



Higiro v Jomo Kenyatta University of Agriculture and Technology (Civil Case E244 of 2023) [2024] KEHC 4063 (KLR) (Commercial and Tax) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E244 OF 2023**

PM MULWA, J

APRIL 26, 2024

BETWEEN

MARTIN HIGIRO APPLICANT

AND

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY RESPONDENT

RULING

1. Judgment was delivered on 31st July 2018 at the Commercial Court at Kigali in the Republic of Rwanda being RCOM00586/2018/TC (ex RCOM0017/2018/TC/NYGE. Thereafter the respondent approached this court to recognise and adopt the said judgment vide a Notice of Motion dated 9th May 2023. The application was allowed and the judgment was registered as a judgment on 28th July 2023.
2. The applicant has now filed a Chamber Summons dated 14th August 2023 seeking orders that the court do set aside, review and/or vary the orders of 28th July 2023 as well as the costs of the application.
3. The application was supported by the grounds on the face of it and by the sworn affidavit of Richard Kariuki who stated that the applicant was never served with the court process in the recognition proceedings and only learnt of them upon service of the ex parte order issued therein on 4th August 2023 adopting and registering the impugned foreign judgment as a judgment of the High Court of Kenya.
4. In response, the respondent filed a replying affidavit dated 4th September 2023 opposing the application and stated that the applicant was duly served with summons to enter appearance in the original suit through their legal officer and representative Christine Mutesi yet they still failed to enter appearance or participate in the proceedings.



5. The respondent added that the copy of judgment filed in court and served upon the applicant possess an international code at the top of each page of the judgment in Kinyarwanda whereas the translated version is endorsed by the notary public from the Ministry of Justice Department in Kigali being the standard requirement to validate the same for purposes of enforcement.
6. The application was canvassed by written submissions in which the applicant submitted that the while the respondent provided certified copies of the judgment as required by Section 5(4)(b) of the *Foreign Judgments (Reciprocal Enforcement) Act*, he did not comply with the requirements under Section 5(4)(a)(c)(i) and (d) of the *Act*. That the certificate attached to the application was not signed or sealed and neither was an affidavit by the Judge or Registrar provided to the same effect. The certificate certifying the original court as a superior court of that country was also not provided.
7. Further, the applicant contended that there was no proper service effected upon it as the court process was served on a junior staff member not authorized to accept any court process and should instead have been accepted by its Director in Rwanda.
8. On the other hand, it was the respondent's submission that the instant application is an attempt to delay him from exercising the right to enjoy the fruits of his judgment and the same should be disregarded. The applicant cannot seek to set aside the judgment on the ground that it was not served with a notice of the ex parte hearing as this is not a ground provided for under Section 10(2) on the grounds for setting aside a registered foreign judgment.
9. The court has considered the application and the submissions and the sole issue for determination is whether the foreign judgment should be set aside.
10. Section 10 of the *Foreign Judgments (Reciprocal Enforcement) Act* vests in the High Court the power to set aside a foreign judgment that has been registered if the court is satisfied on any of the 15 grounds set out in section 10(2) and (3) of the Act. The said section provides as follows;

10. Setting aside

- (1) Where a judgment has been registered under this Act an application may be made by the judgment debtor that the judgment be set aside on any of the grounds set out in subsection (2) or (3), and if the High Court is satisfied that any of those grounds has been established it shall set aside the registration of the judgment.
- (2) The grounds upon which a registered judgment may be set aside are that—
 - a. the judgment is not a judgment to which this Act applies;
 - b. the judgment was registered in contravention of this Act;
 - c. the courts of the country of the original court had no jurisdiction to adjudicate upon the cause of action upon which the judgment was given;
 - d. the judgment debtor did not appear in the original court and the jurisdiction of that court was based upon an agreement by the judgment debtor to submit to its jurisdiction which is invalid under the rules of private international law of Kenya;
 - e. the cause of action upon which the judgment was given had at the date of that judgment been the subject of a final and conclusive judgment of a court having jurisdiction to adjudicate upon that cause of action;



- f. the matter in relation to which the judgment was given had, subsequent to the date of that judgment, and as a result of proceedings instituted prior to the institution of the proceedings in the original court, become the subject of a final and conclusive judgment of a court in Kenya which is irreconcilable with the judgment of the original court;
 - g. the judgment debtor, being the defendant in the original proceedings—
 - i. was not duly served with the process of the original court; or
 - ii. notwithstanding that he was duly served in conformity with the law of the country of that court, did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings; and
 - iii. did not appear or appeared only for one or more of the purposes set out in section 4(2)(b);
11. The Applicant herein argued that it was never served with the court process in the recognition proceedings and that the orders issued therein were unenforceable for offending the public policy of Kenya underpinning the right to be heard. This argument fails because Section 5(2) of the *Foreign Judgments (Reciprocal Enforcement) Act* allows the application for recognition and registration of a foreign judgment to be made ex parte.
 12. On the ground that the applicant never participated in the original proceedings before the original court; the respondent herein annexed evidence of service of summons (Annexure ‘MH2’) indicating that the summons was received by Mutesi Christine. The applicant in its further affidavit did admit that Christine Mutesi was one of its staff while the university was still operational in Rwanda.
 13. In addition to the above, at para.13 of the applicant’s supporting affidavit the applicant admitted that it was served with a notice of entry of judgment in the original proceedings on 23rd November 2022 together with two copies of the judgment rendered therein dated 31st July 2018 via email.
 14. It is therefore the court’s considered view that the applicant was duly served with the process of the original court but chose not to participate in the court proceedings. Further, after receiving the notices of entry of judgment the applicant chose to ignore the same and did not at the very least exercise its right of appeal with regard to the said judgment. The applicant cannot therefore argue that it was never served with the process of the original court and this ground for setting aside equally fails.
 15. It was the applicant’s case that the judgment was registered in contravention of this *Act*. What then are the requirements for registration of a foreign judgment? Section 5(4) of the *Act* provides;
 - (4) An application for registration of a judgment under subsection (1) shall—
 - (a) be accompanied by a certificate in the form set out in the Schedule or to the same effect issued from the original court under its seal and signed by a judge or registrar thereof or by an affidavit to the same effect;
 - (b) have attached thereto the judgment or the exemplification or a certified or duly authenticated copy thereof and, where the judgment is not in the English language, certified by a notary public on the Registrar of the original court or authenticated by affidavit;
 - (c) be accompanied by an affidavit stating—



- (i) that, at the date of application, the judgment has not been satisfied or, as the case may be, the sums or items of movable property in respect of which the judgment remains unsatisfied;
 - (ii) that, at the date of application, the judgment can be enforced by execution in the country of the original court;
 - (iii) where, by virtue of section 6(5), the judgment may be registered only in respect of certain of its provisions, the provisions in respect of which it is sought to register the judgment;
- (d) Unless otherwise ordered by the High Court, be accompanied, in the case of a judgment given by a superior court of a Commonwealth country, by a certificate under the seal and signed by a judge or registrar thereof certifying that the court is a superior court in that country;
16. The applicant's contention was that since the judgment was registered in contravention of this Act; then it ought to be set aside, reviewed or varied.
17. The court has perused the documents that were filed herein and agrees that while the respondent herein provided copies of the judgment as required, he failed to comply with all the requirements as the certificate attached to his application is not signed or sealed and neither did he provide an affidavit by a Judge or Registrar to the same effect.
18. The wording in Section 5(4) of the Act is couched in mandatory terms using the word 'shall' therefore it is a command for the respondent to comply with the said requirements. However, when it comes to setting aside of the judgment section 10(2) of the Act states that the judgment 'may' be set aside on the grounds that the judgment was registered in contravention of this Act. This therefore means that it is not mandatory for the judgment to be set aside for being registered in contravention of the Act.
19. The applicant has failed to prove the grounds for setting aside the registered foreign judgment. In the interest of justice, the court invokes Article 159 of the Constitution and grants the respondent leave to file a signed, sealed and dated certificate within 30 days of the date herein.
20. The upshot of the above is that the application dated 14th August 2023 for setting aside the registered foreign judgment is dismissed with no orders as to costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF APRIL 2024.

P. MULWA

JUDGE

In the presence of:

Ms. Moga h/b for Mr. Lutta for Applicant/Respondent

Ms. Reshma for Respondent/Applicant

Court Assistant: Carlos

