IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KIAGE, JJ.A)

CIVIL APPEAL NO.103 OF 2018

BETWEEN

CYRIAQUE HAVYARIAMANA.....APPELLANT

AND

PERMANENT SECRETARIAT OF THE TRANSIT

AND TRANSPORT CO-ORDINATION AUTHORITY

OF THE NORTHERN CORRIDOR.....1ST RESPONDENT

DONAT M. BAGULA.....2ND RESPONDENT

(An appeal against the decision of the Employment and Labour Relations Court of Kenya at Mombasa (O.N. Makau, J.) dated 3rd November, 2017

in

Civil Suit No. 922 of 2016)

****

JUDGMENT OF THE COURT

By this appeal the appellant, **Cryriaque Havyariamana** asks this Court to find as erroneous and reverse the ruling of the Employment and Labour Relations Court (O.N. Makau, J.) delivered on 3rd November, 2017 by which that court declared itself devoid of jurisdiction and struck out the appellant's suit. That ruling was on a preliminary objection raised by the Permanent Secretariat of the Transit and Co-ordination Authority of the Northern Corridor (The Secretariat) and the Donat M. Bagula its Executive Secretary, the respondents herein, asserting diplomatic immunity from legal process, which objection was upheld.

The appellant, a Burundi national, had by a memorandum of claim filed on 6th December, 2016 sued the respondents alleging that he had been maliciously treated and ultimately his employment with the Secretariat as a Conference Officer/Translator unfairly, wrongfully and unlawfully terminated on 9th December, 2013 thereby causing him substantial loss and damage which was particularized as was the unfairness, wrongfulness and unlawfulness of the termination. He sought various reliefs including declarations, payment of outstanding salaries and dues amounting to US $801,726, refund of air tickets for self and family in the amount of US$2002, reinstatement as well as general and punitive damages, plus costs.

The respondents filed a response to claim in which they denied the appellant's claim and also asserted that the 1st respondent had diplomatic immunity under the **Privileges and Immunities Act**, **Cap, 179** and that it would be raising a preliminary objection that the court did not have jurisdiction to entertain the suit, which objection they finally filed on 9th June, 2017. Upon being served with that preliminary objection, the appellant filed grounds of opposition dated 27th October, 2017. The dozen grounds which for reasons that will shortly become apparent we choose to set out verbatim *in extenso* were, that;

> ***"1. Article 41(1) of the Constitution guarantees that every person has the right to fair labour practices which has been breached in this case.***

2. The remedies and redress sought by the claimant are well within the provisions of the Constitution of Kenya, 2010 as read with the Employment Act, 2007 and this honourable court has jurisdiction to hear and determine it per the Industrial Court Act, 2011.

3. The nature, role and responsibility of the claimant's duties as a Conference Officer/Translator place him outside the provisions of any instruments relating to Diplomatic Immunity.

4.The Headquarters Agreement between the Government of the Republic of Kenya and the Northern Corridor Transit Coordination Authority provides as follows at Article II(2)

'The Authority, as an inter-Governmental Organization, whose Treaty has been deposited with United Nations Economic Commission for Africa, shall have in Kenya the capacity in its own name to enter into contracts, to acquire and dispose of immovable or movable property and to participate in legal proceedings.'

5. Any immunity pursuant to the Headquarters Agreement (sic!).

6. The Personnel Rules and Regulations (2011 Edition)of the Permanent Secretariat of the Transit Transport Co-ordination Authority do not invoke the Privileges and Immunities Act (Cap 179) and its provisions relating to termination of employment are *parimateria* ***with the Employment Act, 2007.***

7. The preliminary objection lacks merit and is intended to mislead the court.

8. The preliminary objection is frivolous, vexatious and otherwise an abuse of the court process.

9.The preliminary objection is ill conceived and it is otherwise unsustainable in law and ought not to be entertained by this honourable court.

10. The preliminary objection raises matters of fact and evidence and therefore fails to meet the requirements set out in Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Limited (1969) EA 696 as applied in Janet Syokau Kaswili v Kathonzweni Financial Service Association [2014] eKRL.

11. Allowing the matter to be heard on merits will not prejudice the respondents as it relates to the interpretation of important constitutional provisions vis-à-vis Kenyan Employment law – Nancy Macnally v. International Centre of Insect Physiology and Ecology (ICIPE) (2016) eKLR.

12. The preliminary objection is completely without any merit and lacking in substance and the same ought to be dismissed with costs."

Those grounds did not persuade the learned Judge who upheld the preliminary objection and struck out the suit, a decision the appellant is aggrieved by complaining in his memorandum of appeal that the learned Judge erred by;

- *Resorting to an analysis of the jurisdiction of the Employment and Labour Relations Court and failing to consider its jurisdictional authority under Article 41(1) of the Constitution and the Employment Act.*
- *Considering extraneous matters and failing to consider the merits set out in the grounds of opposition and submissions thereon.*
- *Failing to evaluate the effect of Article 2 of the Headquarters Agreement between the Government of Kenya and the 1st respondent.*
- *Failing to consider that the respondents were guilty of unfairly terminating the appellant who was a subordinate officer.*

The parties have filed written submissions which we have carefully gone through and given due consideration to. For the appellant, the firm of Jacqueline Waihenya & Co. submitted that the appellant was not afforded a fair opportunity to defend himself at a disciplinary board and that the respondents could not rely on diplomatic immunity to avoid litigation in a dispute arising from a contract of employment which is purely private or commercial. They cited **Article 11(1)** of the United Nations Convention on Jurisdictional Immunities of States and the Property which provides that a plea of immunity cannot be invoked against a suit involving a contract of employment.

They asserted that the appellant's right to access to justice under **Article 48** of the Constitution could not be 'impeached' (sic), by which they must have meant impugned, by the respondents' immunities which could only be properly canvassed at a full hearing, not at a preliminary objection. For that contention they cited this Court's decision in ***INTERNATIONAL CENTRE FOR INSECT PHYSIOLOGY AND ECOLOGY (ICIPE) vs. NANCY MCNALLY [2018] eKLR*** as well as the persuasive decision of the Labour and Employment Court (Wasilwa, J.) in ***EMIME NDIHOKUBWAYO vs. ALLIANCE FOR A GREEN REVOLUTION IN AFRICA & ANOR[2018] eKLR.***

They argued further that the appellant having been a translator and therefore a subordinate member of staff, he could not be barred from seeking redress for wrongful termination of employment, for which ***JARALLAH ALIMALIK & ANOR vs. CHERRYLYN REYES [2017]***

U.K. SC 61, a decision of the Supreme Court of England was cited. It was contended for the appellant that we should adopt the stance taken by the European Court of Human Rights Grand Chamber in ***CUDAK vs. LUTHUANIA***, Application No. 15869/02, that there was a trend in international and comparative law towards limiting state immunity in respect of employment-related disputes with the exception of the recruitment of staff in embassies.

Those submissions concluded with the prayers that the orders prayed for in the memorandum of appeal dated 31st July, 2018 be granted as prayed;

> ***"(i) The appeal be allowed;***
>
> ***(ii) The ruling in favour of the respondents be set aside;***
>
> ***(iii) A declaration that the Employment and Labour Relations Court has jurisdiction to hear and determine this suit to its finality;***
>
> ***(iv) A declaration that the respondent has no diplomatic immunity in Employment and Labour Relations cases; and***
>
> ***(v) The appellant be awarded the costs of this Appeal an in the Superior Court."***

We must point out that counsel for the appellant was by this attempting to artfully introduce prayers that are nowhere in the memorandum of appeal, which abruptly ends with the grounds of appeal.

The respondents' submissions in opposition were that the preliminary objection was properly taken, in aid of which the well-known case of ***MUKISA BISCUIT CO. vs. WESTEND DISTRIBUTORS LTD [1969] EA 696*** and this Court's decision in ***NJERI KANDIE vs. ALSANNE BA & ANOR [2015] eKRL*** were cited.

It was contended that part II of the **Privileges and Immunities Act Cap, 179** at **Section 4** imported wholesale the Vienna Convention on Diplomatic Relations and that Kenya having executed the Northern Corridor Transport and Transport Agreement could not "*reside* (sic) *from*" by which they must have meant '*resile from*', the immunity and privileges that the respondents are entitled to under the principle of *pacta sunt servanda*, immunity being a legitimate limitation to the right to access to justice under **Article 48** of the Constitution and not disproportionate to the legitimate aims of conferment of state immunity as held on ***ICIPE vs. NANCY McNALLY*** (supra) and ***KAREN NJERI KANDIE vs. ALASSANE BA &ANOR*** (supra).

The upholding of the preliminary objection was lauded as sound and we were asked to dismiss the appeal as lacking merit.

Those rival submissions were highlighted in plenary hearing by **Ms. Waihenya**, learned counsel for the appellant and **Mr. Tsofwa** learned counsel for the respondents. We have given due and careful consideration thereto, and to the authorities cited as well as the entire record.

We think that the sole question we need to determine in this appeal is whether the learned Judge erred and exercised his discretion improperly in upholding the preliminary objection and striking out the appellant's suit on the basis of his holding that the court had no jurisdiction to entertain it, the respondents being clothed with diplomatic immunity.

It has long been the law as pronounced by the **MUKISA BISCUITS** case (supra) that a preliminary objection should only be raised if it entails a pure point of law and is predicated on non-contested facts. Sir Charles Newborn expressed himself on the point as follows;

> ***"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion."***

Where there is no dispute as to the character and contours of diplomatic immunity, with the facts being agreed and requiring no further inquiry, it may well be that the objection founded on immunity may properly be taken. That view we took in the ***KAREN NJERI KANDIE vs. ALSSANE BA & ANOR*** case (supra) when we expressed ourselves as follows;

> ***"A plea of immunity from legal process such as was raised by the respondents before the court below appears to us to be a proper subject of a preliminary objection which is raised as a threshold issue to be determined in limine. It has to be so because its effect is to raise a procedural bar to the court's jurisdiction and it behoves the court to first address and pronounce itself on it before it can embark, if at all, on hearing the rest of the dispute. We therefore find and hold that the preliminary objection was properly filed and taken and there was no necessity for the appellants to have first filed any pleadings or substantive response to the appellant's claim before filing the notice of preliminary objection."***

Naturally the respondents urge us to follow that reasoning and hold that the preliminary objection in the court below was properly taken. But was it?

It cannot be said that the incidence and character of the immunity claimed by the respondents is an issue that was uncontested. Indeed, the plea of immunity was raised on the basis, strongly disputed by the appellant, that the appellant's employment with the secretariat was of such a character and entailed such duties as would attract the cloak of diplomatic or state immunity and thus be outside the purview of juridical enquiry. Indeed, it is quite clear to us that in the area of employment and labour relations between embassies or other organizations that enjoy

diplomatic immunity and their employees, the extent to which the plea of diplomatic immunity can be raised to resist a suit brought by an employee will depend largely on the character and scope of the duties performed by the employee and in particular whether the employment relationship was of a public law or private law nature. The wide spectrum of the possible nature of the employment and the consequential differential of applicability of immunity is clear from a consideration of the Convention on Jurisdictional Immunities of States and their Properties. The convention, which came into force in 2004 and *'is generally regarded as an authoritative statement of customary international law on the major points which it covers'* (per Lord Sumpton in ***REYES vs. AL MALKI*** & ***ANOR [2017] UK SC 61***)at Article11 provides as follows;

> ***"Article 11***
>
> ***Contracts of employment***
>
> ***1. 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 or to be performed, in whole or in part, in the territory of that other State.***
>
> ***2. Paragraph 1 does not apply if:***
>
> ***(a) The employee has been recruited to perform particular functions in the exercise of governmental authority;***
>
> ***(b) The employee is:***
>
> ***(i) A diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;***
>
> ***(ii) A consular officer, as defined in the Vienna Convention on Consular Relations of 1963;***
>
> ***(iii) A member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or***
>
> ***(iv) Any other person enjoying diplomatic immunity;***
>
> ***(c) The subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;***
>
> ***(d) The subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;***
>
> ***(e) The employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or***
>
> ***(f) The employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding."***

It follows that beyond merely stating that the appellant was an employee, it would have been necessary for the respondents to establish, if their plea of diplomatic immunity were to succeed, that the nature of his employment and his specific duties fell within the categories in paragraph 2 as exceptions to the rule that immunity cannot be invoked in a proceeding relating to a contract of employment between the state, or in this case the Secretariat, and the appellant, as the employee.

The effect of these observation is, as it must be, that there was plenty in this case to militate against resort to striking out of the suit on the basis of a preliminary objection when the factual situation was so highly contested. Indeed, the appellant was on some facially solid ground in asserting, in line with ***CUDAK vs. LUTHUANIA*** (supra) that as a telephone operator, being junior employee, there was nothing in his duties that were part of the '*sovereign acts'* of the secretariat.

It is enough for us to conclude, on an examination of the record and the authorities cited, that what was before the learned Judge was not a straight-forward dispute in which he could properly hold that diplomatic immunity applied and thus strike the suit with infirmity. The approach taken by this Court (Waki, Nambuye & Musinga, JJ.A) in ***INTERNATIONAL CENTRE FOR INSECT PHYCIOLOGY AND ECOLOGY (ICIPE) vs. NANCY McNALLY*** (supra) appears to us to be the correct one in finding that in matters such as was before it and is before us, it is inappropriate to uphold a preliminary objection based on diplomatic immunity, so much about which is yet to be established. Said the Court, and we agree;

> ***"30. So that, in a matter pleading such constitutional issues as raised by the respondent, it was in our view, prudent, and the trial court was right, to subject the matter to full hearing. 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 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 summary one like a PO. The trial court was right in rejecting the PO in respect of the constitutional issues, and we so find."***

See, also ***EMMIE DHIHOKUBWAYO vs. ALLIANCE FOR A GREEN REVOLUTION IN AFRICA & ANOR*** (supra) where Wasilwa, J. concluded her analysis on a preliminary objection raised in an employment dispute on point of diplomatic immunity, that;

> ***"24. Having analyzed 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. Costs in the cause."***

The upshot of our consideration is that the learned Judge fell into error in upholding the preliminary objection and striking the suit in the circumstances of the case. We set aside those orders. The preliminary objection in so contested a factual setting was wholly inappropriate and ought to have been dismissed. We order it dismissed.

The suit shall proceed to hearing before a judge of the Employment and Labour Relations Court, other than Makau, J.

Each party shall bear own costs of the appeal.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR