REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO.1 OF 2020

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

VERSUS

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

RAPHAEL TUJU.....JUDGMENT DEBTOR/2ND APPLICANT

MANO TUJU.....JUDGMENT DEBTOR/3RD APPLICANT

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

YMA TUJU.....JUDGMENT DEBTOR/5TH APPLICANT

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

RULING

Background

1. By a written Facility Agreement dated 10th April 2015, Judgment Creditor/Respondent herein agreed to grant the Judgment Debtors/Applicants a loan facility in the sum of USD $9,300,000.00 for the purposes of funding, in part, the acquisition of property pursuant to the Agreement for sale and construction of commercial units for sale.

2. The Judgment Debtors did not fulfil their obligation to repay the loan under the Facility Agreement and on or about 5th November 2018, the Judgment Creditor filed a Claim at the High Court of Justice, Business and Property Courts of England and Wales, Queens Bench Division, Commercial Court Royal Courts of Justice, being Claim No. CL-2018-000720 (the "London/English Proceedings").

3. Upon lodging the Claim, the Judgment Creditor filed an application for summary judgement in the London Proceedings and after hearing presentations from both sides, Daniel Toledano QC, sitting as a Deputy Judge of the High Court of England and Wales, on 19th June 2019 entered summary judgment in favour of the Judgment Creditor (hereinafter "the English Judgment").

4. Following the entry of judgment in the London proceedings the Judgment Creditor filed an Originating Summons dated 31st December, 2019 before this court seeking the recognition, registration and enforcement of the English Judgment within the jurisdiction of this court and for leave to execute the said Judgment.

5. On 7th January 2020, this court allowed the prayers sought in the Judgment Creditor's said Originating summons thereby triggering the filing of application dated 8th January 2020 wherein the Judgment Debtors sought, *inter alia*, the setting aside of this court's Ruling of 7th January 2020. The Application was later amended on 13th January 2020. This ruling is therefore in respect to the said amended application.

Applicants' Case

6. Through the amended chamber summons dated 13th January 2020, the Judgment Debtors/Applicants seek the following orders:-

a) Spent

b) That there be a stay of execution of the ruling of this Honourable court in these proceedings and any subsequent decree issued by this honourable court on 7th January 2020 pending the hearing and determination of this application.

c) That the ruling of this honourable court issued on 7th January 2020 issuing orders of recognition and registration of 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, Queens Bench Division Commercial Court by Daniel Toledano QC sitting as a Deputy Judge of the High Court of England and Wales in claim number CL-2018-000720 and all consequential orders be set aside.

d) That in the alternative, this honourable court do declare that 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, Queens Bench Division Commercial Court by Daniel Toledano QC sitting as a Deputy Judge of the High Court of England and Wales in claim number CL-2018-000720 is unenforceable as it was obtained in a manner that violates the Article 50 of the Constitution of Kenya and the rules of natural justice .

e) That costs be awarded to the applicants.

7. The application is supported by the 2nd Judgment Debtor's supporting and supplementary affidavits sworn on 13th and 27th January respectively. The application is premised on the grounds that:-

1. On 7th January 2020, this honourable court ordered that the judgment delivered on 19th June, 2019 and order issued pursuant thereto by High Court of Justice Business and Property Courts of England and Wales, Queens Bench Division Commercial Court by Daniel Toledano QC sitting as a Deputy Judge of the High Court of England and Wales in claim number CL-2018-000720(Hereinafter the United Kingdom Judgment) be recognized and registered as judgment of this honourable court and that the respondent herein be at liberty to enforce the order aforesaid within the jurisdiction of this honourable court.

2. The court granted leave to the respondent herein to execute the judgment of 19th June, 2019 and the order issued pursuant thereto both recognized and registered by this honourable court.

3. The applicants have valid grounds for setting aside the orders made exparte by this honourable court on 7th January 2020 which are that;-

a) The United Kingdom judgment was entered in circumstances that are contrary to the rules of natural justice, are against public policy in Kenya contrary to Article 50 of the Constitution.

b) The enforcement of the United Kingdom judgment would be manifestly contrary to public policy in Kenya and would be a violation of the applicants' absolute right to a fair hearing as guaranteed by Article 50 of the Constitution.

c) The United Kingdom judgment was obtained by fraudulent means.

4. The applicants are at risk of being permanently deprived of their property thereby causing the applicants grave injustice and irreparable harm.

8. In the affidavit in support of the application, the 2nd Judgment Debtor explains that prior to the hearing of the application for summary judgment before the English court, Judgment Debtors' advocates received email communication from one Daniel Hull, the Listing Officer of the said court informing them that the court intended to list the matter before Daniel Toledano QC from the same chambers as counsel for the Judgment Creditor in London proceedings.

9. He deposes that their advocates immediately recorded their objection to Daniel Toledano QC presiding over the matter in view of the apparent conflict of interest and limited information about the factual circumstances which could give rise to perception of bias in view of the fact that the judge was connected to the advocate by virtue of being a barrister in the same chambers. He states that the advocates then requested that either the matter be listed before a different Judge or that further information on Daniel Toledano QC be availed. He avers that but that despite their counsel's objection and request for information on the proposed Judge, the said judge declined to recuse himself for the reason that he had no connection to the case or the respondent's counsel Mr. Michael Sullivan QC who was on record for the respondent, other than being a member of the same chambers.

10. He avers that the said Daniel Toledano QC, sitting as a Deputy Judge of the High Court of England and Wales, proceeded to fraudulently hear and summarily determine the Judgment Creditor's application for summary judgment in the London proceedings thereby delivering a judgment which was registered as a judgment of this court through a ruling delivered on 7th January 2020.

11. He contends that considering the facts of this matter, a fair minded and informed observer would conclude that there was a real possibility of bias in the London proceedings as Daniel Toledano QC, a member of One Essex Court presided over an application for summary judgment argued by Mr. Michael Sullivan QC, also a member of One Essex Court.

12. He avers that the decision of Daniel Toledano QC not to recuse himself from hearing the Judgment Creditor's application for summary judgment in the London proceedings was contrary to natural justice and also contravened Article 50(1) of the Constitution of Kenya on the

right to fair hearing. He also avers that as a result, the English judgment is contrary to natural justice and public policy in Kenya as the English Court did not consider the defence filed by the Judgment Debtors.

13. In the supplementary affidavit dated 27th January 2020 in response to the Judgment Creditor's replying affidavit, the 2nd Judgment Debtor reiterates that contrary to the Judgment Creditor's assertions, the Judgment Debtors had no opportunity to advance their case in the London Proceedings as the judgment was entered summarily, contrary to Article 50 of the Constitution of Kenya, 2010 which gives every litigant the right to a fair trial, including the right to adduce and challenge evidence.

14. He contends that the factual circumstances surrounding their transaction and the subsequent impugned judgment indicate that there was extreme bad faith, malice and misrepresentation exhibited on the part of the Judgment Creditor through its employees and agents.

15. In the further affidavit in response the Judgment Creditor's Replying Affidavit, the 2nd applicant provides a detailed narration of the events and meetings that culminated in the Facility Agreement wherein the Judgment Creditor agreed to finance the expansion of the 1st Judgment Debtor's business through the purchase and construction of property known as Tree Lane Property.

16. He deposes that an independent review of the 1st Judgment Debtor showed that it was capable of meeting the interest and principle obligations to the Judgment Creditor if the project was to proceed in the manner approved by the Board of Directors. He states that on 10th April 2015, the 1st Judgment Debtor entered into a Facility Agreement (hereinafter "the Agreement") with the Judgment Creditor for the sum of USD 9.3 million but that the respondent only disbursed USD 9,197,084 and not the entire agreed Facility of USD 9.3 million.

17. He states that the balance of the approved loan of approximately USD 102,916 was cancelled by the Judgment Creditor despite their request for the said funds. He contends that the Judgment Creditor's refusal to disburse the said balance was a flagrant violation of the contract.

18. He deposes that the Judgment Debtors invested substantial amount of money in the project in order to keep the project viable and proceeded to initiate the development of the housing units for sale by injecting its own funds into the project. He further states that the Judgment Creditor was constantly updated as to the progress of the development through their Country Manager, Mr. Jotham Mutoka who periodically visited the site. He attached a copy of the correspondence updating the Judgment Creditors on the status of the project and a letter requesting for the second phase of the disbursement to the further affidavit as annexure marked "RT 10".

19. He states that the failure by the Judgment Creditor to disburse the balance of the USD 9.3 million as agreed (USD 102,916.00) and the further Kshs 294 million precipitated the 1st Applicant's cash flow challenges thereby frustrating its ability to service the Facility Agreement.

20. He further states that it was an act of sabotage of the whole project when the Judgment Creditor declined to disburse critical aspects of funding for the project that was to generate revenue to service the Facility. He contends that the demand for extra security, by the Judgment Creditor was an act of blackmail perpetuated by the shifting of goal posts and compounded by the fact that the Judgment Creditor's Director General, one Vivenne Yeda Apopo, had completely withdrawn her support for the project for reasons that the Judgment Debtors considered to be extraneous.

21. In a nutshell, the Judgment Debtors attribute their failure to meet their obligations under the Facility Agreement to the failure, by the respondent to disburse to the 1st applicant, the balance of USD 102,916 and the remaining Kshs 294 million that would have enabled the applicants to complete their project and have sufficient cash flow.

22. He avers that despite all possible efforts to salvage the project, the Judgment Creditor filed the proceedings before the London Court on 5th November 2018. He confirms that the Applicants have at all times been willing to settle the monies lent to them by the Judgment Creditor but that all such efforts have been frustrated by the Judgment Creditor.

23. He avers that in complete disregard of the deliberate efforts by the Judgment Debtors to return the project to profitable trading, the Judgment Creditor has proceeded to appoint Receivers Managers over all the assets and affairs of the Judgment Debtors to engage in the sale and realization of the Judgment Debtor's assets and properties as its primary option.

24. He states that the Judgment Debtors are at risk of being permanently deprived of their property as a result of unfair and predatory lending practices by the Judgment Creditor. He adds that the Judgment Creditor's *mala fides* is demonstrated in its choice at initiating bankruptcy proceedings against the Judgment Debtors rather than pursuing the sale of the securities held by them which are higher in value than the alleged debt.

25. He avers that the Judgment Creditor's main aim is to take over the Judgment Debtor's properties in a scandalous, malicious manner and that this court should not allow itself to be used as a conduit to perpetuate the grabbing of property through unsavory, unconstitutional means.

26. He avers that the Judgment Creditor seeks to impose the English standards of justice which would be an affront to Kenya sovereignty and that such proceedings have no place in the Constitution of Kenya.

The Respondent's Case

27. The respondent opposed the application through the grounds of opposition dated 12th January 2020 wherein it sets out the following grounds;-

1. The application is incompetent, misconceived, lacks merit and ought to be dismissed with costs.

2. The application has been filed prematurely as no notice of Registration of Judgment has been served on the applicant/Judgment Debtors pursuant to the ruling delivered by Honourable Lady Justice Okwany on 7th January 2020 and the order arising therefrom as required by Section 5(3) of the Foreign Judgments (Reciprocal Enforcement) Act Cap. 43 of the Laws of Kenya read together with Rules 4(3) and 5 of the Foreign Judgments (Reciprocal Enforcement) Rules, 1984.

3. The application is incompetent, incurably and fatally defective as the applicant/judgment debtors through the application purport to move this Honourable court to interrogate, analyze and determine whether their right to a fair hearing under Article 50 of the Constitution of Kenya was violated in proceedings before foreign court being the High Court of Justice, Business and Property of England and Wales, Queens Bench Division, Commercial Court and Her Majesty's Court of Appeal, Civil Division, which interrogation , analysis and determination this honourable court lacks the jurisdiction to make.

4. The application is incompetent incurably and fatally defective as the applicant/judgment debtors through the application purport to move this Honourable court to interrogate, analyze and determine whether the decision by the English High Court Judge not to recuse himself as guided by the laws of England and Wales was proper, which interrogation, analysis and determination this honourable court lacks the jurisdiction to make.

5. The application is incompetent incurably and fatally defective as it raises allegations of bias and fraud in the conduct of proceedings before the High Court of Justice, Business and Property of England and Wales, Queens Bench Division, Commercial Court Claim Number CL-2018-000720, which allegations this honourable court lacks jurisdiction to interrogate, analyze and/or make a determination thereon.

6. The application is incompetent incurably and fatally defective as it raises allegations of bias and fraud in the conduct off the Judge in proceedings to hear and determine the action in the High Court of England and Wales aforesaid based in the fact that the judge and counsel for the respondent/judgment creditor herein are in the same chambers when the long established position at common law and the procedural law of the lex fori, namely England and Wales, it that membership of the same chambers by the judge or arbitrator and counsel for one of the parties does not give rise to an imputation of bias such that it was lawful and proper for the judge to proceed to hear and determine the claim.

7. The application is incompetent incurably and fatally defective as it raises allegations of bias and fraud in the conduct of proceedings of the High Court of Justice, Business and Property of England and Wales, Queens Bench Division, Commercial Court Claim Number CL-2018-000720, which allegations was conclusively dismissed by an order made by the Rt. Hon. Lord Justice Leggatt of Her Majesty's Court of Appeal, Civil Division, on 17th September 2019.

8. The application is incompetent incurably and fatally defective as this honourable court lacks jurisdiction to re-open, re-examine and make a finding on allegation of bias and fraud which were conclusively dismissed by an order made by the Rt. Hon. Lord Justice Reggatt of Her Majesty's Court of Appeal, Civil Division, on 17th September 2019.

9. The application has failed to satisfy the threshold for setting aside the ruling delivered by Honourable Lady Justice Okwany on 7th January 2020 and the order arising there from under Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act Cap. 43 of the Laws of Kenya.

28. The Respondent/Judgment Creditor also opposed the application through the replying affidavit of its Legal Consultant Lynne Elizabeth Wells sworn on 12th January 2020. She explains that by an Originating Summons application dated 31st December 2019 the Respondent moved to this Court seeking orders for the recognition, registration and enforcement of the English Judgment.

29. She avers that the impugned Ruling delivered by this court on 7th January 2020 was merited and that the court was justified in proceeding with the hearing of the said Originating Summons *ex parte* upon being satisfied that the requirements of Sections 5(2) (a) (ii) and 5(2) (b) of the Foreign Judgments (Reciprocal Enforcement) Act (hereinafter "the Act") had been met. She adds that none of the Judgment Debtors herein disputed the jurisdiction of the English High Court and that their application for permission to appeal and a stay of execution from the English Court Judgment was also considered and dismissed on 17th September 2019. She attached as exhibits marked "LEW-6", "LEW–7" and "LEW-8" respectively, copies of the Application Notice, Grounds of Appeal Order by Rt. Hon. Lord Justice Leggatt of 17th September 2019.

30. She avers that in view of the foregoing, the alleged violation of the Applicants/Judgment Debtors' right to be heard under Article 50 of the Constitution is misplaced and untenable as they had every opportunity to advance their arguments before the English Court. She states that the Judgment Debtors were represented by a London-based law firm being The London Law Practice LLP, and Counsel who filed written submissions and made full and detailed oral submissions during the course of the hearing on 17th June 2019 as evidenced in the Approved Judgment and Approved Judgment (on Costs) delivered by the English Court. (Exhibit "LEW-9").

31. She further states that the Judgment Debtors' right to be heard by dint of Article 50 of the Constitution of Kenya afore-said only relates to proceedings before Kenyan Courts being seized of competent jurisdiction under the Constitution, and not any other foreign court. She states that for the above reason, the Judgment Debtors cannot and ought not be allowed to allege that the refusal by the English High Court Judge to recuse himself from hearing the application for summary judgment in the English Court was contrary to their right to be heard under the Constitution of Kenya as the said right does not apply to disputes in the English Court.

32. She deposes that the enforcement of the English Court Judgment and Order would not be contrary to public policy as alleged by the applicants as failure to enforce the English Court Judgment and Order which have been recognized and adopted as a decision of this

Honourable Court would be contrary to public policy.

33. She deposes that the rights, obligations, duties, benefits and sanctions in the Facility Agreement and Guarantee and Indemnity between the parties herein were private, and made between private persons and entities. She further states that the obligation to pay the loan facility through the enforcement of the English Court Judgment and Order therefore does not involve the public as no evidence was presented to show that execution will have any impact on the interests, rights and/or liabilities of any member of the public.

34. She contends that the order for stay of execution should not be granted as there is no immediate risk of execution of the English Court Judgment and Order since the Respondent is yet to take the first step towards the registration of the English Court Judgment and Order. She maintains that the instant Application is premature as Rule 4(3) of the Rules to the Act provides that an application of this nature may only be brought within fourteen (14) days from the date of service of said notice of registration of judgment.

35. She states that the various Statutory Demand Notices purportedly issued to the 2nd to 5th Applicants and which are annexed to the Further Supporting Affidavit as the exhibit marked *"RT-3"*, cannot be relied upon as evidence in support of the allegations of the commencement of execution since the said demand notices were served in the course of a receivership which is the subject matter of a separate action.

36. She further deposes that this court should not set aside the Ruling on the basis of the conduct of the proceedings before the English Court as the Court lacks the jurisdiction to open, entertain, consider, assess, analyse and/or otherwise make a determination thereon.

37. Miss Wells states that the Applicants' claim that the English Court Judgment was obtained by fraudulent means is misplaced as this Court lacks the jurisdiction to interrogate the manner in which the English Court conducted its proceedings, and further, that at no time whatsoever during the said proceedings was the allegation of fraud made or canvassed.

38. In respect to the allegation of bias on the premise that the English High Court Judge and Mr. Michael Sullivan, QC, (being Counsel on record for the Respondent in the proceedings before the English Court) were members of the same chambers, she states that in the first instance, the issue raised amounted to no more than what appeared in the exchange of emails which are annexed to the Supporting Affidavit as exhibit marked "RT-1". She further states that under the English common law and the law of the *lex fori*, the mere membership of the same Chambers in England and Wales of the Judge or Arbitrator and Counsel appearing for one of the parties does not give rise to an imputation of apparent bias.

39. She further states that the allegation that the English High Court Judge should have recused himself, was conclusively determined by the English Court of Appeal in the Order by Rt. Hon. Lord Justice Leggatt made on 17th September 2019 and that any further challenge to this finding by the English Court of Appeal can only be made before the English Courts and not this Honourable Court.

40. The application was canvassed by way of written submissions. At the hearing of the application, Mr. Paul Muite SC, Mr. Paul Nyamodi and Miss Bridgette Ndong appeared for the Judgment Debtors while Prof. Githu Muigai SC, Mr. Michael Sullivan QC and Mr. Peter Kabatsi appeared for the Judgment Creditor.

Judgment Debtors' Submissions

41. On the Judgment Creditor's claim that the application is premature, counsel for the Judgment Debtors submitted that while registration of a foreign judgment is enabled by Section 5 of the Act, the application to set aside that registration is enabled by Section 10 of the Act. They argued that whereas Rule 4 (3) of the Rules provides that an application to set aside the registration of a Judgment should be made after Notice of Registration of Judgment, the aforesaid rule is not a bar to the making of the instant application.

42. It was submitted that the Judgment Creditor's objection to the hearing of this Application is a procedural technicality within the meaning of Article 159 (2) (d) of the Constitution and that the substantive jurisdiction to entertain the present application, having been enabled by statute, Rule 4(3) of the Rules cannot be interpreted to be a restriction on the said substantive jurisdiction.

43. Counsel argued that no prejudice would be occasioned to the Judgment Creditor if the Application is heard and determined in view of the fact that the impugned Judgment has already been registered as a Judgment of this High Court.

44. On the right to fair hearing under Article 50 of the Constitution, the Judgment Debtors raised 2 separate but related issues namely; whether the orders issued by this court, *ex parte*, on 7th January 2020 amount to a violation of the Applicants' absolute right to a fair hearing and secondly; Whether the London proceedings in which the impugned Judgment was obtained were unconstitutional and therefore unenforceable having been obtained in a manner that violates Article 50 of the Constitution of Kenya.

45. In respect to the orders of 7th January 2020 counsel submitted that even though Section 5 (2) of the Act enables the Court to proceed *ex parte* to register a foreign judgment, where the Court proceeds *ex parte*, this amounts to a restriction to the Judgment Debtors' right to fair hearing under Article 50 of the Constitution. Counsel argued that having been enacted in the year 1985, prior to the promulgation of the Constitution of Kenya, 2010, the provisions the Foreign Judgments (Reciprocal Enforcement) Act are subject to Section 7 (1) of the Sixth Schedule to the Constitution and that the Court ought to have construed Section 5 of the Act in conformity with the Constitution.

46. It was submitted that whereas Section 5 of the Act envisages the *ex parte* hearing and determination of an Application for registration of a foreign judgment, the same must be read in conformity with the Constitution, specifically Article 50 on the right to a fair hearing.

47. It was the Judgment Debtors' submission that the proceedings in which the impugned judgment was obtained were conducted contrary to the rules of natural justice for the reason that the presiding Judge Daniel Toledano QC, declined to recuse himself from hearing the case

despite objections from the Judgment Debtors' counsel that he shared the same chambers with counsel for the Judgment Creditor thus raising fears and apprehensions of bias.

48. Counsel submitted that the Judgment Debtors presented reasonable grounds from which bias on the part of Daniel Toledano QC, Deputy Judge of the High Court of England could be inferred and that the Judgment Debtors' request for further information on the said Daniel Toledano QC was not acceded to.

49. It was submitted that in the context of the Judgment Debtors' objection, a fair minded Kenyan observer would conclude that there was perceived bias by Daniel Toledano sitting as he did. It was submitted that from a consideration of Kenyan jurisprudence, a decision must not be tainted by the perceived or actual bias of the decision maker. Counsel relied on the decision of the Court of Appeal in *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woolen Mills Limited & 2 others* [2016] eKLR at paragraphs 63 - 65 where it was stated –

> "'*[63] Bias, whether it is perceived or actual, undermines the public confidence in a judicial officer's ability to dispense justice. In the words of Lord Goff in the case of* R vs Gough, [1993] 2 All CR 724*:*
>
> "*Justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking the judge was biased;*
>
> *[64] In* Metropolitan Properties Co., Ltd v Lannon (1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694 *it was observed that:-*
>
> "*Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias''.*
>
> *[65] In the Australian case of* Webb v The Queen (1994) 181 C L R 41 *Mason CJ and McHigh J held:*
>
> "*In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done ..."*

50. Counsel submitted that the above decision by the Court of Appeal brings to fore the principle espoused in *R v Bow Street Metropolitan Stipendary Magistrate ex parte Pinochet Ugarte* [2000] 1 AC 119 *(Re Pinochet),* wherein it was held that the test was not whether the judge was indeed biased, but whether a reasonable person seized of the facts would be assured that the applicant would get justice before the judge. In the said decision, Lord Browne-Wilkinson observed that –

> "*...The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."*

51. It was submitted that allowing a judge who is reasonably suspected of bias to sit in a matter would be in violation of the constitutional guarantee of a trial by an independent and impartial court. Reference was made to the decision by the Constitutional Court of South Africa when it stated as follows in *The President of the Republic of South Africa v. The South African Rugby Football Union & Others, Case* CCT16/98:

> "*At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront."*

52. Counsel urged the court to note that an international adjudicator must be neutral with regard not only to the countries of the parties and their political systems, but also to the legal systems and concepts of both parties. Counsel added that the standard of natural justice applicable in this case is therefore the Kenyan standard.

53. It was submitted that the proceedings in which the Judgment sought to be enforced was obtained are opposed to natural justice and the common law position adopted by the Court of Appeal in *Jayesh Hasmukh Shah v Navin Haria & another* [2016] eKLR where the Court stated as follows at par 22–

> "*The common law principles on enforcement of foreign judgments were extensively elaborated in the case of Adams & Others – v-Cape Industrials PLC, (1990) Ch. 433. The principles are:*
>
> .....

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."

54. For the argument that a judgment that is incompatible with public policy of the state it is addressed may be refused, Counsel cited Article 5 (1) of the Convention on The Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters which states that:

Recognition or enforcement of a decision may nevertheless be refused in any of the following cases -

(1) if recognition or enforcement of the decision is manifestly incompatible with the public policy of the State addressed or if the decision resulted from proceedings incompatible with the requirements of due process of law or if, in the circumstances, either party had no adequate opportunity fairly to present his case.

55. Counsel submitted that by dint of Article 2 (6) of the Constitution, the Convention on The Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters forms part of the law of Kenya. It was further submitted that the mere appearance of bias was enough for the Court to recuse itself and that the hearing and determination of the matter and the subsequent summary judgment therefrom was in breach of the Judgment Debtor's right to fair trial and was thus contrary to the rules of natural justice.

Judgment Creditor's Submissions

56. Counsel for the Judgment Creditor submitted that the Application is premature on the basis that Notice of Registration of Judgment has not been served on the Judgment Debtors pursuant to Section 5 (3) of the Foreign Judgments (Reciprocal Enforcement) Act (Hereinafter "the Act") as read with Rule 4(3) and (5) of the Foreign Judgments (Reciprocal Enforcement) Rules (Hereinafter "the Rules").

57. Counsel submitted that having regard to the above provisions, together with Rule 5(1) of the Rules which provides that: *Notice of registration of a judgment shall be served on the judgment-debtor,* the Applicants could only file the instant Application within fourteen (14) days of service of the Notice of Registration of Judgment pursuant to the direction by the Court in the Ruling of 7th January 2020. It was submitted that the instant application having being filed before the said service of the Notice, is therefore premature.

58. In a rejoinder to the Judgment Debtors' submissions on the right to fair hearing, Counsel submitted that that there was no such *absolute right* for the Judgment Debtors to be heard as claimed and that this Court was correct in proceeding with the *ex parte* hearing of the Respondent/Judgment Creditor's Originating Summons application dated 31st December 2019. It was further submitted that the Judgment Debtors' right to be heard, if any, was limited by the provisions of the Act.

59. Counsel maintained that the Respondent satisfied the conditions under Sections 5(2) (a) (ii) and 5(2) (b) of the Act for the Originating Summons to proceed for *ex parte* hearing.

60. It was further submitted that the *ex parte* hearing of the Originating Summons was justified as each of the Applicants/Judgment Debtors was served with the Applicant's Claim Form and Particulars of Claim before the English Court after which the Applicants submitted themselves to the jurisdiction of the said Court by acknowledging the said service and by filing their respective Defences, Counterclaims and Amended Defence. It was also submitted that the *ex parte* hearing was justified as the Applicants' appeal against the English Court Judgment and Order was dismissed by the Order made by the Rt. Hon. Lord Justice Leggatt of the English Court of Appeal on 17th September 2019.

61. Counsel submitted that since there was no denial by the Judgment Debtors as to the finality of the proceedings in England and that as a consequence of the Order of Rt. Hon. Lord Justice Leggatt 17th September 2019, there was no violation of the Applicants/Judgment Debtors' right to be heard in the Originating Summons.

62. On the claim that their rights under Article 50 of the Constitution were violated before the English Court, counsel submitted that it is not sufficient for the Judgment Debtors to merely state that the enforcement of the English Court Judgment would be a violation of their "*absolute right to a fair hearing"*. They argued that Applicants are bound to describe the manner in which the enforcement of the English Court Judgment violates their right to fair hearing.

63. It was submitted that even though the Application before this Court is not a constitutional petition in the strict sense and that the Judgment Debtors in alleging said violation of rights nonetheless remain bound to satisfy the threshold for a party to succeed in a constitutional petition. Counsel cited the decision in *Robert Amos Oketch v Andrew Hamilton & 8 others (Sued in their Personal Capacities and as Trustees of the National Bank of the Kenya Staff Retirement Benefit Scheme) & 4 others* [2017] eKLR , where the learned Judge stated that:

"63. First, this being a constitutional petition, the petitioner is required to show with precision that it meets the test set in the case of Anarita Karimi Njeru v Republic (supra). In that case, the court stated that where the Court stated that a party who wishes the Court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it.

64. This was reiterated in the case of Meme v Republic [2004] eKLR thus;

"Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complains without any focus on fact, law or

Constitution, hence it had nothing to do with the constitutional rights of the appellants"

The principle was re-stated in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra) where the court stated;

'The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court… Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle…."

65. Applying the above principles to this case, I have considered the petitioner's pleadings, the evidence as well as submission by his counsel and in my respectful view this is not a proper constitutional petition challenging violation of fundamental freedoms. I say so because although the petitioner has pleaded provisions of the constitution, he has not demonstrated to the required standard how his rights and fundamental freedoms have been violated infringed or are threatened to come within the ambit of Article 23(1) of the constitution for redress."

64. It was submitted that Judgment Debtors cannot succeed in their allegation of the violation of their right to be heard in the jurisdiction of this Honourable Court through the instant application as there is no demonstration as to how the enforcement of the said English Court Judgment would be a violation of the said right to be heard.

65. Counsel submitted that should this Court be inclined to interrogate the nature of the proceedings before this Honourable Court so as to determine whether there was any violation of the Applicants/Judgment Debtors' right to be heard, this Court will still find that there was no violation aforesaid at all.

66. On the alleged violation of the applicants' right to be heard on account of alleged bias following the decision by Daniel Toledano, QC, not to recuse himself from hearing and determining the Judgment Creditor's application for summary judgment, counsel submitted that the *right* to a fair hearing under Article 50 of the Constitution does not apply and cannot be enforced before the English Court being a foreign Court that is not established and recognised under Kenyan law.

67. It was submitted that the English High Court Judge was not appointed as a Judge of this Honourable Court pursuant to Article 166(b) of the Constitution and that as such, there was no obligation on the English Court and the English High Court Judge, to recognise, enforce and/or uphold the right to be heard under Article 50 of the Constitution aforesaid for the reason that both the said Court and Judge are beyond the scope of the jurisdiction conferred for the protection of the said right by the Constitution.

68. It was submitted that this Court lacks the jurisdiction to interrogate and make a finding on whether the decision by the English High Court Judge to recuse himself from the hearing of the application for summary judgment. Counsel maintained that by appearing for the hearing of the application for summary judgment before the English Court and making submissions thereon the Applicants were deemed to have accepted the decision by the English High Court Judge to decline recusing himself.

69. It was further submitted that an allegation of bias in the proceedings before the English Court is not expressly provided for as a ground for the setting aside the Ruling under Section 10 of the Act and further, that this Court lacks the jurisdiction (under the Constitution and Kenyan statute) to interrogate and make a finding on the allegation of bias in the proceedings before the English Court being a foreign Court.

70. It was further submitted that in so far as the proceedings before the English Court were concerned, the applicable procedural law of the hearing conducted in the said proceedings was and remains a matter for the *lex fori*, namely England and Wales, and not the laws of Kenya. Counsel argued that under English and Welsh procedural law, to which the Applicants/Judgment Debtors herein submitted themselves, the action by the English High Court Judge in proceeding to hear the matter before him was proper and lawful and that it in the circumstances of this case, it would have been wrong of the judge to recuse himself on this ground.

71. It was submitted that the claim of bias on the basis that the English High Court Judge and Mr. Michael Sullivan, QC, (being the Counsel on record for the Respondent/Judgment Creditor in the proceedings before the English High Court) were members of the same Chambers with the trial Judge, the English Court and English Court of Appeal have rendered decisions to the clear effect that mere membership of the same Chambers in England and Wales of the Judge or Arbitrator and Counsel appearing for one of the parties does not give rise to an imputation of apparent bias. For this argument, counsel cited the case of *Laker Airways Inc. v FLS Aerospace Ltd* [2000] 1 WLR 113, where the Court held as follows:

"The fact that [the English arbitrator] is located in the same Chambers as Counsel for the Respondent is no sufficient ground to give rise to justifiable doubts as to his impartiality or independence."

72. Reference was also made to the decisions in *Zuma's Choice Pet Products and Vanderbilt v Azumi Ltd and others* [2017] EWCA Civ 2133 and *Watts v Watts* [2015] EWCA Civ. 1297.

Analysis and Determination

73. I have carefully considered the pleadings filed herein, the submissions by counsel together with the authorities that they cited. I find that the find that the main issues for determination are as follows:

i. Whether the Application is premature.

ii. Whether the orders issued, ex parte, on 7th January 2020 amount to a violation of the Applicants absolute right to a fair hearing.

iii. Whether the proceedings in which the United Kingdom Judgment was obtained were unconstitutional and therefore unenforceable been obtained in a manner that violates Article 50 of the Constitution of Kenya and therefore contrary to the rules of natural justice and public policy.

iv. Whether the Ruling of 7th January 2020 should be set aside.

a) Whether the Application is premature.

74. Section 5(3) of the Act stipulates as follows:

> "*Where an application is made under subsection (1) ex parte, the court hearing the application, instead of allowing it, may direct a summons to be issued, but if no such direction is given notice of the registration of the judgment made on the application shall be served upon the judgment debtor in accordance, mutatis mutandis, with order V of the Civil Procedure Rules.*

Rules 4(3) of the Rules

> "*The period within which an application may be made to set aside registration for the purposes of paragraph (2) shall unless the court extends the period, be fourteen days from the date on which the judgment-debtor is served with a notice of registration where the application was ex parte and in all other cases fourteen days from the date of registration.*

75. My finding is that even though Rule 4(3) of the Rules provides for the period, after service with notice of registration of a foreign judgment, within which an application may be made to set aside registration of a foreign judgment, the said Rule does not bar a party, who learns of such registration prior to service with a Notice of Registration, from filing an application to set it aside. I agree with the position taken by the Judgment Debtors that no prejudice has been occasioned to the Judgment Creditor following the filing of the application prior to the service with the Notice of Registration.

76. I find that there is no hard fast rule as to the timing of an application to set aside the registration of a foreign judgment and this explains why the rule is not couched in mandatory terms such that even where there is delay in meeting the 14 days deadline, the Rule allows the court to extend the period. Needless to say, Article 159 (2) (d) of the Constitution mandates the court to administer substantive justice without undue regard to procedural technicalities. To my mind, the early filing of the application by the Applicants before service with the Notice of Registration of Judgment is a procedural technicality that does not prejudice the Respondents in any manner whatsoever.

b) Right to fair hearing under Article 50 of the Constitution

77. Section 5(2) (a) (ii) and (b) of the Act stipulates as follows:

> "*(2) An application may be made under subsection (1) ex parte in any case in which—*
>
> *(a) the judgment debtor—*
>
> *(i) …*
>
> *(ii) though not personally served, appeared in the original court otherwise than for one or more of the purposes set out in section 4(2)(b); and*
>
> *(b) under the law in force in the country of the original court, the time within which an appeal may be made against the judgment has expired and no appeal is pending or an appeal has been heard and disposed of.*

79. Section 7 (1) of the Sixth Schedule to the Constitution on the other hand stipulates *that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.*

80. A reading of section 5 of the Act shows that it permits the court to entertain an application for the registration of a foreign judgment *ex parte* only in instances where it has been established that the Judgment Debtor appeared in the original court and where the time within which an appeal may be made against the judgment has expired and no appeal is pending or an appeal has been heard and disposed of. My understanding of the said provision is that it acknowledges that there are instances where the *ex parte* hearing of an application for registration of a foreign judgment is justified. It is for this reason that the Act expects the court, to which an application for registration has been filed, to first satisfy itself of the participation of the Judgment debtor in the original proceedings and the exhaustion of the appeal process before allowing the enforcement of the judgment.

81. In the present case, I note that it was not disputed that the Judgment Debtors were duly served with the Judgment Creditor's claim before the foreign court where they entered appearance and filed their defence, counterclaim and amended defence. It was also not disputed that the English Court heard the parties' arguments on the application for summary judgment before it entered judgment in favour of the Judgment Creditor. It was further not disputed that the Judgment Debtors' notice of appeal against the English Court Judgment was dismissed by the Order made by the Rt. Hon. Lord Justice Leggatt of the English Court of Appeal on 17th September 2019 for lack of merit. It was also not

disputed that there are no pending proceedings or appeal before the English Court.

82. From the above foregoing undisputed facts, I find that the Judgment Debtors' claim that their rights under Article 50 of the Constitution were violated is not merited. I note that the Applicants had ample opportunity to be heard before the English Court which opportunity they seized and exhausted to its full extent up to the English appellate court.

83. Turning to the claim that Section 5 of the Act offends Article 50 of the Constitution and ought to be construed or amended so as to bring it in conformity with the Constitution, I find that such a challenge on an Act of Parliament can only be made in a proper Constitutional petition where the court will called upon to consider and interpret the Act having regard to the provisions Section 7 (1) of the Sixth Schedule to the Constitution with a view to declaring the Act or its section(s) unconstitutional. I therefore find that the issue of the constitutionality of section 5 of the Act is not a matter that this court can determine in this ruling.

84. My findings on the issue of constitutionality of the impugned section notwithstanding, I also find that reading of section 5 of the Act shows that it does not completely shut out a party from being heard in an application for registration of a foreign judgment so as to warrant the Judgment Debtors' claim that the section is unconstitutional. The section merely grants the court the discretion to hear the application *ex parte* only where it is satisfied that the Judgment Debtor participated in the proceedings original court. Under section 10 of the Act, the court is further granted the leeway to set aside such recognition on grounds set out in the said section. To my mind, the impugned section takes cognizance of the fact that the parties were already granted the right to be heard in the foreign court and that the duty of the court receiving the judgment is simply recognition of the same. I therefore find that in recognizing or enforcing such a foreign judgment, the role of the court is what can be said to be 'ceremonial' as it does not entail a fresh or substantive hearing of the main suit.

Recusal

85. The Judgment Debtors also contended that the proceedings before the English Court were conducted in a fraudulent manner thus rendering the judgment arising therefrom unenforceable in Kenya. The gist of their case was that Daniel Toledano QC who presided over the case before the said court shared the same chambers with Mr. Michael Sullivan QC counsel for the Judgment Creditor thereby giving rise to the perception of bias. The Judgment Debtors argued that since their right to fair hearing was violated before the foreign court, the impugned judgment should not be enforced in Kenya.

86. On their part, the Judgment Creditor maintained that this court lacks the jurisdiction to inquire into the manner in which the English Court conducted its proceedings. It was the Judgment Creditor's position that there is no provision in Kenyan law whether under the Constitution or under statute which gives this Court the jurisdiction to examine and render a decision on the conduct of proceedings of a foreign Court. They urged this Court to down its tools and desist from rendering a decision on the alleged fraud in the English Court.

87. I have considered the detailed and well researched arguments by counsel for the parties regarding the issue of the alleged apparent bias by the trial Judge following his refusal to recuse himself from hearing the Judgment Creditor's application for summary judgment. It is trite law that a court cannot act without jurisdiction. In the Kenyan context, jurisdiction is derived from either the Constitution or an Act of Parliament. As was stated by the Supreme Court in the oft cited case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

> *"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*

88. In the celebrated case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] KLR, it was held that:

> *"…By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision…If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. …..Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given...*
>
> *…"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

89. In *Builders & Concrete Company Limited v National Government Constituency Development Fund Committee-Embakasi South & Another* [2017] eKLR, it was held that:

> *"Third is the verdict that while the Constitution guarantees right to access courts, the same Constitution neither operates in a vacuum nor does it automatically oust other statutory provisions brought to life by the legislative arm of government; a delegate and*

trustee of the sovereign power of the people of Kenya under Article 1 as read with Article 94 of our constitution".

90. In *Eliud Wafula Maelo v Ministry of Agriculture & 3 others* [2016] eKLR it was held that:

> *"In determining whether a court has jurisdiction in a particular matter, a court cannot consider the provisions of the Constitution only. Regard must also be taken of relevant statutes."*

91. Taking a cue from the above cited cases, I note that the preamble of the Foreign Judgment (Reciprocal Enforcement) Act states that it is an *Act of Parliament 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.*

92. From the wording of the preamble of the Act, it is clear that the jurisdiction granted to this court by the Act is limited to the enforcement of foreign judgments emanating from designated countries. I find that the mandate of this court, under the Act, does not extend to reviewing, interrogating or analysing the said judgment in order to determine if the procedure the court adopted was proper or if the judge who presided over the case ought to have recused himself from hearing the matter. My finding is that the issues of recusal of the Judge, the alleged fraud or the alleged breach of the Facility Agreement by the Judgment Creditor are matters which fell within the jurisdiction of the English Court where Judgment Debtors should have presented their concerns.

93. I further find that the issue of recusal was conclusively determined by the English Court of Appeal in the Order by Rt. Hon. Lord Justice Leggatt made on 17th September 2019 wherein in dismissing the appeal the said held that:…"*The appellants have not identified any relevant information which the judge failed to provide nor any reasonable basis for suggesting that he should have recused himself".* I therefore find that any further challenge to the finding by the English Court of Appeal can only be made in before the English Courts and not this Court. To my mind, this court cannot delve into determining the above issues without falling into the trap of sitting on appeal in a decision from a court of equal/concurrent jurisdiction.

94. While advancing the argument that their right to fair hearing was violated before the English Court, the Judgment Debtor's counsel submitted that Kenya is a sovereign state that is not bound to enforce a judgment that was, in their opinion, obtained contrary to the Kenyan Constitution and thus contrary to public policy. My finding is that by enacting the Act, and by recognising the United Kingdom as a reciprocating country, the lawmakers in Kenya were satisfied that judgments and orders emanating from the jurisdiction of the designated countries including the United Kingdom are worthy of recognition in Kenya.

95. I find that if indeed the Kenyan lawmakers intended that our courts should, upon an application being made for the recognition of a foreign judgment, analyse, review, assess or interrogate foreign judgments before adopting them, nothing would have been easier than for a specific provision to be made to that effect in the Act. This is not the case and I therefore find that this court lacks the jurisdiction to inquire into or impeach judgments made in accordance with the law of the reciprocating country, in this case, the United Kingdom.

96. It is also noteworthy that not all judgments from foreign courts are enforceable in Kenya. Under Section 13 of the Act, the country giving the judgment must be a reciprocating country as declared by the line Minister by an order, to be a reciprocating country for the purposes of the Act. The Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984 lists in a schedule the reciprocating countries. Paragraph 2 of the Order provides:

> ***The countries specified in the Schedule are declared to be reciprocating countries for the purposes of the Act and the Act shall apply with respect to judgments given by superior courts of those countries.***
>
> ***SCHEDULE***
>
> ***1. Australia,***
>
> ***2. Malawi,***
>
> ***3. Seychelles,***
>
> ***4. Tanzania,***
>
> ***5. Uganda,***
>
> ***6. Zambia,***
>
> ***7. The United Kingdom,***
>
> ***8. Republic of Rwanda.***

97. From the above provision, it is clear that only judgments from designated countries are recognized in our jurisdiction. In *Jayesh Hasmukh Shah v Navin Haria & Another [2016] eKLR* 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."

98. 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) …

99. Guided by the decision in the above cited case and provisions of the Act, I find that the Judgment Debtor's Debtors' argument that the Kenya is a sovereign state that is not bound to enforce judgments from those jurisdictions is, with all due respect, incorrect.

100. The Judgment Debtors also alluded to the fact that the choice of the English Court as the place of institution of the original suit was imposed on them and that they were coerced into accepting the said jurisdiction. This court however notes that it was not disputed that the Facility Agreement contains a clause providing that disputes arising from the agreement between the parties would be referred to the English jurisdiction. In other words, the parties herein made a voluntary and conscious decision to refer their dispute to the English Court. It is further not in dispute that the Judgment Debtors did not object to the jurisdiction of the English court as they acknowledged service of the Judgment Creditor's Particulars of Claim and fully participated in the proceedings up to the appellate stage.

101. As I have already stated in this ruling, the proceedings before the English court were concluded, with finality, in the Judgment Creditor's favour. I find that in the circumstances of this case, the Judgment Debtor cannot turn back, long after the proverbial horse has bolted in the English court and claim that they were coerced to appear in English proceedings or that the said proceedings were unconstitutional or amounted affront to the sovereignty of Kenya. My humble view is that these are issues which the Judgment Debtor ought to have canvassed before the English court, and not this court whose sole mandate, as I have already indicated in this ruling, is to recognize, register and enforce the foreign judgment.

102. My further finding is that while it is true that Article 50(1) of the Constitution of Kenya enshrines the right of every person to have a fair and public hearing before a court or, if appropriate, any other independent and impartial tribunal or body, in the present case, the parties' choice of jurisdiction was the English court where they ought to have canvassed the alleged violation. I therefore reiterate my finding that the Judgment debtors cannot purport to disown or run away from the said court at this stage when they had already willingly submitted themselves before the jurisdiction of the said court.

103. The Judgment Debtors also took issue with the summary procedure adopted by the English Court and argued that under the said procedure was contrary to the principles of fair hearing as it denied them the opportunity to present their case. My finding is that contrary to the Judgment Debtors' assertions that they were not accorded a fair hearing before the English court, a perusal of the proceedings from the said court paints a completely different picture and reveal the following uncontested facts:

i) That Counsel for both parties in the English Court filed and exchanged skeleton arguments in accordance with the rules of the said Court as shown in the exhibits marked "LEW -11(a)" and "LEW-11(b)" annexed to the Replying Affidavit.

ii) That at the substantive hearing of the application for summary judgment on 19th June 2019 Counsel for the Judgment Debtors was heard and made extensive submissions before the English High Court Judge;

iii) That prior to the hearing, the Judgment Debtors made an application and were allowed to file and serve the Amended Defence and Counterclaim.

iv) That at no time during the hearing before the English Court did counsel for the Judgment Debtors submit to the English High Court Judge that he was acting fraudulently in considering and determining the case before him.

v) That the learned Judge delivered a full judgment which dealt with each and every issue raised by the Judgment Debtors. The Approved Judgment was attached to the Replying Affidavit as annexure marked "LEW-9".

vi) That the Judgment Debtors filed a Notice of Appeal before the English Court of Appeal for permission to appeal against, and for stay of execution of the English High Court Judgment and Order together with Grounds of Appeal.

vii) That in the said Grounds of Appeal and in the supporting written arguments the Applicants/Judgment Debtors did not contend that the English High Court Judge had acted in fraud by hearing and determining the claim and making his Order aforesaid as he did.

viii) That in his reasoned Order dated 17 September 2019, Justice the Rt. Hon. Lord Justice Leggatt, considered and rejected each of the proposed grounds of appeal advanced by the Judgment Debtors, including the suggestion that the English High Court Judge should have recused himself. In dismissing the Applicants/Judgment Debtors application before him, Rt. Hon. Lord Justice Leggatt

learned Lord Justice held that the same were "totally without merit"

104. Having regard to the above uncontested facts, I find English Court considered the defence and counterclaim mounted by the Judgment Debtors both at the original and the appellate stage and found them to be lacking in merit.

105. My further finding on the challenge on the procedure adopted by the English Court is that the law that governs proceedings before the said court (*lex fori),* is the law English law, in which case, this court cannot be called upon to apply the laws of Kenya in England. My finding on the issue of *lex fori* notwithstanding, this court notes that the summary judgment procedure adopted before the English Court is a procedure which is not peculiar to England alone as our own Civil Procedure Rules under Order 13 Rule 2 provides for summary judgment procedure as follows:-

> ***"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just."***

106. In view of the above provision, I find that the Judgment Debtors' argument that the Kenyan courts would not have adopted the summary judgment procedure had the case been filed locally to be incorrect.

Setting aside the Ruling

107. The Judgment Debtors argued that Section 10 (1) as read with Section 10(2)(n) of the Act provides that a registered judgment may be set aside if the enforcement of the judgment would be manifestly contrary to public policy in Kenya. The term "Public policy" within the context of Section 10(2)(n) of the Act was discussed in the case of *Sanjay Shah v Kamlesh Bid & Another* [2017] eKLR at para 12 as follows: –

> *[12] I have given due consideration to the submissions made herein on the point, and in particular as to the definition of "public policy" as brought out in the cases of Kenya Shell Limited vs Kobil Petroleum Limited [2006] eKLR and Christ For All Nations vs Apollo Insurance Co. Ltd [2002] 2 EA 366, in which an award (in this case a foreign judgment) would be taken to be inconsistent with the public policy of Kenya if:*
>
> *[a] It was inconsistent with the Constitution or other laws of Kenya;*
>
> *[b] It is inimical to the national interest of Kenya; or*
>
> *[c] It is contrary to justice and morality.*

108. Black's Law Dictionary Tenth Edition defines 'public policy' as:

> *"the collective rules, principles or approaches to problems that affect the commonwealth or promote the general good; principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole society."*

109. In order to appreciate and determine the Judgment Debtors' claim that the impugned judgment is against public policy this court must consider the nature of the Judgment Creditors claim before the English Court and the resultant judgment arising therefrom. A perusal of the Particulars of the Claim before the said court shows that the Judgment Creditor sought orders for the payment of the sum of USD 13,622,023.72 by way of debt and damages, any costs and expenses, simple and compound interest; and any further or other relief as the court deems fit.

110. Upon considering the Judgment Creditor's application for summary Judgment, the English Court held as follows;

> *"In light of the conclusions on the material before the court and bearing in mind the principles set out in the authorities on the correct approach to summary Judgment, I have decided that it is appropriate therefore to grant summary judgment to the claimant, both on its claim and against the counterclaim. I conclude that there is no real prospect of any of the defences succeeding, no real prospect of the counterclaim succeeding and no other compelling reason for a trial."*

111. Having regard to the above decision, the definition of the word public policy as highlighted hereinabove and having noted that it was not disputed that the Judgment Debtor obtained a loan facility from the Judgment Creditor which facility it did not repay as agreed, the question which then arises is whether registering and enforcing the judgment, whose sole import is to give effect to the Facility Agreement signed by the parties can be said to be against public policy in Kenya.

112. My finding is that the answer to the above question is to the negative. I find that contrary to the Judgment Debtor's position on the issue of public policy, the failure by this court to recognize, register and enforce the impugned judgment may give rise to the undesirable conclusion, in the eyes of other democratic states that observe the rule of law, that the repayment of loans is against public policy in Kenya or that Kenya is a country that does not observe its own laws, in this case, the Act. I find that since the English Court Judgment and Order have not been discharged, set aside and/or substituted, the said judgment cannot be impeached by this court in the manner that has been suggested by the Judgment Debtors. This court is at a loss as to how a valid judgment for the enforcement of a contract between private individuals and entities can be construed to be inconsistent with the Constitution or other laws of Kenya; inimical to the national interest of Kenya; or

contrary to justice and morality.

Conclusion

113. Having found that the impugned judgment met the threshold of the Judgments capable of recognition, registration and enforcement under the Act and having regard to the findings that I have made in this ruling, I am not persuaded that the Judgment Debtors have made out a case for the setting aside of the ruling of 7th January 2020 or for the granting of any of the prayers sought in the amended application dated 13th January 2020. In the circumstances of this case, the order that commends itself to me is the order to dismiss the application with costs to the Judgment Creditor.

Dated, singed and delivered in open court at Nairobi this 13th day of February 2020.

W.A.OKWANY

JUDGE

In the presence of:

Professor Githu Muigai, Mr. Michael Sullivan QC and Mr. Peter Kabatsi for the judgment creditor.

Mr. Paul Nyamondi for the judgment debtor.

Court Assistant: Sylvia