REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 460 OF 1980

INGRA………..…………………………………………..…..PLAINTIFF

VERSUS

NATIONAL CONSTRUCTION CORPORATION…........DEFENDANT

JUDGMENT

Judgment was given for the plaintiff on 16.3.81 for US dollars 387,000 costs and interest. Subsequent to this judgment the defendants on 26.9.84 and 20.2.85 paid sums of Kenya Shs 2,000,000 and Kenya Shs 2,408,948.70 respectively towards satisfaction of the decree. The plaintiffs claim that the decree had not been satisfied by the aforesaid payments. The defendants, claiming otherwise, therefore filed a chamber summons application on 24.6.86 seeking orders that the decree had been fully satisfied and in fact overpaid, that the amount overpaid be determined by court and that the plaintiffs be ordered to refund the over-payment.

The main bone of contention is the rate of exchange to be applied. Mr Barassa for the defendants has submitted that the rate of exchange applicable should be as it stood between the US dollars and the Kenya shilling on the day the cause of action arose. The plaintiffs contend that the rate of exchange to be applied is to be as prevailing on the date the debt or the part thereof is paid.

Mr Barassa relied on the case of *Life Insurance Corporation of India v Valji* (1968) EA 225, a Court of Appeal decision. In this case it was held that in the case of a policy of insurance the relevant date for the purpose of calculating rates of exchange is the date when payment is due. In the instant case the cause of action arose on December 31, 1978 when the default in payment was made. Mr Barassa submitted that the rate of exchange, following the Court of Appeal decision of *Valji's* case, should be as prevailed on December 31, 1978. This decision protected the parties against fluctuation in currency rates. If the dollar had been devalued, argued Mr Barassa, would the plaintiff have accepted the payment at the devalued rate"

The plaintiffs were seeking unjust enrichment as the value of the Kenya shilling had dropped considerably as against the US dollar since December 31st, 1978. Mr Barassa also stressed what the Court of Appeal has stated in a majority ruling in *Inter Continental Greetings v Kenya Litho Ltd* (1982-1988) 1 KAR 902 that it would be argued that due to necessity to preserve foreign exchange and the existence of foreign exchange control in Kenya, the conditions of England would favour the decision in *Miliangos v George Frank* (Textiles) Ltd (1976) AC 443 but that decision could not be applicable here.

As far as the question of need to preserve foreign exchange is concerned the position is that the defendants are a parastatal body. The Kenya Government has an interest in it. The agreement that the defendants were to purchase the plaintiff's shareholding in International Construction Co Ltd and to pay for the same in a foreign currency viz US dollars must have been made with the approval of the Kenya government. In consequence judgment was entered in US dollars. It is not claimed that there has been any difficulty in obtaining consent from the relevant authorities for the repatriation out of Kenya of the two installments paid by the defendants. The question for need to preserve foreign exchange, therefore, does not arise. That question must have been in the mind of the parastatal when agreement was made to pay in US dollars. Mr Barassa's objection to the court being guided by the case of *Miliangos* on that ground, therefore, must fail.

The position in *Valji*'s case was that the premium for the insurance policy was paid in East African shillings and the intention was for the entitlement on maturity to be paid in shillings. The claim in the plaint was for a sum in shillings and the judgment was in shillings to be paid in Kenya to a Kenya resident. It was meant for use in Kenya and not for repatriation. *Valji*'s case is not comparable with the instant case in which the claim and judgment are in US dollars and the judgment sum under agreement was expected by both parties to be repatriated clearly for use outside the country. Further the judgment in *Valji*'s case followed the English decisions including the *Re-United Railways of Havana* case, which, however, were over-ruled by the decision in *Miliangos* case in 1976.

Nor do I agree with Mr Barassa's submission that the decision in *Valji*'s case must be followed because it protects both parties from fluctuations in currency rates. Fluctuations do not protect both parties. They always result in a benefit for one party and loss for the other. Is it fair that a debtor or a judgment debtor who has adopted a protracted method of liquidating a debt agreed specifically to be paid in a foreign currency by installments spread over a number of years should also have the benefit of a currency fluctuation"

Mr Barassa has stressed that in demanding payment at a rate of exchange that applied on the dates when the two installments were paid, the plaintiffs had adopted means of unjust enrichment. If the dollars were to be used in Kenya then certainly that would have amounted to enrichment against the Kenya shilling. In this case the dollars were to be repatriated and used in countries other than Kenya. The amount of dollars the plaintiffs are repatriating is not going to exceed the amount of dollars in the judgment sum. The number of dollars they will get in Yugoslavia will be the same as in the judgment sum. The fact that a much larger sum in Kenya shillings is being paid in Kenya is not going to increase the number of dollars or their value in Yugoslavia. There is no merit in this submission that the plaintiffs are unjustly enriching themselves.

Coming now to the question of the rate of exchange to be applied the value of the dollar today is a little more than double of what it was in Kenya shillings on December 31, 1978 when the debt fell due. The defendants made the payment of the first installment 5 years and 10 months after that date and the second installment 31/2 months later. If it is now ordered that the judgment sum was to be paid at the rate of exchange as applied on December 31, 1978 then clearly the plaintiffs will get not even half of the amount of US dollars they were entitled to for repatriation.

The plaintiffs will be made to suffer for the tardiness of the defendants.

I do not see any reason, particularly in view of the fact that to my mind the question of preservation of foreign exchange is irrelevant to this particular case, why this court should not be guided by the decision in *Miliangos v Frank (Textiles) Ltd* [1976] AC 443 in which the judgment for a Swiss party in Swiss currency was given in England. That is what the position is in the instant case. It was held in

Miliango's case that the conversion in a claim specifically for foreign currency should be at the date when the court authorized enforcement of the judgment in terms of sterling.

I quote below Lord Wilberforce from p 468F as an elaboration:

"As regards foreign money obligations (defined above) it is first necessary to establish the form of the claim to be made. In my opinion acceptance of the argument

already made requires that the claim must be specifically for the foreign currency – as in this case for a sum stated in Swiss francs. To this may be added the alternative

"or the sterling equivalent at the date of …" (see below). 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 *Scharasch Meier* 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 Roads Act 1965 (article 27(2)). 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 Radcliffe in the *Havana Railways* case, seems to me to place the creditor too severely at the mercy of the debtor's obstructive defences (cf. this case) or the law's delay ..."

In the instant case the defendants had deprived the plaintiffs of their US dollars from December 31, 1978. The defendants used that money and derived benefit from it. To my mind it is not justice that because of default of payment in time on the part of the defendants the plaintiffs should be asked to suffer a loss that has resulted on account of fluctuation in the currency value during the default period. The blame lies wholly with the defendants. And the loss must lie where the blame lies. The plaintiffs are entitled to their US dollars at the value they held in the world market on December 31, 1978. The only way to assure that they get that value of the judgment sum which is rightfully due to them is by ordering a conversion at the rate of exchange that applies on the day of payment.

The application is dismissed with costs awarded to plaintiffs against defendants.

Dated and Delivered on this 30th day of September, 1986

A.M COCKAR

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JUDGE