IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MUSINGA, JJ.A)

CIVIL APPEAL NO. 42 OF 2017

BETWEEN

INTERNATIONAL CENTRE FOR INSECT

PHYSIOLOGY AND ECOLOGY (ICIPE) ..... APPELLANT

AND

NANCY MCNALLY ..... RESPONDENT

(An appeal from the Ruling and Order of the Employment and Labour Relations Court of Kenya at Nairobi (Linnet Ndolo, J) dated 20th December, 2016

in

Petition No. 67 of 2015)

****

JUDGMENT OF THE COURT

1. There are two main issues that arise for our determination in this appeal: firstly, whether the diplomatic immunity conferred on the International Centre for Insect Physiology and Ecology (ICIPE) **(the appellant)** can be challenged before a constitutional court and, secondly, whether reliefs arising from an employment contract may be agitated within the constitutional petition. The Employment and Labour Relations Court (ELRC) **(Linnet Ndolo, J.)** held that the court had the jurisdiction to admit and hear a petition filed before it and therefore dismissed a Preliminary Objection **(PO)** raised by the appellant to have the petition struck out, hence the appeal before us.

2. The petition before the ELRC was filed by the respondent who was an employee of the appellant on a two year contract from 17th March, 2014 until her services were terminated on 17th October, 2014. She contends that the treatment meted out to her by the appellant and the termination of her employment were unlawful for many reasons including: the irregular extension of her probationary period contrary to ***section 42*** of the ***Employment Act;*** non-payment of terminal dues contrary to ***section 17 (10)*** of the Employment Act; breach of the Employment Manual which bound all employees of the appellant equally; breach of ***Articles 40, 41*** and ***48*** of the ***Constitution*** on the rights to property, fair labour practices, and access to justice, respectively; breach of the right to privacy contrary to ***Article 31 (c)*** and ***(d)*** of the Constitution; and breach of human dignity contrary to ***Article 28*** of the Constitution.

3. The respondent acknowledged in her pleading that the appellant had diplomatic immunity as she pleaded, in part, as follows:-

> ***"3. THAT the Respondent is an international research centre established in 1986 with world headquarters in Nairobi, Kenya. It has full international legal status and personality as an autonomous, non-profit making, research and training institute.***
>
> **.....**
>
> ***23. THAT the Privileges and Immunities Act (International Centre for Insect Physiology and Ecology) Order, 1989 is in violation of the Constitution and null and void under Article 2 (4) of the Constitution in so far as it grants immunity to the Respondent from suit and legal process for violation of Article 41 of the Constitution and the Employment Act.***

24. THAT the Petitioner avers that the Respondent cannot rely on immunity as a cloak to disguise and evade responsibilities for its violation of the Employment Act and Article 41 of the Constitution.

.....

30. THAT the Respondent has immunity from suit and Legal process under the Privileges and Immunities Act (International Centre For Insect Physiology And Ecology Order) 1989. However, that privilege carries with it the obligation under the Vienna Convention on Diplomatic Relations and under the Privileges and Immunities Act to respect and uphold the Laws of Kenya.

31. THAT the Respondent's Immunity is impregnable only if it is exercised consistently with Article 40, 41 and 48 of the Constitution and the Laws of Kenya."

[Emphasis added].

4. Furthermore, in its ruling, the trial court made the following finding:-

"It is not in dispute that the Respondent enjoys immunity pursuant to duly recognised legal instruments. The question is whether the Court has jurisdiction to entertain the petition in spite of this immunity." [Emphasis added].

5. It follows, therefore, that no issue arises on the diplomatic immunity conferred on the appellant. It is grounded on the ICIPE Charter, signed by Kenya, which established the appellant in 1986, declared Nairobi as the Headquarters, and granted it full international personality as an autonomous, non-profit making research and training institute; a Host Country Agreement signed with Kenya on 27th November, 1986; the ***Privileges and Immunities Act*** (PIA), Cap 179, Laws of Kenya, incorporating Articles of the ***Vienna Convention on Diplomatic Relations*** (Vienna Convention); and the ***Privileges and Immunities (International Centre of Insect Physiology and Ecology) Order 1989,*** published in Legal Notice No. 13 declaring the appellant an international organization and according it, amongst other privileges, ***"immunity from suit and legal process"*** under Paragraphs 1 of Part 1 of the Fourth Schedule to the PIA. Lack of diplomatic immunity was not the respondent's case.

6. The argument by the respondent is rather that the immunity granted under the PIA as well as the Vienna convention cannot override express provisions of the Constitution of Kenya and the Employment Act which are more recent in time. That is why she seeks the following declarations:

"(a) A declaration that the Privileges and Immunities International Centre for Insect Physiology and Ecology Order 1989 is inconsistent with Article 41 of Constitution in so far as it grants the Respondents immunity from suit and Legal process for violation of the Employment Act and ids *(sic)* ***Dull*** *(sic)* ***and vold*** *(sic)* ***to the extent of such inconsistency.***

(b) A declaration that the Privileges and Immunities International Centre for Insect Physiology and Ecology Order 1989 is inconsistent with Article 40, 41 and 48 of the Constitution in so far as it denies the Petitioner access to justice for violation of her labour and property rights.

(c) A declaration that the Privileges and Immunities Act International Centre of Insect Physiology and Ecology Order 1989 is inconsistent with Article 19, 20, 22 and 23 of the Constitution on so far as it clothes the Respondent with immunity from suit and legal process for violation of the Petitioner's Constitutional rights.

(d) A declaration that the Respondent violated the Petitioner's right to privacy under Article 31 (c) and (d) of the Constitution.

(e) A declaration that the Respondent violated the Petitioner's right to human dignity under Article 28 of the Constitution.

(f) A declaration that the Respondent has violated the Petitioner's Rights to fair labour practices under Article 41 of the Constitution.

(g) A declaration that the Respondent has contravened the Employment Act.

(h) A declaration that Section 45 of the Employment Act is inconsistent with Article 28 and 41 of the Constitution in so far as it limits damages for unfair employment to only employees who have been in employment for 13 months."

7. She also seeks specific remedies under the Employment Act as follows:

"(i) US$ 170,492 being fourteen months of salary and benefits of under the Petitioner remaining period of her employment contract on 16th March, 2016 being damages for unlawful termination.

(j) US$ 146,136, being one year salary and benefits for unlawful termination.

(k) US$ 8,000, being relocation allowance due to the Petitioner under the contract.

(l) Kshs. 100,623 being Value Added Tax refunds due to the Petitioner and not reclaimed by the Respondent from the Kenya Revenue Authority.

(m) Reimbursement of US$ 1465, being unlawful deductions from the Petitioner's dues.

(n) An order for the Respondent to deliver to the Petitioner the full documentation regarding ownership and importation of her motor vehicle, her Ministry of Foreign Affairs identity card and her work permit.

(o) Costs.

(p) Interest on (i), (j) and (l) above from the date of Judgement until payment in full.

(q) Interest on (k) and (m) above from the 17th October 2014 until payment in full."

8. The appellant did not respond to the petition upon being served but, instead, raised the PO aforesaid seeking to strike out the petition on the grounds that:

"1. The Respondent is a holder of immunity under the Privileges and Immunities Act (Chapter 179 of the Laws of Kenya) and as such is immune from legal processes;

2. The Respondent entered into a Host Country Agreement with Kenya on 27th November 1986 which grants privileges and immunity to the Respondent from legal process provided under Article 27 of the ICIPE Charter; and

3. The claim/suit is therefore in breach of the express provisions of Section 9 & 11 of the Privileges and Immunities Act (Chapter 179 of the Laws of Kenya), Article 27 of the ICIPE Charter and Article 2 (5) of the Constitution as the Respondent is immune from suit and legal process and has not waived that immunity, consequently this suit and/or claim ought to be dismissed with costs to Respondent."

9. In its short ruling which provoked the appeal, the trial court stated as follows:

"I have looked at the Petitioner's prayers as contained in her petition and find that they traverse from constitutional declarations to specific prayers for payment of dues. It seems to me therefore that this is not an ordinary employment claim. Rather, it calls for interpretation of the instruments granting immunity vis a vis the Constitution. This is clearly within the specialized jurisdiction of the Employment and Labour Relations Court to interpret the Constitution in employment and labour related matters as defined by Majanja, J in United States International University (USIU) vs Attorney General [2012] eKLR. To uphold the preliminary objection as framed would in my view, amount to limitation of this jurisdiction leading to miscarriage of justice and a missed opportunity to grow jurisprudence in this nascent branch of law."

10. The eight grounds of appeal laid before us to challenge that decision emphasize the immunities granted under the PIA which are part of the laws of Kenya by dint of ***Articles 2 (5)*** and ***(6)*** of the Constitution, which for completeness state:

Article 2(5): The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".

We shall therefore examine the appeal on the basis of the two grounds distilled at the opening paragraph of this judgment.

11. In written and oral submissions made by learned counsel, **Mr. Omino Henry**, instructed by M/s Walker Kontos, Advocates, it is submitted that what was before the ELRC was a *'suit'* and it did not matter that it was ***"not a normal employment claim"*** as perceived by the trial court. Counsel referred to the definition of 'suit' in ***Black's Law Dictionary***, 6th Edition, as: ***"referring to any proceedings by one person or persons against another or others in a court of law in which the plaintiff pursues, in such court, the remedy which the law affords him for redress of an injury or the enforcement of a right whether at law or equity".*** He observed that the declarations and reliefs sought by the respondent are in line with that definition. At any rate, he added, the very intention to have the appellant's immunity interpreted by the court is a *'legal process'* which is covered in the diplomatic immunity granted to the appellant.

12. Counsel emphasized that the PO was a jurisdictional issue, and in this case the jurisdiction of the court was ousted by statutory provisions. It follows, on the authority of ***Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR*** and ***The Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1*** that the trial court had no option but to down its tools forthwith. Citing the case of ***Ministry of Defence of the Government of the United Kingdom vs Joel Ndegwa [1983] eKLR,*** counsel submitted that it was a matter of international law that our courts will not entertain an action against certain privileged persons and institutions unless the privilege is waived. In this case, it was not.

13. Mr. Omino concluded by submitting that the trial court was in error when it formed the view that striking out the suit would *'lead to a miscarriage of justice and a missed opportunity to grow jurisprudence.'* Firstly, in his view, the court could not clothe itself with a jurisdiction it did not have simply for the sake of growing jurisprudence, and secondly, there were existing internal dispute resolution mechanisms provided for in the Appellant's *'Employee Benefits Manual'*, which the respondent had not exhausted. Counsel cited several other authorities in support of his submissions, and especially relied on this Court's decision in ***Karen Njeri Kandie vs Alssane Ba & Another [2015] eKLR*** **('the Shelter Afrique' case)** on immunity of international organizations from legal proceedings arising from matters intrinsically linked to its operations.

14. In response, learned counsel for the respondent, **Ms. Kethi Kilonzo,** instructed by M/s Kilonzo & Company Advocates, filed written

submissions which she orally highlighted. She started by observing that the appellant had not filed any response to the petition and, therefore, it had impliedly admitted all the facts stated in the petition including the unlawful termination of employment and transgressions of statutory law and the Constitution. If the facts were disputed, she submitted, then the PO was a non starter on the authority of ***Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited [1969] EA 696.***

15. Moving on to what she termed as the appellant's demand for *"blanket and absolute immunity for breach of the Constitution, the Employment Act and the contract between the parties"*, counsel submitted that the appellant was asking the court to find that it was above the law and the Constitution of this country. She wondered how the appellant can plead immunity after violating the Constitution and statutory law. Counsel further submitted that the instruments relied on by the appellant for immunity, that is, the PIA, the Charter and the ICIPE Order 1989, were several years older than the Constitution and must be subordinated to it and declared invalid under ***Article 2 (1).*** As for the various rights which the respondent pleads had been violated, counsel submitted that the Constitution created the ELRC and gave it specialized jurisdiction under ***Article 162 (2) (a)*** to deal with all matters employment and any constitutional issues arising thereunder. According to counsel, the specialized jurisdiction of the ELRC cannot be taken away by an Act of Parliament, like the PIA, which was passed 40 years earlier and which ought to be declared null and void. Reliance was made on the dicta of Majanja, J. in the case of ***Beatrice Wanjiru vs The Attorney General [2012] eKLR*** that the international conventions and treaties alluded to in ***Article 2 (6)*** of the Constitution are subordinate to the Constitution.

16. Adverting to the Employment Act, counsel submitted that it did not exempt any foreign state, consular or foreign organization from its provisions. Under ***section 45 (3)*** an employee is given the right to move to court if the employer contravenes any provision under the Act. The PIA cannot therefore, in counsel's view, purport to grant immunity to an employer otherwise it would be in conflict with the Employment Act which commenced 37 years after the PIA and 19 years after the ICIPE Order. The Employment Act, in counsel's submission, should take precedence in case of conflict. Considering that there is no denial of liability, she asserted, it would be unjust to deny the respondent her day in court to agitate the case.

17. Finally, counsel submitted that the essence of justice is that there is no wrong without a remedy, and that there can be no violation of a legal right without a legal relief. She referred to ***Article 5*** of the Vienna Convention which enjoins all persons enjoying privilege and immunities to respect the laws and regulations of the host State. She further submitted that the employment contract the respondent entered into with the appellant was a private matter and not a public activity concerning other members of ICIPE. As such, there is no absolute immunity from suits, and the immunity may be lifted where the matter does not form the core mandate of the organization. Reliance was made on the case of ***Tononoka Steels Limited vs Eastern and Southern Africa Trade and Development Bank [1999] eKLR*** where the PTA Bank was denied absolute immunity; ***Josephine Wairimu Wanjohi vs International Committee of the Red Cross [2015] eKLR*** which debunked absolute immunity; as well as other cases decided across Africa to the same effect. In counsel's view, in order to arrive at a conclusion as to whether there is absolute or restricted immunity, there must be a process of fact finding and therefore, the matter before us was incapable of determination by way of a PO.

18. We have anxiously considered the submissions of counsel and the authorities cited on both sides of the argument. Before we consider the two issues at hand, we must dispose of two preliminary matters urged by Ms. Kilonzo. Firstly, she contended that the PO was improperly raised, and, secondly, that the international conventions and treaties alluded to in ***Article 2 (6)*** of the Constitution are subordinate to the Constitution. Fortunately, similar issues have been raised before and determined by this Court in the ***Shelter Afrique case*** (supra).

19. The submission of counsel on the first preliminary matter is that there are factual matters that have to be ascertained before a decision is made as to whether the diplomatic immunity of the appellant was absolute or restricted. *A fortiori*, if the facts pleaded are deemed to have been admitted by virtue of non response to the petition, then the PO has no legs to stand on. As such, the principles enunciated in the ***Mukisa Biscuit case*** (supra) are not met and therefore the PO was inappropriate. ***The Mukisa Biscuit case*** is, of course, the *locus classicus* on POs and lays down the principle that:

> ***"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".***

20. In the ***Shelter Afrique case***, the International Organization which has its headquarters in this country, was sued by one of its employees on matters pertaining to the employment, but Shelter Afrique raised a PO pleading diplomatic immunity from suits and legal process in similar fashion as the appellant herein. The trial court upheld the PO. On appeal to this Court, it was contended that the PO was inappropriate on account of unascertained or disputed facts. But the Court held 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."***

We respectfully approve and adopt the same reasoning in this matter.

21. The second preliminary issue is that the legal instruments granting immunity to the appellant predate the Constitution and therefore are subordinate thereto, the provisions of ***Article 2 (5)*** and ***(6)*** notwithstanding. The submission appears to have been extracted from the *dicta* of Majanja, J. in the ***Beatrice Wanjiru case*** (supra). Once again, the same issue featured in the ***Shelter Afrique case*** and was resolved by this Court in the following manner:

> ***"What is a court deciding a matter in 2015 to make of a treaty ratified without reservation long before the Constitution 2010 came into force? Is such treaty or convention part of the laws of Kenya under Article 2(6) of the Constitution or not? We think it***

is. Starting from the constitutional text itself, it will be noted that there is no cut-off point; it only states that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. The text does not of itself contain a futuristic imperative. Nor does it directly or by implication suggest that such instruments as have been previously ratified are not part of the law of Kenya.....The sentiments of Majanja J may well have been perfectly valid at the time expressed (in July 2012) but given the Making and Ratification of Treaties Act...., the fear of usurpation of legislative authority in violation of the doctrine of separation of powers, and negation of the people's sovereignty as delegated and exercised through elected representatives can hold no longer. We would go a step further and state that the corpus of international treaties in Kenya cannot be demarcated for jural efficacy into pre-and post-2010 categories. We take the view that as long as Kenya's ratification of any treaty remains in force, unrevoked, unrecalled and unsuspended, the obligations that flow from it and its jussive force as part of the laws of Kenya remains the same irrespective of when the ratification occurred. [Emphasis added].

Again, we respectfully agree with those findings.

22. None of the two counsel pointed out to us, if at all they were aware of it, that the ***Shelter Afrique case*** went on appeal to the Supreme Court as **Petition No. 2 of 2015** and is reported as ***Karen Njeri Kandie vs Alassane Ba & Another [2017] eKLR.*** We have perused the decision of the Supreme Court and find that it upheld the decision of this Court on the two preliminary issues. On "*whether Article 2 (6) of the Constitution should be interpreted retrospectively, to apply to treaties and conventions ratified prior to the 2010 Constitution*" , the Supreme Court held, following its earlier decision in ***Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others Sup. Ct. Application No. 2 of 2011; [2012] eKLR***, that its reading of ***Article 2 (6)*** of the Constitution can only lead to the conclusion that there is no bar to its provisions being applied retrospectively. It stated:

"from a plain reading of Article 2 (6) of the Constitution, it appears that the Constitution is silent on whether treaties ratified prior to the 2010 Constitution also form part of the laws of Kenya. In our view, however, the language of Article 2(6) itself should be the beginning of the resolution of the question of retrospectivity, and we note in that regard that, it does not distinguish the types of treaties and conventions that form part of Kenyan law; because the language plainly commands that any treaty or convention that Kenya has ratified becomes part of the laws of Kenya. The provision does not also distinguish treaties and conventions ratified before or after the Constitution of 2010, and therefore, in this particular instance, the agreements and Conventions that Kenya entered with Shelter Afrique, although ratified before 2010, are in force, have remained unrevoked, and therefore, form part of the laws of Kenya, only subject to the Constitution." [Emphasis added].

23. It follows from the above analysis that the two preliminary issues raised by the respondent have no merit and we reject them.

24. Adverting now to the first main issue in the appeal, whether the constitutionality of the diplomatic immunity conferred on the appellant can be challenged before the ELRC, we entertain no doubt that it can. All laws and legal instruments are subject to the Constitution. ***Articles 24*** and ***25*** of the Constitution provide in part as follows:-

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudicethe rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) ...

(3) The State or a person seeking to justify a particular limitation Shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied."

Article 25:

"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited -

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus".

25. Dealing with those provisions in the ***Shelter Afrique case***, the Supreme Court stated thus:-

> ***"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:***
>
> ***"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:***
>
> ***"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].

26. And so it is in the matter before us. 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? It reads:

> ***"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."***

Those are relevant questions to ponder, and there may be others.

27. 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.*** We are not in doubt too, that the relationship between the appellant and the respondent was not a private matter between the two parties but a public activity intrinsically connected to the operations of the appellant. With respect, the contention to the contrary by Ms. Kilonzo has no substance.

28. This Court posed a similar question in the ***Shelter Afrique case*** and responded thus:

> ***"The question that then arises is whether the appellant's employment and the matters related thereto were matters of a professional or commercial activity outside the respondents' official functions and therefore un-entitled to immunity under Article 31 of the Vienna Convention. For this analysis the definition of Laws J, expressed in Propend Finance vs Singh [1987] ILR 611 that commercial activity refers to "any activity which might be carried on by the diplomat on his own account for profit" appears apt. We think the exception does not apply."***

29. Indeed, in the ***Shelter Afrique case***, both this Court and the Supreme Court dwelt on one constitutional issue, access to justice, which the employee argued had been taken away from her by upholding the PO on immunity. Both Courts were of the view that diplomatic immunity, where properly established, is a legitimate limitation on access to courts. This Court stated:

> ***"immunity is a legitimate limitation to the right of access to justice under Article 48 of the Constitution, and is not disproportionate to the legitimate aims of conferment of state immunity."***

And the Supreme Court stated:

> ***"after balancing the right of the appellant to access justice, and Kenya's obligation to ensure that it meets its international obligations of letting the respondents work without hindrance, the limitation on the right to access courts is not disproportionate. The conferment of immunity for the purposes of Kenya upholding its international law obligations, is to that extent, a reasonable and justifiable limitation of the right to access justice as provided under Article 48 of the Constitution, and we so hold."***

The Supreme Court would have dealt with other constitutional issues raised before it under ***Articles 25*** and ***50*** in that matter but it remarked that the lower courts had not pronounced themselves on those issues and it could not therefore consider them.

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 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.

31. Having so found on the first issue, it is, in our view, unnecessary to analyse the second issue. In truth, the fate of the second issue is dependent on the outcome of the declarations sought in the petition and may require evidence tested in cross examination. We leave it to the trial court upon whom the petition lies to give the necessary directions for effective determination of the petition.

32. The upshot is that this appeal is not meritorious and is dismissed with costs.

We so order.

Dated and delivered at Nairobi this 25th day of May, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR