



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 30 OF 2015

FRANCIS OPICHE GONZE T/A PLUMCON EAST AFRICA.....PLAINTIFF

VERSUS

HIS EXCELLENCY THE AMBASSADOR OF SAUDI ARABIA....DEFENDANT

RULING

1. Through a plaint dated 27th January, 2015, the Plaintiff filed suit against the Defendant seeking damages for breach of a tenancy agreement. The Defendant filed a statement of defence. The Defendant subsequently filed Notice of Preliminary Objection on the following grounds:

1. That the Respondent is a holder of diplomatic immunity under the Privileges and Diplomatic Immunities Act Cap 179 Laws of Kenya and as such is immune from any legal processes.

2. That Defendant executed and or signed the tenancy agreement in his official capacity as the Ambassador of Saudi Arabia.

3. That the Plaintiff's entire suit is misconceived and bad in law the orders prayed for do not lie as this court is not empowered to give the said orders.

4. The Defendant prays that this suit be dismissed with costs.

2. When the application came up for hearing, the learned counsels for the parties opted to file written submissions.

3. The Defendant's counsel relied on Article 2(5) & (6) of the Constitution, Fourth Schedule of the Privileges & Immunity Act Cap 179 and Article 2 of the Vienna convention and argued that the Defendant at all material times acted in his official capacity as the Ambassador of Saudi Arabia and therefore enjoyed immunity from the court process unless if there was waiver of the same, which he submitted was not the case herein. The court was referred to the following authorities.

(a) Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa [1983] eKLR

(b) Elkana Khamisi Samarere & another v Nigerian High Commission

(c) Ishak Mohamed v Libya Embassy

(d) Lilian v Caltex Oil (Kenya) Ltd [1989]

4. The Plaintiff counsel submitted that the relationship between the parties was that of a landlord and tenant and the parties herein are governed by the tenancy agreement under which the diplomatic immunity was waived. The court was referred to the applicable law as:

(a) Article 2(5) & 2(6) of The constitution of Kenya

(b) The Privileges and Immunities Act No. 3 of 1970

(c) The Vienna Convention on Diplomatic Relations, 1961

(d) The Vienna Convention on Consular Relations domesticated before 2010 vide the Privileges & Immunities Act & the 1st and 2nd Schedules to the Act.

5. The Defendants counsel further submitted that although the law generally provides immunity against the prosecution of diplomats, there are exemptions to the law. He relied on the following authorities.

(a) Unicom Ltd v Ghana High Commission [2016]eKLR

(b) Ministry of Defence of Government of the United Kingdom v Joel Ndegwa [1983][eKLR

6. It is not in dispute that the Defendant at all material times enjoyed diplomatic immunity under the Privileges and Immunities Act. It is also not in dispute that the Defendant signed the tenancy agreement in his official capacity as the ambassador. The crux of the matter is whether the Defendant is entitled to immunity in the case which is a case based on a lease agreement entered into between the parties.

7. Upon considering the submissions of the parties and the law applicable my view is that although the doctrine of sovereign and diplomatic immunity applies to Kenya, the same is not absolute. The nature of the dispute matters. I am fortified in taking this position by the Court of Appeal decision **Unicom Ltd v Ghana High Commission [2016] eKLR** which quoted the case of **Ministry of Defence of Defence of the Government of the United Kingdom v Joel Ndegwa [1983] eKLR** where it was stated:

“...the test is whether the foreign sovereign or government is acting in a governmental capacity under which it can claim immunity, or a private capacity, under which an action may be brought against it.” It is therefore the nature of the dispute that is critical in determining whether or not our courts will take cognizance of a dispute where immunity is pleaded. Lord Denning explained this in *Rahimtoola v Nizam of Hyderabad [1958] A.C. 379*, in the following terms. “...sovereign immunity should not depend on whether a foreign government is impleaded directly or indirectly, but rather on the nature of the dispute. ...Is it properly cognizable by our courts or not” If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do sobut if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.”

8. In the aforesaid case of **Unicom Ltd (Supra)** the Court of Appeal referred to it’s decision in **Karen Njeri Kandie v Alssane B & another [2015] eKLR** where it was held its earlier decision in **Ministry of Defence of the Government of the United kingdom v Joel Ndegwa (Supra)** where it stated that:

“.....the doctrine of absolute immunity would be anachronistic, and has been for some time now. What immunity there is must be restricted or qualified so that private or commercial activities cannot be immunized.”

9. The upshot is that the Plaintiff is entitled to file suit against the Defendants based on the tenancy agreement. Consequently, I dismiss the preliminary Objection with costs.

Date, signed and delivered at Nairobi this 18th day of Dec, 2017

B. THURANIRAJADEN

JUDGE