Kingsly Construction Limited v Federal Republic of South Africa & another (Commercial Case E265 of 2019) [2024] KEHC 10579 (KLR) (Commercial and Tax) (10 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10579 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E265 OF 2019

A MABEYA, J

SEPTEMBER 10, 2024

BETWEEN

KINGSLY CONSTRUCTION LIMITED ..... PLAINTIFF

AND

FEDERAL REPUBLIC OF SOUTH AFRICA ..... 1ST RESPONDENT

THE ATTORNEY GENERAL OF SOMALIA ..... 2ND RESPONDENT

RULING

1. Before Court are three applications; the defendants' application dated 19/7/2024 and the plaintiffs' applications dated 16/5/2024 and 15/7/2024, respectively.

Application dated 16/5/2024

2. The application was brought under Order 23 rule 1, 2 and 10 of the *Civil Procedure Rules 2010*, section 1A and 1B of the *Civil Procedure Act*, chapter 21 Laws of Kenya. It sought that a garnishee order absolute do issue compelling the garnishee to pay the applicant the sum of Kshs. 25,679,555.33. The amount is to be drawn from the accounts held at Premier Bank under the name Embassy of the Federal Republic of Somalia, Nairobi with the following account numbers: 0025xxxxxx, 0025xxxxxx, and 0025xxxxxx.

3. The application was premised on the grounds set out on the face of the Motion and the affidavit of Everlyne Nzilani Mutungi sworn on even date. It was deposed that judgment was rendered against the respondent for Kshs. 23,493,004/= for breach of contract. The sum is yet to be paid. That the respondent holds accounts with the garnishee which holds sums that can satisfy the decree.

4. The garnishee filed a replying affidavit dated 30/7/2024 sworn by Claris Ogombo. The garnishee stated that the respondent held the subject accounts with funds as follows; account number

0025xxxxxxUsd had Usd 107,816.17 and account numbers 0025xxxxxx and 0025xxxxxx had a total of Kshs 18,521,192/=. The garnishee prayed for costs of Kshs. 60,000/-.

Application dated 15/7/2024

5. The Motion was brought under Order 23 rule 1, 2 and 10 & Order 51 rule 1 of the *Civil Procedure Rules 2010*, section 1A and 1B of the *Civil Procedure Act* Chapter 21 Laws of Kenya. It sought that the orders and or directions of 24/7/2024 be set aside, vary and or reviewed. It further sought that a garnishee order absolute be issued directing the garnishee to pay the applicant the amount of Kshs. 25,679,555.33 together with costs.

6. The Motion was supported by the grounds stated in the Motion and the accompanying affidavit of Evalyne Nzilani Mutungi sworn on 15/7/2024. The applicant argued that on 10/7/2024, the Court scheduled the matter for a notice to show cause on 7/10/2024. That the court should set aside and vary those orders because, the plaintiff had been unable to execute its decree against the 1st defendant for three years. That the plaintiff had complied with the Court's orders and had filed its return of service on July 1 and July 9, 2024, during which the garnishee failed to respond.

Application dated 19/7/2024

7. The application was brought under Article 2(5) and (6) of the *Constitution* of Kenya read with article 2(1) of the *Charter of the United Nations*, section 5 of the *Civil Procedure Act*, section 4 and 5 of the *Privileges and Immunities Act* read with its first and 2nd Schedules, article 22(3) and article 32(2) and (4) of the *Vienna Convention on Diplomatic Relations 1961*, article 45(2) and (4) of the *Vienna Convention on Consular relations 1963*.

8. The application sought to lift the garnishee *order nisi* issued on 20/6/2023 and to unfreeze the bank accounts held with the garnishee. It sought that the warrants of attachment issued on 23/1/2024 be set aside. It further sought that the judgment and decree issued on 26/5/2023 as well as the subsequent execution processes be quashed. The application further seeks to have the suit against the defendants dismissed and the proceedings set aside due to lack of jurisdiction.

9. The application was supported by the grounds set out on the face of it and the affidavit of Ambasador Jabril Inrahim Abdulle sworn on 19/7/2024. The defendant's position was that the Republic of Kenya and the Federal Republic of Somalia were sovereign equals at International Law. That in the circumstances, the defendants enjoy immunity to jurisdiction before the Kenyan courts.

10. That the *Constitution* of Kenya, the *Privileges and Immunities Act* and the *Vienna Convention on Consular Relations* safeguard the foreign state immunity of the 1st defendant and its consular missions. The defendants contended that, as a result, the Court lacked jurisdiction over any legal proceedings against another state. They therefore challenged the entire suit and garnishee proceedings.

11. It further contended that the garnishee *order nisi* was issued per incuriam and without jurisdiction as the defendant had not waived jurisdiction. That the Court was deceived into enforcing execution against bank accounts of the Embassy of a foreign sovereign state. That the bank accounts attached contain funds from application and processing fees paid by individuals seeking passports and visas at the embassy.

Preliminary Obejction dated 25/7/2024

12. In opposition to the defendants' application, the plaintiff raised a preliminary objection dated 25/7/2024. It was founded on the grounds that the defendants' advocate M/s Sheikh &Co Advocates

was not properly on record for want of leave. That the Motion dated 19/7/2024 was incurably defective as it offended the mandatory provisions of Order 9 rule 7 and 9 of the *Civil Procedure Rules 2010*.

13. The plaintiff further opposed the application through grounds of opposition dated 29/7/2024. It argued that the dispute at hand was of a commercial nature, which is not shielded by sovereign immunity. That because the Embassy of the Federal Republic of Somalia entered into a commercial contract, the protection typically afforded by sovereign immunity do not apply.

14. The plaintiff cited specific articles from the *Vienna Convention on Diplomatic Relations of 1961*, particularly articles 1(c), 22, 24, 31, and 32, which generally exclude commercial contracts from the scope of sovereign immunity.

15. The plaintiff further argued that the issue of sovereign immunity had already been addressed by the court, suggesting that the defendants were attempting to have the same issue re-litigated. That the defendants' actions were a deliberate attempt to delay the plaintiff from enforcing its rights under the judgment.

Preliminary Objection dated 29/7/2024

16. On 29/7/2024, the defendant raised a preliminary objection to the plaintiff's applications dated 16/5/2024 and 15/7/2024. The objection was based on several grounds. The defendant contended that the High Court lacked jurisdiction to implead it as it is a sovereign state. That it had not waived immunity.

17. The objection also argued that the Court lacked jurisdiction to levy execution against the assets of the Embassy of the defendant, including the garnishment of the Embassy's bank accounts. It invoked article 45 of the *Vienna Convention on Consular Relations*, which Kenya is a party to, arguing that Diplomatic bank accounts are protected from such legal actions.

18. The applications and objections were argued vide written submissions that are on record and which I have carefully considered. Having reviewed all the applications, the affidavits, the submissions and the authorities relied on, there are two issues that fall for determination, namely;

    a. Whether the preliminary objections dated 25/7/2024 and 29/7/2024 are merited, and

    b. Whether the decree *order nisi* should be made absolute.

19. A preliminary objection was defined in *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 to consist a point of law which has been pleaded or arises by implication, which if argued is capable of disposing off the suit or application. It is argued on the basis that the facts are agreed upon as stated by the parties.

20. There were two preliminary objections. The plaintiff's objection was that the Motion dated 19/7/2024 was defective for offending the provisions of Order 9 rules 7 & 9 of the *Civil Procedure Rules*. Rule 9 provides: -

> " 9) Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-
>
> (a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be"

21. In the present case, it is not in dispute that the firm of M/s Sheikh &Co Advocates was not on record when the default judgment was entered. Further, that there was no other firm of advocates on record for the defendant. In *S. K. Tarwadi vs Veronica Muehlmann* [2019] eKLR, the court observed as follows: -

> " ... In my view, the essence of the Order 9 Rule 9 of the *CPR* was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

22. It is clear from the foregoing that, Order 9 rule 9 is a procedural requirement meant to provide orderliness in civil proceedings with respect to change of advocates. The wording of Order 9 rule 9 is clear that the rule is applicable only where there is a change of advocate or a party decides to act in person when the has been an advocate previously on record. The rule does not envisage a scenario where a party was not previously represented by advocate and an advocate comes on record for the first time.

23. In the premises, I find the preliminary objection by the plaintiff to be un sustainable and is therefore dismissed.

24. The second preliminary objection was by the defendant. It challenged the jurisdiction of the court on 3 grounds; that is, lack of jurisdiction due to sovereign immunity, requirement of waiver of immunity and prohibition of execution against diplomatic assets.

25. It is trite that jurisdiction is everything. Where there is none, a court ought to down its tools at the earliest. See *Owners of the Motor Vessel 'Lillian "(S) versus Caltex Oil (Kenya) Ltd* [1989] KLR 1.

26. The defendant argued that in view of the principle of sovereign equality of states at International Law, the Court did not have jurisdiction. That foreign state immunity is preserved by the *Constitution* of Kenya, the *Privileges and Immunities Act* in section 4 and 5 as well as the *Vienna Convention on Diplomatic Relations* and *Vienna Convention on Consular Relations*. That in the premises, the defendant could not be subjected to the jurisdiction of this court without a waiver of immunity.

27. On its part, the plaintiff contended that the parties entered into a commercial contract which was excluded from the scope of sovereign immunity. According to the plaintiff, the *Vienna Convention on Diplomatic Relations of 1961*, particularly Articles 1(c), 22, 24, 31, and 32, excluded commercial contracts from the scope of sovereign immunity.

28. In Kenya, the principle of state immunity is governed by the application of the *Constitution* of Kenya. Article 2(5) and 2 (6) thereof import the application of the *Vienna Convention on Diplomatic Relations, 1961* as well as the *Vienna Convention on Consular Relations* which were domesticated before 2010 vide the *Privileges and Immunities Act*, Schedules 1 & 2 to the *Act*.

29. Section 4 and 5 of the *Privileges and Immunities Act* outlines the immunities afforded to Diplomatic agents in the country. It details immunity from arrest and detention as well as immunity from compulsory measures of execution.

30. Under article 31 of the *Vienna Convention on Diplomatic Relations (1961)*, Diplomatic agents are granted immunity from the civil and administrative jurisdiction of the host state. However, there are

specific exceptions to this immunity. One key exception is for commercial activities that are conducted outside the scope of the Diplomat's official functions. The article provides: -

> " 31 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and 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 for the purposes of the mission;
>
> b. an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."

31. This Court is aware of the maxim *"Par in parem non habet jurisdictionem"* or *"par in parem non habet imperium"* meaning "an equal has no authority over an equal." It highlights the principle of sovereign equality, where one state or entity cannot exercise authority or impose its will over another state or entity of equal status.

32. In *Principles of Public International Law*, 6th Edition quoted with approval in the case of *(Environment & Land Petition 2 of 2021)* [2022] KEELC 771 (KLR) (10 March 2022) (Ruling), Ian Brownlie observed at page 321 as follows: -

> " It is helpful to distinguish two principles on which sovereign immunity rests. The one, expressed in the maxim par in parem non habet jurisdictionem, is concerned with the status of equality attaching to the independent sovereign: legal persons of equal standing cannot have their disputes settled in the courts of one of them. This principle is satisfied if a sovereign state waives its immunity: the consent given upholds the status of equality. If there is a subject matter over which the national courts of the other state may properly exercise jurisdiction in rem or if there is a basis for acquiring jurisdiction in personam, then jurisdiction follows consent....."

33. The court proceeded to state;

> " 54. The other principle on which immunity is based is that of non-intervention in the internal affairs of other states. The rationale for jurisdictional immunity rests on the dignity of the foreign nation, its organs and representatives, and on the functional need to leave them unencumbered in the pursuit of their mission (See *Principles of Public International Law*, 6th Edition, Ian Brownlie page 322)."

34. In view of the foregoing, a state is protected by sovereign immunity unless it has waived the same. In *Ministry of Defence of The Government Of The United Kingdom Vs Joel Ndegwa* [1983] eKLR, the Court of Appeal considered a decision of United Kingdom whose facts are very similar to this case as follows: -

> " The *Trendtex case* was applied in *I Congreso del Partido* [1978] 1 All ER 1169 and *Czarnikov Ltd v Centrala Handlu Zagranicynego 'Rolimpex'* [1978] All ER 81. In *Planmount Ltd v*

Republic of Zaire [1981] All ER 1110, the plaintiffs agreed to carry out certain building work for the Republic of Zaire under a contract at the official London residence of its Ambassador. The plaintiffs were paid only part of the contract price for the work and issued a writ against the Republic of Zaire claiming the balance. Leave was granted for the plaintiffs to serve the writ outside the jurisdiction. The Republic of Zaire applied to have the writ set aside on the ground that it was an independent sovereign state and as such entitled to sovereign immunity. The plaintiffs submitted that the doctrine of sovereign immunity did not apply to a state's commercial transaction. The court held that the defence of sovereign immunity was not available to the Republic of Zaire because it was not acting in a governmental but in a private or commercial capacity when it entered into the contract with the plaintiffs, and it followed that the case was a proper one for service of the writ out of the jurisdiction. It is apparent that there is no absolute sovereign immunity. It is restrictive. The test is whether the foreign sovereign or government was acting in a governmental or private capacity then the doctrine will apply otherwise it will not afford protection to a private transaction. The nature of the act is, therefore, important."

35. In *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 Lord Denning applied restrictive immunity which limited the application of sovereign immunity. It was held that where a state or its agencies participate in commercial activities, it should be subject to the same rules as private entities. He stated: -

> "In the last 50 years, there has been complete transformation in the functions of a foreign state. Nearly every country now engages in commercial activities. It has its departments of state or creates its own legal entities which go to the market places of the world. They chatter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed the rule of absolute immunity. So many have departed from it that it can no longer be considered as a rule of international law. it has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature described in latin as jure imperii, but no immunity to acts of commercial nature jure gestionis"

36. Further, *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mozambique* [1980] (2) SA 111 (C), Justice Margo addressed the issue of sovereign immunity in the context of a commercial dispute. He upheld the doctrine of restrictive immunity, which differentiates between a state's sovereign acts *(jure imperii)* and its commercial acts *(jure gestionis)*.

37. Applying the foregoing principles to this case, it is not in dispute that the subject transaction that led to the institution of this suit was a commercial contract. The plaintiff carried out repair works to the Embassy of the defendant at Nairobi. It led to the filing of this suit and the entering of judgment.

38. In this context, the Court finds that the doctrine of sovereign immunity does not extend to commercial activities. The principle means that, when a state or its entities engage in commercial transactions, they forfeit the shield of immunity typically granted to sovereign acts.

39. In this regard, the defendant cannot invoke sovereign immunity to avoid legal accountability for its commercial dealings. The Court therefore, affirms that it possesses the appropriate jurisdiction to address and grant the reliefs sought by the plaintiff. Given these considerations, the preliminary objection raised by the defendant is unfounded and is hereby dismissed.

40. The other issue is whether the *decree nisi* should be made absolute. Upon review of the application and submissions on record, the Court finds that nothing is standing in the way of making the decree

absolute. The initial *order nisi* had been issued in compliance with the legal requirements. The Garnishee has confirmed that it holds enough money to satisfy the decree. The objections raised by the defendant do not sufficiently counter the grounds for the order. I find that it is just and equitable to confirm the order.

41. As regards the order for Notice To Show Cause for 4/10/2024, the same was made in error. The order and or directions should not have been made having in mind that the *order nisi* had properly been served upon the garnishee. The direction is for varying.

42. Accordingly, the Court makes the following orders: -

    a. The preliminary objections dated 25th and 29th July, 2024 are without merit and are hereby dismissed.

    b. The application dated 19/7/2024 is without merit and is hereby dismissed with costs.

    c. The applications dated 16/5/2024 and 15/7/2024 are meritorious and are allowed. The garnishee *order nisi* issued herein is hereby made absolute against the garnishee for the sum of Kshs. 25,679,555.33 together with costs of Kshs.60,000/-.

    d. The Garnishee shall recover its costs of Kshs 60,000/= from the accounts disclosed.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF SEPTEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE