



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISCELLANEOUS APPLICATION NO. 453 OF 2015**

**FRED KHAEMBA.....APPLICANT**

**-VERSUS-**

**INTERNATIONAL ORGANISATION OF MIGRATION.....RESPONDENT**

**RULING**

1. This matter was initiated by way of a Chamber Summons dated **7<sup>th</sup> October, 2015**, through which the Applicant sought for orders to the effect that an order be issued directing the Chairman of the Chartered Institute of Arbitrators, Kenya Branch, to appoint an arbitrator to hear and determine the dispute between him and the Respondent. The application is supported by the applicant's affidavit sworn on **7<sup>th</sup> October, 2015** and is hinged on the grounds, *inter alia*, that he had entered into a Consultant's Contract with the Respondent, which contract provided that any dispute between the parties in connection with the agreement would be settled by mutual agreement or failing that through arbitration.

2. It was the Applicant's case that while in the course of his contractual duties in Moyale, they were attacked by bandits and thereby suffered grievous gunshot wounds for which he has been unable to receive "fair and adequate" compensation from the Respondent in accordance with the International Organization of Migration (IOM) Guidelines. Pursuant to Clause 17 of the Consultancy Contract, which provides for arbitration, he approached the court for an order referring this matter for arbitration, contending that the parties have failed to settle the dispute between them by mutual agreement and that despite several requests to the Respondent to appoint a mutual arbitrator, the Respondent had failed and/or neglected to participate in the appointment of an arbitrator.

3. In response, the Respondent filed a Notice of Appointment of Advocates together with a Notice of Preliminary Objection both dated **13<sup>th</sup> November 2015** and filed on even date. The following are the points of Preliminary Objection as raised by the Respondent;-

**(i). THAT the Respondent is an International Organisation enjoying Immunity from Court and legal process conferred on it by Section 9 of the Privileges & Immunities Act, Chapter 179 of the Laws of Kenya and by virtue of a Co-operation Agreement between the Respondent and the Government of the Republic of Kenya;**

**(ii). THAT the Applicant has sought orders against the Respondent in the Applicant's said Chamber Summons;**

**(iii). THAT the Respondent has neither waived such immunity nor consented to be sued in or made a party to these proceedings nor subjected themselves to the jurisdiction of this Honourable Court and as such ought not to have been impleaded in these proceedings;**

**(iv). THAT this Honourable Court lacks jurisdiction to hear and determine these proceedings in as far as they relate to the orders sought in the said Chamber Summons against the Respondent;**

**(v). THAT these proceedings are therefore an abuse of the process of the Honourable Court;**

**(vi). THAT the orders sought against the Respondent are contrary to the relevant provisions of the Constitution of Kenya, the principles of International law by which the Republic of Kenya is bound, the Laws of the Republic of Kenya and the Rules governing these proceedings.**

4. In his submissions, Mr. Amin, Counsel for the Respondent, argued that this Court lacks the requisite jurisdiction to hear the present application on the ground that the Respondent enjoys total immunity from all forms of Court process. He predicated his submission on the provisions of **Section 9 of the Privileges and Immunities Act, Chapter 179 of the Laws of Kenya** as read with **Part I of Schedule 4** thereof. It was the submission of Learned Counsel for the Respondent that this immunity extends to the assets and employees of the organisation. In support of his arguments, Counsel relied on the Co-operation agreement between the Government of Kenya and the Respondent signed on May 11, 2002, and in particular Article 1 thereof. Counsel further relied on **L.N No. 461/90**, by which the Respondent was declared to be an organization to which section 9 of the Privileges and Immunities Act applies. It is the Respondent's case that the immunity it enjoys has not been waived and that the jurisdiction of the Court has not been accepted.

5. The second limb of the Preliminary Objection is that there being no Originating Pleadings filed herein and served, the Chamber Application is incompetent. According to the Respondent, the Chambers Summons has no foundation, upon which summons to enter appearance could be issued, and that it was for this reason that the Respondent did not enter appearance, opting instead to file a Notice of Appointment of Advocate under **Order 9 of the Civil Procedure Rules** to notify the Applicant that they were represented. It was therefore the Respondent's case that the present proceedings are defective, incompetent and bad in law, and should therefore be dismissed with costs.

6. In response to the Preliminary Objection, Ms. Nderu, Counsel for the Applicant, submitted that the Notice of Appointment of Advocates filed by the Respondent was unconditional and that by virtue of that the Respondent subjected themselves to the jurisdiction of this Court.

7. With regard to the objection on immunity, Counsel for the Applicant submitted that the Respondent could not hide behind the **Privileges and Immunities Act** to evade its responsibilities. She submitted that the agreement between the parties provided for arbitration and that the present application was in accordance with **Section 7 (1) and 12 of the Arbitration Act**. Counsel also relied on the cases of **Gremmo Danielle & Another vs. Kilily Spa [2009] eKLR** and **Kanti & Co. vs. South British Insurance Co. Ltd [1981] KLR 1** for the proposition that the Defendant, by entering an unconditional appearance, is deemed to have submitted to the jurisdiction of the court and as long as the unconditional appearance stands, the court is seized of jurisdiction to try the suit.

8. From the foregoing, it is apparent that there are only two main issues to be considered with regard to the Respondent's preliminary objection. The issues are as follows:-

**a) Whether the Respondent enjoys total immunity from Court proceedings;**

**b) Whether or not the Applicant's Chamber Summons is competent without Originating Pleadings.**

9. On the first issue, reliance was placed by the Respondent on the provisions of **Section 9** of the **Privileges and Immunities Act** and **Part I of Schedule 4** of the **Privileges & Immunities Act** to support the argument that the Organisation enjoyed total immunity from all forms of Court process. Section 9 of the aforesaid Act provides, *inter alia*, that:

**"The Minister may, by order--**

**(a) Provide that an organization to which this section applies... shall, to such extent as may be specified in the order, have the immunities and privileges set out in Part I of the Fourth Schedule to this Act and shall also have the legal capacities of a body corporate; ..."**

10. The Respondent has demonstrated that through **Legal Notice No. 461 of 1990**, the IOM was declared to be an Organisation to which Section 9 of the Privileges & Immunities Act applies, and that the Organization **"...shall have the privileges and immunities specified in Part 1 of the Fourth Schedule to the Act..."** Immunity from suits and legal process being one of the immunities covered in Part 1 of the Fourth schedule, there can therefore be no dispute that the Respondent is an International Organisation that enjoys the privileges and immunities afforded by **Section 9** of the Privileges and Immunities Act.

11. In the case of **Ministry of Defence of the Government of the United Kingdom Vs. Ndegwa (1983) KLR 68** whose facts are more or less similar to the facts herein, the respondent filed a suit against the appellant and another person who was a member of the British Army, for damages for negligence arising out of a motor accident. The appellant entered appearance under protest and filed an application seeking for an order to strike out the proceedings against it on the ground that the Government of the United Kingdom of Great Britain and Northern Ireland as a foreign state had not consented to be sued in the Kenyan court and was entitled to immunity. After the application was dismissed, the appellant appealed to the Court of Appeal whereupon the Court of Appeal allowed the appeal on the grounds that:

**"It is a matter of International Law that our Courts will not entertain an action against certain privileged persons and institutions unless the privilege is waived...The appellant had neither waived its immunity nor consented to submit to the jurisdiction of the courts of Kenya."**

It is the Respondent's position that it has neither waived its immunity nor consented to submit to the jurisdiction of the court. It follows therefore that this Miscellaneous Application is untenable.

12. Having established that the Respondent enjoys immunity from Court and legal process, this Court finds it superfluous to consider the second ground of objection, namely, whether or not the Chamber Summons is competent without Original Pleadings.

13. It is noteworthy that the Respondent also placed reliance on the Cooperation agreement dated **11<sup>th</sup> May, 2002** between the Government of Kenya and itself. Although no objection was taken to the introduction of that document, it is trite that a preliminary objection be based solely on points of law. In the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. Westend Distributors (1969) EA 696**, the court laid down this principle thus:

**"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion." Per Charles Newbold, P)**

It is for this reason that I have disregarded the Cooperation Agreement in determining the Preliminary Objection.

14. In view of the foregoing, the Respondent's Preliminary Objection dated **22<sup>nd</sup> July, 2015** and filed on **23<sup>rd</sup> July, 2015** is hereby upheld and the Chamber Application dated **7<sup>th</sup> October, 2015**, and by extension the Miscellaneous Application commenced thereby are hereby struck out with costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF FEBRUARY 2016**

**OLGA SEWE**

**JUDGE**