



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION

CIVIL SUIT NO. 1197 OF 2005

STEPHEN MUNGA
MWANGI.....PLAINTIFF/DECREE-
HOLDER

V E R S U S

- 1. THE GOVERNMENT OF THE UNITED OF AMERICA**
- 2. UNITED STATES OF AMERICA AGENCY FOR INTERNAL DEVELOPMENT
(USAID).....DEFENDANTS/JDs**

AND

COMMERCIAL BANK OF AFRICA
LIMITED.....GARNISHEE

R U L I N G

The Plaintiff herein originally brought this suit against the **United States of America Agency for International Development (USAID)**, a US Government department. The claim is based on unlawful termination of his employment. He claimed severance pay and damages for wrongful dismissal.

It appears that at some stage the Government of the United States of America was added as 1st Defendant. USAID became the 2nd Defendant.

It also appears that the Defendants did not enter appearance or file any papers in the proceedings. More

specifically, they did not raise any objection to the suit on grounds of sovereign immunity and the court's lack of jurisdiction. Nor does it appear that the US Government waived its sovereign immunity or gave consent to be sued in this court.

Eventually my learned sister Nambuye, J heard the case *ex parte*. Perhaps at that stage the court could have properly examined the issue of jurisdiction in view of the clear law involved. See the case of **Ministry of Defence of the Government of the United Kingdom vs Ndegwa [1983] KLR 68**.

In a **judgment dated and delivered on 14th February, 2008** Nambuye, J found for the Plaintiff and entered judgment of him for 3 months salary in lieu of notice (KShs 75,347/00), severance pay (KShs. 134,099/88), costs and interests. His other claims were dismissed.

I have read the said judgement. The court dealt with many issues, none of them the all important issue of jurisdiction.

Eventually, the Plaintiff moved to realise the fruits of his judgment by garnishee proceedings (by attachment of some funds in a bank account of the US Government in **Commercial Bank of Africa Limited**. Garnishee order *nisi* was issued on 18th February 2011.

The US Government has remained silent and has not approached the court to challenge the judgment on grounds of sovereign immunity or at all. But the Garnishee has by **notice of motion dated 25th February, 2011** brought under **Order 23** of the **Civil Procedure Rules** (the **Rules**). **Article 31** of the **Vienna Convention** is also cited. The main order sought is that **the court do give directions as to whether the Garnishee can comply with the garnishee order nisi dated 18th February 2011**.

The two grounds for the application appearing on the file thereof are:-

1. That the Government of the United States of America's account with the Garnishee is in the name of US Disbursing Officer Symbol 0769 Account, which is operated by representatives of the Government of the United States of America.
2. That the account is immune from attachment under Article 31 of the Vienna Convention contained in the first schedule to the Privileges and Immunities Act and on principles of sovereign immunity.

There is a supporting affidavit sworn by one **JAMES KIAGO**, Assistant General Manager – Corporate Banking, of the Garnishee. It expounds the two grounds for the application.

The Plaintiff has opposed the application by replying affidavit (wrongly titled supporting affidavit) filed on 22nd March 2011. The points raised by the Plaintiffs are: -

1. That the Garnishee has no place to challenge the garnishee order, or to seek directions as to whether it should obey it as the order is issued to be obeyed.
2. That the defence of immunity can only be raised by the Defendants/Judgment-Debtors who have chosen not to raise it at any stage of the proceedings.
3. That there are many instances internationally when foreign countries and embassies have been sued and/or their property attached.

I have considered the submissions of the learned counsel for the Garnishee, including the authority cited, as well as those of the Plaintiff, who is unrepresented.

In the case of **Ministry of Defence of the Government of the United Kingdom v Ndegwa** already referred to, it was decided as follows, *inter alia*, by the court of Appeal –

“1. 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. Such persons and institutions include foreign sovereigns, heads of state and government, foreign diplomats and their staff, consular officers and representatives of international organisations such as the United Nations Organizations (UNO) and the Organisation of African Unity (OAU) (now African Union). It is not all acts 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 or government is acting in governmental capacity under which it can claim immunity, or private capacity, under which an action may be brought against it.

2. The appellant had neither waived its immunity nor consented to submit to the jurisdiction of the court of Kenya.

3. ...

4. ...

(Obiter Cheroni, Ag. JA, quoting Lord Denning, MR in *Thai- Europe v Government of Pakistan* [1975] ALL ER 9611WLR(1485): “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 debtor damages. The reason is that, if the courts have once entertained the claim, and in consequence gave judgment against the foreign, 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 repercussions impossible to foresee.” ’

In the case quoted above, the Government of the United Kingdom, through counsel, actively resisted the claim as soon as its concerned department was served with process. It did not simply ignore the process. It actually entered appearance under protest and then proceeded to apply for an order to strike out the claim upon grounds of sovereign immunity.

In the present suit, the Government of the United States of America appears to have simply adopted the attitude of simply ignoring the process served upon it. It did not enter appearance under protest and/or apply to strike out the action. In these circumstances, is waiver of immunity and/or consent to be sued not to be presumed?

At any rate, what is the business of the Garnishee in raising the defence of sovereign immunity at this late stage, which in any case ought to be raised by the Defendants? Is it its place to do so?

I entirely agree with the Plaintiff that the Garnishee’s duty in the circumstances of this case is simply to obey the court order served upon it. It is not the Defendants’ counsel! It cannot raise objection and issues that ought to be raised by the Defendants, particularly when there is no impediment in the Defendants themselves raising the objections.

In the circumstances, I find no merit in the Garnishee’s application. The same is hereby dismissed with

costs to the Plaintiff. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2011.

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2011