



**Nzau v High Commission of Malaysia (Cause E1037 of 2021)
[2022] KEELRC 13020 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13020 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1037 OF 2021
JK GAKERI, J
OCTOBER 27, 2022**

BETWEEN

WELLINGTON NZAU CLAIMANT

AND

HIGH COMMISSION OF MALAYSIA RESPONDENT

RULING

1. This is a Notice of Motion Application by the Respondent dated March 31, 2022 seeking orders that;
 - i. The honourable court be pleased to strike out the claimant's suit against the respondent in limine.
 - ii. The honourable court do give such further or other orders as it may deem fit in the interest of justice.
 - iii. The respondent be awarded the costs of this application and the case.
2. The Application is expressed under Rule 17(1) and (2) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and all enabling provisions of the law and is based on the grounds set out on its face and the Supporting Affidavit sworn by Fatin Zafirah Haris who depones that as the second secretary and deputy permanent representative of the respondent, he is authorised to make the affidavit.
3. The affiant states that the facts deponed are derived from own knowledge attained in the course of employment with the respondent as well as from records and documents belonging to and in the possession of the respondent as well as advise from the respondent's advocates on record.
4. The affiant states that the claimant filed suit herein on December 10, 2021 against the respondent, the Permanent Diplomatic Legation of Malaysia in the Republic of Kenya seeking the sum of USD 26,437.95 as allowances and overtime dues allegedly due to him.



5. The affiant further states that he is aware and has been advised by counsel on record that the Respondent enjoys Diplomatic Immunity from the legal process pursuant to the provisions of section 9 and 11 of the *Privileges and Immunities Act* Cap 179, Laws of Kenya, and the respondent has not waived the immunity in respect of the suit herein by the claimant.
6. That the suit offends the immunity enjoyed by the respondent.
7. The affiant further states that the immunity enjoyed by the respondent finds recognition and immunity from international treaties entered into by Kenya including the *Vienna Convention on Diplomatic Relations, 1961*.
8. The affiant concludes by stating that by virtue of the immunity conferred on the Respondent under the provisions of the *Privileges and Immunities Act*, this honourable court lacks jurisdiction to hear and determine the suit.
9. The Claimant/Respondent filed grounds of opposition to the Notice of Motion Application dated 31st March, 2022 contending that the application is a waste of judicial time to frustrate payment of statutory dues by the respondent and the issue of immunity is one of the issues for determination in the suit by the claimant.
10. It is the Claimant/Respondent's case that the court should discourage the hearing of suits in instalments as it would violate Article 159(2) (b) of the *Constitution of Kenya, 2010* on delay.
11. The court is urged to dismiss the Application and give directions for the hearing of the suit.

Respondent/Applicant's submissions

12. The gravamen of the Respondent/Applicant's submission is that it enjoys immunity from legal processes under the provisions of section 9 and 11 of the *Privileges and Immunities Act* and the *Vienna Convention on Diplomatic Relations, 1961*.
13. Reliance is made on the decisions in *Karen Njeri Kandie v Alassane BA and another* (2012) eKLR and *Elkana Khamisi Samarere & another v Nigerian High Commission* (2013) eKLR. In the latter case, the court held that since the respondent was a representative of a foreign sovereign, it enjoyed immunity that could only be expressly waived by the Republic of Nigeria and the court could not by assuming jurisdiction waive that immunity.
14. That a similar holding was made in *Twictor Investments Ltd v The Government of the United States of America* (2003) eKLR where the court agreed with the sentiments of Denning M.R. in *Thai Europe Tapioaca Services Ltd v Government of Pakistan* (1973) 3 ALLER 961.
15. The Supreme Court decision in *Karen Njeri Kandie v Alassane Ba & another* (2017) eKLR is also relied upon for its holding that upholding Kenya's international law obligations was a reasonable and justifiable limitation of the right to access justice as provided under Article 48 of the *Constitution of Kenya, 2010*.
16. It is urged that the Supreme Court did not disturb the Court of Appeals findings on the place of immunity granted by international treaties and conventions.
17. It is the respondent's case that based on the decisions relied upon, the court has no jurisdiction to hear and determine the suit. The court is urged to strike out the suit.



Claimant/Respondent's submissions

18. The claimant isolates two issues for determination;
 - i. Whether the court has jurisdiction to hear and determine the suit.
 - ii. Whether the respondent enjoys immunity arising from proceeding in respect of individual contract of employment.
19. As regards jurisdiction, the claimant/respondent submits that this court's jurisdiction is vast and expansive as provided by Article 162(2) of the [Constitution of Kenya, 2010](#) read together with section 12 of the [Employment and Labour Relations Court Act, 2011](#).
20. It is urged that the dispute herein relates to employment since the claimant was an employee of the respondent and thus the dispute falls squarely within the jurisdiction of the court.
21. The claimant urges that the disputes is anchored on the breach of Article 41 of [the Constitution of Kenya](#) and section 18(5) and 35(5) of the [Employment Act, 2007](#)
22. As to whether the respondent enjoys immunity from proceedings relating to contracts of employment between servants of host and sending state, it is submitted that section 9 and 11 of the [Privileges and Immunities Act](#) and the [Vienna Convention on Diplomatic Immunity](#) do not offer immunity in relation to disputes based on contracts of employment as there is no host Country Agreement on immunity in such contracts.
23. That the decision in [Karen Njeri Kandie \(Supra\)](#) is distinguishable since there was a Host Country Agreement.
24. That the respondent had no certificate given and signed by the Minister under section 16 of the Act.
25. That the conduct of the Respondent waived its immunity through its Regulations governing Terms and Conditions of Locally recruited staff serving in Diplomatic Mission.
26. That the claimant's claim is founded on Regulation 41 and 50 on the obligation of the respondent to pay overtime dues.
27. It is the respondent's case that Article 33(3) of the [Vienna Convention](#) removes any immunity of the respondent in relation to private contracts of employment to citizens of the host state.
28. Reliance is made on Articles 24, 41, 48, 50 of [the Constitution of Kenya](#) to urge that the Respondent/Applicant's argument should not be upheld as there cannot be a violation of citizen's rights without a remedy.
29. Further reliance is made on the decisions in [United Kingdom v Joel Ndegwa](#) (1983) eKLR and [Tononoka Steels Ltd v Eastern and South Africa Trailer & Development Bank](#) (1999) eKLR cited in [Murigi Kamau Wanjohi v Reconstruction and Development Bank](#) (2018) eKLR to buttress the submission.
30. The court is urged not to rely on state precedents overtaken by the progressive [Constitution of Kenya, 2010](#).
31. Finally, the court is invited to take judicial notice of the latest global developments by the adoption on December 2, 2004 of the [United Nations Convention on Jurisdictional Immunities of States and their Property, 2004](#).



Determination

32. The twin issue for determination is whether the respondent enjoys immunity from the claimant's suit and whether the court has jurisdiction to hear and determine the suit.
33. While the Respondent/Applicant submits that the High Commission enjoys immunity from judicial proceedings, the claimant submits that this was a private contract of employment excepted by the [Vienna Convention on Diplomatic Relations](#) and Provisions of the [Privileges and Immunities Act](#).
34. Section 4 of the [Privileges and Immunities Act](#) provides;
 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 waiver by that state.
35. In addition, Article 32 of the Vienna Convention states that;
 1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending state.
 2. The waiver must always be express.
36. Sub-Article 4 of the Convention provides 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.
37. It is not in dispute that the respondent is a diplomatic mission representing the State Government of Malaysia in Kenya and thus enjoys immunity from civil and criminal actions unless expressly waived.
38. Needless to emphasize, the immunity conferred by the [Vienna Convention, 1961](#) is not absolute. Article 31 of the [Vienna Convention](#) identifies several exceptions.
39. However, none of the three exceptions address employment contracts between the diplomatic mission and citizens of the receiving state.
40. Contrary to the Claimant/Respondent's submission that Article 33(3) of the Convention removes any immunity of the respondent in relation to private contracts of employment involving citizens of the host state, it does not as the Article relates to a diplomatic agent as opposed to an external agency i.e the mission itself.
41. Noteworthy, the respondent in this case is the mission as opposed to the Head of Mission.
42. Article 33(3) of the [Vienna Convention, 1961](#) is specific to a Diplomatic agent who employs private servants who are in the sole employ of a diplomatic agent under Article 33(2).
43. The non-restrictive nature of sovereign immunity is now acknowledged in many jurisdictions. (See *Rahimtoola v Nizam of Hyderabad & another* (1958) A.C. 378 at 418, *Saudi Arabia v Nelson* 507 US 349 (1993), *Bah v Libyan* (2006) (1) BLR 22 (IC), [Ministry of Defense of the Government of the United Kingdom v Joel Ndegwa](#) (1983) eKLR as well as [Talaso Lepadat v Embassy of the Federal Republic of Germany & 2 others](#) (2015) eKLR).



44. In *Karen Kandie v Alassane Bar and another* (*Supra*), the Supreme Court considered the respondent's immunity in the context of Article 24 of the [Constitution of Kenya, 2010](#) and stated as follows;
- “In concluding this issue, we therefore find that after balancing the right of the appellant to access justice and Kenya's obligations of letting the respondent's work without hinderance, the limitation of 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.”
45. Similar sentiments were expressed in *Erad Suppliers & General Contractors Ltd v National Cereals and Produce Board* (2012) eKLR where the court expressed itself as follows;
- “We have held that all treaties and conventions that Kenya has ratified form part of Kenyan law, subject to [the Constitution](#).
- We have also held that the respondents were conferred with immunity against legal processes by international agreements that Kenya entered into, though 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.
46. The court is guided and bound by these sentiments.
47. Contrary to the claimant/respondent's submission that the Supreme Court decision in *Karen Njeri Kandie v Alassane Bar & another* (*Supra*) is distinguishable, this is not the case as immunity in that case was granted by an international agreement and Kenya was a party thereto.
48. Similarly, Kenya is a party to the [Vienna Convention on Diplomatic Relations, 1961](#).
49. Similarly, the legal issue in the two cases is the same, namely immunity and both relate to contracts of employment.
50. In the instant case, the claimant avers that he was employed by the respondent by letter dated January 12, 2007 as a casual driver and subsequently confirmed vide letter dated 4th October, 2019.
51. The claimant further avers that the terms and conditions of employment were governed by the Regulations of Locally recruited staff serving Diplomatic Mission, Trade Commission and student department of Malaysia Overseas of January 1, 1977 (herein after Regulations 202/4). The claimant retired on October 4, 2019 on attaining the age of 60 after a service spanning 12 years.
52. The respondent's memorandum of response dated February 3, 2022 was filed under protest. The respondent denies the claimant's allegations contending that it enjoys diplomatic immunity and does not admit the jurisdiction of this court.
53. The Claimant/Respondent states that Regulation 62(i) of the Regulations entitled him to terminal benefits including but not limited to gratuity calculated at ¹/₁₂ of the last drawn monthly salary for each completed year of service and clause 3 entitled him to overtime payment a total sum of USD 26,437.95 inclusive of gratuity.
54. The claimant submits that his claim is grounded on Regulation 65 of the Regulations 202/4 which states that “notwithstanding the provision in these regulations all local practices which are mandatory shall prevail.



55. According to the claimant, these practices are the Constitution, the Employment Act, 2007 and case law, essentially the law.
56. The construction of local customs as the law is not supported by any evidence or analysis of the context and import of Regulation 202/4.
57. More significantly, the Regulations do not expressly waive the respondent's immunity from civil actions in courts of the host country as provided by the Vienna Convention, 1961.
58. Intriguingly, the Claimant/Respondent has not relied on any decision in support of the proposition that an employment contract is private engagement between persons and has nothing to do with diplomatic immunity generally or specifically to the instant case.
59. The provisions of Article 41, 48 and 50 of the Constitution of Kenya, 2010 which guarantees the right to fair hearing, fair labour practice and access to justice may be derogated in accordance with the provisions of Article 24 as explained by the Supreme Court in Karen Njeri Kandie case (Supra).
60. In Lucy Muingo Kusewa v Embassy of Sweden (2017) eKLR, Wasilwa J. applied the provisions of the United Nations Convention on Jurisdictional Immunities of States and their Property, 2004 and held that the convention was part of the law of Kenya by virtue of Article 2(5) of the Constitution of Kenya, 2010, specifically Article 11 which exempts contracts of employment from immunity granted to states.
61. In Cause No. E268 of 2022 in Debra Ruzage Ndungu v Embassy of Finland where the claimant relied on the decision in Lucy Muingo Kusewa v Embassy of Sweden, this court expressed itself as follows;

“As submitted by the claimant, Article 2(5) of the Constitution of Kenya, 2010 makes general rules of International law part of the law of Kenya.

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 Nigeria High Commission (2013) eKLR, 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.

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.”

62. The foregoing sentiments apply to the facts of this case on all fours.
63. Regrettably, the United Nations Convention on Jurisdictional Immunities of States and their Property, 2004 is inapplicable as law.
64. The jurisprudence emerging from this court on matters germane to contracts of employment between employees of Embassies and High Commissions is consistent that Embassy and High Commissions enjoy immunity from actions filed in courts of host countries unless the immunity is expressly waived.
65. In Elkana Khamisi Samarere & Jeremiah Omwoyo (Supra), Rika J. held as follows;

“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. The Industrial Court would be acting in violation of the principles concerning the sovereign equality of the state’s 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 . . . 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.”

66. The court is in agreement with these sentiments.
67. A similar holding was made in Agnes Akinyi Nyameyo v Austrian Embassy Nairobi Commercial Section & 2 others (2021) eKLR.
68. The court relied on the foregoing sentiments of Rika J. in Elkana Khamisi Samarere and another v Nigerian High Commission (*Supra*).
69. Having found that the Respondent/Applicant has not expressly waived its immunity in the context of Article 32(2) of the Vienna Convention, 1961, and the Claimant/ Respondent has not demonstrated any other way by which the court could legally assume jurisdiction to hear and determine the instant suit, 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.
70. As a consequence, the notice of motion application dated March 31, 2022 is merited and is allowed.
71. Parties to bear own costs.
72. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF OCTOBER 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 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 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

