



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1888 OF 2017**

**MIRIAM CHEROGONY.....CLAIMANT**

**v**

**AFRICAN RURAL AND AGRICULTURAL**

**CREDIT ASSOCIATION.....1<sup>st</sup> RESPONDENT**

**INTERNATIONAL FUND FOR**

**AGRICULTURAL DEVELOPMENT.....2<sup>nd</sup> RESPONDENT**

**RULING NO. 2**

1. The Court is called upon to determine a Preliminary Objection dated 5 February 2020 by the International Fund for Agricultural Development (2<sup>nd</sup> Respondent) contending that

a) The 2<sup>nd</sup> Respondent enjoys immunity from legal process by virtue of the provisions of the United Nations Convention on Privileges and Immunities of the Specialised Agencies as read together with the Agreement establishing the International Fund for Agricultural Development and the Agreement between the United Nations and the International Fund for Agricultural Development.

b) The subject matter of the Claim herein arises from matters intrinsically linked and in furtherance to the mandate and operations of the 2<sup>nd</sup> Respondent and therefore relate to official and not private matters.

2. The Claimant filed a replying affidavit in opposition to the Objection on 18 June 2020.

3. Pursuant to directions by the Court, the 2<sup>nd</sup> Respondent filed submissions dated 17 July 2020 while the Claimant filed submissions dated 25 August 2020.

4. The Court has considered the Objection, submissions and authorities.

5. The 2<sup>nd</sup> Respondent, citing the Court of Appeal authority *Karen Njeri Kandie v Alssane Ba & Ar* (2015) eKLR, urged that there are three elements the Court should consider in determining whether a plea of immunity was applicable.

6. The first element, it was submitted was that under international law, domestic Courts did not have jurisdiction over privileged persons and/or institutions ( foreign sovereigns, heads of states and government, foreign diplomats, consular officers, representatives and officers of international organisations such as the United Nations among others) unless the privilege or immunity was waived.

7. On this first element, the 2<sup>nd</sup> Respondent asserted that it was a specialised organisation by virtue of the United Nations Convention on Privileges and Immunities of the Specialised Agencies as read with the Agreement establishing the International Fund for Agricultural Development, and the Agreement between the United Nations and the International Fund for Agricultural Development. The immunity, it was stated commenced on 15 December 1977.

8. Article III section 4 of the Convention provides

The specialised agencies, their properties and assets, whenever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity.....

9. Secondly, the 2<sup>nd</sup> Respondent urged that the Court should consider whether it had waived immunity. It asserted that it had not waived the immunity.

10. The third element which the 2<sup>nd</sup> Respondent submitted was material was the determination whether the matter in dispute was intrinsically linked to and in furtherance of the mandate of the *immunised entity*.

11. Regarding this aspect, it was submitted that the dispute before Court though anchored on an employment contract related to how it had performed its mandate including issuing of and closure of grants, partnership agreements with its locally based development partners and remuneration of employees.

12. These matters, according to the 2<sup>nd</sup> Respondent, and relying on *Bentley v Consulate General of Barbados/Invest Barbados*, 2010 HCR TO 2258 (Can LII), would require the Court to inquire into how an employee had left employment and the recruitment of another person, and was intrinsically linked to its mandate and operations and thus it would be unacceptable for the Court to intervene.

13. Opposing the objection, the Claimant raised 3 substantive points.

14. The first point was that the instruments cited by the 2<sup>nd</sup> Respondent to claim immunity as well as the *Host Country Agreement* were material, but the *Host Country Agreement* had not been produced to meet the requisite parameters to the immunity plea.

15. Secondly, the Claimant asserted that the 2<sup>nd</sup> Respondent had not demonstrated that the responsible Cabinet Secretary had made an order under section 9 of the Privileges and Immunities Act to apply the Act to the 2<sup>nd</sup> Respondent.

16. Thirdly, it was urged that under section 11 of the Privileges and Immunities Act, immunity could only be raised on matters involving official functions and not private contracts entered with private citizens such as obtained in the dispute advanced, which concerned a consultancy contract.

17. While replying to some of the questions raised by the Claimant, the 2<sup>nd</sup> Respondent took the view that in terms of Article 2(6) of the Constitution, it was not necessary for a *Host Country Agreement* to be in place as the United Nations Convention on Privileges and Immunities of the Specialised Agencies automatically became part of Kenyan law.

18. It was also urged that in any case there was a *Note Verbale* applying the Host Agreement between Kenya and the United Nations Environment Programme to the 2<sup>nd</sup> Respondent.

19. The question of immunity within the context of employment contracts in this country keeps arising from time to time and has even reached the Supreme Court.

20. One of the most recent decisions was rendered by the Court of Appeal in Nairobi Civil Appeal No. 345 of 2017, *Embassy of Sweden, Nairobi v Lucy Muingo Kusewa & Ar*.

21. In the case, the 2 employees of the Embassy of Sweden Nairobi challenged before this Court (differently constituted) the termination of their employment.

22. The Embassy raised a Preliminary Objection that as an extension of Sweden, which is a sovereign nation, it enjoys immunity from criminal, civil and administrative jurisdiction of the receiving state.

23. It contended that Sweden had not waived the immunity nor had it consented to the jurisdiction of the receiving state, being Kenya. Because of the foregoing, the Embassy contended that the Employment Court lacked jurisdiction to entertain the claim and therefore could not make any of the orders sought.

24. The Employment Court held that although the Embassy enjoyed diplomatic immunity, the immunity was restrictive and did not cover employment matters as expressly outlined by the United Nations Convention on Jurisdictional Immunities of States and their property 2004.

25. The Court was also of the view that employment matters fall under the purview of private law where immunity is restricted under the Privileges and Immunities Act and the Vienna Convention on the Law of Treaties.

26. The Embassy appealed and the Court of Appeal identified one issue for resolution

Whether the principle of diplomatic immunity as urged by the appellant applies in the circumstances of this case? and if so, to what extent?

27. In the course of its determination, the Court of Appeal extensively reviewed case law on the question of diplomatic immunity and endorsed the view that the immunity is not absolute but restricted and considered the further question

Whether the doctrine of restrictive immunity is applicable to employment contracts.

28. In answering the question, the Court held

A look at the comparative jurisprudence we have analysed above shows that employment contracts have been held to belong to the Private Law domain and State Immunity does not therefore apply. See **Cudak v. Lithuania** (supra); **Dube and Another vs American Embassy and another and Sebina vs South Africa High Commission** (supra). Our courts have also adopted that approach as can be seen in the Karen Njeri case (supra). We also note that the respondents were locally employed and their contracts of employment were, therefore, subject to the jurisdiction of the Employment and Labour Court.

29. Although the Court of Appeal was not applying or interpreting the provisions of the United Nations Conventions on Privileges and Immunities of the Specialised Agencies, this Court is of the view that the legal principle(s) that employment contracts are in the purview of private law and therefore absolute immunity does not apply is equally true.

30. Before concluding, the Court is of the view that the counter-arguments which were raised by the Claimant on the lack of a Host Country Agreement would not have been determinative of the Notice of Preliminary Objection.

31. In light of the foregoing, the Court finds no merit in the Notice of Preliminary Objection by the 2<sup>nd</sup> Respondent and it is dismissed with costs.

32. In order to move the Cause forward, the Court directs as follows

(a) 2<sup>nd</sup> Respondent to file and serve its Response, witness statements and documents on or before 16 October 2020.

(b) 1<sup>st</sup> Respondent to file and serve witness statements and documents on or before 16 October 2020.

(c) Claimant to file and serve any Reply within 7 days of service of the Responses.

(d) Agreed Issues to be filed before 30 October 2020.

(e) In default of agreeing on Issues by 30 October 2020, Claimant's initial proposed issues to be deemed as trial Issues.

(f) Hearing date to be taken in the registry after compliance.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 25<sup>th</sup> day of September 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Ambala instructed by Odindo & Co. Advocates

For 1<sup>st</sup> Respondent Ms. Opondo instructed by Oluoch Olunya & Associates

For 2<sup>nd</sup> Respondent Mr. Omino instructed by Walker Kontos, Advocates

Court Assistant Judy Maina