



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 423 OF 2015**

**UBA TANZANIA LIMITED.....PLAINTIFF**

**- VERSUS -**

**METRO PETROLEUM TANZANIA LTD & OTHERS.....DEFENDANT**

**RULING**

1. Under consideration in this ruling is the chamber summons dated **20th December, 2017**. It is brought by **Metro Petroleum Tanzania Limited, Bill Kipsang Rotich, Florence Chepkoech** and **Premium Petroleum Company Limited** (collectively referred to as the judgment debtors (JD)).

**BACKGROUND**

2. This matter was initiated by **United Bank for Africa (Tanzania) Ltd** herein after referred to as **UBA**. **UBA** filed an originating summons dated **31st August, 2015**, whereby it sought the registration of a judgment it obtained against the **JD** at High Court Tanzania Daresalam in **Commercial Case No. 98 of 2015**. **UBA** sought that registration of that judgment under the Foreign Judgment (reciprocal) and Enforcement Act Cap 43.

3. This court by its ruling of **4th February, 2016** granted garnishee orders to issue against Family Bank Limited, who have a legal charge over property LR No. 2009/8192/2 Riverside Nairobi, which property is registered in the names of **Kipsang Rotich** and **Florence Chepkoech**. By that ruling, this court stated that if Family Bank Limited realise it's security, the surplus of such realization would be paid to UBA to satisfy the Tanzanian Judgment.

4. Although **JD** sought review of the ruling of **4th February, 2016**, this court through its ruling of **19th December, 2016**, rejected the application for review.

5. By this court's ruling of **13th November, 2017**, **UBA** was permitted to register the Tanzania High Court Judgment as Judgment of this court.

**CHAMBER SUMMONS DATED 20TH DECEMBER, 2017**

6. By that **Chamber Summons**, **JD** seek an order to set aside this court's order of **13th November, 2017**, which order registered the Tanzania High Court judgment as the judgment of this court.

7. The **JD** seeks that prayer based on various grounds.

8. **JD** sought the setting aside of the registration of the foreign judgment on the ground that under **Section 10 (2) (a) of Cap 43**, that judgment which was registered was not one to which Cap 43 applies. The basis of that submissions was that under **Section 3 (3) (k) of Cap 43**, the judgment was not contemplated under Cap 43.

**9. Section 3 (3) of Cap 43** provides:

“This act does not apply to a judgment or order –

**(k) of a designated court in any proceedings if-**

(i) the bringing of those proceedings in that court was contrary to an agreement, or to an instrument in respect of which the proceedings were instituted, whereby the dispute, or the proceedings, were to be settled otherwise than in the courts of the reciprocating country; and

(ii) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given;

(iii) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of the court.”

10. The **JD** argument in this regard was that the proceedings before the Tanzanian High Court did not proceed with the agreement as provided in the section above.

11. A careful examination of **Section 3 (3) (k) (i) and (ii) of Cap 43** shows that a foreign judgment which was entered contrary to the agreement of the parties, and where one of such parties did not consent would not be enforceable. In other words, where by agreement of parties the foreign court had no jurisdiction to hear the matter, a judgment that proceeds from such proceedings cannot be enforced under Cap 43. That is where parties had consented that the foreign court had no jurisdiction to hear a matter, Cap 43 cannot enforce a judgment of such a court.

12. **Section 3 (3) (k) (iii)**, as reproduced above, is not applicable because; and it is not disputed by the parties in this matter; **JD** did not file a defence to the proceedings before the Tanzanian High Court.

13. **JD** further argued, in support of the Chamber Summons, that the registration of the Tanzanian judgment contravened **Section 10 (2) (b) of Cap 43** because it has a pending appeal before the Court of Appeal in Tanzania in respect of the Judgment before the Tanzanian High Court.

14. **JD** relied on an order granted to it by Tanzania High Court, granting it leave to appeal against the judgment delivered by that court.

15. Other than that order, for leave to appeal, **JD** did not annex Notice of Appeal to the Court of Appeal in Tanzania; and accordingly there is no proof before me that **JD** indeed filed an appeal after it was granted leave to appeal.

16. Moreover, **Section 3 (2) of Cap 43** provides that cap 43 regards a foreign judgment as final and conclusive notwithstanding that an appeal may be pending against such a judgment. It follows that the judgment of the High Court Tanzania, is enforceable even if there was a pending appeal. But as stated before, **JD** failed to prove to this court that there was a pending appeal at the Court of Appeal Tanzania.

17. **JD** argued that because there was a pending judgment before the Court of Appeal Tanzania, although there was no proof of it, that the judgment of the High Court Tanzania was statutory stayed.

18. This court in response to that submission would reiterate the provisions of **Section 3 (2) of Cap 43** as referred to above in this judgment.

19. Over and above that response, **JD** did not prove to this court that once a party files an appeal before Court of Appeal in Tanzania, there is an automatic stay of execution.

20. **JD** relied on **Article 13 (6)** of the Constitution of Republic of Tanzania. That article provides:

“(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.”

21. I have considered that article and in my humble view, it provides the right to fair hearing, right to appeal, or to seek other legal remedy against decisions of the court. That right recognized by that article, does not grant a party under the jurisdiction of the Tanzania Court the automatic right of stay of execution after filing an appeal. Even the authority relied on by **JD** being the case ***Ahmed Mbaraka vs Mwananchi Engineering and Contracting Co. Limited Civil Application No. 229 of 2014*** did not state that a party has automatic stay of execution when such a party has filed an appeal in the Court of Appeal in Tanzania.

22. **Ochieng J**, who by his ruling of **13th November, 2017**, registered the Tanzanian High Court judgment, on the issue of the pending appeal which was raised before him, stated thus:

**“if as the respondents (JD) have said, an appeal in Tanzania serves as an order for stay, I hold the view that the respondents would then have little difficulty in getting an appropriate order in Tanzania.”**

23. **JD** submitted that the order of enforcement of judgment should be set aside because, the judgment of High Court Tanzania was contrary to Kenya public policy.

24. In the case ***Kenya Shell Limited vs Kobil Petroleum Limited [2006] eKLR*** the court in considering whether an arbitration award should be set aside for being against public policy stated as follows:

“although public policy is a most broad concept, incapable of precise definition,...an award could be set aside under section 35(2)(b)(2) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

- i. Inconsistent with the constitution or other laws of Kenya whether written or unwritten or
- ii. Inimical to the national interest of Kenya, or
- iii. Contrary to justice and morality”.

25. **JD**'s argument was that it was contrary to public policy for being in contravention of articles 10, 25, 47 and 50 (1) of the Kenya constitution. **JD**'s learned counsel, did not elaborate exactly what rendered the judgment of the High Court Tanzania to be against public policy.

26. It is clear from the Tanzanian judgment that the judgment entered against **JD** in that court was in default of appearance. **JD** unsuccessfully applied before High Court Tanzania to set aside the default judgment. It is that default judgment that was registered by this court on **13th November, 2017**.

27. This court fails to appreciate how that *ex parte* judgment can be against public policy when **JD** were given an opportunity to seek to set it aside but were unsuccessful.

28. On the whole, the **JD**'s application lacks merit and is hereby dismissed.

29. I confirm that I have considered the opposition raised by **UBA** that **JD** had no right to approach this court to seek to set aside the registration of the High Court of Tanzania judgment.

30. **JD** has a standing in law to set aside registration of that judgment under **Section 10 of Cap 43**. **JD** cannot be faulted for having approached the court as it did.

31. In the end, and in view of the above finding the Chamber Summons application dated **20th December, 2017** is dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 13th day of June, 2018.**

**MARY N. KASANGO**

**JUDGE**

**Ruling read in open court in the presence of**

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant