

**THE EFFECTIVENESS OF THE LAWS IN RECOGNITION AND
ENFORCEMENT OF FOREIGN JUDGMENT IN TANZANIA**

**THE EFFECTIVENESS OF THE LAWS IN RECOGNITION AND
ENFORCEMENT OF FOREIGN JUDGMENT IN TANZANIA**

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CERTIFICATION

The undersigned certifies that they have read and hereby recommends for acceptance by Mzumbe University a dissertation entitled: **The effectiveness of the Laws in Recognition and Enforcement of Foreign Judgement in Tanzania**, as partial fulfilment of the requirements for the Degree of Masters of law (LLM) of Mzumbe University.

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DECLARATION

I Edgar Japhet Msolla declare that this dissertation is my own original work and that; it has never been presented and will not be presented to any other university for similar or any other degree award

.....

EDGAR JAPHET MSOLLA

DATE.....

ACKNOWLEDGEMENT

In the course of studying and writing this dissertation, I have obviously become heavily indebted to others. I thank them all for their kindness.

I wish to acknowledge that I have a special debt to my supervisor Prof. Abdul Rayees Khan of the Faculty of Law of Mzumbe University who read the text of this dissertation and offered me invaluable advice and guidance. He must be credited with anything of value herein.

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Despite its loneliness and ultimate sole responsibility this research was heavily inspired and I'm pleased to place it on record that it owes its existence to my wife Victoria Msolla and our children Dierz, Emanuel and Abigail who though outside the family where the study was conducted for all the time, have granted me exceptional support and loyalty. I would never have attempted to indulge myself in a study so fulfilling.

DEDICATION

To my late Parents Paulina Mponzi and Gwerino Msolla

ABBREVIATIONS

AD	-	Anno Domino
BLR	-	Botswana Law Report
CA	-	Court of Appeal
Cap	-	Chapter
Co	-	Company
CW	-	Common Wealth
EA	-	East Africa
EFTA	-	European Free Trade Area
ER	-	English Report
EU	-	European Union Countries
HC	-	High Court
ICC	-	International Commercial Court
JALA	-	Judicature and Application of Laws Act
Ltd	-	Limited
No	-	Number
Pp	-	Pages
QB	-	Queens Bench
RE	-	Revised Edition
Ref	-	References
T.O.C	-	Tanganyika Order in Council
TLR	-	Tanganyika Law Report
UK	-	United Kingdom
URT	-	United Republic of Tanzania
WWI	-	World War I
WLR	-	World Law Report
TANESCO	-	Tanzania Electricity Supply Company

ABSTRACT

This study aims at making assessment of the effectiveness of the laws governing the recognition and enforcement of foreign judgments in Tanzania particularly the Reciprocal Enforcement of the Foreign Judgement Act, No.8(RE 2002), whether they provide for the needful of their intention for the enactment. In assessing this issue the basic question relates to the extent and significance of the laws in bringing about the needful of its intention to enhance justice in Tanzania.

A necessary concomitant of the study is its endeavour to render a jurisprudential justification for the effectiveness of these Laws towards the recognition and enforcement of the foreign judgement and the need for the decisions based on socio-economic considerations within the country.

From time to time the researcher seeks to find how a society's culture, its judicial process and sophistication influence its perception, development and utilization of the foreign judgement in enhancing justice. As far as the international family consists of a variety of legal system with different perceptions and the fact that the right being acquired or vested by the competent authority must be recognised and enforced anywhere.

Hence the need for the assessment of the Laws governing this aspect towards its effectiveness in enhancing justice and rights, and make recommendations.

LIST OF CASES

- Adams vs. Cape Industries Plc* [1990] Ch.433 CA
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- Baijnath v Villabh Das* [1933] AIR Mad 517
- Berliner Industries Bank v Forst* [1971]2 QB 463 CA
- Blower vs. Van Noorden* (1909) TS. 890
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- DB Shapriya and Co. Ltd vs. British International Bv* (2003) 2 EA 404
- Dowans Holding SA (Costa Rica) and Dowans Tanzania Ltd. (Tanzania) v. Tanzania Electric Supply Company Ltd (Tanzania)* ICC Award No 15947/VRO
- Fabbour vs. Custodian of Israel Absentee Property* [1954] 1WLR 139
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- Gwao bin Kilimo v Isunda bin Ifuti* (1938)1 TLR 403
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- Mtui v Mtui* [2000]1 BLR 406 HC
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Showlag vs. Mmansour [1995] 1 AC 431 PC

Sirdar Gurdy Sigh v Rajab Faridkole [1894] AC 670 PC

Soleimany vs. Soleimany [1998] WLR 811 at 821 AC

Tanzania Electricity supply Company Ltd vs. Dowas Holding SA (Costa Rica) and Dowas Tanzania Ltd. Civil Appli No 8 of 2011.

Tracomina vs. Sudan Oil seed Ltd (No 1) [1983] 1 WLR 1026 CA

USA v Inkley [1989] QB 255 CA

Varvaeke vs. Smith [1983] 1 AC, HL

Vogel vs. RA Kohstamm Ltd [1973] QB 133

Wier's case [1607] 1 Rolle Ab 530 K. 12

Y. Narorasimba Rao v Y Venkanta Lakshim (1991) 3 Sec.451

LIST OF STATUTES

Local statute

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- The Civil Procedure Code Act Cap 33 [RE 2002]
- The 1936 Reciprocal Enforcement of the Foreign Judgment Act No 7
- The 1935 Reciprocal Enforcement of the Foreign Judgment Act No 6

International statutes

- The Bill of Exchange Act, 1882. UK
- The British Foreign Jurisdiction Act, 1890.UK
- The Administration of Justice Act, 1920.UK
- The foreign Judgment (Reciprocal Enforcement) Act, 1933.UK
- The Indian Civil Procedure Code India
- Code Michaud 1629 France
- Judgment (International Enforcement) Act 1983 Botswana

International Convention

- The Rome Convention on Contractual Obligation.1980
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CHAPTER ONE

GENERAL INTRODUCTION

1.0 Introduction

Under normal circumstances the court may find itself called upon to recognise and enforce a judgement rendered by a foreign court. Since certain types of judgement, by their nature, only require recognition such as foreign divorce, nullity decree and other all judgement in *personam*, may on occasions only need to be recognised, when a defendant pleads that he had satisfied a judgement given in claimant's favour. But the court may be asked to enforce a foreign judgement such as a maintenance order or any judgement for damages. However the law governing the recognition and enforcement of foreign judgement has been some what complex as, there are different sets of rules which exist which are applicable in different legal systems¹.

Tanzania like any other country in the world recognise and enforce the judgement rendered by the foreign courts under the law governing the recognition and enforcement of the foreign judgement i.e. the Reciprocal Enforcement of the Foreign Judgement Act No.8 as Revised in 2002. But some of the provisions of this law appears to be some what complex. Hence this study conducted to assess the effectiveness of the Tanzania Law in regard to the recognition and enforcement of the foreign judgement, as to whether its provisions are effective to the need of social economic of the society today.

1.1 Historical Background

Tanzania, by then Tanganyika was one of the African countries which were under the colonialist. Tanzania was under a German colony from 1880's to 1910's after the World War I², then Tanzania came under the British colony' from 1920 to 1961 when it acquired its independent. Each of these colonialists had its own system of administration of justice within the country. While the Germans did nothing in shaping the system of administration of justice in Tanganyika, their predecessors did a lot in changing the system of administration of justice within the territory from traditional modes of administration of justice based on customary rules to the

¹ Collier J.G. (2001) Conflict of Law 1st Edition at page 109 Cambridge University Press

² The world war I which took place between 1914 to 1919

common Law system by introducing their common laws and system of administering justice differently from that of pre colonial Tanzanian society.³

During the pre-colonial era in Tanzania customary laws was an established system of immemorial rules which had developed from the way of life and natural wants of the people, the general context of which was a matter of common knowledge coupled with precedents applying to special costs which were retained in the memories of the chiefs and his councillors, their sons and the grandson. Until they become part of their customs. However with the coming of the colonialists, traditional modes of maintaining laws and orders were replaced by the unfamiliar apparatus of police, prison and courts.

To ascertain their political existence and exploitative economic survival, the colonialist passed laws regardless of the feeling of indigenous people. Attitudes of judges and magistrates in the colonies were inclined towards the interests of the colonial government, it is observed that,⁴ they felt that any decision against the government would have imperilled their prospects of advancement and was to secure the decision they desired. Thus, viewed from the colonial legal policy context, law was but a means by which the colonial state formally declared what was to be done or must be done, in accordance with the interest of the foreign based capital or the prevailing ruling class in the country.

The wave of decolonisation in the 1960's marked the emergence of new independent nations with their own hopes and problems. The major problem was that each of these nations had been left with an inherited economic and social base and a superstructure of laws which to a great extent is a product of that base. In order to affect change in one of these superstructures and the base. There had to be a corresponding change in the other. They normally keep a constant interaction with each other preventing or causing change.

³ Mtaki C.K. (1996) Constitutional and Legal System of East Africa 1st Edition at pg.16-17

⁴ Pritt, D.N Autobiography of D.N. Pritt, part III the Defence accuser, Lawrence & Whiskart London (1966) pg21

Since the independence era, there has been a shift in developmental objectives of the Tanzania Government. The new identification feature as professor Sawyer notes include⁵ an increase in respect for traditional institutions including customary law, rapid Africanisation of the judiciary and the promulgation of the codes (or declarations) of customary law. Other features include the ending of the parallel system of courts by establishing a single hierarchy of courts embracing former central and local courts and the provision of more detailed rules for determining when customary law is applicable and abolition of the repugnancy clause.

Bearing in mind the above features, it is desirable that courts and lawyers were to play a big role in shaping the law, moreover when action other than blind adherence to inherited corpus of colonial law is desirable in accordance with what Professor Friedman described⁶ as “A re-appraisal of the role of law and the function of the lawyer [and here I would include judge] is needed in the great majority of nations that have acquired political independence because of general law and static economic and social level. All these countries have an overwhelming need for rapid social and economic change. Law in such a state of social evolution is less and less a recorder of established social, commercial and other customs; it becomes a pioneer, the articulated expression of the new forces that seek to mould the life of the community to new patterns”.

Besides the above features, the current wind of democratisation and social interaction process that hit the country needs to be accommodated. It is generally accepted that⁷ private foreign investment that accompanies the process is crucial to the developmental strategies of all developing countries. Thus many African countries have gone out of their way not only to adopt investment oriented policies but also to promulgate laws and incentives with a view to protect foreign investments. Moreover social mores have changed radically in recent years, outdating many precedents dealing with social interactions.

⁵ As quoted by Kodwo in Introduction to Law in Contemporary Africa, New York, (1976) on pages 80 - 81

⁶ Friedman, Legal theory 5th Edition, (1967) at pg 429

⁷ Ocran T.O The Legal Framework of Foreign Investment in Africa,(1980) 2 Zambia Law Journal

This study aims at making a survey or an assessment of the laws governing the recognition and enforcement of the foreign judgment in Tanzania particularly the Reciprocal Enforcement of the Foreign Judgment Act⁸, on whether it provide for the needful of the Tanzanian society for the purpose of their enactment. Following the fact that laws governing the recognition and enforcement of the foreign judgment had its historical background in English common law system. The system that comes into operation whenever the court is faced with the claim that contain foreign element⁹ and that common law become applicable in Tanzania during the British colonisation by virtual of the British Foreign Jurisdiction Act¹⁰ which allow the British Parliament to enact Laws to be applicable in its colonies. After independence those laws being codified thus, continue to be used. Hence the need to assess its effectiveness in the country today.

1.2 Statement of the Problem

Tanzania has inherited foreign legal system in common law as a result of the British colonial administration. Tanzania like England recognises and enforces the foreign created judgements. Under the law in Tanzania recognition and enforcement of the foreign judgements are much more incorporated in the Reciprocal Enforcement of the Foreign Judgment Act.¹¹ However some of the provisions of these laws are either incorporated from the international convection,¹² and Protocol¹³ while other provisions are codified directly from the English law¹⁴ which come into existence and continue to exist in Tanzania during the British colonial period by virtue of British Foreign Jurisdiction Act,¹⁵ the Tanganyika Order in Council¹⁶ and the Judicature and Application of Laws Act.¹⁷

⁸ Act No 8 [RE: 2002] An act to make provision for the Reciprocal Enforcement of Judgement as between mainland Tanzania and foreign countries and for other related matters.

⁹ Cheshire and North: Private International Law, (1999) 13th Edition at pg 3

¹⁰ 1890 Act which allows the British Parliament to enact Law for its Overseas Territories (Colonies)

¹¹ Act No 8 [Revised Edition 2002]

¹² Convection on the Execution of Foreign Arbitral awards

¹³ Protocol in Arbitration Clause

¹⁴ DB Shapriya and Co ltd Vs British International BV(2003)2 EA 404

¹⁵ 1890 Act which empower the British Parliament to enact laws for its territory abroad and use it.

¹⁶ 1920 Act which allow the applicability of common law in Tanganyika under section 7 of the T.O.C

¹⁷ 1963 Act which retained the application of common law and Statute of General Application under Sec.3(1).

Therefore, the nature of these laws and the change of social and economic development which resulted from the interaction of people from different legal system and the growth of the living system of laws, where the old practices and ancient formulae require to be modified to keep in touch with the expansion of legal ideas and to keep pace with the requirement of the changing condition. Hence the researcher sought to assess the provision of the law relating to the recognition and enforcement of the foreign judgement with the view of determining how effective they are in protecting rights vested under the foreign judgement and enhancing justice in Tanzania.

As Mr Justice Holmes once wrote, in Common Law that¹⁸ “The life of the law has not been logic, it has been experience. The felt necessities of the time, prevalent moral and political theories, institutions of the public policy, avowed or unconscious, even the prejudices which judges shares with their fellow-man, have had a good deal more to do than the syllogism in determining the rule by which men should be governed” and bring justice to the society.

Depicting the role of judges in remoulding the law, Innes C. J had the following to say¹⁹ “ there comes times in the growth of every living system of law when old practices and ancient formulae must be modified to keep in touch with the expansion of legal ideas and to give pace with requirements of the changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decisions and when they are so important or so radical, that they should be left to the legislature.”

Lord Justice Denning in the English court of appeal said²⁰ “it is a recognition that the Common Law (i.e. Foreign Law) can not be applied in a foreign Land without considerable qualification it has many principles of magnificent justice and good sense, which can be applied with advantage to people of every race and colour all over the world. But it has also many refinements, subtleties and technicalities which are not suited to other folk in these far off lands, people must have law which they understand and which they will respect. The common law can not fulfil these roles

¹⁸ Holmes O.W. The common Law, (1881) 1

¹⁹ Blower vs. Van Noorden 1909 TS.890

²⁰ Nyali Ltd Vs Attorney General [1955]1 ALL ER 653

except with considerable qualifications. The task of making these qualifications is entrusted to the judges of the lands. I trust that they will not fail therein”

Since every society in history, whether at present highly industrialised and modernised, or not has seen the beginnings of their present legal system in some organisation for social control, which comes from their very beginning, their very first roots of customs and culture, as both grew and developed into a system of norms. These did not come without but from within the group itself and therefore had complete understanding, support, consent and observance of each member within the society. Thus the law governing the recognition and enforcement of the foreign judgment require to have a common understanding within the present Tanzania society

1.3 Literature Review

Much has been written on recognition and enforcement of the foreign judgement in the World legal system, and I hope much more will come to surface in future. But most of the writings addressed the problem in different ways basing on the circumstances of the place where they are found and the existence and nature of the said problem. However, there seems to be no work devoted to make an assessment on effectiveness of the laws governing the recognition and enforcement of the foreign judgement in Tanzania.

According to Kodwo; the legal culture bequeathed by the colonial powers to their African successors, is that of units created by the partition, and that the continent has been partitioned into geographical law areas, or clusters of territorially inherited legal culture, the commonest of them being common law African countries and the civil law African countries.²¹ For the purpose of this study we shall confine ourselves as pointed above, to Tanzania a common law country. Perhaps let mention before proceeding further that it is preferred to provide a brief outline of what the common law system stand for, starting with the term common law.

²¹ Kodwo: Introduction to law in contemporary Africa, New York 1976 at pg 12

The term common law originates from what is now known as the common law system of England. The system developed from the time of the Norman Conquest in the 11th century AD. Literally in English legal language common law seems to refer to the traditional (customary) part of law as distinct from statute or legislation.

Historically, prior to the Norman Conquest in 1066 the English did not possess a unified system of laws for the whole realm. Each locality was having law into itself. But after the conquest, the Norman Kings took much interest in the administration of justice among the subject, and owing to their highly sophisticated political culture, the king embarked on a series of reforms which laid down the foundation for the present day political legal and cognate system of England. As a result of the efforts, they created the central courts (Kings Courts) before which the public litigated their claims and rights. Later a subordinate branch was established during King Henry II reign known as the common pleas that had mandate to hear people's complaints. Justice was dispensed in these courts in the name of the Crown, according to the value of the Norman Kings and their legal experts who had accompanied them to England. In short, a system of centrally controlled local courts emerged at the time, with the crown as the fountain of justice, dispensing the law "common" to all people and to all parts of English and Wales.²²

Brierly and David had these to say; the major feature of the English common law system is that of principles of law regulating the judicial relation of citizens which are judge made. They are created by the judges who are called to resolve disputes. In this creative activity they draw upon identifiable values of justice which have been sanctioned for generations by English society and which are meant to serve as sources of rights and wrong in judicial behaviour. It is at present notable that new principle of law formulated by the court as precedents in adjudication which are pieces of judicial legislation²³ about which jurist does not quarrel any longer and common law become trial oriented so to speak.

²² Mtaki C. K Constitution and Legal System of East Africa (1996) 1 Edition at page 8

²³ David R and Brierly J.E.C Major legal system in the world today (1978) 2nd Edition at pag 48-56

As far as the legal system of Tanzania is concerned that is, common law system based, the law governing the recognition and enforcement of the foreign judgment and arbitral awards reflect the English conflict of laws which is a body of rules whose purposes was to assist the court in deciding a case which contain foreign elements. The recognition and enforcement of the foreign judgment is the third aspect in the conflict of laws. The first aspect being the jurisdiction of the court in the sense of its competence to hear and determine the case and the second being the selection of an appropriate rule of a system of law which would have been applied in deciding a case over which it has jurisdiction (the rule governing this selection are known as choice of law rule) and the third aspect is the recognition and enforcement of the judgment rendered by foreign courts or awards of foreign arbitration.²⁴ Thus the foreign judgment or arbitral award will be recognised and enforced only when the court satisfy itself that such foreign judgment or arbitral award is rendered by the court competent to hear and being rendered under the proper choice of law. As it was held in one of the decision that²⁵ to recognise the foreign judgment or arbitral awards delivered by the foreign court or arbitration, the court require such judgment or arbitral awards to be proved that it has been delivered by a foreign court with competent jurisdiction over the matter. The competence of the court imposes a duty and obligation to a defendant to pay the sum for which the judgment is given which the court in that particular country is bound to enforce it.

Cheshire and North also observed that the recognition and enforcement of the foreign judgments gives rise to a complicated question in Private International law. That if the claimant fails to obtain satisfaction judgment or arbitral awards in the country where it has been granted, the question arise whether it is enforceable to another country where the defendant is found. But in some countries the recognition and enforcement of the foreign judgments has been permitted with a certain defined limit for the purposes of meeting the essential element of Private International law of the protection of rights acquired under the foreign legal system.²⁶

²⁴ Collier J.G. Conflict of law. (2004) 3rd Edition at pg 3

²⁵ Murthy Vs Sivajion [1999]1 ALL ER 721 at pg 73

²⁶ Cheshire and North; Private International Law (1999) 13th Edition at pg 405

Let consider an example that the seller is a Costa Rican in Costa Rica who agrees to sell goods in Costa Rica to a Tanzanian buyer in Tanzania, to be delivered in Tanzania and paid for in sterling in to Costa Rica Bank in Dar es Salaam. The question arises as to whether the seller can invoke the jurisdiction of the Costa Rica court against the buyer, who is still in Tanzania, if he wishes to sue him for breach of contract or failure to pay the price. The further question may also arise as to which law, Costa Rica or Tanzania is to be applied to determine the parties rights and the obligations should the Costa Rica court possess jurisdiction. Therefore it is from these questions in which the court will rely in recognising and enforcing the foreign judgment being created by any of these courts having jurisdiction over the matter.

It will be seen from the above example that question of jurisdiction and one of choice of law may both be involved in a particular case. But they can arise independently. The court may clearly have jurisdiction, let say in divorce case, but it has to answer the choice of law question. Or there may be no question as to what law to apply, as would be the case in the contract for example if the parties to the contract had stipulated that Costa Rica law should govern their agreement, but there would be a question whether the court has jurisdiction. This shows that recognition and enforcement of the foreign judgment is a wholly independent matter.

Seidman argued that the earliest case in the history of conflict of laws which come in to being at a comparatively late stage compared with the other branches of English laws appear to have concerned with the enforcement of foreign judgment.²⁷ An eighteenth century case which is still of binding authority concerning the validity of marriage.²⁸ However it is regarded that the recognition and enforcement of the foreign judgment began to emerge in the late part of the nineteenth century, the time which is marked with the development of family law and the coming of a coherent body of commercial law, since the period witnessed a rapid expansion of international trade and financial transactions where people were moving from various parts of the world, as a result, marriage between each other and various contract being concluded which its enforcement require the application of the foreign

²⁷ Wier's case [1607] 1 Rolle Ab. 530 k.12

²⁸ Scrimshire Vs Scrimshire [1752] 2 Hagg. Con 395

law. Hence the recognition and enforcement being to another country for the liability for the breach of contract or torts committed abroad, which resulted to the adoption of a clear rules and principles for the recognition and enforcement of foreign judgments and arbitral awards. From this observation it is clear that it is sometimes dangerous nowadays to rely on older authorities.

Moreover even the decisions of those years are unreliable or to our eyes confused. Taking for instance some questions remain unanswered such as what law governs capacity to conclude a commercial contract²⁹ or does capacity to make a will of movable property depend on the law of the testators domicile at the time he make a will or at the time of his death? All these bring confusion at the time of recognizing and enforcing the foreign judgment when the courts consider the next respect of the choice of law rule.

Tanzania like its predecessor English are faced with lack of legislation governing the recognition and enforcement of the Foreign Judgement. It is that until fairly recently English were governed by the rules which are judge-made. Only few statutes did exist, in particular Acts of 1868, 1920 and 1933 which are concerning recognition and enforcement of foreign judgments. But most of this did not contain the provision regarding the choice of law rule. The provisions of the 1933 Act which was made applicable in Tanzania (by then Tanganyika) reflects in the Reciprocal Enforcement of Foreign Judgment Act.³⁰ Likewise these provisions does not provide for the choice of law rules. However there is an isolated statutory provision that contain the choice of law dealing with particular subject in the Arbitration Act.³¹ As it is in the Bill of Exchange Act.³² However these legislations have increasingly being affecting the recognition and the enforcement of the foreign judgment because of the need to implement the International Conventions and Protocols dealing with the subjects³³.

²⁹ The Rome Convention, 1980 on Contractual Obligation does not apply to the capacity of natural persons Art 1(2)(a)

³⁰ Cap 8 [RE 2002]

³¹ Cap 15 [RE2002] which allow the parties to choose the Law in case of Matter between them

³² 1882 Act Section 72 which provide for the choice of the law for the matter pertaining the Bill of exchange on the contract concluded abroad

³³ Refer part III and IV of the Arbitration Act, cap 15 which mainly incorporate the provisions of the International Arbitration Clause and Protocol on arbitration

On the other hand the court may find itself called upon to recognise or enforce judgment rendered by a foreign court. As there are certain types of judgment by their nature only require recognition. These include foreign divorce and nullity decree. Other includes all judgment *in personam* which may on occasions only need to be recognised as when a defendant pleads that he had satisfied a judgment given in the claimant's favour. But the court may be asked to enforce a foreign judgment such as a maintenance order or any judgment for damages.

Collier J.G observed that, it appears that the law governing the recognition and enforcement of foreign judgement has become somewhat complex in the world. Various sets of rules exist depending on the nature and place where the matter arose or require being recognised or enforced. These deal with respectively judgment of courts for instance of European Union Countries, European Free Trade Area countries; The Commonwealth countries to which the Administration of justice Act 1920 applies, countries to which the foreign judgments (Reciprocal Enforcement) Act 1933 applies and other countries to which the rule of common law apply³⁴. For the case of Tanzania which is a commonwealth country which the administration of justice Act 1920 applies and the 1933 Act was codified to be applicable and allow the rules of common law to be applicable. Hence these rules apply in the administration of justice in recognition and enforcement of the foreign judgment.

Blackburn J noted³⁵ that the basis of recognition and enforcement of the foreign judgment since the mid nineteenth century when the theory of recognition and enforcement was adopted by the English court has been the doctrine of obligation. This means that a judgment rendered by a foreign court of competent jurisdiction imposes upon the defendant a duty or obligation to obey it and discharge it and confers correlative rights on the claimant to enforce those obligations through the court. Therefore one of the important aspects in the recognition and enforcement of the foreign judgments is that the court delivering that judgment must be having competent jurisdiction.

³⁴ Collier J.G. Conflict of Law (2004) 3rd Edition pg101

³⁵ Schibsbys vs Westenholz (1870) LR 6 QB 155 quoting Gordard vs Gray (1870) LR 6 QB139

But the adherence of the English courts to this theory explains the ease with which a foreign judgment may be recognised or enforced in England compared with the position under the Laws of some other countries. That the court may only be willing to enforce a judgment if the court of the state in which the judgment was rendered would enforce a judgment of the court which is requested to enforce it³⁶.

It is essential to the recognition and enforcement of a foreign judgment that the court which rendered it had jurisdiction in the eyes of the court of country to which the defendant want to enforce it or such judgment to be recognised. It is not enough that it had jurisdiction under its own rules.

Lord Ellenborough enquired³⁷ can the Island of Tobago pass a law to bind the whole world? Would the world submit to such an assumed jurisdiction? He then answered his own question in the negative. That means if the foreign court did not have jurisdiction in the view of the court of the country where such judgment requires be recognising or enforcing in the court of that particular country. And if it has jurisdiction, the judgment in most cases will be recognised and enforced, since any defences other than lack of jurisdiction are few and circumscribed.

Buckley J; observed that in action *in personam* there are some cases which the court will enforce a foreign judgment that is where the defendant is subject to the foreign country in which the judgment has been obtained, where he is a resident in the foreign country, when action began where the defendant in the character of plaintiff has selected the forum in which he is after wards sued, where he has voluntary appeared and where he has contracted to submit himself to the forum in which the judgment was obtained³⁸. Under all these cases the court in action *in personam* will enforce a foreign judgment.

³⁶ Compare the position of the United states supreme court in *Hilton v Guyot* 159 US 113 [1895] For the meaning of “Reciprocity” in enforcing judgments when the foreign court has assumed jurisdiction in a situation in which the English courts might have done the same see *Schibsby vs Westenholz*.

³⁷ Refer the celebrated case of *Buchanan Vs Ucker* (1894) AC 670 PC in which a judgement was obtained in Tobago where the defendant had never been, by means of substituted service upon him effected by nailing a copy of summons to the court house door as permitted by Tobago law.

³⁸ Buckley I. Js observed in *Adams V Cape Industries Plc*[1990] Ch 433 CA

Salter J noted that in case of a company the enforcement of the foreign judgment the presence of residence of the company has to be determined in a way which takes account of its being a legal and, therefore imaginary person and not a natural one. But it would be wrong to regard it as present where it is incorporated or has its registered office, since these may be dictated solely by convenience and not be in the place or country where the company carries on its business activities. The courts have regarding that a corporation is present or residence in a foreign country when indulges in ‘some carrying on of business at a definite and to some reasonable extent, permanent place³⁹ there. The keen point being that this test is not additional to the grounds enumerated in an action *in personam* and does not apply to natural persons, but is the equivalent for a company of physical presence or residence in the case of a natural person.

Taking for instance the presence in Ghana of an agent for a New Zealand insurance company did not satisfy the test, since it only did minor business on the latter’s behalf and for other companies⁴⁰ Also the presence of a “contact man” in Israel, who merely sought out customers there for an English company and acted as the latter’s means of communication with those customers but had no power to conclude to contracts on the company’s behalf did not amount to presence in Israel of a company itself.⁴¹ However if a company has no fixed place of business of its own in a foreign country, but has an agent there who has full authority to conclude contracts on its behalf without first submitting them to the company for approval, it will, it seems, be regarded as residing at the agent’s place of business in that foreign country⁴². Hence all these aspects are to be considered by the court in the enforcement of the foreign judgment in an action *in personam* and the case of the companies and the law governing the recognition and enforcement of the foreign judgments must provide for the same. The question arises whether the law governing the recognition and

³⁹ Salter J. in *Littauer Glove Corp vs FW Millington (1920) Ltd*, [1928] 44 TLR 746 The test which has been applied by courts in other common wealth countries is aid to be the same as that adopted at common law to determine whether a company is resident in a country.

⁴⁰ *Sfeir vs National insurance Co of New Zealand* [1964]1 L1. R 330

⁴¹ *Vogel v.s R A Kohstamm ltd* [1973] QB 133 the English company had no office of its own in Israel.

⁴² *Fabbour v.s Custodian of Israel Absentee property* [1954]1 WLR 139 The case on whether a foreign company has a place of business in England bear this out

enforcement of the foreign judgment in Tanzania provide for the same and what is the position under the law.

Upon the satisfactory of the court that the foreign court had jurisdiction the claimant will be able to enforce the judgment unless the defendant can raise a defence. In general he is not permitted to re-open the case and cause it to be re-argued on the merits, so as to show that the decision of the foreign court was wrong. Thus very few defences are available and all to a greater or lesser extent reflect the public policy. An error of fact or law on part of foreign court is not a defence, even though that court applied the wrong law or, though it applied the correct law, it got it wrong.⁴³

Moreover although the foreign court had jurisdiction over the defendant but, the court which gave judgment lacked the competence to do so under that particular foreign country law, there is no defence. The reason being that the foreign court (or a court of appeal from it), not a court from a country where the judgment is to be recognised or enforced, is a proper tribunal to decide whether it has exceeded its jurisdiction⁴⁴ considering that this is a question of foreign not a law of that particular country.

Taking an example to the law governing the recognition and enforcement of the foreign judgment in Tanzania the provision relating to the power of the court to set aside the award or judgment rendered by foreign court in Tanzania is not proper since it does not provide the extend of the factors which may lead to the court to set aside such judgment or arbitral awards⁴⁵. As some of the Learned counsels emphasized in the case⁴⁶ that ‘in interpreting the provisions of the Law the fact before it, the defunct court, relying on various English authorities departing with the grounds which may lead to the court to remit or set aside by the court of law including if there is an error of law apparent on the face of the awards the court held that: “the court will be slow to interfere with the award in an arbitration, but will do

⁴³ This is exemplified by *Tracomina v. Sudan Oil Seed Ltd* (No1) [1983] 1 WLR 1026 CA where a French court made an obvious error as to the rules of English law it had purported to apply

⁴⁴ *Pemberton vs Hughes* [1899] 1 Ch 718 CA (foreign divorce decree)

⁴⁵ Section 15 and 16 of Cap 15 [RE 2002] and section 6 of Cap 8 [RE 2002]

⁴⁶ *Dowans Holdings SA (Costa Rica) and Dowans Tanzania Ltd. (Tanzania) vs Tanzania Electric Supply Company Ltd. (Tanzania)* ICC Award No.15 947/VRO

so whenever this become necessary in the interest of the justice and will act if it is shown that the arbitrators in arriving at then decision have done so on a wrong understanding or interpretation of the law, there is an error of law apparent on the face of the award.⁴⁷”

Therefore under this circumstance it appear that the court do not consider the ground on which such an award comes in to existence and what exactly was the base of such award, whether it was contractual obligation, or contract whether valid or void this does not amount to the ground for setting aside or remitting the judgment or arbitral award rendered by the foreign court. And the High Court in Tanzania can not interfere with the findings of the fact by arbitrator and that as a mistake of fact or law is not a ground of setting aside or remitting the arbitral award or foreign judgement.⁴⁸

Hence the judgment by foreign court is valid until set aside for excess of jurisdiction. So if the judgment is pronounced by a foreign court over a person within its jurisdiction and in a matter with which it is competent to deal, the court will never investigate the propriety of the proceedings unless they offend against the country view substantial justice.

With all these there are some circumstances in which the enforcement and recognition of the foreign judgment may not be accepted by the court following the ground in which the judgment was reached by the foreign court such as when the decision was reached by fraud, in breach of Natural justice and that the decision being contrary to the public policy and that of conflicting judgment. Fraud may be on the part of the foreign court or of the claimant. The court may by itself act fraudulently, as where it acted on a bribe; the judgment obviously will not be recognized and enforced. On the part of the claimant fraud may take a form that is may be “collateral fraud” which vitiates the jurisdiction of the foreign court by inducing it to assume jurisdiction which otherwise it would not have done. Under

⁴⁷ Rashid Moledina and Co (Mombasa) Ltd. And others vs Hoima Ginners Ltd. (1967)1 EA 645

⁴⁸ Tanzania Electric Supply Company Ltd. vs Dowans Holding SA (Costa Rica) and Dowans Tanzania (Tanzania) Misc. Civil. Appli No.8 of 2011

this circumstance there is no doubt that this will cause the foreign judgment to be granted no recognition or enforcement.⁴⁹.

Under the Natural justice it appears that if the foreign court acted in breach of natural justice the judgment may not be enforced. That if the court acts in effect as judge in its own cause it offends against the maxim *nemo iudex in causa sua* and if it refuses to allow the defendant to plead his case, it offends against the maxim *audi alteram partem*⁵⁰. However there is no reported case in which a defendant has successfully pleaded the matter in resisting enforcement. But the court insists by urging that a judgment could not be enforced if the trial was conducted in a manner which was not contrary to natural justice in the sense just explained but amounted to a denial of substantive justice.⁵¹

It is observed that the court may not recognize and enforce a foreign judgment which its decision is contrary to public policy.⁵² But what amounts to the public policy remain on the eyes of the court. Generally, no action will be sustainable on a foreign judgment which is contrary to the principle of Public Policy. Even though the defence in one of public policy such a defence could not be raised in the instant case. As the House of Lords held⁵³ that recognition of Belgium judgment invalidating a sham marriage where the parties had no intention of living together as wife and husband would be against the Public Policy. But there are obiter dicta in the Court of Appeal to the effect that it would be against the Public Policy to recognize a foreign judgment enforcing a contract in the situation where a foreign court has found as a fact that it was the common intention of the parties to commit an illegal act in a state which is regarded as foreign or friendly state.⁵⁴ From this fact it is clear that such an act against the Public Policy lies within the eyes of the foreign judgment and not

⁴⁹ In a case of *Mac Alpine vs Mac Alpine* [1958] P.35 A common law case in which a foreign divorce was refused recognition on the ground that the judgment was reached through fraudulently

⁵⁰ *Fet holding Ltd V. Patel* [1990] 1 QB. 335 CA Where the finding by the foreign court that had observed the rule of natural justice did not bind the English court.

⁵¹ *Adams vs. Cape Industries Plc* [1990] Ch. 433 CA

⁵² Section 6 (1) (a)(v) of Act No 8 [RE 2002] and Cheshire and North. *Private International Law* (1999) 13Ed at pg 405-407

⁵³ *Vavvacke Vs Smith* [1983] 1 AC, HL

⁵⁴ *Solemany Vs Solermany* [1998] WLR 811 at 821 CA

within the registering court. Hence is discretion of the court and not the Law governing the recognition and the enforcement and the foreign judgment?

According to Weiler J. the difficult question that arises is whether the enforcement of foreign judgment for exemplary or punitive damage would be against the public policy? Where the court of Appeal had this to say “Nothing contrary to English Public Policy in enforcing a claim for exemplary damages, which is still considering to be in accord with the Public Policy in the United States and many of the great countries of the commonwealth⁵⁵ with this stand of the court of appeal and the position of Law governing the recognition and enforcement of the foreign judgment in a Common Wealth Countries shows that it is the position even in the Law in Tanzania. However the question arises what amounted to public Policy in United States of America and United Kingdom is the same as that of Tanzania? This is subject to the study. Taking for instance the German Federal Supreme Court has refused on Public Policy grounds to enforce the part of Californian judgment which was in respect of exemplary and punitive damages.⁵⁶

On the other hand conflicting judgment (*res judicata*) are be regarded as a defence to the recognition and enforcement of the foreign judgment, where, the foreign judgment is irreconcilable with the previous judgment under such circumstances the foreign judgments are granted no be recognition or enforcement. The Privy Council applied this to the situation where two irreconcilable foreign judgments were in issue⁵⁷. Where by in 1990 an English court held that M had stolen some of S’s money. In 1991 an Egyptian Court held that S had given M the money, so he had not stolen it. S’s legal representatives brought an action in Jersey to recover some of the money, which had found its way there. M relied by way of defence on the second Egyptian judgment as giving rise to *Res judicata*. It was held that the English judgment itself constituted *res judicata* and being first in time to be recognised and

⁵⁵ SA Consortium General Textile vs Sun and Sand a Agencies Ltd [1978] Q B 270 at Page 300

⁵⁶ Re the enforcement of the United States Judgment for damages Case 1 x Z.R. 149/91 [1994] IL Pr 602

⁵⁷ Showlag vs Mansour [1995] 1 AC 431 1C on appeal from Jersey

given effect by the Jersey Court⁵⁸. Despite of this position which lied on the countries member of Brussel Convention 1968, the question arises to the position of the Law in Tanzania what will be the position for an action like this if the Law is silent. Will it base on the common Law decision as a precedent this is subject to discussion in future.

Having considered the above argument with regard to the recognition and enforcement of the foreign judgment. Let earmark on the methods of enforcement of the foreign judgment as far as Tanzania and other common law countries is concerned. Mainly the foreign judgment may be enforced in two ways that is at common law and by statute:

At common law under the former rule a foreign judgment was enforced by an action to begun by a claim form in which the claim is for payment of the sums due, under the judgment But this rule which allow the claimant to sue again on the original cause of action was abolished following the ground that this apparently sensible measures leads to unhappy consequences as the house of Lord held⁵⁹ that the abolition of the former rule did not deprive English court jurisdiction. But it merely create a statutory estoppels in forum of the defendant so preventing him from being sued again on the same cause of action.

Under this method of enforcement of the foreign judgment at common law there are three condition which are to be fulfilled in order for the foreign judgment to be enforced which are the act that, the judgment must be for debt or fixed sum of money, the judgment must not be for tax nor penalty and that the foreign judgment must be final and conclusive in the court which rendered it.

On the other hand under the statute the statutes provide for enforcement of judgments given by a foreign court in certain foreign countries by method of registration with relevant court rather than by the way of action. Taking for instance for the case of

⁵⁸ The Privy Council derived this, in part from the Brussel Convection, 1968 Article 27 (5) which prevents a Court of one Contracting State from recognizing a judgment of another contracting State which is irreconcilable with an early judgment of non country state.

⁵⁹ Republic India vs India Streamship Co Ltd [1993] AC 410 HL

English the Administration of Justice Act 1920 applies to judgments rendered in some countries in the common wealth and the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies to some common wealth judgments and allows the enforcement by the registration on reciprocal basis on their judgment. This is the same as the provision of the law governing the Recognition and Enforcement of the Foreign Judgment in Tanzania that is the Reciprocal Enforcement of the Foreign Judgment -Act Cap 8 [RE 2002] which is the result of the codification of the 1933 Act of England. However the most important aspect is to find out whether the provisions of this law serve the Tanzania society today? As provide that the court must resist a foreign judgment which fulfil the Act requirements and provide for the limitation to enforce it to the creditor and the act the fact that upon registration under the act the courts acquire the same force as the foreign court by considering its effects.

Therefore it is this observation point of view as discussed by various authors and jurist in different decisions following various thought from different matters and authorities that lead to assess the effectiveness of the law governing the enforcement of the foreign judgment.

1.3 Research Hypothesis

The major hypotheses of this study I think is that at the end of the critical analysis made on the law governing the recognition and enforcement of the foreign judgment will appear to have provisions which are not relevant to the present Tanzanian society.

1.4 Objectives of the study

1.4.1 Main Objective

The main objective of the study was to make an assessment of the laws governing the recognition and enforcement of the foreign judgment in Tanzania. The study intended to assess specifically the Reciprocal Enforcement of Foreign Judgment Act No.8 [Re 2002] as to whether it provides effectively to the manner in which their enactment was intended, and make the recommendation and suggestion on whatever observed to overcome the lacuna or to repeal them.

1.4.2 Specific Objectives

The specific objective of this study is to make analysis of the provision governing the recognition and enforcement of the foreign judgment in the present Tanzania society.

1.6 Significance of the study

This study has been important in the society and to the researcher in particular as;

- It provide for the awareness of the lacuna within the laws governing the recognition and enforcement of the foreign judgment.
- It is useful to the government of the United Republic of Tanzania in making review of such laws and ammend them through parliament.
- The study also assist the researcher to identify variable areas for further studies

1.7 Research Methodology

As far as this study is concerned with examining the law governing the recognition and enforcement of the foreign judgment in Tanzania i.e. the Reciprocal enforcement of the foreign judgment Act NO.8 as revised in 2002 the main method of data collection in doctrinal Tanzanian society, that mean textual analysis has been made determine the relevance of the law to the present

1.7.1 Sources of data

In this study the researcher used both primary and secondary sources of data. A primary source is a direct description of any occurrences by an individual who actually observed or faced with the enforcement of the foreign judgment. In research this is a description of a research by a person who actually carried the research.⁶⁰ In this source of data, the researcher applied various information obtained through interview from various experts in law.

Secondary sources of data are those sources which are not of primary nature. It includes any publication written by an author who was not a direct observer or participant in the event observed. Under this study various books and articles are applied by the researcher in this study as secondary sources of data.

⁶⁰ Mugenda M and Abel G. M (1999) Research Method; Qualitative and Quantitative Approach at pg 32

1.7.2 Methods of data collection

In this study data were collected mainly through interview and documentary review. Through interview method, both structured and unstructured interviews were conducted to various experts in law with a view to extract information relating to the law governing the recognition and enforcement of the foreign judgment in Tanzania. On the other hand, data were collected from different published materials such as text books, international and regional instruments and other Acts of the parliaments, law journals periodicals, articles, news papers and other publication relevant to the subject.

1.7.3 Data processing and analysis

As far as this research based on qualitative research processing of data include editing and coding. Editing process refer to the checking of raw data collected for completeness and accuracy for avoidance of possible mistakes which may distort the subsequent stages of processing data. Also, coding was done in order to represent a link between raw data (field notes or interview transcripts) and researches theoretical concept.

After the data were collected, edited and coded the researcher then analysed the data to determine the adequacy of information and the credibility, usefulness, consistency and validation or non validation of the research questions. A researcher closely evaluated the usefulness of the information in answering the research questions.

1.8 Scope of the Study

In this study the researcher embarked on making assessment on the Law governing the recognition and enforcement of the foreign judgments in Tanzania, specifically the Reciprocal Enforcement of the Foreign Judgment Act, by considering their application in different matters in Tanzania

1.9 Organisation of the study

This dissertation report is divided in to five chapters. Chapter one is about the general introduction relating to the laws governing the recognition and enforcement of the foreign judgment. This chapter includes background to the research problem, statement of the research problem, review of related literature, justification of the

study, scope and limitation of the study, significance and objective of the study and methodology employed in research.

The conceptual framework of the law in regard to the recognition and enforcement of the foreign judgment in Tanzania is discussed in chapter two. This chapter discusses the concept under the study and their relationship i.e it conceptualises the relationship of variables involved in the study.

This being the case, the concept of recognition, enforcement and foreign judgment has been discussed under this chapter. The theories or basis of judicial process employed in the application of the recognition and enforcement of the foreign judgment, the role of court in recognition and enforcement of the foreign judgment are discussed. This chapter goes further to examine the methods of enforcement and the defences available to the recognition and enforcement of the foreign judgment.

The historical development of the law in regard to the recognition and enforcement of the foreign judgment in Tanzania has been discussed under chapter three. This chapter trace the development of the law regarding to the recognition and enforcement of the foreign judgment in Tanzania during the colonial period, during the independence period, and the post independence to date.

Chapter four is the core of this study. It sets out to examine the critical analysis of the in regard to the recognition and enforcement of the foreign judgment in Tanzania. It examines the judicial process behind the recognition and the enforcement and the procedures involved therein. This chapter also examine the mode of application and the grounds for setting aside and registering of the foreign judgment within the country under the law.

The summary, conclusion and recommendation are made in chapter five. In the conclusion an account is made of what this work se out to do relating to the effectiveness of the laws in regard to the recognition and enforcement of the foreign judgment in Tanzania. Finally, the researcher made a recommendation for the changes required in the provisions of the law governing the recognition and

enforcement of the foreign judgment in order to make such provisions more effective for the purposes of protecting the right vested by other legal system to be respected by the court of other state as if it is created by its own and to enhance justice.

CHAPTER TWO

CONCEPTUAL FRAMEWORK OF THE LAW IN REGARD TO RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENT

2.0 Introduction

Generally Law confers power to the court to hear and determine matters brought before it which are within its own jurisdiction. The power of the court to hear and determine the matter is known as Jurisdiction of the court. Under the conflict of Law the jurisdiction of court should not be observed only in the eye of its own rule rather than to the court which the judgment rendered by the foreign court is to be enforced. Therefore foreign judgment impose the duty to the court to determine whether the judgment rendered by the court with competent jurisdiction before enforcing it.

This chapter discusses various aspects relating to the law in regard to the recognition and enforcement of the foreign judgment. It includes the concept of foreign judgments, recognition of foreign judgment and the enforcement and enforcement in the first aspect. The basis or theories of recognition and enforcement, the jurisdiction of the court, the methods of enforcement and defences for the enforcement are also discussed in this chapter

2.1 Recognition of foreign judgement

The process of recognition of a foreign judgment occurs when the court of one country or jurisdiction accepts a judicial decision made by the courts of another foreign country or jurisdiction and issues a judgment in substantially identical terms without rehearing the substance of original lawsuit.

Thus, once a foreign judgment is recognized, the party who was successful in the original case can then seek its enforcement in the recognizing country. Taking for instance if the foreign judgment is a money judgment and the debtor has assets in the recognizing jurisdiction; the judgment creditor has access to all the enforcement remedies as if the case had originated in the recognizing country e.g. Judicial sale, garnishment etc. And if some other form of judgment was obtained such as that

affecting status granting injustice relief etc. the recognizing court will make whatever orders which are appropriate to make the original judgment effective.⁶¹

On the other hand it require to the party seeking recognition to furnish the following

- a) A complete and authenticated copy of the decision
- b) If the decision was rendered by default the originals or certified true copies of the documents required to establish that the summons was duly served on the defaulting party
- c) All documents required to establish that the decision fulfill all the conditions required and
- d) Unless the authority addresses otherwise requires, translations of the documents referred to above certified as correct either by diplomatic or consular agent or by sworn translator or by any other person so authorized in other state⁶²

2.2 Foreign Judgment

Ones may ask what foreign judgment means. The Indian Civil procedure Code⁶³ made clear definition on what foreign judgment mean that is the judgment of the foreign court. And a “Foreign Court” Mean a Court situated outside of the country and being not established by the authority of the Government to which such judgment is being enforced. Taking for instance a decree passed before the partition of India by a court having Territorial jurisdiction over the land which has fallen in to Pakistan would be a foreign Judgment. It cannot be executed in Indian dominion but a suit will have to be brought upon it.⁶⁴ However, it should be clear that that the definition of “Judgment” as given under section 2. (a) ⁶⁵ Is in applicable to the foreign judgment. In this context a foreign judgment must be understood to mean adjudication by a foreign court upon a matter before it and not in the reasons for the order made by it for otherwise. Therefore, for the foreign judgment to be valid, the foreign court rendering such judgment must be competent to try such a suit, not only as regards to pecuniary limits of its jurisdiction and the subject matter of it suit but

⁶¹ http://en.wikipedia.org/wiki/enforcement_of_foreign_judgment

⁶² Convection of the Recognition and Enforcement of Foreign Judgment in Civil and Commercial Matter of 1st February, 1971

⁶³ Section 2(6) of the Indian Civil Procedure Code

⁶⁴ SS Said II Hamad Vs Federal Assurance Co. ATR 1951 Simle 255

⁶⁵ “Judgement” means the statement given by the judge on the ground of decree or order.

also with reference to its territorial jurisdiction and the competence of the jurisdiction of the foreign court is to be judged not by territorial law of the foreign state but by the rule of private international law.⁶⁶

The code also embodied the doctrine of *Res judicator* in case of foreign judgment by recognizing the foreign judgment as conclusive except in a certain circumstances.⁶⁷ The underlying object of this recognition of the foreign judgment being that once a court recognizes a particular claim it must be abided with it.

2.3 Enforcement of foreign judgment

Foreign judgment is enforceable in most common law countries including Tanzania on the same grounds and in the same circumstance in which they are enforceable in England under common Law⁶⁸. A judgment of the court can only be enforced by proceedings in execution. A foreign judgment however, may be enforced by proceedings in execution in a certain specified cases. Since the execution proceedings relates to procedures, a change in law during the pendency of a cause has retroactive operation and the executing court are bound to take notice of a change in the legal position.⁶⁹

In executing proceeding it is open to the judgment debtor to raise all objections which he may make in a suit. However in other cases a foreign judgment can only be enforced by a suit upon the judgment. Such a suit must be jailed within six years from the date of judgment⁷⁰ depending on law governing the limitation (ie The Limitation Act) and the provisions of the Limitation Act apply in computing the period of limitation meanwhile the pendency of appeal in the foreign country will not bar a suit in a foreign judgment.

On the other hand if the appeal results in to decree dismissing the appeal, the appellate decree affords a fresh starting point for Limitation⁷¹. But if a suit on a foreign judgment is dismissed no application will lie thereafter to execute the

⁶⁶ Mulla. The code of Civil Procedure 14th Edition at page 131-132

⁶⁷ Section 13 (1) (a-f) of the Indian civil procedure code

⁶⁸ Y. Narrasimha Rao Vs Y. Venkata Lakshim (1991) 3 sec 451

⁶⁹ Mulla the code of Civil Procedure at Pg 133

⁷⁰ Section 4(1) of the Act No 8 Consider the limitation under the law governing Limitation Act for Addition

⁷¹ Baijnath Vs Villabh Das AIR [1933] Mad 517

judgment as it has become merged in the decree dismissing the suit. However where the judgment of a foreign court is obtained on a decree of a court in Tanzania let say the foreign judgment so obtained is no bar to the execution of the original decree in Tanzania. Though a foreign judgment may be enforced by a suit in Tanzania it is not be supposed that Tanzanian courts are bound to in all cases to take cognizance of a suit and they may refuse to entertain it on ground of expediency. Since a person in whose favour a foreign judgment has been given can sue on the judgment or in the alternative sue on the original cause of the action. Basing on the ground that foreign judgment is conclusive that a court cannot inquire if it is supported by evidence⁷²

2.4 The Basis or Theories of Recognition and Enforcement of the Foreign Judgment

Once Blackburn J. argued that⁷³ since the Mid-nineteenth Century the theory adopted by the English courts to explain their recognition and enforcement of the foreign judgment has been the doctrine of “obligation”. This means that a judgment rendered by a foreign court of competent jurisdiction imposes upon the defendant a duty and discharge it and confers a correlative right on the claimant to enforce that obligation through the court.

The adherence of this theory explains the ease with which a foreign judgment may recognize or enforced before the court compared to the position under other legal system. Tanzania Being a common wealth country made application of the English common law adhere to this theory in the recognition and enforcement of foreign judgment. Thus under the law governing the recognition and enforcement of the foreign judgment one may only be willing to enforce a foreign judgment if the court of the state in which the judgment was rendered would enforce a judgment of the court which is requested to enforce it.⁷⁴

⁷² Section (3) The reciprocal enforcement of the foreign Judgment Act No 8

⁷³ Schibsbys Vs Westernholz (1870) LR 6 QB 155; quoting Godard Vs Gray (1870) LR 6 QB 139

⁷⁴ Compare the decision of US Supreme court in Hilton Vs Guyot 159 US 133 (1895) for the meaning of “Reciprocity” in enforcing Judgments when the foreign court has assumed jurisdiction in situation in which English courts might have done

2.5 Jurisdiction of the Foreign Court

It is essential requirement in the law governing the recognition and enforcement of the foreign judgement that the court which rendered it had jurisdiction in the eye of the Tanzanian court⁷⁵. It is not enough that it had jurisdiction under its own rules. As Lord Ellenborough enquired that⁷⁶ if the foreign court did not have jurisdiction in view our view the judgment cannot be recognized or enforced in English. If it did the judgment will, in most cases be recognized or enforced since any defences other than lack of jurisdiction are few and strictly circumscribed. However there are five cases in which the court in Tanzania will recognize and enforce a foreign judgment in an action in personal under the law⁷⁷ herein after contended;

- (i) Where the defendant is a subject of the foreign country in which the judgment has been obtained. That means if the judgment debtor being a defendant in the original court submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting or obtaining the release of property seized or threatened with seizure in proceedings or of contesting the jurisdiction of the court. But this is open to a very serious doubt
- (ii) If the judgment debtor was plaintiff or counter-claimed in the proceedings in the original court or
- (iii) If the judgment debtor being a defendant in the original court had before the commencement of the proceedings agreed in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court
- (iv) If the judgment debtor being a defendant in the original court, was at the time when the proceedings were instituted resident or being a body corporate had its principal place of the business in the country of that court
- (v) If the judgment debtor being a defendant in the original court, had an office or a place of business in the country of that court and the proceedings in that court were in respect of the transaction affected through or at that office or place

⁷⁵ Section 6(1) (b) of the Act No.8

⁷⁶ Burchan Vs Rucker (1808) 9 East 192. See also Sirdar Gurdy Singh Vs Rajab of Faridkole [1894] AC 670 PC

⁷⁷ Section 6 (2) (a) (i) – (v) of the Act No. 8

Therefore from this observation it is clear that the court of Tanzania will regard that the court of the country of the original court as having jurisdiction contrary to the provision of section 6(3) (a) (b) and (c) of the law⁷⁸. And the judgment being given is final and conclusive.

2.6 Methods of enforcement of foreign judgment

Generally for the foreign judgment to be enforceable in Tanzania court the court superior to enforce such judgment must make sure that the foreign judgment satisfy three conditions which are required for it to be enforced.

2.6.1 Conditions which a foreign judgment must satisfy before enforcement

(a) The judgment must be final and conclusive as between the parties thereto⁷⁹

That is a foreign judgment must be final and conclusive in the court which rendered it. This prevent if it can be reopened in the same court by further proceedings in which defences can be raised which could not have been pleaded in the early proceedings a judgment in respect of the latter cannot be enforced. On the other hand the judgment becomes final even though it may be the subject of an appeal and even though an appeal has been lodged. And that if the foreign court having being granted a stay execution of the judgment pending the outcome of the appeal, the Tanzanian court may stay enforcement proceedings. Also it is final even though under the foreign law execution cannot yet be levied in respect of it for reasons other than a grand of stay⁸⁰.

(b) The judgment must not be for tax or penalty

This is another condition for which the foreign judgment will be enforceable in Tanzanian court. That means the judgment being payable there under a sum of money not being a sum payable in respect of taxes or other charges such as penalty and fine.

⁷⁸ The Reciprocal Enforcement of the foreign judgment Act cap 8 Re 2002

⁷⁹ Section 3 (2) (a)

⁸⁰ Idea drawn during *Berliner Industries Bank Vs Forst* [1971] 2 QB 463 CA where in the case the German judgment was not enforced in England under the 1933 Act Since the German tribunal was not a court within the Meaning of the Act.

Sometime the awards of damage may be assimilated to a fine and be regarded as a penalty though it is not imposed in criminal proceedings, but is recoverable in civil action, when it is payable to a foreign state or other public authority by the way of punishment rather than a compensation. Therefore under this condition the judgment must be not for tax penalty under eyes of the Tanzanian law, even though the foreign law under which it is imposed regards or even describes it as such, if it is payable to a private individual.

As it was held in the leading case of *USA Vs Inkley*⁸¹ where a sum of money due under a bail bond given by the defendant in criminal proceedings against him in the United State was held to be penalty and unenforceable in English though it was recoverable in civil proceedings in the United States.

(c) The judgment must be for debt or fixed sum of Money

Under this the judgment is given after the coming in to operation of the order directing that this part shall extend to that foreign country⁸². That a sum is not fixed (nor in the judgment final and conclusive a further requirement discussed above) if it is for an amount which is variable at sometime in future, nor if it is for damages and cost which are ascertainable as it was argued that injunction ordered by a foreign court is not enforceable under the law in Tanzania and at common Law⁸³ the same position under the law in Tanzania. Therefore it is essential for the court to make sure that the foreign judgment satisfies all these condition in order to be enforced in Tanzania.

2.6.2 Methods of enforcement of foreign Judgment

Mainly the main method of enforcing foreign judgment in Tanzania is by the way of statute. The statutes provide for enforcement of judgment given by a court in a certain country by method of registration with the relevant superior court i.e. The High court of Tanzania⁸⁴. The most important statute at present is the Reciprocal

⁸¹ [1989] QB 255 CA

⁸² Section 3 (2) (c) of Act No 8 RE 2002

⁸³ *Airbus Industries GIE Vs Patel*[1996] ILPr 465 per Colman .J. from whose judgment on this point there was no appeal.

⁸⁴ Section 2 &4 of act No. 8

Enforcement of Foreign Judgment Act No.8 as revised in 2002 which allow the enforcement by registration on a reciprocal basis of their judgment⁸⁵.

Under this statute the court is required to register a judgment which fulfils the Acts requirements⁸⁶. Law provides condition of which the registering foreign judgment must be fulfilled for it to be set aside that; if the foreign court rendering such judgment lacked jurisdiction, if the judgment debtor did not receive sufficient notice of the proceedings and did not appear in them, if the judgment obtained by fraud or if its registration and enforcement would be contrary to the public policy or if the right under the judgment were not vested in the person who registered it. The law also provides that the court may set registration aside if it is satisfied that the matter in dispute before the foreign court had already been finally decided by another judgment.⁸⁷

Therefore it is from here now when a judgment has been registered as having fulfilled all the necessary conditions required under the act, appear to have the same force as Tanzanian judgment. As it was held by the High court of Tanzania in the case of *Dowans Holdings SA (Costa Rica) and Dowans Tanzania Ltd Vs Tanzania Electronic Supply Company Ltd Tanzania*⁸⁸ that having satisfied with the procedures and requirements for registration of this judgment this court i.e. (High Court of Tanzania) has the same force as it is the judgment rendered by its own. Hence the foreign judgment has the same force as Tanzanian Judgment.

2.7 Defences available to enforcement of the foreign judgment

The law governing the recognition and enforcement of the foreign judgment provides the ground on which one may plea as a defence towards the enforcement. Although it appear that all the available defences are, perhaps, based on public policy it is convenient to deal with them separately.

⁸⁵ Section 3 (1) Suppra

⁸⁶ Section 3 (2) Suppra

⁸⁷ Section 6 (1) (a) (i)(ii)(iii)(iv)(v)(vi) and in cases in which registered judgment must or may be set aside

⁸⁸ ICC Award No 15 947/VRO at page 36

2.7.1 Fraud

Fraud is one of the grounds in which one may plea as a defence against the enforcement of the foreign judgment. However fraud may be on two parts i.e. Fraud on the part of the foreign court or the claimant.⁸⁹

Fraud on the part of foreign court may be pleaded as defence when the court itself acted on a bribe, the judgment under this circumstance obviously will not be enforced.⁹⁰

Fraud on the part of the claimant may take one if two forms. Either it is collateral fraud which vitiates the jurisdiction of the foreign court by inducing it to assume jurisdiction which otherwise it would not have done. There is no doubt that this will cause the foreign judgment to be refused recognition as it was held in the case of *Macalpine V. Macalpine*.⁹¹ A Bolivian divorce was denied recognition on the ground that recognition would be manifestly contrary to public policy which had no separate heading of fraud.

On the other hand it may be that the fraud vitiates the foreign judgment on the merits of the case, where for example the court is misled in to giving judgment in the claimant's favour, which it otherwise would not have done.

2.7.2 Natural Justice

Natural justice is another factor which one may plea as a defence towards the enforcement of the foreign judgment. This appears if the court acted in breach of natural justice, such judgement may not be enforced. Thus if it act in effect as judge in its own cause, it offends against the maxim *nemo iudex in causa sua*⁹² and if it refuses to allow the defendant to plead his case it offends against the maxim *audi alteram partem*⁹³

⁸⁹

⁹⁰ See section 6 (1)(a)(1v) a ground for the court to set aside the judgment after having being satisfied that there was a fraud behind the judgment

⁹¹ [1958] P.35 A common Law case in which a Foreign Divorce was refused recognition on this ground

⁹² As it was held in *Prince V Dew Hurst* (1837) 8 Sim.

⁹³ *Fet. Holdings Ltd V. Patel* [1990] 1 QB 335 CA. It appears that a finding by a foreign court that it had observed the rules of natural justice is, like a finding that there had been no fraud, not binding on the English court.

However there is no reported case in which the defendant has successfully pleaded the latter in resisting enforcement. Thus, it is the court reliance on its own rules in refusing to allow a party to give evidence on his own behalf or the acceptance by the foreign court of biased evidence does not vitiate the proceedings, provided by the defendants case has actually been heard.⁹⁴

Taking for instance in the case of *Feannot v. Fuerst*⁹⁵ lack of notice of the proceedings was not a denial of natural justice. But in that case the judgment debtor had agreed to submit to the jurisdiction and was taken to know of the French courts rule as to service. On the other hand in *Adams v Cape Industries plc*⁹⁶ the court of appeal said that a judgment could not be enforced if the trial was conducted in a manner which was not contrary to the natural justice in the sense just explained but amounted to the denial of the substantive justice. That the foreign court had adopted a method of assessing damages which was irregular by its own rules and of which a defendant had not been told. Thus under this circumstances it appear that what amounted to the natural justice depend upon the courts own rule to plea as a defence. The same decision applied by the court of appeal in the latter case of *Masters v. Leaver*.⁹⁷

2.7.3 Public policy

Public policy is a ground for non registration of the foreign judgment under the Reciprocal Enforcement of the Foreign Judgment Act⁹⁸. With respect to the situation involving Tanzania public policy there appears to be no case which concerned recognition of nullity decree, where foreign judgment has not been recognised or enforced.

In other way, under the English public policy there is some situation in which the foreign judgment has not been recognised and enforced. In a matter where a man against whom a Swiss court had made a maintenance order sought to have its registration set aside, arguing that to enforce it would be contrary to public policy,

⁹⁴ Collier J. G (2001) Conflict of Law 3dr Ed at pg 123

⁹⁵ (1909) 25 TLR 424

⁹⁶ [1990] ch. 433 CA

⁹⁷ [2000] ILPr 387 CA

⁹⁸ Section 6 (1) (a) (v)

because the Swiss court had followed procedures different from those of English courts and because it had relied more heavily on certain evidence than an English court would have done.⁹⁹ From this observation it is clear that the court must observe the public policy within its own eyes and not on the foreign court rendering such judgment. The same situation argued by Ashbury J¹⁰⁰. When refusing to enforce the order against the estate on the ground that his decision was that the cause of action was unknown to English law, a reasons which can not now be supported.

As later the House of Lord held that¹⁰¹ if the foreign judgment reflects the foreign notion of public policy and the previous judgment with which the foreign judgment conflict reflects to the courts ideas of public policy the courts public policy will prevail. Hence it is like the discretion of the court itself in determining the public policy.

2.7.4 Conflicting Judgment (*Res judicata*)

Conflict judgment may be pleaded as a defence towards the recognition and enforcement of the foreign judgment in the circumstances where as in the case a foreign judgment is irreconcilable with the previous judgment. The previous judgment is *res judicata* and the foreign judgment will not be recognised or enforced. Considering the decision of the Privy Council in *Showlage v Mansour*¹⁰² where two irreconcilable foreign judgments were in issue that; “In 1990 an English court held that M had stolen S money. In 1991 an Egyptian court held that Shad given M the money so he had not stolen it. Ss legal representative brought an action in Jersey to recover some of the money, which had found its way there. M relied by the way of defence on the second Egyptian judgment, as giving rise to *res judicata*.”

Where it was held that the English judgment itself constituted *res judicata* as being first in time must be recognised and given effect by the Jersey court. This being the case it is clear that the position of the law in Tanzania under the Civil Procedure

⁹⁹ Armitage V Nanchen (1983) 4 FLR 293.

¹⁰⁰ Re Macartney [1921] 1 CH 522

¹⁰¹ Vervaeke v smith [1983] 1 AC 145 HL

¹⁰² [1995] 1 AC 431 PC On appeal from a court in Jersey.

Code¹⁰³ which prohibit the matter being tried to be instituted against for the purposes of enhancing justice.

2.8 Conclusion

This chapter has been devoted to discuss in detail the conceptual framework of the law in regard to its effectiveness in recognition and enforcement of the foreign judgment. In the course of discussion the important concepts of the law in regard to recognition and enforcement of the foreign judgment which to great extent have a direct bearing to this work have been looked at. Also, this work examined the theories or basis behind the recognition and enforcement of foreign judgment, the jurisdiction of the court, the methods of enforcement and the defences available towards the enforcement of the foreign judgment in Tanzania compared to other parts of the world are also discussed.

The discussion has shown the power of the High Court to register the foreign judgment and on the other hand its power to set aside the foreign judgment and the conditions necessary for the foreign judgment to be fulfilled for the purposes of being registered before the High Court of Tanzania. Thus affirming that the high court of Tanzania is the court of first instances in the matter pertaining the recognition and enforcement of the foreign judgment within the country.

It should be noted that once the judgment is being rendered by the foreign court such foreign judgment become having the same force as it rendered by the court with competent jurisdiction in Tanzania effectively after having being registered.

¹⁰³ Act No.33 section 9

CHAPTER THREE

HISTORICAL DEVELOPMENT OF THE LAW IN RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENT IN TANZANIA

3.0 Introduction

The recognition and enforcement of the foreign judgment is relatively young topic. In antiquity, local law was applied to foreigners (alien) and foreign judgments were denied any force beyond their territories. By contrast, under the *ius commune* no clear difference was made between foreign and local judgment; foreign judgments were freely recognized and enforced. This liberal altitude changed within the rise of sovereignty. A duty to enforce foreign judgments was rejected as an undue restraint to sovereignty. In France for example denied foreign sovereigns judgment all effects¹⁰⁴ and other European countries adopted similar restrictive position.

Once idea of sovereignty limited the authority of judgment to state boundaries, the recognition of the foreign judgments between sovereign states had to be based on new principles. Dutch authors, in particular Voet and Huber developed two such principles that are still relevant today. The first of this principle is commity, defined much later by the United States of America Supreme Court in decision denying recognition to a French judgment as; “.....*neither a matter of absolute obligation on one hand nor of mere courtesy and god will.....it is the recognition which one nation allow within its territory to the legislative, executive or judicial act of another.....*”.¹⁰⁵

The other principle is reciprocity, the idea that state will and should grant other recognition of judicial decisions only if, and to the extent that their own decisions would be recognised. This requirement creates an unwelcome situation in which each country wait for the other to act first some thing which is problematic also because it punishes private litigants for the omission of the state. The main justification for reciprocity is that it can be used to pursued other country to enter into conventions.

Both commity and reciprocity are principle not a duty but prudence and politeness. It is polite as between sovereigns, to treat judgments of foreign countries with respect

¹⁰⁴ Article 121 of the Code Michaud 1629

¹⁰⁵ Hilton v Guyot

and difference, it is prudent to enforce the judgments of the foreign sovereigns in the hope that foreign sovereigns would enforce ones own judgments. A competing theory, especially influential in the common law, focuses less on the public relations of comity or duty between states and more on the private law relations between the parties. As stated by the English house of lord in 1870, what is enforced is not a foreign judgment as such but the obligation it produces; “ *the judgment of the court with competent jurisdiction over the defendant impose a duty and obligation on him to pay some of which judgment is given ,which the court in this country are bound to enforce* ”¹⁰⁶

A parallel theory explains that what is enforced is not the judgment but the vested rights it creates. The vested right theory has since fallen out of favour for choice of law, but these approaches retain force for foreign judgment though often tacitly or as fiction.

Since, Law grows with the people; it is meant to serve and should be in large measure, a reflection of their spirit and mores. Thus in order to have more understanding of the law at present, one needs to focus attention on its historical development. In some societies the applicable law has been borrowed while in others is a result of colonial transplants.

As far as the world is concerned there are many legal systems in different countries which are mostly colonial or successors of the colonial states. However the nature of world allows the interaction of people from different legal and judicial system socially, economically and politically. In this course of interaction they may find themselves creating a legal relation or contracts between them which are binding in nature and enforceable before the law.

It is from this kind binding legal contract of the people from different legal system which leads to the conflict of law and the question of choice of law rule, forum shopping i.e the court with competent jurisdiction and the enforcement of such judgement created arises.

¹⁰⁶ Schibsby v westernholz

This part focuses on the historical development of the law in regard to the recognition and enforcement of the foreign judgement in Tanzania. Since in Tanzania is one of the country's which recognize and enforce the foreign judgement. It traces the historical background from the colonial period, independence period and post independence period to date. Finally the conclusion will be drawn on what exactly happened in shaping the law for all this time.

3.1 Recognition and Enforcement of the Foreign Judgment during the Colonial Rule

Before coming 1919, Tanzania had for twenty years been under German rule. The period was marked by rebellions in the colony in the first ten years and an outbreak of the First World War in its last five years. Thus it was difficult for the German legal system to have any lasting effects in Tanzania. More over force was not merely preliminary but a mode of operation and the mode of conducting, prosecution by the way of interrogation from the bench appear to have been a common feature in criminal prosecutions during the whole of German Era¹⁰⁷.

Nevertheless some political control was attained by 1914 by bringing all the diversified tribal states under one government and a somewhat systematic judicial control seem to have been setup. Yet justice operated according to colour on the pretext that some race had not advanced to come under the German law, and thereby giving rise to separate courts for whites and non whites.

Following the defeat of the Germans in the First World War, Tanganyika, a former German colony was to be administered by Britain as a mandated territory under the loose supervision by the proposed league of Nation.¹⁰⁸ The mandate thus formally, concluded, gave Britain power of administration. In the sphere of justice British jurisdiction over Tanganyika was exercised under the power vested in the crown by virtual of the 1890 Foreign Jurisdiction Act. Through this Act, Britain issued the

¹⁰⁷ Mwipopo E K (1981) CRIMINAL PROSECUTION IN TANZANIA; LLM DISSERTATION UDSM at pg 40

¹⁰⁸ Ilife J. (1979) A Modern History of Tanganyika at 246

Tanganyika Order in Council of 1920. Under the provisions of this order commonly known as the Reception Clause it was provided that¹⁰⁹

“Subject to the other provisions this order, civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the civil procedure, criminal procedure and penal codes of India and other laws which are in force in the territory at the date of commencement of this order or may hereafter be applied or enacted; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of common law, the doctrine of equity and the statute of general application in force in England at the date of this order, and with the powers vested in and according to the procedure and practice observed by and before courts of justice and justice of the peace in England”

Amongst other provisions, the 1920 Order in Council, also sanctioned the application of customary law, in all cases to which the natives are parties provided that it was not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance¹¹⁰. Therefore by virtue of the 1980 Act the Britain recognizes the judgment rendered by the court in its territory abroad as part of the judgment rendered in Britain by English Court.

As in the early years, the repugnancy clause could be invoked to prevent cases ranging from Trial by ordeal, the indiscriminate killing of witches, to the extension of criminal responsibility to the next of kin etc. A good example is displayed by the case of *Gwao bin Kilimo V. Kisunda bin ifuti*¹¹¹. Where, the court (Tanganyika High Court) held that a customary rule principle which held a father liable to pay part of compensation in a case in which his son was liable, was repugnant to justice and morality.

The High Court of Tanzania was bounded to follow a decision of the court of Appeal of East Africa, both in civil and criminal matters, except where the circumstance

¹⁰⁹ Section 17 of the 1920 Tanganyika Order in Council

¹¹⁰ Section 24

¹¹¹ (1938) 1 TLR 403 at pg 405 it should be noted that Tanzania is of the country which received English common law and its appeals from the East African court were to lay to the judicial committee of the Privy Council

warranted the court itself to depart from its previous decision. Some circumstances are reflected in the judgment of Sir. Kenneth O'Connor as hereunder.¹¹²

“For instance this court could be bound its own, which, though not expressly overruled, cannot, in its opinion stand with a decision of the Privy Councils or of the House of Lords..... or probably with a decision of the Court of Appeal in England on a colonial statute which is “ a like enactment: to an English Act. I think also that decisions of any of old Appellate Court now treated as having similar authority to decision of the court of Appeal would be of the same footing as regards statutes in Primatene. And in my opinion, established decisions on common law or doctrine of equity of the superior court in England, given before the date of the common law and doctrine of equity in to the relevant colony or protectorate within the court’s jurisdiction are binding on the court as well as on the Supreme Court or High Court of that territory. By “established decision” I mean decisions which correctly declared the common law or the doctrine of equity at the date of reception because such decisions are either unrevised decisions of the superior court other than an appellate court, or have been accepted as a correct principle by other superior court in England “

However when looking at the development of the laws in regard to the recognition and enforcement of the foreign judgments in Tanzania we are reminded to trace the nature of this law in order to understand the trend of its development; that it was by virtual of the British foreign jurisdiction act¹¹³ which allow the British parliament to enact laws for its overseas territories and the law common to England to be applicable in the overseas territories.

As a result of this act the Tanganyika order in council¹¹⁴ was made applicable in Tanganyika. Under section 17 of the 1920 order in council the application of the common law and other laws made in Tanganyika. It was from this ground where, the foreign judgments (reciprocal enforcement) act¹¹⁵ which was applicable in England become applicable in Tanganyika herein after referred as reciprocal enforcement of the foreign judgment act no 12¹¹⁶ under the provision of the 1933 act this act was common to all commonwealth countries Tanzania by then Tanganyika being one of them.

¹¹² Kiriri Cotton Co. Ltd V Dewan [1958] EA 239 at pg 246

¹¹³ The 1890 Act

¹¹⁴ The 1920 order in council

¹¹⁵ The 1933 act

¹¹⁶ The 1935 ordinance

Therefore under the reciprocal enforcement of foreign judgment act no 12 of 1935 the recognition and enforcement of the foreign judgment was unavoidable in Tanzania and several amendment were made in this law such as that under the government notes no 8,¹¹⁷ no 9,¹¹⁸ and no 15.¹¹⁹ However all this amendment was made to strengthen their political existence within the country.

3.2 Recognition and Enforcement of Foreign Judgment during and after Independence

Following the wind for decolonisation and then independence. On 9, December 1961 Tanzania mainland (Tanganyika) got her political independence. It was in this date when the British colonial rule in Tanganyika comes to an end and the country was given a constitution tailored along the Westminster model of constitutions. However at this time Tanzania was not able to enact its own laws as a result the British common laws which was applicable within the country during the colonial period continue to be applicable after independence. This being one of the major problems of using these inherited superstructure laws which to a great extent were a product of the colonial base.

Taking for instance immediate after independence, the Judicature and Application of Laws Ordinance¹²⁰ was enacted to be used within the country. Among other provisions, this law provide for the application of the English common laws within the country¹²¹, hence retaining the application of section 17 of the Tanganyika order in council of 1920 in which by virtual of it the English common laws was made applicable amongst the other law the Reciprocal Enforcement of the Foreign Judgment Act,¹²² was allowed to be applicable within the country as part of the country law.

¹¹⁷ Of 1936

¹¹⁸ Of 1936 which provide that such an act will be applicable to all common law countries which were under the British colony as provided in the first schedule

¹¹⁹ Of 1936 which incorporated the Reciprocal Enforcement of the Foreign Judgment Rules under section 5

¹²⁰ The 1961 Ordinance.

¹²¹ Section 3(1) of the JALO 1961

¹²² Act No 15 of 1935 being codified from the 1933 English act for the enforcement of the foreign judgment

However due to the nature of the court system of East Africa, where the by the east African court of appeal was the highest court there was no matter concerning the recognition and enforcement of the foreign judgment in Tanzania particularly rather than those general from other East African countries and England in particular¹²³. But the Tanzania courts had been very receptive towards the enforcement of the foreign money judgments. As such foreign judgment are enforced in Tanzania so long as there is a reciprocal enforcement agreement and when the judgment qualifies for being registered at the court with competent jurisdiction in recognition and enforcement of the foreign judgment under the law in Tanzania.

An example of an attempt to enforce a foreign judgment in Tanzania was in the case of *Inderjeet Kaum Nahal v. Kuljeet Signh Nahal*¹²⁴. In this case a maintenance order was issued by the family division of the high court of justice, for Mrs. Nahal and her three children. Mr. Nahal obeyed the maintenance order but later moved to Tanzania and discontinued paying maintenance. As a result of this Mrs. Nahal applied to the high court of Tanzania to have a maintenance order registered and enforced against Mr. Nahal. The case finally ended in a settlement in 2000 and the parties agreed to discontinue all awards enforcement proceedings that were pending in Tanzania. Since there are no examples of attempts to enforce judgment from the United States of America courts because Tanzania does not have a reciprocal enforcement agreement with the United States of America.

Therefore it is on the base of reciprocity that determines whether the attempt to recognise and enforce a foreign money judgment will be successful or unsuccessful in Tanzania. Hence the recognition and enforcement was not successfully registered on the ground of being no agreement for reciprocal enforcement of the foreign judgment between the two countries.

Sometimes the court are bound to recognise and enforce the foreign judgment in Tanzania provided such judgment rendered met the common law principles for

¹²³ International and Comparative Law Quarterly/ volume 19/issue 03/1970 at page 430 – 446
The Recognition and Enforcement of the Foreign Judgment in Private International Law of East Africa.

¹²⁴ Miscellaneous civil cause No 180 of 1997

recognition of foreign judgment. Taking for instances in the case of *Mtui v. Mtui*¹²⁵ In this case the matter was concerning the distribution of the matrimonial properties the decree being granted in Tanzania and the action being in Botswana to enforce decree. Tanzania High Court decreeing asserts acquired by the parties situated in Botswana to be distributed according to Botswana law.

As the fact was that; the applicant and respondent both nationals of Tanzania were married in Tanzania in 1970. They left for Botswana where they set up their matrimonial home in 1983. In the cause of time, the couple through their joints efforts built up considerable asserts in Botswana. In 1987 the respondent left matrimonial home, and in 1990 he instituted a divorce proceedings in Tanzania which was granted by the high court of Tanzania on 31, August 1998. That, the court decreed that since the court in Tanzania did not have jurisdiction to distribute the asserts of the parties which were located in Botswana. Those assert should be distributed to them in accordance with the law obtaining in Botswana where the properties were acquired and located. The applicant was applied that the court should apply the law of Botswana.

Basing on the provisions of the law relating to marriage in Tanzania¹²⁶Lusimba J, while holding the case said; “the court of Tanzania had competent jurisdiction to grand divorce by virtual of the parties domicile. And that although foreign matrimonial decree are unenforceable under the Judgment (International Enforcement) Act, and there are no statutory provisions in Botswana for the recognition of the foreign judgment or decree they, are however recognisable and enforceable under the common law.

Consequently, the court had jurisdiction to recognise such a foreign decrees provided they met the common law principles for the recognition of the foreign judgment. Under this circumstance it is far clear that the recognition and enforcement of the foreign judgment apart from being enforceable under the statute still ones can enforce it under the common law principles where necessary.

¹²⁵ [2000] 1 BLR 406 HC

¹²⁶ Law of marriage Act, No. 29 of 1971 as Revised in 2002

Further development of the law in regard to the recognition and enforcement of the foreign judgment in Tanzania can be observed much in the registration of the recent case of *Dowans Holding SA (Costa Rica) and Dowans Tanzania Ltd (Tanzania) v. Tanzania electric supply company Ltd (Tanzania)*¹²⁷ following the contractual agreement between the parties that in case of any dispute between the parties to the contract such dispute should be instituted to the International Chamber of Commerce at the Hague. The High Court of Tanzania after having satisfied with the requirement of the law under Part two of the Reciprocal Enforcement of the Foreign Judgment Act¹²⁸ do registered it and the judgment become having the same status as if it was rendered by its own hence leading to the conclusion of its enforcement despite of the appeal pending¹²⁹ to the Court of the Appeal following the appeal from the High Court decision.

3.3 Conclusion

This chapter has attempted to discuss in some detail the historical background of the law in regard to the recognition and enforcement of the foreign judgment in Tanzania during the colonial period, independence period and then post independence period. Further the discussion has shown that during the German colonial period in Tanganyika there had no laws governing the recognition and enforcement of the foreign judgment due to the nature of their administration within the territory.

Also the discussion has revealed that, in Tanganyika the recognition and enforcement of the foreign judgment was introduced during the British colonial administration within the territory. That it was after the WWI when the British took control over the Tanganyika and made the application of their British common law by virtual of the British Foreign Jurisdiction Act of 1890 which leads to the enactment of the Tanganyika Order in Council of 1920 in which under its provisions allow the applicability of the common laws and other laws together with the Statute of General Application in Tanzania.

¹²⁷ ICC Award No.15.947/vro

¹²⁸ Section 3-8 which sets forth for the registration of the foreign judgments.

¹²⁹ Tanzania Electric Supply Company Ltd v. Dowans Holding SA (Costa Rica) and Dowans Tanzania Ltd Civil Appeal No 8 of 2011

The discussion also shows the development of the law and its application in various matters from the colonial period then independence and thereafter post independence to date in different issues in Tanzania.

CHAPTER FOUR
A CRITICAL EXAMINATION OF THE LAW IN RECOGNITION AND
ENFORCEMENT OF THE FOREIGN JUDGMENT

4.0 Introduction

Once Innes J. said¹³⁰“there comes time when the growth of every living system of law when the old practices and ancient formulae must be modified to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of the changing conditions. And it is for courts to decide when the modifications, which time has proved to be considerable, are of nature to be affected by judicial decisions and when they are so important or so radical, that they should be left to the legislature .” while considering the role and effects of the applications of common law in various legal system Lord Justice Denning in the English Court of Appeal said¹³¹ it is recognition that the common law can not be applied in a foreign land without considerable qualifications .. It has so many principles of magnificent justice and good sense which can be applied with advantages to people of every race and colour all over the world. But it has also many refinements, subtleties and technicalities which are not suited to other folk. in these far off lands, people must have law which they understand, and which they will respect. The common Law can not fulfil this role expect with considerable qualifications. The task of making these qualifications is entrusted to the judges of the lands. I trust that they will not fail there in.”

It is from this base that, since the law governing the recognition and enforcement of the foreign judgement in Tanzania has its historical background from the English Common Law i.e. The Foreign Judgement (Reciprocal Enforcement) Act.¹³² It is in the view that this law can not fulfil the role except with considerable qualification as Lord Denning said.

Hence the researcher attempted to discuss the effectiveness of this law in regard to the recognition and enforcement of the foreign judgement in Tanzania by considering

¹³⁰ Justice Innes when depicting the role of judges in remoulding the law in the case of *Blower V Van Noorden* 1909 TS 890

¹³¹ While deciding the case of *Nyali Ltd v Attorney General* (1955) 1 ALL ER 653

¹³² The 1933 Act

the socio – economic development within the country in relation to the social interactions with people of various legal systems of the World.

This chapter, therefore seeks to examine the provisions of the Law governing the recognition and enforcement of the foreign Judgment in Tanzania and in particular the provisions relating to the choice of law, the registration of foreign judgement and the bases for recognition; in the course of discussions the researcher tried to find out the approaches used by the court to register and to set aside the foreign judgements. The main concern for so doing is to see the effectiveness of the approach by the High Court to the provisions relating to the registration of foreign Judgment and see what changes were required in the provisions in order to make such provisions more effective. The methods of enforcement and defences towards the enforcement of the foreign judgment were discussed in the light of the decisions from the other commonwealth countries with the same approaches.

4.1 The choice of law rule

Generally one of the important aspects in the recognition and enforcement of the foreign judgment is the choice of law rule. That the court after having faced with the conflict of law issue had to choose which law to be applicable in entertaining such matter. Therefore it is essential for the court before recognising and enforcing the foreign rendered judgment to examine the law applied in reaching such foreign judgement.

However, it is until to date that Tanzania is governed by the rules which are judge made. The provisions of the law governing the recognition and enforcement of the foreign judgement did not contain the provisions regarding the choice of law rule which is essential aspect in the conflict of law. Thus left the choice of law to be the discretion of the foreign court as the court in Tanzania will not have a mandate to question on whether the law which was used to decide the matter were the proper law or not. Taking for instance that, whether the law applicable is the law of the place where the parties domicile i.e *lex domicilii* , whether is the law of the place where marriage between the parties took place i.e. *Lex celebrationis* , or the law of the

place where the contract has taken *lex contractus* or the place where the property was situated that is *lex situs*.

Therefore it is because of lack of provisions governing this important aspect of the choice of law rule, that may leads to the enforceability of even the unqualified foreign judgment within the country provided such judgement being rendered by the court which competent jurisdiction while, the law being used entertain such matter was not proper law.

Hence, there is a need of the provision within the law which govern the court is examine the choice of the law rule of the foreign court before recognising and enforcing of the foreign judgment rather than leaving to the discretion of the president after being satisfied only that such judgement has been rendered by the superior court¹³³ . Here the question should be also what law applied in deciding the matter and was it a proper law and under what circumstances the law was proper to be used in deciding the matter? Having satisfied with the choice of law rule then the question of the competence of the court to be raised.

Thus, lack of the provisions governing the choice of law rule under the Reciprocal Enforcement of the Foreign Judgment Act may rise to the enforcement of the foreign judgment which is rendered by the foreign court with the application of un proper law to the matter at hand. Hence the need of the provision governing the choice of the law rules.

However, despite of the fact that there is an isolated statutory provision that contains the choice of law dealing with particular subject in the Arbitration Act¹³⁴ . These registrations have increasingly being affecting the recognition and enforcement of the foreign judgment because the need is to implement the Internal Conventions and Protocols dealing with subjects¹³⁵

¹³³ Section 3 (1) of the Act NO 8 [RE 2002]

¹³⁴ Cap 15 [RE 2002] Which allow the parties to choose the law in case of the matter, dispute, misunderstandings between them

¹³⁵ Refer part III and IV of the Arbitration Act Cap 15 RE 2002 which mainly incorporate the provisions of the International Arbitration Clause and Protocols on Arbitration.

4.2 Registration of Foreign Judgment

4.2.1 The basis of recognition and enforcement of the foreign judgment

The theory adopted by the law in Tanzania in regard to recognition and enforcement of the foreign judgment in Tanzania explains the recognition and enforcement of the foreign judgment has been the doctrine of “obligation¹³⁶” that means the judgment rendered by a foreign court of competent jurisdiction imposes upon the defendant a duty or obligation to obey it and discharge it, and confer a correlative right on the claimant to enforce that obligation through the Tanzania High Court.

Hence, it is these provisions¹³⁷ which show the adherence of the High Court of Tanzania to the theory of obligation. That is explains the ease with which a foreign judgment may be recognized or enforced in Tanzania compared is the position of the laws of some other countries¹³⁸. Thus, it shows hat under this circumstances one may be willing to enforce a foreign judgment only if a court of the state would enforce a judgment of the court which is requested to inforce it.

Therefore this kind of loophole provided within the provision of the law created the circumstances in which the ground for enforcing the foreign judgment may be huge to the extent that it is only the obligation of the High Court to recognize and enforce foreign judgment provided that such judgment has rendered by the foreign court with competent jurisdiction is the extent that such judgment may be enforced thereto.

4.2.2 Power of the High Court to register the foreign judgment

The law under the Reciprocal Enforcement of the Foreign Judgment Act, confers power to the High Court of Tanzania to register a foreign judgement¹³⁹. That means

¹³⁶ Consider the wording under section 3(1) and 4(1) of Act No. 8 (RE. 2002) compare with the position Adopted by the English Court in Schibsy V. Westenhol2 (1870) LR 6 QB 155 quoting Godard V Gray (1870) LR 6 136.

¹³⁷ Section 3 and 6 of Act No 8 [RE 2002]

¹³⁸ Judgment(International Enforcement) Act 1983

¹³⁹ Section 4 (1) of Act No 8 As provides that A person being a judgment creditor under the judgment to which this part applies, may apply to the high court at any time within six years after a date of judgment.....

in matters pertaining the recognition and enforcement of the foreign judgment the high court is the court to the first instance and superior court to entertain the enforcement of the foreign judgment. But, it should be noted that the High court will be the court of the first instance only when the president direct so after being satisfied that in the event of the benefits conferred by this part i.e Part II of the Act, No. 8 being extended to the judgements given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects in that foreign country of judgements given in the superior court.¹⁴⁰

However the wording under section 3 (1) of the Act is some what complex that means the high court will have power to entertain the registration of the foreign judgment only after having directed by the president being satisfied himself or herself that the judgment has been rendered by the superior court and not after the court itself to be satisfied that such judgement has been rendered by the court with complement jurisdiction. One may ask how the presidents become satisfied that the judgment has been given by the court with jurisdiction or competent to preside the matter? What procedures are taken to let the president satisfy that the court was superior is entertaining such matter? The law does not provide any of the procedures that are to be followed or committee that will advice the president on this aspect.

This appear to be contrary to the general rule governing the recognition and enforcement of the foreign judgments that foreign judgment and Arbitral award will be recognised and enforced only when the court satisfy itself that such a foreign judgment or arbitral award is rendered by the court competent to hear and being rendered under the proper choice of law.¹⁴¹ Since it is the competence of the court which imposes the duty and obligation to a defendant to pay sum for which the judgement which the court in that particular country is bound to enforce it within its own eyes. Therefore the provision of section 3 (1) appear to limit the power of the high court in matter pertaining the enforcement of the foreign judgement as, it can do so only after being directed by the president after having satisfied .

¹⁴⁰ Section 3 (1) (a) and (b) of Act No 8

¹⁴¹ Murthy v Sivajion [1999] 1 ALL ER Page 73

Therefore it should be provided in the law that the court shall examine whether such foreign judgement has been rendered by the court with competent jurisdiction within its own eyes and not after being directed by the president. That one may think that the role of the high court in determining the competency of the foreign court rendering foreign judgement is to rubber stamp the decision of what the president observed in his own which contrary is the doctrine of separation of power.

4.2.1 The basis of recognition and enforcement of the foreign judgment

The theory adopted by the law in Tanzania in regard to recognition and enforcement of the foreign judgment in Tanzania explains that the recognition and enforcement of the foreign judgment has been the doctrine of “obligation.”¹⁴² That means the judgment rendered by a foreign court of competent jurisdiction imposes upon the defendant a duty or obligation to obey it and discharge it, and confer a correlative right on the claimant to enforce that obligation through the Tanzania High Court.

Hence, it is these provisions¹⁴³ which show the adherence of the High Court of Tanzania to the theory of obligation. That is explains the ease with which a foreign judgment may be recognized or enforced in Tanzania compared is the position of the laws of some other countries¹⁴⁴. Thus, it shows that under this circumstance one may be willing to enforce a foreign judgment only if a court of the state would enforce a judgment of the court which is requested to enforce it.

Therefore this kind of loophole provided within the provision of the law created the circumstances in which the ground for enforcing the foreign judgment may be huge to the extent that it is only the obligation of the High Court to recognize and enforce foreign judgment provided that such judgment has rendered by the foreign court with competent jurisdiction to the extent that such judgment may be enforced thereto.

¹⁴² Consider the wording under section 3(1) and section 4 (1) of act No 8 compared with the position adopted by the English court in *Schbsy v Westenholz* (1870) LR 6QB 155 quoting *Godad v Gray* (1870) LR 6 136

¹⁴³ Section 3(1) and section 4(1) of Act, No 8[RE 2002]

¹⁴⁴ Consider the position of the law in Botswana where there is no provision in regard to the recognition and enforcement of the foreign judgment when the high court of Botswana enforce the foreign judgment from Tanzania in the case of *Mtui v Mtui*

4.2.3 Power of the High Court is make Rules

The law under the Reciprocal Enforcement of the Foreign Judgment Act gives the power to the High Court to make rules with approval of the President. The rules made are expressed to have, effect subject to the provisions contained in order made under section 3 to be necessary for the giving effect to the declared agreement between the United Republic of Tanzania and such a foreign countries in relation to matters with respect which there is power to make rules of the court.¹⁴⁵

This wording of the provision under section 5(1) and (2) shows that it is until this time Tanzania is governed by the rules which are judge made, despite of the existence of the law concerning the recognition of foreign judgment as such law do not contained the provisions regarding to the rules.

That means it is the discretion of the judge who are entrusted to make these rules and not the law which govern the recognition and enforcement of the foreign judgment. Thus, it appear that the absence of the fixed rule under the law would result is a different decision in various cases which are brought before the High Court concerning the enforcement of the foreign judgment. As there is loophole to the judges to depart from the previous rules and leading to different approach in decision for the future.

Hence therefore in order for the law government of the foreign judgment to be effective there is a need to have the fixed rules within the law which govern the enforcement of the foreign judgment rather that depending on the judge made rules which are not fixed within the law. As there are different matters arising within the country for enforcement with different concerning such as matters *in personam* or action *in rem*. Hence this shows weakness of the law and the need to have the rules for enforcement of the foreign judgment within the law.

¹⁴⁵ Section 5 (1) and (2) of Act No 8 [RE 2002]

4.2.4 The power of the High Court to set aside the Foreign Judgment

Following the application for recognition and enforcement of the foreign judgment or arbitral award to the high court of Tanzania under the law. The high Court is vested with power to set aside the enforcement of the judgment or arbitral award rendered by the foreign court after having satisfied that the foreign judgment did not fulfill the conditions thereto laid within the law.¹⁴⁶

However the provisions of the law does not provide the extent of the conditions that the court would have been satisfied to lead the High Court to set aside such a foreign judgment or arbitral awards¹⁴⁷ As the High Court of Tanzania emphasized that “in interpreting the provisions of the law, the fact before it, the defunct court relying on various English authorities departing with the grounds which may lead to the court to remit or set aside by the court of law including if there is an error of law apparent on the face of the awards the court will be slow to interfere with the award in an arbitration, but will do so whenever this become necessary in the interest of the justice, and will act if is shown that the arbitrations in arriving at their decision have done so on a wrong understanding or interpretation of the law, there is an error of law apparent on the face of the award.¹⁴⁸

Under this circumstance it clear that the High Court was bound not to consider the ground under which such an award comes in to existence and what exactly was the base of such an award. And with this situation the High Court of Tanzania cannot interfere with the findings of the facts by arbitrator and will not examine whether the award was reached as due to the mistake of fact, or law. Hence, this being not a ground for setting aside or remitting the arbitral award or foreign judgment.¹⁴⁹

¹⁴⁶ Section 6 (1) (a) (i) of Act No 8 [RE 2002]

¹⁴⁷ Consider the provision under section 15 and 16 of the Arbitration Act Cap 15 [RE 2002] and section 6 of Act No 8 [RE 2002]

¹⁴⁸ While deciding the application of the case of Dowans Holding SA (COSTA RICA) and Dowans Tanzania Ltd (TANZANIA) v Tanzania Electric Supply Company Ltd ICC Award No 15.947/VRO as referring to the decision of the case of Rashid Moledina Co (Mombasa) and others v. Hoima Guinneries Ltd (1967)1 EA 645

¹⁴⁹Following the decision of the high court of tanzania in the case of tanzania electric supply company ltd (Tanzania) v. Dowans Holding SA (Costa Rica) and Dowans Holding (Tanzania) Misc. Civil. App. No. 8 2011

Therefore from general provisions of section 6(1) (a) it appear that the foreign judgment will be valid and the court will set aside only when satisfy that the court had no jurisdictions over the matter other factors cannot stand for as a factor for setting aside.

On the other hand the law provide that the High Court may set aside the registration of enforcement of the foreign judgment if satisfied that the enforcement of the judgment would be contrary to public policy in the country of registration¹⁵⁰. However this provision brings contradictors in itself, as one may ask what amounted is public policy in Tanzania? But this remain in the eyes of the court itself that is, what the court think is a public policy will be considered as a ground for setting aside the judgment rendered by the foreign court.

However public policies do differ from one state to another state depending on the policy of the state. Taking for example the house of lord held that the recognition of Belgium judgment invalidating a sham marriage where the parties had no intention of living together as wife and husband would be contrary to the public policy¹⁵¹. But there are obiter dicta in the court of appeal to the effect that it would be against the public policy to recognize a foreign judgment enforcing a contract in the situation where a foreign court has found as a fact that it was the common intention of the parties to commit an illegal act in a state which is regarded as foreign or friendly state¹⁵². By considering these facts it is clear that an act against the public policy lies within the eyes of the foreign judgment and not within the eyes registering court. Hence it is the discretion of the court and not the law governing the recognition and enforcement of the foreign judgment.

Provided that it is provided under the law, but it does not specify what amounted to the public policy hence leaving to the discretion of the High Court itself.

The difficult question that may arise here for instance is whether the registration for enforcement of foreign judgment for exemplary or punitive damage would be against

¹⁵⁰ Section 6 (1) (a) (v) of the Act No 8 [RE 2002]

¹⁵¹ Vavaeke v. Smith [1983] 1 AC HL

¹⁵² Solemany v. Solemany [1998] WLR 811 at 821 CA

the public policy in Tanzania. The Court of Appeal in England had this to say “Nothing contrary to English public policy in enforcing a claim for exemplary damages, which is still considering being accord with the public policy in the United States and many of the countries of the commonwealth.”¹⁵³ With this stand of the Court of Appeal and position of the law governing the recognition and enforcement of the foreign judgment in commonwealth countries show that it is the position ever under the law in Tanzania. However the question arises does it mean that what amounted to the public policy in the United States of America and the United Kingdom is the same as that of Tanzania? This remains subject to the further study.

4:3 Methods of Enforcement of Foreign Judgment

The method of enforcement of foreign judgment in Tanzania is mainly through statutory. The Law provides for enforcement of judgment given by court in a certain foreign countries by method of registrations with the court competent for registration. The most relevant law at present in Tanzania is the Reciprocal Enforcement of Foreign judgment Act¹⁵⁴ which applies to some commonwealth judgments and allows enforcement by registration on a reciprocal basis of their judgment.¹⁵⁵

However the law provides the condition where as the court must register a judgments which fulfils the Act’s requirements. It further provides that the registration of a judgment must under the act be set aside if it is incapable for registration, if the foreign court lacked jurisdiction if the judgment debtor did not receive sufficient notice of the proceedings and did not appear in them, if the judgment was obtained by fraud or if the registration and enforcement would be contrary to the public policy or if the right under the judgment were not vested to a person who registered it. And that in the circumstances where the court is satisfied that the matter in dispute before the foreign court had or leady been formally decided by another judgment¹⁵⁶.

¹⁵³ SA Consortium General Textile v. Sun and Sand Agencies Ltd [1978] QB 270 at pg 300

¹⁵⁴ Act No 8 [RE 2002]

¹⁵⁵ Refer part II of the Reciprocal Enforcement of the Foreign Judgment Act No 8.

¹⁵⁶ Section 6 (1) (a) and (b) of Act No 8 [RE 2002]

Considering the above conditions necessary for the enforcement method most of these conditions seem to be not proper to protect the registration for enforcement of the foreign judgment. Taking for instance that if the judgment was obtained by fraud, what amounted to fraud under the law lies upon the eyes of the foreign court and not the court registering it.

Since, the court is warned to be slow to interfere with the award of foreign judgment on the matter pertaining the interpretation of the provisions of the law, the fact before it and in the circumstance where there is an error of law apparent on the face of the award¹⁵⁷. Therefore it is this situation which creates a loophole in the provision and one's may use such a lacuna in the provision of the law to register a foreign created judgment which is contrary to the provisions of the law. Thus the need of clear provisions which show the strictness and extend of these conditions.

On the other hand it appear that the law does not prohibit the enforcement of the foreign judgment under the common law principles. As far as the historical background of the law governing the enforcement of the foreign judgment is concerned and with effects of the Order in Council it clean that one may enforce a foreign judgment through the common law principles in Tanzania. Taking for instance in the case of *Mtui V. Mtui*¹⁵⁸ where the High Court of Tanzania decreed the order that the distribution of the material properties which were situated in Botswana should be effected by Botswana Law in Botswana where the properties was situated.

But the law in Botswana does not provide for the enforcement of the foreign judgment and because of that Mrs Mtui apply for enforcement of the order under the common law principles, hence this may appear even within the court in Tanzania by virtue of the Order in Council which allows the applicability of the common law principles within the country thus, be used as legal technicalities in Tanzania.

¹⁵⁷ Ibid at pg 47

¹⁵⁸ [2000] 1BLR 406 HC

4.4 Defenses towards the enforcement of the foreign judgment

Mainly the provisions of the Reciprocal Enforcement of the Foreign Judgment do not provide direct the defence that one may arise against the enforcement of the foreign judgment, rather it provides the conditions of which the foreign judgment must fulfil in order to be registered for enforcement by the High Court¹⁵⁹. However by considering only on these conditions there appear to create a loophole under which one may use to enforce a foreign judgment. For example the High Court is bound to rely only to these condition on part of the foreign court, but if there is an error of fact, or law on the part of the foreign court or even the application of the wrong law or if it applied the correct law can not raise as defence before the High Court.

Since, the defendant would be regarded as adducing fresh evidence which was not available at the time of trial which would have been made the court to arrive at different results. Therefore this kind of loophole would be used as techniques to enforce the foreign judgment which are rendered by improper authorities.

This situation was exemplified in the case of *Gordad v Gray*¹⁶⁰ where the French Court made an obvious error as to the rules of English Law it had purported to apply the court held that the defendant can adduce evidence which could have been adduced to the foreign court.

Also it was held in *Vanquelinv Bouard*¹⁶¹ that it was not a defence that although the French court had jurisdiction over the defendant, the particular French court which gave the jurisdiction lacked the competence to do so under French Court not an English Court is a proper tribunal to decide whether it has exceeded its jurisdiction. This is the question of the foreign law and not the English Law.

Therefore under this circumstances it is creates that there is a weakness in the law as one may use these loopholes to enforce the foreign judgment as those defences

¹⁵⁹ Section 6(1) of Act NO.8 [RE 2002]

¹⁶⁰ (1870) LR 6 QB 139

¹⁶¹ (1863) 15 CB (NS) 341, *Pamberton v Hughes* [1899]1 ch.871 CA

provided under the condition that the foreign judgment has to fulfil seem to be to the great or lesser extent reflect the public policy only.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

In legal process in all human affairs, there is a natural inclination to regard the decisions of the past as guide to the action of the future. In the family circle and in social organizations it is a conduct of regard for those of repute, who went before, of wish to profit from the distilled wisdom of the past, of innate conservatism the yearning for certainty and antipathy to analyse the problems afresh, of the desire to do justice. However, to follow foolish precedents, and Laws which do not match with need of the social economic development which are taking place with the society, and wink with both our eyes is easier than to think.

The first consideration that comes to one's mind who notes the codification and application of the English Laws and common laws principles in Tanzanian society. Looking at the law governing the recognition and enforcement of the foreign judgement in Tanzania which is codified from the English Law¹⁶², one will be able to note that this law is a hybrid which due to the fact that the Act passed by the parliament of Tanzania based on the Westminster model and are influenced by English approach, thus the mode of administering justice in the recognition and enforcement of the foreign judgment are being veering away from the way it should have been.

This study has come to the conclusion that there are several provisions under the Law governing the recognition and enforcement of the foreign judgment which are ineffective for application within the Tanzania society today, as it provide a wide range for enforcement of the foreign judgment within the country which could otherwise not enforced.

Thus, the study comes to the conclusion that most of the provisions under the Reciprocal enforcement of the Foreign Judgment Act are codified from the 1933 Foreign Judgment (Reciprocal Enforcement) Act which was enacted in England and

¹⁶² The 1933 Foreign Judgment Reciprocal Enforcement

was suitable for English society for the time of the enactment and the act of making it applicable in Tanzania, by then Tanganyika was to make their economic exploitation more effective within the country. Hence codification and application of this law in Tanzania shows that the law does not provide effective with the need of the Tanzanian society depending to the socio-economic interaction which are taking place with different people from different legal system.

The study further comes to the conclusion that the law governing the recognition and enforcement of the foreign judgment does not contain the rules which govern the High Court. That means it is up to the moment the High Court is governed by the judge made rule. As provided under section 5(1) of the Act NO.8 as revised in 2002 that the High Court with approval of the president make rules. However, lack of the fixed rules regarding to the enforcement of the foreign judgment would lead the court to make different decisions as one may think this might be proper rule while in actual fact does not hence the need to have a fixed rules within the law which govern the enforcement of the foreign judgment.

On the other hand on the part of the power of the High Court to register or set aside the foreign judgment, the study comes to the conclusion that, the conditions being laid down under the law is somewhat complex as it does not provide the extent of those condition taking for instance under section 6(1)(V) provides that “on an application in that behalf by any party against whom a registered judgment may be enforced, the registration of the judgment shall be set aside if the registering court is satisfied that the enforcement of the judgment would be contrary to public policy in the country of registering court.”

However, despite of this provision the law does not provide the extent of which such public policy is, and one may ask what amounted to the public policy? The law is silent thus shows that what amounted to the public policy lies on the eyes of the court i.e. judges and not the law itself. Hence the need to have the clear provision which express the extent and what amounted to the public policy in the enforcement of the foreign judgment.

Moreover, the law does not contain the provision regarding the examination of experts on the choice of Law rule on parts of the foreign court. It has been observed that upon the satisfaction of the high court that the judgment has rendered by the court with competent jurisdiction such judgment became valid. However, the question arise what about the law applied in deciding the matter? The law is silent. Therefore it is this loopholes which leads one's to use the opportunity of suing outside the country and conclude contracts that at the end would facilitate them to enforce the judgment obtained outside the country even though the law being applied in deciding the matter would have been improper.

Thus having considered all these aspects which shows the weakness of the law governing the recognition and enforcement of the foreign judgment it is in opinion of this study to say the law governing the recognition and enforcement of the foreign judgment is ineffective to the purpose of its intention of its enactment to the Tanzania society depending on the socio-economic development which are taking place and with the social interaction of people from various legal system in the world.

5.2 Recommendation and Suggestions

Following the keen study and critical examination of the law governing the recognition enforcement of foreign judgment in Tanzania i.e. the Reciprocal Enforcement of the Foreign Judgment Act NO.8 as revised in 2002. It is in the opinion of this study that there is a need for amendment of this law particularly in the provisions; under Part II of the law which govern the registration of the foreign judgments. As there are many loopholes which one may use to enforce a foreign judgment which is contrary to the public policy and that such amendment should include the extent to what amounted to the public policy.

Also the law need to be amended on the part of the power of the High Court to make rules that means the rules governing the foreign to enforcement of foreign judgment must be shown within the law rather then depending on the judge made rules. And that the law must provide for the proper procedure for the registration and enforcement and provide the strictness of the use of the common law principle

towards the enforcement of the foreign judgment within the country. This having the law which will fulfil the need of the Tanzanian society which faced with social and economic interaction of people from various parts of the world and hence enhancing justice.

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