

plus interest is enforceable in Uganda, interest from the date of award till payment in full and costs for this suit.

The case was heard in the US and the plaintiffs' claim was that the defendants' pecuniary liability arose out of their wilful failure/ neglect to file timely insurance claim for the covered loss under the subsisting insurance policy issued by the US underwriters insurance company, failure of which led the defendants' inability to seek contribution or indemnity against the said insurance company. Additionally, that their action for contribution was time barred by the statute of the state of New York and that the attempts to join the said insurance company as a defendant to the plaintiffs' suit was unsuccessful due to failure to file a timely insurance claim.

It is stated in the plaint that;

- a) The US district Court of the Southern District of New York adjudicated the defendants in default and ordered an inquest hearing to be held to determine the amount of damages.
- b) The Honourable Magistrate Judge Sharon E. Grubin conducted a hearing on the 24th October 1991 and arrived at proposed findings of fact and conclusions of law on 4th December, 1991. The said memorandum adopted expert, medical and vocational disability opinions fixing the 1st plaintiff's disability at 100%.
- c) The Republic of Uganda entered appearance in response to the District's Court Order to show cause that the proposed findings should not be made final and that the same should be set aside.

- d) The court granted the motion to vacate the default judgment with a condition to post security for costs on 28th December, 1992.
- e) That the defendants filed a motion to re-open the above order, revisit the propriety of the court's direction that the defendants post security for costs. The court re-affirmed its earlier decision to post security for costs and the trial Magistrate judge's findings of fact and law on 9th July 1993, entitling the plaintiffs to file for judgment if the defendant failed to successfully vacate the judgment.
- f) The defendants having failed to meet the conditions set in the court order, the plaintiffs by motion moved court for reinstatement of judgment and the awards which are subject of this action were made.
- g) That the defendants filed an appeal against the said orders although the same was later abandoned.
- h) That the plaintiffs can only enforce a foreign judgment against the defendant being vicariously liable for the negligent acts of the servants.

The defendant contended however that the instant judgment is not only unenforceable but also un-registrable in Uganda by virtue of Cap 9, Laws of Uganda.

In their joint scheduling memorandum, the parties agreed that;

- Judgment entered in 90 Civ 3972 has been verified to the satisfaction of the defendant that it is valid and subsisting

judgment of the said US District Court of the Southern District of New York. An official copy of the judgment was transmitted on 11th December, 2011 through the official channels to the Ministry of Justice and Constitutional Affairs

- The judgment remains unsatisfied to-date
- Uganda does not have a reciprocal arrangement with the United States on mutual enforcement of judgment entered in their respective jurisdictions.

Having failed to have an amicable resolution of the matter the suit was set down for determination and the issues before court were;

1. What is the procedure for obtaining relief under a foreign judgment that is not covered by the express provisions of the Foreign Judgments (Reciprocal enforcement) Act Cap 9 of Laws of Uganda
2. Is the action time barred?

Mr Semogerere of M/s Hall and Partners represented the plaintiffs while Mr. Wanyama Kodoli Principal State Attorney represented the defendants. The parties filed written submissions since no oral evidence was adduced at the hearing because the issues raised herein are purely legal matters regarding the enforceability of the judgment in question.

Mr Semogerere contended that the plaintiffs' action is founded on common law specifically the doctrines of obligation and reciprocity as applied in England and the doctrine of comity as applied both in England and the United States. He stated that there are two main

theories for enforcement of a foreign judgment that is; the theory of obligation and the theory of reciprocity. In England these theories have superseded the doctrine of comity as discussed elsewhere. The theory of obligation states that the judgment of a foreign court creates a debt and liability to pay while the theory of reciprocity states that the court of one country should recognise and enforce judgments of another country if the courts of such a country recognise the judgment of the other country. He thus submitted that the common law position combining these two principles is stated in **Emmanuel & Others v Symon (1908) 1 KB 302** thus;

... the courts of this country enforce foreign judgments because those judgments impose a duty or obligation which is recognised in this country and leads to judgment...

It was his contention that courts will not enforce a foreign judgment in default of appearance against a defendant where the defendant at the time the suit commenced was not a subject of nor a resident in the country the judgment was obtained. He contended that in absence of reciprocity, a foreign judgment debt is enforced like any other debt using the foreign judgment as the evidence of the debt.

Regarding the doctrine of comity, Mr. Semogerere stated that this doctrine seems to be a favoured theory in the United States. He thus alluded to the case of **Hilton v Guyot 159 US 113 decided in 1895** for the proposition that;

When an action is brought in a court of this country by a citizen of a foreign country against one of our own citizens to recover a sum of money adjudged by the court of that country to be due by the defendant to the plaintiff and the foreign judgment appears to have been rendered by a competent court having jurisdiction of the cause. and the parties' and upon due allegation and proof; opportunity to defend against them and its proceedings are according to the course of a civilised jurisprudence and are stated in a clear and formal record, the judgment is prima facie evidence at least of the truth of the matter adjudged and the document is conclusive upon the merits tried in the foreign court unless some special ground is shown for impeaching it; or by showing that it was affected or obtained by fraud or prejudice or that, by the principle of international law and by comity of our country it is not entitled to full faith and credit.

He further stated that comity is concerned with maintaining amicable working relationships between nations, a shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards where a point of law is raised, which if decided in one way would be decisive of litigation. (See **JP Morgan Chase Bank v Altos Honas de Mexico** decided by the US Court of Appeals 2nd circuit in 2004).

As to whether the judgment is automatically enforceable; Mr. Semogerere cited Section 7 of Cap 9 thus;

No proceedings for the recovery of a sum payable under a foreign judgment being a judgment to which this part of this Act applies, other than proceedings by way of registration of the judgment shall be entertained by any court in Uganda. Judgments to which Cap 9 applies are laid out in section 2 of the same chapter by way of Ministerial instrument. The statute expressly does not bar other proceedings in S. 9

He also contended that Civil Procedure Act Cap 65 recognises foreign judgments but does not provide for express procedures. He stated that at common law the absence of express rules or procedure is discussed in Goddard v Gray (1870) LR 6 OB 139 thus;

It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations including France do not enforce judgment of other countries unless there are reciprocal treaties to that effect. But in England and in states which are governed by common law, such judgments are enforced, not by virtue of treaty, nor by virtue of any statute but upon a principle well stated by Parke B: where a court of competent jurisdiction had adjudicated a certain sum to be due from one person to another a legal obligation arises to pay that sum on which an

action of debt to enforce the judgment may be maintained...

It was his contention that the Judicature Act recognises the common law action under the doctrines of theory and obligation. Counsel also alleged that no express procedures have been applied by the courts in Uganda before as the only foreign judgment litigation has been under Cap 47 (see **Bank of Uganda v Transroad** (supra))

As to whether the plaintiffs' action is time barred, Mr. Semogerere had this to say;

No domestic action prior to the instant suit is a basis for this action, as such the statutes of limitation in Uganda would not bar an action for which limitation has not begun to run within the territorial jurisdiction of Uganda. Although the defendant's pleadings state that the judgment is not enforceable by Cap 9, it cannot follow that the defendant can rely on benefit of the same Act as regarding limitation therein. Counsel cited a number of statutes on Limitation. I have not found them relevant in the instant case, I will however comment on Section 80 of the Limitation Act which Mr. Semogerere opined would have offered an alternative defence to the defendants.

For the respondent, Mr. Wanyama maintained from the onset this suit is incompetent and misconceived. He contended that much as the judgment is recognised, it is unenforceable in courts of Uganda as there is no reciprocal treaty with USA (Section 2 of Cap 9)

neither has the Minister made any statutory order to give the same effect of registration in Uganda. A state is not bound to enforce within its territories the judgment of a foreign tribunal unless there is a reciprocal treaty (see **Goddard versus Gray 1870 LR 6 OB 139**). This is the position in Uganda today. It was also the intention of the legislature when enacting Cap 9. There is no evidence adduced by the plaintiffs to the effect that Uganda has enforced foreign judgments in absence of reciprocity. Counsel was alive to the principle that the High Court has unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the law (see Article 139 (1) of the Constitution) this mandate should however be exercised in conformity with the law as provided in Article 126 (2) (e).

Counsel further contended that the common law which has been relied upon by Mr. Semogerere is general law which cannot prevail over the specific law. Citing the case of **David Seijaka Nalima versus Rebecca Musoke CACA No.12 of 1985**, Mr. Wanyama submitted that where a specific law conflicts with the general law, the former prevails. He further sought to draw the attention of this court to the fact that the common law principles relied on by the plaintiffs are from foreign jurisdictions and therefore not binding to this court but merely persuasive. See **Rosemary Nalubega & others v Jackson Kakayira CACA No.40 of 2004**. He thus stated that common law cannot be invoked where there is a specific statutory law likewise the inherent powers of the High court cannot be invoked where specific statutory provision is in place.

Further, Mr. Wanyama submitted that where a statute prescribes procedure as Cap 9 does in the instant case, that procedure has to be strictly adhered to **(Hon Justice Remmy Kasule versus Jack Sabiiti & others HCCS No 230 of 2006)**. He thus maintained that the failure to bring the instant suit under the correct law through the correct procedure is not a mere technicality but a fundamental matter that entails dismissal.

It was his contention therefore that counsel for the plaintiffs is trying to vest this honourable court with jurisdictional competence/ authority to hear this matter contrary to the law. It is only the Minister (responsible) with mandate to make a statutory order with effect to reciprocity (under S.2 of Cap 9) and not this court as counsel for the plaintiff asserts in his submission.

Citing Section 7 of Cap 9, Mr. Wanyama stated that no proceedings for recovery of a sum payable under a foreign judgment, being a judgment to which this part of this Act applies, other than proceedings by way of registration of the judgment shall be entertained by any court in Uganda. He thus submitted that the instant suit is not only a nullity but also ultravires and illegal; it cannot therefore be cured by reasons of estoppel, lapse of time, ratification or delay. An illegality once brought to the attention of court, overrides all questions of pleadings including any admissions made therein. The authority of **M/s Gulu Municipal Council Vs Nyeko Gabriel & others (1996) HCB 66** is instructive. Conclusively, he opined that it is illegal to ask court to enforce a foreign judgment basing on general common law principles when

there is a specific statutory law applicable. He invited court to dismiss the suit with costs to the defendant accordingly.

The issue that is raised here is not one of reciprocity because quite clearly there are no reciprocal arrangements between Uganda and the 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 supposed to do to enforce , if at all. In the case of **Hilton Vs Guyot 159 US 113 (1895)** cited by counsel for the plaintiff, the Supreme Court of the USA based its consideration on the notion of international comity and in the words of the Court at 163-164;

"Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts 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 the protection of its laws"

Then at pp 202-203 the court stated as follows:-

"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 was 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".

So the considerations in this type of trial are recognition and enforcement of foreign judgments which is distinguishable from an application under the Foreign Judgment (Reciprocal enforcement) Act Cap 9 Laws of Uganda where under S.3 would be for registration of the judgment.

There are two reported cases in the USA where courts have refused to afford recognition of Foreign Judgments. In one such case the Federal Court of New York declined to enforce a Liberian judgment on the grounds that, when judgment had been rendered in 1995, the country was in 'a state of chaos' due to civil war, the constitution was ignored, regular procedures for selection of justices and judges were not followed, judicial officers were subject to courts that did not exist or were barely functioning. In short, the court said, "Liberian judicial system simply did not provide impartial

tribunals." (see **Bridgeway Corp. Vs Citibank, 201 f. 3d 134 (2nd Civ. 2000)**)

In another case, the US District court for Southern District of Florida refused to recognise a \$97 Million Nicaraguan judgment against Dole Food Co. inter alia on the ground that the judgment had been rendered "under a system in which political strongmen exert their control over a weak and corrupt judiciary, such that Nicaragua does not possess a system of jurisprudence likely to secure an impartial administration of justice. (see: **Osorio Vs Dole Food Co. 665 F. Supp. 2d 1307 at 1351-52 (S.D Fla, 2009).**)

The judgment before this court does not come anywhere near the Liberian and Nicaraguan experience where courts in the USA declined to recognise their judgments. On the contrary 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 the judgment is enforceable in Uganda, interest from the date of the award till payment in full and costs of this suit.

In view of the distinction between the applications under Cap 9 of the laws of Uganda already referred to and enforceability of the judgment before this court also already discussed I would agree with the counsel for the plaintiff that the recognition and

enforcement of the judgment cannot be subjected to the same Limitation the application of the Act that is not applicable in these proceedings. In the circumstances of this case I would also find that the suit is not time barred.

Eldad Mwangusya

JUDGE

01.02.2013