



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

MATRIMONIAL CAUSE NO. E001 OF 2021

(CORAM: F.M. GIKONYO J.)

IN THE MATTER OF RECOGNITION OF A FOREIGN JUDGMENT

SFK.....PLAINTIFF

VERSUS

PLL.....DEFENDANT

JUDGMENT

[1]. Vide the originating summons dated 2nd February 2021 and filed in court on 24th February 2021, the plaintiff sought adoption of the final judgment and decree of divorce in case no. xx DM xxxx.

[2]. The plaintiff filed this suit after litigation proceedings were determined in the district court Sedgwick County, Kansas USA. The judgment which now the plaintiff seeks its recognition and enforcement.

[3]. The judgement titled 'journal entry of judgment and decree of divorce' electronically signed on the 26/6 2020, signed by the defendant and his attorney and produced as exhibit 'SKF 6'.

[4]. Paragraph 11 of the judgment distributed the property in equal shares.

[5]. Paragraph 17 distributed 50% of the retirement account.

[6]. Paragraph 38 required the defendant to pay \$ 824.00 monthly commencing 1st March 2020.

[7]. As at 31st January 2020 the arrears were \$ 9,444.20 as per paragraph 45.

[8]. Paragraph 43 and 46 required payment of \$ 1,015.36 for uninsured medical expenses of the minors incurred to 31st December 2019.

[9]. Paragraph 44 required the defendant to pay one-half of the trinity academy statement amount of \$ 586.13.

[10]. The parties and particularly the defendant waived the right of appeal expressly as per paragraph 58 of the judgment.

[11]. Following the language and phraseology of paragraph 11 of the judgment, the court clarified the same through a subsequent order clarifying journal entry of judgment and decree of divorce (*Nunc Pro Tunc*) through an order signed on 4th October 2021 particularly identifying the personal property to be shared equally.

[12]. The court also issued a further order titled 'order of judgment' wherein the court found that the respondent dissipated the entire retirement savings by withdrawing the sum of \$ 20,285.09.

[13]. On the 16/12/2021 this court directed that the matter be canvassed by way of written submissions.

[14]. On 27/10/2021, this court directed the defendant to verify the contents of the judgment. The defendant's advocates subsequently on 16/12/2021 confirmed that it originated from the court in Kansas.

[15]. The defendant filed two affidavits; one sworn on 23rd April 2021 and a supplementary affidavit sworn on 31st August 2021. The defendant challenges the recognition and enforcement of the foreign judgment. The main grounds raised are that this suit seeks to reopen the finalized suit inviting this court to quash some exhibits which he believes were irregularly obtained and irregularly admitted as evidence. The defendant also denies owning any property within this court's jurisdiction.

PLAINTIFF'S SUBMISSIONS

[16]. The plaintiff submitted that the court derives jurisdiction to recognize and enforce the judgements of a foreign court expressly from statutes. Both parties are domiciled in Kansas, USA; where the court passed the judgment. She argues that the said court had jurisdiction and the said the judgment is effective. Both parties submitted to the jurisdiction of the court by appearing and upon judgment by expressly waiving their right to appeal. Both parties and their attorneys appended signatures on the judgment as acknowledgement of acceptance of the terms of the judgment. Therefore this court should adopt the journal entry of judgment and decree of divorce signed on 26/06/2020 as reviewed by the order clarifying entry of judgment and decree of divorce and order of judgment both signed on 4/10/2021. She relied on Section 67 of the Marriage Act No. 4 of 2014, Section 9 of the Civil Procedure Act, the case of **Jayesh Hasmukh V Navin Haria & Another [2016] eKLR, EMM VS GWM [2018] eKLR.**

[17]. The plaintiff submitted that this court has no jurisdiction to investigate the propriety of the foreign court proceedings unless the defendant satisfies the court that his complaint falls within the exceptions of Section 9 of CPA. The onus of proof lies on the defendant to prove fraud and he failed to discharge the said burden. No evidence that the evidence of the chief was a forgery or that the neighbours' signatures were obtained fraudulently. The defendant relinquished his right to appeal. Both the defendant and his counsel verified the judgment issued by the district court in Kansas. It therefore, implies that the defendant agreed with the judgment passed by the judicial district court at Kansas including the evidence relied on in making the determination. Failure to file an appeal automatically paves way for adoption and enforcement of the said judgment and decree as an order of the court. The plaintiff has relied on the case of **Jayesh Hasmukh Shah V Navin Haria & Another [2016] eKLR, Sections 107,108 and 109 of the Evidence Act, The Case Of Koinange & 13 Others V Koinange KLR 923 [1986] Evans Otieno Nyakwara V Cleophas Bwana Ongaro eKLR 2015, Kenfreight Uganda Limited & Kenfreight East Africa V Tornado Carriers Limited [2018] eKLR, and Dari Limited & 5 Others V East African Development Bank And 2 Others [2020] eKLR.**

[18]. The plaintiff submitted that the court should adopt and enforce the modified judgment. She argued that the enforcing court will not ordinarily delve into the merits or demerits of the foreign decision. Any challenge to the foreign judgment can only be mounted in the US court. The defendant was duly heard and the court did not agree with his testimony. His remedy in the circumstances was to pursue an appeal, which right he waived. He is therefore estopped from reopening the case and challenging the decision on its merits. The defendant's argument that the property belongs to his father, his assertion was not believed by the court. There are also no objector proceedings by the defendant's father. The plaintiff relied on the following authorities **Jayesh Hasmukh Shah V Navin Haria & Another [2016] eKLR, Kenfreight Uganda Limited & Kenfreight East Africa Limited V Tornado Carriers Limited [2018] eKLR, East African Development Bank V Dari Limited & 5 Others [2020] eKLR, Order 22 Rule 51 CPR, Pre Cast Portal Structures V Kenya Pencils Company & 2 Others [1993] eKLR, Arun C Sharma V Ashan Raikundalia & Co Advocates & 2 Others [2014] eKLR, Section 17 Of The Matrimonial Property Act, and EMM V GWM [2016] eKLR.**

[19]. The plaintiff submitted that the judgment should be modified so as to put into consideration;

i. The child support to be paid towards the maintainance of the child,

The district court of Kansas after awarding full legal custody of the minor children to the plaintiff made provision for monthly child support of \$ 824.00 to be paid by the defendant commencing on March 1st 2020. The defendant however, failed to honour his end falling into arrears amounting to the decretal sum of \$ 20, 000. The plaintiff contends that the defendant cannot state that he is giving financial support to the best of his abilities as consideration of his earning capacity were made by the court which established the monthly child support. She relied on Article 53 of the Constitution, Section 94 of the Children Act, **C.I.N V J.N.N [2014] eKLR**

ii. Division of the matrimonial property on a 50:50 basis and;

The district court found that the property should be distributed equally, therefore, the same should take effect. Section 3 (2) of the Marriage Act, Article 45 (3) of the Constitution, **Agnes Nanjala William V Jacob Petrus Nicolas Vander Goes, Federation Of Woman Lawyers Kenya (FIDA) V Attorney General & Another [2018] eKLR**

iii. The Maasai customary which in this case, should be considered repugnant to justice and morality.

The claim that the animals do not belong to the plaintiff based on Maasai customary law brings an injustice to the plaintiff as she used her hard earned money to invest in the property. That would take away her right of equal ownership of the matrimonial property thus the use of customary law should be considered as repugnant to justice and morality. She relied on Article 159 (3) of the Constitution of Kenya, and Section 3 (2) of the Judicature Act.

[20]. The plaintiff submitted that for a judgment to be registered for purposes of enforcement it must qualify as a conclusive and final judgment in the eyes of the court. It is considered conclusive when it is made by a competent court and has become final in that, no appeal or application for review is pending against it in the country of origin. In this case there is no pending application for review or appeal in the district court of Kansas thus making the judgment conclusive and eligible for enforcement.

[21]. The plaintiff seeks enforcement of paragraph 11 as modified by the order clarifying journal entry of judgment identifying matrimonial property and sharing it equally. Paragraph 38 to 47 which establishes child support due and owing. Paragraph 17 of the judgment read together with the courts finding in the order for judgment signed on 4/10/2021 that shows the defendant dissipated the parties' entire

retirement benefits to defeat the enforcement of the judgment.

[22]. In conclusion, the plaintiff submitted that her application is merited and should be allowed with costs.

DEFENDANT'S SUBMISSIONS

[23]. The defendant submitted that the Foreign Judgments (Reciprocal Enforcement) Act cap 43 laws of Kenya does not recognize / enlist judgments from the United States of America as those within the designated courts to warrant its automatic adoption within Kenyan jurisdiction for want of being non- commonwealth member. The defendant urged that should this court be persuaded to adopt the final judgment, the additional documents filed way late in the day without leave of court, with the sole intention of ambushing the defense and have them constitute the initial court proceedings obtained in the foreign jurisdiction be disregarded.

[24]. The defendant submitted that lack of court's leave to have the additional documents admitted and be deemed as proper on record and failure by the plaintiff's counsel to duly inform court that the plaintiff had gone back to the foreign jurisdiction(USA) for review of the final judgment and decree and lack of proof that indeed the application for review order clarifying the said judgment and decree was ever served upon the defendant requiring him to respond, if at all, this order together with the additional documents must therefore be struck off the record herein.

[25]. The defendant submitted that order signed on 4/10/2021 does not wholly absolve foreign judgments from interrogation, as it equally established room for impeachment of the same thus the judgment herein is not absolutely immune and intended interrogations shall be raised and when appropriate.

[26]. The defendant submitted that the review should not be adopted as constituting the final judgment and decree, thus locking out its enforcement.

[27]. The defendant submitted that the plaintiff did not raise the issue of child support in the trial court or in her pleadings and parties are bound by their pleadings. He relied in the case **Elizabeth O Odhiambo V South Nyanza Sugar Co. Ltd HCCA No. 118 of 2018 [2019] eKLR.**

[28]. The defendant submitted that upon dissolution of marriage parties are entitled to a share of the property equal to their contribution. The defendant disagree with the plaintiff's counsel on the mathematical formula of 50 :50% as there exists no such pronouncement by the trial judge that the matrimonial property shall be divided as such. He relied on Article 45(3) of the Constitution and Section 3(2) of the Marriage Act and Section 7 of the Matrimonial Property Act and the case of **Federation of Women Lawyers Kenya (FIDA) V Attorney General & Another [2018] eKLR**

[29]. The defendant submitted that the parties herein are Maasai and therefore Maasai customs apply to them. He argued that it is a Maasai norm that ownership of the livestock while one is still residing in their father's home does not exist and that this informed the defence application dated 30/6/2021. Further that it is a maasai custom that upon dissolution of marriage the plaintiff should return the dowry and bride price to their in-laws; in this instance the plaintiff is yet to return the same.

[30]. The defendant submitted that on 7/5/2021 he willingly welcomed the stock taking exercise.

[31]. The defendant in conclusion, prays that the plaintiff's application/ suit is without merit and ought to be dismissed with costs.

ANALYSIS AND DETERMINATION.

Issues

[32]. The issues for determination are;

i. Whether the final judgment and decree of divorce in case no. 2018 DM001680 DS as reviewed by order clarifying journal entry of judgment and decree of divorce (Nunc Pro Tunc) signed on 4/10/2021 being foreign judgment should be recognized and enforced by this honourable court.

ii. Whether in recognition proceeding, the court could consider merits of the judgment.

Reciprocity

[33]. In the present case the plaintiff brought a suit against the defendant by way of chamber summons for orders that the judgment entered by the district court in Sedwick County Kansas, in the United States of America be enforced in Kenya. The defendant contended, inter alia, that the USA judgment was not only unenforceable but was also incapable of registration in Kenya by virtue of Foreign Judgments (Reciprocal Enforcement) Act (Cap 43, Laws of Kenya).

International comity

[34]. There may be no reciprocal arrangements between USA and Kenya. But, how does one execute a judgment from a foreign country which has no reciprocity with Kenya?

[35]. It is important to discuss how courts have resolved the dilemma? Courts have considered comity a relevant factor in the granting of recognition to foreign and international judicial decisions. And, despite much traditional scholarly critique, the use of comity as a judicial tool by the judiciary remains extensive- it is seen to constitute a framework for judicial dialogue in the “global community” as well as enhancing respect for judicial authority of nations (Anne-Marie Slaughter^[1])

[36]. Perhaps the most influential statement of the doctrine was made in **Hilton v Guyot**^[2], where Justice Gray of the Supreme Court defined comity as follows: -

Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and goodwill, on the other; it is the recognition which one allows within its territory to the legislative, executive or judicial act of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under protection of its laws...we are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting a trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it is sitting, or fraud in procuring the judgment, or any other special reason why the country of this nation should not allow its full effect, the merits of the case should not, in an action brought in this country upon the judgment be tried afresh, as on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

[37]. A Uganda Court was faced with the dilemma of lack of reciprocity borrowed the work in **Hilton vs Guyot** into the case of **Christopher Sales & Carol Sales vs The Republic of Uganda & Apollo k. Kironde (HCCC No. 2011** which was cited with approval by Court of Appeal in **Nairobi Civil Appeal No. 147 of 2009, Jayesh Has Mukh Shah Vs Navin Haria & Another**, where the court held that: -

The issue that is raised here is not one of reciprocity because quite clearly, there are no reciprocal arrangements between Uganda and USA. The question raised is as to what a judgment debtor who is “stranded” with a judgment from a country with no reciprocal arrangements with Uganda, like in this case, is supposed to do with the judgment. What is he supposed to do to enforce it if at all?

[38]. The court in Uganda adopted dictum in **Hilton vs Guyot** and held that the USA judgement was enforceable in Uganda. The learned judge in that case, **Mwangusya, J** held: -

The Judicial system under which the case was tried is beyond reproach. A judgment creditor armed with such a judgment should be allowed to realize the fruits of his judgment which should be afforded recognition by our courts in absence of a reciprocal arrangement. This court grants him the prayer that judgment is enforceable in Uganda.

[39]. The point to note here is that just as was the case in Uganda, the judgment sought to be enforced in the instant application originates from the United States which has no reciprocal arrangement with Kenya. Even if there was no reciprocal arrangement between the two countries, or express statute governing recognition of such judgment, in so far as the test under international comity is met, Kenya would give the judgment recognition and enforcement. Of course the Foreign Judgment herein does not fall in those judgments which cannot be recognized or enforced in Kenya, such as taxation judgment, for tax regimes do not extend beyond the territorial jurisdiction of the state.

Applicable law

[40]. Nonetheless, in I do note that, under **Section 3** of the **Foreign Judgments (Reciprocal Enforcement) Act**, it is stated that the provisions of the said Act are not applicable to *inter alia* a matrimonial cause or matter and proceedings in connection with custody or guardianship of children. Recognition of foreign judgment arising from matrimonial proceedings is governed by *inter alia* **Section 67** of the **Marriage Act**. The Section provides thus:

“Where a foreign court has granted a Decree in matrimonial proceedings whether arising out of a marriage celebrated in Kenya or elsewhere, that decree shall be recognized in Kenya if;

(a) Either party is domiciled in the country where that Court has jurisdiction or had been ordinarily resident in Kenya for at least two years immediately preceding the date of institution of proceedings.

(b) Being a Divorce of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them.

[41]. **Section 2** of the **Marriage Act**, defines matrimonial proceedings as: -

“proceedings instituted under Part IX and include proceedings for the payment of maintenance or for custody of children instituted independently of a petition for a declaratory decree or for annulment, separation or divorce.”

[42]. Faced with the argument that a foreign judgment from USA which was of similar caliber as the one before me is not recognized in Kenya, Musyoka J correctly observed in the case of **M.N.M vs PNM (2016) eKLR** :

“... It was suggested that foreign judgments in matrimonial cause are not recognized in Kenya. That cannot be the correct position.”

[43]. Thus, the judgment and decree before me therefore fall within the purview of the Marriage Act, and the provisions of **Section 67** apply; Foreign Judgments arising out of, or dealing generally with matrimonial proceedings are recognized in Kenya.

[44]. Of value is, unlike the **Foreign Judgments (Reciprocal Enforcement Act) 1984**, Section 67 of the **Marriage Act**, does not make reciprocity a requirement in the recognition and registration of foreign judgments arising from matrimonial proceedings.

[45]. In this case, therefore, recognition of all foreign judgments relating to matrimonial proceedings should be recognized under section 67 of the **Marriage Act** without the necessity of proof of reciprocity. All that is required is that there be evidence to show that either party was domiciled in the country where the Decree was made and that the Court which issued the Decree had jurisdiction to do so. Secondly it must be shown that the Decree of annulment, divorce or separation was effective in the country of domicile.

[46]. From the material presented to Court the order for judgment and order clarifying entry of judgment and decree of divorce which are the subject of these proceedings, was issued in **Kansas, USA**. A copy of the journal entry of judgment and Decree of divorce electronically signed on 26/6/2020 marked as exhibit **'SKF6'** and order clarifying entry of judgment and decree of divorce and order of judgment both electronically filed on 4/10/2021 are before this court. Nothing shows that the Court in Kansa had no jurisdiction to issue the said Decree.

[47]. The plaintiff averred that after the solemnization of the marriage in **Narok** on 27.05.2000, they relocated to the United States in the year 2002 with her spouse. They were therefore **'domiciled'** in Kansas, United States. To that extent the divorce orders issued in Kansas are recognizable by the Kenya Courts.

[48]. There is also nothing which show any appeal or review is pending in respect of the orders and judgment of the Court in Kansas. Therefore, the judgment as reviewed by the foreign court is final.

Interrogating merit of foreign judgment

[49]. At this juncture, and before I close, wish to state that parties herein attempted to re-litigate the case before this court and introduced new issues. As a matter of law and international comity, the receiving state should allow a foreign judgment its full effect, without trying the merits of the case afresh, as on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact (**Hilton vs Guyot**). All arguments, and invitation towards merit litigation of the case and judgment are hereby rejected.

Registration and recognition

[50]. More judicial hints. Recognition of foreign judgments is not the same as Registration, but may be used sequentially or complementarily. Under the Foreign Judgments (Reciprocal Enforcement) Act; i) registration of a foreign judgment is upon the order of, and by the court under section 6 of the Act, and; ii) foreign judgments of designated courts are recognized under section 18. Designated courts refer to courts in a reciprocating state. Of the former; Subject to the Act, a registered judgment shall, for the purposes of execution, be of the same force and effect as a judgment of the High Court entered at the date of registration. Of the latter; according to section 18, a judgment of a designated court shall be recognized in any court in Kenya as conclusive between the parties thereto, as to the matter adjudicated upon, in all proceedings (no matter by which of the parties in the designated court they are instituted) on the same cause of action and may be relied upon by way of defence or counterclaim in those proceedings

[51]. There is, however, no special or marked difference in the effect of registration or recognition of foreign judgment under the Foreign Judgments (Reciprocal Enforcement) Act.

[52]. Recognition of foreign judgments under the Marriage Act should bear similar effects as in the Foreign Judgments (Reciprocal Enforcement) Act. Except, however, foreign annulment and dissolution of marriage are registered under Section 61 of the Marriage Act 2014. Registration of such orders is by the Registrar of Marriages and not the Courts. See the case of **M.N.M vs PNM (2016) eKLR** where Musyoka J stated as follows:

Foreign annulments and dissolution of marriages are now registrable under Section 61 of the Marriage Act, 2014. However, unlike the provisions in the foreign judgments (reciprocal enforcement) Act, which envisages adoption of such orders by the courts, the registration envisioned in Section 61 of the Marriage Act 2014 is by the Registrar of Marriages.

Conclusions and orders

[53]. The court is satisfied that the trial abroad was by a court of competent jurisdiction, exercising jurisdiction upon regular proceedings, within a judicial system that is beyond reproach. And there is nothing to show either prejudice in the court or in the system of laws under which the decree was made, or fraud in procuring the judgment, or any other special reason why this country should not allow its full effect. Accordingly, the journal entry of judgment and decree of divorce electronically signed on 26/06/2020, the order clarifying journal entry of judgment and decree of divorce (*Nunc Pro Tunc*) signed on 4/10/2021 in the district court Sedwick County, Kansas USA, and order for judgment electronically signed on 4/10/2021 are hereby recognized and enforceable by this court.

[1]. In considering this matter, the court has taken into account the principle that the best interest of the child is paramount as peremptorily demanded by court's constitutional, statutory and international obligation thereto. See **Article 53(2)** of the **Constitution and Section 4(2)** of the **Children Act No. 8 of 2001**, and international instruments on rights of a child.

[2]. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 30TH DAY OF MARCH, 2022

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F. GIKONYO M.

JUDGE

In the presence of:

1. Tanga holding brief for Gitonga for the Defendant
2. Odhiambo for the Appellant
3. Mr. Kasaso – CA

[1] Anne-Marie Slaughter,

A Global Community of Courts, 44 HARV. INT'L L.J. 191, 194 (2003)

[2] *Hilton v. Guyot*, 159 U.S. 113, 143 (1895).