



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 85 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(4), (5) AND (6), 27(1) AND (2), 28, 41(1) AND (2) AND 48 OF THE CONSTITUTION OF KENYA, 2010

-BETWEEN-

GEORGE ODUORI OTIENO.....PETITIONER

VERSUS

THE AFRICAN TRADE INSURANCE AGENCY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

On 20th May 2019, the Petitioner filed the Petition herein against the 1st and 2nd Respondents. However, on 24th May 2019 the 1st Respondent raised a Preliminary Objection seeking to have the Petition struck out on the following grounds-

1. The 1st Respondent is immune from legal proceedings pursuant to the provisions of the Privileges and Immunities Act.
2. Legal Notice No. 89 of 2001 issued pursuant to the provisions of the Privileges and Immunities Act, the 1st Respondent was granted privileges and immunity from legal process by the Government of Kenya. The said immunity from legal process is provided under Article 15 of the said Agreement establishing the 1st Respondent.
3. The 1st Respondent has not waived its immunity and neither have its personnel as provided under Article 15 (8) of the Agreement establishing the 1st Respondent. Under Article 15(8) of the Agreement establishing the 1st Respondent, all Directors, Alternative Directors, the Chief Executive Officer, staff of the 1st Respondent and their spouses, their dependent children and other members of their households enjoy, within and with respect to member states, immunity from legal process of any kind.
4. The Application and Petition are therefore in breach of the express provisions of Section 9 and 11 of the Privileges and Immunities Act and Article 15 of the Agreement establishing the 1st Respondent.
5. Further grounds to be adduced at the hearing

Parties filed their submissions and thereafter highlighted them in open Court.

The Petitioner submits section 9 of the Privileges and Immunities Act does not bar him from filing a suit. In his view, the current suit seeks a constitutional interpretation of the instruments granting immunity *vis-à-vis* the Constitution. He relies on the decisions in ***International Centre for Insect Physiology and Ecology vs. Nancy McNally*** [2018] eKLR and ***Philip Mark Bususru vs. The International Union for Conservation of Natural Resources & The Attorney General*** **Petition 44 of 2017** [Unreported].

The Petitioner further submits that the Petition is challenging the constitutionality of Legal Notice 89 of 4th June 2001 as it contradicts the rights accorded to the Petitioner which the Respondents have infringed upon. As such, the issues raised in the Petition can only be determined upon hearing the Petition on its merits.

The Petitioner further submits that the Respondent enjoys restrictive immunity as opposed to absolute immunity. It is his position that it is trite law that immunity granted in Kenya is subject to suits which are commercial in nature or arise from private law. The Petitioner further submits that the immunity granted to the 1st Respondent does not apply in this case as the dispute arises from a contract of employment hence a private law matter. He relies on the decisions in **Lucy Muingo Kesewa & Another vs. Embassy of Sweden, Nairobi [2017] eKLR**, **Unicom Limited vs. Ghana High Commission [2016] eKLR** and **Nancy McNally vs. International Centre of Insect Physiology and Ecology [2016] eKLR**.

It is the Petitioner's submissions that the 1st Respondent cannot assert a right to immunity under a law enacted in the 1970s to bar the Petitioner from enforcing their constitutional and legal rights guaranteed under the Constitution and the Employment Act. He relies on the principle of *leges posterior respriores contrarias abrogant* which is to the effect that new laws are given preference in case of an inconsistency with the older laws. He further relies on the case of **Martin Wanderi & 19 Others vs. Engineers Registration Board of Kenya & 5 Others [2014] eKLR**.

The 1st Respondent submits that the Government of the Republic of Kenya under Article 8 of the Agreement, granted the 1st Respondent immunity, exemptions and privileges. Further, that pursuant to section 9 (1) and (2)(a) of the Privileges and Immunities Act and Article 15 of the ATI Treaty, the 1st Respondent has immunity and privilege from suits and legal processes by the Government of Kenya. That the 1st Respondent has not waived this immunity, consequently, this Court lacks the jurisdiction to hear the matter. Additionally, the Petition and the Application dated 20th May 2019 are in contravention of the mandatory provisions of the law and should be dismissed. To fortify this position, the 1st Respondent has relied on the decisions of **Josephine Wairimu Wanjohi vs. International Committee of the Red Cross [2015] eKLR**, **Fred Khaemba vs. International Organization of Migration [2016] eKLR** and **Gerard Killeen vs. International Centre of Insect Physiology & Ecology (ICIPE) [2005] eKLR**.

The 1st Respondent also submitted that the preliminary objection has met the threshold set out in the case of **Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited [1969] EA 696**.

The 1st Respondent submits that it has not waived its immunity and neither has it breached any provisions of the Constitution as alleged by the Petitioner. That the Court can only entertain claims against privileged persons where the privilege is expressly waived or a restriction is proved. As such, they have immunity from suits relating to employment matters. They rely on the case of **Ministry of Defence of the Government of the United Kingdom vs. Joel Ndegwa [1983] eKLR**.

The 1st Respondent submits that the Petition and the application dated 20th May 2019 relate to matters intrinsically linked to the operations of ATI which are official, not private or commercial and relate to personal matters for which the 1st Respondent has immunity. It is its submission that the Petitioner's duties in the 1st Respondent are not commercial or private to warrant the restriction of its immunity. It also submits that its relationship with the Petitioner is governed by the ATI Treaty. It relies on the case of **Lucy Muingo Kusewa & Another vs. Embassy of Sweden [2017] eKLR**.

The 1st Respondent submits that pursuant to article 2(5) and 2 (6), the ATI Treaty is part of the laws of Kenya, relying on the case of **Karen Njeri Kandie vs. Alassane Ba & Another [2015] eKLR**.

The 2nd Respondent submits that this Court lacks the jurisdiction to entertain the petition. The 2nd Respondent further submits that the employment of the Petitioner is official in nature and intrinsically linked to the operations of the 1st Respondent hence the absolute immunity as provided under the Privileges and Immunities Act therefore applies and relies on the case of **Karen Njeri Kandie vs. Alassane Ba & Another [SUPRA]**.

The 2nd Respondent submits that the Petition is not competently before this Court as the 1st Respondent has not waived its privilege and relies on the case of **Ministry of Defence of the Government of the United Kingdom vs. Joel Ndegwa [SUPRA]**.

Analysis and Determination

After considering the grounds outlined in the 1st Respondent's preliminary objection and analyzing the submissions by the parties, the issues for determination are-

- a. Whether the preliminary objection raised meets the threshold for a valid preliminary objection.
- b. Whether 1st Respondent has immunity against these proceedings.
- c. Whether this Court has jurisdiction in the matter.

Preliminary Objection

The threshold for a preliminary objection was set out in the case of **Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited [1969] EA 696** as follows-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law and it is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact needs to be ascertained or if what is sought is the exercise of judicial discretion.”

The Court of Appeal expounded on the issue when it held as follows in the case of ***Karen Njeri Kandie vs. Alassane Ba & Shelter Afrique [2015] eKLR-***

“A plea of immunity from legal process is such as was raised by the Respondents before the Court below appears to us to be approver subject of a Preliminary Objection which raised a threshold issue to be determined in limine. It has to be so because its effect is to raise a procedural bar to the Court’s jurisdiction and it behoves the Court to first address and pronounce itself on it before it can embark, if at all, on hearing the rest of the dispute.”

Consequently, I find that the 1st Respondent’s preliminary objection, I meets the threshold set out in ***Mukisa Biscuit Manufacturing Company Limited [SUPRA]***.

Immunity

Article 4(2) and (3) of the Agreement between the 1st Respondent and the Republic of Kenya provides as follows-

“2. Except as otherwise provided in this Agreement or in the Agreement Establishing the African Trade Insurance Agency, and subject to any regulations enacted under Article 5, the laws of the Republic of Kenya shall apply within the Headquarters Seat.

3. Except as otherwise provided in this Agreement or in the Agreement Establishing the African Trade Insurance Agency, the Courts or other appropriate organs of the Republic of Kenya shall have jurisdiction, as provided in applicable laws, over acts done and transactions taking place in the Headquarters Seat. (Emphasis added)

Article 1(3)(h) of the Agreement defines the expression “***laws of the Republic of Kenya***” to include-

i. The Constitution of the Republic of Kenya; and

ii. Legislative acts, Regulations and Orders issued by or under the authority of the Government or appropriate Kenyan authorities.

From this it is evident that the 1st Respondent through the agreement, is subject to the jurisdiction of the laws of Kenya.

Additionally, the Petitioner sought the following prayers in the Petition-

“A declaration that the Privileges and Immunities granted to the 1st Respondent by the Government of the Republic of Kenya as detailed in the agreement signed on the 12th April 2001 are unconstitutional, null and void in relation to the Employment Act 2007.

A declaration that Article 16(1)(b) of the Treaty establishing the 1st Respondent dated 18th May 2001 is unconstitutional, null and void.

A Declaration that the Respondents have infringed on the Petitioners Constitutional rights under Articles 2 (4), (5) and (6), 27(1) and (2), 28, 41(1) and (2) and 48 of the Constitution 2010.”

It is not in dispute that the issues raised in the Petition do not regard an ordinary employment claim as they are challenging the constitutionality of the privileges and immunity granted to the 1st Respondent, and the instruments granting the same. The Constitution being the supreme law, supersedes all the other laws. Where it is alleged that any law is in conflict with the constitution, it is the duty of the court to interpret the law and the constitution and determine the question.

In light of the foregoing, this Court must entertain the Petition in a bid to interpret the Constitution and the impugned instruments as called upon by the Petitioner. The Court of Appeal in ***International Centre for Insect Physiology and Ecology (ICIPE) v Nancy McNally [2018] eKLR*** dealing with the same issue pronounced itself as follows-

“24. Adverting now to the first main issue in the appeal, whether the constitutionality of the diplomatic immunity conferred on the appellants can be challenged before the ELRC, we entertain no doubt that it can. All laws and legal instruments are subject to the Constitution...”

30. So that, in a matter pleading such constitutional issues as raised by the respondent, it was in our view, prudent, and the trial court was right, to subject the matter to full hearing. The Privileges and Immunities Act must be examined together with all the instruments granting immunity for their full tenor and effect. It will be explored whether the immunity is absolute or qualified or restricted. This Court in the Shelter Afrique case found the immunity was absolute and upheld the PO sustained by the trial court, but the Supreme Court, in its analysis, found that the immunity was not absolute. There is certainly a process to follow before reaching that conclusion, and the process is not a summary one like a PO. The trial court was right in rejecting the preliminary objection in respect of the constitutional issues, and we so find.”

In the case of *Kandie vs. Shelter Afrique*, the Supreme Court held that immunity is not absolute.

Parties in their submissions referred to Article 16(1) of the Agreement establishing the African Trade Insurance Agency, which provides as follows-

“Actions may be brought against the Agency only in a court of competent jurisdiction in the territory of a Member State in which the Agency has its permanent or temporary headquarters or an office, or in the territory of any State where it has appointed an agent for the purpose of accepting service or notice of process, or has otherwise agreed to be sued. No such action against the Agency may be brought:

(a) By a Member or a former Member of the Agency or persons acting for, or deriving claims from, a member or a former Member; or

(b) In respect of personal matters.

I am of the view that since one of the prayers by the Petitioner is to have Article 16(1)(b) declared unconstitutional and void, the Court must allow the Petition to be argued before a determination is made on this issue.

Article 16(1) of the African Trade Insurance Agency is not framed to confer absolute immunity to the 1st respondent. For these reasons the preliminary objection fails and is dismissed with costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE