



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1358 OF 2015

EUGINE LINYULU ISALAMBO.....CLAIMANT/RESPONDENT

VERSUS

BARBRO EKVALL.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant seeks through the notice of motion application dated 23rd May 2016 for orders that the Claimant's suit be struck out with costs to the Respondent and that the Claimant do pay the Respondent costs of the application and costs of the suit. The motion was supported by grounds on the face of the motion which were to the effect that the Respondent is a Swedish national who is also an officer of the government of Sweden working at the Embassy of Sweden against whom no jurisdiction would be exercised on the basis of diplomatic immunity and that the Claimant's suit was thus barred by the principle of diplomatic immunity. The application was supported by the affidavit of the Respondent. The affidavit was to the tenor that the Court has no jurisdiction by virtue of the provisions of the Vienna Convention on Diplomatic Immunity as well as the Privileges and Immunities Act, Cap. 179 and that the suit was thus incompetent and otherwise an abuse of the court process.
2. The Claimant/Respondent filed a replying affidavit sworn on 8th June 2016 and filed on 10th June 2016. The Claimant/Respondent deposed that the Respondent/Applicant was indeed employed by the embassy of Sweden but disputed that the Respondent enjoys diplomatic immunity. The Claimant deposed that even if it is true that the Respondent enjoys diplomatic immunity, which is denied, the Claimant asserts that diplomatic immunity is not absolute. The Claimant further deposed that the employment created between him and the Respondent was purely of a private relationship of employer employee and that in creating this relationship the Respondent acted privately and not on behalf of the sending Nation and as a result diplomatic immunity cannot be invoked. The Claimant deposed that this Court has jurisdiction to entertain the matter as per the provisions of the Vienna Convention on Diplomatic Immunity and as per the Privileges and Immunities Act (Cap 179 of the Laws of Kenya). The Claimant/Respondent asserted that the suit was properly before the court and is not an abuse of the court process.
3. The Respondent/Applicant filed submissions on 30th June 2016. In the submissions the Respondent/Applicant submitted that the grounds for striking out the suit are that the Respondent is an officer of the government of Sweden against whom no jurisdiction would be exercised by this court on the basis of diplomatic immunity and that the claim is barred by the principle of diplomatic immunity. It is submitted that the Respondent/Applicant works as a First Secretary,

Head of Migration/Visa Section and that the Respondent is therefore a diplomat. The Respondent/Applicant submits that as a diplomat the Vienna Convention on Diplomatic Relations as domesticated by Kenya through the Privileges and Immunities Act, Cap. 179 applies. The Respondent/Applicant cited Article 31 of the Convention and submitted that the Article does not exclude diplomatic immunity in actions relating to private contracts entered into between a diplomat and their domestic staff in the course of their diplomatic assignments. The Respondent/Applicant submitted that the employment relationship between the Respondent/Applicant and the Claimant/Respondent is not an exception under the third exception in Article 31 of the Vienna Convention as the employment relationship was not a professional or commercial activity and that the employment of a domestic worker was necessary for the discharge of the Respondent/Applicant's duties as a diplomat and cannot be said to be outside of the scope of duty. Reliance was placed on the provisions of Section 7(1) of Part III of the Privileges and Immunities Act cap 179 of the Laws of Kenya. The Respondent/Applicant submitted that the Court must down its tools once it finds that it has no jurisdiction as held in the case of **Owners of Lilian S v Caltex (K) Ltd [1986-1989] EA 305**. The Respondent/Applicant further submitted that it is trite that litigants should not burden the Court with suits that are bound to fail. The Respondent/Applicant submitted that sovereign immunity refers to a fundamental principle of international law and cited the case of **Mbugua Mukara Githuku v Robinson Nganga Chege & Another [2015] eKLR** which defined sovereign immunity as a principle that provides states immunity from legal suits in other states except where this immunity is waived by consent or otherwise limited by law. The Respondent/Applicant stated that justification for such immunity was also addressed in the case of **Thai-Europe v Government of Pakistan [1975] 3 ALL ER 96** cited with approval in the **Mbugua Githuku v Robinson Chege & Another** case above. The Respondent/Applicant also cited the cases of **Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa 91982-1988) 1 KAR 135** as well as **Jimmy M. Ndirangu & Another v RQMS (T) Baker & Another HCCC 77 of 2005** (unreported) where courts have upheld immunity where employees of a diplomatic immunity have been sued. The Respondent/Applicant submitted that the suit is not sustainable and is bound to fail and the court should strike it out with costs to the Respondent/Applicant.

4. The Claimant/Respondent on his part submitted that the suit he had instituted was a labour dispute that was seeking to recover terminal benefits owed to him by the Respondent as a result of the wrongful termination of the contract of employment and that the Respondent was employed by the Swedish embassy while the Claimant was employed by the Respondent as a domestic worker offering his services as a professional domestic worker. The Claimant submitted that the nature of employment was purely domestic and did not at any material time affect or influence the Respondent's official tour of duty as a diplomat as alleged. The Claimant/Respondent submitted that the determination as to whether one in his/her course of employment enjoys diplomatic immunity is not a question of law but a question of fact which must be subjected to strict proof. Section 16 of the Privileges and Immunities Act was cited and the Claimant submitted that the Respondent had not demonstrated that she enjoys such immunity as she had failed to disclose such certificate as provided for under the law. He submitted that in the supporting affidavit the Respondent/Applicant attaches a passport stamped diplomatic immunity which is below the standard of proof required under the section and that the Court cannot engage in surmise or conjecture in relying on the document to demonstrate proof of the status of diplomatic immunity in light of the express provisions of statute as to standard required to establish the status of diplomatic immunity. The Claimant/Respondent submitted that diplomatic immunity is not absolute and that it cannot be invoked in all instances in light of Article 31 of the Vienna Convention. The Claimant/Respondent submitted that he had brought the claim in respect of terminal dues as a result of his wrongful termination of contract of employment in which he was previously employed as a domestic worker which he offered as a professional and that the word professional was defined in the dictionary as following an occupation as a means of livelihood or for gain. He submitted that the work he performed had no bearing on the Respondent's official capacity and therefore had no bearing on the Respondent's diplomatic functions and it did not have a bearing on the Respondent's sending nation and neither did the contract of employment have a bearing on the receiving nation and the same cannot be brought within the ambit of

bilateral relations and the doctrine of diplomatic immunity cannot be invoked. The Claimant/Respondent submitted that the Respondent had failed to demonstrate that the jurisdiction of the Court is ousted and that the Court is vested with jurisdiction to entertain the matter. The Claimant/Respondent submitted that the Respondent's application dated 23rd May 2016 is without merit and should be dismissed with costs. He relied on the cases of **Urbanus Mutiso v Susan Kavanagh [2012] eKLR** and **Tanad Transporters Ltd v United Nations Children's Fund [2009] eKLR**.

5. The spectre of diplomatic immunity has been raised. The Respondent asserts that the Claimant is non-suited against her as she enjoys diplomatic immunity. The Claimant asserts that there is no proof that the Respondent/Applicant has diplomatic immunity as no certificate has been availed in terms of Section 16 of the Privileges and Immunities Act cap 179. Section 16 provides as follows:-

16. If in any proceedings any question arises whether or not a person is entitled to the benefit of an immunity or privilege, or to exercise any power, under this Act, a certificate given by the Minister stating any fact relating to that question shall be conclusive evidence of that fact, and any such certificate purporting to be signed by the Minister shall be presumed to have been signed by him until the contrary is proved.

6. The Vienna Convention provides as follows under Article 31:-

1. 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 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.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

7. The Respondent has availed a copy of her passport which indicates diplomatic immunity but the fact that no certificate is annexed would not of itself disentitle the Respondent/Applicant to the orders sought since the fact of the immunity enjoyed by the diplomat has not been brought strictly within the ambit of Section 16. What the section does provide is that the certificate by the Minister is conclusive evidence of the fact of immunity. It does not provide that is the only evidence of diplomatic immunity. Such reasoning would fly in the face of the Vienna Convention and would in effect require that until a diplomat avails a letter or certificate from the Minister then there is no immunity conferred by that status of being a diplomat. The Court of necessity would require some proof of the fact that the person belongs to the class entitled to be exempt from the jurisdiction of the court. In as far as the diplomatic passport attached, there is proof on it that the Respondent is a

diplomatic agent within the meaning of the Vienna Convention and is as such entitled to the benefit of the protections in the Vienna Convention and the Privileges and Immunities Act Cap 179 Laws of Kenya.

8. In the ILO publication on **Domestic Workers in Diplomats' Households - Rights Violations and Access to Justice in the Context of Diplomatic Immunity. Analysis of Practice in Six European Countries** by **Angelika Kartusch & Heike Rabe** states at page 16 of the publication as follows in regard to the provision of Article 31(1)(c) of the Vienna Convention:-

While this exception covers for instance paid employment of a diplomat outside the mission or the provision of professional services for remuneration by a diplomat, the contract between a diplomat and a private domestic worker is generally considered not a "commercial activity". Therefore, employment relationships between private domestic workers and diplomats are not exempted from a diplomat's immunity. Diplomats are not obliged to give evidence as witnesses (Art. 31 (2)). Immunity also comprises immunity from execution, except for the three exceptions in regard to administrative and civil proceedings mentioned above and provided that the inviolability of the diplomat's residence is respected (Art. 31 (3)). The Convention also specifies that immunity from the host state's jurisdiction does not exempt diplomats from the jurisdiction of their sending state (Art. 31 (4)).

9. The issue of immunity in respect of claims by domestic servants has been the subject of decisions in the United Kingdom and Northern Ireland. In **Al-Malki and another v Reyes and another (Secretary of State for Foreign and Commonwealth Affairs and others intervening)**[2015] EWCA Civ 32 (also reported in the Weekly Law Reports as [2015] WLR (D) 75) the Court of Appeal in a decision handed down on 5th February 2015, Lord Dyson MR, sitting with Arden and Lloyd Jones LJJ, held that

*as a matter of ordinary language, a contract for the provision of services which were incidental to family or domestic daily life was not "commercial activity". That meaning was consistent with the picture which emerged from a consideration of the scheme of the 1961 Convention as a whole. Thus, if the diplomatic agent did in the receiving state what he was sent by the sending state to do, what he did was covered by immunity, but, if he embarked on a private activity for profit, he became subject to the jurisdiction of the receiving state in relation to that activity: see **Denza, Diplomatic Law, 3rd ed (2008), p 305**. The fourth recital to the Convention explained that the purpose of the immunities conferred was not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states. The functions were listed in article 3.1(a)-(e). The employment of persons to provide domestic services in a diplomatic mission or an official diplomatic residence in the receiving state was conducive to the performance of diplomatic functions.*

10. To paraphrase Lord Dyson MR, the purpose of the immunities conferred is not intended to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions. From the above, it is clear that commercial activity as expressed in the Vienna Convention does not apply to activities incidental to daily life but rather to commercial activities engaged in for personal profit outside official duties. The upshot of the foregoing is that the action by the Claimant is outside the jurisdiction of the Court as the court cannot exercise jurisdiction over the Respondent in civil process due to her status. As was held in the case of **Motor Vessel Lilian 'S' v Caltex (K) Ltd [1989] KLR 1** (also reported in East Africa reports as [1986-1989] EA 305), jurisdiction is everything. Without it I have no power to take one more step and have to down my tools. In the premises the suit is struck out with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of July 2016

Nzioki wa Makau

JUDGE