REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL LAW COURTS

ANTOINE NDIAYE……...……...PLAINTIFF

VERSUS

AFRICAN VIRTUAL UNIVERSITY…….DEFENDANT

JUDGMENT

By a Plaint dated 23rd September, 2003, the Plaintiff pleaded that he entered into a contract of employment executed on 7th May, 2002 (hereinafter "the said contract") whereby he was employed by the Defendant as a financial officer for an initial period of three (3) years. The Plaintiff's monthly salary was agreed at US$7,000 which was later revised to US$7,250 from May, 2003. The Plaintiff further pleaded that under that contract, if his services were to be terminated he was entitled to salary for the unexpired portion of the duration of his appointment. That on 23rd July, 2003, the Defendant purported to terminate his employment and offered him one month's salary in lieu of notice being US$5,375.32. That the Defendant's action was in breach of Clause 14.4. of the said contract. The Plaintiff therefore claimed a sum of US$163,138 being 22 months of the unexpired portion of his contract at US$7,250/- per month plus wrongful pro-ratation of terminal dues for one (1) month salary in lieu of notice and gratuity of US$3,740. The plaintiff also claimed interest on the said sum plus costs.

By an Amended Defence amended on 22nd May, 2006, the Defendant averred that it is immune from suit and legal process in the Republic of Kenya pursuant to the Privileges and Immunities (The African Virtual University) (AVU) order, 2002. The Defendant pleaded in the alternative that it admitted having entered into the said contract with the Plaintiff, that it admitted terminated the services of the Plaintiff and had offered to pay the Plaintiff one month's salary in lieu of notice. That under clause 14.4 of the contract, the Defendant was only obligated to pay the Plaintiff one (1) month salary in lieu of notice, that the Plaintiff's notice would have expired on 23rd August, 2003 and the Defendant was therefore entitled to pro-rate the Plaintiff's salary for the month of August 2003. The Defendant therefore pleaded that it had paid the Plaintiff a total sum of US$18,329/43 which was the salary for July, 2003, August, 2003 salary for 23 days and 25% gratuity for the period the Plaintiff was in the Defendant's employment. The Defendant prayed for the dismissal of the suit. In reply, the Plaintiff stated that he had received the said sum of US$18,329/23 on a without basis and joined issue with the Defendant on its Defence.

On 31st October, 2011, the parties recorded a consent to the effect that the documents filed by the respective parties be admitted as evidence without necessarily calling the makers thereof and that the suit do proceed by way of written submissions. The parties filed their respective written submissions which the Counsels ably hi-lighted on 2nd February, 2012 on the basis of which this judgment is made.

The parties framed only three issues for determination. These are:-

"1. Is the Plaintiff's suit as against the Defendant pursuant to the Employment Contract executed on 7th May, 2002 barred by reason of the immunity conferred upon the Defendant on 29th September, 2002 by virtue of the Privileges and Immunities (The African Virtual University (AVU)) order 2002?

2. If not, what sums became payable to the Plaintiff, if any, under Clause 14 of the Employment contract upon termination of the Plaintiff's employment?

3. Who bears the costs of the suit?"

As herein before stated, the Plaintiff entered into the Defendants employment pursuant to the contract dated 7th May, 2005 as a financial officer. On 29th December, 2002, the then Minister for Foreign Affairs Gazetted Legal Notice No.5 declaring the Defendant an organization to which Section 9 of the Privileges and Immunities Act Cap 179 Laws of Kenya applies. In so doing, the privileges and immunities specified in part 1 of the fourth schedule to the Act applied to the Defendant. One of the immunities enjoyed under part 1 of the fourth schedule is "immunity from suit and legal process."

On the first issue, the Plaintiff's case is that his claim is based on the contract entered into on 7th May, 2002, the same did not refer to any immunity, it provided that in the case of any disputes or proceedings thereunder the same shall be subject to the jurisdiction of the High Court of Kenya to which the parties irrevocably submitted. The Plaintiff further contended that that being the case, the parties were bound by the terms of their contract, that the contract having been executed before immunity was granted to the Defendant, that immunity did not affect the contract between him and the Defendant and could not have any retrospective application. That in any event, even if such immunity applied, the Defendant had waived it by entering appearance, applying for security for costs and filing a defence to the claim.

For the Defendant, it was contended that the Defendant was granted immunity from legal suit and process in the Republic of Kenya by virtue of the said Legal Notice No. 5 of 2002, that the Defendant fully enjoys the privileges and immunities specified in part 1 of the fourth schedule, that a Court of Law should be extremely reluctant to inhibit, fetter or take away an absolute immunity conferred on an international organization by parliament such as the Defendant. The Defendant further contended that the immunity still applied because the Plaintiff's cause of action arose in 2003 when immunity had already attached, that clause 17 of the contract between the parties did not waive the immunity as the Legal Notice No. 5 of 2002 takes precedence over the said contract. That the filing of the Defence did not mean a waiver of the immunity as such immunity could only be claimed in the Defence, that the amendment to the Defence backdated to the date of the original defence, that a waiver of immunity must be express. The Defendant distinguished the cases of **Standard Chartered Bank –vs- International in Council & Others 1 WLR 641** and **Tononoka Steel –vs- The Eastern and Soother Africa Trade and Development Bank (2000) 2 EA 536** which the Plaintiff had relied on.

I have considered the Pleadings and Submissions filed by the respective parties.

Lord Denning MR, in the case of **THAI-EUROPE –VS- GOVERNMENT OF PAKISTAN (1975) 3 ALL ER 961** observed:-

"The general principle is undoubtfully that <u>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</u>. The reason is that, if the courts here once entertained the claims and in consequence gave judgment against the foreign sovereign, they could be called to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussion impossible to foresee." (underlining mine)

That is the principle behind which states apply the Vienna Convention on Diplomatic relations and other Privileges and Immunities granted to International Organizations.. It is the same spirit behind our own Law as declared in the Privileges and Immunities Act, Chapter 179 of the Laws of Kenya. The principle was upheld in the Court of Appeal decision of **Ministry of Defence of the Government of the United Kingdom –vs- Ndegwa (1983) KLR 68** wherein it was held 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. It was further held in that case that it is not all acts of a foreign sovereign or government that this principle applies to; the immunity is not absolute but restrictive and the test is whether the foreign sovereign 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.

The two cases set out above apply to foreign governments or their state departments. As regards international organizations, which the defendant is, the applicable Section is Section 9 of the Privileges and Immunities Act which provide that Minister may by order declare an organization to be an organization which Kenya, or the government or any foreign sovereign power(s) are members and in such an order provide that the immunities and privileges set out in part I of the Fourth Schedule to the Act shall apply to such organization. Under Section 17 of that Act, the order made under Section 9 of the Act must be laid in Parliament for approval by a resolution. Accordingly, the order made under Legal Notice No. 5 of 2002 must have been laid in Parliament and duly approved. In my view therefore, once Legal Notice No.5 was gazetted, the Defendant was henceforth to enjoy the Privileges and Immunities set out in part I of the Fourth Schedule when carrying its operations in Kenya.

Did the Immunity apply to the contract between the Plaintiff and the Defendant? The contract between the Plaintiff and the Defendant was entered into on 7th May, 2002 way before the Privileges and Immunities (The African Virtual University (AVU)) order, 2002 came into force on 29th December, 2002. As at that time the order came into force, obviously the Defendant was in operation and had entered into legal relations with 3rd parties. One of such legal relations entered into was the contract between the Plaintiff and the Defendant. In that contract, the parties therein agreed in Clauses 17.9 and 17.10 that:-

"17.9. The validity, construction and observance of these Terms and Conditions shall be governed by Kenyan Law.

17.10 All Disputes, claims or proceedings between the parties relating to the validity construction or performance of these Terms and Conditions shall be subject to the non-exclusive jurisdiction of the High Court of Kenya to which the parties irrevocably submit." (Emphasis mine)

The literal meaning of the said Clauses is plain and very clear. The parties bound themselves to submit to the jurisdiction of the High Court of Kenya and that the operative law was the Kenyan Law. The parties also meant that such submission to the jurisdiction of Kenya was irrevocable meaning unalterable, committed beyond recall (see **Blacks Law Dictionary 8th Edition page 848**). Such commitment in my view, could not be altered by anything else but by a subsequent act of the parties. The parties having entered into a contract that was so clear in its terms cannot be allowed to interpret it in any other way that is contrary than how they expressed it. In the case of **Michira –vs- Gesima Power Mills Ltd (2004) 1 e KLR** the Court of Appeal held:-

"The learned trial judge observed that the agreement appears to have been "home-made" and that it contains several contradictory clauses framed in unusual terms. That fact does not give room to this court to tamper with the agreement. As Apaloo JA said in SHAH –VS- SHAH (1988) KLR 289 at page 292 paragraph 35, in respect of an agreement drawn by laymen:-

"One must bear in mind that this agreement was drawn up by laymen. They did not use any legal language and the court can only interpret the sense of their agreement and not interpolate it with any technical legal concept.

If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties" (Emphasis mine)

As I have already found, the contract between the Plaintiff and the Defendant was very plain in its meaning. That they intended to submit to the jurisdiction of the High Court of Kenya **irrevocably** and the law applicable is the Kenyan Law.

The foregoing being the case, my view is, both the Minister and the Defendant well knowing that the Defendant had entered into legal relations with 3rd parties prior to 29th December, 2002, if it was their and that of Parliament's intention that the Legal Notice No.5 apply retroactively as to affect such legal relations, nothing would have been easier than for such intention to be expressly stated in the order. Further, Parliament knows our laws, that once enacted they apply prospectively not retrospectively. That if it intends that such laws apply retrospectively such as to affect legal relations entered into and concluded before enactment of such law should state so in such laws when enacting them. On this, I am guided by Sections 27 and 28 of the Interpretation and General provisions Act Cap 2 which provide that all subsidiary legislation, which legal Notice No. 5 is, shall operate from the date of Gazettement and if they are to operate retrospectively, it shall so be stated in the legislation itself.

I note that after the Legal Notice No. 5 was published, the Defendant continued to deal with the Plaintiff under the contract of 7th May, 2012. My view is, having bound itself absolutely to the said contract, if it intended not to be bound by any of the terms therein especially clauses 17.9 and 17.10, and to rely on the new found immunity it should have notified the Plaintiff of that fact. In my view, the issue of immunity being a deliberate positive action on the part of the Defendant with a third party, the Minister of Foreign Affairs of Kenya at the time, the same was never in the contemplation of the parties at the time they executed the contract of 7/5/02 and bound themselves irrevocably to submit to the High Court. To my mind, Parliament did not intend to drastically affect the legal relations already entered into by the Defendant when it approved Legal Notice No. 5 of 2002 granting immunity to the Defendant. I will agree with the holding in the case of **Tononoka Steel –vs- The Eastern and Southern Africa Trade and Development Bank** that it will be against public policy to give an absolute immunity to an organization so as to affect legal relations entered into before enactment of an order under Section 9 of the Privileges and Immunities Act Cap 179. This is so considering the express provisions of Sections 27 and 28 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya. I hold that view despite the fact that I am aware that the Court of Appeal in the **Tononoka Steels Ltd (Supra)** applied the principle of public policy on the basis that absolute immunity could not extend to matters that were outside the Bank's core business. In our case, I apply it on the basis that Parliament well knowing the provisions of Sections 27 and 28 of Cap 2 of the Laws of Kenya could not have intended Legal Notice No. 5 to act retroactively without expressly stating so in the Legal Notice No.5 itself.

In my view therefore, it does not matter that the cause of action arose subsequent to the Gazettement of the Legal Notice No. 5 itself. The same would not apply so as to affect a binding contract that had been entered between the Defendant and Plaintiff on 7th May, 2002. In any event, my understanding is that no law is meant to apply to affect existing and/or accrued rights unless it is very express in its wording. The order of 29th December, 2002 could not apply to affect the express waiver inherent in Clauses 17.9 and 17.10 of the contract dated 7th May, 2002.

It should be noted that, when it came to terminating the contract, the Defendant relied on the terms of the same contract. Will the law allow a party to a contract to apply the terms of a contract selectively to the detriment of another, I think not. Since the Plaintiff was not aware of or party to the application to the minister to give Immunity to the Defendant, since the minister was not a party to the contract of 7th May 2002 between the Plaintiff and the Defendant, he could not make an order (read Legal Notice No.5) so as to affect the legal relations between the Plaintiff and the Defendant! In this case therefore, Legal Notice No. 5 did not affect the legal relations between the Plaintiff and the Defendant arising from their contract dated 7th May, 2002.

As regards the filing of the pleadings by the Defendant, I agree with the Defendant that the filing of the pleadings in this case it did not amount to a waiver of the immunity granted to it.

Be that as it may, for the foregoing reasons, I am of the view and so hold that the immune conferred on 29th December, 2002 by the privileges and Immunities (The African Virtual University (UVA), Order 2002 did not affect the contract of 7th May, 2002 between the Plaintiff and the Defendant and does not at all bar this suit.

On the second issue, the parties have sought to know how much sums are payable to the plaintiff under clause 14.4. of the contract of 7th May, 2002. The Plaintiff contended that the Defendant's letter of 23rd July, 2003 which offered the Plaintiff US$5,375.32 was in breach of Clause 14.4 of the contract. According to the Plaintiff, under clause 14.4, he was entitled to payment for the unexpired portion of his appointment, that there were 22 months of his unexpired term as at the time his services were terminated at US$7,250/- per month bringing the total amount due to US$159,390. The Plaintiff relied on the cases of **National Bank of Kenya Ltd –vs- Pipe Plastic Samkolit (K) Ltd & Another (2002) 2 EA 495** and **Sagoo –vs- Donrado (1983) KLR 365** in the proposition that a party is bound by the terms of a contract it has entered into even if it amounts to a bad bargain.

The Defendant on its part argued that the applicable clauses are clause Nos.14.1, 14.1.3 and 14.4 whose totality is that a contract terminates upon issuance of a notice and that the notice period is one (1) month. That if Clause 14.4. is read with Clause 14.1, the words "the unexpired term" means the remainder of the notice period. It was submitted for the Defendant that Clause 14.1.3 of the contract provides the termination notice whilst clause 14.4 comes into play to provide for payment in lieu after the notice in clause 14.1.3 has been given. The Defendant further contended that, to interpret and apply clause 14.4. in isolation would not be prudent as such would not bring out the real meaning between the parties. The defendant finally submitted that it had paid the Plaintiff all his entitlements as set out in paragraph 7 of the Amended Defence and there was therefore nothing more to claim.

The parties have called upon the court to interpret and give effect to their contract. It is trite law that the object of an interpretation of a written contract is to discover the real intention of the parties. In **Halsburys Laws of England 4th Edition Vol 9 (1)** at paragraphs 774 and 775, the learned authors have stated:-

"The contract must be construed as a whole in order to ascertain the true meaning of its several clauses"

And

"If the intention of the parties can be ascertained from the writing, the court will give effect to that intention notwithstanding ambiguities in the words used or defects in the operation of the contract."

In view of the foregoing, in order to ascertain the real intention of the parties, I agree with the Defendant that the court has to look at the entire agreement of 7th May, 2002. This court therefore would peruse and construe the entire contract and ascertain therefrom what the intentions of the parties was regarding termination thereof.

The clause that dealt with termination of the contract was Clause 14. The applicable clauses for our purposes would be clause 14.1, 14.1.3, 14.2 and 14.4 Clause 14.1 provides:-

"14. This Agreement shall automatically terminate and the employee shall forthwith cease to be in the employment of AVU: ……"

This clause is clear beyond any contradiction that it meant the contract would terminate automatically by the happening of any of the matters set out in Clause 14.1.2 or 14.1.3 or 14.1.4. This is so because of the Colon at the end of the clause and the use of the adjective or, in the sub clauses that follow. That is, if the employee is prohibited by law from performing his duties, or by either giving one (1) month notice, or upon expiry of the contract period of 3 years in terms of clause 2.2.

Clause 14.1.3 provides:-

"If either party gives the other one (1) month prior written notice to terminate the employee's employment with AVU: or"

This clause meant that the employment would terminate at the end of the one (1) month notice once such

a notice has been given. This is so because of the use of the words, **one (1) month prior written notice to terminate.**

Clause 14.2 on the other hand provides the instances when the employment would be terminated by notice forthwith without notice or otherwise.

As regards Clause 14.4. on the other hand, the same provides:-

"On serving notice for any reason to terminate the Employees employment or at any time thereafter during the currency of such notice AVU shall be entitled to terminate the employee's employment and in lieu thereof pay to the employee his/her salary……. for the unexpired portion of the duration of his/ her appointment or entitlement to notice as the case may be."

My understanding of this clause is that where the Defendant chooses to terminate the employees employment simultaneously with giving the notice of such termination under this clause, then the salary payable would be the unexpired portion of the duration of the employees appointment. However, if the Defendant chose to give Notice of termination and thereafter whilst that notice was in force decided to forthwith terminate the employee's employment then the salary payable was the unexpired portion of the notice period. I have arrived at the foregoing interpretation of Clause 14.4. on the following reasons:-

a) Clause 14.4 is applicable where the Defendant/Employer elects to terminate the employees employment forthwith because of the use of the words "AVU shall be entitled to forthwith terminate the employees employment,";

b)the clause gives two circumstances when the Defendant would exercise such forthwith termination i.e.

(i) on serving notice for any reason to terminate the employees employment; and

(ii) at any time thereafter during the currency of such notice.

Between these two circumstances there is the use of the disjunctive word "or". They are to be exercised in the alternatives.

c) the clause then gives the effect of electing to terminate the employment in either of the two circumstances set out in (b) (i) and (ii) above as in lieu thereof pay to the Employee his/her salary;

(i) …. for the unexpired portion of the duration of his/her appointment.

or

(ii) entitlement to notice

Then there is the use of the words " ….. as may be the case". The use of these last words in the clause mean that there are two different scenarios applicable i.e. where the salary is either for the unexpired term of employment or notice. In my view, notice will be applicable in the 2nd scenario where termination is effected. **"….thereafter during the currency of such notice"** whilst the unexpired term of the appointment would be applicable where "**on serving notice for any reason to terminate the Employee's employment"** the Defendant terminates the employment forthwith.

Looking at the letter of termination dated 23rd July, 2003, at page 100 of the Plaintiff's bundle (which were produced by the consent of the parties) the Plaintiffs termination of employment was forthwith i.e. on service the notice of termination and therefore on the first scenario and not during the currency of any notice. That being the case, and there having been no notice the salary payable in lieu would be the unexpired portion of the duration of the Plaintiff's employment.

Accordingly, I reject the Defendant's contention that Clause 14.4. is to provide for payment in lieu of notice and that it deals with the omission of payment in lieu of notice in clause 14.1.3. If that were the case, why would Clause 14.4 have two alternative circumstances of immediate termination as well as two alternative sets of payments in lieu; that is:-

a) On serving notice, and

b)at any time thereafter during the currency of such notice, then

In lieu thereof, pay his/her salary for;

a) unexpired portion of the duration of his/her appointment, and

b)entitlement to notice.

My view is, if Clause 14.4 was meant to provide for payment in lieu of notice as contended by the Defendant then the part thereof stating that **"unexpired portion of the duration of his/her appointment"** and the words **"…..as may be the case"** would not have been included in that clause. I hold the view that they are not mere supplusage and their inclusion was meant to serve the purpose which I have set out above. Paying salary for the period of unexpired term may look crazy as the Defendant submitted but the law is that parties must be held to their bargains.

In view of the foregoing, I agree with the Plaintiff that he was entitled to the unexpired portion of his appointment which was 22 months and he is entitled to judgment for US$163,130/- less US$18,329.43 which he admits to have been paid bringing the total sum payable to US$144,800.57 together with interest thereon at court rates from the date of filing suit until payment in full. The Plaintiff will also have the costs of the suit.

DATED and delivered at Nairobi this 2nd day of March 2012.

A. MABEYA
JUDGE