



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 314 OF 1999

S.S. SEHMI.....PLAINTIFF

VERSUS

I.C.I.P.E.....DEFENDANT

RULING

This is an application by defendant in the suit for an order that the suit be struck out and dismissed on ground that defendant has diplomatic immunity from suit and legal process.

Plaintiff claims a total of shs 542,598/50 for professional services rendered to defendant by plaintiff. The professional services rendered are specified in paragraph 3 of the plaint.

The defendant appointed plaintiff to supervise the construction, alteration and or repairs of defendants premises. As para 3 of the plaint shows, the works undertaken were construction of a new guest house, alterations and extensions and repairs to Guest centre and House - keepers flat and repairs to various Headquarters buildings..

Plaintiff pleads that defendant unlawfully terminated the contract and failed to pay the sum claimed.

Defendant entered appearance under protest and proceeded to file the present application without filing a Defence.

By section 9 of the Immunities and privileges Act, an International Organization declared by an order of the minister responsible for foreign affairs to be an Organization of which Kenya or Government and one or more foreign Sovereign powers or Government or Governments thereof are members may by order of the minister be granted, inter alia, immunities and privileges set out in part 1 of the fourth schedule. By Section 17 of the Act the Minister can either lay the draft order before parliament for approval before making the order or lay the order after it has been made before parliament without unreasonable delay and the parliament may pass a resolution either approving or annulling it.

By Gazette Notice No. 13 of 20/1/89, the Minister made an order declared defendant as an organization to which S. 9 of the Act shall apply and proceed to grant defendant the legal capacity of a body corporate and privileges and immunities specified in paragraphs 1, 4 and 5 of part 1 of the fourth schedule to the Act. The immunity given by para 1 aforesaid is immunity from suit and legal process.

Ground No. 7 of the plaintiffs grounds of opposition is that the privileges or immunity could not legally be provided by a subsidiary legislation. Mr. Mutiso for plaintiff referred to judgment of Lakha J.A in Tononoka Steels Ltd versus Easter and Southern Africa Trade and Development Bank (PTA Bank) - C.A no 255 of 1998.

It is true that Lakha J.A at page 10 first paragraph said

“if as the learned Judge held, legal notice no. 265 of 1991 gives immunity to the defendant from Judicial process and “outs the

jurisdiction court to hear such disputes”, it was bad in that the jurisdiction of the court can only be ousted by the Act itself”.

Although Mr. Mutiso also stated that Tunoi J.A held the same, I cannot find such specific holding in his lordships judgment. After the above finding, his lordship, Lakha J.A, quoted from PYX Grante Co. versus Ministry of Housing {1960} ALL 260 to the effect that subject’s recourse to Her Majesty’s Court for determination of his rights” is not to be excluded except by clear words”.

As I have shown above the power of the minister responsible for foreign affairs to give an International Organization immunity and privileges is donated by S. 9 of the immunities and privileges Act.

The minister is required to take the draft order to parliament for ratification or if he makes the order before ratification, he is required to lay the order in parliament for ratification or otherwise. In either event, the Ministers order becomes the resolution of the Parliament. In the present case, there is no complaint that the minister did not take the draft order to parliament before he made the order or that after he made the order he did not lay it before the parliament.

The ministers order was placed in the Kenya Gazette and by S. 69 of the Interpretation and General Provisions Act (Cap. 2), the production of the Gazette containing the ministers order purported to be printed by the Government printer is Prima Facie evidence in all courts and for all purposes whatever of the due making and tenor of the ministers order. Further section 33 of Cap 2 provides:

“An act shall be deemed to be done under an Act, or by virtue of powers conferred by an Act or in pursuance of execution of the powers of or under the authority of an Act, if it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act”

Thus, as the ministers order was ratified by the Parliament, the immunities and privileges given to defendant are deemed to have been given by the parliament. Further as the ministers order was made under power given by S. 9 of the Act, anything done under ministers order (subsidiary legislation) is deemed to be done under the immunities and privileges Act. Thus the tenor of the subsidiary legislation is equated with the tenor of Act itself.

I do not understand Lakha J.A in the passage quoted above as having held that privileges and immunities could not legally be provided by a subsidiary legislation. What I understand his lordship to be saying is that jurisdiction of the court can only be ousted by clear words of a statute. That is the law.

In the present case, defendant has been given statutory immunity from suit and legal process by our laws. The defendant has not waived that statutory immunity. That immunity has been sanctioned by the parliament. Does this court have power to abridge that statutory immunity? I do not think so for the duty of the court is to interpret the laws and not to make laws.

It is submitted that defendant in any case cannot enjoy immunity from suit in this case because the transaction giving rise to this suit was a commercial transaction. But as plaint shows, the transaction involved reconstruction; renovation and repairs of defendants own premises. Defendant was not trading for a profit. I do not construe the transaction as strictly a commercial transaction so as to deny defendants its statutory immunity.

For the foregoing reasons, I am satisfied that defendant enjoys statutory immunity from suit and legal process and this court has no jurisdiction to entertain the suit.

Consequently, I allow the application with costs and strike out the suit with costs.

E. M. Githinji

Judge

23.2.2000

Mr. Minyonge for defendant/applicant present

Mr. Kitonga holding brief for Mr. Mutiso present

Mr. Mutiso present

Mr. Mutiso: I ask for leave to appeal if leave is indeed require.

Court: No leave is required but If I am wrong I give leave to appeal.

E. M. Githinji

Judge

Mr. Mutiso

I apply for copy of the Ruling

E. M. Githinji

Judge

Order: Ruling to be typed and copy supplied as prayed.

E. M. Githinji

Judge