REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL NO. 488 OF 2007

JAYESH HASMUKH SHAH..PLAINTIFF

VERSUS

NAVIN HARIA & ANR...DEFENDANTS

Coram: Mwera J

Sarvia for plaintiff

Nyaencha for defendant

Njoroge, court clerk

RULING

The defendant in this suit filed a preliminary point of objection said to have been dated 7.4.09. A copy was not readily traced on the file but from the submissions of both sides, the court gleaned the following to be the grounds in the objection. The plaintiff extracted in his submission, 3 grounds of objection:

i) that this court lacks jurisdiction to determine this matter;

ii) that the claim herein is time – barred

iii) that the defendants were strangers to the claim that the subject loan was given to Shoe Wind Ltd, a separate entity from them.

And from the defendants' side they only took one ground from their notice, if the plaintiff's extraction above is correct, that:

i) the court lacks jurisdiction to determine this matter.

When it came to the submissions the plaintiff asserted that since the defendants had not alluded to the two other grounds in their submission, ie the claim being time-barred and their being strangers to it, focus

should be only on the ground of lack of jurisdiction on which both sides submitted, with the plaintiff having gone further to submit on those two other grounds which the defendants appear to have abandoned. In this court's considered opinion when the defendants opted to submit on the issue of jurisdiction only in their own notice of preliminary objection, then those other two grounds are deemed abandoned and so the court's decision is confined to the issue of jurisdiction only.

To dispose of points of preliminary objection the celebrated case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] E.A 696** comes in handy and here we quote Sir Charles Newbold, P:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.

It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Having considered that, the only point to be considered here, is that of the court's lack of jurisdiction to determine this matter. The defendants urged that the cause of action here was based on a foreign judgement which was delivered in Ethiopia – a non – commonwealth country and not listed in the schedule of rule 2 of the Foreign Judgements (Reciprocal Enforcement Act and the Rules) (under the schedule thereto.) Focus moved to Section 17 (1) of Cap 43, the Act which reads:

"17. (1) No proceedings, other than proceedings by way of judgement or by way of execution of a judgement so registered shall be entertained by any court in Kenya, which are brought by a judgement creditor to recover a sum of money payable or item of movable property deliverable under a judgement to which this Act applies and which is registrable."

The defendant's position on this provision of law was that the above provision prohibits bringing proceedings in courts of Kenya which are based on a foreign country's judgment. Such judgements must be registered and should have originated from a commonwealth country or a country that has signed a reciprocating treaty with Kenya and therefore only recognized. Such countries were said to have been placed in a schedule to the Act made pursuant to section 13 thereof and those countries are: Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia and the UK. And that under section 3 of the Act, the judgements to which it applies, are either from a superior court in the commonwealth, or of a reciprocating country in the order made under section 13 (above) or a subordinate court there. So Ethiopia not falling in the class of countries stated above, fell outside the Act and a judgement that was delivered there cannot form a basis of proceedings in Kenya. The case of **Italframe Ltd Vs Mediterranean Shipping Co.** [1986] KLR 54 was cited in support.

And on his part the plaintiff urged the court first to find that section 17 (above) was not properly drafted because it appeared as if some valuable phrases that should have been inserted there had been omitted. The plaintiff went on to suggest how he thought section 17 should have been framed. At this juncture the court had difficulty with this proposal to "reframe" and "rephrase" a section in an Act passed by Parliament. When interpreting an Act of Parliament with a view to apply/enforce it, the court may only seek to put on that Act or a section thereof, the meaning, and not an absurd one, to achieve ends of justice, but not to reframe, rephrase and rewrite it at the time of deciding the effect of the given Act or provision of it. This is only, by the way.

The plaintiff proceeded to assert that the Act (Cap 43) was passed to create a mechanism by which foreign judgements from reciprocating countries can be enforced in Kenya through registration. That the judgement herein was from Ethiopia, a non-reciprocating country and therefore section 17 did not apply to it.

But citing the case of **Yukon Consolidated Gold Corporation Ltd Vs Clark** [1938] 1 All ER 366, the plaintiff argued that section 6 of the English Foreign Judgements (Reciprocal Enforcement) Act 1933, whose wording was similar to our section 17, was interpreted by the Court of Appeal (UK) to the effect that section 6 had no application to the Canadian judgement (in the Yukon Case) on the aspect of registration, but the appellant could sue upon the judgement and maintain the action. Therefore the plaintiff was in order to sue to recover his money basing the cause on the foreign judgement from Ethiopia. And such actions are maintainable in the light of **Muhamedally Mulla Ehramji Vs Alibani Jivanji Mamuji** (1917) Vol VII EALR 89 **and Nagina Singh s/o Tara Singh Vs Tarlochan Singh s/o Boor Singh** (1936) Vol. XVII KLR 82. In sum, the plaintiff urged the court that although the Ethiopian judgment was of such a nature that Cap. 43 should not apply to it, accordingly the plaintiff had properly filed this suit to recover his money. Had that judgment been covered by the Act, the plaintiff would have applied to register it in order to enforce it. In any case the defendant's had submitted to the jurisdiction of this court when they unconditionally entered appearance and so they should not abrogate or annul it. At this point the court was not quite clear as to this course of submission as was adopted, because the defendants at no point argued that this court had no jurisdiction over them. All they have put forth is that the court has no jurisdiction to determine the matter that has brought against them here.

What is not disputed is that the claim herein is based on the judgment that the plaintiff obtained as against the defendants when the Supreme Court of Ethiopia, on appeal, found for him an equivalent of Ksh. 36,191,604/=. The parties cannot doubt the competence of the Ethiopian courts. They submitted to them and got a final decision. The defendants filed a defence in essence averring that the cause of action could not be maintained because it was based on a judgement of a foreign country, Ethiopia, which had no foreign judgement enforcement pact with Kenya. That has been the basis of this preliminary objection. And the plaintiff says that section 17 of the Act does not apply to that judgment from Ethiopia. Then does it mean that the plaintiff cannot have any remedy? It is clear that the plaintiff is not in the process of registering the Ethiopian judgement in order to enforce its decree. He is simply suing on that judgement and if he proves his case, he wants to get paid. So the application of the Act and especially section 17 does not come in.

In the Muhamedally case (supra) Pickering J, entertained a suit in which the plaintiff, a resident of India, sued the defendant resident in East Africa, on a decree from the Court of Small Causes at Bombay, India. The defendant ordered for goods from the plaintiff but did not pay. The plaintiff went to the Bombay Court and sued. The defendant did not enter appearance and the plaintiff got judgement against him. So a suit was filed locally based on that judgement.

The learned judge had no doubt in accepting the defendant's objection to having the decree obtained in a foreign court enforced against him locally. And although there were no provisions of law reproduced, that court did observe that the substantive law applicable was that relating to the enforcement of foreign judgements as laid down in the English courts. Then the judge went on to cite from Williams Vs Jones 14 LJ Ex 145 that:

"……. where a court of competent jurisdiction had adjudicated a certain sum to be due from one person to another a legal obligation arises to pay that sum, on which an action of debt to enforce a judgement may be maintained ………. And taking this as the principle it seems to follow that anything which negatives the existence of that legal obligation or excuses the defendant from the performance of it must form a good defence to the action. It must be open therefore to the defendant to show that the court which pronounced the judgement had not the jurisdiction to

pronounce it either because they exceeded the jurisdiction given to them by the foreign law, or because he the defendant was not subject to that jurisdiction."

And **then** the Yukon case above where we noted earlier that the Court of Appeal considering the UK. section 6 more or less word for word with section 17 of the Kenya Act, said this:

" Be that as it may, however it does not make any difference to the fact that the judgement can be enforced only in the same way and as to the same extent that foreign judgements can be enforced, which ex concessis, cannot be enforced until reciprocity is obtained. I think that the Dominion judgements are upon the same basis as are foreign judgements and I agree with the judge that in those circumstances sections 6 and 7 have no application to this case, and leave the plaintiff in this case untrammeled with regards to his rights at common law, so that he can sue on the judgement. He has sued upon the judgement and on the ground he is entitled to go on with the action."

This was an appeal in a cause that started in the Supreme Court of Ontario, Canada. It went to the Court of Appeal there, with the defendant suing the plaintiff company. He lost in both courts and costs were taxed and partly paid by the defendant. The defendant then gave notice of appeal to the Privy Council and gave security for the balance of the costs. When the plaintiff company sought to recover those costs in England the defendant contended that the plaintiff could not sue on the Ontario judgement, having regard to statutes including the UK Foreign Judgements (Reciprocal Enforcement) Act 1933 sections 6, 7. That is how the Court of Appeal came to agree with the defendant as noted above but still granted the plaintiff to proceed with his action, unrestricted or unlimited, in accordance with his rights at common law.

This court was invited to consider the Italframe case above and find that this court had no jurisdiction to entertain this suit and so strike out. But this court's reading of that case pointed to a situation where a foreign judgement from The High Court of Tanzania was registered at the High Court at Mombasa with a view that it be enforced.

However, on application Bhandari J, set aside that judgement with all consequential orders because in the Foreign Judgements Act section 6 replaced by the current Cap. 43 reference was made to the High Court of Tanganyika. It was on the basis of the names of Tanzania and Tanganyika that Bhandari J and the Court of Appeal decided that they did not mean one and the same thing and so the registration of the judgement was vacated. It had nothing to do with the validity of that judgement. And if it may be added, it is not this court's opinion that Parliament passed the subject Act with an intention a person whose foreign judgement could not be registered, should never have a remedy or a place to litigate it in Kenya. In the view of this court the preliminary objection is rejected. May the plaintiff maintain his cause and let the trial court decide. It is just and fair that he is heard on the merits of his claim. The costs of this proceeding to abide the final outcome of the cause.

Delivered on 11.5.11

J. W. MWERA

JUDGE