IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AZANGALALA, GATEMBU & MURGOR, JJ.A) CIVIL APPEAL NO. 56 OF 2014

BETWEEN

UNICOM LIMITED.....APPELLANT

VERSUS

GHANA HIGH COMMISSION.....RESPONDENT

(An Appeal from the Ruling and Order of the High Court of

Kenya at Nairobi, (Hon. D. K. Musinga, J. as he then was) dated

9th day of December, 2011

in

HCCC NO. 256 OF 2011)

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JUDGMENT OF THE COURT

1. In a Ruling delivered on 9th December, 2011, the High Court at Nairobi (Musinga, J, as he then was) allowed the respondent"s motion dated 27th July, 2011 to strike out the appellant"s suit. The basis for doing so was that the court lacked jurisdiction to entertain the suit on account of sovereign immunity enjoyed by the respondent under the Privileges and Immunities Act, chapter 179 of the Laws of Kenya. In that suit the appellant had hoped to recover loss and damage it allegedly sustained as a result of what it contended was an unlawful termination of a tenancy agreement by the respondent. The central question in this appeal is whether the respondent is entitled to immunity.

Background

2. The appellant sued the respondent in the High Court at Nairobi. In its plaint, it described the respondent “as a representative of the Government of the Republic of Ghana.” It pleaded that the parties entered into a tenancy agreement dated 13th October, 2008; that under that agreement, the

appellant, as landlord, agreed to let its property known as L. R. No. 214/172 situated in Muthaiga, Nairobi to the respondent for a term of 5 years and 3 months on the terms therein set out. The tenancy commenced on 15th October, 2008.

3. The appellant averred that the respondent breached that agreement by purporting to terminate it without observing or complying with the provisions in the agreement on termination; that the respondent abandoned the premises and failed to deliver up the same to the appellant in the condition it should have; and that as a result the appellant suffered loss of rent quantified at Euros 66,000.00 (Kshs. 7,901,850.00) and a further amount of Euros 8,865.15 (Kshs. 1,061,380.00) on account of security services and costs of repairs to the property. The appellant sought judgment for those amounts.

4. The respondent entered appearance in the suit under protest. At the same time it filed the application dated 27th July, 2011 asking the court to strike out the suit for want of jurisdiction on the ground that the respondent “enjoys sovereign and diplomatic immunity from court process.”

5. In an affidavit sworn in support of that application, Humphrey C. Ajongbah, who described himself as the Minister-Counsellor at the Ghana High Commission in Nairobi, deposed that the Government of Ghana had opened its new High Commission in Nairobi in the year 2008 with a view to promoting and strengthening the relations between the Government of Kenya and the Government of Ghana and their peoples; that the “court cannot competently exercise jurisdiction over the Government of Ghana, or the Ghana High Commission in Nairobi…because [the respondent] enjoys sovereign immunity and the privileges provided for under the Privileges and Immunities Act, Chapter 179 of the Laws of Kenya.”

6. In opposition to that application, the appellant filed a statement of grounds of opposition. It asserted that allowing the application would be tantamount to depriving it of its rights to property, access to justice and to a fair hearing under Articles 23, 40, 48 and 50 of the Constitution; that the respondent did not have “absolute immunity in relation to purely private commercial transactions and activities”; and that to uphold immunity in the circumstances would be contrary to public policy.

7. After considering the application, the learned Judge delivered the impugned ruling on 9th December, 2011 in which, as we have said before, he struck out the appellant"s suit. The Judge held that the “court lacks jurisdiction to entertain this suit” for the reason that the respondent “enjoys diplomatic immunity from all legal processes unless in instances where the immunity is waved”.

8. The appellant was aggrieved and lodged this appeal.

The appeal and submissions by counsel

9. Learned counsel for the appellant, Mr. A. Mugwuku, submitted that in a landlord and tenant relationship such as existed between the parties to this appeal, the respondent is duty bound to honour its obligations under the tenancy agreement and should not be shielded by immunity; that in any case, even if the respondent enjoyed immunity, it waved it under clause 3(ii) of the tenancy agreement in which the respondent acceded to the appellant taking “whatever action they think fit” in the event of the respondent failing to observe any of the covenants in the agreement. Furthermore, counsel argued, the

agreement to refer disputes to arbitration under clause 1(xii) of the tenancy agreement amounted to submission to the laws of Kenya.

10. In support of the appellant"s argument, counsel referred us to the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 and to the judgment of this Court in **Tononoka Steels Limited v Easter and Southern Africa Trade and Development Bank [1999] eKLR** and urged that it would be against public policy to uphold the decision of the High Court.

11. Opposing the appeal, learned counsel for the respondent, Mr. M. Kang"atta, submitted that the respondent generally enjoys sovereign immunity as it represents a sovereign state. Referring to Article 10 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, counsel submitted that although the respondent cannot invoke immunity from jurisdiction in a proceeding arising out of a commercial transaction, the tenancy agreement at the center of the dispute between the parties in this case should be construed in light of Article 2(2) of that convention; and that the purpose for which the tenancy agreement was entered into should be considered. According to counsel, the purpose of the tenancy agreement in this case was not „commercial" but rather to provide accommodation or a home for the Ghana High Commission in Kenya.

12. In answer to the appellant"s contention that immunity, if any, was waived, counsel submitted that under Article 7 of the Convention, waiver cannot be implied; that there has to be express consent to the exercise of jurisdiction by the court; and that the reference to arbitration under clause 1(xii) of the tenancy agreement or the authority given to the appellant under clause 3(ii) of the tenancy agreement to take “whatever action” does not constitute express consent.

Analysis and determination

13. We have considered the appeal and the submissions by counsel. As we have said, the critical question in this appeal, is whether the respondent is entitled to claim immunity in the circumstances of this case.

14. We begin by observing that the learned Judge struck out the appellant"s suit on the basis that the respondent “enjoys diplomatic immunity from all legal processes” by virtue of the Vienna Convention on Diplomatic Relations having the force of law in Kenya under Section 4 of The Privileges and Immunities Act, Chapter 179 of the Laws of Kenya. Counsel however based their arguments before us on the United Nations Convention on Jurisdictional Immunities of States and Their Property. That Convention was not invoked by the lower court. Furthermore, that Convention is not yet in force. Article 30 thereof provides that:

“1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession."

15. As this Court observed recently in **Karen Njeri Kandie v Alssane B & another [2015] eKLR**, that Convention is not "reflective of the Kenyan law on the subject" and "there is no evidence that Kenya has ratified that 2004 Convention". Under Article 2(6) of the Constitution of Kenya, "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution", and to the extent that Kenya has not ratified that Convention, it is not part of the law of Kenya.

16. That is not to say that the doctrine of sovereign and diplomatic immunity does not apply to Kenya. It does. Section 4 of The Privileges and Immunities Act, Chapter 179 of the Laws of Kenya on which the lower court relied gives the force of law in Kenya to certain Articles of the Vienna Convention on Diplomatic Relations signed in 1961 and the Vienna Convention on Consular Relations signed in 1963. Under those conventions, immunities and privileges are accorded to diplomatic missions or consular posts and to persons connected with such missions or posts.

17. Apart from the fact that 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, the doctrine is a recognised principle of international law. It provides that as a general principle, states are immune from legal suits in other states[1]. The effect is that the state enjoys immunity in respect of itself and its property, from the jurisdiction of the courts of another state. To give effect to State Immunity, a state refrains from exercising jurisdiction in a proceeding before its courts against another state.

18. That said, this Court held in **Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa [1983] eKLR** that the immunity is not absolute but restrictive and that 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."

19. It is therefore the nature of the dispute that is critical in determining whether or not our courts will take cognizance of a dispute where immunity is pleaded. Lord Denning explained this in **Rahimtoola v Nizam of Hyderbad [1958] A.C. 379,** in the following terms.

"... **sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. ... Is it properly cognizable by our courts or not" If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so . . . but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity**."

20. In **Tononoka Steels Limited v Easter and Southern Africa Trade and Development Bank**, (supra) this Court dispelled the notion of absolute immunity taking the view that where a state engages in purely private commercial activities, it would be prejudicial and contrary to public policy to uphold sovereign immunity. Tunoi, JA (as he then was) put it in these words:

"I **do not think that Parliament in its wisdom could have granted absolute immunity from suit and legal process to such a body or organization if it was going to engage in purely private commercial activities and which had nothing whatsoever to do with Member States. This would be prejudicial to the interests of Kenya and would be contrary to public policy**."

21. That position has not changed. In **Karen Njeri Kandie v Alssane B & another (supra)** this Court reaffirmed the earlier decision of the Court in **Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa** (supra) when it stated that:

"…**We, too, agree that the doctrine of absolute immunity would be anachronistic, and has been for some time now. What immunity there is must be restricted or qualified so that private or commercial activities cannot be immunized**."

22. What then is the nature of the transaction in this case and is it one to which immunity should apply" The relationship between the parties to this dispute was defined by a tenancy agreement. The dispute between the parties stems from that agreement. A landlord and tenant agreement. It does not appear to us that in entering into that agreement, the respondent was "acting in a governmental capacity under which it can claim immunity"[2]. Although the purpose of the transaction was to provide accommodation for the respondent, a Diplomatic Commission, that does not detract from the nature the transaction.

23. We are fortified in the view we have taken by the opinion expressed by Lord Denning in **Thai-Europe Tapioca Service Ltd v Government of Pakistan, Ministry of Food and Agriculture Directorate of Agriculture Supplies [1975]1 W L R 1485** to the effect that a landlord tenant agreement would not be one that would enjoy immunity.

24. In our judgment therefore, in entering into the tenancy agreement with the appellant, the respondent was doing so in a private, rather than in a governmental capacity, and the appellant was entitled to bring the action against it based on the tenancy agreement.

25. The result of the foregoing is that we are satisfied that the appeal has merit. We accordingly allow the appeal and set aside the order of the court given on 9th December, 2011 and substitute therewith an order dismissing the respondent"s application dated 27th July, 2011. The appellant shall have the costs of that application in the High Court as well as the costs of this appeal.

Orders accordingly

Dated and delivered at Nairobi this 2nd day of December, 2016.

F. AZANGALALA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

FOOT NOTES

1. Cockburn, CJ expressed the principle in an early case-**In the Matter of the Charkieh [1873]** 197. at page 199 in terms that “a sovereign prince or state cannot be summoned to answer a complaint made in a foreign court.”

2. The language of the Court in Ministry of Defence of the Government of the United Kingdom v Ndegwa so in a private, rather than in a governmental capacity, and the appellant was entitled to bring the action against it based on the tenancy agreement.