



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 922 OF 2016

CYRIAQUE HAVYARIMANACLAIMANT

VERSUS

1. PERMANENT SECRETARIAT OF THE TRANSIT AND TRANSPORT CO-ORDINATION

AUTHORITY OF THE NORTHERN CORRIDOR1ST RESPONDENT

2. DONAT M. BAGULA2ND RESPONDENT

RULING

INTRODUCTION

1) The claimant was employed by the first respondent as Translator/conference officer on 1/8/2008 and worked until 6/12/2013 when he was dismissed for misconduct. He brought this suit on 6/12/2016 alleging that he was unfairly dismissed and prayed USD 801,726 as his rightful terminal dues. The respondents have in response denied liability for unfair termination and pleaded diplomatic immunity. In addition the respondents have filed notice of preliminary objection (P.O.) dated 8/6/2017 objecting to entire suit on ground that this court lacks jurisdiction to entertain the same by dint of Part II of the forth Schedule of the Privileges and Immunities Act Cap 179 Laws of Kenya, and Article 8 (c) (1) of the Northern Corridor Transit and Transport Agreement (NC-TTA). The claimant has opposed the PO and prayed that the suit be heard on the merits.

RESPONDENT'S CASE

2) Mr. Tsofwa, learned counsel for the respondents prosecuted the PO. He submitted that by dint of Article 8(e) (c) of the NC-TTA, the respondents enjoy immunity from all forms of legal process in all words spoken or written and all acts done by them in their official capacity. He explained that the first respondent is the Permanent Secretariat established by the NC-TTA which came into force on 6/10/2007. The NC-TTA member states include Kenya, DR Congo, Burundi and Uganda and the first respondent is the executive and Administrative organ of the Authority. That the decision to terminate the claimants services was made by the secretariat and affirmed by the Council of Ministers of the member countries both of whom enjoy immunity under Part II of the Fourth Schedule of the Privileges and Immunity Act Cap 179 Laws of Kenya.

CLAIMANT'S CASE

3) Ms. Waihenya, learned Counsel for the claimant opposed the PO. She submitted that the suit herein is an employment dispute founded under Article 41 (I) of the constitution of Kenya which guarantees every one fair labour practice. In her view, the claimant's rights have been infringed and reliefs sought are available in the said constitution and the employment Act. She argued that the claimant was junior officer and as such he was removed from the provisions of any instrument relating to diplomatic immunity by dint of Article 8(e) (1) of the NC-TTA. In addition she argued that the respondents were subject to the jurisdiction of this court because under Article 2(2) of the Head Quarters Agreement between Kenya and the NC-TTA, the Authority has a right to enter into contracts and participate in legal proceedings.

4) She further contended that being domiciled in Kenya, the respondents were subject to the laws and jurisdiction of Kenya especially in matters related to employment and commercial contracts. She observed that the personnel rules and regulations of the Authority do not invoke the Immunity and Privileges Act and submitted that the said personnel rules are in *pari materia* with the provisions of the Employment Act. She relied on Jarallah Almalik and Another VS Cherylyn Reyes, R Vs Republic of Iraq, Cudak VS Lithuania and a study by the Yale Law School in 2015 titled:

State practice on Sovereign Immunity in Employment disputes involving embassies and consular staff to urge this court to follow the new trend in the international law where courts are piercing the diplomatic immunity for diplomatic staff in labour disputes involving subordinate staff. She submitted that the R Vs Iraq case involved a translator like this case and it was held that a translator was a subordinate officer because his position did not participate in formulation of policy but only translating what he heard or read.

ANALYSIS AND DETERMINATION

5) The issue for determination herein is whether this court has jurisdiction to determine the dispute herein. The dispute herein involves a former officer of the first respondent and the executive secretary of the first respondent. It is therefore an internal dispute within the organs established by the Treaty. Under Article 8(e) 1 (iv) (v) of the Northern Corridor Transit and Transport Agreement, the first respondent and its senior expatriate staff are accorded diplomatic immunities and privileges in line with the Vienna Convention. In addition, Article V of the head quarters Agreement between the government of the Republic of Kenya and the Northern Corridor Transit Transport Coordinator Authority grants the Executive Secretary privileges and immunities specified in Part II of the Fourth Schedule of Privileges and Immunities Act Cap 179 Laws of Kenya. Section 1 of Part I of the Fourth Schedule of the Act grants immunities and privileges to diplomatic organization and its officials from all suit and legal process. Article V 2(g) of the NC-TTA further grants other official of the authority save for nationals or permanent residents of Kenya, are granted immunity from all legal process of every kind, in respect of words spoken or written and all acts done by them in their official capacity.

6) In this case, it is clear that both first respondent and the second respondent, her Executive Secretary enjoyed absolute immunity and privilege from suit and legal process for acts done while performing the duties of the authority. The reason why they were sued in this suit concerns acts done by them on behalf of the Authority, namely, terminating the contract of service for the claimant. It has not been alleged that they acted outside their mandate under the NC-TTA. I therefore find and hold that the respondent are excluded from the jurisdiction of this court by dint of Article 8e 1(v) of the NC-TTA, Article V 1 and 2 (g) of the Headquarters Agreement and Section 1 of Part I of the Fourth Schedule of the Privileges and Immunities Act Cap 179 of the Laws of Kenya. In allowing the Po, I have satisfied myself that the authorities cited by the claimant are distinguishable from this suit.

7) As a matter of parting shot, I have considered the competence of the suit in line with provision of Article 2 of the Headquarters Agreements and formed the opinion that the suit against the respondents is incompetent because it is not against the Authority. Article 2 provides that:

“the authority, as an inter-governmental organization, whose treaty has been deposited with the United nations Economic Commission for Africa, shall have in Kenya the capacity in its own

name to enter into contract, to acquire and dispose of immovable or movable property and to participate in legal proceedings”.

DISPOSITION

8) For reasons that this court lacks jurisdiction due to the respondent’s diplomatic immunity and privilege from suit and legal process in Kenya, I allow the PO and strike the suit with no order as to costs.

Dated signed and delivered this 3rd November 2017

O. N. Makau

Judge