REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI LAW COURTS

CIVIL CASE NO. 232 OF 2002

ALFRED KIOKO MUTETI ……..……PLAINTIFF/RESPONDENT

VERSUS

TIMOTHY MIHESO ……..……1ST DEFENDANT/APPLICANT

EMBASSY OF CHILE ……..……..2ND DEFENDANT/APPLICANT

RULING

By an Amended Plaint dated 18th January 2006, the Plaintiff has joined the 2nd Defendant (hereinafter referred to as "the Applicant') claiming the damages suffered by him as a result of a road accident occurred on 10th February 1999. I, however, notice that though the Applicant is sued as the Embassy of Chile, it has been described as a female adult in paragraph 2 of the Amended Plaint. The Applicant filed a Memorandum of Appearance under Protest dated 1st December 2008 and has stated therein that the Applicant enjoys diplomatic immunity and is not a registered owner of the vehicle in issue. Thereafter the present application dated 6th April 2009 was filed under Order 1 Rule 10 (2), Order VI Rule 13 (1) and (d) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya and Section 4, Article 31 of the 1st Schedule to the Privileges and Immunities Act Cap 179 of the Laws of Kenya and Section 3 of the Judicature Act Cap 8 of the Laws of Kenya, and the court is urged to strike out the Plaint as against the Applicant.

It is contended by the Applicant that the court does not have Jurisdiction to try the suit against the Applicant which enjoys diplomatic immunity and the suit has no chance of success. The same averments are reiterated in the supporting affidavit of its Ambassador sworn on 6th April 2009. It is further shown from the annexed document as Ann. RG-1 that the Applicant is not the owner of the vehicle in issue, which fact is not denied by the Plaintiff. The provisions of the Privileges and Immunities Act (cap 179) were relied upon. Moreover, it is stressed that in an unlikely event that the judgment be issued in favour of the Plaintiff, the same cannot be executed against the Applicant.

The application is opposed and the Plaintiff has sworn a replying affidavit on 9th July, 2009 which avers that there is no immunity in law in civil liability in favour of the Applicant or its agent and that the 1st Defendant was the servant and/or agent of the Applicant who was driving to and fro the employees of the Applicant and thus it is vicariously liable for the damages suffered by the Plaintiff.

The parties filed written submissions.

The Applicant relied on Article 22 of Vienna Convention which has force of law as per First Schedule of the Privileges and Immunities Act (hereinafter referred to as the *Act*), which stipulates that the premises of the mission shall be inviolable. Article 31 and 32 of the Convention also were relied upon to contend that the Act also extends the immunity to civil liability. It is true that the Applicant has not expressly and otherwise waived its immunity. The observations of Lord Denning in the case of ***Thai Europe Tapioca***

Services Ltd v. Government of Pakistan Ministry of Food and Agriculture Supplies Imports and Shipping Wing [1975]3 All E. R. 961 was cited to outline the rationale of diplomatic immunity, namely: -

"The general principle is undoubtedly that, except by consent, the Courts of this country will not issue process so as to entertain a claim against a 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 repercussions impossible to foresee."

The local case from court of appeal i.e. ***Ministry of Defence of the Government of the United Kingdom v. Ndegwa (1982) Civil Appeal No. 31*** was cited in support of the issue that the court declined to entertain an action filed against certain privileged persons unless the privilege is waived. The submissions made by the Applicant so far as the case of ***Tononoka Steels Ltd. V. The Eastern and Southern Africa Trade and Development Company*** is concerned were that the court erred and that it cannot ignore the statutory law while adopting the principles of international law unless the local Acts are amended so as to adopt those principles.

In response to the above submissions, the Plaintiff strongly urged that the issue of immunity can only be entertained by the Applicant after the certificate under Section 16 of the Act is before the court. The said provision stipulates:

"If in any proceedings, a question arises whether or not a person is entitled to the benefit of an immunity or privilege, or to exercise a power, under this Act, a certificate given by the Minister stating any fact relating to the question shall be conclusive evidence of that fact, and any such certificate purporting to be signed by the Minister shall be presumed to have been signed by him until the contrary is proved."

Whether the Applicant is entitled to the immunity, as per the Plaintiff is really governed by article 43 of the Vienna Convention which is applicable under the Act, namely:

"Immunity from jurisdiction
1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.
2. The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either;
(a) Arising out of a contract concluded by a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or
(b) By a third party for damage arising from an accident in the receiving State caused by a vehicle' vessel or aircraft."

It is also stressed that the suit before the court relates to the tortuous liability and the English case of ***Trendtex Trading Corporation v. Central Bank of Nigeria [1977] 1 QB 529*** was relied where Lord Denning and Shaw LJ stated:

"That even if the bank was part of the Government of Nigeria, since international law now recognized no immunity from suit for a government department in respect of ordinary commercial transaction as distinct from acts of government nature, it was not immune from suit on the Plaintiff's claim in respect of the letter of credit per curiam. The modern principle of restrictive sovereign immunity in international law, giving no immunity to acts of a commercial nature is consonant with justice, comity and good sense."

From the aforesaid, it was submitted that the diplomatic immunity is not absolute as per the principles of international law.

I may add that now the provisions of Article 2 (5) of the Constitution provides that the principles of International Laws shall form part of the Laws of Kenya. If so, at this stage, it may not be appropriate to

remove the Plaintiff from the seat of litigation on the issue of immunity.

I shall now deal with the undisputed fact that the Applicant is not the registered owner of the vehicle in issue and if so, whether the Applicant shall be held vicariously liable to the Plaintiff's claim? The Plaintiff has placed on record that the 1st Defendant was a servant/agent of the Applicant and used to drive the vehicle to ferry staff members of the Applicant. The case of ***Nancy Ayemba Ngaria V. Abdi Ali (2010)e KLR*** was cited where *Hon. Justice Ojwang* (as then he was) held as under:

"There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Act is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership, beneficial ownership, possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the matatu in question."

Thus it was submitted that the Applicant as a ***"beneficial***" owner of the vehicle is vicariously liable for the negligence of his servant/agent.
It is trite principle of law that the court shall not strike out any pleading at the interim stage unless the case of the other side is absolutely hopeless with no hope to breath any life into it. From what I have observed, I cannot find that the Plaintiff's case is so hopeless.

In the premises aforesaid, I dismiss the application on hand. The cost thereof in the cause.

Dated, signed and **delivered** at Nairobi this 25th day of **November, 2011**

K. H. RAWAL
JUDGE
25.11.2011