REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 1197 of 2005

STEPHEN MUNGA MWANGI..... PLAINTIFF/RESPONDENT

VERSUS

THE GOVERNMENT OF THE UNITED STATES

OF AMERICA AGENCY FOR INTERNATIOAL

DEVELOPMENT (USAID).....2ND DEFENDANT/APPELLANT

RULING

Application dated 12/10/2011 a notice of motion, is scheduled for hearing today. The application is supported by affidavits of Jonathan P. Welch and Charles J. Slater and is based on grounds stated in the application.

The application is brought under Order 10 rules 10 & 11 and Order 2 rule 15 (1) (b) (c) & (d) Civil Procedure Rules and also Section 3 & 3A of CPC Act. Order 10 provides for consequences of Non Appearance default by defendant on failure to serve. There is also rule 10 which is applicable in default of filing defence. Rule 11 provides that where judgment has been entered under this order the court May set aside or vary such judgment and any consequential decree or Order upon such terms as are just.

Order 2 rule 15 provides for the striking out pleadings on the grounds that it is scandalous or vexatious or it may prejudice and/or delay the fair trial of the action or it is otherwise an abuse of the process of court.

Section 3 and 3A Criminal Procedure Code Act is for the saving of special jurisdiction and powers of court and saving of inherent powers of court.

The orders sought are:

Garnishee Order Nisi issued by the court on 9/4/2010 be set aside and be vacated.

This suit is a nullity ab initio for the reasons that the USAID as an agency of USA Federal Government does not enjoy separate and distinct legal entity capable of being sued.

That this suit and the proceedings herein against the first and 2nd defendant are a nullity and abuse of court process as U.S.A as an in defendant and Sovereign state under the principle of Sovereign immunity in international law and has not consented to be subject to the jurisdiction of this court nor waived its immunity to jurisdiction and to execution and as a result the suit be struck out as against the U.S Government and USAID.

In the alternative and without prejudice to the foregoing an order that the summons to enter appearance dated the 4th and 1st August 2006 were invalid and was improper and irregular the suit be struck out as against the USA and USAID.

That in the alternative and without prejudice to the foregoing, this court be pleased to set aside the judgment in default entered herein against the first and second defendants on 19/4/2006 and 14/12/20006 respectively and strike out the further Amended Plaint herein as it is statute barred, frivolous, vexatious and therefore a nullity.

That this suit is bad in law against public policy and cannot be sustained.

The application is grounded on

The first defendant as a sovereign state. Under international law its sovereign non commercial assets are immune from attachment and are not subject to jurisdiction of this court.

That the second defendant is an agency of USA and is not a separate legal entity capable of being sued in Kenyan Republic and the only proper party in USA.

That the USA government was never properly served with valid summons herein not with numerous application filed herein by the plaintiff. The USA having not been properly served with these proceedings it has never had an opportunity to raise its immunity or challenge the jurisdiction of this court.

The USA government hold an account with the Garnishee under the name US Disburing Office Symbol 8769 operated by USA Embassy in Kenya for official purposes.

The said account is property as defined under article 21 of Vienna Convention and as contained in Article 22 and 31 of first schedule of privileges and immunities Act(Cap.179) is immune from attachment and execution.

Garnishee Order Nisi dated 9/4/7010 is therefore improper and defective and violates principle of immunity and ought to be set aside or vacated.

The reasons upon which the application and pleadings before this court ought to be dismissed are stated in para. (h) i – iv.

The defendants failure to enter appearance was that there was no proper service and 2nd defendant did not exist.

Furthermore the plaintiff was lawfully dismissed from duties, all dues were paid and was not entitled to severance pay. This suit may adversely affect relations between Kenya and USA.

Waiver of immunity ought to have been sought from USA before Garnishee order was issued. With regard to affidavit of Jonathan P Welch it is stated that the 2nd defendant was not capable of existence at

the time proceedings were filed and therefore suit is a nullity ab initio and that he has perused affidavit of Charles J. Slater and he knows USA is not served with summons to enter appearance. He also knows from the affidavit of Mr. Slater that USA was not able to challenge civil jurisdiction of or court and that the USA holds the Garsnihee account as under Article 21 of Vienna Convention and as contained in Article 22 and 31 of first schedule of Cap 179 Laws of Kenya and that it is immune for attachment and execution.

Notice to enter appearance given under diplomatic channels is for period of 60 days at least. However the summons were only for 15 days and therefore invalid. The cause of action arose in 1994 out of a contract of employment by the plaintiff and defendants and leave to file suit out of time was improperly obtained.

The plaint was amended on 9/8/2006 to add the USA as a party without leave of the court. There was not therefore adequate time to enter appearance and summons were invalid. The affidavit of Charles J. Slater shows that he is responsible for the management section of U.S. Embassy at Nairobi. He confirms that the US Government holds an account with the Garnishee under the name of US Disbursing Officer Symbol 8769 for use for official business of the government of USA. On 20/4/2010 US Embassy received an E-mail communication from Garnishee informing of a Garnishee Order Nisi served on them issued by court in these proceedings ordering the attachment of the account. Then US Embassy sent a letter to the Garnishee Asserting the immunity of the account from attachment or execution exhibit CJS 1 & 2. The order was not served upon US government. The summons dated 4/10/2005 and 1/8/2006 purported to give notice for 15 days. The summons are exhibited as CJS 1.

The US government was not served properly with valid summons. The Kenyan Ministry of Foreign Affairs has written to Deputy Registrar High Court and to the Garnishee advocates confirming that service was not proper see Exhibits marked as No. 5 – 9 CJS. The US government objects to improper service. Copies of Diplomatic Notes are exhibited as CJS Nos. 89 and 431.

In addition the US government avers that the plaintiffs dismissal was lawful. He failed to perform his duties and was issued with several warning letters. He failed to improve and was lawfully dismissed for cause. His dues were paid. See exhibit CJS a bundle marked as pages 17 – 33. In reply the plaintiff Stephen Muga Mwangi has filed an affidavit which shows that leave to file suit was granted by Justice JLA Osiemo by ruling dated 26/10/2005.

That the plaint was amended to include US government as first defendant. Interlocutory judgment was sought when the defendants failed to enter appearance after being served with amended plaint on 10/8/2006. Further amendment was made on 29/5/2007 and was served by registered post on 16/10/2007.

The suit was consequently heard on formal proof and judgment was entered for plaintiff Kshs.75,347/= and Ksh.134,099/= being total Kshs.209,446.88 and costs of the suit with interest. Judgment was made. The execution was commenced but execution did not bear fruit. It is then that Garnishee order was issued on 9/4/2010 by Hon. Justice Rawal. It is when order was served that defendants raised objections that Garnishee should not be attached.

The plaintiff had worked for USA government and the 2nd defendants for 21 years during which he was paid salary using that account. The employees salaries were paid through that account and therefore it is for commercial purposes and hence subject to attachment. The reason why the defendants had given for not appearing in the case ought to be placed before court.

The plaintiffs case was based on contract and the defendants had capacity to deal with service was proper and the same was confirmed in its judgment. It was almost 7 months from service to the time judgment was entered before the defendants took over the defence.

On 10/2/2012 the plaintiff swore a supplementary affidavit saying that his dismissal was due to personal hatred.

In this application the applicants have filed skeleton submissions in which they submit on invalid summons and improper service. The validity of summon is protested because they indicated that the period given to defendant to enter appearance was 15 days instead the period for a foreign government is at least 45 to 60 days. This is affirmed by letter dated 29/4/2010 address to Hamilton Harrison & Mathews by Ministry of Foreign Affairs CJS – 1.

The office of Permanent Secretary confirms that a sovereign state must be granted 45 to 60 days notice before it is required to appear in a local court otherwise the service is improper referring to case of Jimmy Mauta CA 99 of 2003 at Mombasa a local case only 15 days were required. In that case the defendant entered appearance though the time given was less than 10 days not as prescribed. The Court of Appeal held that summons to enter appearance was invalid.

On the issue of immunity from execution or attachment the applicant said the account is used for official purposes of U.S. government and the basis for the immunity is to be found in Customary International Law. The provisions of Article 22 (3) of Privileges and Immunities Act Cap. 179 Laws of Kenya a copy of Article 22(3) of Vienna Convention on Diplomatic Immunities 1961 which extends immunity to property found in the premises of the mission only However it has been held that property used by the sending state for the performance of its diplomatic functions in any event enjoys immunity even if it does not fall within the material or spatial scope of article 22.

In the house of Lords in **Alcom Ltd –vs- Republic** of Colombia the court held that a current account at a commercial bank in the name of a diplomatic mission would be immune unless the plaintiff could show that it had been earmarked by the foreign state solely for settlement of liabilities incurred in commercial transactions. An account used to meet the day today running expenses of a diplomatic mission would therefore be immune.

It is upon the plaintiff to proof that an exception to immunity lies.

In the case of **Bird Shifting Corporation –vs- The Embassy of the United Republic of Tanzania** cited by the plaintiff shows that for determining immunity the foreign state must have waived its immunity and the property attached must be used for a commercial purpose. In that case the parties agreed to submit the dispute to arbitration and also agreed that a court judgment could be acted upon any award rendered pursuant to the arbitration agreement. It was found that property in that case was not immune from attachment. It was of commercial purpose.

It is also submitted that the defendants have not given consent to be sued in the current proceedings citing the authority of Court of Appeal in CA No.31 of 1982 Nairobi Ministry of Defence of government of **United Kingdom –vs- Ndegwa** the Kenyan courts apprehensive that unfavourable repercussions may ensue when you forcibly impose jurisdiction on a foreign government or forcibly seize their property a diplomatic approach is always to be preferred. It is to be said that the courts approach is not in accordance with rule of law.

The defendants further submit that the suit cannot stand against the defendants since it is defective and lacks jurisdiction. In the case of **Nyambura Kamuyu –vs- Doughlas John Francis and United Touring Co. HCC No.3485 1992** Nairobi an application to join a second defendant was filed out of time but without leave. The court struck out the amended plaint. The plaintiffs case did not fulfil the requirement of S.27 Limitations Act. Further the suit can be dismissed at this stage as in the case of **Ghalani –vs- Radia 1968 EA** where a statue barred suit was disposed off at the preliminary stage. The same happened in the case of **Cannon Assurance (X) Ltd –vs- Silvester Kuria Kinyanjui & Another HCC No.1042 of 1996.**

In Reply to the submissions the plaintiff states that summons were served properly and therefore valid as illustrated under attachment “A” “B” and “C” when American Embassy received summons (“A”) they advised the court through the Ministry of Foreign Affairs that any complaint should be addressed in suit against USA government and the summons to enter appearance should be 45 to 60 days. Court Summons were amended and sent to the Embassy on 6/9/2006. The plaintiff was informed by letter dated 26/3/2007

in attachment “C”.

The Embassy did not write back to Ministry of Foreign Affairs or to come to court. Valid court summons was received on 9/6/2006 by the defendant. When warrant of attachment was issued on 11/23/2009 they instructed Hamilton Harrison & Mathews to deal with auctioneers out of court. The warrant was returned to court. Also when Garnishee order was issued on 18/2/2011 they instructed the advocates to stop the attachment but order was rejected court and then American Embassy decided to come to court. The notice was for 45 days but it was changed to 15 days. See attachment ‘B’ the notice was not altered by the plaintiff.

The attachment marked “D” from the Registrar of Court to the plaintiff shows that U.S government said if the plaintiff want to sue the USA government therefore the government waived its immunity between 6/9/2006 and 3/7/2007 a valid court summons was properly served to American Embassy from Ministry of Foreign Affairs.

Upon perusing the submissions of both parties I notice that plaintiff attachment “B” at page 4 summons were required for service within 45 days to sixty days to enter appearance but there was cancellation and number “15” was inserted instead of No.45. Attach “D” advised that the plaintiff should sue the U.S. government but not USAID.

It is also advised that under customary international law before a foreign sovereign can be require before the courts of receiving state proper notice of suit must be provided and must afford at least 45 to sixty (60) days before an appearance or response pleading is required therefore as no proper service was given USA government was never provided an opportunity to appear and present a defence and is not a party to this case. Page 11 exhibits of defendant states “**because the writ of summons issued on August 15, 2006 did not provide at least 45 days to sixty days for proper service”** before appearance USA had no duty to respond or appear and the suit was invalid. This was not correct. It is to be noted that this issue was not addressed by the applicant counsel at the hearing.

In the case cited of Jimmy M. Mauta VS Wilfred Gitonga Civil Procedure Code 3(1) states “When a suit has been filed a summon shall be issued to the Defendant ordering him to appear within the time specified therein provided the time for appearance shall not be less than 10 days.

The minimum period is mandatory. Therefore when Defendants were served with summons by the ministry of Foreign Affairs the Defendants ought to have appeared before court if only in protest. They kept quiet. Services of summons is to let the Defendant know of the suit. By application a Miscellaneous application No. 1117 of 2005 the Plaintiff filed in court under order XXXVI Rule 3C 1 of Civil Procedure Code and Section 27 of Limitations of Actions Cap 22 Laws of Kenya. Court therefore granted leave to file suit against Respondent out of time no appeal was made against suit. The suit was presented against United States of America Agency for International Development (USAID) which is an independent agency of the Government as contained in Foreign Affairs and Reconstructuring Act 1998 of America. Therefore by time of filing suit the USAID was in existence.

The Plaintiff sought to serve summons upon the defendant. Judge Osiemo heard the application and granted orders.

The summons dated 15/8/2006 were received. The service of further amended plaint was by registered post and the court was told the mail had not been returned unclaimed. The court presumed that the same has been received. The court found that all procedure to be correct. The failure to comply with procedural rules in the case of **Ndegwa Wachira –vs – Ricarda Wanjiru Ndanjeru 1982 1 KAR** it was held that when the breach of the rules is not fundamental the proceedings will not be set aside. This court was satisfied that all procedural steps had been taken by the Plaintiff before the court embarking on taking evidence and decision in judgment. It is therefore clear that the submissions as to invalidity of summons is not correct. The 2nd Defendant was and is an independent body established under an Act of 1998 of USA and under Section 9 of Cap 179 “shall have capacity of a corporate body. The Plaintiff had served the Defendant for a period of 21 years and being paid a salary every month of that period.

The USAID was properly served but refused to take action on the summons. The summons were amended to read 45 days as indicated at page 11 of the Defendants documents. The Plaintiff had no hand in altering the period and inserting 15 in its place. In any case the Defendant had sufficient time to act. The purpose of ordering a Defendant to appear is to give opportunity to know of the proceedings against him and if he desires to respond he may do so.

In this case the Defendants opted to keep silent and communicate only through Diplomatic channels.

In respect of the claim for immunity. This is claimed on the issue of attachment of the money in the bank. In the case of **Birch Shipping Corporation –vs- Embassy of United Republic of Tanzania** listed in Plaintiffs list of Authorities it was held that with regard to foreign state it must have waived its immunity and the property attached must be used for a commercial purpose. In that case the property was found not to be immune from attachment and motion to quash the writ was denied.

It is therefore clear that according to the Privileges and immunities Act Cap 179 Laws of Kenya Article 22 immunity is for the premises of the mission that shall be inviolable and their furnishings and other property and their means of transport shall be immune from search requisition attachment or execution. The provision extends immunity to property found within the premises of the mission only. However, it has been submitted that property used for the performance of its diplomatic functions enjoys immunity and that a current account at a commercial bank in the name of the foreign mission solely for settlement of liabilities incurred would be immune. Unless the Plaintiff could show it was used for settlement of liabilities incurred in commercial transactions. Therefore a bank account used for sovereign purposes cannot be attached.

In this case the Plaintiff has shown that for 21 years he has been paid out of this account. The Defendants have not demonstrated any other purpose. For this reason the account ought to be attached as being used for payment of salary which is a commercial transaction. The authority of Ndegwa –vs- United Kingdom does demonstrate that the foreign Government resisted the claim as soon as they were served with the process. It did not simply ignore the process. They entered appearance under protest.

For a Defendant to get audience in court the procedure has to be followed. Defendants had knowledge of the suit in court. They cannot be said not to have waived their rights or to have not consented to being sued. On the ground that Plaintiffs suit is incurably defective it is my view that USAID is an independent agency under an Act of USA and therefore has capacity to be sued. As an agent of the USA Government it is properly sued with its principal by adding the Government. In any case the Civil Procedure Rules encourage a litigant to sue if in doubt see Order 1 rule 7.

This court cannot sit on appeal on high court judgments or orders. No appeal was filed here and the application doesn't seek review. In the circumstances and considering the above I have concluded that there are no grounds to set aside Garnishee Order Nissi issued on 9/4/2010. The account is used for commercial transactions. I have found that this suit is properly before the court and it is not frivolous or vexatious or an abuse of court process. The court was satisfied that summons to enter appearance was properly issued and served.

Also I do not see any grounds to warrant the setting aside the judgment entered herein on 14/12/2006. There has been no reasons advanced to set it aside. By reason of the conduct of the Defendants in failing to enter appearance any immunity is presumed waived regarding this Plaintiffs claim.

The USAID whose full name is UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT is an independent body established under an Act of the USA and therefore was in existence when suit was filed. This application is therefore dismissed with costs to the Plaintiff.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of May, 2012

J. KHAMINWA

JUDGE

Ms Muli for Defendant

I apply for stay for 7 days to enable me to seek instructions. Also I request for typed copy of Ruling.

That is all.

Mr Stephen

No objection to order sought.

Court

Stay is granted for 7 days from today. Let the typed copy of Ruling be supplied to the parties as a matter of urgency.

J. KHAMINWA

JUDGE