



**Mahonga v Weiss (Employment and Labour Relations Cause
426 of 2018) [2024] KEELRC 2393 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2393 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 426 OF 2018
BOM MANANI, J
SEPTEMBER 30, 2024**

BETWEEN

GRACE MAKUNGU MAHONGA CLAIMANT

AND

MARKUS WEISS RESPONDENT

RULING

1. The instant dispute arises from an alleged contract of service between the Claimant and Respondent. The Claimant asserts that the Respondent hired her services as a house help on 12th July 2012.
2. She alleges that she worked for the Respondent until 25th March 2017 when he allegedly unlawfully terminated the contract between them. As such, she has instituted these proceedings to seek compensation for alleged unfair termination of her contract.
3. The Respondent has contested the claim. He denies that the two had an employment relation as claimed by the Claimant.
4. The Respondent contends that he has been working as a diplomatic agent for the United Nations Support office based in Somalia since mid-2016. As such, it is implausible that the Claimant was his employee during the period which she claims since he was not resident in Kenya.
5. In any event, the Respondent contends that being a diplomatic agent, he enjoys diplomatic immunity under the Vienna Convention on Diplomatic Relations. As such, he is insulated from judicial proceedings such as the instant ones.



Preliminary Objection

6. The Respondent has filed a Notice of Preliminary Objection dated 17th January 2024 in which he prays that the case against him be declared a nullity. He contends that this court has no jurisdiction over him in view of his diplomatic status.
7. The objection is opposed by the Claimant. She contends that at the time the two allegedly entered into the contract of service, she was unaware that the Respondent was a diplomatic agent. As such, the Respondent's status remains a contested matter rendering it unsuitable for determination through a preliminary point of law.
8. The Claimant further argues that the concept of absolute immunity is no longer tenable in modern times. As such, the Respondent is not entitled to raise it as an absolute bar to the instant cause.

Analysis

9. Kenya is a signatory to both the Vienna Convention on Diplomatic Relations ("VCDR") and the *Vienna Convention on Consular Relations* ("VCCR"). The two Conventions were domesticated in the country through the *Privileges and Immunities Act*, Cap 179 Laws of Kenya.
10. Section 4(1) of the *Act* provides as follows:-

"Subject to section 15 of this *Act*, the Articles set out in the First Schedule to this *Act* (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in Kenya and shall for that purpose be construed in accordance with the following provisions of this section."
11. Section 5(1) of the *Act* provides as follows:-

"Subject to sections 6(2) and 15 of this *Act*, the Articles set out in the Second Schedule to this *Act* (being Articles or parts of Articles of the *Vienna Convention on Consular Relations* signed in 1963) shall have the force of law in Kenya and shall for that purpose be construed in accordance with the following provisions of this section."
12. Article 1(e) of the VCDR defines the term "diplomatic agent" to mean the head of the mission or a member of the diplomatic staff of the mission. On the other hand, section 2 of the *Powers and Privileges Act* defines a "consular officer" as any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions and any person in the service of the Government of a Commonwealth country performing any such functions.
13. From the preliminary evidence on record, it is clear that the Respondent is an employee of the United Nations. The first personal data form attached to the Respondent's list of documents dated 1st March 2024 shows that the aforesaid agency assigned him to work in Mogadiscio, Somalia as from 6th June 2016. The second personal data form attached to the Respondent's affidavit dated 17th January 2024 shows that as at 30th March 2023, he was still attached to the office of the United Nations, Somalia.
14. Article 31 (1) (a) (b) and (c) of the VCDR confers diplomatic immunity on diplomatic agents in the following terms:-

"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:-



- > a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- > an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- > an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”

15. Article of 43 of the VCCR confers immunity on consular officers in the following terms:-
 - a. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.
 - b. The provisions of paragraph 1 of this article shall not, however, apply in respect of a civil action either:-
 - i. arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or
 - ii. by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.”
16. Clearly, diplomatic immunity under the two Conventions only attaches in and is enforceable against a receiving State. A receiving State is defined in Black’s Law Dictionary as the country to which a diplomatic agent or consul is sent by the country represented by that agent.
17. Part IV of the *Privileges and Immunities Act* empowers the Cabinet Secretary, Ministry of Foreign Affairs to extend the immunities and privileges conferred under the *Act* and Conventions to International Organizations and persons connected to them. As such, once such organizations are granted the immunities and privileges under the *Act* and Conventions through a formal Ministerial Order, they stand in the same position as sending States in respect of their staff posted to Kenya as the receiving State.
18. The record shows that the Respondent was sent by the United Nations on a diplomatic mission to the Republic of Somalia from 6th June 2016 and his duty station was Mogadiscio, Somalia. Indeed, he confirms this fact in his statement of defence and witness statement.
19. The Respondent does not contend that he was a consular officer in terms of the VCCR. And neither does he suggest that he was required to be in Kenya whilst on transit to Somalia, the receiving State in the capacity of a consular officer. Therefore, article 54 of the VCCR does not apply to his case.
20. That said, if it is true that the Respondent was in Kenya between 2012 when he is alleged to have employed the Claimant and mid-2016 when he says he moved to Somalia, then he was not in the country as an employee of the United Nations on the Somalia mission during this period. This is because his assignment to Somalia commenced in June 2016, the same time he contends that he moved to Somalia.
21. It is thus apparent that during the period under review, the Respondent was not a diplomatic agent for the United Nations attached to Kenya. As such, Kenya was not the receiving State for the Respondent as contemplated under clause 31 of the VCCR.



22. Therefore, the Respondent cannot invoke the aforesaid provision to seek immunity from legal proceedings instituted against him in Kenya, a non-receiving State. He can only invoke the provision to seek diplomatic immunity from proceedings instituted against him in Somalia which was his receiving State for purposes of the VCDR.
23. If the Respondent was resident in Kenya during the period when he is said to have employed the Claimant, he was not covered by the immunity provisions in the Conventions whilst on the territory of Kenya. This is because he has not demonstrated that he was present in the country between 2012 and mid-2016 as a diplomatic agent. Nor has he demonstrated that he was in the country at the time as a consular officer on transit to Somalia.
24. In the premises, Kenya was neither a “receiving State” in respect of his diplomatic services nor a third State in respect of his transition to Somalia as contemplated in the Conventions. Therefore, he was amenable to the law of Kenya and the jurisdiction of the country’s courts in respect of private contractual activities which he may have undertaken whilst within its territory.
25. The Respondent has attached to his affidavit dated 17th January 2024 a diplomatic Identity Card issued to him by Kenya on 14th December 2022 to bolster his contention that he enjoys diplomatic status. However and in my view, this card cannot operate retrospectively to confer diplomatic immunity on him for the period between 2012 and 2017 when he is alleged to have been the Claimant’s employer.
26. Finally, it has been emphasized that diplomatic immunity is in any event not absolute. This point is made in the Supreme Court decision of *Karen Njeri Kandie v Alassane Ba & another* [2017] eKLR.
27. It is for the foregoing reason that article 39 (2) of the VCDR provides that the privileges and immunity conferred on a diplomatic agent lapse when he leaves the receiving State at the end of his sojourn. As such, he only continues to enjoy diplomatic immunity limited to the acts which he executed in his official but not private capacity. Article 53 (3) and (4) of the VCCR makes similar provision in respect of Consular Officers.
28. In the instant case, the Respondent contends that he left Kenya for Somalia in mid-2016. He contends that he has been a resident of Somalia ever since.
29. As such, assuming that he was entitled to diplomatic immunity with regard to the private activities he performed whilst in Kenya, such privilege lapsed pursuant to article 39 (2) of the *VCDR* when he relocated to Somalia in 2016. Therefore, he cannot invoke this immunity and privilege to escape liability for such private activities. The immunity which he continued to enjoy was henceforth limited to official acts executed by him whilst in Kenya.
30. This point is made in *Reyes v Al Malki and another* [2017] UKSC 61 where the court observed that a diplomatic agent’s official functions do not include private activities undertaken by him including employment of domestic staff. The court observed that although such agent enjoys diplomatic immunity in respect of his private engagements whilst in the receiving State, this immunity lapses the moment he leaves the receiving State as decreed by article 39 (2) of the VCDR. As such, he cannot invoke the privilege and immunity as a shield against proceedings relating to private activities he undertook whilst he was serving as diplomatic agent in the receiving State.
31. Finally, whether diplomatic immunity should be invoked to escape obligations arising from employment relations is a matter that continues to attract considerable attention. The general thinking is that employers are not entitled to avoid liabilities to employees under the guise of diplomatic immunity. In the recent decision of *Embassy Of Sweden Nairobi v Kusewa & Another* (Civil Appeal



345 Of 2017) [2020] KECA 954 (KLR) (24 April 2020) (Judgment), the Court of Appeal had the following to say on the subject:-

“The next issue for us to address is whether the doctrine of restrictive immunity is applicable to employment contracts. A look at comparative jurisprudence shows that employment contracts have been held to belong to the Private Law domain and State Immunity does not therefore apply.”

Determination

32. Having regard to the foregoing, I am disinclined to allow the preliminary objection by the Respondent.

33. As such, the objection is dismissed with costs to the Claimant.

Dated, signed and delivered on the 30th day of September, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent/Applicant

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

