

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 185 OF 1994

THEURI KHIRA.....PLAINTIFF/APPLICANT

VERSUS

GERHARD MATTHIESSEN.....DEFENDANT/RESPONDENT

RULING

The applicant has two applications on record the first of which is a motion dated 26th March, 2018 and filed on the even date; in this motion, he seeks to join the German Embassy to these proceedings as the 2nd defendant. The 2nd is a motion is dated 24th April, 2018 seeking to serve the German ambassador in Kenya by way of substituted service.

The primary suit in which the German Embassy is sought to be introduced is a claim for both general and special damages; the cause of action arises from a road traffic accident involving the current defendant's vehicle registered as number ICC 2K and motor vehicle registration No. KVR 920. The accident occurred on Nyeri-Mweiga Road on 25th May, 1991. The plaintiff's son who was then driving the latter vehicle was fatally injured. The defendant, on the other hand, was driving his own vehicle. This suit was therefore instituted for the benefit of the deceased's estate and on behalf of his dependants under the Law Reform Act, cap. 26 and Fatal Accidents Act, cap. 32 respectively.

There are correspondences in the file showing that for a long time this suit could not proceed apparently because the original file could not be traced. Apart from lack of this, the plaintiff also stated that at some point, he disagreed with his advocates who would have facilitated speedy disposal of this matter but for the disagreement. He could not take appropriate steps to set the suit in motion himself because, as he informed the court, he has been a victim of diabetes and high blood pressure. A combination of these factors meant that nothing much happened until I ordered the reconstruction of a skeleton file on 4th October, 2017; it is only then that the two applications were made.

I will not hesitate to say that I do not find any reason to join the German Embassy to this suit; I say so because according to the plaintiff's amended plaint, the defendant was sued in his personal capacity though at the time of the accident he was a consulate officer at the Germany Embassy in Kenya. As noted, he was the registered owner and driver of motor vehicle registration No. ICC 2K at the time material to this suit.

It is not clear from the plaintiff's plaint whether at the time of the accident the defendant was on his official business as the employee of the German Embassy and by extension, the German Government, or was on a private or commercial mission outside his official business.

The defendant has himself contended in his statement of defence that "*as a diplomatic agent he enjoys immunity and privileges and therefore the present suit is unmaintainable and is a nullity*". (see paragraph 2 of the statement of defence dated 7th day of July, 1994).

There is no doubt and it is settled that a consulate officer of a sovereign state enjoys immunities and privileges from legal process in the host state. However, it is important to note that not every act of a sovereign is insulated by sovereign immunity; it may well be that the immunity has been waived or the sovereign state has consented or submitted to the jurisdiction of the local courts in determination of particular disputes. It may also be that even though immunity exists a particular act is not among the category of acts that are immune to the local legal process. The point is, sovereign immunity is not always absolute. The circumstances of a particular case will dictate whether the immunity can be invoked.

It is not necessary to delve further into the details of this issue of diplomatic privileges and immunities at this particular juncture lest I preempt the arguments that are bound to arise when the issue is finally argued at the appropriate time. Suffice it to say that it is an issue that invites this court to determine it in limine. For now, all I can say is that I do not see any reason, why the Government of Germany should be made party to this suit. There is no legal basis to implead it. It follows therefore that there is no merit in any of the applicant's motions and they are hereby dismissed.

Considering the age of this matter, I direct that the same be mentioned on 27th September, 2018 when this court will issue directions on its hearing and determination. I appreciate also that the plaintiff is fairly aged and is acting in person; for this reason, I direct the Deputy Registrar to serve the mention notice to Messrs. Ghadijally & Company advocates who I note are on record for the defendant. Meanwhile, for good order, I direct that the applicant files a notice to act in person in view of the fact that he no longer wishes to be represented by his previous advocates. It is so ordered.

Signed, dated and delivered in open court this 21st day of September, 2018

Ngaah Jairus

JUDGE