



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 112 of 2012

In the matter of: Foreign Judgments (Reciprocal Enforcement) Act

And

**In the matter of: An application for Registration of a Judgment of the High Court of Justice,
Queen's Bench Division Leeds District Registry obtained in Claim No. 61s 90055**

COSMOS HOLIDAYS PLC.....JUDGMENT-CREDITOR/RESPONDENT

AND

**DHANJAL INVESTMENTS LIMITED.....JUDGMENT
DEBTOR/APPLICANT**

RULING

1. The Notice of Motion application before me is dated 25th May 2012. The application is brought by the Judgment-Debtor/Applicant under Section 401 of the Companies Act and Order 26 Rules 1 and 4 of the Civil Procedure Rules and seeks the following substantive orders:
 - a) *That the decree holder Cosmos Holidays PLC be ordered to provide security for costs in the sum of Sterling Pounds 95,000 within 30 days from the date of the court's order or within such other limited time as the court may deem just.*
 - b) *Pending the furnishing of security, any further proceedings herein be stayed.*
2. The application is based on grounds set out on its face and is further supported by an affidavit by Nirmal Singh Dhanjal, the Managing Director of the Applicant, sworn on 28th May 2012.
3. The application is opposed through Replying Affidavits sworn by Robin James Adams, a solicitor in the firm of MB Law, the solicitors for the Judgment-Creditor/Respondent and duly notarized in Leeds, United Kingdom.
4. The case of the Judgment-Debtor/Applicant (hereinafter called "Dhanjal") is that it has already made an application to have the registration of the foreign judgment in favour of the Judgment-Creditor/Respondent (hereinafter called "Cosmos") set aside and that it has high chances of success, as the judgment sought to be registered in Kenya relates to recovery of compensation in respect of injuries sustained by claimants who were in Kenya, but chose to institute compensation proceedings in England. Accordingly, in the event Dhanjal succeeds, it will need to be secured in terms of costs as

Cosmos is a foreign company with no known assets in Kenya and neither does it have any known office, operational or otherwise in the country. Dhanjal claims further that Cosmos has previously brought winding up proceedings against it in Kenya but which were struck out with costs to it. It contends that there is a pending bill of costs whose chances of recovery from Cosmos cannot be assured. Dhanjal further argues that whereas there exists reciprocity in registration of judgments and their consequential enforcement between Kenya and Britain, there is not legislation in any of the two countries that provides for reciprocity in execution for recovery of costs awards in a court in a foreign jurisdiction. In its view therefore, it is fair and just that this court should allow the present application for the provision of security for costs.

5. In reply, Cosmos, through the replying affidavits states that it is a public limited liability company incorporated in England and not a company registered in Kenya. It states that the High Court of Justice in England has delivered a judgment against Dhanjal and has certified that the judgment amount is Stg 383,570.90 which amount it claims far exceeds any amount of costs which might be awarded in the proceedings pending in Kenya. With regard to Winding Up Cause Number 45 of 2010, Cosmos claims that the Bill of Costs was only served on its lawyers Hamilton Harrison & Mathews on 23rd March 2012 and that no notice of a date for taxation had been served upon the lawyers. In addition, Cosmos contends that the amount of security for costs claimed by Dhanjal, being Stg. 95,000 on account of the application to set aside the registration of the judgment in Kenya is extremely excessive.

6. Counsel for the parties filed respective written submissions in respect of the application before the court dated 25th May 2012 which I have considered in my determination of the application.

7. Having carefully considered the application, affidavit evidence and the rival submissions by counsel for the parties, I make my view on the application as below.

8. On the outset, I need to clarify that I am not required to consider the merits of the application by Dhanjal seeking to set aside the High Court of Justice of England and Wales aforesaid in respect of which Dhanjal has applied for its setting aside. My task within the context of the application of 25th May 2012 is to consider the merits or otherwise of the application by Dhanjal for security for costs to cushion Dhanjal in the event that the said judgment is set aside.

9. Section 401 of the Companies Act on which the present application is partly premised provides that the court may require sufficient security to be provided where a limited liability company is plaintiff and where it is shown that the company would be unable to pay the costs of the Defendant if successful in its defence. Further Order 26 Rule (1) of the Civil Procedure Rules grants this court jurisdiction to order that security for the whole or any part of the costs of any defendant or third party or subsequent party be given by any other party. Rule (4) thereof provides that in any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court.

10. Counsel for the Plaintiff in his submissions raised technical arguments as to whether the above provisions apply where the party to which an application for provision of security for costs is directed is not a Plaintiff but in my view, being a judgment creditor does not shield such a party from such an application in as long as the party can be shown to be unable to satisfy any costs that may be awarded against it. Similarly, whether or not the company contemplated in Section 401 of the Companies Act is incorporated under the Act is a technicality as I think the section would apply equally to a foreign company as long as that company brings itself within the jurisdiction of the Foreign Judgment (Reciprocal Enforcement) Act of Kenya, cap 43.

11. The Foreign Judgments (Reciprocal Enforcement) Act cap 43 of the Laws of Kenya makes provision for enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya. The United Kingdom is a reciprocating country under the Schedule to the Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order. Section 3 of that Act provides for the judgments to which the Act applies while Section 4 thereof defines jurisdiction for purposes of enforcement of a foreign judgment. In my analysis of the two sections, neither Section 3 of the Act nor

Section 4 of the Foreign Judgments (Reciprocal Enforcement) Act explicitly address the present scenario of enforcement of costs borne by a party in contesting registration of a foreign judgment as opposed to costs arising from the main litigation in the foreign court. The costs relating to setting aside appear somewhat remote to the main litigation at the foreign court. At any rate, given what I think would be a fairly low quantum of costs payable in relation with the application for setting aside, I find it inconvenient to subject enforcement of such costs to the mechanism established under the Act, even if such mechanism allowed enforcement in relation to costs. I would therefore hold that security for payment of such amounts should be provided for within the Kenyan jurisdiction.

12. In addition, I am aware that Dhanjal in its submissions has advanced the argument that Section 4(1) (i) of the Foreign Judgments (Reciprocal Enforcement) Act provides that jurisdiction in respect of recovery of damages for physical injury to the person is only feasible where the circumstances giving rise to the injury substantially occurred in the country of the original court or the injury was suffered in that country. In that regard, it contends that as the injury giving rise to the claim in this matter occurred in Kenya, the English court lacked jurisdiction to adjudicate over the matter hence the ensuing judgment is not enforceable in Kenya. While this is a matter that I need not deal with in the context of the present application, it would appear that should Cosmos encounter the legal challenge of establishing jurisdiction for enforcement of the judgment of the English court it holds against Dhanjal, the same legal hurdle would befall Dhanjal in establishing jurisdiction for recovery of costs from Cosmos in England arising out of its application for setting aside of the English judgment in the Kenyan court.

13. In the matter before the court, the Applicant, Dhanjal seeks provision of security for costs on the grounds that Cosmos has no known tangible assets or place of business in Kenya hence costs awarded against it may not be recoverable within the country. Cosmos on its part claims that it has a judgment in its favour against Dhanjal whose quantum by far exceeds the amount of security for costs demanded by Dhanjal. My humble view is that while it is undeniable that the value of the judgment of the English court is many times over the security for costs demanded by Dhanjal, the application to set aside the judgment if allowed by the Kenyan court would connote that the judgment sum would not be payable by Dhanjal. This will leave Dhanjal exposed for the amount of costs it will have incurred in the pursuit of the setting aside orders. The contention that the judgment sum exceeds the costs demanded, in the premises, gives no respite to Dhanjal.

14. The next issue arising is whether Cosmos has any known assets or place of business in Kenya upon which execution for recovery of costs can be levied. From the material placed before the court, there is no evidence of ownership of assets by Cosmos locally nor existence of a place of business in Kenya. Recovery of such costs would require execution against Cosmos, a company domiciled in the United Kingdom. This would be, as already observed above, uneconomical, inconvenient and time-consuming given the amounts entailed. Consequently, I would exercise my discretion under Order 26 Rule 4 aforesaid and order that such security for costs be provided by Cosmos here in Kenya.

15. This leaves me with the final issue for determination, that is, the quantum of the security for costs to be provided. Dhanjal in its submissions has urged the court to allow security in the sum of Stg. 95,000 on grounds that the same is fair, reasonable and just. It relies on the English case of **Procon (GB) Limited vs. Provincial Building Company Limited (1984) 2 All ER 368** where it was held as follows:

“The Court’s discretion under RSC Order 23 rule 1 to order a Plaintiff to give security for costs for the defendant’s costs of the action or other proceedings in the High Court as the Court thinks just is on the plain language of the rule unrestricted, and there is no justification for any “Conventional approach” of fixing a sum of two-thirds of estimated Party & Party costs; rather than between actions in the Commercial list and other proceedings in the Queens Bench Division. The Correct Principle is that any security ordered should be such as the court thinks just in all the circumstances of the case”.

16. On the other hand, Cosmos, in its submissions, contends that Dhanjal should not be allowed to use the present application to seek security for costs in respect of both the setting aside of the registration of the foreign judgment as well as for the winding up proceedings. For the latter, Cosmos argues that the Bill of Costs is still pending for taxation. In any case, Cosmos submits that the amount which Dhanjal is

seeking as security is outrageous as it is approximately Kshs. 12,445,000/- when the basic fee for opposing a winding up petition is Kshs. 12,600/- and for applying to set aside the registration of a foreign judgment is Kshs. 8,400/-. Even if therefore provision were to be made for complexity or responsibility, the costs payable would not come to even a fraction of the amount demanded as security.

17. My take on the above rival positions is firstly, that the security for costs sought within this application should only be limited to the application to set aside. There should be no intermeddling of both this application and the winding up proceedings. Dhanjal should be at liberty to apply for security for costs in the winding up proceedings separately from the present proceedings. The quantum of security for costs that I would allow is therefore in respect of the application to set aside registration of the foreign judgment.

18. While Dhanjal has urged the court not to apply any conventional approach in fixing the amount of security for costs to be provided, I take the view that the court should allow security that is reasonably commensurate with the subject matter of the proceedings over which the costs being secured relate. I know that the subject matter of the application to set aside is a judgment of a sum equivalent to Kshs. 52.5 Million or thereabouts. However, the application before the court is not a suit for the said amount. I am therefore not bound to consider the subject matter to be Kshs. 52.5 Million and therefore to base my estimation of costs on the same under the scale set in the Advocates Remuneration Order in a claim for that amount. However, even if I were to do so, the sum payable would seldom exceed Kshs. 1 Million. Consequently, I consider a sum of Kshs. 1 Million to be sufficient security for costs in this matter.

19. For these reasons, and in exercise of my discretion under Order 26 Rule 4 of the Civil Procedure Rules, and in line with the holding in the *Procon (GB) Limited case*, I am inclined to Order that Cosmos do furnish security in the sum of Kshs. 1 Million by way of a cash deposit or an irrevocable bank guarantee in favour of the court. Such security should be furnished within 21 days from today. Further proceedings are hereby stayed pending provision of said security.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 4TH DAY OF OCTOBER 2012.

J.M. MUTAVA

JUDGE