



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT 200 OF 2004

**REGIONAL CENTRE FOR SERVICES IN
SERVEYING**

**MAPPING AND REMOTE
SENSING....DEFENDANT/APPLICANT**

VERSUS

CHERUIYOT ARAP CHELULE.....1ST PLAINTIFF)

CHRISTINE APONDO.....2ND PLAINTIFF)

KAHINDI GALGALO.....3RD PLAINTIFF)

JOYCE KITI.....4TH PLAINTIFF)

BENSON I. KURIA.....5TH PLAINTIFF)

PAUL MWANGI WAITHAKA.....6TH PLAINTIFF)

ESTHER NYAMBURA BORO.....7TH PLAINTIFF)

PAMELA ODUWO.....8TH PALINTIFF)

ISAVWA.....9TH PLAINTIFF) RESPONDENTS

J. M. KIGUDWA.....10TH PLAINTIFF)

STEPHENE MWAURA MUHA.....11TH PLAINTIFF)

CAROLINE ONYANGO.....12TH PLAINTIFF)

E. LUVITA.....13TH PLAINTIFF)

L. O. ODONGO.....14TH PLAINTIFF)

L. A.

NOEL J. OPENDA.....15TH PLAINTIFF)

PETER M. GACHIRI.....16TH PLAINTIFF)

R U L I N G

By a plaint which was filed in this court on 19th April, 2004 and amended on the 29th May, 2006, the respondents jointly filed a suit against the applicant. The respondents who are former employees, and or legal representatives of deceased employees of the applicant, sought judgment for USD.1,506,403.74 or the equivalent of Kshs.115,993,087.98, being the amount the respondents claim was lawfully due to them following the termination of their services by the applicant through redundancy.

Appearance was entered under protest by the Attorney General on behalf of the applicant. Subsequently, a defence was filed in which this court's jurisdiction was denied on the grounds that the defendant has been granted immunity from legal process and execution under the Kenyan law. The defence was therefore filed without prejudice to the applicant's right to raise and argue the preliminary objection. In the alternative, the applicant pleaded that the respondents were among the employees whose services were terminated and whose terminal benefits were paid by the applicant in the year 2003. The applicant contended that the benefits were accepted unconditionally, in full and final settlement. The applicant therefore denied owing any of the respondents.

In line with its defence the applicant filed a noticed of motion on the 25th July, 2006 in which it sought to have the respondent's suit struck out with costs on the following grounds: -

- (i) That the defendant is an Inter-governmental Organization having immunity from legal process.
- (ii) That the plaintiff did not seek waiver of that immunity prior to the institution of the suit and the said suit is an abuse of the process of the court.
- (iii) That the defendant stands to suffer in its international status and operations if this suit is not dismissed.
- (iv) That it is in the wider interests of justice that this suit be dismissed.

This application which was argued before me is the subject of this ruling. The application was supported by an affidavit sworn by the applicant's Director General Wilbur Khasilwa Ottichilo on the 17th July, 2006. Ottichilo depones that the applicant is an intergovernmental organization established under the auspices of the Organization of African Unity and the Economic Commission for Africa. He contends that under Article 4 of the agreement between the applicant and the government of Kenya dated 17th October, 1975, the applicant is accorded immunity from legal process except where the applicant has waived its immunity for a specific purpose. Ottichilo further avers that the applicant is also protected by immunity from legal process by the Privileges and Immunities Act Cap 179 of Laws of Kenya and Legal Notice No.183 of 1975.

Mr. Onyiso who appeared for the applicant on behalf of the Attorney General urged the court to strike out the suit against the applicant as the suit was improperly before the court, the applicant's immunity not having been waived.

The respondent objected to the application through grounds of opposition which were filed on 22nd September, 2006. The grounds raised by the respondents are as follows: -

- (i) The motion dated 22nd May, 2006 is incurably defective and incapable of invoking the jurisdiction of this honourable court.
- (ii) The Attorney General is not authorized by law to represent the defendant or draw and file pleadings

for the defendant.

(iii) The issue raised by the said motion is *res judicata*.

(iv) The contracts between the plaintiffs and the defendants were private and/or ordinary commercial contracts (“*jure gestionis*”) and not governmental Acts (“*jure imperii*”).

(v) The orders sought in the motion are contrary to accepted principles of justice and the protection afforded to the plaintiffs by the Constitution of Kenya.

(vi) The orders sought in the motion are contrary to established precedent and to the International law.

A replying affidavit was also sworn by Paul Mwangi Waithaka the 6th respondent on 22nd September, 2006. Waithaka deponed *inter alia*, that a suit filed against the applicant by the 16th respondent was settled following the recording of a consent marking the suit as settled. This was following a ruling dated 11th October, 2002 in which the court rejected the defence of immunity tendered by the applicant. Waithaka contended that the applicant does not enjoy immunity in respect of commercial transaction or in respect of emoluments due to its employees.

Mr. Macharia who appeared for the respondents vehemently opposed the application. He submitted that the doctrine of sovereign immunity is a principle of international law and not municipal law. He contended that the Privileges and Immunities Act, only gives effect to certain international conventions, and that if the international law shifts position, Kenya must likewise shift position. He maintained that there was no general rule of public international law which precludes the jurisdiction of this court regarding causes of action against a foreign state or even inter-governmental bodies regarding non-sovereign activities such as commercial transactions. Mr. Macharia submitted that the whole purposes of sovereign immunity, is to preserve the dignity of a sovereign state from examination of either its policies or functions in a domestic court. He maintained that a foreign state or an intergovernmental body is only entitled to sovereign immunity in respect of governmental or sovereign acts i.e. *jure imperii* and not commercial transactions i.e. *jure gestionis*.

Mr. Macharia further argued that Kenya has moved from the absolute theory of sovereignty, as is evident from the case of ***Tononoka Steels Ltd vs The Eastern and Southern Africa Trade and Development Bank (2000) 2 EA 536***, wherein the Court of Appeal held in a similar case that Parliament did not intend to extend an absolute immunity from suits and legal process to the PTA Bank and that such an extension would be against public policy and in breach of international law. Mr. Macharia submitted that in this case, all the respondents were employees of the applicant who entered into valid written contracts which provided for payment of salary and other benefits. The respondents were retrenched from employment and the applicant did set aside funds and made part-payments to the respondents and only raised the issue of immunity after the part-payment. Mr. Macharia referred to ***Halisburys Laws of England 4th Edition Volume 18 Para 1548C***, wherein it is stated: -

“A State is not immune from proceedings relating to (a) a commercial transaction entered into by the state or (b) an obligation of the state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom, unless the parties to the dispute are states or have otherwise agreed in writing.

Commercial transaction means (a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority:

.....A state is not immune from proceedings relating to a contract of employment between the state and an individual where the contract was made in the United Kingdom or the work is to be wholly

or partly performed there.”

To buttress his argument Mr. Macharia further referred to the following authorities.

- ***I Congreso del Partido (1978) 1 All ER 1169.***
- ***Trendtex Trading Corporation Ltd vs Central Bank of Nigeria (1971) 1 All ER 881.***
- ***Planmount Ltd vs Republic of Zaire (1981) 1 All ER 1110.***

Mr. Macharia made special reference to the Planmount Ltd case, in which it was held that a sovereign state was not entitled to absolute sovereign immunity in English courts but could only involve the doctrine in respect of governmental acts and a foreign sovereign states' commercial transactions were therefore not protected. Mr. Macharia submitted that like the Planmount case, where it was found that the defendant was merely refusing to foot the bill for work done, the applicant herein was merely refusing to pay the respondents the lawful dues arising from their contract of employment. Mr. Macharia further referred the court to an affidavit sworn by the applicant's Director General in HCCC No.160 of 2002 which was a suit brought by one of the respondents. In that affidavit the Director General averred that the applicant was willing to pay its employees. Mr. Macharia therefore submitted that the question of immunity was an abuse of the court process as it was nothing more than an afterthought.

With regard to Legal Notice No.183 of 1975, which was relied upon by the applicant, it was submitted that the order was made without authority, as the Minister had no jurisdiction to limit the access of a party to the High Court. In support of this submission, Mr. Macharia relied on the ***Tononoka Steels Ltd*** case (Supra). It was further contended that the applicant was barred by the doctrine of estoppel from raising the issue of immunity, the court having ruled in HCCC No.160 of 2002, that the defence of immunity cannot cover the applicant in a domestic dispute between it and its employees, and the applicant not having appealed against that ruling, but instead settled the suit. In this regard, Mr. Macharia cited the following cases: -

- ***Northwestern Water Ltd vs Binnie & partners (a firm) (1990) 3 All ER 547.***
- ***Reichel vs Magraph (1989) 14 AC 665.***

Referring to the agreement establishing the applicant, Mr. Macharia pointed out that the agreement gave the applicant capacity to sue and to be sued and it made it clear that the applicant was maintaining an independent juridical personality separate from any government. Therefore, for sovereign immunity to apply, the applicant must demonstrate that it was acting in sovereign capacity. Mr. Macharia therefore urged the court to dismiss the applicant's motion.

In response to Mr. Macharia's submission, Mr. Onyiso submitted that Section 9 of the Privileges and Immunities Act Cap 179 as read together with part 1 of the 4th schedule to that Act provides for absolute immunity. Mr. Onyiso maintained that the concept of qualified or restrictive immunities did not apply to that particular section. Mr. Onyiso distinguished the case of ***Trendtex Trading Corporation Ltd*** (Supra) which was relied upon by Mr. Macharia, contending that the concept of qualified or restrictive immunity only applies in the law of England. Mr. Onyiso referred to the case of ***Philippine Admiral (owners) vs Wallem Shipping (Hongkong) Ltd 1977 AC 373***, in which it was held that commercial transactions are not protected by absolute privilege. Mr. Onyiso maintained that this case does not relate to a commercial transaction as it was not a trade agreement but was a simple contract of employment and the doctrine of absolute immunity applies as the defendant is protected against employees who would want to sue it.

From the affidavit filed in support and in reply to the application before me, as well as the submissions which were made by counsels, it is clear that the applicant is an Intergovernmental Organization operating under the aegis of the Economic Commission for Africa. Under Article 3 of the agreement signed by the participating states concerning the establishment of the applicant, which was annexure 'WKO3' to Ottichilo's affidavit, the applicant is given a juridical personality independent of the parties

to the agreement, to enable it fulfill its purposes and functions with which it is entrusted. Both the agreement establishing the applicant and the agreement between the applicant and the Republic of Kenya (attached as annexure “WKO2” to Ottichilo’s affidavit) gives the applicant capacity to enter into contracts, to acquire and dispose off immovable or movable property, and capacity to sue and be sued. Both agreements also provide that the applicant, his property and assets shall enjoy immunity from every form of legal processes except in so far as in any particular case it has expressly waived its immunity.

It is also evident that the respondents were employees of the applicant whose services have been terminated and that the suit is for recovery of their benefits arising from their contract of employment.

Section 9 of the Privileges and Immunities Act Cap 179 which was relied upon by the applicant states as follows: -

“(1) This section shall apply to an organization which the Minister may, by order, declare to be an organization of which Kenya, or the Government, and one or more foreign sovereign powers, or the government or governments thereof, are members.

(2) The Minister may, by order -

(a) Provide that an organization to which this section applies (hereinafter referred to as the organization) shall, to the extent specified in the order, have the immunities and privileges set out in Part 1 of the Fourth Schedule, and shall also have the legal capacities of a body corporate;

(b) confer upon –

(i) any persons who are representatives (whether of governments or not) on an organ of the organization or are members of a committee of the organization or of an organ thereof;

(ii) such number of officers of the organization as may be specified in the order, being the holders of such high offices in the organization as may be so specified; and

(iii) Such persons employed on missions on behalf of the organization as may be so specified,

To such extent as may be specified in the order, the immunities and privileges set out in Part II of the Forth Schedule;

(c) confer upon such other classes of officers and servants of the organization as may be so specified, the immunities and privileges set out in Part III of the Forth Schedule,

And part IV of the Forth Schedule shall have effect for the purpose of extending to the staffs of those representatives and members as are mentioned in subparagraph (i) of paragraph (b), and to the families of officers of the organization, immunities and privileges conferred on the representatives, members or officers under that paragraph, except in so far as the operation of Part IV of the Fourth Schedule is excluded by the order conferring the immunities and privileges.

(3) An order under subsection (2) shall be so framed as to secure that there are not conferred upon any person immunities or privileges greater in extent than those which, at the time of the making of the order, are required to be conferred on that person in order to give effect to any international agreement in that behalf and that no immunity or privilege is conferred upon any person as the representative of the Government of Kenya or as a member of the staff of that representative.”

In accordance with the above provisions, the Minister for Foreign Affairs did gazette the Privileges and Immunities (Regional Centre for Services in Surveying and Mapping) Order 1975 vide legal notice No.183 of 1975, the relevant portions of which provide as follows: -

“2. In this Order –

“Centre” means the Regional Centre for Services in Surveying and Mapping established by an Agreement made at Nairobi between the governments of certain sovereign states in eastern and central Africa, including the Government of Kenya, which came into force on 18th April, 1975.

.....

3. The Centre is hereby declared to be an organization of which the Government of Kenya and other foreign governments are members.

4. The Centre shall have –

(a) the legal capacities of a body corporate: and

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

To the extent that it is relevant to this suit, Part 1 of the Fourth Schedule to the Act provides for *inter alia*, “immunity from suits and legal process”.

It is clear from the agreements and the legal provisions that the applicant has been provided immunity from suits and legal processes. The question is whether the intention of the above legal provision is to provide the applicant with absolute immunity from legal processes. If not, whether the dispute between the applicant and the respondent is one in respect of which the applicant’s immunity extends and further, whether the applicant has waived its immunity.

In determining these questions, the case of *Tononoka Steels Ltd* (Supra), which was cited by Mr. Macharia is quite instructive. In that case, the Court of Appeal considering a similar immunity conferred on the PTA Bank under Section 9 of the Privileges and Immunities Act, and Legal Notice No.265 of 1991 which is similar to Legal Notice 183 of 1975 held *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.”

Lakha J.A. in the same case clearly put the position as follows: -

“Immunity from suit and legal process conferred on the PTA Bank and other similar organizations was necessary for the fulfillment of their purposes, for the preservation of their independence and neutrality from control by or interference from the host state and for the effective and uninterrupted exercise of their multinational functions only and not private functions.

.....

I do not think that Parliament in its wisdom could have granted absolute immunity from suit and legal process to such a body or organization if it was going to engage in purely private commercial activities and which had nothing whatsoever to do with member states. This would be prejudicial to the interests of Kenya and would be contrary to public policy.”

I am in entire agreement with the above sentiments. It puts to rest the question as to whether the concept of qualified or restrictive immunity is applicable in Kenya. It also puts to rest the question whether the immunity provided under Section 9 of the Immunities and Privileges Act is absolute. Clearly the concept of qualified immunity is applicable in Kenya and the immunity provided under Section 9 of the Immunities and Privileges Act is not absolute. The Minister of Foreign affairs cannot purport to make it absolute through subsidiary legislation.

The dispute between the applicant and the respondents arises from individual contracts of employment

entered into between the applicant as a juridical person and each individual respondent. It is not a dispute arising from the exercise of any sovereign authority by the applicant. I find that the immunity extended to the applicant was not intended to cover such private domestic disputes, which have nothing to do with the preservation of the applicant's independence or interference with the applicant's functions. In this regard, a parallel can be drawn with the position in the United Kingdom in respect of which it is stated in Halsbarys Laws of England 4th Edition Volume 18 Para 1548C, (which was cited by Mr. Macharia) with regard to the State Immunity Act, that a state is not immune from proceedings relating to a contract of employment between the state and an individual.

Further, I find that this court having ruled in HCCC No.160 of 2002, that the applicant is not entitled to immunity in respect of a dispute with its domestic staff, and the applicant having opted to settle the claim rather than appeal, the applicant is clearly estopped from raising the defence of immunity in similar claims.

The upshot of the above is that the applicant's motion dated 22nd May, 2006 fails. It is accordingly dismissed with costs.

Dated and delivered this 21st day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Advocates for the defendant/applicant absent

Ms Mwangi H/B for Mr. Macharia for the plaintiffs/respondents