

KENYA

KAPLAN & STRATTON, ADVOCATES



FIRM INFORMATION

Website address: www.kaplanstratton.com

Languages spoken: English, Swahili, Gujarati

Contacts: Dr. Fred Ojiambo MBS, SC, and Esther W. Kinyenje – FCIARB

Address: 9th Floor Williamson House, 4th Ngong Avenue, Upper Hill, Nairobi, Kenya

Telephone: +254 (20) 284 1000/ 273 3919

Email: KSLitigation@kapstrat.com

ENFORCEMENT OF FOREIGN MONEY JUDGMENTS

What Laws Regulate Enforcement?

The primary legislation regulating the enforcement of foreign judgments in Kenya is the Foreign Judgments (Reciprocal Enforcement) Act.

Treaties

Kenya has adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

Jurisdiction over Foreign Judgment Debtors

A Kenyan court will exercise jurisdiction in enforcing a foreign judgment against assets in Kenya belonging to a foreign defendant if the country of the judgment's origin affords reciprocal treatment in respect of Kenyan judgments. Kenya currently has reciprocal arrangements with Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, Rwanda and the United Kingdom.

If there is no reciprocity between the two countries, the judgment creditor will have to commence a fresh action in Kenya.

Requirements for Enforcement

The following are the main requirements for enforcement of a foreign judgment in Kenya:

- The foreign judgment must be final or must require the judgment debtor to make an interim payment to the judgment creditor. A foreign judgment is deemed final for enforcement purposes even if an appeal is pending against it in the foreign jurisdiction;
- A foreign court must have had jurisdiction over the defendant. The foreign court would have had jurisdiction if the cause of action arose within its jurisdiction, if the defendant voluntarily submitted to the court's jurisdiction or if he resided there or had a place of business there, or, in the case of a contract, if performance of it took place there;
- The defendant must have been given notice of the court proceedings against him;
- Notice should have been given in conformity with the laws of that foreign court;

- Enforcement must not offend Kenyan public policy. Anything inconsistent with the Kenyan Constitution or Kenyan law will be deemed contrary to Kenyan public policy.

Authentication and Translation of Judgment

A foreign judgment is required to be authenticated by a competent authority in its country of origin.

If the judgment is in a language other than English, it is required to be translated into English by a notary public on the Registrar of the original court or authenticated by affidavit.

Procedure

Enforcement of a foreign judgment is by way of a formal application to the High Court in a prescribed form. The application must be supported by various documents including a certified copy of the judgment and an affidavit confirming that the judgment has not been satisfied.

A certificate under the seal of the foreign judge certifying the status of the court may be required.

How long does Enforcement take?

Enforcement of a foreign judgment may take between 6 months to one and a half years, depending on the complexity of the defences to enforcement and whether the matter is protracted.

Judgments in a Foreign Currency

The Kenyan court may convert the currency of the foreign judgment to Kenyan currency. The court however is not obliged to do so and may enforce a foreign judgment in a foreign currency.

Interest

A Kenyan court will enforce the interest portion of a foreign judgment.

Merits

A Kenyan court may not re-examine the merits of the case giving rise to the foreign judgments unless the judgment is inconsistent with a provision of Kenyan law.



Limitation

A judgment creditor has a period of six years from the date of the judgment in which to enforce it in Kenya before it becomes time barred.

Security for Costs

Kenyan courts may order a foreign plaintiff to provide security for the defendant's costs in the event that the defendant succeeds in opposing enforcement.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS**Relevant laws and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards**

Kenya is a party to the New York Convention which it adopted with a reciprocity reservation.

The Kenyan Arbitration Acts generally govern the enforcement of foreign arbitral awards.

Requirements for Enforcement

The requirements for enforcement include the following:

- The original arbitration agreement and the award, or certified copies of them must be provided. If these documents are in a language other than English, the party relying on the award or applying for its enforcement is required to provide a certified translated copies of the documents;
- The award must not be contrary to Kenyan public policy nor must it have been induced or affected by fraud, bribery, undue influence or corruption;
- The parties to the arbitration agreement under the foreign law must have had capacity to contract and the agreements must be valid under the foreign law;
- The defendant must have received notice of the arbitrator's appointment or of the proceedings and must have been able to present his case;
- The award must deal with disputes which fall within the reference to arbitration;
- The constitution of the arbitration tribunal and the proceedings must be in accordance with the relevant arbitration agreement or with the law of the country in which

the arbitration took place;

- The award must be binding on the parties and must not have been set aside or suspended by a competent authority of the country in which the award was made.

Procedure

Enforcement of a foreign arbitral award is by way of an application to the Kenyan High Court. The original arbitration agreement and award, or copies of them, must be provided to the court.

Limitation

A plaintiff with a foreign arbitral award has a period of 6 years from the date of the award to enforce it in Kenya before enforcement becomes time barred.

How long will Enforcement take?

Enforcement may take between 6 months to one and a half years depending on the complexity of the defences to enforcement and whether the matter is protracted.

Security for Costs

A Kenyan court has the power to order a plaintiff to provide security for the defendant's costs in the event that the defendant succeeds in opposing enforcement.

