FOREIGN JUDGMENT RECOGNITION AND ENFORCEMENT IN COURTS OF TANZANIA AND KENYA

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> 'We must (at least until the contrary be clearly proved) give credit to a foreign tribunal for knowing its own law, and acting within the jurisdiction conferred on it by the law.'- In the case of *Castrique v. Imrie,* (1870) L.R. 4 H.L. 414 as per Blackburn, J.

Abstract

This article focuses on the Recognition and Enforcement of Foreign Judgments (REFJ) under Private International Law Rules, Convention, Treaties among nations and more particularly Tanzanian and Kenyan Courts. The concept of recognition, grounds for REFJ and enforcement in international law and private international law perspectives have been discussed. The research article overviews the reciprocal treaties to Tanzania and Kenya and theories which provide justification for REFJ. The procedures in enforcement of foreign judgment in Tanzanian and Kenyan courts are also examined. Finally it examines various court decisions in Tanzania and Kenya in relation to the issues at hand with a view to assessing their strengths and possible weaknesses in REFJ with conclusion and recommendations at the end.

Key Words: *REFJ, Private International Law, Treaties Extradition*

1.0 Introductory Remarks

From a Private International Law perspective enforcing foreign judgment is, perhaps, the best evidence of interstate relation. An effective foreign judgment enforcement regime is a key component of any integration initiative likely to achieve significant success. Developing countries have opened, and continue to make giant strides in opening further, their economies to encourage and secure the inflow of foreign direct investment from developed economies. Many African countries have already done much to create a more business-friendly environment to promote local investment as well as foreign direct investment, and many have made impressive progress towards political and economic stability. In their efforts to revive economic activity they have reduced bureaucratic obstacles and interventions in their economies, embarked on privatisation programmes and are putting in place proactive investment measures.[3] Due to economic liberalisation of any country economy and the globalisation of business activities, there is now almost a free flow

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[3] See the Preface to Foreign Direct Investment in Africa: Performance and Potential, United Nations Conference on Trade and Development (1999) Publication No UNCTAD/ITE/IIT/Misc 15.

of foreign capital investment and movement of people in various countries in the world including Tanzania and Kenya. With the advent of globalisation Tanzania and Kenya poised as one of the major international and global players in the East African economy. Businesses from these developing economies in Africa are also rapidly engaging in a myriad of international transactions spanning from sale of goods through to complex and strategic business transactions locally and internationally. Resolution of potential disputes remains a prime consideration for entrepreneurs in the conduct of risk profile analysis of any transaction. The mode and forum of dispute resolution are significant factors in the decision-making process. Despite the significant strides made by developing countries in changing arbitration law and practice,[4] and introducing adjectival laws that are consistent with acceptable international standards,[5] foreigners engaging in commercial intercourse with business counterparts from developing countries still exhibit a strong reluctance in litigating or arbitrating their disputes *in fora* located in developing countries. Most international sale contracts, joint venture or investment agreements, and indeed, in some cases the acquisition of substantial local assets especially through privatisation; contain foreign jurisdiction and/or arbitration clauses.[6]

Tanzanian and Kenyan companies are increasing their propensity to invest abroad. The impact of liberalisation and globalisation leads to free migration of casual labour including skilled persons. People shift from one country to another by various ways and thus dispute crops up because of transnational child abduction/kidnapping, same sex marriages and adoption and surrogate motherhood in addition to the contractual conflicts. The usual conflicts of interests underlying these types of legal relationships and disputes arising from them gain complexity as a result of the transnational dimension and raise pressing questions as to which (domestic) authority ought to address these in a fragmented world with different applicable laws. The probabilities of disputes are handled by Private International law principles and theories to adjudicate these cases. In general judgments of one State's courts have no force by themselves in another State. Hence, whether judgments delivered in one country would be recognised and enforced in other country is the question to be discussed.

At present, the world is like a hamlet because of liberalisation and globalisation and hence free flow of people in different parts of the world which give birth to innumerable conflicts and the matter goes to court and they would be adjudicated by reading the judgment in the courts of law. Thus there is much more importance of recognition and enforcement of foreign judgments. This article mainly focuses on the Recognition and Enforcement of Foreign Judgment (hereafter written as REFJ)

[4]See AA Olawoyin, 'Charting New Waters with Familiar Landmarks: The Changing Face of ArbitrationLaw and Practice in Nigeria', 26 *Journal of International Arbitration* (2009), 373 for a discourse on the proposed Arbitration and Conciliation Bill in Nigeria.
[5]*Ibid*.http://www.academia.edu/7014902/Enforcement_of_Foreign_Judgments_in_Nigeria (accessed on 25 April 2016).
[6]*Ibid*.

under Private International Law Rules in bilateral and multilateral treaties between and among countries respectively with special reference to Tanzania and Kenya. It extensively examines on the recognition and enforcement of foreign judgment trying to bring some comparative study both in Tanzania and Kenya. This article brings insight on how foreign judgments would be recognised and executed. It is important to note that REFJ in the listed countries face a number of challenges when it comes to its execution. What is generally regarded as the provision of law in East African Community (EAC) dealing with the recognition of foreign *inter partes* judgments is contained in the respective Codes of Civil Procedure in force in each of the countries viz., Tanzania, Kenya, Uganda, Rwanda and Burundi.

An attempt is made in this article to deal with introduction picturing generally on the concept of recognition and enforcement of foreign judgment under the umbrella of International Law and Private International Law perspectives; an overall view of reciprocal treaties applicable to Tanzania and Kenya; theories which provide justification REFJ; the recognition and enforcement of foreign judgment as per various International Instruments, Conventions, treaties which are applicable international, national, regional level when they are accepted or ratified and domesticated in Tanzania and Kenya. This article presents the highlights on the recognition and enforcement of foreign judgment based on Foreign Judgment (Reciprocal Enforcement) Act,[7] and Foreign Judgment (Reciprocal Enforcement) Act[8] are the applicable laws in the respective States. The article also examines various court decisions/judgments in Tanzania and Kenya in relation to the issue at hand in particular, with a view to assessing their strengths and possible weaknesses in advancing the laudable objectives of reformers who promote the revision of laws across the countries specific to Tanzania and Kenya. It also highlights on the important requirements and exceptions for the recognition and enforcement of foreign judgment and end-up with conclusion plus recommendations.

2.0 General Concept of Recognition and Enforcement of Foreign Judgments under International and Private International Law

In law, the enforcement of foreign judgments is the recognition and enforcement in one jurisdiction of judgments rendered in another foreign jurisdiction. Foreign judgments may be recognised based on bilateral or multilateral treaties or understandings, or unilaterally without an express international agreement. In its most basic sense, enforcement may be said to mean 'the act of compelling compliance with a law.'[9] The recognition of a foreign judgment occurs when the court of one country or jurisdiction accepts a judicial decision made by the courts of

[7][Cap. 8, R. E. 2002].
[8][Cap. 43, R. E. 2012].
[9]*Black's Law Dictionary*. 8th edn. 2008, at 569.

another foreign country or jurisdiction, and issues a judgment in substantially identical terms without rehearing the substance of the original lawsuit.

In American legal terminology, a 'foreign' judgment means a judgment from another state in the United States or from a foreign country. To differentiate between the two, more precise terminology used is 'foreign-country judgment' (for judgments from another country) and 'foreign sister-state judgment' (from a different state within the United States). In common law country foreign judgment means that judgment which is other than domestic country. For instance, Kenya or Uganda or Rwanda judgment is foreign judgment to Tanzania. Foreign judgment provisions are dealt in each country Civil Procedure Code including Tanzania[10] and Kenya.[11]

Generally, the judgments of one State's courts have no force by themselves in another State. This is often unsatisfactory because of Sovereignty of each State. Parties are interested in transnational legal certainty and in avoiding repeated litigation and conflicting decisions. The general public has an interest in avoiding resources spent on re-litigation and in international decisional harmonies. States have a common interest in promoting inter-State transactions. However, States have valid reasons to deny foreign judgment the same force they grant their own judgments since the foreign procedure may be viewed as deficient, or the outcome of the foreign litigation may be viewed as objectionable. The field of REFJ mediates between these competing considerations.[12]

REFJ under Private International Law is one of the three prongs of conflict of laws viz., jurisdiction, choice of law and REFJ.[13] Enforcement is not necessarily confined to money judgments as it has been evident in most cases, and in most countries will also recognize non-monetary orders, and much law exists on the recognition of status decisions. However, enforcement is usually limited to civil and commercial matters. Foreign judgments in public law are rarely enforced, although there is no international law reason against it. In criminal law, States mostly prefer *extradition* to enforcement.[14] Some law exists regarding the enforcement of other acts than judgments, for example authentic instruments.[15]

Three possible effects of foreign judgments must be distinguished. Firstly, the foreign judgment presents a fact, regardless of its recognition.[16] Secondly,

[10]Section 11&12, [Cap. 33, R. E. 2002].
[11]Section 9 of Kenya Civil Procedure Act, [Cap. 21, R. E. 2012].
[12]www.mpepil.com (accessed on 3 April 2013).
[13] The authors confined their article to Recognition and Enforcement of Foreign Judgments only.
[14]Commission of the European on Communities Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union (2004) (EC Green Paper 2004).
[15] Art. 57 Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Brussels I Regulation'), settlements (eg Art. 19 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters [1971 Hague Judgments Convention); Art. 58 Brussels I Regulation; Art. 12 Hague Convention on Choice of Court Agreements ('2005 Hague Choice of Court Convention)]; and cost decisions (eg Art. 15 Convention on International Access to Justice).
[16] Art. 14, Conventions on the Civil Aspects of International Child Abduction.

recognition of a foreign judgment precludes re-litigation of the same issues in domestic proceedings. The extent of preclusive effect may be derived from the rendering State[17] or from the State requested to recognise the decision;[18] it may be confined to the extent given by both legal orders[19], or extended to the extent given by either order. Thirdly, enforcement presupposes but goes beyond recognition, and lets the successful plaintiff enforce his judgment in another country; the enforcement procedure is usually left to domestic law and varies greatly among legal systems.

2.1 Recognition of Foreign Judgment at Common Law[20]

Tanzania's legal system is based on the English common law. Common law, doctrines of equity and statutes of general application are enforceable in Tanzania.[21] At common law, in order for a judgment to be recognised, then it must fulfil two conditions: First, it must be final and conclusive in the Court which pronounced it; and second, it must have been given by a Court regarded by the English Court as competent to do so. But also, in order for a judgment to be enforceable it must fulfil two conditions. It must be recognised as final and conclusive upon the merits of the claim; and it must be for a fixed sum of money. The method of enforcement of foreign judgment is for the judgment creditor to institute fresh proceedings in the enforcing jurisdiction, setting out the circumstances of the judgment debt and how the two pre-conditions are satisfied and then, depending on whether the defendant disputes the claim, apply for summary judgment.[22]

2.2 Reason for Recognition of a Foreign Law

The recognition of a foreign law in a case containing a foreign element may be necessary for at least two reasons: First, the invariable application of the *lexfori*, ie. the local law of the place where the court is situated, would lead to gross injustice. For example, a person engaged in English litigation is required to prove that he is the lawful son of his parents, who were married abroad many years ago. The marriage ceremony, though regular according to the law of the place where it was performed, could not perhaps satisfy the formal requirements of English law, but nevertheless to apply the English Marriage Act 1949 to such a union to deny that the parents were man and wife, would be nothing but a travesty of justice.

Second, if the court is to carry out in a rational manner the policy to which is now committed – that of entertaining actions of the relevant foreign law or laws. A plaintiff, for instance, claims damages for breach of a contract that was made and was to be performed in France. Under the existing practice the court is prepared to

[17] This example can be noted among the States of the United States of America.
[18] Art. 6 (II) Convention concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children (Child Maintenance Convention).
[19] This matter, for example, is a good practice according to Austrian law.
[20] https://m.reedsmith.com/files/Publication (accessed on 4 April 2016).
[21] According to section 2 of the Judicature and Application of Laws Act, [Cap. 358, R. E. 2002].
[22] https://m.reedsmith.com/files/.../Presentation/.../Legal%20Update%20for.(accessed on 8 March 2016).

create and to enforce in his favour, if he substantiates his case, an English right corresponding as nearly as possible to that which he claims, but obviously neither the nature nor the extent of the relief to which he is rightly entitled, nor, indeed whether he is entitled to any relief, can be determined if the law of France is disregarded. To consider only English law might also be to reverse the legal obligations of the parties as fixed by the law to which their transaction, both in fact and intention, was originally subjected. Another example is a promise, made by an Englishman in Italy and to be performed there, if valid and enforceable by Italian Law, would not be held void by an English court merely because it was unsupported by consideration.

In Tanzania, section 25 of the Law of Contract Act.[23] spells that an agreement without consideration, is void, unless it is in writing and registered; or is a promise to compensate for something done; or is a promise to pay a debt barred by limitation of law.

'(1) An agreement made without consideration is void unless–

(a) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other;

(b) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or

(c) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits,

in any of the cases under paragraphs (a), (b) and (c), such an agreement is a contract;

(2) Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

(3) An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given.'[24]

2.3 Grounds for Denial of Foreign Judgment

[23][Cap. 345, R. E. 2002].
[24] Section 25 shows consideration difference under English Law of Contract and Tanzania Law of Contract.

There are various grounds for the court to deny recognising and execution of foreign judgments because of every State is sovereign. No state can force other state to recognise and enforce their country courts judgments on another country courts. These are some of the grounds for non recognition and execution of foreign judgments.

a) Where it has not been pronounced by a Court of competent jurisdiction;[25]

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 recognize the law of [Tanzania or Kenya] in cases in which such law is applicable;

d) Where the proceedings in which the judgment was obtained as opposed to natural justice;

e) Where it has been obtained by fraud;[26]

f) Where it sustains a claim founded on a breach of any law in force in [Tanzania or Kenya];

g) Recognition and enforcement of Foreign Judgment will be generally denied if the judgment is substantively incompatible with basic legal principles in the recognizing country;

h) Foreign judgment is not applicable in criminal cases; and

i) Not applicable for payment of any customs duty, tax or penalty.[27]

3.0 Overall View of Reciprocal Treaties Applicable to Tanzania

Tanzania and Kenya are among East African Community (EAC) that has a number of reciprocal treaties applicable in their respective nations as mentioned hereunder.

3.1 Reciprocal Treaties Applicable to Tanzania

By virtue of the United Nations Convention on the Law of the Sea where the United Republic of Tanzania declares that it chooses the International Tribunal for the Law of the Sea for the settlement of disputes concerning the interpretation or application of the Convention. The United Republic of Tanzania and Kenya made reciprocal treaty concerning the delimitation of the Territorial Waters Boundary between the

[25] See the leading case of *Gurdayal Sigh v. Rajah of Faridkot,* [1894] 22 Cal. 222.
[26] See the leading case of *Smt. Satya v. Teja Singh,* [1975] 2 SCR 1971.
[27] Article – 1 of Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.(Concluded 1 February 1971).

two States. This treaty covers the boundaries, the description of the boundaries, fishing and fishing boundaries between the two States.[28]

In East African Community, Kenya, Uganda, Rwanda and Burundi and Tanzania signed the Treaty to establish the EAC for political federation. Tanzania will extend similar reciprocal arrangements to EAC countries for economic and social integration.

Many treaties that are currently in force for Tanzania were ratified by Tanganyika. In international law, any treaties ratified by Tanganyika remain in force for Tanzania.[29] International Laws, that is, Treaties and Conventions, are not self-executing. The Act of Parliament can apply treaties and conventions to which Tanzania is a party in the Courts in Tanzania only after ratification. Some of the treaties are formed by mutual agreement between the States or among the States. Those treaties are discussed below in a nutshell.

3.1.1 Bilateral Investment Treaties

Bilateral Investment Treaties include treaties with Denmark, Finland, Germany, India, Italy, Netherlands, Norway, Sweden, Switzerland, United Kingdom and Zambia.[30]It is possible to enforce some foreign judgments in Tanzania.[31] Foreign judgments are enforceable in Tanzania if they originate from countries whose courts are recognised under the Reciprocal Enforcement of Foreign Judgments Act,[32] as 'superior courts.' Courts of Lesotho, Botswana, Mauritius, New South Wales, Zambia, Seychelles, Somalia, Zimbabwe, Kingdom of Swaziland and United Kingdom have been listed under the REFJA (Extension of Part-II) Order and, as such, final (ie. non appealable) judgments of superior courts from those countries would be enforceable in Tanzania.[33]

3.1.2 Bilateral Extradition Treaties

Extradition means the transfer of an accused from one state or country to another state or country that seeks to place the accused on trial. Extradition comes into play when a person charged with a crime under state statutes flees the state.

Extradition Treaty between His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas and the President of the United States of America, This treaty applicable to Tanzania was originally signed with the United

[28]http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TZA-KEN1976TW.PDF (accessed on 9 May 2016).
[29]Tanzania is formerly known as Tanganyika.
[30] OECD Investment Policy Review: Tanzania 2013. OECD Publishing Websource: http://dx.doi.org/ 10/1787/9789264204348-en (accessed on 9 May 2016).
[31] Section 6, The Extension of Judgments Act, [Cap. 7, R. E. 2002].
[32][Cap. 8, R. E. 2002].
[33]Countries list is mentioned in The Reciprocal Enforcement of Foreign Judgments Act,[Cap.8, R. E. 2002].

Kingdom.[34] Under this Treaty by virtue of Article 3, Bilateral Extradition Treaties extradition shall be reciprocally granted for the twenty seven crimes or offences.

Tanzania International Extradition Treaty with the United States Treaties: Continued Application to Tanzania of Certain Treaties Concluded Between the United States and the United Kingdom November 30, 1965, Date-Signed and December 6, 1965, Date-Signed December 6, 1965, Date-In-Force.[35]

3.1.3 Arbitration

The Arbitration Act,[36] Tanzania still incorporates provisions of multilateral agreements like the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. As the Tanzanian legislation on arbitration was first introduced in 1931 and amended in 1971, The United Nations Commission on International Trade Law (UNCITRAL) Model Law of 1985 has had no effect on it. The major differences between the domestic arbitration law and the Model Law are:

a) under the Model Law, three arbitrators are necessary, whereas schedule one of the Arbitration Act provides that only a single arbitrator is necessary;

b) domestic law requires arbitrators to proceed in without partiality whereas the Model Law prescribes the additional requirement of independence; and

c) unlike the Model Law, the tribunal's determination of its own jurisdiction under municipal law is not a necessary prerequisite to a party's desire to appeal to court.[37]

(A) A Foreign Award is Enforceable if:

It has been made pursuant to an arbitration agreement that was valid under the law by which it was governed; it has been made by the tribunal provided for in the agreement or constituted in the manner agreed upon by the parties; it has been made in conformity with the law governing the arbitration procedure; it has become final in the country in which it was made; and it has been made in respect of a matter that may lawfully be referred to arbitration under the law of Tanzania and its enforcement is not contrary to the public policy of or the law of Tanzania.

(B) Foreign Awards will not be Enforceable if:

The award has been annulled in the country in which it was made; the party against whom it is sought to enforce the award was not given notice of the arbitration

[34]https://internationalextraditionblog.files.wordpress.com/2011/03/tanzania.pdf (accessed on 9 May 2016).
[35]ww.mcnabbassociates.com/Tanzania%20International%20Extradition% (accessed on 9 May 2016).
[36][Cap. 15, R. E. 2002].
[37] Tanzania KarelDaele and others, Mkono& Co Advocates in association with Denton Wilde Sapte: http://www.mkono.com/pdf/Tanzania%2018.pd (accessed on 1April 2016).

proceedings in sufficient time to enable him to present his case or was under some legal incapacity and was not properly represented; or the award does not deal with all the questions referred to or contains decisions on matters beyond the scope of the agreement for arbitration. In that case, the court may postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking the enforcement.

What is the attitude of municipal courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

> 'This question does not have practical importance, since a foreign award has to be sent to a Tanzanian court through the arbitrator, who has to submit the document in a sealed envelope. The arbitrator, in his or her neutral position, would not have any motivation to submit an award for filing if it has been set aside by the courts at the place of arbitration.'[38]

3.1.4 Requirements and Restrictions Applicable to the Choice of Arbitration Rules and Arbitration Place

Arbitration in Tanzania is governed by the Arbitration Act.[39] The Arbitration Act grants substantial way to the parties to determine the manner in which they wish the arbitration to be conducted. Where there is no agreement, the Arbitration Act provides that the arbitrator shall make rules for the arbitration.

An arbitral award shall be recognized as binding and, upon being filed in the court, shall be enforceable as if it were a decree of the court subject to the provisions of the Arbitration Act of Tanzania. Tanzania is a signatory to the New York Convention on the Recognition and Enforcement of Arbitration Awards. Tanzania is also a member of several international organizations including the International Centre for the Settlement of Investment Disputes (ICSID) and Multilateral Investment Guarantee Agency (MIGA).[40]

4.0 Reciprocal Treaty Applicable to Kenya

The Foreign Judgments (Reciprocal Enforcement) Act[41] provides for the enforcement of Kenya judgment given in countries outside Kenya but which accord reciprocal treatment to judgments given in Kenya. Section 13(1) of the Act empowers the Ministers to include the countries with which Kenya has entered into the foreign judgments and reciprocal enforcement agreements. Those countries are Austria, Malawi, Republic of Rwanda, Seychelles, Tanzania, Uganda, the United Kingdom and Zambia.[42] Where there are no reciprocal agreements, the judgement of foreign

[38] http://www.mkono.com/pdf/Tanzania%2018.pd (accessed on 2 April 2015).
[39] [Cap. 15, R. E. 2002].
[40] www.state.gov/documents/organization/244606.pdf (accessed on 9 May 2016).
[41] [Cap. 43, R. E. 2012].
[42] https://books.google.co.in/books?isbn=055713224X (accessed on 9 May 2016).

court is not enforceable in Kenyan courts under the Foreign Judgment (Reciprocal Enforcement) Act except filing a suit on the judgment.[43] Where reciprocal judgment exists, the foreign judgment is enforceable by registration in the Kenyan Court.[44]

4.1 Treaties / Conventions Applicable to Kenya

Kenya is party to many treaties of international criminal, human rights, humanitarian and refugee law, including the 1949 Geneva Conventions and their 1977 Additional Protocols as well as the 1998 Statute of the International Criminal Court.[45] Kenya adopted on 1st February 1971 the Convention on The Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Article 1 provides that the Convention shall apply to decisions rendered in civil or commercial matters by the courts of Contracting States. It does not apply to decisions where the main object is to determine -(1) the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses; (2) the existence or constitution of legal persons or the powers of their officers; (3) maintenance obligations, so far as not included in sub-paragraph (1) of this Article; (4) questions of succession; (5) questions of bankruptcy, compositions or analogous proceedings, including decisions which may result there from and which relate to the validity of the acts of the debtor; (6) questions of social security; (7) questions relating to damage or injury in nuclear matters.

4.2 Bilateral Investment Treaties

The Republic of Kenya is to strengthen national and regional measures in conformity with relevant continental and international Conventions and bilateral Treaties.[46] It aims at providing Kenyans and other actors involved in international cooperation in criminal matters with other countries. It contains bilateral, regional and international agreements that are likely to serve as bases for extradition and mutual legal assistance in criminal matters applicable to the Republic of Kenya. Kenya is a party to bilateral investment treaties with Germany, the Netherlands and the United Kingdom respectively. Ratification Status of the Republic of Kenya is concerning the Regional and International Instruments.[47]

4.3 Arbitration

[43] *Ibid*.
[44] Christian Cambell (ed), *Legal Aspects of Doing Business in Africa*. 2009. https://books.google.co.in(accessed on 1 April 2016).
[45] www.geneva-academy.ch/RULAC/print_state.php?page=12&id_state.(accessed on 9 May 2016).
[46] Compendium of Bilateral, Regional and International Agreements on Extradition and Mutual Legal Assistance in Criminal Matters- Kenya.Prepared by UNODC's Regional Office for Eastern Africa and the Terrorism Prevention Branch of UNODC, in cooperation with the Office of the Director of Public Prosecutions of the Republic of Kenya UNITED NATIONS Vienna. (accessed on 9 May 2016).
[47] https://www.unodc.org/documents/terrorism/Publications/Compendium_Kenya/KENYA_COMPENDIUM_20100618_EN.pdf (accessed on 13March 2016).

Kenya has had the Arbitration Ordinance, 1914 was a reproduction of the English Arbitration Act, 1889. Before January 1996 when the current Arbitration Act,[48] have come into force; the legal framework on Arbitration was contained in the Arbitration Act.[49] This Act was a mirror image of the English Arbitration Act, 1950 and came into force on 22nd November 1968.

Section 31 Arbitration Act states Settlement (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

Section 31 (2) An arbitral award on agreed terms shall be made in accordance with section 32 and shall state that it is an arbitral award.

Section (3) An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.

4.3.1 Requirements and Restrictions Applicable to the Choice of Arbitration Roles and Arbitration Place

Substantive law is determined by classification of the arbitration as either domestic or international. The laws of Kenya are applied as the substantive law in domestic arbitration, while the juridical seat and substantive law are determined by the arbitration agreement in international arbitration. Section 3 of the Arbitration Act provides that an arbitration is international if: i) the parties to the agreement have their place of business in different states; ii) the juridical seat or any place where a substantial part of the obligations of the contractual contract are performed is outside Kenya; and iii) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

4.3.2 Foreign Arbitral Awards / Decisions are Enforceable in Foreign Country

If the country in which the party wishes to enforce the award is a signatory to the New York Convention, the award should be enforceable internationally. Section 36 of the Arbitration Act provides that the procedure for recognising and enforcing foreign awards shall accord with the New York Convention or any other convention to which Kenya is a signatory. Section 37 of the Arbitration Act provides that the local courts may refuse to recognise or enforce an award which has been set aside.

The Nairobi Centre for International Arbitration has as its main goal to the establishment of Nairobi as a financial hub and a centre for international arbitration. It limits the role of the local courts in an attempt to promote international arbitration. The centre will also provide advice and assistance for the enforcement and

[48] [Cap. 49, Laws of Kenya (Act No. 4 of 1995)].
[49][Cap. 49 Laws of Kenya (enacted in 1968)].

translation of arbitral awards, as well as procedural and technical advice to disputants. Under the Nairobi Centre for International Arbitration Act, the centre will have an Arbitral Court. The Arbitral Court will have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the Arbitration Act or any other written law. The board appointed under the governing statute will have the power to make rules for the recognition and enforcement of arbitral awards.[50]

5.0 Theories which Provide Justification REFJ in Private International Law

There are three steps involved in Private International Law. First step is the jurisdiction, the second step is choice of law and third step is the recognition and enforcement of foreign judgment. In other words recognition and enforcement of foreign judgments is one of the three parts of conflict of laws, besides jurisdiction and choice of law in Private International Law. Forum choice/convenience is given to the parties in case of jurisdiction. Choice of law is a procedural stage in the litigation of a case involving in Private International Law. The third is the recognition and enforcement of foreign judgment. In resolving these disputes below theories are adopted in Private International Law are discussed below.

5.1Theory of Comity

The story articulated in the theory of the 'comity of nations,' requiring each state to recognize the legitimate laws of other states, in the expectation that those other states in turn would recognize the laws of the first state.*51* It is nothing but reciprocal approach to give reverence to each other state laws and those laws should be respected by each other states. In other words, whatever forces the laws of one state have beyond its borders depends on the comity given to those laws by another state.

In law, comity specifically refers to legal reciprocity or reverence, the principle that one jurisdiction will extend certain courtesies to other nations/states, or other jurisdictions within the same nation/state. This is particularly done by recognizing the validity and effect of their executive, legislative, and judicial acts.[52]

Foreign judgment is applied because of its convenience and because the State wants to provide protection to citizens, residents, and transients in state land. States usually as a matter of reciprocity and comity: allow visitors to drive four wheelers with drivers' licenses from other states; recognize marriages and adoptions in other States; and often grant professional licenses to migrants or visitors.

[50]http://www.lexology.com/library/detail.aspx?g=5858a7ca-cb2d-4fa4-a2ad-1045abd562c6 (accessed on 9 May 2016).
[51]conflictoflaws.blogspot.com (accessed on 24 April 2016).
[52]scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&contex (accessed on 24 April 2016).

For example, if a Tanzanian court recognises and enforces the judgment of Kenya and in the same reciprocity a Kenyan court recognises and enforces the judgment of Tanzania. This is known reciprocity or comity.

5.2 Theory of Vested Rights

Joseph Beale in the United States, who espoused the vested rights doctrine, promoted in England by A.V. Dicey and Pillet in France summarises the essence of the principle:

> 'a right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere.'[53]

One may enforce not foreign law itself but the rights that have been vested under such foreign law; an act done in another State may give rise to the existence of right if the laws of that State crated such right.

5.3 Theory of Local Law

According to the local-law theory, even if a court of the forum recognizes and enforces a local right in a foreign-element case, it does not essentially apply the rule that would govern an analogous case that is of a purely domestic character. However, the court considers the law of the foreign country by fashioning a local right as nearly as possible upon the law of the country in which the decisive facts have occurred.[54] One may apply foreign law not because it is foreign, but because our laws, by applying similar rules, require us to do so; hence, it is as if the foreign law has become part and parcel of our local law.

5.4 Theory of Harmony of Laws

One has to apply foreign laws so that wherever a case is decided, that is, irrespective of the forum, the solution should be approximately the same; thus, identical or similar solutions anywhere &everywhere. When the goal is realized, there will be 'harmony of laws.'[55]

5.5 Theory of Justice

The purpose of all laws, including Conflict of Laws, is the dispensing of justice; if this can be attained in many cases applying the proper foreign law, One must do so.[56]

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[53]https://books.google.co.in/books?isbn=3540444629 (accessed on 24 April 2016).
[54]http://definitions.uslegal.com/l/local-law-theory/(accessed on 23 April 2016).
[55]www.coursehero.com › Ateneo de Manila University › ACC › ACC 10(accessed on 24 April 2016).
[56]https://www.scribd.com/doc/23322069/Conflict-of-Laws (accessed on 24 April 2016).

6.0 Recognition and Enforcement of Foreign Judgment Based on International Treaties and Conventions

The recognition and enforcement of foreign judgments in Tanzania and Kenya is not only supported by domestic laws prevailing and applicable thereto. It is possible by the use of other international instruments, conventions and without excluding treaties which have also become useful and supporting rules in making the recognition and enforcement of foreign judgment a reality in these countries. In this respect, therefore, there are some international instruments, as stated earlier, that this article tries to highlight based on the specific needs and demands on particular issues intended by the member countries as discussed below.

6.1 Global Enforcement Conventions

In the 20th century, there was a hope for global enforcement conventions; however, first attempts were unsuccessful.[57] Referring to Article 5 Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods of 1958 provided for the enforcement of judicial decisions rendered on the basis of jurisdiction agreements or appearance. The Convention unfortunately never went into force. It shares this fate with a 1965 Convention on the Choice of Court that submitted the recognition and enforcement of judgments based on a choice of court merely to the general enforcement rules of the enforcing State. The 1971 Hague Judgments Convention is in force only between Cyprus, the Netherlands, and Portugal—where it is largely displaced by the Brussels I Regulation,[58] and Kuwait. It is in fact the biggest shortfall is that it requires countries to enter into additional bilateral agreements.[59] In 1999, negotiations began at The Hague towards a global judgments convention, but a draft of 2001 contained many gaps and proved so unpopular with several Member States that projected the idea, at least in its original conception, was stalled.[60] Instead, these negotiations did lead to a narrower 2005 Hague Choice of Court Convention.[61] That convention regulates jurisdiction in civil and commercial matters based on the exclusive choice of parties and mandates, in its Articles 8–15, the conditions and procedures for the recognition of ensuing judgments. So far, only Mexico has acceded to it; the United States and the European Community signed it in 2009.[62]

6.2 Regional Instruments

The first successful regional enforcement conventions existed in Latin America. The Treaty of Lima of 1878, supposed to harmonize conflict of laws rules including

[57] http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship (accessed on 9 May 2016).
[58] See its para. 17.
[59] See foot note 43.
[60] http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship(accessed on 9 May2016).
[61] *Ibid*.
[62] *Ibid*.

recognition and enforcement, never became operative.[63] More successful conventions followed, the most important among them being the treaties on international procedural law of Montevideo of 1889 and of 1940, whose respective Article 5 gives judgments from one State the same force in other countries as they have domestically, provided they fulfil certain requirements.[64] Yet the most important unifying document is the Bustamante Code of 1928, which is regarded as private international law convention among Latin American countries.[65] The Convention provides for the enforcement of civil and administrative but not criminal decisions.[66] Although some countries refused to sign and others made broad reservations (Treaties, Multilateral, Reservations to), the Code remains influential even beyond the Member States.[67] In recent times, the Inter-American Specialized Conferences on Private International Law (CIDIP) created several conventions under the *aegis* of the Organization of American States (OAS).[68] As provided for under Article 2 of the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards lays down conditions for enforcement; the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments specifies requirements for the jurisdiction of the rendering court.[69] Whereas the former Convention has been ratified by eight Latin American countries, the latter is in force only between Mexico and Uruguay.[70] No North American Member State has signed.[71] For MERCOSUR countries,[72] Article 20 of the Protocol of Las Leñas (*Protocolo de cooperación y asistenciajurisdiccional en materia civil, comercial, laboral y administrativa*)[73] is almost identical to Article 2 of the Inter-American Convention of 1979.[74]

Among Member States of the European Union ('EU'), judgments in civil and commercial matters[75] are enforced under Brussels I Regulation of 2000, which replaced an earlier 'Brussels' Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters of 1968.[76] Exceptions to enforcement are very limited; in particular, lack of jurisdiction of the rendering court is no defence.[77] In 2003, the EU also implemented the Brussels II Regulation (Council Regulation (EC) 2201/2003 of 27 November 2003), replacing an earlier narrower

[63] Max Planck Institute for Comparative Public Law and International Law, (London: Heidelberg and Oxford University Press, 2009] at 4.
[64] *Ibid*.
[65] *Ibid*.
[66] Articles 423– 437 of the Bustamante Code of 1928.
[67] Max Planck Institute for Comparative Public Law and International Law, (London: Heidelberg and Oxford University Press, 2009) at 4.
[68] *Ibid*.
[69] *Ibid*.
[70] Max Planck Encyclopedia of Public International Law www.mpepil.com (accessed on 9 May 2016).
[71] 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments.
[72] is a trading bloc in Latin America comprising Brazil, Argentina, Uruguay and Paraguay.
[73] http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship(accessed on 9 May 2016).
[74] *Ibid*.
[75] See, Convention on The Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.
[76] Max Planck Encyclopedia of Public International Law www.mpepil.com (accessed on 9 May 2016).
[77] See Article 35 of the Brussels I Regulations of 2000.

Brussels II Regulation of 2000, dealing with the recognition and enforcement of judgments in matrimonial matters and parental responsibility. Both regulations regulate their relation to other treaties.[78] Uncontested claims and payment procedures become automatically enforceable under two regulations of 2004 and 2006 (Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 Creating a European Enforcement Order for Uncontested Claims; Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12th December 2006 Creating a European Order for Payment Procedure).[79] Judgments opening insolvency proceedings are recognized under Article 16 of the Council Regulation (EC) 1346/2000 of 29th May 2000 on Insolvency Proceedings, with the enforcing State's public policy as the only relevant defence;[80] other judgments of the insolvency court are enforceable under the Brussels I Regulation.[81] Denmark opted out of the existing regulations, but a separate agreement with the EU, concluded in 2005, which is in force since 2007, ensures applicability of the Brussels-I regulation with minimal amendments. An EC Green Paper of 2004 envisages mutual recognition of criminal judgments.[82]

The Brussels regime is supplemented for the European Economic Area (EEA)by the 1988 Lugano Convention, revised in 2007—an actual treaty that is, in substance, largely similar to the Brussels-I Convention (Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters). In addition, several Nordic conventions exist between Scandinavian countries: one for general civil matters of 1932 that was revised in 1977 and is now superseded between EU Member States by the Brussels-I Regulation, and another for marriage, divorce, and guardianship of 1931 that survives the Brussels regime to some extent.[83]

The most relevant Middle Eastern treaties include the 1952 Agreement as to the Execution of Judgments ('Arab League Judgments Convention'), the 1983 Arab Convention on Judicial Co-operation ('Riyadh Convention'), and the 1995 Protocol on the Enforcement of Judgments Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council ('GCC Protocol'). A convention project by the Asian-African Legal Consultative Committee in the 1960s never came to fruition. Regional organizations like an international organisation of lawyers and law associations (LAWASIA), Association of Southeast Asian Nations (ASEAN), and the Southern African Development Community (SADC) have no conventions, though the drafting of a convention has been suggested for each of them. All these regional instruments speak about recognition and enforcement of foreign judgment.

[78]Max Planck Encyclopedia of Public International Law www.mpepil.com at 5, (accessed 9 May 2016).
[79] Max Planck Encyclopedia of Public International Law www.mpepil.com
[80] See Article 26 of the Brussels-I Regulations of 2000.
[81]*Ibid*, Article 25.
[82] Max Planck Institute for Comparative Public Law and International Law, (London:Heidelberg and Oxford University Press,2009) at 5.
[83]*Ibid*, p.5.

So far, there are no independent judgments conventions traditionally exist among countries of the Commonwealth. Yet there is some uniformity because numerous Commonwealth members, past and present, have acts modelled on the 1933 English Foreign Judgments (Reciprocal Enforcement) Act,[84] which provides for reciprocal judgment enforcement between England and other countries—thereby broadening the scope of the Administration of Justice Act 1920[85] that was confined to the Commonwealth. The Act provides for enforcement based on simple registration of the foreign judgment, creating a relatively high degree of uniformity.[86] Between the UK and other EU Member States, it is now widely superseded by EU law.[87]

6.3 Conventions on Specific Substantive Subject Matters

Since the beginning of the 19th century, multilateral conventions on substantive subject matters already contain provisions for the enforcement of foreign decisions within their subject matter; such conventions often maintain priority over regional enforcement conventions.[88] One important area is transportation treaties as stipulated clearly in various international instruments.[89] Similarly, Article 21 Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) lay down bases of direct jurisdiction, and require the enforcement of judgments rendered by a court with jurisdiction under the provision (CVR of 1973).[90] All these conventions provide for a relatively undifferentiated duty to recognize foreign judgments.

On family and matrimonial issues in particular, there have been various family law conventions, especially at the Hague Conference, laying down more calibrated rules for the recognition of judgments. Conventions that require recognition of a status acquired elsewhere extend this duty to the recognition of status-defining judgments.[91] A 1973 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (Hague Maintenance Convention), replacing an earlier narrower one from 1958, facilitates recognition of foreign maintenance decisions; now, the recognition of judgments is regulated by the Hague Maintenance Convention.[92] Judgments on protective measures for children or adults must be

[84] c.13 23 and 24 Geo 5.
[85] c.81 10 and 11 Geo 5.
[86] http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholar (accessed on 9 May 2016).
[87] *Ibid*.
[88] Max Planck Encyclopedia of Public International Law www.mpepil.com at 5 (accessed on 9 May 2016).
[89] See Article 85 Mainz Rhine Shipping Act 1831 and Article 40 of its successor, the Mannheim Rhine Navigation Act 1868, and Article 56 Berne International Convention concerning the Carriage of Goods by Rail of 14 October, 1890, which has now been transformed into Article. 12(1) Convention concerning International Carriage by Rail (COTIF) in the version of the 1999 Protocol (RailwayTransport, International Regulation). Article 31 Convention on the Contract for the International Carriage of Goods by Road (CMR).
[90] Max Planck Encyclopedia of Public International Law www.mpepil.com (accessed on 10 May 2016).
[91] Article 8 Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions1965 (Hague Adoption Convention); Article 1(1) Convention on the Recognition of Divorces and Legal Separations 1970 (Hague Divorce Convention); and Convention on Celebration and Recognition of the Validity of Marriages 1978 (Hague Marriage Convention).
[92] Articles 19– 28 of the Hague Maintenance Convention.

recognized under the same Convention.[93] Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants 1961 (Protection of Minors Convention). Arts. 23–28 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation Respect of Parental Responsibility and Measures for the Protection of Children 1996 (Child Protection Convention). In addition, foreign decisions for nuclear accidents are made enforceable, with no requirements other than jurisdiction of the rendering court and compliance with formalities.[94] Furthermore, it is clearly provided for under Article 20 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels 1989 providing with an exception if the judgment is irreconcilable with an earlier judgment.[95] Many other Conventions relating to the field of nuclear add yet another explicit exception where recognition would violate the requested State's public policy or fundamental standards of justice.[96]

There have been situations where there can be two irreconcilable foreign judgments each pronounced by a court of competent jurisdiction and nothing is final and not open to impeachment on any ground. This situation arose in *Showlag v. Mansour.*[97]

Orders for costs are enforceable under Article 15 of the Hague Convention of 1980 on International Access to Justice are replaced by Article 18 of the Hague Convention on Civil Procedure of 1954.[98] This rule counterbalances the abolition of domestic requirements for foreign parties to provide special securities.[99]

7.0 Procedural Mechanisms for Enforcement of Foreign Judgment in Tanzania

Having observed the various conventions relating to enforcement of foreign judgment in the world, the paper discusses the procedural mechanisms for recognition and enforcement of foreign judgment as far as Tanzania is concerned. As a matter of practice, the enforcement of foreign judgment in the country involves four stages. The first stage is ascertaining the competence of the original court pronouncing a foreign judgment, application, registration, and finally enforcement of the foreign judgment itself. A condition is made under the applicable law in the country that for a foreign judgment to enjoy acceptable recognition and enforcement,

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[93]Article 8. See also Articles 23–28 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation Respect of Parental Responsibility and Measures for the Protection of Children 1996 (Child Protection Convention), and Articles 22–27 Convention on the International Protection of Adults 1999 (Protection of Adults Convention).

[94]Article 13 of the Convention on Third Party Liability in the Field of Nuclear Energy 1960 (last amended 2004). See also Article 11(4) Brussels Convention on Liability of Operators of Nuclear Ships 1962 requires, in addition, a fair hearing and the absence of fraud; similar rules are found in Article 10 International Convention on Civil Liability for Oil Pollution Damage (1969) and Article 10 of the largely
similar International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

[95]http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship (accessed on 9 May 2016).

[96]Article 12 Vienna Convention on Civil Liability for Nuclear Damage 1963, amended 1997, and Article 16(5) and (6) Convention on Supplementary Compensation for Nuclear Damage, 1997.

[97][1995] 1 AC 431.

[98] Ronald A. Brand and Scott R. Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements, (London: Oxford* University Press,2007).

[99]Article 14.

the original court that announced such judgment should be in law considered to have adjudicative competence for it to have a force of law both on the cause of action and subject matter of the litigation.[100] Indeed, the judgment creditor should file an application in the High Court of Tanzania which is the acceptable court competent to determine and entertain cases relating to enforcement of foreign judgment in the country. The second is said to keep time limits with regard to the application which is to be filed in the High Court. The same law reiterates that the intended application should have been filed within the duration of six years from the date of the pronouncement of the judgment.[101] The Act[102] emphasis that '*a person, being a judgment creditor under a judgment to which this Part applies, may apply to the High Court at any time within six years after the date of the judgment or, where there have been proceedings by way of appeal against the judgment, within six years after the date of the last judgment given in those proceedings, to have the judgment registered in the High Court…*'

The fourth procedural step which has to be taken when enforcing foreign judgments is the actual enforcement of the foreign judgment filed, registered and qualified with all the prerequisites as stated earlier. Being a final procedure, it entails the execution of the vested rights of the judgment creditor as against the judgment debtor.[103] Recognition of divorce of decree from Tanzania was recognised in Botswana court decision in the case of *Mtui* 2000 (1) BLR 406.[104]

8.0 The Recognition and Enforcement of Foreign Judgments in Tanzania and Kenya

The issue REFJ is almost the same as in Tanzania with slight noted differences in Kenya. As it the case in Tanzania, the first procedural step which is to be taken into account is on ascertainment of the competence of the original court that awarded the judgment for its enforcement in Kenya. This is to say in other words, the original court should have competence both on the cause of action and subject-matter of the litigation as clearly indicated under the Foreign Judgments (Reciprocal Enforcement) Act.[105]

Having considered the competence of the original court in dispensing the matter at hand, the next step that follows is on filling of the application by the creditor in the High Court of Kenya. The Kenyan law provides that:

> 'where a judgment to which this Act applies has been given in a designated court, the judgment creditor may apply to the High Court to have that

[100] Section 6(2)(a)(ii) of the Reciprocal Enforcement of Foreign Judgment Act, [Cap. 8, R. E. 2002].
[101] Section 4(1) of the Reciprocal and Enforcement of Foreign Judgment Act, [Cap. 8, R. E. 2002].
[102] The Foreign Judgments (Reciprocal Enforcement) Act 1954.
[103] Section 4(1)(b) of the Reciprocal and Enforcement of Foreign Judgment Act, [Cap. 8, R. E. 2002].
[104] Please see also: Enforcing judgments of community courts by national courts .... Protocol A/P.1/7/91 on the Community Court of Justice of the High ....*AG of the Republic of Kenya*, [2008] 3 KLR 397; [2007] 2 *East Afr. United Republic of Tanzania v*..... *Molly Kiwanuka v*. ... judgment from the High Court of Tanzania on the ground that Kenya's Foreign Judgment Act, [Cap. 43, R. E. 2012].
[105] [Cap. 43 R.E. 2012]assets.cambridge.org/97811070/07178/9781107007178_frontmatter. (accessed on 25 April 2016).

judgment registered within six years of the date of the judgment or, where there have been proceedings by way of appeal against the judgment, of the date of the last judgment in the proceedings.'[106]

As pointed out earlier, a simple analysis on the above Kenyan law containing the said provision is that its position is clearly observed to be the same as that of Tanzania. The High Court must make registration of the foreign judgment upon the judgment creditor to have made application. The position is simply as that of Tanzania and the judgment creditor may so do apply to the High Court at any time within six years after the date of the judgment and there is a sufficient proof of its registration.[107] The last procedural step for the enforcement of foreign judgment in Kenya is that of enforcement of the foreign judgment itself, and the judgment creditor is vested with all rights he or she is seeking to enforce followed by other related issues.[108]

Mlay J, decided in the case of *TasneemKausar*,[109] by interpreting the law cited in section 3 of (Reciprocal Enforcement of Judgment) Act,[110] said that, 'the judgment of a foreign court which is registrable must be a judgment of a foreign court which the President of the United Republic of Tanzania has by order directed and it must be the judgment of the superior court of that foreign country which has been specified in the order of the President under part-II of Cap. 8. The foreign countries whose judgments are registrable are listed in the schedule to the Foreign Judgment (Reciprocal Enforcement) General Application Order GN No. 8 of 1936. Kenya is not among the listed countries. For this reason the preliminary objection that the application is incompetent is upheld. Hence application was dismissed.'

8.1 Whose Judgments from their High Courts would be Recognized and Enforced in Tanzania?

The countries listed in the schedule to the Foreign Judgment (Reciprocal Enforcement) General Application Order GN No. 8 of 1936 then that countries High Courts judgments would be recognised and enforced in Tanzania, in terms of the Reciprocal Enforcement of Foreign Judgments Act.[111] However, none of the countries immediately neighbouring Tanzania are in the schedule to the Foreign Judgment (Reciprocal Enforcement) General Application Order GN No. 8 of 1936. But Zambia is in the schedule.

Judgments from Kenya, Uganda, Malawi or Zanzibar are by law not considered foreign. They are extended into Tanzania by the Extension of Judgments Act.[112] The

[106] Section 5(1), [Cap. 43, R. E. 2012].
[107] Section 6(1), [Cap. 43, R. E. 2012].
[108] Section 8(1), [Cap. 43, R. E. 2012].
[109] *TasneemKausar v. Taher HusseinMuccadam,* Misc. Civil Cause No. 52 of 2006. HC, Dar. (Unreported).
[110] [Cap. 8, R. E. 2002].
[111] [Cap. 8, R. E. 2002].
[112] [Cap. 7, R. E. 2002].

Act was enacted in 1921 and was extended countries by virtue of section 6 of Cap.7 in 1921 and 1922.[113]

Where a decree has been obtained or entered up in the High Court of Kenya, Uganda, Malawi or Zanzibar or in any court sub-ordinate to any of those courts, for any debt, damage or costs and where it is desired that the decree shall be executed upon the person or property of the defendant in Mainland Tanzania, the decree may be transferred to the High Court of Tanzania or to any of the courts subordinate thereto for execution.[114]

The provisions of the Civil Procedure Code for the transfer and execution of decrees shall apply in the same manner as if the decree had been obtained or entered up in one court and were transferred for execution to another court within the jurisdiction of the High Court of Tanzania.[115]

After the transfer, all proceedings have to be taken as if the decree had been a decree originally obtained in the High Court of Tanzania or a subordinate court. All reasonable costs and charges with regard to the transfer and execution of the decree must be recovered in like manner as if they were of the original judgment.[116]

The Act extends execution of warrants as well. In the event that a warrant is issued by the High Court of Kenya, Uganda, Malawi or Zanzibar or by a court sub-ordinate to any such courts for the arrest of a defendant in a civil case either before or after a judgment, a judge of the High Court of Tanzania or a magistrate of a subordinate court shall have the power to endorse and execute the warrant or to issue, before such endorsement, a provisions warrant for the arrest of the defendant, upon receipt of telegraphic or other information and in such circumstances as would in his opinion justify the issue of a warrant in a civil case within his jurisdiction.[117]

The provisional warrant must be discharged if the High Court of Tanzania does not receive the original warrant within reasonable time. The High Court of Tanzania must not endorse or execute or issue any provisional warrant if the warrant or information from the court desiring the arrest is not accompanied by intimation that such court indemnifies the High Court of Tanzania or subordinate court against all costs, charges and expenses to be incurred by the High Court of Tanzania or the subordinate court.[118]

In respect of a warrant, the provisions of the Civil Procedure Code, for the arrest of defendants before and after judgment shall apply in the same manner as if the suit

[113] Eve HawaSinare, "This is Important: Time to evaluate or repeal the Extension of Judgments Act of 1921" in *The Citizen,* 5 May 2013.
[114] Section 2, The Judgments Extension Act, [Cap.7, R. E. 2002].
[115] *Ibid*.
[116] *Ibid*.
[117] Section 3, The Judgments Extension Act, [Cap.7, R. E. 2002].
[118] Eve Hawa Sinare, "This is Important: Time to evaluate or repeal the Extension of Judgments Act of 1921" in *The Citizen,* 5 May 2013.

had been originally instituted in the High Court of Tanzania or a subordinate court. All the reasonable costs and expenses with regard to proceedings for the arrest must be recoverable in like manner as if they had been incurred in the court in which the suit has actually been instituted.[119]

The Act requires a judge of the High Court or magistrate of a subordinate court requesting arrest of a defendant under any law similar to the Act by any court in Kenya, Uganda, Malawi or Zanzibar, before communicating with the court in any of those countries, to take security from the plaintiff in such sum as shall be sufficient to cover all costs, charges and expenses to be incurred by the court to which the application is made and must indemnify that court against all those costs, charges and expenses.[120]

The President can extend the Act to any other Commonwealth country or a country dependent of such country. There is no mention of need for reciprocity.[121] While the law is still in force and can be used, it does not take much imagination to see that it is in need of urgent evaluation and possible repeal.[122]

8.2 General Requirements and Exceptions for Recognition and Enforcement of Foreign Judgments

Once a foreign judgment is recognised, the party who was successful in the original case can then seek its 'enforcement' in the recognising country. If the foreign judgment is a money judgment and the debtor has assets in the recognising jurisdiction, the judgment creditor has access to all the enforcement remedies as if the case had originated in the recognising country, eg. Garnishment, judicial sale, etc. If some other form of judgment was obtained, eg. affecting status, granting injunctive relief, etc., the recognizing court will make whatever orders are appropriate to make the original judgment effective. There is a need of choice of proper jurisdiction of the courts. It is also important to note that both domestic law and conventions usually require judgments to be valid, final, and on the merits,[123] even though these requirements are not always spelled out. The duty to recognise foreign judgments is usually excluded where fundamental procedural principles were violated in the rendering court.

In a decision involving the *Tanzania National Roads Agency v. Kundan Singh Construction Limited*, [124] the High Court of Kenya declined to enforce an arbitral award delivered in Tanzania on the basis that the arbitral tribunal dealing with the

[119] Section 3(2), The Judgments Extension Act, [Cap.7, R. E. 2002].
[120] Section 4, The Judgments Extension Act, [Cap.7, R. E. 2002].
[121] Eve Hawa Sinare, "This is important: Time to Evaluate or Repeal the Extension of Judgments Act of 1921" in *The Citizen,* 5 May 2013.
[122] *Ibid*.
[123] Refer: *Singh v. Singh,* (1936-37) KLR 82. It was held that judgment is on the merits if matter in controversy between the parties is the subject of direct adjudication.
[124] [2014] eKLR.

contractual dispute had in reaching its decision, failed to apply Tanzanian law which was the governing law of contract. This in effect rendered the award unenforceable in Kenya on the grounds that it was against Kenya public policy.

In the Case of *Christ for All Nationals v. Apollo Insurance Co. Ltd.,*[125] formed the view that:

> 'although public policy is a most broad concept incapable of precise definition…. . an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was: a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten or b) inimical to the national interest of Kenya or c) contrary to justice and morality.'

9.0 Conclusion

Today, the world has truly become a global village. In other words the world is a hamlet or the world is on the palm. Tanzanian and Kenyan businesses regularly enter into commercial relationships with persons and corporations resident or present in countries in world. Judgments obtained in any of those countries often require enforcement in Tanzania and Kenya. So many litigations are cropped up because of mobility of people from one country to another either for settlement or for trade and merchandise purposes. The necessity of REFJ becomes indispensable in the administration of justice to parties who hail from different countries. The enforcement of the foreign judgments in Tanzania or Kenya court is a complex procedure since the basis and requirements for enforcement can be found in various legal sources (conventions, treaties statutes, common law) depending on the State in which the judgment was obtained. Global justice must be balanced by global values such as respect for one country judgment should be considered, respected and enforced then only every country squat on the global map including Tanzania and Kenya.

The countries names must be listed whose judgments from their High Courts would be recognised and enforced in Tanzania, in terms of the Reciprocal Enforcement of Foreign Judgments Act[126] and then only Recognition and Enforcement of Foreign Judgment would be followed or practiced. Decisions of foreign courts exercising civil jurisdiction may be enforced in Tanzania or Kenya provided that specified conditions are met, which are defined by principles of private international law. REFJ is itself the topic of a vibrant debate which helps to unveil the political considerations underlying human behaviour and thus fine-tune private international law techniques to address particular global governance challenges. According to

[125][2002] 2 EA.
[126][Cap. 8, R. E. 2002].

Bonaventura de Sousa Santos versions 'law is not only about normatively, but also 'imagination, representation and description of reality.'[127]

An enforcement regime that recognises the global reach of Tanzanian and Kenyan business intercourse is desirable. Joining and participating in international initiatives such as The Hague Conference on Private International Law can only be beneficial for both countries.

In Tanzania and Kenya a foreign judgment would be denied recognition if the foreign court refused to recognise Tanzania and Kenya law as the applicable law. This is based on the Comity theory which was discussed above in this article. Much more efforts have been done and much more to be done in the sphere of Private International Law in the field of recognition and enforcement of foreign judgment in general to the world and in particular to the Tanzania and Kenya plus neighbouring countries.

10.0 Recommendation

There are no uniform codes or rule applicable to the all countries because each country is a sovereign country and the legal system differs. Due to globalisation and liberalisation now the world is like a hamlet. To keep or increase the economy of any country, there should be uniform rules or applicable laws as agreed by the parties. It is possible through international conventions, bilateral or multilateral treaties, unification of the internal law of the various countries upon as many legal disputes as possible. In case of choice of law is not there between or among the parties where foreign country is involved then common law practices should be adopted to resolve the conflict. Thus judgment which is pronounced by each country competent court must be recognised and enforced in other country then only there is vertical growth in countries economy and political stability between countries or among the countries. No nation may grow, prosper and become sound when there is no recognition and enforcement of foreign judgment in general. Justice is justice in anywhere in the world. Thus any country apex court[128] judgment is valid judgment and it should be respected or recognised and enforced by the other countries.[129]

The author recommends that there should be harmonization and unification of Private International Law, various international instruments and theories are discussed above in this article to resolve the conflicts to REFJ in members states either to bilateral or multilateral treaties or signatory to the international instruments for adjudication of conflict in Private International Law or as agreed by the parties earlier.

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[127] See B. de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law,' 14 *Journal of Law and Society,* 279 (1987), 281.

[128] Not less than the rank of High Court. Please see also "The Supreme Court held in the case of *Moloji Nar Singh Rao v. Shankar Saran,* AIR 1962 SC 1737.

[129] There is no Recognition and Execution of Foreign Judgment in criminal cases.

The author strongly recommends that all the countries should and must follow all theories, unification of private international law and bilateral plus multilateral treaties, conventions, protocols or declarations then all countries squat on world map including Tanzania and Kenya in the epoch of liberalisation and globalisation.