



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISC CIVIL APPLICATION NO 72 OF 2014

IN THE MATTER OF: THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT CAP 43 LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR ENFORCEMENT OF A JUDGMENT OF THE HIGH COURT OF JUSTICE, CHANCERY DIVISION OF THE UNITED KINGDOM OBTAINED IN CLAIM NO HC06C01491 AND CONSEQUENTIAL ORDERS

SANJAY SHAH.....JUDGMENT CREDITOR

VERSUS

KAMLESH BID.....1ST JUDGMENT DEBTOR

DILESH BID.....2ND JUDGMENT DEBTOR

JUDGMENT

INTRODUCTION

1. The Judgment Creditor's Originating Summons dated 20th February 2014 and filed on 26th February 2014 was brought pursuant to the provisions of Sections 3, 4, 5, 8 and 13 of the Foreign Judgments (Reciprocal Enforcement) Act Cap 43 Laws of Kenya, Rules 2 and 3 of the Foreign Judgments (Reciprocal Enforcement) Rules and Order XXXVII Rule 1 (sic) of the Civil Procedure Rules. It sought the following orders:-
 1. **THAT leave be granted to the Judgment Creditor to register in the High Court of Kenya the Judgment issued on 19th February 2013 and Consequential Orders of the High Court of Justice, Chancery Division of the United Kingdom in Claim No HC06C01491 made on 18th April 2013 and 19th September 2013.**
 2. **THAT execution of the said Judgment and consequential orders of the High Court of Justice, Chancery Division of the United Kingdom in Claim No HC06C01491 do issue after the period of fourteen (14) days from the service of the Notice of Registration of Judgment on the Judgment Creditors (sic).**
 3. **THAT costs of the Originating Summons be provided for.**
2. On 20th June 2014, the court directed that the matter herein would proceed by way of affidavit

evidence in Nairobi for one (1) day. Parties filed their respective written submissions as had been directed by the court. They informed the court that they did not wish to highlight their said submissions. The judgment herein was thus based on the parties' said written submissions.

THE JUDGMENT CREDITOR'S CASE

3. The Originating Summons was supported by the Affidavit of Sanjay Shah that was sworn on 20th February 2014. He also swore a Supplementary Affidavit on 20th June 2014 that was filed on even date. His written submissions were dated 11th July 2014 and filed on 17th July 2014.
4. The circumstances of this case were that M/S Teclof International Limited filed civil suit Claim No HC06C01491 in High Court of Justice, Chancery Division of the United Kingdom against the Judgment Creditor, Town Castle Limited and one Max Cohen. The said suit was dismissed with costs to the Judgment Creditor on 11th February 2009.
5. In an order dated 30th January 2012, the Judgment Debtors herein were enjoined for purposes of costs only and were ordered to pay the Judgment Creditor costs pursuant to Section 51 of the Senior Courts Act 1981. His application for a non-party costs order against the Judgment Debtors was allowed on 19th February 2013. The court directed that they pay him costs of the action together with his costs for the application for the non-party costs, which costs were to be assessed.
6. Subsequently, he filed Bills of Costs for the action and application for non-party costs. Unfortunately, the said Judgment Debtors failed to serve their respective points of disputes as a result of which Default Costs Certificates were issued to him for GBP 234,212.00 and GBP 92,292.00 being costs for the action and application for non-party costs respectively.
7. As the said Judgment Debtors failed to pay him the said costs which totaled a sum of GBP 326,504.00, he filed the present application pursuant to the Foreign Judgments (Reciprocal Enforcement) Act. He contended that the Judgment Debtors had no assets in the United Kingdom.
8. He therefore urged the court to allow his Originating Summons as the orders he was seeking to enforce were issued resultant to the judgment of 11th February 2009 and in accordance with the English Law and the Foreign Judgments (Reciprocal Enforcement) Act after the Judgment Debtors' failed to attend court on 27th February 2009 for assessment of costs which order had never been set aside, varied and/or appealed against.

THE JUDGMENT DEBTORS' CASE

9. In opposition to the said Originating Summons, on 17th April 2014, the 2nd Judgment Debtor swore a Replying Affidavit on his own behalf and on behalf that of the 1st Judgment Debtor. The same was filed on even date. Their written submissions were dated 27th October 2014 and filed on 28th October 2014.
10. The Judgment Debtors contended that the application, as framed, was incompetent for the reason that no execution could take place until the judgment had been registered and court had heard applications for setting aside the said judgment once registered. They also stated that the application was defective as it sought registration and execution of judgment issued on 19th February 2013 which judgment was a nullity in law in view of the final judgment in the claim dated 11th February 2009.
11. They were categorical that the Judgment Creditor's application for registration of judgment on costs did not lie in law in the Kenyan jurisdiction under the Foreign Judgments (Reciprocal Enforcement) Act and that the order issued on 27th February 2009 was not in accord with the Judgment of 11th February 2009.
12. They denied having been Directors or Shareholders in the M/S Teclof International Limited and averred that there was no basis for them to be joined in the suit two (2) years after the judgment only for purposes of saddling them with costs.
13. It was also their contention that the judgment the Judgment Creditor sought to be registered was contrary to public policy and contrary to the law and practise on payment of costs as the sum awarded as costs in the sum of GBP 326,054.00 (equivalent to Kshs 47,408,251.90) was colossal and exorbitant and could never have been awarded by any High Court in Kenya under the

Advocates Remuneration Order.

14. They also averred that the Judgment Creditor's solicitors overcharged and were awarded excessive costs in the sum of GBP 135,184.00 (equivalent to Kshs 14,176,110.32) and that in any event, they had paid security of costs in the sum of GBP 135,184.00 (equivalent Kshs 19,655,753.60) which they said was more than adequate to cater for the costs of the suit.
15. For the reason that the present application purported to prejudice their right to set aside the registration of the judgment, they prayed that the same be dismissed with costs to them.

LEGAL ANALYSIS

16. The Judgment Creditor argued that it had complied with all the provisions of Section 5 of the Foreign Judgments (Reciprocal Enforcement) Act leaving the court with no option but to register the judgment in accordance with Section 6 of the said Act. He stated that the Judgment Debtors' had not advanced any evidence to show that the judgment and orders he had sought to be registered had been wholly satisfied or that the same could not be enforced by the court in Kenya. Notably, the Judgment Debtors did not address themselves to this issue leading the court to conclude that this issue was an undisputed fact.
17. The court deemed it prudent to address the Judgment Debtors' argument that their enjoining in the suit two (2) years after judgment was entered did not lie in law. In the order of dated 30th January 2012, a copy which was annexed to the Judgment Creditor's Supporting Affidavit Exhibit marked "SS 4" it was stated as follows:-

1. **that Mr Dilesh Bid and Mr Kamlesh Bid (also known as Kamlesh Shah) ("the respondents") be added as defendants in these proceedings for the purpose of costs only pursuant to Rule 48.2 of the Civil Procedure Rules, and in particular for the purpose of the Second Defendant's application against them for an order that they do pay the Second Defendant's costs of this claim pursuant to Section 51 and 52 of the Senior Courts Act 1981 ("the substantive application.")**

18. Evidently, the aforesaid order was issued by a court of competent jurisdiction. This court had no power or jurisdiction to review and re-evaluate the said order as it was not sitting on appeal against the said order. Indeed, as was rightly submitted by the Judgment Debtor, this was an issue the Judgment Debtors ought to have raised in the original court in the United Kingdom.
19. Having said so, the Judgment Debtors major objection seemed to be that the order of costs could not be registered as a judgment. They referred the court to Section 3 (3) of the Foreign Judgments (Reciprocal Enforcement) Act which they said provides as follows:-

"This Act applies to a judgment referred to in subsection (1) if it-

- a. **Requires the judgment debtor to make an interim payment of a sum of money to the judgment creditor; or**
- b. **is final and conclusive as between the parties thereto**

but a judgment is deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the court of the original court."

20. The court noted that the provisions of Section 3(3) of the Foreign Judgments (Reciprocal Enforcement) Act were different from what they had set out in their written submissions. On its part, the Judgment Creditor submitted that the judgment and consequential orders issued on 19th February 2013, 18th April 2013 and 16th September 2013 were issued by a designated court as was defined in Section 2 (1) of the Foreign Judgments (Reciprocal Enforcement) Act and that judgment on costs was not one of the judgments in respect of which Section 3 (3) of the said Act would not apply.
21. Contrary to the Judgment Debtors' arguments, the provisions of Section 3 (3) of the Foreign Judgments (Reciprocal Enforcement) Act could not be read in isolation of other provisions in the

Act. In this regard, the court considered the provisions of Section 8 (2) (a) of the Foreign Judgments (Reciprocal Enforcement) Act that was relied upon by the Judgment Creditor. It stipulates as follows:-

Subject to this Act, where a judgment for the payment of any monetary sum (emphasis court) is registered, the following sums may be recovered upon the registration of judgment-

- a. **The amount remaining payable under the judgment, including interest and costs awarded to the judgment creditor, as at the date of registration.**
- b. **Any reasonable costs awarded by the High Court in respect of any of registration, including the costs of obtaining a certificate or exemplification or copy of a judgment or translation thereof for purposes of Section 5 (4).”**

22. In Paragraph 32 of the judgment that was delivered on 11th February 2009, it was stated as follows:-

“On the evidence or trial this claim fails. There will be judgment for Mr Shah.”

23. The court noted the Judgment Debtors’ submission that the decree had to agree with the judgment, that is that it was required to contain the number, the names and descriptions of the parties and the particulars of the claim and that it was to specify clearly the relief granted or other determination of the suit.
24. Their reliance on the case of **Shunguli & Another vs Rama [1995-1998] 2 EA 377** where the Court of Appeal held that the signing of the judgment on two (2) occasions was in breach with the mandatory provisions of the then Order XX Rule 8 (1) of the Civil Procedure Rules did not appear to resonate with the Judgment Debtors’ submissions on the competence of the judgment that was delivered in the original court.
25. The court did not also find the said judgment to have offended the provisions of the Civil Procedure Rules, 2010. The Judgment Debtors did not clearly demonstrate the relevance of Order 21 Rule 7 (1) of the Civil Procedure Rules, 2010 to the proceedings herein making it difficult to follow their argument.
26. Evidently, the order of 27th February 2009 annexed in the Judgment Creditor’s Supporting Affidavit and marked “SS 2” was clear that the claim against him was dismissed and M/S Teclof International Limited ordered to pay his costs. The Judgment Debtors’ submission that the said judgment was ambiguous was misleading as there could not have been clearer declaration by the court on the fate the claim by M/S Teclof International Limited.
27. In Paragraph (6) of the Certification as to Judgments and Defaults Costs Certificate dated 17th December 2013 annexed to the Judgment Creditor’s Supporting Affidavit and marked “SS 1”, it was stated that the Judgment Debtors were served with the Judgment Creditor’s application.
28. In Paragraph (7) therein, it was clear that the said Judgment Debtors did not object to the jurisdiction of the original court while in Paragraph (17), it was stated that no appeal against the judgment or the Default Costs Certificates, the latter which had been served in accordance with the provisions of Part 6 of the Civil Procedure Rules 1998, had been brought within the time that was stipulated under the law.
29. The Judgment Debtors’ contention that an award of costs could not be made by way of a slip rule was misplaced. Indeed, its reliance on the case of **Quick Service Stores vs Thakkar [1958] EA 357** was distinguishable from the facts of this case and the same found no favour with this court. Unlike in that case, the Judgment Creditor herein took the requisite steps to have his costs assessed when he filed his Bills of Costs. The Default of Cost Certificate was not an afterthought and was carefully considered by the original court.
30. It is clear from the provisions of Section 8 (2)(a) of the Foreign Judgments (Reciprocal Enforcement) Act that interest and costs awarded to the judgment creditor as at the date of registration were payable. Indeed, judgment can never be complete unless the issue of costs has been addressed. However, costs may or may not be awarded.
31. Clearly the Judgment Debtors did not furnish the court with any evidence to show that there was any appeal or application pending in the original court in the United Kingdom lending the court to

- find that they were therefore estopped from raising any issue of legality or otherwise of the said Default Costs Certificates.
32. The court thus associated itself with the holding in the case of **Innocent Musheja & Another vs Marshall Fowler Engineering Limited [2014] eKLR** which was relied upon by the Judgment Creditor where the court found that the judgment therein was final and conclusive as there no pending application before the Supreme Court of Kigali or any other court in Rwanda, the matters having been dealt with and finally concluded.
33. The court was also in agreement with the several other cases the Judgment Creditor placed reliance upon to support his argument that this court had jurisdiction to register the judgment and order that were delivered in the United Kingdom. The question of whether or not the original court was *functus officio* by the time it made the order for costs would not be one that this court would have power or jurisdiction to entertain and determine. All that the court wished to observe was that it was not unusual for a successful party to have judgment delivered in his favour and for him to file his Bill of Costs way after such judgment in the Kenyan jurisdiction.
34. The fact that the Judgment Debtors found the costs that were awarded to have been exorbitant would not fall under this ground of public policy. The court could also not revisit the payments which had or had not been credited or re-open the evidence to come to any other decision than the one that had been arrived at by the original court in the United Kingdom. The case of **Christ For All Nations vs Apollo Insurance Company Limited [2002] 2 EA 366** was therefore of no assistance to the Judgment Debtors as they did not demonstrate how the judgment was contrary to the public policy of Kenya or any written law in Kenya.
35. The above notwithstanding the Judgment Debtors raised a pertinent issue regarding execution of the judgment in the event the same was registered. They referred the court to Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act which provides as follows:-

“Where a judgment has been registered under this Act, an application may be made by the judgment debtor that the judgment be set aside on any of the grounds set out in subsection (2) and (3) and if the High Court is satisfied that any of those grounds has been established, it shall set aside the registration of the judgment.”

36. As they rightly submitted, it was irregular for the Judgment Creditor to have sought the prayer for registration of the judgment and execution of the same in the same application as the Judgment Debtors still had a right to apply for its setting aside. However, the court found that the court could not refuse to register the Judgment merely because the said two (2) prayers had been sought in the manner they were. This is because the court could grant any of the orders the Judgment Creditor could have proven.
37. Accordingly, having considered the pleadings, the affidavit evidence, written submissions and the case law in respect of the parties' case, the court found that it had no option but to register the judgment on costs. Indeed, United Kingdom is a reciprocating country for the purpose of the Foreign Judgments (Reciprocal Enforcement) Act as evidenced in the schedule in the Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984. The court was not persuaded at all by the Judgment Debtors arguments on all issues that they had raised. Section 8 (2) (a) of the Foreign Judgments (Reciprocal Enforcement) Act provides that judgment for the payment of any monetary sum can be registered such as costs and interest.

DISPOSITION

38. For the aforesaid reasons, the court hereby grants Prayer No (1) of the Judgment Creditor's Originating Summons dated 20th February 2014 and filed on 26th February 2014 as the same was merited. It was, however, not necessary for him to have sought leave to register the judgment and consequential orders as he could apply to register the same in accordance with Foreign Judgments (Reciprocal Enforcement) Act. The Judgment Debtors shall bear the Judgment Creditor's costs of this Originating Summons as had been sought in Prayer No (3) therein.
39. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of February 2015

J. KAMAU

JUDGE