



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 182 OF 2008

MBUGUA MUKARA GITHUKU. APPELLANT

VERSUS

ROBINSON NGANGA CHEGE. 1ST RESPONDENT

ITALIAN DELEGATION FOR SOMALIA. 2ND RESPONDENT

(From the judgment of Mr. Kiarie W Kiarie S.P. M. in Nairobi Milimani RMCC NO. 3070 of 2007)

R U L I N G

In a preliminary Objection dated the 6th February, 2014, the 2nd Respondent raised the following grounds of objection to this appeal: -

- 1. That the 2nd Respondent, (the Italian government) is not subject to the jurisdiction of this court in this appeal.**
- 2. That this appeal is incompetent.**

The Respondent averred that the 2nd Respondent, Italian Delegation for Somalia, was a department of Italian Government which enjoyed complete diplomatic immunity from Criminal, Civil and/or administrative jurisdiction of the Kenya state. That no such legal action was therefore, maintainable against it or those acting on its behalf, unless such privilege is by its consent, waived. Ms Murungi, counsel for the Respondent stated that its client has never waived such privilege or given consent to that end.

Ms Murungi, secondly, argued that this appeal is as presently is fatally incompetent for having been filed out of the legally prescribed time of 30 days. That lower court judgment was delivered on 18th February, 2009 and this appeal was filed on 14th April, 2009 without leave of court having been applied for or somehow obtained.

The Appellant in this appeal did not deny either of the above averments by the Respondent. Instead, he urged this court to ignore the averments as both were technicalities. He urged the court to be dictated by substantive justice as dictated by the Constitution of Kenya. He cited the **American case of Natissa Tou Diallo Versus Dominique Strauss-Khan 12 Civ., 6540 PAC** - United States District Court, Southern District of New York, in which the court held that the Defendant could not raise a similar objection on the ground of diplomatic immunity way later into the case after squandering opportunities in the earlier forums.

On the second issue he argued that he had applied for proceedings early in time on 27th February, 2008 but same were not released until 22nd May, 2008 when he had filed the Memorandum of Appeal on 14th April, 2008. He did not contradict the fact that the date of filing the Memorandum of Appeal on 14th April, 2008, he was out of the prescribed time, considering the fact that delivery of judgment was on 18th February, 2008.

I have carefully perused the records and considered the submissions from both parties. In **Ministry of Defence of the Government of United Kingdom Versus Ndegwa [1983] KLR**, the Court of Appeal held that a court will not entertain an action against privileged persons unless the privileged person has waived his privilege. Also in **Killen Vs International Centre for Insect Physiology and Ecology [2005] KLR** the court held that a court will not issue process so as to entertain a claim against a foreign sovereign for debts of damages.

I have considered the issue. I adopt what the Supreme Court of Kenya stated in **Samuel Kamau Macharia Versus KCB & 2 Others** in Civil Application No. 2 of 2011; where the court stated:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

Sovereign immunity is one of the fundamental principles of International Law. The law provides that states are immune from legal suits in other states, save where such immunity is by consent waived or otherwise bylaw limited. The reason as stated by **Lord Denning in Thai-Europe Vs Government of Pakistan [1975] 3ALL ER, 961** – was that if the courts here once entertained the claim, and in consequence gave judgment against the property here, execution of the judgment might impair our relations with that country and lead to repercussions impossible to foresee.

In the instance, the Respondent had not waived the privilege. It averred that it had not been served with court process even at the lower court to enable it take early opportunity to raise the defence. The position this court takes is the same as expressed by courts cited above. That is to say this court has no jurisdiction to entertain this appeal.

On the second point, the Appellant has not denied the fact that this appeal was filed out of the time prescribed by the law i.e. 30 days. He did not seek nor obtain leave of this court to file the appeal out of time. This appeal is accordingly fatally incompetent.

For both reasons, this appeal is struck out and dismissed. I make no order as to costs, considering the fact that the Appellant, a layman and old, acted in person. Orders accordingly.

Dated and delivered at Nairobi this 19th day of February, 2015.

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D A ONYANCHA

JUDGE