



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2599 OF 2016

CHRISTOPHER BERNARD WASIKE.....CLAIMANT

VERSUS

INTERNATIONAL CENTRE OF INSECT

PHYSIOLOGY AND ECOLOGY.....RESPONDENT

RULING

Introduction

1. The claimant was employed by the respondent as an Electrician in her facilities and Assets Unit from 21.3.2000 until 5.9.2016 when he was discharged. He brought this suit alleging that the termination was unfair within the meaning of section 41, 43 and 45 of the Employment Act of Kenya and prayed for Kshs.3,117,066 made up of:

- (a) Salary in lieu of notice
- (b) Salary for the remainder of his fixed term contract
- (c) Compensatory damages for the unfair termination
- (d) Accrued leave and ex-gratia terminal dues

2. The respondent never filed defence but a Notice of Preliminary Objection(P.O) *in limine* that this court lacks jurisdiction to hear the suit on the following grounds:

- (a) The Respondent enjoys immunity from legal process by virtue of the provisions of Article 27 of the ICIPE Charter and the provisions of the privileges and immunities Act Cap 179 Laws of Kenya.
- (b) The subject matter of the claims herein relates to matters intrinsically linked to the operations of the respondent and further relates to official and not private matters.
- (c) The respondent has not waived its immunity.

3. The P.O. annexed the ICIPE Constitutive Charter and Legal Notice No. 13 of 20.1.1989 by the Foreign Affairs Minister giving various privileging and immunities as set out under the Privileges and Immunities Act.

4. The P.O was disposed of by written submissions. The Respondent filed hers on 19.6.2018 claimant filed his on 12.6.2018.

Respondent's Submissions

5. It was submitted for the respondent that she has been granted and enjoys immunity from legal proceeding in Kenya by virtue of Article 27 of the ICIPE Charter which is the Constitutive document creating the respondent as an intergovernmental organization. It was further urged that the status, rights, powers, privileges and immunities of an intergovernmental organization are provided for under section 9 of the privileges and immunities Act and they are set out in Part 1 of the Fourth Schedule of the Act. That the foregoing matters are granted to the entity through a Gazette Notice published by the Minister for foreign Affairs and in this case, the respondent submitted that the Gazette

Notice was issued on 24.11.1988 on by Minister John Ouko and published on 20.1.1989. That paragraph 3 of the Notice stated that, the respondent shall have legal capacity of a body corporate, and; have privileges and immunities specified under paragraph 1, 4 and 5 of part 1 of the Fourth Schedule of the Act. She emphasized that paragraph 1 of part I of the Fourth Schedule of the Act confer immunity from suit and legal process.

6. The respondent appreciated that the immunity granted to an organization under section 9 and Fourth Schedule to the Act is not absolute but subject to certain exceptions including waiver of the immunity by the organization or where the subject matter is private and commercial and does not constitute an official matter intrinsically linked to the operations of the organization. She submitted that the employment of the claimant which is the subject matter of the suit, was official and intrinsically linked to her operations and contended that the immunity conferred to her under section 9 of the Act and the Fourth Schedule to the Act applies to this case. She relied on the Supreme Court of Kenya decision in *Karen Njeri Kandie vs Alsane Ba & Another [2017]eKLR* to support the foregoing submission.

7. She further urged that the claim herein like, in the *Karen Njeri Kandie Case* amounts to a sovereign and immunized subject matter and is not actionable before Kenyan Courts since the claim relate to

termination of employment of Electrician employed in the respondent's facilities and Assets unit which is a matter intrinsically linked to the operations of the respondent. She further urged that allowing the suit to proceed would entail interrogation of internal workings of the respondent which constitutes an unacceptable interference with the right of the respondent to control and regulate her own workforce.

8. The respondent submitted that the facts of this case are diametrically different from *Nancy McNally vs ICIPE* which was a constitutional petition challenging the validity of the law which grants the respondent the immunity from legal process where a similar P.O was dismissed and the suit allowed to proceed. She therefore urged that the P.O herein should be allowed like in the *Karen Njeri Kandie Case* because the suit is purely employment matter which is barred by the immunity conferred upon her by the law, she further urged me to follow the decision in *Edward Onkendi vs International Centre for Insect Physiology and Ecology [2016] eKLR and Gerald Killen Vs ICIPE [2015]eKLR* where similar P.O. was sustained and the suits struck out on ground that the respondent herein was clothed with immunity from legal process.

Claimant's Submission

9. The claimant submitted that she brought this suit to seek legal redress for the unlawful and illegal termination of his employment by the respondent. He further submitted that through the suit he is seeking to assert his rights to fair labour practices as guaranteed under Article 41 of the constitution and protection from unfair termination under section 45 and 49 of the Employment Act. He therefore urged that the jurisdiction to hear his suit cannot be taken away because it is the legal framework derived from constitution that exists to resolve disputes between employers and employees.

10. He contended that the immunity conferred upon the respondent is not absolute but one that is subject to the constitution which provides for the right to fair administration of justice and right to fair hearing among others and as such according to him, it is unimaginable that such rights be denied by taking refuge in the immunity. He urged that the immunity granted under part 5 of the schedule to the Privileges and Immunities Act is restrictive and subordinate to the Constitution. He relied on the decision of *Nancy McNally vs ICIPE* which was upheld by the Court of Appeal where a P.O on ground of immunity was dismissed. He prayed for the P.O to be dismissed with costs.

Analysis and Determination

11. The issues for determination are:

- (a) Whether the Respondent has raised a P.O capable of terminating the suit *in limine*.
- (b) Whether the respondent enjoys immunity from suit and legal process which is bar to this suit.

Preliminary Objection

12. A P.O was defined by *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [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.”

13. The Court of Appeal was faced with the same question of whether a plea of immunity from legal process can be a proper subject of a P.O. in the *Karen Njeri Kandie Vs Alsane Ba & Shelter Afrique*

[2015] eKLR and held as follows:

“A plea of immunity from legal process 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 behooves the Court to first address and pronounce itself on it before it can embark, if at all, on hearing the rest of the dispute.”

14. In view of the foregoing binding precedent, I find and hold that the respondent has laid before the Court a P.O. which meets the threshold

set out by *Mukisa Biscuits Case* aforesaid.

Immunity from suit and legal process

15. The pleadings by the claimant do not describe the respondent as an intergovernmental organisations enjoying immunity from legal process. Even in his submissions on the P.O he has not acknowledged that the respondent is clothed with any immunity. He argued that, if at all the respondent enjoys any immunity the same is subordinate to the constitution and it cannot bar the jurisdiction of this court to hear a claim for redress arising from unfair termination of employment contract by the respondent whom he urged is bound by the provisions of the Employment Act.

16. The respondent has contended that she enjoys immunity from suit and legal process by dint of Article 27 of her constitutive charter and section 9 of the paragraph 1 of part I of the Fourth Schedule to the Act. She however admits that the said immunity is not absolute but restrictive to matters which are official and intrinsically linked to her operations but not commercial or private matters. She urged that the subject matter in the impugned suit relates to termination of employment of her Electrician who was employed in her facilities and Assets Unit which is a position intrinsically linked to her operations and her right to control and regulate her staff. The claimant has not disputed the foregoing submission that his service were not private but related to the operations of the respondent as an entity.

17. 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 accrued benefits and compensatory damages for unfair termination of employment relationship between the parties herein. There is nothing in the suit that challenges the immunity conferred upon the respondent as contended herein above. The facts of this case are therefore distinguishable from the facts in *Nancy McNally vs ICIPE* cited by the claimant in his opposition to the P.O herein.

18. The fact of this case are similar to the facts in *Edward Okendi vs ICIPE*, and *Gerald Killen vs ICIPE* cited by the Respondent where the P.O on ground of immunity from legal process was allowed and the suits struck out. The same position obtained in *Karen Njeri Kandie vs Alsane Ba* and *Shelter Afrique* where P.O on ground of immunity from legal process in employment dispute filed before this court. I am bound by the said Supreme Court decision in the *Shelter Africa Case* and I also have no reason for departing from the persuasive decisions in *Edward Okendi Vs ICIPE* and *Gerald Killen vs ICIPE* by this Court and the High Court respectively. It obvious that the immunity from legal process conferred upon the respondent by its constitutive Charter and the Privileges and Immunity Act of Kenya erects a procedural bar to the Court's jurisdiction over suits brought against her including the present one. The claimant must therefore result to Alternative Dispute Resolution

Mechanism under the respondent's HR policy and disciplinary manual or Diplomatic mechanism through the Ministry of Foreign Affair.

Conclusion and Determination

19. I have found that the respondent enjoys immunity from legal process in relation to matters that are official and intrinsically linked her operations as an intergovernmental organization. I have also found that the subject matter of the suit herein involves termination of employment of an Electrician employed at the respondents facilities and Assets Unit on an official capacity and not for commercial or private capacity. Consequently, it is my view that the suit is barred by the respondent's immunity from legal process aforesaid and the court must down its tools. This should serve as a warning that, for the time being, the persons who seek employment from intergovemental organizations, embassies and diplomats should approach their gates with their amber lights on. The suit is thus struck out with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE