Dari Limited & 5 others v East African Development Bank (Civil Appeal 70 of 2020) [2023] KECA 454 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KECA 454 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 70 OF 2020

K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA

APRIL 20, 2023

BETWEEN

DARI LIMITED ..... 1ST APPELLANT

RAPHAEL TUJU ..... 2ND APPELLANT

MANO TUJU ..... 3RD APPELLANT

ALMA TUJU ..... 4TH APPELLANT

YMA TUJU ..... 5TH APPELLANT

S.A. M COMPANY LIMITED ..... 6TH APPELLANT

AND

EAST AFRICAN DEVELOPMENT BANK ..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Okwany, J.) dated 13th February 2020 inHCCC No. J1 of 2020)

JUDGMENT

1. After the respondent, the East African Development Bank, obtained judgment against the appellants in the High Court of Justice, Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court, on June 19, 2019, it applied in the High Court of Kenya at Nairobi under the the *Foreign Judgments (Reciprocal Enforcement) Act* (the Act) for recognition and enforcement of the said judgment. By a ruling dated January 7, 2020, Okwany, J allowed the application and ordered the recognition, registration and enforcement of the judgment. Subsequently the appellants unsuccessfully applied to the same court for orders to set aside the recognition of the judgment, and are now before this court contending that the recognition of the judgment is contrary to the Act, the *Constitution* of Kenya, 2010 and public policy of Kenya.

2. The background to the appeal, briefly, is as follows: On April 4, 2015, the appellants and the respondent entered into a written facility agreement under which the respondent agreed to grant the 1st appellant a loan facility in the sum of USD$ 9,300,000.00 to partly fund the acquisition and development of commercial units for sale in Nairobi. The other appellants entered with the respondent into a guarantee and indemnity for repayment of the loan by the 1st appellant. Contending that the appellants had failed to repay the disbursed loan as per the facility agreement, the respondent, on November 5, 2018, filed against them claim No CL-2018-000720 in the High Court of Justice Business and Property Courts of England and Wales, Queens Bench Division Commercial Court Royal Courts of Justice. The appellants duly entered appearance and filed a defence to the claim and a counter- claim.

3. On April 23, 2019, the respondent applied for summary judgment against the appellants. After hearing the parties, Daniel Toledano, QC, sitting as a Deputy Judge of the High Court of England and Wales, (hereafter Judge Toledano), entered judgment in favour of the respondent on June 19, 2019. On July 10, 2019, the appellants unsuccessfully applied in the English Court of Appeal, civil division, for leave to appeal and stay of execution.

4. The theatre then shifted to Nairobi, when the respondent, on January 3, 2020, applied by originating summons for recognition, registration and enforcement in Kenya, of the judgment of the English Court. By a ruling dated January 7, 2020, the High Court of Kenya (Okwany, J) allowed the application, thus paving the way for execution of the judgment of the English Court in Kenya. The very next day, the appellants applied for stay of execution and setting aside of the ruling of January 7, 2020. In the alternative, they prayed for an order that the judgment of the English Court was unenforceable in Kenya. These orders were sought on the contention that the judgment of the English Court was obtained in circumstances that were fraudulent, in violation of article 50 of the *Constitution* of Kenya and the rules of natural justice, and was contrary to the public policy of Kenya.

5. The respondent opposed the application on several grounds, among them, that the application was premature because the respondent had not yet served upon the appellants a notice of registration of judgment. The respondents further contended that the court lacked jurisdiction to interrogate and determine: the alleged violation of the *Constitution* of Kenya by a foreign court, the propriety of the decision of a foreign judge not to recuse himself, and alleged bias and fraud on the part of a foreign judge. Lastly, the respondent urged that the issue of the alleged bias and fraud on the part of Judge Toledano, was conclusively determined by Her Majesty's Court of Appeal, civil division, on September 17, 2019, and could therefore not be re-opened by the High Court.

6. After hearing the parties, the learned judge identified four issues for determination, namely:-

    a) wether the application was premature;

    b) whether the *ex parte* orders issued on January 7, 2020 constituted violation of the applicants right to fair hearing;

    c) whether the United Kingdom judgment was unconstitutional and unenforceable, having been obtained in proceedings that violated article 50 of the *Constitution* of Kenya, the rules of natural justice and the public policy of Kenya; and

    d) whether the ruling dated January 7, 2020 should be set aside.

7. By a ruling dated February 13, 2020, the High Court found that it was not mandatory for the appellants to be served with a notice of registration of judgment before they could apply to set aside the recognition of the judgment, and therefore, the application to set aside the ruling of February 7,

2020 was not premature. As regards issue No 2, the learned judge found that section 5 of the Act permits *ex parte* hearing of an application for registration of a foreign judgment where the judgment debtor appeared in the foreign court and no appeal is pending. Satisfied that both conditions were met, the learned judge concluded that the ex parte hearing was justified and that, therefore, there was no violation of the appellants' right to a fair hearing as guaranteed by article 50 of the *Constitution*.

8. Turning to issue No 3 at the heart of which was the contention that the judgment of the English Court could not be recognised and enforced in Kenya because of the perceived bias of Judge Toledano who shared chambers with the respondent's counsel, Mr Michael Sullivan, QC, the learned judge found that the court's jurisdiction under the Act is limited to enforcement of judgments from reciprocating countries, and did not extend to review of such judgments. Accordingly, the court held that the question of bias or recusal of Judge Toledano was a matter solely for the English Courts, and that, in any event, the question was conclusively determined by Her Majesty's Court of Appeal.

9. Lastly, on issue No 4, the learned judge found that recognition and enforcement of the judgment of the English Court was not manifestly contrary to public policy in Kenya, and therefore there was no basis for setting aside the recognised judgment. Accordingly, the learned judge dismissed the application and awarded the respondents its costs.

10. The appellants were aggrieved and, after lodging a notice of appeal on February 14, 2020, they filed a memorandum of appeal in which they listed ten grounds of appeal. However, in their written and oral submissions, the appellants compressed the ten grounds of appeal into three issues, namely:

    i) whether the learned judge erred in law and in fact in failing to properly appreciate the High Court's jurisdiction to set aside a foreign judgment under Section 10 of the *Foreign Judgments (Reciprocal Enforcement) Act* and in so doing, failed to interrogate the grounds raised by the appellants in the application to set aside the registration and recognition of the United Kingdom judgment;

    ii) whether the learned judge erred in law and in fact in failing to appreciate the High Court's jurisdiction to examine the constitutionality of the United Kingdom proceedings and the United Kingdom judgment, in respect of which recognition was sought in Kenya; and

    iii) whether the learned judge erred in law and in fact in failing to properly appreciate the exercise of the court's discretion to award costs

11. On the first broad ground of appeal, the appellants, who were represented by Mr Muite, SC, and Mr Nyamodi, learned counsel, submitted that the learned judge misapprehended the jurisdiction of the High Court to set aside a recognised foreign judgment under section 10 of the Act. It was contended that the court erred by describing its jurisdiction as "ceremonial" and by declining to review, interrogate and analyse the judgment of the English Court to confirm that the procedure adopted was appropriate, and the correctness of Judge Toledano's refusal to recuse himself. It was further contended that the Act required the learned judge to interrogate and ascertain whether proceedings in a foreign jurisdiction constituted a violation of rights. In support of that expansive interpretation of the Act, the appellants relied on the decision of the High Court in *Elizabeth Namutebi v Threeways Shipping Services K Ltd* [2015] eKLR.

12. By dint of sections 10(2) (n) and 10(2) (i) of the Act, the appellants urged, that the court has jurisdiction to set aside a registered judgment, firstly, if its enforcement would be manifestly contrary to public policy in Kenya, and secondly, if there are provisions of the law of Kenya which would have been

applicable by virtue of Kenya's private international law notwithstanding the choice of another system of laws. In both instances, it was contended that the applicable law is the law of Kenya where the suit property is situated, and where the foreign judgment is to be recognised. It was contended further that the learned judge erred by failing to exercise the above jurisdiction vested in her by the Act.

13. On the second ground of appeal, the appellants faulted the learned judge for failing to hold that the English judgment was manifestly contrary to the public policy of Kenya. Relying on article 5(1) of the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, the appellants submitted that, under the convention, recognition and enforcement of a judgment may be denied if recognition or enforcement is manifestly incompatible with the public policy of the State addressed, if the decision that resulted from proceedings is incompatible with the requirements of due process of law, or, if either party had no adequate opportunity fairly to present his case. As regards public policy, the appellants cited the decision in *Kenya Shell Ltd v Kobil Petroleum Ltd* [2006] eKLR and submitted that a foreign judgment is contrary to the public policy of Kenya if it is inconsistent with the *Constitution* or laws of Kenya, inimical to the national interest of Kenya, or contrary to justice and morality.

14. It was the appellant's further contention that the judgment of the English Court was manifestly contrary to the public policy of Kenya because of perceived bias on the part of Judge Toledano, who shared chambers with Mr Michael Sullivan, the respondent's counsel. It was submitted that Judge Toledano's participation in the matter was a violation of the rules of natural justice as well as article 50 (1) of the *Constitution* of Kenya, which guarantees every person a fair and public hearing by an independent and impartial court or tribunal. By way of emphasis, the appellants noted that the right to a fair hearing is so fundamental that it is non-derogable. In their view, barristers in the same chambers in the United Kingdom are not independent barristers but, rather, are a collectivity sharing professional business connection and marketing themselves as such, which creates the possibility and perception of bias. Recognition and enforcement of a judgment arising in the above circumstances, it was argued, amounts to a violation of the appellants' rights guaranteed by the *Constitution*, which rights every person, including the court, is enjoined to uphold and protect. It was further submitted that violation of the appellant's constitutional right to a fair hearing was also manifestly contrary to the public policy of Kenya, and that recognition and enforcement of a judgment arising from such violation is an affront to Kenya's sovereignty.

15. As regards the right to fair hearing and the rules of natural justice, the appellants submitted that the standard applicable is the Kenyan standard. Several local and foreign authorities, among them, *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (suiting division) Limited (Now Known As King Woollen Mills Limited & 2 others* [2016] eKLR; *Metropolitan Properties Co, Ltd v Lannon* [1968) 3 All ER 304; *Webb v The Queen* [1994] 181 CL R 41 and *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (Re Pinochet)* [2000] 1 AC 119 were cited to underpin the proposition that perception of bias on the part of a judge has debilitating effect on the administration of justice and that the test of bias is not whether the judge is in fact biased but, rather, whether right minded people would think the judge is biased. It was submitted that, in the circumstances of this case and, in particular the sharing of chambers and the paucity of disclosure in that respect by the judge, created perception of bias on the part of judge Toledano.

16. Next, on disregard of applicable provisions of the law of Kenya that would have been applicable by virtue of the rules of private international law of Kenya, the appellants submitted that the English Court ought to have applied the Kenya standard in the determination of an application for summary judgement, which inclines towards determination of dispute after a full trial, as demonstrated in *Osodo v Barclays Bank International Ltd* [1980] eKLR. The applicants also cited the decision of *Sanjay Shah*

v Kamlesh Bid & another [2017] eKLR to demonstrate an instance where the High Court applied a Kenyan standard in lieu of an English one.

17. On the last ground of appeal regarding the exercise of discretion in awarding costs, the appellants submitted that the learned judge misdirected herself and applied the wrong principles. They cited article 48 of the *Constitution* (on access to justice) and urged that the provision does not allow exercise of discretion so as to impair access to justice. The appellants also relied on *County Government of Tana River & another v Hussein Furno Hiribae* (2021] eKLR and submitted that the proper purpose of award of costs is not to penalise a losing party.

18. On the basis of the above submissions, the appellants urged the court to allow the appeal, set aside the recognition of the English judgment, and award them costs.

19. The respondent, represented by Prof Muigai, SC and Mr Michael Sullivan, QC, opposed the appeal. The respondent filed its written submissions before those of the appellants after the latter failed to meet the agreed timeline for filing their submissions. In its submissions the respondent compressed the appellants' ten grounds of appeal into five, but a careful perusal of the five grounds shows that they correspond and respond comprehensively to the three grounds identified by the appellants.

20. Firstly, the respondent addressed the question whether the High Court has jurisdiction, in an application to set aside recognition of a foreign judgment, to examine the constitutionality of the foreign proceedings. It was submitted that the appellants did not raise the issue of the application and alleged violation of the *Constitution* of Kenya either before the English High Court or the English Court of Appeal. Instead, they voluntarily submitted to jurisdiction and presented their case without the present belated complaint. The respondent further submitted that the High Court of Kenya did not have jurisdiction to examine the constitutionality of foreign proceedings, or to apply art 50 of the *Constitution* to such proceedings when considering an application to set aside a recognised foreign judgment.

21. The respondent supported the conclusion by the learned judge that the jurisdiction of the High Court under the Act is limited to enforcement of foreign judgments rather than to review, interrogate or analyse them; that the High Court lacks jurisdiction to impeach judgments of foreign courts made in accordance with the law of the reciprocating states; that by their own choice, the parties voluntarily and consciously agreed to refer their disputes to the courts of England and Wales; that the appellants voluntarily submitted to jurisdiction of the courts in England and fully participated both in the English High Court and the English Court of Appeal; that the issues raised belatedly by the appellants regarding the application and violation of the *Constitution* of Kenya ought to have been raised before the English courts; and, lastly, and in any case, the law governing the proceedings in England and Wales (*lex fori*) was the law of England, and not the law of Kenya.

22. It was the respondent's further submission that in determining the jurisdiction of the High Court, regard was not limited to the *Constitution* only, but also to statutes like the Act, which properly limited the jurisdiction of the High Court to aside recognition of judgments from reciprocating states.

23. The respondent made the alternative argument that if indeed the High Court of Kenya had jurisdiction to examine the proceedings in the English courts to determine their consonance with art 50 of the *Constitution*, it must be satisfied that the said provision was indeed violated. It was submitted that the appellant had failed to demonstrate violation of article 50 by the English Courts.

24. Next, the respondent addressed the issue of the jurisdiction of the High Court of Kenya under section 10 of the Act. It was submitted that the jurisdiction of the High Court to recognise or set aside a foreign judgment is a creature of the Act rather an inherent jurisdiction of the court, and that, once a foreign

judgment has satisfied, the requirements of the Act, the judgment should be recognised and enforced. In the respondent's view, the judgement of the English Court fully satisfied the requirements of the Act in so far as it was delivered by designated court; that court had jurisdiction to determine the dispute; the findings of the court were conclusive; the judgment was properly registered in Kenya following an *ex parte* application; and the High Court of Kenya was not called upon to investigate the proceedings of the designated court or to conduct a re- hearing.

24. The respondent further argued that the only ground upon which the appellants applied to set aside the recognition of the judgment of the English Court was fraud under section 10(2) (h) of the Act, which they had not raised before the English High Court or the English Court of Appeal, and were therefore precluded from raising the issue in the High Court of Kenya. It was submitted that, whereas the appellants raised before the hearing the issue of Judge Toledano and the respondent's counsel sharing chambers, they did not raise the issue at the hearing, and that when they raised the issue of Judge Toledano's alleged bias in the English Court of Appeal, the allegation was found to be totally without merit. The respondent contended that it was a universal principle that the procedural law for the hearing is determined in accordance with the *lex fori* which, in this case, was the law of England and Wales, and that under English Common law, bias cannot be imputed merely because a judge and counsel are members of the same chambers.

25. On the appellants' contention that enforcement of the judgment of the English Court was manifestly contrary to the public policy of Kenya, the respondent submitted that the facility agreement which led to the dispute was a private commercial act rather than a public or Government act; that, under the facility agreement, the respondent advanced moneys to the appellants rather than to members of the public; that the appellants did not demonstrate how enforcement of the English judgment was inimical to Kenya's national interest or contrary to justice and morality, and that they also failed to demonstrate how the proceedings, which were conducted in accordance with the lex fori, were contrary to public policy.

26. As regards the appellants' contention that the judgment of the English Court disregarded provisions of the law of Kenya which would have been applicable by virtue of rules of the private international law of Kenya, the respondent submitted that this was not a ground upon which the appellants had applied to set aside the recognition of the English judgement. It was contended that the appellants applied to impeach the recognition of the judgement of the English court only on grounds of public policy and fraud, and that the issue of disregard of the provisions of the law of Kenya that would have been applicable by virtue of rules of private international law of Kenya was being introduced for the first time in this appeal. The respondent submitted that it was denied an opportunity to address that issue in the High Court, and that the High Court did not pronounce itself on the issue. In any event, it was contended, the complaint has no substance because the appellants had not specified the rules of private international law of Kenya that would have been applicable in lieu of the laws of England and Wales.

27. Turning to the issue of bias, independence and impartiality of Judge Toledano and the standard for entry of summary judgment in England and Kenya, the respondent submitted that the High Court of Kenya was not required to make a determination of those issues simply because they are governed by the lex fori, and not by rules of the private international law of Kenya. It was urged that it is a universal principle of conflict of laws that the lex fori determines issues of procedural law, and that alleged bias is not a ground for setting aside a recognised judgment under section 10 of the Act. The respondent emphasised that after the appellants raised, before the hearing of the application for summary judgement, the issue of the alleged bias of Judge Toledano based purely on the fact of sharing of chambers, the Judge found no good reason to recuse himself and, thereafter, the appellants did not file an application for his recusal. The appellants then raised the same issue in their application before

the English Court of Appeal for leave to appeal, but the same was found to be utterly unmeritorious. Relying on the decision in *Laker Airways Inc v FLS Aerospace Ltd* [2000]1 WLR 113; Zuma's *Choice Pet Products & Vanderbilt v Azumi Ltd & others* [2017) EWCA Civ 213 and *Watts v Watts* [2015] EWCA Civ 1297, the respondent submitted that mere membership of a chamber does not give rise to appearance of bias, and is not a sufficient ground for recusal of a judge.

28. Regarding the procedure for entering summary judgment, it was once more submitted that the same is governed by the lex fori, which in this case was the law of England and Wales, and that the High Court of Kenya had no jurisdiction in the matter. It was the respondent's view that, in any event, the summary procedure provided for in the Kenya *Civil Procedure Rules* was not different from that of England and Wales.

29. Lastly, the respondent addressed the issue of the court's discretion in awarding costs. They replied on the general principle that costs follow the event, and submitted that the party who, on the whole, succeeds in an action is entitled to costs. The respondents urged this court to be slow in interfering with the learned judge's exercise of discretion, and to find that she properly exercised her discretion in awarding costs to the respondent, who was the successful party. For the foregoing reasons the respondent urged the court to dismiss the appeal and award it costs.

30. We have carefully considered the impugned ruling of the High Court, the written and oral submissions by both parties, the *Constitution* of Kenya 2010, the Act, and the authorities cited. We propose to address the issues as raised in the appellant's three broad grounds of appeal. But before that, it is apposite to first dispose of the respondent's contention that the applicant has raised, for the first time before this court, matters which were not before the learned judge and which she did not pronounce herself on, namely the alleged error in failing to set aside the judgment of the English Court on the grounds of disregard of provisions of the law of Kenya, which would have been applicable by virtue of the rules of international private law of Kenya, as provided in section 10(2) (i) of the Act.

31. Section 10 of the Act vests in the High Court the power to set aside a foreign judgment that has been registered if the court is satisfied on any of the 15 grounds set out in section 10(2) and (3) of the Act. It is not necessary at this stage to consider all those grounds because, other than three of them, the others are not relevant for the purposes of this appeal. The relevant grounds for setting aside a recognised foreign judgment that were addressed in this appeal by the parties are:

> " 10(2)
>
> (h) the judgment was obtained by fraud, other than fraud which was, or could have been, put in issue by the judgment debtor in the proceedings in the original court or on appeal therefrom;
>
> (i) there are provisions of the law of Kenya which, by virtue of the rules of private international law of Kenya, would have been applicable notwithstanding any choice of another system of law by the judgment creditor and the judgment debtor, had the proceedings been brought in the High Court, and the judgment disregards those provisions in some material respect; and
>
> (n) the enforcement of the judgment would be manifestly contrary to public policy in Kenya."

32. In their amended chamber summons from which the impugned ruling issued, the appellants applied for three substantive prayers. The first was for stay of execution of the ruling of the High Court dated

February 7, 2020, which recognised the judgment of the English Court, and the second was to set aside the said ruling and all consequential orders. The third prayer was worded as follows:

> "That in the alternative this honourable court do declare that the judgement delivered on June 19, 2019 and the order issued pursuant thereto by the High Court of Justice Business and Property Courts of England and Wales, Queens Bench Division, Commercial Courts by Daniel Toledano, QC, sitting as a deputy judge of the High Court of England and Wales in claim No CL-2018- 00720 is unenforceable in Kenya as it was obtained in a manner that violates article 50 of the *Constitution* of Kenya and the rules of natural justice."

33. It is apt to observe at this stage that by dint of order 51 rule 4 of our *Civil Procedure Rules*, every application is required to state the grounds upon which it is based. The appellants set out three grounds upon which their application was based, namely:

    i) the United Kingdom judgment was entered into in circumstances that are contrary to the rules of natural justice, are against public policy in Kenya and contrary to article 50 of the *Constitution*;

    ii) The enforcement of the Unite Kingdom judgment would be manifestly contrary to public policy in Kenya and would be a violation of the applicants' (appellants') absolute right to fair hearing as guaranteed by article 50 of the *Constitution*; and

    iii) The judgment was obtained by fraud."

34. As far as the distinct grounds for setting aside a recognised and registered foreign judgment in section 10 (2) of the Act are concerned, the appellants invoked fraud (section 10 (2)(h) and violation of the public policy of Kenya (section 10(2) (n). They did not invoke or rely on section (10) (2) (h) regarding any alleged disregard of the provisions of the law of Kenya which by virtue of the rules of private international law of Kenya were applicable.

35. Indeed, the above two grounds for setting aside the recognised judgment were amplified by the 2nd respondent, Mr Raphael Tuju, in his affidavit sworn on January 13, 2020 in support of the application. The deponent deposed that the proceedings of the English court presided over by Judge Toledano were fraudulent, and that failure by the said judge to recuse himself was contrary to natural justice, and a violation of article 50(1) of the *Constitution* of Kenya, which guarantees fair and public hearing by an independent and impartial court or tribunal. He further deposed that the refusal to recuse amounted to failure of professional probity in the administration of justice, and was contrary to the public policy of Kenya. Nowhere in that affidavit did the 2nd appellant depose to anything to do with disregard of provisions of the law of Kenya which would have been applicable by virtue of the rules of international private law of Kenya as provided in section 10(2) (i) of the Act.

36. We have also carefully perused the certified copy of the proceedings before the High Court as well as the parties' respective cases and submissions as summarised in the impugned ruling, and it is plainly clear to us that none of the parties addressed the issue as to whether the registration of the English court's judgment should be set aside under section 10(2) (i) of the Act, namely disregard of law of Kenya otherwise applicable by virtue of the rules of international private law of Kenya. Even the learned judge did not address section 10(2) (i) of the Act as a ground for setting aside the registered judgment.

37. The fact of the matter is therefore, that neither the appellants nor the respondent raised, in their pleadings or submissions, the issue of section 10(2)(i) as a ground for setting aside the registration of the judgment of the English Court, and neither did the learned judge address the issue. By dint of rule 104 of the *Court of Appeal Rules, 2010* which were in force at the time the appellants filed this appeal,

a party was not allowed, without leave of the court, to challenge a decision of the High Court on a ground that was neither relied upon nor considered by that court. The appellants neither applied for nor obtained leave to challenge the decision of the High Court on grounds of section 10(2)(i) of the Act.

38. The rationale behind the restriction in rule 104 (presently rule 107) was aptly articulated by Lord Birkenhead, LC in *North Staffordshire Railway Company v Edge* [1920] AC 254 at page 263 as follows:-

> " The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods...The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the Judges in the courts below."

39. Similarly, in *George Owen Nandy v Ruth Watiri Kibe*, CA No 39 of 2015, this court held thus:-

> " In general a litigant is precluded from taking a completely new point of law for the first time on appeal. The jurisdiction of this court is not to decide a point which has not been the subject of argument and decision of the lower court unless the proceedings and resultant decision were illegal or made without jurisdiction. (See *Nyangau v Nyakwara* [1986] KLR 712) Earlier, in *Kenya Commercial Bank v Osebe* [1982] KLR 296, it this court held that an appeal must be confined to the points of law raised and determined by the trial court, except where the trial court commits an illegality or acts without jurisdiction, which is not the case here.

40. Accordingly, we agree with the respondent that the question of setting aside the registered judgement on the ground of disregard of provisions of the law of Kenya which would have been applicable by virtue of the rules of international private law of Kenya under section 10(2) (i) of the Act is not properly before us, and we have no basis for considering, let alone determining it.

41. As regards the first broad ground of appeal on whether the High Court erred in failing to appreciate its jurisdiction under section 10 of the Act to set aside a registered foreign judgment, and by refusing to analyse and interrogate the judgment of the English Court, both parties took diametrically opposed positions, the appellants agitating for an expansive interpretation of section 10 of the Act whilst the respondent advocated for a minimalist and limited role of the court. On her part, the learned judge held that the jurisdiction of the High Court was "ceremonial", limited to enforcement of foreign judgments rather than to review, interrogate or analyse them.

42. It is common ground that a registered foreign judgment may be set aside if the High Court is satisfied on any of the 15 grounds set out in section 10(2) and (3) of the Act. This raises the question of how far the High Court is expected to go while inquiring into whether or not to set aside a recognised foreign judgment. Is the role of that court purely ceremonial as held by the learned judge and supported by the respondent, or is the court expected to review, analyse and interrogate the judgment including its merits as advocated by the appellants?

43. To our minds, a good starting point is appreciation of the purpose and object of the Act. By the time a foreign judgment comes for recognition and registration in Kenya today, invariably a competent superior court of a reciprocating state in the commonwealth will have heard and determined the matter conclusively and with finality. The eight states currently declared by the minister to be reciprocating

states pursuant to section 13 of the Act and whose judgments are recognised and registrable in Kenya are all from the commonwealth and with judicial and legal systems based on the common law system, just like Kenya's. These countries are Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom, and Rwanda.

44. A careful reading of the Act indicates a deliberate bend towards countries in the commonwealth as reciprocating countries. It is no wonder that section 13 of the Act requires the minister, where a reciprocating state is not a commonwealth country, to specify the courts of such country that are deemed to be superior courts, whilst section 14 empowers the minister to make special provisions if the reciprocating state is not a commonwealth country. We are persuaded that these are not accidental provisions. Rather, they are informed by similarity of their legal and judicial systems with Kenya's. It bears emphasising that the recognisable and registrable foreign judgments are not from any court of a reciprocating state. They are judgments of superior courts of those countries. (See the *Foreign Judgments (Reciprocal Enforcement) (Extension of Act*) Order, 1984). Those judgments therefore are due some level of respect and cannot be set aside without circumspection, or as a matter of course. In *SA Consortium General Textiles v Sun Sand Agencies Ltd* [1978] 2 All ER 339, Lord Denning stated:

> "[T]hen, when the French company quite properly sought to register that judgment in England, the English company took all sorts of objections, technical objections as I see them, against enforcement of it. I do not think we should uphold these technical objections. We should give full faith and credit to the judgment of the French court as we would expect them to give full faith and credit to a judgment of an English court..." (emphasis added).

45. That decision was cited with approval by this court in *Patel Bank of Baroda* [2001] 1 EA 189.

As the Act expressly states, the object of the Act is to make "provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith." Save in the exceptional 15 instances set out in the Act, the purpose and philosophy of the Act is towards recognition and enforcement of foreign judgments, rather than the re-opening and re-litigation in Kenya of matters finally and conclusively determined by a superior court of a reciprocating State. It is also important to remember that it is the parties themselves, like the appellants before us, who voluntarily choose to subject themselves to the laws of the reciprocating states. It is therefore to be expected that before they make the choice of where their disputes will be resolved, they fully appreciate and understand the applicable law. To later on complain that the lex fori is oppressive is nothing short of an illegitimate attempt to renegotiate the applicable law after the fact. To justify setting aside a recognised judgment, the judgment debtor must come within the four corners of the Act as set out in section 10(2) and (3).

46. A clear pointer to this conclusion is the nature of the grounds upon which a recognised foreign judgment may be set aside. To determine whether the prescribed grounds for setting aside the judgment exist or not would not call for a re-opening of the case, nor detailed review of the merits of the foreign judgment. Some of the grounds for setting aside of the judgment are that the foreign judgment is one to which the Act does not apply; that the foreign judgment was registered in violation of the Act; that the foreign court had no jurisdiction in the cause of action resulting in the judgment; that the judgment debtor did not appear before the foreign court and that his or her submission to the jurisdiction of the foreign court was pursuant to an agreement that was invalid under the rules of private international law of Kenya; that at the time the foreign judgment was rendered, the matter had been finally and conclusively determined by a competent court; that the foreign judgment is irreconcilable with a subsequent final and conclusive judgment of a competent court of Kenya in a matter filed in Kenya before the foreign proceedings; that the judgment debtor was not served with the

process in the foreign court and did not receive notice of the proceedings in good time; that the foreign judgment was obtained by fraud; that provisions of the law of Kenya which would have been applicable by virtue of the rules of international private law of Kenya were disregarded; that the foreign judgment has been reversed on appeal or set aside by a court of the reciprocating State; that the judgment debtor enjoys immunity under public international law; that the foreign judgment had not vested rights in the person who registered the foreign judgment; that the enforcement of the judgment would be manifestly contrary to public policy in Kenya; and lastly, that the enforcement of the foreign judgment would require the judgment debtor to pay monies in excess of limits upon liability imposed by any statute of Kenya which applies under the rules of private international law of Kenya.

47. To determine whether a foreign judgment should be set aside on account of the above issues would not require reopening the judgment and re-evaluating its merits in the manner suggested by the appellants. For example, issues such as whether the judgment debtor enjoys immunity, would require the applicant to merely show the basis of the immunity. Whether the monies payable exceed limits imposed by a statute would require the applicant to merely identify the relevant statute. Whether the judgment has been reversed or set aside on appeal requires only the production of the decision of an appellate court. And whether the judgment debtor was notified of the proceedings or afforded an opportunity to be heard could be easily established without re-opening the judgment.

48. One of the main arguments put forward by the appellants is that the foreign judgment in this case should have been set aside because its enforcement would be manifestly contrary to public policy in Kenya. Subject to appreciation of the fact that the matter involved setting aside of an award under the *Arbitration Act* rather than setting aside a foreign judgment under the Act, we would accept as a guide the definition of public policy as given by the High Court (Ringera, J, as he then was) in *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 EA 366 that

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."
>
> (See also *Absa Bank Uganda Ltd v Uchumi Supermarkets PLC* [2021] KEHC 14 (KLR)).

49. Again, we are persuaded that it would not require the reopening of a foreign judgment in the manner advocated by the appellants to show that a recognised foreign judgment is contrary to the *Constitution* or laws of Kenya, is inimical to national interest of Kenya, or is contrary to justice and morality. All this leads us to the conclusion that the purpose of sections 10(2) and (3) of the Act is not to provide a backdoor through which an unsuccessful litigant in the reciprocating foreign state can re-agitate his case in Kenya. The provisions are restrictive and clearly do not require the court to engage in elaborate analysis of the correctness of the foreign judgment. Further, under the provisions, a registered foreign judgment cannot be set aside on the mere grounds that it is erroneous on merit, which, to our minds, would constitute an appeal in disguise. Nor, in our view, do the grounds for setting aside a registered foreign judgment countenance a fresh hearing or argument or correction of an alleged erroneous view taken by the foreign court of a reciprocating country.

50. We do not see how the decision of the High Court of Kenya in *Elizabeth Namutebi v Threeways Shipping Services (K) Ltd* (supra) can be relied upon as authority for the proposition that in considering an application to set aside a recognised foreign judgment, the High Court is entitled to interrogate, analyse and review the foreign judgment. The application in that decision was for recognition and registration of a judgment of the High Court of Uganda and the only issue was whether the

applicant had complied with the requirements of the Act, to warrant registration and recognition. The application involved sections 3, 5, 7 and 8 of the Act and did not address the issues under section 10 of the Act, which is the heart of this appeal. True, the learned judge made an orbiter statement that:

> " Today, observance of rights in a proceeding which is to be enforced in another jurisdiction is a fundamental consideration in international cooperation on mutual legal and judicial assistance. And as a general rule, a judgment which violates rights of the parties will not be enforced in foreign jurisdictions including Kenya."

51. However, that statement and the context in which it was made does not support the proposition articulated by the appellants that in considering an application to set aside a registered judgment, the High Court must literally re-open the case determined by the foreign court.

52. Having said that, we would not go as far as describing the role of the High Court in an application to set aside a registered foreign judgment as "ceremonial", as the learned judge did. That creates the unfortunate, though clearly unintended, suggestion that the role of the court in such applications is robotic dispatch of applications to set aside registered foreign judgments. On the contrary, the court must apply its mind to the specific grounds relied upon, but subject to the limits we have suggested above, which would not amount to re-opening of the concluded litigation.

53. In the second broad ground of appeal, the appellants' contention may be summarised as follows: that the High Court erred by failing to examine the constitutionality of the proceedings of the English Court; that those proceedings were unconstitutional because they were conducted in violation of article 50(1) of the *Constitution* of Kenya which guarantee a fair and public trial by an independent court or tribunal and also in violation of the rules of natural justice; that the violation of article 50 and the rules of natural justice resulted from the refusal of Judge Toledano to recuse himself from the proceedings in the face of apparent bias arising from the fact that he shared chambers with Mr Michael Sullivan, the respondent's counsel; and that, further, because of the violation of article 50 (a) and the rules of natural justice, the enforcement of the judgment would be manifestly contrary to public policy in Kenya.

54. Firstly, we are in agreement with the respondent that the lex fori, the law of the forum or the law of the jurisdiction, was the law of England and Wales where the parties voluntarily and consciously decided to resolve any disputes arising from the facility agreement; and that all matters on procedure, which in turn guides exercise of jurisdiction, are to be determined exclusively according to the *lex fori*, is firmly established principle (see for example, *Cheshire & North's Private International Law*, pg 68). Accordingly, we are satisfied that there is no merit in the appellants' contention that the English courts should have applied the *Constitution* or the laws of Kenya in the proceedings before them.

55. This is an appropriate place to address the issue of sovereignty which the appellants have belaboured, contending that as a sovereign state, Kenya is not bound by the rules of the lex fori and that, by giving extraterritorial effect to foreign law, the learned judge acted in a manner that is less than sovereign. There is absolutely no dispute that Kenya is a sovereign Republic as declared in article 4(1) of the *Constitution*. However, as the authors of *Starke's International Law* (11th ed, Butterworths, 1994) point out at page 90, accepting some form of limitation on the right to action does not take away a state's sovereignty. The authors explain as follows:

> " Normally a state is deemed to possess independence and 'sovereignty' over its subjects and its affairs, and within its territorial limits. 'Sovereignty' has a much more restricted meaning today that in the eighteenth and nineteenth centuries when, with the emergence of powerful highly nationalised states, few limits on state autonomy were acknowledged. At the present

time there is hardly a state which, in the interests of the international community, has not accepted restrictions on its liberty of action."

56. In the particular context of this appeal, we do not appreciate how recognition and enforcement of a foreign judgment from a reciprocating state can be deemed a diminution of sovereignty. On the contrary, the Act was passed by the Republic of Kenya in exercise of its legislative sovereignty. The country decided, in exercise of that sovereignty, to recognise and enforce judgments of superior courts of other sovereign states that have reciprocated in recognising and enforcing judgments from superior courts of Kenya. Rather than being an erosion of sovereignty, in our view, the enactment of the Act by the Republic of Kenya was an incident, a manifestation of sovereignty. Indeed, the authors of *International Law: Norms, Actors, Process* (Aspen Publishers, 2006) at page 63 capture this sentiment in a passage attributed a United Nations delegate:

> "We are all sovereign countries here in the United Nations, but all of us have international commitments and we do not consider that to be a curtailment of sovereignty. We have treaties by which we have accepted certain principles...There are all sorts of commitments in international life which do not curtail sovereignty. There are also commitments to international morality and decency, and these are no curtailment of sovereignty as we all know."

57. We now turn to the appellants' contention that enforcement of the judgment of the English Court will be manifestly contrary to public policy in Kenya because of violation of article 50(1) of the *Constitution* arising from perceived bias on the part of Judge Toledano. As we have already stated, the appellants contend that the alleged perception of bias arises from the fact that the Judge and the respondent's counsel are from the same chambers. The appellants have not alleged actual bias against Judge Toledano. The test of whether there is perceived bias on the part of a judge is the same in England and in Kenya. Indeed, decisions of the courts of England on the test of bias have been approved and followed by the courts of Kenya.

58. In *Kalpana H. Rawal v Judicial Service Commission of Kenya & 2 others* [2016] eKLR, this court addressed the test and stated as follows:

> "For quite some time there was contestation in several commonwealth jurisdictions regarding the proper test to be applied in such case: was it real likelihood of bias or reasonable apprehension of bias by a reasonable person. In *R v Gough* [1993] AC 646, the House of Lords adopted the real danger test, meaning that the question to ask is whether there was a real danger that a fair trial was likely to be denied. The test did not win universal acceptance within the commonwealth and in *Magill v Porter* [2002] 2 AC 357, the House of Lords subsequently modified the test to whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased."

59. The court also cited with approval the following passage from the decision of the East African Court of Justice in *Attorney General of Kenya v Prof Anyang Nyong'o & 10 others*, application No 5 of 2007:

> "We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, (a) litigant who seeks disqualification of a judge comes to court because of his own

perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

60. An equally elaboration elucidation of the objective test of bias was rendered by the Supreme Court of Canada in *R S (RD)* [1977] 3 SCR 484 as follows:

> "The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."

61. The respondents submitted that the practice of barristers sharing chambers in England is not the same as the practice of advocates who are partners in a law firm in Kenya. They cited a number of English authorities where the courts have held that a perception of bias on the part of a judge cannot arise purely from the fact of belonging to the same chambers with a barrister in a matter before him. In *Lakers Airways Inc v FLS Aerospace Ltd*, the issue was whether, by reason of being from the same chambers, there was justifiable doubt about the impartiality of a barrister acting as an arbitrator whilst another barrier acted for a party in the arbitration. In rejecting the claim of justifiable doubt of impartiality, the court found the apprehension to be fanciful and theoretical and did not disclose justifiable doubt about the arbitrator's impartiality.

62. Similarly in *Watts v Watts* [2015] EWCA Civ 1297, a deputy judge declined to acceded to a request to recuse herself because counsel for one of the parties was her junior in a different and unrelated matter. On appeal, one of the grounds, like in this appeal, was that the judge had not made full disclosure of the relationship with the counsel. Rejecting the appeal, the Court of Appeal held that the judge had disclosed material particulars, and that a deputy judge was not required to disclose every piece of litigation they had been involved in as a barrister. On the perception of bias, the court found that a fair-minded informed observer would understand the professional standards between a judge and a member of the bar as well as consequences of deviation. The court concluded that the apprehension of bias was far-fetched. (See also *Zuma's Choice Pet Products & Vanderbilt v Azumi Ltd & others* [2017] EWCA Civ 213).

63. Having found that the question of Judge Toledano's alleged bias was to be determined by the *lex fori*, and applying the above principles, the issue becomes, could a reasonable, fair-minded and informed person, aware of all the circumstances and knowledge of the practice of English chambers as well as the impartiality obligations of a judge, apprehend that Judge Toledano would be biased merely because of sharing chambers with counsel for the respondent? We would not think so, and this much is confirmed

by the fact that when the appellants applied for leave to appeal citing that ground, the English Court of Appeal found that particular contention to be utterly without merit.

64. The allegation of fraud against Judge Toledano, founded on the same allegations as the claim of perceived bias, is even more difficult to appreciate. Other than the fact that the fraud was merely alleged and not particularised as expected or cogently proved as required, the appellants are barred by section 10(2) (h) from alleging that the judgment was obtained by fraud, having failed to put it in issue in the proceedings before the English courts. The appellants had an opportunity to put the alleged fraud in issue before the High Court of England and the Court of Appeal of England, which they failed to do. This argument is belated and completely bereft of merit.

65. The last issue is whether the learned judge misapprehended her jurisdiction as regards award of costs. Under section 27(1) of the *Civil Procedure Act*, costs are in the discretion of the court. As a matter of principle, this court interferes with exercise of discretion by the High Court with a lot of circumspection. In *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] EA 898, Madan J.A (as he then was) explained the court's approach thus:-

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

66. The other relevant principle as regards costs is that costs follow the event unless, for good reason the court directs otherwise. In *Attorney General of Burundi v Secretary General of EAC & another*, Appeal No 4 of 2019, the East African Court of Justice explained the issue in a manner that is similar to the approach of the courts in Kenya. The court held:-

> " The general principles applied by the court when called upon to award costs are well settled... They are: one, costs are in the discretion of the court; and, two, in exercising such discretion, the court bears in mind that costs follow the event and that a successful party may only exceptionally be deprived of costs depending on the particular circumstances of the case such as the conduct of the parties themselves or their legal representations, the nature of the litigants, the nature of the proceeding or the nature of the success. In this court, whenever we are called upon to review an order of costs by the trial court, the only pertinent consideration is whether the trial court exercised its discretion judicially in either awarding or declining to award costs to the successful party... [W]e think it was irrational to deny the successful litigants their costs for the reason that the applicant had lost on a technicality. We say so for the following reasons. Cases are lost either on technicalities or the merits. A loss is a loss whatever be the reason. We know of no authority, and none was cited to us from the jurisprudence of this court or any other persuasive jurisprudence, that a party who wins litigation on a technicality should not get costs."

67. In this appeal, the learned judge awarded the respondents costs in line with the general principle because they were the successful party. There was no compelling reason put forth as to why the court must depart from the general rule. Article 48 of the *Constitution* that the appellants relied on relates to filing fees rather than award of costs. When it comes to taxation of costs, the taxing master is obliged

to take into account, among other principles, that awarded costs do not escalate to such an extent as to make access to the court the preserve of the rich or to amount to a denial of access to justice. But that is an issue for the taxing master, not for this court.

68. Before we conclude, we wish to thank all counsel for the well prepared and presented submissions and the breadth of research they undertook. We further wish to apologise to the parties for the delay in finalisation of this judgment, which is attributable to exigencies of official duties in the region for one of the members of the bench.

69. Ultimately, we are satisfied that this appeal has no merit. It brings to mind the words of this court in *Patel v Bank of Baroda* (supra) where, in an appeal involving the Act, the court observed:

> " At the end of it all, we think the appellant is merely hanging onto technicalities in order to avoid his just obligations arising from the contract of guarantee."

Accordingly, this appeal is hereby dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2023

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

M. GACHOKA, CIARB, FCIARB

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR