



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1296 of 2012

KAREN NJERI KANDIE.....CLAIMANT

VERSUS

ALASSANE BA1ST RESPONDENT

SHELTER AFRIQUE.....2ND RESPONDENT

RULING

By a notice of motion dated and filed on 31st July, 2012, the claimant **KAREN NJERI KANDIE** seeks the following orders:

1. That this application be certified urgent and service thereof be dispensed with the first instance.
2. Pending the hearing and determination of this application inter partes, the Honourable Court issue an order lifting and or setting aside the purported 'special leave' and or suspension letter issued by the 1st Respondent on behalf of the 2nd Respondent on July 6, 2012;
3. Pending the hearing and determination of this application inter partes, the Honourable Court do issue an order reinstating the Claimant to her employment on the same terms with the 2nd Respondent.
4. Pending the hearing and determination of this application inter partes a temporary injunction do issue restraining the Respondents from terminating the Claimant's employment or in any other way interfering with her terms of employment enjoyed before July 6, 2012.
5. Pending the hearing and determination of this application inter partes, the Board of Directors of the 2nd Respondent or any Committee formed under it be restrained from conducting any investigation, hearing, considerations caring from the Claimant's complaint of assault against the 1st Respondent.
6. Pending the hearing and determination of this suit/cause, the Honorable Court do issue an order

reinstating the Claimant to her employment on the same terms with the 2nd Respondent as applied on the 6th July, 2012.

7. Pending the hearing and determination of this suit/cause, a temporary injunction do issue restraining the Respondents from termination or otherwise interfering with the Claimant's employment or the terms she enjoys as Finance Director of the 2nd Respondent.
8. Pending the hearing and determination of this cause/suit, the Board of Directors of the 2nd Respondent do investigate, hear and consider the Claimant's complaint against the 1st Respondent in accordance with the Employment Act.
9. Costs be provided for.

The Notice of Motion is supported by the affidavit of the Claimant sworn on 31st July 2012. The application is filed under certificate of urgency and concurrently with a Memorandum of claim both of which are also dated and filed on the same day.

In the Memorandum of Claim the Claimant prays in the following orders:-

- a. A declaration that the 1st Respondent's decision dated 6th July, 2012 and ratified by the 2nd Respondent to suspend and or send the Claimant on 'special leave' from her employment is null and void;
- b. The Claimant be reinstated to her employment with 2nd Respondent on the same terms in the position of Finance Director;
- c. A permanent injunction do issue restraining the Respondents from terminating the Claimant's employment pursuant to her complaint of assault against the 1st Respondent;
- d. The Board of the 2nd Respondent be compelled to suspend the 1st Respondent from holding any substantive office or that of Managing Director for the duration that the Board will consider preside over complaint by the Claimant;
- e. The Board of Directors of the 2nd Respondent to compelled to investigate, hear and consider the Claimant's complaint of assault against the 1st Respondent afresh and in the absence of the 1st Respondent;
- f. Damages for breach of contract and unlawful suspension from work and harassment;
- g. Damages for assault by the 1st Respondent;
- h. Costs of the suit.

The claimant was first heard ex-parte on 31st July, 2012 when the court issued orders that;

1. That the application be and is hereby certified urgent and heard ex-parte in the first instance.
2. That the application is served upon the Respondent immediately.
3. That the Respondent files a replying affidavit on or before 2nd August 2012.
4. That interpartes hearing on 3rd August 2012 at 9.00 am.

On 3rd August, 2012 when the application was scheduled for hearing inter partes the Claimant's Advocate were present in court but the Respondent was absent. The court heard the Claimant and issued a temporary injunction restraining the Respondents from terminating or otherwise interfering with Claimant's employment or the terms she enjoys as Finance Director of the 2nd Respondent pending the hearing and determination of this suit. The main case was fixed for hearing on 4th September, 2012 and the Respondents who had by then not filed any Response to the claim were granted leave to file their reply on or before 21st August, 2012.

The Respondents filed a Notice of Preliminary objection on 2nd August 2012 together with a replying affidavit of **RUTH ONYANCHA**, the 2nd Respondent's Director of Corporate Affairs and Secretariat. On the hearing date, **Mr. Imende** appeared for the Claimant and **Mr. Munyi** for the Respondents.

When the case came up for hearing, the parties agreed to file written submissions in respect of the

preliminary objection and come back to court to highlight their written submissions on 12th October, 2012.

The preliminary objection raises the following issues:

- a. **THAT** the Respondents are holders of diplomatic immunity under the privileges and Diplomatic Immunities Act (Cap 179 Laws of Kenya) and as such are immune from legal process as claimed in this case.
- b. **THAT** the 2nd Respondent has entered into a Host Country Agreement with Kenya on 19th October 1983 which grants diplomatic privileges and immunity to the 2nd Respondent and to its senior officials including its Managing Director (the 1st Respondent) from legal process as provided under Sections 23 and 24 of the said Agreement.
- c. **THAT** both Shelter Afrique and the African Development Bank have entered into agreements with the Government of Kenya that confer diplomatic privileges and immunity to employees of the two institutions.
- d. **THAT** the issue of the Respondents' diplomatic privileges and immunity is Allasane Ba and Director of Public Prosecution and others....
- e. **THAT** the Claimant's application and the entire suit are misconceived and the orders prayed for do not lie as this Court is not empowered to give the said orders.

The Respondents submitted that their Preliminary Objection is challenging the jurisdiction of this court to hear and determine this case in view of the fact that the Respondents enjoy privileges and immunities under various Acts and Instruments. These are:

- I. The Privileges and Immunities Act (chapter 179) which recognizes the Vienna Convention on Diplomatic Relations, 1969. It applies to international organizations with immunities and privileges as set out in the schedule thereof.
- II. The Shelter Afrique Act (chapter 493c) which recognizes the 2nd Respondent as an international organization having bilateral relations with Kenya.
- III. The Host Country Agreement signed between Kenya and the 2nd Respondent which grants the 2nd Respondent and its senior officials immunities from legal process of any kind and that the 1st Respondent who is the Managing Director of the 2nd Respondent enjoys immunity under the agreement.
- IV. The constituent charter of Shelter Afrique which provides that Directors, managers and other full time employees of the 2nd Respondent be accorded exemptions and privileges not less favorable than those accorded to such persons of international financial institutions located in Kenya which includes the World Bank, the African Development Bank and the international Monetary Fund.

In addition the Respondent submits that the 1st Respondent is a holder of a diplomatic passport. They have however not submitted how the diplomatic passport affects the 1st Respondent in respect of the claim before the court.

On those grounds the Respondents submit that no legal proceedings can be instituted against them unless they voluntarily and unequivocally waive their immunity, which they have not. The Respondents have referred the court to the decision of the High Court in **GERALD KILLEEN –VS- INTERNATIONAL CENTRE FOR INSECT PHYSIOLOGY & ECOLOGY (ICIPE) IKLR 718** wherein the court found that the charter establishing ICIPE provided that it enjoys such privileges and immunities as are necessary for the fulfillment of its purposes and that the contract of employment between the plaintiff and ICIPE fell within the operations of ICIPE in respect of which diplomatic immunity and privileges could be properly invoked.

They urged the Court to apply those findings to the present case. The Respondents further submitted that the Claimant has not exhausted the avenues for redress available to her within the organization which provides for internal resolution of disputes.

The Claimant opposes the preliminary objection. It was submitted for the Claimant that giving effect to the immunity would infringe on the Claimants constitutional right of access to justice, right to a fair hearing in enforcement of her right to fair labour relations before a court or another independent and impartial tribunal at body, and that the limitations as proposed do not meet the test under Article 24 of the constitution, that the proposed alternative remedy of using the internal dispute resolution machinery in the 2nd Respondents. It was further submitted that the Staff rules are illusory as the 1st Respondent against whom she has complained oversees the process. The claimant also submits that the privileges and Diplomatic Immunities Act (Cap 179) is not applicable as there is no order of the Minister declaring Shelter Afrique as one of the international organizations that enjoy the privileges and immunities as stipulated in part 1 of the Fourth Schedule to the Act and further that the Shelter Afrique Act (Cap) 493C passed to give effect to both the convention on the constituent Charter of Shelter Afrique and the Host Country Agreement provide that Shelter Afrique has full juridical status with capacity to sue and be sued in its own name.

It is further submitted for the Claimant that if at all Shelter Afrique, enjoys immunity, the scope of the immunity does not apply to private law such as the Claimant's case, that judgment can be executed against the 2nd Respondent if it is a final judgment as provided in section 3 of the schedule to the Shelter Afrique Act.

The Claimant has distinguished this case from the case of **GERARD KILLEEN – VS- INTERNATIONAL CENTRE OF INSECT PHYSIOLOGY AND ECOLOGY** on the ground that the case was decided before the enactment of the current constitution of 2010 and secondly that the schedule to Shelter Afrique Act allows execution of a final judgment.

The Claimant has also raised issue with the manner in which the preliminary defection has been raised. Counsel for the Claimant has referred to the case of **MUKISA BISCUIT CO-VS- WESTEND DISTRIBUTORS LTD (1969) EA 696** which lays the basis upon which a preliminary objection may be raised. The Claimant has also raised the issue of the pending constitutional application which it has stated only relates to criminal prosecution and does not affect this case.

The issues for determination herein are 3:

1. Whether this court has jurisdiction to hear and determine the case against the Respondents in view of the plea of immunity.
2. Whether the preliminary objection is properly before this court
3. Whether this case should be stayed pending the hearing and determination of High Court Constitutional Petition No. 312 of 2012 wherein the 1st Respondent is challenging his prosecution on charges arising from the same facts giving right to this case.

On the first issue of whether the Preliminary Objection is properly before this court, I would agree with the Claimant that it is irregularly brought before the Court. The right manner of raising a Preliminary Objection is as set out in the case of **MUKISA BISCUIT CO. –VS- WESTEND Distributors Ltd**. The Respondent should first have filed its defense or replying affidavit so that all the documents they wish to rely on are on record and the argue the Preliminary Objection based on facts and documents already before the court.

The other manner of raising the same issues would have been through a Notice of Motion seeking the striking out of the claim on the grounds that the Respondents enjoy diplomatic immunity and privileges. Be that as it many, the parties have already fully argued the application and I do not think the Claimant will suffer prejudice as the same arguments would have been made if the issues raised in the Preliminary Objection were raised otherwise. I will therefore, proceed and deal with the substantive issues in the Preliminary Objection. I am guided by the provisions in Article 22(3) (e) and Article 159 (1) (d) both that courts shall not be unreasonably restricted by procedural technicalities of which are to the effect.

The next issue for determination is whether this case should be stayed to await the determination in Constitutional Petition No. 312 of 2012 filed by the 1st Respondent objecting to his criminal prosecution

on grounds of immunity. I have only been shown the conservatory orders issued by the High Court on 25th July 2012. The brief submissions by the parties point to an application against criminal prosecution.

I have not seen the pleadings and do not have sufficient information to decide either way. For this reason I am unable to order stay of these proceedings pending the hearing of the petition as I cannot tell whether or not it will resolve the issues of immunity as raised in the Preliminary Objection filed herein.

The final issue for determination is whether the Respondents are immune from prosecution in this case by virtue of the provisions of the various Acts and instruments cited by the Respondents in support of the claim. In my understanding, the various instruments are the following:

- I. The Privileges and Diplomatic Immunities Act (Cap 179).
- II. Vienna Convention of Diplomatic Relations.
- III. Host Country Agreement of 19th October 1983.
- IV. Shelter – Afrique Act (Cap 493 c)
- V. Convention on the Constituent Charter of Shelter Afrique.

The Privileges and Diplomatic Immunities Act gives effect to international Conventions that confer immunities and privileges to international organizations to which Kenya is a member. The Host Country Agreement at Annex B states at Clause 2 that Shelter Afrique shall have full juridical personality and full legal capacity to among other powers, enter into contracts and to sue and be sued in its own name.

Clause 3 protects the 2nd Respondent from nationalization and all forms of seizure without payment of first and prompt compensation or before the delivery of final judgment.

The Host Country Agreement Exhibited as “R06” to the affidavit of Ruth Onyancha at section 8(a) 23 and 24 give the 1st and 2nd Respondents immunities from prosecution.

The relevant Sections are reproduced here below:-

ARTICLE 1

Kenya undertakes to grant to the Company for Habitat and House Africa (SHELTER-AFRIQUE) without delay, the constituent Charter appearing as Annex B hereof and made by reference part of this Conversion. The said Charter shall have force of law among the parties hereto and Kenya undertakes not to repeal it, amend or add to it otherwise than in agreement with the other signatory Governments.

ARTICLE 4

Kenya shall, as soon as the procedural steps required to make effective in its territory the provisions of this Convention as well as Annex commencement of operations of SHELTER-AFRIQUE, sign with SHELTER-AFRIQUE and take all necessary measures to make effective in its territory the agreement entitled ‘Agreement between the Republic of Kenya and the Company for Habitat and Housing in Africa regarding the Headquarters of the Company for Housing and Habitat in Africa’

SECTION 8

The headquarters seat shall be inviolable. No officer or official of the Republic of Kenya, or other person exercising any public authority within the Republic of Kenya, shall enter the headquarters seat to perform any duties therein except with the consent of and under conditions approved by, the Managing Director. The service of legal process, including the seizure of private property shall not take place within the headquarters seat except with the express consent of the Managing director.

SECTION 23

Senior officials of SHELTER-AFRIQUE shall enjoy within and with respect to the Republic of Kenya the following privileges and immunities:

- a) Immunity from legal process of any kind in respect of words spoken or written, and of acts performed by them in their official capacity, such immunity to continue notwithstanding that the persons concerned may have ceased to be officials of SHELTER-AFRIQUE;**
- b) Immunity from personakl arrest or detention and from seizure of their personal and official baggage;**

SECTION 24

In addition to the privileges and immunities specified in Section 23:

- 1. The Managing Director, members of the Board of Directors and officials of SHELTER-AFRIQUE having the rank of Assistant Director and above shall be accorded the privileges and immunities exemptions and facilities accorded to Ambassadors who are heads of missions:**
- 2. A senior official of SHELTER-AFRIQUE, when acting on behalf of the Managing Director during his absence from duty, shall be accorded the same privileges and immunities, exemptions and facilities as are accorded to the Managing Director:**

From these excerpts, it is clear that the Respondents enjoy immunities and privileges among them immunity from legal process of any kind, seizure of personal property and immunity from arrest and detention. The offices of the Respondents are inviolable and legal service of process may not be affected without the consent of the Managing Director who is the 2nd Respondent.

The parties have relied on several authorities. The Claimant relied on the following authorities:

TRENDEX CORPORATION -VS- CENTRAL BANK OF NIGERIA 2WLR (1997) 366. This case related to immunity in a case where the Government of Nigeria was involved in commercial activities with a foreign company. The court held that the Government does not enjoy immunities in such circumstances.

This issue has been discussed at length in the case of **MINISTRY OF DEFENSE UNITED KINGDOM –VS- NDEGWA LLR. NO. 53 (CAK)** where the Court of Appeal sitting in Nairobi decided that the Court could not entertain an action against a Foreign Sovereign State unless that state submitted to jurisdiction.

The case of **TRENDEX CORPORATION -VS- CENTRAL BANK OF NIGERIA** is therefore distinguishable from this case as the 2nd Respondent Shelter-Afrique is deemed to have the same privileges and immunity status as a foreign state.

I have also read the Articles by **Malcolm N. Sham, International Law, 6th Edition, Cambridge University Press, London,** and **Prof. Mmag, Dr. Reinisch, Immunity on International Organizations and Alternative Remedies Against the United Nations, a paper presented during the seminar on State Immunity at the Vienna University, Summer Semester, 2006.** I find both articles inconclusive on the issue before this Honourable Court and therefore of little help.

Both parties also relied on the case of **GERARD KILLEEN –VS INTERNATIONAL CENTRE OF INSECT PHYSIOLOGY & ECOLOGY**, Civil Case No. 1737 of 2002. The Claimant has distinguished it on the basis that it was decided before the constitution 2010 and secondly that Shelter Afrique Act expressly allows execution of a final judgment against Shelter Afrique while the Respondents urge the Court to apply it and dismiss this case. I do not agree. Article 2(5) and (6) of the Constitution 2010 provides that general rules of International law and any treaty or convention ratified by Kenya form part of the Laws of Kenya under the Constitution. Secondly, the Host Country Agreement signed between

Shelter Afrique and Government of the Republic of Kenya is part of the conventionon **THE CONSTITUENT CHARTER OF SHELTER-AFRIQUE** and thus forms part of the laws of Kenya.

The Host Country Agreement Expressly provides that the Respondents have immunity from arrest and attachment and the 2nd Respondent's offices are inviolable. This means that even if this court issues orders against the Respondents it would be in vain as the orders will not be capable of execution against the Respondents.

For the foregoing reasons, I allow the Preliminary Objection.

I strike out the Memorandum of Claim and dismiss the case. Each party shall bear its costs.

Dated and delivered in Nairobi this 22nd Day of October 2012.

**Hon. Lady Justice Maureen Onyango
Judge**

In the presence of:

For Claimant: _____

For Respondent: _____