



National Airways Corporation (PTY) Limited v Aberdair Aviation Limited & another (Civil Case E140 of 2019) [2025] KEHC 13376 (KLR) (Commercial and Tax) (26 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E140 OF 2019
FG MUGAMBI, J
SEPTEMBER 26, 2025**

BETWEEN

NATIONAL AIRWAYS CORPORATION (PTY) LIMITED PLAINTIFF

AND

ABERDAIR AVIATION LIMITED 1ST DEFENDANT

ADRIAN WILCOX 2ND DEFENDANT

RULING

Introduction and Background

1. This Court is called upon to determine the Notice of Motion dated 24th March 2024, brought under Order 2 Rule 15 of the Civil Procedure Rules and Section 10 of The *Foreign Judgments (Reciprocal Enforcement) Act*. The application arises from foreign proceedings in the High Court of South Africa, Gauteng Division, Johannesburg in Case No. 18/38116, where the respondent obtained judgment against the 1st and 2nd applicants. The present suit was filed by the respondent for purposes of enforcing that judgment in Kenya.
2. The applicants seek to strike out the suit for being premature on the ground that the judgment sought to be enforced is not final, there being a pending rescission application before the South African High Court, akin to an application to set aside a default judgment under Kenyan law. The application was filed on 21st September 2022 and is grounded on lack of jurisdiction and non-service, and remains pending and unopposed. They therefore urge that until the South African court pronounces itself on that application, the judgment cannot be said to be final and enforceable in Kenya.
3. The application is opposed through Grounds of Opposition dated 7th February 2025. The respondent does not dispute the pendency of the rescission proceedings in South Africa but argues that such



pendency does not operate as a bar to enforcement in Kenya. It is further contended that the applicants have not demonstrated any justifiable grounds for striking out the suit, and that the respondent stands to suffer prejudice if enforcement is delayed, while any prejudice to the applicants can be compensated by costs.

Analysis and Determination

4. The power to strike out pleadings under Order 2 Rule 15 of the Civil Procedure Rules is draconian and must be exercised sparingly, as emphasized in *D.T. Dobie & Company (Kenya) Ltd V Joseph Mbaria Muchina & Another*, [1980] eKLR, where Madan JA warned that a court should only strike out pleadings in the clearest of cases where they are hopeless and beyond redemption.
5. The issue for determination is whether the present suit ought to be struck out and whether the judgment sought to be enforced in this jurisdiction is “final and conclusive” within the meaning of the *Foreign Judgments (Reciprocal Enforcement) Act*. Section 3(2)(b) of the Act provides that a judgment shall not be registered if it is “not final and conclusive between the parties”.
6. The test of finality was elaborated in *Jayesh Hasmukh Shah v Navin Haria & Another* [2016] eKLR, where the Court of Appeal held that a judgment which has not been given on the merits of the case may not be considered final for purposes of enforcement. Similarly, the Court held that:

“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.”
7. Applying these principles, it is not in dispute that a rescission application is pending before the South African High Court, challenging both jurisdiction of the court and service of the pleadings. The pendency of that application, if successful, would vitiate the very judgment sought to be enforced in Kenya. It follows that the judgment cannot at this stage be deemed final and conclusive for purposes of registration and recognition under the Act.
8. In addition, comity of courts demands that this Court refrains from acting in a manner that would undermine or pre-empt proceedings still active before the originating court, for instance where the foreign judgment is subject to proceedings that could alter or set it aside.
9. On the respondent’s contention that striking out is drastic, I am persuaded that the applicants have established a clear bar under statute. Allowing this matter to proceed would expose the parties to unnecessary costs and judicial time when the substratum of the enforcement remains uncertain.

Disposition

10. In light of the foregoing, I find merit in the application. Accordingly, I order as follows:
 - a. The suit filed herein for enforcement of the judgment of the High Court of South Africa, Gauteng Division, Johannesburg in Case No. 18/38116 is hereby struck out for being premature;
 - b. Costs of this application are awarded to the applicants.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2025.

F. MUGAMBI



JUDGE

