



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**MISC. APPLICATION NO. 389 OF 2006**

**IN THE MATTER OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENTS) ACT,  
CHAPTER 43 OF THE LAWS OF KENYA)**

**AND**

**IN THE MATTER OF JUDGEMENT/ORDER OF THE SUPREME COURT OF RWANDA AT  
KIGALI CASE NUMBER RCAA 0012/04/CS**

**INNOCENT MUSHEJA ::::::::::::::::::::::::::::::::::::::: 1ST APPLICANT**

**TWAHIRWA JEAN BOSCO ::::::::::::::::::::::::::::::::::::::: 2ND APPLICANT**

**- VERSUS -**

**MARSHALL FOWLER ENGINEERING LIMITED ::::::::::::::: RESPONDENT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR THE REGISTRATION OF THE  
JUDGEMENT/ORDER OF THE SUPREME COURT OF RWANDA AT KIGALI (CASE NO.  
RCAA 0012/04/CS) ISSUED ON 1ST DAY OF SEPTEMBER 2005, BY THE HONOURABLE  
JUSTICES MUTSINZI JEAN, HAVUGIMANA JULIEN AND MUKANYUNDO PATRICIA**

**BETWEEN**

**MARSHALL FOWLER ENGINEERING LIMITED ::::::::::::::: RESPONDENT**

**- VERSUS -**

**INNOCENT MUSHEJA ::::::::::::::::::::::::::::::::::::::: 1ST APPLICANT**

**TWAHIRWA JEAN BOSCO ::::::::::::::::::::::::::::::::::::::: 2ND APPLICANT**

**AND**

**BANK OF COMMERCE DEVELOPMENT**

**AND INDUSTRIES (B.C.D.I) ::::::::::::::::::::::: VOLUNTARY INTERVENER**

## J U D G E M E N T

1. Before the court are two Originating Summons filed in different files and by different parties but against a common respuence as follows:-

1. *In Misc. Civil Appl. No. 854 of 2006 filed in court on 21st August 2006 where the parties are:-*

***BANK OF COMMERCE, DEVELOPMENT AND INDUSTRY***

– VS –

***MARSHALL FOWLER ENGINEERING LIMITED.***

2. *In Misc. Civil Appl. No. 389 of 2006 dated and filed in court on 12th May 2006, where the parties are:- INNOCENT MUSHEJA & TAWHIRWA JEAN BOSCO*

– VS –

***FOWLER ENGINEERING LIMITED.***

2. The prayers in both applications are the same. In the first application the Applicant, a bank, is an Interested Party in the suit property, and if its application is successful, would receive the suit property on the behalf of the Applicants in the second application. The Applicants in the second application are the actual owners of the suit property.

3. By agreement of the parties the two applications were, for the purposes of hearing, consolidated, with the Misc. Civil Appl. No. 389 of 2006 being the operative file. In that regard the Originating Summons before the court is dated and filed in court on 12th May 2006. The Originating Summons seeks the following orders:-

1. ***That leave be granted to the Plaintiffs to register in the High Court of Kenya the Judgement/Order of the Supreme Court of Rwanda at Kigali Case No. RCAA 0012/04/Cs) issued on 1st day of September 2005.***

2. ***That execution of the said Judgement of the Supreme Court of Rwanda dated 1st September 2005 do issue after 14 days of service of the Notice of Registration of Judgement.***

3. ***That the Plaintiffs be granted leave to apply for further orders after the registration herein above referred to as the Court may deem fit and just.***

4. ***That the costs of this application be provided for.***

4. Together with the Originating Summons dated 12th May 2006, the Plaintiff filed a Chamber Summons application dated 12th of May 2006 seeking the same orders sought in the Originating Summons.

5. The application is based on the grounds set out therein and mainly that there is a final judgement/decree by the Supreme Court of Rwanda in favour of the Plaintiffs which remains outstanding and which the Defendant has refused, neglected and or failed to satisfy. The Defendant Company is alleged to be registered in Kenya and is carrying on business in Kenya but has no known assets in Rwanda and as such the Judgement of the Supreme Court of Rwanda cannot be enforced in Rwanda hence this application. The application is supported by affidavit of JEAN BOSCO TWAHIRWA dated 12th May 2006 with its annextrues, and two further affidavits of the same person filed in court on 27th July 2006 and 5th March 2009 both with annextures.

6. The Originating Summons is opposed. The Defendant has filed a Replying Affidavit sworn by **GABRIEL RAFAEL DAEMLO** dated and filed in court on **14th June 2006**. In addition, the Defendant filed a Notice of Preliminary Objection on 21st May 2007. At this stage it may be

- observed that the said Notice of Preliminary Objection was filed on the basis that the proceedings herein could not proceed for hearing on 22nd May 2007 because the decision sought to be registered was not then a final and conclusive decision, and it was alleged that the said decision was still being reviewed by the Supreme Court of Rwanda. Pursuant to the submissions of the parties before me, and their written submission, it now appears, and I take it as such, that the said Preliminary Objection is still relevant but only in so far as it is to be taken to form part of the opposition to the application, and therefore it will be determined together with the application.
7. With the leave of the court parties filed written submission to the Originating Summons. The Applicants filed their submission on 15th November 2010 while the Respondent did the same on 2nd March 2011. Those submissions were highlighted before me in court on 3rd April 2014.
  8. In summary the Applicants case is that since they already have a final and conclusive judgement of the Supreme Court of Rwanda, the highest court in Rwanda, the process of litigation is exhausted and the Applicants have the right now to execute the said Judgement. But they are unable to do so in Rwanda since the Respondent Company is registered in Kenya and has no known assets in Rwanda. The Applicants submitted that this court has the jurisdiction to register the said Judgement and to have it enforced against the Defendant in this country.
  9. On their part, the Respondent states that the alleged Judgement was not final and conclusive Judgement of the Supreme Court in Rwanda, and that even if it was, the said Judgement was not legitimate since it was procured by fraud in a process, which did not allow the Respondent to freely litigate and ventilate its defence. It is a Judgement tainted by illegality and this court should not clothe it with any legitimacy since the Supreme Court of Rwanda gave it through unclear, illegal and unjust process. The Respondent has urged this court to exercise judicial caution and to deny the application.
  10. In reference to the Preliminary Objection there was little oral submission on the same. As I have stated earlier the Preliminary Objection was to the effect that the decision of the Supreme Court of Rwanda sought to be enforced herein was not final and was inconclusive being the subject of review in the said court. The Plaintiff in response filed an affidavit by TWAHIRWA JEAN BOSCO sworn on 4th March 2009 which stated that the said application for review did on the 2nd of October 2006 affirm the Judgement sought to be enforced herein. With that submission, it appears that the issue of the finality and conclusiveness of the said Judgement is now a matter of fact. The Respondent in their oral submission then shifted from the inconclusive of the said Judgement to the allegation that the Judgment was procured by fraud in an unjust and unfair process tainted with serious irregularities and illegalities and should not be registered in Kenya on those grounds.
  11. The applicable law in this respect is the Foreign Judgements (Reciprocal Enforcements) Act Cap 43 of the laws of Kenya. The Act provides the procedure to be adopted in an application like this. Section 3 of the Act provides the range of Judgement to which the Act applies. Of particular relevance to this case is Section 3 (1) which provides:-

***Section 3 (1) Subject to Subsections (2) and (3), this Act applies with respect to –***

- a. ***A Judgement 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 or a former or reputed spouse or a child or other person who is or was a dependant of another;***
- b. ***A judgement or order of a designated court in civil proceedings under which movable property is ordered to be delivered to any person, including an order for the delivery of movable property as part of a scheme for the 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 another;***
- c. ***A judgement or order of a designated court in criminal proceedings for the payment of a sum of money in respect of compensation or damage to an injured person or for the delivery of movable property by way of restitution to an injured person;***

- d. ***A Judgement given in any Court on Appeal against a Judgment or order of a designated court referred to in paragraphs (a) and (c).***

***Section 3 (2) continues:-***

***This Act applies to a Judgment referred to in subsection (1) if it –***

- a. ***Requires the Judgement Debtor to make an interim payment of a sum of money the Judgement creditor; or***
- b. ***Is final and conclusive as between the parties thereto, but a judgement 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.***

12. Relying on Section 3 (2) (b) of the Act quoted above it is clear that the Judgement of the Supreme Court of Rwanda at Kigali Case No. RCAA 0012/04/CS issued on the 1st day of September 2005 is conclusive and final as between the parties herein, the Supreme Court of Rwanda being the highest court in that country. There is now no pending application before the Supreme Court of Rwanda at Kigali or any other court in Rwanda the matters having been dealt with and finally concluded. This then answers the Preliminary Objection filed herein by the Respondent that the subject matter of this application were still pending in a court in Rwanda. The said Preliminary Objection is accordingly dispensed with as it lacks the factual merits necessary to sustain it.

13. All parties in this matter agreed that this court has the jurisdiction to hear and determine the application. However, the Respondent urged the court to exercise its jurisdiction and discretion sparingly and most judiciously, as the judgement sought to be registered was obtained through alleged series of illegalities. The Republic of Rwanda is listed as one of the reciprocating countries for the purposes of the said Act. That *prima facie* indicates that the Republic of Kenya respects the established legal order in Rwanda, and also the Judgements and/or decrees which may emanate from the courts of that country. A Judgement or order from the highest court of Rwanda will be, *prima facie*, considered a legally binding document procured in a legal way or manner. A court sitting in Nairobi will not normally question the integrity of an order of Judgement emanating from the highest court of a reciprocating country, unless on the face of the record, there is indeed a need to question such a document. Before this court is a certificate issued by the Supreme Court of Rwanda confirming that the Judgment of 1st September 2005 that is sought to be enforced herein is its decision. There is the French and the English translations of the Judgment annexed to the Originating Summons and Chamber Summons applicators both dated 12th May 2006. The parts in the Judgement of the Supreme Court of Rwanda sought to be enforced have been itemised in the two affidavits of TWAHIRWA JEAN BOSCO both sworn on 12th May 2006. There is no submission on the part of the Respondent that the said French or English translations are incorrect, or that the said annexed Judgement in fact is not the Judgement of the said court. Instead, the Defendant has raised other issues altogether which impugn the integrity of the said Judgment and on which basis the Respondent asks this court to decline the application. Mr. Nowrojee for the Respondent submitted that in principle the act of reciprocity is an ideal principle. It allows reciprocating countries to give full faith and credit to the Judgement of reciprocating counterparts. Quoting the court in **SA CONSORTIUM GENERAL TEXTILES – VS - SUN SAND AGENCIES LTD. [2978] 2 ALL ER 339, 335 D cited in PATEL – VS - BANK OF BARODA [2001] 1EA 189, 194**, the counsel said -

***“We should give full faith and credit to the Judgement of the French Court just as we would expect them to give full faith and credit to a Judgement of an English court . . .”***

14. I think we all agree with that, and indeed, we should give full faith and credit to the Judgement of Rwanda Court as we would expect them to give full credit and faith to our Judgement. In that process, however, there should be no injustice to the Respondent either. Mr. Nowrojee submitted that this second principle is protected by statutory safeguards afforded to the Respondent, and by

procedural requirements which have to be observed by the Applicant and that these have not been met in this application.

15. Section 9 of the Civil Procedure Act, Cap 21 provides the following safeguards and exceptions: -

***“9. A foreign judgement shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title except –***

- a. ***Where it has not been pronounced by a court of competent jurisdiction;***
- b. ***Where it has not been given on the merits of the case;***
- c. ***Where it appears on the face of the proceedings to be founded upon an incorrect view of international law or a refusal to recognising the law of Kenya in cases in which such law is applicable;***
- d. ***Where the proceedings in which the judgement was obtained are opposed to natural justice.***
- e. ***Where it has been obtained by fraud.***
- f. ***Where it sustains a claim founded on a breach of any law in force in Kenya.***

The Respondent submitted that the said Section 9 of the Civil Procedure Act applies herein and so the said Judgement does not qualify to be registered.

16. The third principle applicable is that registration is a discretionary relief. This is the effect of Section 9, Civil Procedure Act Cap 21, Foreign Judgements (Reciprocal Enforcement) Act, Cap 43, and the applicable case law.

The principle was set out in *Re Lowenthal* (1967) EA 75:-

***“There is one other matter to which I wish to refer. Registration under Part II (of the old Act) is discretionary and subject in all the circumstances of the case to the court considering it just and convenient that the Judgement should be enforced in Kenya.”***  
(per Rudd J., 77H).

The Respondent submitted that this is still the position under Cap 43 (since 1984), where before the Court ‘*shall enter judgement*’ it must be ‘*satisfied as to proof of matters required by the Act and any rules of court.*’ Further discretion is vested in the court by the provisions of **Section 10 (2) (n), Foreign Judgements (Reciprocal Enforcement) Act**, where the court has to decide whether ‘*the enforcement of the Judgement would be manifestly contrary to the public policy.*’

17. Applying these three principles, the Respondent submits that the registration sought is in violation of the several provisions of the above laws, safeguards and procedural requirements, and in particular, that the proceedings in which the Judgement was obtained are opposed to natural justice in that:-

- ***The proceedings in which judgement was obtained were carried out in the absence of the Respondent.***
- ***Judgement was entered for not one, but also an added second claimant (‘Voluntary Intervenor’) against the Respondent, neither of whom was it heard.***
- ***The court did not call for or receive any evidence from the Respondent.***
- ***When the Respondent applied for review, the Supreme Court did not admit the review and no review took place and the Respondent was denied a hearing.***
- ***The finding of the court on various documents and legal relationships were without the benefit of the Respondent’s submissions or cross-examination thereon.***
- ***The Respondent became a party without notice of the proceedings continuing in the absence of itself or its counsel.***

18. It was further submitted for the Respondent that the said decision was not made on the merits of

- the case because the Respondent was never heard, and that th
19. Evidence of the Respondent was never taken, and that the court proceeded in the absence of the Respondent, making the proceedings effectively a formal proof without notice of such step to the Respondent. Citing the Court of Appeal in **DT DOBIE – VS - MUCHINA (1982) KLR 1**, the Respondent submitted that the findings of facts in the Judgement are thus not conclusive and can be examined by the court pursuant to Section 4 (3) (2), Foreign Judgements (Reciprocal Enforcement) Act, Cap 43.
20. In addition, the Respondent submitted that the said Judgement was in breach of a law in force in Kenya, that is Section 9 (f), Civil Procedure Act Cap 21. The Respondent submitted that the decision is not just as required to be under the provisions of Section 1A, and 1B of the Civil Procedure Act. It is submitted that the overriding objective of the proceedings could not have been achieved by the alleged shutting out of the Respondent, and proceeding in its absence without any further court order being served upon it of such consequences. A just determination could not have been achieved in the absence of such notice in all the circumstances of the case. Mr. Nowrojee submitted that this court must independently test the circumstances leading to the Judgement, and dismiss the application if that Judgement is tainted with procedural irregularities. It was further submitted that the Judgement does not qualify for registration under Section 3 (3) (b) of the Act which exempts its applicability to the extent to which the Judgement provides for the payment of a sum of money by way of exemplary, punitive or multiple damages. In this regard, the Respondent submitted that the Judgement contains orders providing for other charges of a nature to taxes and orders in respect of a penalty or a fine, and orders for the payment of money by way of a punitive measure.
21. I have carefully considered the application and submission of parties. The Respondent has made serious allegations about the said Judgement of the Supreme Court of Rwanda. Those allegations go to the integrity of the said Judgement. In the exercise of my discretion, I must examine those allegations, to the extent that I can, sitting in a court in Nairobi. There are allegations that the said Judgement was provided by fraud and forgery and that there were procedural miscarriage of justice, given that the Defendant was not present in some aspects of the hearing after its application for adjournment was denied. What I must state from the outset is that this court will not sit as a Court of Appeal over the matter which has been conclusively determined by a competent and highest court in Rwanda. Any allegations of fraud and forgery are very serious. Those allegations, whenever made in a matter in court, are required to be proved beyond reasonable doubt. I believe that this court would not be the appropriate forum to prove these allegations. I think the jurisdiction of this court to deny this kind of application is very limited, although that jurisdiction is discretionary. It is limited in this sense. A reciprocating country, like Kenya, has admitted the legitimacy of another reciprocating country like Rwanda. By that act alone, Kenya acknowledges that Rwanda as a sovereign country has a competent Judiciary and a working legal system acceptable in Rwanda and in all other reciprocating countries. Kenya then accepts at the face value, that any decision reached by any court in Rwanda, leave alone its Supreme Court, the highest in the land, is binding unless there are obvious reasons of public knowledge which militates otherwise. So in peace time, and in absence of any epidemic or calamities which may have affected the administration of justice in that country, Kenya cannot question the legitimacy of a decision of the Supreme Court of Rwanda. To do that would be to openly disparate the Sovereignty of the Republic of Rwanda, and the integrity of its Judiciary and legal system. That is only possible in wartime, where it is deemed that there could have been a general disintegration of the justice system.
22. It must be noted that even in Kenya, today, cases are concluded, and they remain valid for eternity, even where parties have not been given a chance to be heard. The fact that a party applied for adjournment which application was not granted and the matter then proceeded to hearing does not alone amount to procedural injustice enough to find that the Judgement referred to herein was not a valid Judgement. In any event, all those allegations of fraud, forgery and procedural illegalities were raised in the Supreme Court of Rwanda which rejected the same. Before this court is a certified final and conclusive Judgement of a Sovereign Country recognised as a reciprocating party under the Foreign Judgments (Reciprocal Enforcements) Act. The jurisdiction

of this court is not to go into that Judgement and criticize it. Rather, the jurisdiction of this court is to carefully determine whether the said Judgement met the general processes of litigation required in the foreign country. In regard to that, I note and emphasize the stages and processes the suit went through before the final and conclusive judgement of the Supreme Court:-

- a. ***That the Plaintiffs filed suit at the first instance in Kigali Rwanda as R.C. 29454/99 in respect of a debt to British Pounds Thirty Eight Thousand, One Hundred and Sixty Six and Twenty Seven pence (£52,566.27).***
  - b. ***That the said case was heard on 23rd December 1999 and Judgement was rendered in favour of the Plaintiffs.***
  - c. ***That the Defendant being aggrieved with the decision of the court of first instance appealed to the Court of Appeal at Rwanda in Kigali in Case Number RCA 12.969 Kigali Rwanda.***
  - d. ***That the Court of Appeal on the 22nd of June 2001 dismissed the appeal and confirmed the decision of the court of first instance.***
  - e. ***That the Defendant being further aggrieved with the decision of the Appeal Court of Rwanda appealed to the Supreme Court of Rwanda in RC AA 0012/04/CS.***
  - f. ***That the Supreme Court of Rwanda rendered its Ruling on the 1st of September 2005 in the following terms:-***
    - i. ***That the appeal was unfounded.***
    - ii. ***That Bank of Commerce Development and Industries Intervention was unfounded as they were not parties to the contract.***
    - iii. ***That Marshall Fowler Engineering Limited to pay Musheja Innocent and Twahirwa Jena Bosco FRW 51,363,161 as the principal debt.***
    - iv. ***That Marshall Fowler Engineering Limited to pay Bank of Commerce Development and Industries in the place of Musheja Innocent and Twahirwa Jean Bosco the debt equivalent to FRWA 89,194,116 as demanded as at 1st May 2005.***
    - v. ***That Marshall Fowler Engineering Limited to pay the costs/charges equivalent 4% of FRW 51,363,161 that is to say FRW 2,054,526 to the Rwandan Government.***
    - vi. ***That Marshall Fowler Engineering Limited to pay costs/charges to Bank of Commerce Development and Industries 4% of 89,194,116 Rwandan Francs that is to say FRW 3,567,767 to the Rwandan Government.***
    - vii. ***That Marshall Fowler Engineering Limited to pay to Bank of Commerce Development and Industries FRW 2,000,000 for court procedures.***
    - viii. ***That Marshall Fowler Engineering Limited to pay the sum of FRW 14,500 in respect of court fees disbursements.***
  - g. ***That the said Judgement of the Supreme Court of Rwanda is final and conclusive as between the Plaintiffs and the Defendant.***
  - h. ***That the Defendant despite demand, has refused, neglected and or failed to satisfy the said Judgement of the Supreme Court of Rwanda.***
  - i. ***That the Defendant Company is duly registered as a Company within the Republic of Kenya and runs business in Kenya and has no known assets in Rwanda and as such the Judgement of the Supreme Court of Rwanda cannot be enforced in Rwanda.***
23. This court cannot impugn the stages and processes named above which led to the Judgement under consideration. To do that would be the same as the High Court of Kenya not only opening up this matter for fresh litigation, but the High Court of Kenya doing that inside the Supreme Court of Rwanda in Kigali. That would be a judicial tragedy, a scenario which was never envisaged under The Foreign Judgements (Reciprocal Enforcements) Act Cap 43 Laws of Kenya. I also reject the submission that the said Judgement contains other charges of a nature similar to taxes and or orders in respect of a penalty or a fine or orders for the payments of money by way of a punitive measure against the provisions of Section 3 (3) (b) of the Act. This is so because the Applicant in the supporting affidavit of TWAHIRWA JEAN BOSCO dated 12th May 2006 at paragraph 15 has stated which parts of the said Judgment the Applicant seeks to register and enforce, and these are orders (iii), (viii) and (ix) of the said Judgement. These orders are not exempted under the said Section 3 (3) (b) of the Act.

24. In view of the foregoing, it is my view that the Respondent is precluded from challenging the enforcement of the Judgement issued by the Supreme Court of Rwanda on 1st 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 judgement in the nature of a final determination, even if that judgement 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 Judgement that the Respondent had sought to be reviewed, the Judgement sought to be review remains the final judgement in the matter.

**Halsbury's Laws of England, 4th 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 judgement in its nature final. When the word ‘final’ is so used with reference to a judgement, it does not mean a judgement which is not open to appeal but merely a judgement which is ‘final’ as opposed to ‘interlocutory’. A judgement which purports finally to determine rights 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.”*

In the present case, the Respondent having unsuccessfully attempted to review the judgment sought to be enforced herein, it has no other forum to appeal the decision and lacks any other opportunity to seek a further review of the judgement in Rwanda, or anywhere at all.

25. The upshot of the foregoing is that the Originating Summons filed by the Plaintiffs dated 12th May 2006 and the Chamber Summons of the same date whichever is applicable, are allowed as prayed with costs to the Plaintiffs/Applicants.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 30TH DAY OF MAY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Wanjohi holding brief for Abida for Applicant

Gachuki holding brief for Nowrojee for Respondent

Teresia – Court Clerk