



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 20 OF 2013

(CORAM: OUKO, KIAGE & M'INOTI J.J.A)

BETWEEN

KAREN NJERI KANDIEAPPELLANT

AND

ALSSANE BA 1ST RESPONDENT

SHELTER-AFRIQUE 2ND RESPONDENT

(Appeal from the ruling and order of the Industrial Court of Kenya at Nairobi (Maureen Onyango, J.) dated 22nd November, 2012

in

INDUSTRIAL CAUSE NO. 1296 of 2012)

JUDGMENT OF THE COURT

By this appeal the appellant **NANCY NJERI KANDIE** challenges a decision of the Industrial Court (M. Onyango J.) rendered on 22nd November 2012 by which that court upheld a preliminary objection raised against the appellant’s statement of claim and struck it out.

The appellant had sued **ALSSANE BA** (the 1st respondent) and **SHELTER AFRIQUE** (the 2nd respondent) for various reliefs and remedies arising from an incident on 28th June 2012 wherein she was allegedly threatened and physically assaulted by the 1st respondent who twisted her hand occasioning her serious bodily injuries. She was at the material time the 2nd respondent’s Director of Finance while the 1st respondent was its Managing Director and her immediate supervisor. She sought medical attention and also reported the assault to Capital Hill Police Station in Nairobi where she recorded a statement.

A week later, on 6th July 2012, by a letter under the hand of the 1st respondent, the appellant was advised to proceed on special leave as a temporary necessary measure that did not “pre-empt,” (by which the author must have intended ‘preclude’) disciplinary action against her. She was indeed summoned to a special board meeting that was scheduled for 25th July 2012 to consider, inter alia, “the recent altercations” between herself and 1st respondent, and to consider an appeal she had made to the Board of

Directors.

The appellant did not attend that meeting because she was admitted to hospital. She also harboured various apprehensions about the disciplinary process as detailed in the statement of claim she filed on 31st July 2014. She accordingly sought a declaration that her being sent on leave was null and void, an order for reimbursement, a preliminary injunction restraining termination of her employment, temporary suspension of the 1st respondent, an order compelling the Directors of the 2nd respondent to investigate and consider her complaint against the 1st respondent as well as damages for breach of contract, unlawful suspension, harassment and, as against the 1st respondent, assault.

To that statement of claim the respondents raised a preliminary objection notice whereof they issued on 24th August 2012 in the following terms;

“1. THAT the respondents are holders of diplomatic immunity under the Privileges and Diplomatic Immunities Act (Cap 179 Laws of Kenya) and as such are immune from legal process as claimed in this case.

2. THAT the 2nd respondent has entered into a Host Country Agreement with Kenya on 19th October 1983 which grants diplomatic privileges and immunity to the 2nd respondent and to its senior officials including its Managing director (the 1st respondent) from legal process as provided under Sections 23 and 24 of the said Agreement.

3. THAT both Shelter Afrique and the African Development Bank have entered into agreements with the Government of Kenya that confer diplomatic privileges and immunity to employees of the two institutions.

4. THAT the issue of the respondent’s diplomatic privileges and immunity is currently the subject of Constitution Petition No. 312 of 2012, Between Allasane Ba and Director of Public Prosecutions and others due for hearing on 20th September 2012.

5. THAT the Claimant’s application and the entire suit are misconceived and the orders prayed for do not lie as this Court is not empowered to give the said orders”.

After hearing the parties on that preliminary objection the learned judge upheld it, struck out the appellant’s Memorandum of Claim and dismissed her case. In doing so the learned Judge considered a number of statutes and instruments and made some significant findings including;

“From these excerpts, it is clear that the respondents enjoy immunities and privileges among them immunity from legal process of any kind, seizure of personal property and immunity from arrest and detention. The offices of the respondents are inviolable and legal service may not be effected without the consent of the Managing Director who is the 2nd respondent”.

And also that;

“Article 2(5) and (6) of the Constitution 2010 provides that general rules of international law and any treaty or convention ratified by Kenya form part of the laws of Kenya under the Constitution. Secondly, the Host Country Agreement signed between Shelter Afrique and Government of the Republic of Kenya is part of the convention on the constituent charter of Shelter Afrique and thus form part of the laws of Kenya”.

In her appeal to this Court, the appellant has by her Memorandum of Appeal raised some ten points of grievance. They are to the effect that the learned judge erred by: entertaining the respondent’s preliminary objection on contested facts; failing to find that the Shelter Afrique Act, Cap 493C, domesticated some only of the provisions of the Host Country Agreement and the Convention of the Constituent Charter of

Shelter Afrique and was the only basis for any immunity for the respondents and did not include immunity from all legal process; failing to give effect to the customary international law doctrine of restrictive immunity for the respondents thereby abrogating the appellant's access to justice and equal protection of law rights; failing to hold provisions of the Host Country Agreement and the Convention on the Constituent Charter unconstitutional and failing to afford the appellant an appropriate effective alternative legal recourse against the respondents.

In the written submissions filed and in his address, the appellant's learned counsel **Mr. Mohammed Nyaoga** appearing with **Mr. Geoffrey Imende**, cast this appeal as an access to justice issue in that the appellant was by the sustenance of the diplomatic immunity objection, denied access to justice contrary to Article 48 of the Constitution, and that, on the basis of the status of the respondents in violation of the cardinal principle that ought to guide courts, namely that justice shall be done to all irrespective of status expressed in **Article 159 2(a)** of the Constitution. Counsel took issue with the learned judge for ignoring the Constitution thereby upholding impunity in the name of diplomatic immunity. The Judge was also criticized for preferring the provisions of the Host Country Agreement and the Convention to the Shelter Afrique Act which was the domesticating legislation when he should have given effect to the Act which prevails where a conflict exists between it and the other instruments.

For that proposition Mr. Nyaoga referred to the case of **ROSEMARY MORAA & ANOR Vs. ATTORNEY GENERAL** [2006]eKLR where a two judge bench of the High Court, applying among others, Principle 8 of the Bangalore Principles on Judicial Independence, held that where there is no ambiguity, the clear provisions of the Constitution, or national law must prevail over international conventions conflict therewith and courts are therefore obligated to give effect to such national law. Charging that the learned judge effectively invalidated an Act of Parliament Mr. Nyaoga also cited the case of **BEATRICE WANJIKU & ANOR Vs. ATTORNEY GENERAL & ANOR** [2012]eKLR where Majanja J. expressed the view that;

“Although it is generally expected that the government through its executive (sic) ratified international instruments in good faith on behalf of and in the best interest of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives ...”

Even assuming without conceding that the respondents did have immunity, Mr. Nyaoga submitted that such immunity could only be restrictive and not absolute the test being whether the act in question was a sovereign governmental one which would be immunized, or a commercial or private one, to which no immunity can attach. Reference was made to this Court's decision in **MINISTRY OF DEFENCE OF THE GOVERNMENT OF THE UNITED KINGDOM Vs. NDEGWA** [1983] KLR 68 where that distinction was highlighted with the Court citing with approval the English case of **TRENDEX TRADING CORPORATION Vs. CENTRAL BANK OF NIGERIA** [1977] 1 QB 529 where it was held, *inter alia*; that;

“(2) Even if the bank were part of the Government of Nigeria, since international law now recognized no immunity from suit for a Government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature, it was not immune from suit”

Mr. Nyaoga completed his submissions by criticizing the learned Judge for failing to consider whether the appellant had any alternative forum whereat she could ventilate her grievances against the respondents with the result that the appellant's right to access to justice under **Article 48** of the Constitution was rendered illusory.

Next came Mr. Imende who first referred us to the Immunities and Privileges Act, Cap 179 Laws of Kenya which domesticated the 1961 Vienna Convention on Diplomatic Relations and made the submission that the respondents are not diplomats *per se* and that international organizations such as the 1st respondent require to be first designated and their privileges set by the relevant Minister under Section 9 of the Immunities and Privileges Act but the Minister not having done so in respect of the respondents, they could not derive any benefits thereunder.

Mr. Imende added that the Shelter Afrique Act did not effect a wholesale domestication of the Shelter Afrique Convention and did not confer the immunities raised by the respondents.

This selective application of the Convention was a deliberate act of the Legislature and the learned judge was therefore in clear error when he effectively obliterated Parliament's work of differentiation.

Counsel returned to the access to justice theme and assailed the learned judge for failing to find that the appellant's said right would have been best served by giving full effect to the Shelter-Afrique Act. By not doing so, it was submitted, the learned judge permitted an unwarranted derogation of the appellant's right to access to justice especially given that the 1st respondent had failed to put in place an independent mechanism for addressing grievances such as the appellant had against the 2nd respondent.

Opposing the appeal, Mr. Munyu, learned counsel for the respondents pointed out that the 1st respondent holds a diplomatic passport of the Islamic Republic of Mauritania and is the Managing Director of the 2nd respondent on secondment from the African Development Bank and is a diplomat with the attendant immunities and privileges attaching to him. Counsel made reference to the agreement between the Republic of Kenya and the Company for Housing and Habitat in Africa Regarding the Establishment of the Headquarters of the Company for Housing and Habitat Africa (the Headquarters Agreement). That Agreement, signed between Shelter Afrique and the Government of the Republic of Kenya on 19th October 1983, on which date it came into force, in Article XI deals with Senior Officials of the 2nd respondent as follows;

“SECTION 23;

Senior officials of Shelter Afrique shall enjoy within and with respect of the Republic of Kenya the following privileges and immunities;

(a) Immunity from legal process of any kind in respect of words spoken or written, and of acts performed by them in their official capacity, such immunity to continue notwithstanding that the persons concerned may have ceased to be officials of Shelter Afrique;

Broader immunities and privileges are then provided for the highest officials of the 2nd respondent under Article 24 as follows;

“(a)The Managing Director, members of the Board of Directors and officials of Shelter Afrique having the rank of Assistant Director and above shall be accorded the privileges and immunities, exemptions and facilities accorded to Ambassadors who are heads of missions”

Asserting that Kenya voluntarily agreed and is bound to grant diplomatic immunity to the respondents and in particular officers of the 1st respondent's station and status, Mr. Munyu referred to the Convention on the Constituent Charter of Shelter Afrique that was signed by various African States assembled at Lusaka Zambia between 10th to 11th May 1982 whereunder Kenya undertook to grant Shelter Afrique, the 1st respondent, the constituent charter that was annexed to the convention. He submitted that Kenya's voluntary acceptance to host the 1st respondent within its territory is consistent with **Article 2** of the Vienna Convention on Diplomatic Relations. Absent a waiver by the 2nd respondent, the 1st respondent enjoys immunity from Kenya's civil and administrative jurisdiction.

While conceding that the Shelter Afrique Act which is the local statute domesticating the Headquarters Agreement did not duplicate the Agreement or the Convention, it was Mr. Munyu's contention that in the event of any inconsistency between the two, the Act must give way to the Convention as international treaties ratified by Kenya are now part of the laws of Kenya by virtue of **Article 2(6)** of the Constitution, 2010.

Mr. Munyu posited that whereas under the Vienna Convention immunity does not attach to any

professional or commercial activity exercised by a diplomatic agent outside his official functions, that exception was not relevant to the present case as the area of employment within which the dispute arose is incidental to the performance of the respondents' official functions. The respondents therefore stood in exactly the same situation as far as immunities and privileges are concerned, as High Commissions, Embassies, Diplomatic Missions and their heads.

Mr. Munyu concluded by stating that Article 48 of the Constitution on access to justice cannot oust **Article 2 (6)** of the Constitution which declares that the international instruments granting the respondents immunity are part of the laws of Kenya. Moreover, in counsel's view, the appellant is not without recourse to justice, as she alleges, since there does exist an alternative remedy to her under the 1st respondent's staff rules.

So concluding, Mr. Munyu urged us to find and hold that the learned judge was entirely correct in upholding the preliminary objection and downing her tools, a decision we should leave undisturbed.

Making reply to those submissions, Mr. Imende countered that the position of the respondents is not the same as that of diplomatic missions and therefore the immunities and privileges attaching to the former under Cap 179 of the laws of Kenya did not fully apply to them. He submitted that for organizations such as the 1st respondent, only such privileges and immunities as may be stated by the Minister by appropriate notice would apply and that no such notice had been issued in respect of the 1st respondent.

Counsel urged that the Host Country Agreement did not have the same status as a convention and therefore the provisions thereof did not automatically become part of our law as envisioned by **Article 2(6)** of the Constitution. The learned judge was therefore wrong to assume the existence of privileges and immunities by a wholesale importation of agreements into our laws and of the Charter into the Immunities and Privileges Act, Cap 179.

Mr. Imende rested by taking issue with the learned judge's reliance on the decision of the Industrial Court in **ELKANA KHAMISI SAMARERE & ANOR VS. THE NIGERIAN HIGH COMMISSION** (Industrial Court Cause No. 1464 of 2011) where the applicability of the principle of restrictive immunity as a principle of customary international law was rejected in favour of full enforcement of Kenya's obligations to observe diplomatic immunity.

Before we deal with the central issue of this appeal which is whether the learned judge was entitled to find in favour of the existence of and give effect to immunity from legal process for the respondents, we shall dispose of the appellant's first complaint which is that the learned judge ought not to have entertained the preliminary objection in the first place "when the facts upon which it was based were contested by the parties". We do not see much merit in this ground which, though not abandoned, counsel for the appellant chose not to press with any force in their written and oral submissions. The case of **MUKISA BISCUIT CO. Vs. WESTEND DISTRIBUTORS LTD** 1969EA 969 cited in the appellant's list and bundle of authorities established long ago the proper province of preliminary objections. In his judgment, Sir Charles Newbold, P. put it thus, and we respectfully agree;

"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". At P701

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.

Next we address the standing of covenants, treaties and other international instruments executed by Kenya. The appellant's complaint in this regard is that the learned judge fell into error in giving effect to the Convention on Establishment of the Constituent Charter on Shelter Afrique ('the Convention') yet, at the time it was ratified "Kenya was a dualist state [and] conventions ratified by Kenya had no force of law in Kenya unless and until they were domesticated".

It is not in dispute that prior to the promulgation of the Constitution of Kenya 2010, Kenya was a dualist state, meaning that the treaties it ratified were not self-executing and did not automatically become part of the law of Kenya. Any treaty executed by the State still required domestication by way of a local statute, passed by the Legislature that would incorporate the treaty. See **EAST AFRICAN COMMUNITY Vs. REPUBLIC** [1970] EA 457, a decision of the former Court of Appeal for East Africa. This Court in **DAVID NJOROGI MACHARIA Vs. REPUBLIC** [2011]eKLR restated that position but was alive to the radical shift that the new Constitution portended. Said the Court;

"Kenya is traditionally a dualist system, thus treaty provisions do not have immediate effect in domestic law nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or existing legislation. However, this position may have changed after the coming into force of our new Constitution".

It is worth noting that even before the coming into effect of the new Constitution, treaties and conventions, even without domestication, could still be applied in Kenya where they were not in conflict with existing municipal law. In **RONO Vs. RONO** [2005] 1KLR 538 this Court held that;

"Even though Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated, current thinking in the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation".

The judgment of Waki J.A in that appeal which dealt with the issue of discrimination on grounds of sex and gender addressed that 'current thinking' on the applicability of international treaties and convention at some length concluding as follows, with which we respectfully agree;

"A pointer to the currency of that thinking in this country is in the draft constitution where it is proposed that the laws of Kenya compromise, amongst others:-

'Customary international law and international agreements applicable to Kenya'

...the central issue relating to discrimination which this appeal raises, cannot be fully addressed by reference to domestic legislation alone. The relevant international laws (sic) which Kenya has ratified will also inform my decision". (At P551)

What was then a draft was on 27th August 2010 promulgated as the Constitution of Kenya, 2010. It emphatically decrees the place of international law in Kenya's juridical set up as follows;

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

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

There can be no doubt therefore that by constitutional fiat, Kenya converted itself from a dualist country to a monist one with the effect that a treaty or convention once ratified is adopted or automatically incorporated into our laws without the necessity of a domesticating statute.

Such a change of, curse, would have far reaching consequences in that the Executive act of treaty making would seem to import law into Kenya thus by-passing Parliament's legislative mandate at national level

as stipulated by **Article 94(1)** of the Constitution. That was sorted out by the enactment of the Treaty Making and Ratification Act, No. 45 of 2012. That statute is an Act of Parliament to give effect to the provision of Article 2(6) of the Constitution and to provide for the making and ratification of treaties. It addresses issues regarding the initiation of treaties and ensures their consideration and approval by Cabinet and Parliament before ratification. That Act, though, applies to treaties concluded by Kenya after its commencement, which was on 14th December 2012, by virtue of Section 3(1) thereof.

What we have to determine then is the interaction between treaty or convention provisions on the one hand, and the domesticating statute where the latter is not a replica of the former in terms of the provisions contained therein. 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. We have at any rate made reference to the decisions of this Court that already accepted the applicability of international law within our jurisdiction.

We note also that other than declaring the Constitution's pre-eminence in Kenya's juridical system, the listing of the laws in the Article 2 of the Constitution does not denote any prioritization. That being so it is enough to observe that the international treaties and conventions are part of the laws of Kenya and are at least at par with other laws enacted by Parliament. The High Court has in a number of decisions acknowledged this view. In **DIAMOND TRUST KENYA LTD Vs. DANIEL MWEMA MULWA HCCC NO. 70 of 2002**, decided before the current Constitution, Njagi J. grappled with the apparent conflict between the provisions of Section 40 of the Civil Procedure Act which provided for the arrest and detention of a judgment debtor and Article 11 of the International Covenant on Civil and Political Rights, (ICC PR) of which Kenya is a party, which prohibit such penal consequence for civil debt. The judge reluctantly admitted that "the highest rank [the ICC PR] can possibly enjoy is that of an Act of Parliament" but was quick to add that "even if it ranks in parity with an Act of Parliament, it cannot oust the application Section 40 of the Civil Procedure Act".

On his part, Majanja J in **BEATRICE WANJIKU & ANOR Vs. ATTORNEY GENERAL & ANOR** (supra) quite clearly subordinated treaties to statutes in expressing the view;

"Article 1 places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the Executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of our constitutional set up."

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 that we have already adverted to, 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. A differentiation born of judicial interpretation is neither tenable nor practical. Its utility is equally doubtful.

Now, as far as diplomatic relations are concerned, the general applicable law is as set out in Part II of the Privileges and Immunities Act Cap 179. At Section 4, that Act makes a wholesale importation of the Vienna Convention on Diplomatic Relations that was signed in 1961. The Convention constitutes the

First Schedule to that Act and, it “shall have the force of law in Kenya”. The section then sets out certain provisions in accordance with which the Convention is to be construed. Its legal force within our jurisdiction is indisputable.

It is instructive that the preamble of the convention provides as follows;

“The states parties to the present convention.

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents

...

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems ...”

The States were there expressing a self-evident imperative of co-operation by way of granting to each other mutual and reciprocal privileges and immunities which, in their own words, they realized are for the purpose, not of benefiting individuals, “but to ensure the efficient performance of the function of diplomatic missions as representing states”.

Under Article 31 of the Convention

“1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

....

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions”.

The applicability and binding force of the Vienna Convention in matters of diplomatic privileges and immunities has not been challenged or questioned in these proceedings. It is with that convention and its domesticating statute in mind that we now turn to an examination of the applicability of the Convention in the Constituent Charter of Shelter Afrique as well as the Memorandum of Understanding on the Establishment of Shelter Afrique, both of which are instruments completed by African States. The Memorandum of Understanding on the Establishment of An African Housing Development and Finance was executed by Seventeen Founder Members, all African states, among them Kenya, on 14th September 1981. It has a clause on privileges and immunities that provides;

“In the host country, Shelter-Afrique and its personnel shall enjoy privileges and immunities at least equivalent to those granted to the headquarters and personnel of other international or regional organizations by host countries of such organizations”.

Whatever may be the legal force of a Memorandum of Understanding between states, the Convention on the Constitution Charter of Shelter Afrique is a multilateral treaty that is fully binding upon the states parties thereto. Article 1 thereof is in clear terms;

“Kenya undertakes to grant the company for Habitant and Housing in Africa (Shelter-Afrique) without delay the constituent Charter appearing as Annex B hereof and made by reference part of this Convention. The said Charter shall have force of law among the parties hereof and Kenya undertakes not to repeal it, amend or add to it otherwise than in agreement with the other Signatory Governments”

(Emphasis ours) On the question of immunities and privileges the Constituent Charter recites Kenya’s selection to host Shelter Afrique and in consideration of that and as a signatory to the said Memorandum of Understanding has agreed to grant Shelter Afrique and its personnel “such privileges and immunities

not less favourable than those granted to the headquarters personnel of international organizations in Kenya”.

Taking all of these instruments together, it seems plain to us that Kenya did voluntarily enter into agreements and obligations that are binding upon it. It gave undertakings with regard to immunities and privileges for the respondents that it cannot lawfully resile from. The principle of international law rendered *pacta sunt servanda*, that treaties are meant to be binding which imposes an obligation on parties thereto to serve or honour them seems to us to be a salutary and indispensable element of international intercourse. It follows therefore that in enacting the Shelter Afrique Act, Kenya was obligated to ensure that it did not repeal, amend or add to what it had voluntarily undertaken.

There is no denying that the said Act, though declaring in its preamble that Kenya was thereby making provision for giving legal effect to the Articles of the Charter and fulfilling its obligations, is not a faithful reproduction of the obligations voluntarily assumed by Kenya under the various instruments we have made reference to. The body of the Act is shorter than the preamble and comprises just three brief sections, a record of sorts. Section 3 merely states;

“The provisions of the charter set out in the Schedule and the statutes of Shelter-Afrique as promulgated from time to time shall have the force of law in Kenya”.

We note in particular that the schedule to the Act makes no mention of the immunities that attach to the headquarters personnel of Shelter Afrique. It only provides for their being accorded exemptions, concessions and privileges in respect of taxation, import duties and otherwise, which are to be at par as those of such persons of international financial institutions hosted in Kenya. The provision as it stands is a derogation from the obligation Kenya entered into with regard to the respondents and we have little difficulty in holding as we do that the respondents are and were at all material times entitled to immunity in the first instance.

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. SING** [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.

Now, if the 1st respondent were being sued in respect of private debts and other obligations wholly unrelated to his official functions, there is little doubt that as far as liability goes, he could be sued in Kenyan courts but only after he ceased holding office the immunity claimed being a procedural as opposed to a substantive bar from suit. But when the incident leading to suit is one that occurred at the premises of the 2nd respondent during official hours and in the course of official work involving the appellant and the 1st respondent as officers of the 2nd respondent, doubtless the 1st respondent was acting in his official capacity and is therefore immunized from civil suit not only during his holding of the post, but also after he ceases holding it. See the English Court of Appeal decision in **ZOERNESCH Vs. WALDOCK & ANOR** [1964] 2 ALL E.R. 256.

The questions that would arise at the trial of a claim arising out of the circumstances such as obtained in the matter before us would necessarily entail an interrogation of the internal workings of the 2nd respondent, an international organization with membership drawn from Sovereign African States. At any rate its headquarters is given the status of a foreign mission. We would adopt the approach of the Human Rights Tribunal of Ontario in **BENTLEY Vs. CONSULATE GENERAL OF BARBADOS/INVEST BARBADOS**, 2010 HCR TO 2258 (Can LII) which, after citing the Supreme Court of Canada’s decision in **RE CANADA LABOUR CODE** [1992] CAN LII54 SSC [1992]2 S.C.R. 50, stated as follows;

“[36] The Supreme Court affirmed that, under the SIA [State Immunity Act], foreign states are immune from proceedings which relate to their sovereign as opposed to commercial acts ... in order to determine whether the foreign state’s activity is ‘commercial’ or ‘sovereign’ in nature, we must

consider the activity in its entire context

This application, were it to proceed, would necessarily require the Tribunal to examine the reason for and the circumstances of the plaintiff's departure from the respondent's employ as well as the respondent's reasons for hiring someone other than the applicant on permanent basis. The courts have held that this kind of enquiry would constitute an unacceptable interference with the sovereign right of the defendant state to control and regulate its own work force The Supreme Court of Canada has stated that "the operations of embassies ... are the quintessential examples of state activity that should be immune from foreign review".

Now that the headquarters of the 2nd respondent have the same status as an embassy, we hold that the same immunity would shut out from view or enquiry by litigation, the matter that the appellant filed in court. The subject matter is sovereign and immunized, not commercial and actionable before Kenyan courts. In this respect, we find that this Court's decision in **MINISTRY OF DEFENCE OF THE GOVERNMENT OF THE UNITED KINGDOM Vs. NDEGWA** (supra) cited by the appellant represents good law but does not aid the appellant's cause. That case is important for laying the law in three distinct respects relevant to the matter before us; out of its first holding as reported;

1. *"It is a matter of international law that our courts will not entertain an action against certain privileged persons and institutions unless the privilege is waived".*

No such waiver has occurred herein.

2. *"Such persons and institutions include foreign sovereign or heads of state and government, foreign diplomats and staff and their staff, consular officers and representatives of international organizations such as the United Nations Organizations (UNO) and the Organization of African Unity (OAU) (sic)".*

The 2nd respondent would fall in that list.

3. *It is not all acts of a foreign sovereign or government that this principle applies to; the immunity is not absolute but restrictive and the test is whether the sovereign or government is acting in a governmental capacity under which it can claim immunity or a private capacity, under which an action may be brought about it".*

As we have seen and held, the matter herein was intrinsically linked to the operations of the 2nd respondent, and were official, not private or commercial.

In the subsequent case of **TONONOKA STEELS LTD Vs. THE EASTERN AND**

SOUTHERN AFRICA TRADE AND DEVELOPMENT BANK [2000] 2EA 536, this Court gave resounding approval to the principle of restricted or qualified immunity as opposed to that of absolute sovereign immunity. The Court there cited with approval of the English Court of Appeal's decision in **TRENDEX CORPORATION LTD Vs. CENTRAL BANK OF NIGERIA** (supra) which had emphatically rejected the notion of absolute immunity. We, too, agree that the doctrine of absolute immunity would be anachronistic, and has been for some time now. What immunity there is must be restricted or qualified so that private or commercial activities cannot be immunized. The facts herein, however, do not disclose a commercial or private transaction.

We have taken note of jurisprudence from the European Court of Human Rights some of which was cited by the parties herein that has posited that an existing employer-employee relationship such as obtained in the present case cannot benefit from the doctrine of immunity. It is telling that the said Strasbourg jurisprudence followed appeals from decisions of member states of the European Union that had upheld immunity in their highest courts. They include

FORGATY Vs. UNITED KINGDOM [2002]34 EHRR 12 and **CUDAK Vs. LITHUANIA**

[2010] 51 EHRR 15. We do not think that the holdings in those cases is applicable to the case before us, even for persuasive purposes, not least because the European Court of Justice is treaty-based and we are strangers to the said treaty and because also, they were based, in no small measure on the limiting provisions of the Convention of Jurisdictional Immunities of States and their Property adopted by the United Nations General Assembly in 2004. There is no evidence that Kenya has ratified that 2004 Convention and the eroded version of state immunity the convention represents cannot be reflective of the Kenyan law on the subject. We so hold notwithstanding the highly contested view that the said Convention and the Draft Articles developed and adopted in 1991 by the International Law Commission are a codification of customary international law. Article 11 watered down and effectively removed a States' employment contract with its staff from the purview of immunity.

An earlier Strasbourg case cited to us by the appellant is **Mc ELHINNEY Vs. IRELAND** (Application No. 31253/96), decided by the Grand Chamber of the European Court of Human Rights on 21 November 2001. It was an application challenging the application of the doctrine of sovereign immunity by the Irish courts to bar the applicant's claim against the United Kingdom thereby denying him the right to a judicial determination of his compensation claim.

The court held by twelve votes to five that the upholding of state immunity did not violate Article 6(1) of the European Convention on Human rights which provided that "In the determination of his civil rights and obligations ...everyone is entitled to a fair ...hearing...by [a] ...tribunal ...". In its assessment the Court expressed itself, inter alia, as follows;

"34. The right of access to court is not, however, absolute, but may be subject to limitations, these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation

35... The court considers that the grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty....

37. It follows that the measures taken by a High Contracting Party which reflect generally recognized rules of public international law or state immunity cannot in principle be regarded as imposing a disproportionate restriction on the right to access to court as embodied in Article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State Immunity".

It is a matter of some interest that the English Employment Appeal Tribunal in **AL-MALKI & ANOR Vs. REYES & ANOR** UK EAT/0403/12/6E decided on 1st May 2013, Mr. Justice Langstaff, (President) found a way to go around the latest Strasbourg jurisprudence that appeared to deprive states of the bar of immunity in matters relating to the employment of embassy staff. The Judge-President made the case, which we find highly persuasive, that there is a clear distinction between **state immunity**, which has over time been greatly eroded by the qualifications, restrictions and limitations we have already addressed on the one hand, and **diplomatic immunity**. Referring to the decisions of the Supreme Court of Poland in **ALDONA s. Vs. ROYAUME UNI** (JDI 1963) 191 rendered in 1948 and of the German Federal Constitutional Court in the leading case of **EMPIRE OF IRAN** (45 ILR 57) both of which were treated by Hazel Fox in her **The Law of State Immunity** 2nd Ed. 2008, OUP, he posited that diplomatic immunity is a personnel immunity conferred by Article 31 of the Vienna Convention upon diplomats and extends further than State Immunity;

"34. The need to protect the special vulnerability of a diplomatic agent when present in the territory of a receiving state for the purpose of representing the sending state is a major justification for diplomatic immunity which does not apply in the case of state immunity Bringing a claim against a state does not necessarily prevent or hinder the conduct of the affairs of the sending State, whereas making a serving diplomatic personally subject to a criminal or civil proceedings – however justified

they may be in the domestic law of the receiving state – is always liable to hinder his performance of his official functions”

The Judge-President then put the various cases we have ourselves referred to in perspective and also roped in the whole question of limitation of the right to access to justice, which we find apposite;

“35. Whereas State immunity was subject to restrictions, most recently agreed by international convention (in 2004); that was not the case where diplomatic immunity was concerned. It was the 2004 convention which persuaded the European Court of Human Rights to hold that Article 6 had been breached in the State immunity cases of CUDAK [supra] and SABEH EL LIEL Vs. FRANCE (2012)54 EHRR 14]; there was no similar development where diplomatic immunity was concerned, where the Vienna Convention remained unaffected. The principle of FORGARTY [supra] was that (absent such development) the aims pursued by the conferment of State immunity justified a restriction of access to court. Since there was no modification of the Convention applicable to diplomatic immunity as had been the case of State Immunity and since diplomatic immunity was wider reaching than State Immunity, there was no warrant for holding that the restriction of access in the present case was disproportionate”.

(Our emphasis) Given the sentiments we have already expressed and the holdings we have already made, the conclusion is inescapable that the immunity that attaches to the 2nd respondent and to its officers such as the 1st respondent finds recognition and legitimacy from international treaties entered into by Kenya including the Vienna Convention which had express validation by the clear constitutional text found in Article 2(6) of the 2010 Constitution. In so far as they impact and implicate Article 48 of the right to access to justice, they constitute a legitimate limitation to the right. Moreover, they are not, in all the circumstances of the case, disproportionate to the legitimate aims of conferment of state immunity.

As regards the 1st respondent , we find and hold that whatever doubts, restrictions, qualifications and erosion may have attended State Immunity from its former hallowed perch of absolute sway, he remains invested with diplomatic immunity which is wider and has not suffered any diminution since the coming into force of the Vienna Convention. He is therefore quite completely immunized from criminal or civil proceedings before Kenyan Courts no matter how desirable or expedient such proceedings may seem.

These holdings suffice to dispose of this appeal with the result that it fails in entirety. As costs are in our discretion, we order that each party bear its own costs.

Dated and delivered at Nairobi this 13th day of February, 2015.

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR