



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1310 OF 2018

JOSHUA MULEI KIMWELI.....CLAIMANT

VERSUS

INTERNATIONAL CENTRE FOR RESEARCH

AGROFORESTRY (ICRAF).....RESPONDENT

RULING

Introduction

1. The claimant was employed by the respondent as a Research Technician from 15.9.2014 until 7.3.2018 when he was served with a termination Notice of one month. On 14.8.2018, he brought this suit alleging that the termination was unfair for being done in breach of the procedure provided under section 40 of the Employment Act of Kenya and also of Article 2,28,41 and 47 of the Constitution of Kenya. He therefore prayed for:

- (a) Declaration that his termination on account of redundancy was unfair, unlawful and wrongful
- (b) Reinstatement without loss of benefits and seniority.
- (c) Alternatively, damages equivalent to salary for the remainder of the contract term totaling to Kshs.8,625,534
- (d) Severance pay.
- (e) Certificate of service stating that he exited without any blemish.
- (f) Costs and interest.

2. The respondent never filed defence but a Notice of motion dated 19.9.2018 seeking for striking out of the suit *in limine* for the following grounds:

- (a) That it enjoys immunity from every form of legal process by virtue of Article XI (1) of the Host Country Agreement between her and the Government of Kenya.
- (b) That it enjoys immunity from every form of legal process under the provisions of section 9 and 11 of the Privileges and Immunities Act Cap 179 Laws of Kenya.
- (c) That it has not waived its immunity.
- (d) That the suit was brought before exhausting the dispute resolution mechanism specified in the Host Country Agreement.
- (e) That the court lacks jurisdiction to hear and determine the suit.

3. The application is supported by the affidavit sworn by the respondent/applicant's Legal Manager Mr. Francis Mahia on 14.9.2018 and it basically reiterates the above grounds and annexes the Host Country Agreement as an exhibit.

4. The claimant opposed the application vide the Replying Affidavit sworn on 5.11.2018 and prayed for it to be dismissed with costs for lack of merits. In brief the claimant contended that his suit is about violation of his rights to fair labour practices as guaranteed under Article 41 of the Constitution. That the said rights are not given by the state and therefore the Host Country Agreement cannot subordinate the said rights, abrogate or limit them except as contemplated by the constitution. That the claim is not an ordinary claim because he has prayed for severance pay and a certificate of service and as such it calls for interpretation of the instruments that has purportedly granted immunity *vis a vis* the constitution. That his counsel has advised him that he has a right to fair hearing of his suit and the current application is only seeking to deny him his day in court. That there is no wrong without a remedy and the immunity granted by Article XI of the Host Country Agreement is not absolute in the nature of a *carte blanche*.

5. The application was disposed of by written submissions. The Respondent/applicant filed hers on 11.4.2019 claimant filed his on 23.4.2019.

Respondent/applicant's Submissions

6. It was submitted for the respondent that she is an international Organization with its Head Quarters at Nairobi which has been granted and enjoys immunity from legal process in Kenya by virtue of the Host Country Agreement dated 13.5.1996 between itself and the Government of Kenya. That under Article XI (1) of the agreement, it and all its property, assets and facilities enjoy immunity from every form of legal process except in so far as, in any particular instance it has waived immunity. That the powers of the state to grant immunity are provided for under section 9 and 11 of the Privileges and Immunities Act Cap 179 read with Part 1 (1) of the Fourth Schedule to the Act. That the said immunity has not been disputed by the claimant and contended that under the instruments conferring the immunity, the jurisdiction of this court can only be invoked on the basis of a waiver of the immunity which has not been done.

7. The applicant further submitted that the contention by the claimant that the state cannot contract to limit his right to fair labour practices under the constitution is incomplete and unsustainable *vis a vis* the provisions of Article 24 of the Constitution. It argued that the limitation placed on the Bill of Rights by the diplomatic immunity is justified and reasonable and relied on the decision of Supreme Court of Kenya in **Njeri Kandie v Alassane Ba & another [2017] e KLR** and **Eugine Linyulu Isalambo v barbro Ekvalli [2016] e KLR** to fortify that view.

8. In addition to the foregoing, it submitted that under Article II (3) of the agreement, the state agreed to apply the provisions of the convention on privileges and immunities of Specialized Agencies adopted by the UN general Assembly on 21.11.1947 to it (ICRAF), its properties and assets in so far as it is not inconsistent with the said Act. It further contended that the said UN convention, from which its immunity is derived, was adopted by Kenya on 9.12.1994 and by dint of Article 2(6) of the Constitution, the immunity granted to it (ICRAF) is validated.

9. On the other hand, the applicant submitted that the suit was prematurely filed before the alternative dispute settlement mechanism provided under the Host Country Agreement was exhausted. It contended that under Article XI (2) of the agreement, any dispute or legal claim brought against it in Kenya, other than by the Kenya Government, can only be referred to the Ministry of Foreign Affairs and International Cooperation for negotiation and settlement. It therefore urged that the claimant's claim for termination of his services is not properly before the court and prayed for the same to be struck out.

Claimant's submissions.

10. The claimant submitted that he brought this suit to seek legal redress for the unlawful termination of his employment by the respondent/applicant. He further submitted that the right to fair labour practices as guaranteed under Article 41 of the constitution, which he is enforcing through the suit, is not granted by the state but confer automatically to every person under Article 19 (3) (a) of the constitution by reason of being a human and therefore the parliament cannot subordinate, abrogate or limit the same except as contemplated by the constitution. He further contended that there is no injury without remedy and an employee who claims violation of his rights by the employer cannot be sent away by the court on the basis of immunity status granted to employer by state.

11. While appreciating that the applicant has been granted immunity by the state, he contended that the immunity conferred upon the respondent is not absolute. He relied on **Tononoka Steel Limited v Eastern and Southern Africa Trade and Development Bank [1999] eKLR** where the Court of Appeal held that that the Privileges and Immunities Act did not intend to grant absolute immunity for all manner of transactions in the nature of a *carte blanche* but only for purposes of effective and uninterrupted exercise of multinational functions only and not private functions. He further relied on **Josphine Wairimu Wanjohi v International Committee of the Red Cross [2015] e KLR** where the Seron J held that in dealing with diplomatic immunity, the test ought to be whether the acts complained of are within the governmental or private sphere.

12. As regards the alternative dispute resolution mechanism provided under Article XI (2) of the Host Country Agreement, he relied on the decision by Lord Denning in **the Feihmarn [1957] 2 Lloyd's Rep 551**, cited by the Court of Appeal in **Tononoka Steel Limited v Eastern and Southern Africa Trade and Development Bank [1999] e KLR**, where he held that the it was an overriding principal that no one by his private stipulation can oust the jurisdiction of the court in a matter that properly belongs.

13. Final, the claimant submitted that striking out of the suit would go against the grain of Article 159(d) of the Constitution which enjoins the courts to administer justice without undue consideration to legal and procedural technicalities. He therefore urged that the application lacks merits and it should be dismissed with costs.

Analysis and Determination

14. After careful consideration of the application, affidavits and submissions filed by both parties, there is no dispute that the applicant herein

has been conferred with immunity from legal process in Kenyan courts by the Host Country Agreement dated 13.5.1996 signed between it and the Government of Kenya pursuant to section 9 and 11 of the Privileges and Immunities Act Cap 179. The issue for determination is whether the court lacks jurisdiction to entertain the suit herein due to the applicant's immunity from legal process.

The scope of the immunity from legal process

15. The applicant contended that it enjoys immunity from every form of legal process by dint of Article XI (1) of the Host Country Agreement signed pursuant to section 9 and 11 of the Privileges and Immunities Act Cap 179 read with part I (1) of the Fourth Schedule to the Act. It further contended that the right to fair labour practices under Article 41 of the Constitution is not absolute and as such the said immunity is justified by dint of Article 24 of the constitution which 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.”

16. I have considered the foregoing and Article XI (1) and (2) of the Host Country Agreement which provides as follows:

“” Article XI (1) ICRAF, its property, assets and other facilities, wherever located and by whomsoever held, shall enjoy immunity from every legal process except insofar as, in any particular instance it has waived immunity.

(2) any dispute or legal claim brought against ICRAF in Kenya, other than by the Kenya Government, shall be referred to the Ministry of Foreign Affairs and International Cooperation for negotiation and settlement.”

17. The pleadings by the claimant do not describe the respondent/applicant as an intergovernmental organizations enjoying immunity from legal process. However, in his submissions to the application he has acknowledged that the respondent is clothed with immunity from legal process but argued that, the immunity enjoyed by the respondent is subordinate to the Constitution and it cannot bar the jurisdiction of this court to hear a claim for redress arising from violation of right to fair labour practices through unfair termination of his employment contract by the respondent. He further argued that the threshold for enjoyment of immunity is proof that the transaction of function being protected is governmental and not private.

18. After careful consideration of the pleadings filed and the submissions by both parties, it is clear that the claim before the court is purely employment dispute seeking reinstatement to his employment or compensatory damages for unfair termination of employment contract by the respondent/applicant. There is nothing in the suit that challenges the immunity conferred upon the respondent as contended by the claimant in his submissions. The facts of this case are therefore distinguishable from the facts in *Nancy McNally vs ICIPE* cited by the claimant in which the petitioner had challenged the constitutionality of the immunity from legal process conferred upon the employer in a manner similar to this case.

19. In addition, the claimant has alleged that the issue in dispute in the instant suit is a private matter of employment that falls outside the scope contemplated for the immunity. The contract of service between the claimant as a Researcher and the respondent, in my view goes to the core function and objective of the respondent, as a research Centre. He was not on a private commercial contract but serving the respondent on official capacity as a Researcher towards achieving its core objective. I must therefore return that the court lacks jurisdiction to entertain the suit herein because there exists a procedural bar erected by the diplomatic immunity from every law process granted to the respondent by dint of Article XI (1) of the Host Country Agreement and section 9 and 11 of the privileges and immunities Act Cap 179.

20. The facts of this case are similar to the facts in *Karen Njeri Kandie vs Alsane Ba and Shelter Afrique* where this court upheld objection and rejected the suit on ground of immunity from suit and legal process in employment dispute filed before it. Both the Court of Appeal and the Supreme Court dismissed appeals by the employee and found that the right to access court under Article 48 of the Constitution is not absolute. That the said right can be limited through grant of diplomatic immunity to an intergovernmental organization under the Privileges and Immunity Act of Kenya to bar filing of claims in court against such an organization.

21. The Supreme Court 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, 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."

23. The foregoing view was also taken in the persuasive decision of 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."

24. It follows therefore that, the limitation of the right to access court by the grant of immunity does not distinguish the cause of action or the substantive claim but only bars access to court for agitation. The claimant's rights in the dispute remains intact, but procedurally he can only ventilate it in other fora available other than before the courts. As contended by the applicant, the claimant still can pursue his claim through the alternative dispute settlement mechanism afforded to him vide Article XI (2) of the Host Country Agreement, being Diplomatic mechanism through the Ministry of Foreign Affairs, or even internally under the respondent's HR policy and disciplinary manual.

Conclusion and Determination

25. I have found that the respondent enjoys diplomatic immunity from every legal process before Kenyan courts in relation to matters that are official and intrinsically linked to its operations as an intergovernmental organization. I have also found that the subject matter of the suit herein involves termination of employment of a Researcher appointed by the respondent on an official capacity to advance its objective and not in commercial or private capacity. Finally, I have found that the court lacks jurisdiction to determine the suit herein because the immunity granted to the respondent bars the claimant from accessing Kenyan courts for legal redress for any claim founded on the said contract of service due to its official nature. Consequently, I strike out the suit with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 21st day of June 2019

ONESMUS N. MAKAU

JUDGE