IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, J. MOHAMMED & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL 147 OF 2009

BETWEEN

JAYESH HASMUKH SHAH……...……..…… APPELLANT

AND

NAVIN HARIA……..…….…...…. 1ST RESPONDENT

MANU SHAH …….....…….. 2ND RESPONDENT

(An appeal from the Ruling/Order of the High Court of Kenya at Nairobi (Sitati, J.) dated 27th January, 2009

in

H.C.C.C No. 488 of 2007)

****

JUDGMENT OF THE COURT

1. Enforcement of foreign judgments in Kenya is the subject of ***The Foreign Judgments (Reciprocal Enforcement) Act (Cap 43 of the Laws of Kenya).***

   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.

2. This appeal relates to enforceability in Kenya of foreign judgments from non-designated countries.

The appellant seeks to enforce and execute in Kenya a judgment from Ethiopia which is not a designated country under the provisions of ***Foreign Judgments (Reciprocal Enforcement) Act (Cap 43 of the Laws of Kenya).***

3. The relevant facts to this appeal are that on or about 7th November, 2001, the appellant filed suit in the ***Federal High Court of Ethiopia Case No. 11659,*** against the two respondents herein and a company incorporated in Ethiopia known as Shoewind Company. The appellant made a liquidated claim of US dollars Two Hundred and Fifty Thousand (US $ 250,000/=) plus costs and interest thereon. The Ethiopian High Court dismissed the suit. On appeal, the Federal Supreme Court of Ethiopia, in a judgment delivered on 17th January, 2005, allowed the appeal and entered judgment in favour of the appellant against the respondents and Shoewind Company in the sum of US $ 250,000/= . The respondents and Shoewind Company have failed to satisfy the judgment in Ethiopia and the appellant is seeking to enforce and execute the judgment in Kenya. The total decretal sum in Ethiopian currency is Birr 4,839,161/40. *(Four Million Eight Hundred and Thirty Nine One Hundred and Sixty One Thousand and Forty)*.

4. The appellant correctly appreciating that Ethiopia is not a designated country under Kenya's ***Foreign Judgment (Reciprocal Enforcement), Act*** filed a Plaint against the respondents at the High Court of Kenya in Nairobi as ***Nairobi HC Civil Case No. 488 of 2007***. In the Plaint, the appellant claimed against the respondents the sum of Kenya Shillings Thirty Six Million One Hundred and Ninety One Thousand Six Hundred and Four *(Ksh. 36,191,604/=)* being the equivalent of Ethiopian Birr 4,839,161/40 at the exchange rate of 1 Ethiopian Birr = Ksh. 7.4789 prevailing on 31st May, 2007.

5. The respondents filed a statement of defence averring that Kenya has no reciprocal enforcement agreement with Ethiopia and as such, the foreign judgment from Ethiopia was not recognizable and enforceable in Kenya; the respondents denied receiving any loan from the appellant and if at all any such loan was received, the same was time barred as the suit should have been filed within six years after due date of payment. Of relevance to this appeal is paragraph 6 of the defence wherein the respondents contend as follows:

a. ***that the Ethiopian legal system is different from the Kenyan legal system;***

b. ***Ethiopia is not a member of the commonwealth and hence shares little with Kenya in its legal system;***

c. ***the finding of the Federal Supreme Court of Ethiopia is against the commonwealth laws of distinctiveness of a limited liability company from its shareholders;***

d. ***the two jurisdictions have not signed a foreign judgment enforcement treaty and the said Ethiopian judgment is irrelevant and inapplicable and that the judgment was obtained under doubtful circumstances and its veracity must be scrutinized by the Kenyan courts;***

e. ***that the Ethiopian judgment cannot be relied upon as a cause of action;***

f. ***That the jurisdiction of the Kenyan courts is denied as the alleged advancement of loan was done in Ethiopia under Ethiopian laws and outside the jurisdiction of Kenyan courts***.

6. Upon being served with the statement of defence, the appellant by way of Notice of Motion dated 12th July, 2007, applied for summary judgment in the sum of Ksh. 36,191,604/= against the respondents under the then ***Order XXXV Rule 1*** of the ***Civil Procedure Rules***. The application was grounded on the judgment of the Federal Supreme Court of Ethiopia.

7. The respondents in a replying affidavit denied borrowing any monies from the appellant in Ethiopia and averred that the judgment from Ethiopia cannot be enforced in Kenya and or relied

unquestionably because Kenya and Ethiopia have not entered into a foreign judgment reciprocal enforcement treaty; that the defence raises triable issues that can only be determined by *viva voce* evidence and cross examination of witnesses.

8. Upon hearing the parties, the trial judge dismissed the appellant's application for summary judgment. In dismissing the application, the judge at Paragraph 19 of the Ruling expressed as follows:

"It is worth noting that at this stage, I have only an application seeking summary judgment. The guiding principle here is whether the defence case is so hopeless that there would be no need for the court to waste anymore judicial time on it. I think that after hearing both sides in this matter, I am of the view that the defendants have raised pertinent issues that must be determined by way of viva voce evidence. The issue of reciprocity of enforcement of the Ethiopian judgment has arisen; the defence also alleges that the Ethiopian judgment was not made by a court of competent jurisdiction and further that there was fraud on the part of the plaintiff while pursuing his claim in Ethiopian court. In my view, these are weighty issues which the court cannot deal with under summary judgment when the defence raises so many triable issues…In the instant case; I think that there is more than one triable issue raised by the defendants in their statement of defence. I therefore find and hold that the defendants ought to be heard at a full trial…I find and hold that the Plaintiff's application lacks merit and is dismissed in its entirety with costs to the defendants".

9. Aggrieved by the Ruling, the appellant has lodged the instant appeal citing the following grounds of appeal:

i. ***that the learned judge erred in dismissing with costs the appellant's application for summary judgment;***

ii. ***the judge erred in holding that the respondents had raised triable issues in their defence and that they had raised pertinent issues requiring viva voce evidence;***

iii. ***the judge erred in holding that the defence had raised weighty issues which the court could not deal with under summary procedure;***

iv. ***the judge erred in holding that a full trial should be conducted.***

10. During hearing, learned counsel Mrs. Manras Pallan held brief for learned counsel Sandeep Saruia for the appellant. Despite service of hearing notice, there was no appearance by the respondents. Pursuant to prior directions by this Court, all parties had filed written submissions.

11. The appellant submitted that under English common law, which is the applicable law in Kenya, a judgment of a competent foreign court condemning a party to pay a certain sum constitutes a good cause of action and is regarded as creating a debt in respect of which a suit may be filed; that this position is supported in Kenya by the decisions in ***Mohamedali Mulla Ebramji -v- Alibhai Jivanji Mamuji, (1917) Vol. VII EALR 89 and Nagina Singh t/a Tarlochan Singh s/o Boor Singh (1936) Vol. XVII KLR 82***.

12. Counsel submitted that the contention that ***Section 17 (1)*** as read with ***Section 3 (1) (a)*** of the ***Foreign Judgments (Reciprocal Enforcement) Act*** outlawed the common law position in Kenya is incorrect; that what is outlawed are proceedings founded on foreign judgments that are registrable under the ***Act***; that where there is a foreign judgment to which the ***Act*** applies and which is registrable, the only proceedings that can validly be brought in respect of that judgment are those seeking its registration or execution under the ***Act***; that the Ethiopian judgment is from a non-reciprocating country and the Foreign Judgment *(Reciprocal Enforcement)*

Act is inapplicable.

13. Counsel for the appellant quoted the *"Text Book of the English Conflict of Laws, Private International Law"*, 2nd edition at page 438 wherein it is stated:

"It has been seen that at common law, the only method of giving affirmative effect to a foreign judgment in the English jurisdiction is to institute an English action upon the foreign judgment in order to obtain a judgment upon a judgment. This procedure is in practice not as cumbrous as it would appear to be since, owing to the conclusive effect normally produced by a foreign judgment, a limited number of defences only is admitted".

14. The appellant submitted that failure by the Ethiopian Supreme Court to apply the doctrine of separate corporate legal personality does not bring the Ethiopian judgment within the exceptions laid down in ***Section 9 of the Civil Procedure Act (Cap 21, Laws of Kenya)***; that the concept and principle of separate legal personality is not an issue of international law; it was submitted that the respondent by raising the issue of distinct corporate personality was urging Kenyan courts to examine the merits of the Ethiopian judgment which is contrary to law. Counsel submitted that a foreign judgment cannot be impeached on its merits and it is not open for the High Court of Kenya to examine the merits or otherwise of the Ethiopian judgment; that the merits of the Ethiopian judgment are *res judicata* under ***Section 7*** of the ***Kenyan Civil Procedure Act***.

15. The appellant submitted that the trial court erred in finding that fraud was a triable issue when the same had neither been raised in any pleading nor in the affidavit of the parties; that the passing mention of fraud in the respondent's replying affidavit was an afterthought and mere mention of fraud was not sufficient to raise a triable issue. The appellant emphasized that both respondents submitted to the jurisdiction of the Ethiopian Court and appeared and testified on their own behalf before the Ethiopian Federal High Court; it was submitted that the Ethiopian judgment was not contrary to Kenyan law; that the appellant's suit was not time barred in Kenya as the Ethiopian Federal Supreme Court delivered its judgment on 17th January, 2005, and the present suit was filed on 19th June, 2007; that the limitation period on actions founded on judgments is 12 years as per ***Section 4 (4) of the Kenya Limitation of Actions Act***.

16. The respondents in their written submissions urged that ***Section 3 (1) of the Judicature Act*** was not relevant as Kenyan Courts have no jurisdiction to hear and make determination on foreign judgments from non-designated countries; that the decisions in ***Mohamedali Mulla Ebramji -v- Alibhai Jivanji Mamuji*** and ***Nagina Singh t/a Tarlochan Singh s/o Boor Singh,*** cited by the appellant were made in 1917 and 1936 before the Kenya ***Foreign Judgment (Reciprocal Enforcement) Act , Cap 43, Laws of Kenya***, was enacted and whose effective date is 31st August, 1984. The respondents contend that the Ethiopian foreign judgment the subject of this appeal does not conform to ***Section 9 of the Civil Procedure Act*** as it was not given by a court of competent jurisdiction; that it was obtained by fraud and had been lodged against the provisions of the Kenya ***Companies Act (Cap 486, Laws of Kenya)*** that recognizes limited liability companies as separate and distinct from its shareholders.

17. The respondents submitted that the Kenyan learned judge did not err in finding that there were triable issues raised in the defence. Citing the case of ***Postal Corporation of Kenya -v- Inamdar & 2 Others, (2004) KLR 359,*** the respondents submitted that among the principles applicable in an application for summary judgment is that if the evidence filed by a defendant raises even one *bona fide* triable issue, then the defendant must be given leave to defend. It was submitted that the defence filed before the trial court discloses several triable issues as pleaded in paragraph 6 *inter alia* whether the Ethiopian Courts correctly applied international law on distinctiveness of a limited liability company from its shareholders; whether the Ethiopian judgment was obtained by fraud; whether the foreign judgment sought to be enforced is time barred and whether the Ethiopian judgment goes against the known Kenya laws.

18. We have considered the written submissions by the parties, the authorities cited and oral submission by counsel for the appellant. This is an interlocutory appeal where the trial court ordered that the suit between the parties should proceed to full trial.

19. The pertinent issue in this appeal is what is Kenya law on enforceability of foreign judgments from non-designated countries and what is the procedure for enforcement of foreign judgments from non-designated countries? In ***Keshavji Ramji Ladha -v- Bank of Credit and Commerce International – SA (BCCI), Civil Appeal No. 44 of 2004***, this Court expressed:

"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".

20. Pursuant to ***Section 3*** of the ***Judicature Act, (Cap 8, Laws of Kenya)*** the jurisdiction of the High Court of Kenya is exercised *inter alia* in conformity with the Constitution, all other written laws and subject to certain qualifications, the substance of common law of England. In the High Court of Kenya, a judgment of a foreign court which is a *"designated court"* of a reciprocating *"designated country"* is capable of registration in Kenya and is enforceable as a High Court of Kenya judgment.

21. There is currently no treaty in place between Kenya and Ethiopia pursuant to which either country's judgment may be enforced by either country's courts. It is not in dispute that Ethiopia's Federal Supreme Court is not a "designated court" within the meaning of Kenya's ***Foreign Judgment (Reciprocal Enforcement) Act***. The respondent cited the case of ***Intalframe Ltd -v- Mediterranean Shipping Company, (1986) KLR*** where this Court expressed that the basic principle upon which neighbouring or other states provided for enforcement of foreign judgments is one of reciprocity. It is our considered view that the case of ***Intalframe Ltd -v- Mediterranean Shipping Company, (supra)*** and the Foreign Judgment ***(Reciprocal Enforcement) Act (Cap 43, Laws of Kenya)*** are not relevant to this appeal as they are applicable only where there is reciprocal arrangement on enforcement of foreign judgments.

22. In the absence of a reciprocal enforcement arrangement, a foreign judgment is enforceable in Kenya as a claim in common law. The common law principles on enforcement of foreign judgments were extensively elaborated in the case of ***Adams & Others – v- Cape Industrials PLC, (1990) Ch. 433***. The principles are:

a. ***Where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. (See Park B. in Williams – v-Jones (1845) 13 M. & W. 628,633 as quoted in Adams & Others – v- Cape Industrials PLC, (1990) Ch. 433 at 513.***

b. ***In deciding whether the foreign court was one of competent jurisdiction, courts will apply not the law of the foreign court itself but English rules of private international law. The competence of the foreign court is competence of the court in an international sense – i.e. its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not material. (See Lindley M.R. in Pemberton –v- Hughes, (1899) 1 Ch. 781,791).***

c. ***In Emanuel – v- Symon, (1908) 1 KB 302, Buckley L.J. said that in actions in personam there are five cases in which the courts of England will enforce a foreign judgment. These are: (i) where the defendant is a subject of the foreign country in which the judgment was obtained; (ii) where he was resident in the foreign country when the action began; (iii) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued;***

iv. ***where the defendant has voluntarily appeared and (v) where the defendant has contracted to submit himself to the forum in which the judgment was obtained.***

d. ***If a foreign judgment is to be enforced against a corporation, it must be shown that at the relevant time, the corporation was carrying on business and it was doing so at a definite and to***

some reasonable extent, permanent place in the foreign country. (See Adams & Others – v-Cape Industrials PLC, (1990) Ch. 433 at 512).

e. ***It is only the judgment of a foreign court recognized as competent by English law which will give rise to an obligation on the part of the defendant to obey it. The onus is on the plaintiff seeking to enforce the foreign judgment to prove the competence of such court to assume jurisdiction; the evidentiary burden may shift during trial. (See Adams & Others – v-Cape Industrials PLC, (1990) Ch. 433 at 550).***

f. ***The principle that a foreign court has jurisdiction to give an in personam judgment if the judgment debtor, the defendant in the foreign court, submitted to the jurisdiction of the foreign court is well settled.***

g. ***A foreign judgment obtained in circumstances that are contrary to natural justice does not give rise to any obligation of obedience enforceable at common law.***

h. ***If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter in which it is competent to deal, English courts will never investigate the propriety of the proceedings in the foreign court, unless they offend substantial justice. Where no substantial justice is offended, all that the English court shall look into is the finality of the judgment and the competence of the foreign court to entertain the sort of case which it did deal with and its competence to require the defendant to appear before it. (See Pemberton –v- Hughes, (1899) 1 Ch 781,790-791 as per Lindley M.R). Mere procedural irregularity, on the part of the foreign court according to its own rules, is not a ground of defence to enforcement of the foreign judgment. (See Adams & others – v- Cape Industrials PLC, (1990) Ch. 433 at 567).***

i. ***A defendant, shown to have been subject to the jurisdiction of a foreign court, cannot seek to persuade English court to examine the correctness of the judgment whether on the facts or as to the application by the foreign court of its own law. A foreign judgment is not impeachable merely because it is manifestly wrong. (See Goddard – v- Gray, L.R. 6 Q.B. 139).***

j. ***A judgment of a foreign court having jurisdiction over the parties and subject matter – i.e. having jurisdiction to summon the defendants before it and to decide such matters as it has decided – cannot be impeached on merits but can be impeached if the proceedings, the method by which the court comes to a final decision, are contrary to English views of substantial justice.***

23. Adopting the foregoing common law principles *mutatis mutandis* and taking into account the provisions of ***Section 9*** of ***Civil Procedure Act (Cap 21 Laws of Kenya)***, to enforce a foreign judgment in Kenya from a non-designated country, the following requirements must be fulfilled:

a. ***A party must file a plaint at the High Court of Kenya providing a concise statement of the nature of the claim, claiming the amount of the judgment debt, supported by a verifying affidavit, list of witnesses and bundle of documents intended to be relied upon. A certified copy of the foreign judgment should be exhibited to the Plaint.***

b. ***It is open to a defendant to challenge the validity of the foreign judgment under the grounds set out in Section 9 of the Civil Procedure Act.***

c. ***A judgment creditor is entitled to summary judgment under Order 36 unless the defendant judgment debtor can satisfy the Court that there is a real prospect of establishing at trial one of the grounds set out in Section 9 of the Civil Procedure Act.***

d. ***If the foreign judgment creditor is successful after trial, the judgment creditor will have the benefit of a High Court judgment and the judgment creditor will be entitled to use the procedures of the Kenyan courts to enforce the foreign judgment which will now be executed as***

a Kenyan judgment.

e. ***The money judgment in the foreign judgment must be final and conclusive. It may be final and conclusive even though it is subject to an appeal. Under Section 9 of the Civil Procedure Act, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title except:***

i. ***where it has not been pronounced by a court of competent jurisdiction;***

ii. ***where it has not been given on the merits of the case;***

iii. ***where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;***

iv. ***where the proceedings in which the judgment was obtained are opposed to natural justice;***

v. ***where it has been obtained by fraud; or***

vi. ***where it sustains a claim founded on a breach of any law in force in Kenya.***

f. ***Under Section 4 (4) of the Limitation of Actions Act, (Cap 22 of the Laws of Kenya) an action for enforcement of a foreign judgment must be brought in Kenya within 12 years of the date of that judgment.***

g. ***The foreign court must have had jurisdiction, (according to the Kenyan rules on conflict of laws) to determine the subject matter of the dispute and the parties to the foreign court's judgment and the enforcement proceedings must be the same or must derive their title from the original parties.***

h. ***The Kenya High Court will generally consider the foreign court to have had jurisdiction where the person against whom the judgment was given:***

i. ***Was, at the time the proceedings were commenced, habitually resident or incorporated in or having a principal place of business in the foreign jurisdiction or***

ii. ***Was the claimant or counterclaimant in the foreign proceedings or***

iii. ***Submitted to the jurisdiction of the foreign court or***

iv. ***Agreed, before commencement, in respect of the subject matter of the proceedings to submit to the jurisdiction of the foreign court.***

v. ***Where the above requirements are established to the satisfaction of the Kenya High Court, the High Court will not re-examine the merits of the foreign court judgment. The foreign judgment will be enforced on the basis that the defendant has a legal obligation as a matter of common law, recognized by the High Court, to satisfy the money decree of the foreign judgment.***

24. In further illustration of the procedure outlined above, see the 2014 text of ***Memorandum of Guidance between the Dubai International Financial Centre Courts and the High Court of Kenya, Commercial & Admiralty Division***.

25. A relevant comparative judicial decision is the Uganda case of ***Christopher Sales & Another -v- The Attorney General, Uganda HCCC No. 91 of 2011***. The plaintiff in the Uganda case brought action against the defendant by way of plaint for a declaration that the judgment entered by the

Southern District of New York (US District Court vide ***Christopher Sales & Carol Sales -v-The Republic of Uganda & Apollo K. Kironde),*** against compensation to the first plaintiff in the sum of US $ 1,891,607.76 and US $ 245,637.50 as compensation to the 2nd plaintiff be enforced in Uganda. The case was heard in the United States and judgment was entered in the United States of America (USA) against The Attorney General of Uganda.

26. The plaintiff instituted a suit in Uganda to enforce and execute the USA judgment in Uganda. During hearing, the respondent contended that the USA foreign judgment was not only unenforceable but also un-registrable in Uganda by virtue of the ***Foreign Judgments (Reciprocal Enforcement) Act (Cap 9, Laws of Uganda).*** It was also contended that enforcement of the USA foreign judgment was time barred under the Uganda Limitations Act. In dismissing the contentions, the High Court of Uganda expressed as follows:

"The issue that is raised here is not one of reciprocity because quite clearly, there are no reciprocal arrangements between Uganda and the USA. The question raised is as to what a judgment debtor who is "stranded" with a judgment from a country with no reciprocal arrangements with Uganda, like in this case, is supposed to do with the judgment. What is he supposed to do to enforce it if at all? In the case of Hilton –v – Guyot, 159 US 113 (1895) cited by counsel for the plaintiff, the Supreme Court of the USA based its consideration on the notion of international comity and in the words of the Court at pages 163-164 and 202-203, it is stated:

'Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and good will, on the other; it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.…We are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting a trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it is sitting, or fraud in procuring the judgment, or any other special reason why the country of this nation should not allow its full effect, the merits of the case should not, in an action brought in this country upon the judgment be tried afresh, as on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.' "

27. The learned Justice Eldad Mwangusya of Uganda High Court while endorsing and adopting the dicta in ***Hilton –v – Guyot, 159 US 113 (1895***) directed enforcement of the USA judgment in Uganda and expressed as follows:

"The judicial system under which the case was tried is beyond reproach. A judgment creditor armed with such a judgment should be allowed to realize the fruits of his judgment which should be afforded recognition by our courts in absence of a reciprocal arrangement. This court grants him the prayer that the judgment is enforceable in Uganda..."

28. We now apply the fore-tasted common law principles and ***Section 9*** of the ***Kenya Civil Procedure Act,*** to the grounds of appeal urged in this matter in light of the appellant's application for summary judgment before the trial court. Case law has crystallized the parameters within which a relief of summary Judgment can either be granted or withheld. In the case of ***Osodo - v- Barclays Bank International Limited, (1981) KLR 30*** it was held *inter*

alia that:-

"Where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionality."

29. In the case of ***Magunga General Stores - v- Pepco Distributors Limited*** ***(1987) 2 KAR 89***, this Court held *inter alia* that:

"An appellate court will not interfere with a trial Judges' exercise of his/her discretion on an application for summary Judgment unless the exercise was wrong in principle or that the Judge acted wrongly on the facts."

See also the case of Nairobi Golf Hotels (Kenya)

Limited Civil Appeal No. 5 of 1997 (UR) wherein this Court made observations that:

'it is now trite that in applications for summary judgment…, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty is however limited to showing prima facie the existence of bona fide triable issue or that he has an arguable case. On the other hand, it follows that a plaintiff who is able to show that a defence raised by a defendant … is shallow or a sham is entitled to summary judgment'".

30. The appellant's application for summary judgment was dismissed by the trial court. We have considered the averments in the plaint, Paragraphs 6 and 7of the defence, the appellant's Notice of Motion and the grounds and affidavit in support thereof, the replying affidavit and the ruling by the trial court. A defence which reveals contentious issues cannot be dismissed by way of summary judgment. While the purpose of proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim, when bona fide triable issues exist, parties must be allowed to defend that issue without condition. (See ***Attorney General versus Equip Agencies Ltd, [2006] eKLR)***.

31. We concur with the *dicta* in ***Commercial Advertising and General Agencies Ltd. -v-Qureishi, (1985) KLR 458*** where it was stated that on an application for summary judgment, the plaint, defence, counterclaim and reply to defence, if any, and affidavits in support and in reply as well as all relevant issues and circumstances are all proper material for consideration. We take cognizance of the *dicta* by Madan, J. in ***C.A. Civil Appeal No. 33 of 1977, B. Gupta -v- Continental Builders Limited,*** where he stated that if a defendant is able to raise a prima facie triable issue, he is entitled in law to defend.

32. The respondents defence at paragraph 6 raise issues germane to making a determination whether a foreign judgment from a non-designated country is enforceable in Kenya. The issues raised in paragraphs 6 and 7 of the statement of defence must be evaluated and considered in light of the provisions of ***Section 9*** of the ***Civil Procedure Act.*** The Section must be applied to determine if the Ethiopian foreign judgment is enforceable in Kenya. The issues of competence of the Ethiopian Court and alleged fraud in procurement of the Ethiopian judgment have been pleaded; the particulars of the alleged fraud have neither been pleaded in the defence nor in the replying affidavit. It is trite law that particulars of fraud must be pleaded. The trial court is to determine the legal effect of failure to pleaded particulars of fraud. In ***Mutsonga vs. Nyati, (1984) KLR 425, at pg 439***, this Court held that whether there is any evidence to support an allegation of fraud is a question of fact.

33. In light of the provisions of ***Section 9 of the Civil Procedure Act***, we arrive at the decision that the issues raised in paragraphs 6 and 7 of the defence cannot be determined by way of summary judgment where the foreign judgment is from a non-designated country. For this reason, we uphold the Ruling by the trial court dismissing the appellant's application for summary judgment. We affirm that the suit between the parties should proceed to full trial and direct that the common law principles outlined above on enforcement of foreign judgment as read with ***Section 9*** of the ***Civil Procedure Act*** should be applied in arriving at the final determination of the issues in this suit. For avoidance of doubt, we state that the High Court of Kenya pursuant to the provisions of ***Section 3*** of the ***Judicature Act*** and its original and unlimited civil jurisdiction provided in ***Article 165 (3) of the Constitution*** has jurisdiction to hear and determine any issue relating to

enforceability of foreign judgments from non-designated countries.

34. We find that this appeal has no merit and is hereby dismissed with no order as to costs as the respondent did not appear at the hearing.

Dated and delivered at Nairobi this 26th day of February, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

J. MOHAMMED

……..……

JUDGE OF APPEAL

J. OTIENO-ODEK

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR