REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 10 OF 2014

RAW BANK PLC.....PLAINTIFF

-VERSUS-

1. YUSUF SHAA MOHAMED OMAR

2. SHADOUST YUSUF.....DEFENDANT

RULING

1) This ruling determines two applications pending for determination in this matter. The first application is the Plaintiff's application dated 17th September, 2014 (herein after "the Plaintiff's application"). The application seeks for the following orders;

a) **That the Defendant's Statement of Defence dated 24th February, 2014 be struck out and Judgment be entered for the Plaintiff as prayed for in the Plaint.**

b) **That the costs of this application and this suit be borne by the Defendant in any event.**

c) **That any other or further reliefs that this Honourable court may deem just and expedient to grant in the circumstance of the case.**

2) The application is premised on the grounds on its face which can be briefly summarized as;

(a) that the Plaintiff's Suit seeks recognition and or enforcement of a foreign Judgment of the Commercial Court of Lubumbashi delivered on 18th March 2013;

(b) there has been no appeal against the said Judgment and there are no interlocutory applications pending in the aforementioned suit;

(c) the Judgment is conclusive to all the matters thereby directly adjudicated upon between the parties herein;

(d)by virtue of Section 9 of the Civil Procedure Act the issues determined by the foreign Court do not fall for further determination by this court; and

(e) finally, that this court is bound by law to recognize and give effect to the Judgment of the foreign country. The Application is further supported by an affidavit sworn on 30th May, 2014 by **Mpoyi Kabongo Cesar**, the Plaintiff's Recovery Manager. The Deponent explicates the grounds on the face of the application.

3) It is averred that the 1st Defendant was carrying out business as ETS YSMO at Lubumbashi in the Democratic Republic of Congo. By an agreement dated 11/01/2011, the Plaintiff advanced to the Defendant a sum of USD150,000/= and a credit line of USD 25,000/=. The 2nd Defendant was a guarantor to the 1st Defendant vide promissory notes for the said sum pursuant to an agreement dated 11/01/2013 between the Plaintiff and the 2nd Defendant. The 1st Defendant thereafter disappeared from his place of business after closing its business, making it impossible for the Plaintiff to recover the loan advanced to the 1st Defendant. The 2nd Defendant is said to be a son to 1st Defendant and also disappeared and could no longer be located in the Democratic Republic of Congo. The Defendant's whereabouts were not known to the Plaintiff and a suit was commenced in the Commercial Court of Lubumbashi. After trial, the court entered Judgment against the Defendant's in the sum of Kshs.118,619.74 being the principal sum and USD10,000/= as damages together with interest at 8% p.a.

4) The Plaintiff then carried out investigations and discovered that the Defendants had various properties in Kenya including houses, Motor vehicles and other moveable properties in Mombasa which is within the jurisdiction of this court. The 1st Defendant was however, arrested at Mombasa by Interpol Police and taken to Democratic Republic of Congo to answer criminal charges preferred against him. While it is averred that Democratic Republic of Congo and Kenya do not have reciprocal treaty or agreement for enforcement of Judgment given by their respective courts, the Plaintiff avers that this court has a duty to uphold the rule of law, facilitate and expedite delivery of justice.

5) The Defendants' filed no replying affidavit to the Plaintiff's application.

6) The second application is the Defendant's application dated 14th July, 2015 seeking for orders that;

> a) **The Plaintiff's Plaint and suit herein be struck out and dismissed with costs for being scandalous, frivolous or vexatious and it is otherwise an abuse of the process of the court.**
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> b) **In the alternative, the Plaintiff be ordered to deposit security for costs of the suit in the sum of Kshs.1,000,000/= within ten days of the order, if the case is to proceed further in default suit to stand dismissed with costs.**
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> c) **The costs of this suit be provided.**

7) The application is premised on the grounds that;

> *(a) the foreign judgment sought to be enforced and the cause of action therefrom occurred in the Democratic Republic of Congo and this court lacks jurisdiction to entertain the matter.*
>
> *(b) The 1st Defendant is a citizen of Congo where he carries his business and has all his assets there.*
>
> *(c) The subject judgment is still under litigation in the Republic of Congo hence the suit herein is an abuse of the court process.*
>
> *(d) Lastly, it is averred that the Plaintiff company is located in D.R.C with no attachable assets in Kenya hence the need to have security for costs in the sum of Kshs.1000,000/=. The application is supported by an affidavit sworn by the Plaintiff on the 14/7/2015 which in essence reiterates the grounds stated above.*

8) In response thereof, the Plaintiff filed a replying affidavit sworn on 30/9/2015 by its Recovery Manager, Mpoyi Kabongo Cesar. He reiterates that the Judgment delivered on 18/03/2013 by the court of Lubumbashi has not been set aside and that the Defendants have not produced any evidence in support of those allegations. He adds that the Plaintiff filed this suit before this court to obtain a judgment that can be enforced on the Defendants' properties in Kenya to satisfy the Debt and cannot amount to an abuse of the court. The Plaintiff denies that the 1st Defendant has any assets in D.R.C and after investigations the Plaintiff realized there are attachable assets belonging to the Defendant in this courts geographical Jurisdiction.

9) By consent of the Parties, the two applications were argued together by way of written submissions and a date for highlighting set. The Plaintiff's submissions were filed on 13th November, 2015 whilst the Defendant's submissions were filed on 1st March, 2016.

Plaintiff's Submissions

10) The Plaintiff submits that it seeks to enforce a Judgment which was lawfully delivered by a competent court of Lubumbashi and no documents have been filed to show that there are ongoing proceedings before the Supreme Court in Kinshasa with regard to the same matter. There is no document showing that the document was set aside as averred by the Defendants. The Plaintiff argues that the Judgment annexed to the Plaintiff's documents is conclusive since the same has a certificate of non-appeal and has been gazetted. That the Foreign Judgment (Reciprocal Enforcement) Act is not applicable to the instant case since D.R.C is not among the Nations set out in the schedule to the Act. Therefore, Section 9 of the Civil Procedure Act which deals with the enforcement of a foreign Judgment comes to play.

11) In a nutshell, the Plaintiff claims that this court cannot re-litigate issues which have been determined by a foreign court and Judgment thereto has not been denied. In support of its submissions, the Plaintiff relies on the case of ***Jayesh Hasmukh Shah v Navin Haria & another [2011] eKLR.***

12) In response to the Defendant's application, the Plaintiff submitted that it has not been shown how the suit is scandalous, frivolous or vexatious. That the Defendant's assertions remain bare averments as there is not any proof by way of annextures. The Plaintiff is of the view that nothing would be easier than to annex court documents and translations to show that the foreign judgment was set aside or that proceedings were still pending in regard to this matter. Therefore this court cannot be moved to act on mere averments.

13) In responding to the issue of security, the Plaintiff anchors its argument on Article 48 of the Constitution which guarantees an unimpeded right of access to Justice. It is argued that a Plaintiff in pursuit of his claim cannot be stifled or blocked with an unreasonable order for security of costs. Nonetheless, the Defendants have not shown a bonafide defence since neither is the amount claimed denied nor is it denied that the Plaintiff advanced the monies to the defendants. This court is sought not to block the debt recovery process because it may even paint an unclean picture of the Kenyan judicial System to foreign countries. To buttress his submissions, the counsel for the Plaintiff called to its aid a plethora of judicial precedence including the cases of ***Telkom Kenya Ltd-vs-John Ochanda & 996 Others [2015] eLKR, Harswell Trading Ltd-vs-KRA [2012] eKLR,*** and ***Qad Software South Africa (pty) Ltd-vs-Rift Valley Railways Investiments (pty) Ltd [2013] eKLR.***

Defendants' Submissions.

14) With regard to the Plaintiff's application, the Defendant submits that the court should be guided by the provisions of Order 2 Rule 15(1) of the Civil Procedure Rules which set out the grounds in which a court can strike out pleadings. In a nutshell, the court can only dismiss pleadings if;

(a) it discloses no reasonable cause of action or defence in law;

(b) it is scandalous, frivolous, or vexatious;

(c) when it may prejudice, embarrass or delay the fair trial of the action or it is otherwise an abuse of the court process. In doing so, the court should not delve unto the merits of the case. The argument is supported by a number of cases including, ***DT Dobie & Company (K) Ltd-vs-Muchina [1982] KLR 1, Said Hamad Shamisi-vs-Diamond Trust of Kenya Ltd [2010] eKLR, Dyson –vs Attorney General [1911] KB 410*** and ***Hubduck & Sons Ltd-vs-Wilkinson, Heywood & Clark [1899] I.K.G 86.***

15) It is submitted that the Judgment seeks to enforce a foreign Judgment yet some of the monies advanced to the Defendant were secured by a Sister Company of the Plaintiff called Beltexco which owes to the Defendant a sum of USD245,000/= hence the present suit is unnecessary.

16) The Defendant avers that the Judgment of the Lubumbashi Court showed that the Defendant had no known residence in Congo hence was entered exparte. The issue of service is therefore a jurisdictional issue according to the Defendant and it goes to the root of fair trial. This court cannot then purport to enforce a Judgment where the Defendants were not heard because it would be against the principle of natural justice.

17) It is further submitted that Congo and Kenya do not have a reciprocal agreement for enforcement of Judgments and the Defendants reiterate that the Plaintiff's suit is invalid for want of Jurisdiction, and in any event if the court had jurisdiction, then the matter has to be proved; i.e. proving the allegation on disappearance of the Defendant's from Congo, and whether there are no other assets in Congo where the Judgment can be enforced against. These issues have to be determined on full trial.

18) With regard to the application for security of costs, the Defendants aver that the minimum fees payable in defending this matter is Kshs.680,533.07. Hence, the Plaintiff as a foreign Company should Deposit the sum of Kshs.1,000,000/= as security which is within the reasonable range. The case of ***Shah-vs-Shah*** is relied on where the court held that; the test on an application for security for costs is not whether the Plaintiff has established a prima facie case but whether the Defendant has shown a bona fide defence. The Defendants avers that they have passed this test and the court should order accordingly.

Determination

19) Having set out the respective parties' positions as above, it is my most considered view that the issues for determination are as follows;

a. Whether the Defence raises triable issues;

b. Whether this suit is eligible for an interlocutory judgment at this stage for enforcement of a foreign judgment

c. Whether the Plaintiff should be condemned to deposit security for costs

20) I wish determine the issues concurrently since they are interrelated. Enforcement of foreign judgments in Kenya is the subject of ***The Foreign Judgments (Reciprocal Enforcement) Act (Cap 43 of the Laws of Kenya).*** The objective of the Act is to make provision for enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya.

21) Under the Act, a judgment creditor in whose favour a foreign judgment from a "designated country" has been made may apply and register the foreign judgment at the High Court of Kenya and such foreign judgment shall, for purposes of execution, be of the same force and effect as a judgment of the High Court of Kenya entered at the date of registration. Subject to exceptions in Section 18 of the Act, 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 defense or counterclaim in those proceedings. The designated countries under the Kenyan Foreign Judgments (Reciprocal Enforcement) Act are: Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Republic of Rwanda.

22) In this suit, the Appellant seeks to enforce and execute in Kenya a Judgment from Democratic Republic Congo which is not a designated country under the provisions of ***Foreign Judgments (Reciprocal Enforcement) Act (Cap 43 of the Laws of Kenya).***

23) The Relevant facts in this suit are that vide an agreement dated 11th January, 2011, the Plaintiff advanced to the 1st Defendant a sum of USD150,000/= and a credit line of USD25,000/=. The monies were secured via promissory notes in which the 2nd Defendant was a guarantor. The Defendants vanished in their ordinary places of business and the Plaintiff filed a cause of action at the Commercial court of Lubumbashi. The Court delivered its Judgment on 18/03/2013 in favour of the Plaintiff in the sum of USD118,619.74 as the principal sum and USD10,000/= for damages at an interest rate of 8% p.a. Since the Defendant vanished, the Plaintiff avers to have done research and realized that the Defendants held properties in Mombasa, Kenya in which now the Plaintiff seeks to execute the Judgment against for recovery of the debt. On their part, the Defendants held that this court lacks jurisdiction to entertain the claim.

24) The question that commands itself therefore is what is the law in Kenya on enforceability of foreign judgments from non-designated

countries and what is the procedure for enforcement of foreign judgments from non-designated countries? The court of appeal in the case of ***Jayesh Hasmukh Shah v Navin Haria & another [2016] eKLR*** cited with approval the case *of* ***Keshavji Ramji Ladha -v- Bank of Credit and Commerce International – SA (BCCI), Civil Appeal No. 44 of 2004***, where the court had earlier observed that;

> ***"It is now trite in civil litigation in this jurisdiction that a judgment of whatever nature, whether foreign or otherwise, is good until otherwise declared. But it is not in its form as a judgment per se that it is capable of being enforced. It has to take the shape of another procedural document before it can reach any execution stage".***

25) Pursuant to ***Section 3*** of the ***Judicature Act, (Cap 8, Laws of Kenya)***, the jurisdiction of the High Court of Kenya is exercised *inter alia* in conformity with the Constitution, all other written laws and subject to certain qualifications, the substance of common law of England. In the High Court of Kenya, a judgment of a foreign court which is a *"designated court"* of a reciprocating *"designated country"* is capable of registration in Kenya and is enforceable as a High Court of Kenya judgment.

26) The parties herein do not dispute that currently there is no treaty in between Kenya and Democratic Republic of Congo for reciprocity in enforcement of Judgment by either country's courts. The Defendants anchored their arguments in the case of ***Intalframe Ltd -v- Mediterranean Shipping Company, (1986) KLR,*** where the court of appeal expressed that the basic principle upon which neighbouring or other states provided for enforcement of foreign judgments is one of reciprocity. In my view, the ***Intalframe Ltd case*** is not relevant in the circumstances of this case since it only dealt with situations where there is a reciprocal arrangement on enforcement of foreign judgments. So does the Foreign Judgment ***(Reciprocal Enforcement) Act (Cap 43, Laws of Kenya).***

27) I align myself with the finding by the court of appeal in the case of ***Jayesh Hasmukh Shah v Navin Haria & another [2016] eKLR,*** where on a similar circumstance the court held that;

> ***"…In the absence of a reciprocal enforcement arrangement, a foreign judgment is enforceable in Kenya as a claim in common law…"***

28) The court went ahead to consider the common law principles on enforcement of foreign judgments as elaborated in the case of ***Adams & Others – v- Cape Industrials PLC, (1990) Ch. 433***. For clarity of issues, I will list the principles as follows;

> **a.** ***Where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. (See Park B. in Williams – v-Jones (1845) 13 M. & W. 628,633 as quoted in Adams & Others – v- Cape Industrials PLC, (1990) Ch. 433 at 513.***
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> **b.** ***In deciding whether the foreign court was one of competent jurisdiction, courts will apply not the law of the foreign court itself but English rules of private international law. The competence of the foreign court is competence of the court in an international sense – i.e. its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not material. (See Lindley M.R. in Pemberton –v- Hughes, (1899) 1 Ch. 781,791).***
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> **c.** ***In Emanuel – v- Symon, (1908) 1 KB 302, Buckley L.J. said that in actions in personam there are five cases in which the courts of England will enforce a foreign judgment. These are: (i) where the defendant is a subject of the foreign country in which the judgment was obtained; (ii) where he was resident in the foreign country when the action began; (iii) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued;***
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> **iv.** ***where the defendant has voluntarily appeared and (v) where the defendant has contracted to submit himself to the forum in which the judgment was obtained.***
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> **d.** ***If a foreign judgment is to be enforced against a corporation, it must be shown that at the relevant time, the corporation was carrying on business and it was doing so at a definite and to some reasonable extent, permanent place in the foreign country. (See Adams & Others – v- Cape Industrials PLC, (1990) Ch. 433 at 512).***
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> **e.** ***It is only the judgment of a foreign court recognized as competent by English law which will give rise to an obligation on the part of the defendant to obey it. The onus is on the plaintiff seeking to enforce the foreign judgment to prove the competence of such court to assume jurisdiction; the evidentiary burden may shift during trial. (See Adams & Others – v-Cape Industrials PLC, (1990) Ch. 433 at 550).***
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> **f.** ***The principle that a foreign court has jurisdiction to give an in personam judgment if the judgment debtor, the defendant in the foreign court, submitted to the jurisdiction of the foreign court is well settled.***
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> **g.** ***A foreign judgment obtained in circumstances that are contrary to natural justice does not give rise to any obligation of obedience enforceable at common law.***
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> **h.** ***If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter in which it is competent to deal, English courts will never investigate the propriety of the proceedings in the foreign court, unless they offend substantial justice. Where no substantial justice is offended, all that the English court shall look into is the finality of the judgment and the competence of the foreign court to entertain the sort of case which it did deal with and its competence to require the defendant to appear before it. (See Pemberton –v- Hughes, (1899) 1 Ch 781,790-791 as per Lindley M.R). Mere procedural irregularity, on the part of the foreign court according to its own rules, is not a ground of defence to enforcement of the foreign judgment. (See Adams & others – v- Cape Industrials PLC, (1990) Ch. 433 at 567).***

i. ***A defendant, shown to have been subject to the jurisdiction of a foreign court, cannot seek to persuade English court to examine the correctness of the judgment whether on the facts or as to the application by the foreign court of its own law. A foreign judgment is not impeachable merely because it is manifestly wrong. (See Goddard – v- Gray, L.R. 6 Q.B. 139).***

j. ***A judgment of a foreign court having jurisdiction over the parties and subject matter – i.e. having jurisdiction to summon the defendants before it and to decide such matters as it has decided – cannot be impeached on merits but can be impeached if the proceedings, the method by which the court comes to a final decision, are contrary to English views of substantial justice.***

29) Adopting the foregoing common law principles mutatis mutandis and taking into account the provisions of Section 9 of Civil Procedure Act (Cap 21 Laws of Kenya), to enforce a foreign judgment in Kenya from a non-designated country, the following requirements must be fulfilled:

a. ***A party must file a plaint at the High Court of Kenya providing a concise statement of the nature of the claim, claiming the amount of the judgment debt, supported by a verifying affidavit, list of witnesses and bundle of documents intended to be relied upon. A certified copy of the foreign judgment should be exhibited to the Plaint.***

b. ***It is open to a defendant to challenge the validity of the foreign judgment under the grounds set out in Section 9 of the Civil Procedure Act.***

c. ***A judgment creditor is entitled to summary judgment under Order 36 unless the defendant judgment debtor can satisfy the Court that there is a real prospect of establishing at trial one of the grounds set out in Section 9 of the Civil Procedure Act.***

d. ***If the foreign judgment creditor is successful after trial, the judgment creditor will have the benefit of a High Court judgment and the judgment creditor will be entitled to use the procedures of the Kenyan courts to enforce the foreign judgment which will now be executed as a Kenyan judgment.***

e. ***The money judgment in the foreign judgment must be final and conclusive. It may be final and conclusive even though it is subject to an appeal. Under Section 9 of the Civil Procedure Act, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title except:***

i. ***where it has not been pronounced by a court of competent jurisdiction;***

ii. ***where it has not been given on the merits of the case;***

iii. ***where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;***

iv. ***where the proceedings in which the judgment was obtained are opposed to natural justice;***

v. ***where it has been obtained by fraud; or***

vi. ***Where it sustains a claim founded on a breach of any law in force in Kenya.***

f. ***Under Section 4 (4) of the Limitation of Actions Act, (Cap 22 of the Laws of Kenya) an action for enforcement of a foreign judgment must be brought in Kenya within 12 years of the date of that judgment.***

g. ***The foreign court must have had jurisdiction, (according to the Kenyan rules on conflict of laws) to determine the subject matter of the dispute and the parties to the foreign court's judgment and the enforcement proceedings must be the same or must derive their title from the original parties.***

h. ***The Kenya High Court will generally consider the foreign court to have had jurisdiction where the person against whom the judgment was given:***

i. ***Was, at the time the proceedings were commenced, habitually resident or incorporated in or having a principal place of business in the foreign jurisdiction or***

ii. ***Was the claimant or counterclaimant in the foreign proceedings or***

iii. ***Submitted to the jurisdiction of the foreign court or***

iv. ***Agreed, before commencement, in respect of the subject matter of the proceedings to submit to the jurisdiction of the foreign court.***

v. ***Where the above requirements are established to the satisfaction of the Kenya High Court, the High Court will not re-examine the merits of the foreign court judgment. The foreign judgment will be enforced on the basis that the defendant has a legal obligation as a matter of common law, recognized by the High Court, to satisfy the money decree of the foreign judgment.***

30) I will now apply the fore-tested common law principles and ***Section 9*** of the ***Kenya Civil Procedure Act,*** to the facts pleaded in the Plaint as well as the grounds set forth in the application dated 17/9/2014 by the Plaintiff. Case law has crystallized the parameters within which a relief of summary Judgment can either be granted or withheld. In the case of ***Osodo - v- Barclays Bank International Limited, (1981) KLR 30*** it was held *inter alia* that:-

> ***"Where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionally."***

31) In the case of ***Nairobi Golf Hotels (Kenya) Limited Civil Appeal No. 5 of 1997 (UR)*** the Court of appeal made observations that:

> ***'It is now trite that in applications for summary judgment…, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty is however limited to showing prima facie the existence of bona fide triable issue or that he has an arguable case. On the other hand, it follows that a plaintiff who is able to show that a defence raised by a defendant … is shallow or a sham is entitled to summary judgment'".***

32) Whereas this court has time and again held that the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that that a Plaintiff should not be kept away from his judgment by unscrupulous Defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case. (See the case of ***Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR).***

33) I have carefully considered the averments in the statement of defence. At Paragraph 5 therein, the Defendants contest the Jurisdiction to enforce the foreign judgment. Under Paragraph 6 it is averred that the monies advanced to first Defendant were secured by Plaintiff's sister company which owes some money to the Plaintiff. In that Regard, it is averred under paragraph 7 that the 2nd Defendant never executed any guarantee or security on account of the 1st Defendant as alleged. In my view, the aforementioned paragraphs raise issues germane to making a determination whether; a foreign Judgment from a non-designated country is enforceable in Kenya, or whether the 2nd Defendant executed the guarantee on account of the 1st Defendant. I take cognizance of the *dicta* by Madan, J. in the Court of Appeal ***Civil Appeal No. 33 of 1977, B. Gupta -v- Continental Builders Limited,*** where he stated that if a defendant is able to raise a prima facie triable issue, he is entitled in law to defend.

34) In light of the provisions of ***Section 9 of the Civil Procedure Act***, I arrive at the decision that the issues raised in the defence cannot be determined by way of summary judgment where the foreign judgment is from a non-designated country. For that reason I find and hold that the case should proceed for full trial. The Plaintiff's application is hereby declined.

35) I now turn to the Defendant's application dated 14/07/2015 which the application seeks that the court does order the Plaintiff to deposit security for costs on the ground that the Plaintiff is a foreign company with its offices in the Democratic Republic of Congo. The Defendant suggests that the Plaintiff do deposit a security of Kshs.1,000,000/= while the Plaintiff averred that its right to fair hearing should not be interfered or stopped for a requirement to deposit security.

36) An order for security for costs is a discretionary one as per the provisions of Order 26 rule 1 of the Civil Procedure Rules which is the relevant provision in these circumstances. It confers discretion on the court, which is recognition that there may be many cases where a call for security for costs may be refused. In fact, even where a company is foreign or insolvent, the court would still refuse to order security to be lodged if circumstances do not support any lodgment of security. The discretion is, however, to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as;

> (a)absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs;
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> (b) the general financial standing or wellness of the Plaintiff;
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> (c) the bona fides of the Plaintiff's claim; or
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> (d) any other relevant circumstance or conduct of the Plaintiff or the Defendant the list is not even exhaustive. The court had this to say in the case of **GUFF ENGINEERING (EAST AFRICA) LTD v AMRIK SINGH KALGI**, at page 281 quoting the dictum of **Lord Denning MR** in Sir Lindsay Parkinson & Co. Ltd (1973) 2WLR 632 and at page 284 quoting Maughan L J in Gill All Weather Bodies Ltd Vs All Weather Motor bodies Ltd.
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> **''…if there is reason to believe that the company cannot pay the costs, then, security may be ordered, but not must be ordered… Some of the matter which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has reasonably good prospects of success. Again it will consider whether there is an admission by the Defendant on the pleadings or elsewhere that money is due.**
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> **…the court might also consider whether the application for security was being used oppressively – so as to stifle a genuine claim. It would also consider whether the company's wand of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work.**

37) In most cases, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that she is unsuccessful. The same must be proven. See ***Hall -vs- Snowdon Hubbard & Co. (I), (1899) 1 Q.B 593,*** the learned Judge at page 594 stated:-

> ***"The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made."***

38) In the instant case, the Plaintiff is a foreign bank which seeks to recover its money in a duly delivered Judgment. The Defendants do not deny being indebted to the Plaintiff. Only that this case has to go through a full trial for a decision to be reached as to whether the said Judgment can be enforceable in our jurisdiction for reasons stated above. My view is that the Plaintiff's claim is a genuine one since it seeks to realize the fruits of its judgment though delivered in a foreign jurisdiction. Nothing was adduced by the Defendant to show any financial limitation on the part of the Plaintiff. From the record, the bona fides of the Plaintiff's claim is un-challenged.

39) The overall impression out of the above analysis is that there is not a reasonable cause why the court should exercise its discretion in favour of the Defendant. It will, therefore, not call up for any security for costs from the Plaintiff. The upshot is that the Defendant's application is dismissed.

40) Costs for both the Plaintiff's and the Defendant's applications shall be in the cause of the suit after full trial. Parties should ensure steps are taken in order to progress the case to trial without delay.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MAY, 2020.

D. O CHEPKWONY

JUDGE.

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes.