



Tornado Carriers Limited v Kenfreight Uganda Limited & another (Civil Appeal (Application) 63 of 2018) [2022] KECA 1272 (KLR) (18 November 2022) (Ruling)

Neutral citation: [2022] KECA 1272 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 63 OF 2018
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 18, 2022**

BETWEEN

TORNADO CARRIERS LIMITED APPELLANT

AND

KENFREIGHT UGANDA LIMITED 1ST RESPONDENT

KENFREIGHT EAST AFRICA LIMITED 2ND RESPONDENT

(An application for leave to appeal to the Supreme Court against the Ruling of the Hon. Alnashir Visram, W. Karanja and F. Sichale JJA delivered on 14th February 2019)

RULING

1. The applicants herein were the respondents in the main appeal, and they seek leave to appeal to the Supreme Court of Kenya, against the judgment of Alnashir Visram, W. Karanja and F. Sichale JJA delivered on February 14, 2019. The said prayer is in a Notice of Motion application dated April 15, 2019, brought under section 3A of the *Civil Procedure Act*, Rule 24 of the *Supreme Court Rules*, 2011 and Rule 39 and 40 of the *Court of Appeal Rules*, 2010, and is supported by an affidavit sworn on April 15, 2019 by Ben Oluoch-Olunya, the applicants' advocate. The applicants fault the Court of Appeal for misinterpreting the law on enforcement of foreign judgments and retrying the case as a trial court; delving into the merits of the case and setting its own standards hence offending public policy; and wrongfully interfering with the discretion of the High Court on the issue of jurisdiction.
2. The appellant in the main appeal, who is the respondent in this application, opposed the application vide their replying affidavit sworn May 22, 2019 by Shakil Ahmed Khan on the grounds that the same was misconceived, filed contrary to the law and did not disclose any reason or matter to warrant the interference by the Supreme court in the decision of this court. Further, that the application did not meet the criteria for matters of general public importance that would necessitate the intervention of the Supreme Court, as the decision of this court did not depart from known principles of law regarding the



issue of enforcement of foreign judgments in Kenya. Lastly, that this being the first appellate court in respect to the application by the Applicants for the enforcement of a foreign judgment, it had the jurisdiction and duty to reevaluate the evidence on record and arrive at its own decision.

3. The background to the application is that the appellant was dissatisfied by the ruling of the High Court of Kenya (P.J Otieno J.) delivered on February 16, 2018 in Mombasa HC Civil Case No. 52 of 2016, which granted a certificate of recognition of a foreign judgment delivered on February 22, 2016 by the High Court at Kampala, and filed the appeal herein seeking to have the decision set aside. The suit in the High Court at Kampala arose from a contract of carriage involving the applicants and appellant in which goods were stolen while in transit to Uganda, and the applicants were awarded damages by the High Court at Kampala, which judgment they sought to have recognised and enforced in Kenya on account of its non-satisfaction by the appellant. This court in its judgment delivered on February 14, 2019 set aside the recognition by the High Court of Kenya, hence the instant application.
4. We heard the application at a virtual hearing held on July 18, 2022, in which learned counsel Ms. Misere, holding brief for Mr. Olunya appeared for the applicants, while learned counsel Ms. Mutubia appeared for the Appellant. While Ms. Misere had filed written submissions, Ms. Mutubia on her part informed the court that she had not filed her submissions and prayed for time to do so. The request was declined and the counsel were directed to make oral submissions.
5. Ms. Misere reiterated that the learned Judges of Appeal misinterpreted the law on enforcement of a foreign judgment and failed to adhere to the provision of section 4(2) of the *Foreign Judgments (Reciprocal Enforcement) Act* and articles 4 to 7 the *Convention on the Recognition of Foreign Judgments in Civil and Criminal Matters*; that they “went on a frolic of their own” and delved into the merits of the case that were exhausted by the trial court in Uganda and thereby acted as an appellate court of the High Court at Kampala and retried the matter which was beyond their jurisdiction; and that the High Court in Kenya correctly observed that the issue of jurisdiction ought to have been determined by the Ugandan Courts pursuant to Order 9 Rule 3 of the Ugandan *Civil Procedure Rules*. Therefore, that this application is of public interest as it concerns the jurisdiction of the Court of Appeal to deal with the merits of foreign judgments.
6. Ms. Mutubia on her part asserted that the matter arose from a private contract between private companies incorporated in Kenya in which the question was one of payment of damages for loss of goods in transit. Further, that the Appellant raised an objection to the jurisdiction of the Ugandan courts, and the Court of Appeal being the first Appellate Court correctly perused the pleadings filed in the enforcement proceedings to determine if this issue of jurisdiction was correctly addressed by the high Court of Kenya. Therefore, that the issue of jurisdiction having arisen from the facts of the said proceedings, this was not a matter of general public importance.
7. The issue that presents for determination is whether the intended appeal to the Supreme Court raises a matter of general public importance, and is therefore eligible for certification as such to warrant leave. This application is brought arising from the provisions of article 163(4) of the *Constitution* which provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of this Constitution; and in any other case where the Supreme Court or the Court of Appeal certifies that a matter of general public importance is involved.
8. Before we delve into the substantive issue before us, we need to point out at the outset that Rule 40(2) of the *Court of Appeal Rules* of 2010 in this respect requires that an application by motion for certification that a point of law of general public importance is involved in an intended appeal against the decision of this court shall be made within fourteen days of the said decision. The decision of this court sought to be appealed against was delivered on February 14, 2019, and the instant application is dated April



15, 2019 and was lodged in this court on April 15, 2019. The application is therefore incompetently before this court, having been filed out of time, and the applicants did not bring any evidence that they were granted extension of time.

9. On the substantive question before us, the criteria for certification of a matter as one of general importance was laid down by the Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gneccchi Ruscone*, (2013) eKLR:

“...a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”

10. The Supreme Court further enunciated the principles for determining whether a matter of general public importance thus:

- i. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
- ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
- iii. such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;
- iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
- v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of article 163(4) (b) of the *Constitution*;
- vi. the intending applicant has an obligation to identify and concisely set out the specific elements of general public importance which he or she attributes to the matter for which certification is sought;
- vii. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

11. It is notable in this respect that the arguments by the Applicants on the role of the Court of Appeal in interrogating a decision of the High Court of Kenya on the recognition of a foreign judgment are adequately answered by the various decisions on the role of the Court of Appeal as a first appellate court, which is essentially one of retrying the case that was before the High Court and evaluating the High Court’s decision in light of the evidence that was adduced before it and applicable law. See in this regard the decisions in *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR and *Selle and another v Associated Motor Boat Co. Ltd* [1968] EA 123;



Therefore, it was within the Court of Appeal's remit to interrogate the issue of whether the High Court of Kenya correctly applied the law in light of the evidence that was before the said Court as regards the recognition of the judgment of the High Court of Kampala.

12. The law governing the recognition and enforcement of foreign judgments in Kenya is settled and is regulated by the Foreign Judgments (Reciprocal Enforcement) Act. In addition, it is elementary that an interrogation of the jurisdiction and thereby competence of the foreign court, is key and relevant when determining an application of recognition of a judgment issued by the foreign court, both under section 4 of the *Foreign Judgments (Reciprocal Enforcement) Act* and under the principles of private international law. See in this regard the decisions in *Jayesh Hasmukh Shab v Navin Haria & another* [2016] eKLR and *Adams & others v Cape Industrials PLC*, (1990) Ch. 433.
13. The issue of jurisdiction that arose in this regard was aptly stated by this court in the impugned judgment as follows:

“The respondent has contended that since the appellant appeared and defended the matter before the original court; she submitted to the jurisdiction of the court of origin and cannot be seen to claim that the court lacked jurisdiction. Consequently, that the appellant's argument that the foreign judgment was by a court with no jurisdiction, has no basis herein. A resolution of this issue is to be found under section 4 (2) (b) (i) of the Act aforesaid; which categorically provides that defending a matter does not mean that a party has submitted to the jurisdiction of an originating court. This is even more so, when the party has only entered appearance for the purpose of objecting to jurisdiction. This position was further enunciated in the case of *Re: Dulles Settlement (No. 2) Dulles v Vidler* [1951] 1 CH 842, where Denning L. J expressed himself as follows:

“I cannot see how one can fairly say that a man has voluntarily submitted to the jurisdiction of a Court, when he has all the time been vigorously protesting that it had no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction.

What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will not accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he appears with the sole object of protesting against jurisdiction, I do not think that he can be said to submit to the jurisdiction.”

That case is on all fours with the present circumstances herein. The appellant in this case only appeared before the court of origin with one goal; to dispute the jurisdiction of the said court. The fact that she entered appearance and defended herself as regards jurisdiction does not connote a submission to jurisdiction.”

14. On the argument that this court at on appeal of the decision of the High Court of Kampala, this court explained the applicable law and the role of the recognising court in this respect in the impugned judgments as follows:

“As a result, the appellant cannot be said to have submitted to the jurisdiction of the court of origin. In its judgment, the court of origin never addressed the issue of jurisdiction. The same therefore remained an unresolved issue. From the contents of the foreign judgment



that ensued, the issue of jurisdiction was never addressed or determined by the original court. No appeal seems to have been lodged to contest the said judgment. While bearing in mind that this court will not sit on appeal of the decision of the court of origin, where a question of jurisdiction subsists, in our view the superior court should decline to register such judgment. Given the objection to jurisdiction, which was still an undetermined issue even at the time the registration of the foreign judgment was being sought, the superior court below should have been cognizant of this fact and dismissed the application. This appeal would in fact succeed on that singular point. We shall however consider other pertinent grounds raised by the appellant...”

15. The law is therefore settled on the issues raised by the applicants in this application as indicated hereinabove, and the decision of this court on the said issues turned on the evidence and facts before it. In particular, this court noted on the issue of the jurisdiction of the Kenyan Courts vis- à-vis the High Court at Kampala as follows:

“The factual situation upon which the claim before the court of origin was based was the loss of goods while in transit. It is common ground that the hijacking and loss of those goods happened at Kakamega, within Kenya. As rightly submitted by counsel for the appellant, the Kenyan courts would have had jurisdiction over the matter. As per the respondent, however, the court of origin had exclusive jurisdiction given that the completion of the contract was to happen in Uganda. With due respect to learned counsel, the cause of action in the proceedings before the court of origin was damages for loss of goods, not breach of or non-completion of contract.”

16. Arising from the above stated reasons, the issues raised by the applicant in our view do not qualify as substantial questions of law or matters of general public importance, nor are they capable of transcending the dispute between the parties in this particular case. The applicants’ Notice of Motion dated April 15, 2019 is accordingly found not to have merit and is dismissed with costs to the respondents.

17. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF NOVEMBER, 2022.

S. GATEMBU KAIRU, FCIARB

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JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

