

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS CAUSE. 09 OF 2008
IN THE MATTER OF THE FOREIGN JUDGEMENTS
(RECIPROCAL ENFORCEMENT) ACT (CAP 9)

AND

**IN THE MATTER OF AN ORDER OF THE HIGH COURT OF KENYA AT
NAIROBI OBTAINED IN MISCELLANEOUS APPLICATION NO. 556 OF
2008 AND DATED THE 23RD DAY OF JULY, 2008**

AND

**IN THE MATTER OF THE APPLICATION BY MICHAEL NDICHU MBURU
(RECEIVER/MANAGER OF MANDEEQ AFRICA LIMITED (IN RECEIVERSHIP) FOR
REGISTRATION OF THE SAID ORDER IN THE HIGH COURT OF UGANDA AT
KAMPALA**

BEFORE HON LADY JUSTICE M.S ARACH-AMOKO

Ruling

This is an application under S. 3 of the Foreign Judgments (Reciprocal Enforcement) Act, Cap 9 and Rule 4 of the Foreign Judgments (Reciprocal Enforcement) Rules (hereinafter referred to as the “Act” and the “Rules”) for an order that:

- (a) the order of the High Court of Kenya at Nairobi obtained in Misc Application No 556 of 2008 dated 23rd July, 2008 be registered by this Honorable Court.
- (b) Provision be made for the costs of this application.

The grounds for the application are set out in the affidavit in support of Michael Ndichu Mburu filed on 4th August 2008 in this Court. They are briefly that:

- a) On 23rd July, 2008 the Applicant obtained an order in the High Court of Kenya at Nairobi, whereby he was allowed inter alia to attach all the assets of Maandeeq Africa Ltd (In Receivership), charged under a debenture dated 5th September, 2007;

- b) To date, the whole amount secured under the said debenture is outstanding.
- c) After the said order was issued, most of the assets subject of the order were fraudulently transferred into Uganda by the directors of the Debtor without the applicant's knowledge,
- d) The said order is capable of being enforced in the High Court of Kenya at Nairobi.
- e) If the order were registered in this Honourable Court the registration would not be liable to be set aside in any proceedings.
- f) It is in the interest of justice that this application be granted to enable the applicant to attach the said assets within the jurisdiction of this Honourable Court.

According to the affidavit in support of the application, the Applicant, Micheal Ndichu Mburu is the Receiver/Manager of Maandeeq Africa Limited (In Receivership), referred to in the application as the Debtor. Maandeeq Ltd is a limited liability company engaged in transport business with its usual place of business in Nairobi, Kenya. On or about the 5th September, 2007 the company created a debenture over a number of its properties/assets in favour of Fina Bank Limited, to secure a loan facility of K shs 89,600,000. The Bank is also registered and is based in Nairobi, Kenya.

The company defaulted in its obligations to the bank under the said debenture and the bank, on or about 17th July, 2008, put it under Receivership and appointed the Applicant Receiver/Manager.

On the 23rd July, 2008, the applicant obtained an order of the High Court of Kenya at Nairobi allowing him to attach, seize, repossess, collect, inspect and or take possession and or control for the purposes of preservation and accounting, all the assets of the company which had been charged under the debenture. The total amount due and owing including interest is Kshs 89,599,990 (principal) plus Kshs 24,236,9997 (accrued interest) which is equivalent to UG shs 2,732,087,688 (at the exchange rate of Kshs 24 per 1 Ug. shs), hence this application.

The question for determination by this Court is basically whether the application complies with the conditions set out in the Act and the Rules. Section 3 of the Act provides that:

“(1) A person, being a judgment creditor under judgment to which this part of this Act applies may apply to the High Court at any time within six years after the date of the judgment,to have the judgment registered in the High Court, and on any such application the Court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered except that a judgment shall not be registered; if at the date of the application-

a) It has been wholly satisfied; or

b) It could not be enforced by execution in the country of the original Court”.

The application complies with the Act. The application has definitely been brought within 6 years. The judgment debt has not been satisfied and the judgment is enforceable in Kenya, the county of the original

Court. A certified copy is attached to the applicant’s supplementary affidavit. It was issued under the seal of the Milimani Commercial and Tax Division at Nairobi High Court on the 23rd July, 2008. Kenya is a member of Commonwealth to which the Act applies. This is by virtue of the Foreign Judgments (Reciprocal Enforcement) (General Application) Order, SI No. 35/2002.

This Court is also enjoined to take judicial notice of the Commonwealth territories under S.56 (i) of the Evidence Act and takes judicial notice of that fact in respect of the Republic of Kenya.

As for the Rules, Rule 4 requires that:

- 1) The application under section 3 be made ex parte by notice motion supported by an affidavit.
- 2) The motion and affidavit shall be titled in the manner specified in the schedule to the Rules thus:

“In the matter of the Foreign Judgments (Reciprocal Enforcement) Act and in the matter of the judgment of the.....(describe the court) obtained in(described the cause or matter) and dated theday of20.....”

3) The affidavit shall contain-

a) a statement made according to the best knowledge and belief of the deponent-

- (i) that the applicant is entitled to enforce the judgment.
 - (ii) that at the date of the application the judgment has not been satisfied in part and if so, satisfied in part the amount of money remaining unpaid,
 - (iii) that at the date of the application the judgment can be enforced by execution in the original Court and that if the judgment were registered the registration would not be liable to be set aside under section 5 of the Act.
- b) a statement of the amount of interest, if any, which under the law of the country of the original Court, has become due under the judgment up to the time of registration;
- c) a statement as to the full name, title, trade or business and the usual or last known place of residence or business of the judgment creditor and the judgment debtor respectively as far as known to the deponent; and
- d) a statement of the amount payable under the debt expressed in Uganda shillings calculated at the current rate of exchange.

4) The affidavit shall be accompanied by-

- (a) a certified copy of the judgment issued by the original Court and authenticated by its seal and where the judgment is not in the official language, a translation of the judgment certified by a notary public or authenticated by an affidavit, and
- (b) such other evidence with respect to the matters referred to in sub rule(3)(a)(iv) and (b) of this rule as may be required having regard to the provisions of any other statutory order made by the Minister under section 2 of the Act extending the Act to the country of the original Court.

On perusal of the affidavits on Court record, I find that the Applicant has satisfied all the above requirements by his affidavits. It is an ex parte application by Notice of Motion under S.3 of the Act and Rule 4 of the Rules. It is properly entitled as specified in the Schedule to the Rules. The affidavits contain information to the effect that the applicant is entitled to enforce the judgment in his capacity as the Receiver/Manager of the Debtor Company, at the date of the application the

judgment has not been satisfied, the whole amount is due; the judgment can be enforced by execution in the original Court and it would not be liable to be set aside under section 5 of the Act. Section 5 provides that a judgment shall be set aside if Court is satisfied inter alia, that it is not a judgment to which part 11 of the Act applies; that the original Court had no jurisdiction in the circumstances of the case, the proceedings were flawed, the judgment was obtained by fraud, its enforcement would be contrary to public policy in the country of the registering Court or that the rights under the judgment are not vested in the applicant. None of these apply to the Applicant.

The affidavits also contain the interest due that is, KS 24,236,997 as well as the total amount in UG shs of shs 2,732,087,688. The registered place of business, Debtor and the Creditor is also stated.

Accompanying the supplementary affidavit is a copy of the judgment certified and sealed by the Deputy Registrar of the Kenya High Court at Milimani Commercial Court, Tax Division. A copy of S1 No. 35/2002. that is, the Foreign Judgments (Reciprocal Enforcement) (General Application) Order 2002 was also availed to this Court. It provides in S.2 that:

***“2. Part 11 of the Foreign Judgments (Reciprocal Enforcement) Act shall apply to the territories of the Commonwealth and to judgments obtained in the Courts of those territories as it applies foreign countries.*”**

On the basis of the above the Court is thus satisfied that the provisions of the Act and the Rules have been complied with:

(1) Leave to register the judgment of the High Court of Kenya obtained on the 23 rd July 2008 in Misc Application. No. 556 of 2008 is hereby granted as prayed.

2) The Applicant shall upon registration of the judgment take possession of the trucks listed in the judgment for purposes of preservation only, pending any application to set aside the registration.

3) Any application for setting aside registration of the judgment shall be made within 14 days after service of this order on the Debtor.

4) Execution of the judgment shall not issue until after the expiry of the period.

5) Costs of the applicant shall be provided for by the applicant.

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M.s Arach-Amoko

Judge

11/8/2008