



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 252 OF 2019

DR. MARY KERUBO NYASIMI.....PLAINTIFF

VERSUS

SOPHIA HUYER.....1ST DEFENDANT

KADRA RAYALE.....2ND DEFENDANT

INTERNATIONAL LIVESTOCK RESEARCH INSTITUTE (ILRI)...3RD DEFENDANT

WORLD UNIVERSITY SERVICE OF CANADA.....4TH DEFENDANT

RULING

1. Dr. Mary Kerubo Nyasimi, the plaintiff/applicant herein, filed an action against Sophia Huyer, Kadra Royale, International Livestock Research Institute (ILRI) and World University Services of Canada, the 1st, 2nd, 3rd and 4th defendants/respondents herein respectively vide the plaint dated 19th November 2019. In the aforesaid plaint the plaintiff sought for general and exemplary damages for libel with an apology plus costs.

2. Sophia Huyer and ILRI, the 1st and 3rd defendants/respondents respectively took out the motion dated 27th July 2020 whereof they sought for the suit against them to be struck out with costs. The motion is the subject matter of this ruling and is supported by the affidavit sworn by Ian Wright.

3. When served with the motion the plaintiff filed a replying affidavit she swore to oppose the application. The 2nd and 4th defendants indicated they were not filing any responses to the application. Learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submissions.

4. I have considered the grounds stated on the face of the motion dated 27th July 2020 and the facts deponed in the rival affidavits. I have also considered the written submissions plus the authorities cited by the parties. It is pointed out that ILRI, the 3rd defendant is an International organization headquartered in Nairobi, Kenya. It is said that on 2nd April 1993, the government of Kenya and ILRAD now ILRI signed an agreement for the regulation of ILRAD's headquarters which agreement also extended the privileges and Immunities provided under the Fourth Schedule of the Privileges and Immunities Act (Cap 149 Laws of Kenya).

5. The 3rd respondent avers that it enjoys immunity from every form of legal process except in so far as, in any instance, it has waived its immunity. The 3rd respondent has stated that it has not waived its immunity in respect of the plaintiff's suit. It is the applicants' submission that by virtue of the Host Country Agreement that the 1st and 3rd defendants enjoy immunity from the legal process under the provisions of Sections 9 and 11 of the Privileges and Immunities Act.

6. It is pointed out that the Host Country Agreement provides under Article V that any dispute or legal claim brought against ILRI in Kenya other than by the Kenyan government shall be referred to the Ministry of Foreign Affairs for negotiations and settlement. The applicants aver that this suit is premature since the plaintiff has not exhausted the prescribed dispute resolution mechanism.

7. The plaintiff/respondent opposed the application arguing that the applicants do not enjoy absolute immunity but restrictive or qualified immunity by virtue of the promulgation by the Minister concerned of ILRI Order 2000 and Legal Notice no. 2/2001 in line with the provisions of Section 9 of the Privileges and Immunities Act which provided for absolute immunity.

8. The plaintiff further argued that ILRI Order 2000 under Legal Notice no. 2/2001 waives the absolute immunity the 1st and 3rd defendants enjoyed and restricted them. The plaintiff further argued that the 1st and 3rd defendants submission, that the plaintiff ought to ventilate the issues before this court before the Ministry of Foreign Affairs is neither here nor there. The respondent reiterates that by virtue of Legal Notice no. 2 of 2001, the plaintiff is properly before this court hence the motion should be dismissed.

9. The main issue which this court has been called upon to determine is whether the 1st and 3rd defendants/applicants enjoy absolute immunity under Sections 9 and 11 of the Privileges and Immunities Act (Cap 179 Laws of Kenya). I have considered the rival submissions. The background of this dispute can be deduced from the pleadings filed before this court.

10. The plaintiff avers that she was engaged by World University Service of Canada, the 4th defendant herein as an independent consultant for AFDB and equally by CIAT as the project manager for CCAFs research program to undertake the implementation of the inclusive climate change for A sustainable Africa Program (ICCASSA) a project under the African Development Bank (AFDB) under a shared leadership of various persons including but not limited to Sophia Huyer the 1st defendant.

11. In 2017, AFDB is said to have directly approached the plaintiff to implement a project on gender and climate change (ICCASA) on their behalf as a consultant. The plaintiff alleged that on or about 20th November 2018 the 1st and 2nd defendants in a bid to undermine her expertise on the aforesaid project while acting under the instructions of the 3rd and 4th defendants, maliciously caused to be written and published a letter to AFDB by way of email with the result that her reputation and professionalism was subjected to ridicule and odium. The plaintiff felt defamed and hence she filed the instant suit and application seeking for damages.

12. Having given the background of the dispute, I now turn my attention to the main issue this court is called upon to determine vide the motion dated 27th July 2020. I have already indicated that the 1st and 3rd defendants are of the submission that this court has no jurisdiction to entertain the suit because they enjoy diplomatic immunity.

13. The plaintiff is of the submission that the 1st and 3rd defendants do not enjoy absolute immunity hence this suit is properly before this court being one of those exceptions allowed by law.

14. There is no doubt that under Article 2(5) of the Constitution of Kenya, 2010, the general rule is that international law shall form part of the law of Kenya and that the powers of the state to grant protection are derived from Sections 9 and 11 of the Privileges and Immunities Act (Cap 179 Laws of Kenya) as read together with part 1 of its Fourth Schedule.

15. On 25th September 1973 the Government of Kenya through the Ministry of Agriculture and the Rockefeller Foundation executed a memorandum of Agreement (MOA) to create International Laboratory for Research on Animal Diseases (ILRAD). Through the MOA ILRAD was to enjoy certain privileges, immunities and facilities in Kenya.

16. On 13th June 1994, ILRAD was incorporated as a company limited by guarantee whose main objective was to carry out research in livestock and disease control in Kenya. On 2nd April 1993 the government of Kenya and ILRAD executed an agreement for the regulation of ILRAD's headquarters. The said agreement recognized the 1973 MOA and extended the privileges and immunities in the 1973 MOA. On 14th May 1993 the aforesaid agreement was published vide legal no. 134 of 1993 pursuant to the provisions of Section 9 of the Privileges and Immunities Act thus entitling ILRAD the privileges and immunities provided for under the Fourth Schedule of the Act.

17. On 24th September 1994 state parties including the Government of Kenya executed an agreement transforming ILRAD into the International Livestock Research Institute (ILRI) with its own constitution. On 29th December 1994 ILRI and the government of Kenya executed a Host Country Agreement (HCA) where inter alia the 1973 MOA was re-affirmed. Pursuant to the 1994 agreement, legal Notice no. 2 of 2001 was published with similar terms as those in Legal Notice no. 134 of 1993 essentially extending privileges and immunities to the newly formed ILRI.

18. Article V of H.C.A stated in part as follows:

“1.

2. Any dispute or legal claim brought against ILRI in Kenya, other than by the Kenyan Government, shall be referred to the Ministry of Foreign Affairs for negotiation and settlement.”

19. It is so clear from legal notice no. 2 of 2001 that the immunity enjoyed by ILRI is extended to the employees who are not Kenyan citizens and not permanently resident in Kenya, meaning that the immunity from legal process extends to the 1st defendant.

20. This court has been urged to find that the 1st and 3rd defendants do not enjoy absolute immunity from legal process to the extent of the nature of transaction that was between her and the defendants as the transaction was purely private and commercial in nature and was not in exercise of ILRI's sovereign function or multinational in nature that would affect its member states.

21. The plaintiff aver that the engagement between her and the 1st and 3rd defendants was and remains private in nature and not governmental that would qualify the defendants absolute immunity.

22. A cursory look at the pleadings will reveal that at this stage, it cannot be said that the cause action relate to private or governmental transaction. It is therefore clear that this court is unable at this stage to conclude that the plaintiff's dealings with the 1st and 3rd defendants

was private or governmental.

23. I am convinced that the dispute between the plaintiff and the 1st and 3rd defendants falls within that envisaged under Article V(2) of the Host Country Agreement. Consequently, any legitimate claim against 1st and 3rd defendants can only be ventilated before the Ministry of Foreign Affairs as an alternative dispute resolution mechanism. In other words, the 1st and 3rd defendants enjoy immunity unless it is waived. In the case of **Karen Njeri Kandie =vs= Alassane BA and Anotehr (2015) e KLR** the Court of appeal expressed itself inter alia as follows:

“..... the conclusion is inescapable that the immunity that attaches to the 2nd respondent and its officers such as the 1st respondent finds recognition and legitimacy from international treaties entered into by Kenya including the Vienna convention which had express validation by the clear constitutional text found in Article 2 (6) of the 2010 constitution. In so far they impact and implicate. Article 48 of the right to access to justice, they constitute a legitimate limitation to the right. Moreover, they are not, in all circumstances of the case, disproportionate to the legitimate aims of conferment of state immunity.”

24. In the end, I am convinced that the suit as against the 1st and 3rd defendants is improperly before this court because the 1st and 3rd defendants enjoy immunity from legal process. I also find that the plaintiff has failed to exhaust the available alternative dispute resolution mechanism provided for under Article V (2) of the Host Country Agreement.

25. Consequently, the motion dated 27th July 2020 is found to be meritorious and the same is allowed as prayed. For the avoidance of doubt, the suit as against the 1st and 3rd defendants is hereby ordered struck out with costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF AUGUST, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Respondent

..... for the defendant/applicant