



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CRIMINAL APPLICATION NO.88 OF 2016**

**ILYAS YUSUF WARSAME.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

By Notice of Motion dated 9<sup>th</sup> March 2016, the Applicant moved this court pursuant to **Articles 165(3) (a), (b), (d)(i) and (ii), (6) and (7), and Article 49(1)(h) of the Constitution** and the inherent jurisdiction of the court seeking essentially two (2) orders from the court:

***“ii) The applicant be admitted to such bail/bond as the honourable court shall deem fit and reasonable pending the hearing and determination of the application.***

***iii) An order/declaration do issue that the arrest of the applicant, the search of the house of the applicant, the detention of the applicant in police custody, the charging and arraignment of the applicant before the Chief Magistrate’s Court at Nairobi, Milimani Law Courts, in Criminal Case No.164 of 2014 (Republic –Vs- Hassan Abdi Mahamud & Others), the continued prosecution of the applicant in the said case and the continued detention of the applicant without bail in remand prison are the violations of the absolute immunity of the applicant from Kenyan jurisdiction and legal processes in contravention of Articles 29, 30, 31 of the Vienna Convention on Diplomatic Relations having the force of law in Kenya as contained in the Privileges and Immunities Act (Chapter 179, Laws of Kenya) read with Articles 2(5) and (6) of the Constitution.”***

The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the applicant. He swore a supplementary affidavit in further support of the application. The Applicant contends that he is the Third Secretary of the Embassy of the Federal Republic of Somalia in Kenya. He has a diplomatic passport and has been issued with a diplomatic identity card by the Kenya Government recognizing him as such. The Applicant states that pursuant to his diplomatic immunity that is recognized by the **Vienna Convention on Diplomatic Relations**, the **Privileges and Immunities Act** and the **Constitution** of Kenya, he has absolute immunity from being subjected to any criminal prosecution without the Federal Republic of Somalia expressly waiving that immunity. In breach of his diplomatic immunity, the Applicant averred that he had been charged, *inter alia*, for allegedly commissioning a terrorist act contrary to **Section 4(1) of The Prevention of Terrorism Act 2012**. The Applicant contends that he cannot be charged with any criminal offence in Kenya as long as he is a diplomatic agent in Kenya of the Federal Republic of Somalia. The Applicant averred that even if his diplomatic status is disputed, he was entitled to exercise his rights and fundamental freedom as provided by the **Constitution**. In that regard, the Applicant specifically stated that the decision by the trial court to deny him bail pending trial as guaranteed by the **Constitution**

amounted to breach of his fundamental right to fair trial. The Applicant urged the court, if it was inclined not to uphold his diplomatic immunity, to at the very least, release him on bail pending trial.

The application is opposed. IP. Leonard Bwire swore two replying affidavits in opposition to the application. He denied that the Applicant's assertion that he held any diplomatic office in the Federal Republic of Somalia's Embassy in Kenya. He averred that the Ministry of Foreign Affairs had confirmed in writing that the Applicant held no such diplomatic status as he claims. In any event, he deponed that the Applicant held a Kenyan identity card and a passport. *Prima facie* therefore, the Applicant was a Kenyan and could not enjoy any diplomatic immunity before the courts' of law in Kenya. He deponed that the Applicant was facing serious criminal charges before the trial court. The issue as to whether the Applicant was a diplomat or enjoyed diplomatic immunity was a matter that was before the trial court. He urged the court to give the trial court an opportunity to render a decision on the basis of the evidence that will be adduced. He averred that from the evidence placed before the court, the Applicant did not enjoy any diplomatic immunity. He was properly charged before the trial court under the provisions of the law and the **Constitution** of Kenya.

During the hearing of the application, this court heard oral rival submission made by Mr. Mbugua for the Applicant and by Ms. Aluda for the State. Mr. Mbugua submitted that the Applicant was a diplomat working at the Embassy of Federal Republic of Somalia. The Applicant's diplomatic status had been recognized by the Ministry of Foreign Affairs. One of the witnesses who testified before the trial court (PW15) had even admitted that the Applicant was a diplomat. The Embassy of the Federal Republic of Somalia in Nairobi had written a letter confirming that the Applicant was in fact a diplomat working at the said Embassy. The Ministry of Foreign Affairs had acknowledged that the Applicant was a diplomat. Learned counsel submitted that under **Section 2** of the **Privileges and Immunities Act**, the Applicant was a diplomatic agent and had absolute immunity from being prosecuted for any criminal offence allegedly committed in Kenya. He cited **Articles 31(1)** and **32(1)** of the **Vienna Convention on Diplomatic Relations** which provides that a diplomat can only be prosecuted in the courts of a receiving State if his diplomatic immunity is waived by the sending State. The waiver must be express and cannot be presumed. He submitted that the Ministry of Foreign Affairs cannot in the circumstances of this case deny the Applicant's diplomatic status. He urged the court to order the release of the Applicant on bail pending trial on account of his deteriorating medical condition. Learned counsel took issue with the attempt by the Ministry of Foreign Affairs to deny the Applicant's diplomatic immunity. He urged the court to peruse the documents that the Applicant has annexed to the affidavit in support of his application. It clearly points to the fact that the Government of Kenya recognizes the Applicant as a diplomat. In that regard, learned counsel relied on the cases of **Eugine Linyulu Isalamboi –Vs- Barbro Ekvall [2016] eKLR, Karen Njeri Kandie –Vs- Alssane Ba & Another [2015] eKLR** and **Elkana Khamisi Samarere & Another –Vs- The Nigerian High Commission [2013] eKLR** in support of his assertion that the Applicant, being a diplomat, should not be subjected to the criminal process in Kenya.

In response to the application, Ms. Aluda for the State submitted that the Applicant was not a diplomat. The Applicant was a Kenyan. He holds a Kenyan identity card and a Kenyan passport. She stated that the Cabinet Secretary, Ministry of Foreign Affairs had stated in writing that the Applicant was not a diplomat and was not recognized as such by the Government of Kenya. Learned counsel doubted the authenticity of the documents relied on by the Applicant in support of his contention that he was a diplomat working for the Embassy of the Federal Republic of Somalia. In particular, she stated that the letter allegedly written by the Embassy of the Federal Republic of Somalia was not signed and therefore it could not form a basis to authenticate the diplomatic status of the Applicant. The evidence so far collected pointed to the fact that the Applicant was a Kenyan and could not rely on an alleged diplomatic immunity to shield himself from criminal prosecution. She urged the court to dismiss the application as it lacked merit.

This court has carefully evaluated the facts in support and in opposition to the application. The Applicant claims that he is a Somali national. He alleges that he is a diplomat employed by the Embassy of the Federal Republic of Somalia. He has annexed a letter issued by the Federal Republic of Somalia dated 20<sup>th</sup> April 2016 which states that the Applicant is employed as a Third Secretary in that Embassy. The letter is written by Ali Mohammed Sheikh, a Counsellor at the said Embassy. The Applicant annexed a copy of a diplomatic identity card No.556/2013 issued by Ambassador S.K. Maina, the Chief of Protocol

in the Ministry of Foreign Affairs. The identity card recognizes the Applicant as The Third Secretary in the Embassy of the Republic of Somalia in Nairobi. The Applicant also annexed a diplomatic passport issued by the Federal Republic of Somalia on 22<sup>nd</sup> May 2013 that recognizes the Applicant as a diplomat. The passport is indorsed by the Immigration Directorate of the Republic of Kenya. It is these documents that the Applicant alleges supports his claim that he is a Somalia diplomat.

In opposition to this claim, the investigating officer in the case annexed a certificate issued under **Section 16** of the **Privileges and Immunities Act** to his affidavit issued by Ambassador (Dr.) Amina C. Mohammed, the Cabinet Secretary for Foreign Affairs of the Republic of Kenya dated 24<sup>th</sup> June 2016 which categorically states that the applicant “*is neither entitled to nor does he enjoy either the benefits of any immunities or privileges under the Privileges and Immunities Act Cap 179 of the Laws of Kenya*”. He further annexed a Kenyan Identity card No. 27132345 issued on 6<sup>th</sup> November 2007 which identifies the Applicant as a Kenyan Citizen. The Applicant also has a Kenyan passport which was issued to him on 1<sup>st</sup> April 2008. That passport will expire on 1<sup>st</sup> April 2018. The Applicant has used the passport to travel to several countries including The Republic of Mozambique, Uganda and Somalia. The State contends that the Applicant is a Kenyan and therefore liable to be tried before the Kenyan courts if the prosecution forms an opinion that a case has been made for such charges to brought against the Applicant.

This court, in its considered opinion, is not being called upon to make a declaration in regard to the nationality of the Applicant. From the documents availed to the court, the Applicant may well be a dual national of Kenya and Somalia. This court cannot render any decision regarding the authenticity or otherwise of the identity documents issued to the Applicant by the Republic of Somalia and the Republic of Kenya. The court noted that the Kenya Government, through the Director of Public Prosecutions has challenged the validity of the Kenyan identity card and the passport issued to the Applicant. That issue is pending determination by the trial court. In the circumstances of this application, this court holds, *prima facie*, that the Applicant appears to have authentic identification documents issued by the Republic of Somalia and the Republic of Kenya. In that regard, the Applicant may well be a diplomat employed by the Embassy of the Federal Republic of Somalia in Nairobi Kenya. He is also a Kenyan Citizen.

If that be the case, *can the Applicant invoke diplomatic immunity to prohibit is prosecution in the Kenyan courts?* **The Privileges and Immunities Act** sets out the circumstances under which immunity is conferred to persons having diplomatic status in Kenya. The **Act** incorporates some articles of the **Vienna Convention on Diplomatic Relations** as part of the Laws of Kenya. The Articles of the **Vienna Convention on Diplomatic Relations** having the force of law in Kenya are provided in the **First Schedule** of the **Act**. **Article 31(1)** of the **Convention** provides thus:

***“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.”***

**Article 32** of the **Convention** provides that:

***“1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.***

***2. The waiver must always be express.”***

In the present application, if the Applicant had only the nationality of the Republic of Somalia, this court would have, without any hesitation held that the Applicant had diplomatic status which conferred him immunity from both civil and criminal process as recognized under **The Privileges and Immunities Act**. However, as previously observed by the court, the Applicant *prima facie* holds dual citizenship as recognized in **Article 16** of the **Constitution** of Kenya. The issue for determination is therefore whether a diplomatic status conferred by a foreign government on a person, who *prima facie* holds dual citizenship, including the Kenyan citizenship, can invoke diplomatic immunity to shield himself from both criminal and civil liability before Kenyan courts. This court is of the considered opinion that the Applicant's diplomatic status can only invoked in a third country other than Somalia and Kenya. This is because, as a *prima facie* citizen of both countries, he cannot use the diplomatic status conferred to him by one of the two countries to escape criminal or civil liability before the municipal courts of either country.

This court therefore holds that the Applicant, being *prima facie* a Kenyan citizen, cannot invoke diplomatic status conferred upon him by another country which has conferred him citizenship to claim immunity from both criminal and civil processes in Kenya. The **Vienna Convention on Diplomatic Relations** and the **Privileges and Immunities Act** does not contemplate that a Kenyan citizen having diplomatic status conferred by another country in Kenya can use such status to shield himself from criminal or civil liability.

The upshot of the above reasons is that the Applicant's application to the effect that he holds diplomatic status conferred to him by the Federal Republic of Somalia and therefore has immunity from being subjected to a criminal charge before a Kenyan court lacks merit and is hereby dismissed. As regards the Applicant's application to be released on bail pending trial, this court noted that the trial has substantially proceeded and is about to be concluded. The Applicant is facing a serious charge that may, if convicted, result in his incarceration for a long period of time. This court cannot fault the trial court for denying the Applicant bail pending trial. The nature of the charges brought against the Applicant constitutes compelling reasons as contemplated under **Article 49(1)(h)** of the **Constitution** of Kenya to deny him bail pending trial. It is so ordered.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH 2017**

**L. KIMARU**

**JUDGE**