**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, KARANJA & SICHALE (JJ.A)**

**CIVIL APPEAL NO. 63 OF 2018**

**BETWEEN**

**TORNADO CARRIERS LIMITED .....APPELLANT**

**AND**

**KENFREIGHT UGANDA LIMITED .....1ST RESPONDENT**

**KENFREIGHT EAST AFRICA LIMITED....2ND RESPONDENT**

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Mombasa (P.J Otieno .J,) delivered on 16th February, 2018*

***in***

***Mombasa H.C.Civil Case No. 52 of 2016)***

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**JUDGMENT OF THE COURT**

1. This is an appeal challenging the grant of registration, by the High Court of Kenya at Mombasa *(the superior court)*, of a foreign judgment delivered on 22nd February, 2016 before the High Court at Kampala *(the court of origin)*. By an Originating Summons dated 24th May, 2016, filed at the superior court, the respondents sought registration of the foreign judgment on the basis that though they were awarded a sum of €45,362 therein; being the value of goods lost in the course of transit with the appellant; the appellant was yet to settle the said sum. The application for registration was supported by an affidavit sworn on 19th May, 2016 by Yese Mugenyi.

2. Opposed to the application, the appellant filed a replying affidavit sworn on 25th July, 2016 by the Director of the appellant, one Shakil Ahmed Khan; who deposed that by allowing the application, the court would be ousting the jurisdiction of the High Court of Kenya, which under the Constitution has the exclusive jurisdiction to determine all disputes involving Kenyan entities and persons. For avoidance of doubt, the appellant said, this was a commercial dispute between two Kenyan companies who had contracted in Kenya for transportation of cargo; but which contract was frustrated when the said cargo was hijacked and stolen by thugs at Kakamega, while in transit to Uganda.

3. It was the appellant's position therefore, that since the cause of action arose in Kenya and the parties to the suit were all Kenyans, then the Ugandan Court lacked jurisdiction over the matter; meaning the resulting foreign judgment was flawed, illegal and that the registration of the same in Kenya would equally offend the Kenyan Constitution as well as its statutory instruments, including the Foreign Judgment (reciprocal enforcement) Act *(the Act)* and the Convention on Recognition and Enforcement of Foreign Judgments in civil and commercial matters *(the convention)*.

4. The appellant added that on her part, she had filed **Mombasa Chief Magistrate's Court Case No. 3176 of 2006**; **Kenfreight (EA) Limited v. Tornado Carriers Limited**; in relation to the said commercial dispute and that the appellant had entered appearance and filed defence therein; and thereby submitted herself to the jurisdiction of the Kenyan courts. Furthermore, the appellant had in any event appealed against the foreign judgment and as such, the same could not be registered in Kenya until that appeal is heard and determined. The appellant accused the court of origin of culpable fraud, collusion and impropriety in its issuance of the foreign judgment and stated that by recognising the foreign judgment, the superior court would be aiding in the perpetuation of an illegality.

5. Following the parties' respective submissions on the matter, the learned superior court Judge (Otieno J.) in a reserved Ruling delivered on 16th February, 2018, found the application for registration of the foreign judgment merited and allowed it with costs to the respondent. That Ruling is what prompted this appeal.

6. In the appeal, the appellant contends that the superior court below erred by: allowing the respondent's Originating Summons dated 24th May, 2016 without giving sufficient reasons therefor; finding that there was no appeal pending against the decision of the High Court at Kampala; failing to find that the foreign judgment sought to be enforced was tainted with illegalities and judicial impropriety; finding that the appellant did not challenge the jurisdiction of the foreign court; finding that a court of the designated country was not required to interrogate the merits of the foreign judgment and; failing to find that the judgment by the High Court of Uganda did not meet the required threshold for enforcement as a valid foreign judgment under section 9 of the Civil Procedure Act and section 4(2) of the Foreign Judgments (Reciprocal Enforcement) Act.

7. The appeal was ventilated through written submissions, with oral highlights at the plenary hearing. Urging the appeal was learned counsel **Mr. Mutubia** for the appellant, who submitted that the adoption of a foreign judgment is a judicial function and not an administrative one and that while so doing, the Kenyan court must consider whether the decision in question aligns with Kenyan law. In this case he said, the foreign decision was wanting, as the Ugandan court lacked jurisdiction to hear a dispute in respect of a contract executed in Kenya by Kenyans.

8. He added that the superior court below also erred by finding that the jurisdiction of the court of origin was never opposed. If anything, he said, the lack of jurisdiction is even evidenced not only by the fact that the parties were Kenyans; but also in that both the subject matter as well as the cause of action were in Kenya. On another note, Mr. Mutubia also stated that the initial transport contract was between the appellant and the 2nd respondent; and that at the time of contracting with the 2nd respondent, the appellant was never informed of the existence a sub contract, between the 1st respondent and Fotogenic Limited (a third party), or of a further sub contract between the respondents themselves. In short, the appellant was not privy to these latter contracts. Consequently, counsel argued, in delivering the foreign judgment, the court of origin misapprehended and mixed up all these contracts; thereby arriving at an erroneous judgment.

9. The appellant also faulted the superior court below for what she termed as a failure to interrogate the compatibility of the foreign judgment with the norms of a just decision under Kenyan law. In particular, the appellant cited the provisions of Article 4 and 5 of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial matters *(the Convention)* and stated that the foreign judgment failed to be in conformity with these provisions. In addition, counsel stated that the appellant was only dragged into the matter post judgment, by way of third party proceedings. He argued that even though all these issues were raised before the superior court, the learned judge failed to address them, thus arriving at erroneous findings.

10. It was counsel's further submission that in light of the foregoing, the appellant was denied his right to be heard and that the foreign judgment therefore offended the principles of natural justice, which in turn rendered it incapable of registration in Kenya. Counsel opined that on the whole, the foreign judgment offended section 9 of the Civil Procedure Act on domestication of foreign judgments and as such, should not have been registered.

11. Opposing the appeal was **Mr. Oluoch**, learned counsel for the respondent who stated that though the contract between the parties was executed in Kenya, the same was to be performed in Uganda. Further, that in this case, if at all the appellant was desirous of contesting the jurisdiction of the court of origin, he ought to have moved the Ugandan court by way of a Chamber Summons application as per **Order 9 rule 3 of the Civil Procedure Rules 1964 & Civil Procedure Rules 2014 of Uganda**. Not only did the appellant fail to do so, but she failed to defend the third party proceedings as well. The same were thus heard and concluded to the appellant's detriment and she should not be seen to complain. Still on the subject of jurisdiction, the respondents cited the case of **Ssebagala & Sons Electric Limited v. Kenya National Shipping Lines Limited [2002] eKLR** in support of the position that the appellant had voluntarily submitted to the jurisdiction of the High Court of Uganda and that in any event, the cause of action arose in Uganda, since the transportation contract was to be completed in Uganda.

12. In Mr. Oluoch's, view the appellant was wholly misconstruing the import of Articles 4 and 5 of the Convention. He asserted that contrary to the appellant's assertions, the said provisions do not avail an absolute ground for refusal of recognition of a foreign judgment. Rather, that the same are merely designed to be a guide. Moving on, counsel argued that the allegations of fraudulent conduct as levelled by the appellant against the trial court should have been proved. In the absence of such proof he said, the foreign judgment cannot be said to have been steeped in fraud as the appellant herein purports. In conclusion, counsel urged this court to uphold the findings of the superior court below and dismiss the appeal with costs.

13. This being a first appeal, this court is mindful of the fact that its role is confined to re- evaluating and re- analysing the evidence in order to reach its own conclusions and findings. This much was rehashed in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**; where this Court stated as follows regarding the duty of first appellate court:-

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

From the submissions of the parties and the grounds of appeal, the issue for determination herein is whether the superior court below properly interrogated the merits of the Originating Summons and whether the foreign judgment merited registration as awarded.

14. The law governing the registration of foreign judgments is primarily regulated by section 5(1) of the Foreign Judgments (reciprocal enforcement) Act *(the Act)* which states that:

> ***'Where a judgment to which this Act applies has been given in a designated court, the judgment creditor may apply to the High Court to have that judgment registered within six years of the date of the judgment or, where there have been proceedings by way of appeal against the judgment, of the date of the last judgment in the proceedings.'***

It is not in dispute that the appellant was a judgment debtor while the respondents were the judgment creditors in respect of the foreign

judgment in question. The appellant has however labored to demonstrate that the superior court below ought to have disallowed the prayer for registration of the judgment on the basis that the foreign judgment was issued without jurisdiction and failed to be in conformity with Kenyan law. On the issue of jurisdiction, guidance can be derived from section 4 of the Act which states in part as follows:

> ***'(1) In proceedings in which it is necessary for the purposes of this Act to determine whether a court of another country had jurisdiction to adjudicate upon a cause of action, that court shall, subject to subsection (2), be treated as having had jurisdiction, where—***
>
> ***(a) the judgment debtor, being the defendant in the original court, submitted to the jurisdiction of the court by voluntarily appearing in the proceedings;***
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> ***(b) ……***
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> ***(c) ……***
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> ***(d) ……***
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> ***(e) ……..***
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> ***(f) ……***
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> ***(g) ……***
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> ***(h) ……***
>
> ***(i) ……***
>
> ***(2) A court shall not be treated as having had jurisdiction under subsection (1)—***
>
> ***(a) where by reason of the subject matter of the proceedings, exclusive jurisdiction thereto was, under the rules of private international law of Kenya, vested in the courts or authorities of a country other than that of the original court;***
>
> ***(b) by reason only of the fact that the judgment debtor, being the defendant in the original court, appeared (conditionally or otherwise) in the proceedings for all or any of the following purposes—***
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> ***(i) to contest the jurisdiction of the court;***
>
> ***(ii) to invite the court in its discretion not to exercise its jurisdiction;***
>
> ***(iii) to protect, or obtain the release of, property seized or threatened with seizure in those proceedings;***
>
> ***(c) …….***
>
> ***(3) A finding of fact made (expressly or by implication) by the original court in the proceedings in which the judgment was given and on the basis of which jurisdiction was assumed in those proceedings shall—***
>
> ***(a) if the judgment debtor appeared in those proceedings and did not contest the jurisdiction of the original court, be conclusive evidence of the fact found; and***
>
> ***(b) in any other case be sufficient proof of that fact unless the contrary is shown.'*** (Emphasis added)

15. From the foregoing, it is clear that the original court is presumed to have jurisdiction if *inter alia*, the defendant voluntarily submitted to that court's jurisdiction. It has been contended in this case that the appellant always contested the jurisdiction of the original court. Looking at the pleadings filed before the Kampala High Court, it is apparent that the appellant was sued as a third party in the proceedings. A third party notice to this effect, dated 8th November, 2011 indicated that the suit in question had been brought against the appellant by the 1st respondent and that in the event that the appellant failed to enter appearance in the matter, she would be *'deemed to admit the validity of any decree passed against the defendant..'*In response to the said notice, the appellant entered appearance and filed a written statement of defence dated 12th December, 2011 in which she raised an objection to the jurisdiction of the court. The pertinent part of the defence read as follows:

> ***'1. The Third Party (Tornado Carriers limited) shall raise a preliminary objection at the hearing to the effect that the suit in respect to it is not maintainable in law so far as:***
>
> ***a) ……***
>
> ***b) ……***

***c)***

***d) That this Honourable Court lacks jurisdiction to handle the defendant's third party claim.***

***e) ……'***

16. 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 vs 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.

17. 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 infact succeed on that singular point. We shall however consider other pertinent grounds raised by the appellant.

18. It was not disputed that the 2nd respondent had filed CMCC NO.2006 of 2009(supra) against the appellant seeking damages for loss of the same goods, which suit was said to be pending before court. Recognition of the said judgment in the circumstances ran afoul Article 5 (3) of the Convention on the Recognition & Enforcement of Foreign Judgments in Civil and Commercial Matters (1971).

19. The appellant has also asserted that an appeal had been lodged and that this should have barred the superior court from registering the foreign judgment. However, as per section 3(2) of the Act, the existence of an appeal does not of itself render a foreign judgment incapable of registration. Therefore, the contention that the superior court ought to have found the registration of the foreign judgment unmerited based on the pendency of an appeal, fails.

20. Then there was the argument that the cause of action arose in Kenya, given that the loss of goods happened in Kakamega and that the parties herein are companies incorporated in Kenya. The fact that the parties are Kenyan entities is without dispute. Equally not in dispute, is that the contract between the appellant and the respondents was executed in Kenya. As to the cause of action; a cause of action is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. See ***Letang v Cooper [1964] 2 All ER 929 at 934.*** 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.

21. We think we have said enough to demonstrate that this appeal has merit. Accordingly, we allow the same with the result that the Ruling and Order dated 16th February,2018 in Mombasa HCCC NO.52 OF 2016(OS) is hereby set aside and the said suit is hereby dismissed. The appellant is awarded costs both here and in the High Court.

**Dated at Mombasa this 14th day of February, 2019.**

**ALNASHIR VISRAM.**

**……**

**JUDGE OF APPEAL**

**W. KARANJA**

**……**

**JUDGE OF APPEAL**

**F. SICHALE**

**……**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

***DEPUTY REGISTRAR***