



**Isaji v Avihama & another (Civil Appeal E509 of 2021)
[2024] KEHC 2107 (KLR) (Civ) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2107 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E509 OF 2021

AN ONGERI, J

MARCH 1, 2024

BETWEEN

BERNARD ISAJI APPELLANT

AND

HUDSON AVIHAMA 1ST RESPONDENT

THE EMBASSY OF QATAR 2ND RESPONDENT

*(Being an appeal from the ruling of Hon. E. M. Kagoni (P.M)
in Milimani CMCC No. E6731 of 2020 delivered on 19/7/2021)*

JUDGMENT

1. The court delivered a ruling on 19/7/2021 in Milimani CMCC No. E6731 in the following terms;
 - i. That the plaintiff's plaint dated 28/9/2020 be and is hereby struck out.
 - ii. That the plaintiff will bear the costs of the application and the suit.
2. The appellant who was the plaintiff in Milimani CMCC no. E6731 of 2020 has filed this appeal on the following grounds;
 - i. That the learned magistrate erred in law and fact in holding that the 1st respondent is a person with diplomatic immunity.
 - ii. That the learned magistrate erred in law and fact in holding that diplomatic immunity is absolute.
 - iii. That the learned magistrate erred in law and fact in holding that failure to respond to the application by way of a sworn affidavit is fatal.



- iv. That the learned magistrate erred in law and fact in not taking into account entirely the written submissions of the appellant.
 - v. That the learned magistrate's finding and decision were against the weight of the evidence adduced.
3. The parties filed written submissions as follows; The appellant submitted that the 1st respondent herein is the driver of the 2nd respondent as evidenced in the police abstract which is proof of the fact that following an accident, the occurrence thereof was reported to the police who took cognizance of that accident and went ahead to apportion liability to the 1st respondent as the one to blame for the occurrence of the said accident.
 4. The 1st respondent claimed that they are immune to civil and criminal proceedings on the acts done while in the course of ordinary duties as such sovereign or agent at the time of the accident. Under section 107(1) of the *Evidence Act*, Cap 80, the burden is always on him to prove that that immunity had not been waived, or that his country had not consented or submitted to the jurisdiction of the local courts in determination of such dispute, or the road traffic accident was among the category of acts that are immune to the local legal process. None of these things were proved and without such proof it is more probable than not that he was driving in his private capacity and was not subject to any immunity from the legal process.
 5. The appellant submitted that there is no immunity in civil liability to cushion the respondent from the liability of the injuries caused to the appellant herein. Diplomatic immunity is not absolute as per the principles of international law but rather it is applied from case to case basis among states. In support he cited *Theuri Kihira v Gerhard Matthiessen* [2019] eKLR wherein judge Ngaah Jairu opined;

“I need not say anything more on this issue save to cite the Court of Appeal decision in *Ministry of Defence of the Government of United Kingdom versus Joel Ndegwa* (1983) eKLR where it was held that there is no absolute sovereign immunity but that it is restrictive”
 6. The appellant submitted further that the trial court erred in finding that the appellants response to the application was scandalous, frivolous and vexatious as it answered wide grounds of opposition instead of a supporting affidavit. As per Order 51 rule 14, one has to determine the purpose the rules committee intended the provision to serve as the language should be interpreted in its own plain approach meaning as the provision is meant to guide on which document is to be filed in response to the application rather than an election of which document is to be used.
 7. The respondent on the other hand submitted that the Trial Court did not commit any error in its Ruling and orders of 19th July 2021. Substantively, the Trial Court properly analysed the available material and reached correct conclusions. In addition, the Appellant was the author of his misfortune by failing to give a robust response to the Respondents' Application and by making damaging averments in its Plaint and in its grounds of opposition to the Application under consideration in the Trial Court.
 8. Further, that the Appellant also mixed up the legal regimes governing Diplomatic Missions and Consulates. the 2nd Respondent is an Embassy (technically “Diplomatic Mission”) that enjoys diplomatic immunity for the liability that the Appellant pursued in the Trial Court, that is damages for personal injury arising from a motor vehicle accident. Such a civil action does not fall within any of the exceptions set out in Article 31 of the Vienna Convention of Diplomatic Relations 1961 (VCDR 1961) which are:



- a) Real action relating to private immovable property
 - b) Private succession matters
 - c) Professional or commercial activity outside official functions
9. In support the respondent cited Ministry of Defence of the Government of the United Kingdom versus Joel Ndegwa (1983) eKLR, the Court of Appeal stated that the sovereign state could not be sued under vicarious liability in a domestic Court. The following words are instructive:

“In this case the alleged vicarious liability is by the first defendant as an employee of the second defendant and described by the plaintiff’s council as ‘Ministry of Defence employee overseas’, which is a department of the Government of the United Kingdom of Great Britain and Northern Ireland. The second defendant would be vicariously liable only if the first defendant was acting in the course of his employment. In the circumstances of the suit that would involve the second defendant acting in a governmental capacity which entitles it to sovereign immunity. The court will not issue its process against the second defendant unless the immunity is waived or that the defendant consents to submit to the jurisdiction of the courts of this country in the matter in dispute. As there has neither the necessary waiver nor consent to submit to the jurisdiction of the courts of this country, I would allow the appeal, set aside the High Court’s ruling and order that the second defendant be struck out from the proceedings.”

10. The respondent submitted that although the Appellant cited Article 43 of “the Convention” it was clarified by the Respondent that the Article 43 referred to was an Article in the Vienna Convention on Consular Relations 1963 (VCCR 1963) on consulates which is a whole different regime from the one of the Vienna Convention on Diplomatic Relations 1961 (VCDR 1961) relating to diplomatic missions. Contrary to what is submitted by the Appellant, the Trial Court never made any Ruling to the effect that diplomatic immunity is absolute but actually identified exceptions at page 4 of its Ruling. Neither did the Respondents also argue that immunity is absolute and the Appellant has formulated and argued his own in-existent issue in dispute.
11. This being the first appellate court, the duty of the first appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at my own conclusion whether to support the findings of the trial court.
12. The issues for determination in this appeal are as follows;
- i. Whether the court was right in dismissing the appellant’s suit for the reason that the 1st respondent is a person with diplomatic immunity.
 - ii. Whether the trial court had the jurisdiction to hear the suit.
13. The defendant/respondent filed an application dated 21/5/2021 seeking the striking out of the plaintiff/respondent’s suit for lack of jurisdiction to hear the suit on the basis that the 1st respondent is a person of Diplomatic Immunity and that Dipomatic Immunity is absolute.
14. In the case of Republic of Kenya all war Heroes & Others v Attorney General & Others [2017] eKLR, the court said as follows;

“In the case of Bird Shifting Corporation –vs- The embassy of the United Republic of Tanzania, United States district Court, District of Columbia 1980, the court held that, “in determining the immunity the foreign state must have waived its immunity....”



The following passage attributed to Lord Denning in my view does shed more light on the subject before hand:-

“Sovereign immunity should not depend on whether a foreign government is impleaded directly or indirectly, but rather on the nature of the dispute ... if the dispute brings into question, for instance, the legislative or international transactions of a foreign government or the policy of its executive, the Court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic Courts of another Country; but if the dispute concerns, for instance, the commercial transaction of a foreign government, and it arises properly within the territorial jurisdiction of a sovereign government, and it arises properly within the territorial jurisdiction of our Court, there is no ground for granting immunity”.^[5]

Also relevant is the case of Ministry of Defence of the Government of the United Kingdom Vs. Ndegwa^[6] which in my view represents good law. The said case is important for laying the law in three distinct respects relevant to the matter before me now. The court rendered itself as follows:-

1. “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”.
 2. “Such persons and institutions include foreign sovereign or heads of state and government, foreign diplomats and staff and their staff, consular officers and representatives of international organizations such as the United Nations Organizations (UNO) and the Organization of African Unity (OAU) (sic)”.
 3. It is not all acts of a foreign sovereign or government that this principle applies to; the immunity is not absolute but restrictive and the test is whether the sovereign or government is acting in a governmental capacity under which it can claim immunity or a private capacity, under which an action may be brought about it”.
15. I find that the 1st defendant/respondent did not prove the allegation that he enjoys diplomatic immunity.
 16. Further, it is not true plaintiff/appellant’s failure to respond to the application by way of sworn affidavit was fatal.
 17. As held in the case of Republic of Kenya all war Heroes & Others v Attorney General & Others (supra), diplomatic immunity is not absolute as per the principles of international law but rather it is applied from case to case basis among states.
 18. Further, it was held in that case that it is not all acts of a foreign sovereign or government that this principle applies to; the immunity is not absolute but restrictive and the test is whether the sovereign or government is acting in a governmental capacity under which it can claim immunity or a private capacity, under which an action may be brought about it”.
 19. No one should be denied a hearing on the basis of a blanket claim of diplomatic immunity.



- 20. The right to a fair hearing is a fundamental right guaranteed by *the constitution*. Article 20(2) stresses that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
- 21. I set aside the order dismissing the plaintiff/appellant’s suit with costs and direct that the suit be reinstated and set down for hearing.
- 22. The trial court to give priority to this case considering the lapse of time since the same was filed in court and to ensure that the case is determined within 90 days after it is first mentioned before the Chief Magistrate.
- 23. The same to be heard before any other magistrate other than the one who struck out the suit.
- 24. Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

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A. N. ONGERI
JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

