REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1309 OF 2001

TWICTOR INVESTMENTS LTD ……PLAINTIFF

VERSUS

THE GOVERNMENT OF THE UNITED

STATES OF AMERICA ……. DEFENDANT

RULING

By a plaint dated 3.8.2001 and filed on 03.08.2001 the plaintiff sued the Government of the United States of America for damages in negligence for loss arising from a Terrorist attack on US embassy in Nairobi on 7.8.98. The plaintiff claims that its building situated on LR No.209/1350/2 at the junction of Commercial street and Enterprise Road in Nairobi which was within close proximity of the attacked Embassy was extensively damaged with its two other wings completely demolished.

Holding the US Government responsible the plaintiff now claims compensation amounting to Kshs.24,890,950.00 as the amount needed to enable it to reconstruct and refurbish the said building, and for another amount of Kshs.10,800,000/= for loss of income and lastly an amount of Kshs.460,000/= spent on hiring experts to assess the damage, The Embassy of the United States in Kenya while refusing to accept service of summons raised certain reservations against the institution of the case against it as being undiplomatic.

In response to this the US Government instructed the firm of M/s Hamilton Harrison & Mathews advocates to institute these interlocutory proceedings by way of Notice of Motion dated 14.03.02 under O.6 r 13(1)(b)(c) and (d) of the Civil Procedure Rules made under Cap.21 of the Kenya Laws, for orders that there be a stay of any application to enter judgment in default pending the determination of this application. Secondly that the plaint and all the proceedings herein be struck off. The application is based on the affidavit by CAROL J. LIGHT Attorney advisor in the Office of the Assistant Legal Advisor for Diplomatic Law and Litigation at the Department of State in Washington D.C. sworn on 8th March 2002 in the District of Columbia and filed in this case on 14.03.02.

The US prays that the proceedings be struck out on grounds of foreign state immunity. The deponent supports her reasons on grounds that:-

> **“5 the USA is a sovereign state with all the privileges and immunities to which its status as a sovereign state entitles it:**
>
> **“(6) The Government of the USA h as not consented to the jurisdiction of the Kenyan courts. With regard to the matters raised in the plaint.**
>
> **“(7) It is the position of the USA Government that the US is immune from the jurisdiction of the courts of Kenya, on the grounds that the matters raised in the plaint**

relate to the protection, security and safety of the Embassy of the US in Kenya, which are matters within the concern of the Government of the USA and the Government of Kenya".

Mr. Frazer for the applicant has forcefully argued in support of the claim quoting several authorities saying that the plaint refers to security concerns of the US Embassy and advice on security from the concerned Representatives of the US Government which matters are of sovereignty and cannot be investigated by a Foreign State and further that courts should not meddle in matters relating to sovereignty.

He urged that the application be allowed.

The defendant opposed the application relying on affidavit of Reply by Lawrence Muriithi Mbaabu sworn on 23.04.2002 saying that under Article 31 of the 1st Schedule of Privileges and Immunities Act Cap 179 Diplomatic immunity has been exempted in the case of a real action relating to an action on immovable property situated within the receiving state and that no consent is required before a suit of this nature is instituted, and Mr. Kuria for the plaintiff relied on this adding as a further ground of opposition that the antecedent conduct of the defendant amounted to a waiver. He also stated that the old strict immunity idea is now no more and that past rigidity has been relaxed in many jurisdictions.

The Rules of the Civil Procedure O.6 r 13(b)(c) and (d) upon which this application is grafted allows courts to strike out pleadings for being (b) scandalous, frivolous or vexatious or (c) where it may prejudice, embarrass or delay the fair trial of the action or (d) when it is an abuse of courts process. However the tenor of this application is not accommodated by these provisions. The effect of the argument presented by Mr. Fraser and of course the application seems to me to be jurisdictional in whether this court has/or has no jurisdiction, if the international principles and conventions relied on are vindicated. A decision based on jurisdiction should be disposive of the matter. Perhaps the omitted first limb of the said provision O 6 r.13(1)(a) regarding existence of a cause of action would have been more relevant. Nevertheless the question to answer is whether the US is immune from jurisdiction of our courts within the principles of International Law.

The law regulating this as far as Kenya is concerned is the Privileges and Immunities Act Cap. 179. The preamble to which states that it is an Act of Parliament:-

"…… to amend and consolidate the law on diplomatic and consular relations by giving effect to certain International Conventions and otherwise to consolidate the Laws relating to the immunities privileges and capacities of International organizations of which Kenya is a member". S.4 of the Act provides tha t S.4(1) – Subject to S.15 The Articles set out in the First Schedule (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in Kenya……."

It is upon this provision that the Vienna Convention the first schedule to that Act is pegged and Article 31 thereof provides that:-

1. A diplomatic agent shall enjoy immunity from the Criminal jurisdiction of the receiving state. He shall also enjoy immunity from its Civil Administrative jurisdiction, except in the case of:-

(a) a real action relating to private immovable property situated in the Territory of the receiving state, unless he holds it on behalf of the sending state.

Mr. Fraser submitted that the Act dealt with Diplomatic Relations only and not with Sovereign Immunity, but I do not support that view, nevertheless but in as much as it is startling however, and Mr. Fraser did not support it with any authority, yet the case of ROBIN LAVERTY vs WILLIAM LAVERTY (1994) ONTARIO C.A. 21840/94 quoted by Mr. Fraser extols the Vienna convention. However, the difficulty is appreciable, since primarily, there is not even description of "state" in international Law. Be as it may it is

in popular understanding that the term state immunity refers to immunity accorded by one state through its courts to another state against who it is sought to entertain proceedings to (attach property or to execute judgments). The concept the courts observe is that in international law all states are sovereign and they must therefore deal with each other on a basis of equality and this equality must be respected.

A state can choose to waive it. However, the principle is part of international law and is instrumental in keeping world order. It is also part of our law having been incorporated in the Municipal Law by Act 279. The preamble I have set out above gives the policy and object of the statute. The preamble says it is to consolidate the law on diplomatic and consular relations. Diplomacy has come of age and I believe it concerns the immunity of states and its agents in foreign state courts and vice versa. Mr. Fraser has not complained about the wording of the Statute or the Convention, but the schedule to the Kenyan law is headed ARTICLES OF VIENNA CONVENTION ON DIPLOMATIC RELATIONS. The second schedule to it is ARTICLES OF VIENNA CONVENTION ON CONSULAR CONVENTION having the force of law in Kenya.

This court applies the two conventions in determining liability of a diplomatic official a consular official and or the immunity of such persons from legal processes in Kenya.

The principle of state immunity results on two principles one expressed in the Latin phrase maxim PAR IN PAREM NON HABET JURISDICTION meaning that no state can claim jurisdiction over another so that as a rule states cannot be sued in foreign courts assuming of course that the state has been duly recognized but a state can choose to sue in foreign courts and can willingly submit to it, however, even when a state does submit itself so, that submission only encompasses the incidents of normal procedure including counter claims and set offs and must only relate to the matter of the suit and not to include an independent suit against the foreign state.

Sovereignty is an old concept of International persons within the Law of Nations, and these in turn are a body of rules agreed on by the civilized states of the World to legally regulate their intercourse OPPENHEIM in his International Law A Treaties Vol. 1, 8th Ed. Says:- at p.118 says that a state exists when the people is settled in a country under its own sovereign Government and one of the conditions which must exist is a sovereign Government which that state must have", and he says, "sovereignty is supreme authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies therefore independence all round within and without the borders of the country".

As a consequence of sovereignty the states are considered equal under international law hence no state can claim jurisdiction over another sovereign state. Severally there is comity or reciprocity among states that is to say that for a concession of immunity the recipient state or sovereign is granted by the other state it also makes mutual concessions of immunity for such other states and sovereigns, so judgment of a Municipal court cannot be enforced against a foreign state as this can interfere with the mutuality. Where a state has received another into its territory there is implied acceptance on the part of the receiving state that the sovereignty of the received state will not be affected disregarded or impugned. See (Jordan CJ's decision in – New South Wales) case of Wright vs Atterelo 1943 SRNSW 430). These are the principles that have been considered to support the principle of sovereign immunity.

In considering the common law, international practice, and of course the conventions the Kenyan courts cannot subject foreign states to their jurisdiction.

Perhaps the time tested remarks of US Chief Justice John Marshall in the classical case of SCHOONER EXCHANGE vs M'FADDON 11 US 7 cranch 116 may be pertinent when he said

> **"…….. A nation would justly be considered as violating its faith, although that faith may not be expressly plighted, wh ich should suddenly and without previous notice exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world"**.

Although Marshall CJ considered this with regards to foreign sovereigns, because the idea of a state has only since evolved as juristic person, Still the notion underlies the concept of sovereign immunity.

The cases cited to me by Mr. Fraser show that sovereign states are insulated against the reach of Municipal courts so as not to allow them to implead foreign sovereigns before them or to challenge the legality of Foreign sovereigns, as this could upset friendly relations between such states. (See International Law cases and Commentary by Mark W. Janis and John E. Noyes (1997) pp 658). and I think the opinion of J.G. Starks in his Text Book entitled, AN INTRODUCTION TO INTERNATIONAL LAW 2ND ED. PP 169 is decisive of the matter.

It says:-

"The rule of Jurisdictional immunity of foreign states and foreign heads of states has 2 branches:-

(1) An immunity as to process of the court

(2) An immunity with respect to property belonging to the foreign state or foreign sovereign.

Branch (1) may be considered in the light of (British) practice ……. That the courts will not by their process "implead" foreign state or foreign sovereign in other words they will not against its will, make it a party to legal proceedings whether the proceedings involve process against its personality or seek to recover from it specific property or damages".

The test is of pleading. In the case of THE CRISTINA 1938 AC 485. The House of Lords held that a foreign Government was "pleaded" in the writ, which commandeered the defendant to appear or face default judgment hence imposing a condition of either submitting to its jurisdiction or be adjudged to lose the ship. This is similar to the case here against the US Government. They have been served with summons to enter appearance requiring them to enter appearance and consequently to subject the US to the jurisdiction of the Kenyan courts or face default judgment and be condemned to pay damages for the claimed negligence.

As to branch No. 2 of the rule of immunity the courts apply the principle that they will not by their process whether the foreign state or the foreign sovereign is a party to the proceedings or not allow the seizure or detention or judicial disposition of property which belongs to such sovereign. I do not see how this court can deviate from these principles.

Mr. Kuria for the plaintiff argued that the US Government had waived this immunity by implication in that its agents had met severally with the plaintiff's agents in a bid to agree certain terms of settlement but Mr. Fraser countered this argument by saying that waiver must be unequivocal and never by implication. These two propositions seems to me to be at a tangent with what I understand waiver of immunity to be. First we start with the principle that no sovereign is to be sued in our courts except by their own consent. This happens when a foreign state sues in the Municipal court or as a defendant he appears without protest. That connotes submission to the jurisdiction of the Municipal court and to all that is incidental of the case including, procedure and appeal process but such submission must be genuine and unequivocal without misapprehension or ignorance.

See the PARLEMENT BELGE CASE appeal court decision (1880) 5 PD 97) and appeal case In MIGHEL vs SULTAN OF JOHORE [1894] 1QB 149. Where the court said that:- …….

> **"a new agreement by a foreign s overeign to submit to the jurisdiction of the courts of (England) is wholly ineffective if the Foreign Sovereign chooses to resile from it. Nothing short of actual submission to the jurisdiction – a submission as it has been termed in the face of the cour t – will suffice".**

It shows how far from reality the argument is by Mr Kuria that discussions alleged between plaintiff and US agent which in themselves were indefinite and none descript between un-identified US

agents could have singly or cumulatively constituted a waiver. They could not to my mind have been considered so. However, even Mr. Fraser's argument that waiver cannot be implied seems also to be a limited deviation from the state of the law and is in contrast with Mr. Kuria's expansive vision of the law there. The authorities I have referred to in my research state the law as follows:-

> **"…… Immunity may be waived by express or implied consent. What amounts to an implied waiver depends on all the circumstances of the case and the courts hav e been extremely reluctant to infar a waiver of immunity"**.

That is to say that waiver can be implied although not easily. Per AN INTRODUCTION TO INTERNATIONAL LAW by J.G. Starke 2nd Ed. Pp 172.

He relied on the English cases of

1.MIGHELL v SULTAN OF JOHORE [1894] QB 149, (2) DUFF DEVELOPMENTS & CO. vs KELANTAN GOVERNMENT [1924] AC 797; (3) THE CRISTINA [1938] AC 485; [1938] 1 ALL ER 719 The Foreign state can waive its immunity "itself if it wishes. The rules, however are strict. The Vienna Convention lays down with reference to diplomatic immunity that **"waiver must always be express "** and the rule can hardly be less strict in the case of proceedings directly involving the state itself or the sovereign. Where a diplomat or state has appeared in the proceedings and has unequivocally put in a defence to the claim on the merits WAIVER OF IMMUNITY HAS BEEN INFERRED and in such a situation the courts have considered themselves entitled to assume that the diplomat or those representing the state in the proceedings had the necessary authority from the foreign Government to submit to the jurisdiction" the only fear is that sovereign may resile from it with impunity The case of TAYLOR vs BEST [1854] 14 C.B. 487 is a case in point.

Although waiver needs to be express this is not absolute. In the case of CHUN CHI CHEUNG vs THE KING [1939] A.C. 160 (Privy Council) a British court decided that a waiver of immunity could be implied from the failure of authorities of the nationality of the warship to take proper steps to secure the surrender of accused who escaped into port after a murder on board From the discussions of learned and well known international law scholars, writers and theorists it is fair to conclude that waiver is normally express, in fact the Vienna Convention declares so, but that courts have also implied waiver. So there is waiver by implication and Mr. Fraser's stand is not supported.

There is a nagging point I wish to mention in this case and that is what it is that is the basis of the Law we apply. Authorities quoted in the case to me are indeed persuasive. They show the legal approach courts of England particularly have taken in the area of jurisdiction but I am unsure by the extent of assumption on the part of the parties who argued this matter in their omission to establish why Kenyan courts should apply those English cases or in effect why those so called principles of international law should apply to Kenya. The point becomes crucial particularly with Mr. Fraser's dismissal of the Vienna Convention without enacting any other jurisdictional basis for the decision sought. It may in part be academic but in practice it is basic and determinative particularly when in legal application our jurisdiction is provided under S. 3 of Cap 8 the Judicature Act which states that:-

"The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with

> (a) The Constitution
>
> (b) Subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule of this Act, modified in accordance with Part II of that Schedule;
>
> (c) Subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of

justice in England at that date;

but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil case in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay".

I have sought to reassure myself by applying those English cases that existed before or at the date of reception. These rules like those on sovereign immunity based on the reciprocity view that what is done to a foreign state should be what that foreign state could correspondingly do to the subject state are internationally of general application. The law relating to immunity has risen to form customary international law with those of state immunity originating from Judicial decisions of Municipal courts. Because of notoriety of such decisions on topics of international law like state immunity they have come to be applied generally in our jurisdiction but this does not releave the courts and litigants from ascertaining the source of the law applicable. The only local case cited to me is the Court of Appeal case of Ministry of DEFENCE of the Government of United Kingdom vs Joel Ndegwa (1982 – 88) I KAR 135.

In that case the respondent sued a British soldier in Kenya for damages arising from a car accident alleging that he was a servant of Defence Claims Commission. Defendant commission entered appearance under Protest saying it was a department of the British Government and had no separate entity and so as agent of a foreign sovereign state they could not be impleaded. The High Court found the Claims Commission liable but Court of Appeal allowed the appeal saying a foreign state could not be sued, however, in a bench of 3 no one stated the source of the law they ought to apply or why they applied it in Kenya.

Chesoni JA on status of foreign sovereigns in our courts, said –

"I have been unable to locate any local authority on the point. Nevertheless it is a matter of international law that our courts will not entertain an action against certain privileged persons and institutions unless the privilege is waived ". The class of such persons and institutions include foreign sovereigns heads of states and Governments foreign diplomats and their staff consular offices and rep. Of international organizations like UNO and AOU".

Agreeing generally with decision of English courts in THAI EUROPE TAPIOACA SERVICES LTD vs GOVERNMENT OF PAKISTAN (……..) [1973] 3 AII ER 961 where Denning MR had said:

> **"The general principle is undoubtedly that except by consent the courts of this country will not issue their processes so as to entertain a claim against the foreign sovereign for debt or claim…."**

Chesoni JA agreed saying for Kenya that

> **"The same gen eral principles apply to courts of this country".**

The question is which "general principles" are these. If it is common law of England then it is not wholesale since in our jurisdiction substance of the common law applicable is qualified. Law JA said with some reflection on the point of law applicable IN the same case that:

- "…… the Government of UK as a foreign sovereign state did not submit to the jurisdiction of the court……. As was held in MIGHELL vs SULTAN OF JOHORE [1894] 1 QB 149. The courts i n one country have no jurisdiction over an independent foreign sovereign of another country. Unless he submits to the jurisdiction".

It would appear here that Law J.A was conscious of the applicable law the common law, since the case of MIGHELL vs SULTAN OF JOHORE [1894] 1 QB 149 that he quoted is a Kenyan precedent by virtue of Law of Reception but in the same appeal case. Hancox J.A submitting to the general exposition of undefined source of applicable law stated that

> "The principle that a sovereign or foreign Government cannot be impleaded in the courts of another country in the courts of another country was clearly stated in 1938 by Lord Atkin in COMPANIA NAVIERA VASIONGADA vs (RISTNA [1938] 1 ALL ER 72 "The first is that the courts of another countr y will not implead a foreign sovereign….."

Hancox JA (ag) merely relied on contemporary English decision. Without showing why he should apply it. Since Compania case cannot be part of our precedent Law but can only be persuasive. I think our courts and the litigants must always establish the law applicable.

The last opinion I refer to is Mr. Kuria's assertion that application of sovereign immunity is relaxed nowadays. He did not go any further beyond that statement but I think he was alluding to the increasing view being taken in some jurisdictions particularly in the courts in Continental Europe modifying the rule that the courts cannot exercise jurisdiction over a foreign sovereign (state).

Those courts have done so by drawing a distinction between acts of a sovereign nature (jure imperii) and those acts (commercial and administrative) which fall outside state responsibility and contact. In NO BILI vs EMPEROR CHARLES I of AUSTRIA [1919 – 1922] I AD case No. 90. The Italian court of cassation held that it had jurisdiction over the former Emperor of Austria in relation to obligations incurred in Italy. In most other countries immunity would have been observed.

In a similar attitude the Belgian court in the case of S.A DHLELLEMES ef MASUREL vs BANQUE CENTRALE DE TURQUIE [1963] 45 I LR 85 refused to accept a plea of immunity by Turkish Central Bank which the plaintiff in Belgium sued as guarantor in certain private contracts. The court said:-"Immunity from jurisdiction depends upon the nature of the act rather than upon the character of the body responsible for it. Whether it emanates from the Foreign State itself or from one of its organs, or from a public body in form of a cooperation acting on behalf of the state, the act is covered by immunity from jurisdictions only when it constitutes an act of Government or of executing power, or as it is also put, when it is done JURE IMPERII, on the other hand it loses immunity when it is done JURE GESTIONIS".

Such decisions have become evident in international law scene but do not constitute evidence that international law has changed states must subscribe to the Rule of law and observe comity.

I agree with Mr. Kuria for the plaintiff that there may be stiffer applications in certain cases in Europe but there is no basis for discounting the principle that sovereign states are still entitled to immunity for those activities they perform which are of sovereign nature. The question to ask is whether the acts fall within the limits and ambit of state authority.

Mr. Kuria's clients case is based on negligence and I do not think the arguments relating to the limitation of the principle is even relevant.

Kenyan courts apply common Law Principles which are normally influenced by English court decisions. By dint of Judicature Act as received laws. Although the shift to limit sovereign immunity is growing judicially however even in the Commonwealth it is only discussed in matters relating to ships of public ownership. The privy council in the case of Phillipine Admiral [1976] 1 AII ER 78 decided the

matter, In that case the ship was owned by a parastatal body of the Phillipine Government, but was hired by a third party, a limited company, which was buying it on certain conditions. The private company was using it commercially to convey cargo.

The issue arose whether it should be regarded as Phillipine Government property and be subject to immunity. The privy council held, that it did not qualify to be granted immunity. Not any vessel owned by a Foreign state is immune from jurisdiction But in a leading Canadian case of BROWN vs S S INDOCHINE [1922] 21 Ex CR 406.

The Court of Appeal (Maclennan LJA) said that the French Government was immune from jurisdiction even though the ship was trading. The Judge said that "all Government owned ……. Ships whether used for military, political or commercial purposes were immune".

I feel that the shift of judicial position is not so strong enough to influence the world yet because even within the commonwealth the balance is not settled on the matter.

My view therefore is that where a case requires the summoning of the sovereign state to submit itself to the jurisdiction of Kenyan court and be subject to Judicial consequences as those that are incorporated in our summons like entry of appearance such can only be sustained perhaps where the court has preliminarily ruled that the Act complained of had no state authority or foreign state correction and that sovereign immunity must be safeguarded, and strictly applied by courts because laxity can cause the state to incur damages and more affect its parity and commity with other states. I have considered the Scottish case of MORTENSEN v PETER, High Court of Judiciary Scotland 1906 [1906] 1 r SLR 227 since it is illustrative.

In that case it was an offence under Scottish law to trawl in the Moray Firth even out of the 3 mile limit. A Danish national, Mortisen, breached it. His defence was that outside 3 mile limit the Act had no application, but Scottish court refused to accept this defence holding – The Act of Parliament as supreme and said that they must follow it and convicted Mortisen saying it applied to all people including aliens. The Danish Government lodged a Diplomatic protest to the British Government. The Government disowned the judgment of the court and paid back the fine and reparations.

Such are the incidents courts must have a view of and learn to avoid by recognizing the proper International Law and practice.

REAL ACTION

There was something said about real action. Arguments were rendered on whether or not the intended suit is a real property case so as to be accorded diplomatic immunity by reference to article 31(g) of the Vienna Convention but in my judgment this is not a real property case i.e real action. I agree with Eileen Denza in the Commentary Diplomatic Law 2nd Ed. Pp 238 saying that there is confusion in the Vienna Convention. Article 31(a) and that in Vienna Convention on the meaning of real action but says that from a study of national legislations

> **"a real action is equivalent to action in rem in the sense which this action has in jurisdictions which (unlike England) permit actions in rem in respect of immovable property where title or possession is in issue. It does not include actions for reco very of rent or performance of other obligations deriving from ownership or possession of immoveable property".**

A suit on negligence because a terrorist bomb detonated at a US Embassy near the property in question cannot in my view be real action and so I reject the claim.

I think the Government of the United States is immune from this suit and this court cannot assume jurisdiction. The case is therefore incompetent and is struck off and dismissed. There is no order as to costs.

Let it be so ordered.

Delivered at Nairobi this 23rd day of May, 2003.

A.I. HAYANGA

JUDGE

Read to Mr. Kwacha of Hamilton Harrison and Mathews for defendant/applicant

Mr. Ndunda for plaintiff/respondent

A.I. HAYANGA

JUDGE