



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO 67 OF 2015**

**NANCY MACNALLY.....PETITIONER**

**VERSUS**

**INTERNATIONAL CENTRE OF INSECT PHYSIOLOGY**

**AND ECOLOGY (ICIPE).....RESPONDENT**

**RULING**

**Introduction**

1. The Petitioner, Nancy McNally was an employee of International Centre of Insect Physiology and Ecology (ICIPE) from 17th March 2014 until 1<sup>st</sup> November 2014 when her employment was terminated. Following her termination, she brought a petition claiming violation of her rights under the Constitution and the law. She also seeks a declaration that the Privileges and Immunities (International Centre of Insect Physiology and Ecology) Order, 1989 is inconsistent with the Constitution.

2. The Petitioner further seeks a declaration that Section 45 of the Employment Act is inconsistent with Articles 28 and 41 of the Constitution.

**Preliminary Objection**

3. Upon being served with the petition, the Respondent gave notice of preliminary objection to the effect that the Petition should be struck out on the following grounds:

a) That the Respondent is a holder of immunity under the Privileges and Immunities Act (Chapter 179, Laws of Kenya) and is therefore immune to legal process;

b) That the Respondent entered into a Host Country Agreement with Kenya on 27<sup>th</sup> November 1986 by which the Respondent was granted privileges and immunity from legal process as provided under Article 27 of the ICIPE Charter; and

c) That the petition is in breach of the express provisions of Sections 9 and 11 of the Privileges and Immunities Act (Chapter 179, Laws of Kenya), Article 27 of the ICIPE Charter and Article 2(5) of the Constitution as the Respondent is immune from suit and legal process and has not waived that immunity, consequently the petition ought to be dismissed with costs to the Respondent.

4. It is this objection that is the subject of this ruling.

### **The Petitioner's Reply**

5. The Petitioner filed a replying affidavit on 25<sup>th</sup> July 2016 in which she states that the Privileges and Immunities Act is not superior to the Constitution and the Employment Act. She adds that employers enjoying diplomatic immunity should not be allowed to break the law.

6. The Petitioner goes on to state that in as far as the Privileges and Immunities Act and the Host Country Agreement purport to give the Respondent a blank cheque to violate the Constitution and the Employment Act, they are unconstitutional.

### **The Respondent's Submissions**

7. In its submissions filed on 19<sup>th</sup> August 2016, the Respondent states that it is an international intergovernmental research organisation established by a Charter to which the Government of the Republic of Kenya subscribed as a founder member on 27<sup>th</sup> November 1986.

8. The Charter declares Nairobi within the Republic of Kenya as the ICIPE world Headquarters and grants the Respondent full international status and personality, as an autonomous, non-profit making research and training institute.

9. The Charter further declares that the Government of the Host Country, Kenya where its world Headquarters is situated and other subscribers to the Charter shall, subject to negotiations and agreements with individual governments, accord the Respondent rights, powers, privileges, immunities and other conditions necessary to enable it to operate effectively and efficiently in carrying out its mandate and objectives.

10. The Respondent also makes reference to the Privileges and Immunities (International Centre of Insect Physiology and Ecology) Order, 1989 which recognises the Respondent as an organisation to which Part IV, Section 9(1) and (2) of the Privileges and Immunities Act applies. The Respondent adds that under Section 3(b), ICIPE enjoys the privileges and immunities specified in paragraphs 1, 4 and 5 of the 4<sup>th</sup> Schedule to the Act. Specifically, paragraph 1 grants the Respondent immunity from suit and legal process.

### **The Petitioner's Submissions**

11. In her submissions filed on 20<sup>th</sup> September 2016, the Petitioner asserts her right to fair labour practices as guaranteed under Article 41 of the Constitution of Kenya, 2010. She states that the jurisdiction of this Court is derived from the Constitution and that she has a right under Article 22 to move the Court for the enforcement of her rights.

12. The Petitioner contends that the immunity from legal process granted under Part 1 of the Schedule to the Privileges and Immunities Act is subordinate to the Constitution which is the supreme law. It is the Petitioner's case that the Respondent cannot assert a right to immunity under a law enacted in the 1970s to bar her from enforcing her constitutional and legal rights.

13. The Petitioner further submits that the proceedings from which the Respondent seeks absolute immunity are not ordinary proceedings. In this regard, the Petitioner asks the Court to interpret the very immunity under which the Respondent seeks refuge.

14. The Petitioner also advances the argument that the Respondent enjoys restrictive rather than absolute immunity pointing out that the Respondent is bound by the provisions of the Employment Act.

## Determination

15. The issue for determination in this application is whether the Respondent has laid before the Court a preliminary objection which would lead to dismissal of the petition *in limine*.

16. Reference was made to the definition of a preliminary objection found in the well-known case of ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Limited [1969] EA 696*** where it was stated:

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law and is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

17. In advancing the Respondent’s case, Counsel referred to Section 9(1) of the Privileges and Immunities Act which provides that:

***“This section shall apply to an organization which the Minister may, by order, declare to be an organization of which Kenya, or the Government, and one or more foreign sovereign powers, or the government or governments thereof, are members.”***

18. Reference was also made to Article 27 of the ICIPE Charter which provides as follows:

***“Upon the entry into force of this Charter, the ICIPE Company registered under the Companies Act of Kenya (Cap 486), shall subject to the provisions of that Act cease to operate as such company and shall in lieu thereof assume the status, rights, powers, privileges and immunities of an intergovernmental organization.”***

19. The Court was further referred to Article 2(5) and (6) of the Constitution of Kenya, 2010 which incorporates the general rules of international law and ratified treaties and conventions as part of the law of Kenya under the Constitution.

20. From the foregoing provisions, it is not in dispute that the Respondent enjoys immunity pursuant to duly recognised legal instruments. The question is whether the Court has jurisdiction to entertain the petition in spite of this immunity.

21. Counsel for the Respondent relied on the decisions by **Mugo** and **Onyango JJ** in ***Gerald Killeen v International Centre of Insect Physiology & Ecology (ICIPE) [2005] eKLR*** and ***Karen Njeri Kandie v Alassane BA & Another [2012] eKLR*** where the learned Judges dismissed *in limine* claims filed against bodies enjoying immunity from suit and legal process. The decision by **Onyango J** in the ***Karen Njeri Kandie Case*** was confirmed by the Court of Appeal in Civil Appeal No 20 of 2013.

22. In seeking to distinguish the ***Karen Njeri Kandie Case*** from the present petition, Counsel for the Petitioner submitted that part of the Petitioner’s prayers have to do with interpretation of the very immunity under which the Respondent seeks refuge.

23. In her submissions filed on 20<sup>th</sup> September 2016, the Petitioner states that the rights to fair labour practices guaranteed under Article 41 of the Constitution of Kenya, 2010 confer automatically on every person by reason of being human and as provided under Article 19(3)(a) are not granted by the State. It follows therefore that the State cannot, through an Act of Parliament subordinate these rights, abrogate or limit them except as contemplated by the Constitution.

24. The Petitioner further submits that there should be no injury without a remedy, meaning that an employee who claims violation of their rights by an employer should not be sent away by the Court on the basis of immunity status granted to the employer by the State.

25. It is the Petitioner's view that the immunity granted to the Respondent is restrictive. In this regard, the Court was referred to the decision in *Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank [1999] eKLR* where the Court of Appeal held that in enacting the Privileges and Immunities Act, Parliament did not intend to grant absolute immunity for all manner of transactions in the nature of a *carte blanche*.

26. In applying the *Tonoka Case* in *Josephine Wairimu Wanjohi v International Committee of the Red Cross [2015] eKLR* **Sergon J** held that when dealing with diplomatic immunity, the test ought to be whether the acts complained of are within the governmental or private sphere.

27. In have looked at the Petitioner's 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 a 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 as defined by **Majanja J** in *United States International University (USIU) v Attorney General [2012] eKLR*.

28. To uphold the preliminary objection as framed would in my view, amount to limitation of this jurisdiction leading to miscarriage of justice and a missed opportunity to grow jurisprudence in this nascent branch of law.

29. For the foregoing reasons, the preliminary objection raised by the Respondent is overruled with costs being in the petition.

30. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI**

**THIS 20<sup>TH</sup> DAY OF DECEMBER 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Ms. Kethi Kilonzo for the Petitioner

Ms. Ouma for the Respondent