



**Elix Assets 2 Limited & another v Jetlite Air Limited (Miscellaneous Civil Case E835 of 2021)  
[2023] KEHC 22575 (KLR) (Commercial & Admiralty) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22575 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND ADMIRALTY**  
**MISCELLANEOUS CIVIL CASE E835 OF 2021**  
**EC MWITA, J**  
**SEPTEMBER 22, 2023**  
**IN THE MATTER OF THE**  
**FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT**  
**AND**  
**IN THE MATTER OF THE JUDGMENT ENTERED ON 17TH**  
**JUNE 2021 AT THE HIGH COURT OF JUSTICE, BUSINESS**  
**AND PROPERTY COURT OF ENGLAND AND WALES, AT**  
**LONDON IN CL- 2019-000726 BY HER LADYSHIP THE**  
**HONOURABLE MRS. JUSTICE COCKERILL**

**BETWEEN**

**ELIX ASSETS 2 LIMITED ..... 1<sup>ST</sup> APPLICANT**

**ELIX ASSETS 7 LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JETLITE AIR LIMITED ..... RESPONDENT**

**RULING**

1. This is a ruling on an originating summons (OS) dated 2<sup>nd</sup> September 2021, brought under section 5 of the *Foreign Judgments (Reciprocal Enforcement) Act*, (The Act), rule 2 (1) of the Foreign Judgments (Reciprocal Enforcement) Rules, 1984 and Order 37 rule 14 of the Civil Procedure Rules.



2. The Summons seeks registration of the judgment entered on the 17<sup>th</sup> day of June 2021 at the High Court of Justice, the Business and Property Court of England and Wales, London, in Case CL-2019-000726 (Elix Assets 2 Limited and Elix Assets 7 Limited v Jetlite Air Limited).

### **Application**

3. The basis of the application as can be seen from the grounds on the face of the Summons, affidavits and written submissions, is that the applicants obtained a judgment in the High Court of Justice, Business and Property Court of England and Wales at London, (the original Court), but the respondent has not satisfied the decree.
4. According to the applicants, pursuant to lease agreements entered into on 23<sup>rd</sup> and 25<sup>th</sup> October, 2017 and 19<sup>th</sup> July, 2018, the 1<sup>st</sup> applicant leased three Bombardier DHC-8-300 aircraft serial numbers 234, 340 and 375, while the 2<sup>nd</sup> applicant leased two Bombardier DHC-8-100 aircraft serial numbers 330 and 361 to the respondent. In consideration, the respondent was to remit rent security deposit and maintenance reserves to the applicants as and when they fell due. The respondent, however, defaulted.
5. The parties entered negotiations and the respondent requested to return four aircraft because they were no longer commercially viable. The respondent's default and request to return the aircraft, led the applicants to terminate the leases in respect of Aircraft serial Nos. 234, 330, 340 and 361, through notices issued on 19<sup>th</sup> and 22<sup>nd</sup> November, 2019.
6. On 22<sup>nd</sup> November 2019, the applicants commenced proceedings before the original Court, seeking an order for delivery of the aircraft and damages for breach of contract. The particulars of claim were served on the respondent on 17<sup>th</sup> January 2020. The outstanding amount due to the applicants was US \$ 2,591,803.90 at the time.
7. On 7<sup>th</sup> February 2020, the applicants filed an application for summary judgment. On 26<sup>th</sup> February 2020, parties attended a without prejudice settlement meeting in London where they agreed on settlement head of terms which was signed on 11<sup>th</sup> March 2020.
8. Following that agreed settlement, the respondent remitted USD 250,000 on 16<sup>th</sup> March, 2020 and pursuant to clause 3.3, parties were to agree on a payment schedule under which the respondent would make regular instalment payments for the balance of USD 3,170,000. However, the respondent suspended all operations of the aircraft with effect from 19<sup>th</sup> March 2020, due to the COVID 19-pandemic.
9. The respondent filed a response to the application for summary judgment on 20<sup>th</sup> March 2020 which was served by the respondent's counsel on even date. On 9<sup>th</sup> November 2020, following corporate approvals for settlement, parties signed a settlement agreement in which the outstanding amount was agreed to be USD 3,420,000. Parties also agreed to instruct their solicitors to execute a Tomlin order (consent order) within 3 days of execution of the settlement agreement.
10. The parties' Tomlin Order was accepted by the Court on 16<sup>th</sup> November 2020, in effect staying the proceedings of the Court. It further stipulated that any claim for breach arising from an alleged breach of terms set out in the schedule could be dealt with by an application to the original Court without the need to start a new claim.
11. On 29<sup>th</sup> March, 2021, parties entered into a supplemental settlement agreement in which the respondent agreed to a payment schedule. The respondent was to remit the balance of USD 3,170,000 in a series on instalments on specified dates between 1<sup>st</sup> April 2021 and 1<sup>st</sup> September 2025.



12. The respondent failed to remit any amount as agreed under the payment schedule, which led to the applicants invoking clause 4.3 and demanded immediate payment. The second instalment of USD 10,000 which fell due on 1<sup>st</sup> April 2021 was also not paid.
13. On 13<sup>th</sup> May, 2021, the applicants filed an application for summary judgment, pursuant to the Tomlin Order, and copied it to counsel for the respondent (Clyde & Co. LLP), who acknowledged receipt on 21<sup>st</sup> May, 2021. The respondent's counsel further acknowledged that they had received the application for summary judgment; had forwarded it to the respondent directly and spoken with the respondent's counsel in Nairobi who advised that they would be responding in the subsequent week.
14. On 16<sup>th</sup> June 2021, the respondent's counsel wrote to the Court requesting it to dispose the summary judgment application through oral hearing. The applicant's counsel responded through a letter dated 17<sup>th</sup> June 2021, urging the original Court to proceed on the basis of the documents filed as the respondent had not controverted the claim.
15. The respondent's counsel's request for an oral hearing was rejected and the original Court determined the application on the basis of documents filed. The original court entered judgment in the applicants' favour on 17<sup>th</sup> June, 2021. The original Court ordered the respondent to pay USD 3,170,000 with interest at 8% per annum from the date of judgment until payment in full, together with costs of the application.
16. The original Court also ordered the respondent to deliver to the applicants the auxiliary power unit (APU) originally supplied to the aircraft serial number 330, duly repaired, and with a certificate of release to service or a replacement APU with a value and utility at least equivalent to that of the APU. This judgment was served upon the respondent's counsel on 29<sup>th</sup> June, 2021.
17. The applicants annexed the documents required by section 5(4), namely; an authenticated copy of the judgment entered on 19<sup>th</sup> June, 2021 and a certificate of enforcement under seal, dated 22<sup>nd</sup> July, 2021 (as "LJ-2 (a) and (b)), respectively.
18. The applicants urged this Court to allow their application and register the foreign judgment being from one of the reciprocal states recognized under the Schedule to the Act. The applicants argued that the judgment is conclusive and is not subject to interrogation of its merits.
19. The applicants relied on sections 5(1) and 18 of the Act and the decisions in *ABSA Bank Uganda Limited (Formerly known as Barclays Bank of Uganda Limited) v Uchumi Supermarkets PLC* (Civil Case E316 of 2020) [2021] eKLR and *Jayesh Hasmukh Shah v Navin Haria & another* (Civil Suit No. 488 of 2007) [2016] eKLR on the purpose and procedure for recognising foreign judgments in Kenya.
20. The applicants again relied on *Ssebagala & Sons Electric Ltd v Kenya National Shipping Lines Ltd* (Civil Case 1723 of 2000) [2002] eKLR for the argument that whether registered or not, a judgment of a designated court has the same legal status as a judgment of this Court until it is set aside subsequent to registration, or until it is shown that the registration would have been set aside. Further, that a foreign judgment is conclusive until it is shown that any of the exceptions in section 9 of [\*Civil Procedure Act\*](#) do exist.
21. The applicants asserted that the respondent cannot challenge the judgment at this stage of the proceedings. In their view, any challenge can only be done through an appeal in the Courts of England and Wales.
22. Regarding the respondent's challenge to the procedure adopted by the original Court, the applicants relied on the decision in *East African Development Bank v Dari Limited & 5 others* (HCCC No.1 OF



- 2020) [2020] eKLR to argue that this Court cannot be called on to apply the laws of Kenya in England and that the summary judgment procedure adopted before the original Court is similar to order 13 rule 2 of our Civil Procedure Rules.
23. The applicants maintained that the respondent was not condemned unheard. According to the applicants, the application for summary judgment was accommodative of the 30-day period under clause 4.3 and there was uncontroverted proof of service of pleadings and process upon the respondent's counsel.
  24. The applicants took the view, that the respondent is precluded from challenging the enforcement of the judgment of the original Court by the doctrine of estoppel by records. They relied on *Innocent Musheja & another v Marshall Fowler Engineering Limited* (Misc. Application No. 389 of 2006) [2014] eKLR for the argument that when a court of competent jurisdiction delivers a judgment in the nature of a final determination. Even if that judgment is appealable, the doctrine of estoppel by records would still apply to prevent the respondent from challenging its enforcement.
  25. Further reliance was placed on *East African Development Bank v Dari Limited & 5 others* (HCCC No.1 of 2020) [2020] eKLR, (supra), that the respondent cannot purport to disown or run away from the original court at this stage when it had already willingly submitted itself to the jurisdiction of the original Court and actively participated in its process.

## Response

26. The respondent opposed the application through a replying affidavit and written submissions. The respondent argued that it was not personally served with pleadings and the application for summary judgment as required. It is the respondent's case that it was denied an opportunity to either remedy the default within 30 days as was required by clause 4.3 of the supplemental agreement, or participate in the proceedings by instructing a representative.
27. The respondent contended that there was a possibility of bias as the original Court did not appreciate the challenges the respondent faced in complying with the supplemental agreement. According to the respondent, it paid the first instalment of USD 250,000, while the subsequent default was due to the diplomatic row between Kenya and Somalia that led to complete suspension of commercial flights between the two countries, which was its major route thus greatly affected its financial viability.
28. Similarly, Covid 19 pandemic led to suspension of international flights which again greatly hampered the respondent's business. In the circumstances, the rules of natural justice would have allowed for variation of the terms of the agreement by consent.
29. The respondent asserted that the purported service of the application for summary judgment and the orders of 17<sup>th</sup> June 2021 on Mr. Dylan Jones of Clyde and Co. LLP, was inconsequential. This, the respondent argued, was because it did not instruct that law firm to represent it in the matter as shown in the email of Friday, May, 2021 in which Dylan Jones informed one Helen, that they had forwarded the application to Silverstone directly and had spoken to Silverstone's legal Counsel in Nairobi.
30. The respondent contended that the judgment and orders are unconstitutional and unenforceable because they were corruptly obtained as the applicants intended to exclude its participation from the beginning.
31. The respondent again contended that there was no proof that the original claim, the application for summary judgment dated 13<sup>th</sup> May, 2021 and the order of 17<sup>th</sup> June 2021 were served. Similarly, the notice of entry of judgment was not served upon its director or his representatives to make them



- aware of the entry of the judgment and afford the respondent an opportunity to apply to set aside the judgment or appeal.
32. The respondent relied on section 9 (1) (d) of the Act to argue that a foreign judgment such as the one the applicants are seeking to enforce, can only be adjudicated upon if it was obtained in manner that was in tandem with the rules of natural justice as understood within our laws.
  33. In this regard, the respondent relied on article 50 (1) of *the constitution* and the decision in Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another (Civil Appeal 125 of 2018) [2018] eKLR, to argue that its right to fair hearing was violated before the original Court.
  34. The respondent again relied on the decisions in Jayesh Hasmukh Shah v Navin Haria & another (Civil Suit No. 488 of 2007) [2016] eKLR and Adams & others v Cape Industrials PLC [1990] Ch. 431, that a foreign judgment obtained in circumstances that are contrary to natural justice does not give rise to any obligation of obedience at common law.
  35. The respondent again relied on the decision of the Supreme Court of Uganda in Management Committee of Makondo Primary School and Another v Uganda National Examination Board (HC Civil Misc. Application No.18 of 2010), to argue that the rules of natural justice would prevail against the rules of procedure in the original Court that would undermine the rights of a litigant and or a Kenya citizen to fair hearing.
  36. The respondent again relied on General Medical Council v Spackman [1943] 2 ALL ER 337, that violation of the principles of natural justice, renders a decision invalid, regardless of the outcome.
  37. The respondent urged the Court to dismiss the application with costs.

#### **Determination**

38. The applicants have sought registration of the judgment entered in their favour on 17<sup>th</sup> day of June 2021 pursuant to section 5 of the *Foreign Judgments (Reciprocal Enforcement) Act*. The judgment was entered against the respondent by the original Court in Case CL-2019-000726 (Elix Assets 2 Limited and Elix Assets 7 Limited v Jetlite Air Limited).
39. The applicant's case is that the judgment is final; conclusive and is from a reciprocal country, thus should be registered in this country for purposes of enforcement.
40. The respondent opposed the application on grounds that the judgment was not lawfully obtained; that it was denied an opportunity to participate in the proceedings and that its right to a fair hearing was violated. For those reasons, the court should decline the application.
41. I have perused the provisions of the Act, the law governing applications of this nature. Under section 3(1), the Act applies to, among others, a judgment or order of a designated court in civil proceedings whereby a sum of money is made payable.
42. In terms of subsection (2), the Act will apply if the judgment requires the judgment debtor to make an interim payment of a sum of money to the judgment creditor; or the judgment is final and conclusive as between the parties. The subsection emphasises that a judgment is deemed to be final and conclusive, notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.
43. Sub section (3) provides for circumstances under which the Act does not apply in respect of judgments from a foreign country.



44. There is no doubt that the judgment, the subject of this application, relates to payment of money by the respondent to the applicants. There is also no doubt that in terms of subsection 2, the judgment is a final judgment between the parties and is a judgment from a court of a reciprocal country; England and Wales.
45. In terms of jurisdiction, there is no argument by the respondent, that the original court did not have jurisdiction to determine the dispute between the parties. From the record, the respondent had agreed in writing before the commencement of the proceedings, to submit, in respect of the subject matter of the proceedings or disputes of the kind which were the subject matter of the proceedings, to the jurisdiction of the original court.
46. That is, the respondent did not argue that the original court did not have jurisdiction. Rather, parties had an agreement that any dispute between them would be determined by the original court.
47. Section 5 (1) of the Act permits, where a judgment to which the Act applies has been given in a designated court, the judgment creditor to apply to this Court to have that judgment registered within six years of the date of the judgment or, where there have been proceedings by way of appeal against the judgment, of the date of the last judgment in the proceedings.
48. Subsection (4) provides what documents should accompany the application for registration of the foreign judgment. These are; an authenticated copy of the judgment and a certificate of enforcement under seal. In this respect, the applicants attached a copy of the judgment entered on 17<sup>th</sup> June, 2021 and a certificate of enforcement under seal dated 22<sup>nd</sup> July, 2021. The applicant further stated in the supporting affidavit, that the judgment had not been satisfied at the time of the application.
49. Where the court is satisfied as to the matters brought under section 5(1), the Court's obligation is to order registration of that judgment. The only time the Court may decline to do so, is if it is satisfied that the judgment has been wholly satisfied, or that the judgment can be enforced through execution in the country of the original court.
50. The respondent has not argued that the judgment has been wholly satisfied or that enforcement can be done through execution in country of the original court; England and Wales. The respondent's argument, if anything, shows that the judgment has indeed not been satisfied and there is no prospect of satisfying the judgment, going by the respondent's response and submissions.
51. The respondent urged that the application be declined so that the judgment is not registered. According to the respondent, it was denied an opportunity to be heard because there was no personal service. The respondent again argued that it did not appoint the advocate to represent it before the original court.
52. I have perused the application and the response. The applicants stated that the pleadings were served and a defence was filed. Later parties entered into negotiations and reached a settlement plan. The respondent paid some instalments but later defaulted. An application for summary judgment was filed and served. The respondent's counsel requested that the application be disposed of orally which the applicants opposed. The original court ruled that the application be determined on the basis of the documents filed. The court then delivered its decision in favour of the applicants.
53. The position taken by the respondent on how the matter was determined was not challenged by the respondent before the original Court. There is therefore evidence that the application was served and the respondent was represented before the original court. Service of pleadings need not have been on the respondent personally, where there was an agent.



54. The respondent's argument that it had not appointed counsel, is not persuasive before this court. The respondent did not deny knowledge of the Advocates and the fact that the documents were sent to it and counsel in country of the original court had talked to the respondent's counsel in Nairobi was not denied. Furthermore, this court is not dealing with an application for setting aside of the judgment so that it could consider the merit of the entry of the judgment.
55. There is also the argument that the judgment may have been corruptly obtained. This is a serious assertion that can only be made before the original court as this court is not in the perfect position to interrogate such an allegation.
56. The respondent again advanced reasons why it was not able to meet its obligations under the contract or supplemental agreement. The reasons included closure of the Kenya-Somali border and the outbreak of the Covid 19 pandemic. Whereas these reasons may sound persuasive, they could only be raised in the original court. This is so, because this court is not the trial court. This Court's mandate under the Act, is to determine whether the judgment should be registered in this country or not. This court does not determine whether there was a good defence or not.
57. Having considered the application and the response, the conclusion I come to, is that this court is satisfied that the application meets the threshold registering the judgment in this country.
58. Consequently, and for the above reasons, the application is allowed as prayed. Costs of the application to the applicants.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023**

**E C MWITA**

**JUDGE**

