



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. E031 OF 2020

IN THE MATTER OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT)

ACT, CAP 43 OF THE LAWS OF KENYA

IN THE MATTER OF AN ORDER OF THE SUPREME COURT OF INDIA ISSUED ON 28TH OCTOBER, 2020

AN

IN THE MATTER OF AVK (A CHILD)

AND IN THE MATTER OF SECTION 4, 22, 113 OF THE CHILDREN ACT AND

ARTICLE 53 OF THE CONSTITUTION OF KENYA 2010

FOR AN APPLICATION FOR MIRROR ORDERS

BY

PK.....EX PARTE APPLICANT

BETWEEN

PK.....EX PARTE APPLICANT

JUDGMENT

1. PK the Applicant herein, filed an Originating Summons dated 30.10.2020 seeking the following:

1. Spent

2. THAT the judgment delivered by the Supreme Court of India in Supreme Court Civil Appeal No. 3559 of 2020 – SMK v PK be registered.

3. THAT further, or other or orders, be granted so as to give effect to the orders of and in compliance with judgement of the Supreme Court of India made on 28th October 2020.

4. THAT costs be reserved.

2. The Application is anchored on the provisions of the Constitution of Kenya, 2010, the Children Act and the Foreign Judgments (Reciprocal Enforcement) Act and all enabling provisions of law. Given the prayers sought herein, the primary law on the matter is the Foreign Judgments (Reciprocal Enforcement) Act.

3. The facts of this case as can be gleaned from the record is that the Applicant a Kenyan citizen married S an Indian citizen 29.7.09. Following the marriage, S moved to Kenya and settled in her matrimonial home. In 2009, she returned to India for the birth of their son AVK, who was born on 2.12.09 in New Delhi, India. On 1.7.10, the child came to Kenya with his parents where they lived. On 10.3.12 the child went to India both parents and was due to return to Kenya on 6.6.12. The Applicant went to India on 22.6.12 and spent time with S and

the child until 26.4.12 when he returned to Kenya. On 26.5.12, S filed suit in the Delhi High Court, seeking a permanent injunction restraining the Applicant and his parents from removing the child from her lawful custody or from Delhi, or accessing the child in school, which orders were granted. This marked the beginning of litigation between the parties from the High Court all the way to the Supreme Court and culminated in the judgment, the registration of which the Applicant seeks.

4. In the judgment, the Supreme Court of India ordered that the custody of the child be handed over by S to the Applicant subject to several conditions set out in the judgment. Key among the conditions is that the Applicant was to obtain a mirror order from this Court reflecting the directions in the judgment, within 2 weeks. A copy of the mirror order was then to be filed in the Supreme Court of India.

5. The law relating to enforcement of judgments made in foreign countries is set out in the Foreign Judgment (Reciprocal Enforcement) Act, Chapter 43 of the Laws of Kenya. The objective of the Act is to make provision for the enforcement in Kenya, of judgments given in other countries which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith. The orders that the Applicant seeks to have registered by this Court were issued by the Supreme Court of India. In order for the said order to be enforceable, it must meet 2 criteria. First, the order must be made by a designated court and second, it must be an order or judgment to which the Act applies.

6. Section 2(1) of the Act defines a designated court as follows:

“designated court” means—

(a) a superior court of a reciprocating country which is a Commonwealth country;

(b) a superior court of any other reciprocating country which is specified in an order made under section 13;

(c) a subordinate court of a reciprocating country which is specified in an order made under section 13;

7. Section 2(1) of the Act further defines a “reciprocating country” as that country declared as such, for the purposes of this Act by the Minister under section 13(1). The superior Court giving the judgment must be of a reciprocating country, as declared by the line Minister by an order, to be a reciprocating country for the purposes of the Act.

8. The Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984 lists in a schedule, the countries declared by the minister to be reciprocating countries. Paragraph 2 of the Order provides:

The countries specified in the Schedule are declared to be reciprocating countries for the purposes of the Act and the Act shall apply with respect to judgments given by superior courts of those countries.

SCHEDULE

1. Australia,

2. Malawi,

3. Seychelles,

4. Tanzania,

5. Uganda,

6. Zambia,

7. the United Kingdom,

8. Republic of Rwanda.

9. From the above schedule, it is evident that India has not by an order of the Minister, been declared to be a reciprocating country. In the case of Jayesh Hasmukh Shah v Navin Haria & another [2016] eKLR the Court of Appeal dismissed an appeal where the appellant sought to enforce and execute in Kenya a judgment from Ethiopia which like India, is not a reciprocating country under the provisions of the Act. The Court stated:

There is currently no treaty in place between Kenya and Ethiopia pursuant to which either country’s judgment may be enforced by either country’s courts. It is not in dispute that Ethiopia’s Federal Supreme Court is not a “designated court” within the meaning of Kenya’s Foreign Judgment (Reciprocal Enforcement) Act. The respondent cited the case of Intalframe Ltd -v- Mediterranean Shipping Company, (1986) KLR where this Court expressed that the basic principle upon which neighbouring or other states provided for enforcement of foreign judgments is one of reciprocity. It is our considered view that the case of Intalframe Ltd -v- Mediterranean Shipping Company, (supra) and the Foreign Judgment (Reciprocal Enforcement) Act (Cap 43, Laws of Kenya) are not relevant to this appeal as they are applicable only where there is reciprocal arrangement on enforcement of foreign judgments.

10. There are currently no reciprocal arrangements in place between Kenya and India pursuant to which either country's judgment may be enforced or registered by either country's courts. As such, the Supreme Court of India is not a "designated court" within the meaning of the Act.

11. It is noted that the order, the registration of which is sought by the Applicant relates to the custody of the child of the Applicant and S. Even if India were a reciprocating country, the Application herein would still run into headwinds in view of the provisions of Section 3(3)(e) of the Act which stipulate:

(3) This Act does not apply to a judgment or order—

(e) in proceedings in connection with the custody or guardianship of children;

12. This Court has no jurisdiction to enforce or register a foreign judgment in proceedings in connection with the custody or guardianship of a child. This is because the Act does not apply to judgment in in such proceedings. In this regard, I agree with Musyoka, J. who in Ian Mbugua Mimano v Charlotte Wamuyu Mutisya & 2 others [2014] eKLR, stated:

There is no jurisdiction for me to deal with the matter of the enforcement of a foreign decree in proceedings in connection with the custody or guardianship of a child.

There is clearly no merit in the application dated 20th May 2014 so far as it relates to enforcement of a decree made by a USA court in proceedings in connection with the custody or guardianship of a child. I decline to grant it, and I hereby dismiss it with costs.

13. The Court therefore makes a finding that the judgment from the Supreme Court of India, being from a superior court of a non-reciprocating country, and further being one in proceedings in connection with the custody or guardianship of a child, is not registrable in this Court by dint of Sections 13(1) and 3(3)(e) of the Foreign Judgment (Reciprocal Enforcement) Act.

14. The Applicant has relied on the case of In Re Matter of I W P (Infant) [2013] eKLR in support of his case. I have considered the decision and note that the same is distinguished, in that the judgment in respect of which registration was sought therein, was from a superior Court in the United Kingdom, a reciprocating country within the meaning of Section 2 of the Act. Notably, the learned Judge did not address that restriction in Section 3(3)(e) on applicability of the act to matters relating guardianship and custody of children. In any event, the said judgment being of a Court of concurrent jurisdiction to this Court is not binding on this Court.

15. In the end and for the reasons stated, I do find that the Originating Summons dated 30.10.2020 lacks merit and the same is hereby dismissed. This being a matter concerning a child, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 21ST DAY OF MAY 2021

M. THANDE

JUDGE

In the presence of: -

.....**for the Petitioner**

.....**Court Assistant**