Case Number:	Civil Appeal 31 of 1982
Date Delivered:	18 Mar 1983
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Eric John Ewen Law, Zakayo Richard Chesoni, Alan Robin Winston Hancox
Citation:	Ministry of Defence of the Government of the United Kingdom v Ndegwa[1983] eKLR
Advocates:	KA Fraser for Appellant HPG Waweru for Respondent
Case Summary:	**Ministry of Defence of the Government of the United Kingdom v Ndegwa** **Court of Appeal, at Nairobi** **March 18, 1983** **Law, Hancox JJA & Chesoni Ag JA** **Civil Appeal No 31 of 1982** ***Diplomatic immunity*** *- immunity from legal process - immunity as a foreign sovereign or government - definition of foreign sovereign - circumstances under which a foreign sovereign or government may be impleaded - liability of foreign sovereign - legal persons - department of a ministry of a foreign government - whether its acts are a subject of state immunity - whether a department is a separate legal entity from the government.* ***Vicarious liability*** *-of foreign sovereign - liability of foreign government - for wrong of servant - liability only capable of arising in course of*

employment - when one is acting in course of employment of a governmental purpose invoking immunity.

The respondent filed suit jointly and severally against the appellant and another person who was a member of the British Army, for damages for negligence arising out of a motor accident. The appellant entered appearance under protest and filed an application seeking for an order to strike out the proceedings against it on the ground that the Government of the United Kingdom of Great Britain and Northern Ireland as a foreign sovereign state had not consented to be sued in the Kenyan court and was entitled to immunity. It was deponed for the appellant that it being a ministry, it had no legal entity separate from its government. After the application was dismissed, the appellant appealed to the Court of Appeal.

Held:

1. 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 or heads of state and government, foreign diplomats and their staff, consular officers and representatives of international organisations such as the United Nations Organisation (UNO) and Organisation of African Unity (OAU). It is not all acts of a foreign sovereign or government 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.

2. The appellant had neither waived its immunity nor consented to submit to the jurisdiction of the courts of Kenya.

3. There was evidence that the appellant, the Ministry of Defence Claims Commission (UK), was a section or department of the Ministry of Defence of the UK which in turn was a department of the government of the United Kingdom of Great Britain and Northern Ireland and as such, the appellant

had no legal entity separate from that government, therefore had diplomatic immunity.

4. The appellant would be vicariously liable only if the first defendant was acting in the course of his employment and in the circumstances of the case, that would involve the appellant acting in a governmental capacity which entitled it to sovereign immunity.

5. (*Obiter* Chesoni Ag JA quoting Lord Denning MR in *Thai-Europe v Government of Pakistan* [1975] 3 All ER 961; 1 WLR 1485): “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 judgment 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.”

Appeal allowed

Cases

1. *Thai-Europe v Government of Pakistan* [1975] 3 All ER 961; 1 WLR 1485

2. T*rendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529

3. *I Congreso del Partido* [1978] 1 All ER 1169

4. *C Czarnikow Ltd v Centrala Handlu Zagranicznego ‘Rolimpex’* [1978] 1 All ER 81

5. *Planmount Ltd v Republic of Zaire* [1981] 1 All ER 1110

6. *Mighell v Sultan of Johore* [1894] 1 QB 149

7. *The Cristina* [1938] 1 All ER 719 at 721

Statutes

1. Civil Procedure Rules (cap 21 Sub Leg) order

	VI rule 13 2. Rules of the Supreme Court (UK) order 2 **Advocates** *KA Fraser* for Appellant *HPG Waweru* for Respondent
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Hancox JJA & Chesoni Ag JA)

CIVIL APPEAL NO. 31 OF 1982

BETWEEEN

MINISTRY OF DEFENCE OF THE GOVERNMENT

OF THE UNITED KINGDOM.....APPELLANT

AND

NDEGWA.....RESPONDENT

JUDGMENT

This is an appeal from a ruling of the High Court (O'Kubasu J) at Nyeri refusing to strike out the proceedings against the second defendant, the Ministry of Defence Claims Commission (UK).

The plaintiff filed a suit against the defendants praying for the judgment against them jointly and severally for special and general damages for negligence arising out of a motor accident involving a motor vehicle driven by the first defendant Stuart Brown and the motor vehicle KPA 169 which the plaintiff was driving at the material time. The second defendant entered appearance under protest and subsequently filed an application in the High Court under order VI rule 13 of the Civil Procedure Rules and the inherent powers of the court seeking an order that the proceedings against it (the second defendant) be struck out. That application was dismissed with costs and the second defendant has appealed to this court.

The ground on which the application was made is that the Government of the United Kingdom of Great Britain and Northern Ireland as a foreign sovereign state had not consented to be sued in the Kenyan Court and was entitled to immunity. Colonel Adrian Neville Prestige, the defence adviser in the British High Commission in Nairobi swore an affidavit in support of the application. He deponed that the first defendant was at all material times a member of the British Army serving in the 1st Battalion Scots Guards. He also stated in his affidavit that the second defendant, the Ministry of Defence of the Government of the United Kingdom of Great Britain and Northern Ireland had no legal entity separate from that Government. There appears to have been no dispute to the fact that the Ministry of Defence Claims Commission (UK) is a department within the Ministry of Defence of the Government of the United Kingdom of Great Britain and Northern Ireland. Indeed there was no replying affidavit filed by the respondent to contradict whatever Colonel Prestige said in his affidavit. It is for observation that although the plaintiff states in para 2 of the plaint that the first defendant was at all material times the agent and/or servant of the second defendant, his counsel told the court in reply to Mr Mahan's submission that he (presumably first defendant) was 'Defence Ministry employee overseas', so by 'agent and/or servant of the second defendant' the plaintiff did not restrict himself to the Ministry of Defence Claims Commission (UK), but also extended the meaning to the Ministry of Defence of the Government of United Kingdom of Great Britain and Northern Ireland.

There is no doubt that the claim against the second defendant is based on vicarious liability, as it is clearly shown in para 4 of the plaint, which alleges that the first defendant as agent and/or servant of the second defendant was driving the motor vehicle registration No 64 of 54.

Mr Mahan who appeared for the second defendant submitted before the learned judge that a foreign sovereign state could not be made party to a suit unless it consented. Mr Waweru for the plaintiff does not appear to have seriously explained away that contention nor does the learned judge appear to have seriously considered the position of a foreign sovereign in our courts. I have been unable to locate any local authority on the point. Nevertheless, 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. The class of such persons and institutions include foreign sovereigns or heads of state and governments, foreign diplomats and their staff, consular officers and representatives of international organizations like UNO and OAU.

Mr Fraser for the appellant cited the English case*Thai-Europe v Government of Pakistan* [1975] 3 All ER 961. In that case the plaintiffs, who carried on business in Hamburg, chartered a vessel to a Polish company on September 30, 1971. The plaintiffs were to deliver a cargo of fertilizer to Karachi, which they did. The charter party also contained a demurrage clause of £ 400 per running day. The charter party contained an arbitration clause under which any dispute was to be settled ‘in London in accordance with the law and procedure prevailing there’. The consignee of the cargo was the National Bank of Pakistan Agricultural Development Corporation at Lahore. The corporation took up the documents and paid for the goods. The goods were shipped in October and the vessel arrived at Karachi on December 2 and gave notice of readiness. On December 6 or 7, Karachi was bombed by hostile Indian aircraft and the vessel was seriously damaged. The discharge of the vessel’s cargo was finally completed on February 24, 1972, that is eighty three days from the date of giving notice of readiness. The plaintiffs claimed that demurrage was payable for sixty seven days at £ 400 per day and applied in August 1973 to the High Court in England under the RSC order 2 for leave to issue a writ against the corporation and serve notice of the writ outside the jurisdiction. Leave was granted and the plaintiffs issued a writ of September 4, 1973 claiming £ 26,968.61. Before notice of the writ had been served however, the plaintiffs learnt that the corporation had been dissolved and its assets and liabilities assumed by a department of the government of Pakistan. Accordingly, on December 14, 1973 the plaintiffs amended their writ making the government department defendants. The government department entered a conditional appearance and applied to set the writ aside claiming sovereign immunity. The sovereign immunity was upheld by the master who set the writ aside and the judge affirmed the decision. The appeal was dismissed and the court said (p 965 letter b per Lord Denning MR):

“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 judgment 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.”

As I have already indicated, the same general principle applies to courts of this country. It must, however, be made clear that the principle does not apply to every act of a foreign sovereign or government, as illustrated by the following cases: In *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, a suit based on a letter of credit in a commercial transaction it was held that

“(1) the bank, which had been created as a separate legal entity with no clear expression of intent that it should have a governmental status, was not an emanation, arm, alter ego or department of the State of Nigeria and was therefore not entitled to immunity from suit”

and further that:

"(2) even if the bank were part of the Government of Nigeria, since international law now recognized no immunity from suit for a Government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature, it was not immune from suit on the plaintiff's claim in respect of the letter of credit".

The *Trendtex* case was applied in *I Congreso Del Partido* [1978] 1 All ER 1169 and *C Czarnikow Ltd v Centrala Handlu Zagranicznego 'Rolimpex'* [1978] 1 All ER 81. In *Planmount Ltd v Republic of Zaire* [1981] 1 All ER 1110, the plaintiffs agreed to carry out certain building work for the Republic of Zaire under a contract at the official London residence of its ambassador. The plaintiffs were paid only part of the contract price for the work and issued a writ against the Republic of Zaire claiming the balance. Leave was granted for the plaintiffs to serve the writ outside the jurisdiction. The Republic of Zaire applied to have the writ set aside on the ground that it was an independent sovereign state and as such entitled to sovereign immunity. The plaintiffs submitted that the doctrine of sovereign immunity did not apply to a state's commercial transaction. The court held that the defence of sovereign immunity was not available to the Republic of Zaire because it was not acting in a governmental but in a private or commercial capacity when it entered into the contract with the plaintiffs, and it followed that the case was a proper one for service of the writ out of the jurisdiction. It is apparent that there is no absolute sovereign immunity. It is restrictive. The test is whether the foreign sovereign or government was acting in a governmental or private capacity then the doctrine will apply otherwise it will not afford protection to a private transaction. The nature of the act is, therefore, important.

Mr Waweru agreed with the law as laid down in the authorities cited by Mr Fraser, but he contended that the principle sovereign immunity applied to this case only if the court found that the second defendant was a department of the Ministry of Defence of the United Kingdom of Great Britain and Northern Ireland of which there was no evidence. In the plaint he named the second defendant as The Ministry of Defence Claims Commission (UK) which to me infers the knowledge on his part that the Commission is a section or department of the Ministry of Defence, but above all he referred to the first defendant in his submission in the High Court as 'Ministry of Defence employee overseas', when in the plaint he had stated the first defendant was a servant of the Commission (second defendant). Considering this together with para 2 of the plaint and para 3 of Colonel Prestige's affidavit I would say that there is evidence that the second defendant is a section or department of the Ministry of Defence of UK aforesaid, and the plaintiff was conscious of the fact from the time he commenced this suit.

In this case the alleged vicarious liability is by the first defendant as an employee of the second defendant and described by the plaintiff's counsel as 'Ministry of Defence employee overseas', which is a department of the Government of the United Kingdom of Great Britain and Northern Ireland. The second defendant would be vicariously liable only if the first defendant was acting in the course of his employment. In the circumstances of the suit, that would involve the second defendant acting in a governmental capacity which entitles it to sovereign immunity. The court will not issue its process against the second defendant unless the immunity is waived or that defendant consents to submit to the jurisdiction of the courts of this country in the matter in dispute. As there has been neither the necessary waiver nor consent to submit to the jurisdiction of the courts of this country, I would allow the appeal, set aside the High Court's ruling and order that the second defendant be struck out from the proceedings. I would award costs of the appeal and the application in the High Court to the second defendant to be paid by the respondent plaintiff.

Law JA. The respondent to this appeal filed a suit claiming general and special damages, arising out of a collision between his vehicle and another vehicle which was allegedly being negligently driven by the

first defendant, a British soldier, as servant or agent for the second defendant, who is described in the plaint as 'Ministry of Defence Claims Commission (UK)'. The first defendant did not enter an appearance. The second defendant entered an appearance under protest, and applied by chamber summons stated to be under order VI rule 13 and the inherent powers of the court for the proceedings against the second defendant to be struck out. The application was supported by an affidavit sworn by Colonel Prestige, Defence Adviser in the British High Commission in Nairobi, in which he deponed *inter alia* as follows:

"3. The second defendant is the Ministry of Defence of the Government of Great Britain and Northern Ireland and has no legal entity separate from that Government.

4. The Government of the United Kingdom of Great Britain and Northern Ireland as a foreign sovereign state does not consent to submit to the jurisdiction of this honourable court and be impleaded in the present proceedings."

In the heading to this affidavit, the second defendant was stated to be the Ministry of Defence Claims Commission (UK), as in the title to the plaint. Clearly para 3 of the affidavit must be read as referring to the second defendant as impleaded. No counter-affidavit was filed. The application came before O'Kubasu J for hearing on February 5, 1982. Mr Mahan for the second defendant relied on Colonel Prestige's affidavit, and pointed out that there was no counter-affidavit to refute what was stated by Colonel Prestige. Mr Waweru for the plaintiff submitted that the suit was not brought against the Government of the United Kingdom, but against a commission established to handle all claims arising out of the activities of that country, whatever that may mean, and he submitted that the suit was not against a foreign government. I need hardly say that Mr Waweru's submission did not constitute evidence and had no evidentiary value whatsoever. The learned judge reserved his ruling to February 16, 1983, when he dismissed the second defendant's application on those grounds:

"The second defendant herein is Ministry of Defence Claims Commission of London and not the Ministry of Defence in the Government of United Kingdom. This Claims Commission was specifically set up for the purposes of settling claims such as this one brought by the plaintiff. I am therefore satisfied that the second defendant is properly joined as a party to this suit."

He accordingly dismissed the application with costs.

From this decision the second defendant, represented by Mr Fraser, has appealed. The plaintiff, respondent in this appeal, was represented by Mr Waweru. I need not repeat their submissions, which are merely an elaboration of what was said before the learned judge in the court below.

I will content myself by saying that, in my view, this appeal must succeed. The only evidence available to the judge, which evidence was unrebutted, was that the second defendant had no legal entity separate from that of the Government of the United Kingdom, and that the Government of United Kingdom, as a foreign sovereign state, did not submit to the jurisdiction of the court. The learned judge's finding that the Ministry of Defence Claims Commission was in some way distinguishable from the Ministry of Defence and was a separate legal entity capable of being sued was completely unsupported by evidence and cannot stand. As was held in *Mighell v Sultan of Johore* [1894] 1 QB 149 the courts in one country have no jurisdiction over an independent foreign sovereign of another country, unless he submits to the jurisdiction. There has been no submission here. The only exceptions to this rule, which do not apply here, are comprehensively listed in *Thai-Europe v Government of Pakistan* [1975] 1 WLR 1485.

I would accordingly allow this appeal. As Hancox Ag JA and Chesoni Ag JA agree, it is so ordered, and

there will be orders in the terms proposed by Chesoni Ag JA.

Hancox JA. I fully and respectfully agree with the draft judgment prepared by Chesoni Ag JA, which I have read, and with the orders proposed by him.

The principle that a foreign government or sovereign cannot be impleaded, that is to say sued or prosecuted in the courts of another country, was clearly stated in 1938 by Lord Atkin in *The Cristina* [1938] 1 All ER 719 at 721 as follows:

“The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control.”

This passage is cited by Scarman LJ in support of Lord Denning MR’s judgment in the case of *Thai-Europe v Government of Pakistan* [1975] 3 All ER 961, from which Mr Fraser, for the appellant, quoted extensively in this appeal.

The point taken by Mr Waweru, who appeared both before the learned judge and in this appeal, however, was that in his affidavit of July 20, 1981 in support of the summons to strike out, Colonel Prestige, or those advising him, had failed to appreciate that the second defendant was not the Ministry of Defence of the Government of the United Kingdom of Great Britain and Northern Ireland, but was the Ministry of Defence Claims Commission (UK). In his submission before us Mr Fraser agreed that para 3 of that affidavit did not state in terms that the claims Commission was a department of the Ministry of Defence of the United Kingdom and was consequently the same as the Ministry of Defence. Mr Waweru continued that the onus was wrongly being placed on the respondent to establish the contrary, when in truth it was the appellant who should show that the Commission had no separate legal entity other than as a part and parcel of that Ministry. Furthermore, he said this is not a matter which should be left to necessary implication.

As Chesoni Ag JA said during the course of the arguments, if that was the delusion under which the respondent’s advisers were labouring, then it was incumbent upon them to take the matter up at the first opportunity, as a matter of duty to the court, by pointing out in affidavit, or other admissible evidence, that there was an alleged gap in the third paragraph of Colonel Prestige’s affidavit. As the matter stands, however, there is absolutely nothing, either before the judge or before us, to refute this statement of Colonel Prestige that the named second defendant is the Ministry of Defence of the Government of the United Kingdom; indeed since the title of the case at the head of Colonel Prestige’s affidavit specifically shows that the Ministry of Defence Claims Commission (UK) is the second defendant, he cannot possibly have been under any misapprehension as to its identity. Therefore the position is that there is an uncontradicted statement on oath that the second defendant is the Ministry of Defence and, accordingly, is part of the Government of the United Kingdom of Great Britain and Northern Ireland, which is a sovereign state.

If anything more were needed in support of the foregoing, further references to the *Thai* case show that the original defendant to the plaintiff’s claim for demurrage in respect of the ship was the West Pakistan Agricultural Development Corporation, a legal entity and therefore a separate juridical personality.

The corporation was subsequently dissolved and succeeded by the Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies, which had no legal entity separate from that

government. When the plaintiffs amended their writ accordingly they were successfully met with a plea of sovereign immunity. Had the action continued against the corporation there would have been no such plea.

Mr Waweru accepted the law as stated in the *Thai* case (supra), and since it was clearly established and unrefuted that the defendant was a part of a foreign sovereign state, it must follow that the case against the appellant should have been struck out by the learned judge.

Therefore this appeal must be allowed.

Dated and delivered at Nairobi this 18th day of March, 1983.

E.J.E LAW

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JUDGE OF APPEAL

A.R.W HANCOX

……

JUDGE OF APPEAL

Z.R CHESONI

……

Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR