IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 317 OF 2013

BETWEEN

DHANJAL INVESTMENTS LIMITED.....APPELLANT

AND

COSMOS HOLIDAYS PLC.....RESPONDENT

(An Appeal from the Ruling and Orders of the High Court of Kenya

at Nairobi (Havelock, J.) dated 20th June, 2013

in

H. C. C. C. No. 112 of 2012 (O.S.))

****

JUDGMENT OF THE COURT

1. When is a foreign judgment enforceable in Kenya? Are there exceptions or, put another way, which foreign judgments are not enforceable? What is the true construction of sections ***3 (3) (b); 4 (1) (a), (b), (c), (i)*** and ***(g),*** of the **Foreign Judgments (Reciprocal Enforcement) Act**? These and other issues on jurisdiction and *res judicata* arise for our consideration and we shall do so presently. First, the background to the appeal.

2. The appellant, ***Dhanjal Investments Ltd*** **(Dhanjal)** is a Kenyan Company in the hospitality business, which owns and operates the Travellers Beach Hotel in Mombasa. It also operates a tented camp in Mwaluganje elephant sanctuary, known as Travellers Camp. The respondent on the other hand, **Cosmos Holidays PLC (Cosmos)** is a private company registered in the United Kingdom in the business of a tour operator, selling package holidays to UK consumers to various holiday destinations around the world.

3. In the course of that business, Cosmos entered into an agreement with Dhanjal on 29th October, 1999 under which Dhanjal would reserve 40 rooms at Travellers Beach Hotel between 15th November, 1999 and 23rd December, 2000, and Cosmos would in turn supply package holiday tourists **(**hereinafter, **'the contract').** The package would include the benefit of visiting the elephant sanctuary and staying overnight at the Camp. The contract had clauses which essentially bound Dhanjal to indemnify Cosmos for any legal liability which Cosmos may incur in respect of its own contract with the tourists regarding their safety during their stay with Dhanjal. It was to be construed in accordance with the laws of England and the parties submitted to the jurisdiction of English courts.

4. In April 2000, Cosmos dispatched a group of 9 holiday makers from the UK to Dhanjal in accordance with the contract. As fate would have it, the group was viciously attacked by armed robbers on the night of 3rd/4th May, 2000 at the tented camp where their property was stolen and they suffered personal injuries. On their return to the UK, they sued Cosmos before the Birmingham County Court for recovery of damages invoking Regulation 15 of the ***"Package Travel, Package Holidays and Package Tours Regulations 1992"*** of the UK, which allowed them to do so. The suit was compromised between the parties and Cosmos settled the sums agreed to be paid to the claimants in July 2005.

5. In turn, Cosmos went before the Queen's Bench Division of the High Court of Justice in Leeds and filed its claim against Dhanjal on the basis of the contract of indemnity seeking to recover GBP 208,784.80 together with interest and future losses. Dhanjal filed a lengthy defence denying the claim which proceeded to trial, but the claim by Cosmos was upheld by the court in May 2008. Dhanjal was dissatisfied with the judgment and sought to overturn it on appeal but the appeal was dismissed by the Court of Appeal in March 2009. Ultimately,

Dhanjal was ordered to pay GBP 325,982.29 together with costs.

6. The battle then swung to the Kenyan courts in an effort by Cosmos to execute the decree. It issued and served a notice to Dhanjal under ***Section 220*** of the Companies Act for payment of the decretal amount. When there was no compliance, Cosmos went to the High Court on 14th December, 2010 and filed **Winding Up Petition No. 45 of 2010 (**hereinafter '**the petition')** to wind up the company**.** Dhanjal then protested that the petition was bad in law and sought an injunction to stop it. In a considered Ruling made on 26th June, 2011, **Njagi, J.** agreed with Dhanjal that there was no enforceable judgment in Kenya due to want of registration of the foreign judgment in accordance with the **Foreign Judgments (Reciprocal Enforcement) Act (**hereinafter, **'the Act')**. Cosmos filed a notice of appeal intending to challenge that finding but never pursued it further.

7. Instead, taking the cue from the ruling, Cosmos went back to the High Court on 24th February, 2012 and filed an Originating Summons **(OS)** seeking the order for registration of the judgment of the Queen's Bench Division of the High Court of Justice in Leeds made on 10th August, 2009. It was duly registered on 16th March, 2012.

8. Dhanjal, however, shot back with an application of its own dated 4th May, 2012 (not 11th May, 2012) seeking to set aside the registration of the foreign judgment and to have the OS struck out or alternatively stayed on the basis that there was apending appeal from the decision of Njagi, J. or in further alternative, that the OS was *res judicata*. That was the application heard before **Havelock, J.** who dismissed it on 20th June, 2013, thus provoking the appeal now before us.

9. The memorandum of appeal raises 10 grounds but, as earlier observed, they essentially address two broad issues of law which were urged as such:

> ***i). Whether the originating summons was res judicata (Grounds 1 & 2).***
>
> ***ii). Whether the court had the jurisdiction to register the foreign judgment in view of express provisions of the Act (Grounds 3 to 10).***

As jurisdiction has been said to be everything (see ***'The Owners of the Motor Vessel "Lillian S" vs Caltex (Kenya) Ltd [1989] KLR'***), we shall consider the two issues in reverse order.

10. The jurisdictional issue is premised on four fronts. In written submissions and oral highlights, learned counsel for the appellant **Mr. Paul Buti** argued before us, as he did in the High Court, firstly, that the foreign judgment sought to be registered in this country was based on a claim for recovery of damages for *"personal injuries"* suffered by the nine tourists in their Kenyan sojourn. He referred us to the *'Claim Form'* filed by Cosmos in the English Court which particularized the nine tourists and the amounts of compensation paid to them. Counsel also observed that medical reports were produced in evidence to support the claim that the tourists were indeed injured while in Kenya.

11. In those circumstances, submitted counsel, ***Section 3(3)(b)*** of the Act was a complete bar to the registration of a foreign judgment since the effect of it would be the enforcement of payment for recovery of compensation in damages for personal injuries. The Section provides:

> ***"(3) This Act does not apply to a judgment or order-***
>
> ***.....***
>
> ***b. To the extent to which it provides for the payment of a sum of money by way of exemplary, punitive or multiple damages."*** [Emphasis added].

12. The second Jurisdictional front was the application of ***Section 4 (1) (i)*** of the Act which provides:

> ***"4 (1) In proceedings in which it is necessary for the purposes of this Act to determine whether a Court of another country has jurisdiction to adjudicate upon a cause of action, that Court shall, subject to subsection***
>
> ***(2), be treated as having had jurisdiction where;***
>
> > ***i. In the case of an action to recover damages for physical injury to the person or the death of a person, or for damages to tangible property, the circumstances giving rise to injury, death of damage substantially occurred in the country of the Original Court or the injury or damage was suffered in that country****. [Emphasis added.]*

13. The import of that provision, according to counsel, was that jurisdiction in respect of recovery of damages for physical injury to the person is only feasible where the circumstances giving rise to the injury substantially occurred in the country of the original court (England) or the injury was suffered in that country. In that regard, it is contended that as the circumstances leading to the injuries giving rise to the claim, and the injuries themselves, occurred in Kenya, the English court lacked jurisdiction to adjudicate over the matter and therefore the ensuing judgment is not enforceable in Kenya.

14. The third jurisdictional front urged was in respect of ***Section 4 (1) (g)*** of the Act which provides as follows:

> ***"4(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 –

.....

g. In the case of a claim arising out of a contract, the obligation which was the subject of the proceedings was, or was to be, wholly or mainly performed in the country of the original court. *[Emphasis added].*

15. According to counsel, the obligation under the contract in issue in this matter was to the nine tourists involved in the travel package and the whole performance of that obligation was within Kenya. No part of it was to be done outside Kenya. It follows therefore, submitted counsel, that the courts in England had no jurisdiction to determine contractual matters on issues that arose in Kenya.

16. Finally on jurisdiction, counsel submitted that the indemnity contract signed between the parties herein was null and void for all purposes and was unenforceable. That is because the agreement bound the parties to submit to the exclusive jurisdiction of the English courts and to English law for construction of the contract, to the complete exclusion of all courts in Kenya. Counsel cited the case of ***Davies & Another vs Mistry [1973] E. A. 463*** and ***Tononoka SteelsLimited vs Eastern and Southern Africa Trade Development Bank [2000] E A 536*** - for the proposition that rights of access to Kenyan courts may only be taken away by clear and unambiguous words of the Kenyan Parliament, not even by subsidiary legislation. In counsel's view therefore, the construction and effect of the contract ought to have been subjected to the jurisdiction of Kenyan courts.

17. In response to those submissions, learned Senior Counsel, **Mr. Kenneth Fraser**, instructed by M/s Hamilton Harrison & Mathews, filed written submissions which were also orally highlighted. Counsel was in no doubt that the appellant had totally misapprehended the nature of the case filed before the English High Court of Justice by Cosmos. Referring to the Claim Form and particulars thereunder which stated that the claim was for *"indemnity and/or damages pursuant to a contract"*, the entire proceedings of the two English courts which set out the contractual position of the parties and the issues at hand, and the *'Certificate of Judgment'* which showed that all the proceedings were fully defended by Dhanjal before those courts, Mr. Fraser submitted that it was beyond doubt that the basis of the suit was the contract of indemnity for expenses incurred by Cosmos and not for recovery of damages for personal injuries as contended by the appellant. It was instructive, observed counsel, that Cosmos was the only party in the proceedings that gave rise to the judgment being enforced, as the tourists were not privy to the contract. There were no exemplary, punitive or multiple damages involved.

18. Citing the persuasive High Court authority of ***Kuoni Travel Ltd vs Private Safaris (East Africa) Ltd; HCCC No. 111 of 2012 (O. S.),*** counsel submitted that the registration of the judgment on the contractual indemnity was distinct from the original claim by the tourists against Cosmos.

19**.** Turning to the construction of ***Section 4 (1)*** of the Act which provides for the mechanism of determining whether the foreign court had jurisdiction, counsel submitted that it was sufficient to satisfy the requirements of any one of the subsections, not necessarily all. For this proposition, reliance was made on the case of ***Societe Cooperative Sidmetal vs Titan International Ltd [1966] 1 QB***

b. In this case, he urged, Dhanjal voluntarily submitted to the jurisdiction of the English courts by executing the contract containing the exclusive jurisdiction provision and by participating in the proceedings before the English courts. Jurisdiction was therefore given to the English courts under ***sub-sections (a*)** and b. of ***section 4 (1)*** which provide:

a. The judgment debtor being the defendant in the original court, submitted to the jurisdiction of the court by voluntarily appearing in the proceedings;

b. The judgment debtor was plaintiff, or counterclaimed, in the proceedings in the original court;

As such, concluded counsel, ***sub-sections (i)*** and ***(g)*** which the appellant relied on were irrelevant and without merit since jurisdiction has already been established.

20. As regards the validity of the contractual jurisdiction clause which was challenged as a nullity, counsel submitted that it was a normal contractual clause which expressed the wishes of the parties and which courts are generally slow to interfere with. In any event, counsel observed, such clauses were expressly sanctioned by the Act itself in ***Section 4 (1) (c)*** which provides:

"c) The judgment debtor, being the original defendant in the original court, had, before the commencement of the proceedings, agreed otherwise than in pursuance of some statutory requirement, in writing or by an oral agreement confirmed in writing, to submit, in respect of the subject matter of the proceedings or in respect of disputes of the kind which were the subject matter of the proceedings, to the jurisdiction of the original court or of any other court of the country of the original court".

21. Counsel went further to cite the treatise by **Cheshire and North** in **'Private International Law",** 11th Edition at pages 183, 191 and 192 which considered the issue of submission to jurisdiction; and the decision of the predecessor of this Court in ***United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] KLR 898*** where the contract between the parties had an exclusive jurisdiction clause in favour of Indian courts. **Madan, JA** (as he then was) and **Hancox, JA** (as he then was) emphasized that such clauses should berespected. There was therefore nothing illegal or null and void about such contractual clauses, stressed counsel. He distinguished the authorities relied on by the appellant on the ground that they related to attempts to exclude jurisdiction through by-laws and subsidiary legislation, and were not about respect for the wishes of parties in their contracts.

22. We have given anxious consideration to the issue of jurisdiction and have come to the conclusion that the objections raised by the appellant are lacking in merit, for the following reasons:

As this Court stated about the purpose of the Act in the case of ***Jayesh Hasmukh Shah vs Navin Haria & Another*** ***[2016] eKLR:***

> ***"The objective of the*** **Act** ***is to make provision for enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya. Under the Act, a judgment creditor in whose favour a foreign judgment from a*** **"designated country"** ***has been made may apply and register the foreign judgment at the High Court of Kenya and such foreign judgment shall, for purposes of execution, be of the same force and effect as a judgment of the High Court of Kenya entered at the date of registration. Subject to exceptions in*** **Section 18** ***of the*** **Act,** ***a judgment of a*** **"designated court"** ***shall be recognized in any court in Kenya as conclusive between the parties thereto, as to the matter adjudicated upon, in all proceedings*** **(no matter by which of the parties in the designated court they are instituted)** ***on the same cause of action and may be relied upon by way of defense or counterclaim in those proceedings. The designated countries under the Kenyan*** **Foreign Judgments (Reciprocal Enforcement) Act** ***are: Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Republic of Rwanda."***

23. All other things being equal, we perceive no issue arising out of the finality and enforceability of the decree issued by the English Court. The Kenyan court will not re-examine the merits of the foreign judgment, which is enforced on the basis that the judgment debtor has a legal obligation as a matter of common law, recognized by the High Court, to satisfy the money decree of the foreign judgment. In the case of ***Sebagala & Sons Ltd vs Kenya National Shipping Lines Ltd*** ***[2002] eKLR,*** it was held thus:

> ***"...in general, as provided in Section 9 of the Civil Procedure Act, a foreign judgment is conclusive until it is shown that any of the exceptions in Section 9 of the Civil Procedure Act do exist. Such a judgment of a reciprocating country as defined in the Act or judgment of any foreign court is not impeachable on the merits, whether for error of fact or law..."***

24. The first contention by the appellant is that the decree was expressly barred under ***Section 3 (3) (b)*** of the Act since it relates to personal injuries. In rejecting similar submissions made on the issue, the trial court reasoned as follows:

> "***I have carefully perused the Affidavit of the said Mr. Adams sworn in support of the Originating Summons herein dated 23 February 2012. That Affidavit was sworn on 14 February 2012 and at exhibit "RJA 1" is the Certificate of Judgment and "RJA 3" contain details of the Respondent's claim in the High Court at Leeds. The prayers of the Particulars of Claim sought damages in respect of past losses of GBP 196,563.30 plus interest to date and further interest accruing at a daily rate. The second prayer sought an indemnity in respect of future losses which may have been owing to the Respondent and finally sought the costs of the case again on an indemnity basis pursuant to clause 2 (a) of the contract. Clauses 1 and 2 of the contract were quite clear in that the Applicant/ Judgment Debtor indemnified the Respondent against all losses, liabilities, claims or expenses for or in respect of injury (including death), loss or damage to persons or property which may arise from any cause whatsoever out of or in connection with the supply of services to the Respondent. I detail such in full so as to show that the Judgment sum in the English Superior Court did not include the payment of monies by way of exemplary, punitive or multiple damages. Accordingly, I find that section 3 (3) (b) of the Act does not apply to this Application before Court."***

25. With respect, we find no valid reason to differ from the appreciation of the documents made available to the trial court or the assessment and conclusions reached thereon. The foundation of the foreign judgment was a contract made between the appellant and the respondent here, and there were no other parties to it. It was the interpretation of that contract that engaged the English courts, both at the trial and the appeal stages. The full judgments of those courts are part of the record of appeal and we are able to verify that the issue that engaged the English courts, even before the quantum of the loss claimed by Cosmos was assessed, was the construction of the indemnity clause in the contract.

26. **Grenell, J.** reproduced the contentious indemnity clause ***[Clause 2 (a)]*** which stated as follows:-

> ***"Throughout the period of contract the Hotelier warrants and guarantees as follows: (a) that the design, installation, structure and contents of the Hotel and its furnishings and the services and goods supplied at the Hotel comply with all applicable national and local laws, decrees, regulations and codes of recommended practice (including those promulgated by trade associations of which the Hotelier is a member) relating to hygiene, fire and general safety of those using the Hotel or any of its amenities. The Hotelier shall indemnify and keep indemnified Cosmos all losses, liabilities, claims or expenses for or in respect of injury (including death) loss or damage to persons or property which may arise from any cause whatsoever out of or in connection with the supply of services to Cosmos (excluding the negligence or default of Cosmos, its servants or agents but including any failure on the Hotelier's part to comply with the laws, decrees, regulations and codes of recommended practice referred to above)."***

27. The contention by Cosmos was that the clause created an indemnity extending beyond events at the Hotel whereas Dhanjal contended that it was limited to events at the hotel. The learned Judge then framed and determined four issues as follows:

> ***"(i) Does clause 2(a) extend to the Camp where the attack took place and does it entitle Cosmos to indemnity with respect to the liability of the consumers ('the construction issue')? Yes.***
>
> ***ii. Is that clause an onerous and unusual contract clause such that it should be incorporated into the contract? No.***
>
> ***iii. Was Cosmos' decision to settle the claims of the consumers, in principle, a reasonable one and was it made in good faith?***
>
> ***('the reasonableness issue') Yes. I am satisfied that I should determine reasonableness as to settlement without having any regard to quantum.***
>
> ***iv. Has Cosmos' claim been the subject of a compromise agreement? ('the compromise issue') No.***

28. The Court of Appeal re-examined those issues at the behest of Dhanjal and unanimously dismissed the appeal. Thereafter the matter proceeded to assessment of the losses claimed under the contract. In our view, the reference made to injuries suffered by the tourists was merely part of the matrix or, put loosely, part of the *res gestae* in the case. It did not detract from the cause of action pleaded in the Claim Form, which was indemnity under the contract.

29. The next two issues invoking ***Sections 4 (1) (i)*** and ***(g)*** carried forward the contention that the claim was based on personal injuries and therefore, by dint of the two sections there was no jurisdiction on the part of the English courts to deal with it since the cause of action wholly arose in Kenya. In rejecting the same contention, the trial court reasoned as follows:-

> ***"As I understood it, what the Applicant/Judgment Debtor meant by its submission was that the English Court had no jurisdiction to decide upon the action brought in England by the injured tourists as against the Respondent herein for injuries and damage suffered in the said raid at the Elephant Camp as aforesaid. That could well be the case if it was the suit the Judgment in which was being registered here. Quite clearly from the suit whose Judgment has been registered here, the subject matter had nothing to do with personal injuries or damages in relation to the said tourists. That was a separate suit. It may be that as a result of that suit, the Respondent herein was seeking indemnification for the damages awarded against it. As a consequence, the injury or damage suffered by the Respondent was attained in England which is where it had to pay out monies to settle the tourists' claim against it. Accordingly, I do not find that section 4 (1) (i) of the Act applies in the present circumstances."***

30. Once again, we respectfully defer to that reasoning. The rejection of the contention is a logical follow up of the rejection of the earlier contention that the decree registered in Kenya arose from a suit relating to personal injuries.

31. Finally, as regards the exclusive jurisdiction clause which both parties subscribed to and is now sought to be impeached, we agree with the submissions of counsel for the respondent that contractual terms, lawfully and freely entered into by parties, deserve the respect of the courts. As this Court stated in the case of ***National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR:***

> ***"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved".***

As regards exclusive jurisdiction clauses, **Madan, JA** (as he then was) in the ***United India Insurance Co. Ltd*** case (supra) stated it more succinctly, thus:

> ***"The courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the courts of some other country. The exclusive jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement."***

> ***"Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. There must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure "per Cairn, L J in the Makefjell [1976] 2 Lloyd's Law Reports, Part 1, 29 at p 34."*** [Emphasis added].

33. There was no coercion, fraud or undue influence pleaded or proved in this matter and we must therefore find that the exclusive jurisdiction clause was valid and enforceable. The authorities cited by the appellant in support of a contrary view are clearly distinguishable. The appellant freely submitted to the foreign jurisdiction and actively participated in the litigation. There was neither protest nor disengagement from the foreign process. Perhaps that could have availed the appellant some modicum of favourable consideration as did the appellant in ***Re: Dulles Settlement (No. 2) Dulles vs Vidler [1951] 1 CH 842,*** where Denning L. J said:

> ***"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".***

34. We now turn to the second main issue in the appeal, and that is *res judicata.* The basic contention by the appellant is that the facts relating to enforcement of the foreign judgment were directly in issue in the petition which was rejected as unenforceable by Njagi, J. on 28th June, 2011. The amount sought to be recovered was the same, the parties were the same, the foreign judgment was the same, and the issue in both matters was enforcement of the foreign judgment. In urging that issue Mr. Buti relied on the decision of this Court in the case of ***Mburu Kinyua vs Gachini Tuti (1978) KLR. 69.*** He criticized the trial court for relying on the dicta of Madan, JA in that case which was a dissenting one, but ironically cited the same dicta which was derived from **Wigram V-C, in** ***Henderson vs Henderson (1843) 67 E R 313, 319,*** stating:-

> ***"……..where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence or even accident omitted part of their case."***

35. Counsel submitted that the facts giving rise to the foreign judgment were known to the respondent and the question of registration of the judgment was exhaustively canvassed; the respondent contending that the issue of registration was discretionary while the appellant insisted it was mandatory, and the court agreed with the appellant. On authority therefore, concluded counsel, the second application for registration

of the foreign judgment was *res judicata*.

36. In response, Mr. Fraser contended that it was necessary, before considering the issue, to identify the issue which Njagi, J. heard and determined. According to him, there was only one issue identified and spelt out by Njagi, J. in the petition, and that was whether the registration of the English judgment was discretionary or obligatory. The issue was determined by holding that registration was necessary under ***section 5 (1)*** of the Act before the judgment can be enforced. Counsel, however, observed that the learned Judge did not dismiss the petition, but only struck it out, being of the view that the petitioner had six years within which to register the judgment and the period had not expired. The court was clearly anticipating an application for registration of the judgment which is what the respondent ultimately did successfully.

37. Turning to the ***Mburu Kinyua case,*** counsel submitted that it was not helpful to the appellant. That is because the petition was concerned with whether the appellant was insolvent and should be liquidated. The appellant opposed the petition on the basis that the foreign judgment was not evidence of indebtedness unless it was registered in Kenya. There was no scope therefore for raising the prayer for registration because both processes are separate and distinct statutory jurisdictions. Registration could not have been sought in winding up proceedings. Counsel was finally of the view that the appellant was merely abusing the process of the court in raising technicalities in order to delay payment of the debt. He wondered how the appellant could have sought the striking out of the petition for want of registration of the foreign judgment while at the same time arguing that the respondent cannot apply for registration, the very thing the appellant said had to be done.

38. We have considered the issue, the submissions of counsel and the law. In rejecting the issue of *res judicata*, the trial court was not clear about the reasons. But it found that the most important consideration was to identify the issue decided by Njagi, J. in the first suit; that the main objection taken by the appellant to the petition was that it was not based on a registered judgment; that the issue identified and decided on by Njagi, J. was based on the objection raised by the appellant; and that matters subsequently raised in the application for setting aside the registration of judgment were not before Njagi, J. *Res judicata* did not therefore lie.

39. We may restate the doctrine of *res judicata* as it applies in Kenya and the principles applicable. It is embodied in ***Section 7*** of the **Civil Procedure Act** which provides as follows:-

> ***"No court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

40. As Waki, JA stated in the case of ***Ukay Estate Ltd & Another vs Shah Hirji Manek Ltd & 2 Others [2006] eKLR***,*:*

> ***"The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause."***

41. The doctrine also applies to applications. If it were not so, as discussed in the case of ***Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others [1996] eKLR:***

> ***"...the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our Civil Procedure Act caters for."***

42. The ***Uhuru Highway Development Limited*** case (supra) also distilled four elements that must be present before a defence of *res judicata* can be relied on, thus:-

> *(i.) A previous suit in which the matter was in issue.*
>
> *(ii.) The parties were the same or litigating under the same title.*
>
> *(iii.) A competent court heard the matter in issue and determined it.*
>
> *(iv.) The issue has been raised once again in a fresh suit.*

43. Finally, as explained in the case of ***Pop-in (Kenya) Ltd & 3 Others vs Habib Bank AG Zürich (1990) KLR 609***:

> ***"…. The plea of res judicata applies not only to points which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."***

This is essentially a reflection of 'Explanation 4' of ***Section 7*** (supra) which states:

> ***"Any matter which might and ought to have been made a ground of defence or attack in such a former suit shall be deemed to have been a matter directly and substantially in issue in such suit."***

44. Applying those principles, it is our view that although the petition and the application for registration of the foreign judgment involved the same parties litigating under the same titles, and the issue of registration of the foreign judgment arose before Njagi, J., nevertheless, it can hardly be said that the issue was decided with finality and that the subsequent application for registration of the foreign judgment was barred by the doctrine of *res judicata*. In the first place, the issue arose in the first matter by way of an objection taken by the appellant that the petition was bad in law for want of registration of the foreign judgment. The objection was upheld and the petition was struck out but not dismissed on merits.

45. We may reproduce the ruling of Njagi, J. on the issue:-

> ***"In the absence of registration of such a judgment in the High Court of Kenya, it would be difficult for anyone to be certain that any such debt exists. Before Section 220 of the Companies Act can be invoked, it is imperative that the existence of a debt be established and this, in my view, is the more reason why registration of such a judgment is required. Registration gives such a judgment the seal of approval as a judgment enforceable within the Kenyan jurisdiction since under Section 8 (1) of the Foreign Judgments (Reciprocal Enforcement Act), such a registered judgment bears "… the same force and effect as a judgment of the High Court entered at the date of registration". The corollary is that unless the Foreign Judgment is registered under Section 5(1) of the aforesaid Act, it does not bear the same force and effect as a judgment of the High Court.***
>
> ***As such, it is not enforceable. As the judgment at Leeds has not been registered in this Country, I find that the applicant has made out a prima facie case for the grant of an injunction in terms of Prayer (d) for lack of compliance with the explicit provisions of Section 5 (1) of the Foreign Judgments (Reciprocal Enforcement) Act".***

47. So that, the filing of the petition was found to have been premature and the respondent suffered the costs of its rash action. The striking out of the petition did not, however, affect the right of the respondent to invoke the law to have the foreign judgment registered. Indeed, Njagi, J. whose ruling has not been challenged, stated as much in the penultimate paragraph deciding whether to dismiss or strike out the petition, thus:

> ***"I think that it would be premature and unfair to dismiss the petition as Section (1) of the Foreign Judgments (Reciprocal Enforcement) Act gives a judgment creditor six years within which to register such a judgment. Since the judgment sought to be enforced was entered in August 2009, the creditor still has sufficient time to apply for registration of the said judgment and take up the matter from there.***
>
> ***For the above reasons, the petition herein is hereby struck out with costs to the Company."***

48. In sum, there was no finality in the decision made on the petition with respect to the issue of registration of the foreign judgment and we cannot in the circumstances make the finding that it was *res judicata*. As was stated in the case of ***Keshavji Ramji Ladha vs Bank of Credit and Commerce International –SA (BCCI), Civil Appeal No. 44 of 2004***:

> ***"It is now trite in civil litigation in this jurisdiction that a judgment of whatever nature, whether foreign or otherwise, is good until otherwise declared. But it is not in its form as a judgment per se that it is capable of being enforced. It has to take the shape of another procedural document before it can reach any execution stage".***

The foreign judgment remained alive despite the decision of the court in the petition. We so find.

49. The upshot is that this appeal has no merits and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 27th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR