



**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) (Commercial and Tax) (9 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 14 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E316 OF 2020  
JM MATIVO, J  
SEPTEMBER 9, 2021**

**BETWEEN**

**ABSA BANK UGANDA LIMITED (FORMERLY KNOWN AS BARCLAYS BANK OF UGANDA LIMITED) ..... PLAINTIFF**

**AND**

**UCHUMI SUPERMARKETS PLC ..... DEFENDANT**

**Procedure for the recognition of foreign judgments.**

Reported by John Ribia

***International Law** – public international law – principle of reciprocity – foreign judgments - recognition of foreign judgments - under what circumstances would the High Court recognize and enforce foreign judgments in Kenya - what was the procedure for recognition of foreign judgments - Foreign Judgement (Reciprocal Enforcement) Act.*

***Company Law** – legal persona – separate legal entity – relationship between a parent company and a subsidiary company – whether the two were different companies with two separate legal entities - whether a parent company could be sued for the debts of a subsidiary company.*

**Brief facts**

The plaintiff, previously known as Barclays Bank of Uganda Limited, filed a suit against the defendant in the High Court of Uganda at Kampala, being Civil Suit Number 905 of 2016. It stated that the Ugandan High Court issued a judgment in its favour on February 6, 2018 as per the decree dated March 7, 2020 to recover UGX. 710,471,631 (Seven Hundred and Ten Million, Four Hundred and Seventy-One Thousand, Six Hundred and Thirty-One Uganda Shillings) from the defendant. The plaintiff sought the recognition and enforcement of the judgment of the Ugandan High Court against the defendant.

The defendant contended that they had not been served and they had not received the certified copies of the judgment from the High Court of Uganda. They further contended that Uchumi Supermarkets PLC was a



different legal entity from its Ugandan subsidiary who was the judgment debtor in Civil Suit Number 905 of 2016 in the High Court of Uganda.

### **Issues**

- i. Under what circumstances would the High Court recognise and enforce foreign judgments in Kenya?
- ii. What was the procedure for recognition of foreign judgments?
- iii. Whether a parent company could be sued for the debts of a subsidiary company.

### **Held**

1. The recognition of a foreign judgment occurred when the court of one country accepted a judicial decision made by the courts of another foreign country, and issued a judgment in substantially identical terms without rehearing the substance of the original lawsuit. Recognition of a foreign judgment would be denied if the judgment was substantively incompatible with basic fundamental legal principles in the recognizing country.
2. A foreign judgment would have no direct operation and could not be enforced until it had been recognized. The party seeking to enforce a foreign judgment had to therefore first apply to the court to have it recognized. Once the necessary procedural steps had been completed, the foreign judgment would be enforced as if it was a Kenyan judgment.
3. The primary statute governing enforcement of foreign judgements was the Foreign Judgement (Reciprocal Enforcement) Act which only applied to enforcement of judgments originating from countries outside Kenya which accorded reciprocal treatment to judgments given in Kenya. Those countries as listed under the Act included Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and the Republic of Rwanda.
4. Kenya adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters which applied to decisions rendered in civil or commercial matters by the courts of contracting States. However, the Convention did not apply to decisions the main object of which was to determine the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses; the existence or constitution of legal persons or the powers of their officers; questions of succession; questions of bankruptcy, compositions or analogous proceedings, including decisions which could result therefrom and which related to the validity of the acts of the debtor; questions of social security; questions relating to damage or injury in nuclear matters; decisions for the payment of any customs duty, tax or penalty.
5. In the absence of a reciprocal enforcement arrangement, a foreign judgment was enforceable in Kenya as a claim in common law. Where a foreign court of competent jurisdiction had adjudicated a certain sum to be due to another, a legal obligation arose to pay that sum, on which an action of debt to enforce the judgment could be maintained. In deciding whether a foreign court was one of competent jurisdiction, the courts would apply not the law of the foreign court itself but English rules of private international law. The competence of the foreign court was the competence of the court in an international sense, that was, its territorial competence over the subject matter and the defendant. Its competence or jurisdiction in any other sense was not material.
6. Under common law, the onus would be on the plaintiff seeking to enforce the foreign judgment to prove the competence of such court to assume jurisdiction although that evidentiary burden could shift during the trial. The general requirements for enforcement of foreign judgments were:
  1. the foreign judgment must be final and have no conflict with prior judgments.
  2. A foreign judgment was final for enforcement purposes even if an appeal was pending against it in the foreign jurisdiction.
  3. The judgment of a foreign court that could not be enforced by execution in that state's court could not be enforced by a Kenyan court.
  4. The foreign court must have had jurisdiction over the defendant. Jurisdiction was 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 was contractual, the contract was substantially performed in the country of that court.

5. The defendant had to 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.
6. 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 would be deemed contrary to Kenyan public policy.
7. The foreign judgment was only enforceable within six years of the date of judgment or six years after the last judgment where there were appeals from the original judgment.
7. Enforcement of a foreign judgment from designated countries where there was a reciprocating enforcement mechanism was by filing of a formal application in the High Court in a prescribed form. The motion was to be accompanied by an affidavit confirming that the judgment had not been satisfied and a certified copy of the judgment had to be exhibited. A certificate under the seal of the foreign judge certifying the status of the court could be required.
8. For enforcement of a foreign judgment from a non-designated country, 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 plaint.
9. A foreign judgment had to be authenticated by a competent authority in its country of origin. If the judgment was in a language other than English, it was required to be translated into English by a sworn translator or by any other person so authorized in either State. The judgment of a foreign court was enforced on the principle that where a foreign court of competent jurisdiction had adjudicated upon a claim, a legal obligation arose to satisfy that claim in the country where the judgment needed to be enforced. Such a recognition was accorded not as an act of courtesy but on consideration of basic principle of justice, equity and good conscience.
10. The defendant argued that Uchumi Super Markets Ltd was not a party to the proceedings in Uganda. That argument was misleading and lacking in cadre. Uchumi Super markets Ltd was the defendant sued in the proceedings in Uganda. At paragraph 2 of the plaint, it was clearly described as a company domiciled in Kenya. At paragraph 3 of the plaint, it was clearly pleaded that it was sued for breach of terms of a guarantee obtained by its subsidiary company, Uchumi Supermarkets Uganda Limited. The argument that a parent company could not be sued for debts of a subsidiary was misguided. The suit against the defendant was founded on a guarantee instrument it signed to secure borrowing for Uchumi Super Markets Uganda Ltd. Equally misguided was the attempt to argue that Uchumi Supermarkets PLC was a different company. That was because a public limited company (PLC) was a company that was legally allowed to offer its shares for sale to the public. The use of the term PLC in the instant proceedings did not mean it was a different company from the one sued in Uganda.
11. The argument that the plaintiff could not enforce a judgment in which the guarantor was not a party to the suit was wrong and misleading. The defendant was the guarantor; hence, it was properly sued in that capacity. The allegation that certified copies were not annexed to the application was also false. The allegation that service was not effected was also untrue.

*Suit allowed*

### **Orders**

- i. *The plaintiff's originating summons and order that the judgment of the High Court of Uganda at Kampala delivered by the Honourable Justice David K. Wangutusi in Civil Suit Number 905 of 2016 on February 6, 2018 was registered.*
- ii. *The defendant was to bear the costs of the proceedings.*



## Citations

### Cases

#### *East Africa*

1. *Hannah Maina T/A TAA Flower v Rift Valley Bottlers Limited* Civil Appeal 358 of 2013;[2016]eKLR – (Explained)
2. *Namutebi, Elizabeth v Threeways Shipping Services (K) Limited* Civil Case 96 of 2014;[2015]eKLR- (Explained)
3. *Ssebagala & Sons Electric Ltd v Kenya National Shipping Lines Ltd* Civ Case 1723;[2002]eKLR- (Explained)

#### *India*

*Satya v Teja Singh*, (1975) 1 SCC 120; AIR 1975 SC 105 –(Followed)

#### *United Kingdom*

*Adams & others v Cape Industries PLC* [1990]Ch 433 – (Followed)

### Statutes

1. Foreign Judgments (Reciprocal Enforcement) Act (cap 43)— sections 2, 18, 3 (1) (a); 5 (1); 5 (4); 13 (1) — (Interpreted)
2. Insolvency Act,2015 (Act No 18 of 2015) -In general (Cited)

## RULING

1. *Vide* an originating summons dated 14<sup>th</sup> August 2020, the plaintiff prays for an order that this court registers the judgment of the High Court of Uganda at Kampala delivered by the Honourable Justice David K Wangutusi in Civil Suit Number 905 of 2016 on 6<sup>th</sup> February 2018. It also prays for costs of this application to be provided for.
2. The originating summons is premised on the grounds listed on the face of the motion. The grounds are also explicated in the supporting affidavit of Christine Nshemerirwe, the plaintiff's Corporate Recoveries Manager. The grounds are that the plaintiff, previous known as Barclays Bank of Uganda Limited, filed a suit against the defendant in the High Court of Uganda at Kampala, being Civil Suit Number 905 of 2016. It states that the Honourable Justice David Kwangutusi issued judgment in its favour on 6<sup>th</sup> February 2018 as per the decree dated 7<sup>th</sup> March 2020 as follows: -
  - a. Judgment is entered in favour of the plaintiff to recover UGX 710,471,631 (Seven Hundred and Ten Million Four Hundred and Seventy-One Thousand Six Hundred and Thirty-One Only) from the defendant;
  - b. The decretal sum above shall attract interest of 20% per annum from 6<sup>th</sup> November 2015 until payment in full;
  - c. The defendant shall pay the costs of the suit.
3. The plaintiff states that on 23<sup>rd</sup> October 2018, its Bill of Costs was taxed and allowed at UGp 33, 166,502.00 and that the decretal amount together with the costs remain unsatisfied by the defendant to date. It states that the defendant is domiciled in Kenya, but currently the defendant is the subject of a Company Voluntary Arrangement approved by the court on 1<sup>st</sup> July 2020 in Milimani High Court Insolvency Petition Number 25 of 2018; In the matter of Uchumi Supermarkets PLC.



4. It states that registration of the judgment will allow it to secure its rights and interests as a creditor of the defendant within the defendant's Company Voluntary Arrangement. Further, that, the cause of action in the said suit arose in Uganda, the parties' contractual obligations were, similarly, to be performed in Uganda and, as such, the High Court of Uganda at Kampala was seized of the requisite jurisdiction to hear and determine the matter. Further, it states that Uganda is a reciprocating country for purposes of the *Foreign Judgments (Reciprocal Enforcement) Act*,<sup>1</sup> and the judgment is recognizable and registrable in Kenya. Additionally, the judgment emanates from civil proceedings whereby a sum of money is payable, that the judgment is final and conclusive as between the parties and no appeal has been preferred against it, hence, the provisions of the act apply to the judgment.
5. Additionally, the plaintiff states that this application has been brought within 6 years from the date of the judgment which is within the time limit set by the Act. Also, that the defendant stands to suffer no prejudice should this court grant the orders sought. The plaintiff also states that it is in the interests of justice and equity that the orders sought be granted otherwise the plaintiff stands to suffer irreparable loss and grave injustice.

### **The defendant's Response**

6. The defendant replied vide the replying affidavit of Judith Matata, its Legal manager dated 27<sup>th</sup> October 2020. She averred that the instant application is defective in law and fact; that the defendant has never been served with court papers relating to the primary suit; and that the plaintiff only served the defendant with copies of the judgment, the decree and a Bill of Costs whose validity it cannot ascertain. The defendant also states that the said documents do not bear the Official Court Seal of the High Court in Kampala, Uganda, and as such they cannot be treated as Official Court documents nor is there a letter or notice issued by the High Court in Kampala certifying their validity, hence, this court cannot rely on such documents without actual verification. The states that it made phone calls to the registry in Uganda and failed to get concrete information on the existence of the said suit, and urged this court to throw out these proceedings on account of unreliability of the documents. Alternatively, the defendant prays that this court stays these proceedings pending validation of court documents.
7. Also, the defendant states that it was not a party in the alleged suit and that the company that was sued in Uganda and the Company being cited in Kenya are different entities, hence, the Kenyan Company cannot shoulder the burdens of another company. Accordingly, it states that the plaintiff should pursue its recovery proceedings against the Ugandan company. It also states that if at all such a loan facility was ever granted, the same was granted to the Kenyan Company and not the Ugandan Company, so, the plaintiff made a fatal omission by failing to enjoin the defendant in the primary suit.
8. Further, it states that the plaintiff is making an attempt to litigate a fresh in a bid to secure its interests, when its remedies lie in the Ugandan Court and the Ugandan Company. Also, it states that no agreement of the nature of borrower-guarantor exists between the two companies, and if the same ever existed, which is denied, the same ought to have been raised in the primary suit. Additionally, the respondent prays for better particulars, otherwise this court should dismiss the application as frivolous and wanting in merit.

### **Plaintiff's supplementary affidavit**

9. Allan Waniala, an Advocate of the High Court of Uganda practicing as such as a Partner in the law firm of Sebalu & Lule Advocates, situate in Kampala, Uganda swore supplementary affidavit dated 10<sup>th</sup> May 2021 in response to the defendant's replying affidavit. He averred that he had personal conduct of Kampala High Court Civil Suit Number 905 of 2016 and he appeared before the Honourable Justice

<sup>1</sup> Cap 43 Laws of Kenya.



David K Wangutusi on behalf of the plaintiff. He deposed that the said proceedings were brought against the defendant company and not its Ugandan counterpart, Uchumi Supermarkets Uganda Limited. He also deposed that the plaint dated 22<sup>nd</sup> November 2016 and filed on 23<sup>rd</sup> November 2016 was duly served upon the defendant company at its head office on 14<sup>th</sup> February 2017 and in acknowledgement of service, its duly authorized officers affixed its stamp and signed the plaintiff's copy.

10. Additionally, he deposed that the defendant instructed a law firm in Kampala by the name Ms OS Kagere to represent it and the said firm filed a Written Statement of Defence and Summary of Evidence, and they participated in the preparation and filing of the Joint Scheduling Memorandum and signed a copy of the same in acknowledgement of their participation, and, upon the hearing and final determination of the matter, judgement was delivered in favour of the plaintiff on 6<sup>th</sup> February 2018 and copies of the plaint, judgement, decree and taxed bill of costs are annexed to the supporting affidavit of Christine Nshemerirwe dated 14<sup>th</sup> August 2020.
11. He deposed that the defendant never appealed against the said judgement and that the statutory timelines for lodging an appeal has since lapsed. Also, the Deputy Registrar of the Commercial Division of the High Court at Kampala issued the plaintiff with a certificate *inter alia* verifying the existence of the proceedings and the entry of Judgement in the matter as set out in the said certificate. He averred that the said certificate explains that the said Judgment remains wholly unsatisfied by the defendant. Additionally, he averred that the said certificate is issued in satisfaction of the requirements at section 5 (4)(a) of the Kenyan Foreign Judgements (Reciprocal Enforcement) Act and was procured at the request of the Advocates on record for the plaintiff in the instant proceedings.

#### **Plaintiff's further affidavit**

12. The plaintiff also filed the further affidavit of Christine Nshemerirwe dated 13<sup>th</sup> November 2020 dated in reply to the defendant's replying affidavit. She deposed that she was aware that the Plaint and summons were served upon the defendant at its heads office on 14<sup>th</sup> February 2017 as evidenced by the defendant's stamp and signature on the served copies.
13. She deposed that she was aware that copies of the judgment, decree and the bill of costs annexed to the originating summons were certified as correct by the Deputy Registrar of the Commercial Division of the High Court of Uganda, Kampala and they all bear the courts signature and stamp. Further, she averred that the Foreign Judgements (Reciprocal Enforcement) Act of Kenya only require the Plaintiff to annex a certified copy of the judgment whose registration is sought and that there is no requirement for the document to be embossed with the seal of the originating court or it be accompanied by a letter from the original court. Also, she averred that the original documents are in custody of the plaintiff's advocate and can be availed to this court or the defendant for inspection.
14. Regarding the argument that the defendant has been wrongfully impleaded, she deposed that the proceedings in Uganda and the ultimate judgment were brought against Uchumi Supermarkets Limited in its capacity as the guarantor against Uchumi Supermarkets of Uganda Limited, and that the said proceedings and the resultant judgment were not issued against Uchumi Supermarkets of Uganda Limited as claimed by the defendant.
15. She also deposed that prior to the commencement of the proceedings, in Uganda, demand letters dated 15<sup>th</sup> September 2016 and 21<sup>st</sup> October 2016 were sent to the defendant by registered post demanding payment on the strength of the guarantee issued by the defendant in favour of Uchumi Supermarkets of Uganda Limited. Additionally, she deposed that prior to sending out the said demand letters, the plaintiffs then legal officer wrote an e-mail to the defendant seeking to negotiate settlement terms in addition to other correspondence to the defendant on the same subject.



16. M/s Nshemerirwe averred that owing to the defendant's conduct in handling this matter, the plaintiff is apprehensive that the defendant is intent on defeating the plaintiff's interests, especially considering its prejudicial conduct against the plaintiff at the second creditor's meeting held on 2<sup>nd</sup> March 2020 where the plaintiff's proxy was refused entry into the meeting by virtue of being a Ugandan creditor and subsequently refused the proxy to vote. She deposed that the said conduct offends the *Insolvency Act*. In addition, she averred that the plaintiff's recourse only lies in the recognition and enforcement of the judgment.

#### **Plaintiff's advocates submissions**

17. The plaintiff's counsel submitted that the law governing enforcement of judgements in Kenya is The *Foreign Judgments (Reciprocal Enforcement) Act* and cited section 13 (1) of the Act which provides that the Act shall apply as against judgements issued by the superior courts of reciprocating countries. He argued that the Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984 prescribes the list of reciprocating countries whose judgements are eligible for registration and enforcement under the Act at rule 2 as read with the Schedule to the said Order. He listed the countries as Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom, and the Republic of Rwanda. Based on the foregoing, he submitted that Uganda qualifies as a reciprocating country for purposes of the registration and enforcement of the Judgment. Counsel submitted that the High Court of Uganda at Kampala, which is a superior court in Uganda, issued the judgement whose registration the plaintiff seeks. He cited section 2 of the Act which provide: -

#### Section 2

“designated court” means—

- (a) a superior court of a reciprocating country which is a Commonwealth country;
  - (b) a superior court of any other reciprocating country which is specified in an order made under section 13;
  - (c) a subordinate court of a reciprocating country which is specified in an order made under section 13;
18. He also cited section 18 of the Act which provides that judgments issued by a designated court shall be recognized as conclusive between the parties:
18. Recognition of certain foreign judgments
    - (1) Subject to this section, a judgment of a designated court shall be recognised in any court in Kenya as conclusive between the parties thereto, as to the matter adjudicated upon, in all proceedings (no matter by which of the parties in the designated court they are instituted) on the same cause of action and may be relied upon by way of defence or counterclaim in those proceedings.
19. Based on the provisions of section 18 of the Act, counsel argued that it is apparent that the judgement in issue, having been issued by a designated court from a reciprocating country, is final for the purposes



of the Act, and is to be deemed as conclusive and is not subject to interrogation on its merits and cited *Ssebagala & Sons Electric Ltd v Kenya National Shipping Lines Ltd*<sup>2</sup> which held that:-

20. Counsel submitted that the defendant cannot be heard to challenge or otherwise seek to impugn the judgement at this stage of the proceedings as this can only be properly done within an appeal against the judgement. He argued that the defendant has not proffered any evidence or proof that it has lodged an appeal against the judgement.
21. Regarding the question whether the plaintiff has satisfied the threshold for registration of a foreign judgement, counsel cited section 3 (1) (a) of the act which provides: -
  1. Subject to subsections (2) and (3), this Act applies with respect to—
    - a. a judgment or order of a designated court in civil proceedings whereby a sum of money is made payable, including an order for the payment of a lump sum as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another;
22. Counsel argued that the judgement constitutes a judgement by the High Court of Uganda in civil proceedings whereby the court ordered that a specified sum of money be paid to the plaintiff. He submitted that the foregoing corresponds with the provisions of section 3 (1) (a) of the Act, hence, the judgement satisfies the threshold of judgements to which the Act applies as set out in section 3 of the Act. Also, counsel submitted that section 5 (1) of the Act prescribes a 6-year time limit within which a Judgement Debtor should apply for registration of a foreign judgement and argued that since the judgement was issued on 6<sup>th</sup> February 2018, the plaintiff's application is within the said time limit.
23. Also, counsel cited section 5 (4) of the Act which stipulates the documents that are to be annexed to an application for registration of a judgement as follows: -
  - (4) An application for registration of a judgment under subsection (1) shall—
    - (a) be accompanied by a certificate in the form set out in the Schedule or to the same effect issued from the original court under its seal and signed by a judge or registrar thereof or by an affidavit to the same effect;
    - (b) have attached thereto the judgment or the exemplification or a certified or duly authenticated copy thereof and, where the judgment is not in the English language, certified by a notary public on the Registrar of the original court or authenticated by affidavit;
    - (c) be accompanied by an affidavit stating—

<sup>2</sup> [2002] e KLR.

“ Thus, in the enforcement proceedings under the Act, a judgment of a designated court whether registered or not has the same legal status as a judgment of High Court of Kenya until it is set aside subsequent to registration or until it is shown that the registration would have been set aside. Further, in general, as provided in section 9 of the *Civil Procedure Act*, a foreign judgment is conclusive until it is shown that any of the exceptions in section 9 of *Civil Procedure Act* do exist. Such judgment of a reciprocating country as defined in the Act or Judgment of any foreign court is not impeachable on the merits whether for error of fact or of law”



- (i) that, at the date of application, the judgment has not been satisfied or, as the case may be, the sums or items of movable property in respect of which the judgment remains unsatisfied;
- (ii) that, at the date of application, the judgment can be enforced by execution in the country of the original court;
- (iii) where, by virtue of section 6(5), the judgment may be registered only in respect of certain of its provisions, the provisions in respect of which it is sought to register the judgment;
- (d) unless otherwise ordered by the High Court, be accompanied, in the case of a judgment given by a superior court of a Commonwealth country, by a certificate under the seal and signed by a judge or registrar thereof certifying that the court is a superior court in that country;
- (e) be accompanied by such other evidence as may be prescribed.

24. He submitted that in satisfaction of the requirements of the above section, the plaintiff annexed the following documents to the supporting affidavit of Christine Nshemerirwe, and the supplementary affidavit of Allan Waniala:-

- a. A copy of the certificate issued by the Deputy Registrar of the Commercial Division of the High Court at Kampala;
- b. A copy of the Judgement certified as correct by the Deputy Registrar of the Commercial Division of the High Court of Kampala at Uganda;
- c. A copy of the Decree issued pursuant to the Judgement, also certified as correct by the Deputy Registrar of the Commercial Division of the High Court of Kampala at Uganda; and
- d. A copy of the taxed bill of costs as well as a certificate of taxation also certified as correct by the Deputy Registrar of the Commercial Division of the High Court of Kampala at Uganda by the Registrar of the High Court.

25. He relied on *Elizabeth Namutebi v Threeways Shipping Services (K) Limited*<sup>3</sup> and submitted that it has filed all documents required under the Act.

#### **The defendant's advocates submissions**

26. The defendant's counsel submitted that the documents filed by the plaintiff refer to the beneficiary of the funds as Uchumi Supermarkets (Uganda) Limited, while the defendant is sued as Uchumi Supermarkets PLC. He argued that no evidence was tendered to show that the two companies are the same. He argued that a separate legal entity cannot shoulder the responsibilities of a separate legal entity unless the law so determines. He argued that the debt of a separate company is not transferrable to the

<sup>3</sup> {2015} eKLR.



parent company. He cited *Hannah Maina t/a TAA Flower v Rift Valley Bottlers Limited*<sup>4</sup> which held that the respondent could not be liable for debts of a subsidiary company the two being distinct and separate legal entities.

27. Counsel also argued that the plaintiff cannot enforce a judgment in which the guarantor was not a party to the suit and argued that the question whether the defendant was a guarantor is a matter for the trial court. He argued that it is not the duty of this court to help the plaintiff to look for a new defendant against whom to enforce the judgment. He argued that the omission to enjoin the Kenyan company in the primary suit is fatal. Citing section 9 of the Act, he argued that the parties in the primary suit must be the same as in the instant proceedings. He invited this court to be guided by *Adams & others v Cape Industries PLC*.<sup>5</sup>

### Determination

28. A useful starting point is to mention that the “recognition” of a foreign judgment occurs when the court of one country accepts a judicial decision made by the courts of another “foreign” country, and issues a judgment in substantially identical terms without rehearing the substance of the original lawsuit. Recognition of judgment will be denied if the judgment is substantively incompatible with basic fundamental legal principles in the recognizing country.
29. Generally speaking, a foreign judgment will have no direct operation and cannot be enforced until it has been recognized. The party seeking to enforce a foreign judgment must therefore first apply to the court to have it recognized. Once the necessary procedural steps have been completed, the foreign judgment will be enforced as if it was a Kenyan judgment.
30. In Kenya, the primary statute governing enforcement of foreign judgements is the Foreign Judgement (Reciprocal Enforcement) Act<sup>6</sup> which only applies to enforcement of judgements originating from countries outside Kenya which accord reciprocal treatment to judgements given in Kenya. These countries as listed under the Act include Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and the Republic of Rwanda.
31. This discourse would be incomplete if I do not mention that Kenya adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters which applies to decisions rendered in civil or commercial matters by the courts of contracting States. However, the Convention does not apply to decisions the main object of which is to determine the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses; the existence or constitution of legal persons or the powers of their officers; questions of succession; questions of bankruptcy, compositions or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor; questions of social security; questions relating to damage or injury in nuclear matters; decisions for the payment of any customs duty, tax or penalty.
32. Its also significant to mention that in the absence of a reciprocal enforcement arrangement, a foreign judgment is enforceable in Kenya as a claim in common law. The milestone case of *Adams v*

<sup>4</sup> {2016} e KLR.

<sup>5</sup> P{1990}Ch 433.

<sup>6</sup> Cap 43 of the Laws of Kenya



*Cape Industries PLC*<sup>7</sup> laid down the common law principles governing the enforcement of foreign judgments. The principles are summarized as follows: -

33. Under common law, the onus will be on the plaintiff seeking to enforce the foreign judgment to prove the competence of such court to assume jurisdiction although that evidentiary burden may shift during the trial. The general requirements for enforcement of foreign judgments can be summarized as follows: -
  - a. The foreign judgment must be final and have no conflict with prior judgments.
  - b. A foreign judgment is final for enforcement purposes even if an appeal is pending against it in the foreign jurisdiction.
  - 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.
  - 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.
  - 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.
  - 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.
  - 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.
34. Enforcement of a foreign judgment from designated countries where there is a reciprocating enforcement mechanism is by filing of a formal application in the High Court in a prescribed form. The motion is to be accompanied by an affidavit confirming that the judgment has not been satisfied and a certified copy of the judgment must be exhibited. A certificate under the seal of the foreign judge certifying the status of the court may be required.
35. For enforcement of a foreign judgment from a non-designated country, 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 judgement debt, supported by a verifying affidavit, list of witnesses and bundle of documents intended to be relied upon. A certified copy of the foreign judgement should be exhibited to the Plaint.

<sup>7</sup> {1990} Ch 433.

“...Where a foreign court of competent jurisdiction has adjudicated a certain sum to be due to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. In deciding whether a foreign court was one of competent jurisdiction, the courts will apply not the law of the foreign court itself but English rules of private international law. The competence of the foreign court is the competence of the court in an international sense, that is, its territorial competence over the subject matter and the defendant. Its competence or jurisdiction in any other sense is not material...”



36. A foreign judgment must be authenticated by a competent authority in its country of origin. If the judgment is in a language other than English, it is required to be translated into English by a sworn translator or by any other person so authorized in either State. The judgment of a foreign court is enforced on the principle that where a foreign court of competent jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy that claim in the country where the judgment needed to be enforced. Such a recognition is accorded not as an act of courtesy but on consideration of basic principle of justice, equity and good conscience.<sup>8</sup>
37. With the principles of law discussed above which cover both the applicable law and procedure in mind, I now examine the diametrically opposed facts presented by the parties in this case. The defendant argued that the documents filed by the plaintiff refer to the beneficiary of the funds as Uchumi Supermarkets (Uganda) Limited, while the defendant is sued as Uchumi Supermarkets PLC. It argues that the two companies are separate and distinct legal entities and that no evidence was tendered to show that the two companies are the same. The defendant contended that a separate legal entity cannot shoulder the responsibilities of a separate legal entity unless the law so determines nor can a debt of a separate company be transferred to the parent company.
38. I have taken time and considered the Pleadings filed in Uganda. The plaintiff in the plaint, the decree and certificate is clearly shown as Barclays Bank of Uganda Ltd and the defendant is Uchumi Supermarkets Limited. The plaintiff's name subsequently changed to Absa Bank Uganda Ltd. This explains why the certificate issued by the Deputy Registrar, Commercial Division, High Court of Kampala bears and the instant pleadings bear the name *Absa Bank Uganda Ltd versus Uchumi Supermarkets Limited*.
39. The defendant argued that Uchumi Super Markets Ltd was not a party to the proceedings in Uganda. This argument is misleading and lacking in cadre. Uchumi Super markets Ltd is the defendant sued in the proceedings in Uganda. At paragraph 2 of the plaint, it is clearly described as a company domiciled in Kenya. At paragraph 3 of the plaint, it was clearly pleaded that it was sued for breach of terms of a guarantee obtained by its subsidiary company, Uchumi Supermarkets Uganda Limited. The argument that a subsidiary cannot be sued for debts of a subsidiary is misguided. The suit against the defendant was founded on a guarantee instrument it signed to secure v borrowing for Uchumi Super Markets Uganda Ltd.
40. Equally misguided is the attempt to argue that Uchumi Supermarkets PLC is a different company. This is because a Public Limited Company or PLC for short is a company that is legally allowed to offer its shares for sale to the public. The use of the term PLC in the instant proceedings does not mean it's a different company from the one sued in Uganda.
41. The defendant argued that the plaintiff cannot enforce a judgment in which the guarantor was not a party to the suit. It argued that the question whether the defendant was a guarantor is a matter for the trial court. Unfortunately, this argument is also wrong and misleading. The defendant was the guarantor; hence, it was properly sued in that capacity.
42. The other ground of assault propounded by the defendant is that certified copies were not annexed to the application. Again, this is not true. The copies were annexed and uploaded into the e-filing system. Above all, a certificate signed by the Deputy Registrar, Commercial Division, High Court, Kampala, is among the documents filed.

<sup>8</sup> *Satya v Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105.



43. The defendant argued that it was never served with court summons and the pleadings. This assertion was addressed in the plaintiffs further affidavit and supplementary affidavit. Both affidavits detail how service was effected and also highlight that the defendant acknowledged service as required by signing and affixing its stamp on the plaintiffs copy. The allegation that service was not effected is totally untrue. Also, in the further affidavit, it was deposed that the defendant instructed a firm of advocates who represented it in the said case and even filed pleadings. By now, it is evident that the defendant has not been candid at all.
44. Regarding the applicable provisions of the law, I find and hold that the plaintiffs' counsel correctly cited the applicable and relevant provisions of the law and properly construed and contextualized them to the facts of this case. It will add no value for me to rehash them here.
45. Flowing from my analysis of the law, procedure, facts and application of the law discussed above, I find and hold that the applicants' originating summons dated 14<sup>th</sup> August 2019 is merited. Accordingly, I allow the plaintiff's originating summons and order that the judgment of the High Court of Uganda at Kampala delivered by the Honourable Justice David K Wangutusi in Civil Suit Number 905 of 2016 on 6<sup>th</sup> February 2018 be and is hereby registered. The defendant shall bear the costs of these proceedings.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 9TH DAY OF  
SEPTEMBER 2021**

**JOHN M. MATIVO**

**JUDGE**

