Embassy of the Kingdom of Belgium in Nairobi v Mande (Civil Appeal 184 of 2019) [2025] KECA 214 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 214 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 184 OF 2019

PO KIAGE, LA ACHODE & GV ODUNGA, JJA

FEBRUARY 7, 2025

BETWEEN

EMBASSY OF THE KINGDOM OF BELGIUM IN NAIROBI ..... APPELLANT

AND

CHARLES GITAU MANDE ..... RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (L. Ndolo, J) delivered on the 5th day of May 2017 in ELRC Cause No. 416 of 2016)

JUDGMENT

1. The respondent, Charles Gitau Mande, in his Memorandum of Claim filed in the Employment and Labour Relations Court, Nairobi dated March 15, 2016, against the appellant sought compensation for unlawful dismissal, injured reputation and loss of future earnings. According to the respondent, he was locally recruited as a gardener by the respondent from 1st June 1991 for an undetermined period. However, on 7th March 2013, the respondent was accused of theft of a watch on 26th January 2013 at the appellant's Chancery. After the hearing, the respondent was discharged from his duties on the grounds of grave misconduct and breach of trust and was paid his full salary for March 2013, accrued leave of 14 days and pension savings amounting to Kshs 3,500 for the 22 years service. According to the respondent, despite the intervention by the Ministry of Foreign Affairs and the Commission on Administration of Justice (Ombudsman) the appellant maintained its position that the respondent was not entitled to compensation. It was the respondent's case that the allegations of theft made against him were not proved to warrant his summary dismissal by the appellant.

2. The appellant in response to the Claim filed a Notice of Motion dated 28th November 2016 in which it sought to have the Claim struck out with costs on the ground that, being a diplomatic mission, it was not a body corporate capable of suing or being sued and that it enjoyed diplomatic immunity pursuant to section 4(1) and Article 31 of the First Schedule to the *Privileges and Immunities Act*. According to the appellant, the proper respondent ought to have been the Kingdom of Belgium which

similarly enjoys jurisdictional immunity under the general principles of customary international law as domesticated under Article 2(5) of *the Constitution* and that both the respondent and the Kingdom of Belgium had not waived their immunity.

3. After considering the said application, the learned trial Judge in her ruling delivered on 5th May 2017, dismissing the application, expressed herself as hereunder:

> "To my mind, these are not straightforward issues. Foreign Embassies and Missions are a special category of employers operating under specific legal and administrative arrangements. The Court would need to examine the specific arrangements in this case in order to determine whether the proper party has been sued. Regarding the issue of immunity, the Court will need to delve into the nature and extent of the immunity enjoyed by the Embassy of the Kingdom of Belgium in Nairobi. In my view these are not questions that can be adequately answered in an interlocutory application such as the one before me, which in essence is a preliminary objection."

4. Dissatisfied with that decision, the appellant moved to this Court challenging the said decision on the grounds that the learned Judge erred in law: by failing to hold that the court had no jurisdiction to entertain the respondent's Memorandum of Claim pursuant to the general principles of customary international law and Article 31 of the Vienna Convention on Diplomatic Relations as domesticated under Article 2(5) of *the Constitution* of Kenya and the *Privileges and Immunities Act*; by failing to hold that the court had no jurisdiction to entertain the respondent's Memorandum of Claim despite the appellant being a representative of the Kingdom of Belgium, a foreign sovereign that has not waived its immunity from the jurisdiction of the court; by failing to hold that the court had no jurisdiction to entertain the respondent's Memorandum of Claim in light of the principle of absolute immunity of foreign states from proceedings in the courts of Kenya which has not been restricted by any Kenyan legislation; by failing to determine whether it had jurisdiction to entertain the respondent's Memorandum of Claim in the first instance despite being urged to do so in the application; and by failing to strike out the respondent's Memorandum of Claim despite the existence of an absolute bar to the Claim in the form of the diplomatic immunity vested in the respondent which has not been waived by the Kingdom of Belgium.

5. It was sought that the appeal be allowed and that the Notice of Motion application dated 28th November 2016 be allowed as prayed with costs.

6. When the appeal was called out for hearing on the Court's virtual platform on 1st October 2024, learned counsel, Mr Wafula, appeared for the appellant while learned counsel, Ms Judith Kubai, appeared for the respondent. Both learned counsel informed us that they had filed their submissions which they highlighted briefly.

7. On behalf of the appellant, it was submitted: that based on Black's Law Dictionary, Ninth Edition's definition of "embassy" the party brought to court was not a juristic person against whom an action could be sustained; that on the authority of the case of Fort Hall Bakery Supply Co. v Frederick Muigai Wangoe [1959] EA 474, once a court is made aware that a party to the suit is non-existent, it cannot allow the action to proceed hence the learned Judge erred in failing to find that, as the party named as the respondent lacked legal capacity to be sued, the action against it could not proceed; that since the proper respondent, the Kingdom of Belgium, enjoys jurisdictional immunity under the general customary international law which it had not waived, the trial court lacked the jurisdiction to entertain the respondent's claim; that in any event the premises of an ambassador are inviolable on judicial process; that, based on the authority in the cases of Stefano Ucceli & Another v Salama Beach Hotel Limited & 8 Others [2019] KLR and Owners of Motor Vessel "Lilian s" v Caltex Oil

(Kenya) Ltd [1989] KLR, the trial court was enjoined to determine the issue of jurisdiction before determining any other issue before it; that the learned Judge erred in failing to determine the question of jurisdiction once it was raised based on the material before it; that on the authority of the cases of Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa [1983] KLR and Tahi-Europe Tapioca Service Ltd v Government of Pakistan Ministry of Food and Agriculture Directorate of Agricultural Supplies Imports and Shipping Wing [1975] 3 All ER 961, except with consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages; that absent jurisdiction, the trial court ought to have downed its tools and struck out the claim as sought by the appellant.

8. It was sought that the appeal be allowed and the application dated 28th November 2016 be allowed with costs. In the alternative, the appellant urged this Court to refer the matter back to the trial court to determine the question of its jurisdiction to entertain the respondent's claim against the appellant.

9. On behalf of the respondent, it was submitted: that on the authority of the case of Reginald Njagi v French Embassy Cause No. 160 of 2011, the parties to the contract had by their conduct evinced no intention of excluding themselves from the jurisdiction of the court; that since employment contracts are matters of private law, immunity is not available since such functions are not connected to diplomatic functions or public powers; that on the authority of the case of Alliance for Green Revolution in Africa & Another v Emie Ndicho Kubwayo [2020] eKLR, the learned Judge committed no error in finding that the issues raised could not be determined at that stage of the proceedings; and that based on the case of Unicom Limited v Ghana High Commission [2016] eKLR and Cyriaque Hayariamana v Permanenet Secretariat of the Transit and Transport Co- Ordination Authority of Northern Corridor & Another [2019] eKLR, immunity is not absolute but is restrictive, the test being whether the foreign sovereign or government is acting in a governmental capacity under which it can claim immunity or in a private capacity under which an action may be brought against it.

10. The respondent prayed that the appeal be dismissed with costs.

11. We have considered the submissions made on behalf of the parties as well as the record as placed before us. This being an interlocutory appeal, care must be taken to obviate expressing a conclusive view of the matter as the main suit is still pending before the trial court. The practice is and has always been that at an interlocutory stage the court may only express its views in the matters in controversy on a prima facie basis. Otherwise, a concluded view is likely to tie the hands of the Judge who would eventually hear the case, and is likely to cause embarrassment to the trial court. See Mansur Said & Others v Najma Surur Rizik Surur Civil Appeal No. 186 of 2005 and Niazons (K) Limited v China Road & Bridge Corporation (Kenya) Civil Appeal No. 157 of 2000 [2001] KLR 12; [2001] 2 EA 502. A similar view was expressed by this Court in Said Almed v Mannasseh Benga & Another [2019] eKLR where it was appreciated that:

> "...this is an interlocutory appeal, and so, like the trial court, this Court cannot make conclusive finding of fact as that would prejudice the proceedings in the main trial which is still pending."

12. The issue that falls for determination before us in this appeal is simply whether the learned trial Judge erred in not making a conclusive finding on the issue of jurisdiction and whether it ought to have found that it had no jurisdiction to entertain the respondent's claim against the appellant.

13. It is not in doubt that the appellant's claim was based on a contract of employment between the appellant and the respondent. It is also not in doubt that in terminating that contract the appellant invoked the provisions of the local legislation being section 44(1) (g) of the *Employment Act*, 2007.

The respondent's challenge to his summary dismissal in effect brought the matter under the ambit of fair labour practices. The legal provisions dealing with diplomatic immunity are geared towards the limitation of some of the rights such as access to justice where rights including the right to fair labour practices which is recognised in Article 41 of *the Constitution* are alleged to have ben violated. The Supreme Court, while dealing with the limitation of rights expressed itself in the case of Karen Njeri Kandie v Alassane Ba & Another [2017] eKLR (the Shelter Afrique Case) as hereunder:

> " Kenyan courts have previously analysed the limitation test enshrined in Article 24 of *the Constitution*; for example, in the case of Attorney General & Another vs Randu Nzai Ruwa & 2 Others Civil Appeal No. 275 of 2012; [2016] eKLR, the Court of Appeal observed that the rights and freedoms in the Bill of Rights can only be limited under Article 24 of *the Constitution*, and neither the State nor any State functionary can arbitrarily do so. The Court further endorsed the holding of the trial court with respect to Article 24, and stated thus:
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> > 'Our reading of Article 24 (1) is that not only must the law limiting a right or fundamental freedom pass constitutional muster but also the manner in which the law is effected or proposed. So both the law prescribing the limitation and the manner in which it is acted upon must satisfy the requirement of Article 24.'
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> Further, in the High Court case of Union of Civil Servants & 2 others vs Independent Electoral and Boundaries Commission (IEBC) & Another H. C. Petition No. 281 of 2014 & 70 of 2015; [2015] eKLR, the Court examined Article 24 and stated that the test to be applied is a strict and elaborate scrutiny based on the 'reasonability and justifiability' test. The learned Judge thus stated:
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> '46. ... once a limitation of a fundamental right and freedom has been pleaded as has happened in the present Petition, ..., then the party which would benefit from such a limitation must demonstrate a justification for the limitation. In demonstrating that the limitation is justifiable, such a party must demonstrate that the societal need for the limitation of the right outweighs the individual's right to enjoy the right or freedom in question; See S vs Zuma & Others (1995)2 SA 642(CC). [Emphasis added].'"

14. This Court in International Centre for Insect Physiology and Ecology (ICIPE) v Nancy Mcnally [2018] eKLR, while revisiting the Shelter Afrique Case expressed 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 justifiability" 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."

15. The Court concluded that:

> " 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."

16. In this case, the learned Judge took the position, and rightly so in our view, that the issues raised before her required further interrogation before a conclusive determination could be made.

17. The learned Judge is however faulted for failing to make a determination on the issue of jurisdiction. We are alive to the decision of this Court in Owners of the Motor Vessel "LilianS" v Caltex Oil (Kenya) Limited [1989] KLR 1 that:

> " Without [jurisdiction], a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

18. The Court however appreciated that:

> " If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction".

19. In other words, a determination on whether or not a court has jurisdiction to entertain a mater may depend on the establishment of certain facts. If at the time the court is called upon to make a determination on the issue, the facts are not clear, the court cannot be expected to make a determination in the dark. The only reasonable course is for the court to postpone its determination on the issue pending the establishment of all the necessary facts so as not to find itself in a situation where it holds that it has jurisdiction and subsequently, when all the facts are placed before it, to realise that it in fact had no jurisdiction.

20. We have said enough to show that, at this interlocutory stage of the proceedings, the learned Judge did not err in making the decision she made. As we stated at the beginning of this judgement, to avoid embarrassing the trial court, we ought not to go further than that.

21. In the premises we find no merit in this appeal which we hereby dismiss with costs.

22. Those shall be our orders.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.