ENFORCEMENT OF FOREIGN JUDGMENTS, LEGISLATION, PROCEDURES AND CASES BY FRANCIS M. SSEKANDI

UGANDA

Law applicable

The Reciprocal Enforcement of Judgment Act Cap 21

The Foreign Judgment (Reciprocal Enforcement) Act Cap 9

The Civil Procedure Act Cap 71

The Judicature Act Cap 13

The Foreign Judgments (Reciprocal Enforcement) (General Application) Order S.I No. 35/2002

The Foreign Judgments (Reciprocal Enforcement) Rules S.I 9-1

The Reciprocal Enforcement of Judgment Act Cap 21 was passed in 1922 to cater for the enforcement in Uganda of judgments made in the UK,the Republic of Ireland and other Commonwealth countries only.

The Foreign Judgment(Reciprocal Enforcement) Act Cap 9 was passed in 1961 to provide for the enforcement in Uganda of judgments given in foreign countries which accord reciprocal treatment to judgments given in Uganda and facilitate the enforcement in foreign countries of judgments given in Uganda.

The Foreign Judgments(Reciprocal Enforcement)(General Application) Order S.I No. 35/2002 extended the application of Part II of Cap 9 to the territories of the Commonwealth and to judgments obtained in the courts of those territories as it applied to other foreign countries not part of the Commonwealth.

When S.I No.35/2005 came into force, Cap 21 ceased to have effect except in relation to those territories of the Commonwealth to which it extended immediately before the coming into force of the general application order-**see s.8 of Cap 9**

Sections 9 and 10 of Cap 71 recognize foreign judgments but does not provide for express procedures.

Before a foreign judgment can be registered in Uganda, there has to be a reciprocal arrangement that judgments from Uganda will be enforced in that country. The arrangement may be a ***reciprocal treaty*-see s.2 of Cap 9**

However, according to **Christopher Sales & Carol Sales v the Attorney General** HCCS 91/2011 **Mwangusya E J (as he then was)** agreed with the Plaintiffs and held that 'a judgment creditor armed with such a judgment should be allowed to realize the fruits of his judgment which should be afforded recognition by our courts in absence of a reciprocal arrangement.'

In the event that there is no reciprocal arrangement between Uganda and the foreign country, registration will be done under the common law regime and not **Cap 9** since reciprocity is a precondition for registration under the Act**.**

It should be noted that the High Court has power to apply common law rules-**see s.14 of Cap 13.**

SOUTH AFRICA

In South Africa, registration of foreign judgments without any reciprocal arrangement is possible both at common law and statute law.

Both in England and in South Africa, it is well established that foreign judgments are recognizable and enforceable under the common law. **See North and Fawcett: *Cheshire and North's Private International Law* (13th ed. 2004) at 407; Forsyth: 13 *Private International Law* (4th ed. 2003) at 389.**

In South Africa, the procedure for and scope of recognition proceedings are lucidly expounded in **Joubert (ed.): *The Law of South Africa* (First Reissue, 1993) Vol. 2 at para. 476**, as follows:

"... the present position is that a foreign judgment is not directly enforceable in South Africa; but if it is pronounced by a proper court of law and certain requirements are met any determination therein (for example of a party's rights or status) will be recognized and the judgment will in fact found a defence of *res judicata* if it would have founded such a defence had it been a South African judgment. In addition, an authenticated foreign judgment constitutes a cause of action and as such is enforceable by ordinary action in a South African court, including, where appropriate, an action for provisional sentence or for a declaratory order or for default judgment. A South African court will not pronounce upon the merits of any issues or factor of law tried by the foreign court and will not review or set aside its findings though it will adjudicate upon a "jurisdictional fact establishing international competency".

The general requirements for recognition and enforcement of foreign judgments are set out in **Joubert (*op cit*), at para 477**. These requirements were adopted and applied by the Appellate Division in ***Jones v Krok* 1995 (1) SA 677 (A) at 685B-E** and in ***Purser v Sales* 2001 (3) SA 445 (SCA) at 450D-G.**

In ***Jones's*** case, **CORBETT CJ** summarized these requirements as follows:

- the foreign court must have had international competence as determined by South African law;
- the judgment must be final and conclusive and must not have become superannuated;
- the enforcement of the judgment must not be contrary to South African public policy (which includes the rules of natural justice);
- the judgment must not have been obtained by fraudulent means;
- the judgment must not involve the enforcement of a penal or revenue law of the foreign state; and
- enforcement must not be precluded by the Protection of Business Act 99 of 1978

For statute law, the Enforcement of Civil Judgments Act 32 of 1988 was intended to provide an expedited means of enforcing foreign judgments emanating from designated countries. Unlike other statutory schemes in Africa, reciprocal treatment from the designated country is not required [1] . The Act provides procedures for the foreign judgment to be registered. Once registered it is treated as a judgment emanating from the magistrates' court.

It should be noted that South African law does not require that reciprocity be shown before a foreign judgment will be enforced. If the requirements for enforcement are met, a South African court will enforce a foreign judgment irrespective of whether any form of reciprocity of enforcement exists between the two jurisdictions in question.[2]

GHANA

There are two things that judgment creditors can do with a foreign judgment. They may sue on the judgment to recover their money or plead the judgment as a defence in an action brought against them by the judgment debtor. As regards the former, there are two ways by which the foreign judgment may be recognized and enforced in Ghana. These are through an action on the

[1] Richard Frimpong Oppong 'Private International Law and the African Economic Community: A Plea for Greater Attention' [ICLQ vol 55, October 2006 p.916

[2] www.gettingthedealthrough.com accessed on 8/1/2013 at 1800hrs;Roger Wakefield 'Getting the Deal Through-Enforcement of Foreign Judgment 2012' South Africa

judgment at common law or through a system of registration under the Courts Acts 1993[3] and Instruments[4] made there under.

Whereas an action on the judgment at common law does not require reciprocity, registration of foreign judgments under the relevant Act and instruments requires reciprocity as their operation is on the basis of reciprocity.

Ghana is a common law country in West Africa. Despite the fact that common law deems the foreign judgment as creating an obligation, the foreign judgment creditor has to bring a fresh action on the judgment. Hence s/he cannot directly enforce/execute the judgment. S/he has to bring an action on the judgment. The common law treats such judgments as evidence of a debt. Consequently, only judgments for fixed sums of money are enforceable in Ghana. To be recognized and enforced, the judgment has to be final and conclusive and must have been given by a court which, as a matter of Ghanaian private international law, had international jurisdiction.[5]

A distinctive feature of this regime is that the court will not go into the merits or substance of the case and there is no requirement of reciprocity.[6]

The procedure in Ghana is for the judgment creditor to issue a writ and to plead that the judgment debt is due and owing. S/he can apply for summary judgment under Order 14 of the High Court Civil Procedure Rules [7] on grounds that the defendant has no real prospect of successfully defending the claim.

Relevant case law to look at includes:

1. *Yankson v Mensah*[8];
2. *Republic v Mallet, Ex Parte Braun*[9].

[3] Part V of the Courts Act 1993 Act 459
[4] High Court (Civil Procedure) Rules C.I.47 2004 and Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993 (L.I.1575).
[5]Richard Frimpong Oppong 'Recognition and Enforcement of Foreign Judgments in Ghana: A Second Look at a Colonial Inheritance Commonwealth Law Bulletin Vol 31 No 4 p.22
[6]Richard Frimpong Oppong 'Private International Law and the African Economic Community: A Plea for Greater Attention' [ICLQ vol 55, October 2006 p.920]
[7] High Court Civil Procedure Rules, Constitutional Instrument 47 of 2004
[8] [1976] 1 GLR 355
[9] [1975] 1 GLR 68

NIGERIA

Historically, several foreign countries mandated a showing that the other country would enforce judgments of a similar nature from their courts.[10] Although many countries have eliminated the reciprocity requirement, some have not, Nigeria inclusive.

In Nigeria there are two statutes under which a foreign judgment can be enforced by registration following the concept of reciprocity viz:

- **Reciprocal Enforcement of Foreign Judgments Ordinance, Cap 175, Laws of the Federation of Nigeria NA Lagos, 1958** ("the 1958 Ordinance) (this Ordinance was enacted in 1922 as L.N. 8, 1922).
- **Foreign Judgments (Reciprocal Enforcement) Act, Cap 152, Laws of the Federation of Nigeria, 1990** ('the 1990 Act') (enacted in 1961 as L.N.56, 1961).

One of the two statutes has proved to be controversial because a prerequisite to its application, the issuance of a ministerial order, has not been fulfilled. Nevertheless, the Nigerian Supreme Court has found a way to apply one of the provisions of the statute.[11]

Non Reciprocal Judgments[12]

So what is the procedure of registering foreign judgments obtained in countries that **do not assure substantial reciprocity as regards the enforcement of judgments given by Nigerian courts?**

It has been suggested that where it is **impossible** to obtain registration of a foreign judgment in Nigeria for **want of reciprocity, common law becomes applicable** and the judgment creditor may use the foreign judgment to **procure a judgment in Nigeria by instituting a fresh action.**[13] The reasoning behind this is that just as common law has not ceased to apply in spite of the many statutes and Conventions regulating enforcement of foreign judgments in England, both the 1958 Ordinance and the 1990 Act cannot operate to the exclusion of the common law.

It is however difficult to see how the common law would apply in Nigeria to countries whose superior courts do not recognize and enforce judgments given by Nigerian courts. Indeed, section

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[10] Philip R. Weems 'Guidelines for Enforcing Money Judgments Abroad' *International Business Lawyer,* Volume 21 Number 11, p.510

[11] Gbenga Bamodu *'The Enforcement of Foreign Money Judgments in Nigeria: A Case of Unnecessary Judicial Pragmatism* Summer 2012 The Oxford University Commonwealth Law Journal Vol.12 Issue 1

[12] http://www.mondaq.com/x/27249/international+trade+investment/Legal+Regime+For+The+Enforcement+of+Foreign+Judgements+in+Nigeria+An+Overview accessed on 8/2/2013 at 2122hrs

[13] Article on "cross border insolvency" published on the internet. Author Unknown

12 of the 1990 Act manifests a clear intention on the part of the legislature to render any judgment pronounced by a court of a foreign country which does not give due recognition to judgments delivered by Nigerian courts unenforceable in Nigeria under any **guise whatsoever.**

TANZANIA

Tanzania is a common law country in East Africa. The recognition and enforcement of foreign judgments in Tanzania is governed by the common law rules and a statutory regime for the registration of judgments from specified countries.

Although the common law position in Tanzania is similar to that of other common law countries like Ghana discussed above, it is worthy of note that the common law rule that a cause of action survives the foreign judgment such that fresh action could be brought by either party if dissatisfied with the judgment may not apply in Tanzania.[14] This is because under section 11 of the Civil Procedure Code Act[15], 'a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them they claim…' [16] This presumption makes it easier for an application for summary judgment to be founded on it since the judgment is less susceptible to challenge and shifts the burden of proof, with the cost it entails, onto the defendant[17]

In Tanzania as in Uganda, upon the production of any document purporting to be a certified copy of a foreign judgment, court shall presume that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record[18]

The statutory regime is governed by the Reciprocal Enforcement of Foreign Judgments Act 1935[19], together with two subsidiary pieces of legislation, namely, the Reciprocal Enforcement of Foreign Judgments Order[20] and the Reciprocal Enforcement of Foreign Judgment Rules.[21]

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[14] Discussed in Richard Frimpong Oppong (n 6) p.918

[15] **Chapter 13, Laws of Tanzania**

[16] S Thanawalla 'Foreign Inter Partes Judgments: Their Recognition and Enforcement in the Private International Law of East Africa' (1970) 19 ICLQ 430

[17]This presumption is, however, rebuttable by proof of want of jurisdiction, fraud, breach of natural justice, a law in force in Tanzania or international law and the fact that the judgment was not given on merits. See ss 11 and 12 of the Civil Procedure Code Act Cap 13 Laws of Tanzania

[18] Section 12 of Chapter 13 Laws of Tanzania and section 10 of Chapter 71 Laws of Uganda; but such presumption may be displaced by proving want of jurisdiction.

[19] Ch 8 of the Revised Laws of Tanzania

[20] GN Nos 8 and 9 of 1936

[21] GN No 15 of 1936

Under the Act, 'judgment' means a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.

The Act applies to judgments given in named foreign countries on the basis of reciprocity. The President designates these countries after he is satisfied that judgments of the Tanzanian courts will be accorded similar treatment in that country. [22] Thus, like other statutory enforcement schemes in Africa, the doctrine of reciprocity lies at its heart.[23]

MALAWI

In the case of **NICOLAAS ALBERTUS HEYNS v JOHN DEMETRIO** [24] **D F MWAUNGULU J** observed that the jurisdiction of the High Court of Malawi over foreign judgments is statutory and common law. Three statutes cover the matter viz; the British and Commonwealth Judgments Act, 1922; the Judgment Extension Ordinance, 1922 and the Service of Process and Enforcement of Judgments Act. **The Judgment Extension Ordinance 1922** replaced the **1912 Ordinance which itself repealed the 1903 Ordinance** and covered Kenya, Uganda, Tanganyika (now Tanzania), Northern Rhodesia (now Zambia) and Zanzibar. It certainly never covered South Africa. **Section 6 (1)** provides for extension to other countries. There has been no extension to South Africa. **The Service of Process and Execution of Judgments Act, 1957** covered Zambia and Southern Rhodesia (now Zimbabwe). These statutes recognize judgments of all levels of courts in countries they apply. They differ from the British and Commonwealth Judgments Act in this respect.

Besides the British and Commonwealth Act and the Judgment Extension Ordinance, courts at common law enforce foreign judgments. The power depends not on comity or reciprocity but on the defendant's duty to the court of the judgment and the contract. **see <u>Schibsby v Westernholz</u>[25]**

He also referred to **<u>Societe Cooperative etc v Titan</u>[26]<u>,</u>** where **Widger LJ** stated the common law procedure for enforcing foreign judgments:

> 'On the other hand, it is equally clear that for many years the common law had

[22] The Reciprocal Enforcement of Foreign Judgments Order list named courts in the following countries in its schedule Lesotho, Botswana, Mauritius, New South Wales, Zambia, Seychelles, Somalia, Zimbabwe, Kingdom of Swaziland and the United Kingdom

[23] Richard Frimpong Oppong 'Private International Law and the African Economic Community: A Plea for Greater Attention' [ICLQ vol 55, October 2006 p.918-919

[24] Malawi HCCS No. of 2001

[25] [1861-73] All E.R. Rep. 988, 991, Blackburn, J.,

[26] [1965] 3 All E.R. 494, 496

> recognized in appropriate circumstances that a judgment obtained abroad might be enforced by action in this country. That involved, in the appropriate circumstances, the issue of a writ in this country claiming the amount of the foreign judgment and setting up the foreign judgment either as the cause of action or as a conclusive proof of the existence of the original cause of action. By those means, in the cases which at common law were appropriate, judgment could be obtained in the English action for an amount equivalent to the foreign judgment, and the English judgment was then enforceable in the ordinary way.'

The action is by writ of summons. Unlike the statutory procedure, at common law, the judgment creditor cannot enforce a foreign judgment directly by execution or any other process. Between the parties, a foreign judgment creates a debt (Walker v Witter[27], and Grant v Easton[28]).The debtor's liability stems from an implied promise to pay the amount of the foreign judgment (Grant v Easton).

ZAMBIA

The legal regime on the procedure of registration of foreign judgments between Zambia and other countries without any reciprocal arrangement is summarized in the celebrated case of **AG v DR. FREDERICK JACOB TITUS CHILUBA and Others[29].**

Currently, there are two leading Supreme Court decisions concerning registration of foreign judgments in Zambia.

The most recent decision was in the case of **Zanetta Nyendwa V Kenneth Paul Spooner, SCZ. Judgment[30]** That case involved the registration, under the **Foreign Judgments (Reciprocal Enforcement) Act,[31]** of an order made ex parte by the High Court of Justice, Family Division in England, which dealt with the return of two minor children to the court's jurisdiction. The Supreme Court held that the English Court's order was not capable of registration under the Foreign Judgments (Reciprocal Enforcement) Act for the following reasons;

(a) that the order was not for the payment of money

(b) that the order was neither final nor conclusive and

(c) that the order was obtained ex parte, in the absence of the other party.

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[27] (1778) 1 Doug K B 1
[28] (1883) 13 QBD 302
[29] 2007/HP/FJ/004
[30] No. 20 of 2010
[31] Chapter 76 of the Laws of Zambia

There is an earlier decision in the case of **Mileta Pakou & others V Rudnap Zambia Limited**[32]. That case involved the registration of a judgment for the payment of sums of money awarded by a Yugoslavian court. The Supreme Court held in that case;

(a) that Yugoslavia was not one of the scheduled countries under the Foreign Judgments (Reciprocal Enforcement) Act and therefore the question of enforcing the judgment of its courts directly by registration did not arise and

(b) that the law which applies in Zambia in default of any statute is the common law of England.

In that case, the Supreme Court did observe that even under common law the judgment did not meet the conditions required for it to be enforced.

The Foreign Judgments (Reciprocal Enforcement) Act is not the only statute by which all foreign judgments should be considered for registration.

For example, maintenance orders made by foreign courts, being orders made in matrimonial proceedings are excluded from registration under the Foreign Judgments (Reciprocal Enforcement) Act. Yet maintenance orders made by the courts of England or Ireland are enforceable, here in Zambia, under the **Maintenance Orders (Enforcement) Act,**[33] There is a special provision in that Act for their registration.

Again, a decree of dissolution or annulment of marriage made by a foreign court is excluded from registration under the Foreign Judgments (Reciprocal Enforcement) Act. Yet such decrees are recognized under the **Matrimonial causes Act**[34].

Another example is with regard to judgments made by courts of record in Zimbabwe or Malawi. Civil judgments from such courts are enforceable in Zambia under the **Service of Process and Execution of Judgments Act**[35]. This Act became part of our laws as an "Applied Act", that is, an enactment of the Legislature of the former Federation of Rhodesia and Nyasaland which came into force in Zambia by virtue of the **Federation of Rhodesia and Nyasaland (Dissolution) Order in Council**.

'The position that emerges from the cases and the statutes cited above is thus; whenever a judgment creditor seeks to enforce, here in Zambia, a judgment or order made by a foreign court, the creditor should first consider whether judgments and orders of such foreign court are

[32][1998] ZR 233
[33] Chapter 56 of the Laws of Zambia
[34] No. 20 of 2007
[35] Chapter 79 of the Laws of Zambia

enforceable under the Foreign Judgments (Reciprocal Enforcement) Act or, indeed, under any other written law. If such judgments are not enforceable under any of our written laws, then the creditor should seek to enforce such judgment at common law.[36]

According to Halsbury's Laws of England 4th Edition Paragraph 715 regarding enforcement of foreign judgments at common law:

"subject to certain qualifications, a judgment in personam of a foreign court of competent jurisdiction is capable of recognition and enforcement in England. Apart from statute, it will not be enforced directly by execution or any, other process, but will be regarded as creating a debt between the parties to it, the debtor's liability arising on an implied promise to pay the amount of the foreign judgment. The debt so created is a simple contract debt and not a specialty debt, and is subject to the appropriate limitation period. It is immaterial that the debtor dies before judgment is given by the foreign court and that the judgment is pronounced against his personal representative."

Paragraph 716 provides:

"As a foreign judgment constitutes a simple contract debt only, there is no merger of the original cause of action, and it is therefore open to the plaintiff to sue either on the foreign judgment or on the original cause of action on which it is based, unless the foreign judgment had been satisfied."

The case of **Mileta Pakou and Others V RUDNAP Zambia Limited**[37] contains passages to the same effect.

For our purposes what should be noted from these passages is that a judgment creditor wishing to enforce a foreign judgment at common law will have to commence an action founded on that judgment as a cause of action. The trial court will have to consider several rules, including the rule that the foreign court must have had jurisdiction over the defendant in accordance with the principles of conflict of laws before it can entertain the action.[38]

[36] E. M. Hamaundu, J. in AG v DR. FREDERICK JACOB TITUS CHILUBA and Others 2007/HP/FJ/004
[37] Supra no. 28
[38] Discussed in AG v DR. FREDERICK JACOB TITUS CHILUBA and Others (n 33)

ZIMBABWE

Registration of Foreign Judgments in Zimbabwe

Insofar as concerns the registration of foreign civil judgments, the relevant statutory provisions presently in force in Zimbabwe are contained in the **Civil Matters (Mutual Assistance) Act [*Chapter 8:02*].**

Section 3 of the **Civil Matters (Mutual Assistance) Act [Chapter 8:02]** provides for the enforcement in Zimbabwe of civil judgments given in foreign countries, and related matters. That said, the Act only applies to the judgments of:

1. an international tribunal, being any court or tribunal established pursuant to any international agreement or resolution of the general assembly of the United Nations; and

2. the judgment of a court in a "designated country" i.e. a country specified by the Minister of Justice in a separate statutory instrument as being a country to which the Act will apply.

The word "judgment" is defined in **section 2** of the Act to mean "a judgment or order given or made by any court or tribunal requiring the payment of money, and includes an award of compensation or damages to an aggrieved party in criminal proceedings".

In any event, the Act is clearly not exhaustive in the coverage of its provisions. **Section 25** expressly acknowledges that the Act does not derogate from other laws and provides that:

"This Act shall be regarded as additional to, and not as limiting the provisions of any other law relating to the recognition and enforcement of foreign judgments, the service of process or the taking of evidence, whether on commission or otherwise."

It follows that **Chapter 8:02** does not purport to override or exclude the operation of any other law, including the **common law**, pertaining to the recognition and enforcement of foreign judgments. In effect, **section 25** accords with the general rule of statutory interpretation that the common law cannot be ousted except by clear language or in express terms.

If a foreign country is not one of the "designated countries" for the purposes of the Act, and accordingly the provisions do not provide any assistance in relation to the enforcement in Zimbabwe of a civil judgment entered by the courts of that country, there is, for practical purposes, no mechanism which can be used for the enforcement in Zimbabwe of a judgment which has been entered.

This means that proceedings will have to be instituted *de novo*[39] out of the High Court of Zimbabwe, in which regard:

1. the Plaintiff will have to satisfy the Court that it has jurisdiction to entertain the claim, although if the Defendant is resident in Zimbabwe then the Court will almost invariably assume jurisdiction;

2. the Plaintiff, as a non-resident of Zimbabwe, may be called upon to file security for the costs of the Defendant in the action;

3. the Plaintiff, in order to succeed, will have to establish a cause of action to satisfy the Court that it is entitled to the judgment which it seeks; and in this connection the Zimbabwean courts will apply the normal conflict of law rules in order to determine the legal system to apply; and

4. any judgment which has already been obtained in a foreign court may, in appropriate cases, be of persuasive evidential value, but will not be regarded as being decisive in disposing of any dispute which may arise.

The background to the dispute will determine the appropriate procedure to be used before the High Court. In this regard two possibilities present themselves: **First**, to proceed by way of a court application (which will be determined on the papers) where no material disputes of fact arise; or **secondly** by way of trial action, where such disputes do exist.

The Zimbabwean courts have generated no body of learning relating to proceedings instituted by a foreign resident in these particular circumstances.[40]

KENYA

In Kenya- as in Uganda[41], foreign judgments are merely to be treated as *conclusive*[42]. **Section 9 of the Civil Procedure Act**[43] provides as follows:

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[39] http://www.actl.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=5003 accessed on 8/5/2013 Peter Lloyd, Gill, Godlonton & et al 'The Enforceability of US and Canadian Judgments in Zimbabwe'

[40] Ibid

[41] Section 9

[42] S Thanawalla 'Foreign Inter Partes Judgments: Their Recognition and Enforcement in the Private International Law of East Africa' (1970) 19 ICLQ 430-431

[43] **Chapter 21,Laws of Kenya**

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except -

(a) where it has not been pronounced by a court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in Kenya.

Whereas under common law[44], a foreign judgment cannot be impeached on the ground that it was erroneous on the merits, in Kenya-as in Uganda[45] and Tanzania[46], merit is a requirement of general application not restricted to the case where the foreign judgment is pleaded in defence.

The legal position with respect to enforceability of foreign judgments in Kenya is outlined in **The Foreign Judgments (Reciprocal Enforcement) Act[47]** which applies to:

1. Judgments whereby a sum of money is made payable;
2. Judgments in which movable property has been ordered to be delivered;
3. Certain judgments for criminal compensate on and costs; and
4. An award in arbitration proceedings that has become enforceable as a judgment

However, only Judgments emanating from countries that accord reciprocal treatment to Judgments from Kenya can be enforced locally.

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[44] *Godard* v *Gray* (1870) L.R. 6 Q.B.139 at p.150 per **Blackburn J**
[45] Section 9(b) of Chapter 71, Laws of Uganda
[46] Section 11(b) of Chapter 33, Laws of Tanzania
[47] **Chapter 43, Laws of Kenya**

Without such an arrangement, a foreign judgment is not enforceable in Kenya except by filing suit on the judgment.

It should be noted that a suit upon a foreign judgment will only be entertained if the foreign judgment is conclusive and was not a judgment in default. Thanawalla[48] refers to the ruling of Panigrahi C.J. in **Chintamoni v. Paika Samal (1956) A.I.R Orissa 136 at p.142** and the Kenya case of **Nagina Singh s/o Tara Singh v. Tarlochan Singh s/o Boor Singh**[49] to illustrate this point.

'The English rule on the subject appears to be more stringent and the observations of Lord Herschell and Lord Watson in ***Gustave v. Freeman*** *would indicate that the mere fact that a foreign judgment was given in default of appearance does not render it any the less binding upon the parties to that judgment. Under the English law, therefore, a suit lies upon a foreign judgment which was 2, given in default. But the Civil Procedure Code makes a foreign judgment conclusive except in certain cases specified in the clauses. Clause (b) makes a departure from the English rule in insisting that a foreign judgment should have been given on the merits of the case'* **Per Panigrahi C.J in Chintamoni v. Paika Samal**

And in *Nagina Singh s/o Tara Singh v. Tarlochan Singh* ***s/o*** *Boor Singh,* the plaintiff sued the defendant in the Kenya court on a judgment of an Indian court at Jullundur. In the proceedings at Jullundur, the defendant and two others had been sued on a promissory note, and judgment entered against all three. One of these other defendants appeared to have -admitted the amount claimed, but there was no. record ***as,*** to whether the present defendant had been served, or had entered an appearance at Jullundur. Relying *inter alia* on the case of *D. T. Keymer v. Viswanatham Reddi* (1916*)* P.C.121; 40 Mad.112 and after citing the requirement under exception *(b)* to section 9,

Webb J. dismissed the action as not having been given on the merits and held that '*... the judgment sued upon here was not a judgment upon the merits so far as regards this defendant. In saying this I am, of course, expressing no opinion as to whether he has any merits, but merely saying that the present form of action is not available to the plaintiff.'*

[48] S Thanawalla 'Foreign Inter Partes Judgments: Their Recognition and Enforcement in the Private International Law of East Africa' (1970) 19 ICLQ 433-434
[49] (1937) 17 K.L.R.82

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