



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 16 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 6th June, 2018)

JULIET INDETIE.....APPLICANT/DECREE HOLDER

VERSUS

ELIJAH CHINGOSHO CHAIRMAN OF

THE AFRAA DISCIPLINARY COMMITTEE.....1ST RESPONDENT/CONTEMNOR

AFRICAN AIRLINES ASSOCIATION (AFRAA)...2ND RESPONDENT/CONTEMNOR

RULING

1. Before this Court is a Notice of Motion dated 31st January, 2018 brought under Section 5(1) of the Judicature Act Cap 8 (now repealed by Contempt of Court Act No 46 of 2016) Section 38 and Section 1A and 1B, 3 and 3A of the Civil Procedure Act, Cap 21, the Constitution of Kenya 2010, Employment and Labour Relations Court Act and (Procedure) Rules, Laws of Kenya and Order 52 Rule 211 of the Supreme Court Practice of England 1999 and all other enabling provisions of the law.

2. The Applicant seeks orders as follows:

1. That this application be certified as urgent and the service of the same be dispensed with in the first instance and the same be heard on priority basis.

2. That this Honourable Court be pleased to dispense with personal service of the DECREE of this Honourable Court given on the 27th November 2017 as they are fully aware and have actual and circumstantial knowledge of the said DECREE.

3. That Mr. Abderahmane Berthe being the Secretary General and Principal Officer of the 2nd Respondent be committed to civil jail for a term of 6 months or for such other period and impose such fine as this Honourable Court may deem fit and just to grant, for having deliberately disobeyed the DECREE of this Honourable Court given on 27th November 2017 in whole by failing, refusing and/or neglecting to fully REINSTATE the Applicant to her employment and failing to pay her dues from the date of the DECREE.

4. That this Honourable Court be pleased to direct Mr. Abderahmane Berthe being the Secretary General and Principal Officer of the 2nd Respondent to purge the disobedience and to immediately comply with the DECREE of this Honourable court given on 27th November 2017 by directing him to fully REINSTATE the Applicant forthwith and further to pay the applicant her dues from the date of the DECREE.

5. That this Honourable Court be pleased to grant such directions and other or further Orders as it may deem fit to grant geared towards protecting the dignity and authority of this Honourable Court.

6. That the cost of this application be provided for.

3. This Application is supported by the affidavit of one Juliet Indetie and is premised on the grounds:

- a) That by a DECREE given on 27th November 2017 this Honourable court did interalia:- quash the entire proceedings, deliberations and decisions of the disciplinary Committee chaired by the 1st Respondent and the consequential summary dismissal letter authored by the 1st Respondent and dated 15th August 2016 terminating the Applicant's employment.
- b) That the full purport and effect of the judgement was to reinstate the Applicant's employment with the Respondent a fact that is not disputed and was admitted by the Respondent vide their letter to the applicant dated 5th December 2017 which sated "... Your Judicial Review application was allowed with the effect that you were reinstated back to the office".
- c) That at all material time the Respondents were represented by Legal Counsel who were present in court when the Judgement was delivered and were further served with the Decree by the Counsel for the Applicant.
- d) That pursuant to the Decree the Applicant did report to work on 5th December 2017 when she was sent on 21 days compulsory leave to enable the Respondents make logistical arrangements for her reinstatement. The compulsory leave was further extended for a period of 45 days vide a letter dated 10th January 2018.
- e) That thereafter the Respondent requested for her dues however to date she has not received her dues from the date of the Judgement.
- f) That to her shock and dismay the Respondent through its Secretary General has now written to the Respondent vide a letter dated 24th January 2018 informing her that her contract expired in September 2017 during the pendency of the suit.
- g) That this cause was filed by the Applicant on or around 18th August 2016.
- h) That it is now clear that the Respondent has no intentions of complying with the DECREE of this Honourable Court.
- i) That this amounts to contempt on the face of the court and is therefore punishable summarily.
- j) That the Respondents deliberately disobeyed the orders of this Court given on 27th November 2017 despite being aware of the Judgement.
- k) That the dignity and authority of the Court must be protected at all times.
- l) That the culture of disobeying Court orders and decisions has reached very high levels in Kenya and the courts must now exercise their constitutional authority of punishing people for contempt of Court.
- m) That the Respondents are fully aware and have actual and circumstantial knowledge of the said DECREE.
- n) That the Respondents are stopped by their own conduct and continued participation in the litigation from claiming that the contract of employment has expired.
- o) That communication from the Respondents to the Applicant subsequent to September 2017 is a clear indicator that the applicant's holds a valid contract of employment with the Respondent.
- p) That the purported withdrawal of the letters dated 5th December 2017 and 10th January 2018 respectively is a mere afterthought designed to deny the Applicant the fruits of her Judgement and to render Judgement null and void and is tantamount to a disguised termination which is unlawful.

4. The Respondents filed their Replying Affidavit where they averred that the 1st Respondent is no longer in employment of the 2nd Respondent and that the Applicant was the 2nd Respondent's Deputy Director Corporate Finance and Administration until 15/8/2016 when she was summarily dismissed from employment on grounds of gross misconduct which she was notified of by way of a letter dated 15/8/2016 and later on she filed a Judicial Review application challenging the decision to summarily terminate her employment and the claim was determined in her favour.

5. The 2nd Respondent, keen to implement the judgement and the order started making plans to reinstate the Applicant, they however faced challenges in implementing the judgement as it was 1 year and 6 months since termination of the Applicant and the 2nd Respondent had already filled the position of Deputy Director Corporate Finance and Administration as the Applicant had not applied for extension of contract as is required under contract. In light of the above, there was no employment contract between the 2nd Respondent and the Applicant meaning that neither the 2nd respondent nor the Secretary General disobeyed the Judgement of the Court hence no contempt of Court.

Submissions

6. The Applicant filed her submissions where she submits that the alleged feature in the case which prevents the Court from exercising its jurisdiction is that the Respondents are immune from legal process under the Privileges and Immunities (African Airlines Association) Order 2008 but the Respondent does not enjoy any immunity from suit or legal process meaning that the 2nd Respondent does not have immunity from suit and legal process or inviolability of its premises under part 1 of the Fourth Schedule.

7. On the issue of contempt of Court, she avers that in the Judicial Review, the Court found that the Respondents had unlawfully terminated the Applicant and accordingly issued a judgement order of reinstating the Applicant but the Respondent failed to comply to the Court orders which actions and omission constituted contempt of Court under Section 4(2) of the contempt of Court Act 2006. The Applicant relied on the case of **Alfred N. Mutua Vs Ethics & Anti-corruption Commission (EACC) [2016] eKLR at paragraph 28.**

8. The Respondents filed their submissions on 21/3/2018 and other than addressing Court on the issue of instant Application before Court, they asked Court to consider their Preliminary Objection dated 12.2.2018 where they raised the issue of diplomatic immunity.

9. They submitted that the Respondent and its employees enjoy immunities granted pursuant to Section 11 of the Privileges and Immunities Act, Cap 179 Laws of Kenya as read with Order 2 of Legal Notice No. 19/2008 and therefore this Court lacks jurisdiction.

10. Under Order 4 of the said Legal Notice, they submitted that employees of the 2nd Respondent are immune from any legal proceedings in the course of undertaking their duties on behalf of the 2nd Respondent.

11. Concerning the Applicants Applications, they also submitted that this Court lacks jurisdiction to entertain and determine the Notice of Motion as it is a well settle principle of law, that without jurisdiction, a Court downs its tools and cannot take any further step in determining a special matter. They cited "**The Owner of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited (1989) KLR1** in this regard where the Court held that:-

"Jurisdiction is everything and without it a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

12. The Respondents also cited the Supreme Court decision in **Karen Njeru Kandie vs Alassane Ba & Shelter Afrique (2017) eKLR on 28/7/2017** where Supreme Court held that privileges and immunities enjoyed by persons accorded statutory immunity such as the Respondent are a reasonable and justifiable limitation of the rights of access to justice.

13. The Respondents further cited **Fred Khaemba vs International Organization of Migration (2016) eKLR, Peter Letiwa & Another vs Charles Mbugua (2016) eKLR** where in both case, the Hon. Judge upheld the Principles of Immunity against the International Agencies.

14. The Respondent pray that the Notice of Preliminary Objection dated 12th February 2018 be allowed and the Applicant's Notice of Motion dated 31st January 2018 be struck out with costs.

15. I have examined the averments and submissions of both parties. The issues for determination by this Court are:-

1. Whether the Respondents are diplomatically immuned from action by this Court by virtue of Section 11 of the Privileges and Ammunition Act Chapter 179 Laws of Kenya in the current matter.

2. If not whether the Respondents have committed any acts or omissions in contempt of this Court's and judgement dated 27th November 2017.

3. What orders this Court can grant in the circumstances.

16. On the 1st issue, the Respondents have pleaded immunity by virtue of Section 11 of Cap 179 Laws of Kenya. Section 11 of Cap 179 provides as follows:-

1) Where the Government of Kenya has, whether before or after the commencement of this Act, entered into any agreement with an external agency under which, in return for assistance or co-operation in works executed in, or services rendered to, Kenya by that agency, the Government has agreed that such agency or persons in its service should enjoy immunities or privileges, the Minister may, by order:-

a) declare that such agency is one to which this section applies;

b) provide that, to such extent as may be specified in the order, such agency shall have the immunities and privileges set out in Part I of the Fourth Schedule to this Act;

c) confer upon such classes of officers and servants of such agency as may be specified in the order, to such extent as may be so specified, the immunities and privileges set out in Part III of the Fourth Schedule, and for the purposes of any such order references in the said Fourth Schedule to the organization shall be construed as references to the external agency name in the order.

2) An order under subsection (1) of this section shall be so framed as to secure that there not conferred on any person any immunities or privileges greater in extent than those which are required to be conferred on that person by the agreement concerned and that no immunity or privilege is conferred on any person who is a citizen of, or permanently resident in, Kenya.

3) Where immunities and privileges are conferred upon any person by an order under subsection (1) of this section, the Minister

shall, by notice in the *Gazette* specify the persons who are for the time being entitled to those immunities and privileges.

4) For the purposes of this section, “external agency” means:-

a) the government of a foreign State;

b) a recognized agency of such a government;

c) an internationally recognized foundation or other body.

17. Section 11 above provides for Immunity for an Agency where there is an Agreement between that Agency and the Government of Kenya for assistance or corporation.

18. Other than the above provision, the Respondent have demonstrated that the Respondent’s Agency have an agreement with the Government of Kenya for assistance and corporation under Order 2 of Legal Notice No. 19/2008 which fact is admitted under paragraph 23 of the Applicants submissions dated 14/3/2018.

19. The Applicant have however submitted that this privilege was waived by the Respondents. The Applicants referred Court to Article 32 of the Vienna Convention on Diplomatic Relations 1961 listed in the First Schedule of the Privileges and Immunities Act 1970 as having force in Kenya and which states as follows:-

“Article 32

1) *The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.*

2) *The waiver must always be express.*

3) *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 counter-claim directly connected with the principal claim.*

4) *Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary”.*

20. The Applicants pointed this Court to Article 16 of the contract of employment between the Applicant and Respondent. The 1st Respondent expressly stated their intent to surrender immunity from judicial proceedings where the contract provides as follows:-

“Applicable law and jurisdiction

This contract shall be governed and construed in accordance with the law of the place of its performance and the Courts of that Country shall have jurisdiction with regard thereto”.

21. The Applicant cited **Eckert International vs Government of the Republic of Fiji, 834 F. Supp. 167 (E.D Va. 1993)** where the Court held that a contractual choice of law clause constitutes a waiver of immunity.

22. The Applicant also cited **Resource Dynamics International vs General People’s Committee for Communications and Maritime Transport in the Socialist People’s Libyan Arab Jamahiriya 593 F. Supp. 572 (N.D. Ga. 1984)** where it was held that an implicit waiver exists where a foreign state has agreed to arbitrate in another country or where a foreign state has agreed that the law of a particular country should govern a contract.

23. Besides the cited law, the Applicant submits that the Respondent submitted to this Court’s jurisdiction by unconditionally entering appearance and defence in the Judicial Review proceedings on merit and even filing a Notice of Appeal.

24. I do agree that the Respondents herein as stated above have immunity as pleaded. I however note that this Judicial Review Application was filed in Court on 18/8/2016. On 26/8/2016, the Respondents herein filed their replying Affidavit to the Application without any reservations and therefore fully submitting to this Court’s jurisdiction.

25. The current application for contempt however is against a Mr. Abderahmane Berthe the Secretary General and Principle Officer of the 2nd Respondent herein.

26. The Replying Affidavit (under protest) filed herein however is deponed to by one Dr. Koussai Mrabet who depones that he is the current Director, Commercial/Corporate and Industry Affairs of the 2nd Respondent and that the alleged contemnor Abderahmane Berthe the persons against whom orders of contempt are sought against replaced the 1st Respondent as Secretary General of the 2nd Respondent with effect from 1.1.2018 and that the 1st Respondent is no longer in employment of the 2nd Respondent.

27. In view of the fact that the 1st Respondent who is the alleged contemnor is not before Court and the cited contemnor pleaded immunity having not submitted to this Court's jurisdiction previously, I do agree that proceeding to cite him with contempt will be against his privileged position and especially in view of the fact that he joined the Respondents employment in 2018 when the acts of the alleged contempt were committed in 2017.

28. The said Abderahmane Berthe has pleaded diplomatic immunity by filling the Replying Affidavit under protest thus pleading that his immunity has not been waived.

29. From the circumstances of this case then, this Court cannot proceed to determine whether or not the alleged contemnor is guilty or not guilty of contempt. That resolves the 1st issue above.

30. In the circumstances, this Court will not delve into the other issues having resolved that the alleged contemnor cannot be cited for contempt due to privilege.

Dated and delivered in open Court this 6th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwangi holding brief for Mailu for Respondent – Present

Nyanguthie for Applicant – Present