



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 841 of 2019

(Before Hon. Lady Justice Maureen Onyango)

JOYCE MUENI GATAMBIA.....CLAIMANT

VERSUS.

AGA KHAN FOUNDATION (KENYA).....1ST RESPONDENT

ALEX MATHU.....2ND RESPONDENT

RULING

The Respondent filed a notice of preliminary objection dated and filed on 3rd February, 2020 (the **Preliminary Objection**) to the Claimant's notice of motion application dated and filed on 21st January, 2020 (the **Application**) and the Claimant's Memorandum of Claim dated and filed on 16th December 2019. The Preliminary Objection seeks for an order that the Application as well as the Memorandum of Claim both dated 16th December, 2019 be struck out with costs on the following grounds:

1. Section 11(1) of the Privileges and Immunities Act, Chapter 179, Laws of Kenya (the **Act**) read together with Order 2 of the Legal Notice 165/1997, made on 27th August 1997, effective 11th July, 1997, (the **Legal Notice**) declares the 1st Respondent to be an organization to which Section 11 of the Privileges and Immunities Act applies.
2. Order 3 of the Legal Notice declares that the 1st Respondent has the privileges and immunities specified in part I of the Fourth Schedule of the Act.
3. Under Part I of the Fourth Schedule to the Privileges and Immunities Act, the 5th Respondent (sic) is immune from the suit and legal process.
4. Under Part II of the Fourth Schedule of the Act, Representatives and High Officers of the 1st Respondent, such as the Regional Chief Executive Officer, receive like immunity from suit and legal process as is accorded to a diplomatic agent under the First Schedule to the Privileges and Immunities Act.
5. Under Part III of the Fourth Schedule of the Act, the 2nd Respondent as well as other Officers and Servants of the 1st Respondent are immune from suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties.
6. This Honourable Court therefore lacks the jurisdiction to hear and determine the Notice of Motion Application dated 21st January, 2020 as well as the Memorandum of Claim and the Notice of Motion Application both dated 16th December, 2019.

In opposition to the Preliminary Objection, the Claimant filed grounds of opposition dated and filed on 5th February, 2020 (the **"Grounds of Opposition"**). The Claimant in its Grounds of Opposition objected to the Preliminary Objection on the following grounds:

1. The Preliminary Objection does not consist of a point of law which has been pleaded or which arises by clear implication out of pleadings.
2. The Respondent has failed to file any pleadings which would be supported by the purported evidence, the documents purported to have been filed by the Respondent should be struck out.

3. *The requirement that a preliminary objection must be based on uncontested facts which can only be ascertained from the pleadings has not been met.*

4. *The Respondent has not proved that it enjoys any privileges and immunity as claimed in the Preliminary Objection. The application (sic) is premature and unwarranted on the following grounds:-*

i) The Respondent has not filed a response to the Claim for the Court to determine the existence and/or extent of immunity if any. The orders sought by the Respondents should be canvassed and determined in the main suit.

ii) The issue of jurisdiction of the Honourable Court is a matter to be resolved by the Court after full hearing by the Court.

3. *The Applicant is not deserving of the Orders sought for the following reasons:-*

i) Even if there was immunity, the Respondent has failed to prove that the same is enjoyed by the Respondent and/or its officers.

ii) The 1st Respondent and the Claimant's employment contract dated 6th June 2017 stipulated that it is subject to the laws of Kenya and 1st Respondent's Human Resources Manual. The Manual at Clause 4 stipulates the employment relationship between the parties shall be subject to Kenya labour laws and no Privileges and Immunities Act (Cap 179) is evoked.

iii) The dispute before the court relates to an employment contract between the Claimant and the 1st Defendant which falls under private law and immunity under the Privileges and Immunities Act and the Vienna Convention on the Laws of Treaties does not cover employment matters.

4. *Article 4(1) of the Constitution guarantees that every person has the right to fair labour practices which have been breached in this case.*

5. *The remedies sought by the Claimant are within the provisions of the Constitution of Kenya, 2010 as read with the Employment Act, 2007 and the Court has the jurisdiction granted to it by the Industrial Court Act, 2011 to hear and determine the dispute.*

6. *That the Preliminary Objection is otherwise frivolous, vexatious and an abuse of the court process of this Honourable Court and should therefore be dismissed with costs.*

Submissions

The Parties appeared before me on 6th February, 2020 when they agreed to dispose of the Preliminary Objection by way of written submissions.

The Respondent filed its written submissions dated 17th February, 2020 on 20th February, 2020. The Respondents in summary submitted that:-

i) The Respondents are immune from legal proceedings pursuant to the provisions of the Privileges and Immunities Act, Chapter 179 of the Laws of Kenya. The 1st Respondent is a non-profit, non-denominational agency, which seeks to promote sustainable and equitable socio-economic development, through innovative approaches to selected generic problems in the fields of health, education and rural development, including provision of new opportunities for women. The Aga Khan development Network signed an Agreement of Co-operation with the Kenyan Government on 4th November, 1996, pursuant to which Legal Notice was enacted.

ii) The Legal Notice recognises the 1st Respondent as an organisation to which Part IV Section 9(1) and 2(a) of the Privileges and Immunities Act is applicable to. In addition Order 2(1) of the Legal Notice declares that the 1st Respondent is an organization to which Section 11 of the Act shall apply. In its submissions the Respondent reproduced the provisions of Section 11 of the Act that reads:-

11. Technical assistance, etc., agencies

(1) Where the Government of Kenya has, whether before or after the commencement of this Act, entered into any agreement with an external agency under which, in return for assistance or co-operation in works executed in, or services rendered to, Kenya by that agency, the Government has agreed that such agency or persons in its service should enjoy immunities or privileges, the Minister may, by order—

(a) declare that such agency is one to which

this section applies;

(b) provide that, to such extent as may be specified in the order, such agency shall have the immunities and privileges set out in Part I of the Fourth Schedule to this Act; (c) confer upon such classes of officers and servants of such agency as may be specified in the order, to such extent as may be so specified, the immunities and privileges set out in Part III of the Fourth Schedule..."

iii) Similarly, Order 3 of the Legal Notice provides that the Network shall have the privileges and immunities specified in Part I of the Fourth Schedule to the Privileges and Immunities Act meaning the 1st Respondent was granted privileges and immunity from legal process by the Government of Kenya.

iv) Under Part 2 of the Fourth Schedule of the Privileges and Immunities Act, the 2nd Respondent as well as other officers and servants of the 1st Respondent are immune from suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties.

v) Since the immunity of the 1st Respondent has not been

waived then the Court cannot assume jurisdiction. It relied on **Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Limited [1989] KLR 1**.

vi) The Claimant’s applications and Memorandum of Claim are thus in breach of the express provisions of Part IV Section 9(1) and (2)(a), Section 11, Parts 1, 2, and 3 of the Fourth Schedule of the Privileges and Immunities Act as the Respondent are immune from legal process.

vii) The Preliminary Objection is a pure point of law which if upheld would dispose of the suit in its entirety and that it fits the definition of a preliminary objection as set out in Mukisa in that:-

a. They have raised a pure point of law – that as an organization duly recognized by the Legal Notice, to which Part IV Section 9(1) and (2) (a) and Section 11 of the Privileges and Immunities Act is applicable. Order 3 of the Legal Notice specifically states that the Respondent shall have the privileges and immunities specified in part I of the Fourth Schedule to the Privileges and Immunities Act.

b. No facts need to be ascertained since they have clearly set out their legal status and all the relevant applicable laws governing them.

c. The Respondent are not seeking the exercise of judicial

discretion. Part I of the Fourth Schedule under Paragraph 1 is also unambiguous.

The pleas

viii) The plea of immunity from suit and legal process goes to the very foundation of this matter and it is of critical importance that the Court addresses and makes a pronouncement on the issue at this stage as the success of the Preliminary Objection shall save judicial time and resources arising from a lengthy trial.

ix) The Respondent draws the Court’s attention to the Agreement for Cooperation Development between the Republic of Kenya and the Aga Khan Development Network (The Agreement) which under Article I provides that :

“The Republic of Kenya agrees to grant all requisite enabling rights, privileges, consents, approvals, academic and other forms of accreditation, authorisations and permissions as may be necessary in connection with the establishment or operation of such agencies as well as for the programmes and projects sponsored by them in Kenya”.

x) With respect to the status of the Respondents, Article 9 of the Agreement provides that they shall enjoy immunity with regard to acts done by them in the discharge of their duties. They relied on the provisions of Section 9(2) that reads:

9. Privileges, etc., of certain international organizations and persons connected therewith

(1) This section shall apply to an organization which the Minister may, by order, declare to be an organization of which Kenya, or the Government, and one or more foreign sovereign powers, or the government or governments thereof, are members.

(2) The Minister may, by order—

(a) provide that an organization to which this section applies (hereinafter referred to as the organization) shall, to such extent as may be specified in the order, have the immunities and privileges set out in Part I of the Fourth Schedule to this Act, and shall also have the legal capacities of a body corporate;

xi) They submitted that the said provisions were applied by the Court in **Josephine Wairimu Wanjohi v International Committee of the Red Cross [2015] eKLR**, **Fred Khaemba v International Organization of Migration [2016] eKLR**, **Gerrard Killeen v International Centre of Insect Physiology & Ecology (ICIPE) [2005] eKLR**. The Respondents also relied on the case of **N J vs Aga Khan Academy & 6 Others [2018] eKLR** a case involving a constituent of the Aga Khan Development Network Mwita J. stated as follows after considering the Legal Notice and the provisions of the Privileges and Immunities Act:-

“There is no doubt, therefore, that the 5th respondent has immunity from suits and other legal processes a fact the petitioner did not dispute. That means the 5th respondent is immune from suits and legal processes in this country including this petition. It is

therefore clear to me, that the 5th respondent having been conferred with immunity and privileges in accordance with the law is immune from the present litigation and the petitioner's decision to include it in this petition was doomed to fail."

xii) The Respondents also relied on the findings of Serгон J. in **Peter Letiwa and IGAD Secretariat on Peace in the Sudan vs Charles Mbugua [2016] eKLR** where he found the immunity enjoyed by the 2nd Appellant in that case and the 1st Respondent herein could not be taken casually without serious ramifications in international relations.

xiii) As regards to evidence needed for immunity to be inferred, the Respondent relied on the case of **S.S. Sehmi vs ICIPE [2000] eKLR** where the court held that production of the Minister's Order as has been done by the Respondents herein was prima facie evidence of the existence of the immunity.

xiv) It further relied on the Court of Appeal's findings in **Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa [1983] eKLR** and the High Court's holding in **Alfred Kioko Muteu vs Timothy Miheso & Another [2015] eKLR** that courts should not entertain an action against privileged persons and institutions unless the privilege is waived. So that in the absence of a waiver of the immunity the court is bound by the rules of International Law that the Constitution has imported. The Courts should not ignore such important rules of International Law regarding state/diplomatic immunity as it would lead to repercussions impossible to foresee.

xv) In the application of immunity in employment matters it referred this Court to the Court of Appeal's finding in **African Development Bank v Beatrice Agnes Acholla Rosemary Ambalo Achola (Representatives of the Estate of the Late Bonaventure Eric Acholla) [2015] eKLR** and the United States Court of Appeal decision in **Mendaro vs World Bank 717 F.2d 610 [1983]**. Their findings in summary were that if international organisations were subjected to suits worldwide by its employees for the purposes of the organisation would be greatly hampered.

xvi) The Respondents' submission is that they have always enjoyed immunity from suit and legal process as granted under the Privileges and Immunities Act and the Immunity has not been waived.

xvii) The contract of employment between itself and the Claimant is not a private affair but rather a part of the official function of the 1st Respondent. The function of hiring and terminating an Executive Manager such as the Claimant herein is an integral part of the functions, purpose of the 1st Respondent.

xviii) The filing of this suit and the consequent application was and is in complete breach of Section 9 of the Privileges and Immunities Act as well as the Privileges and Immunities (Aga Khan Development Network) Order, 1997 and the Agreement for Co-operation for Development between the Republic of Kenya and the Aga Khan Development Network.

xix) By proceeding to hear and determine the suit, the Court would be doing so and ultimately issuing the orders in vain and the only way of ensuring that this does not happen would be to allow the Preliminary Objection filed by the Respondents.

xx) The Respondents also relied on my findings in **Karen Njeri Kandie vs Alassane BA & Another [2012] eKLR** and to the consequent decisions in the Court of Appeal and the Supreme Court in **Karen Njeri Kandie vs Alassane BA & Another [2015] eKLR** and **Karen Njeri Kandie vs Alassane Ba & Another [2017] eKLR** respectively both of which upheld the decision of this Court.

xxi) Kenya enters into voluntary agreement and obligations that are binding upon it. It gave undertakings with regards to immunities and privileges for the Aga Khan Development Network that it cannot lawfully ignore. These Agreements and Treaties are binding upon parties and this in turn imposes an obligation on the parties thereto to serve and honour them. Scholarly works on the issue of immunity granted to international organizations and agencies have generally observed that such immunity prevents any state party from gaining an unfair advantage in or crippling an international organization or agency by way of its Courts and also provides guarantee that a member state is not likely to become both Judge and Party.

The Claimant filed on the other hand, filed her written submissions dated 28th February, 2020 on 2nd March, 2020. The Claimant's submissions in summary were that:-

i) It is trite law that a preliminary objection should be based on pure points of law based on the standards set by **Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited [1969] EA 696**.

ii) The Respondents have not filed any pleadings where they have pleaded a point of law. The only facts that have been pleaded are those that have been raised by the Claimant.

iii) The dispute before the Court relates to an employment contract between the Claimant and the 1st Respondent. No other facts have been pleaded by the Respondents. The Claimant relied on the case of **Oraro vs Mbaja [2005] 1 KLR 141** where the Court relied on the principles espoused in the Mukisa Biscuit case (Supra) and reproduced an extract of the findings of Ojwang J.

(as he then was) that:

"The principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or

seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”

iv) The issues raised in the Preliminary Objection are in a nature that would require calling of evidence, it raises questions of fact and law in regard to which both the Applicant and the Respondent are in several aspects in disagreement. The court has to establish where or not there is an employment contract as between the parties and under what regime of law that contract would fall under. The Preliminary Objection is thus not sustainable.

v) The Respondents have failed to file any pleadings which would be supported by the purported evidence and the documents purported to have been filed by the Respondents should be struck out. In support of these submissions, the Claimant relied on the holding in **ELRC CAUSE NO. 35 OF 2018 SALOME MAINA vs CHIEF OFFICER DEPARTMENT OF EDUCATION, LAIKIPIA COUNTY GOVERNMENT** where it was held by Nzioki Wa Makau J. that:

“The Respondent has not filed any pleadings and has instead filed a preliminary objection which seeks to upset the cart by asserting that the Claimant was not employed by the Respondent and that the Claimant is thus non-suited to seek remedies against the Respondent. The Claimant counters this by saying that her suit is seeking fair administrative action. In a nutshell, the issues in contention require the calling of evidence whether documentary or viva voce to prove or disprove the facets of employment being asserted by either side. The Respondent therefore jumped the gun as there are no legal issues that emerge from the pleadings to base the preliminary objection upon. As was stated by Law JA and Sir Newbold and Ringera J. (as he then was) the preliminary objection should be a pure point of law. It should not be raised where there is no clarity as to the point. In this case, the Respondent’s preliminary objection does not meet the threshold of preliminary objection as the issues cannot

be determined in limine.”

vi) The Claimant also relied on the case of **John Mathu Ndungu vs B.O.M Ihwa Secondary School [2018] eKLR** where the Court held that in matters where no pleadings are filed such a preliminary objection hangs in the air.

vii) The Claimant further submitted that a preliminary objection must be based on uncontested facts which can only be ascertained from the pleadings. The Claimant placed reliance on the case of **Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu High Court Civil Case No. 53 of 2004** where the Court held that:-

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

viii) The Respondents have not proved they enjoy any privileges and immunities as claimed. On the Claimant’s review of the relevant sections of the Privileges and Immunities Act as well as Order 2 of the Legal Notice their view was that:-

a. The privileges and immunities the Respondents allege to have been granted to the Aga Khan Development Network. The “Network” is defined as a network of Development Agencies: the Respondents have failed to prove that the 1st Respondent is one of the “Development Agencies”.

b. The 1st Respondent is a legal entity on its own and if it was part of the “Network” granted immunity, the Respondents would have simply provided evidence to this effect.

c. The Respondents have not filed a response to the Claim for the Court to determine the existence and/or extent of immunity if any. The orders sought by the Respondents should be canvassed and determined in the main suit.

ix) It was there submission that the 1st Respondent and by extension the 2nd Respondent, do not have any immunity envisioned in the Privileges and Immunities Act as read together with Order 2 of the Legal Notice. The Claimant relied on **ELRC Cause No. 685 of 2018 Mercy Muhandia vs Razor Tara** where the court held that:-

*“The Court has perused the memorandum of claim and nowhere is it stated by the claimant that the respondent is the Head of Mission for the Pakistan High Commission. The respondent has not filed a defence. The claimant disputes that the respondent is such Head of Mission and for the respondent it is stated that he is such Head of Mission. What is clear is that the issue whether the respondent is a Head of Mission and therefore enjoying the diplomatic immunity under the Privileges and Immunities Act (Cap. 179 of the Laws of Kenya) as read with the Vienna Convention on Diplomatic Relations, 1961, (absolute, restricted, or qualified) is a matter in dispute which will require evidence to resolve. It was in *Mukisa Biscuit Manufacturing Company Limited –Versus- West End Distributors Limited [1969] EA 696* that the binding principle on preliminary objections was held thus, “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.” The present preliminary objection is premised upon a plea of absolute diplomatic immunity on account of the respondent being the High Commissioner of the Republic of Pakistan but which fact the claimant does not concur to by her pleadings and affidavit or submissions. On that ground alone, the preliminary objection would therefore be liable to collapsing.”*

x) The Respondents are not deserving of the orders sought for the reasons that:-

a. Even if there was immunity, the Respondents have failed to prove the same in enjoyed by the 1st Respondent and/or its officers.

b. The 1st Respondent and the Claimant's employment contract dated 6th June, 2017 stipulated that it is subject to the Laws of Kenya and the 1st Respondent's Human Resource Manual. The HR Manual at Clause 4 stipulates that the employment relationship between the parties shall be subject to Kenya labour laws and no Privileges and Immunities Act is invoked.

c. The evidence that the employment contract makes no reference to the Privileges and Immunities Act has not been challenged.

xi) The Claimant filed the present case alleging violations by the Respondents of the employment contract and the Respondent's Human Resource Manual. These are matters that are undisputed. The Respondents cannot therefore counter the matter by raising issues of immunity by way of a preliminary objection. In support of her submissions, the Claimant again relied on **Mercy Muhandia vs Razor Tara** (Supra) where it was held:-

“The Court considers that the listed rights as they obtain in employment situations based on individual cases would automatically render unnecessary the discussion of whether the diplomatic immunity under the Privileges and Immunities Act (Cap. 179 of the Laws of Kenya) as read with the Vienna Convention on Diplomatic Relations, 1961 absolutely or restrictively limited the right of an employee to work and thereafter any of such unqualified or unlimited rights or rights that cannot be derogated from are shown or established to have been violated. Such is an issue as raised for the claimant that needs to be investigated at the full hearing in cases such as the present case and therefore, the preliminary objection would fail.”

xii) The dispute before the Court relates to an employment contract between the Claimant and the 1st Respondent which falls under private law and immunity under the Privileges and Immunities Act and the Vienna Convention on the Law of Treaties does not cover employment matters. The Claimant placed reliance on **NAIROBI ELRC CAUSE NO. 2193 OF 2015 (CONSOLIDATED WITH CASE NO. 2194 OF 2015) LUCY MINGO KUSEWA AND RENALDA MBOJE MJOMBA VERSUS EMBASSY OF SWEDEN, NAIROBI** which cited the case of **THE MINISTRY OF DEFENCE OF THE GOVERNMENT OF THE UNITED KINGDOM VS JOEL NDEGWA [1983] eKLR**. The extract from **Lucy Muingo Kusewa** case (supra) reads:-

“It is apparent that there is no absolute sovereign immunity. It is restrictive. The test is whether the foreign sovereign or government was acting in a governmental or private capacity then the doctrine will apply otherwise it will not afford protection to a private transaction. The nature of the act is, therefore, important.”

An employment contract has been defined by ILO at il.org.ifpdial- labour –law = lang-ed 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 remunerations.....it is the key point of reference for determining the nature and extent of employer's rights and obligation towards their workers”.

An employment relation would as submitted above fall under private law which is a branch of law that deals with relations between individuals and institution rather than relation between these and the government.

xiii) They relied on the provisions of Article 31 of the Privileges and Immunities Act which states as follows:-

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.

xiv) They also relied on the United Nations Convention on Jurisdictional Immunities of State and their Property state as follows under Part II:-

Article 11

Contracts of Employment

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.

xv) By virtue of Article 2(5) of the Constitution, 2010, general rules of international law form part of the Laws of Kenya. As such, the UN Convention on Jurisdictional Immunities of States and their Property form part of the Laws of Kenya, and it is therefore apt

for this Court to apply the principles enunciated therein.

xvi) The Claimant alleges that her rights under the employment contract and the 1st Respondent's Human Resources Manual have been violated by the Respondents. Article 41(1) of the Constitution guarantees that every person has the right to fair labour practices which have been breached by the Respondents in this case.

xvii) The Claimant relied once again on the case of Mercy Muhandia (Supra) where it was stated:-

“It is urged for the applicant that the plea of diplomatic immunity would amount to a legitimate limitation or qualification to the claimant's right of access to justice as provided for in Article 48 of the Constitution of Kenya 2010 as read with Article 24 on the limitation of rights and fundamental freedoms. The Court has carefully weighed that submission against the claimant's submission that even if the applicant enjoyed diplomatic immunity as urged, he should not be allowed to have enjoyed the claimant's services under the contract of service and be left to go without paying the claimant's dues under the contract...”

The Court has particularly considered Article 25 of the Constitution which provides that despite any other provision in the Constitution, the following rights and fundamental freedoms shall not be limited, thus, freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial;”

xviii) The remedies sought by the Claimant are within the provisions of the Constitution of Kenya, 2010 as read with the Employment Act, 2007 and the Court has the jurisdiction granted to it by the Industrial Court Act, 2011(sic) to hear and determine the dispute. In support of this submission, the Claimant cited **ELRC CAUSE NO. 277 of 2018: EMIME NDIHOKUBWAYO vs ALLIANCE FOR A GREEN REVOLUTION IN AFRICA & AGNES KALIBATA** where it was held:-

“I note that by virtue of Legal Notice No. 24 of 26.2.2016, the Respondent have Diplomatic Immunity specified in paragraph 1 and 3 of part 1 of the 4th Schedule of The Privileges and Immunities Act (Cap 179 Laws of Kenya).

The privileges envisaged are however not absolute as seen from Article 31(1) of the Vienna Convention on Diplomatic Immunity (supra).

The Limitation comes in in matters of a private nature. An employment contract would fall under the purview of private law as opposed to public law, which deals with relations between individuals and institutions rather than the institutions and the government.”

xix) The Claimant also relied on the cases of **RHIMTOOLA VS NIZAM OF HYDERABAD** and **INTERNATIONAL CENTRE FOR INSECT PHYSIOLOGY AND ECOLOGY [ICIPE] VS NANCY MCNALLY [2018] ECLR**. It was the finding of the Court of Appeal in **ICIPE vs Nancy McNally (supra)** that:-

“So that, in a matter pleading such constitutional issues as raised by the respondent, it was in our view, prudent, and the trial court was right, to subject the matter to full hearing. 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.”

Determination

I have looked at the Preliminary Objection and the Grounds of Opposition as well as the extensive submissions filed by the parties. The issues for determination by this Court are:-

- i) Whether the Preliminary Objection is properly before this Court.
- ii) Whether this Court has jurisdiction to hear and determine the suit in view of their plea of immunity.
- iii) Whether the Applications and the Suit by the Claimant ought to be struck out.

On the first issue of whether the Preliminary Objection is properly before this court, it is clear that the Preliminary Objection is irregularly brought before the Court. The right manner of raising a Preliminary Objection has been anchored on the case of **MUKISA BISCUIT CO. – VS- WESTEND DISTRIBUTORS LTD** for the last 50 years.

The Respondent should first have filed its defence or replying affidavit so that all the documents they wish to rely on are on record and then argue the Preliminary Objection based on facts and documents already before the court. The Respondents instead elected to file the Notice of Preliminary Objection and attach the relevant statutes and legal notices to the submissions. This indeed is very irregular and must not be encouraged.

The other manner of raising the same issues would have been through a Notice of Motion seeking the striking out of the claim on the grounds that the Respondents enjoy diplomatic immunity and privileges. Be that as it may, cross arguments have been made and the same have been

submitted upon all of which would have been done if the issues in the Preliminary Objection had been raised otherwise save on the contest of whether the Preliminary Objection is properly before the Court.

In the case of **Bia Tosha Distributors Limited v Kenya Breweries Limited & 4 others [2016] eKLR** Onguto J. held:-

*“The case of **Mukisa Biscuits Co. Ltd vs. West End Distributors Ltd [1969] EA 696** which was referred to by the 2nd Respondents counsel set the barometer way back in 1969. In his concurring judgment, Newbold P stated as follows of preliminary objections:*

“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”

And for the last over three and half decades the Mukisa Biscuits’ benchmark has stood in good stead obtaining approval from even the Supreme Court of Kenya.

The flight – path for preliminary objections seem however to have been slightly altered by the Supreme Court. In the case of Hassan Ali Joho & Another vs. Suleiman Said Shabhal 2 Others [2014]eKLR (SCK) the court stated that:

“.....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.”

The same approach, the departure from the traditional Mukisa Biscuits’ preliminary objection, was again adopted by the Supreme Court of Kenya in Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 Others [2015] eKLR where the court went further to state as follows:

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

*Later in **Lady Justice Kalpana Rawal & Another vs Vs. Judicial Service Commission & Others [2016]eKLR (SCK)**, the Supreme court again adopted a similar approach and focused on the purpose rather than the nature of the preliminary objection in disposing of an application summarily.*

Where the purpose of the objection assists in saving the scarce judicial time and militates against profligate deployment of time, then the court will entertain a preliminary objection even where it appears some factual aspect of the case may come under scrutiny. Of course, the caution that disputes are better off being resolved judiciously rather than summarily, must be tagged along.”

I find myself in total agreement with the Onguto J. in his aptly captured view on the stated principles of the law. I further also form the view that in the present case, the Preliminary Objection filed is worthy of being heard *in limine*.

Similar to that case, the core issue raised touches on the court’s jurisdiction and that ought to be interrogated at the very inception as without jurisdiction the court must down its tools as enunciated by the landmark decision in **OWNERS OF THE MOTOR VESSEL LILLIAN “S” vs. CALTEX OIL (KENYA)** (supra). If the finding of this Court is that it lacks jurisdiction, it would save on scarce judicial time which are the overriding objectives espoused under Article 159 and Section 3 of the Employment and Labour Relations Court Act.

The crux of the matter is whether the Respondents are immune to legal process under the cited provisions by the Respondents including the Privileges and Immunities Act and the **PRIVILEGES AND IMMUNITIES (AGA KHAN DEVELOPMENT NETWORK) ORDER, 1997** and the Agreement for Cooperation Development between the Republic of Kenya and the Aga Khan Development Network which have been reproduced *in extenso* above.

From these excerpts, it is clear that the Respondents enjoy immunities and privileges among them immunity from legal process of any kind. Under Part 2 of the Fourth Schedule of the Privileges and Immunities Act, the 2nd Respondent as well as other officers and servants of the 1st Respondent are immune from suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties.

While the Claimant has heavily relied on the provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property, respectfully, my reading of the same informs that it is an instrument that relates to states and other state like territories. In any event, Kenya has not ratified the same and is not bound by the provisions of the said Convention.

The Claimant has claimed that the Respondent would need to prove that the Respondents have immunity by production of evidence and in full hearing and determination of the matter. The Claimant has further stated that even if indeed the Respondents were immune to legal process under the Privileges and Immunities Act, there is no proof that the 1st Respondent is a member of Aga Khan Legal Network as

espoused in the Legal Notice. Respectfully, it is apparent from the documents attached to the Claimant's Memorandum of Claim, including all correspondence, the letter of offer, the performance appraisal forms that the 1st Respondent is identified as an agency under the Aga Khan Development Network. It is also confirmed that the Agreement for Cooperation Development between the Republic of Kenya and the Aga Khan Development Network is existed and binding as set out in the Legal Notice.

While it was an inappropriate manner for this to be brought to the attention of the Court, even if this matter was to go to full hearing, the fate of the suit would be *fait accompli* as the Respondents are immune to legal process.

For the foregoing reasons, I allow the Preliminary Objection. I accordingly strike out the Memorandum of Claim and dismiss the case. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JUNE 2020

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