



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO.96 OF 2014**

**IN THE MATTER OF FOREIGN JUDGMENT (RECIPROCAL ENFORCEMENT) ACT (CAP 43)**

**AND**

**IN THE MATTER OF THE JUDGMENT DELIVERED ON THE 7<sup>th</sup> Day Of July 2010 AT THE HIGH COURT OF UGANDA AT KAMPALA, CIVIL SUIT NO. 143 OF 2008 (*Before the Honourable Lady Justice M.S. Arach Amoko*)**

**BETWEEN**

**ELIZABETH NAMUTEBI.....APPLICANT/JUDGMENT CREDITOR**

**Versus**

**THREWAYS SHIPPING SERVICES (K) LIMITED...RESPONDENT/JUDGMENT DEBTOR**

**RULING**

**Enforcement of Foreign Judgment**

[1] This is an application for enforcement of foreign judgment under the provisions of the Foreign Judgment (Reciprocal Enforcement) Act (CAP 43). The application is made by way of an Originating Summons dated 16<sup>th</sup> June, 2014. The Applicant is the Judgment-holder in, and requests for the Judgment delivered on the 7<sup>th</sup> of July, 2010 at the High Court of Uganda at Kampala (Civil suit No. 143 of 2004) by the Honorable Lady Justice M.S Arach Amoko to be registered and executed in Kenya.

[2] The application is expressed to be brought under Order 37 rule 14 of the Civil Procedure Rules and sections 3(1) (a), 3(2) (b); 5(1)(2)(a)(i) and (b),(c) (i) and 2(d),(e); 7(1) and (2); 8(2)(b), (b), and (c) of the Foreign Judgment (Reciprocal Enforcement) Act: and Rules 2(1), 3 and 4 of the Foreign Judgment (Reciprocal enforcement) rules. It is supported by the Affidavit of the Judgment Creditor as provided for under rules 2 (1) and 3 of Cap 43 Rules, it states as follows;

***2.(1) An application for registration under section 5 of the Act shall be made by originating summons entitled in the matter of the Act and in the matter of the judgment sought to be registered.***

**3. An application for registration of a judgment under section (5) of the Act shall be supported by an affidavit.**

[3] In reply to the application, the Respondent- the Judgment-debtor -filed Grounds of Opposition dated 14<sup>th</sup> October, 2014. The major grounds of objection are; a) That the application is incurably defective and bad in law' b) That the application wholly violates the provisions of the Foreign Judgment (Reciprocal Enforcement) Act Cap 43 Laws of Kenya; c) That the applicant has not fulfilled the conditions required under the Foreign Judgment (Reciprocal Enforcement) Act Cap 43 Laws of Kenya to warrant the grant of the orders sought; d) That the application is scandalous and highly prejudicial to the Respondent; and e) That the applicant has violated the orders mandated in the Ruling delivered herein by the Honourable Judge F. Gikonyo on the 14<sup>th</sup> day of May, 2014.

**Court ruled...**

[4] By a Ruling delivered herein on the 14<sup>th</sup> day of May, 2014, this court ruled the following:-

***Other than the application and the affidavit in support thereof, all the other documents annexed to the application are mere photocopies which I do not think in law could be said to be the legal documents or exemplifications or certified or duly authenticated copies of the original legal documents of the Designated Court of Uganda. I can see a rubber stamp of sort tending to certify the documents as true copies of the original but the grave error that the Applicant committed is that it annexed photocopies of the purportedly certified documents instead of the certified documents themselves. That is problematic and the application does not, therefore, meet the requirements of the law.***

And went on to order:-

***The upshot is that, the application herein wholly violates the provisions of Foreign Judgment (Reciprocal Enforcement) Act. But in the interest of justice I am persuaded to exercise my discretion leniently under the Act, and instead of dismissing the application, I direct the Applicant:***

***a) To file compliant application for registration and execution of the foreign judgment herein within 30 days; with all the documents required under the Foreign Judgment (Reciprocal Enforcement) Act,***

***b) The Applicant to serve the compliant application together with a summon on the judgment-debtor to appear and be heard on the application filed pursuant to this order; and***

***c) Of course, service of summons and the application upon the judgment-debtor shall be served in accordance, mutatis mutandis, with order V of the Civil Procedure Rules.***

[5] By that ruling my work is made simple. Has the Applicant filed the documents which are in conformity with the provisions of the Foreign Judgment (Reciprocal Enforcement) Act? Before I answer this question, let me settle some few important matters. The court found that the Applicant is a Judgment-holder of a judgment delivered on 7<sup>th</sup> July, 2010 by the Honourable Lady Justice M.S Arach Amoli of the High Court of Uganda; which is a Designated Court under Cap 43 Laws of Kenya as it is a superior court of a reciprocating country, that is Uganda, and the same is specified in the schedule in the Foreign Judgment (Reciprocal Enforcement) (Extension of Act) Order, 1984 as declared by the order issued pursuant to section 13 of the Cap 43 Laws of Kenya. It is that judgment that the Applicant herein is applying to be registered and executed in Kenya. The Judgment Debtor is registered in Kenya and carries on business in Kenya and it is for that

reason that the Applicant has come before this Honourable Court for enforcement of the judgment delivered on 7<sup>th</sup> July, 2010 by Honourable Lady Justice M.S Arach Amoko of the High Court of Uganda. From the record, the judgment Creditor was part of the proceedings in the original action and the judgment was final and conclusive as between the parties. For comfort, there is no appeal pending in the Supreme Court of Uganda. See Section 3 of CAP 43 Laws of Kenya which states as follows;

**3(1) subject to subsections (2) and (30), this Act applies with respect to –**

**(a) a judgment or order of a designated court in civil proceedings whereby a sum of money is made payable, including an order for the payment of a lump sum as financial provision for, or maintenance of, a spouse of a former or reputed spouse or a child or other person who is or was a dependant of another;**

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

**(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 country of the original court.**

[6] Similarly, I agree with the submissions by the Applicant that the application dated 16<sup>th</sup> June, 2014 was filed within the time prescribed in Section 5(1) of the Foreign Judgment (Reciprocal Enforcement) Act CAP 43 Laws of Kenya which states as follows;

**5(1) where a judgment to which this Act applies has been given in a designated court, the judgment creditor may apply to the High Court to have that judgment registered within six years of the date of the judgment or , where there have been proceedings by way of appeal against the judgment, of the date of the last judgment in the proceedings.**

[7] I also agree with the Applicant that, in the circumstances, the judgment-debtor has not disputed the existence of the proceedings before the superior court of Uganda or the debt, the subject of these proceedings. See the case of *Innocent Musheja & Another V Marshall Fowler Engineering Limited [2014] eKRL* where the Learned Hon. Judge E.K. OGOLA states as follows;

**“In view of the foregoing it is my view that the Respondent is precluded from challenging the enforcement of the Judgment issued by the Supreme Court of Rwanda on 1<sup>st</sup> September, 2005 in Kigali Case No. RCAA 0012/04/Cs. Further, by virtue of the doctrine of estoppels by record, it is now well settled that when a court of competent jurisdiction delivers a judgment in the nature of a final determination, even if the judgment is appealable, the doctrine of estoppel by record would still apply to prevent the Respondent from challenging its enforcement. In the present case, since the Supreme Court of Rwanda affirmed its own judgment that the Respondent had sought to be reviewed, the judgment sought to be reviewed remains the final judgment in the matter”.**

Also *Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 16* at page 852 posits as follows:-

**“...the doctrine of estoppels by record thus limited finds expression in two legal maxims, *interest reipublicae ut sit finis litium*, i.e. it is in the public interest that there should be an end of litigation; and *nemo debet bis vexari pro una et eadem causa* i.e. no one should be proceeded against twice for the same cause. It accords with the first to these maxims that a party relying on estoppels by record should be able to show that the matter has been determined by a judgment in its**

***nature final. When the word "final" is so used with reference to a judgment, it does not mean a judgment which is not open to appeal but merely a judgment which is 'final' as opposed to 'interlocutory'. A judgment which purports finally to determine right is none the less effective for the purposes of creating estoppels because it is liable to be reversed on appeal, or because an appeal is pending or because for the purpose of working out inquiries or accounts have to be taken".***

Accordingly, the judgment delivered on 7<sup>th</sup> July, 2010 by the Honourable Lady Justice M.S Arach Amoli of the High Court of Uganda is final judgment for purposes of the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43 of the Laws of Kenya.

[8] I resume the penultimate question on whether the Applicant has complied with the requirements of the Foreign Judgment (Reciprocal Enforcement) Act and as was ordered by the court on 15<sup>th</sup> May 2014? The Applicant says her application is compliant. She filed as annexures to the supporting affidavit relevant documents from the High Court of Uganda; duly sealed and certified by the Registrar of the High Court of Uganda, Commercial Division. These documents are; judgment of the designated court of Uganda; Decree; Taxation Ruling; as a Certificate of the Registrar. The judgment-debtor admits these documents have been filed except it urged that the application still wholly violates the provisions of Foreign Judgment (Reciprocal Enforcement) Act, Cap 43. The first quarrel the judgment-debtor has fastened on the application is that it is not accompanied by an affidavit stating *that, at the date of application, the judgment can be enforced by execution in the country of the original court*. The judgment-debtor is relying on section 5 (4) (c) (ii) provides that an application for registration of a judgment shall:

5(4)....

a).....

b).....

c) *be accompanied by an affidavit stating—*

***(ii) that, at the date of application, the judgment can be enforced by execution in the country of the original court;***

According to the judgment-debtor, the absence of such affidavit is blatant breach of Section 5 (4) (c) (ii) of Foreign Judgment (Reciprocal Enforcement) Act, Cap 43 as it is listed as one of the documents to accompany the application dated 12<sup>th</sup> June 2014. In addition, the judgment-debtor urged that the Applicant has not included Certificate under Seal signed by the Judge or registrar as provided for within Section 5 (4) (d) of Foreign Judgment (Reciprocal Enforcement) Act, Cap 43. Further, the judgment-debtor argued that the application violates Rule 3 (1) of the Foreign Judgment (Reciprocal Enforcement) Rules, 1984 which provides that the application for the registration of a Judgment shall be supported by an affidavit:

***Rule 3(1) (d) ...stating to the best of the information or belief of the deponent—***

***(iii) that the judgment is a judgment to which the Act applies, specifying which paragraph of section 3(1) of the Act applies;***

***(vii) that the judgment can be enforced by execution in the country of the original court and that if it were registered, the registration would not be liable to be set aside under section 10 or 11 of the Act;***

[9] They also submitted that the court ordered the application to be filed within 30 days but

the application herein was filed on the 16<sup>th</sup> of June 2014, a clear 32 days after the date of the delivery of the ruling. Therefore, the Applicant did not comply with the orders of the court made on the 14<sup>th</sup> of May 2014 as the application was filed out of time and not in compliance with the Foreign Judgment (Reciprocal Enforcement) Act. The application is incurably defective, bad in law, scandalous and highly prejudicial to the Respondent. They cited the case of *Africa Management Communication International Limited vs. Joseph Mathenge Mugo & another [2013] eKLR* where it was held that in the interests of justice, where a party knowingly and willfully disobeyed the orders of this Court, they are to be in contempt of that order. Similar stand was taken by the court in the case of the *Edward Njuguna Kangethe vs. Joel Kiema Mutinda & Another [2014] eKLR*. The application should be dismissed.

[10] I have considered all the rival arguments, the affidavit evidence produced before court as well as the applicable law. I take the following view of the matter. In accordance with Section 3(1) and 5(4) of Foreign Judgment (Reciprocal Enforcement) Act, Cap 43 and Rule 3 (1) of the Foreign Judgment (Reciprocal Enforcement) Rules, 1984, the affidavit in support of the application for registration of foreign judgment should state that that; a) the judgment is a judgment to which the Act applies, specifying which paragraph of section 3(1) of the Act applies; b) that the judgment can be enforced by execution in the country of the original court; and c) that if it were registered, the registration would not be liable to be set aside under section 10 or 11 of the Act. Paragraph 4 of the affidavit in support states:-

**4. THAT I have been informed by my Counsel on record that the judgment is a judgment to which the Act applies.**

The averment is a positive one except it ought to have pointed out the specific paragraph in section 3(1) to which the judgment falls. That notwithstanding, paragraph 5 of the supporting affidavit offers some augment to paragraph 4 when it stated that...*the judgment is for payment of sum of money owed to me...* And of course the judgment is annexed and is easily discernible to be one falling under section 3(1) (a) of the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43. To that extent, the affidavit is compliant. I do not wish any thought to thrive that section 3(1) is a technicality. It is a substantive requirement founded upon valid constitutional underpinnings. The provisions of section 3(3), 10 and 11 of the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43 explain why I say these are substantive provisions of law. Section 3(3) of the Act prevents registration and enforcement in Kenya of foreign judgments which relate to taxes or fines or other tariffs of the foreign state. These are real policy matters of the law and based on that policy of law, countries will always hesitate to enforce other country's tax claims, reliefs or fines. But I am yet to see application of this law in enforcement of a decree based on asset recovery of stolen property arising out of organized crimes with trans-national tendencies such as corruption; money-laundering; terrorism financing; counterfeits etc. which requires a forthright resolve by states to combat these crimes which threaten world peace and economy, and which, therefore, would require a much more robust international cooperation. Other notable matters which are not enforceable under section 3(3) include judgments on such matters, only to mention a few, as multiple damages, matrimonial properties rights, children matters, social security of another country will not be enforced through the legal system of Kenya. Sections 10 and 11 of the Foreign Judgment (Reciprocal Enforcement) Act makes it even clearer. The sections relate to the statutory anticipation that proceedings in the foreign country adhered to all the requisite procedural and substantive rights of the parties in the suit in the original court. Today, observance of rights in a proceeding which is to be enforced in another jurisdiction is a fundamental consideration in international cooperation on mutual legal and judicial assistance. And as a general rule, a judgment which violates rights of the parties will not be enforced in foreign jurisdictions including Kenya. See provisions in the Proceeds of Crime and Anti-money Laundering Act and other statutes with international cooperation component. But I note in this case, it has not been alleged that the judgment herein did not comply with procedural and substantive rights of parties envisaged under sections 10 and 11 of the Foreign Judgment (Reciprocal Enforcement) Act. The judgment-debtor was represented in the proceedings in the original court. This takes me to the other argument that the affidavit does not state the judgment can be enforced by execution in the

country of the original court; and that if it were registered; the registration would not be liable to be set aside under section 10 or 11 of the Act. The affidavit in paragraph 7 states as follows:-

**7. THAT my Counsel on record has informed me that the judgment does not fall within any class of cases in which a judgment may not be ordered to be registered**

This is sufficient for purposes of section 3, 5, 10 and 11 of the Foreign Judgment (Reciprocal Enforcement) Act. But it is desirable that the judgment-debtor makes positive averments clearly stating the type of compliance it is speaking to rather than making generalized statements. And there are those specific depositions which the affidavit in support of an application under section 5 of the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43 should contain. See the Act and the rules on this. Parties should know that they bear the obligation to state their cases and the relief they are seeking with such clarity and particularity as are required of law; and that courts of law have no time to waste on interpreting statements made by parties and left at very high stage of generalization.

[12] I have seen all the documents filed and contrary to the submission by the judgment-debtor, they are in accordance with the Foreign Judgment (Reciprocal Enforcement) Act. The documents are from the High Court of Uganda, to wit: judgment of the designated court of Uganda; Decree; Taxation Ruling; as a Certificate of the Registrar. All these documents have been sealed, signed and certified by the Registrar of the High Court of Uganda, Commercial Division as required by Foreign Judgment (Reciprocal Enforcement) Act, Cap 43. I should mention that a Certificate of the Registrar has been annexed too. Therefore, this application does not at all violate the provisions of the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43 or the orders of the Court in the ruling delivered on the 14<sup>th</sup> of May 2014 as alleged by the judgment-debtor. The judgment-debtor seems to rely on the shortcomings on the application which were revealed in the ruling of 14<sup>th</sup> May 2014. The ruling of the court delivered on 14<sup>th</sup> May 2014 was based on the state of the application and documents which had been presented before the court at the time. The ruling was specific and was not intended to bear a general condemnation of any subsequent application filed pursuant to the said ruling unless, of course, if the application repeated or carried over similar shortcomings. Counsel also seems to equate the shortcomings he found in the application to an act of contempt of court. I do not think those omissions would assume proportions of contempt of court even if we use a very magnanimous yardstick.

**ORDERS**

[13] In light thereof, the Court is satisfied as to the proof of matters required by the Act and rules of court; the application dated 16<sup>th</sup> June 2014 complies with the Act; the judgment to be registered *is* final and conclusive as between the parties thereto; the judgment is not wholly satisfied; and it can be enforced by execution in the country of the original court. And by estoppel of record enforcement of such final and conclusive judgment cannot be denied. See the case of *Innocent Musheja & Another V Marshall Fowler Engineering Limited [2014] eKRL* (E.K. Ogola J) as well as *Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 16* at page 852. Accordingly, I order that the judgment by Honourable justice M. S Arach Amoko delivered on 7/7/2010, to be registered in accordance with section 6 of the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43. And subject to the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, the registered judgment, for the purposes of execution, shall be of the same force and effect as a judgment of the High Court entered at the date of registration. The upshot is that I allow the application dated 16<sup>th</sup> June, 2014 with costs to the judgment-holder. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 23<sup>rd</sup> day of February 2015**

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**F. GIKONYO**

**JUDE**