



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, MUSINGA & KIAGE, J.J.A.)

CIVIL APPEAL NO. 314 OF 2013

BETWEEN

THE GOVERNMENT OF THE

UNITED STATES OF AMERICA.....1ST APPELLANT/RESPONDENT

UNITED STATES OF AMERICA AGENCY

FOR INTERNATIONAL DEVELOPMENT.....2ND APPELLANT/RESPONDENT

VERSUS

STEPHEN MUNGA MWANGI.....RESPONDENT

ESOLLOM MWANGI MUNGA (*Suing as a co-administrator*

***ad litem of the estate of STEPHEN MUNGA MWANGI – deceased*)**

COMMERCIAL BANK OF AFRICA LIMITED.....GARNISHEE

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (Khaminwa, J.) delivered on 10th May, 2012

in

H.C.C.C. No. 1197 of 2005)

JUDGMENT OF THE COURT

1. By an application dated 12th October, 2017, the 1st appellant sought the following orders:

“1. ...

2. ...

3. The Garnishee Order-Nisi issued by the Court on 9th April 2010 be set aside and the orders vacated.

4. This suit is a nullity *ab initio* for reasons that the USAID as an agency of the United States Federal Government does not enjoy a separate and distinct legal entity capable of being sued.

5. This suit and the proceedings herein against the 1st and 2nd Defendant are a nullity and abuse of court process as the United States of America as an independent and sovereign state under the principle of sovereign immunity in International Law and has not consented to be subject to the jurisdiction of this Honourable court nor waived its immunity to jurisdiction and to execution and as a result the suit be struck out as against the US Government and USAID.

6. *In the alternative and without prejudice to the foregoing, an order that the summonses to enter appearance herein dated the 4th October 2005 and 1st August 2006 were invalid and service of Summons to Enter appearance herein was improper and irregular and the suit be struck out as against the US Government and USAID.*

7. *That in the alternative and without prejudice to the foregoing, this Honourable Court be pleased to set aside the Judgments in default entered herein against the 1st and 2nd Defendants on 19th April 2006 and 14th December 2006 respectively and strike out the Further Amended Plaintiff herein as it is statute barred, frivolous, vexatious and therefore a nullity.*

8. *This suit is bad in law, against public policy and cannot be sustained.”*

2. The application was premised on grounds as disclosed on the face thereof and on an affidavit sworn by **Jonathan P. Welch**, a Trial Attorney in the Office of Foreign Litigation, Civil Division of the United States Department of Justice, and **Charles J. Slater**, who was the Management Counselor at the United States Embassy, Nairobi.

3. Mr. Welch deposed, *inter alia*, that the 1st appellant is a sovereign state while the 2nd respondent is an agency of the United States Federal Government and it does not have a separate legal entity capable of being sued or filing suit in its own name in Kenya and could therefore not be a party to the proceedings. Mr. Welch further stated that the 1st appellant was not properly served with any valid summons to enter appearance, nor was it ever served with any of the applications and orders filed and obtained by the respondent.

4. Since the 1st appellant was never properly served with the court process, it did not have an opportunity to assert its sovereign immunity to challenge the civil jurisdiction of the trial court. The same immunity was also applicable to the 2nd appellant, Mr. Welch stated.

5. Further, Mr. Welch added, the account that the 1st appellant holds with the Garnishee is maintained and used for purely sovereign and non-commercial purposes; that under customary international law, and **Article 21** of the **Vienna Convention** on Diplomatic Relations as contained in Articles 22 and 31 of the **First Schedule of the Privileges and Immunities Act (CAP 179 Laws of Kenya)**, the account is immune from attachment and execution.

6. The appellants further argued that under customary international law, proper notice of service of any summons must be provided through the appropriate diplomatic channels and must give notice of at least sixty days before appearance is required. The summons to enter appearance issued by the trial court dated 24th October, 2005 and 1st August, 2006 purported to give a notice of only fifteen days and for that reason both were invalid.

7. The appellant further argued that the cause of action arose in 1994 upon termination of the respondent's contract of employment and consequently, the suit was statute barred under **Section 4(1)(a)** of the **Limitation of Actions Act** which requires that such suits be brought within six years from the date the cause of action arose.

8. Although the respondent had been granted leave to file the suit out of time, the leave was improperly obtained under **Section 27** of the **Limitation of Actions Act** which only allows for leave to file a suit out of time in specified circumstances; in any case, the leave to file suit out of time was invalid as it was issued against the 2nd appellant which is not a separate legal entity from the 1st appellant and could therefore not be sued. The respondent had purported to amend the plaint on 9th August, 2006 to add the 1st appellant as a party to the suit without leave of court and out of time and for that reason as well the suit against the 1st appellant ought to be struck out, Mr. Welch stated.

9. Further, the 1st appellant contended that since the summons issued were invalid as they do not afford the 1st appellant enough time to enter appearance, and that had been communicated through the proper diplomatic channels to the Ministry of Foreign Affairs, all subsequent pleadings, proceedings and orders were therefore a nullity and cannot be sustained under the law and ought to be struck out. For those reasons, the appellants urged the trial court to grant the orders as sought.

10. The respondent opposed the application and in his replying affidavit stated that on 25th July, 2005 he filed an application seeking leave to file suit out of time since the 2nd appellant had made presentations making him believe that it would pay him his dues but did not do so; that leave having been granted by the court he filed a suit and served summons and plaint upon the 2nd appellant, who failed to enter appearance within the stipulated time. Consequently, interlocutory judgment was entered against the 2nd appellant. Subsequently, the respondent amended the plaint to include the 1st appellant and served it with the court process. Similarly, the 1st appellant did not enter appearance and the respondent requested for interlocutory judgment.

11. Following a formal proof, judgment was entered in favour of the respondent in the sum of Kshs.75,347 being three months salary in lieu of notice and severance pay of Kshs.134,099.88, totaling to Kshs.209,446.88 plus costs of the suit and interest. The respondent sought a review of the judgment sum and the award for three months salary in lieu of notice was adjusted to Kshs.109,926 and severance pay to Kshs.269,318.70. A further award was made in the sum of Kshs.1,328,812 on account of three years' loss of employment. Subsequently, it was realized that there was an error in the calculations of the severance pay which, on application, was revised to Kshs.323,182.44 vide a ruling dated 8th May, 2009. The respondent's bill of costs was taxed at Kshs.50,070 and a decree issued on 3rd June, 2009.

12. An attempt to execute the decree against the 1st and 2nd appellants was not successful and the respondent applied for a Garnishee Order against the Garnishee which was issued on 14th February, 2011.

13. When the respondent served the Garnishee Order upon the Garnishee, that is what caused the appellants to move to court to challenge the orders that had been granted against them, the respondent stated. In view of the foregoing, the respondent urged the trial court to find the appellants' application unmerited.

14. In the impugned ruling, the learned judge (Khaminwa, J.) held, *inter alia*, that the appellants had knowledge of the suit; that the 2nd appellant is an independent agency under an Act of the United States of America (USA) and therefore has capacity to be sued; that as an agent of the USA Government, the 2nd appellant was properly sued together with its principal, the 1st appellant; that the High Court could not consider whether the respondent's suit was time barred since leave to file the suit out of time had been granted; and that there were no valid grounds to set aside the judgment entered against the appellants as well as the Garnishee Order-Nisi.

15. Being aggrieved by that ruling, the appellant preferred an appeal to this Court. The memorandum of appeal contains 17 grounds that were clustered into four main categories as follows:

- (i) Issue of validity of the summons,
- (ii) Issue of the diplomatic immunity of the 2nd appellant's account with the Garnishee,
- (iii) Issue of the sustainability of the suit against the 2nd appellant, and
- (iv) issue of the sustainability of the suit against the 1st appellant.

16. Regarding the issue of validity of the summons, the appellants submitted that the law dictates that if a defendant is served with summons that are invalid, such service is of no consequence and all proceedings emanating from such purported service are null and void. The appellants cited the High Court decision in **Jimmy Mauta v Wilfred Gitonga [2006] eKLR** where the High Court cited this Court's decision in **Ceneast Airlines Limited v Kenya Shell Limited, Civil Appeal No. 174 of 1999**. In that matter, the summons served upon the appellant required her to enter appearance within 10 days from the date of service, whereas **Order 4 rule 3(4)** of the **Civil Procedure Rules** stated that the time for entering appearance "**shall not be less than 10 days**". This Court held that the clear breach of that order rendered the summons invalid and of no effect.

17. The appellants' learned counsel, Miss Wanyoike, submitted that the basis for invalidity of the summons was that the summons initially granted the 2nd appellant fifteen days to enter appearance and the 1st appellant forty five days. The period was subsequently reduced to fifteen days in respect of the 1st appellant. She added that under the customary international law, foreign governments operating in a foreign State are accorded between **45 to 60 days** to enter appearance in the event a suit is lodged against them before a local court. In Kenya and the United States the notice period is **60 days**, she stated.

18. On the issue of diplomatic immunity relating to the 2nd appellant's account, Ms Wanyoike submitted that the learned judge erred in making a finding that the account known as "**US disbursing officer symbol 8769**" was used for commercial transactions as it was what was used to pay the respondent. She contended that there was no evidence submitted by the respondent to support that finding. In her view, the onus was on the respondent to prove that the account was for commercial purposes and enjoyed immunity from attachment.

19. On the issue of sustainability of the suit against the 2nd appellant, counsel argued that the court erred in making a finding that the 2nd appellant was served with summons providing a notice period of 45 days. The fact of the matter was that the only summons issued against the 2nd appellant provided a notice period of 15 days.

20. Further, it was submitted that the High Court erred in making a finding that the 2nd appellant was capable of being sued in its own name and that the suit could be sustained. That finding was in complete

disregard of the evidence on record, the appellants' counsel submitted.

21. Lastly, on the issue of sustainability of the suit against the 1st appellant, Ms. Wanyoike submitted that the High Court erred in making a finding that the 1st appellant had waived its immunity when it failed to enter appearance. In so doing, counsel stated, the court failed to appreciate that the 1st appellant did not enter appearance because the summons served were invalid.

22. Further, the High Court failed to consider and appreciate the suit against the 1st appellant was statute barred as the respondent had only sought leave to bring a suit out of time against the 2nd appellant; no leave was sought to bring the suit against the 1st appellant out of time.

23. That notwithstanding, the leave that was granted to file the suit out of time against the 2nd appellant was improper in law because the cause of action lay in contract and the limitation period of 6 years cannot be enlarged. The High Court erred in making a finding that it did not have jurisdiction to entertain the issue of limitation since leave to file the suit out of time had earlier been granted and no appeal had been preferred in respect of the same, counsel submitted.

24. In his written submissions, the respondent's counsel, **Mr. C.N. Kihara**, addressed the four thematic areas of the appeal as follows; Starting with the issue of validity of summons, counsel submitted that when the American embassy received the first summons, they wrote to the court through the ministry of foreign affairs indicating that any complaints against the 2nd appellant should be addressed in a suit against the 1st appellant; and the summons to enter appearance should be for 45 to 60 days; that the summons were amended as above and the amended summons were served upon the American embassy on 6th September, 2006 but no appearance was entered. Mr. Kihara further submitted that although the summons had initially been amended to provide for 45 days, in the set of summons on record the number 45 was not cancelled, they still show 15 days. He attributed that anomaly to an interested person. Since no appearance was entered by the appellants, interlocutory judgment was properly entered and formal proof subsequently done, Mr. Kihara stated.

25. Regarding the subsequent execution proceedings, Mr. Kihara submitted that one **Mr. Fraser**, an advocate with Hamilton, Harrison and Mathews Advocates, informed the auctioneers that the 1st appellant has immunity from any attachment of its assets and therefore the auctioneers returned the warrants of attachment and sale unexecuted. When the respondent applied for garnishee orders against the US Government account at Commercial Bank of Africa, again Mr. Fraser stopped the execution by notifying the garnishee that the American government is immune from the civil jurisdiction of the Kenyan courts. Subsequently, the American embassy instructed **Messrs Kairu and McCourt** Advocates to apply for stay of execution and to set aside the entire proceedings and judgment of the High Court. Counsel submitted that the appellants paid the auctioneers charges in order to stop them from executing the decree. In his view, that amounted to the appellants' submission to the court jurisdiction.

26. Regarding the issue of immunity, the respondent submitted that the 1st appellant went to court after having occasioned an inordinate delay of 6 years; that it had high handedly ignored the summons issued by the Judiciary of Kenya (the host government); and that the conduct of the 1st appellant in failing to enter appearance amounted to waiver of its immunity. The other conduct that signified waiver of immunity or submission to the jurisdiction of Kenyan courts, according to counsel, were: When the appellants contested and took up issues of who ought to have been sued, the required minimum notice period to enter appearance, and filing and prosecuting the application to set aside the default judgment.

27. Counsel added that the respondent's claim arose from the 2nd appellant's breach of an employment contract with the respondent, who had worked for the 2nd appellant for over 21 years.

28. The respondent's counsel further submitted that the UN Convention treats immunity as a general rule but there are certain exceptions as regards employment contracts. He cited **Article 11** which provides as follows:

“Unless otherwise agreed between the states concerned, a State cannot invoke immunity from jurisdiction before a court of another state which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed ...in the territory of that other State.”

Counsel therefore submitted that the 2nd appellant did not enjoy absolute immunity. He urged this Court to dismiss the appeal.

29. We have carefully considered the entire record of appeal and submissions by counsel. In our view, the first issue for consideration should be whether the respondent's ex parte application for leave to file the suit out of time was proper in law and whether the appellants could subsequently challenge that grant of leave. It is not in dispute that the respondent was an employee of the 2nd appellant until 1994 when his services were terminated. It was not until sometime in 2004 that the respondent filed an ex parte application seeking leave to file suit outside the statutory period of 6 years. The application was filed against the 2nd appellant only.

30. The appellants argued that the grant of the leave was contrary to the provisions of **Sections 4(1) and 27** of the **Limitation of Actions Act** which state as follows:

“4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law. 27(1) Section 4(2) does not afford a defence to an action founded on tort where—

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

31. In **Divecon Limited v Samani [1995-1998] 1 EA 48** this Court held

that:

“...no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued,

an action founded in contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after a cause of action arose or any application to extend such time for the bringing of the action.

32. The appellants' counsel raised the issue of limitation with the learned judge but the trial court did not give the issue a serious consideration. The learned judge's position was that leave to institute the suit out of time having been granted, and no appeal having been preferred against the ex parte ruling, the appellants were estopped from raising the issue subsequently. With respect, the learned judge's position was not correct in law. The issue of limitation goes to the jurisdiction of a court and may be raised at any time in the course of the proceedings. An ex parte order granting leave to institute a suit of time may be challenged during the inter partes hearing of the suit.

33. In our view, the respondent's suit was properly time barred. It mattered not that there may have been some out of court negotiations between 1994 and 2005 when the suit was filed, as was suggested by the respondent. If that was so, nothing prevented the respondent from filing the suit in time and thereafter proceed with the negotiations. The learned judge erred in failing to appreciate that the respondent's suit was statute barred and the leave that had been granted to institute it out of time was of no legal effect.

34. The above finding in itself is sufficient to dispose of this appeal. However, we shall briefly address ourselves to the other issues that were raised by counsel in their submissions.

35. Regarding the issue of validity of summons, it is not in dispute that the summons addressed to the 2nd appellant dated 4th October 2005 required the 2nd appellant to enter appearance within 15 days. The summons to enter appearance that were addressed to the 1st appellant initially required the 1st appellant to enter appearance within 45 days but that was cancelled by hand to read 15 days from the date of issue. It was not clarified how the cancellation was done. That notwithstanding it appears to us that the appropriate notice period should have been sixty days from the date of issue of the summons. According to the **Foreign Sovereign Immunities Act section 4(a) U.S.C. section 1608(d) (1976) (United States)**, which was an annexure to the 1st appellant's affidavit, in any action brought in a court of the United States or of a State, a foreign State, a political subdivision thereof, or an agency or instrumentality of a foreign State shall serve an answer or other responses leading to the complaint within sixty days after service has been made. It is therefore evident that the period of 15 days that was granted to the appellants to enter appearance was inappropriate. In line with that, Kenya's Ministry of Foreign Affairs vide a letter dated 29th April 2010 had stated, *inter alia*:

“Under customary international law, before a foreign sovereign can be required to appear before the courts of the receiving state, proper notice of the suit must be provided through diplomatic channels, and must afford at least sixty days notice before an appearance or responsive pleading is required.”

The learned judge does not appear to have given any regard to the decision of this Court in **Ceneast Airlines Limited v Kenya Shell Limited** (supra) that was cited before her. We therefore agree with the appellants that since the validity of the summons served upon the appellants was questionable, the service was of no consequence and all the proceedings emanating therefrom were null and void.

36. We now turn to the issue of diplomatic immunity of the 2nd respondent's account with the Garnishee. The evidence on record indicated that the 1st appellant holds an account with the Commercial Bank of Africa (the garnishee) under the name **“US Disbursing Officer Symbol 8769”**. That account is used for official purposes of the government of the United States of America, and it is managed and maintained by the management section on behalf of the US Embassy, Nairobi. The said account, being property as defined under **Article 21 of the Vienna Convention on Diplomatic Relations** as contained in **Articles 22 and 31 of the First Schedule of The Privileges And Immunities Act Cap 179** is immune from attachment. It follows therefore that the garnishee order that was issued by the court with the objective of attaching the funds in the account was unlawful and ought to have been vacated. We would also allow the appeal on that ground.

37. Lastly, as to whether the 1st appellant waived its immunity, the learned judge stated:

“By reason of the conduct of the defendants in failing to enter appearance any immunity is presumed waived regarding this plaintiff's claim.”

With respect, we think that the learned judge's finding as quoted above does not accord with the law. The 1st appellant had stated that it had not entered appearance because the summons served were invalid. Mr. Welch had indicated in his affidavit that **“the US Government has a policy not to appear in legal proceedings unless it has been properly served and did not ignore or neglect to appear. The US government objections were at all times communicated to the Ministry of Foreign Affairs.”**

38. We are unable to find that the appellants' conduct amounted to waiver of its immunity as suggested by the respondent.

39. Having considered all the substantive issues raised by counsel, for the reasons aforesaid, we allow this appeal, set aside the High Court ruling dated 12th May 2012 and all the consequential orders made thereunder and substitute therefor an order dismissing the respondent's suit in the High Court. We make no order as to costs.

Dated and delivered at Nairobi this 22nd day of February, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR