REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 384 OF 2010

PETER LETIWA..... 1ST APPELLANT

IGAD SECRETARIAT ON PEACE IN THE SUDAN..... 2ND APPELLANT

VERSUS

CHARLES MBUGUA ..... RESPONDENT

(Being an appeal from the ruling of Mr. S. Okato Senior principal magistrate delivered on 24th August 2010 in respect of the application dated 30th June 2008 in Civil Case no. 7203 of 2005 at the Chief Magistrate Court's Milimani Commercial courts, Nairobi)

JUDGEMENT

1. Charles Mbugua, the Respondent herein was on 22.11.2003 involved in road traffic accident while on board motor vehicle registration no. KX 39A04 along Lodwar-Kakuma Highway. The aforesaid motor vehicle at the material time was being driven and or managed by Peter Letiwa, the 1st Appellant herein. The motor vehicle was at the time registered in the name of **Igad Secretariat Peace In the Sudan**, the 2nd Appellant herein. As a result of the accident, the Respondent suffered a fracture of cervical spine at C4 and C5. The Respondent filed a compensatory suit before Chief Magistrate's Court, Milimani against the Appellants. The 2nd Appellant took out the motion dated 30th June 2008 in which it sought for the suit against it to be struck out because it was immune from suits and legal processes under the provision of Section 9 of the Privileges and Immunities Act. The Respondent opposed the application by filing grounds of opposition. The application was heard and eventually dismissed by Hon. Okato, the then principal magistrate. Being dissatisfied, the 2nd Appellant preferred this appeal.

2. On appeal, the 2nd Appellant put forward the following grounds in its memorandum:

1. ***The learned magistrate erred both in fact and in law by failing to appreciate that the 2nd Appellant is a privileged institution immune from legal process in Kenya.***
2. ***The learned magistrate erred in law by misapprehending the import of Section 9 of the Privileges and Immunities Act, Chapter 179 of the Laws of Kenya as read together with Part 1 of the Fourth Schedule to the said Statute and Legal Notice No. 10 of 28th January 2000.***
3. ***The learned magistrate erred in law and in fact in failing to appreciate that the Respondent had not demonstrated that the circumstances and facts of the case fell within an exception to the defence of immunity known to domestic and or international law.***

4. ***The learned magistrate erred in law by failing to fully appreciate the ratio of the decision of the Court of Appeal in the case of Ministry of Defence of the Government of the United Kingdom and Ndegwa (1983) KLR Pg 68 which clearly brought the facts and circumstances of the instant case within the scope of the Defence of Immunity.***
5. ***The learned magistrate erred in holding that the said Notice of Motion application dated 30th June 2008 amounted to an ambush on the Respondent yet the same was a preliminary application filed before the hearing and which the Respondent was availed full opportunity to oppose.***
6. ***The learned magistrate erred in fact and in law by completely ignoring the fact that the Appellants had in paragraph 10 of the statement of Defence denied the jurisdiction of the court thus giving the Respondent adequate notice of the Appellants intention to challenge jurisdiction.***
7. ***The learned magistrate erred in both fact and in law by misapprehending the case law cited to her by the Appellants.***
8. ***The learned magistrate erred in both fact and law in failing to strike out the Respondents claim against the 2nd Appellant.***

3. When the appeal came up for hearing, learned counsels appearing in the appeal recorded a consent order to have the appeal disposed of by written submissions.

4. This being the first appellate court, I am enjoined by law to re- evaluate the case that was before the trial court. I have also considered the rival written submissions. Though the 2nd Appellant put forward a total of eight (8) grounds of appeal, those grounds may be summarised to two main grounds namely:

i. ***The learned principal magistrate erred when he formed the opinion that the Respondent had been ambushed yet there was sufficient notice of the preliminary point of law raised before the hearing of the suit.***
ii. ***That the learned principal magistrate failed to appreciate the fact that the 2nd Appellant was and is a privileged institution and or organization which was and is immune from suits and legal processes in Kenya and that it did not fall within an exception to the defence of immunity known to domestic and or international law.***

5. In the first ground, the Respondent was of the view that the 2nd Appellant did not raise the issue of diplomatic immunity, thus breaching the provisions of Order 2 rule 4 of the Civil Procedure Rules, 2010. The 2nd Appellant is of the view that the subject application challenged the court's jurisdiction to entertain a claim against the 2nd Appellant and that the issue can be raised at any stage of the proceedings. It is further argued that it cannot be limited to what was or was not raised in the defence. The 2nd Appellant further averred that paragraph 10 of the defence specifically gave notice to the plaintiff that jurisdiction was denied. I have carefully looked at the ruling of the learned principal magistrate. It is on record that he stated that the 2nd Appellant did not plead the question of limitation based on statute being allowed to use it as the basis of the preliminary objection under the provisions of the Civil Procedure Rules. The learned principal magistrate also came to the conclusion that the 2nd Appellant did not plead the issue relating to the statute of privileges and immunity. The learned magistrate stated that paragraph 10 of the defence was a general pleading. He stated that the law required that the statute being relied on as a defence be specifically pleaded.

6. After a careful consideration of the rival submissions on appeal and after re-evaluating the arguments over the issue raised in the first ground, I have come to the conclusion that the

learned principal misapprehended the point. To begin with, there was a specific pleading expressed in paragraph 10 of the 2nd Appellant's defence that the jurisdiction of the court was going to be challenged before the trial begins. It was therefore erroneous for learned Principal Magistrate to state that the issue had not been specifically pleaded. Perhaps the learned principal magistrate mistook the objection and treated it as purely a bare preliminary point of law. With great respect to the learned principal magistrate, he failed to appreciate the fact that he was dealing with a substantive application supported by an affidavit. It is not therefore correct to say that the Respondent was taken by surprise.

7. The second ground of appeal is to the effect that the learned principal magistrate failed to appreciate the fact that the 2nd Appellant was and still is a privileged institution and or organization. The issue relating to the immunity or privilege status of the 2nd Appellant was raised and argued before the learned principal magistrate who opined that the immunity enjoyed by the 2nd Appellant was not absolute and does not apply to this case. On appeal, the Respondent argued that the fact that the Appellant's motor vehicle was required to comply with the provisions of the Insurance (Motor Vehicles Third Party Risk) Act Cap 405 Laws of Kenya as a matter of law with no exception to diplomatic vehicles, the 2nd Appellant's diplomatic immunity cannot be invoked. It is also argued that the 2nd Appellant waived its diplomatic immunity when it instructed the firm of Ms Muduni & Co. Advocates to enter appearance and file a defence against the Respondent's claim. In short, the Respondent argued that the 2nd Appellant waived its diplomatic immunity when it took out a certificate of insurance and when it failed to prove that the said motor vehicle was being used on a diplomatic mission at the time of the accident so as to apply immunity. The 2nd Appellant on the other hand is of the view that it enjoyed the privileges and immunities specified in the privileges and Immunities Act which insulated the 2nd Appellant from suits and legal processes. The 2nd Appellant further argued that there is no room in law to waive its immunity. After a careful consideration of the rival submissions, I have come to the conclusion that appeal should be allowed. The Court of Appeal in the case of **The Ministry of Defence of the Government of the United Kingdom =vs= Ndegwa (1983) KLR at pg 68** expressed itself as follows *interalia*

"It is a matter of international law that our courts will not entertain an action against certain privileged persons and institutions unless the privilege is waived. Such persons and institutions include foreign sovereigns of heads of state and government, foreign diplomats and their staff, consular officers and representatives of international organizations such as the united Nations Organisations (UNO) and or organization that this principle applies to, the immunity is not absolute but restrictive and the test is whether the foreign sovereign or government is acting in a governmental capacity under which it can claim immunity, or a private capacity, under which an action may be brought against it."

8. In the aforesaid case, the Court of Appeal cited the case of **Thai Europe = vs= Government of Pakistan (1975) 3 ALL E.R 961** in which the court expressed itself interalia as follows:

"The general principle is undoubtedly that except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages. The reason is that, if the courts 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 country and lead to repercussions impossible to foresee."

9. With great respect to the learned principal magistrate, the 2nd Appellant did not in any manner as

stated hereinabove waive its diplomatic immunity. The 2nd Appellant therefore has immunity from suits and legal processes in this country which cannot be casually taken away without causing serious ramification in international relations. The Respondent in my view did not demonstrate his claim for compensation under the tort of negligence arising out of a road traffic accident falls within any exception to immunity known to international law. It is clear to this court that diplomatic immunity extends to cover claims arising from road traffic accident.

10. In the end, the 2nd Appellant's appeal is found to be meritorious. Consequently, the order dismissing the 2nd Defendant's (2nd Appellant) application dated 30.6.2008 is set aside and is substituted with an order allowing the aforesaid motion with costs.

11. Costs of this appeal is given to the 2nd Appellant.

Dated, Signed and Delivered in open court this 3rd day of March, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent