

UGANDA / JUDGMENT

# African Mercantile Co. Ltd v Patel (Civil Appeal No. 14 of 1927) [1927] EACA 14 (1 January 1927)

**[1927] EACA 14****COURT**

East African Court of Appeal

**BEFORE**

Stephens, J

**CASE / FILE NUMBER**

Civil Appeal No. 14 of 1927

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

**APPELLATE CIVIL.****Before STEPHENS, J.****AFRICAN MERCANTILE CO., LTD. \$(Appellants)\$ (Original Plaintiffs)****MAGANBHAI NARSHIBHAI PATEL (Respondent) (Original Defendant) C. A. \$14/1927\$ .**

Civil Procedure Code (1882), Section 17-suits to be instituted where defendants reside or cause of action arose.

Held: - That an action lies in the Courts of this Colony under Section 17 of the Civil Procedure Code against the absent Defendant provided he was duly served and the cause of action arose here. Defendant could give notice in writing under Section 20 of the Civil Procedure Code to stay pro

JUGDMENT.-This is an appeal from Mr. Eric Johnson the Resident Magistrate at Mombasa on a preliminary point.

According to the plaint, the plaintiffs are a Limited Liability Company having their registered office in London and carrying on business in Kenya Colony and elsewhere, and the defendant is a Hindu British Indian subject at present residing and trading in Kampala in the Uganda Protectorate. The defendant was at one time working for the plaintiffs as a branch manager of the Mbale Branch of the plaintiff's business. On or about the 9th August, 1926, the defendant requested the plaintiffs to give the defendant leave to go to India for a period of four months. \$\\mathbf{On}\$ or about the 25th August, 1926, the defendant at Mombasa entered into a contract, whereby the defendant agreed, in consideration of the granting of the said leave, to return to the plaintiff's employment on the determination of his leave.

The plaintiffs accordingly granted the leave to the defendant and paid to him on his behalf sums of money set out in the account attached to the plaint. The defendant never returned to the service of the plaintiffs nor reported for duty at the expiration of his leave, and before the expiration of his leave namely on 30th November, 1926, gave notice determining his employment with the plaintiffs and refusing to return to the service of the plaintiffs. The plaintiffs therefore claim Sh. 1,379.88 as per particulars attached to the plaint.

Counsel for the defendant contended that the Court had no jurisdiction to try the case, and it is from the ruling on this preliminary issue by the Magistrate that this appeal was brought.

### **The learned Magistrate says:-**

"The contract was made in Mombasa and Mombasa is 'the place where in performance of the contract any money to which the suit relates is expressly or impliedly payable' (Explanation III (iii) Section 17 Code of Civil Procedure).

But section 17 protects defendants who are not resident in the jurisdiction by the proviso that either the Court must give leave, or defendants who do not reside or carry on business or work for gain must acquiesce in the institution of the suit.

Now, if a defendant resident in the jurisdiction of the Nairobi Court make a contract here a suit will lie against him in either the Nairobi Court or this Court. But section 20 gives him power, if a suit be instituted in this Court, to satisfy this Court that justice is more likely to be done if the suit is instituted in the Nairobi Court and if he satisfy the Court the suit will be staved.

Since Cap. 6 of the Uganda Laws (Judgments Extension Ordinance) came into force should the defendant acquiesce in this Court, a decree could be transferred for execution to a Subordinate Court in Uganda and the defendant would lose the right to object to the jurisdiction of this Court which he would retain if this Court's decree required to be sued on as in the case of a 'foreign Court' or was a judgment within the scope of Cap. 7 of the Uganda Laws (Reciprocal Enforcement of Judgments Ordinance).

I will go further and express the opinion that if the defendant  $\mathbf{I}$  were duly served in Uganda, and did not appear in obedience to a summons issued by this Court, an *ex parte* decree would be executed under Cap. 6 of the Uganda Laws by a Uganda Court and the defendant would not be heard on an objection to jurisdiction.

But objection has been taken at the proper stage of the case and it would be absurd for me to hold that a defendant in Uganda must be in a worse plight than one in Nairobi under section 20 Civil Procedure Code. The Judgment Extension Ordinance, Uganda, is concerned with the Enforcement of Decrees and Orders both before and after judgment but does not confer jurisdiction on this Court. Uganda cannot do so. She merely says she will enforce such decrees or orders as are made.

For the purpose of the institution of suits there I am of opinion that as regards Uganda I am a 'foreign Court' if the defendant chooses to take exception to my jurisdiction. I am in the position of the Bombay Court in such case and the rule laid down by Pickering, J., in *Mahomedali Mulla Esmailji v. Alibhai Jivanji Mamuji*, VII E. A. L. R. p. 89, applies. If the defendant does not acquiesce I must dismiss this suit and leave the plaintiff to seek his remedy in Uganda."

The question raised in this appeal is an extremely important one, and I have very carefully considered the leading cases on the subject of jurisdiction. Section 17 of the Civil Procedure Code enacts as follows: \$-\$

Subject to the limitations aforesaid, all other suits shall be instituted in a Court within the local limits of whose jurisdiction-

- (a) the cause of action arises, or
- (b) all the defendants, at the time of the commencement of the suit, actually and voluntarily reside or carry on business, or personally work for gain; or
- (c) any of the defendants, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain: Provided that either the leave of the Court is given or the defendants who do not reside, or carry on business or personally work for gain, as aforesaid acquiesce in such institution.

Explanation III.—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely: -

- (i) The place where the contract was made.
- (ii) The place where the contract was to be performed or performance thereof completed.
- (iii) The place where in performance of the contract any money to which the suit relates was expressly or impliedly payable."

Section 20 enacts as follows:

"If a suit which may be instituted in more than one Court is instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside, or carry on business, or personally work for gain, the defendant or any defendant may after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly; and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further orders and make such order as it thinks fit as to the costs already incurred by the parties or any of them. In such case, if the plaintiff so requires, the Court shall return the plaint with an endorsement thereon of the order staying proceedings. Every such application shall be made at the earliest possible opportunity, and in all cases before the issues are settled; and any defendant not so applying shall be deemed to have acquiesced in the institution of the suit."

Now it seems clear to me that the clause "Provided that either the leave of the Court is given "in section 17 only refers to paragraph \$(c)\$ and means that where some of the defendants at the commencement of the suit do and others do not actually and voluntarily reside or carry on business or personally work for gain, that then the leave of the Court must be obtained to sue those who do actually and voluntarily reside, etc., unless those who do not reside, etc., acquiesce in such institution.

In support of this interpretation, I might mention that section 20 of the C. P. C., 1908, corresponding to section 17, runs as follows: - "Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction \$\dots\$ (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution."

In the 1908 Code the words commencing "Provided that" run on without a break in the sentence.

Now under section 20 of the Code of 1882 in use in this Colony the defendant who does not voluntarily reside, etc., within the jurisdiction may after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly. In the present case I can find no evidence on the file that the defendant did give notice in writing to the plaintiff that he intended to apply to the Court to stay proceedings, so that this section does not avail him.

We then come back to the question as to whether a suit lies in this country against a person living in Uganda when the contract is made in this country. I have very carefully considered the leading cases on the subject and I will deal with them first.

The case most strongly in favour of the respondent's contention is that of *Gurdial Singh v. Raja of Faridkot* (1895, 22 Cal. 222) which was decided by the Privy Council. In that case *ex parte* decrees were made in the Territories of the Ruling Chief of Faridkot, a State in subordinate alliance with the Government of India, against a person who had been employed by that State within its territories but had before suit brought relinquished his employment, had left the State, and was then, at the time when he was sued, resident in another State, of which he was a domiciled subject. It was held that these decrees were a nullity by international law, and could not receive effect in a British Indian Court.

### **Their Lordships in the course of their judgment said:-**

"He (the appellant) was in Jhind when he was served with certain processes of the Faridkot Court, as to which it is unnecessary for their Lordships to determine what the effect would have been if there had been jurisdiction. He disregarded them. and never appeared in either of the suits instituted by the Raja, or otherwise submitted himself to that jurisdiction. He was under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise, unless that Court had lawful jurisdiction over him. Under these circumstances, there was, in

their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit (Actor sequitur forum rei) which is rightly stated by Sir Robert Phillimore (International Law, Vol. 4, section 891) to 'lie at the root of all international, and of most domestic jurisprudence on this matter.' All jurisdiction is properly territorial, and extra territorium jus dicenti, impune non paretur. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it, but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living, were domiciled, within the territory. As between different provinces under one Sovereignty (e.g. under the Roman Empire) the legislation of the Sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognize against foreigners who owe no allegiance or obedience to the Power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign  $\frac{1}{2}$  Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the forum by which it was pronounced. These are doctrines laid down by all the leading authorities on international law; among others by Story (Conflict of Laws, 2nd Edit. sections 546, 549, 553, 554, 555, 556), and by Chancellor Kent (Commentaries, Vol. I, p. 284, note (c) 10th Edit.), and no exception is made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the locus solutionis. In those cases as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice."

In *Emanuel v. Symon* (1908, 1 K. B. 302) it was held that neither the fact of possessing property situate in a foreign country. nor the fact of entering into a contract of partnership in that country to deal with that property, is sufficient to give the Court of the foreign country jurisdiction in an action in personam over a British subject not resident in the foreign country at the date of the action, who has neither appeared to the process nor expressly agreed to submit to the jurisdiction of the foreign Court.

### **Buckley, L. J., on page 309 says:-**

" In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is

afterwards sued; (4) where he has voluntarily appeared, and (5) where he has contracted to submit himself to the forum in which the judgment was obtained. The question in the present case is whether there is yet another and a sixth case" (that is the fact of possessing of property in a foreign country).

**Kennedy L. J. says on page 313:-**

"That question is dealt with in *Sirdar Gurdial Singh v. Rajah of Faridkote* (1894 A. C. 673) ... and the decision of the Privy Council is clear that there is no implied obligation on a foreigner to the country of that forum to accept the forum loci contractus, as having, by reason of the contract, acquired a conventional jurisdiction over him in a suit founded upon that contract for all future time, wherever the foreigner may be domiciled or resident at the time of the institution of the suit. Such an obligation may exist by express agreement, as in the case of *Copin v. Adamson* (L. R. 9 Ex. 345; 1 Ex. D. 17), and as in many cases of foreign contracts where the parties by articles of agreement bind themselves to accept the jurisdiction of foreign tribunals; but such an obligation, as is pointed out in the decision of the Privy Council (1894, 2 A. C. at p. 686) is not to be implied from the mere fact of entering into a contract in a foreign country."

A clause in a contract made between a British subject resident and domiciled in England and a foreigner that all disputes relating to the agreement and its fulfilment should be determined by the jurisdiction of the foreign country, gives the

Courts of the foreign country jurisdiction to deal with such disputes and to bind the British subject by a judgment of the foreign Court duly given against him in default of his appearance, where all the requirements of the law of that foreign country as to citation, service of process, and otherwise, have been complied with; and an action upon such judgment may be maintained in the Courts of this country against the British subject (*Feyerick v. Hubbard* 1902 86 L. T. 829; *Copin v. Adamson*, 1 Ex. D. 17; and *Rousillon v. Rousillon* 14 Ch. D. 351 considered and followed. See also *Jeannot v. Fuerot* 100 L. T. 816).

In *Ashbury v. Ellis* (1893, A. C. 339) it was held that 15 and 16 Vict. C. 72 on its true construction, empowers the legislature of New Zealand to subject to its tribunals persons who are neither by themselves nor their agents present in the Colony.

Held, further, that a law of the local legislature authorizing the local Courts in any case of contracts made or to be performed in the Colony to decide whether they will or not proceed in the absence of the defendant is *intra vires* and reasonable.

Whether a judgment against an absentee without service of the writ will be enforced by the Courts of another country is a matter for those Courts to determine, and does not affect the validity of the local law.

In this case which came before the Privy Council, the appellant was domiciled in England. He was not at the time the actions were commenced present either in person or by agent in the Colony, and had not been there since December 1886 (and the case had come before the Lower Court in New Zealand in June, 1891), when he was there on a short visit, and never had a permanent residence there. At the time the writs were issued he was resident in London.

### **Lord Hobhouse delivering the Judgment of the Court said:-**

"The main question argued in this case relates to the right of the New Zealand legislature to authorize judicial proceedings against absentees. The rules of the New Zealand Code (46 Vict. No. 29) which has come under discussion is rule 53 one of a group of rules which fall under the head of 'Proceeding without service.' The material part of it is as follows:-

'In actions founded on any contract made or entered into or wholly or in part to be performed within the Colony, on proof that any defendant is absent from the Colony at the time of the issuing of the writ, and that he is likely to continue absent, and that he has no attorney or agent in the Colony known to the plaintiff who will accept service, the Court may give leave to the plaintiff to issue a writ and proceed thereon without service !'

Then come a number of provisions relating to the conditions on which leave should be given, and to its incidents when given.

Another group of rules in the same Code relates to service of process out of the Colony. His (the appellant's) contention is, that the Act of Parliament (15 and 16 Vict. C. 72) which gives to the legislature of New Zealand power "to make laws for the peace, order, and good Government of New Zealand, provided that no such laws be repugnant to the Laws of England," does not give it power to subject to its judicial tribunals persons who neither by themselves nor by agents are present in the Colony. It is not contended that the rules in question are repugnant to framed  $\text{the laws of}$  . In fact,  $\text{they are}$   $\alpha$  England. principles  $\text{adopted}$   $\text{in}$   $\text{But}$   $\text{it}$   $\text{is}$  said that the moment an attempt is made by New Zealand law to affect persons out of New Zealand, that moment "the local limitations of the jurisdiction are exceeded, and the attempt is nugatory  $\text{therefore}$  (p. 344). Their Lordships are clear that it is for the peace, order and good Government of New Zealand that the Courts of New Zealand should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether they will or will not proceed in the absence of the defendant. The power is a highly reasonable one. So far as regards service of process on persons not within their local jurisdiction, or substituted service, or notice in lieu thereof, in proper cases the English Courts have it conferred on them by the Imperial Parliament. The New Zealand legislature, it is true, has only a limited authority, but in passing the rules under discussion, it has been careful to keep within its limits.

But it was said that a judgment so obtained could not be enforced beyond the limits of New Zealand; and several cases of suits founded on foreign judgments were cited. Their Lordships only refer to this argument to say that it is not relevant to the present issue. When a judgment of

any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country, with regard to all the circumstances of For trying the validity of the New Zealand laws it the case. is sufficient to say that the peace, order, and good Government of. New Zealand are promoted by the enforcement of the decrees of their own courts in New Zealand.

The only other contention related to the word "absent" in rule 53. The appellant seeks to confine it to persons who at some previous time have been domiciled or resident in New Zealand. It is not easy to appreciate the reasons why such an artificial sense should be put upon the word; and during the argument their Lordships expressed agreement with the Judges of the Court of Appeal, who held that "the word is used in its ordinary sense. and describes persons who are not in New Zealand."

**In Turnbull v. Walker (1882, 67 L. T. 763) Wright, J., said, page \$769:\$**

"Jurisdiction of this kind ordinarily depends on the allegiance of the party or his consent, or on some fact which is held to be equivalent to allegiance or consent. Or, secondly, the Court of a State may have jurisdiction in such sense that its judgments will bind Courts and persons and govern rights within that State, but will not be enforced by the Courts of other States: or, what is another form of the same case, it may have given judgment without any jurisdiction, but by reason of lapse of time or otherwise there may be no means of questioning the judgment in the local Courts. Or thirdly (though in strictness this is not a third case, but is one as to which doubts may often exist as to whether it ought to be treated as of the first or as of the second kind), the jurisdiction may exist locally by virtue of some local law which empowers or binds the local Court to act as if it had jurisdiction in cases in which upon ordinary principles of jurisprudence it has none. Such are some of the cases provided for such legislation as is now in England embodied in Order XI of the Rules of the Supreme Court and by the practice or legislation of many States."

In Carrick v. Hancock (1895, 12 T. L. R. 55) it was held that a defendant who was duly served with process while temporarily present in a foreign country is amenable to the jurisdiction of its Courts so as to be bound by their judgment and the Courts of this country will therefore enforce a judgment so obtained.

In Luckmee Chund v. Zorawur Mull (1860, 8 Moo. I. A. 291; 19 E. R. 541) a contract was entered into at Rutlam, in the independent State of Malwa between the firm of L. who resided and carried on business at Muttra, within the jurisdiction of the Zillah Court at Agra, and the firm of Z. carrying on business at Rutlam and elsewhere, for the establishment of a co-partnership for the purchase and sale of opium. The co-partnership business. was carried on principally at Muttra, and the business was conducted there by means of the capital advanced in the concern. by the firm of L. in which place the partnership books were kept. At the close of the partnership, which was attended with loss, a balance was struck at Muttra, which showed a debt due by the firm of Z. to the firm of L. In an action brought by the firm of L. against the firm of Z. in the Zillah Court at Agra, for the recovery of the amount of this balance, it was pleaded by Z. that as the contract was made at Rutlam, where the firm resided. the Zillah Court at Agra had, by Beng. Reg. II of 1803, no

jurisdiction to entertain the action, which objection the Zillah Court allowed, and afterwards the Sudder Court at Agra on appeal, sustained.

Upon appeal such decision was reversed by the Judicial Committee on the ground that the cause of action arose in Muttra, and was, by Beng. Reg II of 1803, within the jurisdiction of the Zillah Court of Agra (1) because Muttra was the established place of business of the co-partnership, where the books were kept for the purpose of the partners ascertaining the state of transactions between them, and (2) because, as it was there that the balance was struck, and payment of the balance due.

**The Right Hon. Lord Chelmsford in delivering the Judgment of the Privy Council said: -**

" Now, where can it be said that the cause of action, supposing it exists for that balance, properly arose? Muttra was, undoubtedly, the central place of business; at Muttra the partnership books were kept; at Muttra the partners would have recourse to those books for the purpose of ascertaining the state of the transactions between them; and if, in the result a balance was due to the appellants, Muttra would be the place where the payment of that balance would have to be made. It, therefore, appears clear to their Lordships that if there is a cause of action arising out of the balance resulting from these partnership transactions, that cause of action arose at Muttra."

It is very common for the Courts of a country to entertain actions under circumstances in which they would not admit that the jurisdiction was sufficiently founded to entitle the judgment of a foreign Court, pronounced under similar circumstances, to be recognized as internationally binding. For example, the personal forum of the plaintiff introduced by Art. 14 of the Code Napoleon, and copied in other countries whose legislation is based on that Code, is not even in France considered to possess any international validity, and no authority is allowed there to a judgment pronounced in one of those other countries on the ground of it.

Article 14 authorizes Frenchmen to sue foreigners in France. even though not residing there, and even on obligations contracted abroad; thus introducing the novel conception of a personal forum of the plaintiff, on the ground that a citizen is entitled to demand justice of his state.

I have dealt with the leading cases connected with foreign judgments given against absent foreigners, and I will now deal with their applicability to this country. As we have seen by. private international law a decree given against an absent foreigner not resident in nor owing allegiance to the country where the judgment is given is a nullity by international law, yet there is nothing to prevent a country passing a law giving jurisdiction to its Courts to pronounce judgment against an absent foreigner. Such a judgment would be enforceable against the person of the foreigner if he should come into the country, but would not be enforced by the Court of another country, unless of course there was some treaty between the two countries empowering the Courts of that country to enforce it. Now by the Judgments Extension Ordinance, Chapter 6 of the Uganda Laws, section 2, it is enacted that:

"Where a decree has been obtained or entered up in His Majesty's Supreme Court of the Colony and Protectorate of Kenya or High Court of Nyasaland or of Tanganyika or in His Britannic Majesty's Court for Zanzibar, or in any of the Courts of His Highness the Sultan of Zanzibar, or in any Court subordinate to any of such Courts for any debt, damages or costs, and when it is desired that such decree shall be executed upon the person or property of the defendant in the Uganda Protectorate, such decree may be transferred to His Majesty's High Court of Uganda (hereinafter called ' the High Court ') or to any of the Courts subordinate thereto (hereinafter called 'subordinate Courts') for execution, and the provisions of ... the Indian Code of Civil Procedure for the transfer and execution of decrees shall apply in the same manner as if such 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, and all proceedings shall, and may be, had and taken as if the decree had been a decree originally obtained in the High Court or a subordinate Court, and all reasonable costs and charges with regard to the transfer and execution of such decree shall be recovered in like manner as if the same were part of the original judgment."

I am of opinion that the action lies in the Courts of this country under section 17 of the Civil Procedure Code against the absent defendant provided he was duly served as the cause of action arose here. It is true that defendant could have given notice in writing under section 20 of the Civil Procedure Code to stay proceedings, but this he has apparently not done, and had he done so it is very doubtful whether the application ought to have been granted, as the debt was incurred here, and all the evidence must be here. But for the Judgment Extension Ordinance above referred to, the judgment of a Court of this country would doubtless not be enforced, nor an action lie on the judgment in the Uganda Courts against an absent foreigner.

I therefore allow the appeal with costs, and remit the case to the Magistrate for trial.

---

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://ulii.org/akn/aa/judgment/eaca/1927/14/eng@1927-01-01>

**CASE PAGE**              <https://chat.esheria.ai/case-law/uganda/african-mercantile-co-ltd-v-patel-civil-appeal-no-14-of-1927-1927-eaca-14-1-january-1927-unknown-topic-unknown-court-1927--6a3ea4d93b1caa91297e60a5>

Prepared on 13 October 2026 · Esheria