

Enforcement of Foreign Judgments

Fundamental Principles [Kenya]

2020



TABLE OF CONTENTS

	Page
I. RECOGNITION AND ENFORCEMENT OF A FOREIGN COURT DECISION (CIVIL AND COMMERCIAL MATTERS)	5
A. Ability to apply for recognition and enforcement of a court judgment.....	5
1. Is it possible to apply for enforcement of a foreign court judgment in your country?	5
B. Applicable Law: General Rules	5
1. Which laws are generally applicable to the enforcement of a foreign court judgment in your country?	5
C. Special Rules: European Union	6
1. Are there any special rules regarding the enforcement of a foreign court judgment in your country?	6
2. Does the European Union have a special procedure to enforce court judgments coming from its member states?	6
D. Average Duration of Enforcement Procedure	6
1. What is the average length of time for this kind of procedure?	6
II. DENIAL OF RECOGNITION AND ENFORCEMENT OF A FOREIGN COURT JUDGMENT: REASONS	7
A. Can a Court in your country deny recognition and enforcement of a foreign court judgment? If YES: what kind of reasons may justify denial?	7
B. Costs and expenses	8
1. What kind of cost and expenses can a claimant expect in this enforcement procedure?	8
III. FORMAL REQUIREMENTS.....	8
A. Time limit	8
1. Is there a time limit to apply for enforcement of a foreign court judgment?	8
B. Final and Definitive Court Judgment: Provisional Enforcement	8

1.	Is it mandatory for the judgment to be a final and definitive court judgment? If NO: Are there any special requirements to provisionally enforce a court judgment which is not final and definitive?	8
C.	Necessary Requirements.....	9
1.	What necessary requirements must the foreign court judgment fulfill to be recognized and enforced?	9
D.	Other Formal Requirements: Court Fees.....	9
1.	Is it mandatory to pay court fees for this kind of application?	9
E.	Are there any other formal requirements in your country to enforce a court judgment?	9
IV.	PROCEDURE.....	10
A.	Competent court	10
1.	Which court or courts are competent to decide an enforcement application?	10
B.	Informational Requirements for the Application to Enforce a Foreign Court Judgment	11
1.	What information must be contained in the enforcement application of a foreign court judgment?	11
C.	What documents must be included with/attached to the application to enforce a foreign court judgment?	12
D.	Phases of the Procedure	12
1.	What are the phases of the procedure to enforce a foreign court judgment?	12
E.	Opposition of the Defendant	13
1.	Can a defendant oppose to this enforcement application?	13
2.	Are there a limited number of reasons for the defendant to oppose to the enforcement of the court judgment? If YES: what are those reasons?	13
F.	Appeal and its Consequences in this Procedure	15

1.	Is it possible to appeal a court decision to recognize and enforce a foreign court decision?	15
G.	Recovery of judicial costs and expenses	17
1.	Are there any rules concerning recovery of the judicial costs incurred as a result of the enforcement application?	17
V.	RECOVERY OF THE DEBT	17
E.	Means of Enforcement.....	17
1.	What types of assets are subject to enforcement of the court's judgment?	18
VI.	OTHER ISSUES OF INTEREST IN YOUR JURISDICTION	19
F.	Any other issues of interest in your jurisdiction	19

**I. RECOGNITION AND ENFORCEMENT OF A FOREIGN COURT DECISION
(CIVIL AND COMMERCIAL MATTERS)**

A. Ability to apply for recognition and enforcement of a court judgment

1. Is it possible to apply for enforcement of a foreign court judgment in your country?

Answer: Yes

B. Applicable Law: General Rules

1. Which laws are generally applicable to the enforcement of a foreign court judgment in your country?

Answer:

- i. Foreign Judgement (Reciprocal Enforcement) Act (CAP 43)
- ii. Convention on the Recognition of Foreign Judgements in Civil & Commercial matters.
- iii. Section 9 of the Civil Procedure Act
- iv. **Section 3 of the Judicature Act-** This section allows for application of the doctrines of common law where there is no specific legislation on a particular issue. The Section provides as follows:

The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with—

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general Application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

- v. **Common Law** – In the absence of a reciprocal enforcement arrangement, a foreign judgment is enforceable in Kenya as a claim in common law. This

was so held by the Kenya Court of Appeal in **Jayesh Hasmukh Shah v Navin Haria & another [2016] eKLR**

C. Special Rules: European Union

1. Are there any special rules regarding the enforcement of a foreign court judgment in your country?

Answer:

Yes. The following subsidiary legislation is made under the Foreign Judgement (Reciprocal Enforcement) Act (CAP 43)

(a) Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984.

- This Order is made pursuant to Section 13 of the Foreign Judgement (Reciprocal Enforcement) Act (CAP 43) which allows the Cabinet Secretary (Minister) to declare reciprocating countries.
- The order lists the following as the recognized reciprocating countries:
 - i. Australia
 - ii. Malawi
 - iii. Seychelles
 - iv. Tanzania
 - v. Uganda
 - vi. Zambia
 - vii. The United Kingdom
 - viii. Republic of Rwanda

(b) Foreign Judgments (Reciprocal Enforcement) Rules, 1984

- These are rules made by the Chief Justice pursuant to Section 15 of the Foreign Judgement (Reciprocal Enforcement) Act (CAP 43)

2. Does the European Union have a special procedure to enforce court judgments coming from its member states?

Answer: Not applicable to Kenya

D. Average Duration of Enforcement Procedure

1. What is the average length of time for this kind of procedure?

Answer: 3 months to 1 year depending on the complexity of the defence against enforcement

II. DENIAL OF RECOGNITION AND ENFORCEMENT OF A FOREIGN COURT JUDGMENT: REASONS

A. Can a Court in your country deny recognition and enforcement of a foreign court judgment? If YES: what kind of reasons may justify denial?

Answer: YES-

• Section 3 of Foreign Judgment (Reciprocal Enforcement) –

The above section provides that the Act does not apply to a judgment or order

- i. Whereby a sum of money is payable or an item of movable property is deliverable in respect of taxes or other charges of a similar nature or in respect of a fine or other penalty;
- ii. To the extent to which it provides for the payment of a sum of money by way of exemplary, punitive or multiple damages;
- iii. For the periodical payment of money as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of the person against whom the order was made;
- iv. In a matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship, not being a judgment referred to in paragraph (a) or (b) of subsection (1), whereby a sum of money is payable or item of movable property deliverable;
- v. In proceedings in connection with the custody or guardianship of children;
- vi. In proceedings concerning the administration of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs; and
- vii. In a matter of succession to, or administration of, estates of deceased persons whereby a sum of money is payable or movable property is deliverable.

Section 5 of the Foreign Judgment (Reciprocal Enforcement) Act – provides that an application for registration of a foreign judgment should be filed within 6 years and will therefore be statute barred and unenforceable after the 6years.

Courts will also refuse to register a judgment if at the time of delivery of the judgment, the jurisdiction of the Court which delivered the judgment was in dispute.

The Court of Appeal in **Tornado Carriers Limited v Kenfreight Uganda Limited & Another [2019]eklr** in declining to register a foreign judgment, stated that where a party enters appearance solely for the purpose of challenging a court's jurisdiction, that party cannot be said to have submitted to the court's jurisdiction and therefore

where a court delivers judgment without first determining whether or not it has jurisdiction, the judgment so delivered will not be registered in the Kenyan Court

B. Costs and expenses

1. What kind of cost and expenses can a claimant expect in this enforcement procedure?

Answer:

Section 15 of the Foreign Judgment (Reciprocal Enforcement) Act –

- Cost for Claimant to give security for Costs
- Court filing fees
- Costs of obtaining a certificate of exemplification
- Costs of obtaining a copy of a judgment or a translation thereof (where the foreign judgment is in any language other than English, a translation of the judgment to English is requisite).
- Legal Fees

III. FORMAL REQUIREMENTS

A. Time limit

1. Is there a time limit to apply for enforcement of a foreign court judgment?

Answer: Yes

Section 5(4) of the Foreign Judgment (Reciprocal Enforcement) Act –

The section provides that an application to have a foreign judgment registered should be made **within six (6) years** of the date of the judgment nor, where there have been proceedings by way of appeal against the judgment, of the date of the last judgment in the proceedings.

In **Lamshore Limited & 2 others v Bizanje K. U.D.K & 2 others [2014] eKLR**, the court declined to register a foreign judgment as the application for registration had been brought after expiry of six years.

B. Final and Definitive Court Judgment: Provisional Enforcement

1. Is it mandatory for the judgment to be a final and definitive court judgment? If NO: Are there any special requirements to provisionally enforce a court judgment which is not final and definitive?

Answer: YES-

Section 3(2) of the Foreign Judgment (Reciprocal Enforcement) Act –

The section provides that the Act applies to a judgment if it: -

- i. Requires the judgment debtor to make an interim payment of a sum of money to the judgment creditor; or

- ii. Is final and conclusive as between the parties thereto.

The Court of Appeal in **Jayesh Hasmukh Shah v Navin Haria & Another [2016] eKLR** held that judgment in the foreign judgment must be final and conclusive even though it is subject to an appeal.

Section 9 of the Civil Procedure Act- When foreign judgment not conclusive

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: -

- i. Where it has not been pronounced by a court of competent jurisdiction;
- ii. Where it has not been given on merits of the case;
- iii. 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;
- iv. Where the proceedings in which the judgment was obtained are opposed to natural justice;
- v. Where it has been obtained by fraud;
- vi. Where it sustains a claim founded on a breach of any law in law force in Kenya.

C. Necessary Requirements

1. **What necessary requirements must the foreign court judgment fulfill to be recognized and enforced?**

Answer: -

- i. Judgement must have been entered within 6 years.
- ii. The judgement must be final and conclusive.

D. Other Formal Requirements: Court Fees

1. **Is it mandatory to pay court fees for this kind of application?**

Answer: YES- The court filing fees will be assessed at the court registry. The filing fees must be paid for the application to be filed.

1. **Are there any other formal requirements in your country to enforce a court judgment?**

Answer: YES -

Section 5(2) of the Foreign Judgment (Reciprocal Enforcement) Act

- i. An application under the Act to have the judgment of a designated court registered should be made within six years of the date of the judgment or,

where there have been proceedings by way of appeal against the judgment, of the date of the last judgment in the proceedings.

ii. An application for registration shall be accompanied by:

- (a) A certificate issued from the original court under its seal and signed by a judge or registrar thereof or by an affidavit to the same effect.
- (b) The judgment or the exemplification or a certified copy thereof. Where the judgment is not in English, certified by a notary public on the Registrar of the original court or authenticated by affidavit.
- (c) An affidavit stating:
 - i. That at the date of the application, the judgment has not been satisfied or, as the case may be, the sums or items of movable property in respect of which the judgment remains unsatisfied.
 - ii. That at the date of the application, the judgment can be enforced by execution in the country of the original court.
 - iii. Where, by virtue of Section 6(5), the judgment may be registered only in respect of certain of its provisions, the provisions in respect of which it is sought to register the judgment.
- (d) Unless otherwise ordered by the High Court, be accompanied in case of a judgment given by a superior court of a commonwealth country, by a certificate under the seal and signed by a judge or registrar thereof certifying that the court is a superior court in that country.
- (e) Any other evidence as may be prescribed.

Rule 2 of the Foreign Judgment (Reciprocal Enforcement) Rules

Provides that an application for registration under Section 5 of the Act shall be made by Originating Summons entitled in the matter of the Act and in the matter of the judgment sought to be registered.

IV. PROCEDURE

A. Competent court

1. Which court or courts are competent to decide an enforcement application?

Answer: The High Court of Kenya-Section 5(1) Foreign Judgment (Reciprocal Enforcement) Act

B. Informational Requirements for the Application to Enforce a Foreign Court Judgment

1. What information must be contained in the enforcement application of a foreign court judgment?

Answer: - Rule 3 of Foreign Judgment (Reciprocal Enforcement) Rules

An application for registration of a judgment under section (5) of the Act shall be supported by an affidavit—

- (a) Exhibiting the certificate required by section 5(4)(a) of the Act or an affidavit to the same effect;
- (b) Exhibiting the judgment or the exemplification or a certified or duly authenticated copy thereof, and where the judgment is not in the English language, a translation thereof in that language certified by a notary public or the Registrar of the original court or authenticated by an affidavit;
- (c) Stating the name, trade or business and the usual or last known place of abode or business and postal address of the judgment creditor and the judgment-debtor respectively, so far as known to the deponent;
- (d) Stating to the best of the information or belief of the deponent—
 - i. that the judgment creditor is entitled to enforce the judgment;
 - ii. as the case may be, either that the judgment has not been satisfied, or the amount in respect of which it remains unsatisfied;
 - iii. that the judgment is a judgment to which the Act applies, specifying which paragraph of section 3(1) of the Act applies;
 - iv. as the case may be, either that the judgment is for an interim payment of a sum of money to the judgment creditor or that it is final and conclusive as between the parties thereto;
 - v. that the judgment does not fall within any of the classes of cases in which a judgment may not be ordered to be registered under section 3(3) of the Act;
 - vi. where the judgment is not in all respects a judgment which may be registered under the Act, how much of the judgment may be so registered and the reasons therefore;
 - vii. that the judgment can be enforced by execution in the country of the original court and that if it were registered, the registration would not be liable to be set aside under section 10 or 11 of the Act;
 - viii. where the application is made *ex parte*, that the judgment-debtor was personally served with process in the original action or that he appeared in the original court for purposes other than those set out in section 4(2)(b) of the Act;
- (e) Specifying the amount of interest, if any, which under the law of the country of the original court has become due under the judgment up to the time of registration;

- (f) Stating the facts supporting an application for a garnishee order under section 9 of the Act.

C. What documents must be included with/attached to the application to enforce a foreign court judgment?

Answer: -

Section 5(4) Foreign Judgment (Reciprocal Enforcement) Act as read together with Rule 3 of Foreign Judgment (Reciprocal Enforcement) Rules

- i. An application for registration shall be accompanied by:
 - (f) A certificate issued from the original court under its seal and signed by a judge or registrar thereof or by an affidavit to the same effect.
 - (g) The judgment or the exemplification or a certified copy thereof. Where the judgment is not in English, certified by a notary public on the Registrar of the original court or authenticated by affidavit.
 - (h) An affidavit stating:
 - iv. That at the date of the application, the judgment has not been satisfied or, as the case may be, the sums or items of movable property in respect of which the judgment remains unsatisfied.
 - v. That at the date of the application, the judgment can be enforced by execution in the country of the original court.
 - vi. Where, by virtue of Section 6(5), the judgment may be registered only in respect of certain of its provisions, the provisions in respect of which it is sought to register the judgment.
 - (i) Unless otherwise ordered by the High Court, be accompanied in case of a judgment given by a superior court of a commonwealth country, by a certificate under the seal and signed by a judge or registrar thereof certifying that the court is a superior court in that country.
 - (j) Any other evidence as may be prescribed.

D. Phases of the Procedure

1. What are the phases of the procedure to enforce a foreign court judgment?

Answer: The procedure is dependent on whether the foreign judgment is from a designated country or from a country with no reciprocal arrangement.

Where the foreign judgment is from a designated country

The Foreign Judgments (Reciprocal Enforcement) Act sets out the procedure at Section 5 as hereunder:

- i. Within six years of the date of the judgment, the Decree Holder may apply to the High Court to have the judgment registered.
- ii. The application for registration of the judgment is made through an originating summons. The Application is accompanied by a certificate in the form set out in the schedule or to the same effect issued from the original court under seal and signed by a Registrar of the original court or authenticated by the affidavit.
- iii. The affidavit states that the judgment remains unsatisfied, that at the date of the application, the judgment can be enforced by execution in the country of original court and where only certain provisions are to be registered, the said provisions are stated in the affidavit.
- iv. Unless otherwise ordered by the High Court, for judgments given by Superior Courts of a Commonwealth Country, the application for registration of the judgment must be accompanied by a certificate under seal and signed by a Judge or Registrar certifying that the court is a Superior Court.
- v. The High Court may request for provision of further evidence. Where the High Court is satisfied as to the proof of matters required by the Foreign Judgments (Reciprocal Enforcement) Act and any other rules of the Court, it may order that the judgment be registered. The High Court shall not register a judgment that has been wholly satisfied or one that could not be enforced by execution in the country of the foreign court.

Where there is no reciprocal enforcement arrangement.

The procedure for enforcement of judgments from non-designated countries was set down by the Court of Appeal in **Jayesh Hasmukh Shah v Navin Haria & another [2016] eKLR** as follows:

- i. A party files a plaint at the High Court providing a concise statement of the nature of claim, the amount of the judgment debt, supported by a verifying affidavit, a list of witnesses and a bundle of documents intended to be relied upon as well as a certified copy of the foreign judgment.

E. Opposition of the Defendant

1. Can a defendant oppose to this enforcement application?

Answer: YES

2. Are there a limited number of reasons for the defendant to oppose to the enforcement of the court judgment? If YES: what are those reasons?

Answer:

Where a judgment has already been registered, the Defendant may file an application under **Section 10 of the Foreign Judgment (Reciprocal Enforcement) Act** to have the same set aside on the following grounds:

- (a) The judgment is not a judgment to which the Act applies
- (b) The judgment was registered in contravention of the Act
- (c) The courts of the country of the original court had no jurisdiction to adjudicate upon the cause of action upon which the judgment was given.
- (d) The judgment debtor did not appear in the original court and the jurisdiction of that court was based upon an agreement by the judgment debtor to submit to jurisdiction which is invalid under the rules of Private International Law of Kenya.
- (e) The cause of action upon which the judgment was given had subsequent to the date of that judgment and as a result of proceedings instituted prior to the institution of the proceedings in the original court, become subject of a final and conclusive judgment of a court in Kenya which is irreconcilable with the judgment of the original court.
- (f) The judgment debtor being the defendant in the original proceedings:
 - i. Was not duly served with the process of the original court; or
 - ii. Notwithstanding that he was duly served in conformity with the law of the country of that court, did not receive notice of those proceedings in sufficient time to enable him defend the proceedings; and
 - iii. Did not appear or appeared only for one or more of the purposes set out in section 4(2)(b)
- (g) the judgment was obtained by fraud, other than fraud which was, or could have been, put in issue by the judgment debtor in the proceedings in the original court or on appeal therefrom;
- (h) there are provisions of the law of Kenya which, by virtue of the rules of private international law of Kenya, would have been applicable notwithstanding any choice of another system of law by the judgment creditor and the judgment debtor, had the proceedings been brought in the High Court, and the judgment disregards those provisions in some material respect;
- (i) it was necessary for the original court, in order to give its judgment, to decide a question relating to any matter specified in paragraphs (c) to (k) of section 3(3) and the decision is different from that which the High Court, having applied the rules of private international law of Kenya to that question, would have reached;
- (j) the judgment has been taken on appeal, and reversed or discharged or otherwise set aside, in a court of the country of the original court;
- (k) the judgment debtor is a person who, under the rules of public international law, is entitled to immunity from the jurisdiction of the High Court;
- (l) the rights under the judgment are not vested in the person by whom the application for registration was made;

- (m) the enforcement of the judgment would be manifestly contrary to public policy in Kenya.
- (3) An application may be made under subsection (1) to set aside the judgment to the extent that its enforcement would require payment of sums in excess of monetary limits upon liability imposed by any statute of Kenya which applies under the rules of private international law of Kenya.
- (4) Where the High Court is satisfied, on an application made by or on behalf of a judgment debtor, that the sums, including costs, awarded under a registered judgment are substantially in excess of those which would have been awarded by the High Court on the basis of the findings of law and fact made by the original court, had the assessment of those sums been made in proceedings before the High Court, the High Court may set aside the judgment to the extent of that excess.

An application may also be made under **Section 11 of the Foreign Judgment (Reciprocal Enforcement) Act** to set aside the registration of a judgment on the ground that:

- (a) An appeal is pending against the judgment; or
- (b) He is entitled and intends to appeal against the judgment; or
- (c) The matter in relation to which the judgment was given is the same as that in respect of which proceedings, instituted prior to the institution of the proceedings in the original court, are pending in court in Kenya.

F. Appeal and its Consequences in this Procedure

1. Is it possible to appeal a court decision to recognize and enforce a foreign court decision?

Answer: YES-

Rule 7 of the Foreign Judgment (Reciprocal Enforcement) Rules provides that an appeal shall lie as of right from an order registering or refusing to register judgment.

2. Can this appeal suspend the enforcement?

Answer: No. Unless the applicant files an application for stay of execution of the judgment pending the hearing and determination of the Appeal.

Order 42 Rule 6 of the Civil Procedure Rules, 2010 provides that an appeal shall not operate as an automatic stay of execution or proceedings under a decree appealed from except in so far as the court appealed from may order.

(2) No order for stay of execution shall be made unless:

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Where an order of stay is granted by the High Court, a party may apply to the Court of Appeal to set the stay aside.

Where an appeal has been proffered against the judgment which the Applicant seeks to register, such appeal does not operate as automatic stay against the application for registration of the foreign judgment.

Section 3 of the Foreign Judgment (Reciprocal Enforcement) Act

A judgment is deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

In **Tornado Carriers Limited v Kenfreight Uganda Limited & Another [2019]eklr**, the Court of Appeal held as follows:

“the appellant has also asserted that an appeal had been lodged and that this should have barred the superior court from registering the foreign judgment. However, as per section 3(2) of the Act, the existence of an appeal does not of itself render a foreign judgment incapable of registration. Therefore, the contention that the superior court ought to have found the registration of the foreign judgment unmerited based on the pendency of an appeal, fails.”

However, it should be noted that under **Section 8 of the Foreign Judgment (Reciprocal Enforcement) Act**: execution upon a registered judgment shall be stayed:

- (a) in case the application was made *ex-parte*, until the expiration of fourteen days from the date on which judgment debtor is served with a notice of registration of judgment or such extended period as the court order.
- (b) Where an application is filed to set aside the registered judgment, until such application is finally determined.

Where an application is made to set aside the registration of judgment under **Section 11 of the Foreign Judgment (Reciprocal Enforcement) Act**, the High Court may set aside the registration or adjourn the application until the expiration of such period as appears to the High Court to be reasonably sufficient to enable the proceedings, and any appeal therefrom to a competent tribunal to be disposed of.

Effect of setting aside in certain cases: Section 12 the Foreign Judgment (Reciprocal Enforcement) Act

- (1) Where the registration of a judgment is set aside under Section 11 of the Act or solely for the reason that the judgment was not at the date of application for registration enforceable by execution in the country of the original court, the setting aside of the registration shall not prejudice a further application to register the judgment when the appeal or the proceedings have been disposed of or if and when the judgment becomes enforceable by execution in that country, as the case may be.
- (2) Where the registration of a judgment is set aside solely for the reason that the judgment was registered for the whole sum payable, or all the items deliverable, thereunder, notwithstanding that it had at the date of the application for registration already been partly satisfied, the High Court shall, on the application of the judgment creditor, order the judgment to be registered for the amount remaining payable, or items remaining deliverable, as the case may be, at that date.

G. Recovery of judicial costs and expenses

1. **Are there any rules concerning recovery of the judicial costs incurred as a result of the enforcement application?**

Answer: Yes

Section 8 of the Foreign Judgment (Reciprocal Enforcement) Act

Where a judgment for the payment of any monetary sum is registered, the following sums may be recovered upon the registered judgment.

- (a) the amount remaining payable under the judgment, including interest and any costs awarded to the judgment creditor, at the date of registration;
- (b) interest from the date of registration on that amount, excluding interest and costs referred to in paragraph (a), calculated at the rate applicable to a judgment of the High Court; and
- (c) any reasonable costs awarded by the High Court in respect of registration, including the costs of obtaining a certificate or exemplification, or copy of a judgment or a translation thereof, for the purposes of section 5(4).

Where a judgment for the delivery of movable property is registered, the following sums may also be recovered upon the registered judgment;

- (a) any costs awarded to the judgment creditor remaining payable at the date of registration;
- (b) any reasonable costs awarded by the High Court in respect of registration, including the costs of obtaining a certificate or exemplification, or copy of a judgment or a translation thereof, for the purposes of section 5(4).
- (c)

V. RECOVERY OF THE DEBT

E. Means of Enforcement

1. What types of assets are subject to enforcement of the court's judgment?

Answer:

Section 44 of the Civil Procedure Act (CAP 21 Laws of Kenya)- Property liable to attachment and sale in execution of a decree

(1) All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree.

Provided that the following shall not be liable to attachment or sale;

- i. the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted;
- ii. the tools and implements of a person necessary for the performance by him of his trade or profession;
- iii. where the judgment-debtor is an agriculturalist—
 - (a) the first ten thousand shillings in value of his livestock, if any; and
 - (b) the first five thousand shillings in value of all implements, tools, utensils, plant and machinery used in connection with stock or dairy farming or in the production of crops or plants; and
 - (c) the first one thousand shillings in value of agricultural produce necessary to enable him to earn his livelihood;
- iv. books of accounts;
- v. a right to sue in damages;
- vi. a right of personal service;
- vii. stipends and gratuities allowed to pensioners of the Government, or payable out of a service family pension fund notified in the Gazette by the Minister, and political pensions;
- viii. two thirds of the salary of public officer or other person in employment;
- ix. a contingent or possible right or interest, including an expectancy of succession by survivorship;
- x. a right of future maintenance;
- xi. any fund or allowance declared by law to be exempt from attachment and sale in execution of a decree.

Section 38 of the Civil Procedure Act – Powers of court to enforce execution

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree;

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale, or by sale without attachment, of any property;
- (c) by attachment of debts;

- (d) by arrest and detention in prison of any person;
- (e) by appointing a receiver;
- (f) in such other manner as the nature of the relief granted may require

VI. OTHER ISSUES OF INTEREST IN YOUR JURISDICTION

F. Any other issues of interest in your jurisdiction

Answer:

i. Modes of execution of a decree

The modes of execution of a decree are provided for under **Section 38 of the Civil Procedure Act – Powers of court to enforce execution** as follows:

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree;

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale, or by sale without attachment, of any property;
- (c) by attachment of debts;
- (d) by arrest and detention in prison of any person;
- (e) by appointing a receiver;
- (f) in such other manner as the nature of the relief granted may require

ii. Recognition of foreign judgments in Kenya regarding matrimonial proceedings is dependent on the domicile of the parties and jurisdiction of the foreign court

Divorce and Marriage proceedings are listed under Section 3 of the Foreign Judgments and Reciprocal Act, as being among those recognized for entry of foreign judgments before any superior court in Kenya.

However, the **Marriage Act at sections 61 and 67** provides as follows:

Section 61-Registration of foreign annulments and divorces;

- (1) Where a marriage celebrated in Kenya is annulled or dissolved by a decree of a foreign court, any party to the annulled or dissolved marriage may apply to the Registrar to register the decree.

Section 67-Dismissal of petition deception or non-disclosure

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.

The above sections envisage recognition of all foreign judgments regarding matrimonial proceedings without the need to demonstrate reciprocity as long as the conditions set out therein are met.

The above position was upheld by the High Court in **P M v VM [2018] eKLR** where the Court in recognizing and adopting the dissolution of marriage decree given to the Applicant and the Respondent in the Republic of Slovakia (which is neither a commonwealth nor a reciprocating country) held that:

“It should however be borne in mind that recognition of foreign judgments is not the same as registration. Whereas the provisions of sovereign judgments (reciprocal enforcement) Act only regulates registration of foreign judgments, it implies that judgments arising out of matrimonial cause are registrable not for enforcement purposes given that matrimonial causes are declaratory in nature for dissolution of a marriage which is a personal right with no orders for enforcement unlike commercial transactions. However, foreign annulment and dissolution of marriage are now registrable under Section 61 of the Marriage Act 2014. Registration of such orders is a preserve of the registrar of marriages and not the courts.it is therefore clear that under the Marriage Act 2014, foreign judgments annulling marriages or generally dealing with matrimonial proceedings are recognized in Kenya and the prayers herein are properly sought and therefore allowed in terms of prayer No. 2.”

In **M N M v P N M [2016] eKLR** the High Court found that Foreign annulments and dissolution of marriages are now registrable under section 61 of the Marriage Act, 2014. However, unlike the provisions in the Foreign Judgments (Reciprocal Enforcement) Act, which envisage adoption of such orders by the courts, the registration envisioned in section 61 of the Marriage Act, 2014, is by the Registrar of Marriages. The upshot of this is that foreign judgments are recognized in Kenya irrespective of whether or not the originating court is a designated country under the Foreign Judgement (Reciprocal Enforcement) Act.

Submitted by

	Contact 1	Contact 2 (optional)	Contact 3 (optional)
Contact Name:	Allen Waiyaki Gichuhi C.Arb.	Charles Wamae	Prestone Wawire
Firm Name:	Wamae & Allen Advocates	Wamae & Allen Advocates	Wamae & Allen Advocates
Email:	allen@wamaeallen.com	charles@wamaeallen.com	prestone@wamaeallen.com
Phone :			
Website:	www.wamaeallen.com	www.wamaeallen.com	www.wamaeallen.com