REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 2 OF 2018

D U.....APPLICANT

VERSUS

M M T A.....RESPONDENT

RULING

[THE APPLICANT'S NOTICE OF MOTION DATED 29TH JANUARY, 2018]

1. D U has brought the Notice of Motion dated 29th January, 2018 under sections 3 and 4 of the Foreign Judgements Act, Cap 43 and Section 3A of the Civil Procedure Act seeking orders against M M T A, the Respondent as follows:

> **"1. THAT the judgement delivered on the 26th of October, 2017 in the Tribunal of Milano in Italy being case No. 10798/2017 between D U and M M T A be received by this Honourable Court and be deemed to be the judgement of this court.**
>
> **2. THAT the costs of this application be in the cause."**

2. The application is supported by the grounds on its face as follows:

> **"1. That the parties who resided in Kenya at Watamu and Milano in Italy as married couples have so far divorced.**
>
> **2. That upon the said divorce, the property they jointly owned in Kenya at Watamu was awarded to the Applicant.**
>
> **3. That it is necessary for the Kenyan Courts to receive the said judgement in order for the Applicant to be able to execute the judgement.**
>
> **4. That no prejudice shall be occasioned to the Respondent as she no longer resides in Watamu and she has also been compensated in the properties held in Italy."**

3. No reply was filed by the Respondent and neither is there evidence of service. I will thus consider the application based on the facts before the court and the law.

4. The law (Foreign Judgements Act, Cap. 43) under which the application is brought is, as per Section 2,

only applicable to judgements emanating from a superior court of a reciprocating country which is a commonwealth country; a superior court of any other reciprocating country which is specified in an order made under Section 13; and a subordinate court of a reciprocating country which is specified in an order made under Section 13. Italy does not feature anywhere in the Act.

5. In **Accredo AG & 3 others v Steffano Uccelli & another [2017] eKLR**, the Court of Appeal held that:

> **"18. On the issue of jurisdiction, we note that the jurisdiction of the superior court over this matter was questioned on two distinct fronts; on one hand, the appellants contended that by failing to observe the procedure for registration and enforcement of foreign judgments as set forth under the Act, the 1st respondent failed to properly invoke the court's jurisdiction in the review application. Conversely, the 1st respondent on the other hand, asserted that the court's lack of jurisdiction was due to the fact that Italy is not one of the recognized reciprocal countries under the Act and the Kenyan courts can therefore not recognize any judgment from Italy. In view of these two contestations, it was argued, that the High court had no jurisdiction to hear any of the proceedings instituted before it in this matter.**
>
> **19. In its preamble, the Foreign Judgments (reciprocal enforcement) Act is defined as being enacted; 'to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith' (*emphasis added)**
>
> **Accordingly, foreign enforceable judgments under the Act are those from designated courts set out under section 2. The section defines a '*designated court*' as:**
>
> **a. a superior court of a reciprocating country which is a Commonwealth country;**
>
> **b. a superior court of any other reciprocating country which is specified in an order made under section 13;**
>
> **c. a subordinate court of a reciprocating country which is specified in an order made under section 13;**
>
> **20. Consequently, in order for a judgment to qualify for enforcement under this Act, the same must emanate from the list of reciprocating countries identified by the Minister under Section 13(1) of the Act. In this regard, the schedules to the Act identify reciprocal countries as Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, United Kingdom and the Republic of Rwanda. It would thus appear that the 1st respondent was correct in contending that since Italy fails to find mention, the Milan court is not a designated court under the Act."**

The Applicant's approach to this court is thus premised on the wrong law and procedure.

6. In the already cited case of **Accredo AG & 3 others**, the Court of Appeal provided the correct law and procedure applicable to cases like that of the Applicant by stating that:

> **"22. Under the law however, the enforceability of foreign judgments from non-designated countries and the procedure thereof was given focus by this court in the case of Jayesh Hasmukh Shah v Navin Haria & another [2016] eKLR; where it was held that if a foreign judgment emanates from a non reciprocating country, the judgment fails to find application under the Act. Furthermore, if no treaty exists between Kenya and that country, regarding the (reciprocal) enforcement of each other's judgments, then any judgment emanating from such a country is equally unenforceable in Kenya under the said Act. The court however hastened to add that such a judgment, though unenforceable under the Act, is nonetheless enforceable under Common law, specifically under the realm of private International law. To this court therefore, a judgment from a non reciprocating country can still find local**

enforcement under Common law. This is achieved by filling a Plaint before the High Court; subject though, to the provisions of Section 9 of the Civil Procedure Act."

7. From a reading of the law and the cited decision of the Court of Appeal, it is clear that the instant application is fatally defective and cannot succeed. The application dated 29th January, 2018 is therefore dismissed with no orders as to costs.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT