



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, KOOME & KANTAL, J.J.A.)**

**CIVIL APPEAL NO. 412 OF 2018**

**BETWEEN**

**ALLIANCE FOR A GREEN REVOLUTION IN AFRICA.....1ST APPELLANT**

**AGNES KALIBATA.....2ND APPELLANT**

**AND**

**EMIME NDIHOKUBWAYO.....RESPONDENT**

*(Being an appeal from the Ruling and Order of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 24th September, 2018*

**in**

**ELRC No. 277 of 2018)**

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**JUDGMENT OF THE COURT**

By a letter dated 18th August, 2014 the 1st appellant, **Alliance for a Green Revolution in Africa (AGRA)** offered employment to the respondent, **Emine Ndiokubwayo**, as its Program Officer. The 2nd appellant, **Agnes Kalibata**, was at the material time the 1st appellant's President. The agreement provided that the period of employment of the respondent by the 1st appellant was 3 years and could be renewed subject to the respondent's performance. The respondent served in that capacity which was later changed to "**Policy & Advocacy Officer**" but at the end of the 3 year period the 1st appellant issued a letter to the respondent dated 31st August, 2017 which in the material part stated that the respondent's employment contract would not be renewed upon expiry of the same.

Non-renewal of the contract did not amuse the respondent. She therefore filed a Memorandum of Claim at the then Industrial Court of Kenya (that Court has since been renamed "Employment and Labour Relations Court" (ELRC) where various averments are made and it is prayed that a declaration do issue that the respondent's rights have been violated; that damages be awarded for such violation of rights, and for mental anguish, torment and depression suffered by the respondent and any other relief be granted by the trial court.

The claim is resisted by the appellants through a Statement of Response filed in that court on 6th August, 2018. The appellants take as a principal defence in that response, the application of **Privileges and Immunities Act (Legal Notice No. 24 dated 26th February, 2016)** arguing that the appellants are protected by immunity granted by that Act.

The suit has not been heard or determined because the appellants by a Notice of Motion said to be taken under **Section 11** of the **Privileges and Immunities Act Cap 179, paragraphs 1 & 3** and **Part 1** of the **Fourth Schedule** to the **Privileges and Immunities Act, Vienna Convention on Diplomatic Relations, Rule 17** of the **Employment and Labour Relations Court (Procedure) Rules 2016** and all other enabling laws the trial court was asked to strike out the statement of claim and the suit be dismissed with costs. In grounds in support of the Motion and in a supporting affidavit it was stated that by Kenya Gazette Notice dated 10th December, 2015 the Cabinet Secretary for Foreign Affairs had published the **Principles and Immunities (Alliance For Green Revolution In Africa) Order, 2016 as Legal Notice No. 24**; that pursuant to that Legal Notice the 1st appellant had been declared an organization to which **section 11** of the **Principles and Immunities Act** applied; that the appellants were privileged and could not be sued in such legal process as the one taken by the respondent in the trial court and for all that the suit should be struck out.

The respondent resisted the application through a replying affidavit and in a ruling delivered on 24th September, 2018 Wasilwa, J., found that:

***“24. Having analysed the claim before me and having considered the precedents on this issue, it is my finding that at this point in time, issues of immunity cannot be resolved through this Preliminary Objection.***

***25. There are issues that would need to be determined after a full hearing in order to find out the extent if any to which there is immunity at all. I therefore find the Preliminary Objection without merit. I dismiss it accordingly and direct the case proceeds for full hearing ....”***

It is those orders that have aggrieved the appellants who in a Memorandum of Appeal drawn by their advocate, **Issa & Company Advocates**, have raised 7 grounds of appeal. It is said that the judge erred in law and fact in finding that issues of immunity could not be determined through a preliminary objection when what was before the court for determination was a Notice of Motion seeking striking out of the claim; that the judge erred in failing to allow the Motion after finding that the appellants enjoyed diplomatic immunity; that the judge erred in her interpretation of the law on diplomacy immunity; that the judge erred in not making specific findings as concerned the claim by the respondent against the 2nd appellant and not finding that there was mis-joinder of the 2nd appellant in the suit; and, finally, that the judge misdirected herself on the applicable law and principles thereby arriving at a wrong decision.

The appeal came up for hearing before us on 23rd October, 2019 when learned counsel **Mr. Mansur Issa** assisted by **Mrs. Ahoma** appeared for the appellants while learned counsel **Mr. Deniss Ngira** appeared for the respondent. Both parties had filed written submissions and in a highlight of the same Mr. Issa submitted that what was before the trial court was a civil claim, not a constitutional petition alleging any breach of rights. According to counsel the appellants had pleaded privilege through immunity and the claim should have been struck out. Counsel faulted the judge for proceeding as if what was before her was a preliminary objection when the record shows that the appellants had moved the court through a notice of motion. Counsel also faulted the trial judge for not striking out the suit against the 2nd appellant submitting that there was no privity of contract between the respondent.

Mr. Ngira in response, submitted that a point of law had been taken before the trial judge by the appellants and that such point would always amount to a preliminary objection, thus it was a matter of form, not substance, and the trial judge should not be faulted for treating it as a preliminary objection. Further, that the contract of employment precedes the grant by the Minister of immunity to the 1st appellant and the contract should be construed in accordance with Kenyan law. Counsel, in final submissions, was of the view that there were specific allegations against the 2nd appellant in the Memorandum of Claim and the 2nd appellant was thus a necessary party to the suit.

In a rejoinder Mr. Issa submitted that the employment contract was overtaken by the grant of immunity and the contract had no legal effect once immunity was granted.

We have considered the appeal and the submissions made. The trial judge considered the Motion for striking out of the suit and found that issues raised in the claim could not be resolved through preliminary points.

Central to this appeal is whether the judge was right in refusing to strike out the suit and whether the judge was right in treating the motion as a preliminary objection. Also, whether the 2nd appellant was a necessary party in the suit before the trial court. We note from the record that the contract of employment is dated 18th August, 2014. The applicable law for purposes of interpretation of the contract is stated at clause 18 to be:

***“The Agreement shall be governed and interpreted in all respects in accordance with Kenyan law and the parties irrevocably submit to the exclusive jurisdiction of the court of Kenya to settle any disputes that may arise in connection with your employment and this Agreement.”***

A Gazette Notice being Legal Notice No. 24 of 26th February, 2016 was issued by the Cabinet Secretary for Foreign Affairs and International Trade granting AGRA certain immunities under The Privileges and Immunities Act, Cap 179 Laws of Kenya.

We find, as the trial judge did that whether the Privileges and Immunities Act which was applied in the year 2016 misplaced agreements made prior to that Act is a triable point which could not be resolved in an application as was filed before the trial court.

The trial judge proceeded in the application before him as if a preliminary objection had been taken when, in fact, there was a Notice of Motion filed by the appellants. The judge found that the issues in the suit were weighty and could not be resolved through preliminary process.

What the appellants were asking the trial court to do, was to find that The Privileges and Immunities Act be applied in the case, and in that event the suit should be struck out. The appellants now fault the judge for proceeding as if there was a preliminary objection before her when, indeed, there was a motion for her determination. The judge reached the decision that there were issues in the suit that could only be decided after hearing the parties. The question, then, is whether the appellants suffered any prejudice by the trial judge proceeding as if what was before her was a preliminary objection, when, in fact, there was a motion before her. What **Article 159** of the **Constitution of Kenya, 2010** is telling us is that we should look at the substance of the matter before us and not be moved or excited by procedural technicalities that do not affect the substance of the matter. It says:

***“(d) Justice shall be administered without undue regard to procedural technicalities....”***

The substance of the finding by the judge was that there were issues in the suit that could not be resolved in the manner taken by the appellants. We agree with the judge and cannot find any error in the finding made.

On the final complaint by the appellants that the 2nd appellant should have been removed from the suit – there are specific allegations in particular paragraph 14 of the statement of claim against the 2nd appellant and the same could not be resolved through the process taken by the appellants. They could only be resolved after the suit was heard.

We have considered the grounds of appeal and submissions made and are satisfied that the appeal has no merit. The suit before the Employment and Labour Relations Court should be heard on the merits. The appeal is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 7th Day of February, 2020.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**