REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE NO. 723 OF 2006 (O.S.)

IN THE MATTER OF THE FOREIGN JUDGMENTS RECIPROCAL ENFORCEMENT ACT CAP. 43 LAWS OF KENYA

AND

IN THE MATTER OF A JUDGMENT AND A DECREE OF THE HIGH COURT OF TANZANIA AT ARUSHA DELIVERED IN

CIVIL CASE NO. 14 OF 1999 ON 13TH DAY OF OCTOBER 2005

BETWEEN

HERMAN PHILLIP STEYN .....APPLICANT/ RESPONDENT

VERSUS

CHARLES THYS.....RESPONDENT/ APPLICANT

RULING

By an ex parte Originating Summons brought under **Sections 3 (1) (a), 3 (2) (b), 5 (1), 5 (2) (a) (i) and (b), (c) (i) and 2 (d) (e), 7 (1) and (2), 8 (2) (a) (b) and (c) Foreign Judgments (Reciprocal Enforcement) Act Cap 43 Laws of Kenya** and **rules 2 (1), 3 and 4 of the Foreign Judgments (Reciprocal Enforcement) Rules**, the applicant sought the following orders:
"1. ……

2. That the applicant be granted leave to register the judgment and decree of the High Court of Tanzania at Arusha in Civil Case Number 14 of 1999 delivered on 20th October, 2005 between the applicant as plaintiff therein against the respondent as defendant therein as a judgment and decree of the High Court of Kenya at Nairobi pursuant to Section 3 (1) (a) of the Foreign Judgments Enforcement Act Cap 43 Laws of Kenya.

3. That the terms of the decree issued on 21st October, 2005 in Arusha HCCC No. 14 of 1999 be recorded as a decree of the High Court of Kenya at Nairobi namely:

"That the respondent do pay to the applicant the following recoverable sums upon registration of

the judgment aforesaid:

(a) the unpaid sums under the decree issued on 21st October 2005 comprising of:

(i) A sum of US$150,000,000.00.

(ii) A sum of US$1,000,000.00 or its equivalent in Tanzanian shillings at the exchange rate prevailing on 20th October, 2005; and

(iii) A sum of US$254,000,000.00 being interest at 7% per annum on the sum of US$150,000,000.00 from 19th October, 1981 till 20th October, 2005.

(b) The unpaid costs awarded to the applicant in Arusha High Court Civil Case No. 14 of 1999 as shall be taxed by the Taxing Master of High Court of Tanzania at Arusha.

(c) Interest from the date of registration of the judgment aforesaid on such aforesaid sums amounting to US$405,000,000.00 under items 2(a) (i) (ii) and (iii) above or any outstanding part thereof and the aforesaid unpaid costs once taxed under item 2 (b) above or any outstanding part thereof at the rate applicable to a judgment of this honourable court (that is to say 12% per annum until payment in full).

(d) Costs in respect of the instant application including costs of obtaining the prescribed the certificate issued on 23rd June, 2006 by the District Registrar, High Court of Tanzania at Arusha and a copy of the judgment delivered by the Honourable MS Justice Sheikh on 20th October, 2005."

The application was supported by the applicant's affidavit wherein he stated, *inter alia*, that he commenced High Court Civil Case No. 19 of 1999 against the respondent as the defendant. Judgment was delivered in his favour on 20th October, 2005 in the terms that:

- **The plaintiff was awarded a sum of US$150,000,000.00.**

- **The plaintiff was awarded general damages in the sum of US$1,000,000.00 or its equivalent in Tanzanian shillings at today's exchange rate.**
- **The plaintiff was awarded interest at 7% on the principal sum from 19th October, 1981 until the date of judgment plus costs of the suit.**

The said judgment is enforceable in Kenya under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act. The respondent has todate failed to pay any part of the aforesaid sums of money.

The applicant stated that although the respondent has a right of appeal to the Court of Appeal, no appeal has been instituted and therefore the said judgment is final and conclusive as between the parties herein. The applicant further stated that he is the Judgment Debtor in Nairobi HCCC No. 1508 of 1984 which was commenced by the respondent as the plaintiff against himself (the applicant) as the defendant. The decretal amount in the said judgment is US$439,587.00 as at 19th June, 1989. The applicant has not satisfied the decree in Nairobi HCCC 1508 of 1984 and execution proceedings are pending before this court. The applicant intends to commence proceedings for cross execution of the decrees in the Arusha case upon its registration as a judgment of this court and the one pending before this court.

A replying affidavit was filed by **Alex Ngatia Thangei,** the respondent's advocate. He stated that the applicant's Originating Summons is bad in law and incurably defective on the grounds that:

(a) To the extent that it was brought ex parte it offends the provisions of Section 5 (2) (b) of the Foreign Judgments (Reciprocal Enforcement) Act Cap 43 in that:

(i) A Notice of Appeal was filed against the said judgment on 1st November, 2005 and certified copies of the judgment and decree were sought by a letter dated 31st October, 2005.

(ii) At the time of filing the originating summons a Notice of Appeal had been filed and served upon the applicant's advocates in Tanzania.

(ii) The applicant has deliberately chosen to mislead this court that there is no pending appeal against the said judgment and that the time for an appeal has expired.

(b) Pursuant to the Notice of Appeal the respondent, vide Civil Application No. 137 of 2006 did apply for stay of execution of the judgment in HCCC No. 14 of 1999 at Arusha and order of stay of execution was granted on 12th October, 2006. In granting the said stay of execution Justice J.A. Moroso specifically ordered "that the respondent should not proceed with the application said to have been filed in the High Court of Kenya or commence proceedings elsewhere intended to facilitate execution of the decree of the High Court of Tanzania at Arusha in Civil Case No. 14 of 1999 until the application now pending in this court has been concluded." A copy of the said order was annexed to the replying affidavit.

(c) In view of the orders by Morso, JA. the judgment sought to be registered cannot be so registered in view of the provisions of Section 6 (2) (b) of Cap. 43 of the Laws of Kenya to the extent that the judgment sought to be registered cannot be enforced by execution in the country of the original court.

Inresponse to Mr. Thangei's replying affidavit, the applicant filed a further affidavit and stated, *inter alia*, that he had been informed by his advocate in Arusha and which information he verily believes to be true that as at the time of filing this application, the respondent had not instituted an appeal in the manner prescribed by the Tanzanian Court of Appeal rules. He further stated that the orders stated by Mroso, J. on 12th October, 2006 were interlocutory in nature since the respondent's application for stay of execution was adjourned to a date to be fixed by the Registrar. The respondent's application has not yet been heard and determined. The respondent annexed to his affidavit an affidavit sworn by Elvaison Erasmo Maro, an advocate of the High Court of Tanzania having conduct of High Court Civil Case No. 14 of 1999 at Arusha on behalf of the applicant and also representing him in Court of Appeal Civil Application No. 137 of 2006. The said Mr. Maro stated in paragraph 3 of his affidavit that:

"3. That I wish to unequivocally depone that under the provisions of the Court of Appeal Tanzania rules:

(a) Any person who desires to appeal to the Court of Appeal of Tanzania shall give a Notice of Appeal in writing

(b) An appeal shall be instituted by lodging within sixty (60) days of the date when the Notice of Appeal was lodged:

(i) A memorandum of appeal in quadruplicate.

(ii) The record of appeal in quadruplicate.

(iii) The prescribed fee; and

(iv) Security for costs of the appeal."

The advocate further stated that whilst it is true that the respondent filed a Notice of Appeal, he had not

instituted an appeal against the said judgment and decree by lodging a Memorandum and Record of Appeal, the prescribed fee and security for costs of the intended appeal as required by the Court of Appeal rules.

Under **Section 5 (2)** of the **Foreign Judgments (Reciprocal Enforcement) Act,** an application to register and enforce a foreign judgment can be made ex parte where under the law in force in the country of the original court the time within which an appeal may be made against the judgment has expired and no appeal is pending or where an appeal has been heard and disposed of. The simple question for this court's determination is whether there is a pending appeal in the country of the original court, that is Tanzania, and if so, whether the judgment in High Court Civil Case No. 14 of 1999 at Arusha can be registered in Kenya and thereafter be enforced.

In the first affidavit sworn by the applicant in support of his application, he stated that there was no appeal that had been preferred against the said judgment. However, from the affidavit sworn by the respondent's advocate and from the affidavit of Erasmo Maro, the applicant's advocate at Arusha, there is no dispute that the respondent filed a Notice of Appeal and thereafter filed and application for stay of execution in Civil Application No. 137 of 2006 before the Court of Appeal of Tanzania at Dar es Salaam. The application was not fully heard but Mroso, JA. made an interim order of stay of execution on 12th October, 2006.

Although Mr. Maro stated in his affidavit that the appellant did not comply with certain mandatory requirements under the Court of Appeal rules of the Tanzanian Court of Appeal, there is nothing to show that the orders issued by Mroso, JA have been vacated. The said Judge of Appeal specifically ordered that the respondent (now the applicant herein) should not proceed with the application said to have been filed in the High Court of Kenya or commence proceedings elsewhere with a view to executing the decree issued by the High Court of Tanzania at Arusha in Civil Case No. 14 of 1999 until the application is heard and determined. If indeed the application had been concluded one way or the other, or the Notice of Appeal had been struck out, nothing would have been easier than for Mr. Maro to swear an affidavit to that effect.

In my view therefore, an appeal against the said judgment has been filed and there is an order of stay of execution that is in force. In the circumstances, the orders sought by the applicant cannot be granted. Consequently, I dismiss the applicant's application with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2011.

D. MUSINGA

JUDGE

In the presence of:
Nazi – court clerk
Mr. Nyaanga for Mr. Gross for the Applicant
No appearance for the Respondent