

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
CONSTITUTIONAL PETITION No. E001 OF 2021

LUKO OGINI SILA.....1ST

PETITIONER/APPLICANT

SAMSON MAENDE.....2ND

PETITIONER/APPLICANT

OGALO SEWE.....3RD

PETITIONER/APPLICANT

MOSES OTIENO OMOLO.....4TH

PETITIONER/APPLICANT

ODERO JOSEPH OYUGI.....5TH

PETITIONER/APPLICANT

TOM MBOYA ODHIAMBO.....6TH

PETITIONER/APPLICANT

KENNEDY OCHIENG ONYANGO.....7TH

PETITIONER/APPLICANT

VERSUS

**THE INTERNATIONAL CENTRE FOR INSECT
PHYSIOLOGY AND ECOLOGY (ICIPE).....1ST**

RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND

RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD

RESPONDENT

RULING

1. By way of a Notice of Motion dated 11th March 2025, the Applicants seek the following orders;

1) That the petition filed against the 1st Respondents be struck out.

2) The costs of this Application be awarded to the 1st Respondents.

2. The Application is premised on the grounds on the face of it and the averments of the deponent in the supporting affidavit. The Applicant contends that the Petition is an abuse of the court process for reasons that the 2nd Respondent enjoys diplomatic immunity from legal process pursuant Sections 9, 11 and 15 and part 1 of the 4th Schedule of the Diplomatic Immunity Act CAP 179 and Legal Notice 13 of 1989.

Petitioners'/Respondents' Grounds of opposition

3. The Petitioners filed Grounds of opposition dated 12th March 2025 premised on the following grounds;

1) The application shall prejudice embarrass or delay the fair trial of the petition, in that the issue concerning the Privileges and Immunities (International Centre for Insect Physiology and Ecology) Order have been raised in paragraphs 9 and 10 of the petition dated 16th June 2021.

2) The matters raised are already an issue in the petition and shall be determined together with other issues.

3) The application is likely to lead to a duplication of work which can be determines together.

4) Joinder of parties is allowed under Order I rule 7 and 9 of The Civil Procedure Rules and therefore an

issue should not be raised on the matter prematurely.

4. The parties were directed to file submissions. The 2nd Respondent filed submissions dated 17th July 2025 whereas the Petitioners filed submissions dated 15th May 2025 through the firm of **Messrs. G.S Okoth & Company Advocates.**

2nd Respondents' Submissions

5. Counsel submitted that the petitioners acknowledged in their pleadings that the Respondent is an intergovernmental organization established in 1986 with headquarters in Nairobi. Further, that in paragraph 9 of the petition they state that the Privileges and Immunities Act (International Centre for Insect Physiology and Ecology) Order, 1989 is inconsistent with the Constitution and null and void under Article 40(3) (b) (ii) of the Constitution in so far as it grants immunity to the Respondent from suit and legal process for violation of section 111 of the land Act.
6. Counsel contended that the issue of immunity must first be determined as it goes into the root of the court's jurisdiction. He cited the case of **Karen Njeri Kandie vs Alssane Ba & Another [2015] eKLR** in this regard. Further, that ICIPE enjoys full immunity from suit and legal process, a necessary privilege to allow it to function independently and without interference in accordance with Kenya's international obligations; unless and until it expressly waives its immunity. This is by virtue of its status as an international organization operating under diplomatic privilege pursuant to section 9 &

11 and Part 1 of the 4th Schedule of the Privileges and Immunities Act Cap 179 as well as Legal Notice 13 of 1989.

7. Counsel urged that immunity from suit and legal process means that, a party contemplating to raise a legal right against the respondent cannot do so in a court unless the Respondent waives the immunity. The said immunity operates as a procedural bar, citing the decision of the Supreme Court of Kenya in **Karen Njeri Kandie Vs Alssane Ba & Another (2017) eKLR** in this regard.
8. Counsel urged that the court further stated that the test to determine whether immunity was Absolute is whether it is just and reasonable. In this circumstance the petitioners contend that the immunity from legal process inconsistent with Article 40(3) of the constitution and section 111 of the land act and this right were violated by the employees of the government.
9. Counsel urged that by their own admission and the legal position is that acquisition land for public use is done by the government and not the 1st Respondent. That the land vested in ICIPE was done so through allocation by the Government of Kenya and therefore, such claims ought to be addressed to the proper governmental authorities and not ICIPE. Counsel prayed that the court finds that the Petition is improper and accordingly strikes out the suit with costs.

Respondent/petitioners' submissions

10. Counsel submitted that the fundamental rights and freedoms of the Respondents are guaranteed by Article 40 (3) of the Constitution of Kenya and which rights and

freedoms have been manifestly violated with impunity by employees of the Government of the Republic of Kenya. Further, that the privileges and immunities (International Centre for Insect Physiology and Ecology) order 1989 grants the 1st respondent immunity from suit and legal process for violation of Section 111 of The Land Act. The said order is therefore inconsistent with the Constitution in so far as it denies the Respondents access to justice and clothes the 1st respondent with immunity from suit and legal process for violation of the Respondents constitutional rights of the petitioners.

- 11.** Counsel cited Article 2 (1) of the constitution and Rule of 5 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, urging that filing this Petition against I.C.P.E. The Honourable Attorney General and the National Land Commission is legally and constitutionally proper. Further, that in the same breath the application dated the 11th day of March is misconceived and incompetent. He prayed that the application be dismissed with costs.

Analysis and Determination

- 12.** The issue that arises for determination is; Whether the Petition should be struck out due to the 2nd Respondents' diplomatic immunity
- 13.** Section 9 of the Privileges and Immunities Act provides as follows;

This section shall apply to an organization which the Minister may, by order, declare to be an

organization of which Kenya, or the Government, and one or more foreign sovereign powers, or the government or governments thereof, are members.

(2) The Minister may, by order—

provide that an organization to which this section applies (hereinafter referred to as the organization) shall, to such extent as may be specified in the order, have the immunities and privileges set out in Part I of the Fourth Schedule to this Act, and shall also have the legal capacities of a body corporate;

14. The fourth schedule of the Privileges and Immunities Act provides as follows;

“Immunity from suit and legal process.”

15. A plain reading of the provisions would lead one to the conclusion that the applicant is indeed immune from all suits instituted in court against it. However, the 2nd Respondent’s have pointed out that the issue of the constitutionality of said immunity is a pertinent issue for determination in the Petition.

16. I have perused the Petition, and especially in paragraph 9, the petitioner has indeed sought to have the court find that the Privileges and Immunities enjoyed by the applicant are inconsistent with Article 40(3) (b) (ii) of the Constitution of Kenya.

17. This issue was considered by the Court of Appeal in **International Centre for Insect Physiology and Ecology (ICIPE) v Nancy McNally 2018 KECA 569 (KLR)**, while

revisiting the Shelter Afrique Case expressed, the court itself as hereunder:

“Constitutional issues of access to justice, right to property, fair labour practices, right to privacy, and the right to human dignity have been raised. Those are issues any court of law would be loath to dismiss casually. The respondent says they call for the “reasonability and justiciability” test despite her concession that the appellant had immunity. Was the immunity so absolute that constitutional provisions may not be set up against it? Are the instruments and laws relied on to support immunity subject to section 7 (1) of the Sixth Schedule of the Constitution?.....Those are relevant questions to ponder, and there may be others...There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of United States International University (USIU) vs Attorney General [2012] eKLR which was upheld by this Court in Daniel N. Mugendi vs Kenyatta University & 3 Others [2013] eKLR.”

18. The Court went on to state;

“The Privileges and Immunities Act must be examined together with all the instruments granting immunity for their full tenor and effect. It

will be explored whether the immunity is absolute or qualified or restricted. This Court in the Shelter Afrique case found the immunity was absolute and upheld the PO sustained by the trial court, but the Supreme Court, in its analysis, found that the immunity was not absolute. There is certainly a process to follow before reaching that conclusion, and the process is not a summary one like a PO. The trial court was right in rejecting the PO in respect of the constitutional issues, and we so find.

19. I am bound to follow the decision of the Court of Appeal and I find no divergent fact that would make me distinguish the basis of the instant matter from the holding of the Court of Appeal one. Therefore, it follows that the Application is unmerited. Diplomatic immunity from suits is not absolute. More succinctly, to place diplomatic immunity over constitutional rights and freedoms of the citizens as guaranteed in their supreme law would mean that the sovereignty of the state has been surrendered to other external authority than that which is guaranteed to a state under international law.

20. International institutions that are clothed with diplomatic immunity, while operating within the territory of Kenya, have to respect and operate within the constitutional parameters set by the supreme law of the law of the land, the Constitution (of Kenya). Thus, diplomatic immunity does not shield the 1st Respondent from Constitutional Petitions such as the instant one. Additionally, given that the issue of the

constitutionality of the provisions that the applicant seeks to rely on to have the suit struck out are a subject of the Petition, it would be premature to determine the same at this juncture.

- 21.** In the premises, the application is dismissed in its entirety with costs to the Petitioners.
- 22.** The matter be mentioned on 3rd February 2026 for compliance with Order 11 of the Civil Procedure Rules, 2010.
- 23.** Orders accordingly

Ruling dated, signed and delivered virtually via the Teams Platform this 18TH day of December 2025.

HON. DR IUR NYAGAKA

JUDGE

From 10:58 AM in the presence of,

Court Assistant: Terence

Ms. Oyala advocate for the Petitioner/ Respondent

The AG for the respondents/ applicant, absent