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Amra Leasing Limited v DAC Aviation (EA) Limited & 2 others (Civil Suit E147 of 2020) [2022] KEHC 12737 (KLR) (Commercial and Tax) (30 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12737 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E147 OF 2020

DAS MAJANJA, J

AUGUST 30, 2022

IN THE MATTER OF THE

FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT

AND IN THE MATTER OF

ENFORCEMENT OF JUDGMENT DELIVERED ON 11TH MARCH 2020 IN THE HIGH COURT OF ENGLAND AND WALES, COMMERCIAL COURT, QUEENS BENCH DIVISION IN CLAIM NO. CL-2019-000762

BETWEEN

AMRA LEASING LIMITED .... PLAINTIFF

AND

DAC AVIATION (EA) LIMITED .... 1ST DEFENDANT

DAC INTERNATIONAL AVIATION LIMITED .... 2ND DEFENDANT

EMMANUEL ANASSIS .... 3RD DEFENDANT

RULING

1. In the amended notice of motion dated August 2, 2022, the defendants seek review of the ruling/order dated July 19, 2022 dismissing their application dated May 10, 2022 and substitute it with an order that the registration order and decree of this court dated May 29, 2020 be set aside. In the alternative, they request the court to adjourn the hearing and determination of the application pending the hearing and determination of the intended appeal by the defendants against the judgment in default of defence entered against the defendants by the High Court of Justice in England and Wales in Commercial Court, Queen Bench Division in Claim No CL 2019-000762 between the parties on the subject matter herein and the order of this court given on July 19, 2022 declining to set aside the registration order.

2. The application is supported by the affidavit and replying affidavit of the 1st and 2nd defendant's general manager, Peter Muga, sworn on August 2, 2022 and August 10, 2022 respectively.

3. I directed that the defendants' application be heard together with the plaintiff's application dated July 29, 2022. In the application, the plaintiff seeks an order that the ex-parte orders issued on July 28, 2022 by Chepkwony J, be set aside on the ground of non-disclosure of material facts. It also seeks an order that the firm of Litoro and Omwebu Advocates pay costs of the application on account of abuse of the court process. The application was canvassed by brief oral submissions by the respective counsel.

4. The substantial issue for consideration is whether the court should review its order dated July 19, 2022 which, in effect, dismissed the defendants application dated May 10, 2022 seeking to stay or set aside the order dated May 29, 2020 registering the judgment delivered on March 11, 2020 in the High Court of Justice of England and Wales, Commercial Court, Queens Bench Division, in Claim No CL-2019-000762 under the *Foreign Judgment (Reciprocal Enforcement) Act* ('the Act') ('the registration order').

5. Before considering the matter, a brief summary of the matter will suffice. On March 11, 2020, the High Court of Justice England & Wales, Commercial Court, Queens Bench Division in Claim No CL-2019-000762 delivered judgment in favour of the plaintiff and against the defendants for the sum of GB£ 8,992,980.25. The plaintiff, in an application dated May 6, 2020, applied to have the said judgment recognized and registered as a judgment of this court as well as it being enforced within the jurisdiction of this court, which was allowed by the court, in the ruling dated May 29, 2020.

6. After the registration order, the defendants filed an application dated July 9, 2020 seeking an order for postponement of the payment of the judgment debt and to settle it in instalments. The court, by the ruling dated August 24, 2020 allowed this application and ordered the defendants to pay the judgment debt in monthly instalments of USD 50,000 for a period of six months commencing November 1, 2020 and April 2020; and thereafter, by monthly instalments of USD 100,000 for a period of twelve months whereupon the entire debt shall become due and owing.

7. After a lull of almost a year, the defendants filed an application dated June 28, 2021 seeking to set aside the registration order on the ground that they had filed an application to set aside the judgment in England. By the ruling August 27, 2021, I adjourned the application for a period of 3 months to enable the defendants set aside the judgment before the court in England. The application before the court was not heard within the 3- month period whereupon the defendants filed an application to enlarge time. I acceded to that request on May 16, 2022.

8. On July 8, 2022, counsel for the plaintiff informed this court that the court in England had determined the application seeking to set aside the default judgment on June 16, 2022 and had declined to set it aside by the judgment dated and delivered on the same day; AMRA Leasing Limited v DAC Aviation (EA) Limited, DAC International Aviation Limited and Emmanuel Anassis [2022] EWHC 1718 (Comm). The defendants' accepted this position but informed the court that their lawyers had made an application for extension of time on July 6, 2022 hence their avenue for appeal in England has not been exhausted. They requested this court to stay this matter until the appeal in England is heard and determined.

9. The issue urged in that application and the result of the ruling dated July 19, 2022 ('the ruling') was whether this court should set aside the registration order in light of the dismissal of the application to set aside the default judgment by the court in England and the pending appeal therefrom. In the ruling, I considered sections 2, 10 and 11 of the Act and came to the conclusion that the judgment the defendants wish to appeal against in England is the judgment declining to set aside the default

judgment which does not fall under section 3 of the Act. I held that the judgment contemplated by section 11 of the Act is the judgment subject of the registration order which is not subject of appeal in England. I also held the application pending before the court in England is for extension of time to lodge an appeal and is not an appeal against the default judgment. I therefore dismissed the application on the ground that the application for extension of time to lodge an appeal out of time against a judgment refusing to set aside a default judgment pending before the court in England does not affect the registration order.

10. The thrust of the defendants' case is that the court made a mistake or error apparent on the face of the record as it failed to address its mind to statutory provisions relied on by the defendants in seeking to reinstate and or enlarge the orders given on August 27, 2021 particularly section 3(1)(d) of the Act. That the court determined the application dated May 10, 2022 on the basis of section 3(1)(a) of the Act which was neither invoked nor relied on by the defendant hence it came to the wrong conclusion. In summary, the defendants point out that their submissions on July 18, 2022 in support of the application dated May 10, 2022 were based on section 2(1), 3(1)(d) and 11(1)(b) of the Act, that they never invoked nor relied on section 3(1)(a) of the Act and that the court interrogated section 3(1)(a) of the Act instead of section 3(1)(d) of the Act which constitute a mistake and error apparent on the fact of the record.

11. Counsel for the defendants submits that the court should have limited itself to the parties' submissions and that by interrogating a provision of the law not relied on, the court not only arrived at the wrong conclusions but also prejudiced the defendants. Counsel pointed out that the error on the face of the record is demonstrated by the court's failure to appreciate that the application dated July 6, 2022 in England seeking extension of time to appeal is a clear intention to appeal against the impugned judgment of the High Court of Justice England and Wales delivered on March 11, 2020 in Claim No CL-2019-000762 hence there is sufficient to ground to review the order.

12. In response to application, counsel for plaintiff submits that the defendants have not established any ground to review the ruling and more particularly, there is no error on the face of the record to warrant review. Counsel submits that the arguments raised by the defendants amount to grounds of appeal which should be agitated in an appeal and that the court in fact considered the applicable provisions of the law including section 3(1)(d) of the Act which is in fact not applicable this case as there is no appeal pending against the default judgment which forms the basis of the registration order.

13. The defendants have invoked the provisions of section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules* which provide as follows:

Section 80 of the *Civil Procedure Act*

80. Any person who considers himself aggrieved-

(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 rule 1 of the Civil Procedure Rules

45 Application for review of decree or order

(1) Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

14. The principles governing the exercise of discretion to review a decree or order are now settled. As regards this case, the defendants are required to show that there is an error apparent on the face of the record. In *National Bank of Kenya Limited v Ndungu Njau [1996] KLR 469*, the Court of Appeal explained what constitutes an error of law apparent on the face of the record and the scope of review as follows:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.

15. *In Nyamogo & Nyamogo Advocates v Kogo [2001] EA 170*, the Court of Appeal emphasized the same point as follows:

Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view as adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for appeal. [Emphasis mine]

16. As stated earlier, the subject of the ruling was whether or not to set aside the registration order on the basis that the defendants were in the process of appealing. In the said ruling, I expressed the view that resolution of that issue turned on the interpretation of the Act more particularly sections 2, 10 and 11. In addition, I considered section 3 of the Act in deciding whether the appeal pending before the court in England and Wales is one contemplated under the Act and I observed as follows:

(13) As to whether the defendants' pending appeal against the judgment of the court in England refusing to set aside the default judgment amounts to an appeal for purposes of the Act, I hold that the relevant judgment is the one that is the subject of the registration order. This is the default judgment that was issued by the High Court of England and Wales on March 11, 2020. This finding is buttressed by section 3 of the Act which deals with judgments to which the Act applies. In particular, section 3(1) states as follows:

3(1) Subject to subsections (2) and (3), this Act applies with respect to—

(a) a judgment or order of a designated court in civil proceedings whereby a sum of money is made payable, including an order for the payment of a lump sum as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another.

Further section 3(2) provides as follows:

3(2) This Act applies to a judgment referred to in subsection (1) if it—

(a) requires the judgment debtor to make an interim payment of a sum of money to the judgment creditor; or

(b) is final and conclusive as between the parties thereto,

but a judgment is deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

(14) The judgment the defendants wish to appeal against is the judgment declining to set aside the default judgment which does not fall under section 3 of the Act. The judgment contemplated by section 11 of the Act is the judgment subject of the registration order. Under section 11(1)(a), I can safely conclude that there is no appeal pending against that judgment. The application to set aside the default judgment in the English court was for purposes of that section deemed to be the appeal as I stated in the ruling dated May 16, 2022 giving the defendants' an opportunity to prosecute its 'appeal'.

17. The defendants contend that the court ought to have considered and relied on section 3(1)(d) and not section 3(1)(a) of the Act. I hold that this is a substantive argument and not merely an error of law on the face of the record. The court when interpreting a statute does not and cannot limit itself to the specific provision of the law cited. The court is duty bound to read a statute as whole in order to give it effect (see *Adrian Kamotho Njenga v Kenya School of Law NRB Pet No 398 of 2017[2017] eKLR).* In this case, the court duly considered the applicable provisions and was satisfied that section 3(1)(a) of the Act was the appropriate provision as opposed to any other provision. The argument that section 3(1)(d) is applicable is a substantive one and calls for re-interpretation and application of the statute. It is not a matter that can be the subject for review.

18. I have also considered the plaintiff's application seeking to discharge interim orders made on July 28, 2022 by Chepkwony J I only wish to emphasise that the matter was placed before the honourable judge as I was away on official assignment. I do not intend to belabor the issues raised therein save that since the application for review has now been dismissed, the ex-parte orders stand discharged.

19. For the reasons I have set out above, I dismiss the application dated August 2, 2022 with costs to the plaintiff. The interim orders in force are now discharged.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST 2022.

DS MAJANJA

JUDGE

Court Assistant: Mr M Onyango

Mr Kuyo instructed by Coulson Harney LLP for the Plaintiff/Judgment Creditor.

Mr Muhuyu instructed Litoro and Omwebu Advocates for the Defendants/Judgment Debtors.