



URBANUS MUTISO.....PLAINTIFF

VERSUS

SUSAN KAVANAGH.....DEFENDANT

## RULING

1. The Plaintiff herein in his plaint dated 13<sup>th</sup> February, 2004 claims, among others, general and exemplary damages for defamation against the Defendant who was at the time enjoying diplomatic privileges.
2. Having failed to enter appearance or file defence, the Plaintiff sought and obtained default judgment against the Defendant. He subsequently applied for the Defendant to tender security in court for fear that she may leave this court's jurisdiction, and also for execution of the decree by personal arrest and committal to civil jail. The Attorney-General then came in as a friend of the court and raised a preliminary objection as to jurisdiction, which is the subject of this ruling.
3. Essentially counsel for the Attorney-General submitted that the cause of action having arose while the Defendant was conducting official duty; she is immune from any action in court by virtue of the ***Convention on the Privileges and Immunities of the United Nations*** which immunity has not been waived by the Secretary-General of the United Nations. He further submitted that the certificate by the then Minister for Foreign Affairs Minister was conclusive evidence as to the Defendant's immunity.
4. On his part the Plaintiff's counsel opposed the preliminary objection. He submitted that the ***Privileges and Immunities Act (Cap 179)*** domesticates the ***Vienna Convention on Diplomatic Relations of 18<sup>th</sup> April 1961***, not the ***Convention on Privileges and Immunities of the United Nations*** adopted on 13<sup>th</sup> February 1946. Secondly, that since the Defendant ceased working for the United Nations on 1<sup>st</sup> August, 2004 she no longer enjoyed immunity and was amenable to the legal action herein. He also submitted that whether the cause of action arose out of the Defendant's official duties was irrelevant and cannot prevent the Defendant from entering appearance.
5. I have considered these rival submissions and considered the authorities cited.
6. I respectfully agree with the Plaintiff's learned counsel's submission that the Privileges and Immunities Act domesticates the Vienna Convention on Diplomatic Relations of 18<sup>th</sup> April 1961, not the Convention on Privileges and Immunities of the United Nations adopted on 13<sup>th</sup> February 1946. However, it is noteworthy that the said Vienna Convention provides as follows, which provisions are similar to those of the Convention on Privileges and Immunities of the United Nations:

### Article IV

**Section 11. "Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:**

- (a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;**
- (b) Inviolability for all papers and documents;**
- (c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;**
- (d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;**
- (e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;**
- (f) The immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;**
- (g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.**

**Section 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.”**

7. The first question that arises is how a diplomat agent is to claim immunity if he is brought before the court for some alleged violation of the laws of the country, or if he is made a defendant in a civil action before a local court; and how are the courts to be satisfied that the person claiming immunity belongs to the class of persons who are to be clothed with immunity?

8. It is clear that an application must be made to court, since the court is not in a position to know the accuracy of the allegations which may appear even on the face of the record. It is not the function of the court to dismiss the suit unless it is asked to do so by a party, nor is it for the court of its own motion to declare that it has no jurisdiction. For a long time the practice followed had been for the diplomat to prove his status on any given occasion before the court in which the claim or suit was pending against him, and it was a matter for the court to decide the question of immunity as a preliminary issue. In recent years, however, it has been felt that such a practice was not very satisfactory. On the one hand it seems rather strange that a diplomat should be required to prove before a court that he is entitled to immunity whilst he is claiming exemption from the jurisdiction of that very court. But on the other hand the procedure and practice of every court requires some formal proof of the fact that the person belongs to the class entitled to be exempt from the jurisdiction of the court.

9. It is now the practice for the courts to accept as conclusive the statements made to them by the executive as to the existence of certain facts of international nature, such as the status of a person, or the extent of immunity. It would be useful to consider at least one such decision in this regard.

10. In **Engelke v. Mussmann (1928) AC 433** the **House of Lords** finally laid down the basis on which the courts will rely on the foreign office regarding the status of a foreign envoy in the following terms:

**“It was for the court to determine, as a matter of law, whether, the diplomatic status of a person having been proved by the foreign office statement that recognition had been accorded, immunity from process necessarily followed. If the court could go behind the statement and investigate into**

**facts, it would involve a breach of diplomatic immunity. The certificate is not a piece of hearsay evidence. The status has been created by virtue of its prerogative by the crown.”**

**11. Section 16** of the Diplomatic Privileges Act, which was enacted to effect to the Vienna convention 1961, provides for a certificate to be given by the foreign office regarding the status of the person who may be claiming immunity.

**12.** Having said so I hold that the certificate of 11<sup>th</sup> May, 2005 by the then Minister for Foreign Affairs is satisfactory proof of the fact that the Defendant was entitled to privileges and immunities under the Act.

**13.** The next issue to be determined is whether the suit relates to act performed by the defendant in her official capacity. From the pleadings on record, the Defendant while writing the alleged memorandums was conducting administrative functions in the discharge of her duties for which she cannot be sued. I hold that the fact that her employment has now ceased does not render her vulnerable unless the acts were done after her employment with the United Nations.

**14.** Article V, Section 18 of the Convention on the Privileges and Immunities of the United Nations as well as the Vienna Convention on Diplomatic Relations of 18<sup>th</sup> April 1961 are clear on the fact that officials of the United Nations shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. The present case does not fall under the exceptions in Article 31 of the 1<sup>st</sup> Schedule considering the fact that the Defendant was a member of the administrative and technical staff of the UN.

**15.** In view of the foregoing, I uphold the preliminary objection and strike out the suit with costs. It is so ordered.

**16.** The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully regained my health.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2012**

**H.P.G. WAWERU**  
**JUDGE**

**DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2012**