REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 27 OF 2013

JOHN KALUAI.....1ST PLAINTIFF

JOSEPH WAMBUGU.....2ND PLAINTIFF

GEOFFREY JAMES.....3RD PLAINTIFF

PHYLLIS MUCHEMI.....4TH PLAINTIFF

SILAS MWANGI.....5TH PLAINTIFF

VERSUS

COLONEL MARK CHRISTIE.....1ST DEFENDANT

THE SECRETARY OF STATE FOR DEFENCE OF

THE UNITED KINGDOM OF GREAT BRITAIN AND

NORTHERN IRELAND.....2ND DEFENDANT

RULING

1. On 23rd September, 2013 the plaintiffs filed a suit against the defendant seeking an order of injunction restraining the defendants by themselves, their agents or servants from terminating the plaintiffs' various tenancies with the defendant otherwise than in accordance with Landlord and Tenant (Shops, Hotels and Catering Establishments) Act or obstructing the plaintiffs' access to their respective business premises in Laikipia Airbase or Nanyuki Show Ground or otherwise interferring with the plaintiffs' conduct of their respective businesses in the said premises.

2. The plaintiffs averred that they were defendants' tenants through the British Army and that by a letter dated 11th September, 2013 not particularly addressed to the plaintiffs, the 1st defendant purported to terminate all the plaintiffs' various tenancies on two days notice.

3. They further averred that acting on the said notice the 1st defendant with effect from 16th September, 2013 locked out the plaintiffs from their respective trading premises.

4. The plaintiffs contend that the unilateral decision to terminate the plaintiffs' respective tenancies was illegal as it was contrary to Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

5. Concurrent with the suit, the plaintiff brought a motion under certificate of urgency dated 20th

September, 2013 seeking interlocutory injunction couched in terms of the ultimate prayers sought in the plaint but pending the hearing and determination of the suit herein.

6. The respondent entered appearance to the motion and raised a preliminary objection to the effect that the court lacked jurisdiction to entertain the suit for the reason that the 1st defendant is a British National who at all material times was working with the British Army Training Unit – Kenya (BATUK), a department of the U.K's Ministry of Defence against whom no jurisdiction would be exercised on the basis of foreign sovereign immunity. Further, that the 2nd defendant is a British National who is also an officer of the Government of the U.K against whom no jurisdiction would be exercised on the basis of sovereign immunity.

7. Concurrent with the objection the respondent brought a counter- motion seeking that the plaintiff's suit be struck out on similar grounds contained in their notice of preliminary objection and grounds of opposition.

8. When the matter came before me on 6th February, 2014 Mr. Mahan for the respondents and Mr. Kariuki for the applicants proposed that the two applications be disposed of by way of written submissions. I therefore directed that they each file submissions and let the court determine the two applications as requested.

9. Mr. Kariuki in his submissions contend that his application should be allowed on the ground that there was a Landlord-Tenant relationship which the respondent irregularly terminated. Regarding the issue of immunity, Mr. Kariuki submitted that the relationship between the plaintiffs and the defendant being that of a Landlord-Tenant, was a commercial relationship hence not covered by sovereign immunity. According to him, a sovereign does not enjoy immunity where it enters into a commercial transaction with a trader within the territory and a dispute arises which is properly within the territorial jurisdiction of the court. He thus submitted that the relationship between the plaintiff and the defendant falls within the exceptions to sovereign immunity rule.

10. Regarding injunction, counsel submitted that the plaintiffs have made sufficient case for the granting of temporary injunction in that defendant was in breach of the tenancy contract by citing third party concerns as a reason for evicting the plaintiffs from their business premises. According to counsel, if the evictions were carried out, the resulting loss could not be adequately compensated by an award of damages since loss of business is tantamount to loss of livelihood.

11. The defendant on its part submitted that there was no tenancy agreement between the plaintiffs and the defendant and as such the action filed could not be sustained against the defendants. It was the defendant's position that the plaintiffs are not entitled to an injunction as they have not met the threshold as laid out in **Giella v. Cassman Brown & Co. Ltd. (1973) E.A 358.**

12. Concerning jurisdiction, the defendants' counsel reiterrated that the1st and 2nd defendants were foreign Government Nationals and entities and had not submitted to the jurisdiction of the court and as such no jurisdiction would be exercised over them on the basis of the principle of foreign sovereign immunity. In support of thissubmission counsel relied on the cases of **Ministry of Defence of the Government of U.K v Joel Ndegwa (1982 – 1988) 1 KAR 135;Thai-Europe Tapioca Service Ltd v Government of Pakistan, Ministry of Food and Agriculture; Directorate of Agricultural Supplies, Imports and Shipping Wing (1975) 3 All ER 961; The Cristina (1938) AC 485.**

13. The question of jurisdiction is paramount in any adjudication and whenever raised, the Court or Tribunal siezed of the matter must as a matter prudence inquire into it *in limine* and resolve it before doing anything concerning the matter in respect of which it is raised.
14. In the case of **The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1** at page 14-15, Nyarangi J. stated:

"jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.

15. Recently the Supreme court of Kenya in the case of **Samuel Kamau Macharia v KCB & 2 Others, Civil Application No.2 of 2011** stated this:

"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"

16. The question that this court has a duty to determine is whether it has jurisdiction to entertain the suit in the light of the plea of sovereign immunity raised by the respondent.

17. Sovereign immunity is one of the fundamental principles of International Law, providing that states are immune from legal suits in other states, save where such immunity is waived or otherwise limited.

18. In the US case of **The Schooner Exchange v Mc Fadden,** Justice Marshall of the US Supreme Court observed that state immunity was based upon the perfect equality and absolute independence of sovereigns and common interest impelling them to mutual intercourse. Referring to the importance of maintaining friendly relations with other nations, the American Supreme Court confirmed that state immunity is based upon international comity among nations.

19. **The Schooner Exchange** case has been cited in support of the absolute form of state immunity.However as nations continued to trade, absolute immunity became problematic. Lawyers, scholars and private parties urged that the complete immunity of statesengaged in commercial activities was not required by international law and was undesireable because such absolute immunity deprived private parties that dealt with state enterprises of judicial remedies and gave state business an unfair competitive advantage. For this reason most states including US presently implement restrictive approach for state immunity by denying immunity in cases stemming from commercial activity.

20. In the **Thai-Europe case** relied on by the defendant, Lord Denning at page 965 observed that:

".....the general principle is undoubtedly that, except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages.... The reason is that, if the courts here once entertain the claim, and in consequence gave judgment against the foreign sovereign, they could be called on to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee.

21. However Lord Denning proceeds to qualify this general proposition of the law when he observes:

"So it seems to me that the general principle must be applied unless it comes within any of the recognized exceptions. But the exceptions are several and they are important. Some are already recognized; others are coming to be recognized.

22. The Judge then proceeded to list some of the exceptions which include; no immunity on land situate in England. If a foreign sovereign takes a lease of land and fails to pay rent, the lessor can institute proceedings for forefeiture; second, a foreign sovereign has no immunity in respect of trust funds or money lodged for the payment of creditors; third, a foreign sovereign has no immunity in respect of debts incurred for services rendered to its property in England and fourth, a foreign sovereign has no immunity when it enters into a commercial transaction with a trader

and a dispute arises which is properly within the territorial jurisdiction of an English Court.

23. Whereas the US, the UK and a considerable number of countries in the world have moved towards a restricted approach to foreignsovereign immunity, Kenya jurisprudence as evidenced from local cases relied on by the defendant, seem to lean more towards absolute foreign sovereign immunity where no suit whatsoever can be entertained by our Courts against a foreign sovereign without waiver on the part of that foreign sovereign. **(See Ministry of Defence of the government of United Kingdom v Joel Ndegwa, Jimmy Ndirangu & another v RQMS (T) Baker & another, Nyeri HCCC No. 77 of 2005, Karen Njeri Kandie v Alassame Ba & Shelter Afrique IC 1296 of 2012, Elkana Khamisi Samarere & Another v The Nigerian High Commission IC 1964)**

24. In **Joel Ndegwa's case,** the claimant sued for recovery of damages for negligence arising out of a motor accident; in **Kandie's and Samarere cases** the plaintiffs sued for wrongful termination of employment. In all cases, the suits were struck out on the defence of foreign sovereign immunity without consideration of the exceptions enumerated by Lord Denning in **Thai-Europe Tapioca's case.**

25. In the case of **Tononoka Steels Limited v the Eastern & Southern Africa Trade & Development Bank Civil Appeal No. 255 of 1998** the Court of Appeal departed from the absolute immunity approach taken by the same court in Joel Ndegwa's case.

26. Kwach JA in allowing the appeal against the order Ole Keiwa J striking out a suit on grounds of foreign sovereign immunity, stated

"...I know of no country which would allow a bank to provide banking and financial services with absolute immunity from suits and legal process and with absolutely no protection for its hapless customers... The decision by the Minister to grant PTA Bank absolute immunity from suits and legal process even in purely commercial transactions seems to me to be contrary to international law."

27. In the English case of **Trandex Trading Corporation Ltd v Central Bank of Nigeria (1977) 1 All ER 881** Shaw L.J at page 908 observed as follows:

".....there has been put before the court a wealth of material comprising decisions of foreign courts and the writings of international jurists which tend to show that over the last half century there has been a shift from the concept of absolute immunity to a narrower principle which excludes ordinary mercantile transactions from the ambit of sovereign immunity notwithstanding the sovereign states of a party to those transactions... so long as sovereign institutions confine themselves to what may in general terms be described as the basic functions of government a total personal or individual immunity from suit was unobjectionable...."

28. From the foregoing, my understanding seems to be that the concept of foreign sovereign immunity has considerably shifted from the conservative absolute approach to a narrower principle which excludes ordinary mercantile transactions. Kenyan jurisprudence too has leaped in that direction in the **Tononoka's case.**

29. Whereas the Tononoka's case concerned an institution created by sovereign states which enjoyed immunity in the traditional sense, the reasoning by the court can be applied with equal measure to foreign sovereigns in cases where they are embroiled in disputes arising from ordinary mercantile transactions.

30. The defendants in this matter permitted the plaintiffs to enter their premises and carry out business selling curios in return for a levy which to the minds of the plaintiffs was rent. The relationship cannot therefore be said to be ordinary basic function of the British army in Kenya to

benefit from absolute immunity. The document entitled "contract between curio Traders and the British Army provided as follows:

CONTRACT BETWEEN CURIO TRADERS AND THE BRITISH ARMY

a) I SHALL ONLY SELL HAND MADE CURIOS AND ANY SALE OF DVD'S, ELECTRONICS AND ANY OTHER SUNDRIES SHALL ONLY BE SOLD AFTER CLEARANCE FROM THE QM(F).

b) I SHALL NOT HANDLE NOR SELL ANY MILITARY CLOTHES OR EQUIPMENT.

c) I SHALL NOT ENGAGE MYSELF IN THE TRADE OF ANY ILLEGAL EQUIPMENTS, DRUGS OR LIQUOR IN THE CAMP.

d) I SHALL ALLOW ANY SPOT CHECKS FROM TIME TO TIME FROM ANY MILITARY PERSONNEL APPOINTED BY THE QM(F)

e) I SHALL PAY KSH.12,000 TO THE BRITISH ARMY AFTER EVERY BATTLE GROUP.

f) IF FOUND TO BREACH ANY OF THE ABOVE RULES, I UNDERSTAND AND ACCEPT THAT MY CONTRACT WILL BE TERMINATED IMMEDIATELY WITHOUT REFUND.

31. This document clearly shows a contractual relationship between the plaintiffs and the defendant hence qualifies as an ordinary mercantile transaction within the exceptions listed by Denning J in the Thai-Europe Tapioca's case.

32. The court is alive to the fact foreign sovereign immunity is intended to promote friendly relationship among nations and that an order of execution against a foreign sovereign may strain such a relationship but the risk of straining a relationship in the event an order of execution is issued by Court of Law ought not to stand in the way of qualifying foreign sovereign immunity in Kenya especially in the light of the international paradigm shift and more so when selfsame foreign sovereigns practice at home, qualified sovereign immunity against other foreign sovereigns. If execution is the main fear and reason for reluctance to qualify foreign sovereign immunity other diplomatic methods and channels may be used to enforce the decisions of our our courts without soiling our relationship with such foreign sovereigns.

33. This court, in determining this issue is confronted by two conflicting Court of appeal decisions. That is to say **Joel Ndegwa's case** and **Tononoka's case.** However the decision in Joel Ndegwa's case was earlier in time than **Tononoka's case** hence it is presumed the Court of Appeal in **Tononoka's case** must have been aware of its decision in **Joel Ndegwa's case.**

34. This court will follow the decision in Tononoka's case and overrule the preliminary objection raised by the defendant and declare that the relationship between the plaintiffs and the defendants was an ordinary mercantile transaction and not a basic function of the defendants in Kenya to which foreign sovereign immunity applies.

35. The next question I have to decide is whether there is a prima facie case to warrant interventions by the court by way of injunction and if not can the court proceed and strike out the plaint as prayed by the defendants?

36. Apart from the defence of foreign sovereign immunity, the defendant contends that the suit filed discloses no reasonable cause of action against the defendant in that there is no tenancy agreement between the plaintiff and the defendant.

37. The sample document exhibited by the plaintiffs reproduced earlier in this ruling is titled "contract between Curio Traders and the British Army". It is purportedly signed by a Mr. John

Kaluai and J. Smokey. Unlike a simple lease or tenancy agreement, it neither describes nor makes reference to the size or location of the premises being let and whether the payment was of Kshs.12,000 was annual or monthly rent. Second the document is not signed by the defendants or any person in that behalf.

38. One J. Smokey merely witnessed the document or rather the signature of John Kaluai.

39. The court further observes that receipts purportedly issued by the defendant variously described the payments as "rent", "curio shop income, curio payments and electronics". From the plaintiffs' stand point it is therefore not clear from the documents exhibited, if their relationship with the defendant qualifies in law, as that of Landlord and Tenant. This therefore leaves uncontroverted, the averment by the 1st defendant that the plaintiffs were only allowed access to sell their ware in the 2nd defendant's premises on conditions set out in the contract document referred to earlier in this ruling. The court therefore finds that the relationship between the plaintiffs and the defendants did not qualify either expressly or implicitly as that of Landlord and Tenant.

40. I have further perused the plaint in this matter and it would appear to me to have been entirely premised on the assumption that there was in existence a Landlord Tenancy relationship between the parties. The plaint further seeks only one remedy of permanent injunction restraining the defendants from terminating the plaintiffs' various tenancies otherwise than in accordance with Landlord and Tenant (Shops, Hotel and Catering Establishment) Act.

41. This being the case and the court having made a finding that the relationship between the plaintiff and the defendants did not meet what in law, can be described as a landlord and Tenant relationship, hereby determines that the same does not disclose a prima facie case to warrant a grant of interlocutory injunction sought with the result that the defendants' prayer that the suit be struck out for non disclosure of a reasonable cause of action is granted.

42. The suit as filed is consequently struck out costs to the defendants.

43. It is so ordered.

Dated at Nyeri this 31st day of March, 2014.

ABUODHA N. J.

JUDGE

Delivered in open Court in the presence of Mr. Mwangi holding brief for Mr. Mwangi Kariuki Advocate for the Plaintiffs and in the presence of Mr. Mahean holding brief for Advocate for the Defendants.

ABUODHA N. J.

JUDGE