



**Telkom Network Malawi PLC v Smart Banking Solutions Limited  
t/a Neramo Limited (Miscellaneous Application E004 of 2023)  
[2024] KEHC 15778 (KLR) (Commercial and Tax) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15778 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E004 OF 2023  
BM MUSYOKI, J  
DECEMBER 13, 2024**

**BETWEEN**

**TELKOM NETWORK MALAWI PLC ..... JUDGMENT CREDITOR**

**AND**

**SMART BANKING SOLUTIONS LIMITED T/A NERAMO  
LIMITED ..... JUDGMENT DEBTOR**

**JUDGMENT**

1. On 29<sup>th</sup> March 2022 this court on application by the judgement creditor registered foreign decree passed in High Court of Malawi commercial cause number 411 of 2019 given on 5<sup>th</sup> March 2020. The judgment creditor tried to execute the decree against the judgement debtor with no success following which it filed an application dated 27<sup>th</sup> January 2023 seeking to have the judgment debtor's corporate veil lifted and it be allowed to execute against the individual directors of the judgment debtor. In the said application the applicant prays for;
  1. This Honourable Court be pleased to issue an order lifting the corporate veil of the defendant/judgement debtor/respondent and issue summons to Rumina Farouk Prayal Merali, Alean Farouk Merali and Farouk Prayal Merali, directors/shareholders of the defendant/judgement debtor/respondent to show cause why they should not be committed to civil jail for failure to pay Kshs 102,507,058.00 being the decretal sum, in addition to accrued interest and costs of this suit.
  2. An order be issued compelling the defendant/respondent's directors/shareholders, being Rumina Farouk Prayal Merali, Alean Farouk Merali and Farouk Prayal Merali to file an affidavit of the company's assets.



3. An order be issued compelling the defendant/respondent's directors/shareholders to produce the defendant/respondent's books of accounts for the year 2014 to 2022, bank details and bank statements for the year 2014 to 2022, audited accounts for the year 2014 to 2022 and income returns for, the year 2014 to 2022.
  4. This Honourable Court be pleased to issue summons for the directors/shareholders of the defendant/respondent, Rumina Farouk Prayal Merali, Alean Farouk Merali and Farouk Prayal Merali, to appear before this Honourable Court to be cross examined on the contents of the affidavit on company's assets.
  5. In default of prayers 2, 3 and 4 above, a warrant of arrest be issued against the defendant/respondent's directors and further order committing the defendant/respondent's directors/shareholders, Rumina Farouk Prayal Merali, Alean Farouk Merali and Farouk Prayal Merali, to civil jail for conspiring to disobey court orders.
  6. This Honourable Court be pleased to compel the defendant/judgment debtor/respondents to pay the decretal sum plus interest and auctioneers fees.
  7. The costs of this application be provided for.
2. Faced with the above application, the judgment debtor moved this court vide chamber summons application dated 26<sup>th</sup> April 2023 seeking the following orders;
1. The application be certified as urgent and heard ex parte in the first instance.
  2. Pending hearing of this application inter parte this Honourable Court be pleased to issue an order staying the execution of the decree dated 29<sup>th</sup> March 2022 and issued by this Honourable Court on 27<sup>th</sup> April 2022 and the hearing and determination of the respondent's notice of motion dated 27<sup>th</sup> January 2023.
  3. Pending hearing and determination of this application, this Honourable Court be please to issue an order staying the execution of the decree dated 29<sup>th</sup> March 2022 and issued by this Honourable Court on 27<sup>th</sup> April 2022 and the hearing and determination of the respondent's notice of motion application dated 27<sup>th</sup> January 2023.
  4. This Honourable Court be pleased to set aside the registration of an order and a decree of unknown dates, which were supposedly given by the High Court of Malawi Commercial Division in case number 411 of 2019.
  5. This Honourable Court be pleased to set aside the decree dated 29<sup>th</sup> March 2022 and issued by this Honourable Court on 27<sup>th</sup> April 2022, which arises from the registration of the order and decree of unknown dates that were supposedly given by the High Court of Malawi Commercial division in case number 411 of 2019.
  6. The costs of this application be provided for.
3. The above two applications were on 26-05-2023 ordered to be heard together and by way of written submissions. The parties have filed their respective submissions. In my view, the application by the judgment debtor seeking to set aside the decree should be considered first because, if the same were to succeed, then the application by the judgment creditor dated 27<sup>th</sup> January 2023 would automatically have no ground to stand on. I will therefore start with the judgment debtor's application dated 26<sup>th</sup> April 2022.



4. The judgment debtor's application is supported by an affidavit of one Farouk Pyarali Merali identified as its director sworn on 26<sup>th</sup> April 2023. The grounds upon which the application is hinged are mainly that the judgment debtor was not served with summons for the suit in the High Court of Malawi and further that the said judgment was obtained irregularly as there was an arbitration clause in the undisputed commercial agreement.
5. The judgment debtor has submitted that it is entitled to the orders prayed as the Malawian case ought to have been settled by way of arbitration. It does not deny existence of the contract between the parties but argues that clause 24.2 of the commercial agreement provided that all dispute arising out of the said agreement should be settled amicably or through arbitration. On this point, the judgment debtor has relied on section 10(2)(j) of the Foreign Judgements (Reciprocal Enforcement) Act Chapter 43 of the Laws of Kenya which provides that the grounds upon which a registered judgment may be set aside are that;
  - (j) it was necessary for the original court, in order to give its judgment, to decide a question relating to any matter specified in paragraphs (c) to (k) of section 3 (3) and the decision is different from that which the High Court, having applied the rules of private international law of Kenya to that question, would have reached.
7. The applicant has picked section 3(3)(k) of the Act to fit its case for setting aside. That section provides that;

This Act does not apply to a judgment or order of a designated court in any proceedings if:-

  - i. the bringing of those proceedings in that court was contrary to an agreement, or to an instrument in respect of which the proceedings were instituted, whereby the dispute, or the proceedings, were to be settled otherwise than in the courts of the reciprocating country; and
  - ii. those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given;
  - iii. that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of the court;
8. The judgment creditor has not answered to this issue. I have looked at the agreement exhibited by the judgment debtor and it is clear to me that the parties agreed to subject disputes arising therefrom to arbitration. There is no evidence that the option of arbitration was exhausted before the case was filed in the High Court of Malawi. The judgment debtor has deponed that it was not aware of the institution of the case in court leave alone consenting to its filing thereby subjecting itself to the jurisdiction of the court. The judgment debtor did not make a counterclaim or even appear in the court case. The judgment creditor's silence on this issue in both its submissions and the replying affidavit leaves me with no alternative but to place the case perfectly under section 10(2)(j) as read together with section 3(3)(k) of Foreign Judgements (Reciprocal Enforcement) Act.
9. The judgment debtor has also averred that it was not served with the summons in the original suit and did not appear in it. This court has been referred to Section 10(2) (g) of the Act. Under this section, registration of a foreign decree or judgment may be set aside if it is established that the judgment debtor was not duly served with the process of the original court and did not appear in the original court. The judgment debtor has maintained that it was not served with the process in the Malawi case and it did not appear in that case.



10. On its part, the judgment creditor avers that the judgment debtor was served and in proof of the service, it has produced an affidavit by one Judith Hiwa. This affidavit states that the summons were served through courier services of DHL Express and the same were served on received by one Vivian Wangoi. The judgment debtor has refuted this claim of service by stating that as at the time of the alleged service which was on 19-12-2023, it did not have offices located at the alleged place of service. According to the judgment debtor, its offices at Furniture Palace Complex where it is said to have been served were destroyed by fire on 5<sup>th</sup> and 6<sup>th</sup> August 2018 as a result of which it relocated to Kalamu House in Westlands Nairobi. In proof of this, it has exhibited a county fire report dated 5-08-2018 and lease dated 30<sup>th</sup> July 2019 for the Kalamu House address. It also denies that it had an employee or agent by the name Vivian Wangoi.

11. In its reply to the application, the judgment creditor has filed an affidavit sworn by one Nitta Chikara. The affidavit claims that the service was done. Notwithstanding what the rules on service state in Malawi, this court is enjoined to use the benchmark of our local rules of service which are found in Order 5 of the Civil Procedure Rules. This court must uphold the safeguards of service upon a defendant as provided in our laws despite the suit having been prosecuted in Malawi. It is my opinion that this was the purport of the holding of the Supreme Court of Kenya in *Ingang'a & 6 Others v James Finlay (Kenya) Limited (2023) KESC 22 (KLR)* where it stated that;

‘To allow universal recognition and enforcement of foreign decisions would result in recognizing that foreign courts were superior to the national courts, thereby infringing on the sovereignty of a country. Further, due to the diversity of laws, automatic recognition may result in the enforcement of decisions that go against the laws or public policies of the enforcing country. It was for that reason that there must be adequate safeguards in place. The citizens or residents of the country where the decision was sought to be enforced should not be left without protection in respect to arbitrary measures which might be taken against them in foreign countries.....’

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 Kenya which accorded reciprocal treatment to judgments given in Kenya. Courts had an active role to play where foreign decisions were concerned.’

12. The obvious flow from the above holding is that, in deciding whether the respondent was served or not, this court would examine the alleged mode of service and establish whether the same is sufficient as per the laws of Kenya. It is not in doubt that service through recognised courier is an accepted mode of service under the Civil Procedure Rules. However, a party who intends to rely on such service must go beyond production of a certificate of posting and delivery to justify proper service especially when dealing with service outside the court’s jurisdiction.

13. The service is said to have been effected with a forwarding letter dated 19-12-2019. The judgment creditor has exhibited what is indicated as a shipment tracking record which shows that a parcel under waybill number 3574810315 was delivered to Vivian Wangoi in Nairobi on 23-12-2019 at 1554 hours. This tracking record does not indicate what was actually delivered to Vivian Wangoi. It has not been shown or indicated in what capacity the said Vivian Wangoi was receiving the parcel and whether she was an employee or authorized agent of the judgment debtor.

14. Further examination of the tracking record and the accompanying waybill show that the parcel was addressed to Smart Banking Solutions of Furniture Palace Complex Nairobi. On this date, the said Smart Banking Solutions Limited had changed its name to Purplefire Limited which is evident from



certificate of change of names dated 20<sup>th</sup> July 2018 annexed to the judgment debtor's supporting affidavit as annexure 'FPM1'. The judgment creditor has not addressed me on the judgment debtor's change of address and name and as such the judgment debtor's averments on the same remain uncontroverted. The above leads me to conclude that on a balance of probabilities, the judgment debtor was not properly served with summons and was not aware of the proceedings in the High Court of Malawi. If it was served at all, then the service did not satisfy the criteria for service as stipulated in Order 5 of the Civil Procedure Rules.

15. The other point the judgment debtor urges is that the judgement of the High Court of Malawi was irregular and not conclusive as per section 9 of the *Civil Procedure Act*. According to it, the judgment was against the rules of natural justice as it was condemned unheard. The application of the doctrine that no person should be condemned unheard interrogates whether or not that person has been given an opportunity to present their side of the case. Where a party has been given that opportunity but squanders the same, the rule cannot be said to have been violated. However, since I have already held that the judgment debtor did not appear to have been duly served, nothing else turns on this ground.
16. In its submissions dated 17<sup>th</sup> July 2017, the judgment creditor has tried to make out its case for sustaining the decree under Order 12 Rule 7 of the Civil Procedure Rules. In my opinion, an application for setting aside registration of a foreign judgment should not be considered under the same principles established under Orde 12 Ruel 7 of the Civil Procedure Rule. There is a special and specific regime for considering pleas for setting side registration of foreign judgments. It is notable that setting aside registration of a foreign judgment does not mean the same as setting aside of proceedings or judgment in the foreign jurisdiction. All that it means is that the registration foreign judgment once set aside cannot be executed in Kenya as it ceases to be a judgment or decree in this country. That is why there is an exclusive Act of parliament dealing with registration and enforcement of foreign judgments. In that regard, it is my finding that the matters of consideration for setting side registration of a foreign decree are governed under *Foreign Judgments (Reciprocal Enforcement) Act* Chapter 43 of the Laws of Kenya and not the *Civil Procedure Act* and Rules.
17. The judgment creditor argues that regularity of the decree should be raised in the High Court of Malawi and not in this court. I do agree with that to the extent that this court cannot interrogate the regularity or otherwise of the judgement in the High Court of Malawi. However, this court has jurisdiction to interrogate whether the registration of the High Court of Malawi decree is sustainable as per our laws.
18. Going by my analysis above and having found that the judgment debtor was not properly served and that the court would have been entitled to make a decision on whether the jurisdiction of the court was ousted by the agreement between the parties, it is my finding that the respondent's application dated 27<sup>th</sup> April 2023 is merited and I proceed to grant it. The respondent is also granted the costs of the application.
19. Now that I have allowed the application to set aside the registration of the foreign decree, it follows as indicated earlier in this ruling that, there is no decree capable of being executed and in the circumstances, the applicant's application dated 17<sup>th</sup> January 2023 falls by the way side. The same is disallowed but I make no orders as to costs in respect thereof.
20. My final specific orders are as follows;
  - a. This court's order dated 29<sup>th</sup> March 2022 registering judgment dated 5<sup>th</sup> March 2020 in the High Court of Malawi Commercial Division cause number 411 of 2019 is hereby set aside.



- b. Consequent to 'a' above, this court's decree dated 29<sup>th</sup> March 2022 and issued in 27<sup>th</sup> April 2022 is hereby set aside.
- c. The respondent is awarded costs of the application dated 26<sup>th</sup> April 2023.
- d. The applicant's application dated 27<sup>th</sup> January 2023 is disallowed with no orders as to costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Miss Wanjohi holding brief for Miss Kangeya for the judgment creditor and Mr. Omondi for the judgment debtor

