



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**EMPLOYMENT PET NO. 67 OF 2015**

**NANCY MCNALLY.....CLAIMANT**

**VERSUS**

**INTERNATIONAL CENTRE OF INSECT**

**PHYSIOLOGY AND ECOLOGY .....RESPONDENT**

**ATTORNEY GENERAL..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The petitioner was employed by the Respondent, an Intergovernmental Organization established in 1986 with its head Quarters in Nairobi. The employment relationship was governed by the letter of appointment dated 11th February 2014 and the respondent's Employee manual of 2006. The contract was for two years from 17th March 2014 subject to a probation period for 6 months. The appointment was at professional level and she was reporting to the respondent's Director General. A review done on the petitioner's performance after the 6 months the probation period found that the she was not capable of meeting the expectations in her role and as such her appointment was not confirmed.

2. The Petitioner was aggrieved by the termination of her employment and brought this petition against the respondent challenging the decision by the respondent to terminate her services as communicated in the Respondent's letter dated 17th October 2014. She contended that the termination was a complete violation of the Constitution, Employment Act and the first respondent's Employee Manual and prayed for the following orders:

a) A declaration that the Privileges and Immunities (International Centre for Insect Physiology and Ecology) Order 1989 is inconsistent with Article 41 of the Constitution in so far as it grants the Respondent immunity from suit and legal process for violation of the Employment Act and is null and void to the extent of such inconsistency.

b) A declaration that the Privileges and Immunities (International Centre for Insect physiology and Ecology) Order 1989 is inconsistent with Article 40, 41 and 48 of the Constitution in so far as it denies the petitioner access to justice for violation of her labour and property rights.

c) A declaration that the Privileges and Immunities (International Centre for Insect physiology and Ecology) Order 1989 is inconsistent with Article 19, 20, 22 and 23 of the Constitution in so far as it clothes the Respondent with immunity from suit and legal process for violation of the Petitioner's Constitutional rights.

d) A declaration that the Respondent violated the Petitioner's right to privacy under Article 31 (c) and (d) of the Constitution.

e) A declaration that the Respondent violated the Petitioner's right to human dignity under Article 28 of the Constitution.

f) A declaration that the Respondent has violated the Petitioner's rights to fair labour practices under Article 41 of the Constitution of Kenya.

g) A declaration that the Respondent has contravened the Employment Act.

h) A declaration that Section 45 of the Employment Act is inconsistent with Article 28 and 41 of the Constitution in so far as it limits

damages for unfair employment to only employees who have been employed for 13 months.

- i) US\$170,492 being fourteen months of salary and benefits under the petitioner remaining period of her employment contract dated 16th March 2016, being damages for unlawful termination.
- j) US\$ 146,136, being one year salary and benefits for unlawful termination.
- k) US\$ 8,000, being relocation allowance due to the Petitioner under the Contract.
- l) Kshs. 100,623, being value added Tax refunds due to the Petitioner and not reclaimed by the Respondent from the Kenya Revenue Authority.
- m) Reimbursement of US\$ 1465, being unlawful deductions from the Petitioner's dues.
- n) An order for the Respondent to deliver to the Petitioner the full documentation regarding ownership and importation of her Motor Vehicle, her Ministry of Foreign Affairs Identity Card and her work permit.
- o) Costs.
- p) Interest on (i), (j) and (l) above from the date of Judgment until Payment in full.
- q) Interest on (k) and (m) above from the 17th October 2014 until payment in full.
- r) Any other relief the Honourable Court may deem fit to grant.

3. The petition is supported by the affidavits sworn by the petitioner and the annexed bundle of documents but it is vehemently opposed by the Respondent through their Replying Affidavit filed on 28th April, 2017. The petition was heard on 7.6.2018, 27.9.2018 and 9.10.2018 when the petitioner testified as Pw1 and the respondent was represented by her chief Legal Officer, M/s Caroline Oyula who testified as Rw1. The interested party never called any witnesses but like the other parties, he filed written submissions.

#### **Petitioners' evidence**

4. The petitioner (Pw1) adopted the affidavits which she swore in support of her petition and the documents annexed thereto. The summary of the affidavits is that she was employed by the Respondent from 17th March, 2014 for a fixed term of 2 years and was to report to Director General as per the letter of Appointment dated 11th February 2014. That she was appointed at professional staff level and was entitled to a housing and security allowance, transport allowance, accident insurance, education allowance, membership in the pension scheme, duty free privileges, economy class air fares to and from her home country for herself and her entire family, home leave travel once a year and a relocation allowance. She was also entitled to 30 days of paid vacation leave.

5. She further contended that upon her appointment she was placed on 6 months' probation which period was to lapse on 16th September 2014 during which period her contract could be terminated by giving one month's notice or payment of one month's basic salary in lieu of notice. That the probation period lapsed on 16.9.2014 after which her employment was confirmed. However, on 6.10.2014, she was notified that she was still on probation and her performance during the probation was to be assessed by a "performance Review Panel" on 16.10.2014. That after the review, she was issued with a letter on 17th October 2014 stating that the Respondent had reached a conclusion that the Petitioner had failed to reach set targets and that she had additionally not demonstrated the ability to meet the expectations of the position she held. A result of which the Petitioner's services were terminated on 1st November 2014.

6. She further contended that, the conduct by the respondent of conducting the performance review after the probation period and the subsequent termination of her services amounted to breach of contract and the respondent's internal rules and regulations, and the law. She further contended that Clause 4.9 of the Respondent's Employee Manual provided that her probation would be six months while section 42 of the Employment Act provided that probationary period cannot be more than six months unless extended by consent of the employee, which was not done in her case.

7. She further contended that the Respondent also breached the provisions of Section 17 (10) of the Employment Act which provides that upon termination of a contract an employee should be paid his entire dues failure to which amounts to a criminal offence. That after the separation on 1.11.2014, she was not paid her dues until 6.3.2014 when she was paid only a part of the dues owed. That as a result of the withholding of the dues she and her family were rendered destitute.

8. She further contended that her right to privacy under the Constitution was violated by the Respondent, which accessed, used and monitored her ICIPE email account for about six months after she left the Respondent's employment. She again contended that her fundamental right to privacy was also violated by the Respondent, who made it a requirement that she had to undergo a H.I.V test as a pre-condition to her employment.

9. The Petitioner further contended that the Respondent has violated her right to fair labour practices as guaranteed under Article 41 of the Constitution of Kenya. That her right of access to justice as envisaged under Article 48 of the Constitution of Kenya is being violated by granting immunity to the respondent, who is acting in breach of the law. She further contended that the respondent has engaged unfair labour practices and is raising the defence of immunity to shield itself from scale of justice.

10. Finally, she contended that the respondent, never provided her with any alternative dispute settlement mechanism and when she wrote to the respondent's board on the matter, she was asked to apologize to the respondent's Director General and thereafter she was served with an injunction order from this court. In her view the appeals procedure provided under section 2.11A and 2.11B of the respondents Employee Manual was not applicable to her case because it deals with disciplinary matters and probation or performance evaluation during probation.

11. In cross examination the Petitioner admitted that the respondent has immunity but contended that her case is that it has no immunity to breach the law. She confirmed that during her tenure at the respondent she enjoyed some immunity and privileges like tax

exemptions and exemptions from work permits but denied that she was immune from court process. She contended that she was never made aware of the privileges and immunities bestowed upon the respondent by the gazette supplement N0.3 Legal Notice No. 13 of 1989 and the Headquarters Agreement.

12. She admitted that, the contract did not provide that after completing the 6 months' probation period, her employment would be confirmed automatically. She further admitted that section 4.9 of the respondent's Employee Manual provided that he was to be confirmation undergoing a written evaluation. She however contended she was not given the Employee Manual and she had no access to it until after the termination when she got a copy from a friend.

13. The Petitioner stated that she was called for a performance evaluation after serving the Respondent for 7 ½ months but clarified that the evaluation was not for purposes of probationary review as claimed by the Respondent because her probation had ended after the lapse of 6 months' period. That before the evaluation meeting on 16.10.2014, she had another meeting with her manager where they discussed her performance after which she received the letter dated 6.10.2014.

14. The Petitioner further stated that vide the letter dated 18.2.2014 (Annexure B) the respondent requested for an appropriate medical examination to be done by a Medical doctor on her including an H.I.V test and that she had no choice but to undergo the tests as it was a requirement for the appointment. She contended that section

4.7 of the respondent's Employee manual provided for medical examination.

15. She contended that [NMcNally@icipe.org](mailto:NMcNally@icipe.org) was her personal email address although it had the employer's portal and she was using it for work related purpose. She further contended that after leaving employment the email address was opened by the by her junior in the respondent and thereby invading her privacy. She opined that after her exit, the account should have been closed or an automatic response installed stating that she had left.

16. She confirmed that she got another job with Catholic Relief Services 6 months after leaving the respondent.

### **Respondents' evidence**

17. RW1 adopted her Replying Affidavit filed on 28.4.2017 and the annexed documents as her evidence in chief. She however stressed that the respondent enjoys immunity from the jurisdiction of the court and legal process by dint of the constituting Charter signed by 13 states in 1986 including Kenya, and the Headquarter Agreement between the respondent and Kenya on 21.2.1995 and the impugned Legal Notice 13 of 1989 which grants the respondent the privileges and immunities under paragraph 1,4 and 5 of Part I of the Privileges and Immunities Act. She contended that under Article III(c) of the Host Agreement, the Courts or other organs of the Republic of Kenya do not have jurisdiction over acts done and transactions taking place in the Headquarters seat where otherwise provided for in the agreement.

18. She contended that under Article XV of the Host Agreement, all disputes arising out of contracts and of private law character to which the respondent is a party are to be settled in the manner provided for by the Director General of the respondent. That the Director General has comprehensively provided for settlement of employment disputes in the manner set out at clause 2.11(b) of the respondent's Employee Manual 2012. She therefore stated that, since the petitioner has failed to comply with the dispute settlement procedure provided by the respondent, she is improperly before this court and the court lacks jurisdiction to determine the present dispute.

19. She further contended that under Article III(d) of the Host Agreement, the respondent has power to make regulations operative within its premises, for the purpose of establishing conditions in all respects necessary for the full execution of its functions, and that any Kenyan that is inconsistent with a regulation of the respondent shall not be applicable within the respondent's Headquarters seat.

20. She admitted that the petitioner was its employee commencing her employment as from 17th March, 2014, under probationary terms until her employment was confirmed. Contended that the appointment letter dated 11.2.2014 provided under clause 19 that the probation period was for duration of 6 months while under Clause 21 it provided that all other terms and conditions of the petitioner's employment with respondent were contained in the Human Resource Policy Manual.

21. Rw1 contended under clause 4.9 of the respondent's Human Resource Policy Manual, an employee is required to undergo a at least one written performance evaluation by his/her immediate supervisor at least one month before the completion of the probationary period and that, only upon the receipt of an overall successful rating is the employee removed from probationary status and confirmed. In that premises, she contended that the petitioner was required to undergo performance evaluation before confirmation.

22. She stated that after the Performance Review, panel reached a conclusion that the Petitioner had not adequately performed her duties and responsibilities, and had failed to demonstrate her ability to meet the expectations of the position she held. This was communicated to the Petitioner vide the letter dated 17th October, 2014.

23. She further contended that under the respondent's Employee manual, where the contract of service is terminated before confirmation, the

employee is only entitled to one month's salary. She however, stated that the Respondent opted to make the following payments to the Petitioner:

- i. Salary for October 2014 plus Salary and Benefits for November 2014, December 2014 and January 2015.
- ii. Relocation allowance of USD 8,000
- iii. One way economy class tickets for the Petitioner and her Dependants back to their home
- iv. Pension contributions for November 2014, December 2014 and January 2015.

23. Rw1 further contended that despite the fact that the Petitioner failed to duly complete a Departure Clearance Form to facilitate her clearance, the Respondent remitted item (i) and (iv) above to Petitioner on 11th February 2015 with item. That item (ii) is available for her collection at the Respondent's office together with item (iii) as and when the Petitioner provides details of departure or in the alternative provide an account where the relocation allowance may be deposited. She therefore contended that it has fully settled all the dues payable to the Petitioner and is not indebted to the Petitioner as alleged or at all.

24. Rw1 denied that there was monitoring of the Petitioner's email account after her departure and contended that the said email address was an office tool for official use and as such the Petitioner cannot claim any rights to privacy with respect with the said email address. She further denied that the Petitioner was required to take a H.I.V test as a condition for employment, and contended that the said test was not a condition set in the offer letter issued to the Petitioner. That did the tests using her own doctor at her home country. She concluded by stating that the Petition herein lacks merit and it should be dismissed with Costs.

25. On further cross examination RW1 admitted that Section 42 of the Employment Act provides that probation can only be extended beyond six months with the consent of the employee and contended that the petitioner agreed to the extension. She further contended that under Clause 4.9 of the HR Manual probation will automatically be extended by the number of days an employee is absent from scheduled work and that if the number of days of absence exceed five it may result in the employee's immediate termination without notice. RW1 stated that the Petitioner was absent for 7 working days.

26. RW1 contended that Evaluation is part of probation and the Petitioner accepted to undergo the same. She admitted that the Employee Manual required for evaluation one month before expiry of the probation period. She further admitted that the letter dated 6.10.2014 was done after the lapse of the Probationary period.

27. On further cross examination RW1 stated that the Petitioner had a meeting with the Director General and the Director Research on 2.10.2014 where petitioner was informed that she was to undergo an evaluation. Rw1 explained that the delay in conducting the performance evaluation was due to lack of quorum due to absence of some members of staff. She admitted that the petitioner wrote the letter dated 9.10.2014 stating that according to the Petitioner the Probation Period had already lapsed and that she had already been automatically confirmed to her position. That she never the less attendant the evaluation proceedings but unfortunately she failed and her services were terminated.

28. Rw1 admitted that the petitioner was paid her travel expenses of \$8000 after the respondent's preliminary objection on immunity was dismissed but she maintained the delay was caused by her failure to handover. She maintained that the respondent still has immunity from jurisdiction of this court and that she was only giving evidence on without prejudice basis. She admitted that the Constitution of Kenya and the Employment Act applies to the respondent and she champions labour rights.

#### **Petitioners' submissions**

29. It was submitted by the petitioner's counsel that the Petitioner's right to fair labour practice as provided under Article 41 of the constitution was violated. It was further submitted that the Employment Act is made pursuant to Article 41 of the Constitution and that under Section 42(2) of the Employment Act provides that a probationary period shall not be more than six months and that it can only be extended for a further period with the agreement of the employee.

30. It is further submitted that the Petitioner's employment was automatically deemed to have been confirmed in law at the expiry of the probation period. The Petitioner for emphasis relied on *Agnes Yahuma Digo Versus PJ Petroleum Equipment Limited (2013) eKLR* where it was held that:

***“where an employee's probationary period ended before receiving the letter of confirmation, and yet the employee continues in employment, the Respondent could not then come to Court and say that the employee was not confirmed.”***

The Court went on to state that:

***“the decision whether to confirm the Claimant after the probation period was to be made at least seven days before the probation period came to an end. This was not done and the Claimant continued working. Since the Respondent failed to adhere to the express terms of the letter of appointment the Respondent was estopped from up opening up the issue of her confirmation. The Claimant was confirmed upon lapse of her probation period.”***

31. The Petitioner further relied on *Wilson Simiyu Versus Chairman, B.O.G Friends School Bokoli & Another (2016) eKLR* where it was stated that the moment the Claimant's probation period ended, the Claimant was confirmed in employment. She also relied on *Gichuki*

**Kabukuru Versus Postal Corporation of Kenya (2012) eKLR** and **Winnie Mghoi Rondo Obinju Versus China Civil Engineering Construction Corporation (Kenya) Ltd (2018) eKLR** to emphasize the issue of automatic confirmation upon the expiry of probation period.

32. Flowing from the foregoing the Petitioner submitted her employment was terminated unfairly contrary to section 45 of the Employment Act. That Section 43 (1) of the Employment Act provides that any claim arising out of termination of a contract, the employer shall be required to prove reasons for the termination, and where the employer fails to do so, the termination shall be deemed to be unfair. She relied on **Youth Agenda Versus Rita Kijala Shako (2017) eKLR** where it was stated that in all claims arising out of termination of contracts an employer must prove the reason or reasons for termination. The termination shall be deemed to be unfair where the employer fails to do so.

33. The Petitioner further submitted that the respondent had an obligation to follow a fair procedure and she relied on **Phirinyane Versus Spie Batignolles 1995 BLR 1 (IC)**. She further relied on **Mary Chemweyo Kiptui Versus Kenya Pipeline Company Limited (2014) eKLR** where it was stated that

**“prior to termination of one’s employment, reasons must be given. These reasons must be addressed before the termination notice is issued. A hearing should be conducted to establish whether an employee has a defence on the grounds issued.”**

34. The Petitioner further submitted that her rights to privacy and dignity envisaged by Articles 31 (c) and Article 28 of the Constitution of Kenya were violated when she was forced by the respondent to undergo an H.I.V test as a precondition for her employment.

35. She further submitted that Section 13 (2) (a) of the H.I.V and AIDS Prevention and Control Act provides that no one shall be required to take a HIV test as a pre-condition for employment. It is submitted that in the Respondent’s letter dated 18th February, 2014 which she was to present to a doctor for examination clearly indicated that the Petitioner was to take a H.I.V test. That Clause 4.7 of the Respondent’s Employee Manual provides that employment was contingent upon a candidate’s successful completion of a medical exam. She relied on **YBA (Pseudonym) Versus Brother Nicholas Banda & Others Tribunal Case No. 007 of 2012** where it was held that

**“the requirement by an employer that an employee should submit their medical records was held to be a breach of privacy.”**

36. She further relied on **VMK Versus CUEA (2013) eKLR** where the Petitioner was awarded Kshs.5,000,000 for breach of the right to the Victim’s privacy, whose HIV status information was divulged to a third party without her written consent” The Petitioner further relied on the case of **Hollingsworth Versus BCTV, 1998 CanLII (BC CA), (1998) B.C.J No. 2451 (C.A)** and **Peris Nyambura Kimani Versus Dalbit Petroleum Limited** for further emphasis on the issue of breach of her privacy.

37. The Petitioner further submitted that after she left employment her email address was delegated to her intern in complete violation of her right to privacy. The Petitioner relied on the case of **Barbulescu Versus Romania Application No. 61496 of 2008** for emphasis.

38. On the issue of Respondent’s Defence of Immunity the Petitioner submitted that in **United States International University (USIU) Versus Attorney General**, the Court held that Article 19 the Constitution provides that the Bill of Rights is an integral part of Kenya’s democratic state and is the frame work for social, economic and cultural policies. That the necessity of having the Employment and Labour Relations Court is to deal with matters fundamental rights and freedoms as part of the jurisdiction to resolve disputes is to infuse into employment and labour relations the values and essence of the Bill of Rights. She therefore contended that this court has the jurisdiction to enforce the labour rights envisaged in Article 41 of the constitution and all other fundamental rights ancillary to employment and labour relations including interpretation of the constitution within a matter before it.

39. The Petitioner further contended that the Respondent violated her fundamental rights under Article 28, 31, 40 and 41 of the Constitution of Kenya and further contravened Sections 35 (1) (c), 36, 41 (1), 42(2), 43(1) and (2), 45(1), 2(a), (3) and (5) of the Employment Act. She therefore urged that the respondent cannot hide behind the shield of immunity because under Article 41 of the Vienna Convention on Diplomatic Relations, the person enjoying the privileges and immunities must respect the law and regulations of the receiving (host) state.

40. She further urged that although the Privileges and Immunities Act and the Vienna Convention on Diplomatic Relations are part of the Laws of Kenya, they are both subordinate to and are subject to the Constitution and therefore cannot be used as a shield to the Court’s power under Article 22, 23 and 162 of the Constitution to give relief for breach of any person’s fundamental rights. That Article 2 (4) of the Constitution provides that any law which is inconsistent with the Constitution is void to the extent of inconsistency. The Petitioner for emphasis relied on the case of **Beatrice Wanjiru & Another Versus The Attorney General & Others** where the Court held that:

**“International Conventions and treaties are subordinate and ought to follow the Constitution.”**

41. The Petitioner further relied on **Cudak Versus Lithuania 2010 51 EHRR 15** where the European Union Court on Human Rights held that:

**“an Applicant’s right to access employment should not be impeded by a claim that the Respondent has diplomatic immunity from such proceedings.”**

42. She further relied on **International Committee of the Red Cross Versus Phyllis Sibanda and Munyama Nyangura** for emphasis. She has also relied on the case of **Dube and Another Versus American Embassy and Another**, where the Court held that

**“foreign sovereigns are not immune from legal proceedings arising out of contracts of employment or under the Employment Act, both of which involved private law transactions...”**

43. She also relied on **Trendtex Trading Corporation Limited Versus Central Bank of Nigeria (1977)** where the Court held that

***“Sovereign immunity was not applicable to ordinary commercial transactions. It was only applicable for government acts. The intrinsic nature of the transaction and not its purpose or object was material consideration in determining whether the transaction was of a commercial or governmental nature”.***

44. The Petitioner further submitted that if the Respondent had any immunity, which is denied, the Respondent waived the same by ceding to the Jurisdiction of this Honourable Court. Further, the Petitioner submitted that the Respondent cannot pray for and continue to enjoy Orders of this Honourable Court and simultaneously claim that no relief can lie against it in favour of the Petitioner due to immunity.

45. The Petitioner concluded by urging the Court to allow the instant Petition as drawn.

#### **Respondent’s submissions**

46. The Respondent submitted that it enjoys immunity from suit and legal process, by virtue of Article 27 of her (the ICIPE) Charter which provides as follows:

***“Upon entry into force of this charter the ICIPE company registered under the Companies Act (Cap 486), shall subject to the provisions of this Act cease to operate as such company and shall lie thereof assume the status, rights, powers,***

***privileges and immunities of an intergovernmental organisation.”***

47. The respondent further submitted that in Kenya the status, rights, powers, privileges and immunities of an international organization are provided for under section 9 of the Privileges and immunities Act. That by dint of section 9 of the said Act, the minister for Foreign Affairs issued a notice on 24.11.1988, published on 20.1.1989 which provided that the respondent shall have privileges and immunities specified under paragraph 1,4 and 5 of the Fourth Schedule to the Act.

48. She therefore urged that she enjoys immunity from legal process as it was observed by Ndolo J in her ruling herein dated 20.12.2016. The respondent further relied on several judicial precedents to fortify her contention that she is clothed with immunity from suit and legal process under the Kenyan law, ICIPE Charter, Headquarters Agreement and the impugned Order of 1989.

49. As regards the dispute before the court, the Respondent further submitted that the petition is linked to the Petitioner’s employment with the Respondent herein and is as such covered from being adjudicated before this Honourable Court by virtue of it enjoying diplomatic immunity. She relied on ***Karen Njeri Kandie Vs Alssane Ba & Another (2017) eKLR*** where in an employment dispute, like in the present case, the Supreme Court of Kenya upheld the decision of this court and the Court of Appeal that the respondent was clothed with immunity from suit and legal process and as such the Kenyan courts were barred from entertaining it.

50. The Respondent relied on the said precedent to urge that the constitutional right of access to justice is limited by the grant of immunity and that the grant of immunity to the respondent herein from suit and legal process, did not violate her right to access justice under Article 48 of the Constitution and as such the present suit must fail.

51. As regards the petitioner’s labour rights, the Respondent submitted that the grant of immunity under the Vienna Convention and the Privileges and Immunities Act does not take away any rights as alleged by the petitioner but merely precludes the court from inquiring into whether those rights have been infringed. She relied on the ***Karen Njeri Kandie Vs Alssane Ba & Another (2017) eKLR*** where the supreme court stated as follows:

***“It was argued on their behalf that, immunity is only a procedural bar, and not a limitation of the right to access justice, and it was not a disproportionate limitation as it served the purpose of fulfilling international law obligations of allowing diplomatic missions and its employees to carry out their functions.***

***We agree with that submission...”***

52. The respondent therefore urged her immunity from the employment related suits does not violate Article 41 of the Constitution. She relied on ***African Development Bank vs Beatrice Agnes Acholla Rosemary Ambalo Acholla (Representatives of the Estate of the late Bonaventure Erick Acholla) (2015) eKLR*** for emphasis.

53. The Respondent further contended that the petitioner’s Right to property have also not been taken away by the immunity granted to her and maintained that all what it means is that this Honourable Court is **merely procedurally barred from interrogating** whether or not the Respondent infringed upon the Claimant’s right to property under Article 40 of the Constitution.

54. In addition to the foregoing, the Respondent urged that the particulars of the alleged violation of the right to property under Article 40 of the constitution have not been pleaded with precision and relied on ***Anarita Karimi Njeru V The Republic (1976-1980) I KLR 1272*** where the High Court stated as follows as regards pleadings in Constitutional cases:

***“... if a person is seeking redress from the High Court on a matter which involves a reference to constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”***

55. On the issue of waiver of Immunity, the Respondent submitted that it has not waived its immunity by submitting itself to the jurisdiction. It further submitted that the waiver must be expressed as provided for by Article 32 (2) of the Vienna Convention on Diplomatic Immunity. It further contended that petitioner has not pleaded the alleged waiver in her pleadings. It relied on ***Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR*** where it was held as follows in respect to the essence of pleadings:

***“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”***

56. The respondent submitted that its conduct in the proceeding herein is not consistent with the alleged waiver of its immunity. That she first filed objection to the proceedings citing its immunity from legal process, appealed against the dismissal of the said objection and finally, filed reply to the petition herein raising the same defence of immunity. It denied that the application for injunction to restrain the petitioner from contacting its donors was equal to waiver of immunity under Article 30(3) of the Vienna convention contending that the application was not a counterclaim.

57. As regards violation of the Petitioner’s right to privacy the Respondent submitted that it had the right to access petitioner’s official email address since it was her property. It further contended that it had the right to access the official email of the claimant by dint of Clause 2.8 of its Employee Manual. The said clause expressly provided as follows:

***“The icipe expressly reserves the right to access, retrieve, read and delete any communication that is created, received or sent via the e-mail system to assure compliance with this and other Centre policies.”***

58. To fortify the foregoing, the Respondent relied on ***Peter Apollo Ochieng vs Instarect Ltd [2017] eKLR*** where the Court held:

***“Access to work place emails and communication is a prerogative of the employer. Where an employee uses workplace tools, time, resources to send communication, such time, tools and resources are the property of the employer. In a scenario where an employer has a workplace website and allows employees to communicate through the same, any communications therein is ordinarily accessible to the employer through the internet link.”***

59. The Respondent further contends that it did not violate the Petitioner’s right to privacy with regards to the HIV test as the same was not made compulsory and that the same was not a pre-condition for the Petitioner’s employment as alleged by the Petitioner herein.

60. The Respondent sought to distinguish the Authorities cited by the Petitioner in support of her claim for damages for purported breach of privacy including the cases of ***YBA vs. Brother Nicholas Banda & Others Tribunal Case 007 of 2012*** and ***VMK vs. CUEA (2013) eKLR***. It contended that the said two authorities can be distinguished, from this case for the reason that in both those cases, there was an allegation that the employee’s HIV statuses were shared with third parties unlike the position in this case.

61. Finally, the respondent submitted on without prejudice basis that she never breached the petitioner’s labour rights and the Employment Act. It contended that it was a requirement under clause 4.9 of the its Employee Manual that the petitioner could not have been confirmed to her employment without undergoing performance evaluation. That it was further required under clause 19 of the Manual that removal from probation status was only possible after an overall successful rating on the six-month evaluation. It further contended that under the Employee Manual, an employee terminated before confirmation is only entitled to one month salary, but the petitioner was paid 3 months salary plus other benefits.

62. In conclusion, the Respondent urged that the petition failed to pursue her alleged rights through the internal dispute settlement mechanism it has provided and came to court. That such choice was deliberate the petitioner’s demand letter through counsel dated 5.3.2015 whereby she demanded for hearing by its Appeal Panel under clause 2.11 of the Employee Manual. That Article 159(2) (c) of the constitution recognizes and recommends the use of alternative dispute resolution mechanisms. It therefore urged the Court to dismiss the instant Petition with Costs.

#### **Interested Party’s submissions**

63. It was submitted by the Interested Party that the nature of relationship between the Petitioner and the Respondent was probationary. Further, that the Petitioner was not an employee of the Respondent since she had no written contract of employment between herself and the Respondent.

64. The Interested Party further submitted that it is the prerogative of the employers not to be compelled to retain employees who in their opinion are not fit for the duties. He relied on ***Danish Jalang’o and Another Versus Amicabre Travel Services Cause No. 1068 of 2012 (2014) eKLR*** where Rika J described probation as a period granted for employers and employees to get to know each other before making firm Commitments and the burden of persuasion rests within the confines of the probationary contract rests with the employee,

65. The learned Judge held that

***“...why should employees on probation be considered for reinstatement re-engagement or up to 12 months' salary in compensation. Is it for the courts to determine the suitability of employees on probation or force such employees on the employers”.***

66. The Interested Party further submitted that the Petition is misconceived and misinformed as section 42 (1) of the Employment Act is not inconsistent with the Constitution. He contended that probation is an extension of the selection process which ensures suitability of an employee.

67. Probationary period shall not be more than six months but it may be extended for a further period not more than six months with the agreement of the employee. The nature of the relationship was probationary guided by section 42. The nature of the relationship was already defined by statute, parties cannot themselves declare the nature of the relationship, and it is for the courts to determine the nature of the relationship by looking at the substance and not the form.

68. The Interested Party submitted that Sections 41(1), 42(1), 45(3) of the Employment Act cannot be said to be inconsistent with the Constitution as alleged by the Petitioner as the Petitioner has not satisfied the burden of proof placed on her. The Interested Party further submits that the provisions of the Employment Act are to be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other legislation of the entire Act, inclusive of the said Sections 41(1), 42(1), 45(3).

69. The Interested Party relied on the Authority of *Centre for Human Rights and Awareness Versus John Harun Mwau and 6 others Civil Appeal No. 74 & 82 of 2012 (2012) eKLR* stated that

***“...the constitution should be interpreted in a manner that promotes its purposes, values and principles .advances the rule of law , human rights and fundamental freedoms and permits the development of law and contributes to good governance.”***

70. The Interested Party further submitted that the entire constitution has to be read as an integral whole and no one particular provisions destroying the other but as to effectuate the great purpose of the instrument (harmonization principle).

71. The Interested Party further relied on the case of The criteria in such circumstances was set in *Lyomoki versus Attorney General (2005) 2 EA 127* where the constitutional court of Uganda set out the following principles:

a) the onus is on the petitioners to show prima facie case of violation of constitutional rights

b) Thereafter the burden shifts to the respondent to justify the limitations of the rights contained in the impugned statute is justified within the meaning of article 43 of the constitution. Both purposes and effect of an impugned legislation are relevant in the determination of its constitutionality.

c) The constitution is looked as a whole. It has to be read as an integrated whole with no particular provision destroying another but each supporting each other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument.

d) Where human rights provisions conflict with other provisions of the constitution, human rights provisions take precedence and interpretation should favour enjoyment of human rights and freedoms.

72. Further, it was submitted that in determining whether a statute is unconstitutional, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. The same sentiments were echoed in the case of *Muranga Bar Operators and Another versus Minister for Provincial Administration and Internal Security and others*.

73. Similarly the Court in *R versus Big M Drug Mart Ltd (1985)1 SCR 295* enunciated the principle that:

***“..both purpose and effect are relevant in determining constitutionality, either unconstitutional purpose or unconstitutional effect can invalidate the legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation, purpose and effect respectively, in the sense of the legislation's object and its ultimate impact clearly linked, if not indivisible, intended and achieved effects have been looked for guidance in assessing the legislation's object and thus the validity.”***

74. The Interested Party concluded by urging for the dismissal of the petition as the Petitioner has not satisfied standards of the impugned sections of the Law. For emphasis the Interested Party relied on the Authority of *Dismiss Jelango & Anor Versus Amicable Travel Services Ltd (2014) eKLR*, where Rika J, a senior and experienced judge in employment and labour matters held that the remedy for unfair termination does not apply to probationary contracts. The learned judge stated as follows in his conclusive remarks:

***“...the correct interpretation is that sections 43 and 45 of the Employment Act both in terms of procedure and substantive justification have no application to termination of probationary employment contracts.”***

#### **Analysis and determination**

75. After careful consideration of the petition, evidence and the rival submissions, there is no dispute in the fact that the petitioner was employed by the respondent from 17.3.2014 to 17.10.2014. There is further not dispute that the respondent enjoys diplomatic immunity conferred upon it by the ICIPE Charter (1986); Host Country Agreement (27.11.1986); Privileges and Immunities Act (PIA) Cap 179, Laws of Kenya; the Vienna Convention on Diplomatic Relations; and the Privileges and Immunities (International Centre of Insect Physiology and Ecology) Order 1989, Legal Notice No. 13 published pursuant to section 9 of the PIA.

76. There are however two main issues in dispute which revolve around the alleged use of the said immunity by the respondent as a shield

from legal process brought against it for violating the petitioner's rights under Constitution, Employment Act and the Contract of service between itself and the petitioner; and reliefs sought for the alleged violation of the petitioner's constitutional rights and those arising from the contract of service. The issues for determination are therefore summarised as follows:

- a) Whether the Privileges and Immunities (International Centre for Insect Physiology and Ecology) Order, 1989 is inconsistent with:
  - i. Article 41 of the constitution in so far as it gives the respondent immunity from suit and legal process for violation of the Employment Act.
  - ii. Article 40, 41 and 48 of the constitution in so far as it denies the petitioner access to justice for violation of her labour and property rights by the respondent.
  - iii. Article 19,20,22 and 23 the constitution in so far as it gives the respondent immunity from suit and legal process for violation of the petitioner's constitutional rights.
- b) Whether section 45 of the Employment is inconsistent with Article 28 of the constitution.
- c) Whether the reliefs arising from the contract of employment should be granted including declaration that that the respondent has contravened the Employment Act and violated petitioner's right to human dignity, privacy and fair labour practices contrary to Article 28, 31 and 41 of the constitution respectively.

**Whether the Privileges and Immunities (International Centre for Insect Physiology and Ecology) Order, 1989 is inconsistent with Article 19,20,22,23,40,41, and 48 of the constitution.**

**Highlight of the said Articles**

77. Article 19 of the constitution provides that the purpose of Bill of Rights is to preserve the dignity of individuals and communities, and to promote social justice. It further provides that the rights and fundamental freedoms in the Bill of Rights belong to each and every individual and they are not granted by the state, and are only subject to the limitations contemplated in the constitution itself.

78. Article 20 provides that the Bill of Rights applies to all law and binds all state organs and all persons; that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of right or the fundamental freedom; and that the court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom in addition to the spirit, purport and objects of the Bill of Rights.

79. Article 22 provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. The article further provides for the procedure for instituting the constitutional proceedings.

80. Article 23 provides that the High Court (read ELRC) has the jurisdiction, in accordance with Article 165, to hear and determine application for redress of a denial, violation or infringement of, or threat to, a right or freedom in the Bill of Rights. It further lists down the various reliefs that the court can grant in any proceedings brought under Article 22.

81. Article 40 provides that subject to Article 65, every person has the right either individually or in association with others, to acquire and own property of any description and in any part of Kenya. Article 65 limits certain land rights non-citizen of Kenya.

82. Article 41 provides that every person has the right to fair labour practices. It further provides that every worker has the right to fair remuneration; to reasonable working conditions; to form, join or participate in activities and programmes of a trade union; and to go on strike. The Article also provides for corresponding labour rights to every employer.

83. Finally, Article 48 provides that the state shall ensure access to justice for all persons at a reasonable fee that does not impede access to justice.

84. The foregoing highlight reveals the infallible nature of the rights and freedoms in the Bill of Rights; the right of every person to approach court for relief for any denial, violation, or threatened denial or violation; and the court's jurisdiction to hear and determine any proceedings brought under the Bill of Rights. It is on the said basis that the petitioner has instituted the present suit alleging that the Privileges and Immunities (International Centre for Insect Physiology and Ecology) Order, 1989 is inconsistent with rights, obligations and jurisdiction envisaged in said Articles of the constitution.

**The meaning of the immunity from suit and legal process**

85. There is no dispute that the Foreign Affairs minister of this country, published Privileges and Immunities (International Centre for Insect Physiology and Ecology) Order in 1989, granting the respondent immunity from suit and legal process under paragraph 1 of Part 1 of the Fourth Schedule to the PIA. The said immunity is not absolute but restricted to matters which are official and intrinsically linked to the respondent's operations as opposed to professional or commercial or private matters. It is common knowledge that the petitioner's engagement was not commercial or private but intrinsically linked to the respondent's operations.

86. Immunity from suit and legal process in the context of the respondent herein means that, a party contemplating to agitate for a legal right

against the respondent cannot do so in a court of law unless the respondent waives the immunity. The said immunity therefore operates as a procedural bar to bringing suits in court against the respondent. This is fortified by the decision of the Supreme Court of Kenya in **Karen Njeri Kandie Vs Alssane Ba & Another (2017) eKLR** where it was held that:

***“It was argued on their behalf that, immunity is only a procedural bar, and not a limitation of the right to access justice, and it was not a disproportionate limitation as it served the purpose of fulfilling international law obligations of allowing diplomatic missions and its employees to carry out their functions. We agree with that submission...”***

**Inconsistent with Article 19,20,22,23 40,41 and 48 of the constitution.**

87. After careful consideration of all the materials presented to the court, I have formed the opinion that the petitioner is mainly offended by the said procedural bar erected by the grant of immunity from suit and legal process through the impugned **Privileges and Immunities (International Centre for Insect Physiology and Ecology) Order, 1989**. It is her case therefore that the said bar is inconsistent with Article 19, 20, 22,23,40,41, and 48 of the constitution, highlighted above.

88. The right of access to justice *vis a vis* diplomatic immunity has been the subject of decision in several precedents including the binding decision by the Supreme Court of Kenya in **Karen Njeri Kandie Vs Alssane Ba & Another (2017) e KLR** where it held that the right of access to justice provided under Article 48 is not an absolute right listed under Article 25 of the constitution and it can therefore be limited by a statute by dint of Article 24 of the constitution.

89. Article 24 provides that:

***“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-***

***a) the nature of the right or fundamental freedom;***

***b) the importance of the purpose of the limitation;***

***c) the nature and extent of the limitation;***

***d) the need to ensure that the enjoyment of the rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***

***e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”***

90. In consideration of the foregoing constitutional provision on the limitation of the right of access to justice through conferment of diplomatic immunity, the Supreme Court of Kenya in the **Karen Kandie Case** found that the limitation was reasonable and justifiable under Article 24 in the following words:

***“It was argued on their behalf that, immunity is only a procedural bar, and not a limitation of the right to access justice, and it was not a disproportionate limitation as it served the purpose of fulfilling international law obligations of allowing diplomatic missions and its employees to carry out their functions. We agree with that submission, and find that it is not unjustified to hold that the legitimate aim of diplomatic immunity is for the state to meet its obligations under the international law, and to allow diplomats and those clothed with diplomatic immunity, like the respondents, to effectively conduct their official functions, without any hindrance.***

***In concluding on this issue, we therefore find that after balancing the right of the appellant to access justice, and the 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 court is not disproportionate. The conferment of immunity for purposes of Kenya upholding its international law obligations, is to that extent, reasonable and justifiable limitation of the right to access justice as provided under Article 48 of the Constitution, and we so hold.”***

91. In making the foregoing decision, the Supreme Court declined to follow the decisions by the **European Court of Human Rights** which has posited that parties to an employer-employee relationship cannot benefit from the doctrine of diplomatic immunity. The Supreme Court stated as follows:

***“we do not think that the holdings in those cases is applicable to the case before us, even for persuasive purposes, not least because the European Court of Justice is treaty-Based and we are strangers to the said treaty and because also, they were based, in no small measure on the limiting provisions of the Convention of Jurisdictional Immunities of States and their property adopted by the United Nations General Assembly in 2004. There is no evidence that Kenya has ratified that 2004 convention and the eroded version of state immunity the convention represents cannot be reflective of the Kenyan law on the subject.”***

92. Having considered the evidence, the submissions by counsel and the foregoing binding precedent, it is my view that the grant, to the respondent, of the immunity from suit and legal process by **Privileges and Immunities (International Centre for Insect Physiology and Ecology) Order, 1989** is justified and not disproportionate when weighed against its purpose of Kenya upholding its obligations under international law, and allowing the respondent to seamlessly conduct its functions without hindrance or interruptions through court process

and executions. Consequently, I return that the *Privileges and Immunities (International Centre for Insect Physiology and Ecology) Order, 1989* which donated to the respondent the immunity from suit and legal process is not inconsistent with Article 19,20,22,23,

40,41 and 48 by limiting the petitioner's right of access to justice in court.

93. Flowing from the foregoing finding, it is correct to hold that, the fact that the immunity to suit and legal process is only a procedural bar from approaching court for redress, the petitioner's right to property and right to fair labour practices under Article 40 and 41, the Employment Act, and the contract of service remain intact and can be agitated for through alternative dispute settlement mechanisms as provided by the constituting instruments. This view is fortified by the persuasive decision by the European Court of Human Rights in *Al-Adsami vs United Kingdom, European Human Rights Reports 34 (2002) 11, p. 273* where it was held that:

***“The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.”***

94. In Kenya, Alternative dispute Resolution Mechanisms are recognized and encouraged by Article 159 (2)(c) of the Constitution which provides that:

***“159(2) In exercising judicial authority the courts and tribunals shall be guided by the following principles-***

***(a)...***

***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted, subject to clause (3).”***

#### **Whether the immunity was waived.**

95. The petitioner contended that the respondent has waived its immunity when it filed a Notice of Motion on 30.1.2017 seeking injunction to restrain her or her agents from corresponding, sharing, contacting or in any way communicating to it, its management, governing council, stakeholders and donors on any matter, aspect or content touching in any matter with her. That the said gagging order was granted ex parte on 31.1.2017 and confirmed by consent of the parties on 16.2.2017.

96. The respondent denied that it waived its immunity by filing the said Notice of Motion and contended that its conduct in the proceedings herein is inconsistent with the alleged waiver. That, despite the said motion, it has persisted in agitating for its immunity by filing a Preliminary Objection which was dismissed by this court; by appealing against the dismissal of the P.O, and pleading the defence of immunity in the Affidavit filed in reply to the Petition.

97. It urged that, under Article 32 (2) of the Vienna Convention on Diplomatic Immunity, waiver of the immunity must always be express. That under Article 30 (3) of the Convention, immunity is deemed to be waived only if a counterclaim directly related to the principal claim is made by the diplomatic agent, it stated that the petitioner has not cited any law or authority to support the alleged waiver of immunity.

98. After considering the rival submissions on the alleged waiver, I find that immunity from suit and legal process can be waived expressly under Article 32 of the Vienna Convention; and also impliedly through the conduct of the diplomatic agents by appearing in court proceedings and unequivocally putting a defence to the suit on the merits, or under Article 30 (3) of the Convention by filing a suit in which case he can not invoke immunity if counterclaim is filed. Article 30 (3) provides:

***“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 counterclaim directly connected with the principal claim.”***

99. The claimant has not proved that the respondent has expressly waived its immunity under Article 32 of the Vienna Convention or impliedly done so by filing a suit or a counterclaim related to the principal claim herein. She has also not proved that the respondent entered appearance in this suit and unequivocally made a defence on merits. In my view and I believe it is trite law that, an interlocutory application like the respondent's Notice of Motion filed on 30.1.2017 does not amount to either a suit or counterclaim. Such motions are meant to prevent prejudices, mischief or injuries that may be occasioned to either party to the suit pending hearing and determination of the suit.

#### **Whether section 45 of the Employment Act is inconsistent with Article 28 and 41 of the Constitution.**

100. The petitioner contended that section 45 of the Employment Act is inconsistent with Article 28 and 41 of the constitution in so far as it limits damages for unfair termination of employment to only employees who have served for at least 13 months. The relevant provision under attack by the petitioner is subsection (3) which provided for the denial complained of. However, as correctly submitted by the interested party (the A. G), the declaration sought is predicated a non-existent provision because the said subsection was declared unconstitutional on 18.5.2012 by Lenaola J (as he then was) in *Samuel G.Momanyi v Attorney General & another [2012] eKLR*. I therefore see no need of answering that issue of section 45 of EA.

#### **Reliefs arising from the contract of employment and declaration of the alleged contravention of the Employment Act and violation of the petitioner's rights under Article 28,31 and 41 of the constitution.**

101. In view of the finding that, immunity from suit and legal process granted to the respondent by the impugned Order of 1989, is justified, and that the same has not been waived, I find that I am procedurally barred from determining the petitioner's claims arising from her employment contract with the respondent. The said bar extends to claims of the alleged contravention of, the Employment Act and violation of the petitioner's rights under Article 28, 31 and 41 of the constitution which relate to the formation and/or termination of the said contract of service.

102. The foregoing disputes should therefore go through the procedure of settlement of disputes contemplated by Article XV of the Host Country Agreement between Kenya and the respondent signed on 21.2.1995 which provided thus:

*“The Director General shall make provision for appropriate methods of settlement of :*

*(a) Disputes arising out of contracts and dispute of a private law character to which ICIPE is a party; and, in consultation with the government.*

*(b) Dispute involving an official of the ICIPE who, by reason of his official position, enjoys immunity, if such immunity has not been waived.”*

103. As correctly contended by the respondent, the Director general of the respondent has provided for internal dispute settlement mechanism under **Clause 2.11 b** of the respondent's Employee manual. Under the said Clause an employee has a right to appeal against the offending decision in writing to the Director General of the respondent through the Head of HR within 10 days of the decision. In this case the petitioner seems to have slept on her right to invoke the said appeal procedure from 17.10.2014 to 5.3.2015, when she demanded, through her lawyer, for the appeal panel to be constituted to hear her case. That is the far I can go on that point.

### **Conclusion and disposition**

104. I have found that immunity from suit and legal process is not a denial of the of access to justice but only a procedural bar from approaching court for determination of the rights of the parties to a dispute. I have further found that the said procedural bar or limitation of the right of accessing court is not disproportionate and it is justifiable considering Kenya's obligations in international law and in ensuring that the respondent and its officers are able to perform their functions without distractions by court process and executions. Flowing from the foregoing I have found that the impugned **Privileges and Immunity (International Centre for insect Psychology and Ecology) Order 1989 is not inconsistent with Article 19,20,22,23,40,41 and 48 of the constitution in so far as it limits the petitioners right of access to justice.** Finally, I have found that the respondent has not waived its immunity from suit and legal process and consequently I have declined to determine the claims arising from, or related to the contract of service between the parties herein including the alleged contravention of Employment Act and her rights under the Constitution. In the end, the petition is dismissed with no costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 5th day of April, 2019**

**ONESMUS N. MAKAU**

**JUDGE**