



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. E063 OF 2021

SCL...1ST PLAINTIFF/APPLICANT

CL.....2ND PLAINTIFF/APPLICANT

RULING

1. Vide an application brought by way of a Plaint dated 16th September, 2021 the Plaintiffs/Applicants SCL and CL sought that the Court orders issued in South Africa dated 30th April, 2018 and the Order issued in France dated 18th May, 2021 be recognized, adopted and enforced as orders of this court. The 2nd Applicant swore an affidavit verifying the correctness of the contents of the Plaint.

2. At all material times to this suit, the Plaintiffs are the biological parents of the minors KJL (*name redacted*) and RSL (*name redacted*) born in Sandton Johannesburg (South Africa) on 23rd August, 2008 and 13th June, 2011 respectively.

3. The Plaintiffs were previously married, having solemnized their union on 23rd April, 2005 in South Africa. They later got a divorce, upon which they were awarded joint equal custody of the minors, and the 1st Plaintiff was awarded the residency of the minors. On 1st June, 2019, the 1st Plaintiff and the minors subsequently moved to France where he was deployed on a job assignment. He and the minors have resided there since then. The 1st Plaintiff has however now been deployed to work in Kenya by his employer [Particulars Withheld], and having residency of the minors, he is desirous of living with them in Kenya. It is on this basis that both Plaintiffs seek that the orders issued in South Africa and in France be recognized and enforced in Kenya to facilitate the move by the minors to Kenya.

4. The Applicants asserted that even if both South Africa and France lack reciprocity of judgments with Kenya, there is still a provision for the court to recognize and enforce the decrees issued in South Africa and in France. They urged that both the courts in South Africa and France had competent jurisdiction to hear and determine the matters.

5. The primary statute governing recognition of foreign judgments in Kenya is the **Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 Law of Kenya**. Under **section 3** of the **Act** however, it is provided that the provisions of the **Act** are not applicable to *inter alia* a matrimonial cause or matter and proceedings in connection with custody or guardianship of children. Needless to state, South Africa is a commonwealth country and therefore enjoys automatic recognition and entry of its judgments in Kenya. France though is not a commonwealth country and is also not amongst those listed under **section 13** of the **Act** in order to qualify for recognition and registration by dint of the Ministerial extension of reciprocity powers under the **Act**. Therefore, even if it were that the matrimonial proceedings were not exempted from the **Act**, the orders issued in France would not enjoy reciprocity.

6. Despite the fact that the provisions of the **Foreign Judgments (Reciprocal Enforcement) Act** are not applicable hereto, the Applicants can still find solace under **section 67** of the **Marriage Act** which permits recognition of foreign judgments in respect of matrimonial proceedings. 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.”

7. The import of **section 67** reproduced above is that in respect of recognition of foreign judgments emanating from matrimonial proceedings, parties need not demonstrate reciprocity between Kenya and the Country in which the foreign court is situated. In the instant

case, there is nothing to show that the courts in both South Africa and France lacked jurisdiction to pronounce themselves on the parental rights and responsibilities of the Applicants.

8. In any event, the orders issued by the High Court of South Africa, which granted the 1st Applicant SCL primary residency of the Subject children also provided that the Applicant would forthwith be entitled to emigrate with the minor children to France on 1st June, 2018 or such date thereafter. Additionally, the orders issued in the Family Division of the Court of Justice of Nanterre in France were by dint of a judgment pronounced on 18th May, 2021. Having moved to France on 1st June, 2018, the 1st Applicant was resident in France for a period exceeding two (2) years thus rendering jurisdiction over the proceedings before the court in France. On this basis, this court can recognize the orders made in France.

9. It is noteworthy that **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.*” The instant proceedings therefore fall within the purview of the Act and the provisions of **section 67** apply.

10. From the foregoing, it is evident that foreign judgments dealing with matrimonial proceedings are recognized in Kenya by dint of **section 67** of the **Marriage Act**. It is noteworthy that the **Foreign Judgments (Reciprocal Enforcement) Act** only regulates registration of foreign judgments, and its effect is that such judgments in matrimonial causes are not registrable. That is not the same as saying such judgments are not recognized. (See – **MNM vs. PNM [2016] eKLR** and **IWN vs. HJC [2021] eKLR**).

11. Additionally, the application is not contested as both parties, being the Plaintiffs, accept that this court has jurisdiction in this matter and further that it is in the best interest of the subject minors that the orders issued in South Africa and France in respect of the subject minors are recognized. Additionally, the Plaintiffs have already secured admission for the subject minors at [Particulars Withheld] School in Kenya.

12. In considering this matter, I am also reminded that the best interest of the subject children is what is paramount and that this court has both a constitutional and statutory obligation in this respect. This in view of **Article 53(2)** of the **Constitution** as amplified by **section 4(2)** of the **Children Act No. 8 of 2001**. Any orders pertinent hereto must therefore seek to safeguard and promote the welfare of the subject children.

13. Reasons wherefore, I hereby allow the prayer sought in the Complaint dated 16th September, 2021 namely that the court orders dated 30th April, 2018 issued in South Africa and the court orders dated 18th May, 2021 issued in France be and are hereby recognized and adopted as orders of this court.

It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 26TH DAY OF OCTOBER, 2021

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicants.