REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 112 OF 2012 (O. S.)

IN THE MATTER OF: The Foreign Judgments (Reciprocal Enforcement) Act

AND

IN THE MATTER OF: An application for Registration of A Judgment of the High Court of Justice, Queen's Bench Division Leeds District Registry obtained in Claim No. 61 s 90055

COSMOS HOLIDAYS PLC …… JUDGMENT CREDITOR/RESPONDENT

VERSUS

DHANJAL INVESTMENTS LIMITED …JUDGMENT DEBTOR/APPLICANT

R U L I N G

1. There were two Applications filed herein almost simultaneously, the one currently for determination before this Court being a Chamber Summons dated 11 May 2012 brought by the Applicant/Judgement Debtor seeking the striking out of the foreign registered judgement obtained by the Respondent/ Judgement Creditor or, in the alternative, that the proceedings before this Court be stayed pending finalisation of the intended appeal in *Winding up Cause No. 45 of 2010*.

The other Application was dated 25 May 2012 and sought orders that the Respondent/ Decree Holder do provide security for costs. That Application was dealt with and determined by Mutava J. on 4 October 2012. The Judge ordered that the Respondent/Decree Holder should provide security in the amount of Shs. 1 million.

2. The Applicant/Judgement Debtor's said Chamber Summons apart from applying for Orders as above also prayed for the Foreign Judgement given in claim No. 6LS90055 in the Queen's Bench Division of the High Court in England dated 10 August 2009 and registered in Kenya on 16 March 2012 be set aside in its entirety. However the Applicant/Judgement Debtor did detail in its Application that the first two reliefs were sought to be argued as matters of preliminary objection in the first instance. The Application was brought under the provisions of **section 10 (2) (c)** and **(4)**, **section 3 (3) (b)** and **section 4 (1) (i)** of the *Foreign Judgements (Reciprocal Enforcements) Act* (hereinafter "the Act") as well as **section 7** of the *Civil Procedure Act* and **Order 42** of the *Civil Procedure Rules, 2010*. As regards the first 2 prayers as above, the Applicant/Judgement Debtor based its Application on the following grounds:

> **"(i) In December 2010, the respondent (Cosmos) filed winding-up proceedings in the High Court of Kenya at Nairobi, in W.C. No. 45 of 2010, in which it sought to wind up the Applicant for failure (Dhanjal) to pay to Cosmos the sum of £325,982.29.**
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> **(ii) All parties participated in those proceedings, which were ultimately struck out by the Court on the 28th June, 2011.**
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> **(iii) The respondent (Cosmos) lodged a Notice of Appeal, manifesting its clear intention to proceed to the Court of Appeal to challenge the ruling of the High Court delivered on the 28.06.2011.**
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> **(iv) In these circumstances, the provisions of Order 42 Rule 6 (4) come into play. That Rule provides as follows:**
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> > **"4. For the purposes of this rule, an appeal to the Court of Appeal shall be deemed to have been filed, when under the rules of that Court, Notice of appeal has being given.**
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> **(v) There being an appeal, arising out of the same matter, between the same parties, and litigating in the same capacities, the bringing of the present proceedings during the pendency of that appeal is improper.**
>
> **(vi) In the alternative and without prejudice to the foregoing, the present proceedings are res judicata W.C. 45 of 2010 aforesaid".**

3. The Applicant/Judgement Debtor detailed in its grounds upon which it sought the setting aside of

the English judgement that the court in England lacked jurisdiction for the purposes of the Act where it determined claims that arose as a result of the attack on British tourists at Mwaluganje Elephant Camp as a result of which some of the tourists were injured. However, leaving that aside for the moment, the Applicant/Judgement Debtor maintained that the application for registration of the foreign judgement as brought before this Court was materially inadequate and ineffective as it failed to comply with the mandatory provisions of **section 5 (4) (d)** of the Act. The objection that would seem to be raised was that the judgement of a Superior Court of a Commonwealth country was required to be sealed and signed by a Judge or Registrar certifying that the Court that issued the judgement is a superior court in the country. The Applicant/Judgement Debtor also raised a query as to whether the Respondent's claim was based on contract pointing to **section 4 (1) (g)** of the Act. It noted that the Respondent had admitted that it was not part of any contractual obligation as between it and the Applicant/Judgement Debtor that was to be carried out anywhere in England. Accordingly, the Applicant/Judgement Debtor maintained that for this reason, as well, the registration of the English Judgement in Kenya ought to be vacated. Then as regards the Applicant/Judgement Debtor's ground raised on transgressions under **section 10 (1) (m)** and **10 (4)** of the Act, it put forward the position that that the rights under the Judgement in the Court at Leeds were not vested in the Respondent. Finally, as regards the grounds upon which its Application was based, the Respondent/Judgement Debtor maintained that the award of damages as well as the costs and interest adjudicated by the English Court were unreasonably high and excessive in comparison to what the Kenya Court may have awarded. Under **section 10 (4)** of the Act, this Court could set aside the English Judgement on the basis of excess.

4. The Applicant/Judgement Debtor's application was supported by the Affidavit of **Andrew Nyakota** sworn on 10 May 2012. The deponent maintained that he was the Manager in charge of operations for the Applicant/Judgement Debtor. He noted that the Originating Summons herein had been brought in addition to proceedings originally brought by the Respondent against the Applicant/Judgement Debtor, under a Winding-up Notice issued on 10 August 2010 under **section 220** of the *Companies Act*. The amount the Respondent had claimed in the Winding-up Notice was GBP 325,982.29 which was exactly the same amount as sought in the present proceedings. However, in the Originating Summons, the Respondent had not made any mention of these previous proceedings instituted in Kenya as against the Applicant/ Judgement Debtor. The deponent then detailed what had transpired so far as the Winding-up proceedings were concerned in terms of it opposing the Petition filed in *Winding-up Cause No. 45 of 2010*. Mr. Nyakota referred at length to the Affidavit filed in Court on 3 February 2011 having been sworn by one Robin James Adams, the same person who had sworn the affidavit in support of the Originating Summons. He attached copies of the Affidavit which had been sworn for and against the Winding-up Petition, commenting upon the same as he thought necessary. The deponent then recorded that the Court delivered its ruling in the Winding-up cause on 28 June 2011 when it struck out the Petition filed by the Respondent with costs. Thereafter, the Respondent had filed a Notice of Appeal against the whole decision of this Court. He maintained that the Respondent was desirous of pursuing the Appeal as was confirmed by correspondence exchanged by the advocates for the respective parties in connection therewith.
5. In concluding his Supporting Affidavit, Mr. Nyakota referred to the Affidavit sworn on 14 February 2012 by the said Mr. Adams in support of the Respondent's Application to register the Foreign Judgement in Kenya. The deponent commented thereupon as follows:

> **"30. That I now turn to substantively respond to the averments of Mr. Adams in his affidavit sworn on the 14th February 2012 further as follows:**

a. **It is not true, factual and or legal, to aver as he does in Para 7 (a) that the judgment creditor is entitled to enforce the said judgment. Consequently, it follows that all the averments contained in that paragraph (7 (a)-(i)) are inapplicable in assisting Cosmos.**

b. **It is apparent that in Para 7 (i) Cosmos does not disclose the nature of the claims which gave rise to the alleged debt now claimed, it however states that those claims are set out in paragraph 5 to 7 of the particulars of claim.**

c. **A perusal of paragraphs 5 to 7 of the particulars of claim clearly shows that the claim arose as a result of <u>personal physical injuries occasioned to tourists who were in Kenya on holiday</u>. This attack by robbers on the tourists occurred on the 3rd and 4th May in the year 2000.**

d. **In conclusion therefore, the alleged indemnity which Cosmos seeks from Dhanjal is in respect of damages paid by Cosmos, to those tourists, <u>for such injuries suffered</u>".**

Mr. Nyakota completed the picture for the benefit of this Court by concluding his Affidavit by attaching seven medical reports in relation to the injuries sustained by the said tourists who were on a visit to Kenya and at the time being booked at the Travellers Beach Hotel, owned by the Applicant/Judgement Debtor. He noted that the tourists were attacked and injured during the night of 3rd/4th May 2000 while out camping at the aforesaid Elephant Camp.

6. The said **Robin James Adams**'s swore a Replying Affidavit in response to the Chamber Summons dated 11 May 2012, on 18 June 2012. He commenced the same by stating that the Petition in *Winding-up Cause No. 45 of 2010* was struck out on 28 June 2011 on the application of the Applicant/Judgement Debtor primarily on the ground that the Judgement Creditor had not registered the English judgement in Kenya. The deponent commented that Njagi J., who struck out the Petition, had noted in his Ruling that the Respondent still had sufficient time to apply for registration of the said Judgement. He confirmed that the Respondent had filed a Notice of Appeal. However, he had been advised by the Respondent's advocates on record that under **Rule 83** of the *Court of Appeal Rules, 2012* where a party had failed to institute an appeal within the appointed time, it was deemed to have withdrawn the said notice. Consequently, as far as the Respondent was concerned, the Notice of Appeal filed on 5 July 2011 is deemed to have been withdrawn. The deponent went on to attach the Judgement of the English Court as an annexure to his Affidavit. The deponent then commented upon the findings in the said Judgement and noted that the Applicant/Judgement Debtor herein had appealed to the English Court of Appeal, attaching a copy of that Judgement as a further exhibit to his said Affidavit. He noted that the English Court of Appeal's Judgement made it clear that the Respondent herein had brought only one claim against the Applicant/Judgement Debtor which was for indemnity under the terms of the contract between the two parties. Mr. Adams then noted that there had been two separate sets of proceedings in England the first being brought by the tourists who had been injured in the incident as against the Respondent. The second set of proceedings is the case which resulted in the Judgement which has been registered here in Kenya. Again the deponent emphasised that the case had been brought by the Respondent seeking indemnity under the Contract dated 29 October 1999, (hereinafter "the contract") between it and the Applicant/ Judgement Debtor.
7. Following upon the Applicant/Judgement Debtor's unsuccessful appeal in the English Court of Appeal, the case had been referred back to the Judge at first instance to quantify the indemnity to which the Respondent was entitled. The deponent stated that he was present during the quantification hearing as well as at the delivery of the Judgement on the same day. He noted that both the Respondent herein and the Applicant/Judgement Debtor were represented by counsel during that hearing. In that regard, I consider the contents of paragraph 16 of Mr. Adams' Replying Affidavit very pertinent to the Application before this Court and would detail of the same as follows:

> **"16. The issues determined by the Court were the reasonableness of: (i) the damages settlements paid by the judgment creditor to the tourists; (ii) the amount that the judgment creditor agreed to pay in respect of costs to the tourist's legal representatives; and (iii) the costs incurred by the judgment creditor in resolving tourist's claims. The Court also considered the extent of interest to be allowed on the above items. The judgment was delivered after the judgment debtor had been heard on all issues. Following exchanges between the legal representatives for the parties, the judgment amount was agreed at £325,982.29 and incorporated into the final Order that appears at page 3 of exhibit "RJA 3". This sum does not include any allowance for the judgment creditor's costs of pursuing the claim again the judgment debtor which fall to be assessed separately".**

It seems from the above that the judgement amount was agreed. Mr. Adams, concluded in his Replying Affidavit by noting that the Certificate of Judgement issued by the High Court in England as annexed to his Affidavit sworn on 14 February 2012, in support of the Originating Summons contained at clause 8 the certificate as required by **section 5 (4) (d)** of the Act.

8. Presumably for the reason that the Security for Costs Application was taking time, the Applicant/Judgement Debtor's written submissions were not filed herein until 11 February 2013. The Respondent's submissions followed shortly afterwards, being filed on 6 March 2013. The Applicant/Judgement Debtor outlined the two substantive Orders that it was seeking at this stage. It went on to note that one of the grounds that it was urging, was that the Application filed by the Respondent on 23 February 2012 should be struck out as the same was *res judicata*. The Applicant/Judgement Debtor maintained that matters which have been traversed herein were raised and determined in the proceedings brought by way of Petition filed by the Respondent in *Winding-up Cause No. 45 of 2010. In the opinion of the Applicant/Judgement Debtor this Court had already ruled upon the matter bearing in mind that the parties in the Winding-up Cause were the same and the amount of money claimed was also the same as detailed above. Further, the date of the judgement to be enforced was in both instances the 10 August 2009 and which bore the same claim No 6LS0055.*
9. The submissions continued that in a further demonstration that the Originating Summons was res judicata, the Applicant/Judgement Debtor referred to paragraph 7 (i) of the Affidavit in support of the Originating Summons, which is repeated in the particulars of claim filed in the English High Court by the Respondent. In arriving at the determination on the face of the Winding-up Petition, the parties were required to file written submissions which the Applicant/Judgement Debtor did on 21 February 2011. The submissions were set out in full by the advocates for the Applicant/Judgement Debtor in relation to paragraphs 15 and 16 of their former submissions. It was submitted that paragraphs 15 and 16 provided further grounds that made the bringing of the Petition based on an unregistrable judgement here in Kenya. It was the Applicant/Judgement Debtor's view that the Respondent had now come to court again, after its Petition had been struck out, to seek and obtain registration of the Judgement. In its submission, the Respondent had squandered its chance to do so, when it went for the winding-up of the Applicant/Judgement Debtor without simultaneously seeking the registration of that Judgement. To this end, the Applicant/Judgement Debtor referred the Court to the provisions of **section 7** of the *Civil Procedure Act* more particularly Explanation 4 thereof.
10. The Court was also referred to the finding of **Lord Diplock** in the well-known case of **D. S. V. Silo Und Verwaltungs Gesellschaft M. B. H. v Owners of the Sennar (1985) 1 WLR 490**. The Applicant/Judgement Debtor noted that in the case before this Court, it was not dealing with previous proceedings from a foreign court but with those from a Court of coordinate jurisdiction. In taking account of the words of the **Lord Diplock**, the Applicant/Judgement Debtor maintained that the conclusion reached by this Court (Njagi J.) on 28 June 2011 was one that cannot be varied, reopened or set aside by this Court. As the Appeal against that Ruling by Njagi J. had been abandoned, the Ruling was a judgement in finality on the same matters that the

Applicant/Judgement Debtor is relying upon in its present application. Such conclusion, maintained the Applicant/Judgement Debtor, was further fortified when one considers that, whether the proceedings in the issue were brought by Petition or by Originating Summons, the core of the matter was the question of enforceability. In order to emphasise its submission as regards *res judicata*, the Applicant/Judgement Debtor referred the Court to the case of **Mburu Kinyua v Gachini Tutu (1978) KLR 69** as per **Madan JA** (as he then was) quoting from **Wilgram V.C.** in **Henderson v Henderson (1843) Have, 100** as follows:

> **"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".** (underlining mine)

To my mind also worth considering in so far as the **Mbuyu Kinyua** case is concerned is the finding of **Law JA** as quoted by the Applicant/Judgement Debtor as follows:

> **"Mr. D. N. Khanna submitted that the second application was not res judicata because the decision in the first application was not on the merits, as the merits of the appellant's case had not been disclosed in his affidavit. With respect, the merits of the proposed defence were known to the appellant and his advisers when the first application was made and could have been disclosed. It was held as long ago as 1932, by the Court of Appeal for Eastern Africa, that it is only when the facts on which a party is relying in the second proceedings were not known to him at the time of the former proceedings, that the defence of resjudicata cannot be sustained (See *Duranji Lal & Co vs. Bhaijee* (1932) 14 KLT 28)" ….**
>
> **Can only successfully file a second application if it is based on facts not known to him at the time he made the first application". (Emphasis added).**

11. The Applicant/Judgement Debtor continued with its submissions by referring to the Act, in detailing that it did not apply to the present Judgement sought to be registered, because **section 3 (3) (b)** clearly excluded its application. That subsection reads as follows:

> **"3. This Act does not apply to a Judgement or order:-**
>
> **(b) to the extent to which it provides for the payment of a sum of money by way of an exemplary, punitive or multiple damages."**

Thereafter the submissions of the Applicant/Judgement Debtor went into considerable detail concerning the relevant portions of the supporting Affidavit with respect to this Application. They concluded that the claims and payments made in this matter were in respect of the injuries suffered by

tourists visiting in Kenya and as supported by the Medical Reports which had been annexed to the Supporting Affidavit herein. Counsel submitted that where a claim is based on personal physical injuries sustained by persons in Kenya but those persons do not file suit for recovery of damages for such personal injuries here in Kenya, but do so in England, any judgement so obtained cannot be registered and is not enforceable in Kenya. The Applicant/Judgement Debtor then set out in detail the provisions of **section 4 (1) (i)** of the Act. It maintained that that section came into play and that this Court cannot recognise the jurisdiction of the English High Court in determining compensation for the claims for injuries which were sustained whilst the claimants were in Kenya.

12. In the third leg of its submissions, the Applicant/Judgement Debtor referred to paragraph 7 (i) of the Affidavit of Mr. Adams in which the latter had stated that the judgement debt arose from the contract entered into as between the Applicant/Judgement Debtor and the Respondent under which the Applicant/Judgement Debtor was to provide accommodation for tourists. The Applicant/ Judgement Debtor set out the provisions of **section 4 (1) (g)** of the Act as follows:

> **"(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."**

The Applicant/Judgement Debtor submitted on this point that the Court could not recognise or treat the English High Court as having had the jurisdiction to determine the compensation claims presented to it even though based on contract, since no part of that contract was to be performed in England by the injured tourists. It maintained and submitted that the Judgement of the English High Court cannot therefore be recognised for the purposes of registration and subsequent enforcement in Kenya. Consequently, the Applicant/ Judgement Debtor prayed that the Judgement registered by this Court on 16 March 2012 be set aside.

13. The Respondent noted that it had obtained a Judgement out of the High Court of Justice of England and Wales for the said sum of GBP 383,570.90 together with interest thereon from 26 October 2011. The Respondent pointed to the Certificate issued by the said Court more particularly paragraphs 2, 3, 4, and 5 thereof which clearly showed that the Applicant/Judgement Debtor had defended the proceedings in England. The said Judgement was registered in Kenya on 16 March 2012. After setting out the relevant provisions of **section 7** of the *Civil Procedure Act* as regards the first complaint of the Applicant/ Judgement Debtor, being that the matter was *res judicata*, the Respondent submitted that it was important to identify the issues which Njagi J had heard and finally determined as per his said Ruling of 28 June 2011. The Respondent set out 2 findings of the learned Judge in relation to the Winding-up Petition, the main one being that as the Judgement of the English High Court at Leeds was not registered in Kenya, the applicant therein (the Applicant/Judgement Debtor herein) had made out a *prima facie* case for the grant of an injunction in full compliance with the express provisions of **section 5 (1)** of the Act. In the opinion of the Respondent, Njagi J. had determined only one question and one question only – whether the judgement creditor could bring a winding up petition based on the English judgement without first registering the said Judgement under the Act. That was what was *res judicata*. According to the Respondent, the Applicant/Judgement Debtor herein could not have it both ways firstly arguing that the winding-up Petition be struck out because the English judgement was not registered in Kenya and secondly that the Respondent (Judgement Creditor) could not now apply for registration which is what it had submitted had to be done first. In this regard, the Respondent referred to the **D. S. V. Silo** case (supra) cited to this Court by the Applicant/Judgement Debtor.
14. The Respondent then turned its attention to the provisions of the Act and noted that the English Judgement which had been registered was a Judgement given in proceedings between the Respondent and the Applicant/Judgement Debtor. It had not involved the tourists who were injured while at the Applicant/Judgement Debtor's premises at the Elephant Camp, South Coast. The Respondent referred to the proceedings as regards the English Court as well as the judgements of the High Court and the Court of Appeal in England exhibited to the Replying Affidavit of Mr. Adams sworn on 18 June 2012. It particularly noted that the Judgement in the High Court set out the contractual position between the parties in the case and made it clear that the question that was

determined was whether the Judgement Debtor therein was to indemnify the Judgement Creditor under the terms of the contract between those two parties. The Respondent also pointed out the exclusive choice of English jurisdiction in clause No. 13 of the contract between the parties. Further, it noted that the English judgement had not awarded "exemplary, punitive or multiple damages" as envisaged by **section 3 (3) (b)** of the Act. It was not a judgement to recover damages from physical injury to the person as contemplated by **section 4 (1) (i)** of the Act. It was a judgement based on contractual indemnity. The Respondent noted that this very point had been raised in **HCCC No. 111 of 2012 (O. S.) Kuoni Travel Ltd v Private Safaris (East Africa) Ltd** as per **Mutava J.** In that case the learned judge had found that what was being registered in Kenya was a judgement on contractual indemnity and that it had been properly registered.

15. The Respondent made two more points in its submissions worthy of note. Firstly it maintained that the Applicant/Judgement Debtor had submitted to the jurisdiction of the English courts as per the contract between the parties containing the exclusive jurisdiction provision. Further, it had participated in the English proceedings both in the High Court there and on to the Court of Appeal. Consequently, the English courts had jurisdiction within the meaning thereof under **section 4 (1) (g)** of the Act. The Respondent concluded that the decisions of the English High Court and the Court of Appeal were decisions of competent courts on the issue of contractual obligations. For the above reasons, the Respondent submitted that the English Judgement was properly registered in Kenya.
16. When the parties appeared before Court to highlight their submissions, Mr. Buti for the Applicant/Judgement Debtor emphasised that the amount claimed in the Winding-up proceedings being *Winding-up Cause No. 45 of 2010* and the amount claimed in the registered Judgement was the same. Further, the same documents that appeared in the Originating Summons were the same documents put forward in support of the Winding-up Petition that was struck out. The issue of the registration of the Judgement was central and was canvassed at the hearing of the Petition. The question was whether the English Judgement should be registered or not, the Petitioner maintaining that such was not necessary. Further, the whole question of the English Judgement being based on an indemnity was also canvassed during the hearing of the Petition. Counsel for the Respondent seemed to take the view in those proceedings that registration of the English Judgement was discretionary. Mr. Buti maintained that the Respondent was at all times told that registration was a necessity but it ignored those warnings, the Petition was struck out and the Respondent has now come back for a second bite. Counsel also drew the attention of the Court to the Notice of Appeal which had been filed by the Respondent and was still in place. When the Respondent came to register the English Judgement, it did not notify this Court that there was still an appeal being proferred in relation to the Petition, which had been struck out. Similarly, the contract, upon which the Respondent relied for its Judgement on indemnity, was also before this Court in the Winding-up proceedings. Mr. Buti emphasised his view that the English Court had no jurisdiction to adjudicate on the contract between the parties or for personal injuries. It could only have jurisdiction under **section 4 (i)** of the Act. With regard to the **Kuoni Travel** case, counsel maintained that what was not present and detailed therein was that under **section 4 (1) (g)** of the Act, the original English. Court would only have jurisdiction if the requirements of section 4 of the Act were followed. He maintained that an indemnity only arises out of the performance of a particular contract. There was no obligation under the contract between the parties that required it to be performed anywhere but in Kenya. As a consequence, the English Court could not adjudicate in relation to personal injuries or on the question of indemnity. Finally, counsel referred to clause 13 of the Contract between the parties in which they had submitted to the exclusive jurisdiction of the English Court. If either of the parties required to execute in Kenya, then there should have been a proviso to that clause but as it read, exclusivity was total.
17. Mr. Fraser, in response, referred to section 7 of the Civil Procedure Act with regard to matters *res judicata*. In his view, it did not matter what evidence or submissions was put before this Court in the Winding-up proceedings. What was important was the finding of Njagi J. that the Petition was based on an English Judgement that had not been registered in Kenya. In setting out the relevant portions of the learned Judge's Ruling, counsel pointed to that section thereof where the Judge was openly inviting the Respondent to do what it had done, namely apply to register the English Judgement in Kenya. None of the matters raised in the Petition were decided upon and consequently *res judicata* does not apply. As regards the Notice of Appeal, Mr. Fraser noted that

Order 42 rule 6 was a provision for an application to stay pending appeal. The Notice was only relevant to such an application not the Appeal itself. He drew the court's attention to the fact that in the Replying Affidavit of Mr. Adams, it had been conceded that the Appeal was out of time and had been abandoned. Turning to section 4 of the Act, the same detailed a series of scenarios where the English Court has jurisdiction: (a) by voluntarily appearing in the proceedings and (b) where the parties themselves had submitted to the jurisdiction. Counsel noted that the Judgement which was registered was not for personal injuries but for indemnity under the Contract between the parties and that it fell under the provisions of **section 4 (a)** and **(c)** of the Act. Counsel concluded that the English Judgement was properly registered and that there is no *res judicata*.

18. It is quite clear to this Court that the Applicant/Judgement Debtor is trying every which way to avoid the registration of the English Judgement here in Kenya and the inevitable execution proceedings which will follow the same. What is for this Court to determine is whether the Applicant/Judgement Debtor has put forward enough grounds to satisfy this Court that its Application does succeed. In this regard, the submission that the proceedings surrounding the registration in Kenya of the English Judgement was *res judicata* must first be considered. I do not agree with counsel for the Respondent that in looking at previous proceedings in relation to such being *res judicata*, it is not so much the documentation put before Court for its consideration but the finding of the Judge and what bearing that has upon subsequent proceedings. In that regard, I am backed up by the finding of the Kenya Court of Appeal in **Pop-in (Kenya) Ltd & 3 Ors. v Habib Bank AG Zürich (1990) KLR 609** where the Court held *inter alia*:

> **"….. The plea of *res judicata* applies not only to points which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."**

19. I have carefully perused the Ruling of Njagi J. delivered on 28 June 2011 the same is found at pages 134 to 141 annexed to the Affidavit of the said Andrew Nyakota sworn on 10 May 2012. The first ground in support of the Application filed by the Applicant/Judgement Debtor dated 24 January 2011 which sought *inter alia* to strike out the Winding-up Petition read as follows:

> **"(a) The petition filed herein is grounded upon the judgement which was delivered by the Court at Leeds, Queens Bench Division, in England, which judgement has not been registered as a judgement of this court as mandatorily required by the Foreign Judgements (Reciprocal Enforcement) Act, Cap. 43 of the Laws of Kenya."**

20. Indeed, the learned Judge was considerably swayed by the argument of Counsel for the Applicant/Judgement Debtor for at page 7 of his said Ruling, he had this to say:

> **"In the absence of registration of such a judgment in the High Court of Kenya, it would be difficult for anyone to be certain that any such debt exists. Before Section 220 of the Companies Act can be invoked, it is imperative that the existence of a debt be established and this, in my view, is the more reason why registration of such a judgment is required. Registration gives such a judgment the seal of approval as a judgment enforceable within the Kenyan jurisdiction since under Section 8 (1) of the Foreign Judgments (Reciprocal Enforcement Act), such a registered judgment bears "… the same force and effect as a judgment of the High Court entered at the date of registration". The corollary is that unless the Foreign Judgment is registered under Section 5 (1) of the aforesaid Act, it does not bear the same force and effect as a judgment of the High Court. As such, it is not enforceable.**

As the judgment at Leeds has not been registered in this Country, I find that the applicant has made out a prima facie case for the grant of an injunction in terms of Prayer (d) for lack of compliance with the explicit provisions of Section 5 (1) of the Foreign Judgments (Reciprocal Enforcement) Act".

The remainder of the learned Judge's said Ruling involved in the Applicant/Judgement Debtor's application to transfer the Petition in *Winding-up Cause No. 45 of 2010* to Mombasa for hearing and determination. I gather that the Applicant/Judgement Debtor owns/operates the Travellers Beach Hotel in Bamburi, Mombasa hence such a prayer in its said Application. It seems to me that in view of the striking out of the Petition by Justice Njagi, such an application to transfer was overcome by events.

21. To my mind, it seems that Njagi J. did not have before him the evidence that is before this Court put in by both sides with reference to the Applicant/Judgement Debtor's Chamber Summons dated 11 May 2012. However it would be remiss of this Court not to take into account the 2 authorities put forward by the Applicant/Judgement Debtor in support of its submissions before Court. I have perused both the **D. S. V. Silo** case as well as the local Court of Appeal authority of **Mburu Kinyua** (both supra). The former case as per **Lord Diplock** carefully examined the principle of issue estoppel. In the second paragraph of his Judgement, **Lord Diplock** had this to say:

> **"In English law when the plaintiff, who, basing his claim on a particular set of facts, has already sued the defendant to final judgement in a foreign court of competent jurisdiction and lost, then seeks to enforce a cause of action in an English court against the same defendant based on the same set of facts, the defendant's remedy against such double jeopardy is provided by the doctrine of issue estoppel."**

With due respect to the learned counsel for the Applicant/Judgement Debtor, the situation as envisaged by **Lord Diplock** does not apply to the set of circumstances before this Court. The Respondent herein did not lose the case in the Leeds High Court nor indeed, in the English Court of Appeal. In my opinion, the doctrine of issue estoppel does not apply in the circumstances of this case before me.

22. However, I received more assistance from the Court of Appeal's finding in the **Mburu Kinyua** case (supra) in relation to the principle of *res judicata*. At page 73 of the authority **Madan JA** (as he then was) found:

> **"I am not aware of any bar generally to presenting more than one application until the conscience of the court comes to rest at ease that justice has been done. I would not go so far as to say that the court must act whether or not there is a right of appeal, review or application. It would depend on the circumstances in each case. Moreover, the liberty to present more than one application is always subject to the court's power to prevent abuse of its process, including mulcting the offending party in costs. It is also of course subject to the rule of *res judicata* including what is laid down in explanation (4) to section 7, unless a special circumstance is present in which even I would be content to follow the following *dictum* of Wigram V-C, in *Henderson v Henderson* (1843) 67 E R 313, 319, which the Privy Council described as the *locus classicus* of this aspect of res judicata, in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] A C 581, 590:**
>
> **'…. where a given matter becomes the subject of litigation in, and adjudication by a**

> **court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".**

As I see it, there was no *res judicata* here. The matters raised in the Respondent's Replying Affidavit dated 18 June 2012 fully set out what transpired in relation to the proceedings involving the parties in the English Courts. Njagi J. never considered the same nor indeed was he invited to do so by either party.

23. I will now move on to the submissions made by the Applicant/Judgement Debtor in relation to alleged breaches of the Act. Firstly, from the heading to the Application, the same was brought under the provisions of **sections 10 (2) (c) and (4)**, **section 3 (3) (b)** and **section 4 (1) (i)** of the Act. Taking the same sequentially, **section 3 (3) (b)** reads that the Act does not apply to a judgement or order –

> **"to the extent to which it provides for the payment of a sum of money by way of an exemplary, punitive or multiple damages;"**.

I have carefully perused the Affidavit of the said Mr. Adams sworn in support of the Originating Summons herein dated 23 February 2012. That Affidavit was sworn on 14 February 2012 and at exhibit "RJA 1" is the Certificate of Judgement and "RJA 3" contain details of the Respondent's claim in the High Court at Leeds. The prayers of the Particulars of Claim sought damages in respect of past losses of GBP 196,563.30 plus interest to date and further interest accruing at a daily rate. The second prayer sought an indemnity in respect of future losses which may have been owing to the Respondent and finally sought the costs of the case again on an indemnity basis pursuant to clause 2 (a) of the contract. Clauses 1 and 2 of the contract were quite clear in that the Applicant/ Judgement Debtor indemnified the Respondent against all losses, liabilities, claims or expenses for or in respect of injury (including death), loss or damage to persons or property which may arise from any cause whatsoever out of or in connection with the supply of services to the Respondent. I detail such in full so as to show that the Judgement sum in the English Superior Court did not include the payment of monies by way of exemplary, punitive or multiple damages. Accordingly, I find that **section 3 (3) (b)** of the Act does not apply to this Application before Court.

24. I turn now to the applicability or otherwise of **section 4 (1) (i)** as regards Jurisdiction. It was the Applicant/Judgement Debtor's submission that the English Court had no jurisdiction:

> **"in the case of an action to recover damages for physical injury to the person, or the death of the person, or for damage to tangible property, the circumstances giving rise to injury, death or damage substantially occurred in the country of the original court or the injury or damage was suffered in that country."**

As I understood it, what the Applicant/Judgement Debtor meant by its submission was that the English Court had no jurisdiction to decide upon the action brought in England by the injured tourists

as against the Respondent herein for injuries and damage suffered in the said raid at the Elephant Camp as aforesaid. That could well be the case if it was the suit the Judgement in which was being registered here. Quite clearly from the suit whose Judgement has been registered here, the subject matter had nothing to do with personal injuries or damages in relation to the said tourists. That was a separate suit. It may be that as a result of that suit, the Respondent herein was seeking indemnification for the damages awarded against it. As a consequence, the injury or damage suffered by the Respondent was attained in England which is where it had to pay out monies to settle the tourists' claim against it. Accordingly, I do not find that **section 4 (1) (i)** of the Act applies in the present circumstances.

25. I now come to **section 10 (2) (c) and (4)** of the Act. The whole section of the Act deals with setting aside. **Section 10 (2) (c)** reads:

> **"(2) The grounds upon which a registered judgement may be set aside are that –**
>
> **(c) 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;"**

As already indicated, the Contract as between the parties dated 29 October 1999 contained the following clause no.13:

> **"13. PROPER LAW, LANGUAGE AND JURISDICTION**
>
> **This agreement is written in the English language which shall be the authentic language; and shall be construed to take effect in accordance with the Laws of England. The parties hereto submit to the exclusive jurisdiction of the courts of England."**

To my mind, that clause could not be clearer and clearly gives the English Courts jurisdiction over matters arising out of the said contract between the parties including the indemnity contained therein given by the Applicant/Judgement Debtor. As a result, the Application of the Applicant/Judgement Debtor must fail on this ground.

26. **Section 10 (4)** of the Act reads as follows:

> **"Where the High Court is satisfied, on an application made by or on behalf of a judgement debtor, that the sums, including costs, awarded under a registered judgement are substantially in excess of those which would have been awarded by the High Court on the basis of the findings of law and fact made by the original court, and the assessment of those sums been made in proceedings before the High Court, the High Court may set aside the judgement to the extent of that excess."**

From the Exhibit "RJA 2" annexed to the Affidavit of Mr. Adams dated 14 February 2012 sworn in support of the Application for registration of the English Judgement in this Court, I have been able to peruse the Order of **Grenfell J**. made on 10 August 2009 in the High Court of Justice in the Queen's Bench Division, Leeds District Registry, England. Judgement was entered for the Respondent herein in the sum of GBP 325,982.29, such sum to be paid within 14 days. I note that the learned Judge made that Order after hearing both counsel for the Claimant and counsel for the Defendant in the suit before him. As I understand it from paragraph 16 of Mr. Adams' Affidavit dated 18 June 2012 as quoted above, the Judgement amount was more or less agreed between the parties and certainly, the Applicant/Judgement Debtor herein has not filed any Appeal against that Order. All in all therefore, I do not consider that there is any justification for this Court to reduce the Judgement sum as above and I have not been convinced by the Applicant/Judgement Debtor herein that the said sum is substantially

in excess of what would have been awarded by this Court on the basis of the findings of law and fact made by the English Court.

27. **Section 5 (4) (d)** of the Act, upon which the Applicant/ Judgement Debtor also relies, reads as follows:

> **"(4) An application for registration of a judgement under subsection (1) shall –**
>
> d. **unless otherwise ordered by the High Court, be accompanied, in the case of a judgement 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;"**

I have perused the Certificate of Judgement which was attached as Exhibit "RJA 1" to the said Affidavit of Mr. Adams sworn on 14th February 2012 in support of the application to register the English Judgement here in Kenya. The Certificate is certified by District Judge Giles and paragraph 8 of the Certificate reads:

> **"This Court forms part of the Senior Court of England and Wales (formerly the Supreme Court of England and Wales) and is a superior court of England and Wales."**

I also note that the Certificate is sealed and dated 7 December 2011. In this regard therefore, I find that the Respondent has complied with the said **section 5 (4) (d)** of the Act.

28. As I understood it, the next query raised by the Applicant/ Judgement Debtor was brought under the provisions of **section 4 (1) (g)** of the Act. That subsection reads:

> **"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;"**

Quite apart from my having already found that the parties under their contract, agreed to submit to the jurisdiction of the English Court, the whole essence of the English Judgement was as regards the indemnity given to the Respondent by the Applicant/ Judgement Debtor. Under clause 1 of the contract the Applicant/ Judgement Debtor acknowledged that it was aware of the Respondent's liability as a travel organiser under the European Union's directive on package travel, holidays and tours as well as the UK Package Travel, Package Holidays and Package Tours Regulations 1992. The Applicant/Judgement Debtor was aware of the Respondent's liability to its clients and the legal liability which the Respondent was bound to assume in its own contract with its own clients. Thereupon, the Applicant/Judgement Debtor warranted and guaranteed matters in relation to the safety of its premises as well as the personal safety of the Respondent's clients and their belongings. Although the liability that fell on the shoulders of the Applicant/Judgement Debtor in that regard was to be covered in Kenya, the indemnity itself was, to my mind, to apply in England. As a consequence,

I find that the English Court did have jurisdiction to decide these matters before it. This is particularly so when one takes into account the provisions of **section 4 (1) (a)** where the Applicant/Judgement Debtor, being the defendant in the English Court, submitted to the jurisdiction of that Court (and indeed in the English Court of Appeal) by voluntarily appearing in the proceedings. Further, this position is supported by the finding of **Mutava J**.in the **Kuoni Travel** case (supra) which I adopt herein.

29. Finally, the Applicant/Judgement Debtor referred the Court to the transgressions of the Respondent under **section 10 (1) (m)** of the Act. Such provided that the Registered Judgement could be set aside where the rights under the Judgement were not vested in the person by whom the application for registration was made. I found this submission on the part of the Applicant/Judgement Debtor somewhat confusing. I think what the Applicant/Judgement Debtor was getting at was that the Respondent was the wrong party to come to Kenya to obtain damages for personal injuries and loss of property for such claims should have been filed in Kenya by the affected tourists in relation to the incident at the said Elephant Camp. I have already found that the suit upon which the Judgement was registered in Kenya was based on an indemnity given by the Applicant/Judgement Debtor to the Respondent. To my mind, there can be no doubt that the Respondent was the right person in whose name the application for registration was made.
30. The outcome of all the above is that I dismiss the Applicant/ Judgement Debtor's Chamber Summons dated 11 May 2012 with costs to the Respondent.

DATED and delivered at Nairobi this 20th day of June, 2013.

J. B. HAVELOCK

JUDGE