



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 501 OF 2007

CAROLI OMONDIPLAINTIFF

VERSUS

AFRICAN TRADE INSURANCE AGENCYDEFENDANT

RULING

By a **contract of employment dated 7th May 2002** the Defendant employed the Plaintiff on a three year contract as its **General Counsel and Secretary to the Board** at agreed terms and conditions of service. By **Agreement dated 3rd August 2005** the Plaintiff's contract of employment was renewed and extended for a further three years effective 3rd September 2005 upon terms and conditions stipulated in the Agreement.

By a **letter dated 12th March 2007** the Defendant summarily dismissed the Plaintiff for alleged **gross misconduct**.

The Plaintiff brought this suit by **plaint dated 26th June 2007** for general damages for "loss of expectation of employment up to the end of 60 years" and generally for unlawful termination of his employment. The Plaintiff also sought release to him forthwith and unconditionally of **US\$ 136,636/27** and accrued interest thereon, the same being monies held by the Defendant for and on his behalf upon a **staff gratuity scheme**. The Plaintiff also sought costs and interest.

The Defendant entered appearance and filed defence **under protest**. The protest is upon the main ground that it enjoys diplomatic immunity and that thus it could not be impleaded in the courts of this country without its consent, or without waiving its diplomatic immunity.

The Defendant also pointed out in the **statement of defence dated 3rd August 2007** that on 10th July 2007, and before it was served with process in this case, it paid to the Plaintiff through his advocate on record a sum of **US\$ 138,322/58**, the same being the gratuity payable to the Plaintiff on "separation" from the Defendant, plus accrued interests.

By **chamber summons dated 27th September 2007** the Defendant has sought an order to strike out the plaint dated 26th June 2007 and dismissal with costs of the Plaintiff's suit. The application is brought under the then **Order VI, rule 13(1) (b) and (d)** of the **Civil Procedure Rules (The Rules)**. It means therefore that the application is brought upon the grounds that the plaint is scandalous, frivolous or vexatious; or that it is otherwise an abuse of the process of the court.

The specific grounds on the face of the application are:-

- (a) That the Defendant is immune from suit and legal process by virtue of the provisions of **sections 9 and 11** of the **Privileges and Immunities Act, Cap. 179**, Laws of Kenya as read with **Part 1 of Schedule 4** to the said Act and **Legal Notice No. 89 of 2001 (The Privileges and Immunities (The African Trade Insurance Agency) Order 2001)**.
- (b) That no suit lies against the Defendant with respect to personnel matters under the terms of the **Agreement dated 18th May, 2000** (as amended) that established the Defendant and the **Agreement dated 12th April, 2001** between the Defendant and the Government of the Republic of Kenya that set up the Defendant's headquarters.
- (c) That the Defendant's immunity status has been acknowledged and admitted by the Plaintiff.

The application is supported by an affidavit sworn by one **Peter Michael Jones**, the Chief Executive Officer of the Defendant. To this affidavit are annexed a number of documents, including the Agreement establishing the Defendant and the Agreement regarding the headquarters of the Defendant in Nairobi.

The Plaintiff has opposed the application as set out in the **replying affidavit filed on 2nd October 2007** sworn by the Plaintiff. The grounds of opposition emerging from the replying affidavit include:-

1. That the provisions of the Agreement establishing the Defendant and the Agreement establishing the Defendant's headquarters in Nairobi cannot bind the Plaintiff as he was not a party to the said agreements.
2. That in any event the two agreements constitute treaties which have not been domesticated in Kenya by any legislation.
3. That **Legal Notice No. 89 of 2001** by which the Minister conferred immunity upon the Defendant has not been sanctioned or legislated by an Act of Parliament, and that therefore it has no force on law.
4. That in any event Legal Notice No. 89 of 2001 was *ultra vires* the power of the Minister.
5. That if the Defendant has diplomatic immunity, the same does not extend to the present suit.

I have considered the submissions made by the parties, including the authorities cited. I have also perused the Agreement establishing the Defendant and also the Agreement establishing the Defendant's headquarters in Nairobi.

The **Extension of Employment Contract dated 3rd August 2005** by which the Plaintiff's employment with the Defendant was renewed and extended provided, inter alia, that:

“Any dispute between you (Plaintiff) and the Agency shall be resolved exclusively in accordance with the procedures laid down in the Agreement establishing the Agency and the staff manual.”

Article 16, paragraph 1(b) of the Agreement establishing the Defendant provides as follows:

“Actions against the Agency

Actions may be brought against the Agency only in a court of competent jurisdiction in the territory of a Member State in which the Agency has permanent or temporarily headquarters, or in the territory of any State where it has appointed an agent for the purpose of accepting service or notice of process, or has otherwise agreed to be sued. No such action against the Agency may be brought:

- (a) ...

(b) in respect of personnel matters.”

There cannot be any doubt that the Plaintiff’s suit herein against the Defendant is in respect of **personnel matters**. Those personnel matters include the alleged unlawful termination of the Plaintiff’s employment with the Defendant.

The Agreement regarding the headquarters of the Defendant in Nairobi dated 12th April 2001 was executed by the Defendant and the Republic of Kenya. By **Article 8, paragraph 1** of the Agreement,

“The Government (of Kenya) shall accord to the Agency, in its territory, the status, immunities, exemptions and privileges set forth in this Agreement and in the Agreement establishing the... Agency, and shall promptly inform the Agency in writing of the specific legislative and administrative action which it has taken for that purpose.”

By **Legal Notice No. 89 of 4th June 2001**, the Minister for Foreign Affairs and International Co-operation conferred upon the Defendant legal capacity of a body corporate and privileges and immunities specified in **Part 1** of the **Fourth Schedule** to the **Privileges and Immunities Act, Cap 179. Paragraph 3** of the legal notice specifically provided as follows:-

“3. The Agency shall have –

(a) the Legal capacity of a body corporate; and

(b) the privileges and immunities specified in Part 1 of the Fourth Schedule to the Act.”

Part 1 of the Fourth Schedule grants immunity from suit and legal process.

As already observed, the present suit concerns personnel matters. The suit is not a commercial or trade dispute to bring it within the authority of the Court of Appeal decision in the case of **Tononoka Steels Ltd –vs- The Eastern and Southern Africa Trade and Development Bank [2000] 2 EA 536**. It was held in that case, *inter alia*, that:-

“Parliament did not intend to extend an absolute immunity from suits and legal process to the PTA Bank. Such an extension would be against public policy and in breach of international law. The only immunity the Minister could validly extend to the bank under section 9 of the Act would be qualified immunity that would not cover its operations as a bank . . .

“ . . . In any case, the Minister under the Privileges and Immunities Act had no power to make a rule that completely ousts the jurisdiction of the court.”

In the instant case it cannot be argued that Legal Notice No.89 of 4th June 2001 conferred upon the Defendant absolute immunity from suit and legal process. The immunity conferred must extend only to the parameters set by the Agreement establishing the Defendant. Those parameters are set by Article 16 of the Agreement establishing the Defendant. The Article permits actions against the Defendant,

“...in a court of competent jurisdiction in the territory of a Member State in which the (Defendant) has its permanent or temporary headquarters or an office, or in the territory of any State where it has appointed an agent for the purpose of accepting service or notice of process, or has otherwise agreed to be sued.

The article then specifically prohibits action,

“...by a Member of a former Member of the Defendant or persons acting for, or deriving claims from, a Member or a further Member, or in respect of personnel matters”.

So, the issue of absolute immunity from suit and legal process does not arise. The only issue one has to consider is whether the particular suit or action in issue falls within the prohibited parameters as set out

in Article 16 aforesaid.

In the present case the action clearly is in respect of personnel matters, and the immunity granted to the Defendant by Legal Notice No.89 of 2001 extends to it.

It was argued on behalf of the Plaintiff that sub-paragraph (b) of paragraph 1 of Article 16 (**in respect of personnel matters**) must be read *ejusdem generis* with sub-paragraph (a), and that therefore it is only a Member or a former Member of the Agency (Defendant), or persons acting for, or deriving claims from, a Member or a former Member, that is prohibited from bringing action in respect of personnel matters. I see no need for such a restrictive interpretation, and no authority was cited to support the proposition.

It was also submitted for the Plaintiff that because he was not a party to the Agreement establishing the Defendant and the Agreement regarding the Defendant's headquarters, he cannot therefore be bound by the provisions of the two agreements.

As already seem, the Extension of Employment Contract dated 3rd August 2005 by which the Plaintiff's employment with the Defendant was renewed and extended, provided for resolution of disputes between him and the Defendant "*exclusively in accordance with the procedures laid down in the Agreement establishing the agency and the staff manual.*" The **procedures** laid down in the Agreement surely must include such immunities and exclusions as may be set out therein.

As seen, Legal Notice No 89 of 2001 cannot be interpreted as granting absolute immunity to the Defendant against all suits and legal processes in view of the provisions of Article 16 of the Agreement establishing the Defendant. The submission therefore that the legal notice was *ultra vires* the power of the Minister is, with respect, wrong and cannot be upheld.

The other points taken on behalf of the Plaintiff are:-

1. That the two Agreements establishing the Defendant and its headquarters constitute treaties which have not been domesticated in Kenya by any legislation.
2. That Legal Notice No. 89 of 2001 has not been sanctioned or legislated by an Act of Parliament.

No submissions were made upon the first point, and I consider it to have been abandoned. With regard to the second point, **section 17** of Cap. 179 provides as follows:-

"17. Any order made under this Act shall, unless a draft thereof has been laid before Parliament and approved by resolution before the making thereof, be laid before Parliament without unreasonable delay, and, if a resolution is passed by Parliament within twenty days on which Parliament next sits after the order is laid before it that the order be annulled, it shall henceforth be void, but without prejudice to the validity of anything personally done thereunder, or to the making of a new order."

The requirement that Legal Notice No. 89 of 2001 be laid before Parliament without unreasonable delay would have been necessary if a draft of the legal notice had not been laid before Parliament and approved by resolution before gazettelement of the legal notice. There is no evidence that a draft of the legal notice had been laid before Parliament and approved by resolution, despite the issue having been raised in the Plaintiff's replying affidavit filed on 2nd October 2007. It must therefore be assumed that the legal notice was never laid before Parliament for approval before gazettelement.

It was thus necessary under section 17 of Cap 179 that Legal Notice No. 89 of 2001 be laid before Parliament. There is no evidence that was done.

But of more importance is what would have been the effect of laying the legal notice before Parliament.

Under section 17 aforesaid, unless a resolution was passed by Parliament, within twenty (20) days from the date on which Parliament next sat after the legal notice had been laid before it, that the legal notice be annulled, the legal notice remained valid and lawful.

The Plaintiff has not placed before the court any such resolution by Parliament annulling Legal Notice No. 89 of 2001. It was his duty to do so as he was the one asserting that the legal notice was null and void under section 17 of the Privileges and Immunities Act, Cap. 179. The legal notice is thus valid and lawful.

In the event, and upon all the reasons given above, I find that the Plaintiff's suit is bad on account of the immunity enjoyed by the Defendant.

I will allow the chamber summons dated 3rd September 2007. The plaint dated 26th June 2007 is hereby struck out and the Plaintiff's suit dismissed with costs. It is so ordered.

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by misplacement of the file in the course of moving chambers and is highly regretted.

DATED AT NAIROBI THIS 10TH DAY OF MARCH 2011

H.P.G. WAWERU
JUDGE

DELIVERED THIS 11TH DAY OF MARCH 2011