Case Number:	Civil Case 409 of 1973
Date Delivered:	06 Nov 1975
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Dermot Joseph Sheridan
Citation:	M.G Radia v Transocean (Uganda) Ltd[1975] eKLR
Advocates:	Mr. KK Cohan, instructed by Bryson, Inamdar & Bowyer, for the Plaintiff Mr. JRO Masime, instructed by Masime & Kwach, for the Defendant
Case Summary:	**M.G Radia v Transocean (Uganda) Ltd** **High Court, at Mombasa** **November 6, 1975** **Sheridan J** **Civil Case No 409 of 1973** ***Contract*** *– law applicable - action for breach of contract – where parties have not indicated the applicable law in the contract – power of the court to infer the intention of the parties - where the parties have failed to indicate the applicable law – presumptions in favour of lex loci contractus and lex loci solutionis – proper law to be applied.* ***Contract*** *– breach of contract – damages for breach – wrongful dismissal.* The plaintiff was an employee of the defendant company in Mombasa, Kenya although the head office was situated in Kampala Uganda. The

contract was to be performed in Mombasa where all sums due under it were to be paid, where the plaintiff worked.

The Uganda government introduced a new policy regarding persons of Asian origin thereby making the contract illegal and contrary to public policy in Uganda. As a result the plaintiffs contract was terminated and he sued for wrongful termination of employment in Kenya . One of the issues was which law was applicable in the case.

Held:

1. In cases where the parties have not expressly stated the law applicable to it, in the contract, the court will infer the law which the parties ought to have intended to apply from the terms of the contract itself and the circumstances surrounding it.

2. The presumption in favor of *lex loci contractus* comes into operation if the place where the contract is made coincides with the place where it is performed but this presumption may be rebutted by a stronger presumption of l*ex loci solutionis.*

3. The proper law to be applied is that which the transaction has it's closest and most real connexion in the absence of any term.

4. The place and form of payment are of great importance and in this case it was Kenya and further more there was nothing to frustrate or render illegal the performance of the contract in Kenya.

5. The applicable law being that of Kenya, under which the plaintiff's employment was lawful and accordingly therefore the plaintiff was wrongfully dismissed.

Cases

1. *Karachi Gas Co Ltd v Issaq* [1965] EA 42

2. *Assunzione, The* [1954] 1 All ER 278

3. *Regazzoni v K C Sethia (1944) Ltd* [1957] 3 All

	ER 286; [1958] AC 301 **Texts** Guest, A.G. *et al*. (Eds) (1968) *Chitty on Contracts* London:Sweet & Maxwell 23rd Edn p 836 **Statutes** 1. Evidence Act (cap 80) section 98 2. The Immigration (Cancellation of Entry Permits and Certficate of Residence) Decree [Uganda] **Advocates** *Mr. KK Cohan,* instructed by *Bryson, Inamdar & Bowyer,* for the Plaintiff *Mr. JRO Masime*, instructed by *Masime & Kwach*, for the Defendant
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	Kshs 14,440

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO 409 OF 1973

M.G RADIA.....PLAINTIFF

VERSUS

TRANSOCEAN (UGANDA) LTD.....DEFENDANT

JUDGMENT

November 6, 1975, **Sheridan J** delivered the following Judgment.

In May, 1970 the plaintiff was appointed the defendant's branch manager in Mombasa to act as its clearing and forwarding agent for goods destined to Uganda. Its clients included the Uganda Government. Some 800-1000 tons of merchandise a month to the value of Kshs 10 million was involved. The plaintiff has vast experience of this work since 1948 securing the quick release of goods from the Port and Customs Authorities without paying demurrage.

The defendant is a limited company incorporated in Uganda. It was a subsidiary of the National Trading Corporation, a parastatal body established by the Uganda National Corporation Act 1966, and was subject to its directives. In late 1971 a Mr. Mukama was appointed designate branch manager and then manager with the result that there were two managers in the Mombasa Branch – the defendant's only effective Branch. In December 1971 the plaintiff complained to Mr. Blasberg, the defendant's managing director who was on a periodical visit to Mombasa that the dual mangership was leading to conflicts between him and Mr. Mukama over the staff and work. It was arranged that he would go to Kampala to train staff and that the matter would be sorted out there. In January 1972 he went to Kampala where he remained until May when he returned to Mombasa. On February 10th he signed an agreement whereby he was appointed deputy branch manager (Annexure A to the plaint). Its terms were –

"Agreement made this TENTH day of February nineteen hundred seventy two between NTC Transocean, a private, limited liability company, incorporated in Uganda, whose registered office is No 6A Kampala Road, Box 4710, Kampala, on the one hand herein called the employer and MG Radia of Kenya on the other hand hereinafter called the employee. This Agreement witnesseth that whereas the employers have offered and the employee has accepted the employment in East Africa at the Company's offices in Mombasa and Kampala, the following terms and conditions are agreed :-

(1)the employee is engaged as from 1st January, 1972 to 31st December 1974 as Deputy Branch Manager of the employers and shall during the whole period of his employment work diligently and faithfully, serving the employers and act with honest propriety and descretion at all times.

(2)After December 31, 1974 this agreement shall continue in full force and effect, unless and until it will be determined by the parties hereto in writing and in such event, not less than six months' notice shall be given by either party who wish to determine this Agreement. (3)The employee shall, during the currency of this Agreement be entitled to any necessary medical, dental or optical treatment in accordance with the normal staff terms and conditions of service.

(4)The employee shall be entitled to a salary of Kenya Kshs 43,200 per annum payable monthly in arrears and subject to review at the end of each year's service under this Agreement.

(5)The employee shall be entitled to leave at the rate of 30 days leave per annum. In addition to this the employee shall be entitled to all gazetted public holidays in Kenya.

(6)At the end of each year of service a gratuity of 15% of the salary drawn shall be paid to the employee provided he has observed all the foregoing terms and conditions of service. This gratuity shall be deposited to the employees bank account in the bank approved by the employer and will be drawn by the employee on completion of the Contract of Service.

(7)The employer will provide a car for use by the employee free of charge."

On 12th September, 1972 the National Trading Corporation was superseded by the State Trading Corporation which was incorporated by a Decree bearing that name (Decree No 24 of 1972). On February 13, 1973 the managing director of the Corporation wrote the following confidential letter to the defendant's branch manager in Mombasa (Ex A) –

Dear Sir,

Mr. Radia – Accountant/Deputy Manager

In pursuance of the Uganda Government policy on Ugandanization, you are hereby instructed to dispense with the service of Mr. Radia with immediate effect. Please pay him off according to the terms of service.

You are also advised to stay clear of any association or dealings with Asians in Kenya on official business matters. This should be adhered to strictly.

Yours faithfully

STATE TRADING CORPORATION

Signed

TP Manya

Managing Director.

It is not suggested that this directive had any legal effect on the plaintiff's contract, but following upon it the plaintiff's employment was terminated by following letter dated February 19, 1973 (Ex 2 (a) –

"Dear Mr. Radia,

Re: Termination of Employment

Due to various changes affecting the development and management of our Company, Management have been directed to terminate your services with the Company with immediate effect.

This decision has no relation at all to your work performance and overall efficiency in the handling of the

Company's affairs. You have, since you joined the Company, discharged your duties most diligently and won the admiration of all the people who worked with you.

We have found ourselves compelled to make this decision. We wish, however, on behalf of the Managing Director, myself and that of the staff of this company, to extend to you our gratitude for the invaluable service you rendered since you joined the employment of this company. In case there is anything you require from us by way of recommendation, we shall be pleased to make one available to you.

Management have been directed to pay you six months' salary in lieu of notice and all benefits due to you up to the time of termination of your employment. We wish you all the very best in your future endeavours.

Yours faithfully,

For: TRANSOCEAN (UGANDA) LIMITED

Signed

O A KUKAMA

For: GENERAL MANAGER"

Originally the plaintiff put in a claim for Kshs 135,040 which after allowing for Kshs 32,937 paid by the defendant left a balance of Kshs 103,103. The bulk of this claim has been abandoned as the plaintiff was able to mitigate his loss when on May 2, he obtained similar employment with Interfreight (Kenya) Ltd on the same terms including the payment of gratuity (Ex 3) refers). Mr. Chohan, for the plaintiff, explained that no claim was made for the loss of salary for March and April as it was considered that the plaintiff had been treated generously by the defendant when he was given 6 months salary in lieu of notice. This is included in the Kshs 32,937 which he has already received. The present claim for damages for wrongful dismissal is confined to –

(a) loss of expected gratuity for 1973 and 1974 ……..Kshs 12,960

(b) salary for the balance of the month of February 1973 …….Kshs 1,440

Total ……..... Kshs 14,400

Mr. Masime, for the defendant, submitted that the plaintiff was claiming the gratuity twice over but the plaintiff gave evidence that he had a verbal agreement with his new managing director who happened to be the same Mr. Blasberg, that if he recovered the gratuity from the defendant he would not be entitled to it under Ex 3. Mr. Chohan upheld this verbal agreement as a condition precedent under provisio (ii) to section 98 of the Evidence Act (cap 80) and so admissible in evidence. I agree.

The main issue is whether the contract of employment (annexure A) is governed by the Law of Kenya or by the Law of Uganda. Paragraph 4 and 7 of the plaint state –

"4. The plaintiff served the defendant in the said capacity at its own branch at Mombasa from the commencement of the said agreement until about the 19th day of February, 1973 when the defendant wrongfully and in breach of the aforesaid agreement terminated and dismissed the plaintiff from services

with immediate effect and refused to allow him to remain in the employment.

7. The plaintiff avers that the said agreement was wholly and/or substantially to be performed in the Republic of Kenya in whose currency the plaintiff was to be remunerated and the entire services before the aforesaid termination were in fact performed in Kenya hence this Honourable Court has jurisdiction to try this suit."

The defendant's answer to these averments is contained in paragraphs 4, 7 and 8 of the defence as follows –

"4. As regards paragraph 4 of the plaint the defendant denies that it wrongfully and in breach of the agreement terminated and dismissed the plaintiff from services as alleged or at all and puts the plaintiff to the strict proof thereof. The defendant avers that :-

(i)The defendant company is incorporated in the Republic of Uganda and governed by laws of Uganda and subject to all the laws of Uganda

(ii)As a result of the promulgation of decrees number 17 and 30 of 1972 in the Republic of Uganda namely, The Immigration (Cancellation of Entry Permits and Certificate of Residence) Decree enacted on 9th August, 1972 and 25th October, 1972 the Defendant Company was completely frustrated for the performance of all and any of its obligations under the said agreement and to continue with the performance of the agreement would have become illegal for the Defendant Company.

(iii)As a result of the directives issued by the Government of Uganda it would have become illegal and or against the public policy in Uganda for the Defendant Company to continue with the performance of the agreement.

For reasons aforesaid the said agreement become void and its performance by the Defendant Company become illegal and contrary to public policy and the Defendant Company was frustrated from performing the said contract.

7.The Defendant contends that the said agreement is governed by the relevant Laws of the Republic of Uganda and that it was intended by the parties that the said agreement shall be governed by and be subject to the Laws of Uganda.

8.With reference to paragraph 7 of the plaint the defedant stated that it was entirely up to the Defendant Company to decide whether the Plaintiff would serve the defendant at Mombasa or Kampala.

Before dealing with the effect of the decrees I will consider the plaintiff's evidence, which was virtually uncontradicted, as Mr. P O Adengo (DW 1) was appointed the defendant's acting general manager in May 1975 and could only speak second hand from the defendant's records. The plaintiff stated that it was fortuitous that the agreement was signed in Kampala. He has worked for the defendant throughout in Mombasa where the work for which he is qualified must of necessity be performed. Although the agreement states that he has accepted employment in Mombasa and Kampala there was no work for him to do as branch manager in Kampala. He has never been called to Kampala for consultations. The agreement itself describes him as "of Kenya". He is a Kenyan citizen. By condition (4) his salary was to be payable in Kenya. It was so paid during the short period he was in Uganda training staff. By condition (6) the gratuity was to be deposited in the plaintiff's bank account. His only bank account is in Kenya. By condition (5) he was entitled to all gazetted public holidays in Kenya which would be meaningless if there was any likelihood of his transfer to Uganda. As against these weighty considerations Mr. Masime urged

the *lex loci contractus* Kampala, where the agreement was signed, and the plaintiff's accountability to the defendant's headquarters in Kampala. It is a company incorporated in Uganda and has its principal place of business there. The Mombasa Branch is only a transit office for the clearing and forwarding of goods and all the finances to sustain it have to be transferred from Uganda.

The law on the matter is clear. The parties not having expressed in their contract the law applicable and to it the court will infer the law which the parties ought to have intended to apply from the terms of the contract itself and the circumstances surrounding it: *Chitty on contracts* (23rd Edition) p 836. The presumption in favour of the *lex loci contractus* comes into operation if the place where the contract is made coincides with the place where it is to be performed. The plaintiff has rebutted this presumption by a stronger presumption of *lex loci solutionis*, the place where the contract is to be performed : *Chitty* (*supra*) page 839. The proper law is that with which the transaction has its closest and most real connexion: *Karachi Gas Co Ltd v H Issaq* (1965) EA 42 per Spry JA at page 56. The answer is Kenya and in particular Mombasa. This is not affected by the remote control exercised by the defendant from Kampala. The place and form of payment are of great importance. *The Assunzione* (1954) 1 All ER 278. I find that the parties intended the contract to be governed by the law of Kenya. Finally Mr. Masime submitted that even if the law of Kenya applied the contract would not be enforced here as a matter of public policy because its performance would have involved, as the parties to it knew, doing in a foreign and friendly country an act which would have violated a law of that country. He relied on *Regazzoni v K C Sethia (1944) Ltd.* (1957) 3 All ER 286. In that case an attempt was made to circumvent a law in India prohibiting the export of goods to South Africa by first shipping them to Italy so that they might be resold to a South African buying agency contrary to the law.

This brings me to a consideration of the two Decrees (1)Decree No 17 of 1972 is entitled

"A Decree to Cancel Entry Permits And Certificates of Residence Held By Certain Persons In Uganda And For Other purposes Connected Therewith"

It provides –

1."Notwithstanding any provision of the Immigration Act, 1969, to the contrary but subject to the provisions of section 2 of this Decree, on and after the commencement of this Decree, every entry permit or certificate of residence issued or granted under the provisions of the Immigration Act, 1969, to any person who is of Asian origin extraction or descent and who is a subject or citizen of any of the countries specified in the schedule to this Decree shall cease to have any validity whatsoever.

2.The Minister may, in his absolute discretion, by statutory order, reinstate any entry permit or class of entry permit or certificate of residence cancelled or revoked under section 1 of this Decree.

3. In this Decree, "Minister means the Minister responsible for internal affairs".

Kenya is not one of the countries specified in the Schedule:

(2)Decree No 30 of 1972 widened the scope of the earlier Decree by substituting for section 1 the following new section –

1.Notwithstanding any provision of the Immigration Act, 1969, to the contrary, but subject to the provisions of section 2 of this Decree on the after the commencement of this decree, every entry permit or certificate of residence issued or granted under the provisions of the Immigration Act, 1969.

(a)to any person who is of Asian origin, extraction or descent and who is a subject or citizen of any of the countries specified in the schedule to this Decree;
(b)to any other person who is of Indian, Pakistani or Bangla Desh origin, extraction or descent, Shall cease to have any validity whatsoever". While the plaintiff is a person of Indian descent under section 1(b) of the Decree there is no evidence –
(1) that he was ever the holder of an entry permit or certificate of residence as a resident in Uganda;
(2) that he ever held an entry permit or certificate of residence on or after the commencement of the decree which ceased to have any validity, or was ever likely to;
(3) that if he had applied for an entry permit so that he might be able to perform any duties in Uganda the Minister responsible for internal affairs might not have been able to accommodate him under the wide powers conferred on him by the earlier Decree.

Mr. Adengo frankly admitted that citizens of Pakistan and Bangla Desh are being recruited for work in Uganda. If they can be exempted from these draconian provisions why not the plaintiff whose service to Uganda through the agency of the defendant was admitted to be of the highest order" But as I have already said this question is academic as the possibility of his transfer to Uganda was never seriously adumbrated.

There was nothing to frustrate or render illegal the performance of the contract in Kenya in accordance with the Laws of Kenya. The plaintiff's dismissal was unlawful.

There will be judgment for the plaintiff for Kshs 14,440 with interest and costs.

Dated and delivered at Mombasa this 6th day of November , 1975.

D . J SHERIDAN

JUDGE.