



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1464 of 2011

ELKANA KHAMISI SAMARERE

JEREMIAH OMWOYO.....CLAIMANTS

VERSUS

THE NIGERIAN HIGH COMMISSION.....RESPONDENT

Rika J

CC. Elizabeth Anyango

M/s Lily Munene instructed by Nyaberi and Company Advocates for the Claimant

Respondent absent

RULING

1. The two Claimants filed this claim against the Nigerian High Commission on 29th August 2011. They were employed by the Respondent as Groundsmen, on 14th January 1999. They were summarily dismissed on 14th July 2005. They claim they were unfairly dismissed: they were not given reason or reasons for termination of their contracts of employment; they were not heard; and they were not paid terminal benefits. They seek to be paid terminal benefits and damages.

2. The Nigerian High Commission did not file any Statement of Reply, or attend Court at the hearing. It has completely declined to submit itself to the Jurisdiction of the Industrial Court of Kenya.

3. M/s Munene for the Claimants attended Court on 5th April 2013 when the dispute was scheduled for hearing. She asked the Court to first rule if it has jurisdiction to hear and determine the claim. This Ruling is made pursuant to that request.

The Court Finds and Orders:-

4. The Nigerian High Commission represents a Foreign Sovereign. It enjoys immunity from the Criminal, Civil, Labour, and Administrative jurisdiction of the receiving State, Kenya.

5. The immunity enjoyed by the Nigerian High Commission can only be expressly waived by the Republic of Nigeria. The Industrial Court of Kenya, as an Organ of the receiving State would be waiving immunity, by assuming jurisdiction, contrary to Article 32 of the Vienna Convention on Diplomatic Relations.

6. 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 ramification for Kenya's own Diplomatic Missions abroad.

7. 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.

8. 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.

9. 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.

10. Apart from the issue of diplomatic Immunity, the claim fails on the ground that it was filed out of the 3 year limitation period imposed by section 90 of the Employment Act 2007. The Claimants were summarily dismissed way back on 14th July 2005. They seek to enforce employment protection given by section 45 of the Employment Act 2007. The Employment Act 2007 is not applicable to a claim that arose before it came into force. *IT IS ORDERED:-*

(a) *The Claim is hereby dismissed with no order on the costs.*

Dated and delivered at Nairobi this 9th day of May 2013

James Rika
Judge