REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CIVIL APPLICATION NO. 30 OF 2015

E M M ALIAS

E M G……APPLICANT

VERSUS

G W M

ALIAS G W M……RESPONDENT

RULING

The applicant has moved this court via a motion dated 28th April, 2015, seeking for orders that this honourable Court be pleased to adopt the judgment issued by the District Court of the County Hennepin, State of Minnesota, USA in case No. 27-FA-14-1893 for the purpose of enforcement; that the Court also be pleased to authorise its deputy registrar to execute all transfer documents on behalf of G W M alias G W M and that the land registrars in Nyeri and Kajiado land registries be directed to dispense with the production of copies of the PIN, identity card and passport size photographs of G W M alias G W M in the registration of property listed in the decree.

The motion was made under **section 67** of the **Marriage Act, 2014** and was supported by the applicant's own affidavit sworn in Minnesota in the United States on 28th April, 2015. In the affidavit, the applicant swore that he celebrated his marriage with the respondent in Karatina in Nyeri in June 1993 after which they both migrated to United States and settled in Minnesota. The marriage, however, broke down and he petitioned for divorce in the year 2014 in the District Court of the County of Hennepin in which the divorce cause was registered as No. 27-FA-14-1893. The judgment in the cause was recorded on 15th August, 2014.

According to the judgment, the applicant was awarded all the real estate in Kenya and Africa. In Kenya, the respondent owned several properties registered either in her own name or in the joint names of the applicant and the respondent; these properties are listed as:-

1. LR Nyeri/Naromoru/[particulars withheld] registered in the respondent's name;
2. LR Nyeri/Naromoru//[particulars withheld] registered in the respondent's name;

3. LR Iriaini/Gatundu//[particulars withheld] registered jointly in the names of the applicant and the respondent;
4. LR Ruguru/Karuthi//[particulars withheld] registered jointly in the names of the applicant and the respondent;
5. LR Konyu/Baricho//[particulars withheld] registered jointly in the names of the applicant and the respondent;
6. LR Konyu/Baricho//[particulars withheld] registered jointly in the names of the applicant and the respondent;
7. LR KJD/Olchoro-Nyore//[particulars withheld] registered jointly in the names of the applicant and the respondent;

The respondent was served by way of substituted service by advertisement in the Daily Nation of 24th July, 2015 and through registered mail to her last known address. An affidavit of service was filed to that effect. Despite this service the respondent did not file any form of response to the application and thus it proceeded *ex parte.*

Counsel for the applicant submitted by way of written submissions; she reiterated facts as deposed to in the supporting affidavit of the applicant. On the law, counsel submitted that under **section 67** of the **Marriage Act (No 4 of 2014)** and **Section 17** of the **Matrimonial Property Act** (**No 49 of 2013)** a party to a dispute regarding matrimonial property may approach the court by way of a petition in a matrimonial cause. The judgment which the applicant seeks adopted, so counsel argued, incorporates all those aspects of custody, divorce and matrimonial property and ought to be adopted by virtue of **Section 67** of the **Marriage Act, 2014**. Counsel urged that this section together with **section 17** of the **Matrimonial Property Act** recognise all foreign judgments regarding marriage and sharing of matrimonial property.

Counsel distinguished the **Foreign Judgments (Reciprocal Enforcement Act), 1984** from the **Marriage Act, 2014**, in so far as enforcement of foreign judgments is concerned; according to her, whereas the former Act lays emphasis on mutual recognition of foreign judgments of countries that recognise judgments delivered in Kenya, the latter Act recognises all foreign decrees issued in matrimonial proceedings without the need to demonstrate reciprocity.

I have considered the provisions which counsel has made reference to; **section 67** of the **Marriage Act,** simply gives recognition to a decree from a foreign court in matrimonial proceedings; it does not provide for the manner of registration or execution of such a decree. For better understanding it is necessary to reproduce it here verbatim.

Where a foreign court has granted a decree in matrimonial proceedings whether arising out of a marriage celebrated in Kenya or elsewhere, that decree shall be recognized in Kenya if—

(a) either party is domiciled in the country where that court has jurisdiction or had been ordinarily resident in Kenya for at least two years immediately preceding the date of institution of proceedings;

(b) being a decree of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them.

Section 17 of the Matrimonial Property Act No. 49 of 2013 on the other hand, appear to deal with declarations of rights over property that is subject to a contest between spouses or between former spouses. Whenever there is such a contest, a person applies to court in accordance with the procedure that may be described. That section provides;

17. Action for declaration of rights to property

(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

On the face of it, this provision does not cater for registration of foreign judgments as one would seek to register and enforce them under **Foreign Judgments (Reciprocal Enforcement Act) 1984;** in my opinion, this particular provision has to do more with a substantive action seeking declarations of rights over property in a dispute between spouses or former spouses. The manner of approaching the court for such declarations is subject to the rules formulated by the Rules committee established under the Civil Procedure Act; section 18 of Matrimonial Property Act sheds more light on this. It states as follows:-

18. Provisions on delegated powers

(1) The Rules committee established under the Civil Procedure Act (Cap 21) shall make rules to regulate any matter of practice or procedure under this Act.

(2) Without prejudice to the generality of subsection (1), such rules may prescribe—

(a) the procedure to be followed and the forms to be used under this Act;

(b) the time within which documents are to be filed and served under this Act.

As far as I am aware the rules contemplated in **section 18** of the Act have not yet been formulated; I would suppose that in the absence of these rules, it is open to a party to take proceedings under this Act in any manner known in law. Prior to the enactment of the **Matrimonial Property Act**, a party would take out an originating summons whenever any question arose between spouses as to title to or possession of property; such summons would be taken under **section 17** of the now repealed **Married Women's Property Act, 1882** which is the predecessor of the current law. I doubt there would be anything wrong if one adopted this procedure in institution of an action under **section 17** of the **Matrimonial Property Act** considering that the Rules committee has not come up with any rules of how one should move the court for the declaration of rights over disputed property.

Be that as it may, neither **section 67** of the **Marriage Act** nor **section 17** of the **Matrimonial Property Act** appeal to me to be a substitute or an alternative to any provision in the **Foreign Judgments (Reciprocal Enforcement) Act 1984 on registration** and enforcement of foreign judgments solely because a judgment sought to be registered and enforced does not originate from a 'designated court' or a 'reciprocating country, as understood under **section 2** of that **Act.** All I mean is that one cannot invoke any other law to register and execute a judgment from a non-designated court or a non-reciprocating country in the same manner it would have been done under the **Foreign Judgments (Reciprocal Enforcement) Act 1984** if the judgment originated from a designated court or a

reciprocating country**.**

The question that then arises is, how does one execute a judgment from a foreign country which is not reciprocating country" This same question was asked in the Ugandan case of **Christopher Sales & Carol Sales vs The Republic of Uganda & Apollo k. Kironde (HCCC No. 2011)** which was cited with approval by our own Court of Appeal in **Nairobi Civil Appeal No. 147 of 2009, Jayesh Hasmukh Shah vs Navin Haria & Another**.

In that case the plaintiff brought a suit against the defendant by way of a plaint for a declaration that the judgment entered by the court in Southern District of New York, in the United States of America be enforced in Uganda. At the hearing, the respondent contended, *inter alia,* that the USA judgment was not only unenforceable but was also incapable of registration in Uganda by virtue of Foreign **Judgments (Reciprocal Enforcement) Act (Cap 9, Laws of Uganda).** While rejecting this argument, the court held that:-

The issue that is raised here is not one of reciprocity because quite clearly, there are no reciprocal arrangements between Uganda and USA. The question raised is as to what a judgment debtor who is "stranded" with a judgment from a country with no reciprocal arrangements with Uganda, like in this case, is supposed to do with the judgment. What is he supposed to do to enforce it if at all"

In answer to this question, the court in the Ugandan case cited the case of **Hilton vs Guyot 159(US 113 (1895)** where the concept of international comity, as a solution, was considered; in that case it was said:-

Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and goodwill, on the other; it is the recognition which one allows within its territory to the legislative, executive or judicial act 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 protection of its laws…we are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting a trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it is sitting, or fraud in procuring the judgment, or any other special reason why the country of this nation should not allow its full effect, the merits of the case should not, in an action brought in this country upon the judgment be tried afresh, as on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

The court in Uganda adopted this dictum and held that the USA judgement was enforceable in Uganda. The learned judge in that case, Mwangusya, J held**:-**

The Judicial system under which the case was tried is beyond reproach. A judgment creditor armed with such a judgment should be allowed to realise the fruits of his judgment which should be afforded recognition by our courts in absence of a reciprocal arrangement. This court grants him the prayer that judgment is enforceable in Uganda.

The point to note here is that just as was the case in Uganda, the judgment sought to be enforced in the instant application originates from the United States which has no reciprocal arrangement with Kenya.

Noting that without such arrangement, the judgment could not be registered and executed under **Foreign Judgments (Reciprocal Enforcement) Act** which is the equivalent of our own version of this law, the judgment creditor moved the court by way of substantive suit; he did not seek to register and execute the judgment under any other law as if he was applying the **Foreign Judgments (Reciprocal Enforcement) Act**.

In my view this is what the applicant ought to have done; he should have moved the court by way of a substantive action or suit and not through an application for neither **section 17** of the **Matrimonial Property Act** nor **section 67** of the **Marriage Act** provide for registration and enforcement of judgments from non-reciprocating countries. Without pretending to prescribe any particular form such a suit should take, I would suppose that an originating summons under **section 17 of the Matrimonial Property Act** would have been the appropriate cause. For this reason I think that the applicant's application which, for all intents and purposes, is seeking to register and execute a foreign judgment as if it were from a reciprocal country yet it is not, is misconceived. I hereby dismiss it with no orders as to costs.

Signed, dated and delivered in open court this 11th day of March, 2016

Ngaah Jairus

JUDGE