Opera Software Ireland Ltd v Keraco Holdings Ltd (Miscellaneous Case E059 of 2024) [2024] KEHC 8699 (KLR) (Commercial and Tax) (22 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8699 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CASE E059 OF 2024

A MABEYA, J

JULY 22, 2024

IN THE MATTER OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT

AND

IN THE MATTER OF AN APPLICATION FOR REGISTRATION OF A JUDGMENT OF THE HIGH COURT OF JUSTICE KINGS BENCH DIVISION OBTAINED CLAIM NO KB—2023-002582

BETWEEN

OPERA SOFTWARE IRELAND LTD ..... JUDGMENT CREDITOR

AND

KERACO HOLDINGS LTD ..... JUDGMENT DEBTOR

RULING

1. This suit was commenced by way of an Originating Motion dated 12/2/2024 under 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* ("the Act"), Order 37 rule 14 of the *Civil Procedure Rules*, Rules 2(1) and 3 of the *Foreign Judgments (Reciprocal Enforcement) Rules)*.

2. The judgment-creditor sought for recognition and enforcement of the judgment given in claim no KB-2023-002582 in the High Court of Justice Kings Bench Division on the 11/10/2023, in the United Kingdom.

3. The Summons was supported by the affidavit of Esther Phillips sworn on 8/2/2024. She stated that on 11/10/2023, the High Court of Justice, Kings Bench Division in London entered judgment in favour of the judgment-creditor against the judgment-debtor for a sum of USD 4,370,944.81 together with interest ("the subject judgment"). That the judgment had not been satisfied and no appeal had been

filed with respect to the judgment. That in view thereof, the same should be recognized and registered in this country.

4. The judgment-debtor opposed the summons vide replying affidavit of Dedan Mungai sworn on 15/5/2024. He deposed that the judgment was not registrable and its registration would be liable for setting aside. He deposed that the parties had entered into an agreement known as the Insertion Order and the monthly consideration was USD 360.000.

5. That the Insertion Order contained only 6 clauses for contract information, campaigns, terms and termination, fees and payment, special conditions and signature. That the judgment-debtor executed the same on the basis of the said clauses. That nevertheless, the said Insertion Order made reference to Terms and Conditions accessible from the judgment-creditor's website which were stated to be incorporated by reference but neither its terms nor a physical copy thereof was provided.

6. That he had now seen attached to the application a copy of the Terms and Conditions whose clause 17 vested the exclusive jurisdiction over disputes arising from the Insertion Order upon courts located in London. That the effect of the said clause was prorogation of jurisdiction on disputes from either the Republic of Kenya where the contract was performed or the Republic of Ireland where the contract was made. That the clause vesting jurisdiction to courts foreign to the parties was an onerous clause which the judgment-debtor ought to have been duly given notice of by attaching it to the contract. That the judgment-debtor was not informed of the proceedings that culminated with the judgment.

7. It was therefore contended that the English Courts were bereft of jurisdiction and the said judgment was therefore an unenforceable. That in any event, the deponent had subsequently visited the judgment-debtor's website and downloaded a copy of the Terms and Conditions whose clause 19 provided that in case of dispute, the same would be settled by way of arbitration in accordance with the Rules of the London Court of Arbitration ('LCIA').

8. That the judgment-debtor neither counterclaimed in the primary proceedings nor submit to the jurisdiction of the English Court that passed the judgment.

9. The judgment-debtor filed a replying affidavit by Niall Power sworn on 30/5/2024. He deposed that the proper court to interrogate whether or not the exclusive jurisdictional clause was an onerous one or not is the High Court of Justice, Kings Bench Division in London, England and not this court.

10. Without prejudice to the foregoing, Power asserted that the judgment-debtor cannot feign ignorance because, the Terms and Conditions were incorporated into the Insertion Order be reference having been adequately brought to the attention of the judgment-debtor in the opening paragraph of the Insertion Order in bold, in blue and in a hyperlink. That in any event, the same was clearly set out in the letter before action dated 29/3/2023 by the Judgment-creditor's UK Counsel.

11. He further deposed that the copy of the Terms and Conditions relied on by the judgment-debtor was misleading as the same were updated on 14/12/2023 while the Insertion Order was signed on 16th and 187th December, 2021 and its effective date was 25/12/2021. That by the time those terms were revised and updated to include clause 19, the contract between the parties had already terminated. That there was no dispute on the debt. That in the premises, the judgment is registrable.

12. The application was canvassed by way of written submissions. The judgment-creditor submitted that it had satisfied the procedural and documentary requirements for the registration of a foreign judgment. That the judgment qualified for registration and it was delivered by a competent court. The case of *Dari Ltd & 5 Others vs. East African Development Bank* [2023] KECA (KLR) was relied on for that proposition.

13. On whether the original court lacked jurisdiction, it was submitted that the judgment debtor had relied on modified standard terms and conditions that came into effect on 14/12/2023 and was actually not applicable for purposes of the insertion orders. The case of *Absa Bank Uganda Ltd vs Uchumi Supermarkets PLC* [2021] KEHC 14 (KLR) was cited in support thereof.

14. On incorporation of the Terms and Conditions by reference, it was submitted that the same was effective as it had been brought to the attention of the judgment-debtor in the Insertion Order and in the letter before action. The Case of *Hugger-Mugger, L.L.C. vs Netsuite, Inc*., 2:04-CV-529TC, 2005 WL 2206128 9D. Utah Sept. 12, 2005) was relied on in support thereof.

15. It was further submitted that the judgment-debtor had acknowledged the debt and proposed a payment plan in the email dated 20/12/2022 sent to the judgment-creditor and that there was therefore nothing to refer to arbitration. The case of *UAP Provincial Insurance Company Ltd vs. Michael John Becket* [2013] eKLR was cited in support of that proposition. That the judgment-debtor had been properly served with the process. Finally, that the parties having freely submitted to the jurisdiction of the English Court, lack of counterclaim should not impede the registration of the judgment. The case of *Areva T&D India Ltd vs. Priority Electrical Engineers & Anor* [2012] eKLR was referred to in support on that proposition. It was urged that the objections of the judgment-debtor be dismissed and the judgment be registered.

16. On the other had it was submitted for the judgment-debtor submitted that this Court has the jurisdiction to determine first whether the original court was competent to enter the default judgment. The case of *Ingang'a & 6 Others vs. James Finlay (Kenya) Ltd* [2023] eKLR was cited in support thereof. That the twin issues to determine whether the English Court had jurisdiction were whether the standard terms and conditions sufficiently incorporated the jurisdictional clause by reference and whether the said Terms and Conditions are verifiable.

17. Counsel submitted that in common law it is a presumption that the terms that were fundamental or material to the contract ought to be incorporated in the main contract. The decision in *AIG Europe (UK) Ltd vs. The Ethniki* [1999] Lyod's Rep IR 221 at 227 was relied on.

18. It was further submitted that an exclusive jurisdictional clause was an onerous clause and posed great inconvenience to the judgment-debtor both logistically and financially. That in common law, a clause that had been incorporated by reference was unsustainable where the court makes a finding that it does not supplement or enhance the meaning of an incomplete contractual term. That the clause that vested exclusive jurisdiction was a standalone clause which gave no explanation neither did enhance any clause in the insertion order.

19. That the principle of sufficient cause accords the contracting party the opportunity to make an informed choice. The cases of *Blu-Sky Solutions Ltd vs. Be Caring Ltd* [2021] EWHC 2619 and *Goodlife Foods Ltd vs. Hall Fire Protection Ltd* [2018] EWCA Civ 1371 were relied on in support of that supposition. That the exclusive jurisdiction clause was in the standard terms and conditions which were not open to negotiation thus making it unconscionable. The decision in *Euromec International Ltd vs. Shandong Taikai Power Engineering Co. Ltd* [2021] KEHC 93 (KLR) was cited in support thereof.

20. Counsel submitted that the standard terms and conditions that govern the relationship of the parties could not be verified. That the link that provided the standard terms and conditions contained in the judgment debtors exhibit. It was further submitted that the judgment was obtained contrary to the rules of natural justice. The case of *Jayesh Hasmukh Shah vs. Navin Haria & Anor* [2016] eKLR was relied on.

21. Finally, it was submitted that the provisions of section 4 of the Act had not been met to warrant recognition and registration of the subject judgment. That the registration of the judgment would be liable to be set aside under sections 10 and 11 of the Act.

22. I have considered the contestations by the parties and the submissions on record. The main question for determination is whether the judgment creditor has met the threshold for recognition and enforcement of the subject judgment.

23. There is no dispute that the parties were in a contractual relationship entered into in 2021 by way of Insertion Order. It is also not in dispute that the judgment-creditor commenced proceedings in England which culminated in the subject judgment. What is in issue is whether the said judgment should or should not be recognized for enforcement in Kenya.

24. The judgment-creditor contended that the subject judgment had not been satisfied nor appealed against and should be recognized and enforced. On the other hand, the judgment-debtor contended that the judgment was not recognizable and enforceable and was liable for setting aside under section 10 and 11 of the Act. The grounds upon which the judgment-debtor relied on were that; the original Court had no jurisdiction to entertain the dispute, that the judgment was unconscionable and given in breach of the rules of natural justice in that process had not been served upon the judgment-debtor.

25. In *Ingangá & 6 Others vs. James Finlay (Kenya) Ltd* [2023], the Supreme Court of Kenya held that: -

> "In the case of foreign judgments, Parliament enacted the *Foreign Judgments (Reciprocal Enforcement) Act* (Cap 43 for the enforcement of judgments given in countries outside Kenyawhich accord reciprocal treatment to judgments given in Kenya. We shall shortly be unravelling the conundrum of how judicial assistanceis accorded to interlocutory decisions. However, what is evident is that the courts have an active role to play where foreign decisions are concerned.
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> ...
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> We have no difficulty finding that decisions by foreign courts and tribunals are not automatically recognized or enforced in Kenya. They must be examined by the courts in Kenya for them to gain recognition and to be enforced."

26. In D*ari Ltd & 5 Others vs. East African Development Bank* [2023] KECA 454 (KLR), the Court of Appeal held: -

> "In Kenya, the primary statute governing enforcement of foreign judgments is the Foreign Judgment (Reciprocal Enforcement) Act which only applies to enforcement of judgments originating from countries outside Kenya which accord reciprocal treatment to judgments given in Kenya. ...
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> ... the court's jurisdiction under the Act is limited to enforcement of judgments from reciprocating countries and did not extend to review of such judgments.
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> ... Save in exceptional 15 instances set out in the Act, the purpose and philosophy of the Act is towards recognition and enforcement of foreign judgments, rather than re-opening and re-litigation in Kenya of matters finally and conclusively determined by a superior court of a reciprocating State. It is also important to remember that it is the parties themselves, like the appellants before us, who voluntarily choose to subject themselves to the laws of the reciprocating states. It is therefore to be expected that before they make the choice of where their disputes will be resolved, they fully appreciate and understand the applicable law. To

later on complain that the lex fori is oppressive is nothing short of an illegitimate attempt to renegotiate the applicable law after the fact."

27. In *ABSA Bank Uganda Limited (Formerly Known as Barclays Bank of Uganda Limited) v Uchumi Supermarkets PLC* (Civil Case E316 of 2020) [2021] KEHC 14 (KLR), it was held that: -

> " a) The foreign judgment must be final and have no conflict with prior judgments.
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> b) A foreign judgment is final for enforcement purposes even if an appeal is pending against it in the foreign jurisdiction.
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> c) The judgment of a foreign court that cannot be enforced by execution in that state's court cannot be enforced by a Kenyan court.
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> d) The foreign court must have had jurisdiction over the defendant. Jurisdiction is confirmed if the cause of action arose within the jurisdiction of the foreign court, if the defendant voluntarily submitted to the court's jurisdiction or if he resided there or had a place of business there, or where the matter is contractual the contract was substantially performed in the country of that court.
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> e) The defendant must have been given notice of the court proceedings against him in conformity with the rules of natural justice and due process of law. Notice should be given in conformity with the laws of that foreign court.
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> f) The foreign judgment must not be contrary to Kenyan public policy. Anything inconsistent with the Kenyan domestic laws, morality and sense of justice or national interests will be deemed contrary to Kenyan public policy.
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> g) The foreign judgment is only enforceable within six years of the date of judgment or six years after the last judgment where there may have been appeals from the original judgment."

28. The judgment debtor has challenged the registration and recognition of the judgment on account of jurisdiction. From the record, it is not in dispute that the parties executed an agreement dubbed Insertion Order where the judgment- creditor would provide an online betting site speed dial services to the judgment-debtor. The point of departure is with regard to the jurisdiction preferred with respect to settling disputes.

29. The judgment-debtor contended that the courts with jurisdiction should have been either those of Ireland where the contract was entered into or Kenya where the contract was performed. That the High Court of Justice, Kings Bench in London had no jurisdiction. On its part the judgment-creditor contended that the Insertion Order incorporated by reference, the judgment- creditor's standard terms and conditions whose clause 17 provided that the courts located in England had the exclusive jurisdiction to determine any dispute that may arise.

30. In the decision of the UK Supreme Court in *RTS Flexible Systems Limited v Molkerei Alois M ller Gmbh & Company KG (UK Production)* [2010] UKSC 14, in particular the summary by Lord Clarke at [45] it was stated thus;

> " The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that

they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations..."

31. It is trite that parties are bound by the terms of their contract and a court ought not to rewrite the same. In execution of a contract, there is a presumption that the parties are well aware of the conditions and terms contained therein. A court will have jurisdiction if there is in existence a jurisdictional clause in which there is real consent or actual acceptance which must be clearly demonstrated. It must be established clearly that the jurisdiction of a foreign court was a subject of consensus between the parties.

32. In the present case, the exclusive jurisdictional clause was in the judgment-creditor's standard terms and conditions. The judgment-creditor contended that since the reference was in bold, in blue and in a hyperlink, the judgment-debtor could not have missed it. The judgment-debtor contended that it never read the said standard terms and conditions before executing the contract. That it only first saw the same after being served with the present application. That when it went to the link, it downloaded a version of the standard terms and conditions that were different from the exhibited one.

33. In *Blue Sky Solutions Ltd vs. Be Caring Ltd* [2021] EWHC 2619(Comm), the court observed that where there are standard terms, a condition which is particularly onerous or unusual will not be incorporated into the contract, unless the party relying on it has fairly and reasonably brought it to the other party's attention. The court held: -

> " It is common ground that where, as here, the T&Cs are not contained in the contract signed by the accepting party, but are referred to in the signed contract the question is whether those T&Cs were sufficiently brought to the attention of that party. Both parties also referred me to the decision of Teare J in Impala Warehousing and Logistics (Shanghai) Co. Ltd v Wanxiang Resources (Singapore) PTE Ltd [2015] EWHC 25 (Comm) for the propositions that: (a) in modern times, when standard terms are frequently to be found on websites, reference to the website in a contractual document may well be a sufficient incorporation of the standard terms to be found on that website; (b) where the website contains reference to more than one set of T&Cs, the T&Cs which the party relying on them seeks to rely upon must have been those which were clearly applicable to the contract being entered into (in that case the distinction was between warehousing terms and freight terms).
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> ...
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> In my view, it would be preferable for me simply to have due regard, when making my decision, that the fact that the defendant was prepared to sign a contractual document must always be powerful factor against a conclusion that terms expressly incorporated into it were not sufficiently brought to its attention. ... It is likely to be strong if there is a short form signed contract which refers to the term itself, and likely to be relatively weak if the order foam is signed but the term is 'buried away' in detailed T&Cs, which are incorporated as a matter of law but which were neither found in the signed contract nor provided with the signed contract.
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> ...
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> Whilst I accept that the STCs were reasonably clearly brought to the defendant's attention in the order form the offending clause itself was not and was cunningly concealed in the middle of a dense thicket which none but the most dedicated could have been expected to discover and extricate, so that in my judgment, this case does not fall foul of the restrictive approach to the application of the principle suggested by the analysis in DO-Buy."

34. In *Interfoto Picture Library Limited vs. Stiletto Visual Programmes Limited* [1989] 1 QB 433 and *Bates v Post Office (No. 3)* [2019] EWHC 606 (QB), it was held that: -

> " The more unusual and/or onerous a term is in a document which has been incorporated by reference, the more attention must be drawn to that particular term for it to be incorporated. The term cannot be "buried in the small print" (think back to Lord Denning's "red hand" judgment from your law school days). Whilst it was not unusual to provide for cancellation fees, this particular term was deemed onerous because the exorbitant fee bore no relationship with any loss the Claimant could potentially incur. And because it was onerous, it needed to be sufficiently brought to the Defendant's attention, something that had not happened."

35. In *Goodlife Foods Ltd vs. Hall Fire Protection Ltd* [2018] EWCA Civ. 1371, the court observed that: -

> " It is a well-established principle of common law that, even if A knows that there are standard conditions provided as part of B's tender, a condition which is "particularly onerous or unusual" will not be incorporated into the contract, unless it has been fairly and reasonably brought to A's attention."

36. From the foregoing, it is clear that the English courts have firmly held that, and I hold as much, that where a party is relying on the standard terms and conditions, there should be clear demonstration that the other party was aware of the terms as at the time of entering the contract. There must be more than mere reference.

37. Further, where an onerous clause and/or condition exist, the same must be expressly be brought to the attention of the other party. Mere reference would not suffice. It must be contained and/or specifically mentioned in the document that the parties sign. Additionally, the language must be so express as to leave no doubt that the party sought to be bound is made aware of the same.

38. A jurisdictional clause is an onerous clause in my view. I state so because of its consequences on the parties. It should not be incorporated by mere reference, it must be expressly notified of the party sought to be bound thereby.

39. In *African Express Line Ltd (AEL) vs. Socofi S.A. and Plantations Dam S.A*. [2009] EWHC 3223 9Comm), the court stated: -

> " In all of the cases to which I have previously referred the jurisdictional clause from the separate contract was held not to have been incorporated into the contract in dispute. Thus:
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> i. In *The Ethniki*, the Court of Appeal held that "Conditions: wording as original" was insufficient to incorporate the jurisdiction clause: The Ethniki [2000] 2 ALL ER at 574 – 575 @ [30] – [41]. (The same decision had been reached earlier by Turkey J. in *Arig Insurance Co. Ltd v. Sasa Assicurazione Rassicurazione S.p.A*. (unreported, Feb. 10, 1998).
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> ii. "Conditions: All terms, Clauses and conditions as original and to follow the original in all respects including settlements" was held to be insufficient in *AIG Europe SA v. QBE International Insurance Ltd*. [2001] 2 Lloyd's Rep. at 269 @ [4] & 273 – 274 @ [27].
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> iii. "All the terms whatsoever of the said charter applyto and govern the rights of the parties concerned in this shipment" failed to incorporate the jurisdiction

clause in *Siboti v. BP France* [2003] 2 Lloyd's Rep. [18], [45] – [46] & 58, despite the "whatsoever".

iv. "To follow all terms and conditions of the primary policy together with riders and amendments applicable there -to covering the identical subject matter and risk including ..." was held insufficient in Dornoch even though that clause contained the words "Jurisdictional Clause" on a separate line at the bottom. Aikens J. (affirmed by the Court of Appeal) held even that was not enough: Dornoch [2006] Lloyd's (Ins. & Reins.) Rep. at 135@ [19] & 142 – 143 & [53].

v. In *Prifiti v. Musini* [2004] Llyod's (Ins. & Reins) Rep. 518 a full reinsurance clause ("Being a reinsurance of and warranted subject to the same terms and conditions (excluding limits and rates) as and to follow the settlements and the Reassured") was inapt to incorporate a Spanish jurisdiction clause, even though the slip for the previous year had made express reference to such a clause. Andrew Smith J held that, even in the earlier year, teher was no such incorporation because the fact that the leading underwriter had initialed the wording of the clause under the slip which read "Form Slip Reinsurance NMA 1779a plus wording as agreed by Leading Underwriter on 10 December 1999" did not mean that the jurisdiction clause was incorporated into the reinsurance policy."

40. A choice of law and jurisdiction clauses are important. For that reason, clear words of incorporation must be used to incorporate them. Mere reference would not do. A jurisdictional clause is bound to impose on the party to a contract a burden which such a party may not be prepared to shoulder or may not contemplate if he is made aware of it at the time of execution.

41. In the present case, the Insertion Order provided that; "The Insertion Order standard Terms & Conditions at https://www.opera.com/contract/insertion-order ("Terms & Conditions") are incorporated in this Insertion Order by this reference". This insertion Order and the Terms & Conditions collectively make up the "Agreement".)

42. The question is whether the above words can be said to have sufficiently incorporated the jurisdiction clause. I do not think so. There was no reference to jurisdiction in the Insertion Order. The jurisdiction clause having been an onerous clause, the same should have either been in the Insertion Order itself or be expressly referred to in the document executed by the parties. The words used did not sufficiently incorporate the jurisdiction clause.

43. The other concern is the nature of the said 'Insertion Order Terms & Conditions' themselves. I have looked at the document produced by the judgment-creditor. They are barely legible. It would require a magnifying glass to read the same. The jurisdictional clause itself is tucked away as the very last clause. It qualifies to what the court in *Blu-Sky Solutions Ltd vs. Be Caring Ltd (supra*) termed as "very close to a misrepresentation case, in that the offending terms are concealed within detailed T&Cs (I will add here, illegible and undecipherable), making it very hard to see the important from the unimportant".

44. Another issue of concern is that, the document which the judgment-debtor relies on as the standard terms & conditions, is not only legible but very clear in its terms. It is world apart as compared to the one relied on by the judgment-creditor. It is said that it was updated in December, 2023 but it is not clear what additional terms and conditions were introduced. It is not explained why that version is clear and legible while the one relied on by the judgment-creditor is a complete opposite.

45. Be that as it may, I hold that the jurisdiction clause was an onerous clause since it was to cause the judgment-debtor greater expense in the event of a dispute being adjudicated in the London courts. There would have been logistical challenges. The same should have been expressly brought to the attention of the judgment-debtor. It was not. The words of incorporation used in the Insertion Order were insufficient.

46. Accordingly, I hold that the judgment-debtor did not voluntarily submit or consent to the choice of law condition. The jurisdiction clause having not been brought to its attention, the judgment-debtor cannot be said to have consented to the choice of law and the original court therefore did not have jurisdiction to entertain the matter. The cause of action did not arise within its jurisdiction. The subject judgment is subject to be set aside under section 10(2)(c) of the Act.

47. Based on the foregoing, the Court finds that the judgment-creditor has not met the threshold for recognition and registration of the judgment. The Originating Summons dated 12/2/2024 is not merited and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2024.

A. MABEYA, FCI Arb

JUDGE