



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E190 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

AGNES AKINYI NYAMEYO.....CLAIMANT

VERSUS

AUSTRIAN EMBASSY, NAIROBI COMMERCIAL SECTION.... 1ST RESPONDENT

MS. EDITH PREDORF, COMMERCIAL COUNSELLOR..... 2ND RESPONDENT

AUSTRIAN EMBASSY, NAIROBI.....3RD RESPONDENT

RULING

1. Before me, for determination is the Respondent's Notice of Motion Application dated 25th February 2021. It seeks the following orders **THAT:**

- i. Spent;
- ii. Spent,
- iii. Spent,
- iv. THAT inter-partes to the application and the claim herein be issued on priority basis seven days after service by email and via Ministry of Foreign Affairs,
- v. THAT respondents be ordered to issue the Claimant/ applicant with Certificate of Service to enable her to apply competitively for employment in other organizations,
- vi. THAT the respondents be compelled to pay to the applicant her November 2020 and December salary pending herein and determination of the Claim,
- vii. THAT the cost of this application be in the cause.

2. The Application is premised on the following grounds:

- i. The illegal withholding of the Claimant's/Applicant's November 2020 salary and other dues despite unlawful dismissal has continued to subject her to untold financial constraints and psychological distress and is a violation of her Constitutional right to life under Article 26 and her right to dignity under article 28.
- ii. The respondents are bound by Article 20(1) of the Constitution to protect and not to violate, infringe or threaten the rights of the Claimant/ Applicant or right of any other person for that matter.
- iii. On 12th October 2020 or thereabout the 2nd Respondent summoned the Applicant/Claimant to her office and coerced her to sign a notice to declare her redundant and immediately took from her access cards and keys to her office computer and the office building and in a terse informed her that she was no longer their employee.

iv. The illegal action by the 2nd respondent has subjected applicant/Claimant to untold financial constraint and psychological distress leading to her eviction from her rented house and hoping from one relative to another for temporary shelter.

v. Refusal by the respondent to issue the Claimant/applicant with a Certificate of Service has contributed to the applicant's/Claimant missed opportunities for employment in other organizations.

vi. Unless this Court intervenes the Claimant/applicant is bound to suffer more in the hands of the respondents.

3. The Application is supported by the Affidavit of **AGNES AKINYI NYAMEYO** sworn on the same date in which she reiterates the grounds on the face of the motion.

4. Upon being served, the Respondent filed a Preliminary Objection dated 6th April 2021 in response to this Application. The objection on the jurisdiction of this Court is based on the following grounds:-

i. The Respondents are holders of diplomatic immunity under Section 4(1) and Article 31 of the First Schedule of the Privileges and Immunities Act, Cap 179 Laws of Kenya. On account of the Immunity that they hold, they are immune from legal process as claimed in this case.

ii. The diplomatic immunity enjoyed by the Respondents has not in any way been waived.

iii. The Court lacks jurisdiction to entertain the Claimant's/Applicant's claim under the general principles of customary international law as domesticated under Article 2(5) of the Constitution of Kenya, 2010.

iv. The Claimant's application and the entire claim are misconceived and the orders prayed for do not lie as this Court is not empowered to grant the said orders.

5. The Claimant's Counsel responded to the Preliminary Objection via a Replying Affidavit sworn on 17th May 2021. He avers that while the respondents have diplomatic immunity, the same is restrictive and not absolute especially with respect to employment claims. That the Respondents waived their rights of diplomatic immunity by stating expressly in their employment contract with the Claimant that the underlying legal regulations for the same would be Kenyan Law.

6. He argues that it is customary practice of international law that concerned States should not invoke immunity from jurisdiction before Courts of another State which is otherwise competent in proceedings which relate 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 the other State.

7. He concludes that the proper Court of law that hears and determines employment and labour relations disputes is the Employment and Labour Relations Court hence the claim herein is filed in the right and proper forum with constitutional and statutory jurisdiction.

Claimant's Submissions

8. Counsel for the Claimant submitted that the Respondent had failed to prove the threshold to be met by a preliminary objection. The said threshold was stated by Ohungo J. in **David Karobia Kiiru v Charles Gitoi & Another (2018) eKLR**.

9. Counsel submitted that the application of the Vienna Convention on Diplomatic Relations and its domestication under Section 4(1) and Article 31 of the First Schedule of the Privileges and Immunities Act is not being challenged. However, he argued that the Convention has not extinguished the Claimant's constitutional right of access to justice under Article 48.

10. On the doctrine of restrictive immunity, the Claimant submitted that diplomatic immunity does not cover matters remote from sovereign authority, notably transactions within host State, especially those of a commercial or private law character. That diplomatic immunity is a rebuttable presumption of law which cannot be dismissed by way of preliminary objection.

11. He submitted that States have divorced from the doctrine of absolute immunity to focus on restrictive immunity. Counsel relied on the cases of **Alfred Dunhill of London v Republic of Cuba 425 US 682 (1976)** and **Thai-Europe Tapoica Service Ltd v Government of Pakistan, Directorate of Agricultural Supplies** where the court held that a foreign sovereign has no immunity when it enters into a commercial transaction with a trader and a dispute arises which is properly within the territorial jurisdiction of our courts.

12. Counsel submitted on the conduct of a diplomat. He relied on the case of **Rahimtoola v Nizam of Hyderabad (1958) A.C 379,422** where Lord Denning held:

“It is more in keeping with the dignity of a foreign 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.... ”

13. He submitted that the above statement was relied on with approval in **Lucy Muingo & Another v Embassy of Sweden (2017) eKLR** where a similar Preliminary Objection was dismissed with costs when the Swedish Embassy argued diplomatic immunity to deny the court's jurisdiction.

14. Counsel submitted that the Respondents have not provided any evidence to show compliance with the provisions of Article 10 of the Vienna Convention. He argued that in this case, none has been annexed as exhibit before this Court.

15. Counsel argued that Section 109 of the Evidence Act places the burden of proving the existence of the immunity on the Respondent.

16. Regarding the contractual agreement, Counsel quoted the case of **Embassy of Czechoslovakia v Jens Nielsen 78 ILR 81** where the Supreme Court of Denmark held that:

“Neither according to the Vienna Convention nor according to the rules of international law can an embassy be held to be exempt from proceedings based on a civil law contract concluded by the embassy which provides that disputes are to be settled by the courts of the receiving state”.

17. The Claimant quoted the US Court of Appeal case of **Tabion v Mufti 107 ILR 452** where the court held that an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State was outside his official function.

18. The Claimant concluded by urging this Court to dismiss the Preliminary Objection with costs.

Respondent’s Submissions

19. In support of the preliminary objection, Counsel submitted that the Respondents, being holders of diplomatic immunity under Section 4(1) and Article 31 of the First Schedule of the Privileges and Immunities Act are immune from legal processes against them. He submitted that the immunity is drawn from the status of the 3rd Respondent, being the Embassy.

20. He submitted that diplomatic immunity conferred to diplomatic missions as provided for in the Preamble to the Vienna Convention and the case of **Engine Linyulu Isalambo v Barbro Ekvall [2016] eKLR** is not intended to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions.

21. Additionally, he placed reliance on the case **Elkana Khamisi Samarere & Another v Nigerian High Commission (2013) eKLR** where the Court stated that the Nigerian High Commission represents a Foreign Sovereign.

“That the Industrial Court of Kenya 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 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 of representing States. The intervention of the Industrial Court in the dispute would have ramification for Kenya's own Diplomatic Missions abroad.”

22. Counsel submitted that this court has been emphatic that disputes of an industrial nature such as the present one are civil in nature and that as such the claims are outside the court's jurisdiction. He relied on the case of **Ishak Mohamed v Libyan Embassy (2016) eKLR** which relied on Rika J's decision in the case of **Samarere & Another v Nigerian High Commission (2013) eKLR**.

23. Counsel also invited the court to consider the limitation imposed under Article 31 of the First Schedule regarding the prohibition of attachment of the property of a diplomatic mission.

24. Regarding the argument that the employment contract had made reference to the application of Kenyan law, the Respondent submitted that the question before court is whether the Respondents by virtue of their status, are immune from legal process as conferred by the provisions of the **Vienna Convention on Diplomatic Relations (“the Vienna Convention”)** codified under the Privileges and Immunities Act and not the interpretation of the contract.

25. He submitted that the contract of employment cannot be considered in isolation on the question of applicable law as the court is under obligation to consider all other laws relevant and applicable in proceedings including the Privileges and Immunities Act and the Vienna Convention as pleaded in this case. That this court being a state organ, is obligated to observe the requirements of the diplomatic immunity, in accordance with the binding obligations of Kenya, as a State party to the Vienna Convention.

26. On the principle of restrictive immunity as argued by the Claimant, the Respondent submitted that the authorities relied on by the Claimant are foreign decisions and are therefore not binding to the court. That even assuming that this doctrine is applicable, the Respondent submitted that as customary international law, it would still form part of common law which cannot displace statute law.

27. In response to the argument that the Vienna Convention has extinguished the Article 48 of the Constitution, counsel relied on the Supreme Court decision in **Karen Kandie v Alassan Ba & Another (2017) eKLR**. The court held:

“In this case, we have held that the appellant cannot proceed with the case against the respondents, because the respondents are clothed with immunity from legal processes, which applies to the arrest and detention of the 1st respondent. Thus, the appellant's right of access to justice through the courts, is necessarily limited, as the respondents' immunity which is provided for in the law,

and arises from treaties and conventions which form part of the laws of Kenya under Article 2(6) of the Constitution, (see paragraph 78).

... 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 respondents work without hindrance, the limitation on the right to access courts is not disproportionate. The conferment of immunity for the 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 paragraph 85).”

Analysis and Determination

28. I have carefully considered the preliminary objection, the response thereto and the submissions filed by the parties. I find the issues for determination before this Court to be whether the Respondents enjoy immunity from being sued by the Claimant as pleaded so as to deny this Court jurisdiction to hear and determine the instant suit. The second issue is whether the preliminary objection as filed is valid.

29. A preliminary objection was defined in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** as –

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

30. Sir Charles Newbold in the same case observed as follows:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

31. In the preliminary objection herein, the Respondent has raised an issue of diplomatic immunity. Counsel for the Claimant argues that the Respondent failed to prove the threshold to be met by a preliminary objection as set out by Ohungu J. in **David Karobia Kiiru v Charles Gitoi & Another (supra)**.

32. The only position in the David Karobia decision which is relevant to this application is the statement by the Judge at paragraph 21 thereof to the effect that –

“It is important to reiterate that a valid preliminary objection should, if successful, dispose of the suit.”

33. The suit related to a preliminary objection raised over the territorial jurisdiction of a Magistrate. I find the decision does not add value to the issue herein. I further find that the issue of immunity is a pure point of law, and that the Court does not have to look outside the pleadings on record and the law in order to determine the same.

34. Further the preliminary objection herein, if successful, would dispose of the entire suit. I find that the preliminary objection as filed is valid and properly before this Court. The same is in line with the definition of a preliminary objection in **Mukisa Biscuit case** above where Law JA gave examples of issues that can be raised in a preliminary objection to include an objection to jurisdiction of a Court as in the instant case.

35. Section 4 of the Privileges and Immunities Act provides as follows –

4. Application of Convention

1. Subject to Section 15, 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 purposes 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.

3. Articles 35, 36 and 40 shall be construed as granting any immunity or privilege which they require to be granted.

4. The references in Articles 37 and 38 to the extent to which immunities and privileges are admitted by the receiving state and to additional immunities and privileges that may be granted by the receiving state shall be construed as referring respectively to the extent to which any immunities or privileges are specified by the Minister by order and to any additional immunities and privileges that may be so specified.

5. In its application to the immunity granted by paragraphs (2), (3) and (4) of Article 37 of the First Schedule the expression “permanently resident” in Article 38 of that Schedule shall be deemed to extend to an individual other

than one who is resident in Kenya solely for the purpose of performing the duties of his office for a mission.

36. Articles 22, 29, 31 and 32 of the First Schedule to the Privileges and Immunities Act provide as follows –

ARTICLE 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

ARTICLE 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and take all appropriate steps to prevent any attack on his person, freedom or dignity.

ARTICLE 31

1. 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, 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 relating 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.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

ARTICLE 32

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.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. 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 judgment, for which a separate waiver shall be necessary.

37. I have gone through the pleadings filed by the Claimant in the Court portal and I have been unable to find a copy of the memorandum of claim. This in itself is such a serious omission as would invalidate the whole of the suit filed by the Claimant.

38. The foregoing notwithstanding, the pleadings on record are sufficient for the Court to make a determination on the issue of diplomatic immunity which is the subject of the preliminary objection.

39. It is common ground that all the Respondents enjoy diplomatic immunity by virtue of Section 4 of the Act and Articles 22, 29, 30 and 31 of the First Schedule. The Act gives absolute immunity to all the Respondents herein which can only be waived by the sending state.

40. The arguments by the Claimant that her contract provides for application of the laws of Kenya to her contract cannot constitute a waiver as provided for under Article 32 of the First Schedule which provides at Article 32(2) that the waiver must be express. The reference to the Employment Act cannot constitute a waiver of diplomatic immunity under the Act.

41. The Supreme Court in **Karen Kandie v Alassan Ba & Another (supra)** considered the question whether the respondents' immunity is a justifiable limitation under Article 24 of the Constitution, to the appellant's rights to fair trial, fair hearing and access to justice under Articles 25, 50 and 48 of the Constitution respectively. The Court held that:

“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 concluding on 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 respondents work without hindrance, the limitation on the right to access courts is not disproportionate. The conferment of immunity for the 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.”

42. My learned brother Rika J, so aptly explained the reasoning behind the law on diplomatic immunity in **Elkana Khamisi Samarere v Nigerian High Commission (supra)** where, he held:

“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 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 of representing States. The intervention of the Industrial Court in the dispute would have ramification for Kenya's own Diplomatic Missions abroad.”

43. For the foregoing reasons, I find that this Court lacks jurisdiction to determine the suit herein on grounds of diplomatic immunity of the Respondents. I therefore allow the Preliminary Objection and strike out the suit.

44. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE