



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 44 OF 2017

IN THE MATTER OF CONTRAVENTION 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

PHILIP MARK BUSURU 1ST PETITIONER

WELDON KIBET KIRUI 2ND PETITIONER

VERSUS

THE INTERNATIONAL UNION FOR CONSERVATION OF

NATURE AND NATURAL RESOURCES (IUCN) 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

INTRODUCTION

1. The Petitioner brought this petition on 11.5.2017 seeking the following reliefs:-

(a) 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 17th of February, 1998 and Legal Notice Number 130 made on the 19th July, 1999 are unconstitutional, null and void in relation to the Employment Act, 2017.

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

(c) Damages for breach of Constitutional Rights of Kshs.10,000,000/= for each of the Petitioners.

2. In response the 1st Respondent filed Notice of Preliminary Objection dated 24.5.2017 objecting to the entire suit on the following grounds:-

(1) The 1st Respondent enjoys immunity from criminal and civil proceedings as contemplated under Article 2 of the Constitution of Kenya.

(2) That the instant suit offends Section 9 of the Privileges and Immunities Act, Chapter 179 Laws of Kenya which empowers the Cabinet Secretary – Foreign Affairs to confer Immunities and Privileges stated in part 1 to 4 of the schedule to the act to an international organization.

(3) That pursuant to Section 9 of the Privileges and Immunities Act and the consequent Legal Notice No. 130 of 1999, "THE PRIVILEGES AND IMMUNITIES (INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE AND NATURAL

RESOURCES) ORDER 1999” *the 1st respondent enjoys immunity from the civil proceedings herein.*

(4) That Section 9 of The Privileges and Immunities Act, Chapter 179 and Legal Notice No. 130 of 1999 remain in force and as such if the 1st respondent agrees to the question of diplomatic immunity being litigated within this suit (claim for redundancy) then in effect it will have submitted itself to the jurisdiction of this Court which is contrary to the invention of the diplomatic immunity it is now enjoying.

(5) That in HUMPREY GENERAL & THE 1ST Misc. Application 191 diplomatic immunity. KARIUKI KISIOH –VS- ATTORNEY RESPONDENT HEREIN, Nairobi HCC of 2004 Respondent herein enjoys

Brief Facts

3. The Petitioners were employed by the 1st respondent as Senior Finance Officer and Driver/Protocol Assistant until 15.12.2016 when they were called into a meeting by the 1st Respondents management team and notified that their contracts were not going to be renewed after they expire on 28.2.2017. That on the said date they were issued with termination letters invoking the end of term Clause under Section 4 of the Contract of Service but disregarded the provisions of their General conditions of employment as provided under Section 18 of the Contracts.

4. The Petitioners contended that their employment contracts were governed by the following:-

(a) The 1st Respondent’s Global Human Resource Policy of June, 2003 supplemented by the Human Resource Procedure manual.

(b) The 1st Respondent’s Code of Conduct and Professional Ethics for the Secretariat April, 2003.

(c) The 1st Respondent’s General conditions of Service for Eastern and Southern African Region 2012 version.

(d) The 1st Respondent’s condition of service for The International Union For Conservation Of Nature And Natural Resources in Kenya (2012), and

(e) The Employment Act of Kenya, 2007.

5. The Petitioners further contended that the 1st respondent is bound by Agreement between her and the Government of Kenya dated 17.2.1998 and Legal Notice Number 130 made on 19.7.1999 which conferred Privileges and Immunities to the 1st respondent from suit and Legal process. It is the Petitioners’ case that the said grant of immunity and privilege to the 1st respondent violated the Petitioners right to access to justice which is guaranteed by Article 48 of the Constitution which is the supreme law of the land. It is their further case that the Privileges and Immunities Act is inferior to the Constitution and therefore it is unconstitutional because it is inconsistent with the Constitutional right to access to justice.

6. The Petitioners further contended that their freedom from discrimination of work place guaranteed under International Labour Organisations Convention III and Article 27(1) and (2) of the Constitution has been violated through the abolition of the positions they were serving in at the 1st respondent. In addition they have contended that their right to be treated with human dignity guaranteed by Article 28 of the Constitution was violated because they were not notified of the termination before proceeding on leave; they were considered to accept termination letters and cleared before being paid their terminal dues; and by being given 3 days to prepare their handing over report covering 8 years period of service.

Submissions by 1st Respondent

7. The 1st respondent submitted that the Petition before the Court arises from termination of employment contract that occurred on 28.2.2016 and avers that she enjoys immunity from criminal and civil proceedings. She further submitted that the Privileges and Immunities Act Cap. 179 of the Laws of Kenya gives effect to the International Conventions that confer Privileges and Immunities to International Organisation within the Kenyan Borders. She urged that Article 2(5) and (6) of the Constitution adopt the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations as laws applicable in Kenya.

8. She further contended that on 17.2.1998 she signed an agreement with the Government of Kenya and thereafter Kenya Published Legal Notice No. 130 of 1999 which gave effect to the said Agreement. She further contended by dint of the said instruments, she enjoys immunity from suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties. She therefore urged that the Court lacks jurisdiction to determine the petition herein and as such it must withdraw its tools in line with the **Owners of Lilian S. –vs- Caltex (K) Limited [1986 – 1989] E.A. 305**. She relied on **Humphrey Kariuki Kisiah –vs- Hon. Attorney General & Another [2004] eKLR** where the High Court held that it had jurisdiction to determine the issue of Constitutionality of diplomatic immunity.

Second Respondent’s Submissions

9. The second respondent submitted that this court lacks jurisdiction to hear the petition herein because the 1st respondent enjoys Diplomatic Immunity by dint of Section 9 of the Privileges and Immunities Act Cap. 179 Laws of Kenya, and Legal Notice No. 130 of 1999, **Privileges and Immunities (International Union for the Conservation of Nature and Natural Resources) Order 1999** which conferred to the

respondent immunity from Civil Proceedings. She relied on *Creative Print House Limited –vs- East Africa Development Bank [2015] eKLR Gerald Killeen –vs- ICIPE [2005] eKLR Josephine Wairimu Wanjohi –vs-International Committee of the Red Cross [2015] eKLR and Kareni Njeri Kandie –vs- Alassane Ba & Another [2017] eKLR* to urge that courts have upheld the objection raised on ground of diplomatic immunity for international organisations conferred to them under Section 9 of the Privileges and Immunities Act of the Laws of Kenya.

Petitioners’ Submissions

10. The Petitioners submitted that the Preliminary Objection does not raise a pure point of law as it was held in the *Locus Classicus* case of *Mukisa Biscuits Manufacturing Co. Limited –vs- Westend Distributors Ltd. [1969] E.A. 696*. They further submitted that their suit is not an ordinary employment claim but a Constitutional Petition which seeks for the Constitutional interpretation of the instrument of immunity *vis-a-vis* the Constitution. That it is the Petitioners’ case that the Legal Notice No.

130 issued on 19.7.1999 by the second respondent illegally immunised the 1st respondent from legal suit or process and it is therefore unconstitutional to the extent that it limits the constitutionally guaranteed rights which the respondent has infringed upon. They submitted that unless the Court declares the Privileges and Immunities Act Cap 179 of Laws of Kenya unconstitutional, the constitutional authority will be eroded and minimised. They relied on *Nancy Macnally vs- ICIPE [2016] eKLR* where this Court dismissed a similar Preliminary Objection on ground that the petition was not about an ordinary employment claim but one calling for interpretation of the instruments granting immunity *vis-à-vis* the Constitution.

11. In conclusion the Petitioners submitted that the 1st respondent does not enjoy absolute immunity but restricted immunity. They contended that the petition arises from employment contract, which is a private law contract of which no immunity has been granted to the 1st respondent.

Analysis and Determination

12. The issues for determination herein are:-

- (a) *Whether the Preliminary Objection raised meets the threshold for a valid Preliminary Objection.*
- (b) *Whether the 1st respondent enjoys immunity from this Court’s jurisdiction in interpreting the instruments that confer immunity vis-à-vis the Constitution.*
- (c) *Whether the suit is likely to embarrass the Court if it arrives at a different decision.*
- (d) *Whether the suit is an abuse of the Court process.*

Threshold for a valid Preliminary Objection

13. A Preliminary Objection 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.”

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 Preliminary Objection in the *Karen Njeri Kandie Vs Alassane 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 Preliminary which meets the threshold set out by *Mukisa Biscuits* case aforesaid.

Immunity from Interpretation of the Instruments that confer

Immunity

15. There is no dispute from the facts pleaded and the reliefs sought that the Petition herein is not an ordinary employment claim but one which is challenging the constitutionality of the statute and instruments that confer to the 1st respondent privileges and immunity from civil suits and legal process. The Constitution is the Supreme Law in Kenya and all other laws including the statute and international laws bow to it. It is therefore in order for this court which has jurisdiction under Article 162(2) (a) and 165(5) of the Constitution to interpret the Constitution in employment and Labour relations dispute, to entertain a Constitutional petition that seeks interpretation of an instrument that confers immunity to an entity from Civil suits and legal process *vis-à-vis* the Constitution.

16. The foregoing view is fortified by the decision of Ndolo, J. in Nancy Macnally –vs- ICIPE, aforesaid, where she dismissed a similar Preliminary Objection in a petition that was in all fours with the petition herein. The judge held that:-

“I have looked at the petitioners’ prayers as contained in her petition and find that they traverse from Constitutional declarations to specific prayers for payment of dues. It seems to me therefore that this is not an ordinary employment claim. Rather, it calls for interpretation of the instruments granting immunity vis-à-vis the Constitution. This is clearly within the specialized jurisdiction of the Employment and Labour Relations Court to interpret the Constitution in employment and labour related matters... To uphold the Preliminary Objection as framed would in my view, amount to limitation of this jurisdiction leading to miscarriage of justice and missed opportunity to grow jurisprudence in this recent branch of law.”

17. The foregoing decision was impugned in appeal and the Court of Appeal while upholding the decision states thus:-

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

25

26

27. There cannot be any argument that the Employment and Labour Relations Court is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and Labour relations ... We are not in doubt too, that the relationship between the appellant and the respondent was not a private matter between the two parties but a public activity intrinsically connected to the operations of the appellant.”

18. In view of the foregoing persuasive and binding authorities, I find and hold that the Preliminary Objection is devoid of merits and it is overruled.

Conclusion and Disposition

19. I have found that a plea of immunity from legal process as raised by the 1st respondent herein meets the threshold of a valid Preliminary Objection and it should be determined at the earliest time possible because it goes to the jurisdiction of the Court. I have further found that this Court has jurisdiction to entertain a petition challenging the constitutionality of a Statute and instruments that confer to an international entity diplomatic immunity from civil suits and legal process like in the present petition. Consequently, the Notice of Preliminary Objection dated 24.5.2017 is dismissed. Costs shall be in the cause.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of October 2018

ONESMUS N. MAKAU

JUDGE