IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, GACHUHI & APALOO JJA)

CIVIL APPEAL NO. 64 OF 1985

PATEL ……..…..…….APPELLANT

VERSUS

SINGH ……..……..…..…..DEFENDANT

JUDGMENT

This appeal is based on the part of the judgment of Aganyanya J delivered on 23rd September 1983 which states:

> "In any event, this transaction seems to be tainted with illegality, hence unenforceable in law, as 2 Kenya residents entered into an agreement for the advance of Kenya money on Indian Currency in India contrary to section 3 (1) of the Exchange Control Act."

The appellant had accumulated funds on various deposit accounts in India. Such funds were remitted periodically to India through various banks in Nairobi and Mombasa.

The appellant and the respondent while residents of Kenya entered into a contract of lending that part of the money held by the appellant in India. The money was to be lent in foreign currency (Indian Currency), Rupees 40,000 equivalent to Kshs.38,000 interest free to be repaid within a short time. At the time of inception of the contract, both parties were in Kenya but both were at the same time proceeding to India. On 29th December 1966 while they were in India the appellant withdrew from his account and other accounts of family members IR 45,000. He paid IR 40,000 to the respondent on the same day, and obtained a receipt for the money. The respondent never repaid the said amount because, as it is put in the defence, the said transaction was tainted with illegality.

At the trial no evidence was offered for the defence but the defence counsel submitted that the said contract was void for illegality as it contravened section 3(1) of the Exchange Control Act, (cap 113). On that basis the suit was dismissed.

In this appeal Mr Gaya for the appellant submits that the money having been transferred from Kenya to India legally it was no longer subjected to Kenya Exchange Control Act, (cap 113) but that of India where funds were held. He referred to Exchange Control Administration Notices and instructions issued by the Assistant Secretary to the Treasury and in particular to clause 1 (b) of Exchange Control Circular No 32 which reads:

> "(b) Cash balances and deposits with banks, post offices and building societies, etc., in any country in the sterling area are not required to be offered for sale to an authorised dealer. Such funds may be freely invested in sterling area subject to any requirements of the local exchange control authorities concerned."

There is no dispute that India is one of the countries to which its foreign currency is covered by Legal Notice No. 159 of 10th June, 1965, issued under the Exchange Control Act (cap 113).

Mr Gaya's interpretation that funds invested in India by residents in Kenya is exempted from the operation of Kenya Exchange Control Act is not correct. The exemption granted by Exchange Control Circular No. 32 is merely to regularise the transfer of money for investment in India or in any sterling area prior to 11th June 1965. There is however a control in dealing with money invested in those sterling areas by residents in Kenya as contained in section 3(1) of the Act which provides:

> "Except with the permission of the Minister, no person, other than an authorised dealer, shall, in Kenya, and no person resident in Kenya, other than an authorized dealer, shall, outside Kenya, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorized dealer."

It is quite clear from this provision that people resident in Kenya to enter into any dealing for sale of gold or foreign currency or borrowing any of these funds without the consent of the Minister is in contravention of Exchange Control Act, section 3(1). It also amounts to a criminal offence under the Act.

The contract entered into by the appellant and the respondent is illegal and contrary to the provision of section 3(1) of Exchange Control Act.

The learned judge came to the correct conclusion in law in dismissing the appellant's suit.

On the submissions made to us and the evidence on record one cannot hold otherwise but come to the same conclusion that the contract, contravenes the provision of section 3(1) of the Exchange Control Act (cap 113) and as such it was illegal and unenforceable. I would dismiss this appeal with no order as to costs.

Nyarangi JA.I agree with what Gachuhi JA has stated. Paragraph (b) of Exchange Control circular No 32 on which the appellant relied heavily is subject to requirement of local Exchange control, pharaseology which lets in section 3(10) The Exchange Control Act, cap

113. On the evidence, the appellant was not an authorized dealer and he could not enter into a valid agreement. The material contract was, therefore, illegal ab initio and so unenforceable.

In *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, at page 388 Devlin L.J (as he then was) had this to say on the issue of illegality,

> "The effect of illegality upon a contract may be threefold. If at the time of making the contract there is and intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract *ab inito* and that arises if the making of the contract is expressly or impliedly prohibited by statue or is otherwise contrary to public policy."

I conclude, therefore, that the appeal should be dismissed with costs and as Apaloo JA also agrees, it is so ordered.

Apaloo JA. Had I felt able to give judgment in favour of the appellant, I would have done so with complete satisfaction. There is, to my mind, no doubt that the sum claimed in the plaint was lent to the respondent by the appellant and had this matter not been affected by legislation, namely, the Exchange Control Act, judgment in favour of the appellant ought to have been a forgone conclusion.

But whether it was known to the parties or not, section 3 of the Exchange Control Act forbids the transaction entered in to by the parties under pain of criminal section. The upshot, of this, was that the appellant sought the aid of the court to enforce a contract made illegal by statute. Well settled principles of the common law preclude this court from assisting him. Although I am in disagreement with the learned Judge holding that on the facts, a loan contract was not established, I think the alternative ground on which he founded his conclusion, namely, that the contract was unenforceable on the ground of illegality, seems to me plainly right. I am accordingly in respectful agreement with my learned brothers that this appeal fails and should be dismissed.

The result of this appeal is that the respondent is getting away with a handsome present. He is the gainer by this illegal transaction. He succeeds on this appeal not because of any merit which his case possessed, but because of what we conceived to be the policy of the law on this subject. That being so, I am in agreement with my brothers that this is not a case in which we should exercise our discretion as to costs in his favour. Accordingly, I also think we should make no order as to costs on this appeal.

Dated and Delivered at Nairobi this 1st Day of July, 1987

J.O. NYARANGI

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL