



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL 164 OF 2014**

**UNITED NATIONS DEVELOPMENT**

**PROGRAMME (U.N.D.P) KENYA**

**JEREMIAH KIMANI MWANGI.....APPELLANTS**

**VERSUS**

**SAMUEL MAINA.....RESPONDENT**

**JUDGMENT**

The plaintiff in the lower court filed a suit against the two defendants following a road traffic accident attributed to the negligence of the 2<sup>nd</sup> defendant who was in the employment or authority of the 1<sup>st</sup> defendant. The defendants then filed an application to strike out the plaint on the ground that the 1<sup>st</sup> defendant is immune from legal process as it is subject to diplomatic immunity.

The lower court heard the application and made a ruling concluding,

**“From the foregoing it follows that privileges and immunities are not absolute. Cases by a 3<sup>rd</sup> party for damage arising from an accident caused by a vehicle as the one before court is exempted and an injured party can sue. In the upshot, the defendant/applicants Notice of Motion application dated 8<sup>th</sup> November 2013 is ill advised and is dismissed with costs.”**

In arriving at the said conclusion, the trial court cited and analysed several legal provisions including Acts of Parliament and International Conventions. Aggrieved by the said ruling, the appellants lodged this appeal. The appellants have set out several grounds contained in the Memorandum of Appeal dated 25<sup>th</sup> and filed on 28<sup>th</sup> April, 2014. The bottom line is that the appellants believe diplomatic immunity extends to both respondents, and that privilege is absolute.

The lower court was also faulted for holding that the appellants are subject to the jurisdiction of the local courts. I have, as required of me, gone through the record of the lower court with a view to arriving at an independent conclusion. Both parties have also filed submissions which I have considered.

Among the provisions relied upon by the parties are the Privileges and Immunities Act, Cap 179 Laws of Kenya and Assistance Agreement between the Kenya Government and United Nations Development Programme (UNDP).

I observe from the outset that any agreement between the Government of Kenya and any institution operating in the country is subject to the laws of this country. The point of reference therefore is the Act aforesaid. In particular, Part IV Sections 9 and 11 alongside the Fourth Schedule are instructive.

Section 11 (1) of Cap 179 provides as follows,

**1. “Where the Government of Kenya has, whether before or after the commencement of this Act, entered into any agreement with an external agency under which, in return for assistance or co-operation in works executed in, or services rendered to, Kenya by that agency, the Government has agreed that such agency or persons in its service should enjoy immunities or privileges, the Minister may, by order—**

2(a) declare that such agency is one to which this section applies; (b) provide that, to such extent as may be specified in the order, such agency shall have the immunities and privileges set out in Part I of the Fourth Schedule to this Act;

3(c) confer upon such classes of officers and servants of such agency as may be specified in the order, to such extent as may be so specified, the immunities and privileges set out in Part III of the Fourth Schedule, and for the purposes of any such order references in the said Fourth Schedule to the organization shall be construed as references to the external agency named in the order.

4(2) An order under subsection (1) of this section shall be so framed as to secure that there not conferred on any person any immunities or privileges greater in extent than those which are required to be conferred on that person by the agreement concerned and that no immunity or privilege is conferred on any person who is a citizen of, or permanently resident in, Kenya.

5(3) Where immunities and privileges are conferred upon any person by an order under subsection (1) of this section, the Minister shall, by notice in the Gazette, specify the persons who are for the time being entitled to those immunities and privileges.

6 (4) For the purposes of this section, “external agency” means— (a) the government of a foreign State; (b) a recognized agency of such a government; (c) an internationally recognized foundation or other body.”

It is clear from the above provisions that discretion is conferred upon the Minister concerned, to issue an order conferring immunity and privilege set out in the Fourth Schedule of the Act. The Fourth Schedule reads in part as follows,

**“1. Immunity from suit and legal process.”**

In addition, Section 16 and 17 of the Act are relevant. They provide as follows,

**“16. Evidence**

**If in any proceedings any question arises whether or not a person is entitled to the benefit of an immunity or privilege, or to exercise any power, under this Act, a certificate given by the Minister stating any fact relating to that question shall be conclusive evidence of that fact, and any such certificate purporting to be signed by the Minister shall be presumed to have been signed by him until the contrary is proved.**

**17. Making of orders**

**Any order made under this Act shall, unless a draft thereof has been laid before Parliament and approved by resolution before the making thereof, be laid before Parliament without unreasonable delay, and, if a resolution is passed by Parliament within twenty days on which Parliament next sits after such order is laid before it that the order be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of a new order.”**

The 1<sup>st</sup> appellant did not display to the lower court or this court any such certificate as contemplated by these provisions.

The 2<sup>nd</sup> appellant was employed locally by the 1<sup>st</sup> respondent. In the same Assistance Agreement cited by the appellant Article 1X clause 4 (a) it is provided,

**“The government shall grant all persons, other than Kenyan nationals employed locally, performing services on behalf of UNDP.”**

It is clear therefore, under both Section 11 and the provisions of the Assistance Agreement; the 2<sup>nd</sup> appellant does not enjoy any immunity. It matters not that the 1<sup>st</sup> appellant claims immunity. As I have observed, there is no order by the Minister and therefore, it is not absolute. It follows vicarious liability would attach in the circumstances. If the appellants’ submission were to be accepted, then there is a real danger that impunity may become the order of the day.

In the event this case were to proceed to hearing and the appellants found liable, there is evidence that motor vehicle registration No. 40UN 87K was covered by CIC Insurance, a Kenyan insurance company, as deponed to by one Lydia Mwangi, Assistant Claims Manager in her affidavit which is part of this record. Any order to settle a claim thereunder would in the circumstances be met under such policy.

Considering all the material presented in totality, this appeal must fail and is therefore dismissed with costs to the respondent.

**Dated, signed and delivered at Nairobi this 13<sup>th</sup> Day of June, 2018.**

**A. MBOGHOLI MSAGHA**

**JUDGE**