REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & M'INOTI, JJ.A)

CIVIL APPEAL NO. 240 OF 2005

BETWEEN

AGRINCO LIMITED……..…….....……APPELLANT

AND

STANDARD CHARTERED ESTATE MANAGEMENT LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Onyango Otieno, J) dated 9th March, 2001

in

H.C.CC. NO. 4119 of 1993)

****

JUDGMENT OF THE COURT

On 20th August 1998, the appellant, ***Agrinco Limited*** filed a suit against the Respondent, ***Standard Chartered Estate Management Limited*** claiming U.S. Dollars 406.541 for goods sold and delivered on diverse dates in the years 1992 and 1993. The goods were in form of agrochemicals known as "***Cuprocaffaro"*** and "***Clortocaffaro"*** sourced by the appellant from the manufacturers in Italy and paid for in US Dollars.

The respondent in its defence denied that claim and averred that, there was a well established business practice between the two that, upon the appellant selling and delivering goods to the respondent, the appellant would immediately send to the respondent an invoice for payment and on receipt of the invoice, the respondent would pay to the appellant the purchase price for the goods. It further averred that on the 16th December, 1992 and 5th February, 1993, the appellant made deliveries of Clortocaffaro to the respondent but despite several requests and reminders by the respondent, the appellant failed, refused and/or neglected to raise an invoice for payment, a situation which continued to persist even at the hearing of the suit. In order to mitigate possible losses due to the long delay, the respondent voluntarily and without an invoice, paid to the appellant Kshs. 21,513,043.50 on 12th July, 1993 being the equivalent in Kenya shillings of US. Dollars US. 594,000 at the interbank exchange rate prevailing in Kenya as at the dates of delivery of the goods. The respondent maintained that it was entitled to pay for the price of

the goods at the rate of U.S. Dollars prevailing on the date of delivery as contemplated by the provisions of Section 29 of the Sale of Goods Act, Cap 31 Laws of Kenya. The respondent therefore denied owing any money to the appellant beyond the payment already made. On that account, it prayed for the appellant's suit to be dismissed with costs to them.

The appellant filed a reply to the respondent's defence and in addition to joining issues on the defence, averred that the agreed price for the goods was fixed in U.S Dollars and invoices were to be issued on the availability of foreign exchange which was subject to specific releases by the Central Bank of Kenya; that the respondent had proposed to pay for the goods in Kenyan shillings despite agreement that the goods were to be paid for in U.S Dollars; that the respondent set an arbitrary rate of exchange despite being aware and being specifically informed that the invoices could only have been issued on the availability of foreign exchange; that the respondent would be guilty of unjust enrichment by tendering moneys on an exchange rate not prevailing at the time of payment; and lastly, that payment was accepted on account only and not in full and final settlement of the appellant's claim.

At the hearing of the suit only two witnesses, one on each side testified:- **Shiraz Rehmanji** (***Shiraz)*** for the appellant and ***Peder Nortensen*** (***Peder)*** for the respondent.

It was the testimony of ***Shiraz*** that despite the appellant failing to meet the supply dateline for Clortocaffaro which should have been before the 31st day of December, 1991 the respondent did not rescind the contract but accepted the belated deliveries. The deliveries were made on 20th November, 1991, 9th January, 1992, 15th June, 1992, 8th July, 1992, 16th December, 1992 and 5th February, 1993. Other delayed deliveries for Cuprocaffaro were made on 15th April, 1992, 10th September, 1992, 12th November, 1992, 16th December, 1992 and 13th January, 1993. The only deliveries in dispute in the suit related to deliveries of Clortocaffaro made on 16th December, 1992 and 5th February 1993, as well as Cuprocaffaro deliveries on 12th November, 1992 and 13th January, 1993. The other belated deliveries were paid for.

In examination in chief ***Shiraz*** outlined the procedure and trade practice as follows:-

> ***"As soon as we receive the goods we would apply for the allocation of funds for remittance. This would be as soon as the goods arrive. We would then deliver the goods to the customer (respondent). As soon as the goods arrive at the port of Mombasa and cleared, we would invoice the customer at the time of the delivery. This was the practice and it was an on going practice. We would invoice as soon as we receive allocation to remit funds."***

When cross-examined, he conceded that there was no averment in the plaint that the invoices were to be raised after receiving authorization by the Central Bank; that the Dollar rate applied by the respondent when remitting the payments to the appellant for the disputed deliveries was higher than the rate quoted in the contract; that they accepted the said payment on account only; that the payments were at the prevailing Central Bank rate; and that they had not invoiced the respondent for the disputed payments even as at the date of his testimony in court.

Turning to the testimony of ***Peder,*** he had this to say in his examination in chief:-

> ***"Practice was that we paid fairly promptly after presentation of an invoice. All the deliveries were paid within 12 days maximum except for 8 and 10. On 8 and 10 we waited for invoice and sent reminder to suppliers but nothing was forthcoming. By 13th July, 1993 seven and five months after delivery date we made payments. Failing invoice, we made payments using exchange rates ruling at the date of delivery as Central Bank exchange rate"***

When cross-examined, he admitted that despite the respondent's complaints on the delay in the deliveries, the respondent did not rescind the contract; that earlier on, there were restrictions on foreign exchange, till about 1992; and contended that there was nothing in the contract to the effect that invoices would only be issued after allocation of foreign exchange when the rate was known.

At the end of the trial, the learned trial Judge distilled the facts and summarized the case as follows;-

> "***From the same facts, it is apparent that it is not in dispute as to the following aspects i.e that the defendant ordered from the plaintiff and the plaintiff did deliver to the defendant Cuprocaff aro and Clortocaffaro Agro Chemicals which are the items in dispute. Cuprocaffero ordered vide L.P.O. No.7978 dated 13th October, 1992 was delivered on 12th November, 1992. Invoice for the same was dated 17th February, 1993, and was paid under cheque No. 91327 for Kshs.13,167,000.00. Another Cuprocaffaro was ordered vide L.P.O. No. 7978 and dated 13.10.1992 but was delivered to the defendant on 13th January, 1993 and invoice for the same was also dated 17th February, 1993. It was paid on 19·2.1993 vide cheque No. 91327 for Kshs. 6,579,569.00 In both cases of Cuprocaffaro, the exchange rate used was Kshs.36.864. This was the exchange rate on the invoice and it was written down on the invoice as the exchange rate per 17th February, 1993, USD 1=36.864. It was also not in dispute that the two deliveries of Clortocaffaro were ordered vide L.P.O. No. 7013 which appears to have been dated 9th August, 1991. The first lot of 45,000 Kg was delivered on 16th December, 1992 but no invoice was issued in demand for payment. However, it was paid for on 13th July, 1993 vide cheque No.99043 for Kshs. 10,595.062.15. The second lot also ordered vide the same LPO was 45,000 kg in weight and was delivered on 5th February, 1993. No invoice was issued for the same delivery but was paid for on 13th July, 1993 vide cheque No 99043 for Kshs.10, 917,981.55. It is also not in dispute that the agreed prices were in US Dollars."***

The learned Judge drew out the issues in controversy as between the parties as follows;-

> ***"The main issues in controversy are first whether the payment was to be on the rate of exchange at the time of payment or as per the rate in the invoice issued, or at the rate of exchange at the date of delivery i.e whether Section 29 of the Sale of Goods Act applies. Further a look at the statement of Defence and Reply to Defence will reveal that there were other issues in dispute and these are whether the defendant in the circumstances of this case did pay the plaintiff in full for all the deliveries made…."***

The learned Judge then analysed the pleadings filed, the evidence tendered and submissions of counsel before coming to the conclusion that the provisions of Section 29 of the Sale of Goods Act Cap 31 Laws of Kenya, did not apply since the conduct of business between the parties as demonstrated on the evidence did not envisage those provisions.

The Judge also found, as contended by the appellant, that invoices were issued late because the appellant had to get foreign exchange release authority for remittances to the manufacturer in Italy.

In the end, the learned Judge resolved the issue on the Cuprocaffaro claim as follows:-

> ***"In both cases, as I have held that payment was on invoice and as I have held the invoice delayed mainly because the plaintiff wanted to be sure of what to demand after having gotten allocation of funds and having known what to remit to the principal; it goes without saying that the defendant had rightly paid this demand. Even if I were to find that payment was to be at the rate of exchange at the time of payment, it would have still been the duty of the plaintiff to issue another invoice for the difference caused by fluctuation. This was not done or at least I was not shown any invoice demanding the difference between the amount as calculated at the exchange rate on 17th February, 1993 when the invoice was issued and the amount paid on 22nd February, 1993. Under those circumstances, the claim based on these two deliveries cannot stand"***

As regards the claim on Clortocaffaro, the learned Judge stated:-

"The next claim is in respect of Clortocaffaro delivered on 16 .12. 1992 and 5th February, 1993 respectively referred to in the schedule as No. 8 and 10. The main problem with these claims is that in respect of both deliveries no invoice had been issued. I had earlier made a finding that Section 29 of the Sale of Goods Act Chapter 31 is not applicable. That in effect means that the payments made for both of them based on the foreign exchange as on the date of deliveries (See letter dated 12th July, 1993 from the defendant to the plaintiff) could not have been the proper and full payment, and was rightly accepted by the plaintiff on account. However what is the proper payment? That would have been known if the plaintiff had shown the court the invoice issued on the date of the allocation of funds for the import of the same. It would have been established by showing the exact dollars the plaintiff was to pay its principal on the date the funds were allocated for the same when the plaintiff was able to determine the foreign exchange rate. This has not been made available to the court through any relevant invoice.

……..

These pieces of evidence appear to me a clear indication that for the defendant to be called upon to pay to the plaintiff for the deliveries made there has to be an invoice which would show the correct amount calculated (according to the plaintiff) after the allotment of funds. These invoices are not there in respect of these two deliveries of Clortocaffaro in dispute and have not been issued. These deliveries were made on 16th December, 1992 and 5th February, 1993 respectively. It is now well over eight (8) years and no invoices have been issued for these deliveries. Is the plaintiff indicating that for all this time no allocation of funds has been made? In the plaint, the plaintiff claims US Dollars 331, 646 being the balance of the agreed price for 90Kgs Clortocaffaro 75% W.P delivered to defendant at its order and request at Thika between December, 1992 and February 1993. The defendant states at paragraph 4 of its Defence that the plaintiff refused and or neglected to raise an invoice for payment by the defendant and persists on such failure, neglect or refusal to date. Defendant then decided voluntarily to pay at the rate of delivery. I have said this was not a reflection of the proper payment but under the circumstances as the defendant had not been invoiced for the same deliveries for well over five months, I cannot say the defendant took wrong steps as they needed to mitigate their loses (if any). The plaintiff has not in its evidence given any break down showing how the amount it is claiming is arrived at i.e the exchange rate used and the date the exchange rate was applicable and whether the date the allocation of funds was made in a letter dated 2nd July, 1993 addressed to the defendant, the plaintiff put the payment for 90,000Kgs Clortocaffaro at a total of US Dollars 594,000.00 but even in that letter the operative date when the calculation was made is not stated. It is the plaintiff which is claiming that the defendant under paid for the goods supplied to the defendant. The plaintiff has the burden to prove within the balance of probability its claim and how the same is arrived at. In my humble opinion, it has not discharged this burden and I cannot grant this prayer"

The appellant was aggrieved by that decision and he has appealed to this Court citing five (5) grounds of appeal:

1. The learned Judge erred in holding that payment made by the respondent prior to invoicing by the appellant discharged the respondent from further demands from the appellant.

2. The learned Judge failed to appreciate that payment by the respondent prior to invoice was calculated to avoid payment at the correctly calculated US Dollar rate.

3. The learned Judge erred in failing to appreciate that at the time there were delays on the part of the Central Bank in making allocation of foreign exchange for payment of imported goods.

4. The learned Judge erred by drawing an inference that failure to issue an invoice entitled the respondent to pay at the rate they wished.

5. The learned Judge erred in failing to appreciate the exigencies faced by importers late 1992 and early 1993.

In his oral submissions before us ***Mr. Rustam Hira*** learned counsel for the appellant, addressed those grounds globally. He argued that it was not in dispute that a contractual relationship for the supply of Agrochemicals between the appellant and the respondent was in existence; that the transactions between the parties was in U.S. Dollars; that all price quotations in all the documents relied upon were in US Dollars; and that the said contract was subject to foreign exchange restrictions. It followed therefore that the appellant's contention that invoices could not be issued, until foreign exchange allocation had been made to the appellant was a fact known to both parties and ought to have been accepted by the learned judge. The fluctuations in the U.S Dollar rates was also a fact known by the respondent, and it further knew that the price of the goods as at the time of payment would be higher. He cited several authorities in support of the proposition that a debt payable at a future date involves an obligation to pay the nominal amount of the debt as at the date of payment regardless of the rise and fall in exchange value of the currency.

Mr. Hira further referred to the documents on record and submitted that they demonstrated that the respondent understood why the invoices were being delayed and that is why the respondent honoured and made payments on delayed invoices. Lastly ***Mr. Hira*** argued that the onus of proof was shifted by the High Court to the appellant when, on the contrary, it was the duty of the respondent to prove full payments of the debt in accordance with the trade practice between the two as proved by the appellant.

In response ***Mr. Kevin Mc Court***, learned counsel for the respondent, submitted that the central issue in controversy both at the trial and in this appeal is whether the U.S Dollar rate applicable to the disputed payments was the rate prevailing at the date of delivery of the goods; or at the time of issuance of an invoice or at the time of payment as contended by the appellant. In his view, the rate was not as at the time of delivery, but upon issuance of an invoice and certainly not at the time of payment as contended by the appellant. He submitted that all payments in the documents exhibited and accepted by both sides, demonstrate clearly that the respondent met its payments commitments for the goods supplied to it by the appellant against invoices issued and received, which was the custom or trade practice.

As regards the dispute on Clortocaffaro, he submitted that there is no dispute that no invoice was ever issued by the appellant to the respondent for the two deliveries; that the payment made on 13th July, 1993 by the respondent to the appellant was made out of necessity to mitigate loss after waiting to be invoiced by the appellant to no avail for a period exceeding six months; and that the learned Judge was right in rejecting speculation on exchange rates or invoices which were not in evidence.

In his brief response ***Mr. Hira*** maintained that the U.S Dollar rate was subject to fluctuation, which consequently affected the value of the goods. Despite the failure by the appellant to issue the invoice, ***Mr. Hira*** submitted that the respondent was fully aware of the procedure of awaiting foreign currency allotment, and the respondent should not get away with the payment it made as at the date of delivery.

This being a first appeal, our mandate is as set out in Rule 29(1) of the Court of Appeal Rules 2010 namely, to re-appraise the evidence and to draw our own inferences of fact. In ***Selle versus Associated Motor Boat Company [1968] EA 123 at page 126 (***Sir Clement De Lestang) had this to say:-

> ***"An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence , evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Salf Vs. Ali Mohamed Sholan [1955], E.A. CA. 270)***

The complaints raised by the appellant against the Judgment of the learned trial Judge have been summarized above.

It is common ground that the two parties prior to events leading to this appeal had had a fruitful business relationship involving the supply of Agrochemicals. Both sides understood that the transactions would be in US Dollars. The procedure for procuring supply of the goods and the payment therefor was narrated by ***Shiraz*** whose evidence is reproduced above and was not materially controverted by ***Peder*** for the respondent.

On the genesis of the dispute culminating in this appeal, the evidence is also fairly straight forward. The schedule of transactions was tendered in evidence and was thoroughly analyzed by the learned Judge in his judgment. In summary, the schedule demonstrates that the respondent placed an order with the appellant for the supply of the aforementioned Agrochemicals using L.P.O.S. Some of these have been identified in the schedule as L.P.O No.s 7013 of 9th August, 1991, 7381 of 18th December, 1991, No.7978 of 13th October, 1992.

The schedule also contains other requests for supplies by the respondent to the appellant whose L.P.O. numbers and dates of placements have not been indicated in the schedule. The L.P.O.S contained a delivery date. Those for the delivery of Clortocaffaro are indicated as 20th November, 1991, 9th January, 1992, 15th June, 1992, 8th July, 1992, 16th December, 1992 and 5th February, 1993 respectively, whereas those of Cuprocaffaro were indicated as 15th April,1992, 10th September,1992, 12th November, 1992 and 13th January, 1993.

A further perusal of the entries in the schedule indicates that partial invoicing was done by the appellant for deliveries made on 20th November, 1991 and 21st January, 1992 for Clortocaffaro and on 30th April, 1992, 17th February, 1993 and 17th February, 1993 for Cuprocaffaro. The dates and amounts of payments for the invoiced deliveries in Kenyan shillings are indicated as follows; 20th November, 1991 for Kshs.7,027,540.00, 31st January,1992, for kshs.7,145,680.00, 8th May,1995, for Kshs.4,449,350.00, 28th February, 1993 for kshs.1,317,700.00 and lastly 28th February, 1993 for Kshs.6,583,500.00. The payments were effected vide cheque numbers 85168,85586,86089,91327 and 91327 respectively.

We also note that the same schedule contains payments whose invoice dates or numbers are not indicated. These were made on 7th day of July, 1992 for Kshs.1,680,000.00 vide cheque number 870191, 19th August, 1992 for Kshs.6,619,917.70, vide cheque number 76184 and 30th September, 1992 for Kshs.1,208,550.00 vide cheque No.96327.

There are also entries for non-invoiced payments for Clortocaffaro delivered on 16th December, 1992 and 5th February, 1993 and Cuprocaffaro delivered on the 12th November, 1992 and on 19th January, 1993. Despite lack of invoicing, the respondent went ahead to effect the payments for all those deliveries. For the deliveries made on 16th December, 1992 payment to the tune of Kshs.10.595, 062.15 was made vide cheque number 99043, whereas for the delivery made on the 5th day of February, 1993 payments to the total tune of Kshs.10, 917,981.33 vide cheque number 99043 was made.

Regarding correspondence exchanged between the parties, we find, as did the learned trial Judge, that these demonstrate the existence of a disagreement between the parties as to whether the U.S. Dollar exchange rate to be applied should be the rate prevailing at the date of delivery or the date of payment. In its letter dated July, 2nd 1993, the appellant referred to a discussion held between them and addressed the respondent, inter alia, thus:-

RE: 90,000 Kgs Clortocaffaro 75% W.P.

126,000Kgs Caprocaffaro 50% W.P.

"The payment is for the following: 90,000 kgs Clortocaffaro 25% W.P. @U.S. 6.60kgs. Total USD 594, 000.00. 126,00 kgs Cuprocaffaro 50% W.P. @ U.S. 1.70 kg. Total USD 214,000.00.Total US 808,000.00

You proposed that we share the loss due to devaluation of the Kenya shillings visavis the US Dollar, however, we regret you gave us the order on the understanding that pricing was in U.S Dollars. We would accept the equivalent in Kenya shillings on the date of payment only for the purpose of facilitating payment to our principals, M/S Caffaro s.p.a. of Milan, Italy, since the goods were imported through Agrinco Limited, for you.

Following our meeting, we contacted Caffaro s.p.a. and were advised by them that their offer can not be altered. Caffaro S.p.a. quoted very special introductory prices. As a result of granting rebates to you, which we have explained, and in incurring high cost in obtaining import licences, clearing and forwarding transaction etc; we have no margin left."

The respondent replied to the above communication vide their letter of 12th July, 1993, inter alia, thus:-

"Firstly, we are no longer prepared to let you to continue waiting on this matter and consequently we enclose our cheque in your favour for Kshs.21,513,043.50. This is in settlement of the goods per your delivery notes of 14th December, 1992 and 4th February, 1993 copies of which we enclose.

We have utilized the US Dollars Kshs. exchange rate applicable on the date of delivery. Our calculation is detailed in the annex.

Since delivery, we have been requesting you to accept payment and informed you of the consequences but entirely at your own discretion and against our advise you have continued to delay. Consequently the consequences to further material devaluation in the Kenya shilling against the US Dollar subsequent to the date of delivery is to be your responsibility…."

The appellant's reaction to the above communication came vide their letter of July, 14, 1993. It reads in part:-

"***We have for acknowledgement your letter dated 12th instant enclosing your cheque for Kshs.21, 513,043.50 which we are accepting on account of your outstanding as owing to us (sic).***

With reference to the 126,000.00 Caprocaffaro 50% W.P. we confirm that you paid us on 20th February, 1993 the sum of Kshs.7,896,269.00 and as agreed between us, we are to negotiate the adjustment of further payments owing to us arising from the fluctuation of the Dollar and it is for this purpose we are going to hold a meeting next week.

With reference to the 90,000.00 Clortocaffaro 75% W.P, we regret and we have said this before both in writing and verbally that you are liable to pay us the outstanding sum on the basis of the value of the Dollar on the date of payment. Therefore you are still indebted to us in the sum of Kshs.27, 194.956.50 on the basis that the Dollar will be purchased at the rate of Kshs.82.00 but you will be liable for further fluctuation if any…"

That appears to have been the last correspondence before the appellant's advocates demand letter to the respondent dated 23rd July, 1993. It reads in part thus:-

"I have been consulted by Agrinco Limited in connection with the outstandings owing to it arising from the delivery of (a) 126,000 kgs Cuprocaffaro 50% W.P and (b) 90,000 kgs Clortocaffaro 75 W.P. between November, 1992/January 1993 and December,

1992/February 1993 respectfully.

Under the terms of the agreement arrived at, you were to pay for the goods at the equivalent in Kenya shillings or such variable amount at payment and the agreed value was U.S. 1,700 per metric for the exchange inter bank rate prevailing on the day of the first above described goods and it therefore follows that there is a short fall of U.S.$ 74,895.

However, because of the tremendous variation in the value of the Dollar you requested my client for a meeting with a view to adjusting your loss but have now reneged and refused to pay any part of the shortfall.

With reference to the second above described goods the shortfall is now U.S Dollar 331,646.

In the circumstances, this is to call upon you to let me have the sum of U.S. Dollar 406,541 on or before Friday 6th August, 1993 and payment will be accepted on the basis of the equivalent in Kenya shillings or such variable amount at the exchange inter bank rate prevailing on the day of payment…"

The respondent did not accede to the appellant's demands hence the initiation of the litigation giving rise to this appeal.

We note that in the letter of July, 2nd, 1993, the appellant did not indicate the U.S. Dollar rates quoted by them, as indicated in the contract, those prevailing at the date when they obtained foreign exchange allocation to pay off their principals in Italy, or those prevailing as the date of delivery or those prevailing as at the date of payment.

The respondent on the other hand made it clear that they had used the exchange rate applicable as at the date of delivery. When cross-examined on the issue**, *Shiraz*** conceded that the rate applied by the respondent in computing the figure of Kshs.21, 513,043.50 was not only the Central Bank rate prevailing at the date of delivery but was also higher than the rate quoted in the contract.

From our scrutiny of the letter of demand, it is evidently clear that the amount forming the disputed claim had two limbs to it. The first limb of U.S. Dollars 74,895 comprised the shortfall on the amount the respondent had paid for the deliveries made by the appellant to the respondent between November, 1992/January 1993 and December, 1992/February 1993 respectively for 126,000 kgs. Cuprocaffarro 50% W.P and (b) 90,000 Kgs Clortocaffaro 75 W.P. The second limb comprised a claim for U.S. Dollars of 331,646 being the short fall on the amount the respondent paid to the appellant for the uninvoiced deliveries which the appellant alleged was payment on account. The total comes to U.S. Dollars 406,541 forming the claim.

The learned Judge rejected both limbs of the appellant's claim for the reasons stated earlier in this judgment.

On our own assessment and analysis of the averments in the rival pleadings, evidence tendered before the learned trial Judge, the learned trial Judge's findings and the rival arguments and authorities cited on appeal, our finding is that the learned trial Judge made the correct findings on the issues in controversy as between the parties. Our reasons for saying so are as follows: firstly both parties having agreed that an invoice was a very important document in any transaction undertaken between them, it was necessary for the appellant to issue invoices for the amounts claimed for the shortfall on the disputed invoiced payments for Cuprocaffaro, and the uninvoiced contested payments for Clortocaffaro. Secondly, since the appellant was the party claiming that there was a shortfall in both payments, it was imperative for it, not only to demonstrate how both shortfalls had arisen, but also to go further and invoice the respondent for both shortfalls. Thirdly, since the major reason fronted by the appellant for not invoicing the respondent for the amounts claimed was on account of failure to receive foreign exchange allocation from the Central Bank to enable it meet its obligation to its principal in Italy, it was imperative for the appellant to demonstrate to the Court that this sorry state of affairs had justifiably persisted for a period of eight (8)

years. There was no such demonstration. There was no evidence for example, that the appellant had communicated with the Central Bank or its client bank pursuing the release of the foreign exchange allocation by Central Bank or such like concern at the delay occasioned in releasing the foreign exchange allocation. It would also have been a show of good faith for the appellant to provide evidence that their principal in Italy, Caffaro S.p.a. had not been paid for the goods imported from them. In fact, Shiraz was categorical in cross-examination that their principal in Italy had not instigated the litigation between the appellant and the respondent; that the principal had been paid and they were satisfied; and that the only case ***Shiraz*** was aware of between the appellant and their principal in Italy was one involving winding up which had nothing to do with matters giving rise to this appeal.

Lastly, we find no demonstration, either from the evidence tendered before the learned Judge or the correspondence exchanged between the parties, a categorical assertion on the part of the appellant that there was no foreign exchange allocation ever made to them by Central Bank in connection with the litigation giving rise to this appeal. As mentioned above, this is borne out by the fact that for the eight years that had lapsed from the date of delivery of the goods, no single letter was exhibited as having been written by the appellant to the Central Bank over that issue.

In the result, we are satisfied, as was the learned trial Judge, that indeed the appellant had not discharged the burden on it to prove its special claim. No burden should have been shifted to the respondent to show that the defendant was fully paid or to show that it should not pay the shortfall. On the contrary the respondent was under a legal duty to mitigate any losses that were accruing in the manner it did. The correct position in law on the burden of proof pertaining to a special claim was clearly set out in the case of ***Ratcliffe versus Evans [1892] 2 QB 524*** where ***Bowen LJ*** said at pages 532,533 thus:-

> ***"The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on both in pleadings and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves, by which the damage is done"***

This position was adopted by this Court in the case of ***Hann versus Singh [1985] KLR 716*** wherein the Court held, inter alia, that:

> ***"Special damages must not only be specifically claimed but also strictly proved. The degree of certainity and the particularity of proof required depend on the circumstances and the nature of the acts themselves"***

The parties herein having agreed on the mode of consummating their business transactions through invoices, it was not justifiable for the appellant to seek from the respondent any sum of money in US Dollars allegedly owed through any other form other than by way of raising an invoice. In failing to do so, the appellant failed in its duty in proving that indeed the sums claimed from the respondent was infact due and owing.

In the result, we find no error in the learned trial judges findings. We affirm those findings. The appellants' appeal is dismissed in its entirety. The respondent will have costs both on the appeal and in the High Court.

Dated and delivered at Nairobi this 28th day of February, 2014

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

……..…..……..

JUDGE OF APPEAL

K.M’INOTI

……..……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR