**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**civ app 4 of 99**

**HECO UBERSEEHANDEL .....APPELLANT**

**AND**

**MAC'S PHARMACEUTICAL LIMITED .....RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, Heco Uberseehandel , is a German company based in Hamburg, and as plaintiff, it instituted a suit against Mac's Pharmaceutical Limited , a Kenyan company based in Nairobi, claiming from the Kenyan company a total of DM 124,320, the equivalent of K.Shs.1,245,064.80. The plaint was lodged in the superior court at Nairobi on 20th January, 1988 and the claim stated above was said to be due on the foot of three contracts under which the appellant had supplied to the respondent medical drugs in three batches. The first batch was for DM 44,640, equivalent to K.Shs.447,069.60; the second was for DM 46,200 equivalent to K.Shs.462,693.00 and the last supply was for DM 33,480 equivalent to K.Shs.335,302.20. These three amounts totalled the sum claimed of DM 124,320 equivalent to K.Shs.1,245,064.80 which we have set out above. All these information is to be found in the appellant's plaint dated 20th January, 1988 and lodged in the superior court on 18th February, 1988. The appellant's final prayers to the court were:

"REASONS WHEREFORE the Plaintiff pra ys for judgment against the Defendant for: (a)Deutsche Marks 124,320, the equivalent in Kenya shillings being K.Shs.1,245,064.80; (b)Costs of this suit;

(c)Interest thereon (a) and (b) at court rates before filing suit and thereafter at 14% per annum;

(d)Any other or further relief that this Honourable Court may deem fit to grant."

The respondent denied the appellant's claims and the matter was heard by Shields, J between 25th February and 9th July, 1992. In a reserved judgment dated 20th August, 1992, the learned Judge granted to the appellant all its prayers which we have already set out. The appellant is, however, not satisfied with the orders made by the trial Judge in his favour and the appellant comes before this Court on eight grounds of appeal which are as follows: "1.The Learned Judge erred in fact in finding that the Plaintiff had fixed any specific rate of conversion of the Deutsche Marks due from the Respondent to the Appellant.

2.The Learned Judge erred in failing to appreciate that the quantification in Kenya Shillings as set out in the Plaint applied to the specific period of time, namely at the time of filing suit, and that the Appellant

was not bound and did not thereby intend to be bound, by the said quantification for purposes of computing the amount actually payable by the Respondent at the conclusion of the suit.

3.The Learned Judge erred in fact to take Judicial Notice of the fact that quantification of the amount claimed in Kenya Shillings was done solely to meet the requirements of the High Court Civil Registry, for the purposes of computing the court filing fees payable on the plaint.

4.The Learned Judge erred in fact in finding that the Appellant had fixed and tied down a specific amount in Kenya Shillings payable to it by the respondent.

5.The Learned Judge erred in fact and in law by failing to appreciate that the contract between the parties was agreed, specifically made and designated in Deutsche Marks and that the intention of the parties was that the Appellant should get full value of the Deutsche Marks as at the time that payment was actually made. 6.The Learned Judge erred in law in failing to appreciate that the rate of exchange applicable to the Deutsche Marks claimed by the Appellant should have been the rate prevailing at the date of the Judgment.

7.The Learned Judge erred in failing to appreciate that it would be inequitable and unconscionable for the appellant to be paid any lesser amount in Kenya Shillings than the Kenya Shillings equivalent to the Deutsche Marks payable as at the date of Judgment.

8.The Learned Judge misdirected himself entirely as to the law applicable on the issue of the exchange rates applicable and in the result awarded an amount that was grossly undervalued in all the circumstances."

It must be clear to anyone looking at all these grounds that they are predicated on the principle of law to the effect that where judgment is given in a foreign currency, that is, a currency other than the Kenya Shilling, the rate of conversion must be the rate applicable at the time of payment or enforcement. This Court accepted and applied that principle in the case of BELUF ESTABLISHMENT V THE ATTORNEY GENERAL, Civil Appeal No. 134 of 1986 (unreported) which was one of the cases cited and relied on by Mr Regeru for the appellant. In that case, AKIWUMI, J.A., after a very full consideration of the authorities on the issue, concluded his judgment as follows:

"..... Finally the decisions in Miliangos and Despinah, have in my view, put it beyond doubt that the conversion date should be that when payment is made or judgment enforced. Applying all these considerations to the present appeal, I have come to a different conclusion than that reached by the learned trial Judge. I hope that it is now clear that Kenya courts in applying the common law can in proper cases, express judgment in foreign currency convertible at the rates prevailing on the date of payment or enforcement of the judgment. ....."

The other two members of the Court who sat with Akiwumi, JA, agreed with him. Mr Ochieng Oduol who appeared before us for the respondent, agreed with Mr Regeru that the case of BELUF ESTABLISHMENT V THE ATTORNEY GENERAL correctly states the legal position in Kenya, namely that where a judgment is given in a foreign currency the rate of conversion is that prevailing at the date of payment of the sum awarded or the date of the enforcement of the judgment. Even Shields, J was aware of this principle for he says in his judgment, and we quote him: "I think the plaintiff have done themselves a disservice by fixing the dates of payment as the date for conversion of the sums of D.M. due. As they have however been content to claim this sum I feel I should not give them chance to obtain more shillings than they have claimed. The date of conversion will accordingly be the dates set out in the plaint."

The truth of the matter is that the appellant had made specific claims in its plaint and had specifically converted the DM claimed into Kenya Shillings. At no time did the appellant seek to amend its plaint and even in their written submissions, Mr Regeru made the following submissions: "4.Defendant's Indebtedness to the Plaintiff : Along with the aforesaid shipments, the Plaintiff sent t o the Defendant the following invoices, the same being the agreed price of the goods together with freight charges payable by

the Defendant.

(a)Shipment I: Invoice No. 1.129 at page 8 of the Blue Bundle dated 6th July, 1985 for DM 44,640.

(b)Shipment II: Invoice No. 1.178 at page 21 of the Blue Bundle dated 25th September, 1985 for DM 46,200.

(c)Shipment III: Invoice No. 1.219 at page 35 of the Blue Bundle dated 7th December, 1985 for DM 33,480. Total DM 124,320 The aforesaid invoices were duly deli vered to the Defendant but to -date, the Defendant has, without lawful cause or excuse, failed to pay the aforesaid sum of DM 124,320, equivalent to K.Shs.1,245,064.80 as at the time of filing suit, or any part thereof. It is this amount that the Plaintiff claims as properly due and owing to itself from the Defendant. ....." In these submissions, it was rightly pointed out that DM 124,320 was equivalent to K.Shs.1,245,064.80 as at the time of filing plaint but as we have pointed out, the appellant did not at any stage seek to amend its plaint to reflect the correct amount in Kenya Shillings. Mr Regeru concluded his submissions by saying: "In conclusion and in view of the evidence adduced and of the foregoing we pray that judgment be entered for the Plaintiff against the Defendant as prayed in the Plaint."

The judgment prayed for in the plaint was that the DM 124,320 was equivalent to K.Shs.1,245,064.80. That is exactly what the learned Judge gave to the appellant and we are at a loss to understand Mr Regeru's contention that they were not bound by their pleadings. Order VII Rule 6 provides that: "Every plaint shall state specifically the relief which the plaintiff claims ....."

The appellant's claim specifically asked the superior court for DM 124,320 equivalent to K.Shs.1,245,064.80; there was no other request and in these circumstances, we think the learned Judge was perfectly entitled to take the view that the appellant had staked its claim in no uncertain terms and that it was only entitled to that specific claim. The appellant having got exactly what it asked the learned Judge to give it, it cannot legitimately complain before us that the Judge was wrong in giving to it what it had asked for in its prayers. That being our view of the matter this, appeal fails and our order shall be that it is dismissed with costs thereof to the respondent.

**Dated and delivered at Nairobi this 7th day of April,**

**2000.**

**R. S. C. OMOLO ----------**

**JUDGE OF APPEAL**

**A. M. AKIWUMI**

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**JUDGE OF APPEAL**

**E. OWUOR ----------**

**JUDGE OF APPEAL**

**I certify that this is a**

**DEPUTY REGISTRAR**