



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 1758 OF 2015

ISHAK MOHAMED.....CLAIMANT/RESPONDENT

VERSUS

LIBYAN EMBASSY.....RESPONDENT/APPLICANT

RULING

1. The application before the Court is the Respondent/Applicant's Notice of Motion application dated 19th November 2015 and filed on 20th November 2015. Through it, the Respondent seeks to have the memorandum of claim struck out with costs. The grounds for the application are expressed on the face of it, to wit, that the Respondent enjoys absolute diplomatic immunity from suits regarding any claims before this Court and that the state of Libya has not waived expressly the diplomatic immunity of its representative in Kenya. The Respondent's motion was supported by the affidavit of Jacob Auma Okoth Advocate. In brief, the affidavit was to the effect that the Respondent enjoys full diplomatic immunity from suit and that the claim herein does not fall within the exceptions under the Vienna Convention on Diplomatic Relations 1961 or the Privileges and Immunities Act 1970.

2. Mr. Adera urged the application on 21st June 2016. He submitted that the application seeks to strike out the memo of claim filed in this Court on 1st October 2015 for the main reason is that the court lacks the jurisdiction to entertain, hear and determine this claim. He relied on the provisions of Article 2(5) as well as Article 2(6) of the Constitution of Kenya. He also relied on the Vienna Convention on Diplomatic Relations 1961, more specifically articles 1(f), 22, 29, 30, 31, 32, 37, 38 and 39. He submitted that the Respondent enjoys absolute diplomatic immunity from civil process in this Country. He stated that the provisions of Article 22(1) and 31(1) of the Vienna Convention as read together with the Privileges and Immunities Act 1970 confer absolute immunity on the state of Libya. In that regard he relied on case of **Ministry of Defence of the Government of the United Kingdom v. Joel Ndegwa [1983] eKLR**. He submitted that the Court of Appeal was emphatic that in international law the court cannot entertain suits against the persons and institutions that are privileged. He relied on case of **Elkana Khamisi Samarere & Anor. v. Nigerian High Commission [2013] eKLR** where Rika J., the predecessor of the Court upheld diplomatic immunity. Further reliance was placed on the case of **Alfred Kioko Muteti v. Timothy Miheso & Embassy of Chile [2015] eKLR** where a similar objection was upheld by the Aburili J. He submitted that the court specifically stated Embassy of Chile enjoys absolute and privileged immunity and proceeded to dismiss the suit. The last case cited was the case of **Twictor Investments Ltd. v. Government of United States of America [2003] eKLR** where a similar objection was upheld by Hayanga J. (as he then was). He submitted that firstly, the Respondent being part of a sovereign, enjoys absolute diplomatic immunity and cannot be impleaded before this Honourable Court. Secondly, the Respondent has not waived its immunity and specifically deposed it has no intention of waiving its

immunity to bring it within the jurisdictional ambit of the Court. He stated that the position as captured under Article 32 of Vienna Convention on Diplomatic Relations that a sovereign can only be impleaded upon express waiver of its immunity. Lastly, he submitted that the Respondent is not a legal person and that the position at law is that only legal persons can be impleaded before a court. According to **Black's Law Dictionary** an embassy is defined as a building in which a diplomatic body is located and it is the residence of the embassy. He submitted that the Law Dictionary goes on to define embassy as the mission, business and function of an ambassador. He stated that from this definition, the Respondent is simply the building or premises that houses the Libyan ambassador to Kenya and therefore not a legal person. Article 1(f) of Vienna Conventions makes provision on premises and Article 22(1) goes on to say the premises of an ambassador are inviolable on judicial process. Based on that he respectfully submitted that the Respondent is just a building a non-legal person and cannot be impleaded before this Honourable court. He submitted that in the Replying Affidavit at para. 9, the Claimant had raised the case of **Bah v. Libya Embassy 2006** which appears to be a foreign case as it cites the holding of Justice Dingake and that that case is neither persuasive nor binding on this court because it is based on a legal regime that does not obtain in Kenya. He submitted that there are 2 types of diplomatic immunity one is absolute diplomatic authority that obtains in Kenya and the other is restricted diplomatic immunity that obtains in other jurisdictions. He stated that the case cited by Claimant/Respondent is based on concept of restrictive diplomatic immunity that obtains in other jurisdictions. He urged the Court to uphold the objection.

3. The body of conventions and acts dealing with sovereigns and diplomats is what gives rise to the diplomatic immunity claimed by the Respondent. Under the Vienna Convention on Diplomatic Relations, Article 22 Convention makes provision as follows:-

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

4. Further in Article 31(1) of the Vienna Convention on Diplomatic Relations there is provision as follows:-

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.

5. The Industrial Court has had occasion to consider the issues raised in the application. In the case of **Samarere & Anor. v. Nigerian High Commission**, my brother Rika J. held that:-

The Industrial Court would be acting in violation of the principles concerning the sovereign equality of the States, the maintenance of international peace and security, and promotion of friendly relations among nations. The purpose of diplomatic privileges and immunities is not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions

of representing States. The intervention of the Industrial Court in the dispute would have ramifications for Kenya's own Diplomatic Missions abroad.

There are certain States that adopt the principle of restricted State Immunity. By this principle, a foreign State is allowed immunity from the receiving State Courts, except as provided by an Act of Parliament governing Foreign States Immunities. Australia for example enacted the Foreign States Immunities Act of 1985, setting out a number of categories which are exceptions to the immunity of a foreign State, among them being contracts of employment. There is no such legislation in Kenya restricting foreign States immunities, in employment contracts.

The Court has not come across any legislation that allows it to adopt the approach of restrictive immunity. The concept has evolved under customary international law. Absolute immunity is no longer recognized as the dominant principle, as exemplified by the adoption on 2nd December 2004, of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Convention is however yet to come into force, and cannot properly be receivable as a source of the Kenyan law under our Constitution.

In the view of the Court, the Nigerian High Commission must continue to enjoy unrestricted Immunity from the judicial process of the Industrial Court, considering the existing legal framework.

6. In the Botswana case of **Bah v. Libya Embassy 2006**, cited by the Claimant/Respondent, Dingake J. held as follows:-

The Vienna Convention on Diplomatic Immunities and Privileges as incorporated into the laws of Botswana recognizes the existence of certain exceptions to the immunity of a diplomatic agent to jurisdiction of the courts of Botswana. The Diplomatic Immunities and Privileges Act seeks to emphasize the application of immunity on matters which are necessary for the functional needs of a diplomatic mission or agent, hence the acceptance of exceptions to the rule on immunity in respect of matters which are of a non-functional importance to the duties of a diplomatic agent. The Act draws a distinction between the Diplomatic agent when conducting sovereign acts (*acta jure imperii*) and those done as any other individual (*acta jure gestionis*). In the case of the latter, the diplomatic agent is shorn of his/her immunity.

7. The Courts in our realm have consistently held that a sovereign cannot be impleaded unless diplomatic immunity is expressly waived as the laws in Kenya applies the non-restrictive type of diplomatic immunity unlike the Republic of Botswana which applies the restrictive approach of diplomatic immunity clearly demonstrated in the case of **Bah v Libyan Embassy**. It was also urged that the Libyan Embassy is not a juristic person. The definition of an embassy in the **Concise Oxford English Dictionary** is as follows:-

The official residence or offices of an ambassador.

Black's Law Dictionary Ninth Edition defines embassy as follows:-

The building in which a diplomatic body is located especially the residence of the ambassador.

8. Can a building or residence be a juristic person capable of suing and being sued? Strictly, not really. However, in the Court's view, the expression embassy or high commission encompasses more than the building. It refers to the mission or representation of the sovereign in the receiving state and extends beyond the building. The suit could be instituted when immunity is waived and the reference to the sovereign as a defendant or respondent may therefore be made either by naming the state or the embassy or high commission in case of the Commonwealth.

9. The United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 is yet to come into force and therefore cannot be of aid to the Claimant as Article 10 and 11 of that Convention

would have been of some comfort if it were applicable. Its lengthy preamble reads as follows:-

The States Parties to the present Convention, Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law,

Having in mind the principles of international law embodied in the Charter of the United Nations,

Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area,

Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property, Affirming that the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention,

Have agreed as follows: (the Convention lists 33 articles dealing with various areas such as property, persons, immunities, liabilities and process including service and execution. It also has an annex to the Convention)

10. As enunciated by Rika J. in the case of **Samarere & Anor v Nigerian High Commission**, diplomatic missions enjoy immunity from process in the case of employment matters as there is no law permitting the restrictive application of diplomatic immunity. The upshot of the foregoing is that there is no capacity to entertain the suit. In the premises the application by the Respondent must succeed. The suit is struck off but with no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of July 2016

Nzioki wa Makau

JUDGE