



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2193 OF 2015
(CONSOLIDATED WITH CASE NO. 2194 OF 2015)

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st July, 2017)

LUCY MUINGO KUSEWA.....CLAIMANT

AND

RENALDA MBOJE MJOMBA.....CLAIMANT

VERSUS

EMBASSY OF SWEDEN, NAIROBI.....RESPONDENT

RULING

1. The application before the Court is one dated 9.2.2016. The application was brought through a Notice of Motion filed on 8.2.2016 and brought under Section 12 of the Industrial Court Act, the Privileges and Immunities Act and under the inherent power of the Court.

2. The Applicant seeks orders that:

- 1. The Claimant's suit filed herein be struck out.***
- 2. The costs of the suit be borne by the Claimant.***
- 3. The cost of this application be provided for.***

3. The application is premised on the following grounds:

a) That Sweden is a sovereign state with all the privileges and immunities to which its status as a sovereign state entitles it. The Respondent, being the Embassy of the said sovereign state enjoys the said privileges and immunities.

b) That the Respondent enjoys immunity from criminal, civil, labour and Administrative jurisdiction of the Receiving State, Kenya.

c) That the Government of Sweden has not waived immunity nor has it consented to the

jurisdiction of Kenyan Courts with regard to the matters raised in the Statement of Claim.

d) That the Court lacks jurisdiction to entertain the claim by reason of the foregoing and cannot make any of the orders sought against the Respondent.

4. The Respondent filed their grounds of opposition on 30/5/2016 through the firm of Owino and Company Advocates. The grounds are as follows:-

1) That the application is incompetent and fatally defective for the following reasons:-

i) The Application is not based on any relevant provisions of the law.

ii) There is no basis in law to support the orders sought by the Applicant.

iii) The Application is not supported by an Affidavit or any Response.

2. That the application is premature and totally unwarranted on the following grounds:-

i) The Applicant has not filed a response to the Claim. The orders sought by the Respondent should be canvassed in the main suit.

ii) The issue of jurisdiction of the Honourable Court is a matter to be resolved by the Court after full hearing by the Court.

3. That the Applicant is not deserving of the orders sought for the following reasons:-

i) Grant of the orders sought would amount to violation of the Claimant's right to fair hearing under Article 50 of the Constitution of Kenya.

ii) Grant of the orders sought would amount to violation of the Claimant's right to access to justice under Article 48 of the Constitution of Kenya.

iii) The Applicant has come to Court with unclean hands on account of want of material disclosure.

4. That is otherwise frivolous, vexatious and an abuse of the process of this Honourable Court and should therefore be dismissed with costs.

5. The Parties agreed to canvas this application by way of written submissions. The Respondents herein filed their submissions on 29.9.2016 where they submit that this issue being a matter of jurisdiction is a question of law which should be resolved at the onset and not after the hearing of the case.

6. They also submit that Government of Sweden represented in Kenya by its Embassy cannot be sued in Kenya because of immunity.

7. They referred Court to the Vienna Convention on Diplomatic Relations, 1961 as read with the Privileges and Immunities Act Cap 179 which they submit grants Statutory Immunity to all Diplomatic Missions in Kenya and only where such immunity has been waived expressly can such a mission be subjected to proceedings in Kenyan Courts.

8. Article 31 (1) of Vienna Convention (supra grants immunity to any diplomatic agent and diplomatic mission from criminal, civil and administrative jurisdiction of the receiving state. The absolute immunity is qualified by exceptions which restrict the general immunity. They include the following:-

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 purposes 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”.

9. The Respondent cited several cases; see **Elkana Khamisi Samarere & Another vs. Nigerian High Commission (2013) eKLR, Thai-Europe vs. Government of Pakistan (1975) 3 ALL ER 96 and Karen Njeri Kandie & Alsanne Ba & Another (2015) eKLR** all which point out that the Local Courts cannot entertain claims whether criminal, civil or otherwise against a Foreign Sovereign unless immunity has been waived. The futility of such an action is based on the fact that execution of any judgment remitting from such a claim might impair relation between the Foreign Sovereign and the Receiving State.

10. The Claimant filed their submissions on 18/10/2016 where they aver that the absolute immunity doctrine is no longer applicable and that the immunity of the Respondent is waived by codified international law. They contend that employment contracts are matters *jure gestionis*, and therefore immunity cannot be invoked.

11. They submit that Courts in various jurisdictions and legal systems have gradually embraced the doctrine of restrictive immunity and that this has been necessitated by the extent to which the application of absolute immunity doctrine has occasioned injustices and undermined the internally recognized right to access justice.

12. They cited **I Congreso Del Partido (1981) 2 ALL ER 1064 (HL) cited in BAH v LIBYAN EMBASSY 2006 (1) BLR 22(IC)** where the Court held that:-

“to require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is in accepted phrases, neither a threat to the dignity of that state, nor interference with its sovereign functions...”.

13. They also cited **Rahimtoola vs. Nizam of Hyderabad & Another (1958) AC 379 at 418** in which Denning MR stated as follows:

“it is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of the Court of acknowledged impartiality than by arbitrarily rejecting jurisdiction....”.

14. The US Supreme Court in **Saudi Arabia vs. Nelson, 507 US 349 – Supreme Court 1993** also held as follows:

“.....under the restrictive, as opposed to the “absolute” theory of foreign sovereign immunity, a state is immuned from the jurisdiction of foreign Courts as to its sovereign or public acts (jure imperii), but not as to those that are private or commercial in nature (jure gestionis).....”

15. In the case of **BAH vs. LIBYAN EMBASSY 2006 (1) BLR 22 (IC)** the Botswana Labour Court was called upon to make a determination on whether an Embassy was diplomatically immuned to suits filed in the Courts of the receiving states where the subject matter was an employment contract. The Court held as follows:

“.....the doctrine of absolute immunity that was previously applicable in International law is no more. Days past when absolute immunity reigned supreme, a sovereign state was immuned irrespective of the nature of the activities which gave rise to the suit against the foreign sovereign state. The notion of sovereign immunity can safely be regarded as dead and buried, it is offensive to modern thinking and has now given way to restrictive immunity....”

16. In the Ministry of Defence of the Government of the United Kingdom vs. Joel Ndegwa (1983) eKLR the Court buttressed the application of restrictive immunity as follows:

“...it is apparent that there is no absolute sovereign immunity. It is restrictive. The test is whether the foreign sovereign or government was acting in a governmental or private capacity then the doctrine will apply otherwise it will not afford protection to a private transaction. The nature of the act is therefore, important...”

17. Similar views were expressed in the case of Talaso Lepalat vs. Embassy of the Federal Republic of Germany & 2 Others (2015) eKLR where the Court held *ex tenso* as follows:”

“While absolute immunity was presupposed to be inviolable, upto the 19th Century the need to impose restriction on State immunity became imminent when at the end of the 19th Century, States became increasingly involved in commercial activities. That led to the need to establish a more realistic and pragmatic approach to disputes of a purely commercial nature when one of the parties was a foreign State. A distinction in international law was thereafter created between public acts of a State (acts juri imperii) and private acts such as trading and commercial activity (acts jure gestionis).... In the United kingdom, the precedent on absolute immunity was broken in 1975 in the case of The Phillipine Admiral [1977]AC 373 and later in the oft-quoted decision of Lord Denning in Trendtex Trading Corp vs Central Bank of Nigeria [1977]QB 529. Similarly in South Africa, Margo J in Inter-Science Research and Development Services (pty) Ltd vs Republica Popular de Mozambique 1980 (2) SA III CT following Trendtex (supra) had no difficulty in finding that “there is good reason to believe that the rule of sovereign immunity has yielded to the restrictive doctrine.” Closer home, I have been pointed to the decisions in Samarere (supra) where the learned Judge stated that restrictive immunity has no place in our legal regime. I am of a different mind, with respect. I say so because the doctrine has received sufficient judicial and other recognition to be classified as a general rule of international law. Article 2(5) of the Constitution recognizes general rules of international law as forming “part of the law of Kenya.” It is very difficult to argue therefore that restrictive immunity in the present world order cannot apply and that is why I would only agree with my revered brother, Dingake J. in Bah vs Libyan Embassy 2006(1) BLR 22CIC where he cited with approval the dictum of Lord Denning MR in Rahimoola vs Nizam of Hyderabad & Anor [1958] AC 379 at 418 where he stated that; “It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of the Court of acknowledged impartiality than by arbitrarily rejecting jurisdiction ...” It will be noted that Lord Denning, ever the visionary, was making the above statement 20 years before the United Kingdom had formally acknowledged the doctrine of restrictive immunity. I have no hesitation in accepting that the doctrine is now well and alive in Kenya.....”.

18. I have considered the above submissions and I will delve into discussing what an employment contract is. An employment contract has been defined by ILO at il.org.ifpdial-labour-law-lang-ed as follows:

“the employment relationship is the legal link between employer and employees. It exists when a person performs work or services under certain conditions in return for remunerations....it is the key point of reference for determining the nature and extent of employer’s rights and obligation towards their workers”.

19. An employment relation would as submitted above fall under private law which is a branch of law that deals with relations between individuals and institution rather than relation between these and the government.

20. From the submissions cited, the doctrine of absolute immunity is no longer viable. Article 31 of the Privileges and Immunities Act states as follows:

“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:

a) A real action relating to private immovable property situated in the territory of a receiving State, unless he holds it on behalf of the sending State for the purposes 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....”.

21. The United Nations Convention on Jurisdictional Immunities of States and their Property state as follows under Part III:-

“Article II

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”.

22. By virtue of Article 2(5) of our Constitution 2010, general rules of internal 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 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.

24. It is therefore my finding that the Preliminary Objection raised has no basis this being a purely employment case. The Preliminary Objection is therefore dismissed. The main cause may now be set down for hearing.

25. Costs shall be in the cause.

Read in open Court this **31st day of July, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kalume for the Claimant

Miringo for the Respondent