



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CUASE NO. 487 OF 2015

YAKUB IBRAHIM CLAIMANT

VERSUS

INTERNATIONAL COMMITTEE OF THE RED CROSS RESPONDENT

RULING

1. On 28th May 2015 the Respondent filed Notice of preliminary objection on the grounds that the court does not have jurisdiction to entertain and determine the suit as the Respondent enjoy complete immunity against legal process in Kenya in accordance with Privileges and Immunities Act [Chapter 179 Laws of Kenya] as read together with Privileges and Immunities (International Committee of the Red Cross) Orders, 1996.

2. The Respondent submitted that this is an international organisation recognised in law and under 1966 order which granted immunity against any litigation in Kenya. There is an agreement between the government of Kenya and the Respondent which grants immunity to the Respondent against any litigation in Kenya. The suit filed by the Claimant herein go contrary to such immunity. This claim should be struck out.

3. On his part, the Claimant submitted that under article 2 of the constitution, any agreement between the Respondent and any party is subservient to the constitution. Any agreement contrary to the application of article 41 of the constitution on fair labour practices is contrary to access to justice. Where granted immunity is an impediment to access to justice the constitution must prevail. To rely on such immunity is to make the Respondent be their own judge in a case of unfair labour practice and thus contrary to the principles of natural justice. The actions of the Respondent have waived the immunity.

4. The Claimant also submitted that under the Respondent Staff Regulations they provide that matters of employment are subject to national law and the contract of employment shall be in accordance with local law. The Respondent complained to the police against the Claimant thus opening themselves to local law ad waived immunity. The immunity granted by the orders of 1966 and 1997 is to the Respondent staff and not the organisation.

Determination

5. Article 2 of the Constitution declares the constitution as the supreme law of the Republic of Kenya thus;

2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

6. Such supremacy is in application is also extended to all treaties or conventions ratified by Kenya thus;

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

7. With this recognition, the Claimant submitted that even where the Respondent enjoys immunity under orders made between them and the government of Kenya, such was waived by the actions of the Respondent in lodging criminal complaint against the claimant. However in employment and labour relations, there is distinctive separation between criminal and civil matters and one does not automatically override the other. Where there is a criminal charge, that does not bar an employer from commencing employment related sanction on the basis that criminal proceed have commenced or are anticipated. Equally, an employee cannot be barred from commencing employment and labour claims on the basis that there exists criminal complaints against such an employee. In this regard therefore, a criminal complaint against the Claimant cannot be a good basis to infer the lifting of immunity against the Respondent so as to bar any action before this court. See **Charles Manono Onchiri versus Kenya National Hospital & 2 others**.

8. On the application of the Privileges and Immunities Act [Chapter 179 Laws of Kenya], a body, entity, agency or as the case may be that has been granted immunity against prosecution or in any other manner shall continue to enjoy the same until such immunity is removed or waived vide issuance of an appropriate Order. In the case of **Ministry of Defence of the united Kingdom versus Ndegwa, Civil Appeal No.31 of 1982** the Court of Appeal cited the case of **Thai Europe Tapioca Service limited versus Government of Pakistan Ministry of Food and Agriculture Supplies imports and Shipping Wing [1975] All ER** where the court held that;

The general principle is undoubtedly that except by consent, the courts of this country will not issue processes so as to entertain a claim against a foreign sovereign for debt or damages. The reasons is that if the court here once entertained the claim and in consequence gave judgement against the foreign sovereign they could be called to enforce it by execution against its property here. Such execution might imperil our relations with that county and lead repercussions impossible to foresee.

9. Though immunity in this case is not denied, to move as submitted by the Claimant would lead to a process that would go contrary to the purpose for which such immunity was granted. Article 3 of the Agreement between the Republic of Kenya and the Respondent states;

The ICRC, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal and administrative process unless the ICRC has expressly waived its immunity.

10 Where proceeding therefore commence and the Respondent is found culpable in damages or debt, such would be paid by the Respondent from its property or assets against which there already exists immunity as set out above and noting the cited cases above. In **Mwangi Patrick Githinji versus IOM, Cause no.2528 of 2012** the court held that;

... an international organisation it enjoyed privileges and immunities as are necessary for it to fulfil its mandate and purposes... the contract of employment that the parties therein had fell within the ambit of their internal operations in respect of which diplomatic immunity and privileges could be invoked. That contract of employment, where there was a dispute the parties could result to the laid down internal procedures or result to the international mechanism as per the Respondent establishment charter.

11. Therefore, under the headquarters Agreement between the Respondent and the Republic of Kenya, the Respondent enjoys immunity that subsists to date. Such immunity has not been waived for any purpose and the terms remain as agreed upon. Such an agreement was signed before the constitution, 2010 came into force and by operation of article 2, and it is binding. The internal regulations or policy

documents cannot override the Agreement so as to negate its terms.

The objections by the Respondent are upheld. The claim herein is struck out. Each party shall bear their own costs.

Orders accordingly.

Delivered in open court at Nairobi this 16th day of December 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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