



Busuru & another v International Union for Conservation of Nature (IUCN) Represented by Its Eastern Regional Office & another (Petition 44 of 2017) [2024] KEELRC 1102 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1102 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 44 OF 2017**

L NDOLO, J

MAY 16, 2024

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 2(4), (5) & (6), 27(1) & (2), 28, 41(1) & (2) AND
48 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

PHILIP MARK BUSURU 1ST PETITIONER

WELDON KIBET KIRUI 2ND PETITIONER

AND

**THE INTERNATIONAL UNION FOR CONSERVATION OF NATURE (IUCN)
REPRESENTED BY ITS EASTERN REGIONAL OFFICE 1ST RESPONDENT**

HON ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Introduction

1. The 1st and 2nd Petitioners were employees of the 1st Respondent, having been employed on 15th September 2008 and 11th May 2009, respectively. They served until 15th December 2016, when they were notified that their contracts, would not be renewed beyond 28th February 2017.
2. By their Petition as amended, the Petitioners allege violation of their rights under *the Constitution* of Kenya by the 1st Respondent.



The Petition

3. The 1st Petitioner, Philip Mark Busuru states that he was employed by the 1st Respondent on 15th September 2008, initially in the position of Projects Finance Officer and later promoted to Senior Finance Officer effective 1st March 2014.
4. The 2nd Petitioner, Weldon Kibet Kirui states that he was employed on 11th May 2009, in the position of Driver Messenger. He was promoted to the position of Protocol Assistant/Driver as from 1st March 2014.
5. The Petitioners aver that the Respondents are bound by an agreement entered into by the 1st Respondent and the Republic of Kenya on 17th February 1998 and Legal Notice No 130 issued on 19th July 1999, conferring privilege and immunity from suit and legal process on the 1st Respondent.
6. The Petitioners state that, while they were on their annual leave, they were summoned to the 1st Respondent's Nairobi office on 15th December 2016, without prior notification as to the nature of the summons.
7. At this meeting, which was attended by some members of the 1st Respondent's management team, the Petitioners were notified that their contracts would come to an end on 28th February 2017 and would not be renewed. The Petitioners were issued with letters of termination of employment, invoking the end of term clause at section 4 of the contracts.
8. The Petitioners accuse the 1st Respondent of disregarding provisions of the general conditions of employment contained in section 18 of their contracts.
9. The Petitioners accuse the 1st Respondent of misrepresentation, citing the following particulars:
 - a. Misrepresenting to the Petitioners that the cause of their termination was the expiry of their contracts, while in reality the cause was a unilateral organisational restructuring;
 - b. Misrepresenting to the Petitioners that the contracts ending in the 1st Quarter of 2017 would be the first casualties for non-renewal, which turned out to be untrue.
10. The Petitioners state that the real cause of non-renewal of their contracts of employment was their positions becoming redundant owing to unilateral organisational restructuring. The Petitioners accuse the 1st Respondent of invoking termination of the contracts in advance of their time to evade paying the Petitioners redundancy dues.
11. The Petitioners further state that their positions were not funded by donor funds, which were on a reduction trend, but from funds internally generated from the organisation's projects, which were on a growth trajectory.
12. The Petitioners further accuse the 1st Respondent of discrimination, stating that out of 5 employees in the same area, whose contracts were coming to an end, only the Petitioners' contracts were not renewed. They add that within the organisation, 14 employees had their contracts renewed.
13. The Petitioners claim that following revision of the conditions of service by the 1st Respondent in February 2011, all staff whose contracts were terminated as a result of restructuring and redundancy were paid a redundancy package. They complain that they were not considered for a severance package, yet they were covered under the conditions of service, 2011.
14. The Petitioners claim that soon after the termination of their employment, their positions and duties were consolidated and assigned to other employees. They further claim that the termination of



- their employment was predetermined, stating that from about two years to termination, they faced uncomfortable and unfair working conditions orchestrated by their respective supervisors, who would make personal threats and statements on the imminent termination of the Petitioners' employment.
15. The Petitioners plead that the 1st Respondent had waived its diplomatic immunity with respect to employment matters for the Regional Office staff. They cite the South African case of *Ditse Emily Mdluli v International Union for the Conservation of Nature* (Case No JSA 457/2016) to support this position.
 16. The Petitioners further plead that the 1st Respondent waived its immunity when it actively descended into the arena of this dispute and even sought orders from the Court and proof from the Petitioners. They accuse the 1st Respondent of breaching Article 1 of the Agreement dated 17th February 1998.
 17. The Petitioners also accuse the 1st Respondent of issuing them with incorrect and incomplete certificates of service plus negative references, thus hampering their future employment. They further complain that their departure was not handled properly as per established practice.
 18. The Petitioners seek the following remedies:
 - a. A declaration that the 1st Respondent's Director General expressly waived immunity from suit and legal process in relation to all employment matters for the Kenya office staff, by approving the Conditions of Service by IUCN in Kenya, February 2011;
 - b. A declaration that the Respondents have infringed on the Petitioners constitutional rights under Articles 2(4), (5) & (6), 27(1) & (2), 28, 41 (1) & (2) and 48 of the Constitution of Kenya, 2010;
 - c. Damages for breach of constitutional rights @ Kshs. 10,000,000 for each Petitioner and injury to career and loss of employability:
 - i. 1st Petitioner USD 634,752 (Kshs. 69,187,968)
 - ii. 2nd Petitioner USD 313,872 (Kshs. 34,212,048)
 - d. A declaration that the 1st Respondent acted unfairly by terminating the Petitioners' employment on the basis of end of contract instead of redundancy on account of abolition of office;
 - e. A declaration that the termination was as a result of redundancy and payment of benefits in accordance with clause 8.3 of the 1st Respondent's Conditions of Service for Kenya as follows:
 - i. 1st Petitioner USD 25,035
 - ii. 2nd Petitioner USD 5,261
 - f. A declaration that the termination was unfair and compensation @ 12 months' gross pay for each Petitioner as follows:
 - i. 1st Petitioner USD 52,896
 - ii. 2nd Petitioner USD 12,072
 - g. An order directing the 1st Respondent to issue each Petitioner with a certificate of service in conformity with Section 51 of the Employment Act;



- h. An order directing the 1st Respondent to pay the 1st Petitioner USD 5,000 (Kshs. 545,000) being allowance for additional responsibilities of supporting the Global Internal Audit function;
- i. Costs plus interest.

The Response

- 19. The 1st Respondent responded to the Petition by a replying affidavit sworn by its Regional Human Resources Manager, Nancy Njoki Ntinu on 24th March 2022.
- 20. Ntinu depones that the Petitioners' employment was, at all material times, on the basis of fixed term contracts of between 2 and 3 years. She adds that the Petitioners' last contracts dated 27th February 2014 were for a fixed term of 3 years, commencing on 1st March 2014 and terminating on 28th February 2017.
- 21. Ntinu states that the Petitioners were, by respective letters dated 15th December 2016, invited to a meeting to discuss the end of their contracts of employment. She adds that the Petitioners were well aware that their contracts were coming to an end. The allegations of misrepresentation and breach of the Petitioners' constitutional rights made by the Petitioners are denied.
- 22. Ntinu refers to a provision in the Petitioners' employment contracts stating as follows:

“I acknowledge having understood and agree that my fixed term contract has ended as outlined in Section 4 of my contract of employment. I further declare that I shall have no further contractual claims or any other claims on IUCN in respect of all my former contracts of employment with IUCN and IUCN is hereby discharged of any claims on my behalf.”
- 23. Ntinu denies that the Petitioners were discriminated against and states that each employment contract is unique. She further denies that there was redundancy at the time the Petitioners' contracts came to an end. She states that the Petitioners were each re-issued with respective certificates of service on 5th October 2021, with all details as required by law.
- 24. Ntinu asserts that the 1st Respondent enjoys immunity from legal proceedings and denies the averment that the 1st Respondent had at any time waived its immunity. The jurisdiction of this Court to entertain the Petition is therefore challenged.

Determination

- 25. The first issue for determination in this Petition is whether the Court has jurisdiction to entertain the Petition in view of the immunity from legal process granted to the 1st Respondent by virtue of Legal Notice No 130 dated 19th July 1999.
- 26. In their initial Petition, the Petitioners had challenged the constitutionality of the *Privileges and Immunities Act* and had put forth a prayer in the nature of a declaratory order that the immunity granted to the 1st Respondent by Legal Notice No 130 dated 19th July 1999 is unconstitutional.
- 27. This issue was the subject of a notice of Preliminary Objection dated 24th May 2017 by which the 1st Respondent objected to the Petition on the ground of immunity from court proceedings granted to



it by Legal Notice No 130 of 1999. The objection was considered by O.N Makau J, who in a ruling delivered on 26th October 2018 stated as follows:

“I have found that a plea of immunity from legal process as raised by the 1st respondent herein meets the threshold of a valid Preliminary Objection and it should be determined at the earliest time possible because it goes to the jurisdiction of the Court. I have further found that this Court has jurisdiction to entertain a petition challenging the constitutionality of a Statute and instruments that confer to an international entity diplomatic immunity from civil suits and legal process like in the present petition.”

28. However, the Petitioners subsequently amended their Petition by dropping the issue of constitutionality of the instruments granting the 1st Respondent immunity and instead raising a plea that the 1st Respondent had by conduct, waived its immunity. The effect of the amendment was that the character of the Petition, upon which my brother Judge had determined the Preliminary Objection raised by the 1st Respondent, was fundamentally altered.
29. The Petitioners base their plea that the 1st Respondent had waived its immunity on two reasons; first, that the 1st Respondent subjected itself to the jurisdiction of the Court by filing a response to the Petition and second, by issuing a document titled ‘Conditions of Service for IUCN in Kenya’.
30. In their final submissions dated 2nd February 2024, the Petitioners cited a number of decisions where parties were deemed to have waived their immunity from legal process (see *International Planned Parenthood Federation v Pamela Ebot Arrey* [2016] eKLR, *Alphonse Kingo’ri Ngunyi v IFC (Cause No 468 of 2018)* and *Araba [Aderbis v Alliance for a Green Revolution in Africa Cause No E1020 of 2021](#)*)).
31. In the present case, the Court did not see any evidence of the Petitioners’ former employer having waived its immunity either expressly or by conduct. Regarding the assertion that the 1st Respondent had submitted to the jurisdiction of the Court by filing a response to the Petition, I have already stated that the 1st Respondent had in fact raised a Preliminary Objection, which was overruled by the Court, on account of the plea made by the Petitioners in their initial Petition that the instruments granting the immunity were unconstitutional.
32. Having lost on its Preliminary Objection, the 1st Respondent was compelled to respond to the Petition and its compliance cannot now be used against it to construe waiver of immunity.
33. With respect to the document titled ‘Conditions of Service for IUCN in Kenya’ issued by the 1st Respondent to its employees, the only thing to say is that this was an internal employment document issued to employees in the ordinary course of business and it could not in any way be construed as a waiver of immunity.
34. That said, I find and hold that the 1st Respondent’s immunity remains intact and this Court has no jurisdiction to entertain the Petition. With this finding, the only thing to do is to strike out the Petition, which I hereby do.
35. Each party will bear their own costs.
36. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF MAY 2024

LINNET NDOLO

JUDGE



Appearance:

Mr. Namada for the Petitioners

Mr. Kimani for the 1st Respondent

No appearance for the 2nd Respondent

