



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIV CASE 1723 OF 2000

SEBAGALA & SONS ELECTRIC LTD.....PLAINTIFF

VERSUS

KENYA NATIONAL SHIPPING LINES LTD.....DEFENDANT

RULING

Kenya Shipping Line Limited (KSSL) applies for an order that the Judgment registered in this court and the consequential orders be set aside. The application is based on section 10(1)(2)(b)(C)(e)(f)(i) ; section 10(4) and Rule 6 of the Foreign Judgments (Reciprocal Enforcements) Act and Rules (Cap 43 of the Laws of Kenya (The Act) .

The application is supported by seven grounds and by the affidavit of Mr. Augustine Mumato Wekhannya. The background to the application is as follows: The Respondent Ssebagala & Sons Electro Centre ltd – a Company Registered and doing business in the Republic of Uganda filed a suit against KSLLL – applicant, in the High Court of Uganda at Kampala HCCC NO. 431 of 1999 claiming U.K. pound sterling 80795.11 and interest.

The basis of the claim was the plaintiff had contracted defendant to carry its containers of assorted electrical goods from United Kingdom to Mombasa Kenya in transit to Kampala which container arrived at Mombasa but defendant failed to deliver or hand over to plaintiff or his agents. The applicant filed a written statement of Defence to the claim denying liability. The applicant did not raise any issue of jurisdiction of the High Court of Uganda in its statement of Defence.

Eventually, the High Court of Uganda was asked to decide two issues namely:

(a) Whether the court had jurisdiction

(b) Whether defendant as a carrier was liable Submissions were made on those two issues and High Court of Uganda adjudicated on them.

On the issue of Jurisdiction the High Court of Uganda held in part: “I do not agree with him (i.e. defendant’s counsel) that the place of delivery of the goods was at Mombasa. The bill of lading shows that the goods; the subject matter of the contract were in transit to Kampala Via Mombasa. In my view the last destination of the goods was Kampala where the consignee was resident.

Therefore the performance of the contract would have been completed when the goods are received by the consignee or its authorized agent. Therefore this court is seized not only with territorial jurisdiction over the subject matter of the suit. Moreover the defendant voluntarily filed a defence in which it denied

liability without complying with the Provisions of O. 5 1 B (supra) and therefore it cannot be heard disputing the jurisdiction of this court. By filing a defence, it submitted itself to the jurisdictions of the court asking it to adjudicate on the matter in controversy”.

Earlier in the judgment the trial judge had stated that order 5 Rule 1B of Civil Procedure Rules (Uganda) provides that where a defendant wishes to dispute the jurisdiction of the court in any proceedings, he should make an application by summons in chambers from any of the orders set out in the rule.

On the issue of liability the High Court of Uganda considered the facts and the law and concluded that defendant was liable. On 23.10.2000 plaintiff filed an *ex parte* originating summons in this court praying for an order that the judgment be registered in this court.

That application, was heard by Mulwa J and allowed on 16.3.2001 Before I examine the application, it is necessary to state the legal status of the judgment of the High court of Uganda in relation to Kenya. By section 18(1) of the Act, a judgment of the designated court: “Shall be recognized in any court in Kenya as conclusive between the parties thereto, as to the matter adjudicated upon, in all proceedings (no matter by which of the parties in the designated court they are instituted) On the same cause of action and may be relied upon by way of defence or counter claim in those proceedings” The exceptions in section 18(2) of the Act do not apply in this case at this stage because the judgment has already been registered. In addition Section 9 of the Civil Procedure Act provides: “A foreign judgment 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 on incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable:
- (d) Where the proceedings in which the judgment 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.

A “Foreign court” is defined in section 2 of Civil Procedure Act a court situated outside Kenya which has no authority in Kenya and a “foreign judgment” as a judgment of of a foreign court.

Thus in the enforcement proceedings under the Act, a judgment of a designated court whether registered or not has the same legal status as a judgment of High Court of Kenya until it is set aside subsequent to registration or until it is shown that the registration would have been set aside. Further, in general, as provided in section 9 of the Civil Procedure Act, a foreign judgment is conclusive until it is shown that any of the exceptions in section 9 of Civil Procedure Act do exist. Such judgment of a reciprocating country as defined in the Act or Judgment of any foreign court is not impeachable on the merits whether for error of fact or of law –

Halsbury's law of England 4th Edition Vol 8(1) para 1007.

In deed, this court has no appellate jurisdiction over such judgments and its duty in the present application is merely to find out whether or not the statutory grounds for setting aside a registered judgment stipulated in section 10 of the Act have been established. The first ground to support the application is that the judgment has been registered in contravention of the provisions of the Act. However applicants counsel did not submit on that ground. The High Court of Uganda is a superior court of record. A certificate to that effect dated 31.7.2000 was annexed to the application for registration. Uganda is commonwealth country. The judgment in issue was given in Civil Proceedings where a sum of money is

payable.

The judgment shows that it is final and conclusive. Indeed, section 3(1) of the Act applies to the judgment. Mulwa J considered the provisions of section 5 and 6 of the Act and was satisfied that the court had jurisdiction to register the judgment.

Applicant has not shown that the judgment was registered in contraction of the Act.

The second and the main ground to support the application is that the High Court of Uganda had no jurisdiction to adjudicate upon the cause of action in which the judgment was given. On this ground, the applicants counsel submitted inter alia, that:

(i) Jurisdiction is derived from statute.

(ii) Parties before Uganda court were a Ugandan company and a Kenyan Company

(iii) The cause of action arose in Kenya

(iv) Defendant company did not have any place of business in Uganda

(v) The basis of the claim was a contract of carriage of cargo by sea from London to Port of Mombasa and Cargo was loaded in London and discharged in Mombasa

(vi) Defendant appeared in Uganda court and contested the jurisdiction which act is not a submission to the jurisdiction of the High Court of Uganda. (vii) None of the provisions of section 4(1) – paras (a) to (i) applied to the proceedings

The Respondent's counsel on the other hand submitted, among other things that:

(a) Court had jurisdiction on a matter arising out of contract – section 4(1)(g) of the Act

(b) Bill of landing showed that place of delivery of goods was Kampala via Mombasa

(c) Performance of contract was completed when goods were received by authorized agent in Kampala

(d) Defendant voluntarily submitted to jurisdiction of the High Court of Uganda as he filed a Defence and as there was no conditional appearance.

By section 4(1) of the Act, the Uganda Court is treated as having had jurisdiction, inter alia, where

(a) The judgment debtor being the defendant in the original Court submitted to the jurisdiction of the court by voluntarily appearing in the proceedings.

(b) In the case of claim arising from contract the obligations which was the subject of the proceedings was or was to be wholly or mainly performed in the country of original court..

But by section 4(2) (b) of the Act, the court shall not be treated as having had jurisdiction under subsection 1, inter alia, by reason only of the

fact that the judgment debtor being defendant in the original court, appeared (conditionally or otherwise) in the proceedings for all or any of the following purposes.

(i) to contest the jurisdiction of the court:

(ii) to invite the court in its discretion not to excise its jurisdiction

Lastly by section 4(3) OF THE Act a finding of a fact made (expressly or by implication) by the original court in the proceedings in which judgment was given and on the basis of which jurisdiction was assumed in those proceedings shall:

(a) if the judgment debtor appeared in those proceedings and did not contest the jurisdiction of the original court, be conclusive evidence of the fact found and

(b) In any other case, be sufficient proof of fact unless the contrary is shown.

It is clear from section 4(2)(b) of the Act that a defendant can appear conditionally or unconditionally in a designated court for purposes of

contesting the jurisdiction of the Court or for inviting court in its discretion not to exercise its jurisdiction. In such a case, the designated court shall by that very fact be treated as not having had jurisdiction.

In the present case, defendant appeared in the Uganda Court and contested the jurisdiction of the Court. The Court found that it had in fact jurisdiction and further that defendant had voluntarily submitted to the jurisdiction of the court. As the defendant had contested the jurisdiction of the court then by section 4(3) (a) of the Act, the finding of fact on the basis of which jurisdiction was assumed is not conclusive evidence in this court of the fact found. That finding of fact upon which jurisdiction was assumed fall under S. 4(3)(b) of the Act and is only sufficient proof of the fact unless the contrary is shown.

In the present case, the applicant (defendant) appeared in the Uganda Court and filed a Defence to the plaintiffs claim. Defendant did not contest the jurisdiction of the Uganda Court in his defence. The High Court Uganda in its Judgement referred to order 5 rule 1 B of Uganda Civil Procedure Rules which according to that court.

“Provides that where a defendant wishes to dispute the jurisdiction of the court in any proceedings he should make an application by summons in chambers for any of the orders set out in the rule” The Uganda Court made a finding that the applicant voluntarily filed a defence in which he denied liability without complying with the provisions of order 5 rule 1 B.

It appears that the defendant raised the issue of Jurisdiction during trial as one of the issues to be tried by the court. He allowed the court to exercise jurisdiction from the very beginning by filing a Defence which did not contest the jurisdiction of the Court. It is apparent that defendant did not merely appear in the suit to contest jurisdiction or invite the court in its discretion not to exercise jurisdiction.

The applicant has not shown that the finding of fact on the basis of which the court found that applicant had voluntarily submitted to jurisdiction are incorrect. It follows that, by virtue of section 4(3)(b) of the Act, the finding of fact by the High Court Uganda are sufficient proof of those facts. But applicant avers in ground 6 of the application that there were provisions of the law of Kenya which by virtue of rules of private

international law of Kenya would have been applicable notwithstanding any choice of another system of law. Mr. Waweru for the applicant specifically referred to the provisions of the Carriage of Goods by Sea Act (cap 392 of the laws of Kenya) and submitted that that Act contains International conventions like the Hague Rules which the High Court of Uganda did not consider. As Section 4(1) of cap 43 is subject to section 4(2) of cap 43 is subject to section 4(2) of cap 43, the voluntarily submission by application to the jurisdiction of the High Court of Uganda would not confer jurisdiction on the Uganda court where as section 4(2)(a) provides rules of private international law of Kenya confer exclusive jurisdiction to courts of Kenya or another country other than Uganda.

The applicant counsel does not say that the Carriage of Goods by Sea Act confers exclusive jurisdiction to Kenya court or Courts of other countries other than Uganda courts in the proceedings before the Uganda court. The Act does not apply to the proceedings which were before the Uganda court because by section 2 of the Act, the Act applies to carriage of goods by Sea in a ship carrying goods from a port in Kenya to

another port whether in or outside Kenya.

From the foregoing circumstances, applicant is deemed to have voluntarily submitted to the jurisdiction.

I will consider grounds No. 3, 4, and 5 together. The applicant carried the goods to the port of Mombasa. The applicants letter dated 9.2.98 (Exhibit "IS2") show that the container containing the goods the subject matter of the suit was discharged at the port of Mombasa but collected through forged documents by one DSUYA KAKONO of Pamo Ship Contractors before the container left the port.

That document also shows that Olympic Forwarders were the appointed forwarders for the consignee (respondent) and also the party with genuine documents and instruction from the consignee. The respondents exhibit "IS4" show that Olympic forwards ltd claimed for the release of goods to them. JONATHAN DSUYA KAKONO was charged in criminal case no, 3131/96 of Mombasa Chief magistrate's court and that the court on 18.9.96 ordered the container to be released to Olympic Forwarders ltd. That order was flouted and the container was carried away by Pamo Ship contractors never to reach the consignee in Uganda.

It is submitted by the applicant, that the order of the Chief Magistrates Court Mombasa made before the Judgment of the Uganda Court which is irreconcilable with the judgment of the High Court of Uganda. The High Court of Uganda considered this aspect of the dispute and said in part:

"The agent who had been appointed to clear the goods did not do so because apparently the goods were released by Kenya Ports Authority to another persons who was not the consignee. The liability of the carrier had not ended when this happened since the original shipping documents representing the goods were still in its custody The liability of the carrier in this regard was therefore not discharged because the act of Kenya Ports Authority did not absolve the defendant as insured carrier of goods since it is not one of the exemptions already stated..." I understand the applicant as saying that the order of the Chief Magistrate Mombasa absolved applicant from further liability as the Mombasa Court ordered the container to be released to respondent's lawful agent. But the goods were not released to the respondents agents. The Chief Magistrates Court in Mombasa was not dealing with the contract of carriage

of goods between the applicant and the respondent and did not decide on the rights of the parties under that contract. So, when the High Court of Uganda adjudicated on the liability of the applicant under the contract, there was no previous decision of any court in Kenya on that subject. It follows that the order of the Chief Magistrate Mombasa cannot be said to be final and conclusive on the issue of applicants liability under the contract nor can it be said that the decision of the High Court Ugandan is irreconcilable with order of Chief Magistrate Mombasa.

For the foregoing reasons, I dismiss the application with costs

E. M. Githinji

Judge

29.11.2002

Mr. Kibatha holding brief

Mr. Waweru present

Mrs Effendi present

Mr. Kibutha

My instructions and that applicant intends to file an appeal I apply for an interim stay of execution pending formal application for stay of execution

E. M. Githinji

Judge

Mrs Effendi

I oppose that as my client wants to move ahead with execution Despite that I leave it to court.

E. M. Githinji

Judge

RULING

It is just to stay execution for a short while pending making and hearing of a formal application to stay of execution

E. M. Githinji

Judge

Order: Execution is stayed for 14 days pending filing of a formal application. Ruling to be typed and copy supplied

E. M. Githinji

JUDGE