

**SUPREMECOURT OF SEYCHELLES**

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**Reportable**  
[2020] SCSC 657  
MC 29 of 2019

In the matter between

**JOY KAWIRA KANGA**  
*(rep. by F Elizabeth)*

**Petitioner**

and

**MINISTRY OF EMPLOYMENT, IMMIGRATION**

**AND CIVIL STATUS (herein represented by**

**the Principal Secretary, Mrs Myriam Telemaque)**

**1<sup>st</sup> Respondent**

of 2<sup>nd</sup> Floor, Independence House, P.O. Box 1593,

Victoria, Mahe, Seychelles

*(rep. by G Thachett)*

**THE BAR ASSOCIATION OF SEYCHELLES**

**2<sup>nd</sup> Respondent**

**(herein represented by its president, Mr Divino Sabino)**

of Suite 109, Premiere Building, Victoria, Mahe, Seychelles

*(rep. by D Sabino)*

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**Neutral Citation:** *Kanga vs Ministry of Employment, Immigration and Civil Status and Anor*  
(MC 29/2019) [2020] SCSC 657 (14<sup>th</sup> September 2020)

**Before:** R. Govinden J

**Summary:** Preliminary objection upheld; petition dismissed; unsupported by an  
admissible affidavit

**Heard:** Written submissions

**Delivered:** 14<sup>th</sup> September 2020

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**ORDER**  
Petition is dismissed

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## RULING

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### R. GOVINDEN J

#### Introduction

[1] After leave to proceed having been given to the Petitioner and their response being called for, both Respondents in this matter have raised preliminary objections against the Petition together with their objections on the merits. One of those objections relates to the legal validity of the petition before the court. They say that it is incompetent as it fails to meet the requirements of Rule 2 (1) of the Supreme Court (Supervisory Jurisdiction Over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, herein after referred to as “the Rules”.

[2] The 1<sup>st</sup> Respondent raised this in its 6<sup>th</sup> preliminary objection, which avers as follows:

*“It is respectfully averred that the Petition is not in compliance with Rule 2(1) of the Supreme Court (...) Rules, in that the affidavit of the Petitioner sworn before an overseas Notary in Kenya is not in conformity with the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents or the Apostille Convention to which the Republic of Seychelles is a party and hence the affidavit of the Petitioner is not acceptable in judicial proceedings in Seychelles.”*

In his written submission in support of this argument learned counsel attached a copy of the text of the Convention, available on its website, which shows that whilst Seychelles is a party to it, Kenya is not.

[3] The 2<sup>nd</sup> Respondent, on the other hand, raised it in its 3<sup>rd</sup> preliminary objection. It avers that “(t)he affidavit in support of the Petition was sworn before a Notary and has not been authenticated”. In its submission in support of this objection, learned counsel for the 2<sup>nd</sup> Respondent argues that the rationale in ensuring that Judicial Review petitions are supported by affidavits as compared to mere statements is for the court to ensure that the maker attest to the truth of the averments by the force of law. Moreover, learned counsel

further submits that the alternative procedure provided for under section 28 of the Evidence Act was also not followed by the Petitioner.

- [4] On this point of law, the learned counsel for the Petitioner’s position is as follows; the Convention applies to documents which a party intends to rely on at the hearing of a matter and hence it deals with admissibility of such documents during hearings and not to pleadings. Accordingly, he argues that the arguments of the opposing counsels on this point are misguided.

### **The law**

- [5] The necessity to have an affidavit in support of an application in matters in which the Supreme Court exercises its supervisory jurisdiction arises out of Rule 2(1) of the Rules, which provides that, “an application to the Supreme Court for the purpose of Rule 1(2) shall be made by petition accompanied by an affidavit in support of the averments set out in the petition”.

- [6] The content of affidavits and their essential legal formalities are on the other hand found in sections 170 and 171 of the Seychelles Code of Civil Procedure (CAP 213), which provides as follows:

*“What affidavits may contain*

*170. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with the grounds thereof, may be admitted.*

*Before whom affidavits may be sworn*

*171. Affidavits may be sworn in Seychelles –*

*(a) before a Judge, a Magistrate, a Justice of the Peace, a Notary or the Registrar; and*

*(b) in any cause or matter, in addition to those mentioned in paragraph (a) before any person specially appointed for the purpose by the court.*

- [7] The document in support of the Petition in this case is an affidavit in terms of sections 170 and 171 of the Seychelles Code of Civil Procedure. However, ex facie it is not an affidavit sworn in Seychelles; it is sworn in Kenya. As such there is a special legal procedure that needs to be undertaken by the deponent in order to render the document

admissible and executory in Seychelles. The procedure is found in sections 28 (1) and (2) of the Evidence Act (CAP 74). These are to the following effect:

*“Judicial Recognition of Documents sworn before Diplomatic or Consular Officers in Foreign Countries or public documents executed in the territories of a Convention State*

*Admissibility of document sworn in foreign country without proof of seal or signature*

28. (1) *When any document executed in any foreign country or place not being a public document executed in the territory of a Convention or State is produced before any court in Seychelles purporting to have foreign country affixed, impressed subscribed thereon the seal and signature of any without British Ambassador, Envoy Minister, Chargé d'Affaires, Secretary of proof of seal Embassy or Legation, British Consul General, Consul, or Vice Consul, signature Acting Consul, Pro Consul, Consular agent, Acting Consul General, Acting Vice Consul, or Acting Consular agent, duly authorised by section 6, subsection (1) of the Commissioners for Oaths Act, 1889, of the Imperial Parliament as amended by section 2 of the Commissioners for Oaths Act, 1891, of the Imperial Parliament to administer an oath in testimony of any oath, affidavit or act being administered, taken or done by or before any such officer, such document shall be admitted in evidence without proof of the seal or signature being the seal or signature of any such officer and without proof of the official character of any such officer, and the court shall presume that such seal or signature is genuine and that the officer signing any such document held at the time when he signed it the official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in the United Kingdom of Great Britain and Northern Ireland in accordance with the English law of evidence for the time being:*

*Provided always that anything in this section contained shall not be deemed or taken to render inadmissible as evidence in the courts in Seychelles any deed, writing, act or thing which before the passing of this Act would have been admissible or would by law have been taken judicial notice of.*

(2) *When any public document executed in the territory of a Convention State is produced before any court in Seychelles purporting to bear on it or on an allonge a certificate issued by the Competent Authority of the Convention State in which the document is executed, such document shall be admitted in evidence without proof of the seal or signature of the person*

*executing it and the court shall presume that such seal or signature is genuine and the person signing it held at the time it was signed the official character which the person claims and the document shall be admissible for the same purpose for which it would be admissible in accordance with the law of evidence for the time being.*

(3) *In this section -*

*“Competent Authority” means a person designated by a Convention State as a Competent Authority to issue the certificate in accordance with Article 4 of the Convention and referred to in subsection (2);*

*“Convention” means the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents signed at the Hague on 5th October, 1961;*

*“public document” means -*

*(a) document emanating from an authority or an official connected with the courts or tribunals of a Convention State, including those emanating from a public prosecutor, a clerk of a court or a process server;*

*(b) administrative documents;*

*(c) notarial acts;*

*(d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificate recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures;*

*but does not include*

*(e) documents executed by diplomatic or consular agents; and*

*(f) administrative documents dealing directly with commercial or customs operations.*

*(4) Anything in subsection (2) shall not be deemed or taken to render inadmissible as evidence in the courts of Seychelles any documents which before the commencement of that subsection would have been admissible or would by law have been taken judicial notice of.”*

An affidavit as a “notarial act” is a public document and therefore stands to be captured by section 28 (2) and the procedure for its legalisation under that section is therefore required

[8] In the case of ***EME Management Services Ltd v Island Development Company Ltd (90 of 2009) [2010] SCSC 122 (14 March 2010)***; Learned counsel for the plaintiff moved to

produce the Certificate of Incorporation of the plaintiff's company, EME Management Services Ltd, a document issued by the Registrar of Corporate Affairs British Virgin Islands as the said company was registered in the territory of the British Virgin Islands. Learned counsel for the defendant objected to the production of the document as it was a document originating from another country and did not contain an apostille as required by section 28 (2) of the Evidence Act, as amended by Act No 16 of 1996.

[9] The Supreme Court refused to admit the document and found that

*“Learned counsel for the defendant brought to the notice of court that the certificate referred to in section 28 (2) is an apostille. This is a certificate that authenticates the signature of the public official who has signed the document in the home state. The apostille certificate confirms that the person who signed the document has the authority to do so and that the document should therefore be recognised as legal, without further evidence being led in another member state in this instant case Seychelles.”*

*Further it should be the Competent Authority referred to in section 28 (2 ) of the Evidence Act in British Virgin Islands that should issue such a certificate or apostille which would then for all purposes legalise the said document.*

*As section 28 (2) of the Evidence Act is applicable to this document, this court rules that prior to the said document of the plaintiff being produced and accepted in court as an exhibit, it should contain the aforementioned certificate or apostille from the prevailing Competent Authority of the State concerned British Virgin Islands”.*

[10] The same objections and legal submissions are being made here. Given the fundamental nature of this issue to the validity of these proceedings the court will make a determination on it before the other issues that has been raised in the other preliminary objections and the merits. If the objections of the Respondents proves to be meritorious the affidavit in support of the petition would not be admissible, hence rendering the whole process a nugatory. Something that would put an end to these proceedings.

### **Analysis and determination**

[11] The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961, also known as the Apostille Convention, or the Apostille Treaty, is an

international convention. Seychelles is a party to the Convention, having acceded to it on the 31<sup>st</sup> of March 1979. The court has taken notice of the content of this Convention. It specifies the modalities through which a document issued in one of the signatory countries can be certified for legal purposes in all the other signatory States. A certification under the terms of the Convention is called an apostille (from Latin “*post illa*”). It is an international certification comparable to notarisation in domestic law, and normally supplements a local notarisation of the document. If the convention applies between two countries, such an apostille is sufficient to certify a document's validity, and removes the need for double-certification, by the originating country and then by the receiving country.

[12] Apostilles are affixed by Competent Authorities designated by the government of a State which is party to the convention. A list of these authorities is maintained by the Hague Conference on Private International Law. In Seychelles, the Competent Authority is the Registrar of the Supreme Court.

[13] If a State is not party to the Convention the documents must be authenticated. Authentication stands for the verification of the genuineness of a document or signature, to make it effective or valid. For countries which are not party to the Apostille Convention, documents are required to go through the authentication process certifying the authenticity of the document before being presented in the country of use.

[14] A State that has not signed the Convention must specify how foreign legal documents can be certified for its use. Two countries may have a special convention on the recognition of each other's public documents, but in practice, this is infrequent and authentication would be the norm. The document must be certified by the foreign ministry of the State in which the document originates and then by the foreign ministry of the government of the State in which the document will be used; one of the certifications will often be performed at an embassy or consulate. In practice this means that the document must be certified twice before it can have legal effect in the receiving country.

[15] I have carefully considered the objections raised on the admissibility of the affidavit in support of the Petition in this case. I have done this bearing in mind the law and legal

principles applicable to the production and reliance on affidavits sworn outside our jurisdiction. Having done so I am of the view the Petitioner's affidavit which purport to support her petition is not admissible in evidence as it failed to comply with section 28 of the Evidence Act. Accordingly, the Petition is struck out due to the fact that it is not supported by evidence in accordance with Rule 2(1) of the Rules.

[16] The Court takes judicial notice of the fact that Kenya is not a party to the Hague Convention, however all is not lost, if the Petitioner still wants her affidavit to be attested in Kenya. The document can be authenticated through a certificate issued by the foreign ministry of the country in which the document originated, being Kenya, and then by the foreign ministry of the government of the State in which the document will be used, being Seychelles. It is this alternative procedure that the learned counsel for the 2<sup>nd</sup> Respondent has alluded to as not being exhausted by the Petitioner.

Signed, dated and delivered on this 14 day of September 2020.

R Govinden

Judge of the Supreme Court.