



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**HIGH COURT CIVIL CASE NO. 70 OF 2017**

COA.....PLAINTIFF/RESPONDENT

VERSUS

DR CAM.....DEFENDANT/APPLICANT

**JUDGMENT**

**BACKGROUND**

The Applicant and the Respondent were married on 10<sup>th</sup> June 1998. They were blessed with two issues born on 17<sup>th</sup> September 2000 and 19<sup>th</sup> September 2007, respectively. The Defendant filed for divorce and their marriage was dissolved vide **High Court Divorce Cause No.150 of 2013 on 25<sup>th</sup> September 2013**. The plaintiff filed a suit against the defendant in the circuit court for **Baltimore County under case No. 03-C-13-000590** seeking provision for children's maintenance. The court delivered its judgment against the defendant on 1<sup>st</sup> May 2016. The plaintiff sought to enforce the said judgment in this court by filing Plaintiff on 20<sup>th</sup> March 2017.

**PRELIMINARY OBJECTION**

On 20<sup>th</sup> April 2017, the defendant filed a notice of preliminary objection on the grounds that:

- a) the suit offends Section 3 of the foreign judgment (reciprocal enforcement) Act Cap 43 of the laws of Kenya;
- b) the suit offends Section 3 of the Judicature Act Cap 8 of the Laws of Kenya;
- c) the suit offends the Constitution of Kenya 2010;
- d) the suit papers are incompetent and fit the exposition of scandalous , frivolous and vexatious pleadings; and
- e) the suit is an abuse of the court process and sought to be struck out with costs.

**PLAINTIFF'S SUBMISSION**

Parties through their respective Counsel disposed of the preliminary objection by filing of written submissions. The plaintiff submitted as follows: that the P.O was improper as it failed to raise pure points of law and the same could not dispose of the suit against the defendant. It was further her submission that the substance of the claim was the enforcement of a judgment from a foreign court which had jurisdiction and which the defendant had moved in an unsuccessful attempt to set aside the default judgment. It was her submission that no appeal had ever been preferred against the subject judgment and as such the subject judgment remained unchallenged and valid order from designated Court. The Plaintiff contended that it was not in dispute that there are 2 competing court orders on dissolution of their marriage; one from the **Family Court in Kenya** and the other from **Baltimore County Maryland in US**. The question of divorce between the parties had long been settled and the introduction by the defendant was an attempt to neglect to honor his obligation to maintain the two issues of their former marriage. The crux of the judgment sought to be enforced; involved provision for maintenance of minors and the interest of the minors undoubtedly prevail. It was her submission that the Kenyan law recognizes the enforcement of foreign judgments including in matrimonial matters and ancillary maintenance issues from a non-reciprocating country. The Plaintiff relied on the case of **Jayesh Hasmukh Shah vs Navin Haria & Manu Shah C. A. 147 of 2009**.

**DEFENDANT'S SUBMISSION**

It was the defendant's submissions that the enforcement of foreign judgments in Kenya is subject to the Foreign judgments (reciprocal enforcement) Act (**Cap 43 of Laws of Kenya**) whose objective is to make provision for enforcement of judgments issued in countries, which accord reciprocal treatments to judgments issued in Kenya. Further, 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, as to the matter adjudicated upon. The designated countries are Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Republic of Rwanda.

It was Defendant's submission that Kenya does not have a reciprocal law for enforcement of foreign judgments with the United States of America and it would only have been enforceable if the plaintiff had filed a fresh suit in the Kenyan court. He submitted that the suit as framed ought to be declared defective and incapable of resolution.

### **DETERMINATION**

This Court considered submissions with regard to the Preliminary Objection and finds as follows;

A Preliminary Objection as defined in the cases of;

**Mukisa Biscuits Manufacturing Co.Ltd vs Westend Distributors Ltd (1969) EA 696;**

***“A Preliminary Objection consists of a [pure] point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.”***

In the case of **Oraro vs Mbajja [2005] eKLR;**

***“A Preliminary Objection; [correctly understood is now well identified and declared to be ] the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence.”***

From the facts above; the Preliminary Objection is not a pure point of law as the question of whether the foreign judgment is enforceable in Kenya either under the Foreign Judgments [Reciprocal Enforcement] **Act Cap 43** or as shown in The case of **Jayesh Hasmukh Shah v Navin Haria & another [2016] eKLR** with regard to procedure on enforceability of foreign judgments from non -designated countries.

The prerequisites that must be satisfied before enforcement of a foreign judgment from non designated country are;

***“The Kenyan court will consider the foreign court to have jurisdiction here the person against whom the judgment was given;***

***Was at the time of the proceedings were commenced, habitually resident or incorporated in or having a principal place of business in the foreign jurisdiction; or was the claimant or counterclaimant in the foreign proceedings, or submitted to the jurisdiction of the foreign court' or agreed, before commencement in respect of the subject matter of the proceedings to submit to the jurisdiction of foreign court”***

To establish these requirements matters of fact shall be interrogated; Was defendant resident in US at the time of the hearing, was /is he naturalized and therefore subject to US jurisdiction? Was the Defendant legally served with summons and pleadings so as to be accorded and opportunity to be heard and/or participate in the proceedings? By contesting the default judgment in US Court did the Defendant submit to jurisdiction of the US Court? All these are questions of fact and hence cannot be determined at this stage by a Preliminary Objection.

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. The Defendant has legal duty and responsibility to the children of former marriage in terms of **Article 53 of Constitution of Kenya**. The court also takes cognizance of the best interests of the children which is paramount.

### **DISPOSITION**

- 1. Consequently, the preliminary objection dated 20<sup>th</sup> April 2017 is dismissed with costs.**
- 2. The matter shall be heard and determined on merit in any Court within Family Division.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 29<sup>TH</sup> JULY 2019**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**N/A FOR PLAINTIFF**

**N/A FOR DEFENDANT**

**COURT ASSISTANT – ISAIAH OTIENO**