



**Chimphondah v Company for Habitat and Housing Africa (Shelter Afrique)
(Petition E038 of 2022) [2022] KEELRC 1386 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1386 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E038 OF 2022
AN MWAURE, J
JUNE 30, 2022**

BETWEEN

ANDREW CHIMPHONDAH PETITIONER

AND

**COMPANY FOR HABITAT AND HOUSING AFRICA (SHELTER
AFRIQUE) RESPONDENT**

RULING

1. The Petitioner instituted the Petition on the 2nd of March 2022 seeking declarations for the violations of Articles 1, 25, 41, 47, and 50(1) of *the Constitution* of Kenya. The Petitioner says he was employed by the Respondent as its Managing Director in a fixed term contract of 5 years effective the 1st of November 2018.
2. The Respondent filed a Notice of Appointment of advocates through the firm of Oraro and Company Advocates and then entered a Notice Preliminary Objection which comes out as follows;

“The Honourable Court lacks jurisdiction to hear the instant Petition by virtue of Legal Notice No 129 of 1984 that grants the Respondent immunity from suit and legal process under Part 1 of the Fourth Schedule to the *Privileges and Immunities Act* Chapter 179 of the Laws of Kenya.

Respondent’s Written Submissions

3. The Respondent submits that by virtue of the Legal Notice No 129/1984 as read with Part 1 of the Fourth Schedule of the *Privileges and Immunities Act*, it is conferred with immunity from prosecution as well as the execution proceedings at its headquarters.
4. Pursuant to Article 2 of *the Constitution* it is provided under clause 5 that the general rules of international Law shall form part of the laws of Kenya. A treaty or Convention ratified by Kenya



- shall form part of the laws of Kenya. That it is not contested that Kenya is a signatory to the treaty establishing the Respondent, and it subsequently enacted the *Shelter Afrique Act* for this purpose.
5. The Respondent was granted diplomatic status and immunity akin to embassies, albeit limited. The Respondent argues that the issue of immunity of the Respondent has been the subject of litigation before courts where immunity has been upheld, albeit limited in certain circumstances. The Case of *Karen Njeri Kandie versus Alassane Ba & Another* Supreme Court Petition No. 2 of 2015 has been cited in support of the contention.
 6. The Respondent also referred to the High Court case of *Gerard Killeen versus International Centre of Insect Physiology and Ecology* Civil Case No. 1737 of 2002 (2005) eKLR where the court said that ‘I do not foresee, in the presence of the Immunity enjoyed by the defendant herein, a situation where the defendant, having obtained a judgment in this suit would then be allowed to execute against ICIPE’s property in Kenya. The implications for such a move are obvious.
 7. The Respondent relying on the case of Karen Kandie (supra) further submitted that the right to the access of justice under Article 48 of *the Constitution* is not absolute right under Article 25 of *the Constitution*, and therefore it can in proper circumstances be limited by the law. The Respondent submits that pursuant to the provisions of the Host Country Agreement and *Privileges and Immunities Act*, it enjoys immunity from service of process, let alone legal proceedings.
 8. Whereas such immunity is not absolute but qualified, when a court is faced with such a scenario, it has to consider the nature of the proceedings before it to determine whether the same warrant a plea of immunity. In so doing, the court has to consider whether the said actions complained of were done in discharge of an official duty carried out by the Respondent for which it enjoys immunity.

Petitioner’s Submissions

9. The Petitioner submits that the Respondent’s argument that it enjoys absolute immunity is untrue. The Respondent’s immunity cannot for instance override provisions of *the Constitution* on human rights that cannot be derogated. He invites the court to examine the facts of this case which he says reveal the injustices propounded by the Respondent to the Petitioner by unfairly, unreasonably and unjustifiably terminating the Petitioner from his employment.
10. The Petitioner is moving this honourable court on allegations that his right to fair trial and fair hearing have been violated. The singular question for determination is if this court can entertain allegations of violations of an individual’s rights that fall under the category of those that are absolute as prescribed under Article 25 if the alleged propagator is conferred with immunity just as the Respondent herein.
11. The Petitioner herein approached this Honourable under provisions of Articles 2, 3, 10, 19, 20, 22, 23, 25, 27, 28, 41, 47, 48, 50, 162, 165, 259 and 260 of *the Constitution* of Kenya. Article 25 of *the Constitution* of Kenya 2010 provides for rights and fundamental freedoms that shall not be limited. Relevant to the instant matter is the right to a fair trial.
12. Under Article 50 (1) of *the Constitution* guarantees every person the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a court. He submits that the Petitioner herein has a dispute with the Respondent, where the Respondent un-procedurally removed the Petitioner from his employment.
13. Further, at Article 50 (2) the non derogable right to a fair trial is further broken down to constitute a public trial before a court established under *the Constitution*. The Respondent ambushed the Petitioner herein without proper notice requiring the Petitioner to appear before the Respondent’s Board for a Departmental Head’s Vote of no confidence and never afforded the Petitioner a hearing.



14. This actions by the Respondent offends the principles of natural justice and article 25 and 50 of the Constitution among others. That since the Petitioner was never afforded an opportunity to be heard, it was necessary for the Petitioner to approach this Honourable Court, in order to stop any further injustices by the Respondent.
15. He submits that the defence of immunity raised by the Respondent unjustifiably limits the Petitioner’s rights to fair trial, fair hearing, and access to justice. The imposed immunity unfairly limits the Petitioner’s right to a fair hearing and or trial. This cannot stand for reasons that provisions of the Constitution are supreme whenever compared with any other statutory provisions.
16. They further submit that the Respondents herein have relied on the case of Karen Njeri Kandie v Allassane Ba & another [2017] eKLR that the Respondent enjoys immunity. It is argued that in the said case the Supreme Court at paragraph 86 addresses itself thus: “A perusal of the judgments of the Industrial Court and the Court of Appeal shows that the appellant did not raise the issue of the limitation of her rights to fair trial, or fair hearing, and therefore, none of the courts pronounced themselves on this issue. This Court is not a court of first and therefore, we will not make a determination on an issue not addressed at the superior courts (See Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board [2012] eKLR at paragraph 13A)” 5. The Petitioner says that in view of the Supreme Court holding at paragraph 86 captured verbatim hereinabove, the said decision of Karen Njeri Kandie v Allassane Ba & another [2017] eKLR should therefore not blanketly be construed to mean that the Supreme Court upheld the Preliminary Objection on immunity raised therein.
17. The issue of limitation of right to a fair trial and or hearing was never determined in the said case and therefore the Respondent cannot allege that it enjoys immunity when it limits the right of a person to fair hearing. Separately, it is argued that absolute immunity doctrine is no longer applicable and that the immunity of the Respondent is waived by codified international law.
18. Courts in various jurisdictions and legal systems have gradually embraced the doctrine of restrictive immunity and that this has been necessitated by the extent to which the application of absolute immunity doctrine has occasioned injustices and undermined the internally recognized right to access of justice.
19. The claimant cited the case of *Congreso Del Partido* (1981) 2 ALL ER 1064 (HL) cited in *Bah V Libyan Embassy* 2006 (1) BLR 22(IC) where it is said the Court held that: -

“ to require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is in accepted phrases, neither a threat to the dignity of that state, nor interference with its sovereign functions...”.
20. The Petitioner invites the honourable court to be persuaded by the holding in *Rahimtoola vs. Nizam of Hyderabad & Another* (1958) AC 379 at 418 in which Denning MR stated as follows:

“It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of the Court of acknowledged impartiality than by arbitrarily rejecting jurisdiction....”.



21. The Petitioner also cites the US Supreme Court in Saudi *Arabia vs. Nelson*, 507 US 349 – Supreme Court 1993 where it is said the court held as follows:

“under the restrictive, as opposed to the “absolute” theory of foreign sovereign immunity, a state is immuned from the jurisdiction of foreign Courts as to its sovereign or public acts (jure imperii), but not as to those that are private or commercial in nature (jure gestionis)

22. The Petitioner also cites, inter alia, the case of Bah Vs. Libyan Embassy 2006 (1) Blr 22 (IC) where it is said the Botswana Labour Court was called upon to make a determination on whether an Embassy was diplomatically immuned to suits filed in the Courts of the receiving states where the subject matter was an employment contract. The Court held as follows: “.....the doctrine of absolute immunity that was previously applicable in international law is no more. The Petitioner contends that an employment relationship falls under private law which is a branch of law that deals with relations between individuals and institution rather than relation between these and the government.

Decision

23. I have looked at the rival submissions relating to the Notice Preliminary Objection. To my mind, the Respondent’s position pursuant to the Legal Notice No 129/1984 and Section 9 of the *Privileges and Immunities Act* is that it enjoys immunity from suit, though the said privilege is restricted.

24. The legal instrument that legalised the Respondent is referred as *Shelter Afrique Act* 493 (c) which came into force on 23rd October 1983. By legal Notice No. 129/1984 the Minister in compliance with the provisions of Section 9 of the *Privileges and Immunities Act* made the following orders conferring immunity on the Respondent.

1. This order may be cited as privileges and immunities Shelter Afrique order 1984.
2. Shelter Afrique hereinafter referred to as “organisation” being an organisation of which the government of Kenya and other foreign governments are members is declared to be an organisation which section 9 of the Act applies.
3. The organisation shall have
 - a. The legal capacities of a body corporate and
 - b. The immunities and privileges specified in part 1 of the Fourth schedule to the Act.

25. The said order is read together with part 1 of the fourth Schedule of the Act which sets out immunities available to the Respondent thus (1) Immunity from suit and legal processes (among others). The Respondent is clearly an international organisation established and conferred such statutes by the Republic of Kenya. It is as per the provisions of the *privileges and immunities Act*, as read together with immunity from prosecution as well as execution of its proceedings at its headquarters. The Article II of the host Country Agreement provide that its Headquarters will be in Nairobi, Kenya. Also article II section 8(a) of the Host agreement read as follows:-

“The head quarter’s set shall be inviolable. No officer or official of the Republic of Kenya or other person exercising any public authority within the Republic of Kenya, shall enter the head quarter’s set to perform any duties therein except with the consent of and under conditions approved by, the Managing Director. The service of legal process, including the seizure of private property, shall not take place within headquarters seat.”



26. The said host agreement was ratified on 19th October 1983 by Kenya Government and the company for Housing and Habitat in Africa regarding the establishment of headquarters of the company for Housing and Habitat in Kenya.
27. The Respondent has immunity and the Court is supported by the case of *Eugine Linyulu Isalambo versus Barbro Ekwali* Cause No 1358 of 2015 Nzioki Wa Makau J held that “The issue of immunity in respect of claims by domestic servants has been the subject of decisions in the United Kingdom and Northern Ireland. In *Al-Malki and another v Reyes and another (Secretary of State for Foreign and Commonwealth Affairs and others intervening)*[2015] EWCA Civ 32 (also reported in the Weekly Law Reports as [2015] WLR (D) 75) the Court of Appeal in a decision handed down on 5th February 2015, Lord Dyson MR, sitting with Arden and Lloyd Jones LJ, held that as a matter of ordinary language, a contract for the provision of services which were incidental to family or domestic daily life was not “commercial activity”. That meaning was consistent with the picture which emerged from a consideration of the scheme of the 1961 Convention as a whole. Thus, if the diplomatic agent did in the receiving state what he was sent by the sending state to do, what he did was covered by immunity, but, if he embarked on a private activity for profit, he became subject to the jurisdiction of the receiving state in relation to that activity: see *Denza, Diplomatic Law*, 3rd ed (2008), p 305. The fourth recital to the Convention explained that the purpose of the immunities conferred was not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states. The functions were listed in article 3.1(a)–(e). The employment of persons to provide domestic services in a diplomatic mission or an official diplomatic residence in the receiving state was conducive to the performance of diplomatic functions.
28. In another case, the High Court in *Josephine Wairimu vs International Committee of the Red Cross* Civil Appeal No. 100 of 2010 [2015] eKLR held this: The cases cited here do not apply to international organisations as in the instant case. The applicable law with regard to international organisations is Section 9 of the *Privileges and Immunities Act* which provide that Minister may by order declare an organization to be an organization which Kenya, or the government or any foreign sovereign power(s) are members and in such an order provide that the *Immunities and Privileges Act* set out in part 1 of the fourth Schedule to the Act shall apply to such organization. Section 17 of that Act provides that the order made under Section 9 of the Act must be laid in Parliament for approval by a resolution. In this respect, the order was made by legal notice 115 of 1996. The order must have been laid in Parliament and duly approved and for that reason the Respondent enjoys the Privileges and Immunities set out in part 1 of the Fourth Schedule when carrying its operations in Kenya.
29. Having established the sanctity of immunity, the Respondent submits that the Petitioner, in a bid to circumvent the immunity hurdle, has filed an employment claim couched as a constitutional reference alleging breaches of his constitutional rights by the respondents under sections 2, 3, 10, 19, 20, 22, 23, 25, 27, 28, 41, 47, 48, 50, 162, 259 and 260 of *the Constitution* of Kenya (2010). However even as the Petitioner herein makes the application, it will be noted that the said violations are said to have occurred in the course of the Respondent discharging its official duties. So, then, the Respondent is still regarded to have immunity.
30. The Supreme Court in *Karen Kandie (supra)* was also faced with a similar scenario. In that case, the petitioner therein submitted that to allow the immunity would amount to the infringement of the Petitioner’s right to fair trial and fair labour practice herein as enshrined under Article 25 and 50(1) of *the Constitution* of Kenya. In its finding, the Supreme Court held thus:
- (84) 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 invoking article 24(3), the respondents have presented submissions as to why this right is reasonably and justifiably limited. It was argued on their behalf that, immunity is only a procedural bar, and not a limitation of the right to access justice, and it was to a disproportionate limitation as it served the purpose of fulfilling international law obligations of allowing diplomatic decisions and its employees to carry out their functions. We agree with that submissions, and find that it is not unjustified to hold that the legitimate aim of diplomatic immunity is for the state to meet its obligations under international law, and to allow diplomats and those clothed with diplomatic immunity, like the respondents to effectively conduct their official functions, without any hindrance.

- (85) in concluding on this issue, we therefore find that after blanking 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 purpose 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"
31. The decisive issue relating to the present application before Court on the issue of immunity is what would be the attendant consequences of the Court entertaining the same. On the supposition that the Court ultimately issues a judgment in favour of the Claimant, it may inevitably be called upon to issue process against the property of the Respondent. This will certainly impinge on the ultimate aim of diplomatic immunity of enabling the organisation meet its obligations under the international law.
32. At any rate, employment contracts falls within services conducive to the performance of diplomatic functions. It is accordingly covered by the immunity accorded to the Respondent by the rules of law referred hereto. The upshot is that the Notice of Preliminary Objection dated the 15th March 2022 is found to be merited and is upheld. This Court therefore lacks the necessary jurisdiction to entertain the Petition before it and it is so held.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 30TH DAY OF JUNE, 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE

