Githongo & 3 others (The Administrators of the Estate of Joseph Muiruri Githongo - Deceased) v Government of the United States of America (Environment and Land Case Civil Suit 5 of 2022) [2023] KEELC 464 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 464 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 5 OF 2022

LN MBUGUA, J

JANUARY 26, 2023

BETWEEN

MARY WAIRIMU GITHONGO ..... 1ST PLAINTIFF

JOHN MARK GITHONGO ..... 2ND PLAINTIFF

PETER GITAU GITHONGO ..... 3RD PLAINTIFF

JAMES MUGO GITHONGO ..... 4TH PLAINTIFF

THE ADMINISTRATORS OF THE ESTATE OF JOSEPH MUIRURI GITHONGO - DECEASED

AND

THE GOVERNMENT OF THE UNITED STATES OF AMERICA .. DEFENDANT

(Court of Appeal issued on July 14, 2000)

RULING

1. This suit relates to a decision of the Court of Appeal issued on July 14, 2000 in Civil Appeal No 27 of 1999, The Government of USA v Joseph Muiruri Githongo where the respondent (Githongo) was to transfer to the appellant (The USA) within ninety days, the Spring Valley properties namely, LR 7158/281, LR7158/282, LR 7158/283 and LR 7158/284 upon payment of whatever monies were due. If the respondent failed to transfer the said properties to the appellant as ordered by the Court of Appeal, the, the said properties were to be transferred by the deputy registrar of that court to the appellant.

2. It appears that the appellant in that matter who is the defendant herein deposited the sums ordered, but the suit properties were neither transferred by the respondent whose estate is represented by the plaintiffs herein nor the deputy registrar.

3. The plaintiffs then filed the instant suit by way of originating summons dated March 15, 2022.They seek a declaration that in view of the provisions of section 4(4)of the *Limitation of Actions Act* cap 22, the judgement of the Court of Appeal delivered on July 14, 2000 In Civil Appeal No 27 of 1999, The Government of USA v Joseph Muiruri Githongo is stale and no longer capable of execution against the plaintiffs by the defendant for the reason that the same has remained unexecuted to date for a period of over 12 years.

4. The plaintiffs also argue that the defendant's rights over the suit properties accorded to it by the Court of Appeal became extinct from September 29, 2012, thus the defendant became a trespasser on the aforementioned properties. The plaintiffs seek an eviction order against the defendant, mesne profits of Kshs 27,270,000/= from the said date of extinction of rights and Kshs 18,251,162/= being land rates accrued and owing over the period the defendant has been in occupation.

5. The defendant herein is a foreign sovereign state. It has not entered appearance in this matter. However, the plaintiffs filed an affidavit of service sworn on October 14, 2022 indicating that they had served summons to enter appearance through the email address displayed by the defendant in the internet.

6. On November 1, 2022, this court directed counsel for the plaintiffs to address it on the question of service and jurisdiction. Counsel for the plaintiffs submitted that order 5 rule 22 of the *Civil Procedure Rules* provides for electronic mail service by email address and that summons are declared served on the day an email is sent provided it is on official business hours. He further submitted that the rule does not exempt corporate bodies or individuals hence service via electronic mail to the defendant was adequate. It was submitted that the email address used to serve the defendant is the one that is publicly displayed by the defendant and the same is active and that they were served within the jurisdiction of Kenya, thus the need to serve through the ministry of foreign affairs does not arise.

7. On the issue of jurisdiction, counsel submitted that the defendant waived its immunity when it subjected itself to the local courts on the subject matter with respect to the suit properties in Civil Appeal No 27 of 1999 and procured a judgement in its favour which forms the genesis of this suit. He added that the defendant via correspondence dated September 6, 2022 is now attempting to execute the judgement in the said matter which is a demonstration that it is not immunized from these proceedings.

8. The 1st issue for determination is whether there was proper service in this case. The importance of service was amplified in the *Law Society of Kenya v Martin Day & 3 others [2015] eKLR* in the following words;

> " It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence..."

9. Service of the re-issued summons herein were effected through an email obtained in the internet. I hold the view that counsel for the plaintiffs wrongly construed the process of service to a foreign sovereign state in light of the doctrine of sovereign immunity. That is why he served in accordance with order 5 rule 22B of the *Civil Procedure Rules* which is inapplicable in the circumstances of this case. It is the view of this court that service should have been effected by transmission of the summons through diplomatic channels to the foreign Ministry of the defendant or in means agreed by both states as acceptable. That is the channel which would be appropriate in the spirit of Customary International Law and the articles of the *Vienna Convention on Diplomatic Relations*.

10. I find that service effected through an email found in the website in respect of a foreign nation was not proper service of the re-issued summons to enter appearance.

11. The 2nd issue for determination is whether this court has jurisdiction to entertain this matter considering that the defendant is a foreign state. Does the defendant enjoy any diplomatic immunity in so far as this case is concerned? Sovereign immunity is defined by *Black's Law Dictionary,11th Edition* as;

> "any exemption from a duty, liability, or service of process especially such an exemption granted to a public official or government unit."

12. The doctrine of sovereign and diplomatic immunity applies to Kenya by virtue of The *Privileges and Immunities Act*, chapter 179 of the Laws of Kenya which adopts articles of the *Vienna Convention on Diplomatic Relations* signed in (1961) subject to section 15 of the said act.

13. The *Vienna Convention* recognizes the doctrine of sovereign and diplomatic immunity as a principle of international law. Article 31 and 32 thereof makes provision for immunity from civil and criminal prosecution of diplomatic agents of sending states unless waived. Thus the immunity is applicable to states as well. It is noted that article 32(2) of the aforementioned convention states that "waiver must always be express."

14. Courts in Kenya have applied the principle and largely embraced absolute sovereign immunity. On the question of waiver of diplomatic immunity, courts have held that sovereign states should consent or waive their immunity before service is effected.

15. In *Twictor Investments Limited v The Government of the United States of America [2003] eKLR*, the case of Mighell v Sultan of Johore (1984)1QB 149 was cited where it was stated that;

> "The courts in one country have no jurisdiction over an independent foreign sovereign of another country, unless he submits to the jurisdiction"

16. The plaintiffs argued that in this matter, since the defendant filed Civil Appeal No 27 of 1999, it submitted to the jurisdiction of the Kenyan Courts thus waived its immunity. Anthony Aust, in the book; *A Handbook of International law,2nd edition* states at Page 150;

> "A state cannot claim immunity if it initiates or intervenes in the proceedings, unless this is done in ignorance of the facts entitling it to immunity, and immunity is then claimed as soon as possible. It is not consent if the state intervenes merely to claim immunity, or for the sole purpose of asserting a right in the property at issue, provided the state would have been entitled to immunity if the proceedings had not been brought against it. A state instigating or intervening in proceedings does not usually have immunity in respect of a counterclaim."

17. The Supreme Court of Sierra leonne in *Bank of Credit & Commerce International v The Charge D'Affairs of the Ivory Coast Embassy* (MISC APP 3 of 1982) [1983] SLSC 8 (21 September 1983) held,

> "In the application before us, the respondent sued in the name of "The Charge D'Affairs of the Republic of the Ivory Coast Embassy in Sierra Leone acting for and on behalf of the Republic of Ivory Coast. The respondent, by suing as a plaintiff, has submitted to the jurisdiction of our Municipal Courts."

18. In the case which gave rise to the Civil Appeal No 27 of 1999, the current defendant had sued one Joseph Muiruri Githongo over the properties in dispute. The defendant had certainly submitted to the jurisdiction of those courts where it obtained a judgment in its favour at the Court of Appeal which the plaintiffs now claims that it was not executed. I hold the view that even though the defendant had subjected itself to the jurisdiction of the courts in Kenya, by participating in the Court of Appeal

matter, this suit is neither a counterclaim nor a continuation of the Court of Appeal proceedings. Once judgment was entered in the matter, the Court of Appeal became *functus officio*.

19. The question as to whether execution of the judgment of the Court of Appeal was commenced or completed within a 12 year period and whether execution of the said judgement is barred under section 4(4) of the *Limitation of Actions Act* is a fresh issue giving rise to a new cause of action. That is why summons to enter appearance were issued to invite the defendant to answer to the new issues.

20. In *Republic of Kenya all war Heroes & Others v Attorney General & Others [2017] eKLR*, the court while declining to issue summons to foreign states sought to be enjoined as interested parties stated as follows;

> " My conclusion is that this court will be flouting international law and the provisions of the *Privileges and Immunities Act* and indeed the *Constitution* if it decrees or issues summonses in this case unless it is satisfied that the immunity has been waived...."

21. Finally, the Supreme Court considered whether privileges and immunities are justifiable limitations of the right to fair hearing and access to justice and held as follows in *Karen Njeri Kandie v Alassane Ba & Another [2017] eKLR*;

> " ... The conferment of immunity for the purposes of Kenya upholding its international law obligations, is to that extent, a reasonable and justifiable limitation of the right to access justice as provided under article 48 of the *Constitution*, and we so hold."

22. I conclude that even if the defendant had apparently waived its immunity in the previous matters concerning the suit properties, this is now a fresh matter, which requires consent or waiver to sue the defendant. In absence of such consent or waiver, this court has no jurisdiction over the matter. The upshot of this ruling is that this suit is hereby struck out for want of jurisdiction, with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N MBUGUA

JUDGE

In the presence of:-

Mbugua for plaintiffs

Court assistant: Eddel