



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS APPLICATION NUMBER 19 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF A FOREIGN JUDGMENT**

**SNM .....APPLICANT**

**VERSUS**

**MWM..... RESPONDENT**

**RULING**

1. By way of a notice of motion dated 19/11/2018 SNM (hereinafter the applicant) seeks orders;

**1. Spent.**

**2. THAT the court be pleased to adopt and enforce the judgment delivered in Marion Superior Court, state of Indiana United States on 20<sup>th</sup> November, 2002 between the parties herein as a judgment of this court.**

**3. THAT the costs of this application be provided for.**

2. The application is premised on his affidavit sworn on the 12/11/2018 and on grounds;

(a) **THAT** the applicant herein was married to one MWM, the Respondent herein.

(b) **THAT** subsequently the applicant filed divorce proceedings in the Marion Superior Court in United States of America and obtained a decree of dissolution of marriage on 20<sup>th</sup> November, 2002.

(c) **THAT** the said judgment was compliant with all the rules of natural justice.

(d) **THAT** despite the judgment being delivered more than 12 years ago, the same is exempted from the provisions of the **Limitation of Actions Act** under **Section 42(1) (b)** of the said act as the proceedings herein are matrimonial in nature.

(e) **THAT** the applicant wishes the judgment of the Superior Court of Marion Indiana adopted as a judgment of this court as both parties are citizens of Kenya and the respondent has since relocated to Kenya.

(f) **THAT** jurisdiction of this court to deal with this application is provided for under **Article 165 (3)** of the **Constitution of Kenya, 2010**, **Section 3** of the **Judicature Act Cap 8 Laws of Kenya**, the principles of common law as read together with **Section 9** of the **Civil Procedure Act Cap 21 Laws of Kenya** as was rightly held by the **Court of Appeal** in **Jayesh Hasmukh Shah vs Navin Haria & Another [2016] eKLR**.

(g) **THAT** this application is made in good faith and no prejudice will be suffered by the respondent and it is in the interest of justice that the same be allowed as prayed.

3. Despite evidence of proper service, the application elicited no response from the respondent.

4. The applicant's case as summarized by his counsel in his brief oral submissions at hearing is that a judgment was rendered in matrimonial proceeding pitting the applicant versus the respondent and judgment obtained from **Marion Superior Court, State of Indiana, United States** on 20/11/2002. By that judgment the parties marriage was dissolved.

5. The applicant seeks orders that the said judgment be adopted and enforced in Kenya.
6. The only question for determination is whether this court has the jurisdiction to adopt and enforce the judgment delivered in **Marion Superior Court, State of Indiana, United States** as a judgment of this court.
7. The foreign judgments (**Reciprocal Enforcement**) Act Cap 43 of the **Laws of Kenya** makes provision for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya. A judgment creditor holding a foreign judgment from a “designated country” may apply and register the foreign judgment at the High Court of Kenya and such foreign judgment shall for purposes of execution, be of the same force and effect as a judgment of the High Court of Kenya entered at the date of registration.
8. The designated countries under the **Kenya Foreign Judgments (Reciprocal Enforcement) Act** are Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Rwanda.
9. **Marion Superior Court, State of Indiana, United States** is not a designated court within the meaning of **Section 2** of the **Foreign Judgments (Reciprocal Enforcement) Act**. That Section provides;

“Designated Court” means

- (a) a superior court of reciprocating country which is 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”
10. The instant application therefore seeks to determination of enforceability in Kenya of foreign judgments from non-designated countries.
11. As held by the **Court of Appeal** in **JAYESH HASMUKH SHAH vs NAVIN HARIA AND MANU SHAH [2016] eKLR**, in the absence of a reciprocal enforcement arrangement, a foreign judgment is enforceable in Kenya as a claim in common law. The court laid down the common law principles on enforcement of foreign judgments as extensively elaborated in the case of **ADAMS & OTHERS VS CAPE INDUSTRIALS PLC (1990) Ch 433**. These are;
- (a) Where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. (See **Park B. in Williams vs. Jones (1845) 13M. & W. 628, 633** as quoted in **Adams & Others vs. Cape Industrials PLC, (1990) Ch. 433** at 513).
- (b) In deciding whether the foreign court was one of competent jurisdiction, courts will apply not the law of the foreign court is competence of the court in an international sense – i.e. its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not material. (See **Lindley M.R. in Pemberton vs. Hughes, (1899) 1 Ch. 781, 791**).
- (c) In **Emanuel vs. Symon, (1908) 1KB 302**, Buckley L. J. said that in actions in personam there are five cases in which the courts of England will enforce a foreign judgment. These are: (i) where the defendant is a subject of the foreign country in which the judgment was obtained; (ii) where he was resident in the foreign country when the action began; (iii) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (iv) where the defendant has voluntarily appeared and (v) where the defendant has contracted to submit himself to the forum in which the judgment was obtained.
- (d) If a foreign judgment is to be enforced against a corporation, it must be shown that at the relevant time, the corporation was carrying on business and it was doing so at a definite and to some reasonable extent, permanent place in foreign country. (See **Adams & Others vs. Cape Industrials PLC, (1990) Ch. 433** at 512).
- (e) It is only the judgment of a foreign court recognized as competent by English law which will give rise to an obligation on the part of the defendant to obey it. The onus is on the plaintiff seeking to enforce the foreign judgment to prove the competence of such court to assume jurisdiction; the evidentiary burden may shift during trial. (See **Adams & Others vs. Cape Industrials PLC, (1990) Ch. 433** at 550).
- (f) The principle that a foreign court has jurisdiction to give an in personam judgment if the judgment debtor, the defendant in the foreign court, submitted to the jurisdiction of the foreign court is well settled.
- (g) A foreign judgment obtained in circumstances that are contrary to natural justice does not give rise to any obligation of obedience enforceable at common law.
- (h) If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter in which it is competent to deal, English courts will never investigate the propriety of the proceedings in the foreign court, unless they offend substantial justice. Where no substantial justice is offended, all that the English court shall look into is the finality of the judgment and the competence of the foreign court to entertain the sort of case which it did deal with and its competence to require the defendant to appear before it. (See **Pemberton vs. Hughes, (1899) 1 Ch 781, 790-791** as per **Lindley M.R.**).

Mere procedural irregularity, on the part of the foreign court according to its own rules, is not a ground of defence to enforcement of the foreign judgment. (See Adams & Others vs. Cape Industrials PLC, (1990) Ch. 433 at 567).

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

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

12. Applying these principles *mutatis mutandis* to our instant suit and alive to the provisions of **Section 9** of the **Civil Procedure Act**, to enforce a foreign judgment in Kenya from a non-designated country takes a different form from that of enforcing a registered judgment from a designated reciprocating country and court. It is important to highlight **Section 9** of the **Civil Procedure Act**;

“S.9. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except—

(a) where it has not been pronounced by a court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in Kenya.”

13. The **Court of Appeal** in **Jayesh Case** above set the requirements that the applicant in these circumstances must fulfil.

14. The said requirements were listed as;

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

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

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

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

e. The money judgment in the foreign judgment must be final and conclusive. It may be final and conclusive even though it is subject to an appeal. Under **Section 9** of the **Civil Procedure Act**, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title except:

i. where it has not been pronounced by a court of competent jurisdiction;

ii. where it has not been given on the merits of the case;

iii. where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;

iv. where the proceedings in which the judgment was obtained are opposed to natural justice;

v. where it has been obtained by fraud; or

vi. where it sustains a claim founded on a breach of any law in force in Kenya.

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

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

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

i. Was, at the time the proceedings were commenced, habitually resident or incorporated in or having a principal place of business in the foreign jurisdiction or

ii. Was the claimant or counterclaimant in the foreign proceedings or

iii. Submitted to the jurisdiction of the foreign court or

iv. Agreed before commencement, in respect of the subject matter of the proceedings to submit to the jurisdiction of the foreign court.

v. Where the above requirements are established to the satisfaction of the Kenya High Court, the High Court will not re-examine the merits of the foreign court judgment. The foreign judgment will be enforced on the basis that the defendant has a legal obligation as a matter of common law, recognized by the High Court, to satisfy the money decree of the foreign judgment.

15. In view of the above, the application as drawn cannot succeed. The prayer for adoption and enforcement of the subject judgment is drawn, through what appears to be a misapprehension of the law, as one to register and enforce a foreign judgment from a "designated country" yet the judgment is one from a non-designated country under the provisions of **Foreign Judgments (Reciprocal Enforcement) Act Cap 43 Laws of Kenya**.

16. I proceed to dismiss the notice of motion dated 19/11/2018 with no orders as to costs.

**Dated and Signed at Nakuru this 13<sup>th</sup> day of February, 2019.**

**A. K. NDUNG'U**

**JUDGE**