



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 30 OF 2019

IN THE MATTER OF: AN APPLICATION UNDER ARTICLES 162(2) (a); 165(3) (d) (ii) AND 258 OF THE CONSTITUTION

IN THE MATTER OF: ARTICLES 1(1); 1(3); 2(2); 94(5) AND 159(1) OF THE CONSTITUTION

IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

IN THE MATTER OF: SECTION 87(1) OF THE EMPLOYMENT ACT NO. 11 OF 2007

IN THE MATTER OF: THE JUDICATURE ACT CAP. 8 OF THE LAWS OF KENYA PART VII

IN THE MATTER OF: PROVISIONS OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, CHAPTER 43 OF THE LAWS OF KENYA

IN THE MATTER OF: THE KENYA CITIZENSHIP AND IMMIGRATION ACT NO. 12 OF 2011

IN THE MATTER OF: ORDER 3 RULE 9 OF THE CIVIL PROCEDURE RULES – LEGAL NOTICE NO. 151 OF 2010

IN THE MATTER OF: AN APPLICATION FOR DECLARATORY ORDERS

BETWEEN

JAMES FINLAY (KENYA) LIMITED.....PETITIONER

VERSUS

ELLY OKONGO INGANGA.....1st RESPONDENT

LUCAS ONDUSO OMOKE.....2nd RESPONDENT

VITALIS OTIENO MUGA.....3rd RESPONDENT

REBECCA OKENYURI NYAKONDO.....4th RESPONDENT

JOICE MONGERE OCHOI.....5th RESPONDENT

CHRISTOPHER OMWAMBIA CHUMA.....6th RESPONDENT

GETUNGA MASELA INDINGA.....7th RESPONDENT

JUDGMENT

1. James Finlay (K) Ltd (the Petitioner) instituted the instant legal proceedings against Elly Okongo Inganga, Lucas Onduso Omoke, Vitalis Otiemo Muga, Rebecca Okenyuri Nyakondo, Joice Mongere Ochoi, Christopher Omwambia Chuma and Getunga Masela Indinga (Respondents) on 25 January 2019 contending that the *locus inspection orders* issued by the *All Scottish Sheriff Personal Injury Court* (Scottish Court) on 22 November 2018 required judicial adoption and recognition before execution.

2. The *Originating Notice of Motion* was accompanied with a *Chamber Summons* of even date seeking interim interdict staying execution of the *locus inspection orders* (an *Amended Originating Notice of Motion* was filed on 31 January 2019).
3. Before the *Summons* could be heard and determined, the *Central Organisation of Trade Unions (COTU)* and the *Kenya Plantation & Agricultural Workers Union (KPAWU)* moved the Court seeking orders to be joined as Interested Parties to the proceedings.
4. The joinder application was argued, and in a ruling delivered on 6 February 2019, the Court declined to grant leave for joinder of *COTU* and *KPAWU*.
5. Immediately after the ruling, the Court gave directions as to the hearing on the merits of the *Amended Originating Motion*, and in this respect the Petitioner filed its written submissions and Authorities on 15 February 2019 and a Supplementary list of Authorities on 20 February 2019 while the Respondents filed Statements on 6 February 2019 and 8 February 2019, written submissions and authorities on 18 February 2019 and 19 February 2019, and Supplementary List of Authorities on 21 February 2019.
6. The Court took arguments on 21 February 2019 and because of the urgency which had been demonstrated earlier, issued final orders on 22 February 2019 while reserving the giving of reasons to today.

Brief background

7. The Respondents were at some point in time employees of the Petitioner, which runs tea plantations in Kenya.
8. The Respondents moved the Scottish Court alleging that they had suffered injuries/disabilities in the course of work, and as part of the litigation secured orders for *locus inspection(s)* to be carried out by experts in Kenya.
9. The parties' legal advisers then got into discussions on modalities and logistics of the inspection visits, but could not agree.
10. In the meantime, the Petitioner moved this Court seeking the orders already alluded to.

The Issues

11. In its written submissions, the Petitioner identified the following questions as arising for the determination of the Court
 - (a) Whether the Court has jurisdiction to entertain the Petitioner's application?
 - (b) If the answer to (a) above is in the affirmative, whether the execution of the Scottish Court orders before they are adopted and legitimised as an order of this Honourable Court would constitute a breach of Article 159(1) of the Constitution and an infringement of the sovereignty of Kenya as an independent nation.
 - (c) Whether the Respondents, their agents and/or servants should invoke and abide by the High Court (Practice and Procedure) Rules, Part VII thereof read together with the *Foreign Tribunal Evidence Act of 1856* in conducting the *locus inspection*.
 - (d) Whether failure to apply to the Honourable Court to adopt the Scottish Court orders will be contrary to the legal spirit set out in the provisions of *Foreign Judgments (Reciprocal Enforcement) Act* Chapter 43 of the Laws of Kenya.
 - (e) Whether the Petitioner will be in breach of the Constitution were it to allow execution of a foreign court's orders before those orders are legitimised by the Honourable Court.
 - (f) Whether the Respondents, their agents and/or servants must be in possession of valid immigration permits or special passes issued under the Kenya Citizenship and Immigration Act before proceeding with the *locus inspection*.
 - (g) Whether the Petitioner could be prone to prosecution under immigration laws of Kenya should it allow the Respondents' agents and/or servants to visit its premises to conduct *locus inspection* without valid immigration permits or *special passes*.
12. The Court will not address issues (f) and (g) as they raise inchoate questions without a proper factual grounding at this point in time.

Jurisdiction

13. The Respondents raised the jurisdiction question on the premise and contention that the *locus inspection orders* issued by the Scottish Court were not *employment disputes* within the meaning, context or contemplation of section 12 of the Employment and Labour Relations Court Act as read together with Article 162(2)(a) of the Constitution.
14. The Respondents also asserted that because the primary dispute was pending before the Scottish Court, and the Petitioner had voluntarily submitted to its jurisdiction, the principle of *lis alibi pendens* applied to oust the jurisdiction of this Court.
15. The Respondents drew the attention of the Court to the legal principle on jurisdiction as set out in the well-known decision, *Owners of the Motor Vessel Lilian S v Caltex Oil Kenya Ltd* (1989) eKLR, that *jurisdiction is everything* and (when the Court finds it has no jurisdiction, it must down its pen).

16. The Respondents also contended that this Court was not one of the Courts provided for in the *Judicature Act* (the Courts envisaged therein were the Court of Appeal, the High Court and the subordinate Courts).
17. The Respondents abandoned this limb of objection to jurisdiction because of the amendments effected to the *Judicature Act* in December 2018 to include the Employment and Labour Relations Court and the Environment and Land Court.
18. In response to the jurisdiction challenge, the Petitioner posited that the substratum of the suits before the Scottish Court were causes of action anchored on injuries/disabilities sustained in the course of an employment relationship between the Respondents and Petitioner.
19. The *locus inspection orders*, according to the Petitioner, were anchored on a primary dispute arising out of allegations of breach of duties in care and negligence in the workplace.
20. In the view of the Petitioner, the *locus inspection orders* were ancillary to a dispute arising out of an employment relationship.
21. Consequently, the Petitioner urged that in terms of Article 162(2) of the Constitution as read with section 12(1) & (3) of the Employment and Labour Relations Court Act, this Court had been granted exclusive original and appellate jurisdiction in such disputes as between *employers and employees*.
22. To buttress the submission, the Petitioner urged that what the Respondents were alleging before the Scottish Court were actions implicating neglect or failure to fulfil rights and duties arising out of contracts of service(s) and therefore by virtue of section 87 (1) & (2) of the Employment Act, 2007, this was the appropriate Court.
23. It was further submitted that this Court had the jurisdiction to interpret and apply the Constitution where the substratum of a dispute was an employment relationship and the case of *United States International University (USIU) v Attorney General & Ors* (2012) eKLR was invoked.
24. In this regard, the Petitioner submitted that this Court had the status of the High Court.
25. On the doctrine of *lis alibi pendens*, the Petitioner was of the view that section 6 of the Civil Procedure Act had expressly excluded the application of the doctrine in respect of suits pending in foreign jurisdictions.
26. The Court has considered the submissions on jurisdiction.
27. At the heart of the litigation before the Scottish Court are injuries said to have been sustained in the course of the employment relationship(s).
28. Such a cause of action is *contract of service* anchored.
29. In this jurisdiction, legal proceedings/actions in such instances may be anchored/ find support under the common law or statutory law.
30. The primary statute in this country governing such actions, and which regrettably none of the parties referred to is the *Work Injury Benefits Act*.
31. The Court recognised in the Act is this Court.
32. The other primary Acts addressing the question of jurisdiction are the Employment and Labour Relations Court Act and the Employment Act, 2007.
33. Considering that the substratum of the dispute before the Scottish Court is anchored on alleged injuries in the workplace, this Court is of the opinion that it would be the appropriate forum for litigation of any ancillary or secondary disputes arising from implementation and/or enforcement of any orders/processes issued by a foreign Court where the substratum is employment anchored.
34. As regards the argument on *lis alibi pendens*, section 6 of the Civil Procedure Act is clear that the jurisdiction of this Court cannot be ousted merely because there is pending litigation in a foreign Court or outside the jurisdiction. The Court notes that Section 9(h) of the Act may also be implicated.
35. In any case, this Court is not and has not been called upon to make determinations on the merits of the suits pending before the Scottish Court.
36. The Court finds no merit on the *jurisdictional* objections raised by the Respondents.

Do the orders of the Scottish Court require judicial adoption and recognition?

37. Issues (b), (c), (d) and (e) raise one broad legal question, and that is whether the *locus inspection orders* which were issued by the Scottish Court require judicial and/or executive branch adoption and recognition before enforcement.
38. If the Scottish Court had issued a (final) judgment, there would have been no difficulty as to the question of domestic judicial assistance

because the *Foreign Judgments (Reciprocal) Orders Act* has sufficient provisions, on the processes to be taken.

39. In contending that the *locus inspection orders* required judicial assistance, the Petitioner contended that in issue was the broad question of sovereignty, in that sovereign power is exercised on behalf of the people by among others, the judiciary in terms of Articles 1, 2, 94(5) and 159(1) of the Constitution.

40. In developing the argument, it was urged that because the *locus inspection orders* were issued pursuant to the laws of the United Kingdom, the orders would remain void *ab initio* unless ratified, adopted or legitimised in Kenya.

41. According to the Petitioner, the Scottish Court was not one of the Courts contemplated by Article 159(1) of the Constitution.

42. In the view of the Petitioner, it was incumbent upon the Respondents to abide by the provisions of the *Judicature Act, the Foreign Judgments (Reciprocal Enforcement) Act* as well as Order 5 Rule 32 – 35 of the *Civil Procedure Act*, as these statutes were the embodiment of the exercise of the sovereign will of the people through the legislature.

43. The *locus inspection orders*, according to the Petitioner called for an evidence collection process which should be subjected to the *High Court (Practice and Procedure) Rules* made under the *Judicature Act* as read with the Part 1 of the *Foreign Tribunal Evidence Act, 1856*.

44. The legal framework in place, in the view of the Petitioner, required the Respondents to move the Scottish Court to seek the assistance of the Kenyan Courts through a *commission rogatoire* or letter of request, for the obtaining of the evidence required.

45. In sum, the Petitioner submitted that the collection of evidence as decreed by the *locus inspection orders* should be supervised/superintended by this Court.

46. On the *lacuna* in the *Foreign Judgments (Reciprocal Enforcement) Act* to make provision for enforcement of interlocutory orders (such as the *locus inspection orders*) as opposed to judgments, the Petitioner urged that the spirit behind the Act tilted towards a finding that the *locus inspection orders* required judicial assistance.

47. The Respondents in opposing the Petitioner's contentions took the position that the *locus inspection orders* were part of an *interlocutory discovery process* by the Scottish Court and that such a process had a foundational anchor in Article 35 of the Constitution, and that the orders were *self-executing* and did not require any type of domestic judicial assistance.

48. According to the Respondents, the Petitioner had only 2 options, obey the orders by facilitating inspection, or disobey and face the consequences such as dismissal, stay of action and/or debarment from defending.

49. The Respondents were of the firm view that the *locus inspection orders* did not require any enforcement or execution because the power of the Court in the process of discovery was not *restricted* by the Constitution.

50. In the view of the Respondents, there was no legal justification of any sort or premise that the *locus inspection orders* required enforcement or execution for, the *Foreign Judgment (Reciprocal Enforcement) Act* applied only to foreign judgments from designated Courts and not interlocutory decisions, and that it was not the desire of the Scottish Court to obtain evidence in Kenya in terms of the *High Court (Practice and Procedure) Rules* as read with the *Foreign Tribunals Evidence Act*.

51. Citing *Mizzi Pty Ltd v Meredith & Ar* (2009) VSC 367, the Respondents urged that the *locus inspection orders* were self-executing, and therefore did not require the involvement of this Court.

Locus inspection orders: Discovery process/evidence collection

52. The parties are somewhat agreed that the *locus inspection orders* are part of the *discovery* process in litigation.

53. *Discovery* at the very basic level entails a pre-trial procedure to ascertain facts to be presented at the trial, and as noted by the High Court in *Eliud Muturi Mwangi (practicing in the name and style of Muturi & Co. Advocates) v LSG Lufthansa Services Europa/Africa GMBH & Ar* (2015) eKLR, it has constitutional underpinning (right to access information).

54. The Petitioner contended that the *locus inspection orders* were in furtherance of evidence collection, and therefore the aid of this Court was a requirement while the Respondents urged that it was part of a *discovery* process which did not implicate the Court's help in enforcement.

55. It is not lost to this Court that the purpose of *discovery* is to disclose evidence which would be relevant and material to the determination of issues in dispute.

56. The purpose and objective of the *locus inspection order(s)* are to help sustain the actions commenced by the Respondents before the Scottish Court. The report by the experts would be presented as evidence for consideration at the trial.

57. It would, therefore, be true generally that once a competent Court has issued orders for *discovery*, the same become self-executing, and that failure by a party to comply would attract orders such as stay and/or debarment from defending.

58. Difficulties, however, arise where *discovery* is ordered outside the jurisdiction of the trial Court, as is the case herein.

59. The difficulties can be traced to the theory of sovereignty and territoriality.

Sovereignty and territoriality

60. For a long time, there has been a strong presumption against the extraterritorial application of domestic law in a foreign jurisdiction because of the theory of sovereignty.

61. Sovereign power, it is trite, has territorial limits hence the prerequisite for enforcement of *foreign judgments* by domestic Courts.

62. As a consequence, territorial boundaries have for long acted as a restriction on judicial and legislative jurisdiction/power.

63. However, there have been judicial, statutory, bilateral and multilateral interventions against a strict application of the doctrine of sovereignty and territoriality.

64. Judicial, as opposed to legislative breakthrough against the strict jurisdictional concerns, can be traced to legal realism and in case law such as in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

65. The law in this jurisdiction is now encapsulated in the Constitution, *the Foreign Judgments (Reciprocal Enforcement) Act* and *the High Court (Practice & Procedure) Rules* which broadly require domestication of foreign judgment(s) before execution (there are other Statutes which need not be discussed herein).

66. This Court is not dealing with a case of a (final) judgment but interlocutory orders. However, the doctrinal underpinnings of the requirement for recognition/adoption/enforcement of foreign judgments would help to put the current dispute into perspective.

67. The requirement for judicial assistance in the enforcement of foreign judgments is a reflection of the doctrine of comity which was described in *Hilton v. Guyot*, 159 U.S. 113 (1895) as

''Comity'' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But 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

68. Justice Story also captured the rationale by stating as follows

Whatever force and obligation the laws of one country have in another depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity and upon its own express or tacit consent. (see Joseph Story; Commentaries on the Conflict of Laws: Foreign and Domestic, in REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 23 at 24 (1st ed.1834).) 14.

69. Under Article 1 of the Constitution, sovereign power belongs to the people and it can be exercised directly or through delegation, by Parliament, the Executive and Judiciary.

70. By dint of Article 2 of the Constitution, the exercise of the sovereign power can only be as authorised under the Constitution.

71. Pursuant to Article 159(1) of the Constitution, judicial authority as part of sovereignty has been vested in the Courts and tribunals established in terms of the Constitution.

72. The Scottish Court has not been established pursuant to the Constitution of Kenya. Judgment(s) by the Scottish Court, however, would require domestication in terms of the *Foreign Judgments (Reciprocal Enforcement) Act*.

73. And because the *Foreign Judgments (Reciprocal Enforcement) Act* is silent as to the need for judicial assistance in respect of interlocutory orders such as obtain here, this Court is of the view that such orders require judicial aid.

74. The Court is of that view because of the following reasons/considerations.

75. Considerations favouring judicial assistance include public policy. Judicial aid would ensure that the order of a foreign Court is not inconsistent with public policies of Kenya. Public policy considerations include the need for legal certainty, avoidance of re-litigation in domestic Courts and reciprocity.

76. Procedural concerns (reciprocity, personal jurisdiction, subject matter jurisdiction and *forum conveniens*, etc.) are also factors. In the instant case, the Petitioner accepted and submitted to the jurisdiction of the Scottish Court.

77. Without judicial assistance, it would not be possible to discern whether the process followed before the issuance of the *locus inspection orders* were in consonance with the rights guaranteed to the Petitioner under the Constitution of Kenya.

78. The enforcement of the Scottish Court orders on inspection directly impacts the right to fair hearing in Article 50(1) of the Constitution,

and the sovereign and territorial integrity of Kenya.

79. The experts listed in the *locus inspection orders* cannot just travel to Kenya with authority to enforce the *locus inspection orders* without the consent of the Kenyan authorities, judicial or executive.

80. Once the experts arrive in Kenya, they become no more than private citizens within the territory of Kenya.

81. In the view of the Court, it would be the location where the experts conduct the *locus inspections* and not the ultimate purpose of the inspections that would implicate the involvement of this Court, in the exercise of its delegated sovereign mandate.

82. In any case, judicial assistance in suits involving foreign jurisdictions even before final judgment is contemplated in our procedural laws.

83. Section 54 of the Civil Procedure Act empowers the High Court to issue commissions (letter of request) for the examination of witnesses outside Kenya while section 55 of the Act requires the imprimatur (authorisation) of the High Court before commissions (letters of request) issued by foreign Courts are executed.

84. In the same vein, Order 5 of the Civil Procedure Rules envisage grant of leave of Court before service of Summons/process outside the jurisdiction of Court.

85. Under Order 5 Rule 29, the involvement of the Ministry of Foreign Affairs in the service of Notice of Summons is provided for while Rule 30 provides for the need for assistance of the High Court in respect of service of the foreign legal process in Kenya.

86. Similar provisions in respect of commissions by foreign Courts is set out in Order 28 of the Civil Procedure Rules.

87. Judicial assistance, even in cases where there is no final judgment as prescribed by the *Foreign Judgments (Reciprocal Enforcement) Act* is not novel. The philosophy underlying the need for judicial aid has antecedents in sovereignty and territorial concerns. It is not a sterile requirement.

88. To assuage the Respondents, this Court does not believe that judicial assistance would be a merit re-examination of the litigation processes in the Scottish Court.

89. For the above reasons the Court will allow the *Amended Originating Notice of Motion*, and issue orders in terms of the ruling delivered on 22 February 2019.

90. The Court was asked to address an area of law not explicitly covered by legislation, and therefore the Court directs that each party bears own costs.

Delivered, dated and signed in Nairobi on this 28th day of May 2019.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Obura instructed by Obura Mbeche & Co. Advocates

For Respondents Mr. Okero instructed by Behan & Okero Advocates

Court Assistant Lindsey