



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 685 OF 2018

MERCY MUHANDIA.....CLAIMANT

- VERSUS -

RAZOR TARA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th July, 2018)

RULING

The respondent filed the notice of motion on 30.05.2018 through Amin & Company Advocates. The application was under Order 2 Rule 15 (1) (d) and Order 51 of the Civil Procedure Rules, 2010, Section 1A, 1B, 3 and 3A and 5 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya), Rule 17 (1) and (3) of the Employment and Labour Relations Court (Procedure) Rules 2016 and all enabling provisions of law. The applicant prayed for orders:

- a) That the matter be certified urgent and heard ex parte in the first instance.
- b) That the Honourable Court be pleased to order stay of further proceedings in the matter pending the hearing and determination of the application.
- c) That the claimant's suit is struck out with costs.

The application was based on attached affidavit of Bilal Abdul Mohsin and upon the following grounds:

- a) The respondent or applicant being the High Commissioner of the Islamic Republic of Parkistan to Kenya enjoys absolute diplomatic or sovereign state immunity from the claimant's suit.
- b) The applicant has neither waived such immunity nor consented to be sued in or made a party to this suit nor subjected himself to the jurisdiction of the Court and as such cannot be impleaded in the suit.
- c) Thus the Honourable Court lacks jurisdiction to hear and determine the suit.
- d) If stay of proceedings is not granted as prayed for there may be judgment entered in default of filing of a defence.

In the supporting affidavit it is admitted that the applicant employed the claimant as a domestic worker

and the dispute in the present suit is in respect of the said employment. Further, it is the advice by the Advocate for the applicant that a contract between a diplomat like the applicant and a private domestic worker is considered not a commercial activity as it is not a private activity for profit and therefore not excluded from a diplomat's immunity. In the circumstances the Court lacks jurisdiction to hear and determine the suit.

The claimant filed the memorandum of claim on 09.05.2018 through Maari Nyaberi & Company Advocates. The claimant's case is that the applicant employed her as a domestic worker from August 2016 to 15.02.2017 at a monthly salary of Kshs.13, 000.00. On 15.02.2017 the applicant terminated her employment without a reasonable cause and the respondent refused to pay her terminal dues. The claimant therefore claimant payment of a sum of Kshs. 341, 766.00 being a month's pay in lieu of termination notice; underpayment of house allowance; pro rate leave; overtime pay for 9 months, pay for work on public holidays; service pay for a year; NSSF not remitted; 12 months' salary for unfair termination; and certificate of service.

To oppose the application the claimant filed her replying affidavit on 18.06.2018. She states that she worked for the respondent from August 2016 to 15.02.2017 when the contract was terminated without a reasonable cause and her terminal dues were not paid. She states that her employment was under the Employment Act, 2007 which is also recognised under international laws. The claimant cannot therefore invoke immunity to defeat the suit in a claim for failure to pay terminal dues. As an employer, the applicant should be ordered to pay her full terminal dues. Further, the applicant has not exhibited a defence to the claims and the application stands on swift ground. Further, the person sued, the applicant, was sued in his private capacity and not as the High Commissioner of Pakistan. The respondent has therefore been sued in person upon. Finally, the claimant states that the supporting affidavit is made by a person who is a total stranger to the contract of service and the suit.

The written submissions were filed for the parties.

It is submitted for the applicant that the notice of motion is premised on the Privileges and Immunities Act (Cap. 179 of the Laws of Kenya) as read with the Vienna Convention on Diplomatic Relations, 1961 which both provide that a Head of Mission of a diplomatic mission is immune from civil jurisdiction of the Courts of the receiving state. Section 4 of the Act provides, **“Subject to section 15, the Articles set out in the First Schedule (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in Kenya and shall for that purpose be construed in accordance with the following provisions of this section.”** It is further submitted that Article 32 of the Vienna Convention on Diplomatic Relations, 1961 provides, **“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction except in the case of: (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”** Further the Act and the Convention applies in Kenya by reason of Article 2(6) of the Constitution of Kenya, 2010 which states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. The applicant being the Head of Mission, he is therefore immune to the Court's civil jurisdiction. That in **Eugine Linyulu Isalambo –Versus- Barbro Ekvall [2016]eKLR**, (Nzioki Wa Makau J) it was held that commercial activity as expressed in the Vienna Convention does not apply to activities incidental to daily life but rather to commercial activities engaged in for personal profit outside official duties. Further in that case citing **Al-Malki and Another (Secretary of State for Foreign and Commonwealth Affairs and Others Intervening) [2015] EWCA Civ.32** also in **[2015] WLR (D) 75**, it was held that provision of services which were incidental to family or domestic daily life was not **“commercial activity”** . Thus, **“...The fourth recital to the Convention explained that the purpose of the immunities conferred was not to benefit the individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states. The functions were listed in article 3.1 (a) – (e). The employment of persons to provide domestic services in a diplomatic mission or an official diplomatic residence in the receiving state was conducive to the performance of diplomatic functions.”**

As to whether the invoked immunity undermined the constitutional right of access to justice, it was

submitted for the applicant that the Court of Appeal in **Karen Njeri Kandie – Versus- Alassane Ba & Another [2015]eKLR**, it was held thus, “...immunity is a legitimate limitation to the right of access to justice under Article 48 of the Constitution, and is not disproportionate to the legitimate aims of conferment of state immunity.” In the appeal to the Supreme Court in the same case, **Karen Njeri Kandie – Versus- Alassane Ba & Another [2017]eKLR** it was held, “...after balancing the right of the appellant to access justice, and 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 courts is not disproportionate. The conferment of immunity for the purposes of Kenya upholding its international law obligations, is to that extent, a reasonable and justifiable limitation of the right to access justice as provided under Article 48 of the Constitution, and we so hold.”

Further, it was submitted for the applicant that the Court should follow the opinion by Rika J in **Samarere & Another –Versus- Nigerian High Commission [2013]eKLR** thus, “ 7. There are certain States that adopt the principle of restricted State Immunity. By this principle, a foreign State is allowed immunity from the receiving State Courts, except as provided by an Act of Parliament governing Foreign States Immunities. Australia for example enacted the Foreign States Immunities Act of 1985, setting out a number of categories which are exceptions to the immunity of a foreign State, among them being contracts of employment. There is no such legislation in Kenya restricting foreign States immunities, in employment contracts.” It was submitted for the applicant that as per the holding in Owners of the **Motor Vessel ‘Lillian S’ –Versus- Caltex Oil (Kenya) Ltd [1989] KLR 1**, jurisdiction is everything and there being no jurisdiction, the Court should down tools in the matter.

First, it has been submitted for the claimant that there is no evidence before the Court that the applicant is the Head of Mission of the Pakistan High Commission and therefore enjoying diplomatic immunity in law as submitted for the applicant. Second, the maker of the supporting affidavit one Bilal Abdul Mohsin is a total stranger to the matters in dispute. Third, even if the applicant was a diplomat, the immunity claimed would not be absolute. The applicant if a diplomat must nevertheless obey the Constitution of Kenya, the Employment Act, 2007, and other laws of Kenya. The Court should not allow the applicant, having enjoyed the claimant’s services in a private contract of service as a domestic worker, to intentionally and unlawfully refuse to pay her under the invoked diplomatic immunity. The applicant should not be allowed to engage in impunity and the claimant to remain without a remedy. There cannot be a wrong without a remedy. Fourth, the contract of service between the parties was a private matter and not a public activity and the doctrine of absolute immunity will not apply.

It was submitted for the claimant that in **Lucy Muingo Kusewa & Another –Versus- Embassy of Sweeden, Nairobi (2017) eKLR**, (Wasilwa J) it was held that the doctrine of absolute immunity is no longer viable and further, “22. By virtue of Article 2(5) of our Constitution 2010, general rules of international law shall form part of the law of Kenya. It is therefore my finding that UN Convention on Jurisdictional Immunities of States and their Property form part of the law of Kenya and it is therefore apt for this Court to apply principle enunciated therein. 23. Having considered the principles of international law, the cited law above and case law, it is my finding that though the respondent herein may enjoy diplomatic immunity, this immunity is restrictive and does not cover employment matters as expressly outlined under UN Convention on Jurisdictional Immunities of States and their respective Property. Employment matters also fall under the purview of Private law where immunity is restricted under the Privileges and Immunities Act and the Vienna Convention on the Law of Treaties.”

It was submitted for the claimant that the Court should follow the holding in **International Centre for Insect Physiology and Ecology (ICIPE) –Versus- Nancy McNally [2018]eKLR**, where the Court of Appeal (Waki, Nambuye & Musinga JJ.A), held thus, “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 PO in respect of the constitutional issues, and we so find.”

The Court has considered the parties’ submissions and the material on record and makes the following findings on the matters in dispute.

1) The claimant has not established material reason in terms of content and form of the replying affidavit to occasion the expunging of the affidavit from record. That the maker of the replying affidavit may not be privy to the matters in dispute may render the evidence by that affidavit irrelevant or of questionable probative value but not, in the opinion of the Court, a ground for striking out the affidavit.

2) The Court has perused the memorandum of claim and nowhere is it stated by the claimant that the respondent is the Head of Mission for the Pakistan High Commission. The respondent has not filed a defence. The claimant disputes that the respondent is such Head of Mission and for the respondent it is stated that he is such Head of Mission. What is clear is that the issue whether the respondent is a Head of Mission and therefore enjoying the diplomatic immunity under the Privileges and Immunities Act (Cap. 179 of the Laws of Kenya) as read with the Vienna Convention on Diplomatic Relations, 1961, (absolute, restricted, or qualified) is a matter in dispute which will require evidence to resolve. It was in **Mukisa Biscuit Manufacturing Company Limited –Versus- West End Distributors Limited [1969] EA 696** that the binding principle on preliminary objections was held thus, **“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion.”** The present preliminary objection is premised upon a plea of absolute diplomatic immunity on account of the respondent being the High Commissioner of the Republic of Pakistan but which fact the claimant does not concur to by her pleadings and affidavit or submissions. On that ground alone, the preliminary objection would therefore be liable to collapsing.

3) It is urged for the applicant that the plea of diplomatic immunity would amount to a legitimate limitation or qualification to the claimant’s right of access to justice as provided for in Article 48 of the Constitution of Kenya 2010 as read with Article 24 on the limitation of rights and fundamental freedoms. The Court has carefully weighed that submission against the claimant’s submission that even if the applicant enjoyed diplomatic immunity as urged, he should not be allowed to have enjoyed the claimant’s services under the contract of service and be left to go without paying the claimant’s dues under the contract. The Court has considered the opinion in **Lucy Muingo Kusewa & Another –Versus- Embassy of Sweden, Nairobi (2017) eKLR**, (Wasilwa J) where it was held that the doctrine of absolute immunity is no longer viable and further considered the cited cases on whether the diplomatic immunity affords the party invoking it absolute or restricted immunity. The Court has revisited the Constitution and the submission as made for the claimant on work without benefits or pay. The Court has particularly considered Article 25 of the Constitution which provides that despite any other provision in the Constitution, the following rights and fundamental freedoms shall not be limited, thus, freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of habeas corpus. The Court considers that the listed rights as they obtain in employment situations based on individual cases would automatically render unnecessary the discussion of whether the diplomatic immunity under the Privileges and Immunities Act (Cap. 179 of the Laws of Kenya) as read with the Vienna Convention on Diplomatic Relations, 1961 absolutely or restrictively limited the right of an employee to work and thereafter any of such unqualified or unlimited rights or rights that cannot be derogated from are shown or established to have been violated. Such is an issue as raised for the claimant that needs to be investigated at the full hearing in cases such as the present case and therefore, the preliminary objection would fail.

In conclusion, the court returns that the application filed for the applicant Razor Tara on 30.05.2018 is hereby dismissed with costs and with directions as follows:

a) The applicant to file and serve the statement of response, documents and witness statements by 20.07.2018 and the claimant may file and serve a reply to defence and further witness statement by

27.07.2018.

b) Upon the close of pleadings parties to fix a date at the registry for the pre-trial conference.

c) Parties at liberty to compromise the suit.

Signed, dated and delivered in court at Nairobi this Friday 6th July, 2018.

BYRAM ONGAYA

JUDGE