



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

CIVIL CASE 223 OF 2004 (OS)

In the matter of: The Foreign Judgments (Reciprocal Enforcement Act:

And

**In the matter of: An application of a judgment of the High Court of Justice,
Queen's Bench Division Commercial Court obtained in 1997 Folio No. 1306**

THE SOCIETY OF LLOYD'S.....JUDGMENT CREDITOR

AND

CHARLES JULIAN BURTON LARBY.....JUDGMENT DEBTOR

RULING

There are two applications before me both date the 16th December 2004 in which the Applicant seeks orders for:

- 1) An extension of time to file an appeal out of time and
- 2) For leave to Appeal against the order of Lenaola J. given on the 23rd July 2004.

By an Originating Summons (the Summons) dated 9th March 2004, the Society of Lloyds (The Society) seeks to register a judgment obtained against Charles Julian Burton Larby (Mr. Larby) in the High Court Of Justice Queens Bench Division under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act Cap 43.

The matter came before Lenaola J on the 10th march 2004 when the learned Judge ordered the Summons be issued and served on the Respondent.

On the 9/6/2004 the matter came before the learned judge again who heard arguments raised by the Respondent as a Preliminary Objection that the Summons not proceed and should be struck out in limine.

Having heard the arguments, the learned Judge dismissed the Preliminary Objection and it is from that dismissal that the Respondent wishes to appeal out of time and has made the Applications referred to above.

Before considering the merits of the Application I must decide whether an appeal lies from the dismissal of the preliminary point or not.

Mr. Ongicho for the Respondent submitted that there was a right of appeal and relied on the case of **Kenya Commercial Bank Ltd Vs Esipeya CA No. 105 of 1998** a case in which at the commencement of the hearing the Defendant took a preliminary point that the suit was time barred and the learned judge in that case dismissed the preliminary point. The Court of Appeal held that the decision dismissing the preliminary point did not give rise to a preliminary decree from which an appeal is allowed as of right, but an order in respect of which leave to appeal was required. The court relied on the case of **Mandavia Vs Rattan Singh [1965] E.A 118** where it is held as follows:

“ where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails and a suit is permitted to proceed, no preliminary decree arises but only an order; the unsuccessful party has a right of appeal with leave and accordingly the appeal here was incompetent for want of leave.”

Section 75 of the Civil Procedure Act sets out the orders in respect of which an appeal shall lie as of right and also from any order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted.

Order XLII r 2 states:

An appeal shall lie with the leave of the court from any other order made under these rules.

Order XLII r 3 states:

An application for leave to appeal under Section 75 of the Act shall be made in the first instance to the court making the order sought to be appealed from, either informally at the time when the order is made, or within 14 days from the date of such order.

The question arises is the order of Lenaola J made under these orders. I do not think so. It is an order made in respect of a matter in which jurisdiction is conferred on the High Court by section 5 (3) of the Foreign Judgments (Reciprocal Enforcement) Act Cap 43. That being the case leave to appeal must be sought from the Court of Appeal. The only provision which relates to an appeal is under Rule 7 of the Foreign Judgments (Reciprocal Enforcement) Rules but this does not appear to deal with appeals on matters of an interlocutory nature arising during proceedings under the Act.

If I am wrong, then I would be inclined to grant leave to appeal. This also applies to allowing the Notice of Appeal to be filed out of time.

I now turn to the substantive application.

Mr. Ongicho raised a number of objections to the registration of the foreign judgment which I will deal with consecutively:

1. The Supporting Affidavit, the exhibits thereto were not properly marked. Mr. Ongicho relied on a ruling in **Cowest Trading GMBH Vs Specialized Lighting Systems Ltd HCCC 1251 of 2002** in which it was held that exhibits to Affidavit must be identified with the Commissioner's seal.

In this case the exhibits were marked as follows:

“This is the exhibit marked “S9K1” referred to in the Affidavit of STEPHEN GRAHAM KNOTT Sworn before me this 5th day of March 2004. Notary Public, London, England.

In my view this is a sufficient compliance with the English form of attestation as well as the Kenyan Form set out in Rule 10 of the Oaths and Statutory Declaration Act.

2. Mr. Ongicho submitted that the certificate does not accord with Section 5 (4) (a) of the Act which states as follows:

An application for registration of a judgment under sub section 1 shall be accompanied by a certificate in the form set out in the Schedule or to the same effect issued from the original court under its seal and signed by a judge or registrar thereof or by an affidavit to the same effect.

I consider the certificate referred to herein to comply in all respects with the section and that it is only necessary to annex the Certificate to the application.

3. Non compliance with **Section 5 (2)(a) of the Act** which states as follows:

(2) An application may be made under subsection (1) ex parte in any case in which:

(a) The judgment debtor-

I. Was personally served with process in the original action; Mr. Ongicho submitted there was no evidence that the Respondent had been personally served as defined in Section 2 which states:

“Personal service” means actual delivery of the process to the person to be served therewith, whether effected inside or outside the country in which the process was issued. In the Supporting Affidavit, Stephen Knott depones as follows in Paragraph 8(7):

7. The judgment debtor was served with the process in the action in England by personal service on the judgment debtor’s nominated agent. The judgment debtor acknowledged service on the Claim Form and indicated an intention to contest the proceedings.

Mr. Fraser in reply submitted that section 5 (2) (a) only applied where the application is made ex parte.

The intention of the Section is to ensure the respondent was properly served personally. Can it be said that service in accordance with Section 2 of the Act was undertaken? In my view it was not. Although service may well have been sufficient in England to enable the court to have jurisdiction to proceed in the matter in Kenya it is clear that service means the actual delivery of the process to the person to be served therewith. This was clearly not done as service was effected upon an agent.

Be that as it may, Section 5 (2) (a)

(ii) provides that an application to register a foreign judgment may be made in any case in which the judgment debtor

ii. Though not personally served, appeared in the original court otherwise than for one or more of the purposes set out in Section 4 (2) (b).

In the Certificate issued under Section 10 of the Administration of Justice Act 1920, Mr. Paul Michael Miller, a master of the Supreme Court of England and Wales, certifies at paragraphs 2 and 3 as follows:

2. That the Claim Form was duly served on the 10th day of June 1997, upon the said defendant Charles Julian Burton Larby by personal service on the Defendant’s nominated agent Additional Underwriting Agencies (No. 9) limited.

3. That the said Charles Julian Burton Larby acknowledged service of the claim form indicating an intention to contest the proceedings.

Section 4 (1) of the Act provides:

1) In proceedings in which it is necessary for the purposes of this Act to determine whether a court of another country had jurisdiction to adjudicate upon a cause of action, that court shall, subject to subsection (2), be treated as having jurisdiction where

a) the judgment debtor, being the defendant in the original court submitted to the jurisdiction by voluntarily appearing in the proceedings;

The Judgment Debtor having acknowledged service of the claim form and indicated an intention to contest the proceedings, submitted or agreed to submit to the jurisdiction of the Court in England. The High Court of Justice, Queens Bench Division Commercial Court, therefore, had jurisdiction to pronounce judgment against the Judgment Debtor capable of recognition in Kenya.

In the result I allow the application for registration of the judgment. Costs to the Applicant.

DATED and DELIVERED at NAIROBI on 8th June 2005

P.J RANSLEY

JUDGE