

1925

KENYA

104
C. O.
11697
13 MAR 25

FROM
G. X. G. DEWHALL.

DATE
11th March 1925.

FOR CIRCULATION :-

Mr.
Mr. *14*
Mr.
Asst. U.S. of S.
Mr. Streeby
Perm. U.S. of S.
Part. U.S. of S.
Secretary of State.

ENGLISH NAVIGATION CO. LOSS OF THE "SWAHILI".

Fiat on original cause of action has never been refused. Objects to fiat to enforce award. Prepared to go into case before Privy Council. Supports judgment of Court of Appeal.

Previous Paper

MINUTES

Copy will be taken
Jan 10 1925

The tel. on 10353 has gone - all to the good, except for the nuisance of cross-correspondence.

10 March 1925
Copy sent to Bundeilla - 23 JUN 1925
507 25248/1

This is certainly a matter for local advice. I do not know whether the local view is right about the point the first move would involve the point of arguing the merits, but it is certainly due to their own loss of time about the present position has arisen.

Case 14. 3. 25

X Yes - the matter will be argued before the Arbitrator.

If you would send a tel. on lines of DT herewith & follow it as

Subsequent Paper

12688

3. Can't see as yet clear to me how it
is proposed to settle the said appeal. 105
defense of this suit before the Privy Council
will involve. Unless it is the intention
of the Kenya Government, if they ever take
Appeal, to request to grant a fiat, which
alone the Company can proceed to enforce their
award, and also to request to meet the
award without putting the Company to the
unnecessary trouble of enforcing it, the Appeal,
even if the Kenya Govt. are successful, will
have served no useful purpose whatever.

4. The view that the Company ought to
proceed by Action of Right is not strictly
contested and the Company are perfectly
willing to proceed by Action of Right, but
owing to the refusal of a fiat they are
unable to do so and this Appeal to
the Privy Council is their last resort
to get out of their unhappy position.
The Chief fear is not for the success
of the Appeal but for the loss of reputation
which, in any position, the Kenya
will suffer deservedly by being so treated.

My referring the fact, the charges awarded
against them by parliament, unless some
very strong reasons are adduced for referring
the fact I should not feel able to support
the new Govt and depend its action
on Parliament if occasion should arise.

5. I am therefore of opinion, that the best
course would be to avoid the cost of
further litigation, ^{and} subject to any objections
which you may have raised on receipt of my
Telegram of the 13th of March, I propose to ⁽¹⁰³⁵³⁾
attempt to effect the compromise to which
I referred in ^{that} Telegram.

I have R.

C. O.
11697
MARCH 25

TELEGRAM from the Officer Administering the Government of Kenya to the Secretary of State for the Colonies.

Dated 11th March 1925.

(Received Colonial Office 5.45 P.M. 12th March 1925)

*Gen 1850
Gen 10353*

No. 110 11th March Your telegram 3rd March see my despatch No. 114 26th January and Memorandum enclosed fiat on the original cause of action has never been asked for and has never been refused. Respectfully object to fiat to enforce award as distinct from fiat on original course of action on award would prevent question of legal liability being raised. Prepared to go into case fully before Privy Council. Desire to support judgment Court of Appeal which I am advised is correct.

Telegram from the Secretary of State for the Colonies to the Officer Administering the Government of Kenya.

Sent 3.20 p.m., 16th March, 1925.

16 March.

Your telegram No.110 of 11 March following should make my position clear

1. By Agreement June 1914 Government submitted to arbitration.
2. Government failed to persuade Court that they were not bound to arbitrate.
3. Government lost arbitration and had damages awarded against them.
4. No steps taken by Government within time to set aside award.
5. Award now good in law, and apart from prerogative of the Crown as to fiat would have been enforced long ago.
6. Do not doubt correctness of decision Court of Appeal but cannot support refusal of fiat to avoid liability for award which not having been set aside must be regarded as properly made.

7. Cannot see justification for forcing Company to fight case de novo on merits even if evidence still available and such procedure otherwise practicable as to which I have no information.

AMERY.

D.A. 11697/25

109

Kenya

- Mr. Whitaker 18/3
- Mr. ~~Robertson~~ 21/3
- Mr. Strachey
- Sir J. Shackburgh
- Sir O. Davis
- Sir G. Grindle
- H. Lambert
- Sir J. Macartney-Smith
- Mr. Ormsby-Gore
- Mr. Amery

Handwritten notes:
 Done by [unclear]
 H. Lambert
 [unclear] to [unclear]
 [unclear] half [unclear]

DRAFT.

March 1925

Sir,

I have the honour to ack the recd of your tel. No. 110 of the 11th of March regarding the action brought by the English Navigation and Trading Company Ltd against the Attorney General of Kenya to enforce the award of damages for the loss of S.S. Swahili, and to confirm my tel. of the 16th of March which read as follows:

- Your tel. No. 110 of 11th March following should make position clear
- (1) By Agreement June 1914 Govt. submitted to arbitration
 - (2) Govt. failed to persuade Court that

24, were not bound to arbitrate
 (3) Govt lost arbitration and had
 damages awarded against them
 (4) No steps taken by Govt. within
 time to get award
 (5) Award not good in law, and apart
 from irregularities of the award, as to
 fact would have been enforced
 long ago

Do not doubt correctness of
 decision Court of Appeal but cannot
 support refusal of fact to avoid
 liability for award which not
 having been set aside must be
 regarded as properly made
 (6) Cannot see justification for finding Commission

2. As far as award, the judicial
 committee of the Privy Council has
 granted leave to the Company to appeal
 against the decision upheld by
 the Court of Appeal for Eastern
 Africa (that the Company's only
 remedy was to proceed by Petition
 of Right to enforce the award).

to give effect to
 an award even
 where it is not
 and such award
 remains in force
 to which I have
 referred

Mr.
 Mr.
 Mr.
 Mr. Strachey
 Sir J. Edmondson
 Sir G. Davis
 Sir G. Gendle
 Sir J. Masterton Smith
 Mr. Ormsby-Gore
 Mr. Amery

16/10/25
 16/10/25
 16/10/25
 16/10/25

C.
 R 17 MAR
 1925

DRAFT. Tel

Govt. Secy
 Secy
 Nairobi

16/10/25
 1925
 Submitted to arbitration
 By agreement June 1924 Govt

1. Govt failed to persuade Court but
 they were not bound to arbitrate
 2. Govt lost arbitration & had
 damages awarded against them

3. Govt lost award & had
 time to set aside award
 4. Award was good in fact &
 fact from irregularities of the award
 fact would have been enforced long ago

5. Do not doubt correctness
 of decision Court of Appeal, but
 cannot support refusal of fact to

Bothamley
 Secy
 1/15

23 JUN 1925

avoid liability for award which - not
having been set aside must be regarded
as, when made

2. Cannot be justification for forcing
Coy to fight case de novo on receipt even if
evidence still available & such procedure & procedi-
fract (costs) as to which I have no information.