REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 113 OF 2000

AGNES MUTIO MULEI
……..APPLICANT

VERSUS

INTERNATIONAL CENTRE OF INSECT PHYSIOLOGY & ECOLOGY (ICIPE)
…….....…RESPONDENT

JUDGMENT

By a written agreement of service dated 17th March 1997 the appellant, an Advocate of the High Court of Kenya was employed by the respondent as its legal Administrative Officer for a period of three (3) years from 3rd July, 1992 to 2nd July 1995. it was the case for the appellant that in breach of that agreement, the respondent terminated his services unlawfully and wrongfully as a result of which the appellant filed a civil suit to claim from the respondent various heads of damages as stipulated in paragraph 5 of the plaint filed in the court of the Senior Principal Magistrate's at Sheria House Nairobi on 9th May 1995 and amended on 21st June 1996.

According to the lower court record, though the respondent was served with summons to enter appearance and/or defence no such appearance or defence were filed resulting in an interlocutory judgment being entered on 30th April 1997.

And when the respondent engaged the services of a firm of auctioneers to execute the decree, the appellant woke up and filed in that court an application not only to set aside the exparte judgment but also to strike out the suit on grounds that the said respondent enjoyed diplomatic immunity from court litigation.

The matter was placed before an Acting Senior Resident Magistrate (P. Ngatia) for hearing on 29th

June 1998 who indeed heard the application and allowed it on grounds that the respondent enjoyed diplomatic immunity from court litigation and that proper diplomatic channels had not been followed in instituting the suit. In effect the appellant's suit was struck out.

This action on the part of the lower court was not taken well by the appellant who filed an appeal to this court on 15th March 2000 in a memorandum of appeal of the same date. It had eight (8) grounds of appeal. Those grounds complained that the learned magistrate was wrong in setting aside the exparte judgment on ground other than those established or set out for the exercise of the courts discretion to set aside exparte judgment. That he erred in setting aside the exparte judgment and at the same time dismissing/striking out the suit.

That the learned magistrate should not have set aside the default judgment and/or struck the appellants suit when the respondent had abused the court process and that in failing to find that the claimed immunity was an investigatable defence and not a weapon for the summary dismissal of the suit.

The grounds further averred that the magistrate misdirected himself in failing to recognize that the transaction the subject of the suit before the court could not in law be the subject of the respondent's alleged immunity from the court process; that he erred and misdirected himself in defying binding authorities in the negation of the doctrine of stare decis, and that the magistrate's decision was contrary to prevailing international and local jurisprudence on the question of presumed blanket immunity. In this court on 18th March 2003 counsel for both parties appeared to submit on the application.

Mr. Kitonga for the applicant/appellant argued that even if there was some basis in the application for setting aside the judgment, all the magistrate was supposed to do was to set aside the judgment and allow the respondent to file defence because in doing so the court would be recognizing that the said respondent had a good defence to the appellant's claim. According to him this was not a stage to consider whether the suit was competently before the court because this could only arise as an investigation issue during the hearing of the case.

That the magistrate erred when he deviated from the Principles established for considering an application for setting aside an exparte judgment and dealt with it on the basis of diplomatic immunity. Counsel stated that a defence of diplomatic immunity calls for investigation to ascertain its truth or otherwise at a full hearing of the case.

Counsel submitted that International Law has moved away from blanket application to restrictive approach of the issue of immunity and that this defence does not apply to a commercial or contractual engagements. That it only applies to complaints about governmental administrative acts or acts of the armed forces. According to counsel, there was increasing danger of abuse of the concept of diplomatic immunity when it is used to deny suppliers for goods sold and delivered and for services rendered and/or to defraud employees of their benefits other than applying it to protect the user from embarrassment in serious matters.

He argued that this was a straight forward claim for terminal benefits which did not require the application of diplomatic immunity. He prayed that the appeal be allowed, the ruling of the learned magistrate set aside and the lower court judgment be restored with costs to this appeal and the court below. Mr. Manyonge for the respondent opposed the appeal and submitted that the learned magistrate's decision was proper and should be upheld That the magistrate rightly set aside the judgment because once someone had been conferred with immunity or privileges, this is recognized even where that person fails to act.

That it was necessary for the learned magistrate to set aside judgment so that the question of immunity could be looked into and that so far as the judgment was still in place this question could not be investigated by the court to find out if it exists.

Counsel then went on to explain how the respondent was granted immunity from all forms of legal process by the Minister for Foreign Affairs in gazette Notice No. 13 of 1989 and issued a certificate for it.

According to counsel, the respondent appeared in the lower court under protest because it did not submit to the court's jurisdiction and that submissions were made to the learned magistrate which he considered and having satisfied himself that the respondent enjoyed immunity he dismissed the suit, which he was entitled to do.

According to counsel, the question of immunity need not wait to be raised in the defence but that it can be raised whenever the court is called upon to exercise jurisdiction over the person enjoying it. That it is determined as a preliminary issue and not at the time of taking evidence and this is the process the learned magistrate followed.

In answer to submissions by counsel for the appellant as to the application of the concept of immunity, counsel for the respondent stated that theirs was not a blanket application and that the action taken in the ruling subject to this appeal was proper.

Counsel added that the immunity enjoyed by the respondent was statutory and that no court could breach it. He prayed that the appeal be dismissed with costs. That the respondent enjoys diplomatic immunity is really not in dispute. I think the dispute in this particular case is how and to which litigation it should be applied.

Counsel for the parties in this application agree that international law is slowly moving away from blanket application of diplomatic immunity to a more restrictive approach and this is why Hon Justice Lakha (J.A) had this to say in **Tononoka Steels Limited v The Eastern and Southern Africa Trade and Development Bank (Civil Appeal No.255 of 1998)**

> **"a foreign government which enters into an ordinary commercial transaction with a trader ---- must honour its obligation like other traders and if it fails to do so, it would be subject to the same laws an d amenable to the same tribunals as they".**

thus providing an exception to the general rule pertaining to diplomatic immunity.

Not to be seen as going into the merits of the dismissed case which is the subject of the present appeal, the application before the learned magistrate was for setting aside an exparte judgment under order VI Rule 13 and Order IXA Rules 10 and 11 of the Civil Procedure Rules. No defence had yet been filed to this suit.

Counsel in this appeal agreed that at one stage or other of proceedings, the issue of immunity has to be investigated or inquired into.

The question this court poses here is at what stage of proceedings is this inquiry or investigation done?

And going through the proceedings of the lower court relating to the application for setting aside the exparte judgment and striking out the suit, does it come out that this inquiry or investigation was carried out? My answer would appear to be in the negative.

I would not say it is enough to establish the existence of diplomatic immunity but also its manner of application or whether the legislature intended it to be used even in settling in-house or domestic disputes as was the case subject to this appeal.

It is true the issue of immunity is taken as a preliminary issue but notice of this is always given to the opposite party in the first place on filing of the defence otherwise the manner it was taken up in the case subject to this appeal was sort of an ambush to the appellant. Filing defence in such suit should not be misconstrued as forcing the person enjoying such immunity to submit to the jurisdiction of the court. After all he unveils in it that he enjoys such immunity

. Moreover, what is the purpose of the concept of immunity? The legislature could not have intended

that one of the two parties who has entered into a private venture voluntarily backs out of it to the deliberate detriment of the other by using or applying the concept of diplomatic (immunity – see the **Ministry of Defence v Ndegwa [1982 - 88] KLR 135 at pag e 138.**

The application for setting aside exparte judgment was not actually argued before the learned magistrate as the respondent did not show if it had any plausible defence to offer to the appellant's claim apart from raising the issue of immunity.

There was also no reason given for the respondents failure to file appearance or defence to this claim. The issue of immunity is actually a possible defence to a suit but certainly not a ground for setting aside exparte judgment.

If the learned magistrate had considered all these matters he could not possibly have struck out the appeallant's claim

I allow this appeal and set aside the lower court order and direct that the application for setting aside the interlocutory judgment (see paragraph 3 of the application dated and filed in the lower court on 15th June 1998) be heard on its merit by another magistrate at Milimani Commercial Courts, Nairobi.

Costs of this appeal and the court below either agreed or taxed will be paid to the appellant.

Delivered this 10th day of April, 2003.

D.K.S AGANYANYA

PRINCIPAL JUDGE