

-1925

KENYA

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FROM

DATE

GOVERNOR GRIGG.

1245

3rd October 1925.

REC
REL 2 NOV 25

OR CIRCULATION :-

Mr.

Mr. *Beffie*

Mr.

LOSS OF S.S. "SWAHILI".

Asst. U.S. of S.

Refers to claim by English Navigation Co. in respect of loss of vessel and trs. memo by Attorney General, who dissented from decision to settle claim.

Perm. U.S. of S.

Parl. U.S. of S.

Secretary of State.

Previous Paper

MINUTES

O.A.C. 43826

ca 50260/25

In effect Mr. Byall Grant says that the copies of his Dept. was "only a little one". But it has made all the difference to the course of the matter here.

As to his two suggestions, the possibility of getting back to the merits of the case was considered. So was that of settlement for a reasonable sum, and I am quite sure that we should have had as better means of £2500 than at £2000.

*Put by
Nov 13 1925 ap.*

Subsequent Paper

ca 50260

Heard

I have the Duff comparison

copy.

W. S. Strachan

2/11/25

Mr. Bottomley,

We have had all this in mind, and I do not think I need comment on it again, though in one or two particulars I don't think it is altogether accurate.

The end of the Duff case is not yet, and anyhow I am not sure that there is anything in that case from beginning to end which I could recommend any Colonial Government to adopt as a precedent. When the Duff case is quoted against me I always feel, as I think a prisoner must feel, when he hears read out the list of his previous convictions.

H.B.

W. S. Strachan

We have covered the
Lloyd Grant in advance, & I
think in way of Party

W. S. Strachan

3/11/25

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K. J. M.

C O
49243



GOVERNMENT HOUSE,
NATROBI, 31
KENYA.

KENYA.
No. 1245.

3rd October, 1925.

Sir,

1 AC
43826
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With reference to Mr. Denham's telegram No. 442, of the 28th September, relative to the claim by the English Navigation and Trading Company, Limited, in respect of the loss of the S.S. "Swahili" in 1918, I have the honour to transmit a memorandum by the Attorney General who dissented from the advice of Executive Council that a payment of £5,000 should be made in full settlement of the claim.

Memorandum
dated 16-9-25

I have the honour to be,

Sir,

Your most obedient, humble servant,

Edward Gigg

GOVERNOR.

THE RIGHT HONOURABLE

LIEUTENANT COLONEL L.C.M.S. AMERY, P.C., M.P.,

SECRETARY OF STATE FOR THE COLONIES,

DOWNING STREET,

LONDON, S. W.

B/AP.

1481/25.

16th September, 1925.

The Hon'ble Ag. Colonial Secretary,

N a i r o b i.

re: THE ENGLISH NAVIGATION AND TRADING COMPANY LTD.

versus

ATTORNEY GENERAL
S.S. "SHANIL"Ref. Your No. S/B.1209/1/II/4 of the 5th September,
1925.

I have the honour to refer to the Secretary of State's despatch, Kenya No. 725, dated 5th August, 1925.

2. I think it desirable to set out the history of this case in some detail.

3. In the Spring of the year 1914 a warlike expedition was conducted in Jubaland by this Government.

4. On 1st June, 1914, an agreement to be in force for a period of three years was entered into between the Company and Government.

5. The principal purpose of this agreement was to fix rates and tariffs for conveyance of Government stores and passengers on the Juba River.

6. In the contract under Clause 8 Government held itself responsible for damage arising out of military operations or the carrying of explosives. This clause was inserted in view of the campaign referred to in paragraph 3.

Under Clause 10 the Company was to be exempt from liability arising from inter alia, perils of the River.

Under

Under Clause 11 a dispute arising over the terms of the agreement was to be referred to arbitration.

7. In August, 1918, there were no warlike operations of any kind or description in Jubaland or any where near Jubaland.

8. In August, 1918, it was desired to send a force of the King's African Rifles with their wives to relieve the force stationed at Serenli. This was a mere peace time relief.

9. The Captain of the "Swahili" was ordered by Mr. Gabriel to proceed up the river. The water was low and the Captain would not have gone up the river but for his orders.

10. On or about the 7th August "Swahili" while proceeding up stream at a speed not amounting to two miles per hour struck a submerged log and sank in a few minutes.

11. It is alleged by the Company that the Captain told the Officer in Charge of the King's African Rifles on the "Swahili" that it was not safe to go further up the stream but that the Officer ordered him to go on.

12. It is possible that the Officer exhorted the Captain of the steamer to proceed as far as he could. It is not admitted that this was an order, and if even if it was it was an order which the Military Officer had no authority to give and which the Captain of the "Swahili" had no duty to obey.

The soldiers, their wives and children were mere passengers.

13. The "Swahili" was acquired by the Company as a new ship (she is referred to by her builders as a "launch") in 1906. She cost £2300 new and it cost a further £1200 to deliver her on the Juba River making a total cost of £3500.

14. Immediately prior to the voyage on which she was lost "Swahili" had been lying for months a derelict at the bottom of the River. She was raised and repaired for the purpose of the voyage by an artisan who never repaired a ship before.

15. There are no proper scientific appliances for the repair of steamers on the Juba River and the "Swahili" when twelve years old was dilapidated, unseaworthy and worthless. Captain Irkine saw the boat the day before her loss. He was not a passenger but visited the ship and says she was in a deplorable condition, unseaworthy and a mere hulk. This opinion was confirmed by Mr. Hops, C.M.G., who is of opinion that the value of the "Swahili" in 1918 was the value of scrap iron. Captain Rainsford also knew the steamer and says "she was in a most dilapidated condition and being constantly patched up by the owners, and in my opinion, was only fit for scrap iron". A similar opinion has been expressed by Captain Lambert.

16. There was considerable correspondence between the Company and the Government subsequent to the loss of "Swahili". Government always denied liability. It did not admit that an order was given by the Military Officer, and contended that if such an order was given the Officer had no authority to give such an order, or to interfere in any way with the navigation of the ship, and that a passenger could not give orders for which Government would be responsible merely because the passenger happened to be a Government Official.

17. By a letter dated 27th October, 1919, Government informed Mr. Gabriel "that no legal responsibility can be admitted by Government. Any questions of fact or responsibility must therefore be decided in the Courts if you so desire".

18. Mr. Gabriel did not apply for any fiat to have the questions of law and fact decided by the Court.

19. Government refused to submit the matter to arbitration as serious questions of law were involved and it was not considered that the loss of "Swahili" was a matter that came within the arbitration clause.

20. Without applying for a fiat the Company took out a summons in the Supreme Court asking for the appointment of an arbitrator. Government opposed the application, but an arbitrator was appointed.

21. At the arbitration no evidence of the value of the "Swahili" was given by the plaintiffs beyond the fact that her cost in 1906 was \$2300 together with \$1200 to bring her to this country twelve years before the date of her loss.

22. At the arbitration Crown Counsel requested Mr. Rudd, the arbitrator, to state a special case for the opinion of the Supreme Court on the following points of law:-

- (a) Did the facts constitute in law an accident arising out of a military operation within the meaning of the contract?
- (b) Had the military officer authority to bind the Government in law by any order he may have given affecting the navigation of the ship?

23. The arbitrator made his award without stating a special case as requested.

24. The arbitrator awarded \$5000 damages although there was not a scintilla of evidence upon which to base such award.

25. Mr. Gabriel in his letter of 17th July, 1907, to the Secretary of State says "the decision as to value was left to Mr. Rudd as an expert in shipping matters and not as an arbitrator". It is apparent that Mr. Gabriel relies on the \$5000 as the estimate of a witness rather than the award of an arbitrator. There has never been any suggestion that Mr. Rudd saw the "Swahili" at any time in 1917 or 1918 to enable him to form an estimate of her value, or, in fact, that he ever saw her.

Either Mr. Prudd was an arbitrator or he was not. If he was an arbitrator the value of the ship was one of the questions which he had to determine. Counsel for the Crown did not agree that Mr. Prudd should set a value on a ship he may never have seen or that he should fix a valuation without evidence to support it.

26. In a letter dated 20th June, 1923, from the acting Attorney General to Messrs Morrison and Allan it was stated:-

"A letter from the makers of the vessel as to her cost in 1906 and giving opinion as to her market value in England in 1918 is in my opinion inadmissible. If it becomes necessary for the arbitrator to place a value on the vessel he should do so upon the evidence of persons in the local shipping business who can speak as to the condition of the vessel at the time and can estimate her value based upon local consideration."

27. The opinion of trustworthy officials who were well acquainted with the "Swahili" has clearly been stated. (Paragraph 16). Neither the sum of £5000 nor any other sum was so much as mentioned as being the value of the "Swahili" in 1918 nor was any witness produced by the Company who was competent to suggest a value. None of the witnesses suggested any sum as being the value of "Swahili".

28. Mr. Gabriel says in his letter of 27th July, 1925, that "there were good reasons for us to anticipate a higher award (i.e. than £5000) especially as the valuation sent out by the builders and by independent experts were considerably larger than that given by the arbitrator".

It happens that a copy of the builders' letter dated 24th April, 1923, to Mr. Gabriel was supplied to this Department by Messrs Morrison and Allan in an effort to induce Government to agree to a valuation. That letter commenced by stating that the cost of "Swahili" was £2300 and that it was understood that the cost of bringing the boat to Kenya was £1500.

The letter proceeded:-

"We understand from you that on the boat that was sunk the bottom plating had been renewed, machinery thoroughly overhauled and that the boat was generally in good condition.

Similar boats of that age were fetching in 1918 anything from 25% to 50% or even more over their original cost depending on the condition of the boat, we therefore think that £4000 to £5000 was approximately the value at that time."

It will be noted that this estimate, assuming it to be correct, was the value in England of a similar boat in good condition at a time when the demand for shipping in England was very brisk.

The repairs referred to were done by a man who said this was the first ship he repaired, and that she had been four or five months under water. The boat was in fact in very bad condition.

29. Government regards the claim for £5000 as fraudulent and feels bound in the interests of the tax-payers of this country to resist the claim.

30. It has already been pointed out (paragraph 20) that these proceedings were commenced without a fiat and were in consequence null and void ab initio.

31. A copy of the arbitrator's award was received on April 3rd, 1924, and the same day notice was given to Messrs Morrison and Allan that Government did not accept the award and would take proceedings to set it aside if it was filed.

32. The award was filed on April 7th, and the Attorney General received notice on the 9th April that the award was filed.

33. On April 26th, 1924, the Attorney General received a Chamber Summons applying for the enforcement of the award.

34. On April 30th or 1st May, less than four weeks after the award was filed, a notice of motion to set it aside was sent to the Court at London.

35. This would have been well within the time allowed by English Rules but it appeared that by a local Rule of Court an application to set aside ^{the award} should have been filed on or before April 22nd. This local Rule does not appear in any annual volume of Ordinances, Rules and Regulations nor is it mentioned in Sockett's analytical index. From 7th April to 11th only three members of the Department were in Nairobi. On 11th the acting Attorney General went on leave leaving two members of the Department, Law and McElwaine, the latter having charge of this case. From the morning of the 7th to the forenoon of 17th McElwaine was continuously in Court. The Easter Holidays began on 18th. Easter Monday was the 21st. On 22nd the day on which objections should have been filed in Bombay McElwaine was again in Court.

36. The points taken in the late filed motion to set aside the award were

- (a) Misconduct in the arbitrator in not stating a special case on the points mentioned in paragraph 22;
- (b) The award was bad inasmuch as it contained error of law on its face
 - (i) the opinion set out in paragraph 13 of the award is incorrect in law and unsupported by the evidence;
 - (ii) the arbitrator erred in law in estimating the value of "Swahili" at the amount it would have cost to replace her and not her actual selling value;
- (c) That the entire proceedings were null and void and made without jurisdiction as no fiat for a Petition of Right had been asked for or granted.

37. As the motion to enforce the award was dismissed on the identical point set out in Clause (c) of paragraph 36 it is clear that had the motion to set aside the award been filed in time it must have succeeded for the same reason that the Company's motion to enforce the award was

dismissed.

38. As the Crown succeeded on the Company's motion which was heard at the same time as the motion to set aside the award it became unnecessary to appeal against the Order dismissing the Crown's motion on the ground of being a few days late.

39. The time prescribed is unreasonably short and is further curtailed by the time taken to send notice from one town to another (even between Mombasa and Nairobi there is not a mail every day) and to send the objections to the Court at Mombasa.

40. Government has been forced to rely upon the Petition of Right point because it has never been able to get the question of liability, or measure of damages in case liability were established, before the Courts.

41. If the Company is dissatisfied with the position in which it finds itself it has only itself to blame.

It did not ask for a fiat for a Petition of Right when it received the letter of 27th October, 1919.

It commenced proceedings without a fiat.

It raised the technical objection that the motion to set aside the award was late.

42. It is considered that the slight delay in filing the Crown's motion is a very technical breach of a somewhat elusive Rule of Court and is very much less serious than the irregularity of the Company in ignoring an Ordinance of the legislature.

43. Government has always been and still is willing that the issues of law and fact should be decided by the Court but the Company by its illegal action has hitherto prevented this being done.

44. The Secretary of State admits "that the Company ought to proceed by Petition of Right is not seriously contested". If this is true of future proceedings in the case it is equally true of past proceedings. The Company has been in the wrong from the beginning.

In spite of Government's refusal to arbitrate, the Company has taken illegal proceedings in order to prevent the questions of law coming before a Court. Its present difficulties are of its own making. A Petition of Right based on the original cause of action (if any) was its for the asking but it has adopted an illegal procedure, and has lost.

45. Government is quite prepared to give a fiat on the original cause of action (if any).

The proceedings can be taken very largely on a case stated. The only evidence that will be necessary is evidence of value.

While Government does not admit that Lieutenant Lamb gave the order alleged, it is willing to admit that the order was given for the sake of the case stated. This procedure should be both expeditious and inexpensive.

46. The Secretary of State practically admits that the Government has the law on its side. In equity it is difficult to see how an award for £5000 in respect of a twelve year old hulk which when new cost £3500 can be said to be just.

If it is suggested that the technical error of delay in filing the objection gives the Company an equitable right to the money, Government should be entitled in equity to rely on the Company's irregular procedure and the total absence of value.

47. As Mr. Gabriel says that the valuation of £5000 was that of Mr. Frudd as an expert (as to the value of a vessel he had not seen) and not as an arbitrator he admits that his claim is not based upon a proper award.

48. It is understood that some public discussion took place in consequence of the decision of the House of Lords in *Duff Development Company vs Kelantan Government* (1924) A.C. 797, a case which in some respects resembles the present, and in which the decision strongly supports the argument put up by this Department. I presume the Secretary of State had this case in view when he wrote the closing lines of paragraph 13 of his despatch.

49. With great respect I think that the action of this Government can be defended on stronger grounds than were open to the Kelantan Government:-

(1) The Kelantan case differs from this case of the "Swahili" in the following respects:-

- (a) in the Kelantan case the Government did not object to arbitration; in the "Swahili" case the Government of Kenya has all along definitely refused to arbitrate.
- (b) in the Kelantan case the question of the validity of the award was decided by Russell, J., by the Court of Appeal and by the House of Lords in favour of the Duff Company; in the case of the "Swahili" no Court has ever decided that the award was good.
- (c) in the Kelantan case there was evidence to support the award; there was no evidence to support the award in the "Swahili" case.

(2) Government has always been and still is willing to grant a fiat to have the question of liability and value decided.

(3) Even with the illegal procedure adopted by the Company it might still have been possible to have the question of liability decided by the Court if the Company had not taken the technical objection that the Crown's notice was a few days late.

- (4) This Government is bound to have regard to the interests of the public and of the tax-payers of Kenya and is not justified in paying a bogus claim which it is not legally bound to pay.
- (5) The Government of Kenya has offered the sum of £2500 which is extravagantly liberal, or, if the Company prefers, a Petition of Right upon which the facts other than the fact of value can be agreed, is available.

50. Should questions be asked in Legislative Council as to how it comes about that Government having been successful in the Court of Appeal nevertheless has handed over £2500 of the tax-payer's money to this Company the Kenya Government may find it difficult to defend this arrangement. It would be much more difficult to defend the payment of double that sum.

Of course if the Secretary of State orders this Government to pay £5000 the order must be obeyed but it must be anticipated that considerable dissatisfaction will be expressed by the unofficial members if Government pays this exorbitant claim after succeeding in the Courts.

51. I would suggest that the Secretary of State be requested to inform Mr. Gabriel's Solicitors that the best offer this Government is prepared to make is:

- (1) To grant a fiat for a Petition of Right based upon the original cause of action (if any)
- or
- (2) To pay £2500 in full settlement of all claims for damages and costs and to waive the costs which this Government has already been awarded.

The Solicitors might be informed that this Government will withdraw the offer of £2500 unless it is accepted on or before December 1st, 1925.

52. Whatever decision Government may arrive at I would request that a copy of this letter be forwarded to the Secretary of State in order that he may realise that
Government