



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E466 OF 2019

IN THE MATTER OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT

AND

**IN THE MATTER OF THE JUDGMENT ENTERED ON 10TH APRIL 2019 IN THE COMMERCIAL COURT OF GOMA,
DEMOCRATIC REPUBLIC OF THE CONGO (DRC) – RCE 528**

BETWEEN

KAVIRA MALONGA ESTHER.....PLAINTIFF

V E R S U S

SAMUEL ONYANGO OYOO T/A CROSSLINK SERVICES....DEFENDANT

BANK OF AFRICA KENYA LTD.....GARNISHEE

RULING

(1) Before this Court for determination is the Notice of Motion dated **10th February 2020** by which **SAMUEL ONYANGO OYOO** the Defendant / Applicant seeks the following orders:-

“1. SPENT

2. SPENT

3. THAT the Garnishee Nisi made herein on 22nd January 2020 directed at the Defendant’s Account No. [xxxx] domiciled at Bank of Africa Kenya Ltd (the Garnishee) be and is hereby set aside and or vacated.

4. THAT execution of the foreign Judgment made on 10th April 2019 by the Commercial Court of Goma, Democratic Republic of Congo (DRC) Case No. RCE 258 be stayed pending inter-parties hearing of this application.

5. THAT execution of the foreign Judgment made on 10th April 2019 by the Commercial Court of Goma, Democratic Republic of Congo (DRC) Case No. RCE 258 be set aside.

6. THAT this suit be struck-out for want of jurisdiction.

7. THAT cost of this application and the suit be borne by the Plaintiff.”

(2) The application was premised upon **Article 50 & 159** of the Constitution of Kenya, **Sections 3, 4 & 6** of the **Foreign Judgments (Reciprocal Enforcement) Act, Cap 43; Sections 1A, 1B, 3A** of the **Civil Procedure Act, Order 23 & 51, Rule 1** of the **Civil Procedure Rules**; and all other enabling provisions of the law. The application as supported by the affidavit of even date sworn by the Defendant / Applicant. The Plaintiff/Respondent **KAVIRA MALONGA ESTHER** opposed the application.

(3) The application as canvassed by way of written submissions. The Applicant filed his submissions on **11th March 2020** whilst the

Respondent filed her submissions dated 31st May 2020.

BACKGROUND

(4) On various dates between 6th July 2016 and 23rd February 2017 the Plaintiff advanced several loans to **Samuel Onyango Oyoo** who was the sole proprietor of the 2nd Defendant **CROSSLINK SERVICES** a sole proprietorship registered under the **Laws of Kenya**. The 1st Defendant / Respondent sought the said loans to enable him keep the Company afloat as he sourced for business with **The United Nations Mission in the Democratic Republic of Congo** (hereinafter 'MONUSCO').

(5) The Plaintiff claims that after securing the loans and saving his business the 1st Defendant failed to repay the monies owed to the Plaintiff despite the Company [**'Crosslink'**] continuing to receive payments in respect of the lucrative contracts it had secured with **MONUSCO**.

(6) The Plaintiff then instituted a suit against the Defendant in the **Democratic Republic of Congo** in the Commercial Court at **Goma** being **RCE 258** in order to recover the monies due to her. In that suit which was defended the Commercial Court at **Goma** on 10th April 2019 awarded the Plaintiff the sum of **USD 277,044**.

(7) After that Judgment the 1st Defendant left the **DRC** and returned to Kenya. The 1st Defendant also filed an Appeal dated 19th April 2019 against the Judgment delivered in **Goma** being Appeal No. **RCA 4186** before the Court of Appeal in the **Province of North KIVU** which appeal has not yet been determined.

(8) The Plaintiff then instituted this suit vide the Plaint dated 19th December 2019 seeking Judgment in her favour against the Defendants for:-

“(a) The sum of USD 277,014.00 being the sum that is due from the Defendant to the Plaintiff.

(b) Interest on the aforementioned figure of USD 277,014.00 at Commercial rates.

(c) Costs of this suit.

(d) Any other and further relief as this Honourable Court may deem necessary.”

(9) On 22nd January 2020 the Court made temporary Garnishee orders against the Account of the Defendant No. [xxxx] domiciled at **BANK OF AFRICA KENYA LTD**. On 19th March 2020 the Defendant filed under Certificate of Urgency a Notice of Motion seeking to be allowed to access the sum of **USD 21,000.00** from its said account in order to cater for employee's salaries. On 14th February 2020 the parties entered into a consent in the following terms:-

“1. The Defendant be allowed to access USD 21,000 from their Bank of Africa Kenya Limited Account No. [xxxx] to cover salaries of staff for January 2020 pending the hearing and determination of their application dated 10th February 2020.

2. Any remaining balance in the said account be held by the Garnishee pending the hearing and determination of the application dated 10th February 2020.

3. The Defendant is restrained from changing the Bank Account stated above and that the funds from MONUSCO will continue flowing into the said bank account (xxxx) during the duration of the contract, that is June 2020.”

(10) On 19th March 2020 the Defendant made another application seeking yet again to withdraw funds for payment of employees salaries. However **Hon. Lady Justice Mary Kasango** on 20th March 2020 declined to grant the orders sought.

ANALYSIS AND DETERMINATION

(11) I have carefully considered the present application, the Affidavit in Support, the Replying Affidavit as well as the written submissions filed by both parties. The main Statute which governs the enforcement of Foreign Judgments in Kenya is the **Foreign Judgment (Reciprocal Enforcement) Act, Cap 43, Laws of Kenya**. However the Foreign Judgments (**Reciprocal Enforcement) Act Cap 43** of the **Laws of Kenya** only makes provision for the enforcement of Judgments given in countries outside Kenya which accord reciprocal treatment to Judgments given in Kenya. A Judgment creditor holding a foreign Judgment from a “**designated country**” may apply and register the foreign Judgment at the High Court of Kenya and such foreign Judgment shall for purposes of execution, be of the same force and effect as a Judgment of the High Court of Kenya entered at the date of registration. The designated countries under the **Kenya Foreign Judgments (Reciprocal Enforcement) Act** are **Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Rwanda**. Therefore the **DRC** the country from which the Judgment in question originated is **not** one of the countries listed under that **Act**. As such **Cap 43** is not applicable in this matter.

(12) In the case of **JAYESH HASMUKH SHAH –VS- NAVIN HARIA & ANOTHER (2016)eKLR** the Court of Appeal held that:-

“In the absence of a reciprocal enforcement arrangement, a foreign Judgment is enforceable in Kenya as a claim in common law.” [own emphasis]

In cases where a Judgment has been pronounced by a foreign Court within its own jurisdiction and over a matter in which it is competent to deal then the Common Law will not investigate to determine the propriety of the proceedings in the foreign Court unless there is shown to have been some substantial injustice.

(13) In the present matter the Court is being asked to determine whether a Judgment issued by a non-designated country like the **DRC** is enforceable in Kenya. In **ADAMS & OTHERS –VS- CAPE INDUSTRIALS PLC (1990) Ch 433** the Court laid down the common law principles for enforcement of foreign Judgment as follows:-

“(a) Where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. (See **Park B. in Williams vs. Jones (1845) 13M. & W. 628, 633** as quoted in **Adams & Others vs. Cape Industrials PLC, (1990) Ch. 433 at 513**).

(b) In deciding whether the foreign court was one of competent jurisdiction, courts will apply not the law of the foreign court or competence of the court in an international sense – i.e. its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not material. (See **Lindley M.R. in Pemberton vs. Hughes, (1899) 1 Ch. 781, 791**).

(c) In **Emanuel vs. Symon, (1908) 1KB 302**, Buckley L. J. said that in actions in personam there are five cases in which the courts of England will enforce a foreign judgment. These are: (i) where the defendant is a subject of the foreign country in which the judgment was obtained; (ii) where he was resident in the foreign country when the action began; (iii) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (iv) where the defendant has voluntarily appeared and (v) where the defendant has contracted to submit himself to the forum in which the judgment was obtained.

(d) If a foreign judgment is to be enforced against a corporation, it must be shown that at the relevant time, the corporation was carrying on business and it was doing so at a definite and to some reasonable extent, permanent place in foreign country. (See **Adams & Others vs. Cape Industrials PLC, (1990) Ch. 433 at 512**).

(e) It is only the judgment of a foreign court recognized as competent by English law which will give rise to an obligation on the part of the defendant to obey it. The onus is on the plaintiff seeking to enforce the foreign judgment to prove the competence of such court to assume jurisdiction; the evidentiary burden may shift during trial. (See **Adams & Others vs. Cape Industrials PLC, (1990) Ch. 433 at 550**).

(f) The principle that a foreign court has jurisdiction to give an in personam judgment if the judgment debtor, the defendant in the foreign court, submitted to the jurisdiction of the foreign court is well settled.

(g) A foreign judgment obtained in circumstances that are contrary to natural justice does not give rise to any obligation of obedience enforceable at common law.

(h) If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter in which it is competent to deal, English courts will never investigate the propriety of the proceedings in the foreign court, unless they offend substantial justice.

Where no substantial justice is offended, all that the English court shall look into is the finality of the judgment and the competence of the foreign court to entertain the sort of case which it did deal with and its competence to require the defendant to appear before it. (See **Pemberton vs. Hughes, (1899) 1 Ch 781, 790-791** as per Lindley M.R). Mere procedural irregularity, on the part of the foreign court according to its own rules, is not a ground of defence to enforcement of the foreign judgment. (See **Adams & Others vs. Cape Industrials PLC, (1990) Ch. 433 at 567**).

j. A defendant, shown to have been subject to the jurisdiction of a foreign court, cannot seek to persuade English court to examine the correctness of the judgment whether on the facts or as to the application by the foreign court of its own law. A foreign judgment is not impeachable merely because it is manifestly wrong. (See **Goddard vs. Gray, L.R. 6 Q.B. 139**).

k. A judgment of a foreign court having jurisdiction over the parties and subject matter – i.e. having jurisdiction to summon the defendants before it and to decide such matters as it has decided – cannot be impeached on merits but can be impeached if the proceedings, the method by which the court comes to a final decision, are contrary to English views of substantial justice.”

(14) Section 9 of the Civil Procedure Act provides for the cases when a foreign Judgment is not conclusive. Section 9 provides as follows:-

“A foreign judgment is 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 an 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; or
- (f) where it sustains a claim founded on a breach of any law in force in Kenya.”

(15) In the **JAYESH CASE** (*supra*) the Court of Appeal set out the requirements to be fulfilled before a foreign Judgment emanating from a non-designated country can be adopted by the Courts in Kenya. These requirements were listed as follows:-

a. A party must file a plaint at the High Court of Kenya providing a concise statement of the nature of the claim, claiming the amount of the judgment debt, supported by a verifying affidavit, list of witnesses and bundle of documents intended to be relied upon. A certified copy of the foreign judgment should be exhibited to the Plaintiff.

b. It is open to a defendant to challenge the validity of the foreign judgment under the grounds set out in Section 9 of the Civil Procedure Act.

c. A judgment creditor is entitled to summary judgment under Order 36 unless the defendant judgment debtor can satisfy the Court that there is a real prospect of establishing at trial one of the grounds set out in Section 9 of the Civil Procedure Act.

d. If the foreign judgment creditor is successful after trial, the judgment creditor will have the benefit of a High Court judgment and the judgment creditor will be entitled to use the procedures of the Kenyan courts to enforce the foreign judgment which will now be executed as a Kenyan judgment.

e. The money judgment in the foreign judgment must be final and conclusive. It may be final and conclusive even though it is subject to an appeal. Under Section 9 of the Civil Procedure Act, a foreign judgment is 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:

- i. where it has not been pronounced by a court of competent jurisdiction;**
- ii. where it has not been given on the merits of the case;**
- iii. where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;**
- iv. where the proceedings in which the judgment was obtained are opposed to natural justice;**
- v. where it has been obtained by fraud; or**
- vi. where it sustains a claim founded on a breach of any law in force in Kenya.**

f. Under Section 4 (4) of the Limitation of Actions Act, (Cap 22 of the Laws of Kenya) an action for enforcement of a foreign judgment must be brought in Kenya within 12 years of the date of that judgment.

g. The foreign court must have had jurisdiction, (according to the Kenyan rules on conflict of laws) to determine the subject matter of the dispute and the parties to the foreign court’s judgment and the enforcement proceedings must be the same or must derive their title from the original parties.

h. The Kenya High Court will generally consider the foreign court to have had jurisdiction where the person against whom the judgment was given:

- a) Was, at the time the proceedings were commenced, habitually resident or incorporated in or having a principal place of business in the foreign jurisdiction or**
- b) Was the claimant or counterclaimant in the foreign proceedings or**
- c) Submitted to the jurisdiction of the foreign court or**
- d) Agreed, before commencement, in respect of the subject matter of the proceedings to submit to the jurisdiction of the foreign court.**
- e) Where the above requirements are established to the satisfaction of the Kenya High Court, the High Court will not re-examine the merits of the foreign court judgment. The foreign judgment will be enforced on the basis that the**

defendant has a legal obligation as a matter of common law, recognized by the High Court, to satisfy the money decree of the foreign judgment.”

(16) A litigant who is shown to have been subject to the jurisdiction of the foreign Court cannot seek to persuade a common law Court to examine the correctness of the decision whether on its facts or as to the application by the foreign Court of its own law. Accordingly I find and hold that the Defendant/Applicant being a Company which was at the material time operating in the **DRC** was subject to the jurisdiction of the Courts in the **DRC**. Based therefore on the foregoing I find and hold that the High Court in Kenya does have jurisdiction to enforce Judgments emanating from non-designated countries.

(17) The Applicant has pleaded that the funds held in the subject account did not belong to him but belonged to the **United Nations** and thus the said funds could not be the subject to a garnishee orders. With respect I disagree. Whilst it is true that certain privileges are accorded to the **United Nations** its Agencies and staff under the **PRIVILEGES AND IMMUNITIES ACT Cap 179 Laws of Kenya**, that immunity is limited by the **Act**. The same immunity is **not** conferred upon parties who have contractual arrangements with the United Nations, its Agencies or staff. The 2nd Defendant is **not** an employee, agent or member of staff of the United Nations. The United Nations is **not** a signatory to the Defendant’s account. Therefore the funds in that account cannot be said to belong to the United Nations. The funds in the subject account **belong** to the defendant having been derived from payments made to the **Crosslink Services** from **MONUSCO** which is a **UN Agency**. I dismiss this argument by the Defendant.

(18) Finally the Defendant raises the weak argument that **Samuel Onyango Oyoo** is a different person from **Samuel Onyango Odoyo**. This argument fall flat on its face as the Defendant has already entered appearance in this matter.

(19) Under **Section 9** of the **Civil Procedure Act** the Plaintiff was required to file a **Plaint** in the **High Court of Kenya** providing a concise statement of the nature of the claim. The Plaintiff in this case has complied with this requirement by way of her **Plaint** filed on **20th December 2019**.

(20) The Defendants argument that there is an appeal which is pending determination in the **DRC** and that said appeal is a bar to this Court’s recognition and enforcement of the Foreign Judgment is misconceived. Firstly there exists no evidence that the Defendant has actually an Appeal in the **DRC**. All that has been annexed is a Notice of Appeal. No substantive appeal has been exhibited in these proceedings. Secondly the mere existence of a pending Appeal would not act as a bar to the recognition and enforcement of the original Judgment delivered in the **DRC**. **Section 9** of the **Civil Procedure Act** which deals with the enforcement of a Judgment from a non-designated country provides that:-

“The money Judgment in the foreign Judgment must be final and conclusive. It may be final and conclusive even though it is subject to an appeal. Under Section 9 of the Civil Procedure Act, a foreign Judgment is 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.” [own emphasis]

This matter involves a money Judgment and as such **Section 9(e)** is applicable.

(21) The question arose as to whether the High Court had jurisdiction to issue temporary garnishee orders against the Defendant’s Bank Account pending determination of the suit. In the **JAYESH CASE [supra]** it was held thus:-

“For avoidance of doubt, we state that the High Court of Kenya pursuant to the provisions of section 3 of the Judicature Act and its original and untainted civil jurisdiction provided in Article 165(3) of the Constitution has jurisdiction to hear and determine any issue relating to enforceability of foreign judgments from non-designated countries.” [own emphasis]

The issue of temporary Garnishee orders relates to the enforceability of foreign Judgments as they are in the nature of interlocutory orders sought in order to secure the property of the Judgment Debtor with the aim of satisfying the foreign Judgment should the same eventually be recognized by the Court.

(22) The evidence available indicates that the Defendant failed to satisfy the Judgment issued by the Court in **DRC** and instead moved to **Kenya** no doubt in an attempt to evade justice. In my view the above circumstances do merit the grant of temporary garnishee orders to prevent the dissipation of the said Account.

(23) Finally I find no merit in this application. The Notice of Motion dated **10th February 2020** is hereby dismissed in its entirety. Costs are awarded to the Plaintiff/Respondent.

DATED IN NAIROBI THIS 12TH DAY OF MARCH, 2021.

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MAUREEN A. ODERO

JUDGE