



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE , MUSINGA & MURGOR - JJ.A)

CIVIL APPEAL NO. 44 OF 2004

BETWEEN

KESHAVJI RAMJI LADHA.....APPELLANT

AND

**BANK OF CREDIT AND COMMERCE INTERNATIONAL – SA
(BCCI)**

**(IN COMPULSORY
LIQUIDATION).....RESPONDENT**

(Appeal from an Order of the High Court of Kenya at Nairobi (Ibrahim, J) Dated 23rd September, 2003.

in

H.C. Bankruptcy Cause No. 9 of 2000

JUDGMENT OF THE COURT

The chain of events culminating in this appeal has its roots in a judgment dated, entered and or delivered in favour of the respondent as against the appellant on the 18th day of December, 1991 in the High Court of Justice, Queens Bench Division, England, by **Hon. Mr. Justice Popplewell** sitting at the Royal Court of Justice, Strand, London WC22LL in Civil Suit 1996B number 1744, between the respondent and the appellant.

On the 27th August, 1998, the respondent BCCI, then in compulsory liquidation, filed in the High Court of Kenya an application to register a foreign judgment under the Foreign Judgments Act Cap 43 Laws of Kenya. On the 30th September, 1998 the Foreign judgment was duly registered in the High Court of

Kenya (Milimani Commercial Court) in Civil Suit No. 413 of 1998 (OS) in line with the provisions of the registration of Foreign Judgments Act (supra). On the 19th day of October, 1998 it was made a judgment of the Court. On the 22nd day of April, 2000 the respondent allegedly appeared before **Hewett, J.** (as he then was), in the absence of the appellant and informed the learned judge that the matter therein had been concluded. In consequence of the aforesaid representations, the learned judge allegedly recorded that the matter had been settled.

Without extracting a decree from the said duly registered foreign judgment, the respondent moved to enforce the said foreign registered judgment against the appellant vide Nairobi H.C. Bankruptcy Cause No. 9 of 2000 dated 21st day of January, 2000 and amended on the 22nd day of May, 2001. The appellant was duly served with the said Bankruptcy cause No. 9 of 2000. The appellant entered appearance to the petition and before filing a response thereto presented an application by way of chamber summons dated 8th day of March, 2002 and filed on the 11th day of March, 2002, brought under order VI rule 13 of the Civil Procedure Rules, Sections 241(1) (a) and (c) and 401 of the Companies Act (cap 486) and all other enabling provisions of law. The following substantive reliefs were sought:-

1. ***That the petition herein be struck out with costs.***
2. ***That in the alternative the Honourable Court do order that security be given by the petitioner for the whole of the costs of the applicant***
3. ***That the Honourable Court stay any proceedings herein until the security is given.***
4. ***That the amount of security be fixed by this Honourable Court .***
5. ***That the costs of this application be provided for”***

The application was premised on the grounds set out in the body of the application and a supporting affidavit deposed by one **Keshavji Ramji Ladha**, the appellant. The application was opposed by a replying affidavit of one **John Parry Richards** of Westgate House, 9th Holborn, London EC1N2QQ in the United Kingdom which was deposed on the 18th day of February, 2003 and filed on a date not legible from the copy on the Court record.

Parties were heard on the merits of the said application resulting in the ruling of **Ibrahim, J.** (as he then was) of 23rd September, 2003 sought to be impugned herein vide which the appellant's application aforesaid was dismissed with costs to the respondents.

The appellant was aggrieved by the said dismissal order and preferred this appeal citing eight (8) grounds of appeal. On the hearing date the appellant elected to pursue only grounds 5, 6, 7 and 8 abandoning the rest. These read:-

“5. The learned judge erred in finding that the appellant cannot be prejudiced on the application for security for costs.

6. ***The learned Judge erred in finding that it would be “unfair” to make an order for security for costs against the respondent.***
7. ***The learned Judge erred in failing to exercise his discretion to order the respondent to provide security for costs as prayed. The learned judge erred in ordering the appellant to pay the respondents costs”***

On the merits of the appeal, the appellant contended that the claim against the appellant was in excess of Kshs. one hundred and fifty one million (Kshs. 151,000,000.00); no decree was ever extracted; no execution proceedings were set in motion as against the appellant save that the respondent filed Nairobi High Court Bankruptcy Petition Case No.9/2000 aforesaid, purporting to use it to enforce the foreign

registered judgment to which the appellant responded by presenting on 11th March, 2002 an application whose dismissal gave rise to this appeal.

It is the appellant's further argument that the learned trial judge fell into an error in withholding the relief sought from the appellant when the learned judge failed to appreciate that the proceedings where the appellant sought security for costs for were Bankruptcy proceedings; there was clear indication that the respondent was already in compulsory liquidation; in essence the respondent had collapsed and ceased being a viable entity. That is why it had been placed in compulsory liquidation by the Bank of England. In the circumstance, it was only prudent for the learned trial Judge to have found that the appellant was in the circumstances entitled to an order for security for costs. The appellant continued to argue that had the learned trial judge addressed his mind properly to the issues raised before him, he could have noted that no decree had been drawn; and no evidence of an attempt to execute had been laid before him. As such, there was no way the Foreign Judgment could have been through the Bankruptcy proceedings.

Further, the appellant contended that the learned trial judge failed to appreciate that the two competing interests could not in the circumstances have been treated as being equal as the respondent was adjudged bankrupt, while the appellant was an individual; the learned Judge should have realized that the appellant stood to be prejudiced if the Bankruptcy proceedings were to proceed to their finality without security for the appellant's costs, in the event that the said Bankruptcy proceedings did not ultimately succeed. Lastly, that the learned trial Judge fell into an error when he failed to appreciate that since the respondent was already in compulsory liquidation, any money resulting from the realization of the fruits of the foreign registered judgment would have gone to cushion the claims of the respondent's creditors, of whom the appellant was not one.

In response, the respondent opposed the appeal, urging us to uphold the learned trial judge's withholding of the order for security for costs from the appellant. It was the respondent's contention that the learned trial Judge could not be faulted in the exercise of his judicial discretion to withhold the said relief because, the judge rightly appreciated that there was a foreign registered judgment against the appellant in favour of the respondent; the amount involved of Kshs. one hundred and fifty one million (Kshs.151,000,000.00) was far much in excess of the figure of Kenya shillings Six Million, (Kshs.6,000,000.00) that the appellant was seeking as security for costs in the Bankruptcy Petition proceedings.

The respondent conceded that no decree was extracted by the respondent following the adoption of the foreign judgment by the High Court, but this notwithstanding, the learned trial judge was entitled to take into account the totality of the facts as displayed before him inclusive of all the documents tendered, and to arrive at the conclusion, as correctly reached, considering that there was no proof before him that the matter had been settled. The respondent also conceded that the secured creditors were naturally most likely to be ranked high in priority with regard to payment out of the sum forming the foreign registered judgment, nonetheless the existence of such a fact did not preclude the learned judge from weighing all the relevant factors as had been placed before him, and arriving at a reasonable conclusion as he did. To the respondent, they had a valid claim against the appellant as there is no dispute that the said sums of money were in fact owed to the respondent.

In response to the respondent's submissions, the appellant invited us to note that paragraph 8 of the respondent's replying affidavit had not been discussed by the respondents. Neither had the respondent explained by documentary proof the allegations deposed in their replying affidavit. Lastly that the respondent had failed to address the principal concern raised by the appellant, namely; that the respondent's liquidators are based in Britain, and any execution of an order for costs against them by the appellant should the Bankruptcy petition fail would have been an uphill task for the appellant. On that account, the appellant reiterated his earlier call that we should allow his appeal.

This being a first appeal, our mandate is as set out in **Article 164 (3)** of the Kenya Constitution 2010, **Section 78** of the Civil Procedure Act Cap 21 Laws of Kenya, Rule 29 (1) of the Court of Appeal Rules, that is, to re-appraise, re-assess and re-analyze the evidence and arrive at our own conclusions either way. See the case of ***Sumaria & another versus Allied Industries Limited [2007] 2KLR*** for the proposition

that on a first appeal the Court is obligated to reconsider the evidence, re-evaluate it and make its own conclusion, the only caveat being that in the discharge of its aforesaid mandate, (a) it should be slow in moving to interfere with finding of fact by a trial court unless it was based on no evidence, (b) it was based on a misapprehension of the evidence or the Judge has been shown demonstrably to have acted on a wrong principle in reaching the finding he did. See also the decision in the case of *Musera versus Mwechelesi & another [2007] 2KLR 159* wherein this Court reiterated that an appellate Court should be slow to interfere with the trial Judge's findings unless it was satisfied that either there was absolutely no evidence to support the findings or that the trial Judge had misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.

We have on our own revisited the entire record, re-evaluated, re-assessed and reanalyzed it in the light of the rival arguments set out above.

The factual base that the learned trial Judge had before him was that the respondent was in compulsory liquidation; the deponent of the replying affidavit to the appellant's application, **John Parry Richards**, was appointed a liquidator by the Secretary of State on 14th January 1992 pursuant to UK Insolvency Act, 1986, following the making of a winding up order of the petitioner by the High Court of Justice in England at the request of an applicant alleged to have been one of its creditors. The liquidator filed High Court Civil Case No.1996(B) on 30/1/1996 against the appellant who was alleged to have been one of the debtors of the respondent in the UK proceedings. The appellant neither entered appearance nor filed a defence in the said proceedings resulting in a judgment entered against the appellant on 18th December, 1997 for sterling pounds 1,261,04670 said to have been equivalent to Kshs. 151 million.

Following the entry of the aforesaid judgment the respondent filed an originating summons aforesaid in the High Court of Kenya at Milimani Commercial Courts pursuant to the Foreign Judgments (Reciprocal enforcement) Act (supra) seeking to register the judgment in Kenya for purposes of enforcement of the resulting decree against the appellant which judgment was registered on 30/9/1998.

The respondent allegedly gave notice to the appellant of the intended registration of the resulting Judgment thereby giving the appellant the right to challenge the intended registration but the appellant did not do so and in a bid to recover the decretal amount from the appellant, efforts were made to trace the appellant's assets in Kenya to no avail, hence, the presentation of the Bankruptcy petition as a form of execution of the then duly registered judgment as a decree. The appellant did not respond to the petition promptly. He did so two (2) years later when he filed the application subject of the ruling giving rise to this appeal.

Against the above factual base, the learned trial judge made observations on the case of either party as follows: with regard to the appellant, it is noted that he had argued that since it was not disputed that the respondent was in liquidation, it is (the respondent) who needed to have complied with the provisions of Section 241(1) (a) of the Companies Act Cap 486 by seeking the sanction of the Court before presenting the Bankruptcy petition against the appellant or defend any other proceedings in the name of the company; the respondent had not yet then obtained such sanction from the Court; since this requirement was mandatory, the respondent's Bankruptcy petition was an abuse of the due process of the Court, and should therefore have been dismissed and or struck out. In alternative to the foregoing, an order for security for costs be made and the Bankruptcy proceedings be stayed until the security for costs order terms were fully satisfied by the respondent, considering that the respondent had been placed in liquidation on the grounds of its inability to meet its liabilities. To the appellant, he had placed sufficient proof before the learned judge to demonstrate that the respondent would not be able to pay the appellant's costs should the bankruptcy proceedings fail.

Turning to the respondent's assertions, the learned trial judge made observation that the respondent had argued that since the winding up order had not been issued by the High Court in Kenya, the petitioner was under no legal obligation to obtain the sanction of the High Court here prior to commencing the Bankruptcy proceedings against the appellant; the Bankruptcy petition filed was filed properly and was part of the execution process of the judgment/Decree issued on the 18th December, 1997 by the High Court of Justice Queen's Bench Division in England the respondent claimed that the appellant at that time

held in their favour a sum of US\$.278.1 million which was equivalent to Kshs.20 billion and for this reason, it would be unreasonable and unjust to make the petitioner pay or deposit security for costs even if it was a foreign company considering that, the appellant had not challenged both the entry of the judgment against him in the High Court of Justice in London, and the entry of the registration of the judgment for purposes of enforcement against him in the High Court of Kenya.

Against the above, the learned trial Judge made findings on the competence of the Bankruptcy proceedings before him which we shall not go into for reasons that, as observed earlier on, all the grounds relating to this aspect of the appeal were abandoned. With regard to the alternative prayer for security for costs the learned Judge drew inspiration from the provision of Section 401 of the Companies Act Cap 486 as it was then which provided thus:-

“Where a limited company is plaintiff in any suit or other legal proceedings any judge, having jurisdiction in the matter, may if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given”

On the strength of the contents of the above provision the learned trial Judge delivered himself *inter alia* thus:-

“I think that the applicant may be entitled to make this application but he must meet the requirements or conditions stipulated therein. It is not enough that the company instituting the proceedings is a foreign company and has no known assets in the country although this is an important consideration.

I have considered the matters raised and in particular the effect of the registration of the Judgment against the debtor in Kenya for Kshs.151 million. The applicant herein did not challenge the registration of the said foreign judgment in Kenya. Having been registered, it is now a judgment of this Court. There is no appeal against the said judgment. Execution through other means have been unsuccessful as the petitioner cannot trace the applicants assets. The present proceedings are a mode of execution of the judgment whatever it will be worth. The judgment (sum) (sic) is colossal.

In the eyes of the Court, the parties here in this petition are equal i.e there is no finding. It could go either way. In the event the applicant succeeds and it is awarded costs, he will not and cannot be prejudiced. The estimated costs here is Kshs. 6 million. The undisputed decretal sum due to the petition is Kshs.151 million. In such circumstances in could be unfair to make an order for security for costs against the respondent/petitioner. I only able to make this decision without the issue of the petitioners in ability to pay such costs.

In total, I find that the applicant is not entitled to the prayers here in and I hereby dismiss the application with costs to the petitioner/respondent.”

We have given due consideration to the learned Judge’s above conclusions as against the totality of the facts assessed above and the rival arguments put forth by either side and doing our best, we proceed to make findings thereto as follows.

The learned judge rightly appreciated the existence of a discretionary power vested in him by the provisions of Section 401 of the Companies Act (Supra); that the exercise of the said discretionary power could go either way. We however find that he fell into an error when he failed to weigh properly the competing reasons for and against the exercise of that power before arriving at his decision in one way or the other. Before ruling in favour of the appellant, the learned Judge was obligated to satisfy himself that there was credible testimony that there was reason to believe that the company would have been unable to pay the costs of the defendant if successful. We agree with his interrogation of section 401 of the Companies Act; the learned Judge identified two major considerations that needed to be satisfied but then

he treated them very lightly.

The first consideration the respondent was undisputably a foreign registered company under liquidation both as observed and accepted by the judge that this was the correct position. Our reading of the entire ruling reveals that the learned judge properly appreciated the fact that in a situation where a company is in liquidation, the force behind it capable of meeting any obligations for and against such a company was a liquidator. In the case of the respondent, it was the deponent of the replying affidavit namely: **John Parry Richardson**, appointed in the U.K. and his touch with the Kenya High Court jurisdiction was limited to the order for the registration of the foreign judgment in Kenya. There was nothing on the record to show that he would be within easy reach for purposes of execution of costs against him. The learned judge took the registration of the foreign judgment *per se* as, sufficient proof of the vesture of the garment of locus standi in the respondent to meet its obligation in any litigation for and against its interests.

We think this was a serious misapprehension on the part of the learned judge. Our reason for saying so is that, 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. This procedural stage is none other than the requirement that it be converted into a decree. It is the decree document in instances where it is a money decree that can form an instrument for setting off of one party's claim as against another. The judgment the subject of the proceedings before the learned judge, had not been converted into a decree and was therefore incapable of forming an instrument capable of acting as a set-off between the appellant's claim as against those of the respondent and vice versa.

On this account, it was only reasonable for the appellant to take note of this procedural lapse on the part of the respondent and then demand that anticipated costs that may very well be adjudged in his favour should the respondent fail in its Bankruptcy petition be secured. It mattered not that as between the appellant and the respondent, that the respondent was the party owed more than what the appellant had demanded of the respondent to secure in the appellant's favour in terms of anticipated costs. We also find no unfairness would have been occasioned to the respondent had a positive order resulted from that litigation in favour of the appellant. This is because the appellant was not demanding that the sum secured be paid out to him forthwith. There was room for the learned Judge to attach appropriate conditions to ensure that the secured costs were either provided in the form of a bank bond, or similar instrument or if in liquid cash, that it be secured in a neutral entity whereby it would ultimately be easily accessible to the successful party.

In the result, we find the appellant had a genuine grievance. The appeal has merit. We allow it, set aside the learned Judge's order of 23rd September, 2003 and substitute it with the following orders:

1. The respondent do furnish security in the sum of Kshs.6, 081,698.00 within a period of sixty (60) days from the date of the reading of this ruling.
2. The security so furnished to be in the form of a bank guarantee from any reputable bank of the parties choice. Alternatively, the amount forming the security, namely, Kshs. 6,081,698.00 be deposited in an interest bearing account in the joint names of learned counsel for both parties to be held in any reputable bank of their choice within the same period of sixty (60) days from the date of the reading of this judgment.
3. Costs of this appeal and the proceedings in the High Court to the appellant, to be agreed or assessed.

Dated and delivered at Nairobi this 30th day of January, 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

D. MUSINGA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

