



**Ruzage Ndungu v Embassy of Finland Nairobi (Cause E268 of 2022)  
[2022] KEELRC 4052 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4052 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E268 OF 2022  
JK GAKERI, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**DEBRA RUZAGE NDUNGU ..... CLAIMANT**

**AND**

**EMBASSY OF FINLAND, NAIROBI ..... RESPONDENT**

**RULING**

1. This is a notice of motion application dated May 25, 2022 by the respondent/applicant seeking orders that;
  - i. Spent
  - ii. This honourable court be pleased to order a stay of further proceedings in this matter pending the hearing and determination of this application.
  - iii. The claimant's suit be struck out with costs to the applicant.
2. The application filed under certificate of urgency is supported by the supporting affidavit of H.E ambassador Pirkka Tapiola dated May 25, 2022 who depones that the applicant is a diplomatic mission representing the state and government of Finland in the Republic of Kenya and is entitled to all privileges and immunities that a diplomatic agent enjoys under international and Kenyan law.
3. It is deponed that neither a foreign state nor its embassy nor high commission or its diplomatic agents can be impleaded in the municipal courts of another country such as those in Kenya unless the embassy, high commission or diplomatic agent has expressly waived such immunity or consented to defend the suit and/or subjected themselves to the jurisdiction of the court.
4. That the applicant has neither waived its immunity nor consented to defending the action nor subjected itself to the jurisdiction of this court.



5. It is further deponed that the claimant's case is subject to the embassy's immunity from court process.
6. That this court lacks jurisdiction to entertain, hear and determine this suit and impleading the applicant is an abuse of the court's process.
7. In her replying affidavit, the claimant depones that the relationship between her and that applicant is employer/employee having been employed by the applicant on June 5, 2006.
8. That the contract provided that it was "subject to Kenyan legislation unless otherwise specified and taxes, NHIF and NSSF deductions would be made according to Kenyan law and the termination was in accordance with the contract of employment and the laws of Kenya.
9. It is the claimant's case that the embassy's choice of law to govern the relationship was the laws of Kenya.
10. That the embassy's immunity is restricted and does not include employment contracts.
11. That the court is properly seized of jurisdiction to hear and determine the dispute and the claim raises triable issues.
12. The claimant/respondent depones that the issues complained of should be tested in cross-examination and the notice of motion application dated May 25, 2022 should be dismissed with costs.

### **Applicant's Submissions**

13. The applicant submits that as the embassy of Finland to Kenya, it enjoys absolute diplomatic and/or foreign or state immunity from the claimant's suit which it has neither waived nor consented to the suit or subjected itself the court's jurisdiction and the court has no jurisdiction to entertain or determine the suit.
14. The applicant relies on articles 2(5) of the [Constitution](#) of Kenya on the applicability of general rules of international law in Kenya. Reliance is also made on the provisions of the [Privileges and Immunities Act](#), cap 174, as well as the [Vienna Convention on Diplomatic Relations](#).
15. Similarly, the decisions in [Karen Njeri Kandie v Alassane Ba & Shelter Afrique](#) (2015) eKLR, [Elkana Khamisi Samarere v Nigerian High Commission](#) (2013) eKLR, [Fred Khaemba v International Organization of Migration](#) (2016) eKLR, [Eugene Linyulu Isalambo v Barbro Ekvall](#) (2016) eKLR and [Agnes Akinyi Nyameyo v Austrian Embassy, Nairobi Section & 2 others](#) (2021) eKLR are relied upon to demonstrate instances in which the courts upheld the diplomatic immunity of the respondents.
16. The applicant urges that the claimant's suit does not fall within any of the exceptions set out in article 31 of the [Vienna Convention](#).
17. Finally, the applicant urges the court to allow the notice of motion application dated May 25, 2022.

### **Claimant/respondent's Submission**

18. The claimant submits that the diplomatic immunity pleaded is not absolute accordingly to article 31 of the [Vienna Convention](#). The decision in [Karen Njeri Kandie v Assassane Ba & Shelter Afrique](#) (2017) eKLR is cited as authority for the proposition.
19. The Court of Appeal decision in [International Centre for Insect Physiology and Ecology \(ICIPE\) v Nancy McNally](#) (2018) eKLR is also relied upon to underscore the restricted nature of diplomatic immunity.
20. It is urged that employment matters fall under private law as opposed to public law.



21. Reliance is also made on article 11 of the UN Convention on Jurisdictional Immunities and their Property, 2004 which excludes employment contracts from immunity unless otherwise agreed.
22. The decision by Wasilwa J in *Lucy Muingo Kusewa & another v Embassy of Sweden* (2017) eKLR is also relied upon where the learned judge relied on the above mentioned convention to hold that the embassy has no immunity.
23. The provisions of section 32 of the *Privileges and Immunities Act* are also relied upon as are the decisions in *Captain (RTD) Charles KW Masinde v Intergovernmental Authority on Development* (2018) eKLR, *Dorcas Kemunto Wainaina v IPAS* (2018) eKLR.
24. Finally, it is urged that since the employment contract was concluded and performed in Kenya and the parties selected Kenyan law, the same should be decided locally.
25. The court is urged to invoke its jurisdiction under section 162(2) of the *Constitution* of Kenya, 2010 read together with section 2 and 12 of the *Employment and Labour Relations Court Act*, 2011.

### Determination

26. I have considered the notice of motion application, the responses by the claimant/respondent and the submissions filed by both parties.
27. The singular issue for determination is whether the respondent enjoys immunity from the claimant's suit and whether the court has jurisdiction to entertain the suit. While the respondent submits that the embassy enjoys immunity from criminal and civil suits, the claimant asserts that the suit herein is excepted by the United Nations Convention on Jurisdictional Immunities of states and their Property, 2004 as held by Wasilwa J in *Lucy Muingo Kusewa & another v Embassy of Sweden* (Supra).
28. Section 4 of the *Privileges and Immunities Act* provides that;
  1. Subject to section 15 of 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.
  2. For the purpose of article 32, a waiver by the head of the mission of a state or a person for the time being performing his functions shall be deemed to be a waiver by that state.
29. In addition, article 32(2) of the *Convention* is explicit that
 

“Waiver must always be express.”
30. Sub-article 4 states that waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement for which a separate waiver shall be necessary.
31. It is not in dispute that the respondent is a diplomatic mission representing the state government of Finland in Kenya and thus enjoy immunity from civil and criminal actions unless expressly waived.
32. It is trite law that immunity conferred by the *Vienna Convention, 1961* is not absolute. Article 31 of the convention identifies several exceptions to the general rule.
33. The non-restrictive nature of sovereign immunity is now acknowledged in many jurisdictions (See *Rabimtoola v Nizam of Hyderabad & another* (1958) A.C. 378 at 418, *Saudi Arabia v Nelson* 507 US



349 (1993), *Bah v Libyan Embassy* 2006 (1) BLR 22 (IC), *Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa* (1983) eKLR as well as *Talasu Lepalat v Embassy of the Federal Republic of Germany & 2 others* (2015) eKLR.

34. In *Karen Kandie v Assasane Bar & Shelter Afrique* (Supra), the Supreme Court considered the respondent's immunity in the context of section 24 of the *Constitution* of Kenya, 2010 and expressed itself as follows;

“In concluding 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 respondent's work without hinderance, the limitation on the right to access courts is not disproportionate. The conferment of immunity for 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.” (See *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* (2012) eKLR at paragraph 13 A.

We have held that all treaties and conventions that Kenya has ratified from part of Kenyan law, subject to the *Constitution*.

We have also held that the respondents were conferred with immunity against legal processes by the international agreements that Kenya entered into, through immunity so granted was not absolute, as there were exceptions provided in the operative law. Finally, the privileges and immunities that the respondents enjoy were a reasonable and justifiable limitation of the right of access to justice . . .”

35. The court is guided by these propositions of law.
36. In the instant case, the claimant avers that she was employed by the embassy of the Republic of Finland as a project assistant on June 9, 2006 under two (2) year contract at a monthly salary of Kshs 69,000/=.
37. The contract was subsequently renewed until May, 2015 when her employment was made permanent until termination on March 17, 2022 by which time her salary had risen to Kshs 242,257/= per month.
38. It is the claimant's case that the contract of employment provided that the contract was subject to Kenyan legislation.
39. The claimant further submits that the termination letter was explicit that it was “in accordance with the contract of employment and the laws of Kenya.”
40. The claimant prays for Kshs 21,916,194/= as compensation or unlawful termination of employment.
41. The claimant relies on several decisions to urge that the court has jurisdiction to hear and determine this case. Among them is *Lucy Muingo Kusewa v Embassy of Sweden, Nairobi* (Supra) where Wasilwa J relied on the *United Nations Convention on Jurisdictional Immunities of States and their Property, 2004* and held that its provisions were part of the law of Kenya by virtue of article 2(5) of the *Constitution* of Kenya, 2010.
42. Article 11 of the convention provides inter alia;

“ . . . a state cannot invoke immunity from jurisdiction before a court of another state which is otherwise competent in a proceeding which relates to a contract of employment between



the state and an individual for work performed or to be performed in whole or in part in the territory of that other state . . .”

43. As submitted by the claimant, article 2(5) of the [Constitution](#) of Kenya, 2010 makes the general rules of International law part of the law of Kenya.
44. Be that as it may, the claimant tendered no evidence that the convention is operational and thus good law for application to the facts of this case. In *Elkana Khamisi Samarere, Jeremiah Omwoyo v The Nigerian High Commission* (Supra), Rika J declined to rely on the convention because it had not come into operation and thus not applicable as a source of law of Kenya, which remains the case to date.
45. While 28 countries have so far signed the convention, only 23 have ratified it. The minimum number of ratifications for the convention to come into force is 30 as provided by article 30 of the convention.
46. In sum, the [United Nations Convention on Jurisdictional Immunities of States and their Property, 2004](#) is yet to become law and is thus inapplicable.
47. On this ground alone, the court is satisfied that the decision in *Lucy Muingo Kusewa v Embassy of Sweden Nairobi* (Supra) is unsafe to rely on.
48. More significantly, the court subsequently stayed the hearing and determination of the suit pending an appeal filed by the Embassy.
49. In [Elkana Khamisi Samarere & Jeremiah Omwoyo's](#) case, Rika J was emphatic that;

“The Nigerian high commission represents a foreign sovereign. It enjoys immunity from the criminal, civil, labour and administrative jurisdiction of the receiving state, Kenya. The immunity enjoyed by the Nigerian high commission can only be expressly waived by the Republic of Nigeria. The industrial court of Kenya as an organ of the receiving state would be waiving immunity, by assuming jurisdiction, contrary to article 32 of the *Vienna Convention on Diplomatic Relations* . . . In the view of the court, the Nigerian high commission must continue to enjoy unrestricted immunity from the judicial process of the industrial court considering the existing legal framework.”
50. A similar holding was made in [Agnes Akinyi Nyameyo v Austrian Embassy Nairobi Commercial Section & 2 others](#) (2021) eKLR where the court relied on the holding in *Elkana Khamisi Samarere v Nigerian High Commission* (supra).
51. The court is in agreement with the sentiments of Rika J in the foregoing case where the learned judge stated as follows;

“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 representing states . . .”
52. Finally, it is evident that the applicant has neither by word or conduct expressly waived its immunity in the context of article 32(2) of the [Vienna Convention](#).
53. The respondent’s contention that the fact the employment contract subjected itself to Kenyan legislation, deduction of statutory dues and the termination letter indicated that the termination was effected in accordance with the laws of Kenya, gave the court jurisdiction to hear and determine



the dispute herein is unsustainable as a court of law derives its jurisdiction from the Constitution or legislation or both as opposed to an agreement between the parties.

54. For the above stated reasons, it is the finding of the court that it has no jurisdiction to hear and determine the suit on the grounds of diplomatic immunity of the respondent.
55. Consequently, the notice of motion application dated May 25, 2022 is meritorius and is allowed.
56. Parties to bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

