



REPUBLIC OF KENYA



KENYA LAW
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**In re CE & FJ (Applicants) (Miscellaneous Cause E229 of 2023)
[2023] KEHC 23953 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CAUSE E229 OF 2023
JRA WANANDA, J
OCTOBER 23, 2023**

**IN THE MATTER OF THE FOREIGN JUDGEMENTS (RECIPROCAL
ENFORCEMENT) ACT. CAP.43 OF THE LAWS OF KENYA**

RULING

1. Before this Court is the Application brought by way of the Originating Summons dated 16/10/2023 and which basically seeks the following orders:

“That the Decree and Order made on 22nd September 2022 by the Local Court of Kreuzberg in file number 166A F 2264/22 in the Republic of Germany be received and accepted in the Republic of Kenya and recognized as an order made by a competent Court.”
2. The grounds of the Application are as set out on the face thereof and the same is supported by the respective Affidavits sworn by the Applicant. In the Certificate of Urgency under which the Application has been brought, it is stated that the 2nd Applicant is a citizen of Kenya who resides in Germany but currently a foreigner and therefore requires her visa to be valid, that the said visa is due for expiry on 31st October 2023 which is within the next few days, that she has been continuing with the process of acquiring the German citizenship and the only document remaining is an order of recognition from this Court. Finally, it is contended that the 2nd Applicant is therefore at risk of being discounted from school if the Adoption Order will not be recognized in time enough for her to acquire the German citizenship and also risks being deported for being an illegal immigrant in the Republic of Germany.
3. In light of the said averments, one wonders where the Applicants have been all along, why they have been “sitting pretty” all this time and why they have chosen to come to Court at the eleventh hour.
4. Be that as it may, in his Affidavit, CE deponed that he is a German, that he secured under the German law, the adoption of FJ who is an adult and a Kenyan by birth and that he was issued with the Decree dated 22/09/2022, that for registration of FJ as a German citizen, they are required to present the Decree to the Kenyan Embassy which directed that for the order to be accepted by the Kenyan Embassy in Berlin, the same had to be recognized in Kenya.



5. As aforesaid, FJ has also sworn an Affidavit but the copy placed in the Court file is incomplete since only page 1 thereof has been availed. However, I believe that it basically supports the Application.
6. I may mention that the Applicants had a few days ago brought before me an earlier similar Application vide file number Eldoret High Court Miscellaaneous Application No. E10 of 2023 but under the *Children Act*, 2022. Upon perusal of the Application, the Court noted that the 2nd Applicant (adoptee) having been born in the year 1998, was now 25 years old. The Court therefore raised questions on, inter alia, how the *Children Act* would apply to an adult of 25 years of age when the Act is clear that it only applies to an individual who has not attained the age of 18 years. In response, the Applicants withdrew the Application.
7. As regards the present Application, in his Affidavit, CE has further deponed that the Judgment of the German Court is one to which the *Foreign Judgment (Reciprocal Enforcement) Act* applies vide the provisions of Section 3(1), and that the same does not fall within any of the classes in which a Judgment may not be ordered to be registered under Section 3(1)(e) of the *Act* as it does not arise from proceedings in connection to the custody or guardianship of children.
8. In determining the Application, I note that the preamble to the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap. 43 is stated to be as follows:

“An Act of Parliament to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith.”
9. It is therefore clear that the Act can only be invoked to recognize and enforce Judgments given in countries that have been declared by the Minister, under Section 13 thereof, to be reciprocating countries for the purpose of the *Act*. In line with this provision, Musyoka J in the case of *Ian Mbugua Mimano v Charlotte Wamuyu Mutisya & 2 Others* [2014] eKLR held as follows:
 - “6. Judgments given in countries outside Kenya can only be enforced if they are given in countries that have been declared by the Minister, in terms of section 13 of the *Act*, to be reciprocating countries for the purpose of the *Foreign Judgments (Reciprocal Enforcement) Act*.
 7. The *Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order* was made under section 13 of the *Foreign Judgments (Reciprocal Enforcement) Act*. It lists countries that are declared to be reciprocating countries for the purposes of the *Act* and in respect of which the provisions of the *Act* apply to judgments given by their superior courts. The countries listed in the schedule to the Order are Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Rwanda.”
10. In the case of *Jayesh Hasmukh Shah v Navin Haria & another* [2016] eKLR, the Court of Appeal dismissed an Appeal where the Appellant sought to enforce and execute in Kenya a Judgment from Ethiopia which is not a reciprocating country under the provisions of the *Act*. The Court stated as follows:

“There is currently no treaty in place between Kenya and Ethiopia pursuant to which either country’s judgment may be enforced by either country’s courts. It is not in dispute that Ethiopia’s Federal Supreme Court is not a “designated court” within the meaning of Kenya’s *Foreign Judgment (Reciprocal Enforcement) Act*. The respondent cited the case



of *Intalframe Ltd v Mediterranean Shipping Company*, (1986) KLR where this Court expressed that the basic principle upon which neighbouring or other states provided for enforcement of foreign judgments is one of reciprocity. It is our considered view that the case of *Intalframe Ltd v Mediterranean Shipping Company*, (*supra*) and the [Foreign Judgment \(Reciprocal Enforcement\) Act](#) (Cap 43, Laws of Kenya) are not relevant to this appeal as they are applicable only where there is reciprocal arrangement on enforcement of foreign judgments."

11. The Court of Appeal went ahead to state as follows:

"...In the absence of a reciprocal enforcement arrangement, a foreign judgment is enforceable in Kenya as a claim in common-law..."

12. In this case, it has not been alleged nor has it been demonstrated to this Court that the Minister has declared the Republic of Germany, under Section 13 of the [Act](#), to be one of such "reciprocating countries". On this ground alone, this Application cannot succeed

13. There is however still another aspect that arises from the provisions of Section 3 of the [Act](#) which may also require interrogation. Section 3(3) (e) provides as follows:

"3(3) This Act does not apply to a judgment or order –

(e) in proceedings in connection with the custody or guardianship of children."

14. It may be argued that since the subject adoptee herein – the 2nd Applicant - is 25 years of age, she does not fall within the definition of "children". While it is true that the 2nd Applicant is not a "child" under Kenyan law, under the same Kenyan law, proceedings on adoption, custody and guardianship are premised on the presumption that the subject of such proceedings is a "child". Although Counsel indicated that in Germany, adoption is allowed for individuals up to the age of 25 years, in Kenya, the maximum age is 18 years.

15. Under the above scenario, can this Court purport to handle a matter, as herein, relating to adoption, outside the [Children Act](#)? To be fair to Counsel, I will leave that question in abeyance for now since it has not been canvassed before this Court.

16. I also observe another angle in this case. There is very little disclosure on the position and status of the 2nd Applicant's mother as she has not sworn any Affidavit. From what I can glean through from the record before me, the 2nd Applicant's (adoptee) mother is alleged to be married to the 1st Applicant (adopter). The 1st Applicant (adopter) was born in 1982 and is therefore presently 41 years old. The "wife" (adoptee's mother) was born in 1976 and therefore 47 years old. On her part, the 2nd Applicant (adoptee) having been born in the year 1998, is presently 25 years of age.

17. The adoptor being 41 years and the adoptee being 25 years, the difference in age between them is therefore 16 years. While I would not wish to exceed my mandate to scrutinizing the orders made in Germany, I just wish to observe that under Kenyan law - Section 186(2)(b) of the [Children Act](#), the age difference between the adoptor and the adoptee must not be below 21 years. Therefore, apart from the requirement under Kenyan law that only an individual under the age of 18 years is eligible for adoption, unlike the 2nd Applicant who is 25, this further 16 years age difference gap between the adoptor and adoptee being below the threshold allowed under Kenyan law, means that the orders sought to be recognized are in conflict with the Kenyan law.



18. While the *Foreign Judgments Act* does not seem to expressly provide for conflict with the Kenyan law as being a ground for refusing to recognize a Judgment passed in a foreign Court, this Court must guard against a situation where in cleverly circumventing the Kenyan law, realizing that he/she cannot obtain certain orders in the Kenyan Courts because they are prohibited under Kenyan law, a person goes to a foreign country in which such orders are not prohibited, obtains such orders and then brings the same to a Kenya Court for recognition and adoption. If allowed, this will set a dangerous precedent and such a situation could not have been the intention of the drafters of the Act. Doing so blindly may be tantamount to a Kenyan Court being used to sanitize an illegality.
19. For the said reasons, to allow the Applicants liberty to go back to the drawing board and perhaps approach the Court under a different procedure, I will not dismiss the Application on merits, but will instead, strike it out.

Final orders

20. In light of the foregoing, I strike out the Originating Summons dated 16/10/2023.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF OCTOBER 2023

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WANANDA J.R. ANURO

JUDGE

