IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

MISC CIVIL APPLICATION NO 114 of 2010

JAMES ALFRED KOROSO..... APPLICANT

VS

HON. ATTORNEY GENERAL OF
THE GOVERNMENT OF KENYA .....RESPONDENT

RULING

Date of last order: 15-11-2010
Date of Ruling: 11-02-2011

JUMA, J:

This is an application which James Alfred Koroso filed under section 4-(1) and (2) of the **Reciprocal Enforcement of Foreign Judgments Act (Cap. 8 R.E. 2002)**. The applicant is moving this Court to register a foreign judgment in civil suit No. 2966 of 1996 of the High Court of Kenya (Nairobi Civil Division) which was delivered by Ojwang, J. on 22-02-2008. This application before me is opposed by the respondent the Attorney

General of the Government of Kenya who on 21st September 2010 filed his Memorandum of Appearance and on following day filed a Replying Affidavit.

The background facts leading up to this application traces back to 4th December 1996 when the applicant filed a civil suit No. 2966 of 1996 against the respondent Attorney General representing the Government of Kenya. In that suit, the applicant alleged violation of his constitutional rights, false imprisonment and malicious prosecution for which he prayed for special, exemplary and general damages against the Government of Kenya. After a full hearing the applicant was awarded general damages totalling Kenya Shillings 21 million and costs. A decree was subsequently extracted on17-04-2008.

Foreign judgments or judgment of a foreign court are enforced in Tanzania by virtue of the conditions prescribed under the **Reciprocal Enforcement of Foreign Judgements Act**. These foreign judgments are enforced in Tanzania if they were delivered by courts of foreign countries which have reciprocal arrangement with Tanzania to enforce their respective judgments. In his supporting affidavit, the applicant averred that his present application has satisfied the statutory conditions precedent to registration by this Court of the Judgment of the High Court of Kenya. Further, the applicant averred that the foreign judgment should

be registered by this Court because it is not subject to any further appeal, revision or review in Kenya. And also there is no pending order of stay of execution. The applicant strongly believes that because the foreign judgment has not been wholly or partially satisfied in Kenya, this Court should register it for purposes of enforcement under the **Reciprocal Enforcement of Foreign Judgements Act**.

In his replying affidavit sworn at Nairobi on 21st September 2010 and filed in this Court on 22nd September 2010, the respondent advanced several reasons why he thinks that the application for registration of the Judgment of the High Court of Kenya does not satisfy conditions precedent for its registration in Tanzania. First, the respondent avers that the foreign judgment which the applicant annexed to his application is neither properly certified nor is it authenticated as required by Rule 3 (1) (a) of **Reciprocal Enforcement of Foreign Judgments Rules** of Tanzania. Secondly, it was pointed out that judgment cannot be registered in Tanzania because the respondent has already filed a Notice of Appeal. Further, respondent pointed out that since the judgment concerned is against the Government of Kenya, it cannot in terms of section 21 (4) of the **Government Proceedings Act (Chapter 40 of the Laws of Kenya)** be automatically be executed against the Government of Kenya without obtaining a Certificate of Order. Finally, the respondent's counsel averred that if the applicant really wanted to legally enforce the judgment of the

High Court of Kenya in Kenya, he should have first extracted a Certificate of Order against the Government of Kenya. It is the Certificate of Order which legally signifies that a judgment against the Government of Kenya is ready for execution in Kenya. Because the applicant has not made any attempt to enforce it Kenya by extracting a Certificate of Order, that judgment cannot be registered in Tanzania by this Court.

When this application finally came up for hearing on 15th November 2010, Mr. Thadei Hyera the learned Advocate represented applicant. respondent was represented by Mr. Charles Mwanzia Mutinda, the learned Senior Litigation Counsel from the Office of the Attorney General (Kenya). Mr. Mutinda had earlier applied and accorded a special admission by the Chief Justice of Tanzania to practice as an advocate in Tanzania for the purpose of this application. Hon. Chief Justice of Tanzania extended this dispensation under section 39-(2) of the **Advocates Act (Cap. 341)**. In their oral submissions the two learned counsel basically expounded on what was deposed in their respective affidavit and replying affidavit. Mr. Hyera does not think that enforcement in Tanzania of a judgment against the Government of Kenya should be difficult in Tanzania because the Government of Kenya is not a "Government" for purposes of civil litigation in Tanzania. According to the learned counsel property of the Government of Kenya can be attached in Tanzania to satisfy the judgment entered against the Government of Kenya.

Before I examine the application on merit, I would like first to deal with a preliminary point of objection which the applicant filed on 24th September 2010 contending the correctness of respondent's replying/counter affidavit. In this notice of objection the applicant objected that the replying affidavit is incurably defective as it offends mandatory provisions of section 10 of the **Oaths and Statutory Declarations Act (Cap. 34 R.E. 2002 of Tanzania)**. Submitting on the alleged defect, Mr. Hyera pointed out that the respondent's jurat of attestation does not show whether the Commissioner for Oaths before whom Mr. Mutinda swore his replying affidavit knew the deponent or was introduced to the Commissioner by somebody else. While readily conceding that indeed section 10 of the **Oaths and Statutory Declarations Act** of Tanzania indeed provides the form which statutory declarations should take, Mr. Mutinda hastened to point out that the same section 10 has a proviso which allows resort to other formats of statutory declarations where any other written law prescribes different format for statutory declaration to suit purposes prescribed in the law concerned. According to the learned counsel, since the respondent's replying affidavit was sworn in Kenya it is only logical that the **Oaths and Statutory Declarations Act (Cap. 15 of the Laws of Kenya)** and subsidiary legislation made there under should guide respondent's jurat of attestation in the replying affidavit.

I have considered the submissions made by two learned advocates on the question whether respondent's replying affidavit offends mandatory provisions of section 10 of the **Oaths and Statutory Declarations Act (Cap 34 R.E. 2002 of Tanzania)**. The relevant section 10 of **Cap 34 R.E. 2002** provides,

> Where under any law for the time being in force any person is required or is entitled to make a statutory declaration, the declaration shall be in the form prescribed in the Schedule to this Act:
>
> **Provided that where under any written law a form of statutory declaration is prescribed for use for the purposes of that law such form may be used for that purpose. [emphasis provided]**

With respect, Mr. Mutinda is correct in his submission that the proviso in section 10 of the **Oaths and Statutory Declarations Act (Cap. 34 R.E. 2002 of Tanzania)** leaves room for other written laws to also provide the format for jurat of attestation of documents. Beside the **Oaths and Statutory Declarations Act (Cap. 34 R.E. 2002)**, other written laws may also provide the format for the jurat of attestation. Since the **Reciprocal Enforcement of Foreign Judgments Act** of Tanzania and **Foreign Judgments (Reciprocal Enforcement) Act (Chapter 43 of the Laws of Kenya)** both operate on basis of reciprocity, section 10 of **Oaths and Statutory Declarations Act (Cap. 34 R.E. 2002 of Tanzania)** gives room for the respondent's replying affidavit to be prepared in Kenya in accordance with the laws of Kenya. I am therefore satisfied that the

respondent's replying affidavit is not defective since it complied with the relevant law of Kenya, i.e. the Third Schedule to the Subsidiary Legislation made under the **Oaths and Statutory Declarations Act (Cap. 15 of the Laws of Kenya)**. With the preliminary point of objection out of my way, let me move onto the main application before me.

This application is not for the first time foreign judgments have been brought to this Court for purposes of registration and enforcement. For example, Mapigano, J. in **Willow Investment V Mbomba Ntumba and another 1996 TLR 377** described the **Reciprocal Enforcement of Foreign Judgements Act, Cap 8** as a piece of legislation that is designed to facilitate the direct enforcement of certain foreign judgments in Tanzania. **Cap 8** makes provisions for the enforcement in Tanzania of judgments given in foreign countries which accord reciprocal treatment to judgments given in Tanzania. It may be appropriate at this juncture to digress for a moment and ask whether the applicant has shown to this Court that Kenya and Tanzania have reciprocal statutory instruments for purposes of enforcement of their respective judgments. The two learned counsel did not draw my attention to any subsidiary legislation made under principal Acts in Kenya and Tanzania which accord one another reciprocal treatment to their respective judgments. I must however point out that the two opposing parties to this application did not dispute the existence of such subsidiary legislation recognizing Kenya and Tanzania as

reciprocating countries for the purposes of enforcement of foreign judgments.

I came across the **Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, L.N. 135/1984** of Kenya. This statutory instrument includes Tanzania, amongst the eight reciprocating countries singled out in the Order for the purposes of **Foreign Judgments (Reciprocal Enforcement) Act, (Chapter 43 of the Laws of Kenya)**. I hope, Tanzania has similar subsidiary legislation reciprocating judgments of superior courts of Kenya. For purposes of this ruling I will however proceed from the premise that Tanzania and Kenya indeed have reciprocal arrangement for the registration of their Judgments for purposes of enforcement.

From the pleadings and submissions articulated by the learned counsel, two main issues call for my determination. First, is whether the Judgment of the High Court of Kenya (Ojwang, J.) which the applicant wants this Court to register, has satisfied the relevant statutory conditions precedent for its registration in Tanzania. The second main issue is whether that Judgment of High Court of Kenya has satisfied the conditions precedent for its execution in Kenya the country of its origin and hence qualifies for registration by this Court.

Mr. Mutinda has submitted that the relevant Judgment and Decree of the High Court of Kenya which the applicant included in his chamber application has not satisfied the condition of having been properly certified by a notary public nor was it authenticated by affidavit in Kenya. According to the learned counsel the Judgment and Decree which the applicant used in his application should be expunged from applicant's application for registration. Once expunged from the record, there would be no Judgment of a foreign court for this Court to register. On behalf of the applicant, Mr. Hyera brushed off the issue of certification and authentication as a minor oversight by the applicant. The learned counsel submitted that he had indeed secured a duly certified copy of the Judgment of the High Court of Kenya, but he inadvertently failed to annex that certified copy.

The **Reciprocal Enforcement of Foreign Judgements Rules, GN No. 15 of 1936** of Tanzania oblige applicants seeking registration of foreign judgments in Tanzania to exhibit together with supporting affidavit of facts, a certified copy of the judgement issued by the original court. That foreign judgment must be authenticated by a seal of that court. Where that judgment was not composed in the language of this Court, a translated copy duly certified by a notary public or authenticated by affidavit should also accompany an affidavit of facts. The relevant Rule 3 of **GN No. 15 of 1936** provides,

3-(1) An application for registration shall be supported by an affidavit of the facts–

(a) exhibiting a certified copy of the judgement issued by the original court and authenticated by its seal and a translation of the judgement certified by a notary public or authenticated by affidavit;

With due respect, Mr. Mutinda is correct that in terms of the above-shown Rule 3 (1) (a) of **GN No. 15 of 1936** the applicant is required to exhibit in his application a certified copy of the Judgement of the High Court of Kenya duly authenticated by its seal. A certified copy means a copy of the Judgment whose contents is vouched by an appropriate court officer. The applicant did not annex original copy of the Judgment that was certified by Deputy Registrar, High Court of Kenya. The copy of the Judgment of High Court of Kenya which the applicant filed together with his application is a photocopy of a Judgment whose page 53 shows that it was certified by Deputy Registrar, High Court of Kenya in Nairobi. Mr. Hyera has explained that he had the original but inadvertently filed a copy thereof instead of the original version. The photocopy version of the Judgment of the High Court of Kenya which this applicant wants to register was in addition certified to be a true copy of the original in Dar es Salaam by an Advocate of High Court of Tanzania.

It is clear that the applicant annexed to this application a photocopy of a certified Judgment of the High Court of Kenya which was certified to be a true copy of the original in Tanzania by an Advocate of High Court of Tanzania. For a start, I will not go along with the consequences suggested by Mr. Mutinda that the Judgment of the High Court of Kenya should be expunged from the records of this Court. There are several reasons which leave me in no doubt that the attention of this Court has sufficiently been drawn to the Judgment of the High Court of Kenya which the applicant included in his application. First, the respondent does not deny the fact that the applicant is the judgment creditor in the Civil Case No. 2966 of 1996 which concluded at High Court, Nairobi. According to paragraph 5 of respondent's replying affidavit, this civil suit proceeded to full hearing and Judgment was delivered on 22nd February 2008. Further in paragraph 7, respondent tacitly acknowledged the existence of that Judgment of the High Court of Kenya by respondent's intention to appeal by filing a Notice of Appeal. The impending appeal will be lodged when respondents receive copies of typed proceedings before lodging an appeal. Again, it is very plausible to believe that Mr. Hyera indeed had an original copy which was properly certified by the Deputy Registrar of the High Court of Kenya as shown on page 53 of the Judgment. A photocopy of the Judgment of High Court of Kenya which was notarized by An Advocate in Tanzania is in my opinion sufficiently certified to be a true and accurate copy of the original Judgment for purposes of this application. I will therefore decline

to expunge a copy of the Judgment which the applicant has filed in support of his affidavit of facts.

Let me move on to other statutory conditions for registration of foreign judgments in Tanzania which the applicant is required to satisfy this Court:

i) as provided for under section 4 (1) of the **Reciprocal Enforcement of Foreign Judgments Act, Cap 8**; application to register foreign Judgment must be made within six years after the date of Judgment.

ii) the Judgment the applicant is seeking to register, must not have been wholly or partially satisfied in the country of origin, Kenya (section 4 (1) (a), **Cap 8**).

iii) the applicant must have tried to enforce the foreign judgment in Kenya without success (section 4 (1) (b), **Cap 8**).

iv) at the date of filing of an application to register a foreign judgment (i.e. 19th August 2010) it was possible to enforce by execution in Kenya (Rule 3 (1) (b) (iii) **Reciprocal Enforcement of Foreign Judgements Rules, GN No. 15 of 1936**).

The question whether this application to register a foreign Judgment was made in this Court within six years after the date of Judgment need not detain us much longer. The Judgment of the High Court of Kenya (Civil Case No. 2966 of 1996 at Nairobi was delivered on 22nd February 2008.

This application was filed on 19th August 2010 which is clearly within six years of the date when Judgment of the High Court of Kenya was delivered. There is no dispute that the Judgment of the High Court of Kenya has not been satisfied in Kenya so far. The most important issue for my determination is whether the Judgment of High Court of Kenya is enforceable by execution in Kenya the country of its origin. This issue is important because one of the salient conditions for registration of a foreign judgment in Tanzania is that it must be enforceable by execution in the country of the original court. Foreign judgments can only be registered by the High Court of Tanzania if at the time of filing the application the foreign judgment was ripe for execution in the country of its origin.

Mr. Mutinda believes that the Judgment of the High Court of Kenya is not ripe for enforcement in the country of its origin Kenya because of the Notice of Appeal which the respondent has already filed to contest that Judgment. Secondly, Mr. Mutinda submitted that the applicant has not fulfilled all pre-conditions to make the judgment of the High Court ready for execution. He pointed out that in Kenya it is mandatory that a successful litigant first obtains a Certificate of Order before attempting to recover the money from the Government of Kenya. Mr. Mutinda is resolute that the failure to extract and annex this Certificate of Order to his application, the Judgment which the applicant has filed for registration

by this Court has not reached a stage where it can be said to be ready for enforcement by execution in Kenya, the country of its origin.

With respect, I think that on 19th August 2010 when the applicant filed his application to register a Judgment of the High Court of Kenya that foreign judgement was not yet ripe for enforcement by execution in Kenya. The fact of the judgment of High Court of Kenya is not ready for enforcement in Kenya is manifested by the intention of the respondent to appeal to the Court of Appeal of Kenya. Pleadings show that soon after the judgment had been delivered, respondent sought more time to serve a Notice of Appeal (Civil Application No. 114 of 2008). On 16 October 2009 the Court of Appeal of Kenya (S.E.O. Bosire-JA) acted on respondent's application and gave the respondent more time to serve the Notice of Appeal.

In allowing the respondent more time to file the Notice of Appeal, S.E.O. Bosire-JA was of the opinion that the intended appeal by the respondent was arguable because the decree which Ojwang, J. had awarded James Alfred Koroso was on the high side. Pleadings further show how the applicant was dissatisfied with the decision of Bosire, JA who sat as a single Judge of the Court of Appeal of Kenya (Civil Application No. 114 of 2008). The applicant referenced his grievance to the full Court of Appeal of Kenya presided by Githinji, Visram and Nyamu JJ.As. This reference was dismissed by the full court when the full court observed that while the

applicant (James Alfred Koroso) would no doubt suffer some prejudice by the extension of time granted to the respondent (Attorney General) by the single Justice of Appeal in the nature of delay in concluding the litigation and thereby denying him the fruits of his judgment indefinitely, the respondent herein would suffer greater injustice if he were to be prevented from exercising his statutory right of appeal to challenge the awards which the single judge (Bosire, JA) had considered high.

It is clear from the foregoing that the Court of Appeal of Kenya not only furnished the respondent with more time to serve a Notice of Appeal, the Full Court of Appeal of Kenya went on further to intimate that respondent should be allowed to challenge the awards arising from the Judgment of High Court of Kenya. In my opinion, where an appeal against a foreign Judgment sought to be registered in this Court is still pending, and the ultimate award arising from that foreign Judgment is still subject of such an appeal, this Court shall not exercise its discretion to register such foreign judgment. Registration of foreign judgments by this Court should not result to denial of statutory rights of appeal which litigants are entitled to. Furthermore, this Court abhors taking on a journey of futility to register a foreign judgment which is likely to be set aside soon after its registration. Registering such foreign judgment where respondent is still waiting to be supplied by the High Court of Kenya with typed proceedings for purposes of appeal would be an example of a futile exercise of power

of registration of a foreign judgment by this Court. With a process of appeal under way, the Judgment of the High Court of Kenya (Ojwang, J.) cannot be said to have reached a stage where it could not be enforced by execution in Kenya.

Lack of appropriate Certificate of Order against the Government of Kenya is another reason why I think the foreign Judgment which the applicant wants this Court to register cannot be registered. In his submission, Mr. Hyera alludes that the applicant tried to extract the Certificate of Order by filing Miscellaneous Civil Application No. 642/2009 in Nairobi but officials of Government of Kenya colluded and withdrew the application without the applicant's consent. Although the applicant averred in his affidavit that he tried without success to enforce the Judgment in Kenya, he has however not seen it fit to show what specific legal steps he undertook to enforce the Judgment of the High Court of Kenya. These legal steps in my opinion should have included obtaining a Certificate of Order under the **Government Proceedings Act, Chapter 40** of the laws of Kenya. According to paragraph 6 of his affidavit the applicant tried diplomatic avenue by seeking the intervention of the Tanzanian High Commission in Nairobi. With respect, the documents the applicant annexed to his affidavit as annexure JAK-2 are more a cry for help through diplomatic channels than taking concrete legal steps in Kenya to execute the Judgment of the High Court of Kenya.

Mr. Hyera has strongly submitted that the property of Government of Kenya can be easily attached in Tanzania because the Government of Kenya is not a "Government" for purposes of civil litigation in Tanzania. While Mr. Hyera is with respect correct that the Government of Kenya is not the "Government" within the definition ascribed by the **Interpretation of Laws Act, Cap. 1** of Tanzania, I should point out here that enforcement of foreign judgments in Tanzania is governed by the **Reciprocal Enforcement of Foreign Judgments Act (Cap. 8 R.E. 2002)**. Under this law, two criteria will guide this Court in its discretion whether to register for enforcement in Tanzania of a foreign judgment against a foreign Government.

First criterion is whether the foreign judgment concerned has satisfied the conditions precedent for its registration in Tanzania as provided under the **Reciprocal Enforcement of Foreign Judgments Act**. The second criterion is whether that foreign judgment has satisfied the conditions precedent for its execution in the country of its origin i.e. Kenya for purposes of this application. For purposes of determining execution of a foreign judgment for purpose of its registration, this Court places itself in the context of laws and courts of the country where judgment sought to be registered originate. Where a foreign judgment cannot be enforced under the laws of the country of origin then this Court cannot register that

judgment. The relevant law of Kenya to which the applicant should have channelled his efforts to satisfy the High Court judgment against the Government of Kenya is the **Government Proceedings Act, Cap 40 of Kenya**. Section 21 of this Act prescribes conditions for satisfaction of orders against the Government of Kenya. These conditions include the one requiring the Judgment-Creditor (applicant herein) within twenty-one days from the date of Judgment, to apply for a certificate containing particulars of relief the applicant is entitled from the Government of Kenya. The Act is categorical that no attachment or process can be issued to enforce payment by the Government of Kenya without the Certificate of Order obtained under terms provided under sub sections (1), (2) and (3) of section 21.

It is clearly my finding and holding that without proving that he sought and obtained that Certificate of Order, the foreign Judgment which the applicant wants to register in this Court cannot be regarded to have reached a threshold where it could be enforced in Kenya for purposes of this application. The applicant should in his affidavit of facts have exhibited a Certificate of Order against the Government to signify his having tried to enforce the Judgment against the Government of Kenya.

From the foregoing, it is evident that at the date when this application was filed in this Court; the Judgment of the High Court of Kenya the

applicant seeks to register, could not be enforced by execution in the country of the original court. This application is hereby dismissed. Each party shall bear own costs.

I.H. Juma
JUDGE
11-02-2011

Delivered in presence of: Mr. James Afred Koroso in person (Applicant) and Mr. Mutinda, Advocate (for Respondent)

I.H. Juma
JUDGE
11-02-2011