



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2150 OF 2017**

(Before Hon. Justice Hellen S. Wasilwa on 27<sup>th</sup> February, 2019)

**KENNETH NYAGA MWIGE.....CLAIMANT/RESPONDENT**

**VERSUS**

**THE CABINET SECRETARY FOR TRANSPORT,**

**INFRASTRUCTURE, HOUSING AND URBAN**

**DEVELOPMENT OF KENYA.....1<sup>ST</sup> RESPONDENT/1<sup>ST</sup> APPLICANT**

**THE MINISTER FOR WORKS, TRANSPORT AND**

**COMMUNICATION OF THE UNITED**

**REPUBLIC OF TANZANIA.....2<sup>ND</sup> RESPONDENT**

**THE MINISTER FOR WORKS AND TRANSPORT**

**OF THE REPUBLIC OF UGANDA.....3<sup>RD</sup> RESPONDENT**

**THE MINISTER FOR TRANSPORT & COMMUNICATIONS**

**OF THE REPUBLIC OF ZAMBIA.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF THE**

**REPUBLIC OF KENYA.....5<sup>TH</sup> RESPONDENT/2<sup>ND</sup> APPLICANT**

**THE INTER GOVERNMENTAL STANDING**

**COMMITTEE ON SHIPPING.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. The Claimant, Kenneth Nyaga Mwigie, who was the Secretary General of the Intergovernmental Standing Committee on Shipping (ISCOS) for a period of 5 years, filed his Memorandum of Claim on 30<sup>th</sup> October 2017 through the firm of James T Makori Advocates alleging his unlawful, unprocedural, dishonest and unfair Notice of Termination of his employment.

2. The Claimant also filed a Notice of Motion under Certificate of Urgency on 30<sup>th</sup> October 2017 seeking several orders inter alia that the Claimant/Applicant be granted an order barring or stopping the Respondent from conducting or handling the matters advertised to and that Respondents be compelled to let the Claimant continue serving in office without any hindrance pending the determination of the application and the claim.

3. On 5<sup>th</sup> December 2017 the Attorney General acting on behalf of the 1<sup>st</sup> and 5<sup>th</sup> Respondents filed a Preliminary Objection to the

Claimant's Notice of Motion and Memorandum of Claim in which they argue:-

1. **THAT** this Court lacks jurisdiction to hear and determine this matter for the reasons that:

a. As per the "Agreement for the establishment of the Inter-Governmental Standing Committee" signed on 16<sup>th</sup> July, 1987 and marked as Annexure "KNM1" attached to the Claimant's Memorandum of Claim dated 30<sup>th</sup> October 2017 and annexure "KNM2" the Protocol amending the agreement dated 16<sup>th</sup> July 2017, the 6<sup>th</sup> Respondent is an international organisation constituted by the 1<sup>st</sup> to 4<sup>th</sup> Respondents herein.

b. As per Annexure marked "KNM3" attached to the Claimant's Memorandum of Claim, the 6<sup>th</sup> Respondent entered into a host Country Agreement with the Government of the Republic of Kenya dated 29<sup>th</sup> July 1991 wherein under Article IV of the Agreement, the 6<sup>th</sup> Respondent, its property and assets enjoys immunity from legal process.

c. That the Host Country Agreement under Article XIV has put in place an exhaustive dispute settlement mechanism which the Claimant has failed to explore.

d. That further the foregoing, the 1<sup>st</sup> - 4<sup>th</sup> Respondents and the 6<sup>th</sup> Respondents enjoy diplomatic immunity under the Privileges and Immunities Act (Cap 179 Laws of Kenya) read together with Article 2 of the Constitution and the Privileges and Immunities (Inter-governmental Standing Committee on Shipping) Order, 1992 and as such are immune from legal process as claimed herein. This position was clearly set out in *Karen Njeri Kandie v Alssane Ba & Another* [2015] eKLR.

2. **THAT** by dint of 1 above, the 1<sup>st</sup> -4<sup>th</sup> Respondents and the 6<sup>th</sup> respondent cannot by virtue of international law principles be sued within the municipal courts in Kenya.

3. **THAT** there is no justiciable labour dispute between the Claimant and the Respondents herein to warrant the grant of the orders sought as the term of the contract of the Claimant is yet to come to an end in December 2017 as is indicated in Annexure "KNM4" of the Memorandum of claim and the notice issued by the 6<sup>th</sup> Respondent dated 28<sup>th</sup> June 2017, Annexure "KNM1" attached to the Claimant's application dated 30<sup>th</sup> October 2017 was only a notice notifying him of the same.

4. **THAT** there is no cause of action against the 5<sup>th</sup> Respondent herein and his name ought to be expunged with costs.

4. The Parties filed their respective submissions to the Preliminary Objection and on 24<sup>th</sup> January 2019 the parties highlighted their submissions.

#### **1<sup>st</sup> and 5<sup>th</sup> Respondents' submissions**

5. The 1<sup>st</sup> and 5<sup>th</sup> Respondents submit that the 6<sup>th</sup> Respondent is an international organisation which enjoys immunity from suit and legal process in Kenya. Further, in the Agreement for the establishment of the Inter-Governmental Standing Committee dated 16<sup>th</sup> July 2006 the membership of the 6<sup>th</sup> Respondent is open to Eastern, Central and Southern African States as such the agreement is a treaty entered into between sovereign states hence regulated by the Vienna Convention on the Law of Treaties of 1969 (VCLT). They submit that the 6<sup>th</sup> Respondent qualifies to be an international organisation pursuant to Article 2 (1) (a) of the VCLT.

6. The 1<sup>st</sup> and 5<sup>th</sup> Respondents submit that under Section 9 of the Privileges and Immunities Act the Minister has powers to determine the extent of immunities to be accorded to international organisations and persons.

7. Further, that under the Fourth Schedule to the Act, Part 1 provide that International Organisations enjoy immunities from suit and legal process. Hence, the 6<sup>th</sup> Respondent has legal capacity of body corporate and is immune from suit and legal process. Further, that the 6<sup>th</sup> Respondent has not waived its immunity and thus cannot be subjected to any legal process.

8. The 1<sup>st</sup> and 5<sup>th</sup> Respondent further submit that Article 31 of the Vienna Convention on diplomatic Relations of 1961 provides for immunity of diplomatic agents from its civil and administrative jurisdiction except for certain circumstances.

9. They further submit that Part II and III of the Fourth Schedule of the Privileges and Immunities Act gives immunity from suit and legal process to representatives, members of committees, officers and servants of the international organisation for actions done or omitted in the course of duty and as such the 1<sup>st</sup> – 4<sup>th</sup> Respondents enjoy diplomatic immunity. They rely on the Court of Appeal decision in **Karen Njeri Kandie v Alssane Ba & Another** [2015] eKLR where it upheld the finding of the Employment and Labour Relations Court that:-

***"...the subject matter was sovereign and immunised, not commercial and actionable before the Kenyan Courts...The matter was intrinsically linked to the operations of Shelter Afrique and were official, not private or commercial."***

10. The 1<sup>st</sup> and 5<sup>th</sup> Respondents submit that under Regulation 13 (6) of the ISCOS Secretariat Service Regulations on the terms of appointment, notice of renewal or non-renewal shall be given six months before expiry of the contract and the decision to renew or not to renew is subject to performance appraisal reports.

11. They further submit that the Claimant was issued with a six months' notice and that a Secretary General who is aggrieved has a right to

apply to the Co-ordination Committee then to the General Assembly and finally to the arbitration panel. They in this respect submit that, ISCOS, the 6<sup>th</sup> Respondent has extensive mechanism for dispute resolution and the Claimant has remedies available to address his concerns.

12. They submit that there is no justiciable labour dispute for determination as the Claimant was employed for a fixed term of 5 years from 1<sup>st</sup> January 2013 to 31<sup>st</sup> December 2017 and that the Claimant was issued with a 6 months notification of the expiry of the contract in the letter dated 28<sup>th</sup> June 2017.

13. They rely on Section 2 of the Employment Act and Labour Institutions Act on the definition of a contract of service. They also rely on the case of **Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR.**

***“Under these provisions of the law, parties entering into an employment relationship can enter into a written contract that is permanent, fixed term, periodic or seasonal contract based on the need, purpose or the interests of both parties or the persons involved. Once there is a written contract, the Court will seek to give meaning to such a written contract based on its terms in determining any issue that may arise especially any dispute. The court as guided by the provisions of section 10 of the Employment Act will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract.***

***fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract.”***

14. They further rely on the decision in **Margaret A Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR.**

15. They submit that the Court orders issued on 30<sup>th</sup> November 2017 were in vain and should be vacated or varied. Moreover, that this being an employer-employee issue between the Claimant and ISCOS the Attorney General is not privy to the relationship.

16. In conclusion, the 1<sup>st</sup> and 5<sup>th</sup> Respondents submit that this Court lacks jurisdiction to hear the matter as ISCOS is an international organisation which enjoys immunity from suit and legal process. They submit that they entered appearance under protest contesting the jurisdiction of this Court thus the proceedings should be struck out.

#### **Claimant’s Submissions**

17. The Claimant submits that the Attorney General has only filed a Memorandum of Appearance and a Notice of Preliminary Objection and since there is no filed Memorandum of Reply or any other pleading the Attorney General has no right to raise a preliminary objection. The Claimant submits that the Preliminary Objection fails the test set out in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696.**

18. The Claimant submits that the matters raised by the Respondents would require evidence and cannot be entertained by way of Preliminary Objection. He submits that though the 1<sup>st</sup> and 5<sup>th</sup> Respondents rely on the decision in **Karen Njeri Knadie v Alssane Ba & another [2012] eKLR** the Court in the matter emphasised thus:-

***“On the first issue of whether the Preliminary Objection is properly before this court, I would agree with the Claimant that it is irregularly brought before the Court. The right manner of raising a Preliminary Objection is as set out in the case of MUKISA BISCUIT CO. –VS- WESTEND Distributors Ltd. The Respondent should first have filed its defense or replying affidavit so that all the documents they wish to rely on are on record and the argue the Preliminary Objection based on facts and documents already before the court.***

***The other manner of raising the same issues would have been through a Notice of Motion seeking the striking out of the claim...”***

19. The Claimant submits that he had tried all dispute resolution mechanisms available before proceeding to Court as stated in his Supporting Affidavit and that the Respondent have not made any application to refer the case to arbitration. Further that the Respondents are out of time to refer the matter to arbitration pursuant to Section 6 of the Arbitration Act.

20. The Claimant submits that the unique circumstances in this case include *inter alia* that he is a Secretary General of the 6<sup>th</sup> Respondent and would legally be the one to assert the immunity of the 6<sup>th</sup> Respondent. Further, the 1<sup>st</sup> and 5<sup>th</sup> Respondents cannot speak for the other Respondents who have not filed their respective documents and cannot argue that the Claimant should have rights as enumerated in his employment contract which have no remedies.

21. They submit that the issue of immunity does not arise as the Claim herein is not limited to an issue of unlawful termination since the Memorandum of Claim indicates that the Claimant has raised several issues that are beyond him and affect the 6<sup>th</sup> Respondent and its officials. The Claimant relies on the decision in **Nancy Macnally v International Centre of Insect Physiology and Ecology(ICIPE) [2016] eKLR** where the Court held:-

***“I have looked at the Petitioner’s prayers as contained in her petition and find that they traverse from constitutional declarations to specific prayers for payment of dues. It seems to me therefore that this is not an ordinary employment claim. Rather, it calls for interpretation of the instruments granting immunity vis a vis the Constitution. This is clearly within the specialized jurisdiction of the Employment and Labour Relations Court to interpret the Constitution in employment and labour related matters as defined by Majanja J in United States International University (USIU) v Attorney General [2012] eKLR.***

***28. To uphold the preliminary objection as framed would in my view, amount to limitation of this jurisdiction leading to miscarriage of justice and a missed opportunity to grow jurisprudence in this nascent branch of law.”***

22. The Claimant submits that the immunity of the purported immunity of the 6<sup>th</sup> Respondent is not absolute and relies on the decision in **Lucy Muingo Kusewa & Another v Embassy of Sweden [2017]eKLR**. The Claimant further relies on the decision in **Reyes (Appellant/Cross-Respondent) v Al-Malki and another (Respondents/Cross-Appellants) Michaelmas term [2017] UKSC 61**.

23. The Claimant submits that the Attorney General is properly sued in this matter as provided under Article 156 of the Constitution. More so as the Attorney General under Article 156(6) of the Constitution is to promote, protect and uphold the rule of law and defend the public interest and that his failure to uphold the Claimant’s rights has resulted to these proceedings.

24. The Claimant submits that he has a justiciable labour dispute as the termination was couched as the contract lapse through effluxion of time. The Claimant submits that his termination was a witch-hunt aimed at depriving him his position in light of his outstanding performance as confirmed in the official meetings of ISCOS which is acknowledged, reflected and implemented by National Treasuries, Parliaments and Industry in all 4 ISCOS Member States. The Claimant relies on the case of Teresa **Carlo Omondi v Transparency International – Kenya [2017] eKLR** and finally submits that the Court ought to dismiss the Preliminary Objection.

25. I have examined all submissions of the parties. Appendix KNM4 is the letter appointing the Claimant/Applicant to the post in question. Under Article XIV of the Agreement between the Inter Government Standing Committee on Shipping and the Government of the Republic of Kenya states as follows:-

**“Article XIV**

**Settlement of Disputes**

***1) Any dispute or difference arising out of the interpretation or application of this Agreement shall be settled by negotiations between the parties.***

***2) If the parties fail to reach agreement, the dispute shall at the request of either party, be submitted for decision to a tribunal of three arbitrators, one to be nominated by each party and the third to be appointed by the two so nominated .....”.***

26. In regard to this case, the Respondent/Applicant submitted that ISCOS had not waived its immunity on this matter to allow it to be subjected to the legal process.

27. It is therefore true that the 1<sup>st</sup> to 4<sup>th</sup> Respondents enjoy Diplomatic Immunity from this suit. Other than this, the Claimant had been employed on a 5 year renewable contract. The contract was to run from 1<sup>st</sup> January 2013 to 31<sup>st</sup> December 2017 and vide a letter dated 28<sup>th</sup> June 2017, notice for non-renewal of the contract was given to the Claimant.

28. It is true that the contract was renewable but the fact that the contract has a renewable clause does not mean that the renewal is absolute.

29. It is my finding that given that the 1<sup>st</sup> to 4<sup>th</sup> and 5<sup>th</sup> Respondents had a diplomatic immunity and therefore this Claim cannot be entertained against them.

30. As for the 5<sup>th</sup> Respondent, as the Attorney General of the Republic of Kenya, the Claim against the Attorney General cannot stand in view of the fact that they are not the legal advisors of the Respondents.

31. I do find the Preliminary Objection raised has merit. I therefore allow it and strike out this Claim accordingly.

**Dated and delivered in open Court this 27<sup>th</sup> day of February, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties