



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT NO. E147 OF 2020 (OS)

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

DAC AVIATION (EA) LIMITED.....1ST APPLICANT/JUDGMENT DEBTOR

DAC INTERNATIONAL AVIATION LIMITED.....2ND APPLICANT/JUDGMENT DEBTOR

EMMANUEL ANASSIS..... 3RD APPLICANT/JUDGMENT DEBTOR

AND

AMRA LEASING LIMITED..... RESPONDENT/JUDGMENT CREDITOR

RULING NO. 3

1. This is the 3rd ruling in this matter whose facts are largely common cause. On 11th March 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 Respondent and against the Applicants for the sum of GBP 8,992,980.25. The Respondent, in an application dated 6th May 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 a ruling dated 29th May 2020 (“the Registration Order”).

2. Subsequently, the Applicants filed an application dated 9th July 2020 seeking postponement of the payment of the judgment debt and for them to settle the judgment debt in instalments. The Court, by the ruling dated 24th August 2020 allowed this application and ordered the Applicants to pay the judgment debt in monthly instalments of USD 50,000 for a period of six months commencing 1st November 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.

3. The Applicants have now approached the court by the Chamber Summons dated 28th June 2021 made under, inter alia, under **sections 2(a), 8(4) (b), 11(1)(a) and (2)** of the *Foreign Judgments (Reciprocal Enforcement) Act* (“the Act”) and **Rule 6** of the *Foreign Judgments (Reciprocal Enforcement) Rules 1984*. They seek an order that that the Registration Order and all consequential orders arising therefrom be set aside.

4. The application is supported by the affidavits of the 3rd Applicant sworn on 28th June 2021 and 15th July 2021 respectively. It is opposed by the Respondent through the replying affidavit of Paul Clark who is engaged by *MDT(Investments) Limited*, the Respondent’s Lease Manager. The application was canvassed by oral and written submissions with the parties advancing their respective positions.

5. From the application, depositions and submissions, the main issue for determination is whether the Registration Order and all consequential orders should be set aside. The provisions of law germane to the determination of the application are **sections 2, 10 and 11** of the **Act** which provide, in part, as follows:

2. For the purposes of this Act—

“*appeal*” means proceedings by way of application for the discharge or setting aside of a judgment or for a new trial or a stay of execution;

10. Setting aside

(1) Where a judgment has been registered under this Act an application may be made by the judgment debtor that the judgment be set aside on any of the grounds set out in subsection (2) or (3), and if the High Court is satisfied that any of those grounds has been established it shall set aside the registration of the judgment.

(2) The grounds upon which a registered judgment may be set aside are that—

(k) the judgment has been taken on appeal, and reversed or discharged or otherwise set aside, in a court of the country of the original court;

11. Effect of appeals, etc.

(1) An application may be made by or on behalf of the judgment debtor to set aside the registration of a judgment on the ground that —

(a) an appeal is pending against the judgment; or

(b) he is entitled and intends to appeal against the judgment; or

(c) the matter in relation to which the judgment was given is the same as that in respect of which proceedings, instituted prior to the institution of the proceedings in the original court, are pending in a court in Kenya.

(2) Where the High Court is satisfied that the grounds specified in subsection (1)(a) or (b) are established, it may, on such terms as it thinks just, set aside the registration or adjourn the application until the expiration of such period as appears to the High Court to be reasonably sufficient to enable the proceedings, and any appeal therefrom to a competent tribunal, to be disposed of. [Emphasis mine]

6. It is not in dispute the Applicants have lodged an application for stay of execution, setting aside of the foreign court judgment and leave to defend the suit in the High Court of Justice of England & Wales in Commercial Court, Queens Bench Division, Claim No. CL-2019-000762 between parties and that this application is pending before the said court.

7. The Applicants thus submit that it is just and sufficient to set aside the Registration Order. They contend that if the application is not allowed, they will suffer irreparable loss as the appeal pending in the English court against the default judgment will be rendered nugatory as the Respondent is currently executing the said foreign judgment and has also filed **HC COMM Insolvency Petition No. E039/2020, RE-AMRA LEASING vs DAC Aviation (EA) Ltd** pending before this court.

8. The Applicants submit that it is just and fair that the application be granted to allow the parties to be heard on merits in the pending dispute between them in the English court and that they be afforded the protection afforded to them under **section 10 and 11** of **Act**. They further submit that **sections 2(1)** and **11(1)(a)** and **(b)** of the **Act** empower this Court to grant their application as the proceedings in the English court under the said **Act** are an appeal warranting setting aside of the Registration Order. They contend that Respondent will not suffer any prejudice in the circumstances.

9. The Respondent submits that the Applicants’ application is an abuse of the court process. It submits that by filing the application for setting aside before the English Court 6 months after the Registration Order and failing to set it down for hearing is demonstrably cynical and abusive of court procedures. It further points out that the English Court vacated the hearing scheduled for 2nd April 2021 following the Applicants’ breaches of the Commercial Court Rules and that there are no hearings in respect of either the application to set aside the Judgment, or the application for a stay of execution, listed or “pending” before the English courts that would entitle this court to set aside the Registration Order. It submits that the Applicants’ conduct is intended to abuse the process of the English court.

10. The Respondent further submits that despite lodging a Notice of Appeal against this court’s decisions dated 24th August 2020, the Applicants have not taken any steps to move the Court of Appeal but now seek to set aside to aside the Registration Order merely to avoid its admitted liability. The Respondent submits that the Applicants have failed to demonstrate the grounds set out at **section 10** of the **Act** to warrant this Court to set aside the Registration Order.

11. The Respondent urges the court to dismiss the application on the ground that the Applicants have never disputed the decretal sum on any substantive grounds. It adds that in view of their application for payment by instalments, the Applicants are estopped from denying that they owe any amount to the Respondent. The Respondent states that the Applicant's claims of hardship are exaggerated and are a consequence of their own financial mismanagement. It states that its indulgence towards the Applicants has been rewarded by their continuing to settle debts they owe to other creditors in preference to the Respondent.

12. The question whether the court should aside the Registration Order turns on the interpretation of statutory provisions. Under **section 10(2)(k)** of the **Act**, the court must set aside a registered judgment which has been taken on appeal and has been reversed or set aside by the court of the original country. **Section 11** of the **Act** however applies to a case where there are pending proceedings in the foreign court in relation to the registered judgment. Under **section 2** of the **Act**, an application to set aside the judgment in the foreign court such as the one filed by the Applicants falls within the meaning of "appeal" as it is a, '*proceedings by way of application for the discharge or setting aside of a judgment or for a new trial or a stay of execution*'.

13. The question then is whether the court must *ipso facto* set aside the Registration Order merely on the ground that an application to set aside the judgment has been filed by the Applicants in the foreign court. Unlike **section 10(1)** which mandates the court to set aside the registration order once any of the grounds set out in **section 10(2)** are established, **section 11(2)** grants the court two options to this court. First, it may set aside the registration on terms as it thinks fit or second, adjourn the application until expiration of such period as the court may determine sufficient to enable the foreign court deal with the proceedings before it.

14. While the Respondent's protests appear to be directed towards the procedural issues and the slow pace of determination of the application before the English Court, this, in my view, does not negate the fact that the application for setting aside the judgment has been filed and the Respondent has admittedly responded to it. Let me just add that as this court held in ***East African Development Bank v Dari Limited & 5 others ML HCCC No. 1 of 2020 [2020] eKLR***, the mandate of this court, under the **Act** is limited to the enforcement of foreign judgments emanating from designated countries and does not extend to reviewing, interrogating or analysing the procedures of those foreign courts or the substance of parties' disputes. Such grievances or arguments that are being presented by the Respondent fall within the English court's jurisdiction and will be better presented and determined therein.

15. However, the court in exercising its discretion under **section 11(2)** of the **Act**, the court is entitled to consider the Applicants' conduct both before and after filing the application. In this instance, the Respondent is correct to point out that the Applicants have been tardy in prosecuting their application in the foreign court and while they have filed a Notice of Appeal against the ruling of this court dated 24th August 2020, they have not applied either to this court or the Court of Appeal to stay the decision directing them to pay the amount by installments. More importantly, and I agree with the Respondent, the Applicants cannot deny their indebtedness to the Respondent as they are the ones who applied to this court to be allowed to liquidate the judgment debt by installments.

16. Since the proceedings in England are still pending and prosecution thereof remains in the hands of the Applicants and, in view of the circumstances I have outlined, I am not inclined to set aside the Registration Order at this stage but rather adjourn the application to enable the Applicants pursue their case in the court in England. In this case, I think a period of three months is sufficient for that purpose. Consequently, execution of this court's decree shall be stayed pending further orders of this court. I therefore order as follows:

(a) The Applicants' Chamber Summons dated 28th June 2021 is adjourned for a period of three (3) months from the date hereof to enable the Applicants prosecute their application to set aside the judgment of the High Court of Justice England & Wales, Commercial Court, Queens Bench Division, in Claim No. CL-2019- 000762 delivered on 11th March 2020.

(b) There shall be a stay of execution of the decree of this court dated 29th May 2020.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango

Mr Kuyo instructed by Coulson Harney LLP for the Respondent/Judgment creditors.

Mr Litoro instructed Litoro and Omwebu Advocates for the Applicants/Judgment debtors.