



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 52 OF 2016

KENFREIGHT UGANDA LIMITED

& KENFREIGHT EAST AFRICA LIMITED.....APPLICANT

VERSUS

TORNADO CARRIERS LIMITED..... RESPONDENT

R U L I N G

1. There is before court an originating summons dated 24/5/2016 filed in court on the 27/5/2016 by the Applicant and prays:-

i) THAT the Judgment delivered on 22nd February, 2016 at the High Court of Uganda at Kampala (Civil Suit No. 265 of 2009) before the Honourable Justice Henry Peter Adonyo be registered and executed here in Kenya.

ii) THAT this Honourable Court be pleased to grant such further or other relief as may be just in the circumstances.

iii) THAT the Respondent be condemned to pay costs of this application and the incident thereto.

2. That application is supported by the affidavits of Yese Mugenyi and Phoebe Muathe. Yese Mugenyi is an advocate of the High Court of Uganda who prosecuted the Kampala HCCC 265 of 2009. His affidavit exhibits the pleadings and judgments and the decree issued by the Ugandan Court with an assertion that it remains a final judgment on which no appeal has been preferred. The affidavits also computed the total sums due on the decree as at the date of filing the suit at an aggregate sum UEROS 69857, USD 6,582, Kshs.5000 and Ushs.30,378,813 and asserted that no part of the judgment and decree had been satisfied.

3. The other affidavit, that sworn by PHOEBE MUATHE, the financial director of the plaintiff, and a person conversant with the facts of the matter, reiterated the facts deponed to by Mr. Yese Mugenyi and added that she knows the defendant to be resident in Kenya and engaged in the business of logistics with offices next to Port Reitz Hospital Mombasa. She then added that the judgment by the High Court of Uganda is a judgment subject to enforcement under section 3(1) a of Cap 43 Laws of Kenya and that the Ugandan Court which passed the judgment had the requisite jurisdiction to do so hence the said judgment ought to be registered under section 3(3) of the Act as the same is not liable to being set aside and remains unsatisfied.

4. When served, the Defendant did file an affidavit sworn by SHAKIL AHMED KHAN a director of the Defendant, who upon reading the originating summons and on advice by the defendants' advocate took the position that this suit is against the spirit of the Kenya Constitution 2010 which grants to the High Court of Kenya the exclusive jurisdiction to hear and determine all disputes emanating from Kenya and touching on a 'Kenya entity'.

5. To the defendant the proceeding concerned a contract of carriage of goods entered into between two Kenya Companies in Mombasa which contract was frustrated when the cargo was stolen by thugs within the territory of Kenya hence the Ugandan Court had no jurisdiction to entertain the suit and these proceedings are untenable as they seek to oust the jurisdiction of Kenyan Court. It was then added that as against the said judgment an appeal was filed as evidenced by a Notice of Appeal dated 2/3/2016 and that the judgment sought to be registered is flawed and devoid of any jurisprudential and legal principles hence this court has the jurisdiction to reconsider, evaluate and determine if the decision sought to be registered meet the basic legal standards of the constitutional dispensation for country like Kenya. The judgment was then faulted for having been obtained by collusion, impropriety and culpable fraud on the part of the plaintiff.

6. With the leave of the court the plaintiff filed a supplementary affidavit by the same PHOEBE MUATHE whose main gist is evidently to assert that the defendant here as a 3rd party in the Ugandan case submitted to the jurisdiction of the Uganda Courts by entering appearance, filing a defence and calling two witnesses. The second intent of the supplementary affidavit was to attack the Notice of Appeal by exhibiting a letter by the Deputy Registrar, Commercial Court, Uganda, dated 28/7/2016 which asserted that there was no record of the said Notice of Appeal in the Records of Court in Kampala. The Registrar urged this court to treat the Notice of Appeals as highly suspect and not evidence to initiate an appeal against the judgment subject matter of these proceedings.

Submissions by the parties

7. Although the court had on 12/10/2016 with consent of the parties directed that parties file written submissions, there was delay by the Respondents in filling the Replying affidavit and on the 26/1/2017 the court gave directions that the matter proceeds by oral submissions. That notwithstanding, however the Respondent did file submissions dated 20/7/2017 on 21/7/2017. At hearing however, only Mr. Wafula appeared for the plaintiff while there was never representative from the defendant. Mr. Wafula therefore offered oral submissions and prayed that the originating summons be allowed as prayed.

8. In his submissions Mr. Wafula opted to handle only two aspects of the opposition; jurisdiction and pendency of the appeal. On jurisdiction, Mr. Wafula contended that, that is not an issue for this court because the same ought to have been taken and canvassed before the Ugandan Court but was never taken up instead the Defendant submitted to jurisdiction in full. He therefore contended that there is a final judgment that needs to be enforced.

9. On the pendency of an appeal as asserted by the defendant and exhibited by a Notice of Appeal, Mr. Wafula referred the court to the letter by the Registrar, High Court of Uganda, which disparaged the exhibited Notice of Appeal for having not been captured on the courts records in Uganda and was thus termed suspect.

10. The counsel then referred the court to the provisions of section 3(2) and section 4 of the Act, Foreign judgments (Reciprocal enforcement) Act, to provide answers on jurisdiction and pendency of Appeal. As said before, the defendant did not attend but did file written submissions on 21/7/2017, some 7 days after the matter had been argued.

11. Just because I have seen and read the said submissions even though filed well too late, the same are on record and I think I have an obligation to comment on what the Respondent says through them. This is however not to say that parties have the liberty and luxury to file court papers at their convenient time and leisure. In this matter, however, I have said that as I am preparing this decision, I have come across read the submissions and will take some into account noting that they invoke substantial questions of law that I

would have to be considered even if not invoked by the parties.

12. In summary the submissions take the position that there is no jurisdiction upon this court to determine the matter because the governing statutes; civil procedure Act, Cap 21, Foreign judgments (Reciprocal Enforcement) (The Act) and The Convention on The Recognition and Enforcement of Foreign judgment in Civil and Commercial Matters (1971), (The Convention) militate against the same.

13. On jurisdiction, the Defendant submit that the plaintiffs' sister company, Kenfreight East African Ltd, sued the Respondent in Mombasa CMCC No. 3176 of 2009 and the suit was still pending determination. On account of that pending dispute the Defendant contends that section 4 Cap 43 and Article 5(3) a, of the convention (supra) make the judgment sought to be enforced here not enforceable. It is contended that the enforcement of the judgment as sought here would embarrass the Kenya Court.

14. On the merits, the defendant contends that the jurisdiction of the court to have a foreign judgment registered is not mechanical but must be judicious with the court critically examining the foreign decision with a view to determine if it meets the minimum jurisprudential and constitutional threshold so that if it be found to be repugnant to our legal and constitutional practice the court has to make such pronouncement and refuse to have it registered.

15. Elaborate submissions were then made to the effect that the proceedings in Uganda were perverse, calculated to fix the Defendant in that the third party proceedings were ordered to take place after the judgment between the principal parties so that the Defendant here, as 3rd party there, could not challenge the plaintiffs' claim. The Judgments of Henry Peter Adonyo and Irene Mulyagonya Kizooza JJ, were then attacked for lacking merits and devoid of Jurisprudence on the basis that the main suit (suit between principal parties) was heard in the absence of the defendant here as a 3rd party in the Ugandan proceedings, hence it resulted into an injustice to the defendant in these proceedings.

16. Section 9, Civil Procedure Act is then cited to set the thresholds and character of a foreign judgment to qualify for registration and enforcement. Section 5 of the Foreign Judgments (Reciprocal Enforcement) Act and the decision in *Elizabeth Namutebi vs Threeways Shipping Services (K) Ltd [2014]* were cited to fault the originating summons for not exhibiting original documents from the primary suit.

Issues for Determination

17. Having read the affidavit filed as well as submissions offered, I consider the following issues to present themselves for determination by the court:-

- **Is there a conclusive judgment issued by a competent court?**
- **Is there an appeal pending against the judgment?**
- **Should the judgment be ordered registered?**
- **What orders should be made on costs?**

Analysis and determination

18. It is not in contention that Uganda is one of the designated countries under the Act and the convention. It is also not in contention that the judgment now sought to be registered was one in which the current plaintiffs sued the current defendant as a third party and obtained a judgment dated 22/2/2016 in which the court having evaluated the evidence rendered itself and said:-

“a. It is directed that the third party indemnifies the defendant and the fourth party by paying Euros 45,362 being the value of the goods in the container lost with interest at the rate of 8% per annum from the date of filing this suit till payment in full.

b. The third party is also to meet the freight charges of USD5,224.52 and Kenya Shillings 5,000 which were the charges for the transportation of the container from Mombasa to Kampala with interest at the rate of 85 per annum till payment in full from the date of the earlier judgment of this court delivered by my learned sister Hon. Lady Justice Irene Mulyagonja.

c. The Third party is condemned to also meet the cost of the main suit and these third party proceedings accordingly”.

19. For a judgment to be registered for purposes of enforcement it must qualify as a conclusive and final judgment in the eyes of the court. It is to me conclusive when it is made by a competent court and has become final in that no appeal or an application for review is pending against it for determination in the country of origin. Effectively therefore, the question whether there is an appeal pending is one of the considerations the court takes into account to answer the question whether there is in existence a final and conclusive judgment.

20. In this matter, the defendant contends that there is an appeal filed and has exhibited a notice of appeal in its Replying affidavit. I find this question answered by the facts in two ways.

21. First, the ultimate authority for the records of the High Court of Uganda at Kampala, being the Registrar has written to this court by a letter of 28/7/2016 and termed the said Notice of Appeal as highly suspect and asked this court to treat it as such.

22. I do find that the document exhibited in the Replying affidavit of SHAKIL AHMED KHAN and marked “SAK 1” is not a genuine notice of Appeal for purposes of an appeal from the decision now sought to be registered.

23. Secondly section 3(2) of the Act also dictate that a judgment is deemed final and conclusive notwithstanding that an Appeal may be pending against it or that it may still be subject to an appeal in the country of the original court. *IPSO* facto, the pendency or prospects of an appeal does not negate a judgment from being deemed final and conclusive.

24. In this matter, the Defendant has raised a lot of dust over the jurisdiction of the Ugandan Court and accused it of all manner of things including the accusation that the resultant judgment was marred and tainted with impropriety and fraud. However, those very strong words insinuating pervasion of justice system, costs as persons and criminality on the integrity of the Ugandan Court and its judicial officers hence demanding a higher threshold of proof beyond balance of probabilities here there was no particulars of fraud or impropriety nor was proof offered.

25. It must be born in mind that this court exercising its jurisdiction does not set to review or act an appellate court of the proceedings before the trial court. Under articles 5,6,7,8 of the convention, the Kenyan court, being the court addressed may only refuse to recognize and enforce the Judgment if and only if:

(i) The decision is incompatible or the norms and notions of a just decision of Kenya law or public policy say where it was made in contravention of article 50 of the constitution or obtained by fraud.

(ii) There is a previously filed and concluded matter in Kenya courts between the same parties.

(iii) If the proceedings proceeded *exparte* without the defaulting party getting an opportunity to defend the proceeding hence being denied the right to be heard.

(iv) If in reading the decision reached, the Ugandan Court was confronted with the question of status or capacity of a party or rights excluded by paragraph 1-4 of the Article 1 of the

Convention. Nevertheless this court is not expected to act as an appellate court on the merits of matters decided by the Ugandan court.

26. My appreciation of the intendment and purpose of the procedure under the Act and convention is that where a court of a designated country with competent jurisdiction has employed time and resources to determine a dispute, there is no justification for a Kenyan court to consider the point a second time [1] save for purposes of registration and execution.

27. The third ground of attack on the application is that the Ugandan Court did not have jurisdiction to determine the matter on the basis that the plaintiff and the defendant herein are both Kenyan Corporates. The truth of the matter is that the decree now sought to be enforced is one arising out of third party proceedings between the plaintiff herein as defendant in the Ugandan case and the defendant herein as 3rd Party in those proceedings.

28. As the name suggests the plaintiff herein is an Ugandan Corporate. It is not the same defendant sued in Mombasa SPMCC No. 3176 of 2009. But even then Section 4(1)a of the Act [2], provide the parameters of determining whether the designated court had jurisdiction to be dependent on whether or not the defendant submitted itself to jurisdiction of that court. Additionally Article 3 of the convention provides:-

“This convention shall apply irrespective of nationality”.

29. Throughout the papers filed including the appearance by the defendant here as 3rd party in the Ugandan case, there is no protest grounded upon jurisdiction. I find that the High Court of Uganda sitting in Kampala was vested with jurisdiction to try and determine the dispute between the parties as it did.

30. The fourth ground of resistance to registration of the judgment was framed that the judge, Irene Mulyagonja Kakooza, did determine the liability of the 3rd party in its absence. The judge indeed refrained from making that determination and said:-

“And as my ruling delivered before this judgment show that there is a rebus between the defendant and those two parties. For that reason, execution of the decree will abide the disposal of the question of indemnity between the defendant and the third and 4th party”.

31. It is clearly that the Kenyan Law under Order 1 Rule 22 dictates. It is the trial court to determine whether the defendant claim against 3rd party be tried at the same time with that of the plaintiff against the defendant.

32. I have come to the conclusion that none of the objections raised by the defendant disentitles the plaintiff to have judgment registered for purposes of section 5 & 6 of the Act as read with the convention. That being the case and it been clear to me, it having not been denied that the judgment remain wholly unsatisfied, it is hereby ordered that the judgment issued by High Court of Uganda at Kampala Civil Suit No. 265 of 2009 dated the 22/2/2016, arising out of third party proceedings between the plaintiff and the defendant, and the resultant decree given on the 11/4/2016 be registered as a Judgment of this court entered on the date of such registration.

33. I award to the plaintiff the costs of these proceedings to be paid by the Defendant.

34. It is so ordered.

Dated and delivered at Mombasa this 16th day of February 2018.

P.J.O. OTIENO

JUDGE

[1] Article 8, convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial matters provide; “without prejudice to such review as is required by the forms of the preceding Articles there shall be no review of the merits of the decision rendered by the court of origin”. See also Section 17 of the Act.

[2] The judgment debtor, being the defendant in the original court, submitted to the jurisdiction of the court by voluntarily appearing in the proceedings.