



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.393 OF 2014

BETWEEN

TALASO LEPALAT.....PETITIONER

AND

THE EMBASSY OF THE FEDERAL REPUBLIC OF GERMANY.....RESPONDENT

THE ATTORNEY GENERAL OF KENYA.....1ST INTERESTED PARTY

THE NATIONAL COHESION AND INTEGRATION

COMMISSION.....2ND INTERESTED PARTY

RULING ON A PRELIMINARY OBJECTION

1. The Petition dated 8th August 2014 seeks the following orders against the Respondent;
 - “(1) ... compensation for human rights violations of the right to privacy as enshrined in the Constitution, and***
 - (2) For physical and emotional pain and suffering, trauma, psychological torture, caused by the unlawful actions of the Respondent and***
 - (3) Special damages incurred and/or rendered for her medical treatment, and***
 - (4) Costs of this Petition be awarded to the Petitioner and***
 - (5) Any other relief that the Court may deem fit to grant.”***
2. The Petitioner through her brother and attorney, Lepalo Gideon, claims that during the Lake Turkana festival traditionally held at Loiyangalani village, Marsabit County and sponsored by among others, the Embassy of the Federal Republic of Germany, her photograph has been used since 2012 to market the festival in breach of her right to privacy protected by **Article 31** of the **Constitution**.
3. The Interested Parties, the Attorney General and the National Cohesion and Integration

Commission, by a notice of Preliminary Objection dated 28th October 2014 have applied that the Petition should be struck off as “**the Embassy of the Federal Republic of Germany is immune from this suit and this Court cannot assume jurisdiction.**”

Submissions by the Interested Parties

4. Mr. Kamunya who appeared for the Interested Parties submitted that the **Vienna Convention of Diplomatic Relations, 1961** as read with the **Privileges and Immunities Act, Cap.179** grants immunity to all diplomatic missions in Kenya and only where such immunity has been waived expressly can such a mission be subjected to proceedings in Kenyan Courts.

5. Further, that whereas the restrictive application of diplomatic immunity is an emerging issue in international law jurisprudence, it has no application in Kenya as was decided by the High Court in **Samarere & Another vs Nigeria High Commission [2013] eKLR** and earlier in **Twictor Investments Ltd vs Government of the USA [2003] eKLR**.

6. Lastly, that even on the facts, no prejudice would be occasioned to the Petitioner if the Petition is struck off as it was admitted in pleadings that the Respondent was merely a co-sponsor of the Lake Turkana Film Festival and she can pursue other persons who may have allegedly violated her rights by publishing her photograph in festival brochures without her consent.

7. For the above reasons, the Petition is sought to be struck out.

Petitioner’s Submissions in reply

8. In her submissions as presented by Mr. Lagat, Counsel appearing for the Petitioner (through her attorney aforesaid), the principle of diplomatic immunity is admitted but Counsel submitted as follows;

(i) The matter before the Court is premised on the **Constitution 2010** which binds all persons and that where any violation of the Bill of Rights is alleged, this Court, under **Article 165(3)(d)(i)** of the **Constitution** can grant relief. Reliance in that regard was placed on the decision of Odunga J. in **Gakuru & Anor vs Governor, Kiambu County & 3 Others [2013] eKLR** where he cited with approval the findings in **Nation Media Ltd vs A.G [2007], EA 261**.

(ii) The Petitioner’s right to privacy was violated and so she was entitled to protection from invasion and in making that submission, he relied on the case of **Khumalo & 4 others vs Holomisa CCT 53/01 per O’reagan J.** and **Barri vs Mada Hotels Ltd [2013] eKLR** per Waweru J.

(iii) **Article 31(c)** of the **Vienna Convention** and the **Privileges and Immunities Act, Cap.179** expressly restrict immunity “**in an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official function.**” The point made was that the Late Turkana Film Festival was a purely commercial activity and so any action founded on such a transaction cannot be immune from this Court’s jurisdiction.

(iv) **Article 55(1)** of the **Vienna Convention on Consular Relations** states that “**in carrying out official functions, those awarded diplomatic immunity should respect the laws and regulations of the receiving State.**” That therefore the Respondent in the present Petition ought to respect the laws of Kenya including those relating to an individual’s privacy.

(v) Since the law providing for diplomatic immunity seems to be in conflict with the Constitution, then by dint of **Article 2(4)** of the **Constitution**, it is void to

the extent of that inconsistency. In that regard the Court of Appeal decision in Aborwa vs IEBC and 2 Others [2014] eKLR was cited to support that submission.

(vi) That in applying the Bill of Rights the Court is obligated under **Article 20(3)** of the **Constitution** to develop the law to the extent that it gives effect to a right or fundamental freedom and adopt an interpretation that most favours the enforcement of a right or fundamental freedom. That therefore reading **Article 2(5)** and **(6)** of the **Constitution** together with **Articles 10** and **20(4)** of the **Constitution**, as well as **Article 19(1)** and **3(a)**, the Petitioner is properly before the Court in asserting her rights to privacy as conferred both by International Law and the Constitution.

(vii) That for the above reasons, the immunity of the Respondent can be restricted and absolute immunity would not advance the interests of justice and that the objection should therefore be overruled and the Petition determined on its merits.

Determination

9. State immunity is a rule of customary international law under which municipal Courts are prevented from exercising their adjudication and enforcement jurisdiction in disputes where a foreign State is named as a defendant (direct impleading) or where a foreign state intervenes by means of interpleader proceedings (indirect impleadings) – See Public International Law, 4th Edition by Alina Kaczorowska.

10. The author above also at page 354 set out three main justifications for State immunity viz;

§ *The principle of sovereign equality of States;*

§ *The practical impossibility of enforcing judgments against foreign States, in particular in a situation where the foreign State's assets are located outside the jurisdiction of the forum State; and*

§ *The principle, which is now obsolete (though technically not in the UK), that as a sovereign could not himself be sued before his own municipal Courts, so the sovereign of another State was similarly exempt from the jurisdiction of the local law.*

11. She also set out three aspects of the evolution of the doctrine of State immunity over the centuries as being;

§ *Initially, a State enjoyed virtually absolute immunity from proceedings in municipal Courts;*

§ *Subsequently, the immunity was recognized with regard to sovereign or public acts (jure imperii) of a State but not with respect to private acts (jure gestionis).*

12. As for the main challenges made to State immunity, she listed the following;

§ *First, that it is incompatible with the development of international criminal law as it shields Heads of State and other high ranking officials from being accountable for grave human rights abuses before otherwise competent Courts.*

§ *Second, the recognition by the international community that some rules of*

international law are of jus cogens character (i.e. they are superior to any other rules, including the rules on State immunity) entails that the prohibition of crimes having the character of jus cogens, such as genocide, crimes against humanity, war crimes, torture, should prevail over the rules on State immunity which do not enjoy the status of jus cogens.

§ *Third that it clashes with basis human rights such as the right of access to a Court, the right to a remedy and/or the right to effective protection.*

13. The above background is important in addressing the issues arising in the present objection. In my view, they are the following;

- (i) What is the law as regards State immunity?
- (ii) What is the place of restrictive immunity in Kenya?
- (iii) Is the Preliminary objection sustainable in the context of the present Petition and what are the orders to be made?

Law on State Immunity

14. By dint of **Article 2(5) and (6) of the Constitution**, general rules of international law as well as **“any treaty or Convention ratified by Kenya shall form part of the law of Kenya under this Constitution”** form part of the Laws of Kenya. One such Convention is the **Vienna Convention on Diplomatic Relations, 1961** as well as the **Vienna Convention on Consular Relations**.

15. Both have been domesticated vide the **Privileges and Immunities Act** and are the 1st, and 2nd Schedules to that Act, respectively.

16. It is agreed by all parties that **Article 31(1) of the Vienna Convention on Diplomatic Relations** grants immunity to any diplomatic agent and diplomatic mission from the criminal jurisdiction of the receiving State. Such an agent shall also enjoy immunity from civil and administrative jurisdiction except in the following cases;

“(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.”(Emphasis added)

17. In that context, the Petitioner in answer to the Preliminary Objection submitted that the issue in contest in the present Petition is one involving a **“commercial activity”** and therefore absolute immunity cannot be invoked by the Respondent to avoid liability.

18. In addressing the above issue, I note that the term **“commercial”** has been described as **“relating to buying and selling things”** – **Cambridge Advanced Learner’s Dictionary, Third Edition.**

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”

20. In **S vs India 82 ILR 14 at 17**, the Swiss Federal Tribunal placed employment contracts in the same category as contracts of sale and leases.

21. In applying the above principles and holdings to the present case, contrary to submissions by the Petitioner, what is in issue before me is not a commercial dispute, say between the Respondent and a supplier of brochures or other materials for the Lake Turkana Festival, but an alleged violation of the right to privacy. The latter is not by any stretch of imagination, a commercial activity. In fact in **Section 4 of the Foreign States Immunities Act 87 of 1981** of South Africa, “**commercial transaction**” has been defined to mean;

“(i) Any contract for the supply of services or goods;

(ii) Any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and

(iii) Any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority, but does not include a contract of employment between a foreign State and an individual.

In order to determine whether a transaction is commercial, it is therefore necessary to consider its nature and not its purpose. Although most commercial undertakings involving foreign states will be covered by this definition, there are still areas of uncertainty in which it will be necessary to have recourse to case law dealing with the distinction between acta jure imperii and acta jure gestionis. Probably the most helpful guidelines are those enunciated in Victory Transport Inc vs Comisaria General de Abastecimientos Y Transporters. According to this decision, acta jure imperii are limited to;

(1) Internal administrative acts, such as expulsion of an alien;

(2) Legislative acts, such as nationalization;

(3) Acts concerning the armed forces;

(4) Acts concerning diplomatic activity;

(5) Public loans.”

22. The Kenyan Privileges and **Immunities Act, Cap.179** has no definition for “**commercial transaction**” so far I can see and none has been pointed out to me. I shall therefore adopt the above definition for purposes of this judgment.

23. If the matter before me is not one involving a commercial but one involving alleged violations of the Bill of Rights to wit the right to privacy under **Article 31** of the **Constitution**, is the Respondent still immune from this Court’s jurisdiction?

24. The question of State immunity and human rights has troubled many a scholar. **Alina Kaczorowska** in her book cited elsewhere above stated at page 365 that “**human rights, although they enjoy ever increasing recognition by States have not yet reached the stage where they prevail over the rule of State immunity.**”

25. Later at page 384, she writes;

“As international law stands now, immunity means impunity and a State, can, indeed get away with murder.”

26. While the above statement may seem extreme, in **Skeen vs Federative Republic of Brazil, 566 F Supp 1414 (1983)**, it was held that Brazil could not be held liable for injuries caused by the grandson of the Brazilian Ambassador to the United States, who was entitled to immunity as a member of the diplomat’s family, arising out of a shooting outside a nightclub in Washington DC.

27. In **Tachiona vs Mugabe 169 F sup 2 d 259 (SDNY) 2001**, it was held that President Mugabe and agents of his political party, ZANU – PF were immune from liability in a claim that they had planned and executed a campaign aimed at intimidating and suppressing their political opponents in the Movement for Democratic Change Party.

28. Lastly, even in cases of international crimes, at page 381 of her book **Kaczorowska** stated that;

“Arguments based on violations of rights other than that relating to a Court e.g. the right to effective remedy, the right to effective protection and the right to non-discrimination have all failed to challenge the rule on State immunity. Further, even if municipal Courts, including the Supreme Court of a State, refuse to grant immunity to a foreign State, the victims of international crimes are unlikely to be compensated because a foreign State enjoys almost absolute immunity from enforcement.”

29. I am persuaded by the above reasoning and it is clear to me that even in cases of enforcement of human rights, State immunity in our realm must be given its due place and must prevail over all claims save where a restriction to it is proved e.g in commercial transactions as will be demonstrated herebelow.

30. In that context, all the submissions by the Petitioner on the right to privacy under the **Constitution, 2010** may find no favour *vis-à-vis* State immunity.

Restrictive Immunity

31. While absolute immunity was presupposed to be inviolable upto the 19th Century, the need to impose restriction on State immunity became imminent when at the end of the 19th Century, States became increasingly involved in commercial activities. That led to the need to establish a more realistic and pragmatic approach to disputes of a purely commercial nature when one of the parties was a foreign State. A distinction in international law was thereafter created between public acts of a State (acts *juri imperii*) and private acts such as trading and commercial activity (acts *jure gestionis*).

32. A state could only claim immunity in relation to acts *imperii*. One of the first Courts to apply the above distinction was the Supreme Court of Austria in **Dralle vs Republic of Czechoslovakia (1950) 17ILR 165** and other Courts have since followed suit.

33. In the United kingdom, the precedent on absolute immunity was broken in 1975 in the case of **The Phillipine Admiral [1977]AC 373** and later in the oft-quoted decision of Lord Denning in **Trendtex Trading Corp vs Central Bank of Nigeria [1977]QB 529**.

34. Similarly in South Africa, Margo J in **Inter-Science Research and Development Services (pty) Ltd vs Republica Popular de Mozambique 1980 (2) SA III CT** following **Trendtex (supra)** had no difficulty in finding that ***“there is good reason to believe that the rule of sovereign immunity has yielded to the restrictive doctrine.”***

35. Closer home, I have been pointed to the decisions in **Samarere (supra)** where the learned Judge stated that restrictive immunity has no place in our legal regime. I am of a different mind, with respect. I say so because the doctrine has received sufficient judicial and other recognition to be

classified as a general rule of international law. **Article 2(5)** of the **Constitution** recognizes general rules of international law as forming “**part of the law of Kenya.**” It is very difficult to argue therefore that restrictive immunity in the present world order cannot apply and that is why I would only agree with my revered brother, Dingake J. in **Bah vs Libyan Embassy 2006(1) BLR 22CIC** where he cited with approval the dictum of Lord Denning MR in **Rahimoola vs Nizam of Hyderabad &Anor [1958] AC 379 at 418** where he stated that;

“It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of the Court of acknowledged impartiality than by arbitrarily rejecting jurisdiction ...”

36. It will be noted that Lord Denning, ever the visionary, was making the above statement 20 years before the United Kingdom had formally acknowledged the doctrine of restrictive immunity. I have no hesitation in accepting that the doctrine is now well and alive in Kenya.

37. Does it apply to the present case? Sadly not. I have shown elsewhere above that the jury is still out on restrictive immunity in human rights based litigation much as the application of the restrictive doctrine in commercial and trade matters is no longer an issue for debate. The issue before me is neither one involving trade or commerce but allegations of violations of fundamental rights. I have seen no authority in international or municipal law which would grant this Court jurisdiction over such a matter and so the doctrine of absolute immunity was properly invoked and so hold.

Conclusion

38. Having made the findings as above, it is difficult for me to sustain the Petition with tremendous sympathy to the Petitioner who may well have a genuine claim against those who published her photograph without her consent.

39. If any advise is needed however, the Petitioner is still at liberty to pursue her claim in the Civil Courts or in this Court against any other co-sponsor of the Lake Turkana Festival who may have anything to do with her claim but who are not protected by the doctrine of State immunity.

40. In the end, the Preliminary Objection is upheld and the Petition dated 8th August 2014 is struck out.

41. As for costs, none were sought and in any event, let each Party bear its own costs.

42. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Lagat for Applicant

Mr. Kamunya for Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE