



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 422 of 2006

ANTOINE NDIAYE.....PLAINTIFF

VERSUS

AFRICAN VIRTUAL UNIVERSITY.....DEFENDANT

R U L I N G

The application is a Chamber Summons brought by the Defendant expressed to be brought under Order VI rule 13(1) (b) and (d) of the Civil Procedure Rules and section 3A and 63(e) of the Civil Procedure Act. It seeks to have the Plaintiff's suit struck out with costs to the Defendant and for such other or further orders the court deems fit and just.

The main grounds of this application is that the Defendant has been granted immunity from legal suit and process within the Republic of Kenya by virtue of Legal Notice No. 5 of 2002 under the Privileges and Immunities (The African Virtual University (AVU)) Order, 2002.

The application is supported by an affidavit sworn by Mr. Dzvimbo dated 17th November, 2006. I have considered the content of this affidavit. In that affidavit Mr. Dzvimbo has reiterated the grounds on the face of the application by claiming that the Defendant has been conferred immunity from legal suits and process within the Republic of Kenya and further that the Defendant was declared an Organization to which section 9 of the Privileges and Immunities Act applies.

The application is opposed. The Plaintiff has filed a replying affidavit sworn on 19th January, 2007. Briefly, the Plaintiff deposes that the suit is based on a contract of employment which was executed on 7th May, 2002 which contract made no reference to the immunity of the Defendant against legal actions for breach of the terms therein. The Plaintiff refers to clause 17.10 and states that under that clause, the parties covenanted that all disputes, claims or proceedings between the parties shall be subject to the jurisdiction of the High Court of Kenya and that the parties irrevocably submitted themselves to that jurisdiction.

I have considered the divergent submissions of the Advocates to both parties.

The Defendant wishes to have the suit against it struck out on grounds that it has immunity under section of 9 of the Act and by virtue of Legal Notice No. 5 of 2002 in the Privileges and Immunities Order of 2002. Miss Nagi for the Defendant took the court through the scope of the Diplomatic Immunity, which counsel claimed the Defendant enjoys against legal process for breach of contract and damages as claimed in the plaint.

There is no dispute that the Plaintiff and the Defendant entered into a contract of employment which both parties executed on the 7th May, 2002. There is no dispute that the Defendant was granted the Diplomatic Immunity, which is the subject matter of this application, vide Legal Notice No. 5 of 2002 which was dated 29th December, 2002. At the time that the contract of employment was signed between the parties, the Defendant did not enjoy Diplomatic Immunity.

The Plaintiff's contention is that by virtue of clause 17.10 in that agreement, the Defendant cannot claim Diplomatic Immunity for two reasons. The first reason is that immunity conferred on the Defendant did not cover employment contracts which Miss Wetende contended, fell within the commercial regime. The second reason is that the parties covenanted and irrevocably submitted themselves to the jurisdiction of the High Court for the resolution of any dispute arising out of the contract. Clause 17.10 stipulates as follows:

“All disputes, claims or proceedings between the parties relating to the validity, construction or performance of these Terms and Conditions shall be subject to the non-exclusive jurisdiction of the High Court of Kenya to which the parties irrevocably submit.”

The power of the court to strike out proceedings is one which ought to be exercised cautiously and only in the clearest of the cases. It is one which can drive a party from the judgment seat and therefore the courts are mandated to exercise this jurisdiction sparingly and only where no triable issue is disclosed. The burden was on the Defendant to show that it had Diplomatic Immunity against the Plaintiff's suit and that therefore the Plaintiff's case is so unarguable that it is bound to fail. The striking out of the plaint should only be invoked in plain and obvious cases. And even then, only where the plaint is incontestably and hopelessly bad that even an amendment would not redeem it. See **Knitting Properties vs. Kalsi & Another [1995-98] 2 EA 257 and D.T. Dobie vs. Muchina & Another, [1982] KLR page 1.**

Having carefully considered all the cases cited by Miss Nagi in support of the application and the opposition by Miss Wetende for the Plaintiff, it has become abundantly clear to me that the decision whether the Defendant has Diplomatic Immunity from legal process and claims will hinge on the interpretation given to the contract of employment between the Plaintiff and the Defendant. I think that clause 17.10 of the contract created a special jurisdiction for the determination of any disputes that may arise between the parties to the contract relating to the validity, construction or performance of the terms and conditions of the contract. I am aware that the parties described the jurisdiction of the High Court within the meaning of that clause as non-exclusive. Nevertheless the parties covenanted irrevocably to submit themselves to the jurisdiction of the High Court for the purposes of any disputes, claims or proceedings thereunder. It is abundantly clear, and this is not disputed by the parties, that the contract was executed long before the Diplomatic Immunity was granted to the Defendant. There will therefore be a necessity for interpretation of the intention of the parties in the contract of employment and especially the interpretation to the scope of clause 17.10 of the Agreement. That interpretation will be considered against the Diplomatic Immunity which was effective long after the agreement was executed. The court has to determine whether the Diplomatic Immunity had retrospective application and therefore whether the contract of employment falls under the immunity pleaded by the Defendant.

It is my view that the interpretation of the contract of employment and of the intention of the parties under that contract vis-à-vis the Diplomatic Immunity granted to the Defendant can only be considered during the trial of the case. It is not an issue that can be determined at an interlocutory application as proposed by the Defendant in the current application. This is a serious triable issue that should only be determined after the parties have placed their evidence before the court for detailed and minute examination, and this can only be done by the trial court.

It is trite that if there is even one triable issue disclosed in the pleadings, the case should be allowed to proceed to hearing. Even though the court has inherent jurisdiction to strike out the Plaintiff's plaint, I do find that the power to strike out is one which should not be exercised in this case. In the circumstances, I find that the application has no merit and that it ought to be dismissed.

Accordingly, I do dismiss the Plaintiff's application in its entirety with costs to the Plaintiff/Respondent.

Dated at Nairobi this 24th day of October 2008.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Miss Nagi for the Plaintiff

Miss Wetende for the Defendant

LESIIT, J.

JUDGE