



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
INDUSTRIAL COURT
CAUSE NO. 2528 OF 2012

MWANGI PATRICK GITHINJI	1ST
CLAIMANT	
GITHINJI JOHN MWANGI.....	2ND
CLAIMANT	
NDAGWA JAMES LUCAS ODEDE.....	3RD
CLAIMANT	
SHAMWA CLETUS KAS.....	4TH
CLAIMANT	
KAMAU PETER NGANGA.....	5TH
CLAIMANT	
OGIRA NIXON OMONDI.....	6TH
CLAIMANT	
MURUNGI ZIPPORAH KINANU.....	7TH
CLAIMANT	
MALENYU JONES MUTUKU.....	8TH
CLAIMANT	
WANYGI MARTIN GITAU.....	9TH
CLAIMANT	
MBOGO ANTHONY MWAURA.....	10TH
CLAIMANT	
KITAVI PHYLLIS WANGUI.....	11TH
CLAIMANT	
ROBERT ONYANGO OLUOCH.....	12TH
CLAIMANT	
PAUL WAGATUA KABUCHO.....	13TH
CLAIMANT	

**MUSINGURA JACKTON CHANZ..... 14TH
CLAIMANT**

**OUMA PAUL OTIENO.....15TH
CLAIMANT**

VERSUS

INTERNATIONAL ORGANIZATION

FOR

**MIGRATION
RESPONDENT**

JUDGEMENT

This is a claim dated 18th December 2012 by the claimants for unfair summary dismissal by the respondent the International Organisation for Migration (IOM). The suit commenced by Notice of Motion brought under Certificate of Urgency of urgent orders for stay of summary dismissal, the payment of November 2012 salaries and an order for reinstatement of the claimants pending the hearing of the main suit. Despite service on the respondent, they did not enter appearance or give a defence but rather choose to write to the Industrial Court a note received and filed on 26th March 2013 further to a precious communication that had been filed on 17th January 2013. This communication from IOM noted that under their legal status, privileges and immunities of its staff and the subsequent legal obligations of the Government of Kenya there was a Cooperation Agreement between the two dated 11th May 2002. This agreement was attached.

With this background, the claimants asserted that they had valid contracts with the respondent which was never issued to them and that the court should proceed and hear their case and grant the orders sought.

I note the claimants proceeded by the call of two witnesses as representatives of all the claimants. At the close of their case the claimants made written submissions and the court directed that on the basis of the claim, the claimants do produce their written contracts as between themselves and the respondent IOM but these contracts were not made available to the court.

Noting that this Court as empowered as under section 20 of the Industrial Court Act, 2011 to inform itself on any matter as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings, I find the letters and documents submitted by the IOM, their non-appearance and non-attendance in their smatter with consideration. I further directed the IOM to produce any relevant documents in their possession that may be relevant to this case which was done on 21st May 2013.

The claim before court is that in early June 2012 the IOM is alleged to have started Summoning the claimants individually interrogating them in regard to fraudulent medical claims without informing them of supplying to them the investigation report of alleged medical frauds. That as a consequence of these interrogations, the claimants were suspended while on full pay until November 2012 when they were called and informed of their summary dismissal. That this action was unfair, prejudicial and now the claimants seek the court protection.

In evidence the first witness called was Nixon Omondi alias Musa who stated that he was employed by the IOM an international organisation operating in Kenya. That he was terminated without IOM following the internal procedures. That in November 2012 together with the other claimants was terminated unfairly. Before the termination, in June 2012 they all were called for interviews on alleged fraud claims on the medical scheme, it was an interrogation rather than an interview and they were all later suspended. That initially they were 23 employees involved in the interrogation. That the interrogation related to medical claims and in the panel the doctors who had treated him were never called to give evidence. The

has never been charged in court over any fraud and the procedures applied by the IOM to interrogate him and other claimants was wrong and demeaning.

Omondi further stated that he indeed attended at a hospital he was treated and receipts issued for payment as a genuine indication of services received. He used these receipts to claim back a reimbursement from the IOM. That when IOM hired a private investigator to visit these hospitals, he coerced the attendants there to state that the claimants were never treated there and his report was never shared with the claimants to be able to defend themselves.

The witness is now seeking to be reinstated to his position at IOM.

The second witness was Anthony Mwaura Mbogo who stated that he resides at Kinoo in Kiambu County and had authority from the other claimants to give evidence on their behalf. That in November 2012 he was terminated by IOM without notice after being called for a meeting together with 24 others. That they were questioned on their medical claims and later suspended. That they had fraudulently stolen from the IOM as some receipts issued to them in various medical facilities were not genuine. That IOM employees were covered by AAR and once treated they would make reimbursement claim but the witness was being attended to by his personal doctor at Kinoo in Kiambu County and issued with receipts which he would submit to the IOM for reimbursements. That his were not forgeries and he was not told by the IOM how they reached the conclusion that they were forgeries. His doctor was never called to confirm having treated him. That the investigator hired by IOM was of doubtful character and the claimants decided to also hire their own investigator who confirmed that the IOM had sent an investigator to their private doctors to confirm as to whether they ever treated the claimants.

The witness is seeking to be reinstated to his position with IOM. He also seeks compensation for the time he has been out of employment due to the inhuman treatment he underwent at the hands of his employer.

The third witness was Phyllis Wangui Kitavi, who stated that in June 2012 she got an email from the Human Resource office that she was required for an interview which she attended and underwent an interrogation with regard to medical claims for her family. She has never given the investigation report to be able to defend her well. That she had gone to her doctor who informed the witness that he had been contacted by an investigator and coerced to admit that the documents that they had issued were false. That the witness together with the other claimants hired an investigator who established that the alleged consultant for the IOM was a former police officer who had been dismissed due to misconduct.

That the IOM internal procedures were not put in place and the claimant was treated fairly. That she had served the IOM for a long time and was terminated unfairly and now seek to be reinstated to her position with IOM.

Granted this background of facts, I note there were no contracts that were submitted in evidence to confirm the applicable status of the claimants with the IOM as an international organisation. The claimants written submissions were to address this aspect. Written submissions were filed on 13th May 2013 attaching a "regular contract" of the claimants generally stating that each claimant had been appointed by the IOM on a particular date, the grade and the monthly salary and the signature of the parties to the contract. There was also a declaration to this regular contract indicating the employee was to serve the IOM with due diligence.

In submission it was stated that section 9 of the Privileges and Immunities Act deals with immunity of international organizations and the alleged agreement of the IOM with the government of Kenya has no effect to the case in court noting that it had not been gazetted or debated in Parliament and the IOM is not among the organizations listed under the fourth schedule of the Act as having been granted immunity.

That under section 12 of the Industrial Court Act, the court has exclusive jurisdiction to deal with the matter before it. That the claimants had contracts of employment with the IOM and their rights were violated and unfairly dismissed and seek they be reinstated and receive compensation. The claimants further cited the case of *Tononoka Stell Ltd versus the Eastern and Southern Africa Trade and*

Development bank, in Civil Appeal No, 255 of 1998, where the court noted that the Minister made an error in granting absolute immunity from every legal process extending to commercial activities and despite the respondent being an international organisation entitled to immunities and privileges including immunities from suits and legal process, it was not immune from suits in respect of the subject matter of the case, being breach of a contract.

Also cited was the case of *Erick omondi Ojijo versus British Army Training unit Kenya (BATUK) in the Industrial Cause No. 265(N) of 2009* where the court in reference to another case cited therein noted that a party cannot enjoy immunity from suits because the transactions subject of that suit were of a commercial transaction which involved the reconstruction, renovations and repairs to a private premises. The court further went to note that for the respondent to enjoy immunity they need to attach a document or a certificate issued by the minister responsible that they had immunity.

Did the respondent herein the IOM then have the capacity to be sued by the claimants? Do the claimants have a remedy?

I note the Respondent IOM have a Cooperation Agreement as between themselves and the Government of Kenya that established the IOM office in Nairobi Kenya as a Diplomatic Mission with outlined privileges and immunities that include for staff and staffing issues. This agreement is dated 11th may 2002 and signed by the Minister for Foreign Affairs and the Director General of the IOM as a Cooperation Agreement between the Government of Kenya and the IOM which notes that the government of Kenya is a member of the IOM as of 24th may 1985 and since 24th May 1982 there has been cooperation agreement between the parties. This cooperation is outlined to entail the enjoyment of immunities and privileges as set out under the United Nations Convention on the privileges and immunities of its specialised agencies of 21 November 1947.

I note that for organizations as the IOM And as outlined in the cooperation agreement, any disputes arising from the interpretation or issues relating to their operations in the host country as in the case with the claimants herein are noted as shall be addressed are to go for arbitration as appointed jointly by the parties. Further to this cooperation agreement, the parties recognize that the administration of the IOM is governed by the regulations adopted by its Council with respect to the international character of the entity that include their staff to ensure their responsibilities are not influenced in any way. The regulations governing the IOM require the application of international mechanisms by an appeal to the International Labour Organisation Administrative Tribunal and that the claimants had this mechanism available and should use it.

I note under the Privileges and Diplomatic Immunities Act the same gives effect to international conventions that Kenya is a party to to confer privileges and immunities to international organizations placed or based in Kenya in pursuant to these international obligation and hence the essence of this legislation, to facilitate their work and operations. The Cooperation Agreement submitted to this court by IOM create a relationship as between them and the Government of Kenya as envisaged under the Privileges and Diplomatic Immunities Act. this immunities extend to claims and prosecution of its staff and officers while undertaking their work, administrative or otherwise while the Cooperation Agreement is still in force as between the parties.

Thus enjoying immunity and privileges, the legal process now against the IOM offends the very law under which the Government of Kenya had used in entering the Cooperation Agreement with the IOM. It is clear that they cannot be sued over claim relating to employee and employer disputes as they have a mechanism that address the same by use of the international mechanisms available to the IOM to resolve disputes.

In the cited case *Gerald Killeen versus International Centre of Insect Physiology and Ecology, Civil Case No. 1737 of 2002*, a case of similar issues like in this case save that in that case the respondent entered appearance unlike in this case. What was noted there was the fact that as an international organisation it enjoyed privileges and immunities as are necessary for it to fulfil its mandate and purposes and the court went further to note that 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.

Equally in this case, based on the Cooperation Agreement that the IOM enjoys from the Government of Kenya, this entails immunities and privileges against prosecution. The claimant is bound by the internal mechanism of dispute resolution as established by the IOM or their Charter of its formation. I find that this does not in any way infringe on their rights of the claimants noting that under Article 2(5) and (6) of the Constitution provide for the application of international law and any treaty or Convention ratified by Kenya to form part of the laws of Kenya. Therefore, by Kenya being a State Party to the IOM and the subsequent Cooperation Agreement is an affirmation that the intention was to have the obligations outlined therein become binding and applicable.

The claimant's employment agreements/contracts with the IOM were therefore governed by the instruments of IOM and not subject to national court's interpretation. The remedy is therefore only available as outlined under the IOM Council guidelines.

For the above reasons, I will dismiss the claim with no order to costs.

Dated and delivered in open court this 24th day of May 2013

M. Mbaru

Judge

In the presence of

Court Clerk: Jacob Kipkirui

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