



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 128 OF 2013**

N M .....APPLICANT

**VERSUS**

A M.....RESPONDENT

**RULING**

1. The Originating Summons before me is dated 6<sup>th</sup> December 2013. It is brought under **Sections 2, 5 & 6** of the **Foreign Judgment and Reciprocal Enforcement) Act** (hereinafter referred to as the Act) and **Section 1A & 1B** of the **Civil Procedure Act** and **Section 43** of the **Laws of Kenya**. It seeks for orders that the court be pleased to register the agreement dated 17<sup>th</sup> September 2013 as an Order of the High Court of Kenya at Nairobi, and the same be enforced as an order of the court. That upon granting, the court do assist in enforcing the said Orders in its entirety.

2. The application is based on grounds that the parties were married and are now divorced in Divorce proceedings filed in New York State being INDEX NO. [particulars withheld] M vs M. That in the course of the divorce proceedings the parties entered into a comprehensive settlement in which they agreed to cooperate. That the Respondent reneged on the agreement and has made every effort to frustrate the agreement to the Applicant's detriment and that of the child of the marriage. The Respondent's actions are prejudicial to the minor who stands to suffer irreparable loss since she is about to be locked out of her school for failure by the Respondent to pay school fees. The Applicant is in the process of purchasing a home to live in with her daughter but that cannot be achieved unless the orders sought are granted.

3. The Applicant in her supporting affidavit dated 6<sup>th</sup> December 2013 deponed that the Respondent is ordinarily resident in Nairobi. That she commenced divorce proceedings being M vs M – INDEX NO. [particulars withheld] (Hon. Judge Maria G. Rosa) in the state of New York. In the course of the proceedings the parties entered into a settlement which was adopted as of the Divorce proceedings. The said agreement provided for:

- i. Equitable distribution of marital property.
- ii. The Applicant will be entitled to a bonus of the Respondent's 2012 payment from IBM.
- iii. The Applicant will be entitled to the Respondent's 50% retirement benefits within 30 days of settlement.
- iv. The parties will immediately place all the property described as L.R. No. [particulars withheld]

- Miotoni Karen in the market for sale at a price mutually agreed by the parties failing which the parties will agree on an agent.
- v. The parties are to cooperate in the sale of the Kenyan property and also agree to cooperate in selling the property upon which proceeds shall be shared 50:50 basis less the deductions set out in the agreement.
  - vi. The Respondent was to transfer all shares of stock in Jamii Bank to the Applicant.
  - vii. The National Bank of Kenya shares of stock are to be shared on 50:50 basis between the parties.
  - viii. The parties were to exchange log books for the cars. The Lexus was to go to the Applicant and the Audi to the Respondent.
  - ix. The Respondent was to settle the Attorney General's fees.
  - x. Parties were both required to make each other aware of their physical addresses and agree to communicate on matters relating to the child.
  - xi. The maintenance and child support monies will be paid by the Respondent in the Applicant's dollar account by the first of each month, failure to which his employer is to be informed immediately and the monies removed from his wages directly as per the New York law.

The Applicant avers that the Respondent has refused/neglected to comply with the orders and unless this application is heard and orders granted, she stands to suffer irreparable loss.

4. The Respondent in his grounds of opposition stated that the Applicant has not complied with **Section 5(4)** and **16** of the Act; that there is no proof whatsoever that the alleged settlement was adopted in divorce proceedings, because the court can only register/enforce a judgment and not an agreement. He further stated that there was no proof of a judgment of the original court that could be registered or enforced. That the alleged agreement or judgment sought to be enforced or registered arose from matrimonial proceedings and therefore, by virtue of **Section 3(3)(d)** of the Act, the application is misconceived. The Respondent confirms that he is a resident of South Africa and not Nairobi as alleged by the Applicant.

5. Mr. Mbai learned counsel for the Respondent submitted that there is no foreign judgment that is capable of being enforced by this court and that the application does not meet the standard set by the Act under which it is brought. **Section 3(3)(d)** of the Act does not apply to a judgment in a matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship. Subsection (c) thereof also provides that the Act does not apply to a judgment or Order "*for the periodical payment of money as financial provision for, or maintenance of a spouse or a former or reputed spouse or a child...*"

6. Mr. Mbai argued that the application seeks to enforce an agreement, not a judgment. It is therefore not shown that the said agreement was filed or adopted as an order or the court in the divorce proceedings at New York and in any event it would fall under **section 3(3)(c)** and **(d)** of **Cap 43 Laws of Kenya**. The Applicant has not complied with **section 5(4)** of the Act since she has not annexed a copy of the judgement of the divorce cause or the proceedings thereof.

7. I have perused the application, the replying affidavit and the opposing arguments in the submissions of the counsels on record and I am minded to dismiss the application for the reasons set out here under.

This application has not satisfied the requirements of **Section 5(4)** of the **Cap 43** of the Act, which provides as follows:

An application for registration of a judgment under subsection (1) shall—

- a. **be accompanied by a certificate in the form set out in the Schedule or to the same effect issued from the original court under its seal and signed by a judge or registrar thereof or by**

**an affidavit to the same effect;**

- b. Have attached thereto the judgment or the exemplification or a certified or duly authenticated copy thereof and, where the judgment is not in the English language, a translation thereof in that language certified by a notary public or the registrar of the original court or authenticated by affidavit;**
- c. Be accompanied by an affidavit stating—**
  - i. that, at the date of application, the judgment has not been satisfied or, as the case may be, the sums or items of movable property in respect of which the judgment remains unsatisfied;**
  - ii. that, at the date of application, the judgment can be enforced by execution in the country of the original court;**
  - iii. where, by virtue of section 6(5), the judgment may be registered only in respect of certain of its provisions, the provisions in respect of which it is sought to register the judgment;**
- d. unless otherwise ordered by the High Court, be accompanied, in the case of a judgment given by a superior court of a Commonwealth country, by a certificate under the seal and signed by a judge or registrar thereof certifying that the court is a superior court in that country;**
- e. be accompanied by such other evidence as may be prescribed.**

As can be seen from the foregoing the requirements of the law are quite elaborate and there is a raft of conditions to be met before a judgment entered elsewhere can be registered in the Kenyan courts.

8. Secondly, what is referred to in the **Section 3(1)** of the Act is a judgment or order of a designated court or an award in arbitration proceedings. The provisions of this law do not include agreements entered into between parties, unless such agreements have been adopted by the court and have become orders of the court. The judgment which is the subject matter of this application, having not been annexed, the court finds that it has not been demonstrated that the agreement set out in the application was adopted as an order of the court, in the Divorce proceedings in the New York Court.

9. Thirdly, even if the Applicant had met the requirements of Section 5(4), of Cap 43 Laws of Kenya, the judgment adverted to herein is not among the judgments envisioned, by which she may obtain relief under the Act.

Section 3(3) of the Act provides as follows:

This Act does not apply to a judgment or order—

**(a).....**

**(b) .....**

**(c) for the periodical payment of money as financial provision for, or maintenance of a spouse or a former or reputed spouse or a child or other person who is or was a dependant of the person against whom the order was made.**

**(d) in a matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship, not being a judgment referred to in paragraph (a) or (b) of subsection (1), whereby a sum of money is payable or item of movable property deliverable.”**

It is therefore clear as pike staff that the provisions of the Act set out above specifically exclude the

judgment referred to in this application.

In the premise I find that the Chamber Summons dated 6<sup>th</sup> December 2013 is lacking in merit and I dismiss it with costs to the Respondent.

**SIGNED DATED** and **DELIVERED** in open court this **23<sup>rd</sup>** day of **July 2015**.

.....

**L. A. ACHODE**

**JUDGE**

**In the presence of ..... for the Applicant**

**In the presence of ..... for the Respondent**