REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

Civil Appeal 134 of 1986

BELUF ESTABLISHMENT ..... APPELLANT

AND

THE ATTORNEY-GENERAL ..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Sheikh Amin, J.) dated the 7th November, 1987 In H.C.C.C. No 2436 of 1978)

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JUDGMENT OF GACHUHI JA.

I have had the advantage of reading in draft from the judgment of my brother Akiwumi JA and I agree with it.

However, I would say that the development of the law is a continuous process which should be encouraged so as to deal with any new matter of law as and when such an occasion arises, failing which, courts will not arbitrate on the rights of people effectively as required by the rules of natural justice.

The law of this country was imported from England. Section 3 of the Judicature Act (cap 8) sets out the application of the Common Law and Statutes in force in England on 12th August 1897 as the law applicable here. Certain statutes have been reproduced verbatim as Acts of Parliament of this country even those enacted after that date. Decisions of the English courts, past and present, have continued to be applied here as authorities. So whatever decision is being made in England will eventually become applicable here. This will continue for sometime in the future. Economically this country has moved far ahead from where it was thirty years ago. Before independence commercial dealings were restricted to the country of the colonial master. Since independence, gates were opened for Kenya nationals as well as the State to enter into trade transactions and other agreements with foreign countries. These foreign countries dictate that the agreements they enter into, the currency to be stated in them should be recorded in these agreements and be expressed in the currency of their countries meaning that for any breach that there may be, the foreign countries will be compensated in their currency. Judicial notice can also be taken that, at present, any dealing outside the country is conducted in foreign currency. To insist on the fact that foreigners should be paid or compensated for any breach in local currency would be contrary to the agreement and would render the country to disrepute and would receive unfair deals particularly when the local currency is weak and being subjected to devaluation.

In the past, English decisions were that judgment awarding damages be expressed in sterling, and the payment to be converted into foreign currency at the rate of exchange at the time of payment. That position was changed by the decision of the House of Lords in Milliangos v George Frank (Textiles) (1976) AC. 443.

This decision has revolutionalised the English law by allowing judgments to be pronounced in foreign currency. As recipient of Common Law, we are affected by that decision. No matter whether the claim is in tort or in contract, where payment will be made in foreign currency, judgment should better be entered in that currency as claimed.

On this issue of foreign currency, it is an undoubted fact that some currencies are stronger than others. Most currencies are not stabled because they are subject to fluctuation from time to time. The commercial world will dictate that the currency under which a foreigner should be compensated in be the currency that one would be certain that its value would be beneficial to him irrespective of fluctuation.

The claim, the subject matter of this appeal was not based on contract – but in tort. The appellant had no business to transact with this country. It had goods that had to be transported through Kenya under the International convention which allows free passage to the sea. While the goods were being conveyed under the guards of the arms of the law, they mysteriously got lost in Kenya and the respondent was sued in tort. Liability having been admitted, judgment was entered in Kenya currency for Shs 687,737/90 equivalent to 82,643/92 US Dollars at the rate of exchange at that time. Because of the fluctuation of the currency at the time of payment the appellant will not be compensated as he will be paid very much less than what it lost. As a result this appeal was filed so that the appellant may be paid for what it lost in US Dollars.

There was argument before the trial Judge that the appellant's claim was the loss suffered in US dollars and the appellant should be compensated by place it to the position it would have been but for the wrong done to the plaintiff. In this respect, the principles of restitutio in integrum was to be applied. The trial Judge rejected the authorities cited to him and treated the plaintiff's claim as normal damages claim and awarded damages in Kenya currency equivalent to the value of coffee lost of 82,643/92 US Dollars. I think the trial Judge was wrong in rejecting the authorities cited to him.

It is unfortunate that the Court did not have the advantage of hearing submissions from the respondent in particular in reply to Miliangos v George Frank case as submitted by Mr Fraser. Mr Kimani Muhoro is reported to have submitted before the trial Judge that the authorities cited by the appellant were not applicable to the situation in Kenya. The authorities cited at the trial were also cited to us. I do not say that if the respondent had attended, he would not have had anything useful to say but our feelings are that at least a representative should have participated in the hearing. However, the one who came to Court came too late when the appellant was almost concluding his submission. She said that she was instructed to seek adjournment, which request was rejected.

In this particular appeal, applying the decision in Miliangos case, I would also allow this appeal with costs. As Omolo, J.A. also agrees, the order of the Court is that there will be for the appellant as proposed by Akiwumi, J.A.

Dated and delivered at Nairobi this 23rd day of September 1993.

J.M. GACHUHI

JUDGE OF APPEAL