



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E265 OF 2019

KINGSLEY CONSTRUCTION LIMITED..... PLAINTIFF/APPLICANT

- VERSUS -

THE EMBASSY OF THE FEDERAL REPUBLIC OF SOMALIA

TO THE REPUBLIC OF KENYA.....DEFENDANT/RESPONDENT

RULING

1. **KINGSLEY CONSTRUCTION LIMITED** (Kingsley) sued in this case **THE EMBASSY OF THE FEDERAL REPUBLIC OF SOMALIA** (The Embassy). Kingsley by its plaint described the Embassy as:

“...a Sovereign State located in the Horn of Africa with its Embassy in the Republic of Kenya, situated at The Embassy of the Federal Republic of Somalia, Jabavu Likon lane off Dennis Prit Road ...”

2. Kingsley pleaded it entered into an agreement, with the Embassy sometimes in 2016, where upon it was agreed that Kingsley would refurbish the Embassy’s premises at the total costs of Ksh 53,514,214. That agreement, as it was pleaded, was partly in writing and partly oral. Kingsley pleaded that the Embassy breached the agreement by failing to allow Kingsley’s employees access the site of the project, by failing to pay the outstanding sum of Ksh 23,493,004.00 and, by terminating the contract without notice to Kingsley. Kingsley final prayers in this claim are for judgment for Ksh 23,493,004, for general damages and; interest and costs.

3. Kingsley, according to the affidavit service of Kivisu Amos Mutambu, served the Embassy with summons and plaint on 2nd September 2019, along other documents. The Embassy did not file an appearance or defence within the requisite period. Indeed, to date none of those documents have been filed. Kingsley therefore filed a request for judgment against the Embassy in default of an appearance. Kingsley was directed by the court to file a formal application for leave to enter judgment. It filed a chamber summons dated 20th June 2020 seeking to enter judgment against the Embassy in default of appearance. That application is premised on the ground that the Embassy was served with the pleadings on 2nd September 2019; the Embassy failed to enter an appearance and; that the Embassy is a government and it is necessary for leave of the court to enter judgment against it.

4. Before I begin to consider the application it is important to point out, as I believe it is already obvious, that the Embassy, the defendant, is an Embassy representing the state of Somalia. In my view the Embassy, in that representative capacity is not capable of suing or being sued. Under Article 22 of Vienna Convention diplomatic premises, which the Embassy is, are protected. That Article 22 provides:

“The premises of a diplomatic mission, such as an embassy, are inviolable and must not be entered by the host country except by permission of the head of the mission. Furthermore, the host country must protect the mission from intrusion or damage. The host country must never search the premises, nor seize its documents or property. Article 30 extends this provision to the private residence of the diplomats.”

5. Additionally, foreign countries are generally immune from legal action with some exception. This was so stated in the Court of Appeal Case, **Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa (1983) eKLR** as follows:

“The principle that a foreign government or sovereign cannot be impleaded, that is to say sued or prosecuted in the courts of another country, was clearly stated in 1938 by Lord Atkin in *Compania Naviera Vasiongada v Cristina, The Christina [1938] 1 All ER 719 at 721* as follows:

“The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him

against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not, seize or detain property which is his, or of which he is in possession or control.....

International law now recognized no immunity from suit of a Government department in respect of ordinary commercial transactions as distinct from acts of a government nature,

6. In that case **Ministry of Defence of the Government of United Kingdom** (*supra*) 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 Zagranicznego ‘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.”

7. Further in another decision of the High Court namely **Talaso Lepalat v Embassy of the Federal Republic of Germany & 2 others [2015] eKLR** the court had this to say:

*“19. Lord Denning in **Thai – Europe Tapioca Service Ltd vs Government of Pakistan, ‘The Harmattan’** expressed himself partly as follows regarding commercial activity vis-a-vis state immunity;*

“A foreign Government which enters into an ordinary commercial transaction with a trader ... must honour its obligations like other traders and if it fails to do so, it [should] be subject to the same laws and answerable to the same tribunals as they are”

8. Reverting back to the application. Kingsley by the application seeks leave to enter judgment against the Embassy. In my view the Embassy is incapable of suing or being sued. Rather it was open for Kingsley to sue the state of Federal Republic of Somalia, but not its embassy in Kenya.

9. That being so Kingsley needed also to obtain leave of the court to serve summons out of Kenya as per Order 5 Rule 21 and 27 of the **Civil Procedure Rules**. This it did not and having not done so the application to enter judgment must and does fail. It fails because there was no service of the summons upon the Federal Republic of Somalia and because leave was not sought to effect service out of the jurisdiction of this court.

CONCLUSION

10. Accordingly, the **Chamber Summons dated 20th May 2020** is dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 16TH day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiff:

For the defendant:

ORDER

This decision is hereby virtually delivered this 16TH day of July, 2020.

MARY KASANGO

JUDGE