



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 277 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 24th September, 2018)

EMIME NDIHOKUBWAYO.....CLAIMANT

VERSUS

ALLIANCE FOR A GREEN REVOLUTION IN AFRICA.....1ST RESPONDENT

AGNES KALIBATA.....2ND RESPONDENT

RULING

1. The Application before Court is one dated 7th May 2018 brought under Section 11 of the Privileges and Immunities Act Cap 179, paragraphs 1 & 3 of Part 1 of the Fourth Schedule to the Privileges and Immunities Act, Vienna Convention on Diplomatic Relations, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016 and all other enabling provisions of law seeking orders:-

a. That the Statement of Claim filed on 8th March 2018 be struck out and the suit be dismissed with costs to the Respondents.

b. That the Claimant pays to the Respondents the costs of this application.

2. The Application which is supported by the affidavit of one **Annette Kahama** is premised on the grounds:

1. That by a Kenya Gazette Notice dated 10th December 2015, the Cabinet Secretary for Foreign Affairs published the Privileges and Immunities (Alliance for Green Revolution in Africa) Order, 2016 as Legal Notice No.24.

2. That pursuant to the above Legal Notice the 1st Respondent was declared as an organization to which Section 11 of the Privileges and Immunities Act shall apply. The 1st Respondent consequently enjoys the following immunities;

“3. The alliance shall have:-

a) The legal capacity of a body corporate;

b) The privileges and immunities specified in paragraphs 1 and 3 of part I of the Fourth Schedule to the Act.

4. Any person who is an official of the Alliance shall, while residing in Kenya and performing duties in the service of the Alliance, have the privileges and immunities specified in paragraph 2 and 7 of part III of the Fourth Schedule to the Act”

3. That paragraphs 1 and 3 of part I the Fourth Schedule to the Privileges and Immunities Act grants the 1st Respondent “Immunity from suit and legal process”.

4. That the 2nd Respondent was issued a Diplomatic Card on 21st September 2016 by the Ministry of Foreign Affairs and therefore is also a privileged person against whom a civil action cannot be entertained pursuant to Article 31 of the Vienna Convention on Diplomatic Relations, domesticated in Kenya through the Privileges and Immunities Act which provides as follows:

“A Diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state, He shall also enjoy immunity from civil and administrative jurisdiction. Except in case of:-

a) A real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purpose of the mission;

b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state;

c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.”

5. That the claim before the Court is an employment dispute which is civil in nature between the Claimant and the 1st Respondent. The 1st and 2nd Respondents enjoy immunity from civil process and therefore this Honourable Court does not have jurisdiction to entertain a claim against them.

6. That the Claimant is therefore non-situated against the Respondents and the Statement of Claim filed herein on 8th March 2018 should be struck out.

7. That without prejudice to the foregoing, there is no privity of contract between the Claimant and the 2nd Respondent and the suit against the 2nd Respondent is therefore an abuse of the Court process.

Submissions

3. The Claimant filed her submissions where she submits that the Constitution is the *grundnorm* where all laws are subject to it. It is the ultimate source of lawful authority in the country and as such the Respondent cannot purport that the Legal Notice with regard to granting immunity to the Respondent is superior to the provisions of the Constitution.

4. She avers that the supremacy of the Constitution is that ‘the obligations’ required by it must be fulfilled. Article 41 of the Constitution provides for the rights to fair labor practices and fair remuneration to the workers therefore the Immunity from legal process granted under Part 2 and 7 of Part III of the Fourth Schedule of the Privileges and Immunity Act is subordinate to the Constitution, which is the supreme law. Therefore the Constitution should take precedence over International conventions as was stated by Justice Majanja in the case of **Beatrice Wanjiku & Another Vs Attorney General & Another (2012) eKLR.**

5. She states that her rights were violated hence her decision to approach this court for redress. Further, her right to access justice as stipulated in Article 48 of the Constitution cannot be impeached by the immunities cited by the Respondent. She avers that her rights will be indeed violated if the suit is struck out on the basis of the status of the Respondent.

6. She further states that though the Respondent has immunity subject to the Legal Notice, the immunity is not absolute and could only be restrictive since Section 9 of Part IV of the Privileges and Immunities Act and the immunity granted is state immunity and not a diplomatic immunity as pleaded by the Respondents. Therefore, this Court has jurisdiction to hear this matter subject to Article 162 of the Constitution where Parliament was given the power to establish Courts with the status of High Court to hear and determine disputes relating to Employment and Labour Court.

7. She further states that the Respondent has not provided her with any alternative forum where she can ventilate her grievances which means that if this suit is struck out, her right to access justice under Article 48 of the Constitution will be rendered illusory. She therefore requests the Court not to allow the Respondent’s application for the purpose of enhancing the rule of law.

8. The Respondents filed their submissions where they submit that the 1st Respondent was duly gazetted under the Privileges and Immunities Act vide a Legal Notice No. 24 dated 26th February 2016 as required by law and pursuant to an agreement dated 11th March 2008 between the Government of Kenya and the 1st Respondent regarding the establishment of its headquarters in Kenya as required by law.

9. They submit that the 2nd Respondent, the 1st Respondent’s president is also a privileged person against whom civil action cannot be entertained pursuant to the provisions Article 31 of the Vienna Convention on Diplomatic Relations, domesticated in Kenya through Section 4 of the Privileges and Immunities Act. They relied on the case of **Tononoka Steels Ltd Vs The Eastern & Southern Africa Trade Development Bank.**

10. They aver that the claim before this Court is a labour dispute which is Civil in nature, as such, pursuant to the provisions of the Privileges and Immunities Act and the Vienna Convention on Diplomatic Relations, the Respondents are privileged person by virtue of their diplomatic immunity and the Court therefore has no jurisdiction to entertain a Claimant against them by virtue of their status. It is trite in law that where a party has diplomatic immunity, the Court cannot entertain a civil claim against such a party unless the said party waives immunity. They relied on the case of **Ministry of Defence of the Government of the United Kingdom Vs Ndegwa.**

11. They further aver that the applicable test when dealing with diplomatic immunity is whether the acts complained of are within the governmental sphere or private sphere. The 1st Respondent was purely within her right not to renew the Claimant’s contract as the term was fixed and not subject to legitimate expectation, which undertaking by the 1st Respondent was purely in its course of business as provided in the employment contract dated 18th August 2014.

12. They state that having established that the Respondents are indeed clothed with diplomatic immunity. They submit that the jurisdiction of this Honourable Court to determine the claim against them is ousted by statute under Section 11 of the Privileges and Immunities Act as well as Section 4 of the same Act that domesticated Article 31 of the Vienna Convention on Diplomatic Relations. They therefore pray the Court to strike out the Memorandum of Claim herein as sought and dismiss the suit with costs to the Respondents.

13. I have examined all the averments of both parties. I note that Article 31(1) of the Vienna Convention (supra) grants immunity to any diplomatic agent and any diplomatic person from criminal, civil and administrative jurisdiction of the receiving state.

14. The absolute immunity is however qualified by exception, which restrict the general immunity in the following circumstances: in real estate actions, in success matters and in actions relating to any professional or commercial activity exercised by the diplomatic agent in receiving state outside his official functions.

15. I note that by virtue of Legal Notice No. 24 of 26.2.2016, the Respondent have Diplomatic Immunity specified in paragraph 1 and 3 of part 1 of the 4th Schedule of The Privileges and Immunities Act (Cap 179 Laws of Kenya).

16. The privileges envisaged are however not absolute as seen from Article 31(1) of the Vienna Convention on Diplomatic Immunity (supra).

17. The Limitation comes in in matters of a private nature. An employment contract would fall under the purview of private law as opposed to public law, which deals with relations between individuals and institutions rather than the institutions and the government.

18. The UN Convention on Jurisdictional Immunities of States and their property provide as follows:-

“Article 11

Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State”.

19. This issue of immunity has been discussed severally by our Courts. In **case No. 685/2018** (J Ongaya) addressed this issue and dismissed a Preliminary Objection on diplomatic immunity on the ground the issue of absolute immunity did not arise as it amounted to legitimate limitation or qualification to the Claimant’s right to access 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.

20. Lord Denning in **Rhimtoola vs Nizam of Hyderabad (1958) AC 399** stated as follows:-

“Sovereign immunity should not depend on whether a foreign government is impleaded directly or indirectly, but rather on the nature of the dispute..... Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so..... but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity”.

21. Close home, the Court of Appeal in **CA No. 56 of 2014**, the Learned JJA Azangalala, Gatembu and Murgor dismissed an appeal raised on this issue and rendered themselves as follows:-

“22. What then is the nature of the transaction in this case and is it one to which immunity should apply. The relationship between the parties to this dispute was defined by a tenancy agreement. The dispute between the parties stems from that agreement. A landlord and tenant agreement. It does not appear to us that in entering into that agreement, the respondent was “acting in a governmental capacity under which it can claim immunity”. Although the purpose of the transaction was to provide accommodation for the respondent, a Diplomatic Commission, that does not detract from the nature the transaction.....”

24. In our judgment therefore, in entering into the tenancy agreement with the appellant, the respondent was doing so in a private, rather than in a governmental capacity, and the appellant was entitled to bring the action against it based on the tenancy agreement.....”

22. In the current claim, the Claimant/Applicant filed her claim alleging violence of her constitutional rights in an employment relationship, which she also avers that she was bullied, intimidated and verbally assaulted. The inference by the Claimant /Applicant touches on her right to fair labour practices under Article 41 of the Kenyan Constitution and Article 48 of the same Constitution on access to justice.

23. In **International Centre for Insect Physiology and Ecology ICIPE vs Nancy McNally (2018) eKLR**, the Court of Appeal (Waki, Nambuye and Musinga JJA) also found that:-

“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, 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”.

24. Having analyzed the claim before me and having considered the precedents on this issue, it is my finding that at this point in time, issues of immunity cannot be resolved through this Preliminary Objection.

25. There are issues that would need to be determined after a full hearing in order to find out the extent if any to which there is immunity at all. I therefore find the Preliminary Objection without merit. I dismiss it accordingly and direct the case proceeds for full hearing. Costs in the cause.

Dated and delivered in open Court this 24th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Atenya holding brief for Sifuna for Claimant/Respondent – Present

Ms Akhomo holding brief for Issa for Respondent – Present