REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CONSTITUTIONAL PETITION NO. 426 OF 2016

Republic of Kenya all war Heroes & Others.…….……...….Applicants

Versus

The Hon. Attorney General & Others……Respondents

RULING

The petitioners herein have sued 97 Respondents, have named over 70 intended and or interested parties, and 6 *amicus curiae*. The Respondents and interested parties include former heads of states and governments, Foreign Embassies and or Diplomatic missions, International Organizations and individuals.

The petitioners have encountered challenges in serving court papers among majority of the Respondents mainly the former heads of states and governments, Foreign Embassies/Missions and or Diplomatic missions, International Organizations and some individuals. Of all the Respondents, only the 52nd , 89th, 94th Respondents and 66th interested party have appeared and or are represented in court. The rest of the Respondents and interested parties do not seem to have been served with the court processes pertaining to this case. Thus, when the matter came up before me on 23rd January 2017, I directed that all the parties be served and directed that the matter be mentioned on 27th February 2017 to confirm service.

On 24th January 2017 the petitioners filed an application under certificate of urgency and Mwita J directed that the file be placed before me on 25th January 2017. On the said date, the petitioners appeared before me and even though the notice of motion seeks many prayers, the petitioners stated that they had difficulties serving some of the Respondents among them the United Stated Embassy and sought an order from this court fashioned in a manner whereby it will help the Ministry of Foreign Affairs to help them effect service of the summons among the Foreign Missions/Embassies, International Organizations, and former heads of state and governments named in these proceedings.

Of great concern to this court is the question of Diplomatic Immunity. Diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities for both their official and, to a large extent, their personal activities.

The principle of diplomatic immunity is one of the oldest elements of foreign relations. Ancient Greek and Roman governments, for example, accorded special status to envoys, and the basic concept has evolved and endured until the present. As a matter of international law, diplomatic immunity was primarily based on custom and international practice. In the period since World War II, a number of international conventions (most noteworthy, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations) were concluded. These conventions formalized the customary

rules and made their application more uniform.

The special privileges and immunities accorded foreign diplomatic and consular representatives assigned to other countries reflect rules developed among the nations of the world regarding the manner in which civilized international relations must be conducted. The underlying concept is that foreign representatives can carry out their duties effectively only if they are accorded a certain degree of insulation from the application of standard law enforcement practices of the host country.

Among the international bodies named is the International Criminal Court. To my mind, The judges, officials and staff of the International Criminal Court, and any counsel, experts, witnesses and other persons required to be present at the seat of that Court, have the privileges and immunities set out in article 48 of the Rome Statute and the agreement on privileges and immunities contemplated in that article.

The issue for determination here is whether or not this court has the jurisdiction to entertain the application now under determination in light of the immunity referred and issue summons or even direct how the summons are to be served upon the Respondents in question. Lord Denning had this to say in *Ministry of Defence of the Government of the United Kingdom v. Ndegwa**[1]*** and *Thai-Europe v. Government of Pakistan:-**[2]***

> *"...the general principle is undoubtedly that, except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages...The reason is that, if the courts here once entertain the claim, and in consequence gave judgment against the foreign sovereign, they could be called on to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee."(Emphasis added)*

Kenya's jurisprudence courtesy of the application of the Vienna Convention on Diplomatic Relations and other Privileges and Immunities has over the years embraced absolute foreign immunity such that no suit can be entertained against a foreign sovereign without waiver by the foreign sovereign. This position has been affirmed by the Privileges and Immunities Act.[3]

In *Trandex Trading Corporation Ltd v. Central Bank of Nigeria**[4]*** Shaw L.J at page 908 observed as follows:-

> *"...there has been put before the court a wealth of material comprising decisions of foreign courts and the writings of international jurists which tend to show that over the last half century there has been a shift from the concept of absolute immunity to a narrower principle which excludes ordinary mercantile transactions from the ambit of sovereign immunity notwithstanding the sovereign states of a party to those transactions... so long as sovereign institutions confine themselves to what may in general terms be described as the basic functions of government a total personal or individual immunity from suit was unobjectionable..."* (Emphasis mine)

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".*

No such waiver as contemplated in paragraph two above has been obtained. Secondly, the respondents against whom this court is being called upon to issue summons falls under paragraph two above. Hence this court cannot grant the prayers sought in absence of such waiver.

It follows therefore that no suit can be entertained against a foreign sovereign without waiver by the foreign sovereign. It is not for this court to issue or decree the waiver. Secondly, the applicable test that ought to be employed when dealing with diplomatic immunity is whether or not the foreign sovereign was acting in a governmental or private capacity. Protection will then not be afforded in private transactions. This issue cannot be determined at this stage nor has it been clearly pleaded for the court to satisfy itself.

I must mention that the Constitution of Kenya, 2010 Provides for the place of international law in Kenya as follows:-

"Article 2(5) the general rules of international law shall form part of the law of Kenya….

(b) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".

My conclusion is that this court will be flouting international law and the provisions of the Privileges and Immunities Act[7] and indeed the constitution if it decrees or issues summonses in this case unless it is satisfied that the immunity has been waived. Further, it is not for this court to seek and obtain the waiver of the immunity or consent required. That responsibility lies with the petitioners. Doing so, in my view would be tantamount to the court descending into the arena of the dispute by assisting one party.

For avoidance of doubt it is important to mention that section 4 (1) of the Privileges and Immunities Act[8] provides for the application of the Vienna Convention set out in the first schedule of the act (that is articles of the Vienna Convention on Diplomatic Relations signed in 1961) and the section specifically provides that the said convention shall have the force of law in Kenya.

Article 32 of the first schedule of the Articles of Vienna Convention on Diplomatic Relations having the force of law in Kenya provides that the immunity from jurisdiction of Diplomatic agents and of persons enjoying immunity under article 37 thereof may be waived by the sending state and that such waiver must always be express. In my view, this suit was initiated before obtaining such waiver, and to the extent that such waiver was not sought and granted, the suit offends the above provisions and no lawful summons or

processes can be issued against the Respondents or interested parties or intended interested parties who enjoy the immunity expressly provided by the law.

Consequently, I decline to grant the orders sought, namely, that the court directs the Ministry of Foreign Affairs of the Republic of Kenya to assist in serving court summons/processes in this case against the Respondents mentioned above, namely, the Diplomatic missions/Embassies, former Heads of Governments and International Organizations/Bodies and generally the Respondents/Interested parties. The effect is that the application before me fails. No orders as to costs.

Orders accordingly. Right of appeal 30 days.

Dated at Nairobi this **1st** day of **February** 2017

John M. Mativo

Judge

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[1] Civil Appeal No. 31 of 1982 at page 965

[2] *{1975} 3 ALL ER 961*

[3] Chapter 179 of the Laws of Kenya

[4] {1977} 1 All ER 881

[5]*Rahintoolia V HE. The Nizam of Hyderabad and Others, [1957] all e.r. 441*

[6] {1983} KLR 68

[7] Cap 179, Laws of Kenya

[8] Ibid