



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO.1 OF 2020

EAST AFRICAN DEVELOPMENT BANK....APPLICANT/JUDGMENT CREDITOR

VERSUS

DARI LIMITED.....1ST RESPONDENT/JUDGMENT DEBTOR

HON. RAPHAEL TUJU.....2ND RESPONDENT/JUDGMENT DEBTOR

YMA TUJU.....3RD RESPONDENT/JUDGMENT DEBTOR

ALMA TUJU.....4TH RESPONDENT/JUDGMENT DEBTOR

MANO TUJU.....5TH RESPONDENT/JUDGMENT DEBTOR

S. A. M. COMPANY LIMITED.....6TH RESPONDENT/JUDGMENT DEBTOR

RULING

1. Through the originating Summons (O.S) dated 31st December 2019, the applicant/Judgment Creditor (J.C) seeks the following orders:

1. The judgment delivered on 19th June 2019 and the order issued pursuant thereto by the High Court of Justice Business and Property Courts of England and Wales, Queen’s Bench Division, Commercial Court by Mr. Daniel Toledano, Q.C sitting as a Deputy Judge of the High Court aforesaid in Claim Number CL-2018-000720 be recognized and registered as a judgment of this Honourable Court, the Judgment and Order aforesaid be enforced within the jurisdiction of this Honourable Court and that the Applicant be at liberty to enforce the Order aforesaid within the jurisdiction of this Honourable Court.

2. This Honourable Court grant leave to the applicant to execute the judgment of 19th June 2019 and the Order issued pursuant thereto both recognized and registered by this Honourable Court.

3. The costs of this Originating Summons be provided for.

2. The Originating Summons is brought under **Articles 2 and 159 of the Constitution of Kenya, 2010, Sections 3(1) (a), 3(2), 5(1), 5(2)(a) (ii), 5(2) (b), 5(4),6(1) and 8** of the Foreign Judgments (**Reciprocal, Enforcement**) Act, **Order 37 Rule 14** of the **Civil Procedure Rules, Rules 2(1) and 3** of the Foreign Judgment (**Reciprocal, Enforcement**) Rules.

3. The application is supported by the affidavit of the Applicant’s Head of Business **Mr. David Odongo** and is premised on the grounds that:

1. By a Facility Agreement dated 10th April 2015 the “Facility Agreement”) entered into by each of the respondents herein with the applicant herein, the applicant agreed to provide the 1st respondent with a loan facility in the sum of USD (United States Dollars) 9,300,000 which accrued interest at various rates.

2. On the same date of the 10th April 2015, the 2nd to 6th respondents (as Guarantors) entered into a Guarantee and Indemnity in favour of the applicant in respect of the 1st respondent’s payment and other obligations under the Facility Agreement.

3. The loan under the Facility Agreement was disbursed to and received by the 1st respondent. However, the 1st respondent failed and defaulted to repay the loan facility in the terms of the Facility Agreement thereby breaching its obligations under the said Facility Agreement.

4. As a consequence of the 1st respondent's breach of and failure to abide by the terms of Facility Agreement, the applicant by a notice to the 1st to 6th respondents herein issued a demand for the immediate repayment of the loan facility advanced to the 1st respondent under the Facility Agreement together with accrued interests pursuant to the Guarantee and Indemnity between the respondents with the applicant. However, the 1st respondent failed to honour its obligations under the Facility Agreement and the 2nd to 6th respondents also failed to honour the demand thereby breaching their obligations to the applicant under the said Guarantee and Indemnity.

5. The applicant therefore instituted a claim against the respondents herein vide a Claim Form and Particulars of Claim both filed before the High Court of Justice, Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court, on 5th November 2018 so as to claim the sums owed by the respondents, premised on the breach of the aforesaid Facility Agreement and Guarantee and Indemnity by the respondents.

6. All the respondents acknowledged service of the said Claim Form by the applicant, entered appearance in the claim and filed each of their respective defences thereto on 10th December 2018 and their Amended Defences on 19th June 2019.

7. By an application notice dated 23rd April 2019 and filed on even dated before the said court on 23rd April 2019, the applicant applied for summary judgment to be entered as against the respondent in respect of the applicant's claim and the respondents' counterclaim therein.

8. By the judgment delivered on 19th June 2019 and the Order issued pursuant thereto by Mr. Daniel Toledano, Q.C, the said court entered summary judgment as sought in the applicant's favour.

9. By a Notice of Appeal filed on 10th July 2019 before Her Majesty's Court of Appeal, Civil Division, the respondents applied for permission to appeal and for a stay of execution of the Order of 19th June 2019.

10. By an Order made by the Rt. Ho. Lord Justice Leggatt on 17th September 2019, the respondents' said application for permission to appeal was refused as totally without merit.

11. The applicant is now desirous of registering, in Kenya, the judgment delivered on 19th June 2019 and the order issued pursuant thereto by the High Court of Justice Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court by Mr. Daniel Toledano, Q.C sitting as a Deputy Judge of the High Court aforesaid in Claim Number CL-2018-000720 pursuant to the Foreign Judgment (Reciprocal, Enforcement) Act Chapter 43 of the Laws of Kenya.

12. The judgment delivered on 19th June 2019 and the order issued pursuant thereto by the by the High Court of Justice Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court by Mr. Daniel Toledano, Q.C sitting as a Deputy Judge of the High Court aforesaid in Claim Number CL-2018-000720 and judgments entered in Kenya can be recognized, registered and enforced in both counties pursuant to the Foreign Judgment (Reciprocal, Enforcement) Act Chapter 43 of the Laws of Kenya.

13. The united Kingdom is recognized as a reciprocating country as provided for in the Schedule of the Foreign Judgment (Reciprocal, Enforcement) (Extension of Act) Order, 1984.

14. Each of the respondents was served with the applicant's Claim Form and Particulars of Claim, acknowledged the said service and filed their respective defences and subsequently their Amended Defences in opposing the applicant's claim. Further, the appeal against the order of 19th June 2019 which Order the applicant now seeks to have recognized and registered by this Honourable Court was dismissed. As such, the applicant prays that this Honourable court allows the Originating Summons filed herewith to proceed *ex parte*.

15. The 1st respondent herein has its registered office situate within the Republic of Kenya. Furthermore the 2nd -6th respondents herein are domiciled within the jurisdiction of this Honourable court and as such, it is mete and just that the judgment delivered on 19th June 2019 and the Order issued pursuant thereto be recognized, registered and enforced by this Honourable court.

4. At the hearing of the application **Prof. Githu Muigai S.C.** cited the provisions of **Sections 5(2) (a) (ii) and 5(2) (b)** of the Foreign Judgments (**Reciprocal Enforcement**) Act (herein after "**the Act**") to justify the presentation of the application *ex parte*. Counsel submitted that the respondents were duly served with all the court's processes before the English Court and that the respondents appeared, participated in the proceedings before the said court which ultimately entered summary judgment in favour of the applicant herein.

5. Counsel further submitted that under **the Act**, the judgment of the English court is expressly recognized in our jurisdiction and that the applicant, being a successful litigant before the English Court is entitled to the enforcement of the said judgment in Kenya. For this argument, counsel cited the decision in **Jayesh Hasmukh Shah v Navin Haria & Another [2016] eKLR** wherein it was held;

"The objective of the Act is to make provision for enforcement given in countries outside Kenya which accord reciprocal

treatment to judgments given in Kenya. Under the Act, a judgment creditor in whose favour a foreign judgment from a “designated country” has been made 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. Subject to exceptions in Section 18 of the Act, a judgment of a “designated court” shall be recognized 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 of counterclaim in those proceedings. The designated countries under the Kenya Foreign Judgments (Reciprocal Enforcement) Act are: Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia the United Kingdom and Republic of Rwanda.”

6. I have carefully considered the application and the supporting affidavit together with the submissions by the counsel for the Judgment Creditor. **Section 18** of the **Act** provides that:

(1) Subject to this section, a judgment of a designated court shall be recognized 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 maybe relied upon by way of defence or counterclaim in those proceedings.

(2) ...

7. The preamble of the Act indicates that it was enacted ‘to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith’. Accordingly, foreign enforceable judgments under the Act are those from designated courts set out under section 2 thereof which defines a ‘designated court’ as:

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

8. From the above definition, it is clear that in order for a judgment to qualify for enforcement under the Act, the same must emanate from the list of reciprocating countries identified by the Minister under Section 13(1) of the Act. In this regard, the schedules to the Act identifies reciprocal countries as Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, United Kingdom and the Republic of Rwanda.

9. In the present case, I note that the applicant instituted a claim against the respondents before the High Court of Justice, Business and Property Courts of England and Wales, Queens Bench Division, Commercial Court, on 5th November 2018 as shown in the annexure marked “DO-3”. Needless to say, England falls among the reciprocal countries listed under **the Act**.

10. A perusal of the applicant’s supporting affidavit shows that the respondents acknowledged service of the Claim Form in the original suit, entered appearance and filed defences as shown in annexures marked “DO-4” and “DO-5” respectively. I am therefore find that the application satisfies the conditions governing the registration of the foreign judgments as set out under **the Act** which at **Section 5(2)** dispenses with the requirement of service where the Judgment Debtor was personally served with court processes in the original action.

11. I further note that summary judgment was on 23rd April 2019 entered against the respondents in the original as exhibited in annexure marked “DO-6”.

12. The applicant also attached annexures marked “DO-7(a)” “DO-7(b)” and “DO-7(c)” to the supporting affidavit, being copies of Approved Judgment, Approved Judgment on costs and the Order of Daniel Toledano Q.C Of 19th June 2019.

13. On 10th July 2019 the respondents filed a Notice of Appeal after which they applied for permission to appeal and for stay of execution which application was dismissed for lack of merit through an order issued on 17th September 2019 (annexure “DO-9”).

14. From the above foregoing facts, I am satisfied that the applicant has proved that it has a foreign judgment in its favour and that the said judgment is capable of enforcement in the United Kingdom, and by operation of the Act, also capable of enforcement in Kenya.

15. Consequently, I allow the Originating Summons dated 31st December 2019 as prayed. I also award costs of the application to the Judgment Creditor and direct that the notice of registration of the judgment be served on the Judgment Debtors as provided for under **Section 5(3)** of **the Act**.

Dated, signed and delivered in open court at Nairobi this 7th day of January 2020.

W. A. OKWANY

JUDGE

In the presence of

Mr. Wakhisa for Prof. Githu Muigai for the Judgment Creditor

Court Assistant – Jagongo