



**Serenge v Jok & another (Cause 493 of 2017)
[2022] KEELRC 13050 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13050 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 493 OF 2017
L NDOLO, J
NOVEMBER 3, 2022**

BETWEEN

JOSEPHINE VODEKE SERENGE CLAIMANT

AND

PETER GATWEK LUK JOK 1ST RESPONDENT

SOUTH SUDAN EMBASSY, NAIROBI 2ND RESPONDENT

RULING

1. By a notice of motion dated January 2, 2022, the claimant sought leave of the court to amend her memorandum of claim dated March 7, 2017 and to substitute her witness statement of even date.
2. Subsequent to that, the 1st respondent filed a notice of preliminary objection dated April 8, 2022 raising the following grounds:
 - a. The amended memorandum of claim is fatally defective, frivolous, bad in law, lacks merit and is an abuse of the court process;
 - b. The court lacks jurisdiction to entertain the suit against the respondents on the basis of the principle of diplomatic immunity;
 - c. The suit herein offends the *Vienna Convention on Diplomatic Relations* as domesticated by Kenya through the *Privileges and Immunities Act*, cap 179, laws of Kenya;
 - d. The court, in entertaining the claimant's suit would be waiving immunity, by assuming jurisdiction, contrary to article 32 of the *Vienna Convention on Diplomatic Relations*;
 - e. The amended memorandum of claim ought to be struck out in limine.



3. The single issue for determination in this motion is whether the jurisdiction of the court is ousted on account of diplomatic immunity. In pursuing this line, the 1st respondent relies on article 31 of the *Vienna Convention on Diplomatic Relations* which provides:
 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from civil and administrative jurisdiction, except in the case of:
 - a. 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;
 - b. An action related 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;
 - c. An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.
4. On her part, the claimant opposes the application on two grounds; first that there is no evidence that the 1st respondent is a diplomatic agent and second, that the employment contract between the claimant and the 1st was not the subject of diplomatic immunity.
5. On the first ground, the claimant relies on the 1st respondent's statement which he recorded as a complainant in a criminal case where the claimant was charged with the offence of stealing by servant. In that statement, the 1st respondent describes himself as a businessman. The 1st respondent's diplomatic status is therefore a matter in controversy.
6. In the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Limited* (1969) EA, 696 it was held that:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion.”
7. The question whether the 1st respondent was a diplomatic agent during the time the claimant worked for him is a disputed matter which calls for ascertainment by the court. On this ground alone, I conclude that the 1st respondent's objection does not meet the threshold for a preliminary objection as defined in law.
8. Regarding the second ground, the claimant takes the view that the employment relationship between her and the 1st respondent was not regulated by diplomatic immunity. The claimant relies on the decision in *International Centre for Insect Physiology and Ecology (ICIPE) v Nancy McNally* [2018] eKLR where the Court of Appeal stated the following:

“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. I understand the appellate court to be saying that the process of declaring a matter to be insulated by the cloak of immunity calls for inquiry that cannot be achieved by the summary mode of dispensing with a preliminary objection.
10. In a subsequent decision in *Cyriaque Havvariamana v Permanent Secretariat of the Transit and Transport Co-ordination Authority of the Northern Corridor & another* [2019] eKLR the Court of Appeal rendered itself as follows:

“...in the area of employment and labour relations between embassies or other organizations that enjoy diplomatic immunity and their employees, the extent to which the plea of diplomatic immunity can be raised to resist a suit brought by an employee will depend largely on the character and scope of the duties performed by the employee and in particular whether the employment relationship was of a public law or private law nature.”

11. In reaching this conclusion, the appellate court relied on article 11 of the *Convention on Jurisdictional Immunities of States and their Property* which provides as follows:

Article 11 Contracts of employment

1. Unless otherwise agreed between the states concerned, 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.
2. Paragraph 1 does not apply if:
 - a. The employee has been recruited to perform particular functions in the exercise of governmental authority;
 - b. The employee is:
 - i. A diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;
 - ii. A consular officer, as defined in the Vienna Convention on Consular Relations of 1963;
 - iii. A member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or
 - iv. Any other person enjoying diplomatic immunity;
 - c. The subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
 - d. The subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the Head of State, the Head of Government or the Minister for Foreign Affairs of the employer state, such a proceeding would interfere with the security interests of that state;



- e. The employee is a national of the employer state at the time when the proceeding is instituted, unless this person has permanent residence in the state of the forum; or
 - f. The employer state and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the state of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.
12. There is therefore solid jurisprudence to the effect that applicability of the cloak of immunity in employment contracts is not a matter to be determined in limine.
13. This, coupled with the indeterminate nature of the 1st respondent's diplomatic status leads to only one conclusion; that the preliminary objection is not well taken and is overruled with costs in the cause.
14. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF NOVEMBER 2022

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JUDGE

Appearance:

Mr. Onyore for the Claimant

Mr. Esami h/b Mr. Nyamu for the 1st Respondent

No appearance for the 2nd Respondent

