

**RECOGNITION AND ENFORCEMENT OF FOREIGN
JUDGEMENTS IN EAST AFRICAN COMMUNITY:
EFFICIENCY AND THE CHALLENGE IN THE
HARMONISATION PROCESS**

**By
Killey Ebrania Mwitasi**

**Dissertation Submitted in the Partial Fulfilment of the Requirement for the
Award of Masters of Laws (International Law) of Mzumbe University**

Mzumbe University

2014

CERTIFICATION

We the undersigned, certify that we have read and hereby recommend for acceptance by Mzumbe University, a dissertation entitled ***Recognition and Enforcement of foreign Judgement in East African Community; Efficiency and the Challenges in the Harmonisation Process***, in the partial fulfilment of the requirements for award of the degree of Master of International Law of Mzumbe University.

.....

Prof. Padma Sabaya

Major Supervisor

.....

Internal Examiner

Accepted for the Board of Faculty of Law

.....

DEAN FACULTY OF LAW

DECLARATION

AND

COPYRIGHT

I, KILLEY EBRANIA MWITASI, declare that this thesis is my own original work and that it has not been presented and will not be presented to any other university for the similar or any other degree.

Signature.....

Date.....

©

This dissertation is a copyright material protected under the Berne Convention, the Copyright Act of 1999 and other international and national enactments, in that behalf on intellectual property. It may not be reproduced by any means in full or in part, except for short extracts in the fair dealings, for research or private study, critical scholarly review or discourse with acknowledgement, without the permission of the Mzumbe University, on behalf of the author

ACKNOWLEDGEMENTS

This work has benefited greatly from the contributions of many people and from various institutions. It is not going to be possible to mention the names of all who have contributed; therefore I would sincerely request them to accept my heartfelt gratitude for their helpful assistance but there are those I cannot omit.

First on the list is my family for their moral and material support which facilitated me on doing this research. However special and heartfelt thank must be extended to my supervisor, Professor Padma Sabaya for spending her valuable time to supervise me from the beginning of my research proposal up to this work. Her scholarly guidance and help in finding material, comments and valuable criticism have enabled me to come up with this work. To her I am highly indebted.

Moreover I would like to acknowledge scholastically assistance I received from Professor Richard Oppong of the Lancaster University Law School for supplying me materials relating to private international law in Africa; Dr. Gaston Kenedy of the University of Dar es Salaam, Senior Legal officer of the EAC (Rehema Kirefu) and the Counsel to the EAC (Hon. Kahwa) at Arusha-Tanzania, Mr.Magari of the Tumaini University-Dar es Salaam, Mr.Ntamti of the Open University of Tanzania and Advocate Kibatala-the former Vice President of the Tanganyika Law Society.

I would be unfair if I do not acknowledge my Employer, Deputy Attorney General of the United Republic of Tanzania, for the financial support which covered for fares and other expenses to the field centres and the whole research at large.

My thanks also goes to officers of the East Africa Law Society Mr.Mtui, and Mr. Agaba of the EAC Secretariat (legal Division) for connecting me to various lawyers from the EAC member states to whom I collected valuable data for this research. Furthermore I wish to register my sincere appreciations to Michel Ndayikengurukire of the EAC who helped me to translate into English special provisions for this work from Burundi Code of Civil Procedure and Rwanda Code of Civil Procedure.

Lastly, I thank all the respondents who agreed to take their valuable time to answer my questions and finally gave me useful information as it manifests in this work in work. To them I am highly indebted.

I remain responsible for any mistakes and shortcomings that may be found in this work. God bless me. May the Almighty God bless all of you.

DEDICATION

This work is dedicated to my Family.

ABBREVIATIONS AND ACRONYMS

B.L.R	Botswana Law Reports
Cap.	Chapter of Laws
EAC	East African Community
EC	European Commission
EFTA	European Free Trade Association
EU	European Union
HCPIL	Hague Convention on Private International Law
KB	King Bench
K.L.R.	Kenya Law Reports
MIGA	Multilateral Investment Guarantee Agency
QB	Queen Bench
T.L.R	Tanzania Law Reports
US (USA)	United States of America
VCLOT	Vienna Convention on Law of Treaty of 1969
WLR	Weekly Law Reports
URT	United Republic of Tanzania

ABSTRACT

This work deals with the legal regime on recognition and enforcement of foreign judgements in the EAC member states. Recognition and enforcement of foreign judgement is the act in which one sovereign state accepts and enforce the judgement given in another foreign state. It could be noted that due to the international principle on territory sovereignty, no foreign court can render a judgement which will have an automatic legal force in another sovereign state unless there is agreement to that effect. The increase in movement of people and goods, and the social and economic interrelations among peoples of different jurisdictions has lead the world or other jurisdiction in the world to think and create an easy way of resolving dispute arising out of those commercial and social interrelations by adopting conventions which make easy for the parties to resolve disputes which contains foreign elements. The EU has a good legal regime under its Brussels Regime. The EAC and the Africa as a whole has not made effort to have such kind of regional convention which will make the dispute and judgement rendered in one state accepted in another foreign state without unnecessary complications. This is due to poor policy framework and political commitment to enact such kind of convention.

In order to get precise materials for writing this work, researcher employed two research techniques, library research and field research. In library research materials were gathered from legislations, policy documents, newspapers and magazines, articles, textbooks, and case law. In field research the tools employed includes; interviews, questionnaires, email and telephone interviews.

The research conducted revealed that there is no EAC convention on recognition and enforcement of foreign judgement among members state, instead reciprocity arrangement between states applies. Each state has its own legal regime for this purpose which varies from one another. This may be attributed to the fact that private international law was in early years rarely taught in EAC old universities making the old generation lawyers unfamiliar with the principle at study.

From the aforementioned findings, the researcher makes some recommendations that it is time now the EAC to adopt convention on recognition and enforcement of foreign judgement among member states to adhere with the provisions of EAC Treaty of 1999. It is also recommended that universities have to make Private International Law a compulsory subject to be taken so as to prepare lawyers who will be conversant with the principles applicable and help the court in resolving dispute involving foreign element in the proper way.

TABLE OF CONTENTS

CERTIFICATION	i
DECLARATION AND COPYRIGHT.....	ii
ACKNOWLEDGEMENTS	iii
DEDICATION	v
ABBREVIATIONS AND ACRONYMS	vi
ABSTRACT.....	vii
LIST OF STATUTES.....	xiii
LIST OF CASES.....	xv
LIST OF TABLES	xvii
LIST OF FIGURES	xviii
CHAPTER ONE	1
GENERAL INTRODUCTION.....	1
1.1 Introduction.....	1
1.2 Historical Background	3
1.3 Statement of the Problem.....	5
1.4.Objectives of the Research.....	8
1.4.1 Specific Objectives of the Research	8
1.5 Significance of the Study	8
1.6 Hypotheses	9
1.7 Literature Review.....	9
1.8 Research Design and Methodology	14
1.8.1 Sampling and Sampling Procedure	14
1.8.2 Sample Size.....	15
1.8.3 Sources of Data	15
1.8.4 Method of Data Collection.....	15
1.8.4.1 Primary Data	15
1.8.4.1.1 Interview	16
1.8.4.1.2 Questionnaires.....	16
1.8.4.2 Secondary Data	16
1.8.4.2.1 Documentary Review.....	16
1.8.4.2.2 Electronic Sources	17
1.8.5 Data Processing and Analysis.....	17

1.9 Scope of the Study	17
1.10 Conclusion	18
CHAPTER TWO	19
CONCEPTUAL FRAMEWORK	19
2.1 Introduction.....	19
2.2 Judgement	19
2.3 Recognition of Foreign Judgement	20
2.4 Grounds for Non-Recognition of Foreign Judgement.	21
2.4.1 Recognition is manifestly contrary to public policy in the state in which recognition is sought.....	21
2.4.2 Judgement was given in Default of Appearance.....	21
2.4.3 Judgement is Irreconcilable	21
2.5 Enforcement.....	22
2.6 Defences Available to the Defendant.....	23
2.6.1 Foreign Judgement was obtained by Fraud.....	24
2.6.2 Foreign Judgement contrary to Public Policy	24
2.6.3 Foreign Revenue, Penal laws or other Public laws	25
2.6.4A foreign Judgement on the matter already Determined by the Court	25
2.6.5 An Overseas Judgement in breach of the Settlement of Dispute Agreement	26
2.6.6 Foreign Judgement contrary to Natural Justice.....	27
2.7 Proof of Foreign Law	28
2.8 Conclusion	29
CHAPTER THREE	30
THE LEGAL FRAMEWORK RELATING TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENT.....	30
3.1 Introduction.....	30
3.2. International Legal Regime.....	30
3.2.1. The Hague Convention on Recognition and Enforcement of Foreign Judgement in Civil and Commercial Matters of 1971.....	30
3.2.2 The New York Convention of 1958.....	32
3.3 Regional Legal Framework.....	35
3.3.1 The Brussels Regime	35
3.3.1.1 Brussels Convention of 1968	35
3.3.1.2 The Lugano Convention.....	37

3.3.1.3 The 2001 Brussels 1 Regulation	37
3.3.2 Recognition and Enforcement at Common Laws	38
3.4. The East African Community	39
3.4.1 Tanzania Legal Framework	40
3.4.3 Kenyan Legal Framework.....	43
3.4.2 Uganda Legal Frame Work.....	47
3.4.4 Rwanda Legal Frameworks	49
3.4.5 Burundi Legal Framework	50
3.5 Conclusion	51
CHAPTER FOUR.....	52
APPLICABILITY OF THE PRINCIPLES OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS BY COURTS IN EAST AFRICA	52
4.1 Introduction.....	52
4.3 Tanzania.....	52
4.3.1 Willow Investment V. Mbomba Ntumba and another	52
4.3.2 Mtui V. Mtui	57
4.3.3 Athar Mutjaba V. Heena Mutjaba.....	64
4.4 Kenya	66
4.4.1 Introduction.....	66
4.4.2 Italframe Ltd V. Mediterranean Shipping Company Ltd.....	66
4.5. Uganda	67
4.5.1 Christopher Sale and another V. Attorney General	67
4.5.2. Geoffrey Githinji Kamiri T/A Westminster Commercial Traders (Applicant) and Cooperative Bank of Kenya (Creditor/Financier) V. Mathew Ouma Oseko (Debtor/Respondent).....	75
5.6 Rwanda	81
5.7 Burundi	82
5.8 Conclusion	82
CHAPTER FIVE	83
ANALYSIS OF THE LEGAL REGIMES AND PEOPLE’S AWARENESS OF THE SUBJECT AT STUDY IN THE EAC	83
5.1 Introduction.....	83
5.2 Legal Regime	83
5.3 Challenges in the Harmonisation of Law	85
5.4 Data Collected from Lawyers/Advocates	86

5.5 Data Collected from EAC Secretariat and East Africa Law Society (EALS)	89
5.6 Data Collected from the Attorney General of the EAC member states	91
5.7 Data collected from Law Colleges.....	92
5.8 Conclusion	92
CHAPTER SIX.....	94
SUMMARY, CONCLUSION AND RECOMMENDATIONS	94
6.1 Summary	94
6.2 Conclusion	96
6.3 Recommendations.....	97
6.3.1 Legal Recommendations.....	97
6.3.1.1 Adoption of the Protocol on Recognition and Enforcement of Foreign Judgement ..	97
6.3.1.2 Publication of the East African Law Society Laws Reports	97
6.3.1.3 A lesson from EU.....	97
6.3.2 Non Legal Recommendation	98
6.3.2.1 Strengthening Political Will and Commitment.....	98
6.3.2.2 Academic	98
REFERENCES	99
Books	99
Journal Articles.....	99
Electronic Sources	100
APPENDICES	102
SAMPLE OF QUESTIONNAIRES	102
APPENDIX 1.....	102
APPENDIX II	107
APPENDIX III.....	112

LIST OF STATUTES

A: Domestic Legislations (EAC)

In Tanzania

British Judgement Decree, Cap. 9 of the Laws of Zanzibar.

Civil Procedure Code, Cap. 33 RE 2002.

Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar.

Extension of Judgement Act, Cap. 7 RE 2002.

Foreign Judgement (Reciprocal Enforcement) Act, Cap. 8 RE 2002.

In Kenya

Civil Procedure Code, Cap. 43 of the Laws of Kenya.

Enforcement of Foreign Judgement (Reciprocal Enforcement) Act, Cap. 43 of the Laws of Kenya.

In Uganda

Civil Procedure Code, 1961 Cap. 71 of the Laws of Uganda.

Judgement Extension Act, Cap. 12 of the Laws of Uganda.

Foreign Judgement (Reciprocal Enforcement) Act, Cap. 9 of the Laws of Uganda.

In Rwanda

Rwanda Code of Civil Procedure, Act No. 21/2012.

In Burundi

Burundi Code of Civil Procedure Act, Act No.1/010 of 13/05/2004.

In Other Jurisdictions

Venezuela's Private International Law Act of 1998.

Civil Jurisdiction and Judgement Act, 1992 (United Kingdom).

C:Regional Instruments

Brussels Convention of 1968.

East African Community Common Market Protocol of 2009.

East African Customs Union Protocol of 2004.

EU Regulation 1 of 2001.

Lugano Convention of 2007.

Treaty for Establishment of the East African Community of 1999.

D: International Instruments

Hague Convention on Recognition and Enforcement of foreign Judgement in Civil and Commercial Matters of 1971.

United Nations Conventions on Recognitions and Enforcement of Foreign Arbitral Award (New York Convention of 1968).

LIST OF CASES

A: Domestic Cases

Athar Mutjaba V. Heena Mutjaba, Misc. Civil Application No. 425 of 2013, High Court of Tanzania at Dar es Salaam

Christopher Sale and Another V. Attorney General, Civil Suit No. 91 of 2011, High Court of Uganda at Kampala

Geoffrey Githinji Kamiri t/a Westmister Commercial Traders and Cooperative Bank of Kenya V. Methew Ouma Oseko, Misc. Civil Cause No. 13 of 2012, High Court of Uganda at Kampala

Israel Discount Bank of New York V. Hadjipaterans (1984) 1 WLR 137 CA

Italframe Ltd V. Mediterranean Shipping Company Ltd (1986) KLR 54

Jacobson V. Frachon (1928) 138 LT 386

McMillan Inc. V. Bishop gateInvestment Trust PLC (1999) clc 417

Mtui V. Mtui (2001) 2 B.L.R 33

Ochsenbein V. Papelier (1870) 8 Ch.Appl. 695

Price V. Dewhurst (1837) 8 Sin 279

Raulin V. Fischer (1911) 2 KB 93

Rossell V. Smith (1842) 9 M &W 810

Schibsby V. Westernholds (1873) QB 155

Tracom SA V. Frachon (1928) 138 LT 386

US V. Inkeley (1911) QB 225

Vervaeke V. Smith (1983) 1 AC 145

Willow Investment V. Mbomba Ntumba and Another (1996) TLR 377

B: International Cases

Krombach V. Bambarki, European Court of Justice, Case C-7/98

Hoffman V. Kreg, European Court of Justice, Case 145/86

De Wolf V. Cox, European Court of Justice, ECR 1759

LIST OF TABLES

Table 5.1 Legal Regime of the EAC and the member states	84
Table 5.2 Whether there is EAC Regional Convention on Recognition and Enforcement of Foreign Judgement	87
Table 5.3 Whether the available legal framework and court approach vary greatly .	89

LIST OF FIGURES

Figure: 5.1 Whether there is EAC Regional Convection on Recognition and Enforcement of Foreign judgment.....	88
Figure 5.2 Where the available legal framework and court approach vary greatly ...	89

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

The recognition and enforcement of foreign judgement is one among other essential ingredients in private international law.¹ The recognition and enforcement of a foreign judgment occurs when the court of one state accepts a judicial decision made by the courts of another state as in rem and so precludes the litigation of a claim on the same facts on the ground of res judicata and/or collateral estoppel.² Once the judgment is recognized, the party who was successful in the original case can then seek its enforcement. If it is a money judgment and the debtor has assets in the second jurisdiction, the judgment creditor has access to all the enforcement remedies as if the case had originated in that second state.

Private international law or conflict of laws or international private law is that branch of international law and interstate law that regulates all lawsuits involving a "foreign" law element, where a difference in result will occur depending on which laws are applied as the *lex causae*.³ Firstly, it is concerned with determining whether the proposed forum has jurisdiction to adjudicate and is the appropriate venue for dealing with the dispute, and, secondly, with determining which of the competing state's laws are to be applied to resolve the dispute. And lastly deals with the recognition and enforcement of foreign judgements, the matter of which is also associated with the proof of foreign law.⁴ The last one is the core of this study, as it will be wastage of time for the court of the particular country to decide on the matter which will not be recognized and enforced in another state where it is supposed to be enforced.

¹ North P and Fawcett J.J (1999); Cheshire and North's Private International Law, 13thEdn, Oxford University Press, at p. 2

² North P.M and Fawcett J.J. (1992); Cheshire and North's Private International law, 12th Edition, Butterworth, London, at p. 372

³ North P and Fawcett J. J (1999), supra note 1 at p. 2

⁴ Ibid

Once the judgment has been rendered, the successful party must then enforce the judgment which may involve the task of securing cross-border recognition of the judgment.⁵ The procedure for enforcement involves making application in the contracting state in which enforcement is sought. The other party is informed of application and he has a right to appeal.⁶

Hence among the objectives of Private International law is the enforcement of foreign judgment, the Private International law could be functionless if at all it deals with the harmonization of conflicts of laws by settling the issues of forum shopping, characterization of cause of action and the choice of law rule without selecting for the modality of enforcing the decision. The enforcement of judgment can be done through comity, which is the practice through Multi-national treaties and the bilateral treaties.

Rules on recognition and enforcement of foreign judgement are much developed in the Western Countries with the European Union having a well-developed system on the subject.⁷ Some parts of the world have also made a significance development, such as Venezuela and Japan have actually enacted law on private international law. Things look different in Africa where the subject has received less attention hence there is no well-established system in Africa in this area⁸, East African Community being part of Africa suffers from the same weakness.

This work intends to study the position of law and practice in East African Community in the area of recognition and enforcement of foreign judgements, understand the stage reached, the differences and similarities in approach if any, and the effort for harmonisation of law to concur with the aim of the established East African Community. The work will look on the foreign judgements circulating within

⁵North P and Fawcett J. J (1999) at p. 2

⁶ For instance, article 36 and 40 of the Brussels Convention of 1968 gives for the right of appeal to the dissatisfied party, whether on the ground against the authorisation of enforcement or the refusal to recognise the judgement. The Appeal is to be sought to the designated Courts in the member states.

⁷**Richard FrimpongOppong**; Private International Law in Africa. Past, Present and Future; American Journal of Comparative Law, Volume 55, at p. 677

⁸ Ibid at p. 703

member of the East Africa Community and those coming from and going outside the Community.

In this chapter the researcher will explain the background of the problem, statement of the problem, objective and significance of the research, hypothesis, literature review, research design and methodology, case study and the scope of the study.

1.2 Historical Background

In the Conflict of Laws, issues relevant to the enforcement of foreign judgments are frequently regulated by bilateral treaty or multilateral international convention to facilitate the reciprocal recognition and enforcement of judgments between states. It is developed to curter for the private citizen enjoying the right to travel more freely between states, the development of the internet, intermarriage and e-commerce in an increasingly globalized set of markets that individuals routinely buy goods, incur debts and suffer loss and injury across state borders.⁹ In those cross border movements there may arise disputes which need be judicially resolved, but those kind of dispute are cornered with the variation of laws and public policy from one state to another.¹⁰

The well starting point in the development and unification of private international law can be traced in the effort made at the Hague Conference on Private International law (HCPIIL) of 1893.¹¹ The Hague Conference on Private International Law is the preeminent organization in the area of private international law and the rules on enforcement of foreign judgment¹²

Since its formation in 1893, the purpose of HCPIIL has been to work for the progressive unification of the rules of private international law. It has pursued this goal by creating and assisting in the implementation of multilateral conventions

⁹American Society of International Law, Electronic Source Guide at p. 19, In www.asil.org/erg, accessed on 07/12/2013

¹⁰ Ibid

¹¹ Hague Conference on Private International Law, The World Conference on Private International Law for Cross-border Cooperation in Civil and Commercial Matter, Information on the Hague Conference on Private international Law at p. 1, accessed on 24/08, In <http://www.hcch.net/index-en.php?act=text.display&tid=4>,

¹² Ibid

promoting the harmonisation of conflict of laws principles in diverse subject matters within private international law.¹³ Many states are currently members of the Hague Conference.¹⁴ There are number of international instruments which have been developed under the auspices of the HCPIIL to curter for the efficiency in enforcement of foreign judgement.

The Institute of Private International law in Africa of the University of Johannesburg is acting as an information centre for the Hague Conference on Private international law.¹⁵ The objective of the Institute is to undertake and publish research in the field of private international law especially for African context. It drafts regulations, conventions, model laws and other legislative instruments in the field of private international law, for utilization by the various organs and members states of the African Union.¹⁶

The rules of private international law have for all long varied from one country to another.¹⁷ The first instance of private international law in Western legal traditional can be traced to Greek law¹⁸. Ancient Greeks dealt straight forward with multistate problems, and did not create choice of law rules. Leading solutions varied between the creation of court for international cases or application of local law, on the ground that it equally available to citizens of all states.¹⁹

The modern conflict of law is generally considered to have begun in Northern Italy during the Middle age and in particular at trading cities such as Genoa, Pisa and Venice with the rise of commercial transactions between traders belonging to different cities. Maritime law was also of great driver of private international rules,

¹³ Hague Conference on Private International Law, The World Conference on Private International Law for Cross-border Cooperation in Civil and Commercial Matter, Information on the Hague Conference on Private international Law at p. 1, accessed on 24/08, In <http://www.hcch.net/index-en.php?act=text.display&tid=4>,

¹⁴ Ibid

¹⁵ Institute of Private International Law in Africa, University of Johannesburg, led by Prof. Jan Neels, <http://www.uj.ac.za/en/research/newsannouncements/researchhighlights/2008researchhighlights/pages/TheInstituteforPrivateInternationallawinAfrica.aspx>, accessed on 07/12/2012, at 3

¹⁶ Ibid

¹⁷ For instance, in France the law of domicile is the one which applies during resolution of marriage, while in England is the law of the place of celebration (see case of Brett V. Brett (1969) 1 ALL ER 1007

¹⁸ Juenger, Fredrick K. (1993); Choice of Law and Multistate Justice, MartinusNijhof, Kluwer, p. 6

¹⁹ Ibid at p. 7

providing for enforcement of contract, protection of shipwrecked sailor and property and the maintaining harbours.²⁰

Currently, European Union developed standard on recognition and enforcement of foreign judgment and private international rules in general within the region. Those standard are formulated under Brussels Regime consisting of Brussels Convention of 1968, Lugano Convention of 1988 and 2007, and the Brussels 1 Regulations also known as Council Regulation (EC) No. 44/2001 of 22 December 2000.²¹ East African Community may, perhaps gain a lesson from European Union with some minor adjustment to fit the needs of East African Community value.

1.3 Statement of the Problem

The development of private international law with the view of having a better system for enforcement of foreign judgments has stagnated in Africa for some time now. This is reflected in the neglected and underdeveloped state of the subject, and the near absence of Africa in international process, academic forums, writing and institutions that have significance on the subject.²² Thus East African Community, being part of Africa suffer the same problem.

Unsatisfied foreign judgment gives rise to the complicated questions of private international law. If a plaintiff fails to obtain satisfaction of the judgment in the country in which it has been granted, the question arises whether it is enforceable in another country where the defendant is found.²³ It is clear at the outset that owing to the principle of territorial sovereignty, a judgment delivered in one country cannot, in the absence of international agreement, have a direct operation of its force in another.²⁴ These international agreements try to lessen the complication of suit on the same cause of action, instead gives a mode of which the judgment can circulate freely against the judgment debtor in all states party to the agreement.

²⁰ Juenger, Fredrick K. (1993); Choice of Law and Multistate Justice, MartinusNijhof, Kluwer, p. 6

²¹ Retrieved from <http://curia.europa.eu/common/recdoc/convention/en/c-texts/lug-idx.htm>, accessed on 06/12/2012.

²² Retrieved from <http://conflictoflaw.net/2007/private-international-law-in-africa-past-presen-and-future>, By RicharchOppong, accessed on 07/12/2012

²³ North P.M and Fawcett J.J (1992); Cheshire and North's Private International law, 12th Edition, Butterworths, London, at p. 345

²⁴ Ibid

Despite that the foreign judgment upon which the defendant is sued is final and conclusive, it is still open to the defendant to escape liability by pleading defenses, these are, for instance, that the judgment was obtained by fraud, or that it is contrary to natural justice or that is repugnant to the public policy in the country in which it sought to be enforced.²⁵ However not all kind of defenses are allowed at the stage of enforcement of judgment at the foreign court, as some of defense has to be pleaded at the forum court, and that if those defenses were not pleaded, the defendant is estopped from pleading them further.²⁶ This aims at having the matter conclusively determined without allowing further draw back acts by the parties.

East African Community was formed in 1999,²⁷ the founding member being three states, namely Tanzania, Uganda and Kenya,²⁸ these three states as per Preamble of the Treaty, have enjoyed close historical, commercial, industrial, cultural and other ties for many years. Later on two other states joined namely Rwanda and Burundi and that South Sudan is underway to become a party which if it done, the EAC will have six member states. Currently there are five states in total, each state having its own law on the recognition and enforcement of foreign judgment. Further even the currency varies among member states of the Community²⁹ which may also complicate the exchange rate at the state to which enforcement is sought.³⁰

The objectives of the Community are stated under article 5 of the EAC Treaty. Article 5 (1) provides as follows: *The objectives of the Community shall be to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and **legal** and judicial affairs, for their mutual benefit.*

²⁵Cheshire G.C. (1961); Private International Law, 6th Edition, Oxford University Press, Oxford at The Clarendon Press, at pp. 667 - 678

²⁶North P.M and Fawcett J.J (1992), supra note 2 at p. 371

²⁷ Under the Treaty for Establishment of the East Africa Community of 1999 done at Arusha, Tanzania

²⁸ Article 1 of the EAC Treaty

²⁹ There are negotiation going on to have a single currency for East Africa Community, retrieved from <http://www.trademarka.com/eac-single-currency-talks-resume-today>, EAC Single Currency Resume Today, Trade Mark East Africa, accessed on 24/08/2013

³⁰ In England the monetary judgement have to be converted into Sterling Pound and the rate of conversion is the date of payment; Collins L at All (Eds) (1993); Decey and Morris the Conflicts of Laws, 12th Edition, Sweet and Maxwell, Volume 2, London at p. 1583

Then Article 126 of the EAC Treaty requires partner states to harmonise their law for the betterment of the Community. The said Article provides as follows;

1. In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States shall take steps to harmonise their legal training and certification; and shall encourage the standardisation of the judgements of courts within the Community.

2. For purposes of paragraph 1 of this Article, the Partner States shall through their appropriate national institutions take all necessary steps to:

(a) establish a common syllabus for the training of lawyers and a common standard to be attained in examinations in order to qualify and to be licensed to practice as an advocate in their respective superior courts;

(b) harmonise all their national laws appertaining to the Community; and

(c) revive the publication of the East African Law Reports or publish similar law reports and such law journals as will promote the exchange of legal and judicial knowledge and enhance the approximation and harmonisation of legal learning and the standardisation of judgements of courts within the Community.

The legal system in five member states to the East African Community varies. Two states, namely Rwanda and Burundi have different history and follows civil law legal system having colonised by Belgium, while the founding three member, namely Tanzania, Uganda and Kenya share the same history having being colonised by Great Britain. In addition the first paragraph of the EAC Treaty also point out that these original member states share common history, and that they follow common law legal system.³¹ Hence it follows that, in the absence of harmonised legal system, the

³¹ In <http://www.loc.gov/lawweb/servlet/IIoc-news?disp3-1205401325-txt>, The Law Library of the Congress; Burundi/Rwanda: Possible switch of Legal Tradition, accessed on 20/08/2013

recognition and enforcement of foreign judgements may be facing unwarranted difficulties. Article 126 of the EAC Treaty may be a foundation to have law which will make it easy the circulation of judgement in the East Africa Community's member states.

1.4.Objectives of the Research

This research focused to examine and analyses the position of law, the efficiency and the process of harmonisation of law on the recognition and enforcement of foreign judgement in the established East Africa Community.

1.4.1 Specific Objectives of the Research

- To study the provisions and the implementation of the Articles in the EAC Treaty 1999 relating to the recognition and enforcement of judgements from the EAC members states.
- To study/discuss the legal regimes and the practice on the subject matter of each member states to EAC and identify the similarities and differences thereof.
- To examine the awareness and understanding of the lawyers from EAC member states over the principles relating to the recognition and enforcement of foreign judgement.

At the end the research recommend to the law making authorities and the courts on the matter relating to recognition and enforcement of foreign judgement for the purpose enhancing commercial transaction and social relation within the Community.

1.5 Significance of the Study

As noted earlier there is a less attention on private international law in Africa, hence, enforcement of foreign judgement, suffer the same trend. Thus this study is important to the Community for both academic and practical purposes with the view of promoting social-economic relation among member states.

The study will also add knowledge to lawyers and judges in the Community for the better understanding the principles underlying the recognition and enforcement of foreign judgement from other part of the world.

The research is also expected to provide an important basis for other researchers as an input as far as the subject is concerned.

1.6 Hypotheses

This research is guided by the following hypotheses

- (i) East Africa Community has no law/regional convention on the recognition and enforcement of foreign judgement.
- (ii) The available legal framework and courts' approach vary greatly.
- (iii) Harmonisation of the law on the subject has not taken place.

1.7 Literature Review

There is scarce of literature on private international law in general in Africa, hence the topic of recognition and enforcement of foreign judgement which is part and parcel of private international law eventually have suffered the same consequences. Many of the literature on the subject come out of the East Africa Community. However the said theories and standard can be applied in East African Community too only with minor modification if so required to suit the need of the Community.

Leon P.S.G. (1983) observes that private international law is a subject which does not command great attention amongst African lawyers, occupies a modest part of the average university curriculum, and remains largely unfamiliar to the older generation of practicing lawyers.³² In that circumstance is obvious that even the principle on recognition and enforcement of foreign judgement receives less command among East African Lawyers.

Chapter X of the Venezuela's Private International Law Statute of 1998 provide for the recognition and enforcement of foreign judgement in its land so for the said judgement has been rendered by competent court and the same is not pending in

³²Leon P.S. G (1983); The Recognition and Enforcement of Foreign Judgements in South Africa, 16 Comparative and International Law Journal , South Africa, at p. 345

another foreign court. It further add the following conditions, namely, it should have been issued in civil or commercial matters, or, generally, in matters related to private juridical relationships; That the defendant should have been duly served, with sufficient time to appear, and that, generally, procedural guarantees should have been afforded to ensure a reasonable possibility of defense; That they should not be incompatible with a previous judgment having authority of *res judicata*; and that there should not be pending, before Venezuelan Courts, a trial with the same object and between the same parties having commenced before the foreign judgment should have been issued, and that in order to proceed with the enforcement of a foreign judgment, domestic enforcement thereof should have been awarded in accordance with the procedure provided by law and after previous verification that it meets the requirements of article 53 hereof. There are number of other states which have domesticated private international rules which ease the enforcement of foreign judgment having the provision like this of Venezuela statute.³³

Professor Forsyth (2003) has described the situation of underdeveloped of the subject in Africa as the Cinderella subject seldom studied and little understood.³⁴ It is his observation that the subject has been given a very minimal attention to the extent that only few universities tend to include the subject in their curriculum.

Oppong R. F.(2007)³⁵ note that the private international law in Africa have been neglected hence underdeveloped due to the fact that there is a near absence of Africa in international process, academic forums, writings and institutions that have significance for the subject. As for East African Community, He note that the provisions (Article 126) of the Treaty Establishing the East Africa Community calling for the standardisation of judgements of the courts within the Community and the cooperation in the judicial and legal matters with a view to harmonising their

³³ For instance in Japan, The Private International law Act, as translated by Asian-Pacific Law and Policy Journal 8 (2008) 138 available at <http://www.hawaii.edu/aplpj>, accessed on 18/12/2013; Switzerland's Private International Statute of December 18 1987 retrieved on 18/12/2013 from <http://www.bj.admin.ch/bj/en/home/themen/wirtschaft/international-privatrecht.html>, Polish Private International Law Act of 2011, retrieved on 18/12/2013 from <http://ingentaconnect.com/content/mohr/rabelsz/2012/00000076/00000003/art00005>

³⁴ Forsyth C. F. (2003); Private International Law: The Modern Roman – Dutch Law Including the Jurisdiction of the High Court at p. 43; cited in Oppong R.F. (2007) supra note 22 at p. 678

³⁵ Oppong R.F. (2007); Private International Law in Africa; Past, Present and Future. In American Journal of Comparative Law, Volume 55 at pp. 677 - 678

judicial and legal systems, could provide for the legal basis for a regional convention on recognition and enforcement of foreign judgements. He further notes that, in Africa, the common law regime for enforcement of foreign judgement is riddled with procedural and definitional difficulties. That an action to enforce a foreign judgement may take years, the situation of which act as a clog on the free movement of persons, goods, capital and service within the envisaged economic community.³⁶

Institute for Private International Law in Africa (2008)³⁷ is essentially undertaking research of the subject in Africa and it act as an information centre for the Hague Conference on Private International Law. Research is conducted on an on-going basis in order to draft an African Convention on the law applicable to contractual obligations for future use African Union and the rule for enforcement of foreign judgements

McClean. D and Beevers. K(2010)³⁸ point out that it is sometimes easier to obtain judgement than to enforce it. This is explained with hypothetical case that, a claimant, for example, who successfully sues in Japan for breach of contract or tort and is awarded damages, may discover that the defendant has removed all his or her assets to England. The judgement cannot be enforced in Japan because there are no assets there. The officer charged with the enforcement of judgement in English legal system cannot act on Japanese judgement. The Japanese officer cannot act in England. Then what can save the successfully party is the legal system which allows the recognition and enforcement of foreign judgement. It is from that kind of situation this research intend to work on the East Africa Community if a successfully party has a room to enjoy the enforcement of his judgement within a community.

³⁶ Oppong R.F. (2007); Private International Law in Africa; Past, Present and Future. In American Journal of Comparative Law, Volume 55 at p. 703

³⁷ Institute of Private International Law in Africa, University of Johannesburg, retrieved from, <http://www.uj.ac.za/en/research/newsannouncements/researchhighlights/2008researchhighlights/pages/TheInstituteforPrivateInternationallawinAfrica.aspx>, accessed on 07/12/2012

³⁸ McClean David and BeeverKisch (2010); The Conflicts of Law, 7th Edition, South Asian Edition, Sweet and Maxwell, London, 2010 at pp. 157 -158

International Law Institute (Kampala Office) (2011) ³⁹ **working for harmonization of law in East African Community** has noted that law Schools and law faculties face many challenges today in providing a legal education that meets the needs of the 21st century. Advised that the most important thing, of course, is to focus on the basics – to ensure that the graduate is obtaining a solid foundation that allows her or him to practice law (or do other law jobs) successfully over the next 50 years or so. As for the facilitation of trans-border practice, it urged that the Community has to look at the experience of the European Community and the United States and other Commonwealth countries such as Singapore and generally at common law jurisdiction. Further recommended that the uniform training materials would have to be developed and teachers/instructors could be shared among the member countries. The work in fact is too general relating to harmonization of legal system and has not worked out in detail the issue of recognition and enforcement of foreign judgments in the Community.

Oppong R (2013)⁴⁰ observes that the effectiveness of the judgment of a court is territorially constrained. State sovereignty prevents the judgment of one country from having direct force or effect in the territory of another sovereign state. To be effective abroad such a judgment must obtain the approval of a public authority, usually the courts, within the country where that is sought. It is to facilitate this process that a regime for recognition and enforcement of foreign judgments is an essential feature of most legal systems. He further clarify that there are two regimes for recognising and enforcing foreign judgments in the countries under study to which he was undertaking, namely the common law and statutory regimes. The East African Community consists of common law states and those of civil law system, and that this mixture of system of law has to be checked as regard the enforcement of foreign judgement.

³⁹ Final Report Submitted by the International Law Institute (Kampala Office) on East African Regional Study with a View to Harmonise legal training Curriculum and Harmonise Legal and Regulatory Framework Governing Legal Training, Certification and Practice within the Community, March 2011

⁴⁰Oppong R. (2013); The Common Law Regime for Enforcing Foreign Judgement; (unpublished). The author is currently researching this subject under a Social Sciences and Humanities Research Council of Canada funded project, entitled: 'Access to International Justice at the Post-adjudication Phase of International Dispute Settlement: The Role of National Courts', at p.313

Tanzania, Kenya and Uganda are common law countries in East African Community. The recognition and enforcement of foreign judgments in Tanzania is governed by the common law rules and a statutory regime for the registration of judgments from specified countries⁴¹. Although little will be said of the common law rules, it is worthy of note that the common law rule that a cause of action survives the foreign judgment such that fresh action could be brought by either party if dissatisfied with the judgment, may not apply in Tanzania⁴². This is because under section 11 of the Tanzania Civil Procedure Code 1966, a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim. The statutory regime is governed by the Reciprocal Enforcement of Foreign Judgments Act of 1935 together with two subsidiary pieces of legislation, namely, the Reciprocal Enforcement of Foreign Judgments Order and the Reciprocal enforcement of Foreign Judgment Rules⁴³. Under the Act, judgment means a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party. The Act applies to judgments given in named foreign countries on the basis of reciprocity. The President designates these countries after he is satisfied that judgments of the Tanzanian courts will be accorded similar treatment in that country. Thus, like other statutory enforcement schemes in East African Community, the doctrine of reciprocity lies at its heart. Consequently, it may inure to the benefit of judgment creditors from only some few countries⁴⁴.

Ntampaka, Charles (2013) ⁴⁵ has worked for Burundi family law and the enforcement of foreign judgement on related matter. He notes that foreigners enjoy

⁴¹ Chapter 8 of The Revised Laws of Tanzania 2002

⁴²Oppong R; In International and Comparative Law Quarterly, Volume 55, October 2006 at p.918

⁴³ Tanzania Government Notice No 8, 9 and 15 of 1936

⁴⁴ For recognition and enforcement of foreign judgements among founder states of the East Africa Community bases on reciprocity; see section 2 and 3 of the Uganda Foreign Judgement (Reciprocal Enforcement) Act 1961; section 5,6 and 13 of the Kenya Foreign Judgement (Reciprocal Enforcement) Act Cap. 43; and section 3 and 4 of the Tanzania Foreign Judgement (Reciprocal Enforcement) Act Cap. 8

⁴⁵Ntampaka Charles (2013); Reconciling the Source of Law in Burundi Code of Persons and Family, published in Kluwer Law International, retrieved from,

all civil rights and legal protection accorded to nationals. That in Burundi the national law of foreigners is applied to them save where it is contrary to public order, to the interest of the society or to public morality. He further point out that the Code of Persons and Family take up the principles accepted elsewhere, the need for an exequatur for the judgements and decisions made by foreign authorities, the recourse to public order to examine the conditions of divorce.

Those works above have well pointed out the principle under study and the situation of the subject in Africa Continent in general, some having touched particular part of East African Community member states, though they have not gone specifically in detail for East Africa Community, the detail of which this paper has worked out in detail, that is to reveal the position of law, the understanding and problems facing the practices and harmonisation of law on recognition and enforcement of foreign judgement in East Africa Community. However their works were good guiding in the course of doing this research especially where they have touched the area relating to the subject matter of this work.

1.8 Research Design and Methodology

This part is about the framework in which the study was carried out. This part describe the research design, study area, sample size and sampling procedure, source of data, method of data collection, which include both primary and secondary data and data analysis.

1.8.1 Sampling and Sampling Procedure

The selection of the respondents was based on the random sampling. This however was drawn from the relevant authorities of the five member states of the Community mostly those stationed in the capital cities or commercial cities,⁴⁶ three or more major and reputable law firms from each member of the Community, law school/college, Attorney General Offices and any other Association which in one

<http://books.google.co.uk/uk/book?id=vdn4hPpczcic&pg67lpg&dq=burundi+law+on+foreign+judgment&source>, accessed on 17/12/2013.

⁴⁶ For instance, in Tanzania the capital city is Dodoma, but in actual the very busy city (commercial city) which famous lawyers works and are situated is Dar es Salaam.

way or another is connected to the topic of the study. Convenient sampling method employed to study the unit which is available and willing to share information concerning the problem at the time of data collection. The focus was on informants who possess sufficient and reliable data on the matter.

1.8.2 Sample Size

The research was conducted in the East Africa Community member states, the targeted people were in the five capital/commercial cities in the Community, namely Dar es Salaam (Tanzania), Nairobi (Kenya), Kampala (Uganda), Kigali (Rwanda) and Bujumbura (Burundi) and the East Africa Community Secretariat at Arusha-Tanzania.

Given the objective of the research, the targeted population was 21 or more but not more than 40 people, namely 5 Registrars of the Higher Courts from each member state, 2 Principal legal officers from the East Africa Secretariat, 5 prominent lawyers from each member state, law colleges and the lawyer from the Attorney General Office from each member state.

1.8.3 Sources of Data

The researcher employed both primary data and secondary data. Primary data was useful as it testified the reality and reveal to what extent the problem of the study exist. Secondary data covered intensive visit of articles, journal and books concerning the problem at study giving the researcher a gap to scrutinise what has been done by other researchers and what loophole the researcher should address.

1.8.4 Method of Data Collection

In this study the researcher collected data by using the following methods interview and questionnaires, during primary data collection and documentary review of the secondary data.

1.8.4.1 Primary Data

The researcher conducted field research at the East Africa Community Secretariat at Arusha-Tanzania and the High Court Registry at Dar es Salaam. As for Nairobi,

Kampala, Kigali and Bujumbura, due to financial constraints, the researcher relied on e-mail and telephone in collection of data. The technique of data collection which was used by the researcher includes scheduled interviews and questionnaires.

1.8.4.1.1 Interview

The researcher used interview as a method of data collection. Scheduled and unscheduled interviews were employed by the researcher. Scheduled interview was carried out to prominent lawyers in the Community, the EAC Secretariat and East Africa Law Society so as to make a researcher systematic in the process of interviewing. Unscheduled interview was employed to other legal officer/advocates from other association or law firms. Interview method was applied in order to get comprehensive information since the method is flexible and allows the researcher to keep on modifying the questions where clarity is needed.

1.8.4.1.2 Questionnaires

The researcher supplied questionnaires to the relevant personnel from the aforementioned institutions and persons that have rich knowledge on the matter relating to the recognition and enforcement of foreign judgement, and collect necessary information on the practices pertaining to the subject in question in the East Africa Community. The questionnaires which were supplied contained structured questionnaires and unstructured questionnaires, open ended question gave the respondent complete freedom of giving their view and providing information related to the problem at hand.⁴⁷

1.8.4.2 Secondary Data

1.8.4.2.1 Documentary Review

The researcher in conducting this research visited different libraries whereby the analysis of the problem was done through conventions/international instruments, statutes, cases, textbooks, journal articles and other relevant materials available. The researcher visited the Library of Mzumbe University, the Library of the University of Dar es Salaam, the Open University of Tanzania's library, the Library of the

⁴⁷ Sample of the Questionnaires in Appendix 1 to 3

Tanganyika Law Society, The Library of the High Court at Dar es Salaam, the Library of the East Africa Secretariat and the library of the East Africa Law Society.

1.8.4.2.2 Electronic Sources

Internet search was employed through visiting relevant website and the recognition and enforcement of foreign judgement was the lead search engines in which online journal, reports and other useful materials were visited.

1.8.5 Data Processing and Analysis

The collected data were scrutinized and examined in details before analysed. This assisted the researcher to determine whether the collected data are in accordance with the objective of the study. Here the researcher used both qualitative and quantitative data analysis to describe and analyse the collected data.

The method involved summarising the key finding including the data which was collected through interview be broken into smallest meaningful units of information and placed into appropriate categories and analysed in detail through content analysis. The content analysis were analysed by symbolic content of any communication with intent to reduce the total content of communication to some set of categories that represent the objective of our research.

Data collected through structured questionnaires and scheduled interview were coded by assigning symbols to each response and categories. This enabled the researcher to translated data into symbols which can be counted. Tabulation recorded the information coded and classified it, and this was useful for data analysis and interpretation.

1.9 Scope of the Study

The study covered the member states of the East Africa Community. The research provides for the position of law, the practices and the harmonisation of the rules on the recognition and enforcement of foreign judgement in the Community since its establishment in 1999.

1.10 Conclusion

This chapter covered the general introduction to the research. It has laid the foundation for the work. It has pointed out the historical background to the subject at study, statement of the problem, objectives of the research, significance of the study and the hypotheses. The chapter also contains the literature review in which the researcher visited different scholarly works relevant to the study at hand. Despite that the work is specifically for the situation in the EAC, there have been scarce of materials from the EAC and the Africa in general, thus most of the literature reviewed are from outside Africa, however are still relevant to study. The Chapter finally point out the research design and methodology and the scope of the study.

CHAPTER TWO

CONCEPTUAL FRAMEWORK

2.1 Introduction

This chapter provides a broad understanding of the theories and concepts on the law, practices and principles relating to recognition and enforcement of foreign judgements. This Chapter will be a cornerstone of the basic understanding of the different concepts and procedure for executing a foreign judgement as developed by different courts and writers.

2.2 Judgement

A word judgement simply connotes decision. **Oxford Dictionary**⁴⁸ has broadly described the word as follows; the ability to make a sensible decision after carefully considering the best thing to do; the decision of the court of law or judge. Section 2 of Chapter 8⁴⁹ define judgement to mean a judgement or order given or made by a court in any civil proceedings, or a judgement or order given or made by a court in any criminal proceedings, for the payment of a sum of money in respect of compensation or damages to an injured party; Section 3 of the Civil Procedure Code⁵⁰ define judgment to mean the statement given by a judge or a magistrate of the grounds for a decree or order; further to that the same statute and section describe to what amount to foreign judgement, it provides that foreign judgment" means the judgment of a foreign court.

Article 25 of the Brussels Convention⁵¹ provides for the definition of a term judgement, it read that for the purposes of the Convention, 'judgment' means any judgment given by a court or tribunal of a Contracting State, whatever the judgment

⁴⁸ Oxford Advanced Learner Dictionary of the Current English, 6th Edition 2000; Sally Wehmeir (Ed) at p. 645

⁴⁹ The Reciprocal Enforcement of Foreign Judgement, Cap. 8 Revised Edition 2002 of the Law of Tanzania; The Ugandan Statute on Foreign Judgement contains the same wordings like that of Tanzania, see section 1 of Cap. 9 of the Laws of Uganda

⁵⁰ The Civil Procedure Code Cap. 33 of the Laws of Tanzania

⁵¹ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968

may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

2.3 Recognition of Foreign Judgement

There is an important distinction between the recognition of a judgement as one entitled to be given some weight in court of the forum and its enforcement.⁵² A court must recognise every foreign judgements which it enforces, but it need not enforce every foreign judgements which it recognises. Some foreign judgements do not lend themselves to enforcement, but only to recognition⁵³. Examples are a judgement dismissing a claim (unless it orders the unsuccessfully claimant to pay costs, as it frequently does); or a declaratory judgement or a decree of divorce or nullity. But there may be order for payment of money, which are capable of enforcement; for example orders dealing with the financial consequences of divorce or orders as to costs.⁵⁴

It is clear at the outset that owing to the principle of territorial sovereignty a judgement delivered in one country cannot in the absence of international agreement have a direct operation of its own force in another. Nevertheless, the common law system have long permitted the enforcement of a foreign judgement within defined limits, since otherwise one of the essential objects of private international law, the protection of rights acquired under a foreign system of law, would not be fully attained.⁵⁵

It should be noted however that in all legal system, the recognition and enforcement of foreign judgement does not touch matters relating to taxes, administrative law and the penal law,⁵⁶ though sometime in penal law there can be a mixture of sentence of compensation which can be enforced as to be explained herein. (see heading 2.6.3)

⁵² McLean David (2010); *The Conflicts of law*, 6th Edition at p. 158

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ North P.M and Fawcett J.J (1992); *Chishire and North's Private International Law*, 6th Edition, supra note 2 at p. 346

⁵⁶ For instances, Article 1 of the Brussels Convention 1968 provides that; This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. The same position is provided in Cap. 8 of Tanzania-section 3; section 11 of Uganda Act and sections 3 and 16 of Kenyan Act

2.4 Grounds for Non-Recognition of Foreign Judgement.

2.4.1 Recognition is manifestly contrary to public policy in the state in which recognition is sought

Case law establishes that this ground is to be relied upon only in exceptional circumstances.⁵⁷ To safe guard the ready recognition of judgements, the rules must be interpreted so as to set limits on the use which may be made of national understanding of public policy. The European Court in **Krombach V. Bamberski**⁵⁸ has held that they can be used to deny recognition only where recognition or enforcement would be at variance to an unacceptable degree with a legal order of the state in which enforcement is sought; a manifest breach of a rule of law regarded as essential legal order of the state or of a right recognised as being fundamental within that legal order. Thus if the enforcing court is satisfied that the enforcement of the judgement in question is contrary to public policy of that state, then such judgement will not be recognised.

2.4.2 Judgement was given in Default of Appearance

It is considered that the judgement was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgement when it was possible for him to do so.⁵⁹ The defendants who become aware of the proceeding in the particular or the ensuing judgement and decide not take steps open to him or he in that state is debarred from alleging there was no service or no opportunity to arrange a defence. But in general the judgement given without having given the defendant an opportunity to defend, such fact is the good defence against recognition of the foreign judgement.

2.4.3 Judgement is Irreconcilable

If the judgement is irreconcilable with a judgement given in a dispute between the same parties in the state in which recognition is sought can also be ground for

⁵⁷ As ruled out in Hendrickman V. Magenta Dock &Verlag GmbH (1996) E.C.R 1-4943

⁵⁸ Case C- 7/98

⁵⁹ McLean David (2010); supra note 55 at p. 160

rejection of the same. In **Hoffman V. Kreg**⁶⁰, in which the maintenance order was inconsistent with divorce granted in state of intended enforcement, the court held that irreconcilable means having mutually exclusive consequences.

2.5 Enforcement

Unsatisfied foreign judgement gives rise to the complicated questions of private international law.⁶¹ The attitude adopted by English law from the earliest days has been to permit the successfully suitor to bring an action in England on foreign judgement. But in the last hundreds of years the courts have changed their view as to the ground upon which this privilege is based.⁶² The older approach put it solely on the ground of comity.⁶³ Later on the doctrine changed to the doctrine of obligation. This doctrine was laid down in **Russell V. Smyth**⁶⁴, that is, where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation that may be enforced in England by an action of debt. Once the judgement is proved the burden lies on the defendant to show why he should not perform the obligation. This doctrine was later affirmed in **Schibsby V. Westenholz**⁶⁵ when the Court ruled that “*The judgement of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which the judgement is given, which the courts of this country are bound to enforce*”

The merits of this doctrine of obligation, as compared with the principle of comity are twofold. In the first place the question **of reciprocity is eliminated**. For instance, if **A** is under obligation to **B**, there is no more need to consider what treatment is meted out by the foreign court in question to English judgements than there would be to examine the private international law.⁶⁶ An obligation once recognised in English law, must be enforced irrespective of the substantive rules of law obtaining in the

⁶⁰ Case 145/86 (1988) E.C.R 645

⁶¹ Ibid at p. 345

⁶² Ibid at p. 346

⁶³ As held in Geyer V. Aguilar (1798) 7 Temp. Rep 681 at p. 97

⁶⁴ (1842) 9 M&W 810

⁶⁵ (1870) LR 6 QB 155 at p. 159

⁶⁶ North P.M and Fawcett J.J. (1992); Cheshire and North's Private International law, supra note 2 at p.346

country of its creation. In the second place, there is a little difficulty in prescribing the defence available to the defendant, for if the ground of his liability is an obligation, then any fact which disproves the existence of the obligation may be pleaded in the bar.⁶⁷

The court in which enforcement is sought is not entitled to review the merit of the judgement, nor can it question the jurisdiction of the court which gave the judgement, and may not apply the test of public policy to the rules relating to jurisdiction.⁶⁸

The judgement must have been rendered by the court of competent jurisdictions, it must be final, and it must be of such a nature that the principle of comity requires the domestic court to enforce it.⁶⁹ However the matter of recognition and enforcement of the foreign judgement is not based on the principles of comity alone, it also relate to principle of reciprocity and the principle of obligation. In an action to enforce foreign judgement, it is necessary to allege and prove that the judgement is current and final.⁷⁰ Where it is shown that the judgement is subject of appeal in foreign court, the court of enforcement may stay the proceeding pending the final determination of the appeal.⁷¹

2.6 Defences Available to the Defendant

Though is settled that the foreign judgement on which the defendant is sued is final and conclusive, it is still open to him to escape liability not only by pleading that the foreign court had no jurisdiction, but also by pleading one of the following defences;⁷²

⁶⁷ Ibid

⁶⁸ Mclean David (2010); supra note 55 at p. 161

⁶⁹ By the Canadian court in *Pro Swing Inc. V. Elta Golf Inc.* (200) 274 DLR

⁷⁰ Oppong R (2013); Common law Regime, supra note 31 P. 331

⁷¹ Ibid at p. 334

⁷² It should be noted however that not all kind of defences are entertained at the time of enforcement; the English court in **Ellis V. M'Henry (1871) LR 6 CP 228** held that “ *a defendant must take all available defences in foreign country, and is at fault if he does not do so*” Underlying principle are consideration of comity and the duty of courts to put an end to litigation.

2.6.1 Foreign Judgement was obtained by Fraud

It is a well established rule that a domestic judgement may be impeached on ground that it was obtained by fraud. The unsuccessful party, instead of appealing or applying for a new trial, may bring an independence action to set aside the judgement on the ground fraud.⁷³ The Defendant must prove that new facts, evidential of fraud, have been discovered since the judgement and that they were not reasonably discoverable at the time of trial. He must prove that new evidence, had it been adduced in the original action, would in all probability have a material effect on the decision. This is equally the ground in private international law, that a foreign judgement is impeached on the ground of fraud.⁷⁴ In **Ochsenbein V. Papelier**⁷⁵, a French seller, in course of a dispute in Paris with English buyer, produced a writ showing that he had commenced an action to recover the price of the goods. When remonstrated with, however, he burnt the writ then and there and agreed to refer the dispute to arbitration in London. He nevertheless proceeded with the action behind the buyer's back and obtained judgement by default. The seller brought an action in court of Queen Bench on this judgement, and the Court of Chancery, when asked by the buyer to restrain the action, refused an injunction as being unnecessary. It was unnecessary because the above facts, if proved, would afford a good defence to common law action. Fraud cannot be a defence if the foreign court has not been deceived, or if the defendant alleges is plainly untrue.⁷⁶

2.6.2 Foreign Judgement contrary to Public Policy

No judgement which is contrary to public policy of the state which enforcement is sought will be adhered to. In **Israel Discount Bank of New York V. Hadjipaterans**⁷⁷ it was held that undue influence, duress and coercion can within the ambit of the public policy be a defence as to the enforcement of foreign judgement.

⁷³ Flower V. Lloyd (No.2) (1879 10 Ch. D 327 at pp. 333-334

⁷⁴ North P.M and Fawcett J.J (1992) supra note 2 at p. 377

⁷⁵ (1873) 8 Ch App 695

⁷⁶ Jet Holding Inc. V. Patel (1990) 1 QB 335, (1989) 2 ALL ER 648

⁷⁷ (1984) 1 WLR 137 CA

2.6.3 Foreign Revenue, Penal laws or other Public laws

States courts do not enforce foreign revenue, penal law and other public laws either directly or through the recognition of foreign judgement. In **US V. Inkley**⁷⁸ the Court of Appeal of England refused to enforce a judgement granted in Florida relating to a bail appearance bond, where the purpose of the enforcement action was the action of foreign penal law/process. Hence this can be used as a defence by the defendant. However the civil judgement, though combined with a penal judgement, may be actionable by creating a separate and independence cause of action despite the general principle that penal law imposed abroad are disregarded.⁷⁹ In **Raulin V. Fischer**⁸⁰; the defendant, a young American lady, while recklessly galloping her horse in the Bois de Boulogne, ran into the plaintiff, a French officer, and seriously injured him. She was prosecuted by the state for her act of criminal negligence. By the French law a person who is injured by a crime may intervene in prosecution and make a claim for damages, where upon his civil action is tried together with the prosecution and one judgement is pronounced on both matters. The Plaintiff did so intervene. The defendant was convicted of the crime and ordered to pay a fine of 100 Francs to the state and 15,917 francs by way of damages and costs to the plaintiff. It was held by the court in these facts, that in action brought by Plaintiff in England to recover the sterling equivalent of 15,917 francs, that the French judgement was severable. That part of it which awarded the plaintiff damages was not tainted with the penal character of the rest of the proceeding, and therefore might be put without involving recognition of penal judgement.

2.6.4A foreign Judgement on the matter already Determined by the Court

A foreign Judgement will not be recognised if the matter in respect of the same parties and same dispute has already been conclusively determined by the court. The House of Lords of England once dealt with a kind of situation in **Vervaeke V. Smith**;⁸¹ the facts were as follows; In 1954, the appellant, a Belgium domicile woman, entered into sham marriage (i.e the parties did not intend to live as husband

⁷⁸ (1989) QB 225

⁷⁹ North P.M. and Fawcett J. J (1992); supra note 2 at p. 382

⁸⁰ (1911) 2 KB 93

⁸¹ (1983) 1 AC 145

and wife thereafter) with an English man (Smith) in order to avoid deportation. In 1970 the Appellant married in Italy, Messina, who died on the day of the ceremony. The appellant wished to inherit Messina's property as his "wife". An obvious obstacle to this was her previous marriage to Smith. She therefore sought a decree of nullity in England in respect of her first marriage on the ground of lack of consent. This petition was dismissed; the marriage was not invalidated, even though it was a sham marriage. Later on the appellant went to Belgium where she obtained the decree of nullity on the ground that the marriage was a sham. Armed with Belgium court's decree, the appellant returned to England and sought a declaration that a Belgium judgement was entitled to recognition in England, and the declaration that this being so, the marriage between the appellant and Messina was valid (the second marriage). The court dismissed the petition and the appeal to Court of Appeal was dismissed. The appellant appealed to the House of Lords, where the House of Lords dismissed the petitions, by refusing the recognition of the Belgium judgement. It means that the earlier English judgement, which determined the validity of marriage, meant the matter was *res judicata*. The Belgium judgement was in respect of the very same matter, which is the validity of marriage which previously determined by English court.

2.6.5 An Overseas Judgement in breach of the Settlement of Dispute Agreement

Under English law this defence is provided in section 32 of the Civil Jurisdiction and Judgement Act 1992 that a judgement given in an overseas court shall not be recognised or enforced if those proceeding was contrary to an agreement under which the dispute in question was to be settled. The background to section 32 is that some legal systems are much stricter than others in their requirements as to when arbitration or choice of court agreement is incorporated into a contract.⁸² A party who wants to avoid such an agreement may be able to do so by seeking trial in a country which does not accept the agreement being effective. He may obtain judgement in his favour. Then when it comes to England where court recognises the agreement, such foreign judgement shall not be recognised and enforced.⁸³

⁸² North P. M and Fawcett J.J (1992); *supra* note 2 at p. 389

⁸³ *Ibid*

For instance, in **Tracom SA V. Sudan Oil Seeds Co Ltd**⁸⁴; a dispute arose between the Sudanese sellers of peanuts and Swiss buyers. The contract between the parties contained a clause providing for the settlement of disputes by arbitration in London. Despite this, the buyer brought an action for damages before Swiss courts. The Sellers unsuccessfully sought a stay of those proceedings, relying on the arbitration clause. The Swiss court decided that the arbitration clause was invalid because it had not been properly incorporated into the contract under Swiss law, no evidence of English law, which governed the contracts, having been given. Under English law the arbitration clause had been incorporated into the contracts. The buyers sought an injunction in England restraining the arbitration in London, on the basis that the Swiss judgement created estoppels in relation to the issue of validity of arbitration clause. The Court of appeal of England refused to recognise the Swiss judgement for having gone contrary to the arbitration clause.

2.6.6 Foreign Judgement contrary to Natural Justice

Judge Shadwell once said in **Price V. Dewhurst**⁸⁵, that whenever it is material that justice has been disregarded, the court is bound to treat such decision as a matter of no value and no substance. However, this has to be relied with care as a matter of principle foreign judgement is to be enforced as it is notwithstanding that it was proceeded under wrong view of evidence or of foreign law.

The expression *natural justice* has however, figured so prominently in judicial statements that it is essential to fix, if possible the exact scope. When applied to foreign judgements it relates merely to alleged irregularities in the procedure adopted by the adjudicating court, and has nothing to do with the merits of the case. For instance it may relate to the matter of due notice and the proper opportunity to be heard.

The question whether the defendant had a proper opportunity to be heard arose in **Jacobson V. Frachon**⁸⁶, where the facts were as follows; **A & Co** of London agreed to buy crepe de Chine from **B** of Lyons. **A & Co** brought an action in France for

⁸⁴ (1983) 1 WLR 1026, CA

⁸⁵ (1837) 8 Sim 279 at p. 302

⁸⁶ (1928) 138 LT 386

cancellation of the contract on the ground that the deliveries of material were short in quantity and inferior in quality. The French court before giving judgement appointed an expert to examine the material in London. The expert who was relative to **B**, made no proper examination, and, though deputed by the court to take evidence, refused to hear the evidence of **A & Co** and their witnesses. He ultimately made a report adversely to **A & Co** which was found by Roche J to be uncandid production of biased and prejudiced mind. Judgement for **B** was given in French court. **A & Co** then sued **B** in England for breach of the original contract. **B** pleaded the French judgement in bar of action, but **A & Co** replied that this judgement was contrary to natural justice. The Court of Appeal of England held that the judgement was not void as contravening the requirements of natural justice, since **A & Co** had not been prevented from presenting their case to the adjudicating court. It appeared that by French law the court was not bound by the expert report, but could reject it if satisfied of its inaccuracy. Thus **A & Co** were at liberty to produce witness to the court and to attack the report.

This means that a party has to raise his defences at the trial court and not to await during enforcement in the foreign court as not all kind of defences are acceptable at the time of enforcement in foreign courts, some may be rejected if were negligently not raised at the forum court proceeding.⁸⁷

2.7 Proof of Foreign Law

Recognition and enforcement of foreign judgement is in conjunction with the proof of foreign law to the state which the enforcement is sought. The English practice illustrates this which may be helpful to other jurisdictions too.

That if the foreign law is pleaded, English court is invited to apply law of which it is ignorant because English court takes judicial notice of English law and not of foreign law. A party seeking to rely on foreign law has, therefore, to produce evidence on the content of foreign law.⁸⁸ In this sense, foreign law is a matter of facts and has to be

⁸⁷ North P.M and Fawcett J.J. (1992) supra note 2 at p. 371 This principle was also pronounced by the Court of Appeal of England in *Israel Discount Bank of New York V. Hadjipatarens* (1984) 1 WLR 137, it said, “*the defendant must take all available defences in the foreign country.*”

⁸⁸ McLean David (2010) supra note 55 at p. 11

proved like any other facts⁸⁹, though has been held and are taken as matter of fact of a peculiar kind.⁹⁰ The foreign court for instance, may determine as to whether the court had jurisdiction to try the case.

A foreign judges or legal practitioners are of course competent witness for this purpose. However a person may be competent though his or her expertise is not that of a lawyer as such, any person who by virtue of a profession or calling has acquired a practical knowledge of the foreign law may be competent witness. Like Diplomatic and consular officers, academic lawyers, bishop, merchants and bank managers.

In **MacMillan Inc. V. Bishogate Investment Trust PLC**⁹¹ the Court of Appeal of England summarised the functions of the expert witness as being; to inform the English court the relevant contents of foreign law; identifying statutes or other legislations and explaining where necessary the foreign court approach to their construction; and to identify judgements or other authority, explaining what statutes they have as the sources of the foreign law.

2.8 Conclusion

This Chapter has discussed the concepts which have close bearing with the subject of the research. The chapter has discussed the concepts like, the meaning of judgement, recognition of foreign judgement, the grounds for non-recognition of the foreign judgement, the enforcement of judgement, the defences available to the defendants and the proof of foreign law. These concepts have a bearing with the research at hand and will bring positive assistance to the understanding of the matter relating to the recognition and enforcement of foreign judgement to the reader in the next chapters.

⁸⁹ McLean David (2010) supra note 55 at p. 11

⁹⁰ Parkasho V. Singh (1968) p. 233 per Cairns J. at 250

⁹¹ (1999) C.L.C 417 at para 10

CHAPTER THREE

THE LEGAL FRAMEWORK RELATING TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENT

3.1 Introduction

This chapter is made part of this research report to serve the purpose of explaining the system of laws in East African partner states on the recognition and enforcement of foreign judgement. This will go hand in hand with the analysis of international law on the matter, including treaties, conventions, protocols and declarations having bearing to this study. This chapter will go much into detail on the legal regime in East African states analysing the law relating to the recognition and enforcement of foreign judgement.

3.2. International Legal Regime

3.2.1. The Hague Convention on Recognition and Enforcement of Foreign Judgement in Civil and Commercial Matters of 1971⁹²

The Convention (Hague Convention 1971) establish common provisions on the mutual recognition and enforcement of judicial decisions rendered in their respective countries, that is states which are signatory to the Convention. The state which is member to the Convention, ensures that it recognise, respects and its courts enforce the judgement of its colleague's members states rendered in civil and commercial matters.⁹³ Currently there are 78 members to the Convention, 77 states and 1 Regional Economic Integration Organisation (the European Union). None of the five member states to EAC is a member to the Hague Convention 1971.⁹⁴

⁹² It was adopted on 1 February 1971, it has supplementary Protocol adopted on the same day

⁹³ Article 1 of the Hague Convention 1971

⁹⁴ As per ratification Chart, retrieved from www.hcch.net/ir, accessed on 13th November 2014. However it could be noted that a state may not be a member to the Hague Convention of 1971 but party to some of the several conventions adopted under the auspice of the Hague Convention 1971 and the Hague Conference on Private International Law of 1893. For instance three of the EAC member states are parties to some of the conventions. Burundi is bound by two conventions namely Convention of 05th October 1971 Abolishing the Requirement of the Legalisation for Foreign Public Documents, and Convention of 29th May 1983 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Kenya is bound by the Convention of 29th May 1983 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Rwanda is bound by

Generally, in order for the judgement to be recognised and enforced by the contracting states, it must qualify the following conditions,⁹⁵ namely the court of competent jurisdiction gave such judgement. A court is said to have jurisdiction of the defendant if at the time of proceedings had habitual residence in the state of origin. In case of the company, it had its principal place of business or a branch office is established at the state of origin and the proceeding arose from the business transaction or the immovable property is situated in the state of origin or in case to the injuries to the person or the damage to tangible property, the damage occurred in the territory of the state of origin or parties agreed by written contract to vest jurisdiction to the court of origin.

The judgement must be final and conclusive, that is not subjected to ordinary appeal or review in the state of origin. The nature of judgement must be the one which is enforceable in the state of origin.⁹⁶

A party seeking enforcement must make application to the designated court of the foreign state (contracting state). The application has to be accompanied by the following documents,⁹⁷ namely a complete and authenticated copy of the decision, the original or certified true copies of the original required to establish that summons was duly served on the defendant or defaulting party if judgement was rendered by default, all documents that establish that the decision was passed by the competent court and is not subject to review in the state of origin, thus such decision is enforceable at the state of origin, and in addition, where the authority addressed requires so, the formulation of the documents referred should be furnished with the certification of its correctness either by diplomatic or by translator.

the Convention of 29th May 1983 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

⁹⁵ Ibid article 10

⁹⁶ Ibid article 4

⁹⁷ Ibid article 13

The enforcing court is allowed to use its forum rule save that those rules do not offend the provisions of the Convention, or if the Convention provides for the procedure, then it has to be followed.⁹⁸

3.2.2 The New York Convention of 1958⁹⁹

The Convention is specifically for foreign awards relating to civil and commercial matters which its enforcement is sought in another contracting party. Thus generally it is less concerned with judgement of the ordinary courts, however in some EAC member states award has been described to amount to judgement.¹⁰⁰ Article 1 (1) of the Convention provides as follows; *This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.* Article 1 (2) further describes the phrases “arbitral award” to include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

The Convention is widely ratified, and for East African member states, out of five, only one state is not party to it.¹⁰¹ The Tanzania Arbitration Act recognises the foreign arbitral awards and is accordingly enforceable in the country.¹⁰²

⁹⁸ Ibid article 14

⁹⁹ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award, done at New York, 10th June 1958

¹⁰⁰ For instance, part of section 8 of Cap. 9 of Law of Uganda provides that; ***this Part of this Act shall have effect in relation to that territory as if the expression “judgment” included an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place***

¹⁰¹ Burundi is not party to Convention, the rest Tanzania, Rwanda, Kenya and Uganda are party to Convention; as per ratification chart by December 2013

¹⁰² Chapter 15 of the Laws of Tanzania, section 29 (1) provides that; *(1) A foreign award shall, subject to the provisions of this Part, be enforceable in the High Court either by action or under the provisions of section 16 of this Act.* In Kenya the matter relating to foreign arbitral awards are included in the statute relating to foreign judgement, Cap. 43

The Convention require the contracting party to recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the Convention.¹⁰³ It further restrict state party not to impose had rules or high fees, it requires equal treatments as to those of domestic arbitral award.¹⁰⁴

The interested party has to apply to court and the application must accompany the following; the duly authenticated original award or a duly certified copy thereof; the original agreement referred to in article II or a duly certified copy thereof. It further add that, if the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Like the foreign judgement, the recognition and enforcement of foreign arbitral awards can also be refused its recognition on the grounds which are almost equal to those relating to foreign judgement at the request of the party which it is invoked. Article IV of the Convention provides for the grounds of refusal upon proof of the followings;

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on

¹⁰³ New York Convention 1958 Article III

¹⁰⁴ Ibid

matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or The recognition or enforcement of the award would be contrary to the public policy of that country.

The New York Convention has replaced, only among contracting parties, the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927¹⁰⁵

Some Regional bloc has already in place agreement for recognition and enforcement of foreign judgement, the well notable one which stand as a model to world is the European Union with its Brussels Regime. The Brussels Regime includes the Brussels Convention of 1968, the Lugano Convention of 1988, the Lugano Convention of 2007 and the Brussels Regulation (EC) No. 44 of 2001.¹⁰⁶ The Brussels Regime is a set of rules regulating which courts have jurisdiction in legal disputes of a civil or commercial nature between individuals resident in different member states of the European Union and the European Free Trade Area.¹⁰⁷ It has

¹⁰⁵ Ibid article VII (2)

¹⁰⁶ Wikipedia, accessed on 10/02/2014

¹⁰⁷ Ibid

detailed rules assigning jurisdiction for the dispute to be heard and governs the recognition and enforcement of foreign judgements.¹⁰⁸

At international level, there is in place the Hague Convention on the Recognition and Enforcement of Foreign Judgement in Civil and Commercial Matters of 1971. The foreign awards are regulated by the New York Convention¹⁰⁹

3.3 Regional Legal Framework

3.3.1 The Brussels Regime

3.3.1.1 Brussels Convention of 1968¹¹⁰

The 1968 Brussels Convention is the original source for legislation. Although it is still in force between the 15 states making up the European Union before the entry into force of the Brussels I Regulation, the Regulation takes precedence and the Convention is only relevant in its relationship between European Union and certain territories of the EU member states to which the Convention applies but outside of the EU geographically.¹¹¹

Title III (articles 25 to 49) of the Convention is specifically for matters relating to the recognition and enforcement of foreign judgements among EU member states. Article 26 requires a contracting party to recognise a judgement rendered by the court of another contracting party without any special procedure being required, and it is an interested party who is required to make such application. In the case of **De Wolf V. Cox**¹¹² the European Court of Justice held that, in the situation Title III applies, the enforcement procedure in those sections must be used. The national rules cannot be used as an alternative. The case concerned a Belgium judgement for a small amount of money, which was recognised by a Dutch court under the Convention. The Dutch Court wrongly applied Dutch procedure for enforcement, which was cheaper than the procedure under the convention.

¹⁰⁸ Ibid

¹⁰⁹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (done at New York, 10th June 1958)

¹¹⁰ Brussels Convention on Jurisdiction and Enforcement of Foreign Judgement on Civils and Commercial Matters of 1968

¹¹¹ For instance, Aruba, the French overseas territories and Mayotte.

¹¹² (1976) ECR 1759

Article 27 provides for the grounds for non-recognition of the foreign judgement which are framed as follows; (1) If such recognition is contrary to public policy in the State in which recognition is sought; (2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence; (3) if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought; (4) if the court of the State in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State; (5) if the judgment is irreconcilable with an earlier judgment given in a non-Contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognition in the State addressed.

The stay of the recognition if there is an appeal in original court is provided under article 30. Article 31 is about the enforcement of judgement, it provides that a judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there. The judgement is to be enforced as it is, as enforcement court are prohibited to review its substance (article 29)

Article 32 designate court in each contracting state in which recognition and enforcement of foreign judgement is to be sought.¹¹³ The judgement debtor may

¹¹³ For instance, United Kingdom designated courts are; (1) in England and Wales, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court on transmission by the Secretary of State; (2) in Scotland, to the Court of Session, or in the case of a maintenance judgment to the Sheriff Court on transmission by the Secretary of State; (3) in Northern Ireland, to the High Court of Justice, or in the case of a maintenance judgment to the Magistrates' Court on transmission by the Secretary of State. The jurisdiction of local courts shall be determined by reference to the place of domicile of the party against whom enforcement is sought. If he is not domiciled in the State in

appeal against the decision authorising enforcement and that the same are to in accordance with the rules governing procedure in contentious matters of the state in which recognition is sought.¹¹⁴ The same applies to the Applicant, he has a right of appeal if recognition is refused (article 40).

Article 57, direct that contracting parties are not forbidden to enter into other international or regional treaties in relation to the recognition and enforcement of foreign judgement, and that the Brussels Convention shall not affect those other conventions entered before or later.

3.3.1.2 The Lugano Convention¹¹⁵

The Lugano Convention 2007 extends the free circulation of judgement beyond the European Community to what is left of the EFTA bloc (Iceland, Norway and Switzerland). It does this by means of parallel Convention, based closely on the Brussels Convention, albeit not identical the same.

The Lugano Convention applies in the situation where Recognition and enforcement is sought in one contracting state in respect of a matter coming from within the scope of the Convention. This is also a position under the Brussels Convention and presents no problem for EFTA contracting parties to both the Lugano and Brussels Convention. Article 54B of the Lugano Convention deals with the relationship with Brussels Convention. The Lugano Convention applies in the matter of enforcement, where either the state of origin or the state addressed is not a member of the European Community, but is of course a contracting state to Lugano convention.

3.3.1.3 The 2001 Brussels 1 Regulation

The 2001 Brussels 1 Regulation¹¹⁶ is the primary piece of legislation of the Brussels Regime. It substantially replaced the 1968 Brussels Convention; it applies to EU

which enforcement is sought, it shall be determined by reference to the place of enforcement. In Italy, to the *corte d'appello* ; in Luxembourg, to the presiding judge of the *tribunal d'arrondissement* ; in the Netherlands, to the presiding judge of the *arrondissementsrecht bank*

¹¹⁴ Article 37 and 33 of the Brussels Convention

¹¹⁵ There are two Lugano Convention, that of 1988 and that of 2007; both deals with jurisdiction and enforcement of foreign judgement in civil and commercial matters, the later has substantially replaced the former but not repealed it all together because the former still applies to dispute referred to court before entry into the 2007 Lugano Convention (article 63)

member states excluding Denmark. Later in 2005 Denmark signed an agreement with European Community to apply the provisions of the 2001 Regulation between the EU and Denmark. Like the Brussels Convention, it also applies in the matters relating to the jurisdiction and enforcement of foreign judgement on civil and commercial matters.

In 2012 the EU institutions adopted a recast Brussels 1 Regulation which will replace the 2001 Regulation in 2015. The main change is that while the 2001 Regulation applies only to individuals resident in the European Union, the recast regulation will harmonise the rules under which individuals resident outside the EU may be sued in the courts of EU member states.

Generally all four legal instruments under Brussels Regime are broadly similar in contents and application, with the differences in their territorial application. They establish general rules that individuals are to be sued in state of domicile and then proceed to provides for the list of exceptions. The instruments also provides for the recognition and enforcement of foreign judgements in countries member to the instruments.

3.3.2 Recognition and Enforcement at Common Laws

At Common law rules, a judgement creditor has two alternatives. He may either sue on the obligation created by the judgement, or he may plead the judgement as *res judicata* in any proceedings which raise the same issue.¹¹⁷ The common law doctrine is that a foreign judgement, though creating an obligation that is actionable in England, cannot be enforced without the institution of the fresh legal proceeding. The Plaintiff/decree holder may apply for summary judgement on the basis that the defendant has no defence to claim. Furthermore, any action in England will require the English rules as to jurisdiction and service of claim to be satisfied.¹¹⁸

¹¹⁶ It came into force on 1 March 2002

¹¹⁷ North P.M and Fawcett J.J (1992); *supra* note 2 at p. 348

¹¹⁸ *Ibid*

3.4. The East African Community

The East African Community (EAC) as we know it today, is a creature of the Treaty Establishing the East African Community (the EAC Treaty).¹¹⁹ Apart from the founding member states, namely Tanzania, Uganda and Kenya, two more states later joined the Community, namely Burundi and Rwanda.¹²⁰

This being the case, the EAC Treaty is indubitably governed by the Vienna Convention on the Law of Treaties (VCLT) of 1969. According to the basic principle of both civil law and international law, having signed and ratified the EAC Treaty, State Parties are duty bound to fulfil their respective obligations in good faith (*pacta sunt servanda*)¹²¹, though it has been made clear that the implementation of the treaty will be step by step.¹²² Among the principle agreed in the EAC Treaty is the harmonisation of law and standardisation of judgement among the member states.¹²³ It has also been agreed for enforcement of the judgement rendered by the EAC Court of Justice in the member states.¹²⁴ The treaty is however silent on the judgement originating from the courts of the partner state which are to be enforced in another partner states.

¹¹⁹ Signed on November 30, 1999 by the three founding states namely Tanzania, Kenya and Uganda; see Article 2 and 3 (1) of the EAC Treaty of 1999. The predecessor of the present EAC had collapsed on 1977 after having existed for only ten years from 1967 to 1977 for no other reason than the problems inherent in its own establishment, including political and ideological conflicts and different amongst the three partner states namely Kenya, Tanzania and Uganda; See **Prof. Michael Wambali**; Constitution Reform in Tanzania and its Impact on the Intergration Processes in the East African Community, in the Tanganyika Lawyers, Tanganyika Law Society, Volume 1 of 2003 at p. 5

¹²⁰ Article 3 (1) allows for more membership states to join the EAC community.

¹²¹ Article 26 of Vienna Convention on the Law of Treaty, 1969

¹²² For instance Article 5 (2) of the EAC Treaty provides; *In pursuance of the provisions of paragraph 1 of this Article, the Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared.* Therefore the Treaty envisages a step by step progression, beginning with the rudimentary, to the most sophisticated. Beginning with a Customs Union, and ultimately, arriving at Political Federation. In other words, by way of *Gradualism*.

¹²³ Article 5 of the EAC Treaty

¹²⁴ Article 44 of the EAC Treaty

Hereunder follows the description of the legal framework prevailing in each member states of the EAC community on the matter relating to the recognition and enforcement of foreign judgement.

3.4.1 Tanzania Legal Framework

Tanzania is union state comprising of two semi-independent states, namely Tanzania Mainland and Tanzania Zanzibar, the union of which was formed in 1964.¹²⁵ This being the case there are two parallel system of law in Tanzania, that is one prevailing in the Mainland Tanzania and other in Tanzania Zanzibar.¹²⁶ However as noted by Prof. Kabudi, the law for Mainland Tanzania are enacted by the Union Parliament and as the result apply in the Mainland and some cover the mainland and the whole Tanzania.¹²⁷

The recognition and enforcement of foreign judgement in Tanzania is regulated by the statutes, namely the Reciprocal Enforcement of Foreign Judgement Act (Cap.8)¹²⁸, the Extension of Judgement Act (Cap. 7)¹²⁹, and the Civil Procedure Code (Cap.33). However it is not limited to that, as common law can also be resorted as the legal system allows its applicability if there is a lacuna.¹³⁰ For the foreign judgement to be enforced in Zanzibar, the beneficiary has to apply the Civil Procedure Decree of Zanzibar¹³¹, in which sections 8 and 9 take into consideration of the foreign judgement to be forced in Zanzibar. Further to that, for a judgement from

¹²⁵ Article 2 on the Constitution of the United Republic of Tanzania of 1977 (as amended from time to time); But it should be noted that there is an on-going process to have a new Constitution in place (see The Constitutional Review Act Cap. 83; Tanzania Government Notice No. 20 published on 24/01/2014 which published the Draft Constitution; Tanzania Government Gazette No. 4 Vol. 95 dated 24 January 2014) , and the members of the Constitutional Parliament have already been appointed, see Mwananchi News Paper of 08th February 2014 front page.

¹²⁶ Article 4 of the URT Constitution

¹²⁷ **Prof. Kabudi. P (2006)**; International and Regional Fisheries Agreements and Organisation Relating to the United Republic of Tanzania, SADC Monitoring Control and Surveillance of Fisheries Activities Programme, Working Paper No. 45 March 2006 at p. 4; see also Article 34 and 64 of the Tanzania Constitution

¹²⁸ Chapter 8 of the Laws of Tanzania

¹²⁹ Chapter 7 of the Laws of Tanzania

¹³⁰ Section 2 of the Judicature and Application of Laws, Chapter 358 of the Law of Tanzania.

¹³¹ Cap. 8 of the Law of Zanzibar; section 2 define foreign court to mean a court situated beyond the limit of Zanzibar which has no authority in Zanzibar; foreign judgement is defined to mean a judgement of the foreign court

United Kingdom enjoy the specific law in Zanzibar, that is the judgement creditor has to resort to the so called British Judgement Decree¹³²

The subsidiary legislation to Cap. 8 of Tanzania and the principal Act itself does not mention any of the EAC member states as reciprocating states, it is the Cap. 7 on Extension of Judgement which mention only two out of five, namely Kenya and Uganda as states which judgement from there can be recognised and enforced in Tanzania

Section 3 (1) of Cap. 8 provides that the President, if he is satisfied that, in the event of the benefits conferred by Cap.8 being extended to judgements given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgements given in the superior courts may, by order direct (a) that this Part shall extend to that foreign country; and (b) that such courts of that foreign country as are specified in the order shall be deemed to be superior courts of that country for the purposes of this Part.

The clear interpretation of the section is that the recognition and enforcement of foreign judgement in Tanzania is basically founded on reciprocity. And section 11 empowers the President to disallow those foreign judgements from the foreign states which does not accord in substantially manner the judgement from Tanzania.

Under section 4 of Cap. 8, the beneficiary of the judgement has to apply for the enforcement of the foreign judgement within six years of the date in which the said judgement was issued. The judgement on money must be converted to Tanzania currency, the **rate of exchange is that which was prevailing at the time of judgement.** (section 4 (3))

Section 2 of Cap. 7 accord judgement just from few named states including High Court of Zanzibar which is part to Union of Tanzania which are to be enforced in Tanzania Mainland. Other states' courts named in the said statute are High Court of Zambia, High Court of Malawi, High Court of Kenya and High Court of Uganda.

¹³² Chapter 9 of the Laws of Zanzibar; its long title provides that; "*A Decree to provide for the enforcement in Zanzibar Protectorate of the Judgement obtained in a Superior Court in the United Kingdom*"

Section 11 of the Tanzanian Civil Procedure Code¹³³ provides for what amount to conclusiveness of foreign judgement and for the grounds of non-recognition of the same. The said section provides that;

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except; (a) where it has not been pronounced by a court of competent jurisdiction; (b) where it has not been given on the merits of the case; (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Tanzania in cases in which such law is applicable; (d) where the proceedings in which the judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud and (f) where it sustains a claim founded on a breach of any law in force in Tanzania.

A judgement against a person who according to the law, be municipal or international had privilege of immunity cannot be recognised and enforced (section 6 (3) of Cap. 8). Section 12 of Cap.33 amount to the proof of the foreign judgement presented for enforcement, as it provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

Section 42 of the Law of Limitation¹³⁴ provides that no new cause of action shall be deemed to have arisen on a proceeding in Mainland Tanzania on a foreign judgment. That is foreign judgement operates as res judicata for the fresh suit in another foreign country

¹³³ Cap. 33 of the Laws of Tanzania, RE 2002

¹³⁴ Chapter 89 of the Law of Tanzania

3.4.3 Kenyan Legal Framework

Kenya is the commonwealth countries in such common law rule on recognition and enforcement of foreign judgements are applicable.¹³⁵ In regard to the statutory regime, the enforcement of foreign judgements in Kenya is regulated by the statute, namely the Enforcement of Foreign Judgement (Reciprocal Enforcement) Act (Cap. 43).¹³⁶ The said statute covers foreign judgements and the foreign awards (section 3 (1) (f)). The Civil Procedure Code of Kenya provides too for foreign judgement.¹³⁷

Section 13 of the Act provides for the country in which the judgement originates for enforcement in Kenya. It is framed in the following language;

(1) Where the Minister is satisfied that provisions which are substantially reciprocal will be or have been made by a country outside Kenya for the enforcement therein of judgments given by the superior courts in Kenya, he may, by order, declare that country to be a reciprocating country for the purposes of this Act and that this Act shall apply with respect to judgments given by the superior courts of that country.

(2) An order made under subsection (1) shall, where the reciprocating country is not a Commonwealth country, specify the courts which are deemed to be the superior courts of that country for the purposes of this Act.

*(3) Where the Minister is satisfied that provisions which are substantially reciprocal will be or have been made by a country outside Kenya for the enforcement therein of judgments given by subordinate courts in Kenya, he may, by order, declare that this Act shall apply with respect to judgments of that **subordinate courts of that country** and the order shall specify the courts in that country*

¹³⁵Section 14 of the Foreign Judgement (Reciprocal Enforcement) Act, Cap. 43 of the Laws of Kenya

¹³⁶ Chapter 43 of the Law of Kenya

¹³⁷ Section 9 which provide that “A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title,.....”.

which are deemed to be subordinate courts for the purposes of this Act.

The Act limit the judgements to which it applies, that is only judgement which fall under these categories, a judgment or order of a designated court in civil proceedings whereby a sum of money is made payable, including an order for the payment of a lump sum as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependents of another; (b) a judgment or order of a designated court in civil proceedings under **which movable property is ordered to be delivered to any person**, including an order for the delivery of movable property as part of a scheme for the provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a defendant of another; (c) a judgment or order of a designated court in criminal proceedings for the payment of a sum of money in respect of compensation or damage to an injured person or for the delivery of movable property by way of restitution to an injured person; (d) a judgment given in any court on appeal against a judgment or order of a designated court referred to in paragraphs above, a judgment of a designated superior court for the costs of an appeal from a subordinate court, whether or not a designated court, or from an award referred to in paragraph (f); and (f), an **award in arbitration proceedings**, if the award has, under the laws in force in the country where it was made, become enforceable in the same manner as a judgment given by a designated court in that country.

Section 4 empowers Kenyan's courts¹³⁸ to determine as to whether the foreign court had jurisdiction to adjudicate upon the cause of action. Section 5 require a decree holder to apply for enforcement of the foreign judgment within six year from the date of judgment. In some circumstances the application can be made *ex parte*.¹³⁹

¹³⁸ The designated courts for the purpose of the Act are Court of Appeal and the High Court, as per section 2 of Cap. 43, Laws of Kenya

¹³⁹ Section 5 (2) Cap. 43 of the Law of Kenya; When is proved that the judgment debtor (i) was personally served with process in the original action; or (ii) though not personally served, appeared in the original court otherwise than for one or more of the purposes set out in section 4 (2) (b); and (b) under the law in force in the country of the original court, the time within which an appeal may be made against the judgment has expired and no appeal is pending or an appeal has been heard and disposed of. It further provides that, where an application is made under subsection (1) *ex parte*, the court hearing the application, instead of allowing it, may direct a summons to be issued, but if no such

The application must be accompanied with a certificate as set out in the schedule,¹⁴⁰ the certified true copy of the judgment and the affidavit stating that the judgment has not been satisfied, and that the judgment can be enforced in the original court; and the certificate issued by the judge certifying that the Court is the superior in that country.¹⁴¹ Under section 7, the **currency payable is that of Kenya converted from the foreign currency prevailing at the date of filing for registration of the judgment in question**. The Court is also empowered under the Act to issue garnishee order against the judgment debtor (section 9).

A foreign judgment cannot be registered in Kenya if it is proved that it has been fully satisfied or the same cannot be enforced in the country of origin.¹⁴² Moreover the already registered judgment can be set aside on application by judgment debtor on the following grounds;¹⁴³ namely, that (a) the judgment is not a judgment to which the Act applies; (b) the judgment was registered in contravention of the Act; (c) the courts of the country of the original court had no jurisdiction to adjudicate upon the cause of action upon which the judgment was given; (d) the judgment debtor did not appear in the original court and the jurisdiction of that court was based upon an agreement by the judgment debtor to submit to its jurisdiction which is invalid under the rules of private international law of Kenya; (e) the cause of action upon which the judgment was given had at the date of that judgment been the subject of a final and conclusive judgment of a court having jurisdiction to adjudicate upon that cause of action; (f) the matter in relation to which the judgment was given had, subsequent to the date of that judgment, and as a result of proceedings instituted prior to the institution of the proceedings in the original court, become the subject of a final and conclusive judgment of a court in Kenya which is irreconcilable with the judgment of the original court.

direction is given notice of the registration of the judgment made on the application shall be served upon the judgment debtor in accordance, mutatis mutandis, with order V of the Civil Procedure Rules.

¹⁴⁰ It the format in which the certificate has to look like

¹⁴¹ Section 5 (4) of Cap. 43 of the Law of Kenya

¹⁴² Ibid, section 6

¹⁴³ Ibid section 10

It further provides for the grounds for rejection of the foreign judgments' that the judgment debtor, being the defendant in the original proceedings (i) was not duly served with the process of the original court; or (ii) notwithstanding that he was duly served in conformity with the law of the country of that court, did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings; (h) the judgment was obtained by fraud, other than fraud which was, or could have been, put in issue by the judgment debtor in the proceedings in the original court or on appeal there from; (i) there are provisions of the law of Kenya which, by virtue of the rules of private international law of Kenya, would have been applicable notwithstanding any choice of another system of law by the judgment creditor and the judgment debtor, had the proceedings been brought in the High Court, and the judgment disregards those provisions in some material respect; (j) it was necessary for the original court, in order to give its judgment, to decide a question relating to any matter specified in paragraphs (c) to (k) of section 3(3) and the decision is different from that which the High Court, having applied the rules of private international law of Kenya to that question, would have reached; (k) the judgment has been taken on appeal, and reversed or discharged or otherwise set aside, in a court of the country of the original court; (l) the judgment debtor is a person who, under the rules of public international law, is entitled to immunity from the jurisdiction of the High Court; (m) the rights under the judgment are not vested in the person by whom the application for registration was made; (n) and finally, if the enforcement of the judgment would be manifestly contrary to public policy in Kenya.

A judgment debtor has further room to stop enforcement of the judgment as section 11 allow him to make an application to set aside the registration of judgment on the ground that there is an appeal pending against the judgment.

Courts in Kenya have power to inquire if the foreign court had jurisdiction to determine the matter¹⁴⁴. Judgments on criminal cases are enforceable to the extent of compensation awarded to the victim.¹⁴⁵ But the law has set a limit of amount of

¹⁴⁴Section 4 (1) of Cap. 43 of Law of Kenya

¹⁴⁵Section 3 (c) of Cap. 43 of the Law of Kenya

money in which courts are allowed to enforce according to the Private international law of Kenya.¹⁴⁶

The schedule to Cap. 43 of the Law of Kenya contain the list of the reciprocating state on the matter in which three EAC states have been listed, namely Tanzania, Uganda and Rwanda; that is to say, in the list Burundi is missing. But section 14 empower the Minister to make an arrangement with any other country not falling in the commonwealth states, for the purpose having judgment from that specified state to be recognized and enforced in Kenya.

3.4.2 Uganda Legal Frame Work

The Foreign judgements in Uganda are regulated under the Foreign Judgement (Reciprocal Enforcement) Act, 1961¹⁴⁷ and Judgement Extension Act, Cap. 12; and the section 9 and 10 of its Civil Procedure Code.¹⁴⁸ Uganda is common law country in such common law apply too.¹⁴⁹

Unlike Tanzania law which empower the President, Ugandan law under section 2 (1)¹⁵⁰ empower the Minister for legal affairs , if he or she is satisfied that, in the event of the benefits conferred by that Act being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the

¹⁴⁶Section 10 (3) of Cap. 43 of Law of Kenya

¹⁴⁷ Chapter 9 of the Laws of Uganda

¹⁴⁸ The wordings of those two sections is parimateria to sections 11 and 12 of Tanzania civil Procedure Code and section 9 and 10 of Kenya Civil Procedure Code as they generally provides that; *“A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except–*

- (a) *where it has not been pronounced by a court of competent jurisdiction;*
- (b) *where it has not been given on the merits of the case;*
- (c) *where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Tanzania in cases in which such law is applicable;*
- (d) *where the proceedings in which the judgment was obtained are opposed to natural justice;*
- (e) *where it has been obtained by fraud;*
- (f) *where it sustains a claim founded on a breach of any law in force in*

Tanzania/Kenya or Uganda”

¹⁴⁹section 8 of Chapter 9 of Laws of Uganda

¹⁵⁰ Chapter 9 of the laws of Uganda

superior courts of Uganda, may by statutory order direct that this Part of the Act to extend to that foreign country; and that such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for the purposes of Act. The same statute empower the Minister to revoke the order made thereof. In addition section 10 makes clear that there could be no enforcement of foreign judgment if the said state has not been declared to be reciprocating state to Uganda on the matter.

The beneficiary of the judgment is required to apply to High Court within six years for enforcement.¹⁵¹ The law also provides for grounds for non-recognition or defences against foreign judgments as envisaged under section 5 which may render the judgments being set aside, those are (i) that the judgment is not a judgment to which the Act applies or was registered in contravention of the foregoing provisions of the Act; (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; (iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him or her in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him or her to defend the proceedings and did not appear; (iv) that the judgment was obtained by fraud; (v) that the enforcement of the judgment would be contrary to public policy in the country of the registering court; or (vi) that the rights under the judgment are not vested in the person by whom the application for registration was made, and if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

Further, under Ugandan law, a foreign judgment is conclusive as to any matter directly adjudicated upon between the same parties, or between parties under whom they, or any of them, claim to be litigating under the same title, except where: it was not pronounced by a court of competent jurisdiction; it was not given on the merits of

¹⁵¹ Ibid, section 3

the case; it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise Ugandan law in cases where that law was applicable; the proceedings in which the judgment was obtained are opposed to natural justice; it was obtained by fraud; or it sustains a claim founded on a breach of Ugandan law.¹⁵² Foreign judgement to person legally enjoying immunity cannot be enforced (section 5 (3) of Cap. 9 of Uganda)

Section 11 of Cap. 9 clearly point out that penal law or judgement on taxes is not enforceable in Uganda. Section 3 (2) is about the currency to be used in the execution of foreign judgement. It requires the same to be converted into Uganda **currency at the rate which was prevailing at the time of judgement.**

3.4.4 Rwanda Legal Frameworks

Rwanda originally having colonized by Belgium, followed civil law system. But as of now it has decided to join common law system. The move is aimed to conform to the EAC ahead of the on-going negotiations to form a political federation among the five member-states that make up the regional bloc.¹⁵³ As the result the common law principle is applicable in Rwanda for the recognition and enforcement of foreign judgement, that is, a judgment which is not enforceable under the statutory regime can be enforced using the common law regime in which a judgement is treated as a debt entitling the decree holder to enforce by way of filing an action to enforce the same.¹⁵⁴ The Rwanda Code of Civil Procedure contains provisions on recognition and enforcement of foreign judgement¹⁵⁵. Art. 8 of the preliminary title of the Civil Code stipulates that the laws, judgments of foreign countries as well as conventions and private provisions can have no effect in Rwanda in case they are contrary to public policy, social interest or public morals of Rwanda.

¹⁵² Uganda Civil Procedure Act, 1969, section 9

¹⁵³ <http://www.state.gov/e/eb/rls/othr/2012/191224.htm>, infra

¹⁵⁴ Oppong R; Statutory Regime for enforcement of Foreign judgement, at p. 353

¹⁵⁵ Articles 204 and 208 is specifically for that purpose; Article 204 provides that;

“Except where international agreements provide otherwise, judgements ruled by foreign courts and foreign deeds issued by foreign officials shall not be subject to execution in Rwanda, unless they are rendered enforceable by the competent Court.”

Judgments of foreign courts and contract clauses choosing foreign governing law are accepted and enforced by local courts. There have been number of private investment disputes in Rwanda, but the government has never been involved as a complainant or respondent in a World Trade Organization (WTO) dispute settlement.¹⁵⁶ Rwanda signed and ratified the Multilateral Investment Guarantee Agency (MIGA) convention on October 27, 1989. MIGA issues guarantees against non-commercial risks to enterprises that invest in member countries. Local courts lack experience adjudicating cases with non-Rwandan governing law.¹⁵⁷

Parties to a contract are free to choose a foreign legal system to govern the interpretation of the contract. Choice of law clause in contracts will generally be upheld by the Rwandan Courts except where the choice of law is made by the parties with the intention of evading the provisions of another, more appropriate legal system, or where the foreign law is against public policy in Rwanda.¹⁵⁸ A foreign lender is entitled to institute legal proceedings in the same manner as a Rwandan litigant. Foreign judgments are enforced in Rwanda when it is stated so in the loan agreements.¹⁵⁹

3.4.5 Burundi Legal Framework

Burundi's legal system contains standard provisions guaranteeing the right to private property and the enforcement of contracts. Burundi has a written and consistently applied commercial law which allows for the judgments of foreign courts to be accepted and enforced by local courts.¹⁶⁰ Monetary judgments are usually made in the **investor's currency**. A bankruptcy law granting equal rights to foreign and domestic creditors exists, but has not been effectively publicized or enforced.¹⁶¹

¹⁵⁶ <http://www.state.gov/e/eb/rls/othr/2012/191224.htm>, Investment Climate Statement-Rwanda, US Department of State, Diplomacy Action, accessed on 09/02/2014

¹⁵⁷ Ibid

¹⁵⁸ <http://www.bgafricangroup.com/bankingfinance/Rwanda/index.asp>, accessed on 09/12/2014

¹⁵⁹ Ibid

¹⁶⁰ <http://www.state.gov/e/eb/rls/othr/2012/191120.htm>, Investment Climate Statement-Burundi, US Department of States, Diplomacy Action, accessed on 09/02/2014

¹⁶¹ Ibid

Like Rwanda, Burundi is also working to move to common law system to accommodate the upcoming political federation of the EAC.¹⁶² As for the statute dealing with enforcement of foreign judgments, there is a section in Burundi Code of Civil Procedure.¹⁶³

3.5 Conclusion

In this chapter we have seen the legal system for recognition and enforcement of foreign judgements prevailing in the East African member states. The reality is that three states, namely Tanzania, Uganda and Kenya are common law state while Burundi and Rwanda are civil law states, though they(Burundi and Rwanda) are in the move to convert themselves to common law legal system to accommodate the on-going process to form the East African political federation. We have also made aware that the member states act on reciprocity on matter of recognition and enforcement of foreign judgement. There has been also pointed the legal system on the matter prevailing at international level in the Hague Convention of 1971 and the New York Convention. But international laws are not self-executing in the contracting state¹⁶⁴ that is it need be incorporated in the national law for it to have legal force. The position under Brussels Regime remains as a lesson to EAC if they interested to adopt the principles thereof with the minor modification to suit their needs.

¹⁶² Ibid

¹⁶³ Article 234 of the **Burundi Act No. 1/010 of 13/05/2004**

¹⁶⁴ **Prof. Kabudi. P (2006)**; supra note 129 at p. 12, this is especially for Commonwealth states in which international law need a local statute to have legal force in the state concerned.

CHAPTER FOUR

APPLICABILITY OF THE PRINCIPLES OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS BY COURTS IN EAST AFRICA

4.1 Introduction

This chapter is made part of this research to show the way and approach the courts and lawyers in the East African community members states has applied the principles relating to foreign judgement when faced with the dispute involving foreign judgement. Though there is a dead of reported cases on the matter in the region, few cases have been discovered from some of the member's states which will illustrate the approach and applicability of the principles at the study.

4.3 Tanzania

Tanzania is a Common Wealth state having been colonised by Great Britain, thus as per Judicature and Application of Law Act¹⁶⁵ common law is applicable in Tanzania. Three statutes regulate the recognition and enforcement of foreign judgement in Tanzania, namely; Civil Procedure Code¹⁶⁶, The Judgement Extension Act, Cap.7 and the Reciprocal Enforcement of Foreign Judgement Act, Cap. 8; and for legal regime in Zanzibar are Civil Procedure Decree Cap.8and British Judgement Decree Cap. 9. There are few cases in Tanzania which happen to have dealt with the dispute involving foreign judgement, hereunder are selected cases for this study.

4.3.1 Willow Investment V. Mbomba Ntumba and another¹⁶⁷

The judgement of this case was delivered by the High Court of Lubumbashi in the then Zaire (Now Democratic Republic of Congo) to be enforced in Tanzania. While in Tanzania Courts, the legal battle has resulted into three ruling, two of the High Court and one of the Court of Appeal.

¹⁶⁵Section 2 of Cap. 358 of the Law of Tanzania, RE 2002

¹⁶⁶ Cap. 33 RE 2002 section 11 and 12

¹⁶⁷ (1996) T.L.R. 377 before High Court of Tanzania; (1997) T.L.R. 47 before High Court of Tanzania; and (1997) T.L.R. 93 before Court of Appeal of Tanzania

The judgement in this case was as follow (by Mapigano J.); Four companies figure in this matter. They are Willow Investment, OCS and Gecamines which are resident in Zaire, and one called Marina Metal Works which is based in Kenya. Willow Investment obtained a judgment in Lubumbashi for a colossal sum of US\$336,073,260.00 against OCS to which Gecamines is admittedly indebted to the tune of US\$69,048,051.59, and that is the genesis for this case. Upon an application brought by Willow Investment the foreign judgment was registered in Court on 9 August 1996, and on 15 August 1996 an order was made for the execution of the decree by attachment and sale of movable goods belonging to Gecamines which were lying at the Dar es Salaam port. The order was carried out and the goods were purchased by Marina Metal Works. The application was made under the Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap 8 of the Revised Laws and the Court proceeded on the footing that the Ordinance was applicable.

The court said the Ordinance is designed to facilitate the direct enforcement of certain foreign judgments in Tanganyika (now Tanzania). As the preamble says, it makes provisions for the enforcement in Tanganyika of judgments given in foreign countries which accord reciprocal treatment to judgments given in Tanganyika, for facilitating the enforcement in foreign countries of judgments given in Tanganyika, and for other purposes connected with such matters. It was passed in July 1935. In its original terms s 3(1) provided that if the Governor in Council (now replaced by the President) is satisfied that substantial reciprocity of treatment would be accorded by a foreign country in respect of recognition and enforcement of judgments given in the superior courts of Tanganyika, he may by order direct that Part I of the Ordinance be extended to that country.

By virtue and exercise of those powers the Governor in Council extended the benefits conferred by Part I to judgments given in the superior courts of the countries specified in the schedule to GN 8 and 9 of 1936. The power conferred on the Governor has passed to the president in due course but the countries to which the benefits are extended have remained the same to date.

By section 4 a judgment creditor under a judgment to which Part I applies, may apply to the High Court to have the judgment registered in the High Court, and unless any of the circumstances stipulated in the Ordinance obtains the Court is obliged to order the judgment registered. A judgment so registered is for the purposes of execution of the same force and effect and subject to the same control, and proceedings may be taken thereon, as if it had originally been given in Tanganyika.

Gecamines was aggrieved by all the orders that have been made in regard to the registration of the judgment, the attachment of the goods and the sale of the same. It applied for the review of the orders and the application was brought under the provisions of Order 42 of the Civil Procedure Code. Two material grounds were submitted in support of the application.

The first ground is that the Ordinance, ie Cap 8 is inapplicable, and reference has been made to the provision of s 3 and GN 8 and 9 of 1936. It is accordingly submitted that the Tanzanian Court has no jurisdiction to order a registration of a judgment given in Zaire and that, therefore, both the registration and the sale should be set aside.

The second ground urged was on the basis of a supposition that the provisions of the Ordinance are applicable. It is that the registration and execution orders are impaired by palpable irregularities. The first point urged by Mr Nassor for Gecamines was that the existence of the conditions laid down under s 4(1) were not established. This has reference to the proviso that a judgment shall not be registered if at the date of the application it has been wholly satisfied or it could not be enforced by execution in the country of the original court. In the counter-affidavit filed by Gecamines Mr Mutshipangu has deposed, vide para 3, that to the best of his knowledge the law in Zaire forbids the attachment of goods belonging to a parastatal body and that Gecamines is one such body. Mr Nassor cited section 88 of the Tanzania Railways Corporation Act, 1977 to substantiate his assertion that such situation is not peculiar to Zaire.

Secondly it was said that there was a non-compliance with the provisions of Rule 8 of GN 15 of 1936, which rule imperatively calls for the service of a written notice of the registration of such a judgment on the judgment debtor which notice should also tell him that he has a right to apply on the grounds prescribed in the ordinance to have the registration set aside, and state the period within which he may do so. Thirdly, it was contended that the Court went wrong when it ordered the attachment of Gecamines' property without giving due notice to Gecamines and affording it proper opportunity to be heard.

On behalf of Willow Investment Mr Maira conceded that the Ordinance is inapplicable. But to him that does not in any way connote an absence of jurisdiction for the High Court to enforce the judgment. He maintained that Article 108(1) and (2) of the Tanzania Constitution and section 2 of the Judicature and Application of Laws Ordinance, Cap 453, gives the High Court power to order the registration and enforcement of the judgment in accordance with the common law. He suggested that the registration should have been sought and ordered under section 95 of the Civil Procedure Code, and that the mistakes made in the registration and enforcement of the judgment were mere irregularities.

Mr Maira pointed out that Gecamines has been coupled in the proceeding not as Willow's judgment debtor but basically as Willow's judgment debtor's debtor, and that as such Gecamines had no right of audience before the attachment was ordered. Counsel referred the Court to Rule 45 of Order 21 of the Civil Procedure Code which provides for the attachment of debts which are due to judgment debtors. With regard to the sale, Mr Maira has contended that as innocent purchaser of the goods for value Marina Metal Works cannot be prejudiced by whatever flaw that has attended the registration and sale of the goods. His authority is Rule 76 of Order 21 of the Civil Procedure Code, which the court found it better be read along with Rule 2 of Ord 75. Mr Nassor has countered by arguing that there is no occasion for this Court to invoke the provision of Rule 76 of Order 21.

The Judge ruled that, most of Mr Nassor's arguments are irresistible. He agreed that the provisions of Cap 8 are inapplicable. That does not, however, imply that this Court lacks jurisdiction to enforce a judgment given in Zaire. The effect of section 8 of the Ordinance to which court attention has been drawn is merely that where a judgment is capable of registration under the Ordinance the judgment creditor is barred from instituting any other kind of proceeding for its enforcement, such as an action upon the judgment or a suit on the original cause of action.

The court went further to describe that jurisdiction of the Court in Tanzania to enforce judgments given in foreign countries **emanates from statutory law, common law and treaties**. In the absence of any such written law and treaty in relation to Zaire, judgments given in that country are enforceable at common law in Tanganyika on what has become to be known as the doctrine of obligation. In accordance with that doctrine, where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation that is recognised and enforceable in Tanganyika. The foreign judgment is strictly not enforceable as such, but is to be regarded as creating a simple contract debt enforceable by an action of debt. Once the judgment is proved, the burden would lie on the judgment debtor to show cause why he should not perform the obligation. This is consistent with section 11 of the Civil Procedure Code. It follows that a judgment creditor who seeks to enforce a foreign judgment at common law cannot do so by direct execution of the judgment. Enforcement must be sought by bringing an action on the debt. The procedure obtaining in England would serve as a model. The evidence would be on affidavit and the defendant should be given proper opportunity of showing cause why the foreign judgment should not be recognised or enforced. If a decree is ultimately passed in favour of the plaintiff, he may proceed to execute it in Tanganyika in the manner provided by the Civil Procedure Code. For the foregoing reasons the Court held that the proceeding for enforcement of the judgment was bad altogether.

The court went on to say, the position of the purchaser should be viewed in the light of the fact that there was no valid legal basis for the attachment of the goods.

The court concluded that it is right and fair to grant this application. In the final event the registration of the judgment as well as the attachment and sale of the goods were set aside, and Gecamines had to have its costs.

After this review which nullified the earlier order for enforcement of the said judgement, Willow Investment started its effort to appeal against the decision of the High Court in relation to review, however the effort met preliminary objection which were upheld by the Court of Appeal, it was on technicality which rendered the appeal incompetent and was eventually struck off the court record.¹⁶⁸

4.3.2 Mtui V. Mtui¹⁶⁹

This was a matrimonial judgement (divorce) rendered by the High Court of Tanzania, the enforcement was to be partly conducted in Tanzania (their home land) and Botswana where couple had established their residence and business. The Botswana Court seems to have faced difficulty in understanding the finding and decision of the judgement from Tanzania in this matter. Hereunder were the situations of the case;

The appellant (the husband) and the respondent (the wife) were married in Moshi Tanzania on 29 December 1970. The appellant went to live in Botswana in 1982 and was followed by the respondent in the following year. It is common cause that their domicile was and is Tanzania. Later on their relation broke down and the appellant left the respondent in 1987. Considerable assets, both movable and immovable, were acquired by the parties while living together in Botswana, according to the respondent, by the joint effort of both of them.

¹⁶⁸ As per decision of the Court of Appeal, (1997) T.L.R. 93; the judge of the Court of Appeal ruled (p.96); *“As already indicated in the interim order which I delivered at 10.40 am this morning, I am satisfied that this application is incompetent at this stage. Obviously the power of the court to grant a stay under Rule 9 is exercisable only in proceedings which are properly before the court. It is apparent from the record that this application was filed in this court on 21 February 1997, that is, a day after the time for seeking leave to appeal, expired. As already mentioned, no move has been made up to now to seek such leave. In the light of this state of affairs, I am fully satisfied that as matters stand at present, this application is incompetent and cannot be heard. That is why I ordered it to be struck off this morning.”*

¹⁶⁹ 2001 (2) BLR 333 (CA), Court of Appeal of Botswana, Lobatse, dated July 20, 2001, Before the Panel of three Judges, namely, Korsah, Wear and DiboteloJJA

The appellant instituted proceedings for divorce at the court of the Resident Magistrate at Moshi in Tanzania. Decree of divorce was pronounced on 9 July 1993. This was subject of appeal to the High Court of Tanzania and after an immense delay the appeal(which was not related to the divorce itself) was allowed in part on 31 August 1998. The relevant part of the High Court order is in the following terms. That the Court of the Resident Magistrate at Moshi should distribute to the parties their jointly acquired assets which are located in Tanzania under the marriage Law of Tanzania.

And para (c) directed that since the Courts in Tanzania do not have jurisdiction to distribute assets of the parties which are located in Botswana, the said properties be distribute to them in accordance with the law obtaining in Botswana where the properties were acquired and are located.

It is the interpretation to be given to para (c) which gave rise to controversy and it is the principal issue which the Botswana court had to decide in appeal.

The matter came before the trial court in Botswana by notice of motion dated 3 May 1999 seeking an order that para (c) (supra) of the decree of the High Court of Tanzania should be made an order of the High Court of Botswana. The application was heard and the order was made directing the Registrar to appoint an accountant or attorney to act as liquidator of the matrimonial property with inter alia the following duties; to divide the said assets equally between the parties or to sell them and divide the proceeds where a division cannot be conveniently or advantageously be effected.

There was considerable discussion as to which system of law the court a quo was actually applying when directing an equal division of the assets in Botswana. Counsel for the respondent contended in the first place that it must have been applying the law of Tanzania. As an alternative, he submitted that the law of the matrimonial regime in Botswana was being applied. In order to focus this issue more clearly, it was necessary to understand the difference between these two systems of law.

According to the law in Botswana, marriage may be contracted in or out of community of property. If it is in community of property, the law conceives such a marriage as a partnership in which property is jointly owned and, upon dissolution, falls to be divided equally. The law of Tanzania, according to an affidavit of an advocate in practice in Tanzania (whose evidence was accepted by the court), differs in as much as it has been derived from common law of England and is governed by the Law of Marriage Act No. 5 of 1971. Section 114 of the Act provides inter alia:

(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by sub-section (1), the court shall have regard - (a) To the custom of the community to which the parties belong; (b) To the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; (c) To any debts owing by either party which were contracted for their joint benefit; and (d) To the needs of the infant children if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

It will be seen that, having regard to the terms of subsection 2(d), the underlying intention or preference by the law of Tanzania is to achieve an equality of division of property between spouses subject to an important proviso, namely that the court is obliged to take into account the factors mentioned in the preceding sub-paragraphs.

The Court found that, in the present proceedings, there are, or may be, important practical and financial consequences for the parties depending on whether the matrimonial property is to be divided upon a strict equal division as may be required

by the law of Botswana or on the less clear cut basis of division specified by the law of Tanzania.

Counsel for the respondent submitted that in this case there was little practical difference between the two systems of law as regards distribution of assets. There was no indication that in carrying out the distribution of the assets in Tanzania, the qualifying provisions of section 114 were in fact ever applied or that the respondent and the appellant obtained anything other than an equal distribution. The court a quo must have realised what had happened, and in ordering the equal distribution of assets it was applying the law of Tanzania. However, this submission was totally undermined when it turned out that the court in Tanzania never actually carried out the exercise of distribution, possibly because there were no assets located in that country. The court a quo, in making the order, had no means of knowing how the provisions of section 114 of the Act of 1971 would have been applied.

The irresistible conclusion as per Botswana Court Appeal was that the court a quo could not and did not have the law of Tanzania in mind when ordering equal division of the Botswana assets and it follows that it must have been applying the law of Botswana. Then the posed question was whether the court a quo was correct in doing so.

In a learned judgment, Lisimba J. identified a number of issues which he had to determine. First, he expressed the view which is accepted by most systems of law that matrimonial differences were to be settled in the court of the domicile of the husband (and sometimes the spouses) and in accordance with the law prevailing there.

He ruled; "The law of Botswana, which is in line with laws of most civilized countries I know of, is this, that the domicile of a marrying couple is the law of the husband at the time of the marriage"

This was not in dispute in the appeal. *The court said, the learned judge applied his mind to the question as to whether the decree of the High Court of Tanzania dated 31 August 1998 should be recognized and enforced in Botswana as regards the*

matrimonial property situated in this country. He accepted, that as Tanzania was the country of domicile of both parties, it was the court of competent jurisdiction and the court therefore had the power to regulate inter alia the division of the matrimonial property upon divorce. Third, he discussed whether the Tanzanian decree was enforceable in terms of the judgment (International Enforcement Act (Cap. 11:04)) and concluded that upon a careful analysis of relevant statutory provisions, that it was not. Again Court of Appeal agreed with this view and furthermore with **his conclusion that the decree is recognisable and enforceable by the common law of Botswana.**

This view is in accordance with the general principles of international private law (*see Dicey and Morris The Conflict of Laws (12th ed.) at p. 461 et seq*) and is recognised in both Roman-Dutch law and English law. No question had been raised in this case about possible exceptions to the general rule on the grounds, for example, of fraud or the decree being for one reason or another contrary to public policy.

A preliminary argument advanced by counsel for the appellant was that para. (c) of the order of the Tanzanian High Court was not a decree at all. He sought to contrast the terms of para (b) with those of para (c). Paragraph (b) was undoubtedly an order to the local magistrate to distribute between the parties jointly acquired assets located in Tanzania. The local magistrate was obliged to obey that order. Paragraph (c), he submitted, was not of this character. It merely recognized the court's lack of jurisdiction to give any instructions concerning the distribution of assets located in Botswana. Accordingly para (c) amounted to no more than advice to the parties to take the matters, if they wished, to the court in Botswana for decision. There being no order or decree there was nothing for the court in Botswana to recognise or to enforce.

In the opinion of court, this submission was without substance. The court ruled that if given effect, the result would be the end of these already prolonged proceedings and the necessity for the respondent to start all over again, and this prospect is not pleasing. Counsel for the respondent submitted that the cause of action as the order of the Tanzanian court in its entirety, it covered divorce, custody of children as well

as property rights. The process of distribution of assets was ancillary to the divorce proceedings over which the court of that country had the sole jurisdiction. I consider that this is the correct approach, para (c) was an integral and operative part of the order of 31 August 1998 and as such constituted a judgment for recognition and enforcement by the court in Botswana if appropriate.

In the result the court in Botswana, is under an obligation at common law to recognise, accept and enforce the decree of 31 August 1998 according to its terms. The judgment cannot be impeached on account of any supposed error either in fact or law on the part of the court in Tanzania. The question is whether the Tanzanian court intended that the assets located in Botswana should be distributed in accordance with the local law (the *lex situs*) or whether they should be distributed according to the statute law of Tanzania.

In approaching this question two considerations were made. First, as already noticed, the general rule is that in the absence of a contract or settlement, the rights of the husband and wife in each other's property are determined by the law of the domicile. There is no doubt about that rule in the case of movable property. Some uncertainty as regards immovable property exists as a result of a decision of the House of Lords in a Scottish case at the end of the 19th century (**Welch v. Tennent [1891] A.C. 639**). But the general view is that this decision is inapplicable beyond Scotland and is in any event inconsistent with the common-sense view that there is no reason to treat one species of property in a different manner from another. In this situation the court held that in Botswana the general rule is applicable to both types of property.

Second, viewed against the general rule, in interpreting para (c) of the decree, had to be disposed to construe it in the manner which conforms with the foregoing principle. In other words, if it is possible to do so, para (c) shall be construed as to apply the same matrimonial property regime in Botswana as in the court of the domicile unless the wording of para. (c) points otherwise. If court had to follow the direction of the court a quo to divide the Botswana assets equally, that would not only be a departure from the general rule but could lead to anomalous results. As is stated in Dicey op. cit., by way of illustration (at p. 103):

The application of the lex situs could also result in the application of a matrimonial property regime based on social considerations alien to the couple and could run counter to their legitimate expectations; an English man who bought a holiday home in Mediterranean country would probably be surprised if he were told that it was subject of the matrimonial regime of the lex situs; a foreigner who bought land in England would be equally surprised if he were be told that the property was not subject to the regime of the matrimonial domicile.

So a Judge disposed to avoid an interpretation of para (c) which would lead to inconsistency in the manner in which the matrimonial assets are to be distributed according to where they happened to be situated. On examining the submissions made before the High Court of Tanzania, it is interesting to see that no suggestion was made that different rules should be applied to the assets depending upon in which country they were situated. It is clear that what concerned the court was its lack of jurisdiction over the assets in Botswana. The court said ***Since our courts lack jurisdiction to distribute assets of the parties which are located in Botswana, the said properties be distributed to them in accordance with the law obtaining in Botswana.***

Hence the court concluded that nothing said by the Tanzanian court could be taken to infer that the court should apply different rules from that of the court of the domicile. In interpreting para. (c), it is pertinent to notice the difference between the terms of para. (b) and (c). In para. (b), assets in Tanzania are to be distributed "under the marriage laws" of Tanzania. This expression is not repeated in para. (c). ***It was regarded the difference as significant and it denotes careful drafting. If in para. (c), the distribution of assets was to be in accordance with the marriage laws of Botswana then equal division would undoubtedly be required.*** But by refraining from expressing para (c) in identical terms to para (b), the Tanzanian court left it open for interpretation of what is meant by "the said properties be distributed in accordance with the law obtaining in Botswana."

What is the law obtaining in Botswana? It may mean the law of Botswana applicable to the distribution of the assets in Botswana (the *lex situs*). This is how the court *a quo* apparently thought it meant. In considering the problem, it was necessary to first of all to look at the status of the parties. When this is done, it will be seen that they are domiciled abroad. The foreign court wishes its order on distribution to be enforced here. ***The law in Botswana is obliged to recognise that order. In doing so, it has to recognize the rule of private international law that distribution of the matrimonial property, in the absence of special circumstances, should be done in accordance with the lex domicili.*** Accordingly, by directing that the assets be distributed in accordance with the law of Tanzania the court would be applying the law obtaining in Botswana.

Finally the Botswana court ordered, in so far as the appellant succeeded in having the judgment of the trial court set aside, the appeal was allowed with costs. It was ordered that; (a) The matter be remitted to the trial court to be heard *de novo* regarding the division of matrimonial assets; (b) At such hearing the trial court is to apply the provisions of section 144 of the Law of Marriages Act No. 5 of 1971 of Tanzania; (c) To such end, the court may entertain such evidence as either party may adduce in support of his or her claim.

The dispute in this case is the pure indication that a Tanzania court/judges who by the time dealt with this case had no knowledge of the principles of private international law in general, and particular the law governing the dissolution of marriage for the matrimonial cause involving foreign element. It posed difficult tasks to Botswana court to understand what exactly the judgement aimed at.

4.3.3 Athar Mutjaba V. Heena Mutjaba¹⁷⁰

The matter related to the application for registration of foreign order made by Family Court of New York (USA) to be recognised and enforced by Tanzania court. The Parties to the case are husband (applicant) and wife (Respondent) who had

¹⁷⁰ Misc. Civil Application No. 425 of 2013, In the matter of Application for Registration of Foreign Judgement, High Court of Tanzania at Dar es Salaam, Ruling of 30/12/2013 by Utamwa J; (unreported)

established their life in USA though they are Tanzanian. The record show that there was matrimonial dispute filed at the New York Family court and the said court had issued a temporary order giving the Applicant a right of custody of their two issue of marriage, but what appeared is that the respondent defied the court order and run to Tanzania with the said two issues (children) of marriage. The USA court issued an order of arrest of the respondent.

It is from the above USA order the Applicant filed an application under section **4 of the Reciprocal Enforcement of Foreign Judgement Act.**¹⁷¹ However an application faced preliminary objections on the ground that the High court of Tanzania has no jurisdiction to entertain the matter. It was argued by the counsel of the respondent that the foreign order to be registered is not a judgement in the meaning of the term “judgement” as defined by section 2 of Cap. 8. That the judgement to be registered must be a decision for payment of money only, and further must be conclusive and not temporary as to the case at hand. Moreover it was argued that the USA court is not listed in the statute as court which its judgement can be enforced in Tanzania.

The court upheld the said preliminary objection and the matter was accordingly struck out. The court had this to say; (at pp 6,7 and 8 of the typed ruling)

In my settled views, not every decision of the foreign court is capable of being registered under Cap. 8 for the purposes of enforcement. For a decision to be registered it must first fit the definition of the term judgement made in Cap. 8.....It follow therefore that, only decisions for payment of money can be registered under section 4 of Cap. 8 and not otherwise..... Moreover, it is my view that even where a decision is for payment of money, yet it may not be capable of being registered in Tanzania if the foreign court that made it is not among the courts with which Tanzania has reciprocal arrangements of enforcing judgements.

¹⁷¹ Chapter 8 of the Law of Tanzania

It was added that the order did not form the conclusiveness of the matter but was a mere temporary order for custody of the children. With this decision, it could be inferred that Tanzania court do not both to apply common law principle as appeared to Ugandan case of **Christopher Sale case**¹⁷², on the ground that common law will apply to Tanzania only where the statute is silence on particular issue

4.4 Kenya

4.4.1 Introduction

Like Tanzania and Uganda, Kenya, having been a British colony is also a common law country and among the founding member of the present EAC. Two statutes regulate the recognition and enforcement of foreign judgement, namely; the Foreign Judgement (Reciprocal Enforcement) Cap. 43, The Civil Procedure Act of 1924¹⁷³. Below are cases in which the court in Kenya once faced the recognition and enforcement of foreign judgement.

4.4.2 Italframe Ltd V. Mediterranean Shipping Company Ltd¹⁷⁴

In this case the Kenyan court held that the basic principle upon which foreign judgement is recognised and enforced is reciprocity and the advantage to gain there from. However, the court set aside the registration of a judgement from the High Court of Tanzania on the ground that Kenya's Foreign Judgement Act Cap. 43 referred to High Court of Tanganyika not High Court of Tanzania. Of course that was a very strict interpretation or the court had not received judicial notes that after the union of Tanganyika and Zanzibar there was no longer High Court of Tanganyika but High Court of Tanzania. But this position of the Kenyan court was not for judgement from Tanzania alone, as in **Re Lowethal and Air France**¹⁷⁵, the same trend was adopted when it was held that a judgement from the court of Zambia cannot be registered in Kenya under Cap. 43, because the application of the Act to judgements of Northern Rhodesia cannot be taken to have extended to Zambia after independence.

¹⁷² Infra note 178

¹⁷³ Where the definition of foreign judgements and foreign court have been made; that is foreign judgement is the judgement of the foreign court; and foreign court is a court situated outside Kenya which has no authority in Kenya; section 1 of Cap. 43 of the Laws Of Kenya

¹⁷⁴ (1986) K.L.R 54

¹⁷⁵ (1966) 2 A.L.R Comm.301

4.5. Uganda

As pointed in chapters two and three, Uganda is among three states founder of the East African Community in 1999. It is a common law country and that there are three main statutes regulating the recognition and enforcement of foreign judgement, namely; The Foreign Judgement (Reciprocal Enforcement) Act 1961, Cap. 9 of the Law of Uganda, the Civil Procedure Code Cap. 71 and the Judgement Extension Act Cap. 12. There are few selected cases to which the higher court of Uganda once dealt with them, which are narrated hereunder as follows;

4.5.1 Christopher Sale and another V. Attorney General¹⁷⁶

The facts, arguments by parties and decision of the court were as follows. The plaintiffs brought this action against the defendant by way of a plaint for a declaration that the judgment entered by the Southern District of New York US district Court vide **Christopher Sales & Carol Sales versus The Republic of Uganda & Apollo K. Kironde (as the Ambassador and Permanent Representative of Uganda to the United Nations 90 CIV 3972 (CSH)** against the permanent Mission of the Republic of Uganda to the United Nations and Apollo Kironde Ambassador as the *original defendants* for compensation to the first plaintiff in the sum of US dollars 1,891,607.76 (one million eight hundred and ninety one six hundred and seven and seventy six cents) and interest, US dollars 245,637.50 (two hundred and forty five thousand, six hundred thirty seven and fifty cents) as compensation to the 2nd plaintiff plus interest is enforceable in Uganda, interest from the date of award till payment in full and costs for this suit.

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

¹⁷⁶ Civil Suit No. 91 of 2011, in the High Court of Uganda at Kampala, Before Hon. Justice Eldad Mwangusya, Judgement dated 01 February 2013 (unreported), retrieved on 16/12/2013 from <http://www.ulii.org/ug/judgement/high-court/2013/8>.

York and that the attempts to join the said insurance company as a defendant to the plaintiffs' suit was unsuccessful due to failure to file a timely insurance claim.

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

In their joint scheduling memorandum, the parties agreed that;

- Judgment entered in 90 Civ 3972 has been verified to the satisfaction of the defendant that it is valid and subsisting judgment of the said US District Court of the Southern District of New York. An official copy of the judgment was transmitted on 11th December, 2011 through the official channels to the Ministry of Justice and Constitutional Affairs
- The judgment remains unsatisfied to-date
- Uganda does not have a reciprocal arrangement with the United States on mutual enforcement of judgment entered in their respective jurisdictions.

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

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

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

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

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

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

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

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

When an action is brought in a court of this country by a citizen of a foreign country against one of our own citizens to recover a sum of money adjudged by the court of that country to be due by the defendant to the plaintiff and the foreign judgment appears to have been rendered by a competent court having jurisdiction of the cause and the parties' and upon due allegation and proof; opportunity to defend against them and its proceedings are according to the course of a civilised jurisprudence and are stated in a clear and formal record, the judgment is prima facie evidence at least of the truth of the matter adjudged and the document is conclusive

upon the merits tried in the foreign court unless some special ground is shown for impeaching it; or by showing that it was affected or obtained by fraud or prejudice or that, by the principle of international law and by comity of our country it is not entitled to full faith and credit.

He further stated that comity is concerned with maintaining amicable working relationships between nations, a shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards where a point of law is raised, which if decided in one way would be decisive of litigation.

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

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

He also contended that **Civil Procedure Act Cap 71**recognises foreign judgments but does not provide for express procedures. He stated that at common law the absence of express rules or procedure is discussed in **Goddard v Gray (1870) LR 6 QB 139** thus;

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

obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained...

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

As to whether the plaintiffs' action is time barred, Mr.Semogerere had this to say; No domestic action prior to the instant suit is a basis for this action, as such the statutes of limitation in Uganda would not bar an action for which limitation has not begun to run within the territorial jurisdiction of Uganda. Although the defendant's pleadings state that the judgment is not enforceable by Cap 9, it cannot follow that the defendant can rely on benefit of the same Act as regarding limitation therein. Counsel cited a number of statutes on Limitation.

For the respondent, Mr.Wanyama, principal state attorney, maintained from the onset this suit is incompetent and misconceived. He contended that much as the judgment is not recognised, it is unenforceable in courts of Uganda as there is no reciprocal treaty with USA (Section 2 of Cap 9) neither has the Minister made any statutory order to give the same effect of registration in Uganda. A state is not bound to enforce within its territories the judgment of a foreign tribunal unless there is a reciprocal treaty, he cited the case of **Goddard versus Gray 1870 LR 6 QB 139**). He maintained that it is the position in Uganda today. Went further to say it was also the intention of the legislature when enacting Cap 9. He submitted that there is no evidence adduced by the plaintiffs to the effect that Uganda has enforced foreign judgments in absence of reciprocity. Counsel was alive to the principle that the High Court has unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the law (Article 139 (1) of the Constitution of Uganda).

Counsel further contended that the common law which has been relied upon by Mr.Semogerere is general law which cannot prevail over the specific law. Citing the

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

Further, Mr. Wanyama submitted that where a statute prescribes procedure as Cap 9 does in the instant case that procedure has to be strictly adhered to. He thus maintained that the failure to bring the instant suit under the correct law through the correct procedure is not a mere technicality but a fundamental matter that entails dismissal.

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

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

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

Court finding and decision

The court ruled that the issue which is raised before the court is not one of reciprocity because quite clearly there are no reciprocal arrangements between Uganda and the USA. The question raised is as to what a judgment debtor who is 'stranded' with a judgment from a country with no reciprocal arrangements with Uganda like in this case is supposed to do with the judgment. What is supposed to do to enforce, if at all. In the case of **Hilton VsGuyot 159 US 113 (1895)** cited by counsel for the plaintiff, the Supreme Court of the USA based its consideration on the notion of international comity and in the words of the Court at 163-164;

“Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws”

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

“We are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting a trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the country of this nation should not allow its full effect, the merits of the case should not, in an action brought in this country upon the judgment be tried afresh, as on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact”.

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

The court recognized and was aware of the two reported case in the USA where courts refused to afford recognition of Foreign Judgments. In one such case the Federal Court of New York declined to enforce a Liberian judgment on the grounds that, when judgment had been rendered in 1995, the country was in ‘a state of chaos’ due to civil war, the constitution was ignored, regular procedures for selection of justices and judges were not followed, judicial officers were subject to courts that did not exist or were barely functioning. In short, the court said, “Liberian judicial system simply did not provide impartial tribunals.” (see **Bridge way Corp. Vs Citibank**, 201 f. 3d 134 (2nd Civ. 2000))

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

It was noted that the judgment before the court did not come anywhere near the Liberian and Nicaraguan experience where courts in the USA declined to recognise their judgments. On the contrary the judicial system under which the case was tried is beyond reproach. A judgment creditor armed with such a judgment should be allowed to realise the fruits of his judgment which should be afforded recognition by our courts in absence of a reciprocal arrangement. Then the court granted him the prayer that the judgment is enforceable in Uganda, interest from the date of the award till payment in full and costs of this suit.

In view of the distinction between the applications under Cap 9 of the laws of Uganda already referred to and enforceability of the judgment before the court also already discussed, court agreed with the counsel for the plaintiff that the recognition and enforcement of the judgment cannot be subjected to the same Limitation the application of the Act that is not applicable in these proceedings. In the circumstances of the court found that the suit is not time barred.

In fact the court in this case acted in the liberal manner, since it escaped to be bound by the legal constraints which could had denied the plaintiff to enjoy the fruit of the foreign judgement in hand. Thus with this approach it clearly that Ugandan court will only looks on the authenticity of the judgement and the propriety of the legal system where such judgement was rendered, that is a judgement from the well-established system which render impartial judgement should accordingly be recognised and enforced in Uganda.

4.5.2. Geoffrey Githinji Kamiri T/A Westminster Commercial Traders (Applicant) and Cooperative Bank of Kenya (Creditor/Financier) V. Mathew Ouma Oseko (Debtor/Respondent)¹⁷⁷

This ruling arose from the preliminary points of law raised by counsel for the respondent when an application for an Order of Mareva Injunction arising from Misc. Cause No. 13 of 2012 came up for hearing. The applicant brought Misc. Cause No. 13 of 2012 under section 1 of the Judgment Extension Act Cap. 12, section 98 of the Civil Procedure Act Cap. 71, Order 52 of the Civil Procedure Rules and section 33 of the Judicature Act as well as other enabling provisions of the law. The applicant sought for Orders that the judgment delivered by the Chief Magistrate's court at Nairobi be registered by the Uganda Court and the costs of the application be provided for.

The grounds of the application are contained in the affidavit of Mr. Godfrey Githinji Kamiri which are briefly that:

¹⁷⁷ Miscellaneous Cause No. 13 of 2012, in the High Court of Uganda at Kampala, Commercial Division, before Hon. Lady Justice Hellen Obura, in the Ruling dated 08 November 2012 (unreported); retrieved on 16/12/2013 from <http://www.ulii.org/ug/judgement/commercial-court/2012/107>.

- The applicant is a registered/licensed auctioneer under Class B, T/A Westminster Commercial Traders Auctioneers for purposes of executing court warrants, repossessions and distress for rent in the Republic of Kenya.
- The respondent obtained six motor vehicles, the subject of this application, on a hire purchase agreement for the Financier, the Co-operative Bank of Kenya.
- The respondent defaulted in the remittance of the Hire Purchase instalments as provided in the Hire Purchase agreement.
- On the 11th of April 2012 the applicant received instructions from the Co-operative Bank of Kenya to repossesses motor vehicles from the respondent:
- On the 27th day of April 2012 the applicant received Court Order vide Miscellaneous Application No. 307 of 2012 to impound and repossess the above named motor vehicles for and on behalf of the Co-operative Bank of Kenya.
- The said motor vehicles have been moved outside Kenya and are now operating in Uganda within the jurisdiction of this court.
- The applicant is reliably informed that the said motor vehicles are at the verge of being moved outside the jurisdiction of this court.
- It is just and equitable that the Applicant's Court Order be registered in this court.

The applicant also filed Misc. Application no. 279 of 2012 for an Order of Mareva Injunction to issue to restrain the judgment debtor from removing the motor vehicles subject of repossession from the jurisdiction of this court. When that application came up for hearing, Mr. Mugimba Peter, counsel for the respondent informed this court that he had points of law to raise regarding the competence of this case and requested to file written submissions which he was allowed to do.

Counsel for the respondent raised three points of law which were framed as issues, namely:

1. Whether the Chief Magistrate's Court in Kenya lacked the jurisdiction to entertain the matter.
2. Whether the ex parte Order obtained from the Milimani Commercial Court in Kenya is register able in Ugandan Courts.

3. Whether the procedure under which the application was brought was applicable. The court considered the 2nd issue to be the major determining factor on the competence of this case and if it is resolved in the negative it would dispose of this matter. For that reason, the court dealt with it first.

The applicant was seeking for Orders that the judgment delivered by the Chief Magistrate's court at Nairobi be registered by the Ugandan Court. According to Mr. Mugimba Peter the ex-parte Order from the Kenyan Court is not register able in the Ugandan courts because it is not a decree within the meaning of section 1 of the Judgments Extension Act which provides for transferring decrees from Kenya to the High Court of Uganda. He relied on section 2 of the Civil Procedure Act to support his argument that an Order is not a decree.

Section 1 of the Judgments Extension Act provides in part:

“Where a decree has been obtained or entered in the Supreme Court of Kenya or in the High Court of Malawi or of Tanzania, or in any court subordinate to any of those courts, for any debt, damages or costs, and where it is desired that the decree shall be executed upon the person or property of the defendant in Uganda, the decree may be transferred to the High Court or to any of the courts subordinate to it (hereafter called subordinate courts) for execution...” (Emphasis added).

Section 2 of the Civil Procedure Act Cap. 71 defines a decree as:

*“The **formal expression of an adjudication** which, so far as regards the court expressing it, **conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit** and may be either preliminary or final.”* (Emphasis added).

Section 2 of the Civil Procedure Act Cap. 71 also defines an order as:

“The formal expression of any decision of a civil court which is not a decree”.

From the above definitions, a decree of court is different from an order because a decree reflects a conclusive judicial determination of the rights of parties unlike an order. In view of this clear position, Court agreed with the submission of counsel for the respondent that the Order sought to be registered before the court is not a decree because the rights of the parties in dispute were never adjudicated upon and conclusively determined.

The court noted that it is quite clear from the face of the Order itself that it was issued ex-parte for the Officer Commanding any police station in Kenya whose jurisdiction may be sighted to provide assistance to the applicant for purposes of keeping peace and order while the vehicles are being physically repossessed to avoid any resistance or intimidation by the hirer or his agents.

It was argued by counsel for the applicant that the application that gave rise to that Order was brought under rule 9 (c) of the Auctioneers Rules of Kenya. The court visited that rule which is under Part III of the Auctioneers Rules that apply to the attachment and sale of movable and immovable property under warrants of court and letters of instruction from third parties.

It provides that:-

“Where an auctioneer has reasonable cause to believe that –

(a).....

(b).....

*(c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of property, **the auctioneer shall request for police escort from the nearest police station** in order to carry out his duties peacefully”. (Emphasis added).*

From the literal meaning of that rule as discerned from the words highlighted in bold, one would say that the request for police escort could be made to the nearest police station. However, the Auctioneers Amendment Rules 2009 provides that *an*

application under this rule shall be by motion by way of miscellaneous application supported by an affidavit and may be ex-parte. This means that the request for police escort has to be made to court. The orders granted in such an application are specifically to provide police assistance as stated in the side notes of that rule. It does not confer any executable right to the applicant beyond police protection.

It is also important to note that the applicant was acting under a Repossession/Collection Order issued by the Cooperative Bank of Kenya, the creditor. He was therefore acting under a letter of instruction from a third party based on the powers allegedly derived from the Hire Purchase agreement as opposed to a court warrant.

In effect, the dispute between the creditor (third party who gave instructions) and the debtor (respondent) was never adjudicated upon. The respondent was never heard as to his rights and liabilities. The merits of the case were not canvassed. In that sense the Order that was issued was not a decree that is envisaged by the Judgments Extension Act.

It was further argued by counsel for the applicant that much as the application was specifically brought under the Judgments Extension Act; the applicant also alluded to any other enabling provision of the law which in his view includes the Foreign Judgments (Reciprocal Enforcement) Act and the Foreign Judgments (Reciprocal Enforcement) Rules. He therefore argued that this court should be guided by the definition of “*judgment*” under section 1 (1) (c) of the Foreign Judgments (Reciprocal Enforcement) Act which *means any judgment or order given or made by a court in any civil proceedings.*

First of all the court had the view that the application could not be brought under both the Foreign Judgments (Reciprocal Enforcement) Act and the Judgments Extension Act because they provide for two distinct procedures which can neither be mixed in one application nor used interchangeably.

Even if the court were to be convinced by the applicant's arguments, this application would still have challenges under the Foreign Judgments (Reciprocal Enforcement) Act..

It is indeed true that judgment is defined under section 1 (1) (c) to include an order. However, section 2 which gives the Minister power to extend Part II of the Act to foreign countries giving reciprocal treatment qualifies the judgment to which that part of the Act applies in section 2 (2). It provides thus:-

“ Any judgment of a superior court of a foreign country to which this Part of this Act extends , other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part of this Act applies, if –

- 1. It is final and conclusive as between the parties to the judgment; and*
- 2. There is payable under the judgment a sum of money, not being a sum payable in respect of taxesand.....*

From the above provisions, firstly the judgment must be final and conclusive. Secondly, ***there must be a sum of money payable under the judgment*** and it is clear that the Order sought to be registered is not conclusive. It is also clear that there is no sum of money payable under the order as it was specifically for police assistance during repossession of the motor vehicles. For the above reasons the Order would still not qualify to be registered under the Foreign Judgments (Reciprocal Enforcement) Act.

In addition, section 3 (1) of that Act specifies that the person who can apply for registration of a foreign judgment is the judgment creditor under the judgment sought to be registered. Even if for the sake of argument this court were to be convinced that the order in issue is a judgment as strongly argued for the applicant, this section would still disqualify the applicant who is an auctioneer acting under the letter of instruction from the creditor under the Hire Purchase agreement.

The court found that the above findings would adequately dispose of this application. However, just to take the arguments further, it is noteworthy that section 9 of the Civil Procedure Act also prohibits registration of a foreign judgment that has not been given on the merits of the case.

This position was restated in the case of *American Express International Banking v Atul [1990-1994] EA 10* where Oder JSC noted that only a judgment given on merit would be accepted as conclusive in Uganda.

On the issue of procedure, It was observed that the procedure for applying for registration of decrees under section 1 of the Judgment Extension Act is elaborately provided for under Order 22 rule 4 of the Civil Procedure Rules that governs execution of decrees by another court other than the one that passed it.

The applicant did not follow that procedure and the argument that this is a mere technicality that could be ignored is not at all convincing in the circumstances of this case. That the elaborated procedural requirement of Order 22 rule 4 cannot not simply be ignored because it goes to the root of the application.

In the result, the court found that grounds 2 and 3 of the objection have merit thus court dismissed Miscellaneous Cause No. 13 of 2012 with costs to the respondent. Miscellaneous Application No. 279 of 2012 that arose from it also automatically collapsed with costs.

I was so ordered, in that the order from Kenya court was not enforced in Uganda in this matter only on the ground that the matter was not a decree, the matter was still pending in Kenyan Court, which is not conclusively determined.

5.6 Rwanda

Rwanda is the follow civil law system though now is struggling to turn to common law legal system. The Rwanda Code of Civil Procedure contains provisions dealing with recognition and enforcement of foreign judgements. However there is a dead of reported case law in Rwanda probably because the doctrine of precedent is not or

rarely applicable. However, as shown above, the legal system in Rwanda recognises foreign judgement as well.¹⁷⁸

5.7 Burundi

Like Rwanda, Burundi follows civil legal system and there is a dearth of reported law in general, though it is also moving to common law legal system. The recognition and enforcement of foreign judgement is provided under Act No. 1/010 of 2004 (Burundi Code of Civil Procedure).

5.8 Conclusion

In this chapter I have visited some cases in which courts in EAC member states dealt with foreign judgements and those containing foreign judgement to be enforced outside the EAC member states. The selected cases have clearly pointed out the challenges which lawyers have been facing when enforcing foreign judgements from a country having no reciprocity arrangement with enforcing state. In some circumstances courts have ruled that judgements can be allowed to be enforced without regard to reciprocity arrangement with the liberal approach (e.g. **case of Christopher Sale**), but some case law has indicated to remain firm to the requirement of the reciprocity arrangement between states as required by statutes (e.g. **case of Arthur Mutjaba**). Further to that it has been noted that there are few cases on the area decided by courts in EAC, and that there is a dearth of reported cases on the area at study.

¹⁷⁸ See supra note no. 152 for Rwanda Code of Civil Procedure

CHAPTER FIVE

ANALYSIS OF THE LEGAL REGIMES AND PEOPLE'S AWARENESS OF THE SUBJECT AT STUDY IN THE EAC

5.1 Introduction

In this chapter the researcher presents data collected from various selected persons and institutions which in one way or another are concerned with the matter relating to the recognition and enforcement of foreign judgement and the harmonisation of law in that respect thereof. The data presented were collected from the law firms and lawyers, law school/college, East African Secretariat and Attorney General Chambers of the EAC members' states. This chapter will codify, tabulate, analyse and present the data collected through questionnaires and interview which will testify the hypothesis of the study at last.

5.2 Legal Regime

There is no harmonised legal system as of now for law relating to the recognition and enforcement of foreign judgement in the East African Community, thus this being the case, each member state have its own law/legal system on recognition and enforcement of foreign judgement, though three states out of five (namely Uganda, Tanzania and Kenya) have a common law background which render their legal regime almost equal. The rest two which joined the Community later (namely Burundi and Rwanda) have civil legal system background.

Table 5.1 Legal Regime of the EAC and the member states

State	Legal System	Legal Regime	Comments/Notes
AT EAC LEVEL	Three states with common law legal system (Tanzania, Uganda and Kenya); Two states with civil law legal system. Hence mixture of legal system	Articles 5, 44 and 126 of the Treaty Establishing the EAC of 1999	There is on-going harmonisation of law in general, they have not worked on specific matter subject of this research ¹⁷⁹
Tanzania	Common law legal system	1. Reciprocal Enforcement of Foreign Judgement Act, Cap. 8 of RE 2002 2. The Extension of Judgement Act, Cap. 7 RE 2002 3. Section 11 and 12 of the Civil Procedure Code, Cap. 33 RE 2002. 4. For Zanzibar, section 2, 8 and 9 of the Civil Procedure Decree, Cap. 8 of the Law of Zanzibar; and British Judgement Decree, Cap. 9 of Zanzibar	There are two legal system; one for Tanzania Mainland and another for Tanzania Zanzibar ¹⁸⁰
Kenya	Common Law Legal System	1. The Enforcement of Foreign Judgement (Reciprocal Enforcement) Act, Cap. 43 1. Civil Procedure Code, Cap. 5, section 9 and 10	
Uganda	Common Law Legal System	1. Foreign Judgement (Reciprocal Enforcement) Act 1961, Cap. 9 2. Judgement Extension Act, Cap. 12 3. Civil Procedure Code Cap. 71 sections 9 and 10	
Rwanda	Civil Law Legal System	Articles 8, 204 and 208 of the Rwanda Code of Civil Procedure, Act No. 21/2012 of 14/06/2012	Already joined the Commonwealth community and it is working to shift to common law legal

¹⁷⁹ As per interviews conducted on 16th April 2014 with Mr. Agaba, a Principal Legal Officer of the EAC at Arusha-Tanzania

¹⁸⁰ As per Articles 4, 34 and Chapter 4 of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

			system from civil law system ¹⁸¹
Burundi	Civil Law Legal System	Article 234 of the Burundi Code of Civil Procedure Act. No. 1/10 of 13/05/2004	It is in the process to shift to common law legal system to suit the oncoming EAC political federation ¹⁸²

5.3 Challenges in the Harmonisation of Law

There is no big challenges for harmonisation of law with the three founding states of the EAC, namely Tanzania, Kenya and Uganda because they share the same colonial background which have led to their legal regime at study almost identical. The challenges have widened with the joining of two states, namely Rwanda and Burundi which follow civil law legal system to which even their statutes are written in other languages¹⁸³ other than English language. Thus the big challenges, among others, are the difference of language used and the legal systems pertaining in the EAC member states.

Foreign Judgement (Reciprocal Enforcement), Act, Cap. 8 RE 2002 for Tanzania, Foreign Judgement (Reciprocal Enforcement) Act, Cap. 9 for Uganda and the Enforcement of Foreign Judgement (Reciprocal Enforcement) Cap. 43 of Kenya, all these three statutes for three different of the EAC member states share almost the same features with minors different, thus with these three statute it is easy to merge and form convention. Some of the minor variation which may cause challenge in harmonisation process are as follows; e.g Tanzanian law require the foreign money judgement be converted into Tanzania currency and the rate of exchange be that which was prevailing at the time of judgement (section 4 (3), the same approach is for Uganda law(section 3), but Kenya Law provides that the currency payable have to be converted in Kenyan currency at the rate prevailing at the date of filing for the registration of judgement in question. Further the Kenyan and Ugandan statutes

¹⁸¹ The Law Library of the Congress; Burundi/Rwanda possible switch of Legal Tradition, retrieved from <http://www.loc.gov/lawweb/servelet/LLoc-news?disp3-1205401325-text>, accessed on 20/08/2013

¹⁸² The Law Library of the Congress; Burundi/Rwanda possible switch of Legal Tradition, retrieved from <http://www.loc.gov/lawweb/servelet/LLoc-news?disp3-1205401325-text>, accessed on 20/08/2013

¹⁸³ French, though Rwanda is now translating its statutes in English and French

define judgement to include arbitration award, this appear to be different to Tanzania law which arbitration award and judgement does not mean the same. Kenyan statute does not limit foreign judgment to monetary judgement only, but Tanzania and Uganda does.

Burundi and Rwanda has not enacted specific law for recognition and enforcement of foreign judgements, rather the same have been given with few provisions within the general law dealing with civil matters (Burundi Code of Civil Procedure and Rwanda Code of Civil Procedure). Further to that, Burundi and Rwanda being civil law states pose challenge to its lawyers to adopt to what common law states have been doing (eg the adhering to doctrine of precedent which are not among principle strictly practiced in civil law jurisdiction).¹⁸⁴

Another challenge may come from Tanzania which is the union of two semi independence governments with two parallel legal regimes, which is legal regime for Tanzania Mainland and Zanzibar.¹⁸⁵ For this there must be first internal consensus before Tanzania can move to negotiate with other member states of the EAC.

As of now the harmonisation of laws in general is under way.¹⁸⁶ Two protocols have been adopted¹⁸⁷ but no protocol in relation to the principles of recognition and enforcement of foreign judgements.

5.4 Data Collected from Lawyers/Advocates

A number of twenty five questionnaires were distributed to lawyers, five lawyers to each member states. Out of five questionnaires distributed to Tanzania lawyers, all five were brought back which made efficient of 100%, two questionnaires from

¹⁸⁴The main difference between the two systems is that in common law countries, case law — in the form of published judicial opinions — is of primary importance, whereas in civil law systems, codified statutes predominate. But these divisions are not as clear-cut as they might seem. In fact, many countries use a mix of features from common and civil law systems. Understanding the differences between these systems first requires an understanding of their historical underpinnings; Retrieved on 24/6/2014 from <http://onlinelaw.wustl.edu/common-law-vs-civil-law>, Washington University in St. Louis, School of Law; What is the Deference between Common Law and Civil Law.

¹⁸⁵ See Article 4 of the URT Constitution

¹⁸⁶ International Law Institute (Kampala Centre) have been given the task to review the legal regime in the EAC and recommend the way forward in the harmonisation of Law in the EAC, see supra note 42

¹⁸⁷ East African Community Common Market Protocol of 2009 and the Customs Union Protocol of 2004

Burundian lawyers which is 40%, three questionnaires from Rwanda lawyer which account to 60%, two questionnaires from Uganda which account to 40%, three from Kenya which account 60%. Thus out of 25 supplied, 15 questionnaires were brought back which is the average of 60% questionnaires were responded.

Responding to the question as to whether there is the EAC regional convention on recognition and enforcement of foreign judgement, 100% of the respondents said there is no such convention, most of them were aware with the presence of the EAC Protocol on Common Market¹⁸⁸ and EAC Customs Union Protocol.¹⁸⁹

One of the respondents¹⁹⁰ commented that depending on reciprocal arrangement to enforce foreign judgement is an old style thus something like regional convention is needed in the modern world where the movement of person has much increased.

Table 5.2 Whether there is EAC Regional Convention on Recognition and Enforcement of Foreign Judgement

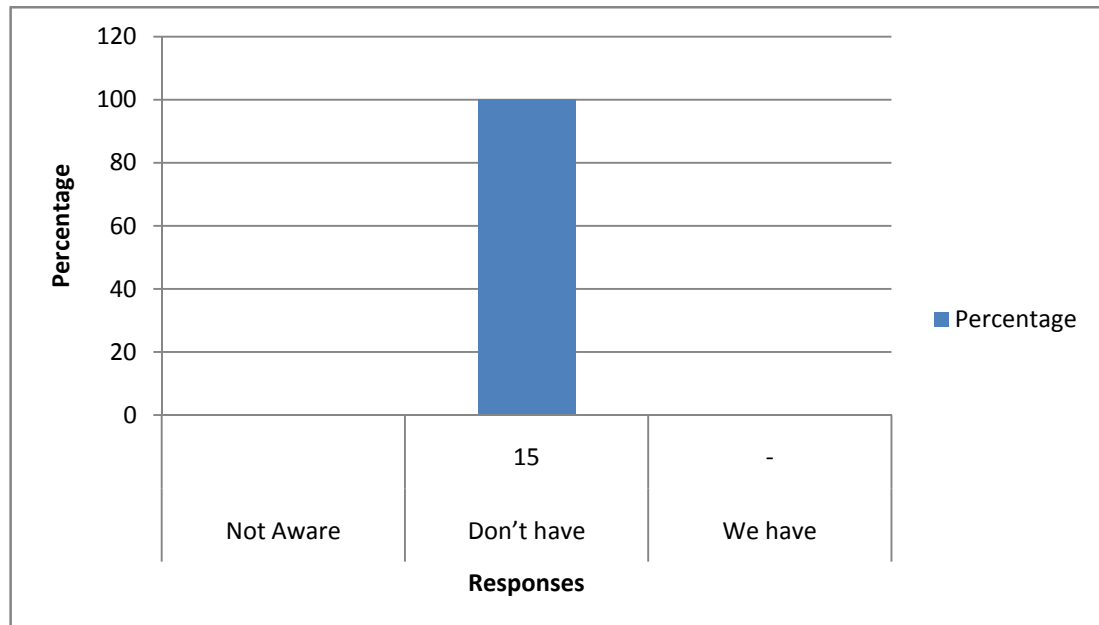
Response	Number of Respondent	Percentage
Not Aware		
Don't have	15	100%
We have	-	
Total	15	100%

¹⁸⁸ Adopted at Arusha-Tanzania by the EAC head of states on 20 November 2009

¹⁸⁹ Adopted at Arusha by the EAC Head of states on 2nd March 2004

¹⁹⁰ In the filed questionnaire and my interview with Advocate Kibatala on 01/April 2014

Figure: 5.1 Whether there is EAC Regional Convection on Recognition and Enforcement of Foreign judgment.



The response to the second question,¹⁹¹ eight respondents gave an affirmative answer that the legal regime in five member states in EAC vary greatly taking into account that each state has its own legal system to protect its interests. Some respondents added further that they have not even bothered their mind to know the legal system of other partner states because they don't meet with circumstances which force them to learn about other legal system, like having a case which involves foreign elements¹⁹². This suggests that there are low social-economic movements from one country to another. But three respondents were a bit at the middle as they said that the variation is not so big to cause injustice, thus to them justice is paramount. Other added that the variation of approach may arise because most of the old generation lawyers did not study private international law which could have acquainted them with the principle of foreign judgements, thus working on the dispute involving foreign elements will be a new thing to them.

¹⁹¹ Whether the available legal framework and court approach vary greatly

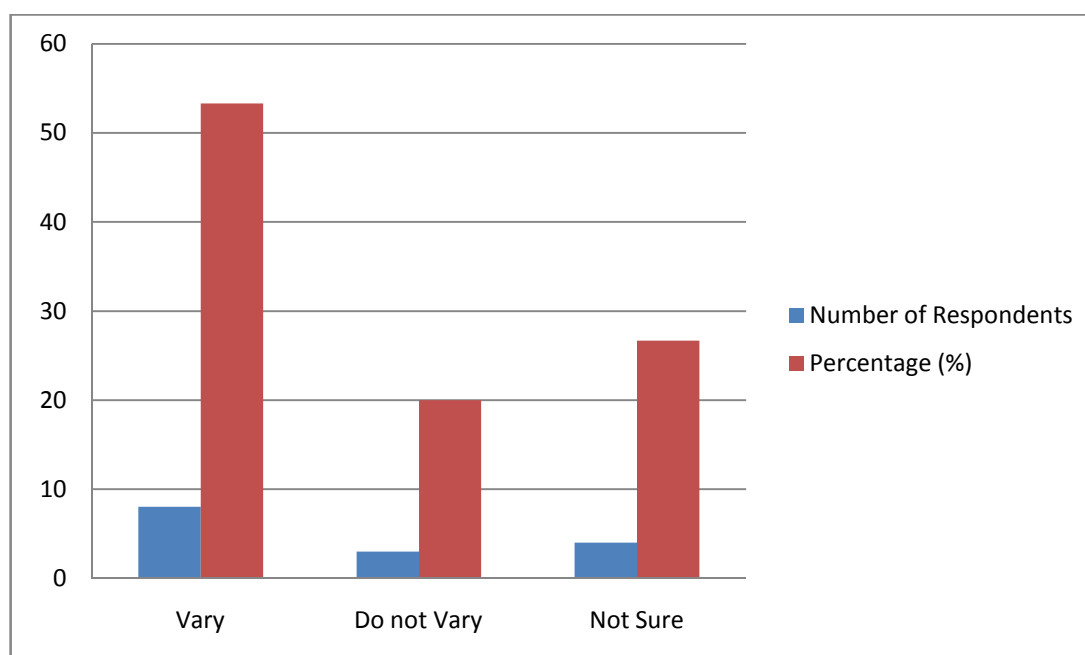
¹⁹² An interview with Advocates Masaka and Sabasaba of Dar es Salaam at the High Court of Tanzania at Dar es Salaam on 12 March 2014, and Faisal of Rwanda by telephone on 15 April 2014

Almost all lawyers were unaware as to whether there is any effort to harmonise the legal system on the matter under the auspice of the EAC.

Table 5.3 Whether the available legal framework and court approach vary greatly

Response	Number of Respondents	Percentage
Vary	8	53.33
Do not Vary	3	20
Not Sure	4	26.67
Total	15	100

Figure 5.2 Where the available legal framework and court approach vary greatly



5.5 Data Collected from EAC Secretariat and East Africa Law Society (EALS)

The researcher conducted scheduled interview to the senior legal officers who will represent the opinion of the EAC and EALS. Moreover the researcher distributed questionnaires to the chief legal counsel of the EAC¹⁹³ and senior legal officer of the EALS¹⁹⁴ which were responded accordingly. The response to the first question,¹⁹⁵ the

¹⁹³ Hon. Kahwa, the EAC Secretary to the Council

¹⁹⁴ Mr. .Mtui, Senior Legal officer of the EALS

EAC Secretary to the Council responded that there is no such convention or protocol under the auspice of the EAC, and that there is no harmonisation of law on the matter has taken place (to third question), as for the second question, he responded that he is not sure if the legal system and court approach vary from one member state to another. Hon. Kahwa had this to say as to adoption of the legal system at study from the European Union; I quote; “.

I suggest that for purposes of comparative analysis you go beyond EU with a view to interrogating how this subject is handled (its effectiveness and drawbacks) in other cross-cutting jurisdictions.”

Three senior legal officers of the EAC¹⁹⁶ informed the researcher that there is an on-going harmonisation of law, but an aspect dealing with recognition and enforcement of foreign judgement has not been reached, as there is a long list to be worked out, the list of which the aspect at study is inclusive.

Mr Mtui¹⁹⁷ of the East Africa Law Society said he is not aware if there is any process to adopt the protocol to curter for recognition and enforcement of foreign judgement in the EAC member states, though he suggested that so far there is Common Market Protocol in place, so there is a need to have the convention at study which will help to resolve disputes arising from the movement of people and commercial transaction which will arise thereof.¹⁹⁸ Mr.Mtui had a say on the working of the East African Court of Justice (EACJ), that though the Court has rendered a number of judgements,¹⁹⁹ the EAC member states has been reluctant to adhere to those judgements, the habit of which contravene Article 44 of the EAC Treaty which require the member states to implement the judgements of the EACJ.²⁰⁰

¹⁹⁵ Whether the EAC has a regional convention on recognition and enforcement of foreign judgement

¹⁹⁶ An interview with Mr. Agaba , Michel and Ms. Rehema Kerefu on 07/April/2014 at the EAC Headquarter at Arusha-Tanzania

¹⁹⁷ An interview with Mtui at EALS office in Arusha-Tanzania on 13 April 2014

¹⁹⁸ Article 2 (4) of the EAC Common Market Protocol of 20/11/2009 done at Arusha-Tanzania provides that; ***In accordance with the provisions of Articles 76 and 104 of the Treaty, this Protocol provides for the following: (a) the free movement of goods; (b) the free movement of persons; (c) the free movement of labour; (d) the right of establishment;(e) the right of residence; (f) the free movement of services; and (g) the free movement of capital..***

¹⁹⁹EACJ judgements are compiled in the EALS Law Digest.

²⁰⁰ The procedure for execution of the EAC Court of Justice’s judgements imposing pecuniary obligation is vested into the court of Partner state by using the civil procedure in force in the Partner State in which execution is to take place, Article 44 of the EAC Treaty 1999.

5.6 Data Collected from the Attorney General of the EAC member states

One questionnaire was distributed to each of the office of the Attorney General in the EAC member states, making the total of five questionnaires. Out of five questionnaires, three were brought back (from Kenya, Rwanda and Tanzania) which account for 60%. No questionnaires were brought back from the Attorney General Office of Burundi and Uganda.

Responding to the first question,²⁰¹ a Kenyan state attorney²⁰² made it clear as per her understanding that there is no such EAC convention on enforcement of foreign judgement. As to the second question, she said she is not sure that the legal system and approach vary greatly within the EAC member states. She further said no harmonisation of law has taken place, though she added that she is not much conversant with principle relating to recognition and enforcement of foreign judgement. She also informed that at the University of Nairobi private international law is among subject listed in the prospectus.

The respondent from Tanzania²⁰³ had the same view with the Kenyan counterpart but he added that he is in EAC member states task force which work on harmonisation of law, and that he is aware the issue at study is in the list to be worked out but hasn't yet been done.

The respondent from Rwanda in response to the question whether there is any EAC convention on the subject, he categorically said there is no such convention.²⁰⁴ He agreed that the law in the member states vary in respect of the study at hand. As to the harmonisation of law of the subject at hand, he answered in affirmative that no harmonisation has taken place. He further commented that, I quote; *“whether there is bilateral agreements or not, the recognition and enforcement of foreign judgement is guided by politics. Its success or failure depends on political will of the states concerned. Some cases may be recognised and enforced while other may not due to nature and effect/impact of a such judgement may have to one or all states*

²⁰¹ Whether there is a EAC regional Convention on recognition and enforcement of foreign judgement

²⁰² Rose Nyakwana, State Attorney of Kenya.

²⁰³ Mr. Kalunde, A state attorney with Attorney General Office of Tanzania.

²⁰⁴ Kanamugire Faisal, identified as working with the Law Reform Commission of Rwanda.

concerned. Therefore EAC needs something else that binds member states".For harmonisation of law, he supported the idea for EAC member states to work on it and he added that in Rwanda it could be easy as of now to enforce judgement from France than from the EAC member states.²⁰⁵

5.7 Data collected from Law Colleges

A number of three universities having faculty of law were consulted/visited in Tanzania,²⁰⁶ two universities in Uganda,²⁰⁷ two in Rwanda,²⁰⁸ one in Burundi and two in Kenya.²⁰⁹ The aim of consulting the above selected universities were two; first to see if Private International Law is among subject offered because it is within the subject where the principle at study are studied, secondly which is just addition to the first aim, was to know if the subject, especially in the old universities, have been taught since early time as compulsory or is just new and not compulsory. It was noted that the subject has been there in those old universities in EAC,²¹⁰ but the subject was just optional and that there were no enough expert to teach the subject.²¹¹ Currently the subject is taught in almost all new emerging universities but still it is not compulsory subject as compared to public international law which has been currently made compulsory in many universities.²¹²

5.8 Conclusion

This chapter presented the data collected from various selected persons and institutions. The data were collected through questionnaires, email and scheduled interviews. The data collected were coded and analysed and presented into tables and graphs. The questions that were asked by the researcher had direct inference to the hypothesis which guides this research and the aim is to test the hypothesis from the

²⁰⁵ Because Rwanda is Francophone state.

²⁰⁶ University of Dar es Salaam, Tumain University and Open University of Tanzania-Head Quarter .

²⁰⁷ Makerere University and Kampala International University.

²⁰⁸ National University of Rwanda and Kigali Independent University.

²⁰⁹ University of Nairobi and Kenyatta University.

²¹⁰ The old universities in EAC are Makerere Universities, University of Dar es Salaam, Univeristy of Nairobi and National University of Rwanda.

²¹¹ As per interview with Dr. Kennedy of University of Dar es Salaam; Mr.Magari- Lecture at Tumain University; Ntanti – Lecture at the Open University of Tanzania; Kahwa-the Secretary to the Council of EAC and Ms. Rose Nyakwama of Kenya.

²¹² For instance at Open University and University of Dar es Salaam the subject is not compulsory.

data collected. The process of data collection has showed some challenges. The researcher circulated questionnaires to various persons and institutions but few were brought back. No questionnaires from judiciary were brought back. Another challenge based on the information/data collected from Rwanda and Burundi where they use other language apart from English, thus I had to find an interpreter/translator who could turn those data into English language.²¹³

²¹³Mr. Michel Ndayikengurukire who works with the EAC legal Department was a helpful translator in this respect

CHAPTER SIX

SUMMARY, CONCLUSION AND RECOMMENDATIONS

6.1 Summary

This research has worked out on the position and applicability of the principles on recognition and enforcement of foreign judgements in EAC and the challenges in the harmonisation of law on the same. It clear that owing to the principle of territorial sovereignty a judgement delivered in one country cannot in the absence of international agreement have a direct operation of its own force in another. Thus there must be in place the rules to regulate the enforcement of foreign courts judgement in favour of the decree holder(if it require/necessitate so to be done) so that the judgement in question is not rendered valueless.

EAC consists of five member states, three founding members namely Tanzania, Kenya and Uganda follows common law legal system, while two states which joined later namely Rwanda and Burundi follow civil law legal system. Having noted the variation in the legal systems, the EAC Establishing Treaty of 1999 require the member states to harmonises their law and standardisation of judgement (Article 5 and 126 of the EAC Treaty). It is a challenge to harmonise legal systems which vary so greatly as it appear in the EAC, but this could be eased because Rwanda and Burundi are now turning to common law legal system.

The researcher visited and consulted different offices and persons who are concerned with the principles at study. Data were collected from the EAC secretariat (legal Department), the East African Law Society, Attorney General Offices of the EAC member states, lawyers from EAC member states and law school/colleges. These data were scrutinised and analysed where only useful data were taken, then the useful data were coded and tabulated in their respective categories. After these data were made into tables, the researcher presents them into meaningful graphs. From these meaningful graphs and tables the researcher and the reader can easily taste the hypothesis guiding this research.

This research was guided with three hypotheses which are East Africa Community has no law/regional convention on the recognition and enforcement of foreign judgement, second; the available legal framework and courts vary greatly and third, the harmonisation of law on the subject has not taken place.

The first hypotheses which say EAC has no convention on the recognition and enforcement of foreign judgement prove the alternative. This hypothesis intended to see if there is an established convention or protocol on the subject ,like in the EU with its Brussels Regime which allow the free circulation of judgement within the European Union/member states. It is noted that there is EAC Common Market Protocol which allows for free movement of people and goods within the EAC which may lead to conflicts involving foreign law elements, so it was indeed necessary to have the convention at study in place. There is also EAC Customs Union Protocol. 100% of the Respondents answered in affirmative that there is no such convention and they are not aware if there is any process to adopt it. Two respondents indicated that the issue is in the list to be worked out though it has not been scheduled to be in the thing of consideration in the near future as there are a lot of things to be worked out before reaching the principle at study.

The second hypothesis also prove to be alternative, from the data collected 53.33% of the interviewed lawyers answered that the legal regime in EAC vary, while 20% said there is no big variation so far the justice is met, and 26.67% were not aware of the principle at study. The hypothesis also intended to see if lawyer from EAC member states take any trouble to learn legal system of another states in the EAC, most of lawyers proved to be unfamiliar with the principle at study prevailing in another member states because they don't meet with circumstances which necessitate them to learn about it, but the adopted Common Market Protocol will eventually force lawyers to learn more about the legal system prevailing in the neighbouring states.

The third hypothesis however proves alternative, 100% affirmative response from lawyers, 100% from the EAC secretariat made affirmative response too, though it was also noted from EAC official that the principle at study in in the list awaiting to worked out among many other thing to be done. However all respondents supported the move to harmonise the legal regime at study so as to accommodate the oncoming disputes which may arise due to the implementation of the Treaty and protocols adopted for mutual benefits of the EAC member states and their inhabitants.

6.2 Conclusion

It has been noted that private international law on which the principle emanate have been neglected in Africa continent. This is due to the fact that there is less attention given to the subject and less movement of people which creates dispute involving foreign law elements hence attracting the application of the principles of private international law.

The creation of the regional community in Africa like the EAC would necessitate the application of the principle at study thus the easy way of recognition and enforcement of foreign judgement from the member states will be highly required rather than to remain with the old mode which require the reciprocal arrangement to be in place between states before the judgements in question can be recognised and enforced. Some regional community in the world have made a well set of principles which eases the circulation of judgements from of country to another within the regional community in question. The EU is a good model for this under its Brussels Regime.

The situation prevailing now within the EAC depends on reciprocal arrangements in which the states concerned may designate or may not designate a certain state to be among reciprocating state. With this, the EAC convention on the subject at study is important.

6.3 Recommendations

Based on field findings, literatures, comments as well as lessons from other jurisdictions this research has come up with the following recommendations grouped into two categories, legal and non-legal.

6.3.1 Legal Recommendations

6.3.1.1 Adoption of the Protocol on Recognition and Enforcement of Foreign Judgement

So far the EAC Establishing Treaty under Articles 5 and 126 require the Community member states to harmonise their legal system and the standardisation of judgements, and taking into account the already adopted Common Market Protocol which make the free movement of people and goods within EAC, the best way to implement the situation is the adoption of the Protocol subject of this study. Once the movement of people and goods come up there is always dispute to come which will end up in court and the judgement thereof, thus such judgement should be given free circulation within the community under the would be adopted protocol on the subject at study.

6.3.1.2 Publication of the East African Law Society Laws Reports

The publication of the law reports over the decision of the courts in the member states is so important for the development of the principles at study or any other principle, and further to that may help lawyers and judges to minimize discrepancies or variation of approach in their judgements. The approach need be almost equal rather than having different approach which may confuse the development of the principles of law. The important of the law reports has also emphasised in Article 126 of the EAC Treaty.

6.3.1.3 A lesson from EU

The European Union has a well settled legal system on recognition and enforcement of foreign judgement under the Brussels Regime (comprising the Brussels Convention of 1968, Lugano Convention 2007 and the Brussels Regulation 1 of 2001 and there is a recast Brussels 1 regulation which will replace the 2001 regulation in 2015). The Brussels Regime has departed from the old mode of depending on reciprocity arrangements among states so that the foreign judgements

are recognised and enforced, rather it now allows the free circulation of judgement from the member states (just with minor conditions to be adhered) to another to curb with the problem of fleeing debtors, to avoid unnecessary obstacles and the avoidance of relitigating of the same matter and parties. Thus it is my recommendation that there is no harm for EAC to adopt such system under Brussels Regime just with minor changes to suit our need.

6.3.2 Non Legal Recommendation

6.3.2.1 Strengthening Political Will and Commitment

It could be noted that the decision as to the implementation of the EAC Treaty and the protocols thereof lie on the hand of political leaders from the members states and the established organ of the EAC²¹⁴. Thus out of their political will and commitment nothing could be done. Political will and commitment should be demonstrated by total effective strengthen of all level of the government on the part of leaders and all levels at the EAC and the civil society participation.

6.3.2.2 Academic

It has been noted that most of the old generation of lawyers are not conversant with the principle at study due to the fact that during those early days private international was not given priority as compared to public international law. It is recalled that now movement of people and goods is on increase thus the application of the principles contained in private international law comes into play. It is recommended that private international law (where the principle at study will be learnt) should be given equal footing as public international law or emphasised to be included in the colleges' prospectus as compulsory subject.

²¹⁴ As established under Article 9 of the EAC Treaty, includes EAC legislative Assembly, Council of Ministers of the EAC and the Summit which for Head of states and Government.

REFERENCES

Books

Cheshire G.C (1961); Private International Law, 6th Edition, Oxford University Press, Oxford at The Clarendon Press.

Collins L at At (Eds) (1993); Decey and Morris The Conflicts of Laws, 12th Edition, Sweet and Maxwell, Volume 2, London.

Juenger, Fredrick K. (1993); Choice of Law and Multistate Justice, Martinus Nijhof, Kluwer.

McClean David and BeeverKisch (2010); The Conflicts of Law, 7th Edition, South Asian Edition, Sweet and Maxwell, London, 2010.

North P. M and Fawcett J.J (1992); Cheshire and North's Private International Law, 12th Edition, Butterworth, London.

North P. and Fawcett J.J (1999); Cheshire and North's Private International Law, 13th Edition, Oxford University Press, Oxford.

Journal Articles

Oppong Richard F., (2007), Private International in Africa: The Past, Present and Future. In American Journal of Comparative Law, Volume 55, 2007.

Leon P.S. G (1983); The Recognition and Enforcement of Foreign Judgements in South Africa, 16 Comparative and International Law Journal, South Africa International and Comparative Law Quarterly, Volume 55, October 2006.

Oppong Richard F, (2006), Common Law Regime for Enforcing Foreign Judgements, In International and Comparative Law Quarterly, Volume 55, October 2006.

Report Submitted at Nairobi Conference by the International Law Institute (Kampala Office) on East African Regional Study with a view to Harmonise Legal Training Curriculum and Harmonise Legal and Regulatory Framework

Governing Legal Training, Certification and Practice within the Community, March 2011.

The Tanzania Lawyers, Volume 1 2013, Number 1 issued by Tanganyika Law Society.

Electronic Sources

The Institute for Private International Law in Africa, University of Johannesburg (UJ)<http://www.uj.ac.za/en/research/newsannouncements/researchhighlights/2008researchhighlights/pages/TheInstituteforPrivateInternationallawinAfrica.aspx>, accessed on 25/07/2013.

Conflicts of Laws, retrieved from <http://en.wikipedia/wiki/conflicts-of-laws>, accessed on 24/08/2013.

Hague Conference on Private International Law, The World Organisation in Civil and Commercial Matters, Information on the Hague Conference on Private International Law, retrieved from http://www.hcch.net/index_en.php?act=text.display&tid=4, accessed on 24/08/2013.

The Law Library of the Congress; Burundi/Rwanda possible Switch of Legal Tradition, retrieved from <http://www.loc.gov/lawweb/servlet/LLoc-news?disp3-1205401325-text>, accessed on 20/08/2013.

East Africa Single Currency Talks Resume Today, Trade Mark East Africa, retrieved from <http://www.trademarka.com/eac-single-currency-talks-resume-today> accessed on 24/08/2013.

Ntampaka Charles (2013); Reconciling the Source of Law in Burundi Code of Persons and Family, published in Kluwer Law International

<http://books.google.co.uk/uk/book?id=vdn4hPpczcic&pg67lpg&dq=burundi+law+on+foreign+judgement&source>, retrieved on 17/12/2013.

Christopher Sale and Another V. Attorney General, Civil Suit No. 91 of 2011, High Court of Uganda at Kampala, retrieved from

<http://www.ulii.org/org/judgement/commercial-court/2013/107>, accessed on 16/12/2013.

Geoffrey Githinji Kamiri and Cooperative Bank of Kenya V. Methew Ouma Oseko, Misc. Civil Cause No. 13 of 2012, High Court of Uganda at Kampala, retrieved from

<http://www.ulii.org/ug/judgement/high-court/2013/8>, accessed on 12/12/2013.

2012 Investment Climate Statement in Rwanda; US Department of State-Diplomacy Action, retrieved from

<http://www.state.gov/e/eb/rls/othr/2012/1912224.htm>, accessed on 09/04/2014.

The Multilateral Investment Guarantee Agency (MICA); Its Applicability in Rwanda to Choice of law Clause, retrieved from

<http://services.bowman.co.za/Bronchores/PractiveAreas/BankingAndFinanceAfrica/BankingAndFinanceAfrica%LR.pdf>, accessed 09/04/2014.

APPENDICES
SAMPLE OF QUESTIONNAIRES
APPENDIX 1

**QUESTIONNAIRES TO THE EAST AFRICA COMMUNITY
SECRETARIAT (LEGAL DEPARTMENT) AND ATTORNEY GENERAL
CHAMBERS OF THE MEMBER STATES**

Dear Respondent, I am **Killey Ebarania Mwitasi** a candidate of Mzumbe University Morogoro, pursuing a Master Degree in Laws(L.L.M – International Law) doing a research entitle, “**Recognition and Enforcement of Foreign Judgement in East Africa Community: Efficiency and Challenge in the Harmonisation Process**” for the year of study 2012/2013.

According towell-developed principle in Private International Law is that there should be an easy and free circulation of judgement obtained in one country to be enforced, with some minor limitations, in another foreign country to avoid relitigating on the same matter or putting several obstacles thereof. Some parts of the world like the European Union have already such kind of system in place to leave away the old system of working through bilateral agreements. **Articles 44 and 126 of the Treaty Establishing East Africa Community of 1999** requires the member states to work out in the harmonisation of law and standardisation of judgement of the courts, and the recognition and enforcement of the judgement rendered by the East Africa Court of Justice in the member states. This study try to analysed the legal situation in the member states, the understanding of the subject, the efficiency and problems to which the courts and lawyers face when dealing with foreign judgement in the national courts, and the process of harmonisation of law on the subject, if any.

The success of the this research depends much on your highly appreciated assistance, in that regard, may I request your precious and valuable limited time to respond to the questionnaires put before you to the best of your knowledge. I declare that the information obtained will be for academic purpose only.

Thank you in advance

PART A

PARTICULARS OF THE RESPONDENT

NAME:.....

GENDER.....

AGE: between a) 18 – 30 years b) 31 – 45years c) 45 and above

OCCUPATION:.....

ADDRESS.....

DATE:.....

PART B: QUESTIONS

General Instruction.

- Please PUT a **tick** for the right answer and for the multiple choice questions.

1. Does the East Africa Community has the law/convention/protocol which deal with the recognition and enforcement of judgements from national courts of the community member states?

- a) *Yes we have* b) *No we don't have*
c) *I don't know* d) *I am not sure*

2. If the answer above is no, is there any effort to have such system in place within the Community

- a) *yes*
b) *not yet decided*
c) *I don't know*
d) *I am not sure*

3. Does the bilateral agreement on the subject exist in the member states, and that does the law vary from one member to another?

- a) *Yes, they exist and the law vary*
- b) *Yes they exist but the law does not vary greatly*
- c) *I am not sure*
- d) *No, they don't exist*

4. Is the enforcement of foreign judgements go smoothly through the system of bilateral agreements? Or does the Community need something different from the present situation.

Please give your opinion.

.....
.....
.....

5. What are the challenges facing the harmonisation of law relating to the subject herein?

Please specify and elaborate

.....
.....
.....

6. Does the East Africa Universities have curriculum relating to Private International law? Does the curriculum old or recently established? Does the subject given good attention as compared to Public International law

YES/NO. If Yes or No please elaborate.

.....
.....
.....

PART C:

MULTIPLE CHOICE QUESTIONS

1. The Recognition and Enforcement of foreign judgement principle is a dead principle in East Africa
 - a) Totally agree b) Agree c) Partially agree
 - d) Disagree e) Totally disagree f) None of the above

2. Recognition and Enforcement of foreign judgement principle is not practiced in East Africa as an economical instrument to bring positive sustainability.
 - a) Totally agree b) Agree c) Partially agree
 - d) Disagree e) Totally disagree f) None of the above

3. The principle on recognition and enforcement of foreign judgement is narrowly understood among lawyers in East Africa.
 - a) Totally agree b) Agree c) Partially agree
 - d) Disagree e) Totally disagree f) None of the above

4. The Principle in question has failed due to the lack or minimal attention given to private international law in the region
 - a) Totally agree b) Agree c) Partially agree
 - d) Disagree e) Totally disagree f) None of the above

5. Having a single convention on the subject in the Community will bring positive change economically and socially and will be a solution to the fleeing debtors
 - a) Totally Agree b) Agree c) Partially Agree
 - d) Disagree e) Totally disagree f) None of the above

6. The Community need to adopt the system on recognition and enforcement of foreign judgement from other developed system like the European Union.

- | | | |
|------------------|---------------------|----------------------|
| a) Totally Agree | b) Agree | c) Partially agree |
| d) Disagree | e) Totally disagree | f) None of the above |

[PART D: OTHER ASSISTANCE

Dear respondent, you may wish to extend your intellectual assistance you think is relevant in the study to the researcher, this may include advice, criticisms and other intellectual materials like magazine, newspaper, journals, articles and other information you think are necessary and may fit this study.

THANK YOU FOR YOUR COOPERATION

PART E:

PARTICULARS OF TH RESEARCHER

NAME: Killey Ebrania Mwitasi

INSTITUTION: Mzumbe University

FACULTY: Law

COURSE: LLM – International Law

P.O. BOX 9050 Dar es Salaam

MOBILE NO: +255 755 470 891

EMAIL: kilepakile@yahoo.com

APPENDIX 1I

QUESTIONNAIRES TO JUDICIALLY, LAW SOCIETIES, LAW FIRMS AND LAWYERS

Dear Respondent, I am **Killey Ebarania Mwitasi** a candidate of Mzumbe University Morogoro, pursuing a Master Degree in Laws(L.L.M – International Law) doing a research entitle, “**Recognition and Enforcement of Foreign Judgement in East Africa Community: Efficiency and Challenge in the Harmonisation Process**” for the year of study 2012/2013.

According to well-developed principle in Private International Law is that there should be an easy and free circulation of judgement obtained in one country to be enforced, with some minor limitations, in another foreign country to avoid relitigating on the same matter or putting several obstacles thereof. Some parts of the world like the European Union have already such kind of system in place to leave away the old system of working through bilateral agreements. **Articles 44 and 126 of the Treaty Establishing East Africa Community of 1999** requires the member states to work out in the harmonisation of law and standardisation of judgement of the courts, and the recognition and enforcement of the judgement rendered by the East Africa Court of Justice in the member states. This study try to analysed the legal situation in the member states, the understanding of the subject, the efficiency and problems to which the courts and lawyers face when dealing with foreign judgement in the national courts, and the process of harmonisation of law on the subject, if any.

The success of the this research depends much on your highly appreciated assistance, in that regard, may I request your precious and valuable limited time to respond to the questionnaires put before you to the best of your knowledge. I declare that the information obtained will be for academic purpose only.

Thank you in advance

PART A

PARTICULARS OF THE RESPONDENT

NAME:.....

GENDER.....

AGE: between a) 18 – 30 years

b) 31 – 45 years

c) 45 and above

OCCUPATION:.....

ADDRESS.....

DATE:.....

PART B: QUESTIONS

General Instruction.

- Please PUT a **tick** for the right answer and for the multiple choice questions.

1. Does the East Africa Community have the law/convention/protocol which deal with the recognition and enforcement of judgements from national courts of the community member states?

a) *Yes we have*

b) *No we don't have*

c) *I don't know*

d) *I am not sure*

2. If the answer above is no, is there any effort to have such system in place within the Community

a) *yes*

b) *not yet decided*

c) *I don't know*

d) *I am not sure*

3. Does the bilateral agreement on the subject exist in the member states, and that does the law vary from one member to another?

e) Yes, they exist and the law vary

f) Yes they exist but the law does not vary greatly

g) I am not sure

h) No, they don't exist

4. Have you ever conducted cases which required the enforcement of the judgement abroad or a case from abroad requiring enforcement in your country? If yes what were those cases and challenges to those cases?

Please specify and elaborate

.....
.....
.....

5. Is the recognition and enforcement of foreign judgements go smoothly through the system of bilateral agreements? Or does the Community need something different from the present situation.

Please give your opinion.

.....
.....
.....

6. Does the East Africa Universities have curriculum relating to Private International law? Does the curriculum old or recently established? Does the subject given good attention as compared to Public International law

YES/NO. If Yes or No please elaborate.

.....
.....
.....

PART C:

MULTIPLE CHOICE QUESTIONS

2. The Recognition and Enforcement of foreign judgement principle is a dead principle in East Africa
 - b) Totally agree b) Agree c) Partially agree
 - d) Disagree e) Totally disagree f) None of the above
2. Recognition and Enforcement of foreign judgement principle is not practiced in East Africa as an economical instrument to bring positive sustainability.
 - b) Totally agree b) Agree c) Partially agree
 - d) Disagree e) Totally disagree f) None of the above
3. The principle on recognition and enforcement of foreign judgement is narrowly understood among lawyers in East Africa.
 - b) Totally agree b) Agree c) Partially agree
 - d) Disagree e) Totally disagree f) None of the above
4. The Principle in question has failed due to the lack or minimal attention given to private international law in the region
 - b) Totally agree b) Agree c) Partially agree
 - d) Disagree e) Totally disagree f) None of the above
5. Having a single convention on the subject in the Community will bring positive change economically and socially and will be a solution to the fleeing debtors
 - a) Totally Agree b) Agree c) Partially Agree
 - d) Disagree e) Totally disagree f) None of the above

6. The Community need to adopt the system on recognition and enforcement of foreign judgement from other developed system like the European Union.

- a) Totally Agree b) Agree c) Partially agree
d) Disagree e) Totally disagree f) None of the above

PART D: OTHER ASSISTANCE

Dear respondent, you may wish to extend your intellectual assistance you think is relevant in the study to the researcher, this may include advice, criticisms and other intellectual materials like magazine, newspaper, journals, articles and other information you think are necessary and may fit this study.

THANK YOU FOR YOUR COOPERATION

PART E:

PARTICULARS OF TH RESEARCHER

NAME: Killey Ebrania Mwitasi

INSTITUTION: Mzumbe University

FACULTY: Law

COURSE: LLM – International Law

P.O. BOX 9050 Dar es Salaam

MOBILE NO: +255 755 470 891

EMAIL: kilepakile@yahoo.com

APPENDIX III

QUESTIONNAIRES TO ACADEMIC INSTITUTIONS (LAW SCHOOLS AND FACULTIES OF LAW)

Dear Respondent, I am **Killey Ebarania Mwitasi** a candidate of Mzumbe University Morogoro, pursuing a Master Degree in Laws(L.L.M – International Law) doing a research entitle, “**Recognition and Enforcement of Foreign Judgement in East Africa Community: Efficiency and Challenge in the Harmonisation Process**” for the year of study 2012/2013.

According to well-developed principle in Private International Law is that there should be an easy and free circulation of judgement obtained in one country to be enforced, with some minor limitations, in another foreign country to avoid relitigating on the same matter or putting several obstacles thereof. Some parts of the world like the European Union have already such kind of system in place to leave away the old system of working through bilateral agreements. **Articles 44 and 126 of the Treaty Establishing East Africa Community of 1999** requires the member states to work out in the harmonisation of law and standardisation of judgement of the courts, and the recognition and enforcement of the judgement rendered by the East Africa Court of Justice in the member states. This study try to analysed the legal situation in the member states, the understanding of the subject, the efficiency and problems to which the courts and lawyers face when dealing with foreign judgement in the national courts, and the process of harmonisation of law on the subject, if any.

The success of the this research depends much on your highly appreciated assistance, in that regard, may I request your precious and valuable limited time to respond to the questionnaires put before you to the best of your knowledge. I declare that the information obtained will be for academic purpose only.

Thank you in advance

PART A

PARTICULARS OF THE RESPONDENT

NAME:.....

GENDER.....

AGE: between a) 18 – 30 years b) 31 – 45years c) 45 and above

OCCUPATION:.....

ADDRESS.....

DATE:.....

PART B: QUESTIONS

General Instruction.

Please PUT a ***tick*** for the right answer and for the multiple choice questions.

1. Does the East Africa Community has the law/convention/protocol which deal with the recognition and enforcement of judgements from national courts of the community member states?
 - a) *Yes we have*
 - b) *No we don't have*
 - c) *I don't know*
 - d) *I am not sure*
2. If the answer above is no, is there any effort to have such system in place within the Community
 - a) *yes*
 - b) *not yet decided*
 - c) *I don't know*
 - d) *I am not sure*

3. Does the bilateral agreement on the subject exist in the member states, and that does the law vary from one member to another?

i) Yes, they exist and the law vary

j) Yes they exist but the law does not vary greatly

k) I am not sure

l) No, they don't exist

4. Is the enforcement of foreign judgements go smoothly through the system of bilateral agreements? Or does the Community need something different from the present situation.

Please give your opinion.

.....
.....
.....

5. What are the challenges facing the harmonisation of law relating to the subject herein?

Please specify and elaborate

.....
.....
.....

6. Does the East Africa Universities have curriculum relating to Private International law? Does the curriculum old or recently established? Does the subject given good attention(by lecturers and students) as compared to Public International law

YES/NO. If Yes or No please elaborate.

.....
.....
.....

PART C:

MULTIPLE CHOICE QUESTIONS

1. The Recognition and Enforcement of foreign judgement principle is a dead principle in East Africa.

c) Totally agree b) Agree c) Partially agree
d) Disagree e) Totally disagree f) None of the above

2. Recognition and Enforcement of foreign judgement principle is not practiced in East Africa as an economical instrument to bring positive sustainability.

c) Totally agree b) Agree c) Partially agree
d) Disagree e) Totally disagree f) None of the above

3. The principle on recognition and enforcement of foreign judgement is narrowly understood among lawyers in East Africa.

c) Totally agree b) Agree c) Partially agree
d) Disagree e) Totally disagree f) None of the above

4. The Principle in question has failed due to the lack or minimal attention given to private international law in the region

c) Totally agree b) Agree c) Partially agree
d) Disagree e) Totally disagree f) None of the above

5. Having a single convention on the subject in the Community will bring positive change economically and socially and will be a solution to the fleeing debtors

a) Totally Agree b) Agree c) Partially Agree
d) Disagree e) Totally disagree f) None of the above

6. The Community need to adopt the system on recognition and enforcement of foreign judgement from other developed system like the European Union.

- | | | |
|------------------|---------------------|----------------------|
| a) Totally Agree | b) Agree | c) Partially agree |
| d) Disagree | e) Totally disagree | f) None of the above |

PART D: OTHER ASSISTANCE

Dear respondent, you may wish to extend your intellectual assistance you think is relevant in the study to the researcher, this may include advice, criticisms and other intellectual materials like magazine, newspaper, journals, articles and other information you think are necessary and may fit this study.

THANK YOU FOR YOUR CORPERATION

PART E:

PARTICULARS OF TH RESEARCHER

NAME: Killey Ebrania Mwitasi

INSTITUTION: Mzumbe University

FACULTY: Law

COURSE: LLM – International Law

P.O. BOX 9050 Dar es Salaam

MOBILE NO: +255 755 470 891

EMAIL: kilepakile@yahoo.com