



**Musa v Kingdom of Saudi Arabia (Cause E910 of 2022)
[2023] KEELRC 1421 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1421 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E910 OF 2022
NZIOKI WA MAKAU, J
MAY 25, 2023**

BETWEEN

MOHAMED ABAS MUSA CLAIMANT

AND

THE KINGDOM OF SAUDI ARABIA RESPONDENT

RULING

1. The respondent raised a preliminary objection to the claimant's suit to wit:-
 1. The respondent enjoys Diplomatic Immunity under the *Privileges and Immunities Act* cap. 173 of the Laws of Kenya, specifically section 4(1) thereof and all the Schedules thereto and is therefore immune from legal process as commenced against it in the underlying Claim.
 2. The respondent has not waived its Diplomatic Immunity in any manner whatsoever.
 3. Pursuant to the principles of Customary International Law as read together with article 2(5) of the [Constitution](#) of Kenya this honourable court cannot properly exercise its jurisdiction against the Respondent.
 4. The claim presented before this court is therefore misconceived and cannot be sustained against the respondent and ought to be dismissed with costs.
2. The claimant is of a different view and filed a replying affidavit sworn in opposition to the said notice of preliminary objection dated December 29, 2022. He stated that contrary to the respondent's position that they enjoy diplomatic immunity, such doctrine is no longer applicable. He avers that immunity of the Respondent is now waived by codified international law. He further avers that the private relationship between himself and the respondent is by dint of his employment contract and therefore immunity cannot be invoked. He asserts that courts and various jurisdictions and legal systems have embraced the doctrine of restrictive immunity by dint of injustices that have been occasioned by the application of the said absolute immunity. He averred that this honourable court is properly seized of



the matter herein hence the right forum with constitutional and statutory jurisdiction. He urged that the preliminary objection be dismissed with costs.

3. The respondent submits that it enjoys Diplomatic Immunity under the *Privileges and Immunities Act* cap 173 of the Laws of Kenya, specifically section 4(1) thereof and all the Schedules thereto. It is submitted that the respondent therefore is immune from legal process as commenced against it in the underlying Claim. The Respondent submits that it has not waived its Diplomatic Immunity in any manner whatsoever. It is submitted that pursuant to the principles of customary international law as read together with article 2(5) of the *Constitution* of Kenya this honourable court cannot properly exercise its Jurisdiction against the respondent. The respondent submits that the claim presented before this court is therefore misconceived and cannot be sustained against the Respondent and ought to be dismissed with costs. The Respondent submits that the laws governing diplomatic immunity in Kenya are article 2(5) & (6) of the *Constitution*, 2010, the *Vienna Convention on Diplomatic Relations* 1961, *Customary International Law* and section 4(1) of the *Privileges and Immunities Act* cap 173 of the Laws of Kenya.
4. The respondent submitted that in Kenya the Employer-Employee relationship is governed by the *Constitution*, 2010 and the *Employment Act*. However, it notes that the *Employment Act* is silent on the question of diplomatic immunity in relation to employment law and therefore guidance is sought from the Vienna Convention applicable by virtue of article 2(6) of the 2010 Constitution. The Respondent submits that diplomatic immunity is a principle of international law by which diplomats are not susceptible to lawsuit or prosecution under the host country's laws. The Respondent submits that the Vienna Convention on Diplomatic Immunity 1961 ratified by Kenya, states that the purpose behind diplomatic immunity is to ensure that diplomats are able to perform their functions efficiently in foreign states. In regards to the matter before this Honourable court, it is the Respondent's submission that it enjoys diplomatic immunity under the *Privileges and Immunities Act*. It cites the case of *Elkana Khamisi Samarere & another v Nigerian High Commission* [2013] eKLR where the court dismissed a claim and held that the Nigerian High Commission represents a Foreign Sovereign and went ahead to hold that:-

“That the Industrial Court of Kenya of the receiving State would be waiving immunity, by assuming jurisdiction, contrary to Article 32 of the Vienna Convention on Diplomatic Relations. The Industrial Court would be acting in violation of the principles concerning the sovereign equality of the States, the maintenance of international peace and security, and promotion of friendly relations among nations.

The purpose of diplomatic privileges and immunities is not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions of representing States. The intervention of the Industrial Court in the dispute would have ramification for Kenya's own Diplomatic Missions abroad.”

5. The respondent also submits that the respondent's diplomatic immunity outweighs the claimants right to commence proceedings against it. The respondent submits that the Supreme Court in *Karen Njeri Kandie v Alassane Ba & another* [2017] eKLR considered the question whether the Respondents' immunity was justifiable limitation under article 24 of *the Constitution*, to the appellants' rights to fair



trial, fair hearing and access to justice under articles 25, 50 and 48 of the Constitution respectively. The Supreme Court held that:

“In that regard, it must be noted that the right of access to justice provided under article 48 is not an absolute right listed under article 25 of the Constitution, and therefore it can, in proper circumstances, be limited by the law.

...In concluding on this issue, we therefore find that 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.”

6. It submits that faced with the same issue the court in the case of Agnes Akinyi Nyameyo v Austrian Embassy, Nairobi Commercial Section & 2 others [2021] eKLR upheld the decisions in Karen Njeri Kandie v Alassane Ba & another [2017] eKLR and Elkana Khamisi Samarere & another v Nigerian High Commission [2013] eKLR and held that it lacked jurisdiction to determine the suit therein on grounds of the respondents' diplomatic immunity and proceeded to allow the preliminary objection and struck out the suit. In conclusion it submits that this honourable court cannot properly exercise its jurisdiction against the respondent in light of its diplomatic immunity and moreover, the respondent has not waived immunity in any manner whatsoever. it therefore prays that the claimants claim be dismissed and the suit be struck out.
7. The claimant submits that the main issue for determination is whether respondent's diplomatic immunity can be waived in this instance for this honourable court to accord its jurisdiction to this claim. As to whether respondent's diplomatic immunity can be waived in this instance for this honourable court to accord its jurisdiction to this claim, the claimant submits that the claim herein is of an employment nature of the claimant's unlawful and wrongful termination with terminal dues. He submits that the Employment and Labour Relations Court has original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations. The claimant submits he entered into a work-related contract as an office driver for the respondent in the year 1997. The claimant submits he had an illustrious career working diligently and honestly for the respondent until November 1, 2022 when he was issued with a termination letter from the Respondent's head of finance and administration. This, he asserts, was done unlawfully minus any prior warning and he was not afforded a right of hearing. The claimant submits this was a violation of his constitutional and statutory rights for right to be heard, fair labour practices and fair administrative action. The claimant submits that article 25 of the Constitution of Kenya, 2010 provides that fundamental rights and freedoms that may not be limited. He submits that freedom from torture and cruel, inhuman or degrading treatment or freedom from slavery or servitude, inhuman or degrading treatment or punishment; the right to a fair trial; and the right to an order of habeas corpus shall not be limited. He placed reliance on the case of Eugene Linyulu Isalambo v Barbro Ekvall [2016] eKLR where it was held that rights contemplated in the above provisions cannot be limited. He submitted that under article 2(5) of the Constitution of Kenya, the general rules of international law shall form part of the law of Kenya and that in Lucy Muingo Kusewa & another v Embassy of Sweden, Nairobi [2017] eKLR, Wasilwa J. held that the doctrine of absolute immunity is no longer viable and stated further as follows:-

“22. By virtue of article 2(5) of our Constitution 2010, general rules of international law shall form part of the law of Kenya. It is therefore my



finding that UN Convention on Jurisdictional Immunities of States and their Property form part of the law of Kenya and it is therefore apt for this Court to apply principle enunciated therein. Having considered the principles of international law, the cited law above and case law, it is my finding that though the respondent herein may enjoy diplomatic immunity, this immunity is restrictive and does not cover employment matters as expressly outlined under UN Convention on Jurisdictional Immunities of States and their respective Property. Employment matters also fall under the purview of Private law where immunity is restricted under the *Privileges and Immunities Act* and the Vienna Convention on the Law of Treaties."

8. The claimant submitted that in the case of [International Centre for Insect Physiology and Ecology \(ICIPE\) v Nancy McNally](#) [2018] eKLR, the Court of Appeal (Waki, Nambuye & Musinga JJ.A), held thus,

"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.

9. The claimant also cited the case of [Francis Opiche Gonze t/a Plumcom East Africa v Ambassador of Saudi Arabia](#) [2017] eKLR and the

Court of Appeal decision in [Unicom Ltd v Ghana High Commission](#) [2016] eKLR which quoted the case of [Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa](#) [1983] eKLR thus:

...that the immunity is not absolute but restrictive and that the "test is whether the foreign 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 against it."

19. It is therefore the nature of the dispute that is critical in determining whether or not our courts will take cognizance of a dispute where immunity is pleaded. Lord Denning explained this in [Rabimtoola v Nizam of Hyderabad](#) [1958] A.C. 379, in the following terms.

"... sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. ... Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so . . . but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."

10. The claimant submitted that diplomatic immunity is not absolute and that the Vienna Convention makes it clear that while immunity ensures efficient performance of the functions of diplomatic and consular missions, those enjoying the status are under a special obligation to observe discretion in their



exercise of privileges. Premised on the above, the claimant submits that this court has the jurisdiction to hear and determine the present suit and that the Respondent's diplomatic immunity is not absolute. The Claimant submits that the statement of claim dated December 6, 2022 is good in the face of the law and should not be dismissed. He thus urges that the Respondent's preliminary objection be dismissed with costs.

11. The court has considered the decisions cited by the parties and applicable laws in coming to this decision. The immunity of a sovereign is not absolute but restrictive and the test is whether the foreign 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 against it. It is therefore the nature of the dispute that is critical in determining whether or not our courts will take cognizance of a dispute where immunity is pleaded. Sovereign immunity does not depend merely on the fact that a foreign government is impleaded whether directly or indirectly but rather it depends on the nature of the dispute. Where the dispute brings into question, for instance, the executive policy of a foreign government or of its legislative or international transactions, the court should grant immunity if asked to do so. However, if the dispute concerns the commercial transactions of a foreign government, and it matters not whether these are carried on by its own departments or agencies or by the setting up of distinct legal entities, and a dispute arises properly within the territorial jurisdiction of our courts, there is no basis for granting immunity. In my considered view, hiring a driver is not legislative or international transactions of the Kingdom of Saudi Arabia nor is it a suit against the policy of a sovereign. As such the claimant's suit is properly before this court as has been held by the Court of Appeal in *Unicom Ltd v Ghana High Commission* [2016] eKLR. The cases of *Elkana Khamisi Samarere & another v Nigerian High Commission (supra)* and *Karen Njeri Kandie v Alassane Ba & another (supra)* are distinguishable. They therefore do not apply in the circumstances of this case while the case of *Lucy Muingo Kusewa & another v Embassy of Sweden, Nairobi (supra)* is persuasive. The sum total of the foregoing is that the preliminary objection by the respondent is not well founded and is accordingly dismissed with costs to the claimant.

It is so ordered.

Dated and delivered at Nairobi this 25th day of May 2023

Nzioki wa Makau

JUDGE

Page 3 of 3

