**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 426 OF 2015**

**WAP ENGINEERING LIMITED.....1ST PLAINTIFF**

**WASSWA PRIMOH.....2ND PLAINTIFF**

**VERSUS**

**THE BOARD OF TRUSTEES DIOCESE OF RUMBEK....1ST DEFENDANT**

**THE ADMINISTRATOR DIOCESE OF RUMBEK.....2ND DEFENDANT**

**THE BISHOP DIOCESE OF RUMBEK.....3RDDEFENDANT**

**RULING**

1. The proceedings before me were brought by way of Originating Summons, pursuant to Section 3, 5, 6, 7 and 8 of the Foreign Judgement *(Reciprocal Enforcement)* Act, Cap. 43 of the Laws of Kenya.

2. The primary intent and purpose of these proceedings is to register at the High Court of Kenya, the foreign judgement which was entered at the High Court of Uganda.

3. It is the plaintiffs' case that;

> **"…the Plaintiffs and the Diocese of Rumbek, represented by the Defendants herein, entered into an agreement to take over a contract that had been entered into between MASTER CONSTRUCTION LIMITED and the DIOCESE of RUMBEK, which contract had been terminated after parties to the contract failed to agree?.**

4. According to the plaintiffs, they performed their obligations under the contract, and they received part payment for the work.

5. However, after the project was completed and was handed over to the defendants, the defendants failed to pay the balance of the money due to the plaintiffs.

6. Having failed to get payment, the plaintiffs sued the defendants at the High Court of Uganda.

7. The plaintiffs case is that they served the defendants with the Plaint and Summons. However, the defendants did not enter appearance.

8. The plaintiffs then applied for judgement in default of defence, and the court duly granted judgment in their favour. The judgement was for the sum of **USD 521,581.75,** together with interest at 30% per annum from 6th November 2008.

9. The plaintiffs' costs against the defendants were later taxed in the sum of **UShs. 22,553,000/-.**

10. The plaintiffs say that they attempted to execute the judgement in Uganda, but they were not successful because they defendants had dissipated their property in Uganda.

11. Having felt frustrated in its attempts to execute the judgement in Uganda, the plaintiffs filed the present proceedings in Kenya.

12. The defendants have opposed the application, firstly on the grounds that the High Court of Uganda did not have jurisdiction to entertain the suit.

13. Secondly, the defendants reasoned that the judgement granted in Uganda was one which could not have been enforced in Uganda.

14. If the judgement were to be registered as a judgement in Kenya, the defendants reasoned that it would be liable to be set aside pursuant to sections 10 and 11 of the Foreign Judgements *(Reciprocal Enforcement)* Act.Therefore, the defendants expressed the view that it would serve no useful purpose to give recognition to that which would thereafter be set aside.

**Jurisdiction**

15. The plaintiffs submitted that the High Court of Uganda had the requisite jurisdiction to entertain the suit.

16. They pointed out that the contract entered into between the parties was partly performed in Uganda, as several payments were made through the plaintiffs' account at **STANBIC BANK, CITY BRANCH, KAMPALA.**

17. Although the plaintiffs pointed out that the statements of their bank account was exhibited before the High Court of Uganda, the said statements of account were not shown to this court.

18. Indeed, even the plaint which was filed in Uganda, was not made available to this court.

19. Therefore, this court was unable to determine whether or not the submissions made before me, were based on actual evidence.

20. However, the plaintiffs submitted that the cause of action arose within Uganda, thus the High Court of Uganda had jurisdiction.

21. Secondly, the plaintiffs pointed out that the defendants did not formally challenge the jurisdiction of the High Court of Uganda.

22. For the purpose of the Foreign Judgement *(Reciprocal Enforcement)* Act, the relevant section which addresses the issue of jurisdiction is Section 4 (1), which states as follows:

> **"In proceedings in which it is necessary for the purposes of this Act to determine whether a court of another country had jurisdiction to adjudicate upon a cause of action, that court shall, subject to subsection (2) be treated as having had jurisdiction, where –**
>
> **a) The judgement debtor being the defendant in the original court, submitted to the jurisdiction of the court by voluntarily appearing in the proceedings;**

**b) The judgement debtor was plaintiff, or counterclaimed, in the proceedings in the original court;**

**c) The judgement debtor, being the original defendant in the original court, had, before the commencement of the proceedings, agreed otherwise than in pursuance of some statutory requirement, in writing or by an oral agreement confirmed in writing, to submit, in respect of the subject matter of the proceedings or in respect of disputes of the kind which were the subject matter of the proceedings, to the jurisdiction of the original court or of any other court of the country of the original court;**

**d) The judgement debtor, being the defendant in the original court, was, at the time when the proceedings were instituted, habitually resident in the country of the court or, not being a natural person, had its place of incorporation or its principal place of business in that country, or, if unincorporated, had its headquarters there;**

**e) The judgement debtor, being the defendant in the original court, had an office or place or business in, or, not being a natural person, had a branch (other than a subsidiary corporation) in, the country of that court and the proceedings in that court were in respect of a transaction effected, or an occurrence arising from business carried out, by, through or at that office, place or branch;**

**f) .....**

**g) In the case of a claim arising out of a contract, the obligation which was the subject of the proceedings was, or was to be, wholly or mainly performed in the country of the original court.**

**h) ....**

**i) ….?**

23. In this case the plaintiffs asserted that the cause of action arose out of a contract.

24. The contract was allegedly entered into between Master Construction Limited and the Diocese of Rumbek.

25. In other words, the plaintiffs were not, according to their own submissions, a party to the original contract.

26. In any event, if the second plaintiff, **(WASSWA PRIMOH)** is a Director of the first plaintiff, **(WAP ENGINEERING LIMITED),** the question of law that arises is why he was a party to these proceedings.

27. Ordinarily, if a limited liability company entered into a contract with another person, it is only the said company that would be a party when it became necessary for it to sue that other person.

28. The directors or shareholders would not ordinarily be a party to proceedings instituted by the limited liability company.

29. In this case, the director has not given any indication as to why he had sued the defendants.

30. Secondly, the Plaint indicated that the alleged contract was signed between the Diocese of Rumbek and Master Construction Limited. The plaintiffs have not demonstrated to the court why they then made a decision to sue the 3 defendants, instead of the Diocese of Rumbek.

31. The plaintiffs also disclosed in the Plaint, that funds were remitted directly to their accounts, by **DR. GIAN ANTIOCO CHIAVARI.**

32. However, as the plaintiffs said *(at paragraph 4 (r)* of the Plaint);

> **"That the plaintiffs communicated to the Order of Malta on June 6, 2009 demanding for their payment, only to receive a response from their Attorney DiTanno Associate stating that there was no legal relationship between the Order of Malta, Mr. Viannacia, Mr. Chiavari, and the Diocese of Rumbek?.**

33. First, the plaintiffs demanded for payment from the Order of Malta. That suggests that the plaintiffs expected that payment should have been made by the Order of Malta. If that were not their expectation, the plaintiffs could not have demanded payment from that entity.

34. Secondly, as the plaintiffs were told that there was no legal relationship between the Order of Malta and, inter alia, the Diocese of Rumbek, when the plaintiffs thereafter sued the defendants, they should have put forward information that would have satisfied the court about the nexus between the plaintiffs and the defendants.

35. Of course, one might reason that the said proof, if necessary, should have been provided to the High Court of Uganda. But that is only partially correct, because of the express requirements of Section 4 (1) of the Foreign Judgements *(Reciprocal Enforcement)* Act.

36. Why do I say so?

37. First because the defendants never submitted themselves to the jurisdiction of the High Court of Uganda.

38. Contrary to the plaintiffs' submissions, the defendants had no obligation to appear before the court in Uganda, and to challenge its jurisdiction. To suggest otherwise would be to compel a person who believes that the case filed against him, in a country which was half-way round the world, would to have to incur time and expense to fight that case, even when he believes that the court had no jurisdiction to determine the case.

39. If the defendant submitted voluntarily to the jurisdiction of the foreign court, then that court is said to have jurisdiction.

40. If the judgement debtor was the plaintiff, he is deemed to have accepted the jurisdiction of the court. He cannot file suit in a court, and after the court determines the case against him, assert that the court lacked jurisdiction.

41. Similarly, if the judgement debtor had counter-claimed, but the court decided against him, he cannot deny the jurisdiction of the court.

42. In this case, the defendants simply stayed away from the original court. They say that;

> **a) They were not incorporated in Uganda;**
>
> **b) They were not resident in Uganda;**
>
> **c) They had no place of business in Uganda;**

43. In the face of those assertions, the evidentiary burden of proof shifted to the plaintiffs, so that they should have shown that the defendants or any of them was incorporated in Uganda, or was resident in Uganda or that they or any of them had a place of business in Uganda, at the time when the suit was filed in Uganda.

44. The plaintiffs have not discharged that burden of proof.

45. If anything, the plaintiffs confirm that the contract, if any, was to be performed in Rumbek, South Sudan.

46. The subject matter of the contract was a Girls Secondary School, which was to be built in Rumbek.

47. Pursuant to Section 4 (1) (g) of the Foreign Judgements *(Reciprocal Enforcement)* Act, it is the High Court of South Sudan which would be presumed to have had jurisdiction.

48. And as the defendants have not been shown to have had assets in Uganda at the time when the plaintiffs filed suit against them, it implies that there was never any possibility of the decree being executed in Uganda.

49. Therefore, as judgement was obtained in a country where it could not be executed, it was not open to the plaintiffs to seek to have the said judgement executed in Kenya.

50. Buckley L.J stated as follows in **HARRIS Vs TAYLOR [1915] 2 KB 581 at 587;**

> **"The question which we have to decide on this appeal depends, as I have said, on whether the defendant submitted to the jurisdiction of the Isle of Man Court….**
>
> **When the defendant was served with the process, he had the alternative of doing nothing, although the Court might have given judgement against him, the judgement could not have been enforced against him unless he had some property within the jurisdiction of the Court".**

51. That is what the defendants did in this case; they did not enter appearance or do anything which could be construed as submission to the jurisdiction of the High Court of Uganda.

52. In **RE: DULLES SETTLEMENT (No.2) DULLES Vs. VIDLER [1951] 1 CH 842,** Denning L.J said something similar, as follows;

> **"I cannot see how one can fairly say that a man has voluntarily submitted to the jurisdiction of a Court, when he has all the time been vigorously protesting that it had no jurisdiction. <u>If he does nothing and lets judgement go against him in default of appearance, he clearly does not submit to the jurisdiction".</u>**
>
> - I have added the emphasis.

**53.** I have come to the conclusion that the High Court of Uganda did not have the requisite jurisdiction in the matter.

**54.** Pursuant to Section 10 (2) (c) of the Foreign Judgements *(Reciprocal Enforcement)* Act, a foreign judgement which is registered in Kenya, may be set aside if the courts of the country of the Original court, had no jurisdiction to adjudicate upon the cause of action upon which the judgement was given.

**55.** Therefore, it would defy logic, common sense and justice to order that the foreign judgement be registered in Kenya when, in all probability, it would then be liable to be set aside for lack of jurisdiction, on the part of the court that had granted the original judgement.

**56.** Accordingly, there is no merit in the Originating Summons dated 22nd September 2016. It is dismissed, with costs to the defendants.

**DATED, SIGNED** and **DELIVERED** at **NAIROBI** this **21st day** of **September** 2017.

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

*Mbogua for the 1st Plaintiff*

*Mbogua for the 2nd Plaintiff*

*Njuguna for the 1st Defendant*

*Njuguna for the 2nd Defendant*

*Njuguna for the 3rd Defendant*

*Collins Odhiambo – Court clerk.*