



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
HCCC MISC. APPLICATION NO. 191 OF 2004

HUMPHREY KARIUKI KISIOHAPPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

THE WORLD CONSERVATION UNION – IUCN.....2ND RESPONDENT

RULING

I have considered Mr. Katwa,s objection and the submissions of all counsel.

In fact, strictly, Mr. Katwa has raised the issue more as a point of clarification than an objection. However, to me the effect would be the same – the clarification or ruling I make would at this stage determine the course of these proceedings.

The second Respondent (Eastern Africa Regional Office), filed this Chamber Summons on 25th March, 2004, seeking an order to have the suit against it, struck out with costs on the ground that it is scandalous, frivolous and an abuse of the process of the court. The second Respondent states that the second Respondent has diplomatic immunity and hence this Honourable court has no jurisdiction to entertain this suit.

At the commencement of the application, the main Applicant’s advocate, Mr. Katwa wants to answer to the following questions:

- i) Whether this court as constituted by myself is sitting as a Constitutional Court since the question of diplomatic Immunity claimed by the second Respondent is a substantive question or issue in the very Constitutional Reference filed by the Applicants by way of Originating Summons:-

Prayer 4 of the said summons seeks the following declaration:-

“4. That the Constitutional Court do make a declaration, make such orders, issue such writs and give such directions as it considers appropriate as to the said IUCN’s legal status and especially regarding its claim of diplomatic immunity as a body and together with its personnel on the true construction of all relevant documents including the agreement dated 17 th February, 1998 as between the Government of the Republic of Kenya and the said IUCN, the Privileges and Immunities Act, Cap 179 and the Constitution of Kenya.”

- ii) whether this court as constituted by myself, can entertain the the Chamber Summons herein in view of the express prayer in the Originating Summons and therefore, whether I have jurisdiction to hear the matter.

Miss Janmohamed for the 2nd Respondent agrees that the question of diplomatic immunity may be in the Originating Summons. However, if the 2nd Respondent agrees to the said issue litigated within the Constitution Reference, then in effect, it would be or have submitted itself to the jurisdiction of this court which is contrary to the invention of the Diplomatic Immunity it is now enjoying.

I have considered the matter raised by counsel . Section 60 (1) of the Constitution of Kenya is very clear in its terms. It says:

“60 (1) There shall be a High Courts which shall be a superior court of record, and which shall have unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”

As I have held in the case of **KAMLESH PATNER –v- NASIR IBRAHIM ALI, H.C.C.C. No. 448 OF 2001** - The High Court is always a Constitutional Court and in particular when matters touch on the Constitution or Constitutional rights are in question. I also held in the said case that there is no law, or practice or custom recognized by law that all constitutional cases as applications under section 84 must be referred to the Chief Justice for directions or Constitution or establishment of “a special Constitutional Court of more than one Judge”

Be that as it may for good order and as circumstances demand, a High Court Judge has the power, right and discretions to recommend to or refer a Constitutional case/application to the Chief Justice in order to set up such a bench or demands it in his opinion. e.g. If the matters raised are of such importance and significance that it is in the public interest that the matter is heard by more than one Judge. There are many reasons for such a decision.

So to answer, Mr. Katwa, the High Court is always a Constitutional Court and I have the jurisdiction to hear not only the application before me but also the Originating Summons.

There is a possibility that if the Originating Summons came before me for hearing, I may care, referred it to the Chief Justice for directions as the issues involved are complex and quite fundamental. I think this is a case that may have required more than one judicial mind in the interest of Justice and the Important issues raised.

Be that as it may, the 2nd Respondent is apprehensive that to allow the matter to go for trial on its entirety will amount to submitting itself to the jurisdiction of the court which was not the intention of the Legal Notice No.130 of 19th July, 1999. The Intention according to it was the contrary to prevent the 2nd Respondent being subject to any legal proceedings.

Considering all, I am of the view that it is essential that this court determines the question of Diplomatic Immunity of the outset. The court has jurisdiction. If it touches on Constitutional issues, there is no difficulty as this court has jurisdiction to determine any Constitutional question before it.

I also think that the question of diplomatic immunity against all legal proceedings raises jurisdiction issues which would always require to be heard at the outset.

I therefore rule and direct that the Chamber Summons herein be heard by any single Judge of the High Court at the first instance.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of July, 2004.

MOHAMMED IBRAHIM

JUDGE

26-07-2004

Coram: Ibrahim, J

Court clerk – Buoro

Mr. Katwa for the Applicant

Ms. Janmohamed for 2nd Respondent

Mr. Kariuki for the 1st Respondent

Ruling read in their presence

Order by consent

The 2nd Respondent's application dated 25th March, 2004 is hereby stood over to 12th October 2004 at 9 a.m. for hearing.

MOHAMMED IBRAHIM

JUDGE