



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Muli & Tunoi JJ A)

CIVIL APPEAL NO. 117 OF 1992

BETWEEN

MOLLO EDILIO.....APPELLANT

AND

1. ABDULLAHI H. KHALIL

2. SALIM.A. AMODY.....RESPONDENTS

(Appeal from a judgment of the High Court of Kenya at Mombasa (Justice Shields) dated 12th September, 1990

in

Civil Case Number 128 of 1989)

JUDGMENT

Mollo Edilio, the appellant is a resident of Toscanini in Italy. Whilst in Kenya as a tourist in 1986, his wife Carbotti Albarosa was involved in a road accident on the 27th day of March, 1986 at about 10.15 pm along Mombasa/Malindi Road at Kizingo village heading towards Malindi and died instantly.

Letters of Administration of the deceased's estate were issued to him at Ventimiglia, Italy on 19th January, 1989, but were not resealed in Kenya as required by section 77 of the Law of Succession Act (cap 160).

On 17th February, 1989, the appellant filed suit in Mombasa High Court claiming damages both under the Fatal Accidents Act (cap 32) on behalf of himself and for the benefit of his son and under the Law Reform Act (cap 26) as personal representative of the deceased for the benefit of the deceased's estate.

At the conclusion of the trial, Shields, J awarded damages and funeral expenses under the Fatal Accidents Act in foreign currency amounting to 120 million Lira for dependency and 4.5 million Lira for funeral expenses. He held that though the appellant was a legal personal representative of the deceased by virtue of the Italian grant, he was not so in Kenya for lack of resealing the said grant. He dismissed the claim under the Law Reform Act.

Because he gave judgment in Italian Lira, he went further to set a date for the conversion of Italian Lira into Kenya Shillings. He relied on *Celine v Voltuno* [1921] 2 AC 554 where it was held that the amount of foreign currency awarded because of a tortious act ought to be converted into the local currency as at the date when it was suffered. He went further to state that damages should be converted at the rate of exchange prevailing on the date when the right to compensation was complete and not on the date judgment assessing damages was delivered. He set this date to be 25th March, 1986.

The appellant has appealed to this Court on two grounds:

- (i) that this Court should reverse the High Court decision and set a more reasonable date for conversion;
- (ii) to allow and access the claim under the Law Reform Act.

Mr Kasmani for the appellant firstly pointed out that the date given as 25th March, 1986 could have been stated so by mistake as this date was two days before the accident. The more probable date that the trial judge meant would have been the 27th March, 1986, being the actual date of the accident. We accept that this date was mistakenly quoted as such.

On the conversion date, Mr Kasmani, in support of the submission that the date should be altered, referred us to *McGregor on Damages* 15th Edition on particular changes in the external value of sterling between the time of accrual of the cause of action and the time of judgment. He took us through paragraphs 631 to 660. These paragraphs illustrate that whether the claim was in contract or tort, the old rule was to fix the rate of exchange when the right to compensation was complete.

Because of the fluctuation of the currency, it was apparent that the plaintiff was not adequately compensated due to the delay between the date of filing suit and the date of judgment and thereafter, the date of payment particularly in the case of an appeal, if filed, as it would extend the period further. On this point, the House of Lords brought about changes and overruled earlier decisions so as to safeguard plaintiff's position by settling the date of conversion nearer to the date where the plaintiff can be adequately compensated and not losing much in terms of currency fluctuation as decided by *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443. The plaintiff will suffer only if the currency of his choice would be devalued.

There had been many decisions of the court before *Miliangos* case all on this subject. *McGregor on Damages* found it useful to comment extensively on *Miliangos*. Lord Wilberforce in his address said this at page 468 letter H to page 469 letter B:

“As regards the conversion date to be inserted in the claim or in the judgment of the court, the choice, as pointed out in the *Havana Railways* case [1961] AC 1007, is between (i) the date of action brought; (ii) the date of judgment; (iii) the date of payment. Each has its advantages and it is to be noticed that the Court of Appeal in *Schorsch Meter* and in the present case chose the date of payment meaning, as I understand it, the date when the Court authorises enforcement of the judgment in terms of sterling. The date of payment is taken in the convention annexed to the Carriage of Goods by Road Act 1965 This date gets nearest to securing to the creditor exactly what he bargained for. The date of action brought, though favoured by Lord Reid and Lord Raddiffe in *Havana Railways* case, seems to me to place the creditor too severely at the mercy of the debtor's obstructive defenses ... or the law's delay. It may have been based on an understanding of the judgment of Holmes J in the *Deutsche Bank* case now seen to be probably mistaken The date of judgment is shown to be a workable date in practice by its inclusion in the Carriage by Air Act 1961 which gave effect to the Hague Convention 1965 varying, on this very point, the Warsaw Convention of 1929, but, in some cases, particularly where there is an appeal, may again impose on the creditor a considerable currency risk. So I would favour the payment date in the sense I have mentioned.”

The trial judge gave judgment in foreign currency as he was asked and was right to do so as Kenyan Courts are not restricted to giving judgments in local currency. What is being challenged is the fixing of the date that the judgment was to be satisfied at the rate prevailing when right to damages accrued. Taking

that period and the date of judgment, there was a gap of approximately 5 years. This appeal has taken three more years to be heard and determined. During that period of eight years, the value of currency world wide has fluctuated. If the appellant were to be paid damages at the rate of exchange prevailing at the time of the accident, he will be very much

at a loss and would not be adequately compensated. The Kenya currency has depreciated while foreign currency has appreciated. No country in the world can claim that its currency will remain static and will not be affected by fluctuation and inflation. Considering the *Miliangos* case and the time factor between the date of accrual of damages, the filing of the suit and the time of obtaining judgment and possible appeal and time for execution; the appropriate date for making payment would be the date toward the end of the road for determining the rate of conversion of foreign currency with the local currency. In our view, the appropriate date for conversion is at the date of payment. This ground of appeal succeeds and the date fixed by the trial judge is set aside and substituted with the date of payment.

On the claim under the Law Reform Act, the law here is clear. Unless the personal representative has obtained Letters of Administration of the estate in his name, he has no *locus standi* in a claim for the benefit of the estate of a deceased person. The law on this point is as pronounced by a bench of five judges in *Troustik Union International & Another v Mrs Jane Mbeyu & Another* Civil Appeal No 145 of 1990 (unreported).

The appeal on the dismissal of the claim under the Law Reform Act (cap 26) fails.

As the appellant has succeeded in part, he will be entitled to half of the costs in this appeal.

Dated and Delivered at Mombasa this 21st day of January 1994.

J.M.GACHUHI

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JUDGE OF APPEAL

M.G.MULI

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR