REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 168 OF 2019

CATHERINE MUENI MUTUKU.....CLAIMANT

VERSUS

INTERNATIONAL LIVESTOCK RESEARCH INSTITUTE....RESPONDENT

RULING

1. The applicant in the Notice of Motion Application dated 14th January, 2020 prays for an order in the following terms:-

> **1. The Honourable Court be pleased to strike out the claimant's suit against the Respondent *in limine.***
>
> **2. The Honourable Court do give such further or other orders as it may deem fit in the interests of justice.**
>
> **3. The costs of the Application together with those of the entire suit be borne by the Claimant.**

2. The application is premised on grounds set out on the face of the Notice of Motion as follows: -

> **(a) The Claimant filed the suit herein on 14th March, 2019 as against the Respondent in which she has sought *inter alia* damages equivalent to the remainder of her contract of employment totaling Ksh. 10,060,408.96 on the basis that she was unlawful terminated.**
>
> **(b) The Respondent is an international organization headquartered in Nairobi, Kenya and founded on 25th September, 1973 as International Laboratory for Research on Animal Diseases** (ILRAD) **which was later transformed into the International Livestock Research Institute** (ILRI) **on 24th September, 1994.**
>
> **(c) There exists between the Government of Kenya and the Respondent a Host Country Agreement dated 29th December, 1994 and under Article V. of the same the Respondent enjoys immunity from every form of legal process except insofar as, in any particular instance, it has waived its immunity.**
>
> **(d) The Respondent has not waived its immunity in respect of the suit herein by the Claimant.**
>
> **(e) By virtue of the aforementioned Host Country Agreement the Respondent enjoys immunity from the legal process under the provisions of Section 9 and 11 of the Privileges & Immunities Act *(Cap 179, Laws of Kenya).***
>
> **(f) The suit filed by the Claimant offends the immunity enjoyed by the Respondent and has been filed before the dispute resolution mechanism specified in the Host Country Agreement has been exhausted.**
>
> **(g) This Honourable Court lacks jurisdiction to hear and determine the suit.**

3. The grounds are buttressed in the supporting affidavit of **Solomon Muasa** the People and Organizational Development (HR) Compensation and Benefits and Employee Relations Manager of the Respondent.

4. The applicant attached the said Memorandum of Agreement **(MOA)** signed on 25th September, 1973 to the Affidavit between the Government of Kenya and Ministry of Agriculture on one part and the Rockefeller Foundation on behalf of the Consultative Group on International Agricultural Research (**CGIAR)** on the other part.

5. That whereas Article XII (a) provided that the International Laboratory for Research on Animal Diseases (ILRAD) will be established by

issuance of an appropriate Charter under the existing Kenya law, the Kenya Government undertook to provide a number of privileges and facilities to wit; exemption from all regional, national and local taxes as per Article XII(a) of the Memorandum of Agreement.

6. That thereafter on 13th June, 1974, International Laboratory for Research on Animal Diseases (ILRAD) was incorporated as a company limited by guarantee and whose main objective was to carry out research in the livestock and disease control. In particular, Article 3(b) (xiii) of International Laboratory for Research on Animal Diseases **(ILRAD's**) Memorandum of Association permitted International Laboratory for Research on Animal Diseases (ILRAD) to acquire immovable properties within the Republic of Kenya for purposes of carrying out its mandate. Marked 'B' is International Laboratory for Research on Animal Diseases **(ILRAD's)** Memorandum and Articles of Association.

7. That on 2nd April, 1993, the Government of Kenya and International Laboratory for Research on Animal Diseases (ILRAD) signed an Agreement for the regulation of ILRAD's Headquarters. The said Agreement recognized the 1973 Memorandum of Agreement whose salient features comprises: -

(a) Articles III of the Agreement permitted ILRAD to enter into contracts, acquire and dispose both movable and immovable assets.

(b) The Agreements preamble recognized the 1973 Memorandum of Agreement "International Laboratory for **Research on Animal Diseases** (ILRAD's**) Articles of Association" reaffirmed by Article VI (1) on governance.**

(c) International Laboratory for Research on Animal Diseases (ILRAD) **was exempted from all direct taxes on its assets, income and properly.**

(d) International Laboratory for Research on Animal Diseases (ILRAD **was brought under the Ministry of Foreign Affairs. Marked 'C' is a copy of the 1993 Agreement.**

8**.** That pursuant to the said 1993 Agreement on 14th May, 1993, Legal Notice No. 134 of 1993 was published in line with Section 9 of the Privileges and Immunities Act **(Cap. 149 Laws of Kenya).** By the said Gazette Notice, International Laboratory for Research on Animal Diseases (**ILRAD)** was entitled to among others the privileges and immunities provided under Fourth Schedule of the Act. Copy of the Gazette Notice was attached and marked 'D'.

9. On 24th September, 1994, the State parties including the Government of Kenya executed an Agreement transferring International Laboratory for Research on Animal Diseases (ILRAD) into the International Livestock Research Institute (ILRI) with its own Constitution. The said Agreement is marked "E".

10. That on 29th September, 1994, the Host Country Agreement (HCA) was executed by International Livestock Research Institute (ILRI) and the Government of Kenya. The salient features of the Host Country Agreement HCA are:-

(a) International Livestock Centre for Africa (ILCA) was merged with International Laboratory for Research on Animal Diseases (**ILRAD) to create International Livestock Research Institute (ILRI).**

(b) The 1973 Memorandum of Agreement was reaffirmed.

(c) International Livestock Research Institute (ILRI) granted a Juridical Legal Personality with ability among others to acquire and dispose both Moveable and Immovable properties.

(d) The Government of Kenya agreed to apply to International Livestock Research Institute (ILRI), its properties and staff, the provisions of Convention on the Privileges and Immunities of the specialized Agencies adopted by the United National General Assembly on 21st November, 1947 per Article 11(3) at page 4 of the Host Country Agreement (HCA).

(e) Article V of the Host Country Agreement (HCA) provided International Livestock Research Institute (ILRI), its properties, facilities and assets with immunity from legal process as per Article V (1) at page 4 of Host Country Agreement (HCA).

(f) Article IX (1) exempted International Livestock Research Institute (ILRI) from payment of all direct taxes (*See pages 8 of the HCA).*

11. Pursuant to the Host Country Agreement **(HCA),** September, 1994, Agreement, that created International Livestock Research Institute **(ILRI)** and the Constitution of Article 18, Legal Notice No. 2 of 2001, was published with similar terms as legal Notice No. 134 of 1993 essentially extending privileges and immunities to the newly formed International Livestock Research Institute **(ILRI)** marked 'G'.

12. The applicant therefore deposes and submits that it enjoys immunity from every form of Legal process except in so far as in any particular instance, it has waived its immunity.

13. That the applicant has not waived its immunity in respect of the suit herein by the claimant.

14. That the applicant denies the claim and pleads that it enjoys immunity from Legal process by more specifically entering appearance under protest and as pleaded in paragraphs 3, 4, and 28 of the Applicant's/Respondents memorandum of reply dated 30th July, 2019.

15. That by virtue of the aforementioned Host Country Agreement, the Applicant enjoys immunity from the Legal process under the provisions of Section 9 and 11 of the Privileges and Immunities Act, Cap. 179, Laws of Kenya.

16. That this suit offends the aforesaid immunity. That the Host Country Agreement (HCA) provides at Article V that any dispute or Legal Claim brought against International Livestock Research Institute **(ILRI)** in Kenya, other than by Kenya Government shall be referred to the Ministry of Foreign Affairs for negotiation and settlement.

17. That the suit herein is premature since the dispute resolution mechanism has not been invoked by the claimant.

18. That by virtue of Section 9 and 11 of the Privilege and Immunities Act, Cap. 179, Laws of Kenya, this Court lacks jurisdiction to hear and determine this suit.

19. That the suit be struck out for want of jurisdiction.

20. The Claimant/Respondent filed a replying affidavit sworn to by the Claimant on 6th March, 2020 in which she deposes that she opposes the application on grounds set out in paragraph 3 (a) to (f) of the replying affidavit as follows: -

(a) That the Claim is hinged on the provisions of the Bill of Rights under Articles 23, 27, 28, 29, 41 *inter alia* of the Bill of Rights and the same raises issues of violations of my human rights which supersede the Respondent's claim of diplomatic immunity.

(b) That the Respondent relies on Article V of the Host Country Agreement which is marked as Annexture F and ends abruptly by providing that *"disputes will be referred to the Ministry of Foreign Affairs for negotiation and settlement."*

(c) That the said agreement makes no provision for situations like the instant case where the claim is by an individual or an aggrieved ex-employee who is litigating issues of infringement and violation of her human rights.

(d) That the said agreement has no room for situations where parties arrive at no settlement as envisioned under Article V of the agreement like in the instant case to my detriment.

(e) That Article 1 of the Constitution which is the Supreme Law of Kenya donates to the Constitution the obligation to protect, promote and fulfil my rights through the Chapter 10 organs whenever my rights are offended, breached and or infringed like in the instant case.

(f) That in any event, I invoked Article 5 of the Host Country Agreement wherein no settlement was arrived at.

21. That on 5th July, 2017, the claimant's advocate wrote a demand letter to the Respondent and on 27th April, 2018, the Claimant's advocate wrote a letter to the Ministry of Foreign Affairs and International Trade.

23. That the claimant was complaining in the letter that the matter had taken too long to resolve and the claimant was losing patience and that there was need to bring closure to the matter.

24. That the Ministry of Foreign Affairs and International Trade has never responded to the letter.

25. That the Claimant and her advocate made numerous visits to the Legal Department at the Ministry of Foreign Affairs and International Trade being on 2nd October, 2017, 18th January, 2018, 24th January, 2018, 13th February, 2018 and 20th March, 2018. That the Claimant's advocate and the Claimant sent text messages to the Legal office of Foreign Affairs to try and resolve the matter to no avail.

26. That all the aforesaid communication and interaction with the Ministry of Foreign Affairs and International Trade have not borne any fruit. That in a bid to negotiate, the Ministry of Labour was in correspondence with the Ministry of Foreign Affairs to help resolve the issue as a result of which they wrote a letter to the Ministry of Foreign Affairs and International Trade on 19th January, 2018.

27. That the Ministry of Labour had requested for the employer to provide a clear and specific response to the issues raised by the claimant and that a joint meeting of both parties be convened by the Ministry of Foreign Affairs and International Trade to enable each party to make presentations of their positions in the matter.

28. The claimant states that she has exhausted the avenue of the Ministry of Foreign Affairs and International Trade as provided for under Article V of the Host Country Agreement **(HCA)** and referring the matter back there will have no relevance and would only go a long way in delaying access to justice as guaranteed under Article 48 of the Constitution.

29. That the claimant has even attempted to settle the matter through negotiations by letters and a round table at the respondent's advocate's offices in vain. That the Court has jurisdiction to hear and determine the matter under Article 1, 22 ,23 and 165 of the Constitution of Kenya, 2010 and determine the dispute before it.

30. That the Host Country Agreement **(HCA)** and the Privileges and Immunities Act Cap. 179 predates the Constitution of Kenya, 2010 and it must be read together with the provisions of the Constitution with the necessary modification and attention so as to resonate with:-

Section 7 of the Sixth Schedule of the Constitution which *provides that," all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution*."

Article 2(1) *stipulates that, "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."*

Article 3(1) *stipulates that, "every person has an obligation to respect, uphold and defend this Constitution*."

Article 20(1*) stipulates that, "The Bill of Rights applies to all law and binds all State Organs and all persons. ....."*

31. In any event the issue of immunity has already been dealt with exhaustively by the Supreme Court in the case of **Karen Njeri Kandie – vs- ALASSANE BA and Another (2017) eKLR** where the judges pronounced themselves as follows:-

> **"While we appreciate the fact that the 2nd respondent was the Managing Director of Shelter Afrique, and could not be expected to grant himself immunity, there is no bar, as a matter of necessity, for the consent to waive immunity to be granted by any other authority within Shelter Afrique, including the Board of Directors, which exercises supervision over the Managing Director.** After, therefore, carefully considering the above provisions of the agreements and treaty, we find that the immunity conferred upon the respondents is not absolute **because in the instance of the 1st respondent, it is only limited to actions related to official functions, and his arrest and detention at the instance of the 2nd respondent, the Managing Director of the Board, may waive the immunity.** If it were absolute, none of these exceptions would have applied."

32. The Claimant prays that the immunity granted to the respondents is limited both by international law, and by the instruments of law that grant them such immunity as explained in the replying affidavit.

33. The claimant prays that the Notice of Motion Application dated 14th January, 2020 be dismissed with costs.

34. The parties have filed extensive written submissions and filed list of authorities which the Court has carefully considered together with the depositions filed by both parties.

Determination

35. ***The issues for determination are:-***

> **(a) Whether the Respondent enjoys immunity from being sued by the Claimant as pleaded as to deny this Court jurisdiction to hear and determine the suit.**
>
> **(b) If the answer to (a) above is in the negative, whether there is any merit in referring this matter to the Conciliation process under the Host Country Agreement (HCA) for being prematurely brought before Court.**

37. From the facts that are common cause the Respondent International Livestock Research Institute (ILRI) by virtue of the Host Country Agreement (HCA) and the provisions of Section 9 and 11 of the Privileges and Immunities Act Cap 179, Laws of Kenya, enjoys privileges and immunities set out in the Host Country Agreement (HCA) and the Act.

38. What needs to be determined is the nature and extent of the immunity extended to International Livestock Research Institute (ILRI) by the Host Country, Kenya in terms of the Municipal law aforesaid, the Constitution of Kenya, 2010 and the applicable international law.

39. In the case of **Unicom Limited –vs- Ghana High Commission (2016) eKLR, Civil Appeal No. 56 of 2014**, the Court of Appeal per Azangalala, Gatembu, and Mugor JJA, considered an Appeal arising from a ruling delivered on 9th December, 2011, by the High Court at Nairobi by Musinga, J. as he then was in which the learned Judge allowed the respondent's motion dated 27th July, 2011 to strike out the appellant's suit on the basis that the Court lacked jurisdiction to entertain the suit on account of sovereign immunity enjoyed by the respondent under the Privileges and Immunities Act, Chapter 179 of the Laws of Kenya. The dispute arose from a termination of a tenancy agreement by the respondent. The central question in the appeal as in the present matter is whether the respondent is entitled to immunity.

40. The Court of Appeal cited the English case of Rahimtullah –vs- Nizam of Hyderbad [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 Court or not." If the dispute brings into question for instance, the legislature 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 inference the commercial transactions of a foreign government** (*whether carried on by its own departments or agencies or by setting up legal entities*), **and it arises properly within the territorial jurisdiction of our Courts, there is no ground for granting immunity."**

41. Lord Denning had in Rahimtulla case, *(supra)* determined that it was the nature of the dispute that is critical in determining whether or not the Court will take cognizance of a dispute where immunity is pleaded.

42. In the present case, the dispute arises from a contract of Employment between the claimant and the respondent.

43. In **Tononoka Steel Limited –vs- East and Southern Africa Trade and Development Bank**, cited with approval by the Court of Appeal in Unicom Limited case, *(supra)* the Court of Appeal dispelled the notion of absolute immunity taking the view that where a state engages in purely private commercial activities it would be prejudicial and contrary to public policy to uphold sovereign immunity. The Court said per Tunoi, J.A.

> **"I do not think Parliament in its wisdom could have granted absolute immunity from suit and Legal process to such a body or organization if it was going to engage in purely private commercial activities and which had nothing whatsoever to do with member states. This would be prejudicial to the interests of Kenya and would be contrary to public policy.**

44. The Court of Appeal in reversing the High Court decision in Unicom Limited (*supra)* concluded:-

> "**We too agree that the doctrine of absolute immunity would be anachronistic and has been for some time now. What immunity there is must be restricted or quantified so that Privilege or commercial activities cannot be immunized."**

45. Closer, home, the Employment and **Labour Relations Court in Lucy Muingo Kusewa & Another –vs- Embassy of Sweden, Nairobi (2017) eKLR,** Hon. Lady Justice Hellen Wasilwa whilst dismissing application dated 9th February, 2016, seeking to have an employment dispute struck out on the basis that the respondent enjoyed sovereign immunity had this to say:-

> "***An employment contract has been defined by International Labour Organisation (ILO) at K. org.ifpdial-Labour langed as follows***:-
>
> "the employment relationship is the Legal link between employer and employees. It exists when a person performs work or services under certain conditions in return for remuneration.... it is the key point of reference for determining the nature and extent of employer's rights and obligations towards their workers."

46. *The Judge went on to state:-*

> **"An employment relation would as submitted above fall under private law which in is a breach of law that deals with relations between individual and institution rather than relation between these and the government."**

47. The judge went further to cite the United Nations Convention on jurisdictional immunities of states and their property as follows under part III:-

"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 part in the territory of that other state."***

48. In Unicom case *(supra),* the Court of Appeal found that Kenya had not ratified the United Nations Convention on jurisdictional immunities of states and their property. Hon. Wasilwa, however invoked Article 2(5) of the Constitution of Kenya, 2010 as follows:

> **"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 United Nations 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 the principle enumerated therein."**

49. Though I have hesitation in finding that a United Nation Convention that has not been ratified by Kenya forms part of the Kenyan law, by dint of Article 2(5) of the Constitution in view of Article 2(6) which expressly reserves Treaties that have been ratified to form part of Kenyan law, I do posit that case law cited by our courts indicate that the doctrine of absolute immunity was long left to the dustbins of history and in place has developed customary international law that prescribes restricted immunity especially in all matters to do with private law between individuals and the international organisations seeking to invoke immunity from being sued.

50. The present case, which is a pure employment and Labour dispute falls in that category.

51. In the present case, the respondent submits that it has not waived its immunity with regard to the present dispute. The respondent has also not provided any compelling argument as to why the dispute has not been resolved at the Ministry of Foreign Affairs and International Trade despite protracted, and concerted efforts for resolution demonstrated by the claimants in the replying affidavit of the claimant.

52. Whilst dismissing the Shelter Afrique Case in the matter of **Karen Njeri Kandie –vs- Alassane BA and Another 2017 eKLR**, with regard to immunity from criminal prosecution of the Managing Director of Shelter Afrique, the Supreme Court stated:-

> "In a nutshell, the immunity granted to the respondents is limited both by international law, and by the instruments of law that grant them immunity as we have explained above."

53. The Supreme Court also found that under Article 24 of the Constitution, the test to be applied in order to determine whether a right as in this case, access to Court of law and justice can be limited under Article 24 thereof, is the ***"reasonable and justifiable test."*** This must be done on a case by case basis, the Court stated that the factors set out in Article 24 have to be weighed in a balancing Act and that these factors set out thereunder are not exhaustive.

54. Article 48 of the Constitution provides the right to access of justice. The Supreme Court cited the provision as follows:-

> "The state shall ensure access to justice for all persons and if any fees is required it shall be reasonable and shall not impede access to justice."

55. The facts of this case present Host Country Agreement (HCA) wherein the Government of Kenya agreed to apply to International Livestock Research Institute (ILRI), its properties and staff, the provisions of the convention on the Privileges and Immunities of the specialized Agencies adopted by the United Nations General Assembly on 21st November, 1947 in terms of Article 11(3) of the Host Count Agreement (HCA).

Legal Notice No. 2 of 2001 was published with similar terms as Legal Notice No. 134 of 1993 essentially extending privileges and immunities to the newly formed International Livestock Research Institute (ILRI).

56. The applicant therefore claims absolute immunity from every form of Legal process except in so far as in any particular instance, it has waived its immunity which it has not waived in this case.

57. Article 31 of the Privileges and Immunities Act provides:-

> "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction."

58. The decision by the Supreme Court in **Karen Njeri |Kandie** (supra) which dealt with an employment and labour dispute has put paid the arguments by the claimant in this matter. It would appear, despite the very progressive views found in **Talaro Lepalat –vs- Embassy of Federal Republic of Germany and 2 Others (2015) eKLR**, citing Lord Denning in Rahimtula case at 418 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 Appeal acknowledged impartiality than by arbitrarily rejecting jurisdictions."

our hands are tied by the decision of the Supreme Court in Karen Njeri case (*supra).* Kenyan courts will no doubt continue to explore the place of General Rules of International law recognized under Article 2(5) of the Constitution of Kenya, 2010 which have increasingly banished absolute invocation of sovereign immunity to this suit from accessing due Legal process in host nations.

59. Having said that, the application to strike the mater out is allowed. The Court hopes that the internal processes in the Host Country Agreement (HCA) shall be utilized justly to allow the dispute between the parties herein to be independently evaluated and resolved as provided in the Host Country Agreement (HCA) to dispel any notion or sense of impunity by an international organization which the Respondent is.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances:

Oraro & Co. Advocates for the Respondent/Applicant

Mr. Chigiti for Claimant/Respondent

Mr. Ekale – Court Assistant