Court of Appeal Clarifies the Rights of Foreign Lenders to Enforce Claims in Kenya

Contentious Decisions

On 25th July 2024, the High Court of Kenya in the case of *Stichting Rabobank Foundation v Ava Chem Limited and Another [2024] KEHC 9931 (KLR)* ("**Stichting Rabobank Case**"), delivered a ruling that sent ripples through the banking and finance sector, particularly among foreign lenders. The High Court held that foreign companies not registered under the Companies Act (Chapter 486 of the Laws of Kenya) ("**Act**") lack the legal standing to enforce their rights against borrowers in Kenya, especially in cases of loan defaults.

The Stichting Rabo Bank ruling aligns with previous judgments that similarly denied foreign companies the right to sue due to their failure to register under Kenyan law. Notably, in *Turn Key International Trade Limited v Sunmatt Limited (Sundip Shah) (Civil Suit E406 of 2022) [2024]* ("**Turn Key Case**"), the High Court ruled that Turn Key, a foreign company not registered under the Companies Act, could not file suit against Sunmatt Limited for an unpaid debt.

Another similar case is *Root Capital Incorporated v Tekangu Farmers' Co-operative Society Ltd & another [2016] KEHC 3735 (KLR)* ("**Root Capital Case**"), where Root Capital Incorporated, a foreign company not registered in Kenya, was denied the ability to sue over a loan default.

The Rabo Bank Case, the Turn Key Case and the Root Capital Case decisions represent a significant challenge for foreign lenders in Kenya, as these rulings contradict the widely accepted norm that foreign companies can enforce their rights in Kenyan courts, even without local registration.

Court of Appeal Decision

On 31st July 2026, the Court of Appeal overturned the High Court's decision in the Stichting Rabobank Case, providing important clarity on the ability of unregistered foreign companies to enforce their rights before Kenyan courts.

The Court held that non-registration under section 974 of the Act does not, by itself, deprive a foreign company of its legal personality, capacity or standing to institute proceedings in Kenya. The Court emphasised that legal personality, *locus standi* and compliance with statutory registration requirements are distinct concepts. Legal personality concerns whether the law recognises an entity as capable of bearing rights and obligations. *Locus standi*, in its conventional sense, concerns whether the claimant has a sufficient interest in the subject matter of the proceedings. Statutory registration, on the other hand, concerns compliance with a regulatory regime prescribed by legislation.

Section 974 of the Act prohibits an unregistered foreign company from "*carrying on business in Kenya*" but does not expressly prohibit such a company from instituting proceedings, maintaining an action, recovering a debt or enforcing a contract. "*Carrying on business*" is defined under the Act to include activities such as offering debentures or acting as a guarantor for a loan but this definition is not exhaustive.

The Court in fact clarified that the reference in section 974(2) of the Act to offering debentures in Kenya is inclusive but does not mean that every financial transaction with a Kenyan entity necessarily amounts to carrying on business in Kenya. The Court held that whether a foreign company is "*carrying on business in Kenya*" is a question of fact dependent on multiple considerations such as the nature, frequency and continuity of the company's activities, where contracts are negotiated and performed, the existence of a local office, employees or agents and the extent of its commercial presence in Kenya.

Accordingly, the appeal was allowed, the High Court's ruling of the Stichting Rabobank Case was set aside and the suit was reinstated for hearing.

Other Considerations

Whilst the Act requires foreign companies to be registered before carrying on business in Kenya, *Article 48 of the Constitution of Kenya,* 2010 ("**Constitution**") requires the State to ensure access to justice for all persons, while *Article 50 (1)* guarantees that every person has the right to access justice and resolve disputes before a court. *Article 260 of the Constitution* further defines a "person" to include both incorporated and unincorporated bodies, and does not make any reference to the nationality, country of incorporation or registration status of an individual or entity in Kenya.

In *Overseas Private Investment Corporation ("**OPIC**") & 2 others v Attorney General [2013] KEHC 6056 (KLR)*, the High Court ruled that OPIC, a foreign entity, had a legitimate property interest in Kenya and could protect it under the Constitution. The High Court emphasized that *Article 27 of the Constitution* guarantees equal protection of the law and the enjoyment of rights and freedoms for all persons, regardless of citizenship. The High Court clarified that the Constitution applies to all persons unless a specific provision limits rights to a citizen or a special category of person. As a result, the High Court dismissed the interested party's claim that OPIC, as an overseas company, lacked the standing to challenge Kenyan laws under the Constitution. This decision affirmed that constitutional rights apply to all persons, regardless of nationality.

Commentary

The Court of Appeal's decision in the Stichting Rabobank Case provides binding authority on the High Court and clarifies the position following the contentious High Court decisions in the Rabo Bank Case, the Turn Key Case and the Root Capital Case.

The decision provides welcome certainty for foreign lenders, confirming that non-registration in Kenya does not, in itself, prevent a foreign lender from enforcing its rights before the Kenyan courts. However, foreign lenders should assess whether their activities in Kenya amount to "*carrying on business*" within the meaning of section 974 of the Act, and consequently, whether registration under the Act is required.

If you have any queries regarding this article, feel free to reach out to the team below:

Ruth Kirunga

Lead Partner, Banking & Finance

RKirunga@kapstrat.com

Victor Njenga

Partner, Dispute Resolution

VNjenga@kapstrat.com

Victor Gatei

Associate, Banking & Finance

VGatei@kapstrat.com