

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 2213 OF 1991

DEVA SAMAT KESHWALA & 10 OTHERS.....APPLICANTS

VERSUS

TOLK INVESTMENTS (K) LTD.....DEFENDANT

UNITED NATIONS FOOD PROGRAMME.....DEFENDANT

RULING

On the 15.12.92 I dismissed the application filed by the second defendant on 10.2.92. That application sought an order that the name of the second defendant be struck out and the suit against the second defendant be dismissed with costs on the ground that the second defendant is immune from the jurisdiction of the court under the Privileges and Immunities Act – Cap 179. I dismissed the application on the ground that the claim arises from a purely private commercial transaction and on the ground that:

“ modern developments in the international law is to discard the doctrine of absolute immunity in favour of the doctrine of restrictive immunity. The latter doctrine does not give immunity in transaction of a commercial nature”

The second defendant has now filed an application asking the Court to review its dismissal order on the grounds *inter alia* that the order contains errors of law apparent on the face of the record.

In support of the application Mr Le Pelley for the second defendant has drawn to the attention of the court the difference between state immunity and diplomatic immunity for which I am grateful. He argues that case law which I relied on cannot qualify or derogate from the rights given by a statute. It is now clear that the cases I relied on, namely *Tredtex Corporation versus Central Bank of Nigeria* [1977] 1 QB 529 and the case of *Ministry of Defence of the Government of United Kingdom versus Joel Ndegwa* – [1982 – 88] I KAR 135 deal with the issue of state (sovereign) immunity in respect of sovereign immunity there is a conflict between absolute theory and restrictive theory. The restrictive theory only affords immunity in respect of acts in exercise of sovereign authority and no immunity is given in respect of commercial activities. The English State immunity Act, 1978 now embodies the theory of restrictive immunity.

In our case, the diplomatic immunity is governed by the Privileges and Immunities Act – Cap 179 which by s 9 12 of the Act and by subsidiary legislation at page 37 of the Act grants the United Nations *inter alia* immunity from suit and legal process in this country I have re-examined the plaint. It is clear from the plaint that it is not the second defendant which entered into contract with the plaintiffs but the first defendant it is averred in para 5 that the first defendant was contracted by the second defendant to transport relief food from Kenya to Sudan. As the pleadings stand it is clear that there is no commercial transaction disclosed between the plaintiffs and the second defendant. The dispute is not between the first defendant and the second defendant but between the second defendant and third parties.

In the circumstances I am satisfied that there is a clear error of law apparent on the face of the ruling and that error lies in the application of the law on state immunity (restrictive doctrine) to diplomatic immunity contrary to clear provisions of Privileges and Immunities Act. There is also an apparent error of fact on the face of the record that the claim of plaintiffs against the second defendant arises from a private transaction which finding of facts is contrary to the pleadings.

For those reasons, I allow the application with no orders as to costs. I set aside the order made on

15.12.92 dismissing the second defendants application. I allow the second defendants application dated 9.10.91 and filed on 10.2.92 with costs to the second defendant. Consequently, I strike out the name of the second defendant from the consolidated suits with costs to the second defendant.

Dated and delivered at Nairobi this 11th day of December 1995 .

E. M GITHINJI

JUDGE