellants further pleaded in their defences that the Company additionally agreed, inter alia, to indemnify KCFC against all claims, obligations and liabilities arising out of the Receivership.

It is also the appellants' case that prior to the conclusion of the sale to the third party Madhupaper and Macharia intimated to the appellants that they wished to pay the total amount due to the appellants and the third party purchaser so that they retrieve their assets. The appellants through its official ***Simon Mburu Kariuki*** (DW2) testified that at that time the third party purchaser had already paid the agreed consideration for the purchase of the assets of Madhupaper and as a consequence of this, a further negotiation and another agreement between the parties herein and the purchaser was entered into. The appellants contend that by entering into that subsequent agreement Madhupaper and Macharia are estopped from bringing and maintaining the action which has given rise to this appeal.

The trial in the superior court was protracted. It spanned a total period of ten years. In a scholarly; and also, well researched judgment delivered on 23rd January, 2003 the learned Judge, Kuloba J. found for Madhupaper and Macharia. He held that: -

"I find it as a fact that the plaintiffs paid the defendants, and the defendants received from the plaintiffs the said sum of Shs.110 million. So, arithmetically, the difference between Shs.110 million and Shs.54 million was a sum of Shs.56 million. The sum of Shs.56 million is what the plaintiffs seek in this suit to recover under the doctrine of restitution of an unjust enrichment."

In the introduction to his judgment the learned Judge assumed that the suit is grounded on the well known principle of unjust enrichment and that the suit therefore according to him, did raise restitutionary claim. In this regard he placed much reliance in the cases of **Saleh bin Ghaleb v Hussein al Qu'aiti [1957] EA 55** and **International Investment Corporation & Another v. Laxman Keshra & others [1978] KLR 143**. The learned Judge stated in his judgment that broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceeded upon the realization that to allow a

defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits which are not relevant in the instant case, will not be tolerated by the law, and owing to the importance and aim of this doctrine it has quickly been accepted in every advanced and civilized system of justice. In its applicability to Kenya, the learned Judge quoted the famous dictum by that sagacious Judge, Madan JA (as he then was) in ***Laxman's*** case (ibid) where he said: -

"Woe unto the day when it is lost sight of in Kenya, which would also be contrary to the spirit of section 3 (c) of the Judicature Act. I trust that in future, in appropriate cases, there will be less smothering of just equitable rights" on the basis of technical objections and artificial distinctions oblivious to justice and substance."

What the predecessor of this Court was then saying was that in Kenya a claim may properly be founded for restitution where it would be unjust to allow a party to retain the benefits of an unjust enrichment.

I would agree with the learned Judge that the doctrine of unjust enrichment was not a foreign concept either in Tanzania or in Uganda. In **Riddoch Motors Ltd v Coast Region Co-op. [1971] EA 438** decided by Sir William Duffus, P. Law. J.A and Onyiuke, J. in the Court of Appeal for East Africa restitution was firmly accepted. In Uganda, although money paid under an illegal contract was held not recoverable, restitution as a doctrine was no doubt recognized in **Broadways Construction Co. v Kasule and Others [1972] EA 76** in the Court of Appeal composed of Law, Ag. V-P, Lutta and Mustafa, JJA. It is worthy of note that the High Court of Kenya had already applied restitution in relation to stolen money in **Zakayo v Naomi [1970] EA 607 (Chanan Singh, J)** on principles used to recover from cheats, blackmailers and robbers, i.e quasi-contract. However, uninhibited by the English thinking of the earlier times, Chanan Singh, J. openly said that stolen money paid to the defendant by a thief was recoverable as an unjust enrichment. He said (at page 609): -

"It is a pity that in this age we should have to rely on a patently absurd legal fiction which was necessitated by old forms of action. The forms of action disappeared in England a long time ago but the fictions still remain to camouflage reality and to confound the layman. The doctrine of unjust enrichment would provide a straightforward and intelligible remedy in these cases. This doctrine is recognized in United States and even in Scotland ..... Judges in England have not hesitated to use this term and terms synonymous with it such as "*ex acquo et bono*", and higher equity."

On the authorities referred to him the learned trial Judge correctly, in my view, enumerated grounds which he thought formed the basis of a restitutionary claim. These were: -

1. non-voluntary conferment of a benefit, such as through mistake or on account of compulsion, necessity, or in ignorance, or due to an unequal condition between the payor or payee;

2. voluntary conferment of benefit for total failure of consideration;

3. benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust;

4. ultra vires demand;

5. abuse of a power entrusted to the defendant by Parliament or by a contractual instrument such as a debenture or other agreement;

6. illegitimate use of self-help sanction;

7. vindication of equitable title to property.

It is abundantly plain from the judgment that the restitutionary event relied upon for the claim by Madhupaper and Macharia and upon which they also rested their case is economic duress. The learned Judge attempted to define what amounted to duress and held: -

"And so, clearly, harassing a debtor is a wrongful act which amounts to duress. It is duress if a person, with the object of coercing another to pay money claimed from the other as a debt due under a contract, harasses the other with demands for payment, which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat of publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress of humiliation: See Norweb plc v Dixon, [1995] 3 All; ER 952. Indeed, in some circumstances, it may be wrongful to threaten to do what one is entitled to do; and a threat may not amount in law to blackmail but may nevertheless amount in law to duress because it is made for an illegitimate purpose. Here I am having in mind the illustration provided by the New Jersey case of Wolf v Marlton Corporation, (1959), 154 A 2d 625."

In ***Wolf's*** case (ibid), the purchasers having contracted to buy a house demanded the return of their deposit, accompanying the demand with a threat that if their deposit was not refunded they would resell the property to a purchaser who would be undesirable in the area and that the vendors would not be happy with the results. Of course these purchasers would have been within their legal rights to resell the houses to whomsoever they liked to sell. But the superior court of New Jersey held that the threat amounted in law to duress, in that it involved an abuse of legal remedies, and was wrongful in a moral sense. The threat was said to be malicious and unconscionable and that "*fundamental fairness requires the conclusion that his conduct in making this threat be deemed wrongful":* per Freund, JAD, ibid, at p 630.

The learned Judge added that in his view of the evidence, Madhupaper and Macharia were driven by the appellants "off and from" the course of seeking justice through the legal process; it was demanded of them, and they had to yield if they were to save themselves from receivership; that all suits by them against the appellants be withdrawn. They did so, in addition to paying the sums demanded of them by the appellants who even escalated their demands by requiring Madhupaper and Macharia to pay third persons like Ravi Investments Ltd., large sums of monies (Shs.14 million with interest) when Madhupaper had not been responsible for the third parties' incurring of the alleged expenditure.

On the role played by Mr. J.T. Letting, the Permanent Secretary in the Office of the President, in the events leading to the dispute the learned Judge was of the opinion that Mr. Letting was an intruder and an intermeddler who was brought into the affairs of Madhupaper simply "*to create terror*" in company. The learned Judge rebuked the appellants thus: -

"As corporate bodies, the defendants could and should have acted without "approval" from the Government in a straight forward matter of contract to which the government was not a party."

The learned Judge concluded that the ever presence of Mr. Letting in the negotiations between the parties was meant to apply illegitimate pressure on Madhupaper to extort monies from it. He firmly concluded:

"Involving the government or the Chief Secretary painted the matter with the colour of demand *colore officii*, conveying to the plaintiffs clear knowledge or belief, that they had no means of escape from paying the extras and surpluses demanded of them.

The plaintiffs were forced to abandon the pursuit of justice. They had to withdraw court cases or suffer losing their assets. The plaintiffs withdrew the cases; but in the end they still lost their assets. This is a case of vitiated judgment: there was illegitimate pressure, unconscionable conduct on the part of the defendants, coercion, inequality between the parties, and lack of real choice for the plaintiffs. This is a case of failed

consideration, for the plaintiffs paid the surplus sums on condition that they got back their assets, but after payment they did not get their assets. It is a case which falls within the first, second, the second part of the fifth (abuse of contractual instrument – debenture".

As I have already stated, the upshot of the learned Judge's lengthy judgment is that he found for both the Company and Macharia against the appellants and KNCC jointly and severally in the sum of Shs.56 million on account of unjust enrichment:

"paid by the plaintiffs to the defendants under duress and coercive pressure, which ..... is against conscience that the defendants should keep it, and they must, in justice, restore it to the plaintiff."

Being aggrieved by this decision, the appellants have preferred ten grounds of appeal against it. Further, Madhupaper and Macharia have filed Notice of Affirming of the Decision and Notice of Cross Appeal. Mr. Ougo, for the appellants, has argued all the grounds either in the numerical order in which they were set out in the memorandum of appeal or in a cluster. However, with due respect to him, I think that the gravamen of the appeal is firstly, whether the learned Judge made a fundamental error of law in basing his judgment on the doctrines of restitution and economic duress; and secondly, whether or not it was an error on the part of the learned Judge in not finding that the parties had willingly and freely entered into an agreement setting out their respective positions, in which Madhupaper and Macharia openly admitted their indebtedness to the appellants. I would think that my resolution on these issues would, more or less, dispose of all the grounds enumerated seriatim in the memorandum of appeal. Thus, my focus will be on the two weighty issues of the doctrines of unjust enrichment and economic duress which were vigorously and strenuously argued before the superior court and which were also re-agitated on appeal.

Mr. Ougo submitted that the sum of **Shs.56 million** was a debt due from Madhupaper and Macharia to the appellants and KNCC. He pointed out that the said sum was contained in the Deed which was executed by all the parties on 17th July, 1989 and by which Madhupaper and Macharia accepted that the sum of **Shs.101,681,369.94** was payable by them to the appellants. Also, Mr. Ougo referred the Court to the letters dated **24th April, 1989** and **13th June, 1989** by which letters Madhupaper and Macharia irrevocably undertook to pay all the amounts outstanding in the accounts of the debenture holders. Mr. Ougo, therefore, contended that the two had fully acknowledged the debt and had voluntarily agreed to liquidate it and the learned Judge made a significant error in invoking the doctrine of unjust enrichment. On the issue of duress, Mr. Ougo submitted that there was absolutely no protest from the two who moreover, expressed willingness to make payment and by indicating that they had sufficient funds to liquidate the debt as:-

"---.We are anxious to have our assets back."

Mr. Ougo further asserted that Madhupaper and Macharia could not have been coerced to make payment to the appellants since the Deed was executed by Madhupaper and Macharia in the presence of their own two chosen advocates and to whom they made no protest. Moreover, they took no immediate steps to avoid the contract.

Dr. Kamau Kuria in opposition to the submissions made on behalf of the appellants argued that this Court has in the past accepted the principle of economic duress and has applied it in a number of cases. He stated that the appellants were 100% owned by the Government which was actually the real owner of the money lent. He contended that the appellants were beneficiaries of the compulsion exercised by the Government and as they unlawfully received an ill-gotten benefit, they should not be allowed to retain it. He submitted that as the appellants were part of the Government, they should not extricate themselves from it. On the doctrine of unjust enrichment, Dr. Kuria averred that the appellants had been enriched at the expense of the company and Macharia and that it would be greatest height of injustice to allow them to retain the benefit. He further argued that Kenyan law does not allow a party to threaten to break the law unless paid some money. According to him, pressure to

place Madhupaper under receivership was tantamount to a blackmail which consisted of a threat to sell the assets of the company if Macharia and Madhupaper did not act in accordance with the demands of the Government and the appellants. To buttress his submissions, Dr. Kuria referred us to the cases of **Chase International (ibid) and Pao & Others v. Lau Yiu & Another [1979] 3 ALL E.R. 65** and the law book, **Law of Restitution**, 5th Edition by Goff and Jones.

It is well established that although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that it has the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in **Sotiros Shipping v. Sauviet Sohold**, The Times, March 16, 1983:

"It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said."

Again, in **Peters v. Sunday Post Ltd. [1958] EA 424**, as decision of the Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at p. 429:-

"It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."

On the authorities, therefore, the jurisdiction to review the evidence should be exercised with caution and it is not enough that the appellate Court might itself have come to a different conclusion.

Accordingly, it must follow that only when the finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did, will this Court interfere with it – see **Ephantus Mwangi & Another v. Wambugu, (1983/84) 2 KCA 100** at page 118. I therefore agree with Dr. Kuria's proposition that if the judgment of the trial court was one at which it could reasonably have arrived on the evidence then it should not be upset on appeal.

Perhaps, of paramount importance in the whole appeal is how Mr. J. Letting, the then Head of Public Service and Secretary to the Cabinet, Office of the President, came to involve himself in the matter which gave rise to the dispute between the appellants on one side and Macharia and Madhupaper on the other. Is it correct, as averred, by the appellants that Mr. Letting was actually roped in into the dispute by Macharia who invited him with a view to assisting both Macharia and Madhupaper" Or was Mr. Letting an intermeddler who occupied a powerful public office in the land and was using that position to exert illegitimate pressure to get money paid by a desperate loan defaulter"

By a letter dated 13th February, 1989, Macharia wrote to His Excellency the retired President Moi as follows:-

"13th February, 1989

S.K. Macharia

P.O. Box 3074309

NAIROBI.

Tel. 334461

H.E. The President, C.G.H, M.P.

Hon. Daniel T. Moi

State House

NAIROBI.

Your Excellency Sir,

RE: MADHUPAPER INTERNATIONAL LIMITED

(IN RECEIVERSHIP)

I wrote to Mr. Letting, on 10th February and copied to the Banks giving him the Banks statement and account numbers in which I owe the Banks the money.

(a) All accounts amount to Kshs.53,679,443.55

(b) Overdraft account (Fully paid)

I informed Mr. Letting that, that is the only money I owe to the Banks and that he can ask the Banks to certify with their records.

Your Excellency Sir, I do not think I will do your Excellency any wrong or offend you if I just go back to my factory and start managing it from the mess it has been put into by the Receivers during the last three years since as far as I am concerned Your Excellency's word or decision in this country is final.

Your Excellency Sir, I would also wish to repeat that as I promised Your Excellency I will never let you down by doing anything that is not in your favour.

I remain your Most Obedient Servant and a true NYAYO FOLLOWER,

S.K. MACHARIA"

And on 7th March, 1989, Macharia wrote as follows to Mr. Letting:-

"Mr. J. Letting,

Head of Public Service &

Secretary to the Cabinet,

Office of the President,

NAIROBI.

Dear Sir,

RE. MADHUPAPER INTERNATIONAL LIMITED

Further to our meeting of yesterday and the instructions you gave to me as contained in my letter dated 6th March, 1989 confirming those instructions, I now enclose herewith photo-copies of the cheques sent today to M/s Oraro & Rachier Advocates payable to Kenya Commercial Bank for a total sum of Kshs.54,000,000/-. The Banks through their lawyers are required to sign and return to my lawyers all the documents for the assignment of all the charges and debentures they hold against this payment.

In this connection, I shall appreciate your personal intervention with KCB to get them to execute the documents my lawyers have delivered to them with the payment for the assignment of charges and the debentures immediately. The Banks have been given indemnity and are fully covered as you required from me against this assignment.

I have accordingly acted in accordance with your instructions in settlement of this matter.

The Receivers will, in accordance with the instructions referred to reconcile with me both the Receivers' overdraft and the Realization accounts and any balances be settled immediately. (Please see a copy of my letters to them attached).

Yours faithfully,

S.K. Macharia"

After these two letters it became fashionable for the parties to copy all the correspondence exchanged between them to Mr. J. T. Letting. In the said letters they informed him of the detailed negotiations they were engaged in, the position as regards the loan and the eventual failure to consummate a meaningful agreement that would have resulted in the appellants lifting the receivership of Madhupaper. Macharia testified that in 1986 he sued the Government for compensation in HCCC No. 1126 of 1986 and that that case was part of the intended settlement. He stated:-

"--- the company withdrew that case, and in consideration, the bank accepted to be paid Shs.54 million as full and final settlement of the debt owed by the company to the bank, and the bank would remove the receivership. This settlement agreement was reached in October 1988, and reduced into writing in various written correspondence between the Chief Secretary on behalf of the Government, and the bank on the one hand, and myself on behalf of myself and the company with the Government on the other."

Macharia further testified that:-

"Although the agreement was thus signed and payments made, I did not take over the assets of the company. Instead the assets were taken over by Ketan Somaia, Ajay Shah and Isaac Gathuthu. I had no connection with any of these three persons, nor did Madhupaper International Ltd have any connection with any of them. I had only met Gathuthu and Ajay Shah for the 1st time at the defendant banks' offices that morning when I went to pay the money referred to above and when we signed the agreement at the Kenya Commercial Bank.

I allowed them to take possession of the assets because Ketan Somaia informed me that His Excellency the President had ordered the 3 to take over the assets and that they (the 3) would pay me a sum of Shs.250 million for them to take over the assets. The assets had been valued by World Bank and the receivers at Shs.750 million. I consented to their demand."

Dr. Kuria submitted before the trial court and also before us that there was duress by exercise of executive power through Mr. Letting to snatch the assets of Madhupaper and by forcing both Madhupaper and Macharia to pay monies to the appellants as a condition for returning the business to them. Mr. Ougo for the appellants countered

these submissions by asserting that Mr. Letting and the Government were brought into the dispute by Macharia and that in any case the allegations of threats, coercion or intimidation against either Mr. Letting or the Government had not been proved. It is worthy of note that Mr. Letting was not called to testify, and also; that there seems to have been no response personally from H.E. the Retired President Moi to Mr. Macharia or to any of the parties.

Looking keenly at the correspondence exchanged between the parties together with the testimony tendered before the trial court, I have no doubt whatsoever in my mind that it was Macharia who drew the attention of both Mr. Letting and H.E. the Retired President Moi to his financial woes with the appellants. It would appear that the intention of Macharia can be gleaned from reading all the letters he addressed to Mr. Letting. And that is that he was seeking Mr. Letting's intervention and that of the then President to see that he got their support in order to force the appellants to return his Company. This was the sole intention of Macharia. I am in no doubt that the learned Judge was in error in not finding that both Mr. Letting and H.E. the retired President Moi were unwittingly solicited into the dispute the subject matter of this appeal by Macharia. Though they were roped into the dispute, it was obvious from the correspondence on record that they intended to assist Macharia and Madhupaper to get back to business. There is no evidence that they would have known of Macharia's financial predicament if Macharia had not tried to seek help from them. Further, Macharia did not offer any evidence at all to show that he was threatened or harassed by Mr. Letting. Neither did Macharia place before the court any credible testimony relating to coercion by them to compel payment of the debt due to the appellants.

With due respect to the learned trial Judge it is plain to me in the light of all the facts and circumstances both prior and subsequent to filing suit that the learned trial Judge misdirected himself by misconstruing the facts and evidence tendered before him and as a result arrived at a wrong decision. Moreover, it was an improper factor for the learned Judge to hold without any evidence that the appellants involved the Government in their contract with Macharia and Madhupaper so as "*to convey to the plaintiffs clear knowledge or belief that they had no means of escape from paying the extras and surpluses demanded of them.*" His decision on the perceived role of Mr. Letting or the Government in the dispute is clearly wrong as it appears as having been based on extraneous matters which ought not to have been taken into consideration. As the learned Judge had demonstrably acted on a misapprehension of the facts and the evidence, it must follow that his finding on the role of Mr. Letting or the Government in the dispute must be interfered with by this Court. I would do so.

True, the Government was not a party to the transaction between the litigants herein. But, it appears that Macharia believed that as the appellants were corporate entities fully owned by the Government, he would probably get the receivership of Madhupaper lifted if H.E. the retired President Moi and Mr. Letting issued some "*Executive Orders.*" That is why Macharia brought the two into the legal dispute and it would be wrong, in my view, to term any of the two as either intruders or intermeddlers in the affairs of the company.

The main issue which I have to determine in this appeal, being guided by the facts and evidence laid before the superior court, is whether the learned Judge was in error when he ordered the appellants to pay the sum of Shs.56,000,000/- on account of unjust enrichment. The appellants aver that the said sum was a debt due from Macharia and Madhupaper to them and that the agreement to pay it was contained in the Deed executed by the parties on 17th July, 1989. The appellants contended that Macharia and Madhupaper are bound by the agreement and that the learned Judge was wrong to hold that the said sum was effected under duress and coercive pressure. On the other hand, Macharia and Madhupaper argue that the agreement was signed under duress; and consequently, the appellants cannot insist on a settlement procured by intimidation.

The concept of economic duress has received strong support in modern times in many jurisdictions and in appropriate cases it may afford a defence. In essence it recognizes that certain threats or forms of pressure, not associated with threats to the person, nor limited to the seizure or withholding of goods, may give grounds for relief to a party who enters into a contract as a result of the threats or the pressure. In **Occidental Worldwide Investment Corp. v. Skibs A/S Avanti, [1976] 1 Lloyds Rep. 293** the charterers of two ships secured a

renegotiation of the rate of hire, after a slump in market rates, by threatening the owners that they (the charterers) had no substantial assets, and that they would go bankrupt if the rates were not lowered. This threat was strongly coercive because, given the slump in the market, the owners would have had to lay up the tankers if the charterers had returned them, and would then have been unable to pay mortgage charges on the ships – all these facts being well known to the charterers. In fact the charterers' allegations, or threats, that they had no substantial assets and would go bankrupt if the rate of hire were not lowered, were false and fraudulent, and Kerr, J. held that the owners were therefore entitled to avoid the renegotiated terms, and withdraw the ships on the ground of fraud; but he recognized that the economic pressure of the threats might also have given rise to relief on the ground of duress, at least in principle. In the event, however, he denied relief on this ground because the owners' consent or will was not vitiated by the pressures, which were only normal commercial pressures.

In **North Ocean Shipping Co Ltd. v. Hyundai Construction Co Ltd. [1979] QB 705** ship-builders who were building a ship under a contract for the plaintiffs, threatened, without any legal justification, to terminate the contract unless the plaintiffs agreed (within a few days) to increase the price by 10 per cent. The owners had chartered the vessel to Shell at very favourable rates and feared that they would lose the charter if the vessel were delivered late, so they reluctantly acquiesced in this demand, but under protest, and without prejudice to their rights. Mocatta, J. held that this amounted to a case of economic duress, and that the plaintiffs would have been entitled, on that ground, to have refused payment of the additional 10 per cent. But he went on to hold that the owners had, by implication, affirmed the contract, or waived their right to avoid it for duress, even though they had not intended to do so; the basis for this part of this decision was that the owners had failed to raise the matter at any further stage, paying the extra installments, and taking delivery of the ship in due course, and so giving the builders grounds for belief that the owners had affirmed the variation in price. Thus a similar conclusion was reached as in **Occidental** (Ibid).

In the case of **Pao On v Lau Yiu Long [1980] AC 614** an allegation was made that a party had secured an amendment to a prior commercial transaction of some complexity, as a result of a threat to break his contract. Here, the Privy Council conceded that economic duress could be recognized in principle, but, held that the plea was not made out on the facts. The speech of Lord Scarman emphasized that the defendant in this case had carefully considered his position when faced with the threatened breach of contract, and had concluded that it was in his interest to grant the concession demanded rather than to sue on the original contract. In determining the validity of the plea of duress in such circumstances, Lord Scarman said that "*it is material to inquire whether the person alleged to have been coerced did or did not* protest; *whether, at the time he was allegedly coerced into making the* contract, *he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it*." Lord Scarman did, however, draw attention to American case law which stressed the effectiveness of alternative remedies available to the party allegedly coerced; and it seems clear that it would no longer be regarded as an adequate answer to a plea of duress that the party coerced had a legal remedy which he could in due course have pursued in the courts. The all-important question is whether, having regard to all the circumstances, that remedy is a practical and effective one.

Another important case under the concept of economic duress is **Universe Tankships of Monrovia v International Transport Workers Federation [1983] AC 366** in which the defendant trade union had "*blacked*" the plaintiffs' ship in port, and refused to release her except on payment of a large sum of money; most of the money was claimed as back pay on behalf of seamen on the ship, but a part of it was a payment for the union's welfare fund. The Court of Appeal, affirming Parker, J. held that the union's actions constituted duress which would prima facie have justified the ship owners in recovering the money, because the coercive nature of the threat was so powerful, and at common law involved unlawful pressure on various third parties to break their contracts. But the Court of Appeal went on to hold that the union's conduct was protected by the statutory immunities in the Trade Union and Labour Relations Act 1974, because it was in the course of, or in furtherance of, a trade dispute under that Act. The "*trade dispute*" defence was disallowed in the House of Lords where the finding of economic

duress was not challenged.

The doctrine of economic duress is therefore now clearly established in the law of England and its existence was firmly stated by the House of Lords in ***Dimskal Shipping Co. Ltd. vs. I.T.W.F [1992] 2 AC 152*** and in a subsequent number of other cases. Although the doctrine is now firmly established, however, there remains considerable doubt and some disagreement over the circumstances in which relief will be granted, and how the decisions are best explained. It is evident from the dicta in **Occidental** (ibid) and the decision in the **Pao On** case that a party who has agreed to a contractual variation cannot always avoid the variation simply because the other party had threatened to break the contract if it was not varied and this threat had some influence on the party seeking relief. It must also be stated that in all cases of duress it is necessary that the victim's agreement was caused by the duress. However, it appears that the nature of the causation required differs according to the nature of the duress. In **Barton v. Armstrong [1976] AC 104** the Privy Council, relying on the analogy of fraud, held that it was sufficient that the threat was a reason for the victim entering the contract: not only it did not have to be the predominant reason, but the victim was entitled to relief even if he had not shown that he would not have entered the contract without the threat. It would be up to the party who made the threat to show that it had not influenced the victim in any way. See **Dimskal's** case (ibid).

Dr. Kuria while submitting on the principle of economic duress also addressed us on duress to goods and stated that this, too, applied to the case before us. However, it must be pointed out that in cases of duress to goods, it seems that the threatened seizure must have been a significant cause of the victim's agreeing to the contract or payment. Thus the victim will not be entitled to avoid the contract if he had an effective alternative remedy, for example to obtain an injunction to prevent the seizure, though it is recognized that a legal remedy may be of no avail if the victim has an urgent need for the goods. The victim will also be unable to avoid the contract if it was a "*voluntary settlement*" of the other party's claim and relief will be denied if the threat was not the reason for the victim agreeing to the other party's demand or if the threat did not influence the victim at all. See **Dimskal's** case (ibid) and **Law of Restitution** 2nd Edn. 2002 page 212.

At common law money paid under economic compulsion could be recovered in an action for money had and received: See **Astley v Reynolds [1731] 2 Stra 915, 93 ER 939**. The compulsion had to be such that the party was deprived of "*his freedom of exercising his* will." It would appear that American law, also, now recognizes that a contract may be avoided on the ground of economic duress. See **Williston on Contracts** (3rd Edn, 1970 Chapter 47). The commercial pressure alleged to constitute such duress must, however, be such that the victim:-

(i) - must have entered the contract against his will;

(ii) - must have had no alternative course open to him;

and (iii) - must have been confronted with coercive acts by

the party exerting the pressure. See **Williston on Contracts (ibid)**

A keen study of decisions on economic duress shows that American judges pay great attention to such evidential matters as the fact or absence of protest, the benefit received and the speed with which the victim has sought to avoid the contract.

Though the doctrine of economic duress has not found wide recognition in our jurisdiction it ought to be developed in order to protect persons against improper pressure and inequality of bargaining power as it affects contracts and other economic transactions.

I now revert to the case before me. By a letter dated 3rd March, 1989 the advocates for Macharia and Madhupaper,

Messrs. Waruhiu & Muite, informed Messrs Oraro & Rachier Advocates then acting for the appellants thus:-

"Dear Sirs

RE: MADHUPAPER INTRNATIONAL LIMITED

We act for Mr. S.K. Macharia the Principal shareholder of Madhupaper International Ltd. We understand that you act for Kenya Commercial Bank Ltd., Kenya Commercial Finance Company Ltd, and Kenya National Capital Corporation Ltd in connection with recovery of the debts allegedly owed to the three Banks by Madhupaper International Ltd.

The amount payable to the three Banks is in round figure Shs.54,000,000/-. (The exact amount is in fact Shs.53,703,784/10 being the total amount owed by Madhupaper as at 25th October 1985 – the date the receivership commenced)."

Subsequent to the above letter a lot of correspondence was exchanged between the parties. This culminated in a Deed dated **17th July, 1989** and executed by the Receivers, Ravi Investments Ltd., the appellants, KNCC and Madhupaper by which it was agreed, inter alia, as follows:-

"NOW IT IS HEREBY AGREED that in consideration of the request made by Madhupaper and in consideration of an undertaking by Madhupaper that it shall pay all expenses incurred by the purchaser agreed to be paid the parties agree as follows:-

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

2.Madhupaper shall itself or through its agents or otherwise pay to the Receivers the balance due on the accounts with the debenture holders. The accounts as accepted by Madhupaper being as follows:

Balances as at 22nd June 1989.

Kenya Commercial Bank Limited	**Kshs.66,653,416.70**
Kenya Commercial Finance Company Limited	**Kshs.25,574,174.49**
Kenya National Capital Corporation Limited	**Kshs.9,453,778.75**
	Kshs.101,681,369.94

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Together with interest thereon from the above-mentioned date to the date of payment into the respective accounts.

2. ----------

3. On receipt of payment by Madhupaper of the amount aforesaid the Receivers shall immediately refund to

the Purchaser the total deposit paid to them by the Purchaser together with interest thereon earned by the Receivers.

4. Madhupaper shall pay to the purchaser all the sums agreed to be paid as expenses incurred by the purchaser simultaneously with the amounts to be paid under condition 3.

In consideration of the premises the purchaser hereby agrees and declares that it has no claims against the Receivers the Bank, KCFC or KENYAC either jointly or severally and to fully absolve the Receivers, the Bank, KCFC or KENYAC from any liability whatsoever under the Agreement."

It is indisputable that the parties duly executed the Deed before their Directors and/or and advocates. Macharia, too, "*signed, sealed and delivered*" the said document as the duly authorized representative of Madhupaper in the presence of his advocates. It is also apparent from the correspondence and the Deed that at all material times Macharia and Madhupaper were represented by some of the most able and prominent counsel in the country and at no time did they protest or raise any question as to the willingness or otherwise of Macharia and Madhupaper to pay any moneys to the appellants. Furthermore, there is no evidence that there was compulsion to pay.

On my own consideration of the evidence I am of the view that Macharia and Madhupaper were on their own accord willing to make payment and had voluntarily committed themselves to do so. Their willingness so to do was shown by their agreement to execute the Deed which set out the respective position of the parties as regards the dispute. No one has challenged the validity of the Deed and in all circumstances, it must be deemed valid in law and must serve as the guide line in determining the rights of the concerned parties. In my view, the learned trial Judge erred in not finding that the payment by Macharia and Madhupaper was voluntary and consequent upon a lawful debt.

Again, I cannot be privy to the submission by Dr. Kamau that Macharia and Madhupaper were induced to enter into contract by means of pressure brought to bear upon them so as to influence their own independent judgment. The facts and the evidence relied upon by the parties in the trial court do not support this assertion. True, there was inequality of bargaining power, Macharia and Madhupaper being the weaker party. However, the terms of the contract were not unfair to them, and moreover; they had competent legal advice. Having considered the clauses of the Deed it cannot be said that their bargaining power was grossly impaired. Further, as the transaction was not actually to the manifest disadvantage of the two parties allegedly subjected to the duress, the obligation to pay cannot be waived. In my view, there was apparent consent by Macharia and Madhupaper to pay the said sum of Shs.56,000,000/- and other sums to the appellants and KNCC. There was no pressure nor duress illegitimate or otherwise applied to induce them to pay. The doctrine of economic duress is not therefore applicable in the particular facts and circumstances of this case. Its application by the learned Judge is misplaced.

Macharia and Madhupaper have put their case forward on, essentially, unjust enrichment or restitution. They claimed the refund of the money allegedly being the difference between the legal entitlement to the appellants and the sum that was paid to them by Macharia and Madhupaper to lift the Company from receivership. The learned trial Judge found for them. However, it is vigorously contended by Mr. Ougo that the doctrine of unjust enrichment was wrongly applied by the learned Judge.

In **Fibrosa Spolka Akayina v. Fairbarn Lawson Combe Barbour Ltd. [1943] A.C** at page 61 Lord Wright stated:-

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the

common law which has been called quasi-contract or restitution."

However, according to Goff and Jones' **Law of Restitution**, the principle of unjust enrichment presupposes three things:-

(1) that the defendant has been enriched by the receipt of a

benefit;

(2) that he has been so enriched at the expense of the

plaintiff;

and

(3) that it would be unjust to allow him to retain the benefit

and finally that there is no defence or bar to the claim.

But, restitution will be denied where the defendant cannot be restored to his original position, the claimant is estopped, the defendant is a bona fide purchaser, or where public policy precludes restitution - See **R. Leslie Ltd v. Sheill [1914] 3 K.B 607** and **Boi Sserain v. Weil [1950] A.C. 327**. Restitution is also denied where the benefit was conferred:-

(i) pursuant to a valid common law, equitable or statutory obligation owed by the claimant to the defendant;

(ii) by the claimant while performing an obligation owed to a third party;

(iii) in submission to an honest claim, under process of law or a compromise of a disputed claim; and

(iv) by the claimant acting *voluntarily* "" or "*officiously*."

See **Owen v. Tate [1976] GB 402 and Goff and Jones**' Law of Restitution.

Macharia and Madhupaper by effecting payment of the sum in dispute were doing so while performing an obligation owed to the appellants and while on their part, the appellants had a valid and an honest claim against Macharia and his Company. In my view, the doctrine of unjust enrichment did not apply to the dispute and its application thereto by the learned Judge was misplaced. Moreover, I am of a firm view that payment of a just debt and the receipt or acceptance of a valid claim cannot at all constitute unjust enrichment.

In the final analysis, I think there is ample evidence on record to hold that Macharia and Madhupaper had willingly and clearly acknowledged payment of the debt owed to the appellants; and KNCC and to confirm their acceptance, they willingly executed a Deed of repayment. Again, they made no protest when the demand for payment was made. Moreover, to make a normal claim for a just debt does not constitute duress nor economic blackmail. What the appellants had done was merely to demand what was justly due to them, and; in my view, the learned trial Judge made an error in finding them liable in unjust enrichment.

In the Notice of Grounds of Affirming of the Decision, Macharia and Madhupaper contend that the Government of Kenya and the appellants having all benefited from the withdrawal of the suits against them they were barred by a rule of commercial estoppel from re-opening the bargain and claiming a sum of money over the agreed

Shs.54,000,000/-. They further averred that the payment of Shs.56,000,000/- was demanded by the appellants in 1989 *colore officii*. As I have already held, there is no evidence whatsoever that the Government of Kenya compelled Macharia and his Company to hand over their assets to the appellants or to anybody. Moreover, the Government was not a party to the transaction as between the parties to the suit even though it owned the appellants. The agency principle was not applicable nor was the doctrine of unjust enrichment in that it has not been shown that the Government had been enriched by receipt of a benefit derived from Macharia and Madhupaper or that it had been enriched at their expense.

Having reached these firm conclusions on the main grounds of appeal, I would allow the appeal. I need not decide on the other grounds of appeal canvassed by the appellants and the respondents since I have made determination on the substantive issues and which are sufficient to dispose of the appeal. Similarly, I would also dismiss the Notice of Cross Appeal and the Notice of Grounds of Affirming the Decision.

In reaching this decision I note that I am differing with the learned Judge who is, indeed, a scholarly jurist of great repute in academic circles. With great respect to him his judgment is a replica of a thesis on the doctrines of unjust enrichment and economic duress of which the learned Judge readily delved into them not remembering that he was trying a case. In doing so he ignored vital evidence adduced before him. Further, he glaringly exhibited a biased disposition towards the appellants and KNCC as a result of which he failed to consider their evidence.

In the result, I would set aside the judgment of the superior court delivered on **23rd January, 2003** and substitute it with an order dismissing Nairobi High Court Civil Case No. 1263 of 1992 with costs to the appellants and the third respondent. I would award the appellants and the third respondent costs of the appeal and of the Notices of Cross Appeal, and of the Grounds of Affirming of the Decision.

As Githinji and Onyango Otieno, JJ.A agree, the appeal is allowed, the judgment of the superior court delivered on 23rd January, 2003 is set aside and substituted with an order dismissing Nairobi High Court Civil Case No. 1263 of 1992 with costs to the appellants and the third respondent. The Notice of Cross-Appeal and the Notice of Grounds of Affirming the Decision are also dismissed. The appellants and the third respondent are awarded the costs of the appeal and the costs of the Notices for Cross-Appeal, and the Grounds for Affirming the Decision.

Dated and delivered at Nairobi this 31st day of July, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

JUDGMENT OF GITHINJI, J.A

I had the advantage of reading in draft the judgment prepared by Tunoi JA. I respectfully agree with his exposition of the law on economic duress. I also agree that the appeal should be allowed.

The superior court entered judgment for Shs. 56 million against the appellants on the basis that the money was paid by the respondents to the appellants under economic duress. The key question is whether the money was in fact and in law paid under economic duress.

In dealing with that question it is imperative to determine whether or not there was a binding contract limiting the respondents' liability under the loan agreements at Shs. 54 million and whether or not the Shs. 110 million which the respondent paid was lawfully due under the loan agreements. This short judgment is restricted to those two issues.

It is necessary to restate some basic facts on which the respondents' claim was founded.

The 1st respondent Samuel Kamau Macharia was at the material time the majority shareholder and Chairman of Board of Directors of Madhupaper International Ltd., the 2nd respondent (Company). Incidentally during the pendency of this appeal, the High Court in *High Court Winding Up Cause No. 12 of 1995* made a winding-up order against the 2nd respondent on 6th March, 2006. However, in *Miscellaneous Civil Application No. 789 of 2006,* the superior court on 13th October, 2006 granted leave to the appellants to proceed with the present appeal against the 2nd appellant. Sometime in July 1981, the company borrowed Shs. 30 million from Kenya Commercial Bank Limited (1st appellant) (KCB), Shs. 13 million from Kenya Commercial Finance Company Ltd. (2nd appellant, a subsidiary of KCB) and Shs. 7 million from Kenya National Capital Corporation Ltd, (3rd respondent) to finance feasibility study and pre-project costs pending the expected grant of a syndicated loan of Shs. 1.2 billion expected from local and international institutions to finance a toilet paper manufacturing plant.

The three loans were secured by respective all-assets debentures which provided *inter alia*, that debenture holders would be entitled to appoint Receiver/Managers in case of default. The expected loan of Shs. 1.2 billion was not however granted and the project stalled. In the meantime, the company defaulted in the payment of the loans granted by the three local banking institutions.

The company failed to pay the loan on demand and on 25th October, 1985 the three banking institutions appointed Receiver/Managers who took possession of the company and started running it. Thereafter, the 2nd respondent entered into negotiations with the debenture holder and ultimately a provisional agreement was reached. According to the agreement the company was to pay Shs. 54 million being the amount owed by the company to debenture holders in full and final settlement and further the company was to withdraw three suits that it had previously filed. The company paid the Shs. 54 million and withdrew the three cases after which the Receivers handed over the company to the 2nd respondent. However, after one week the Shs. 54 million was returned to the respondents lawyers and the Receivers restored. The reason given by the debenture holders for this action was that the respondents had imposed conditions upon which the cheque for Shs. 54 million was forwarded, which were not acceptable to debenture holders. According to the evidence of the 2nd respondent, after about 6 – 8 months, he learnt that the debenture holders had entered into an agreement with M/s. Ravi Investments Ltd which was owned by Malde Transporters Ltd for the sale of the company's assets. Thereafter, he approached the debenture hodlers and the purchasers and offered to pay the entire debt due to debenture holders and asked that the sale of the assets be rescinded. The negotiations were fruitful and a Deed was executed on 17th July, 1989. Under the Deed the purchaser Ravi Investiments Ltd upon request by the company agreed to forego its rights under the agreement on condition that the total amount it had paid could be refunded.

Clause 2 and 6 of the Deed provides:

"2. Madhupaper shall itself or through its agents or otherwise pay to the Receivers the balance due on the accounts with the debenture holders. The accounts as accepted by Madhupaper being as follows:

Balance as at 22nd June, 1989

Kenya Commercial Bank Limited Kshs. 66,653,416.70

Kenya Commercial Finance

Company Limited ***Kshs. 25,574,174.40***

Kenya National Capital

Corporation Limited ***Kshs. 9,453,778.75***

Kshs.101,681,369.94

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Together with interest thereon from the above-mentioned date to the date of payment into the respective accounts.

3. **……**

4. **……**

5. **……**

6. **……**

7. **……**

8. In consideration of the premises Madhupaper hereby agrees and declares that it has no claims against Receivers, the Bank KCFC or KENYAC either individually, jointly or severally and to fully absolve the Receivers, the Bank, KCFC or KENYAC from any liability whatsoever".

The company borrowed Shs. 110 million from Barclays Bank PLC London and paid the debenture holders on or about 17th July, 1989 after which the Receivers were removed and the company was returned to the 2nd respondent.

However, the 2nd respondent testified at the trial that third parties took possession of the company after he was forced to sell the assets of the company at Shs. 250 million, which, according to him, was below their true value of Shs. 750 million. The purchasers were not parties in the suit in the superior court. The sale of assets to third parties allegedly at under value does not concern us here.

Those brief facts show that the claim of Shs. 56 million is the differences between Shs. 110 million which the company ultimately paid to have the receivership lifted and the Shs. 54 million in the aborted agreement. The 2nd respondent justified this claim in his evidence, thus:

"Although I paid Shs. 110 million, to the defendants, what I was actually supposed to have paid to them was only Shs. 54 million. The defendants were not entitled to more than Shs. 54 million, so in this suit I am claiming back the difference between what I actually paid (Shs. 110 million) and what I was rightfully to pay (Shs. 54 million)".

Although it is the respondents' case that the appellants were legally entitled to only Shs. 54 million and that an agreement was reached that the respondents should pay Shs. 54 million in full and final settlement of the debt the respondents did not produce and accounts or agreements at the trial to verify that assertion.

Indeed, the appellants letter dated 10th February, 1989, which contained the offer indicated, among other

things, that the company was to pay Shs. 54 million; a further Shs.10,118,022/70 and in addition balances outstanding on the overdraft in the name of Receivers and Managers. The company in its letter dated 20th February, 1989 disputes those sums. The appellants did not agree with the figures indicated by the company as is clear from the appellants' letter dated 21st February, 1989 addressed to the Chairman of the company which states in part:

"We are in receipt of a letter dated 20th February, 1989 in respect of the above. The amount owed to the debenture holders as at 1st November, 1988 was Shs.99.7 million. However it was agreed vide letter dated 7th February, 1989 from Mr. J. T. arap Letting, Permanent Secretary, Office of the President and Secretary to the Cabinet, that the debt would be settled by payment of Kshs.64,118,022/70 in full and final settlement and compliance with terms and conditions hitherto notified to you. The payment of Kshs.54 million out of the above has to be effected to KCB Moi Avenue Branch as earlier advised. The amount to be paid to the debenture holders under the terms of intended settlement had been quantified and is, therefore, not a subject of any further negotiations".

The company's further letters dated 22nd February, 1989 and 6th March, 1989 respectively show that the company accepted to pay only Shs. 54 million in full and final settlement. There were also conditions and undertakings on settlement suggested by the company and by the company's lawyers M/s. Waruhiu & Muite Advocates in their letter of 3rd March, 1989. The appellants lawyers by a letter dated 8th March, 1989 informed the company that the undertakings requested upon which the cheque was forwarded were not acceptable to the debenture holders and set their own terms on which the cheques would be accepted. The company did not apparently fulfill the conditions and by a letter dated 13th March, 1989 the appellants' lawyers withdrew the counter-offer and returned the documents and the cheque to the company's lawyers. Those correspondence show that, contrary to the respondents case, the respondents owed the appellants approximately Shs. 100 million as at 1st November, 1988 and that the Shs. 54 million was a negotiated figure.

The correspondence further show that the parties were not at *ad idem* on the settlement figure and the conditions thereto leading to the breakdown of the settlement. It is clear therefore that no settlement regarding the money payable under debentures was reached and no agreement was signed to that effect. It follows that the foundation of the respondents claim that they were legally liable to pay only Shs. 54 million to debenture holders is erroneous and is based on wrong premises.

Regarding the circumstances under which the agreement to pay Shs. 110 million was entered into, the respondents pleaded that it was Mr. Leting who intimated to the respondents that the assets of the company would be sold unless the respondents paid Shs. 110 million and that it is the appellant who proposed the rescission of the sale and produced an agreement to rescind that sale to Ravi Investments Ltd.

The 2nd respondent however testified at the trial that on learning that an agreement of sale of the company's assets had been entered into between the debenture holder, Receivers and Ravi Investments Ltd he approached the bank which informed him verbally that if he paid Shs. 110 million to the bank the bank would consider returning the company to him and that he thereafter borrowed the money. The correspondence show that the assets of the company had indeed been sold to Ravi Investments Ltd who had already paid 10% deposit of about 14 million and deposited a further Shs. 151 million and that it is after learning of the sale that the respondents offered to pay off the entire amount due to debenture-holders inclusive of all interest. The letter dated 24th April, 1989 written by the respondents' advocates to the Chairman of KCB is relevant. It states in part:

"Our client S. K. Macharia understands that Madhupapers assets have NOT as yet been transferred to the intending purchasers.

He has secured sufficient funds to pay off the <u>entire amount</u> due to debenture holders inclusive of interest you

will confirm that this is now acceptable to you so that the formalities regarding documentation and release of the monies to you can be undertaken".

The correspondence further shows that negotiations followed culminating with the execution of the Deed on 17th July, 1989. Was that Deed executed under duress".

In ***PAO ON VS LAU YIU*** [1978] 3 All ER 65, the Privy Council said at page 78:

"Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree …… that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent.

……

In determining whether there was a coercion of will such that there no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it".

And in ***North Ocean Shipping Co. Ltd. vs. Hyundai Construction Co. Ltd.*** [1978] 3 All ER 1170, Mocatta J. held, *inter alia,* that if a party who has entered into a contract under economic duress later affirmed the contract he was bound by it.

Lastly, Mr. Ougo, learned counsel for the appellants referred to a passage in Chapter 10 page 307 of The Law of Restitution, 5th Edition, by Golf and Jones which states:

"Deeds or contracts may be avoided for duress at the instance of the coerced party; until the contract has been avoided, any money paid is paid under a binding contract and cannot be recovered in restitution. However, duress renders the document void if the coerced party can prove that *it is not his – non est Factum****".***

The Deed dated 17th July, 1989 constitutes a contract. By that Deed, the respondents accepted the accounts showing their indebtedness to debenture holders at Shs. 101,681,369/94 as at 22nd June, 1989. By the Deed, the respondent further declared that they had no claims against the debenture holders. There was obviously consideration for that contract and the respondents affirmed it by paying money stipulated in the Deed to the debenture holders. The respondents were represented by an eminent counsel during the negotiations and it is admitted that the respondents voluntarily executed the Deed. The Deed was executed after serious negotiations. The contract constituted by the Deed has not been rescinded and the respondents by the suit in the superior court did not seek a rescission of the contract. The contract still remains intact as an executed contract.

The terms of the Deed in which the respondents accepted their indebtedness to debenture holders in the sum of Shs.101,681,309/94 and further declared that they had no further claims against the debenture holders which, in my view, includes the present claim, are binding to all parties to the Deed. Moreover, the Deed speaks for itself and no oral evidence is admissible for the purposes of contradicting, varying, adding or subtracting from its terms. (See ***section 97 (1)*** and ***section 98*** of the Evidence Act).

Having regard to the fact that the respondents owed the debenture holders approximately Shs. 100 million as at 1st November, 1988; that the proposal to settle the debt at 54 million broke down, the price at which the assets were being sold to Ravi Investments Ltd and the negotiations preceeding the execution of the Deed, there is no doubt that the respondents owned the debentures holders Shs.101,681,369/94 as at on 22nd June, 1989 which indebtedness

they subsequently acknowledged in the Deed.

I conclude therefore, that there was no agreement limiting the respondents liability under the loan agreements to Shs. 54 million and that the Shs. 110 million that the respondent ultimately paid was the debt lawfully due under the loan agreements.

In the result, I agree that the superior court erred in making a finding that the respondents were entitled to pay the debenture holders only Shs. 54 million and that the balance of Shs. 56 million was paid in circumstances which amounted to economic duress.

I would also allow the appeal and dismiss the Notice of Cross – Appeal and the Notice of Grounds of Affirming the Decision. I agree with the orders proposed by Tunoi, JA.

Dated and delivered at Nairobi this 31st day of July, 2008.

E. M. GITHINJI

……

JUDGE OF APPEAL

JUDGMENT OF ONYANGO OTIENO, J.A

I have had the advantage of reading in draft, the judgment of Tunoi, J.A. and I do, with respect, agree with his summary of the facts underlying the litigation before us. I do also accept the legal stand as well as the conclusion arrived at in that judgment. There is accordingly, no necessity for me to repeat those facts and legal principles in this brief judgment, except to the extent where this judgment would be unintelligible without a rehash of the facts.

I have perused the entire record. I have considered the able submission by the learned counsel who appeared before us and addressed us at length. I have also considered the law. I am in full agreement with Dr. Kamau Kuria, on his legal exposition on what, in law, amounts to unjust enrichment, the legal definition of coersion, illegitimate pressure, duress and economic pressure. The learned Judge of the superior court (Kuloba J.) has in his judgment gone into depth on the claim that was before him which he termed restitutionary claim. I do agree with him fully on the legal principles as are made clear in that lengthy judgment. The legal concept that a party should not be allowed to keep and enjoy fruits that he has obtained through unjust and unfair means even if the same means would at first appear, in law, to be lawful, is a legal concept that has gained recognition in our jurisprudence and the courts are obliged to ensure that it takes full root and grows. Thus, the doctrine of unjust enrichment and the remedy of restitution to ensure that such a person does not enjoy what he has obtained unjustly and that the victim gets back what he may have lost through unfair means is a doctrine that is founded on sound principles and I have no hesitation whatsoever in accepting those legal propositions as clearly set out by the learned Judge of the superior court.

My points of departure with the learned Judge of the superior court however, are on two aspects as pertains to this appeal, and these are on the applicability of those legal principles to the facts of this particular case. First is whether, in law and in fact, the appellants in this case, **Kenya Commercial Bank Limited and Kenya Commercial Finance Company,** together with **Kenya National Capital Corporation Limited,** which is now the third respondent, were unjustly enriched i.e. did they obtain what was not their entitlement or did they obtain what was their entitlement but through coercion, intimidation or economic duress" For purposes of this judgment, I will

refer to the two appellants and the 3rd respondent all as "**the appellants**".

My second point of departure is on whether, on proper analysis and evaluation of the evidence that is on record, a conclusion can be made that the amount of Ksh.56,000,000/= paid to the appellant was paid through coersion, or economic duress proceeding from the appellants and people then in high government echelons and particularly the then Permanent Secretary in the President's Office, Mr. Letting.

This is a first appeal and I have a duty to analyse and evaluate facts that were before the trial court afresh and arrive at my own conclusion, provided that I do remind myself, as I do, that the trial court had the advantage of seeing and hearing witnesses and I must give allowances for that.

As I have stated, in considering the above, I will only delve into the facts that I feel are necessary for the points, as I do think my brother Tunoi J.A. has admirably set out the facts in the entire case and I do not need to repeat the same in this judgment. In his judgment, the learned Judge of the superior court stated, *inter alia*, as follows:

"The plaintiffs have shown on a balance of probability, that the sum of Shs. 56 million was an overpayment by them to the defendants on the latter's demand; that the plaintiffs were asked to pay Shs.54 million and they did so, but later on they were driven by force of the defendants to pay to the defendants Shs. 110 million and they paid it accordingly. On the general principles which I have attempted to understand and outline in the earlier part of this judgment, can it be correctly said that on a balance of probability, this payment of extra 56 million to the plaintiffs was an unjust enrichment at the expense of the plaintiff, by means of duress, and that the unjust benefit should be reversed" Was this payment and receipt, a benefit derived from the plaintiffs which is against conscience that the defendants should keep it, and should, in justice, be restored to the plaintiff""

The learned Judge answered those questions in his judgment which was in favour of the first and second respondents after enumerating what he felt were unjust ways in which that money, Ksh.56,000,000/=, was received by the appellants. Thus, according to the learned Judge, the only amount that the appellants were entitled to in the entire saga was Ksh.54,000,000/= and no more. However, a careful perusal of the record would, in my view, show a different scenario. In his letter dated 5th September 1989, addressed to Dr. B.E. Kipkorir, the then Executive Chairman of Kenya Commercial Bank Ltd., the first respondent, Mr. Macharia , stated, *inter alia*, as follows:

"This was in total disregard to the previous agreements in writing to settle the debt at Ksh. 54 million, the actual amount of both principal and interest owed to you as on 25th October 1985."

Mr. Macharia was in that letter admitting that Ksh.54 million was the debt as at 25th October 1985. It must be noted that the amount of Ksh.110,000,000/= was the amount in a deed dated 17th July 1989, about four years after the debt of Ksh.54 million accrued in favour of the appellants. This was a bank debt. There is no evidence that interest was waved completely from 25th October 1985, so that no interests accrued from that time. In that case, it would be unfair to contend that the amount remained static. The indebtedness was escalating. That explains the contents of a letter dated 24th April 1989 from the then advocates for the first two respondents to Dr. B. Kipkorir which stated as follows:

"RE: S.K. MACHARIA AND MADHUPAPER INTERNATIONAL LTD. (IN RECEIVERSHIP)

Our client S.K. Macharia understands that Madhupaper's assets have not as yet been transferred to the intending purchasers.

He has secured sufficient funds to pay off the entire amount due to the debenture holders inclusive of all

interest.

Will you confirm that this is now acceptable to you so that the facilities regarding documentation and the release of the monies to you can be undertaken.

Yours faithfully

Signed

P.K. MUITE."

(Underlining supplies)

There is no evidence that that letter was written on a without prejudice basis, nor is there evidence that as on the date of that letter, the respondents still regarded the amount of Ksh.54 million to be the debt due. A look at a draft enclosed in a letter dated 14th November 1988, three years after 25th October 1985, will show clearly that Mr. Macharia himself stated at 2nd paragraph that as at that time the "figure should be around or approximately (excluding receiver's overdraft) Ksh.79 million and at paragraph 4(b) he refers to Ksh.54 million as "*the original debt*" and states further in that draft -

"The above, taken together, I consider offering the Banks a settlement of Ksh.70 million excluding the Receivers overdraft expected to be continued by KCB and serviced normally by the company."

Further, and to demonstrate that the amount of Ksh.110,000,000/= that the appellants received from the first and second respondent was an amount due to the appellants and did not include an extra 56 million to which the appellants were not entitled, two months after the first and second respondents' advocates had made the proposal above, on 24th April, 1989, they wrote yet another letter on 29th June 1989 to Oraro & Rachier Advocates, for the appellants. In that letter, the two respondents stated, *inter alia*, as follows:

"The only other issue you raised in your said letter of 25th May was the fact that the then guarantee was limited to 3 million. This if we may say so, was a legitimate point for you to raise. You have now advised that the amount outstanding as at 22nd June amounted to Ksh.108,091,369/94 approximately. There is of course further interest accruing. Enclosed please find Barclays Bank PLC guarantee for Pound Sterling 3.4 million (Equivalent to Ksh.110,241,94/=) approximately. This guarantee more than covers the total amount payable to your clients".

Looking at the trend of the proposals from the first and second respondents in times of time, it was not surprising that on 17th July 1989 all the parties with Mr. Macharia representing Madhupaper entered into a deed which was duly signed by all and which specifically stated that as at 22nd June 1989 the amount due to the appellants and the third respondent was Ksh.101,681,369/94 plus Ksh.7,500,000/= being the receiver's fee. It is, in my mind, not in doubt from the above that the first and 2nd respondents did accept that that amount was due to the appellants. That being so, I find it difficult to appreciate that receipt and retaining of that amount by the appellants amounted to unjust enrichment of the appellants. I do feel, that had the learned Judge of the superior court analysed fully the evidence that was before him and evaluated the same, he would have most likely come to a different conclusion on that aspect. Further, I do not think that the way that amount was demanded reduced it to an amount received through unfair means. I have, through a few documentary evidence, shown above that it was indeed the first respondent, representing the second respondent, who made certain proposals or admissions of that amount as the amount due and payable to the appellants. Indeed, in the deed, the particulars of payments were recorded down i.e. Kenya Commercial Bank was owed Ksh.66,653,416.70 as at 22nd June 1989, Kenya Commercial Finance was owed Ksh.25,574,174/49 and Kenya National Capital Corporation Limited was owed Ksh.9,453,778/75. That deed

was signed in the presence of P.K. Muite and M.N. Ng'ang'a. These were advocates of the first and second respondents. I do not think Mr. Macharia's evidence in cross-examination that he signed the agreement to secure his property as he had no alternative can be given serious considerations. His advocates proposed documentation i.e. agreement. As I have stated above, the appellants obtained what was theirs and were not, in my view, unjustly enriched i.e. they did not receive and retain what was not theirs to the disadvantage of the first and second respondents.

The next issue I need to discuss is as to whether the first and second respondents were coersed by the appellants and or people in the government to part with Ksh.56 million to the appellants. I do not think it is in doubt that the appellants were at the relevant time wholly owned by the government. They were however, incorporated as business institutions in their own right and were not being or should not have been directly controlled by the government. The learned Judge found that the suit was fought on the basis of economic duress and he "focused" on that. He stated in his judgment concerning the government involvement thus:

"Amidst all these things, the company's intended project did not proceed and the plaintiffs blamed it on the government and the defendants. The government's involvement was through the Chief Secretary's deep involvement in the recovery measures as shown in the letters in the bundles. ……...

While these things were happening, negotiations were undertaken between the plaintiffs and the defendants, with the defendants always consulting, bringing in, and acting according to instructions from the then Permanent Secretary in the Office of the President and Secretary to the Cabinet, Mr. J.T. arap Letting (see for example letters dated February 7, 1989 and February 10, 1989 in bundle A. A settlement was subsequently reached, and was reduced into writing in correspondence between the plaintiffs, the defendants and the said Permanent Secretary."

He went on –

"The Chief Secretary was looming in the vicinity, approving of this, directing that, instructing and controlling what course to be taken by the plaintiffs. …….

If it was not for the only purpose of creating terror in the plaintiffs, why did the defendants enlist the assistance of the Permanent Secretary in the Office of the President and the Head of the Civil Service who was not a director of any of the defendant companies. ……. The Permanent Secretary was brought into the matter from time to time by the defendants as if the defendants were not free to act without the said approval."

The above and many other parts of the judgment clearly indicate that one of the main reasons why the learned Judge felt there was coersion and/or economic duress on the two respondents to part with their money was the ever presence of the then Permanent Secretary and Head of Civil Service, Mr. Letting, who, according to the learned Judge, was brought into the matter by the appellants so as to help the appellants obtain the money by undue coersion, threats e.t.c. He specifically referred to the letter of 7th February 1989 from Mr. Letting to Dr. Kipkorir and the letter dated 10th February 1989. I have perused the record in some details. Before those letters, on 20th December 1988, Mr. Macharia wrote Mr. J. Letting a letter as follows:

"**S.K. Macharia**

P.O. Box 74309

NAIROBI

Tel. 884461

20th December 1988

Mr. J. Letting

Head of Civil Service &

Secretary to the Cabinet

HARAMBEE HOUSE

Dear Sir,

RE: MADHUPAPER INTERNATIONAL LIMITED

I enclose a copy of a letter I have received from Kenya Commercial Bank.

Please note that Kenya Commercial Bank is still pursuing the sale of the company, in fact they seem unwilling to negotiate settlement with me.

I would therefore, be most grateful if you could let me know what is the position after our discussion on Friday 16th December 1988.

Yours faithfully,

S.K. Macharia."

Earlier, vide a letter dated 24th November 1988, Mr. Macharia had written a lengthy letter to Mr. Letting pleading with him on the same matter of the loan. At the end of that letter, he addressed Mr. Letting as follows:

"The above indicates that Kenya Commercial Bank Group and Kenya National Capital Corporation are not willing to settle this matter and that their main interest is to sell the company to a third party.

Please advise me urgently what to do since they have given me seven days deadline."

The last letter I need to refer to is the letter dated 7th March 1989. In that letter, Mr. Macharia is referring to his meeting with Mr. Letting on 6th March 1989 and says at paragraph 2 thereof:

"In this connection, I shall appreciate your personal intervention with KCB to get them to execute the documents my lawyers have delivered to them with the payment for the assignment of charges and the debentures immediately."

I could go on and on quoting several letters written by Mr. Macharia and copied to Mr. Letting. Incidentally, there are very few letters from the appellants copied to Mr. Letting and those are letters in response to Mr. Macharia's letters which are also copied to Mr. Letting in which case the appellants had no option but to copy their response also to Mr. Letting. In that scenario, I would not, with respect, share the learned Judge's finding that it was the appellants who enlisted the assistance of Mr. Letting for "*purposes of creating terror in the plaintiffs*" nor would I be privy to the learned Judge's assertion that the Permanent Secretary was brought into the matter from time to time by the appellants as if the appellants were not free to act without the said approvals. A keen look at

the documentary evidence would on the contrary demonstrate that it was Mr. Macharia who brought in Mr. Letting by way of copying letters to him or writing to him directly seeking his intervention. In my view, such intervention, if any, and I have not seen in the record any adverse intervention, were sought by the first and second respondents. As I have stated, I have not deciphered any adverse intervention from Mr. Letting in the relationship between the parties in this appeal. The conditions spelt out in his letter of 7th February 1989 were acceptable to Mr. Macharia and he confirmed his acceptance in his own letter to the appellants dated 9th February, 1989. Again, in my view, the learned Judge of the superior court, in referring to letters of 7th February and 10th February 1989, did not, in his analysis of the evidence, realise that those letters were a response by Mr. Letting to Mr. Macharia's letters dating back to 24th November 1988 some of which were copied to Mr. Letting and some addressed to him directly. If he had done so in his analysis and evaluation of the evidence before him on coersion and economic duress resulting into unjust enrichment of the appellant, he would have come to a different conclusion at least that there was not "deep" involvement of the government in this matter through the Permanent Secretary except where the first respondent sought his intervention and certainly, that the Chief Secretary was not "looming" in the vicinity, approving of this, directing that, instructing and controlling what course to be taken by the plaintiffs.

As to the appellants, the main complaint advanced against them as such for seeking their return of Ksh.56 million is that the parties had agreed that they be paid Ksh.54 million against the two respondents withdrawing the cases that were in the superior court against them; that whereas the respondents honoured their part of their agreement, paid Ksh.54 million and withdrew the cases in the court; the appellants reneged on the agreement after partially honouring it by removing the receivers for a period of one week and later insisting on a larger amount. The answer to that was given in the letter to Mr. Macharia from the first appellant dated 10th February 1989 which spelt out conditions for accepting the cheque for Ksh.54 million. One of the conditions was that the cheque was to be paid in full to KCB Moi Avenue Branch and not through a lawyer's undertaking, and the debentures were not to be transferred to a third party. Apparently, these conditions were not honoured and hence the end of that agreement. I do not see that as coersion or economic duress.

To conclude this short judgment, I would reiterate that whereas I do agree and endorse fully the legal propositions in the judgment of the superior court, I am nonetheless of a firm view that the learned Judge was plainly wrong in applying that law to the facts of the case that was before him, as the facts of the case did not give rise to unjust enrichment of the appellants by unfair, coersive pressure and or economic duress.

In the result, I would allow this appeal, set aside the judgment of the superior court and in its place, I would substitute an order dismissing the suit in the superior court. I would also dismiss the notice of cross appeal and the notice of grounds affirming the decision. I would award costs of the suit in the superior court and of the appeal and of the notices of cross appeal and of the grounds affirming the decision to the appellants.

Dated and delivered at Nairobi this 31st day of July, 2008.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR