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Locus Standing for unregistered Foreign Companies in Kenyan Courts

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Introduction

In cross border commercial transactions involving Kenyan companies, it is common for foreign lenders, suppliers and investors extend money or credit to Kenyan companies without setting up a local branch or registering as a foreign company in accordance with the requirements under the Companies Act.

The Court of Appeal in *Stichting Rabobank Foundation v AVA Chem Limited & another, Civil Appeal No. E090 of 2025, [2026] KECA 1550 (KLR)* was confronted with a question whether the failure to register a foreign company in Kenya impairs the right of that company to institute a suit in Kenya against a Kenyan company. It answered the question in the negative, holding that failure to register does not automatically mean a foreign company loses its right to sue in Kenya to recover what it is owed.

The crux of the dispute

The appellant, Stichting Rabobank Foundation, a Dutch entity, had advanced USD 180,116 in financial support to AVA Chem Limited in 2016, with the company's director, Christopher Irungu Mwangi, personally guaranteeing repayment. The parties restructured the arrangement in 2018, but the debt was never fully settled. In 2022, the Foundation filed a case the High Court's Commercial Division for USD 230,868.51.

Rather than defending the claim on its merits, the respondents raised a preliminary objection. Their argument was straightforward: the Foundation was a foreign company that had never registered in Kenya under section 974 of the Companies Act, and its financial support arrangement amounted to carrying on business here. Without registration, they argued, the Foundation had no standing to sue at all.

The High Court agreed and struck out the entire suit before it was ever heard on its merits.

On Appeal

Dissatisfied with the Ruling, the appellant lodged an appeal at the Court of Appeal. The Court of Appeal, reversed the High court's decision based on the following reasons:

First, the court drew a sharp line between three concepts that are often, wrongly, treated as one and the same: legal personality (whether an entity exists in the eyes of the law), capacity to sue (whether it can bring a case in its own name), and locus standi (whether it has a genuine interest in the dispute). A company's failure to register under a Kenyan regulatory statute does not automatically strip away any of these. The Foundation existed under Dutch law, was allegedly owed a real debt, and therefore had every right to ask a Kenyan court to hear its claim, at least in principle.

Second, the court looked closely at what section 974 actually says, rather than what it might be assumed to mean. The section prohibits an unregistered foreign company from carrying on business in Kenya, and it prescribes a specific penalty for breaking that rule. What it does not say is that a company which fails to register cannot sue, or that any related contract becomes void. The Court of Appeal was firm on this point: if Parliament wanted non-registration to bar access to the courts entirely, it would have said so plainly. Courts should not read a harsher consequence into a statute than the legislature actually wrote.

Third, and perhaps most practically important, the court held that whether a foreign company is "carrying on business in Kenya" is not something that can usually be decided as a quick, preliminary point of law. It depends on facts: how many transactions took place, where contracts were negotiated and signed, whether the company had staff or offices here, how the funds were disbursed, and how continuous or isolated the activity was. In this case, the Foundation said the loan agreement was executed abroad and funded from its Dutch bank account, while the respondents said the arrangement was directed at a Kenyan company and therefore counted as local business activity. That is a genuine factual dispute, and the court held that a preliminary objection, which only works for pure legal questions where the facts are not contested, was the wrong tool to resolve it.

The court also rejected the idea that a straightforward loan automatically counts as "offering debentures in Kenya" under section 974(2). A loan and a debenture are not automatically the same thing in law, and the difference matters.

The outcome

The Court of Appeal allowed the appeal, set aside the High Court's ruling, dismissed the preliminary objection, and sent the case back to be heard on its merits before a different judge. The Foundation was awarded the costs of both the appeal and the earlier preliminary objection. Notably, the court did not decide whether the Foundation actually was or was not carrying on business in Kenya. That question, and the underlying debt claim itself, still needs to be tried.

Why this matters for cross-border business

For foreign lenders, suppliers, and investors doing business with Kenyan companies, this judgment offers real reassurance: a failure to register locally is not, by itself, a free pass for a Kenyan counterparty to escape a genuine debt. At the same time, the judgment is a reminder that "carrying on business in Kenya" is a fact-heavy question, and companies structuring cross-border transactions should think carefully about how their activity here might be characterised if a dispute ever arises.

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