



Barak Fund SPC Limited (Acting on Behalf of Barak Structured Trade Finance Segregated Portfolio) v Tron Enterprise Limited (Civil Appeal E560 of 2024) [2025] KEHC 5561 (KLR) (Commercial and Tax) (2 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E560 OF 2024**

RC RUTTO, J

MAY 2, 2025

BETWEEN

BARAK FUND SPC LIMITED (ACTING ON BEHALF OF BARAK STRUCTURED TRADE FINANCE SEGREGATED PORTFOLIO) .. APPLICANT

AND

TRON ENTERPRISE LIMITED RESPONDENT

JUDGMENT

1. The applicant moved court by way of an originating summons under Articles 2 and 159 of *the Constitution* of Kenya, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Sections 3(1)(a), 3(2), 5(1), 5(2)(a)(ii), 5(2)(b), 5(4), 6(1), and 8 of the *Foreign Judgments (Reciprocal Enforcement) Act*, Order 37 Rule 14 of the Civil Procedure Rules, Rules 2(1) and 3 of the Foreign Judgment (Reciprocal Enforcement) Rules, 1984 and all other enabling Provisions of law seeking the following orders;
 - i. The judgment delivered on 14 July 2023 and the order issued pursuant thereto by the High Court of Justice Business and Property Courts of England and Wales, King’s Bench Division, Commercial Court, by Mr Sean O’Sullivan KC, sitting as Deputy High Court Judge in Claim number CL-2022-000376 be recognized and registered as a judgment of this Honourable Court, the judgment and order aforesaid be enforced within the jurisdiction of this Honourable Court and that the Applicant be at liberty to enforce the order aforesaid within the jurisdiction of this Honourable Court
 - ii. This Honourable Court grant leave to the Applicant to execute the judgment of 14 July 2023 and the Order issued pursuant thereto both recognized and registered by this Honourable Court.



- iii. The costs of this Originating Summons be provided for.
2. The application is premised on the grounds on the face of the application and supported by the affidavit sworn on 25th June 2024 by Donovan Lindhorst, the Applicant's legal representatives.
 3. The facts of the case are that the applicant on 16th October 2015 entered into a term Loan Agreement with the respondent for the provision of a loan by the applicant to the respondent. In breach of the loan agreement, the respondent failed to pay the outstanding sum amounting to USD.1,009,875.24 being the Loan Amount plus the accrued interest. Following this and as per clause 28.2 of the Agreement, the parties submitted to the exclusive jurisdiction of the courts of England and Wales in respect of any dispute or claim arising out of or in connection with the Agreement.
 4. Therefore, the Applicant filed a claim with the English Court seeking repayment of the Outstanding Sum (plus interest) or, in the alternative, damages for breach of contract being Claim number CL-2022-000376. The Respondent was duly served by personal service but failed to file an acknowledgment of service or a defence. A summary judgment was entered in favour of the applicant in the following terms;
 - a. USD.1,099,875.24 of principal amount and accrued interest under the term loan agreement from 19 October 2015 to the repayment date of 31 July 2016;
 - b. USD.2,479,136.36 of default contractual interest accruing from 1 August 2016 up to and including the date of the order (14 July 2023);
 - c. The sum of EUR. 90,000 for costs;
 - d. Interest at the rate of 8% per annum calculated on the judgment debt and costs from the date of judgment until payment.
 5. The applicant states that no application to set aside the judgment or appeal against it has been brought within the time prescribed. Thus, it is now desirous of registering, in Kenya, the judgment delivered on 14 July 2023 and the order issued pursuant thereto by the High Court of Justice Business and Property Courts of England and Wales, King's Bench Division, Commercial Court, by Mr Sean O'Sullivan KC, sitting as Deputy High Court Judge in Claim number CI-2022-000376 pursuant to the [Foreign Judgments \(Reciprocal Enforcement\) Act](#) Chapter 43 of the Laws of Kenya.
 6. The applicant further states that the United Kingdom is recognized as a reciprocating country as provided for in the Schedule of the Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984; that the respondent has its registered office situate in Kenya within the jurisdiction of this Honourable Court and was served with the Applicant's Claim Form and Particulars of Claim through its advocate. Accordingly, the applicant prays that this Honourable Court allows the Originating Summons to proceed ex parte.
 7. The application was opposed by the respondent who filed grounds of opposition seeking that the application be struck out and or dismissed with costs on grounds that it is frivolous, vexatious and scandalous; that enforcement of the foreign judgment would be manifestly contrary to public policy in Kenya as it would be a breach of right to fair hearing accorded to the respondent in Article 50 of [the Constitution](#) and that the sum awarded by the foreign court are substantially in excess of those which would have been awarded by the High Court of Kenya on the basis of the finding of law and fact by the original court.
 8. From the proceedings, this matter was first before the court on 4th November 2024 when the Deputy Registrar directed the parties to each file their respective submissions within 7 days. The highlighting



of the submissions was set for 18th November 2024. Later, on 18th November 2024 both counsel for the applicant and the respondent were present. Counsel for the applicant then informed court that he was unable to file his submissions and sought to be allowed until the close of day to file its submission. On the other hand, counsel for the respondent requested for seven days to file its submission. The Court proceeded to direct that the applicant files and serve its submissions within 3 days while the respondent files and serve his within 10 days of service. Judgment was reserved for the 2nd of May 2025.

9. None of the parties complied with the directions on filing of submissions within the stipulated timelines. At the time of writing this judgment none of the parties had filed submissions as confirmed from the CTS e-filing portal. I wish to emphasize on the importance of complying with court's directions, particularly concerning procedures towards disposal of the matter before court. I draw reference in the case of *Okoti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others (Application E029 of 2023)* [2023] KESC 69 (KLR) (8 September 2023) (Ruling) where the Supreme Court held that;

“Taking all the above matters into account, we must state that, this court has on several instances underscored the importance of compliance with its orders, rules and practice directions. With regard to filing and service of documents within the requisite time, the court has in a long line of decisions stressed that it will not countenance breaches of timelines set by the rules or by the court, and affirmed the general constitutional principle that justice shall not be delayed. See *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others*, SC Petition No 5 of 2016; [2018] eKLR and *Kenya Railways Corporation & 2 others v Okoti & 3 others, SC Petition (Application) No 13 of 2020 & Petition 18 of 2020 (Consolidated)*; [2022] KESC 68 (KLR). It goes without saying that compliance with court orders goes to the root of the rule of law as well as the dignity of any court.”

10. This position was also underscored in the *Kenya Airports Authority v Otieno, Ragot & Company Advocates (Petition (Application) E011 of 2023)* [2023] KESC 104 (KLR) (8 December 2023) (Ruling).
11. This notwithstanding I will proceed to determine the application based on the pleadings filed. In this instance the applicant seeks that this court to recognize and register as a judgment of this Honourable Court, the judgment and order delivered on 14th July 2023 by the Court of Justice Business and Property Courts of England and Wales, King Division Commercial Court, by Mr Sean O’Sullivan KC, sitting as Deputy High Court Judge in Claim number CL-2022-000376 to be enforced within the jurisdiction of this Court and that the applicant be at liberty to enforce the order aforesaid within the jurisdiction of this Honourable Court.
12. To support this application, the applicant in his supporting affidavit, provided a copy of the agreement subject of the court’s determination; a copy of the application for summary judgment; a copy of the judgment and order and an authenticated certificate issued by the High Court of England and Wales pursuant to Section 59(4)a of the *Foreign Judgments (Reciprocal Enforcement) Act*.
13. In response, the respondent filed grounds of opposition stating that the application ought to be struck out and or dismissed with costs on grounds that it is frivolous, vexatious and scandalous; that enforcement of the foreign judgment would be manifestly contrary to public policy in Kenya as it would be a breach of right to fair hearing accorded to the respondent in Article 50 of *the Constitution* and that the sum awarded by the foreign court are substantially in excess of those which would have been awarded by the High court of Kenya on the basis of the finding of law and fact by the original court.



14. This court notes that what's before court for determination is whether or not to recognise the foreign judgment. This procedure is guided by the *Foreign Judgments (Reciprocal Enforcement) Act*, (the Act) as well as the Foreign Judgment (Reciprocal Enforcement) Rules, 1984 which set out the parameters for the recognition of the Judgment.
15. Section 3 of the Act provides for the judgments to which the Act applies and the sets out the proviso to the application of the Act. It is not in dispute that the judgment herein arose out of a breach of a loan agreement between the parties. It does not fall under the proviso set out by the Act and in any case no evidence has been provided to show that the judgment was founded on an incorrect view or principle of law or that it falls within the exceptions provided for under the Act.
16. Under section 13 of the Act, a Court can recognise and enforce Judgments given in countries that have been declared by the Minister, under Section 13 thereof, to be reciprocating countries for the purpose of the Act. In this instance, it is undisputed that the United Kingdom is recognised as a reciprocating country under the schedule of the Foreign Judgments (Reciprocating Enforcement) Extension of Act) Order.
17. The above notwithstanding, I have considered the respondent's grounds of opposition that the application is frivolous, vexatious and scandalous; and that the enforcement of the foreign judgment would be manifestly contrary to public policy in Kenya. I do note that the respondent has not provided any evidence to support their assertion. On the face of it they have not demonstrated the aspects that are frivolous, vexatious or scandalous in the application. Further, the respondent's argument that there was breach to their right to fair hearing could best be addressed by the foreign court that rendered the judgment. The applicant stated that the case before the foreign court proceeded ex parte, the respondent having failed to participate in the case despite service. This has not been rebutted. Failure to take an opportunity to present one's case cannot of itself result in violation of fair hearing.
18. Moreover, beyond stating in the grounds of opposition that the court's award of interest was more than what the High Court in Kenya would have granted, the respondent has neither provided the basis nor demonstrated this assertion. On the face of it, this court is mindful of the general principle applicable in Kenya that courts should not rewrite contracts. The court's award of interest is indicated to be founded on the contract between the parties, which contract the respondent does not seek to vitiate.
19. In the circumstance therefore, I do find that the respondent assertions remain unsubstantiated. As the parties did not comply with the directions of this court as to the filing of submissions, this court declines to make any orders as to costs of this application allowing each party to bear its own costs. The upshot of the above is that the Originating Summons dated 25th June 2024 is hereby allowed in the following terms:
 - a. The judgment delivered on 14 July 2023 and the order issued pursuant thereto by the High Court of Justice Business and Property Courts of England and Wales, King's Bench Division, Commercial Court, by Mr Sean O'Sullivan KC, sitting as Deputy High Court Judge in Claim number CL-2022-000376 be recognized and registered as a judgment of this Honourable Court, and the resultant order from that judgment is recognised and registered by this court as an order of this court enforceable within the jurisdiction of this Honourable Court;
 - b. The applicant be at liberty to enforce the order aforesaid within the jurisdiction of this Honourable Court;
 - c. The applicant is granted leave to execute the judgment of 14 July 2023 and the order issued pursuant to the said judgment



d. Each party will bear its own costs of the application

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF MAY, 2025

RHODA RUTTO

JUDGE

In the presence of;

.....Applicant

.....Respondent

Sam Court Assistant

