REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION NO. 72 OF 2014

IN THE MATTER OF THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT CHAPTER 43 OF THE LAWS OF KENYA

SANJAY SHAH.....JUDGMENT CREDITOR

VERSUS

KAMLESH BID.....1ST JUDGMENT DEBTOR

DILESH BID.....2ND JUDGMENT DEBTOR

RULING

[1] This Ruling is in respect of the Chamber Summons applicationdated **17 November 2015.** The application was filed under **Section 10(1)(a)** and **(n) of the Foreign Judgments (Reciprocal Enforcement) Act**, and **Rule 6** of the **Foreign Judgments (Reciprocal Enforcement) Rules,** for orders that the foreign judgment entered herein on **19 February 2013** and the consequential orders of the High Court of Justice, Chancery Division of the United Kingdom in **Claim No. HC06C01491** registered on **3 November 2015** be set aside; and that the costs of the application be provided for. The application is supported by the affidavit of the 2nd Judgment Debtor/Applicant, **Dilesh Bid** and the grounds set out in the Chamber Summons.

[2] The brief background to the application is that the Judgment Creditor/Respondent herein was the 2nd Defendant in a suit filed by **Tecof Internantional Limited**, being **Claim No. HC06C01491** in the Chancery Division of the High Court of Justice, United Kingdom. The claim was dismissed on **11 February 2009.** Thereafter, the Applicants were joined to the suit for the purposes of the disposal of an application for costs after **Tecof International Limited** failed to pay the same; whereupon a determination was ultimately made for the Judgment Debtors to pay the Respondent's costs in the sum of **GBP 326,054.** The Respondent then moved the Court for the enforcement of that judgment pursuant to the **Foreign Judgments (Reciprocal Enforcement) Act.** Accordingly, the Court, by its Judgment dated **26 February 2015**, granted leave for the registration of the foreign judgment. The Notice of Registration dated **25 March 2015** was thereafter issued to the two Applicants, a copy of which was filed herein on **3 November 2015.**

[3] The Respondent opposed the application vide his Replying Affidavit sworn **27 January 2016** together with the annexures thereto. The parties thereafter filed their respective written submissions

herein. The Court has carefully perused and considered the averments in the respective affidavits as well as the written submissions filed, including the authorities relied on by Learned Counsel as well as the oral submissions that were made before this Court on **5 October 2016.**

[4] Section 10(1) of the **Foreign Judgments (Reciprocal Enforcement) Act,** under which the application has been filed provides that:

> **"Where a judgment has been registered under this Act an application may be made by the judgment debtor that the judgment be set aside on any of the grounds set out in subsection (2) or (3), and if the High Court is satisfied that any of those grounds has been established it shall set aside the registration of that judgment."**

The Applicants herein have moved the Court under **Section 10(2)(a)** and **(n)** as well as **Section 10(4)** of the Act, namely; that the judgment is not a judgment to which this Act applies and that the enforcement thereof would be manifestly contrary to public policy in Kenya.

[5] It was the contention of the Applicants that in the final judgment of the Chancery Court, which was delivered on **11 February 2009,** there was no order as to costs; and that that is not the judgment that was registered in Kenya. According to them, a formal application for review ought to have been made if costs were to be awarded to the Respondent in the main suit after the passing of the Judgment of **11 February 2009**. On the authority of **Quick Service Stores vs Thakkar [1958] EA 357,** Counsel for the Applicants argued that costs could not be awarded by way of the slip rule; and that since no application for review of the judgment had been filed before the High Court of Justice, Chancery Division of the United Kingdom, the court was *functus officio* as at **11 February 2009**. He relied on the case of **Friis vs Paramount Bagwash Company Ltd [1940] 1 ALL ER 595** to support the argument that an order for costs made after the court was *functus officio* was bad in law and ought not to have been registered in Kenya.

[6] In response to this ground, the Respondent, in his affidavit sworn on **27 January 2016**, averred that the Applicants were joined to the Chancery proceedings after the Plaintiff therein, **Tecof International Limited,** failed to pay the costs of the suit; and that the foreign court had the requisite jurisdiction and powers to grant an order for costs after judgment. It was further averred that the Applicants were duly served and participated in the proceedings that resulted in their joinder and the award of costs. Copies of their witness statements and other documents filed by them in the foreign court were exhibited to the Replying Affidavit to support this averment.

[7] Upon a careful consideration of the impugned foreign judgment, attached to the application as **Annexure DB-3,** it is manifest that the conclusion thereof on the **11 February 2009** was that **"On the evidence at trial of this claim fails. There will be judgment for-Mr Shah."** It is plain then that, the Plaintiff having lost the case, Mr. Shah's judgment could only be for the payment of costs of the suit. Moreover, it is evident that further proceedings were held on **27 February 2009** whereupon further orders were issued as hereunder:

> **"1. The claimant's claim against the second defendant be and is hereby dismissed.**
>
> **2. The claimant do pay the second defendant his costs of this action, to be the subject of a detailed assessment on the standard basis if not agreed.**
>
> **3. Further, the sum of [GBP]129,950 paid into court by the claimant as security for the second defendant's costs pursuant to the order of the Honourable Mr. Justice David Richards dated 15th January 2008, together with any interest accrued thereon, to be paid forthwith to the second defendant's solicitors, and do stand as a payment on account of such costs pursuant to CPR r.44.3(8).**
>
> **4. The second defendant do have liberty to apply in relation to non-party costs orders in the event that the claimant defaults in payment under paragraph 2 above.**

5. Further, there be liberty to apply in the event that the second defendant and the third defendant are unable to agree a consent order disposing of the additional claim."

[8] Clearly therefore, by Order No. 4 above, the Respondent herein was granted the liberty to apply in relation to non-party costs orders in the event that the **Tecof International Limited** failed to pay the costs. Moreover, at pages 1 to 17 of the Replying Affidavit was annexed a copy of the Senior Courts Act and a perusal thereof does confirm that the foreign court had the requisite jurisdiction to entertain and make further orders in respect of the Applicant's prayer for non-party costs; such that the arguments that the court was *functus officio* would not be tenable. Indeed, Section 46.2(1) thereof provides that:

"where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must--

(a) be added as a party to the proceedings for the purposes of costs only;

(b) Be given a reasonable opportunity to attend a hearing at which the court will consider the matter further."

[9] It is evident that an order was made by the foreign court on **30 January 2012** in the following terms:

"That Mr. Dilesh Bid and Mr. Kamlesh Bid (also kown as Kamlesh Shah) ("the respondents") be added as defendants inthese proceedings for the purpose of costs only pursuant to Rule 48.2 of the Civil Procedure Rules, and in particular for the purpose of the Second Defendant's costs of this claim pursuant to Section 51 and 52 of the Senior Courts Act 1991 ("the substantive application.")

Thus, from a consideration of the affidavits filed herein, the Court is satisfied that the order for the payment of costs against a non-party was made after due process, and after the Applicants had been given an opportunity to respond thereto; and that the ensuing order as to costs was competently registered herein for enforcement in accord with the provisions of the **Foreign Judgments (Reciprocal Enforcement) Act;** and in particular **Section 8(2)(a)** thereof, which provides that:

"Subject to this Act, where a judgment for the payment of any monetary sum is registered, the following sums may be recovered upon the registration of judgment:-

(a) the amount remaining payable under the judgment, including interest and costs awarded to the judgment creditor, as at the date of registration."

[10] In the premises, I am of the persuasion that if the Applicants were truly unhappy with the foreign court's order as to costs against them as non-parties, then their remedy lay in either review or appeal in the foreign jurisdiction; and that the order in issue is, for the purposes of our **Foreign Judgments (Reciprocal Enforcement) Act**, final and conclusive (see **Section 3** of the Act). I am fortified in this conclusion by the decision of the court in the case of **Sebagala & Sons Ltd vs Kenya National Shipping Lines Ltd [2002] eKLR,** in which it was held thus:

"...in general, as provided in Section 9 of the Civil Procedure Act, a foreign judgment is conclusive until it is shown that any of the exceptions in Section 9 of the Civil Procedure Act do exist. Such a judgment of a reciprocating country as defined in the Act or judgment of any foreign court is not impeachable on the merits, whether for error of fact or law..."

[11] The other ground upon which the registration of the foreign judgment was attacked was that it is manifestly contrary the public policy of Kenya (**section 10(2)(n) of the Foreign Judgments (Reciprocal Enforcement) Act**. In this connection, the Applicants contended that from the standpoint of **Section 9(c) and (f) of the Civil Procedure Act**, the judgment was founded on proceedings which expressed an incorrect view of international law and on breaches of the laws of Kenya. **Article 5(1)** of the **Convention**

on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters was also relied on to support this argument. The violations complained of are;

> [a] That an order for the payment of costs was made against non-parties and after the court was *functus officio.*
>
> [b] That the Applicants are separate and distinct entities from **Eclof International Ltd** against whom the Respondent obtained the Judgment; and that they were neither directors nor shareholders of the aforesaid company should count for something.
>
> [c] That the quantum of costs awarded is so outrageously excessive as to be countenanced in Kenya; and should accordingly be reduced pursuant to Section 10(4) of the Foreign Judgments (Reciprocal Enforcement) Act.

The Applicants relied on the cases of **Telkom Kenya Limited vs John Ochanda [2014] eKLR; Lilian Wairimu Ngatho & Another vs Moki Savings Co-operative Society Limited & Another [2014] eKLR; Corporate Insurance vs Savemax Insurance Brokers ltd [2002] 1 EA 41** and **Musiara Ltd vs Ntimama [2005] EA 317**; among others to support their arguments.

[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.

[13] The path taken herein by the Applicants is not that the impugned judgment is against the Constitution of Kenya, or that it is inimical to the national interests of Kenyans, or even that it is against justice and morality; but that it is contrary to **Section 9** of the **Civil Procedure Act**; which provides that:

> **"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 breach of any law in force in Kenya."**

[14] That the impugned foreign judgment was pronounced by a court of competent jurisdiction after a hearing on the merits is not in doubt. It is also not the Applicant's contention that the proceedings in

which the judgment was obtained are opposed to natural justice; or that it has been obtained by fraud, or that it is not in tandem with international civil or commercial law. Thus what remains for determination, from the prism of **Section 9** aforementioned, is whether the registered judgment was obtained in contravention of Kenyan law as to the award of costs. **Section 27(1) of the Civil Procedure Act**, which is the provision in point provides that:

> **"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers..."**

[15] From a plain reading of the aforesaid provision, it is easy to see that the Kenyan law is in tandem with the law employed by the Chancery Court in determining by whom the costs were payable; and having made that determination, after a hearing on the merits, the Applicants would not be in their place to argue that the ensuing judgment is against the laws of Kenya. Accordingly, I similarly find no merit in the second ground to warrant the setting aside of the foreign judgment.

[16] However, the Applicants did invite the Court to consider the costs awarded at **pages 146-150** of the Originating Motion and determine whether such sums would have been allowed by a taxing master of the High Court in Kenya. A sum of **GBP326,054** (equivalent to **Kshs. 47,408,251.90** as at the time the application was filed on **17 November 2015)** was awarded as costs to the Respondent and the particulars thereof were provided as aforestated. Counsel for the Applicants singled out a few of the items of the awarded costs for the Court's consideration, namely:

> (a) GBP 1,380.00 (equivalent to Kshs. 200,100) for writing a long email of advice;
>
> (b) GBP 9,070 (equivalent to Kshs. 1,315,150) for liaising with a lawyer in Nairobi;
>
> (c) GBP 3,525 (equivalent to Kshs. 511,125) for drafting an application;
>
> (d) GBP 5,515 (equivalent to Kshs. 799,675) for drafting letters and advising clients on an ex parte application.

[17] There is no gainsaying that, on the face of it, the sums appear to be far above what would have been payable in Kenya. It was however the contention of the Respondent's Counsel that the costs should not be viewed on the basis of the Kenyan Advocates Remuneration order as suggested by the Applicants, but on the basis of the applicable scale in England. It was further averred that the Applicants had an opportunity to contest the assessment of costs by the foreign court but failed to seize the same; and therefore that it would not be just to set aside the registration merely on the ground that the amount awarded as costs is excessive.

[18] Section 10(4) of the **Foreign Judgments (Reciprocal Enforcement) Act** does recognize that a registered judgment may be set aside on the ground that the costs awarded are excessive. It reads:

> **"Where the High Court is satisfied, on application made by or on behalf of the judgment debtor, that sums, including costs, awarded under a registered judgment are substantially in excess of those which would have been awarded by the High Court on the basis of the findings of law and fact made by the original court, had the assessment of those sums been made in proceedings before the High Court, the High Court may set aside the judgment to the extent of the excess."**

And for purposes of **Section 10(4)** above, **Rule 6(2) of the Foreign Judgments (Reciprocal Enforcement) Rules**, provides that:

"Where application is made under section 10(4) of the Act the court may refer the matter to a taxing officer for his certificate of what sum would have been awarded by the High Court."

[19] Accordingly, I am of the considered view that, because the sums that have been adjudged payable to the Respondent as costs appear to be manifestly in excess of what would have otherwise been awarded by the taxing officer in Kenya, it would be in the interests of justice to employ the provisions of **Rule 6(2)** aforementioned for the Deputy Registrar to verify the sums to inform the Court's further orders herein, namely, whether or not the registration of the foreign should or should not be set aside on the ground that the costs awarded by the foreign court are excessive.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2017

OLGA SEWE

JUDGE