



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Civil Application 1015 of 2008

TANAD TRANSPORTERS LTD.....APPLICANT

VERSUS

UNITED NATIONS CHILDRENS FUND.....RESPONDENT

RULING

The applicant filed an originating summons pursuant to the provisions of the Arbitration Act and Section 3A of the Civil Procedure Act seeking to compel the respondent to submit to arbitration within twenty one days of the issuance of the order. In the alternative, the applicant further prayed to be granted leave to commence suit against the respondent. The originating motion is supported by the annexed affidavit of Musa Said Hassan, the managing director of the applicant. On 28th April 2009, the applicant applied under provisions of Order V Rule 17 and 32 of the Civil Procedure Rules seeking to be allowed by the court to serve process upon the respondent by substituted service. The applicant claimed that the respondent had declined service citing diplomatic immunity and had even denied access to its offices to the process server. It is applicant's case that the respondent, being a party to an agreement that has an arbitration clause, and which agreement was of a commercial nature, was precluded from invoking its diplomatic immunity. When the applicant's counsel appeared before this court on 12th June 2009, this court directed the applicant to make arguments in regard to whether this court has jurisdiction to hear this application in light of the fact that the defendant was a United Nations organization and therefore is accorded immunity from civil proceedings by the Republic of Kenya.

Mr. Ligunya for the applicant submitted that the immunity granted to the respondent did not extend to a business transaction entered between the applicant and the respondent. He submitted that the respondent had refused to submit itself to arbitration despite the fact that the agreement provided for any dispute arising from the contract to be determined by arbitration. He submitted that under Article 17 of United Nations Convention on Jurisdictional Immunities of States and Their Properties, immunity could not be invoked in commercial transactions. He urged the court to allow the application.

I have carefully considered the submissions made by learned counsel for the applicant. I have also done a little research on the subject at hand. The issue for determination by this court is whether this court has jurisdiction to entertain a suit where one party has immunity from both criminal and civil proceedings in this court. Section 4(1) of The Privileges and Immunities Act (*Cap 179 Laws of Kenya*) provides that "subject to Section 15, the articles set out in the first schedule (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in Kenya and shall for that purpose be construed in accordance with the following provisions of this Section." Article 31 of the Vienna Convention is one of the articles that appear in the first schedule of the Act. It provides that:

"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."*

In the agreement between the applicant and the respondent, the recital provided that the transportation services required by the respondent

would be in regard to its official programme supplied to final destinations as stated by UNICEF. The agreement provided under clause 22 that in the event of any dispute, the parties shall endeavour to settle the dispute amicably through conciliation in accordance with “*UNCITRAL Conciliation Rules*.” If conciliation fails, the aggrieved party or both parties will be required to refer the dispute for resolution by arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining. Clause 23 of the agreement provides as follows:

“*Privileges and Immunities*

The Privileges and Immunities of the UN, including its subsidiary organs, are not waived.”

It is therefore clear that for the applicant to succeed in its claim that this court has jurisdiction to hear the dispute, it must establish that the commercial activity exercised by the respondent is outside its official function. In the present application, it is clear that the transportation agreement between the applicant and the respondent related to the official function of the respondent. The respondent therefore has full diplomatic immunity from court proceedings.

Further, the arbitration clause in the agreement provided that the dispute would be resolved under UNCITRAL Arbitration Rules. The applicant was required to establish that Kenya is a signatory to the said rules and further that the said rules are applicable in Kenya to entitle a party to invoke the said rules before the Kenyan courts. The agreement did not provide the venue where such disputes would be determined. Article 16 of the UNCITRAL Arbitration Rules provides for the place of arbitration. Other articles of the rules provide circumstances under which arbitration proceedings may be commenced under the said rules. My understanding of arbitrations conducted under the said UNCITRAL Arbitration Rules is that the Kenya Arbitration Act, 1995 and the Civil Procedure Act do not apply. The applicant cannot therefore invoke the provisions of the said Kenyan municipal law to compel the respondent to submit to arbitration. The applicant has no choice but to commence arbitration proceeding under the said UNCITRAL Arbitration Rules.

It is evident from the foregoing that this court lacks jurisdiction to hear and determine the dispute between the applicant and the respondent, even in the circumstances where the applicant established that there exists an arbitration clause. Further, the respondent has full diplomatic immunity from civil proceedings in this court under The Privileges and Immunities Act and the Vienna Convention on Diplomatic Relations, 1961. The respondent has not waived its diplomatic immunity to enable this court have jurisdiction to hear the matter. The applicant knows what to do in accordance with the UNCITRAL Arbitration Rules. The applicant’s originating summons is therefore improperly before this court and is hereby struck out with no orders as to costs.

DATED AT NAIROBI THIS 1ST DAY OF JULY 2009

L. KIMARU

JUDGE