REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 423 OF 2015 (OS)

IN THE MATTER OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT

AND

IN THE MATTER OF THE JUDGMENT ENTERED ON 15TH OCTOBER 2014

(HON. A.A. NCHIMBI JUDGE) IN THE HIGH COURT OF TANZANIA IN

DAR ES SALAAM COMMERCIAL CASE NO. 98 OF 2014

BETWEEN

UNITED BANK OF AFRICA (TANZANIA) LIMITED.....APPLICANT/JUDGMENT CREDITOR

VERSUS

METRO PETROLEUM

TANZANIA LIMITED…….....…...……1ST RESPONDENT/JUDGMENT DEBTOR

BILL KIPSANG ROTICH…….…….....…..……2ND RESPONDENT/JUDGMENT DEBTOR

FLORENCE CHEPKOECH……..….....…3RD RESPONDENT/JUDGMENT DEBTOR

PREMIUM PETROLEUM

CO. LIMITED…….....….....4TH RESPONDENT/JUDGMENT DEBTOR

FAMILY BANK LIMITED…….....……..……...…GARNISHEE/INTERESTED PARTY

RULING

1. On 4th September 2015, the Applicant, **UNITED BANK FOR AFRICA (TANZANIA) LIMITED,** moved this court by way of an Originating Summons, seeking the registration in Kenya, of the Judgement which it had obtained in Tanzania.

2. The judgement was **COMMERCIAL CASE No. 98 of 2014,** which the Applicant had filed at the High Court of Tanzania, Dar-es-Salaam. The defendants in that case were;

a) Metro Petroleum Tanzania Limited;

b) Bill Kipsang Rotich;

c) Florence Chepkoech;

d) Premium Petroleum Co. Limited; and

e) Family Bank Limited.

3. It was a judgement for USD 2,279,740.27 with interest, plus a further sum of Tshs. 600,000,000.

4. It is the desire of the Applicant to execute the Decree by way attaching the funds of the 2nd and 3rd respondents which are in the hands of the Garnishee, Family Bank Limited.

5. The respondents contend that the application was frivolous, vexatious, fatally and incurably defective, on the grounds that a judgement obtained from a court which was located outside Kenya could not be executed until after the said judgement had been registered in Kenya.

6. Furthermore, the respondents perceive the judgement in this case as being of an interlocutory nature. They submitted that there was no final judgement yet, because the one in issue was granted before the parties were heard on merit.

7. The respondents informed the court that they had lodged an application seeking leave of the court to appeal against the whole of the Ruling and the Order made by Songoro J. on 24th August 2015.

8. Songoro J. had, *(in Misc. Application No. 96 of 2015)* declined to set aside the interlocutory judgement which the respondents believe to have been irregular in all respects.

9. The respondents deem as premature, the applicant's attempt to register the judgement and to thereafter seek to have it executed.

10. That is because the respondents believe that their intended appeal could end up annulling the interlocutory judgement and all orders made subsequent thereto. In the circumstances, the respondents reasoned that if the orders sought now were granted, their intended appeal would be rendered nugatory.

11. As far as the respondents were concerned, the appeal was likely to succeed because the applicant had not exhausted the basic avenues of service of process before it effected substituted service upon the respondents.

12. In any event, the respondents believe that because the property in issue was charged to Family Bank *(the Garnishee)*, the property and any proceeds emanating from a disposal of the property cannot be available for attachment.

13. Furthermore, the applicants are said to have failed to demonstrate that the respondents did not have the ability to meet the decree. It was not sufficient, in the opinion of the respondents, to have the applicant simply say that it believed that the property in issue was the only asset which they could have attached to satisfy the decree.

14. On its part, the applicant produced evidence to demonstrate that **L.R. No. 209/8192/2, RIVERSIDE NAIROBI** was registered in the names of **BILL KIPSANG ROTICH** and **FLORENCE CHEPKOECH.**

15. The applicant also produced evidence to show that the said property was charged to the Garnishee, **FAMILY BANK LIMITED.** The fact of ownership has not been disputed by the respondents. Therefore, this court presumes that property belongs to Bill Kipsang Rotich and Florence Chepkoech.

16. The Applicant stated that the 2nd and 3rd respondents still owe Family Bank Limited the sum of Kshs. 31 million.

17. As the security for that financial facility is said to be worth about Kshs. 120 million, the applicant believes that even after the bank recovers all its money, there should either be the property or money which remained after the property was sold and the sale proceeds having been used to settle the debt owed to Family Bank.

18. The respondents did not dispute any of those assertions, concerning the value of the property and also the balance of the debt owed to the Family Bank Limited. In the circumstances, this court presumes that the said facts are therefore accurate.

19. It therefore follows that if the 2nd and 3rd respondents paid off the debt owed to the bank, the property worth Kshs. 120 million would be available for attachment.

20. In the alternative, if the debt was not paid, and the bank sold the property, with a view to recovering the money due to it, there would still be a sum remaining after the debt was cleared.

21. The applicant is entitled in law, as a decree-holder to target any attachable assets belonging to the judgement-debtor, when executing the Decree. There is no legal requirement that a Decree – Holder can only proceed to take out garnishee proceedings after exhausting other modes of execution.

22. Pursuant to Section 3 (2) of the Foreign Judgements *(Reciprocal Enforcement)* Act;

> ***"This Act applies to a judgement referred to in sub-section (1) if it –***
>
> ***a) Requires the judgement debtor to make an interim payment of a sum of money to the judgement creditor; or***
>
> ***b) Is final and conclusive as between the parties thereto,***
>
> ***But a judgement is deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the country of the original court?.***

23. That provides a straight and complete answer to the respondents contention, that the judgement in issue was only of an interlocutory nature.

24. The respondents did try to have the judgement set aside, but the High Court rejected the application. In effect, the High Court of Tanzania has concluded that the judgement against the respondents was valid.

25. The respondents still wish to challenge that decision through an appeal. Of course, that is their right. But Section 3 (2) of the Foreign Judgements *(Reciprocal Enforcement)* Act categorically states that even if an appeal were pending, the judgement would still be deemed to be final and conclusive.

26. In this case, there is still not yet any appeal lodged by the respondents. What they have filed is an application for leave to appeal.

27. In the circumstances, I find that the applicant is holding a final and conclusive judgement, which was capable of enforcement.

28. Pursuant to the Schedule to the Foreign Judgements *(Reciprocal Enforcement)* Act, the following countries were declared to be reciprocating countries for the purposes of the Act, with respect to

judgements given by the superior courts in those countries;

1. Australia;

2. Malawi;

3. Seychelles;

4. Tanzania;

5. Uganda;

6. Zambia;

7. The United Kingdom; and

8. Republic of Rwanda.

29. As the judgement in issue was from the High Court of Tanzania, it is, in principle, registrable in Kenya.

30. Pursuant to Section 9 (1) of the Act;

> ***"At the time of, or at any time subsequent to making an application for registration under section 5, the applicant may apply ex-parte to the High Court for an order that all debts, obligations and liabilities due or accruing due to the judgement debtor from any person named in the application (in this section referred to as "the garnishee") be attached?.***

31. That provision is straight forward and clear. A person applying for the registration of a foreign judgement may, simultaneously, also apply *ex-parte* for the attachment of assets in the hands of a garnishee. That is precisely what the applicant herein did.

32. The application was clearly made *ex-parte.*

33. Contrary to the respondents' opinion, the application was not deemed as spent when Ogola J. had dealt with it.

34. First, it is because the learned Judge actually issued a preservatory order.

35. Secondly, in Section 5 (2) of the Act, it is stated that the applicant may make his application *ex-parte.* In other words, the law gives to the applicant the option, if he is so minded, to make the application *ex-parte.*

36. The rationale is easy to appreciate; it is because the judgement– debtor could easily move to defeat a garnishee application if he were to be served before the matter was heard. If his funds or assets were in the hands of a third party, he could quickly remove the money or the assets, and thus defeat the application.

37. It is noteworthy that Section 5 (3) of the Foreign Judgements *(Reciprocal Enforcement)* 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 judgement shall be served upon the judgement debtor in accordance, mutatis mutandis, with order V of the Civil Procedure Rules?.***

38. To my mind, when the learned Judge gave directions requiring the applicant to serve the garnishee and the respondent, he was acting in accordance with the law.

39. The court had first ordered that the subject matter be preserved, so that there was no danger that it would be wasted.

40. Secondly, and in any event, if the court were to grant garnishee nisi before verifying from the garnishee whether or not he was holding some assets belonging to the Decree-Holder, such an order may well be in vain, if it later transpired that the garnishee did not have any assets belonging to the Judgement debtor.

41. Finally, a reading of section 9 (2) of the Foreign Judgements *(Reciprocal Enforcement)* Act does not reveal the scope of the assets which can be attached through a garnishee order. The court can order the garnishee to pay the judgement creditor, the amount of the debt, liabilities or obligations due or accruing due to the judgement debtor, from the garnishee. But it is evident that the order is not only limited to money.

42. In this case, if the financial facility accorded to the 2nd and 3rd Respondents was paid off, the bank would be obliged to discharge the charge and to release the title document to the chargors. However, this court does not know whether or not the debt will be paid off.

43. If the bank had to realize the security, and there remained a surplus payable to the chargors, I order that such surplus be held by the garnishee, to the order of the applicant. If the surplus exceeds the judgement debt, the applicant would only be entitled to such portion of the surplus as is required to satisfy the decree.

44. The costs of the application are awarded to the Applicant.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **4th day** of **February** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kimani for Mwangi Applicant/Judgement Creditor

VERSUS

Miss Mutava for Nyachoti for 1st Respondent/Judgement Debtor

Miss Mutava for Nyachoti for 2nd Respondent/Judgement Debtor

Miss Mutava for Nyachoti for 3rd Respondent/Judgement Debtor

Miss Mutava for Nyachoti for 4th Respondent/Judgement Debtor

Gacuna for Deya Garnishee/Interested Party

Collins Odhiambo – Court clerk.