

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISCELLANEOUS CAUSE NO. 13 OF 2012**

MR. GODFEY GITHINJI KAMIRI

T/A WESTMINISER COMMERCIAL TRADERS:.....:APPLICANT

COOPERATIVE BANK OF KENYA:.....:CREDITOR/FINANCIER

VERSUS

MATHEW OUMA OSEKO:.....:DEBTOR/RESPONDENT

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

This ruling arises from the preliminary points of law raised by counsel for the respondent when an application for an Order of Mareva Injunction arising from Misc. Cause No. 13 of 2012 came up for hearing. The applicant brought Misc. Cause No. 13 of 2012 under section 1 of the Judgment Extension Act Cap. 12, section 98 of the Civil Procedure Act Cap. 71, Order 52 of the Civil Procedure Rules and section 33 of the Judicature Act as well as other enabling provisions of the law. The applicant sought for Orders that the judgment delivered by the Chief Magistrate's court at Nairobi be registered by this Honorable Court and the costs of the application be provided for.

The grounds of the application are contained in the affidavit of Mr. Godfrey Githinji Kamiri which are briefly that:

- The applicant is a registered/licensed auctioneer under Class B, T/A Westminster Commercial Traders Auctioneers for purposes of executing court warrants, repossessions and distress for rent in the Republic of Kenya.
- The respondent obtained six motor vehicles, the subject of this application, on a hire purchase agreement for the Financier, the Co-operative Bank of Kenya.
- The respondent defaulted in the remittance of the Hire Purchase installments as provided in the Hire Purchase agreement.
- On the 11th of April 2012 the applicant received instructions from the Co-operative Bank of Kenya to repossesses the following motor vehicles from the respondent:

KBN 676V	VOLVO FM 12	PRIME MOVER
KBN 677V	VOLVO FM 12	PRIME MOVER
KBP 758A	VOLVO FM 12	PRIME MOVER
ZD5365	BHACHU	TRAILER
ZD5363	BHACHU	TRAILER
ZD5366	BHACHU	TRAILER

- On the 27th day of April 2012 the applicant received an Order vide Miscellaneous Application No. 307 of 2012 to impound and repossess the above named motor vehicles for and on behalf of the Co-operative Bank of Kenya.
- The said motor vehicles have been moved outside Kenya and are now operating in Uganda within the jurisdiction of this court.
- The applicant is reliably informed that the said motor vehicles are at the verge of being moved outside the jurisdiction of this court.
- It is just and equitable that the Applicant's Court Order be registered in this court.

The applicant also filed Misc. Application no. 279 of 2012 for an Order of Mareva Injunction to issue to restrain the judgment debtor from removing the motor vehicles subject of repossession from the jurisdiction of this court. When that application came up for hearing, Mr. Mugimba Peter, counsel for the respondent informed this court that he had points of law to raise regarding the competence of this case and requested to file written submissions which he was allowed to do.

Counsel for the respondent raised three points of law which were framed as issues, namely:

- 1) Whether the Chief Magistrate's Court in Kenya lacked the jurisdiction to entertain the matter.
- 2) Whether the ex parte Order obtained from the Milimani Commercial Court in Kenya is registerable in Ugandan Courts.
- 3) Whether the procedure under which the application was brought was applicable.

I consider the 2nd issue to be the major determining factor on the competence of this case and if it is resolved in the negative it would dispose of this matter. For that reason, I prefer to deal with it first.

The applicant is seeking for Orders that the judgment delivered by the Chief Magistrate's court at Nairobi be registered by this Honorable Court. According to Mr. Mugimba Peter the ex-parte Order from the Kenyan Court is not registerable in the Ugandan courts because it is not a decree within the meaning of section 1 of the Judgments Extension Act which provides for transferring decrees from Kenya to the High Court of Uganda. He relied on section 2 of the Civil Procedure Act to support his argument that an Order is not a decree.

Section 1 of the Judgments Extension Act provides in part:

“Where a decree has been obtained or entered in the Supreme Court of Kenya or in the High Court of Malawi or of Tanzania, or in any court subordinate to any of those courts, for any debt, damages or costs, and where it is desired that the decree shall be executed upon the person or property of the defendant in Uganda, the decree may be transferred to the High Court or to any of the courts subordinate to it (hereafter called subordinate courts) for execution...” (Emphasis added).

Section 2 of the Civil Procedure Act Cap. 71 defines a decree as:

“The formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties

with regard to any of the matters in controversy in the suit and may be either preliminary or final.” (Emphasis added).

Section 2 of the Civil Procedure Act Cap. 71 also defines an order as:

“The formal expression of any decision of a civil court which is not a decree”.

From the above definitions, a decree of court is different from an order because a decree reflects a conclusive judicial determination of the rights of parties unlike an order. In view of this clear position, I do agree with the submission of counsel for the respondent that the Order sought to be registered in this court is not a decree because the rights of the parties in dispute were never adjudicated upon and conclusively determined.

It is quite clear from the face of the Order itself that it was issued ex-parte for the Officer Commanding any police station in Kenya whose jurisdiction may be sighted to provide assistance to the applicant for purposes of keeping peace and order while the vehicles are being physically repossessed to avoid any resistance or intimidation by the hirer or his agents.

It was argued by counsel for the applicant that the application that gave rise to that Order was brought under rule 9 (c) of the Auctioneers Rules of Kenya. I have had the benefit of looking at that rule which is under Part III of the Auctioneers Rules that apply to the attachment and sale of movable and immovable property under warrants of court and letters of instruction from third parties.

It provides that:-

“Where an auctioneer has reasonable cause to believe that –

(a).....

(b).....

(c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of property,

the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully". (Emphasis added).

From the literal meaning of that rule as discerned from the words highlighted in bold, one would say that the request for police escort could be made to the nearest police station. However, the Auctioneers Amendment Rules 2009 provides that *an application under this rule shall be by motion by way of miscellaneous application supported by an affidavit and may be ex-parte*. This means that the request for police escort has to be made to court. The orders granted in such an application are specifically to provide police assistance as stated in the side notes of that rule. It does not confer any executable right to the applicant beyond police protection.

It is also important to note that the applicant was acting under a Repossession/Collection Order issued by the Cooperative Bank of Kenya, the creditor. He was therefore acting under a letter of instruction from a third party based on the powers allegedly derived from the Hire Purchase agreement as opposed to a court warrant.

In effect, the dispute between the creditor (third party who gave instructions) and the debtor (respondent) was never adjudicated upon. The respondent was never heard as to his rights and liabilities. The merits of the case were not canvassed. In that sense the Order that was issued was not a decree that is envisaged by the Judgments Extension Act.

It was further argued by counsel for the applicant that much as the application was specifically brought under the Judgments Extension Act; the applicant also alluded to any other enabling provision of the law which in his view includes the Foreign Judgments (Reciprocal Enforcement) Act and the Foreign Judgments (Reciprocal Enforcement) Rules. He therefore argued that this court should be guided by the definition of "*judgment*" under section 1 (1) (c) of the Foreign Judgments (Reciprocal Enforcement) Act which *means any judgment or order given or made by a court in any civil proceedings*.

First of all this court is of the view that this application could not be brought under both the Foreign Judgments (Reciprocal Enforcement) Act and the Judgments Extension Act because

they provide for two distinct procedures which can neither be mixed in one application nor used interchangeably.

Even if this court were to be convinced by the applicant's arguments, this application would still have challenges under the Foreign Judgments (Reciprocal Enforcement) Act. I have carefully looked at the relevant provisions of that law and these are my observations.

It is indeed true that judgment is defined under section 1 (1) (c) to include an order. However, section 2 which gives the Minister power to extend Part II of the Act to foreign countries giving reciprocal treatment qualifies the judgment to which that part of the Act applies in section 2 (2). It provides thus:-

“ Any judgment of a superior court of a foreign country to which this Part of this Act extends , other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part of this Act applies, if –

(a) It is final and conclusive as between the parties to the judgment;

and

(b) There is payable under the judgment a sum of money, not being a sum payable in respect of taxesand

(c)” (Emphasis added).

From the above provisions, firstly the judgment must be final and conclusive. Secondly, there must be a sum of money payable under the judgment. I have already made a finding herein above that the Order sought to be registered is not conclusive. It is also clear that there is no sum of money payable under the order as it was specifically for police assistance during repossession of the motor vehicles. For the above reasons the Order would still not qualify to be registered under the Foreign Judgments (Reciprocal Enforcement) Act.

In addition, section 3 (1) of that Act specifies that the person who can apply for registration of a foreign judgment is the judgment creditor under the judgment sought to be registered. Even if for the sake of argument this court were to be convinced that the order in issue is a judgment as

strongly argued for the applicant, this section would still disqualify the applicant who is an auctioneer acting under the letter of instruction from the creditor under the Hire Purchase agreement.

I believe the above findings would adequately dispose of this application. However, just to take the arguments further, it is noteworthy that section 9 of the Civil Procedure Act also prohibits registration of a foreign judgment that has not been given on the merits of the case.

This position was restated in the case of *American Express International Banking v Atul [1990-1994] EA 10* where Oder JSC noted that only a judgment given on merit would be accepted as conclusive in Uganda.

In view of the above straight forward provisions of the law and their effect on this application, I would not waste much time considering the other grounds of objection. However, just to mention in passing, as regards the issue of jurisdiction, my humble view is that since the application for police assistance is merely for maintenance of peace which does not confer any rights on the parties, any court in Kenya could entertain it. I therefore would not find merit on this ground of objection and would accordingly reject it.

On the issue of procedure, I wish to observe that the procedure for applying for registration of decrees under section 1 of the Judgment Extension Act is elaborately provided for under Order 22 rule 4 of the Civil Procedure Rules that governs execution of decrees by another court other than the one that passed it.

The applicant did not follow that procedure and the argument that this is a mere technicality that could be ignored is not at all convincing in the circumstances of this case. To my mind the elaborate procedural requirement of Order 22 rule 4 cannot not simply be ignored because it goes to the root of the application.

In the result, I find that grounds 2 and 3 of the objection have merit. I would accordingly uphold them and dismiss Miscellaneous Cause No. 13 of 2012 with costs to the respondent. Miscellaneous Application No. 279 of 2012 that arose from it would also automatically collapse

with costs. The interim order for the preservation of the suit motor vehicles issued by this court pending determination of Miscellaneous Application No. 279 of 2012 is hereby vacated.

I so order.

Dated this 8th day of November 2012.

Hellen Obura

JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Peter Mugimba for the respondent and Mr. Godfrey Githinji Kamiri the applicant. The applicant's counsel was reported to be indisposed.

JUDGE

08/11/12